



EMPLOYMENT TRIBUNALS

Claimant: Miss M Noori

Respondent: Greenbrook Health Care Ltd

Heard at: London South **On:** 20 and 21 February 2017

Before: Employment Judge Freer

Representation

Claimant: Ms S Bewley, Counsel

Respondent: Mr A Watson, Counsel

RESERVED JUDGMENT

It is the judgment of the Tribunal that the Claimant's claim of wrongful dismissal is unsuccessful.

REASONS

1. By a claim presented to the Tribunal on 6 December 2015 the Claimant claimed sex discrimination, equal pay and wrongful dismissal.
2. The Respondent resisted the claims.
3. The Claimant's claims of sex discrimination were dismissed by combination of withdrawal by the Claimant and non-payment of a deposit. The Claimant's claim for equal pay was struck out upon non-payment of a deposit.
4. Accordingly, the only claim before the Tribunal at the instant hearing is that of wrongful dismissal.
5. The Claimant gave evidence on her own behalf.
6. The Respondent gave evidence through Mr Tony Sheanon, Nurse with Kings College Hospital NHS Foundation Trust; Ms Sarah Noon, Service Manager; Mr Dan Annetts, Chief Operating Officer; and Dr Sally Johnson, Medical Director.
7. The Tribunal was presented with a bundle of documents comprising 418 pages plus other documents presented at the hearing as agreed by the Tribunal.
8. The parties supplied written submissions to the Tribunal on 27 March 2017.
9. The Tribunal apologises for the delay in finalising this judgment and reasons which has been due to lack of judicial resources.

The Issues and law

10. The issues to be determined by the Tribunal are based in common law: whether or not the Claimant committed a repudiatory breach of contract, which was accepted by the Respondent and entitled it to dismiss the Claimant without payment of notice pay.
11. The Tribunal was referred to the following authorities on repudiatory breaches of contract. A repudiatory breach of contract is a deliberate flouting of the essential contractual conditions (see **Laws -v- London Chronicle (Indicator Newspapers) Ltd** [1959] 1 WLR 698): Gross misconduct must be a deliberate and wilful contradiction of the contractual terms (see **Sandwell & West Birmingham Hospitals NHS Trust -v- Westwood** UKEAT/0032/09).
12. Conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment (see **Briscoe -v- Lubrizol Ltd (No 2)** [2002] IRLR 607 approving **Neary -v- Dean of Westminster** [1999] IRLR 288).
13. In more recent times there has been the decision of the Court of Appeal in **Adesoken -v- Sainsbury's Supermarkets Ltd** [2017] IRLR 346 which cited

with approval the decision in **Neary** (above): "The focus is on the damage to the relationship between the parties. Dishonesty and other deliberate actions which poison the relationship will obviously fall into the gross misconduct category, but so in an appropriate case can an act of gross negligence . . . it ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or undermine the employer's policies constitutes such a grave act of misconduct as to justify summary dismissal."

14. The nature of the employer's business and the position of the employee are clearly relevant circumstances to the assessment.

Facts and associated conclusions

15. This case arises out of an incident that occurred during the early hours of the morning of 26 July 2015 whilst the Claimant was working a night shift in the Urgent Care Centre at the Princess Royal Hospital in her capacity as an employed GP with the Respondent, Greenbrook Health Care.
16. The Claimant was dismissed from her employment by reason of leaving a shift without permission, leaving the department with no GP on duty and did so due to an argument with a colleague and did not consider the impact of her actions on the Respondent's service, patients or her colleagues. The Respondent considered this allegation amounted to gross misconduct.
17. The Tribunal considers this is a case where the evidence from both the main witnesses, the Claimant and Mr Sheanon was not wholly reliable. The Claimant was evasive in her answers to questions in cross-examination, Mr Sheanon was vague with his. As a consequence, the Tribunal placed more weight on the contemporaneous documentation.
18. It is common ground that Mr Sheanon and the Claimant had never met each other before the events took place. There was no background to this matter that needed to be taken into consideration.
19. On the morning in question and on two separate occasions, Mr Sheanon knocked on the door of the consulting room that the Claimant occupied at the time.
20. Mr Sheanon first knocked on the door of one of the consulting rooms which the Claimant occupied at around 3.00am. The Tribunal finds that Mr Sheanon told the Claimant there was a patient to be seen and that he needed to know where Dr Noori was in case of an emergency.
21. Mr Sheanon knocked a second time on the door of the consultation room the Claimant occupied, which was a little later between around 04.00 and 04.30.
22. It is from this second event that the matters to which this case relates and the Claimant's ultimate dismissal arose.

