



EMPLOYMENT TRIBUNALS

Claimant: Ms S Tomlinson

Respondent: Dr Sharaf Salem
t/a Greetwell House Nursing Home

Heard at: Lincoln **On:** Monday 10 April 2017

Before: Employment Judge Britton (sitting alone)

Representatives

Claimant: Ms K Durham, Legal Consultant, Simpsons

Respondent: In Person

JUDGMENT

1. The claim of breach of contract, failure to pay notice pay is dismissed upon withdrawal.
2. The claim of unfair dismissal is dismissed.

REASONS

Introduction and First Issue

1. The claim (ET1) was presented in this matter to the Tribunal on 19 July 2016. It is ACAS early conciliation compliant and in time. It had been drafted for the Claimant by her solicitors, Simpsons. It is primarily a claim for unfair dismissal. Essentially what was pleaded is as follows. Between 26 November 2012 and what in fact is the last date of the employment which is 6 May 2016, the Claimant was employed as a registered general nurse and the registered manager of the Respondent's nursing home. By registered manager I mean for the purposes of the CQC requirements.

2. The nursing home has approximately 25 beds. The senior nursing staff compliment was the Claimant and her deputies Jamie Dause (JD) RGN, primarily on days, and Mr Musah Abolade (MA), another registered nurse, who ran the night shift.

3. What the Claimant says is that albeit there was a disagreement between her and the Respondent, Dr Sharif on 7 April, she did not resign; and that when she made that plain to Dr Sharaf on 22 April, he refused to accept this was the case and confirmed that as far as he was concerned she had resigned on 7 April. The Claimant followed up with her letter of the same date (Bp¹30) in which she said she had not resigned, and then a further letter on 25 April (Bp31) reiterating the same and making the issue a grievance. Dr Sharif replied on 29 April (Bp32) reiterating that she had resigned and why: In the circumstances in effect he declined to treat the matter as a grievance.

4. Thus in summary in his response (ET3) he sets out what happened on the 7 April and how on that day the Claimant resigned, and that he was entitled to accept that resignation and treat the employment as at an end. Of course if I was to find that he is correct, then the grievance process is otiose and because by then the employment is simply in its dying stage whereby the Claimant is working out her notice: Four weeks was the requirement. That would of course end if she resigned on 7 April circa 6 May. And it is now agreed by the Claimant that she was paid her notice entitlement and therefore the claim of breach of contract is withdrawn. It is important that I stress that the original claim also included one of sex discrimination. The Claimant had cited allegations of what from time to time Dr Salem had said about her to others when she might have been stressed or upset about an issue at work and in particular his referring to “hormones”; and that also he ignored the female workers, treating them with distain and would only speak to the male workers. However subsequent to the first case management discussion in this matter the Claimant withdrew all claims of sex discrimination. It is not for me to venture as to why, but what it does mean is that the Claimant in my view is precluded from deploying those allegations to attack the credibility of Dr Salem having withdrawn the sex discrimination claim.

5. So the first issue in this case that I have to determine, and with the burden of proof upon the Claimant, is as to who terminated this employment. Of course if the Claimant had said I am resigning or words to that effect on 7 April in the heat of the moment, then of course the employer should have allowed her a cooling off period. The jurisprudence in that respect is clear. But is that the scenario or was the Claimant's resignation made rationally and unequivocally, in which case the Respondent is of course entitled to accept it? The Claimant has not brought a claim of constructive unfair dismissal.

6. Conversely If I was to find that the resignation was said in the heat of the moment and then retracted and in a scenario where the Respondent should have allowed a cooling off period, then this would become a dismissal by the Respondent. Thus the next stage of the exercise would be for the Respondent to establish a reason for the dismissal pursuant to s98 of the Employment Rights Act 1996, and if so, for me to determine on the evidence whether that dismissal was fair or unfair. But I do not get there unless I am persuaded on the balance of probabilities by the Claimant that she did not resign.

Observations

7. That therefore brings me to the evidence in this case. I have heard the sworn evidence of the Claimant and Dr Salem, both giving their evidence in chief by way of a written witness statement. .

¹ Bp = page number in the bundle before me.

