



EMPLOYMENT TRIBUNALS

Claimant: Mrs K Sharples

Respondent: Alston Lodge Residential Home and Community Care Ltd

Heard at: Manchester

On: 16 February 2018
9 May 2018

Before: Employment Judge Ross

REPRESENTATION:

Claimant: Mr Arnold, Friend

Respondent: Ms C Hart, Solicitor

JUDGMENT

The judgment of the Tribunal is that the claimant's claim for unfair (constructive) dismissal is well-founded and succeeds.

REASONS

1. The claimant was employed by the respondent for a period of 30 years. She had an unblemished record.
2. The respondent brought disciplinary charges against the claimant. By a letter of 9 May 2017 the claimant was issued with a final written warning. She appealed. The appeal was successful in part but the final written warning remained imposed as a result of the first two allegations of conduct.
3. By a letter of 28 July 2017, the claimant resigned. She brought a claim to this Tribunal for unfair constructive dismissal.
4. At the outset of the hearing it was clarified that the breach of contract relied upon by the claimant was breach of the implied duty of trust and confidence. The

specific acts she relied upon amounting to a breach of the implied duty of trust and confidence were the disciplinary process undertaken by the respondent which culminated in a final written warning and the upholding of the final written warning at the appeal stage.

5. For the claimant I heard from the claimant, Mrs Hayhurst, Mrs Naylor, Mrs Pye and Mr Arnold. For the respondent I heard from Ms Burns and Mr Smith.

The Law

6. The relevant law is found at section 95C and s 98 of the Employment Rights Act 1996. The case of **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27** is relevant, as is **Malik v BCCI [1997] IRLR 462** where it was stated in relation to the implied duty of trust and confidence that:

“The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

I remind myself of the decision in **Buckland v Bournemouth University [2010] IRLR 445 CA**, which states that a repudiatory breach of contract cannot be cured unilaterally by the party in default.

The Issues

7. The issues in this case were:

- (1) Was there a breach of the implied duty of trust and confidence in relation to the disciplinary process which culminated in a final written warning and the upholding of that sanction at the appeal stage?
- (2) Was it a fundamental breach? (Note: **Morrow v Safeway Stores PLC [2002] IRLR 9 EAT** which states that a breach of the implied duty of trust and confidence is inevitably fundamental).
- (3) Did the claimant resign because of the breach?
- (4) Did the claimant delay too long and affirm the contract?

The Facts

I find the following facts:

8. There is no dispute that the respondent operates a residential care home which currently has approximately 16 live-in clients who are generally elderly and vulnerable people who can no longer live in their own homes or in assisted living complexes. The claimant had worked for the respondent for a period of 30 years and had an unblemished record.

9. For most of her employment the claimant had worked with the mother of the present director and owner, Sarah Burns. For approximately the last 18 years the claimant had been employed as an assistant manager.

10. Ms Burns first became involved with the business in or around April 2014 as her mother became older. At she took control of the business she took responsibility for the majority of HR issues. I find there was a change in culture when Ms Burns took over. She stated in her statement that, "Far more disciplinary investigations were taken and disciplinary action was followed through where appropriate". She also modernised the business by introducing a new staff handbook, contracts of employment and job descriptions. I rely on her evidence to find that, "This made me very unpopular amongst the employees". Ms Burns' perception was that the employees "had been used to getting their own way whenever they pleased". She confirmed the atmosphere was very tense in the business for a period of time as a result. There was no dispute that the respondent received a very poor review from the Care and Quality Commission ("CQC") in November 2016, although I did not see a copy of this report.

11. I accept the claimant's evidence to find that as Ms Burns became more involved in the business, the claimant perceived Ms Burns wanted her to leave. Her reason for this perception was partly because at a meeting in June 2016 Ms Burns said that no other Homes had two managers and the way forward was to have the Registered Manager in five days a week. Ms Burns admitted that she said this. The claimant was concerned that given she was the assistant manager working three days a week, not the Registered Manager, the above remark meant her role as assistant manager was at risk. She was concerned about the security of her job.

12. It was not disputed that not long after this Ms Burns put up a notice asking carers if they wanted to apply for a senior carer's post. Two senior carers, P Houghton and E Atkinson, were appointed. The claimant perceived that that Ms Atkinson in particular was consulted by Ms Burns about issues relating to the Home rather than herself. The claimant also stated that tasks she had done for years were given to Ms Atkinson.

13. It was not disputed the claimant was absent from work on sick leave due a gall bladder operation from 28 November 2016 to 2 January 2017.