23. From the evidence it has received the Tribunal concludes that Mr Sheanon knocked loudly and rapidly on the consultation door because he thought the Claimant was asleep. The Claimant took some time to open the door and appeared to Mr Sheanon to look dishevelled.
24. Mr Sheanon's evidence was hazy on some matters and perhaps understandably relied upon the statements he wrote at the time, but accepted that he knocked "loud and fast" on the second occasion.
25. It was put to Mr Sheenan that paragraph 12 on page 225 was an accurate account of the event and he acknowledged that it was. That paragraph states: "She seemed upset to be disturbed again. Also not happy with being told that her behaviour was unprofessional. She wanted reception to call her instead of me telling her patients were waiting. I told her she should be seeing patients not sleeping as she is paid to do. She then said she had been a doctor for 25 years and never spoken to like this. I said that I had been a nurse for 27 years and never worked with a doctor as unprofessional as her". The Tribunal concludes that this account is generally accurate.
26. The Tribunal concludes from the evidence that Mr Sheanon was firm and was clearly irritated that he could not find the Claimant when he considered there were patients to be seen. He had also formed the view that the Claimant was asleep in the consultation room and that the door was locked. His evidence was that he did not try the door handle himself, but heard an audible clunk of the lock when the Claimant opened the door.
27. The Tribunal has taken particular interest in the accounts given at the time of receptionist Ms Sandra Morgan. She did not appear to have any allegiances or consequences arising from giving her account. Her immediate statement stated: "Tony was very busy triaging and also seeing patients up to the time of the incident. He had mentioned to me that he had to keep knocking on Dr Noori's door alerting her that a patient was waiting. I went for my break about 4.10 (approximately) and stayed in room 6 (between Dr Noori, room 5 and Tony room 7). I heard raised voices with Tony accusing Dr Noori of sleeping. She was furious and accused him of barging in on her room. I heard her say that the receptionist usually rings her to tell her a patient is waiting but I had not rung her at all. I think Tony must have streamed patients to her and then alerted her direct, or maybe she saw them on the screen. She did not see me in room 6 and came out to AE and asked them where I was. She then came in to room 6 and told me Tony was very rude to her and that she was not being spoken to like that and she was going home. She also said that she had backache. Tony was standing near the door at the time so I was a bit lost for words. Then a consultant came round from AE and Tony advised him that our Doctor had been sleeping and was threatening to leave the shift. I went into Dr Noori's room 5 and said to her that I thought she should stay (I believe these were the only words I had with Dr Noori) but she was adamant that she was going home. She packed up her belongings and left somewhere between 4.30am and 5.00am".