8. What I do not have, and this is particularly important as to the Claimant, is corroborative evidence. There is an issue relating to a Mr Christopher Bradley. He was at the material time a care assistant at the nursing home. In order to explain his significance I observe thus: in the run up to this hearing there were two case management discussions the first being before my colleague Employment Judge Heap back on 9 September when she endeavoured to explore the issues and also dealt at that stage with the sex discrimination claim and made orders for further and better particulars. The hearing at that stage was still scheduled to take place over 3 days on 13 to 16 February 2017. But there was a non compliance with the directions, principally because of delay by Dr Salem, as a result that hearing was aborted and the matter discussed before Employment Judge Milgate at a further case management discussion on 15 February 2017. She set revised time lines for directions, the last of which was for exchange of witness statements on 17 March; and she relisted the Hearing before a Judge sitting alone for today. That brings me back Mr Bradley. I accept what Dr Salem says to me which is that a day or so after the second CMD Mr Bradley came to see him knowing about the proceeding and offered him a witness statement. I read between the lines that Mr Bradley is not a scholar, his signature indicates that to me, and so Dr Salem took in his handwriting the statement of Mr Bradley and got him to sign it. As to that statement the important bit is that on 7 April Mr Bradley appears to have been close by to the office at the nursing home when there was the discussion between the Claimant and Dr Salem and in the context of which he appears, if the statement is true, to have heard the Claimant stating that she was resigning and seen her:

"...storm out the office" and then "went to the dinning room and it appears that she and Dr Salem who was in the office had a heated discussion. I left to get on with my work. I noticed that Ms Tomlinson stayed in the dinning room for some time. Dr Salem call her back but she did not return. He went to see her and then left for home. I am willing to tend court if required."

9. As part of the exchange process that statement was sent to the Claimant's solicitors circa 17th March. Mr Tolcher of Simpsons e-mailed Mr Bradley on 21 March as to whether he could confirm that the signature on the statement was his. He replied:

"I can confirm that it's not my signature".

10. As a consequence Ms Durham took a statement from Mr Bradley; I detect over the telephone, typed it and sent it to him for his approval. He signed the same and returned it circa 28 March 2017. In this statement he is effectively making a dynamite point that not only did he not sign the statement but that this was because its contents were not true. He then intriguingly said *"I had seen Sharon after the incident Dr Salem referred to, when she was crying. She told me that she had been sacked"*. But cross referencing to the ET1 and the Claimant never said she had been sacked. Put at its simplest what she said happened, albeit she clearly got her dates muddled, is that in terms of the discussion between her and Dr Salem to which I shall refer, that as a consequence of that all she knew was that she was then told by Dr Salem via JD that she had resigned.

11. So there is a material difference in Bradley statement number 2 even from the Claimant's own case. What matters is this. Apparently last Thursday Mr Bradley informed Ms Durham that he wouldn't be coming to the Hearing because he couldn't get the time off work. Ms Durham given the lateness of matters was unable to do anything about that; and she also laboured under the

misassumption, which may be due to what she understands to be the prevailing practice in a region other than this one, that she couldn't have applied in the circumstances even at the last minute for a witness summons as the practice of the Employment Tribunal would mean that such an application would be refused. But I observe, speaking for myself and my colleague Judges in the East Midlands region, that if an application had been made on the basis that a witness was unable to get time off work to attend ie not that they were hostile, then a witness summons would have been issued.

12. As it is today the Claimant has made several attempts to persuade Mr Bradley to come along and give evidence before me. I was prepared to accommodate him, and if necessary sit past the time I thought this case would need to complete, to allow for time for him to get here. However the outcome on each occasion of the attempts by the Claimant has been that Mr Bradley has said that he can't get away from work. Yet he is working at RAF Scampton, a mere 15 minutes I am told away from this court building. I am not impressed. It is my observation that if Mr Bradley really cared about giving evidence before the tribunal, he would have got here having got his employer to give him the necessary dispensation from work to do so, or would have made it clear to the Tribunal via the Claimant in her phone calls that he was willing to attend as long as somebody told his boss he had to be here. This Judge then directed to Ms Durham that it be made clear to Mr Bradley that I did require his attendance. Mr Bradley still said he couldn't attend. I am driven to a conclusion, which rather echoes something that Ms Durham said in her cross examination of Dr Salem, that Mr Bradley doesn't want to give evidence. Thus given this conflict between the two statements and that his own statement to Simpsons doesn't even square with the Claimant's own case on a material point, I attach no weight whatsoever to his evidence.