14. Ms Burns said that she was informed on 10 January 2017 by Pam Hooghkirk, a co-director of the business, that the Medicine Administration Record ("MAR") had not been completed for breakfast and lunch on 9 January 2017 (page 63 of the bundle).

15. I find that the MAR chart is a very important document as it records the medication provided to a particular client and when. The timely completion of the document is the responsibility of the manager working that day. The document should be signed by the person who administers the medication ensuring that all clients are given the correct medication at the correct times.

16. Ms Hooghkirk said the following morning upon her arrival at 8.30am she went into the Home to check the MAR charts and noted that they had been signed for 9 January for both morning and lunchtime with the initials "KS" (Karen Sharples) and "PH" (Pam Houghton), and that she had confirmed that the MAR chart had been signed for on 9 January by the evening shift despite not being signed in the afternoon. She also confirmed that Pam Houghton had left at 1.00pm.

17. In the bundle there is a document from Elaine Atkinson dated 18 January 2017 (page 72) where she confirmed that when she came to administer the medication at teatime around 5.00pm that the MAR had not been signed for that day, but when she looked that evening she noted it had been signed off for the morning and the lunchtime.

18. There is also a signed statement dated 18 January 2017 for Pamela Hooghkirk confirming these events.

19. Despite the fact that the error had been noticed on 9 January 2017 by Ms Atkinson and drawn to Ms Hooghkirk's attention the same day, it was not brought to the claimant's attention until Friday 10 February 2017, over a month later (page 83). It was not drawn to her attention until after an incident occurred in relation to a funeral.

20. On 30 January 2017 the claimant asked Ms Burns if she could go to a resident's funeral and to the wake afterwards as requested by the family. I accept the claimant's evidence of her recollection as evidenced by her note at page 76 that initially Ms Burns raised with her the issue of cover and told her to speak to E Atkinson. I rely on the claimant's evidence and her note at page 76 and 76A that by 3 February 2017 the claimant had spoken to E Atkinson who told her the morning had not been covered but she could ask H Pye or M Arnold if they would work the Monday morning for her. I rely on the evidence of the claimant and Mr Arnold to find that the claimant asked Mr Arnold who agreed to cover her shift that day.

21. What happened next was disputed. Ms Burns said she instructed Pam Mace, the Home Manager, on 5 February 2017 to contact the claimant and clarify she would only be able to attend the funeral itself and would be expected to work her scheduled shift both before and after. I find Ms Burns thought she had issued that instruction. However, there is a dispute about what exactly Ms Mace said to the claimant. Ms Mace was not a witness at the Tribunal.

22. There is no dispute that Ms Mace phoned the claimant on 5 February 2017. I accept the claimant's recollection at page 80A to find that Ms Mace told her that Ms Burns was not happy about her attending the funeral as she was leaving the Home understaffed. I find the claimant explained to her that she had already spoken to Ms Burns and explained that her shift for the whole day had been covered and that she was not leaving the Home understaffed. I find that Ms Mace told the claimant Ms Burns had not told her about the discussion on 30 January and that she, Pam Mace, had not realised the whole day was fully staffed. I accept the claimant's evidence to find she asked Pam Mace "does that mean I can go to the funeral?" and in reply Ms Mace said "you can still go to the funeral" and did not inform the claimant that she could not go to the wake.

23. There is no dispute that on the day of the funeral the claimant did not attend work and made no contact to explain her absence. I find that is unsurprising because the claimant thought her absence was authorised and covered.

24. A number of managers from the Home in addition to the claimant were at the funeral including Ms Burns the owner but I entirely accept the evidence of Ms Burns

that she felt it was inappropriate to ask the claimant at the funeral why she was not returning to the Care Home.

25. The following day Ms Burns obtained a statement from Ms Mace. In that statement Ms Mace gave a different version of events, saying that she did make it clear to the claimant during the telephone call that she would be expected to come into work both before and afterwards and failure to do so would amount to being absent without authorisation.

26. On 10 February 2017 Ms Burns raised the issue with the claimant. She explained that she had asked PM clearly to tell the claimant that she could go to the funeral "but must work before and after irrespective of whether it had been covered or not as there should be someone senior in given the problems facing them". The claimant replied, "PM had not explained that to her and had not made it clear that SB wanted KS in work". She went on to say: "If PM had insisted she would have been in" (page 83).