28. Ms Morgan was interviewed as part of the disciplinary process and provided further clarification, also by interview. The Tribunal concludes that these accounts were generally consistent, save for some minor but expected variation. However, the same overall picture was given by Ms Morgan.
29. The only substantial difference in the accounts of Ms Morgan was that she stated Dr Noori said she had back-ache in her most immediate statement and stomach-ache in her later statement to the disciplinary investigation. It is not known why Ms Morgan changed that account and whether she had spoken to Dr Noori in the interim between her initial statement and the disciplinary investigation interview.
30. There is an email account from Dr Boon Thomas, A&E Registrar, dated 07 December 2015. Dr Thomas gave an account of when he saw the Claimant: "I was the registrar in charge during this night shift on 25-26 July. A patient was referred to ED by the UCC doctor who did not verbally hand over the patient (which is usual courtesy at PRUH at this time). I went to UCC to find out more information from the doctor. I first met with the UCC ENP (male) who looked upset and told me the GP was angry with him because she was sleeping in her room and he woke her up to see the new patient that had been streamed to the UCC service. I knocked on the door and entered the room. The GP (female) seemed upset and did not want to talk to me and was gathering her bag and coat and told me she "cannot do this any more" and she was leaving now. I left the UCC to tend the patient who had been referred to as in ED. I informed the nurse in charge of ED what had happened told them to inform the site manager as this meant there was no GP covering UCC for the rest of the shift".
31. The email by Mr Steele on 19 August 2015 is inaccurate where it states: Tony tried to pass the phone to her but she would not take it and walked out – this attempt was audible to me". Mr Sheanon candidly confirmed in evidence that when he was speaking to Mr Steele he was in a different room to the Claimant.
32. The content of a telephone conversation between Ms Sara Talia, Lead GP UCC PRUH, and the Claimant on 27 July 2015 is recorded in writing by Ms Talia. It states: "what she then explained was that she has never left work before like that and that she had a lot of back pain and was not feeling well enough to stay so had to leave. She said she informed Sandra Morgan (receptionist) that she was not feeling well before she left and told Sandra to inform the manager". Although the Claimant does separately relay details of the incident with Mr Sheanon, it is not recorded that the Claimant stated her illness was anything to do with Mr Sheanon. This account differs from the account of Ms Morgan. Ms Morgan does not state that she was told to inform the manager.
33. The note also records that the Claimant stated: "She also says that she knows that the management team has set her up by booking Tony on the night shift with her to intentionally cause her problems". The Claimant could not explain the basis for this comment in cross-examination.

34. It is recorded that the Claimant hung up on Ms Talia on two occasions during this conversation. Having considered the note and the surrounding evidence and having heard evidence from the Claimant, the Tribunal accepts this note as being an accurate representation of the telephone exchange.
35. The Claimant did not attend at the disciplinary hearing and again it is recorded that when Mr Annetts, Chief Operating Officer, contacted her by phone the Claimant hung up on him. This corroborates Ms Talia's account of events when she argues that the Claimant hung up her twice and her note of the phone conversation.
36. The Claimant did not visit her GP on the following Monday after the event because in her view in evidence to the Tribunal, it was an acute stress reaction, she felt better by that evening. She was able to drive home after the event.
37. The Claimant's evidence at the Tribunal hearing that she had suffered from "acute stress reaction" was the first time on the documentation the Claimant described her condition in that way.
38. The Tribunal concludes that the Claimant's account was exaggerated and became more so the further the Claimant moved through the internal processes. The accounts of Mr Sheanon and Ms Morgan remained broadly similar.
39. When it was put to the Claimant that there was no verbal handover of a patient with Dr Thomas, the Claimant said that she could not speak because of a "spasm in my throat". The Claimant stated that she told Dr Thomas that she was unwell and needed to go home. When the Claimant was asked how she could speak if she had a throat spasm the Claimant responded that "I could say words and sentences". When it was put to the Claimant she had never said this before, she answered "No one ever asked me before". However, the Claimant had raised a number of issues to do with her health throughout the internal process with the Respondent and did not mention a throat spasm that her prevented her from speaking. This was the first time it had been raised. The Tribunal found the Claimant's evidence on this point to be deeply unpersuasive.
40. The Claimant in her oral evidence stated that she did not think it took her "more than a few minutes" to open the door after Mr Sheanon knocked. When it was put to the Claimant that this was a long time to keep him waiting, the Claimant responded the Mr Sheanon had "knocked hard and aggressively and she needed to catch her breath".
41. The Claimant was taken to her grievance statement and in answer to the question "Can you remember how long it took to open the door" the Claimant answered "straightaway, no unusual delay". When it was put to the Claimant that this was a different answer to the one that she gave in the disciplinary hearing and at the Tribunal hearing the Claimant answered "Different circumstance, different answers. What difference does it make?".