13. The Claimant has not called JD who she is on good terms with. From what I have read and heard in terms of her evidence, he could have given some forensic support to her case even if he didn't witness what may have happened on the 7th April. I say that because he certainly could have given evidence about events up to and including 21 April and beyond. I have noticed that JD was working along side the Claimant at Cheyne Nursing Home until about a week ago when it fell into liquidation. I am surprised that in all the months that have gone by in the run up to today's hearing he has not been proofed, and he has not been called to give evidence by the Claimant. The same applies, particularly in terms of sketching out the background, to MA who was also on good working terms with the Claimant.

14 I also observe that not only has the Claimant sought to deploy the abandoned sex discrimination claim in terms of the factual allegations, albeit they having nothing to do with the circumstances on the 7th April, but sought to deploy a reference to Dr Salem having allegedly been the subject of a sexual impropriety misconduct allegation in 2004, with absolutely no evidence put in the bundle to suggest it ever went anywhere. It is not in any of the GMC adjudications that I have been taken to by the Claimant in the bundle before me. These go to professional competency. Thus what the Claimant has attempted to do is gratuitous and irrelevant muck spreading.

15. I equally note that Dr Salem has sought to deploy that on 7 April in the discussion the Claimant had referred to him in disparaging terms as a Muslim and to MA as black. Again I would have expected that to be pleaded in the ET3 at the first possible instance. What does it all mean? It means evidentially that it is somewhat of a plague on both houses.

Findings of fact on first issue: resignation or dismissal?

16. Dr Salem, who is now 72, owns the nursing home. He is not an efficient administrator whether it be in terms of looking after his own interests as to which see the GMC findings, or in terms of dealing with issues relating to the CQC regime, as to which see the latest CQC findings. On the other hand I bring into the equation that in terms of the standard of care afforded by Greetwell House the Claimant accepts that it is very good.

17. The Claimant and Dr Salem got on very well, other than the occasional professional disagreement, with the Claimant being left to run the nursing home, up until events circa 7 April. What was going on in the background at that stage is that over the December period, ie the run up to Christmas 2015, MA was disgruntled. He wasn't, he thought, being paid enough to cover his travelling expenses from Newark to the nursing home which is outside Lincoln. He therefore wanted his travel expenses paid; he was also angling for a pay rise. The upshot of all of that is that through the good offices so to speak of the Claimant she understood that Dr Salem had agreed that MA would get his travelling expenses and also a pay rise. But Dr Salem wanted a quid pro quo. He was aware that in the mainstream NHS regime there had been a move away from so much delineation between night shift and day shifts with there being a mix of shifts so to speak so that nurses on the night shift could learn more about the day shift and vice versa. It also means that the night shift cease missing out on day time briefings and training and matters of that nature. Now I am well aware that this has been the subject of considerable debate in the NHS. It is done for the best of motives but I am also equally aware that it meets resentment. Some night shift workers just don't want to work days and vice versa. Why does it matter? It is because during this period Dr Salem was putting forward that there should be this move towards mixed patterns of working. The Claimant had no real willingness to work nights although she was sufficiently flexible to say that she would do some if necessary; albeit there would need to be agreement on a reasonable pattern. But MA was very resistant. He had already resigned once over the Newark travelling expense issue and been persuaded to retract his resignation for the reasons I have now gone to. But it was made plain by him to in particular the Claimant that if it the shift pattern change was imposed upon him, then he would resign. Thus I have no doubt that in the run up to 7 April this was a topic under discussion.

18. Also during this period coming up for its annual review was the contract with Lincolnshire County Council Social Services (LCC). It relates to what is known as "top up". I am well aware from the debate on the costs of care of recent time that the local authorities will frequently not pay the whole of the charging rate of a care home for a person for whom they have statutory responsibility, but only a proportion; albeit a very significant one. Therefore if a family wants an elderly relative to live in their preferred choice of nursing home, then there is a top up fees element that they will have to meet. But the local authority, in this case LCC, will not sanction a placement and thus pay fees, without having first approved the top up rates for any given forthcoming year which would run from April: hence the annual contract. And so there is a second issue which was bubbling away; namely Dr Salem not delaying in finalising the proposed top up rates and then submitting them for approval to LCC.