27. I find this is a note of the meeting taken by Ms Burns but it was never sent to the claimant at the time and is unsigned. There is a further note of a conversation that Ms Burns had following a further meeting with PM on Sunday 12 February 2017 although it is not signed by Ms Mace or dated. (p84)

28. Later that week Ms Burns held meetings with Pam Houghton asking her about the signing of the MAR charts on 9 January 2017. The statement is not signed. Pam Houghton said she had not administered any medication on that date. Ms Burns also held a meeting with the claimant on 16 February 2017 with Pam Hooghkirk also in attendance. (P86) In the meeting the claimant was asked "if she had signed the medication records before she went home". The claimant said she "couldn't remember" but said she "wouldn't sign for anyone else". When pushed by Pam Hooghkirk who had said the MAR chart was unsigned at 5.00pm Ms Burns had noted, "Karen admitted she must have signed for them before she went home". The claimant disputes she ever said this and the minutes of the meeting are not signed by the claimant and was not shared with the claimant.

29. On 2 March 2017 Ms Burns interviewed Kim Hammond, another signatory on the MAR chart. See p 87. Once again, the statement is unsigned and undated. There is no reference to the date being discussed apart from at the final bullet point.

30. The claimant was handed a letter dated 13 April 2017 inviting her to a disciplinary hearing. It contained four allegations:

- (1) On 9 January 2017 you failed to sign the MAR charts at the time medication was issued in order to confirm the same.
- (2) On 9 January 2017 you falsified the MAR charts by forging the initials of Pam Houghton, falsifying that she had administered the medication that day.
- (3) On 6 February 2017 you were absent from work without authorisation both before and after the funeral of Elsie Rowe.

- (4) Following the death of Elsie Rowe, you failed to return the controlled drugs that were prescribed to her. In accordance with the company policy these should have been returned at the earliest opportunity following Elsie's passing. As of 12 April 2017, these drugs were still located in the controlled drugs cabinet.

31. On the same day as the claimant was issued with a letter inviting her to a disciplinary hearing the respondent issued her with a letter inviting her to resign (page 120).

32. The claimant was very shocked and went immediately to the GP. She was signed off sick with work related stress. She was not suspended.

33. A disciplinary hearing took place on 5 May 2017. The minutes are at pages 89-97. Present were the claimant, her companion, Judith Singleton; a notetaker, Debs Boyd-Evans; and Ms Burns, the dismissing officer.

34. Ms Burns agreed that she said at the outset of the meeting that "Karen's companion could not say anything or participate and was here for moral support". In cross examination she said that was in accordance with the company's disciplinary policy (pages 116J-116O).

35. The outcome letter was dated 9 May 2017 and upheld a finding that the claimant failed to sign the MAR charts at the time that her medication was issued; that she was absent without authorisation both before and after the funeral of Elsie Rowe; and that she failed to return controlled drugs held for Elsie Rowe.

36. The allegation that she had falsified the signature of Pam Houghton was not upheld. The claimant was issued with a final written warning.

37. The claimant appealed by a letter of 15 May 2017. She relied on the fact:

- (1) That if the claimant had failed to complete the MAR report it should have been raised with her at the time as both Ms Hooghkirk and senior carer, E Atkinson, were aware of it on the day that it happened, but instead it was left for 39 days.
- (2) She raised an issue about P Mace's witness statement signed 7 February 2017 quoting a meeting on 10 February 2017.
- (3) She raised the issue that there was no information or records about the medication for the deceased resident and that it was not her sole responsibility to return it as the responsibility belonged to all managers.
- (4) She also raised a concern about who the minute taker was.

38. The claimant was informed the hearing would be chaired by Pam Hooghkirk. She objected as Ms Hooghkirk had been a witness in the substantive hearing.

39. The appeal took place on 7 July 2017. It was conducted by an independent appeal officer, Mr Ben Smith, an accountant who acted for the respondent. He did

not uphold the claimant's appeal in relation to the failure to sign the medication report in a timely fashion or being absent without authorisation, but he did uphold the appeal in relation to the failure to return end of life medication. He upheld the sanction.

Application of Law to Facts

40. I turn to apply the law to the facts.

41. I remind myself I must consider whether the employer has without reasonable and proper cause conducted itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. I find that there was a breach of the implied duty of trust and confidence in the way the respondent conducted the disciplinary process.

42. Firstly, Ms Burns was the investigating officer and the disciplinary officer. She was also the owner of the Home. She was intimately bound up with the matters she was investigating and adjudicating upon. In relation to the instruction that the claimant attend the funeral only of the resident and was required to attend work before and afterwards, that was an instruction which M Burns said she herself had issued. Ms Burns stated she had asked Ms Mace, the manager of the Home to pass that instruction on to the claimant. There was a dispute as to whether or not that instruction had been clearly passed on to the claimant. Ms Burns then had to adjudicate between Ms Mace's recollection and the claimant's recollection. Ms Mace was the manager of the Home.

43. There was a factual dispute about what was said in the investigatory meeting between Ms Burns and the claimant in relation to the MAR sheets. Ms Burns' note says that the claimant "admitted she must have signed for them before she went home". The claimant disputed that (see page 91). Ms Burns did not require the claimant to sign a copy of the investigatory minutes at the time. She conceded in cross examination that might have been a better practice. As a result, at the disciplinary hearing given that the claimant had disputed she had ever said that, Ms Burns had to resolve a factual dispute. If she resolved it in the claimant's favour it would have involved her admitting that she had made a mistake in her note at page 86.

44. Further Ms Burns sent the claimant a letter on the same day as she invited her to a disciplinary hearing inviting her to resign. Although she says "rest assured if you decide this is not an option you wish to take this will have absolutely no impact on the disciplinary proceedings which will continue", I find it suggests that Ms Burns thought the claimant should not remain employed with the respondent.

45. I also rely on the fact that Ms Burns did not permit the claimant's representative to speak (see note of the disciplinary hearing). She said she relied on the respondent's disciplinary policy but the section in the policy does not state that a companion or trade union representative may not speak.

46. Finally, at the appeal stage the claimant raised an issue about an error in Pam Mace's statement. Ms Burns agreed at the Tribunal that she was the person who

spoke to Pam Mace again resulting in a further statement from Ms Mace saying there was an incorrect date in the statement (page 104).

47. I am satisfied that the owner of the Home conducting an investigatory meeting with the claimant, not informing her that it was an investigatory meeting, not ensuring that the minutes of the meeting were signed, relying on those contested minutes at the disciplinary hearing, conducting the disciplinary hearing and then becoming involved in the appeal amounts to conduct calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, particularly in circumstances where the claimant had been employed by the respondent for a period of 30 years and had an unblemished record.

48. I turn to the next issue: was the breach fundamental? On the basis of the **Morrow** case, a breach of the implied duty of trust and confidence amounts to a fundamental breach of contract.

49. I turn to the next issue: did the claimant resign because of the breach? There is no dispute that she did. Her resignation letter makes it clear that there is a fundamental breakdown in trust and confidence following a disciplinary that was brought against her.

50. I turn to the issue as to whether the claimant affirmed the contract. I find she did not.

51. The claimant submitted fitness to work notes from the date she was notified of the disciplinary hearing which stated she was not fit for work. The reason for absence was "work stress" and the comments from her GP include that she was not sleeping and her appetite was down (page 98). Her final fit note covered the period 2 August to 26 August 2017.

52. The claimant resigned with notice. Section 95(1)(c) ERA provides that a dismissal will take place when an employee resigns with or without notice in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This means that the act of giving notice cannot by itself constitute affirmation in an unfair constructive dismissal claim.

53. I accept the claimant's evidence that she thought that the rules of her contract obliged her to give notice. In the circumstances of a situation where the claimant was absent from work on sick leave and had worked for the respondent for 30 years I am satisfied that the giving of notice does not constitute affirmation in this case

54. The appeal outcome letter was dated 12 July 2017. The claimant's letter of resignation was dated 28 July 2017. The claimant was unwell suffering from the effects of work related stress from April 2017. She submitted regular fitness for work notes showing she was unfit for work. See p88,98,105. It is undisputed that she had worked for the respondent since 1 November 1987, a period of almost 30 years. I am satisfied that taking the decision to resign her employment was a momentous decision for the claimant and given her ill health and the relatively short period of time from the dismissal outcome letter, the appeal outcome letter and the decision to resign, the claimant did not waive the breaches on the implied duty of trust and confidence and did not affirm the contract.

55. Finally, I turn to the last issue: was the dismissal unfair? A constructive dismissal is not necessarily unfair. See **Savoia v Chiltern Herb Farms Limited [1982] IRLR 166**.

56. In these circumstances I had regard to **Barriman v Delabole Slate Limited [1985] ICR 546**, reminding myself that even in a case of constructive dismissal section 98 of the Employment Rights Act 1996 imposes on the employer the burden of showing the reason for the dismissal, notwithstanding that it was the employee not the employer who actually decided to terminate the contract of employment. I am not satisfied any fair reason was shown by the respondent who relied on the submission that the claimant had simply resigned. Therefore, given the findings above, the dismissal was unfair.

57. The case will proceed to a remedy hearing where the issues of contributory fault (if any) and the requirement for any deduction in compensation by reason of the principal in *Polkey v AE Daytonn Services Limited* (if any) will be considered.

Employment Judge Ross

Date 5 June 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

11 June 2018

FOR THE TRIBUNAL OFFICE

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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