19. Sometime shortly before 7 April, Dr Salem was away; I gather in his homeland: Egypt, to which he regularly travels. . I also take into account that

during the period in question he also had other worries on his mind such as a renewed GM hearing as to his fitness to practice and his health.

20. On 7 April he came into nursing home because he had learnt that MA had again resigned: he wanted to know why as he thought matters had been resolved. When so discussing with the Claimant in her office, he discovered that she hadn't sent out the top up letters notifying of an increase to the families of those paying the same. She explained having been in touch with Mr Wright at LCC that she couldn't do so because Dr Salem had only put an annotation on the top of the existing contract which was not sufficient for Mr Wright, and therefore he would have to submit a new contract proposal before it could be considered. Thus she was not therefore permitted to issue the letters as Dr Salem had instructed.

21. Thus I have no doubt that in the Claimant's office there was a firm discussion between the two of them, with the Claimant explaining to Dr Salem that MA had definitely left for another job, and her then going on to explain again about why the top up fee letters could not be issued. I think she did say something along the lines that she was fed up with the "prevailing stupidity", ie Dr Salem's administrative incompetency; and in that context that he also hadn't paid MA the promised increased travelling and pay rate which was why MA had left. I have no doubt that working in this dilatory of administrative regime could from time to time be frustrating for the Claimant who I am sure is a very conscientious senior nurse/manager. I have equally no doubt that Dr Salem was upset that MA had gone and the letters hadn't gone out.

22. But what then happened? The Claimant says nothing happened. They had a robust discussion, including on the topic of the proposed shift pattern changes, but that was where it was left. She did not lose her temper and she said nothing about resigning. But Dr Salem lost his temper and shouted at her, which is why she left the room. There was no subsequent discussion that day about resigning or not and because she had never said that she was resigning. In contrast Dr Salem says that she having roundly accused him of running the home in a stupid fashion, she then told him that she had had enough (my summary) and that she was resigning albeit she would work out her notice. He had not lost his temper and he had not shouted at her. He says that he waited, thinking this might be a heat of the moment utterance, to see if she was going to reflect and tell him she had changed her mind; but after about 30 minutes her having gone into the dining room and not surfaced, he went in there and spoke to the Claimant to see if she had changed her mind but she made it plain that her mind was made up: she was resigning. He says, and this is important, that at that stage the Claimant was calm and composed. As a consultant psychiatrist of long standing, he concluded from her demeanour that her mind was made up.

23. So I have a straightforward conflict. Between the 8th and the 21st April the Claimant carried on working as usual. Then on that day she learnt from JD that he was now acting up in charge because he had been told by Dr Salem that the Claimant had resigned. Now of course the Respondent would have to make preparations if that be the case because of the need to be able to show the CQC that the home had a registered manager or somebody who was in the process of becoming the same and was likely to pass muster with the CQC. The Claimant having heard this from JD made contact with Dr Salem. She wanted to see him. And when he came in on 22 April she told him that she hadn't resigned. There really isn't any dispute now on the evidence as to what then happened. Dr Salem replied that she had made plain that she had resigned on 7 April and what she had said before doing so had upset him. He had come to terms with the fact that

she had made her decision. Accordingly he had appointed JD. She had resigned and that was that. The Claimant went to see her trade union, hence the two letters to which I have referred and Dr Salem's reply.

24. And so the employment ended on 6 May. In the interim on 27 April Dr Salem advertised through the job centre for a qualified registered manager. The reason for that is obvious. If he could recruit an already CQC registered nursing manager then he would not have any problems getting that person very swiftly registered with the CQC as a replacement for the Claimant; this would not be the case with JD. He was able to successfully recruit. As to the Claimant, by the beginning of June she had new employment as the nursing manager at the Cheyne Nursing Home nearby. Shortly thereafter JD joined her.

Conclusion

25. This is a case of one person's word against the other. The documentary evidence does not for the reasons I have gone to assist. Thus I fall back on the burden of proof. The Claimant has not proved on a balance of probabilities that she did not freely resign but was dismissed. Accordingly her claim fails and is dismissed.

Employment Judge Britton

Date: 25 May 2017

JUDGMENT SENT TO THE PARTIES ON
10 June 2017

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S.Cresswell
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FOR THE TRIBUNAL OFFICE