42. The Claimant also argued in evidence that she was probably on her computer at the time the incident occurred. However, as part of the disciplinary hearing the Claimant stated that she could not remember what she was doing.
43. The Claimant in her evidence to the Tribunal stated that she considered that Mr Sheanon was knocking at the door very hard, which she considered to be scary and very threatening and “felt like as if he was going to knock the door down”.
44. In a statement to the Respondent dated 6 August 2015, the Claimant, stated Mr Sheanon “tried forcefully to knock the door down. The Claimant described Mr Sheanon as “a man twice my size”. It is fair to say, however, that Mr Sheanon is not a large person and there is little or no difference in size between himself and the Claimant. The Claimant stated: “I felt I had to leave for the safety of my life”.
45. In the grievance meeting the Claimant stated: “Tony attacked me, he dragged me and I’ve been subjected to harassment and bullying and I am suspended”. The Claimant denied that she stated that she had been “dragged” and that this had been “put there” by the Respondent. That part of the note had not been challenged before this Tribunal hearing. The Tribunal finds that this record is accurate.
46. In the grievance appeal hearing the Claimant stated: “If I had not left he would have stabbed me or killed me. How can you let a nurse be aggressive with a doctor?” This was the first time the Claimant had raised this type of allegation and reflects the increasing hyperbole used by the Claimant when recounting the event.
47. The Claimant complained that Mr Sheanon was holding her in the room “as a hostage”. The Tribunal concludes, having heard the evidence, that this description is also an exaggeration.
48. The Claimant stated in evidence that she had an “acute stress condition” at the time because she was “attacked”. When asked to explain what she meant by attacked, the Claimant said that she had been attacked verbally because Mr Sheanon had called her lazy and stated that she made a lot of money. This account actually corroborates Mr Sheanon’s account of events, as set out above.
49. In the grievance hearing notes it is also recorded the Claimant stated: “You are asking too many questions, you make me feel like I am lying. It doesn't need to be looked at, you're making me uncomfortable. Do you want me to take a grievance against you?”. Again, the Claimant argued that this record had been put there by the Respondent but in evidence accepted that other entries were accurate. The Tribunal concludes that the account by the Respondent is accurate.
50. The Claimant denied in evidence that she had said a number of comments, but it was noted by the Tribunal that the Claimant would deny that comments had been made if they were not *exactly* how she remembered them word for word.

When then Claimant was then asked whether she had said the comment 'along those lines' her answer then changed to she "could not recall".

51. In the grievance appeal letter the Claimant states: "I felt that Greenbrook were discriminatory because of my gender being a woman and the offender is a man. That manifested by expecting me to continue working, being unwell and in hostile atmosphere created by ENP TS. I believe Greenbook has dismissed me to protect a male staff". The Claimant also states: "I believe strongly that he was intentionally harassing me simply because I am a woman working night shift. I believe he was hoping that a man do the night shift with him". Also: "The normal practice that the receptionist ring the doctor to alert me that a patient is waiting, but did not happen at night because I believe he bullied the receptionist not call me so he can attack me claiming that was for the patients". In evidence to the Tribunal the Claimant had no sensible explanation for the basis of those comments.
52. The Claimant stated in her appeal letter that Mr Sheanon: "ridiculed me in front of another man (A&E registrar) laughing and making fun that I was sleep simply because he is a man like him and from his race without making any consideration being a fellow employee in the department and that would inflict harm on me". Again, the Claimant could not explain this comment in cross-examination. It was an unsubstantiated assertion. The note by Dr Thomas did not reflect these circumstances and his was an independent account.
53. The Tribunal also considered the Claimant's evidence to be evasive over her status that morning being more senior than others. Between 2.00am and 8.00am the Claimant was the only GP on duty. At one stage in evidence the Claimant sought to argue that she was not better placed to deal with a medical emergency than the Receptionist. The Claimant's evidence was also non-committal and vague over the types of medical matters that she considered she could address. It appeared that the more serious matters were sent to the Emergency Department and any other less serious matters were seen by the Nurse. It was difficult to ascertain what medical issues the Claimant did consider were within her sphere of competence and job duties. She argued that she was not insured to provide assistance with injuries and if any such a case was triaged/streamed for her attention she would need to discuss the matter with her insurers.
54. The Claimant's evidence of her physical condition on the day in question also changed over time. In the conversation with Ms Talia the Claimant said that she had "a lot of back pain and was not feeling well enough to stay so had to leave". In her 06 August 2015 statement the Claimant states she had "severe pain and spasm in my stomach". At the Tribunal hearing the Claimant argued these were the same conditions. At the fact-finding meeting on 19 August 2015 the Claimant's is recorded as stating: "I was in pain all over my body because I was very distressed". As recorded above the Claimant raised the matter of an acute stress reaction and a throat spasm for the first time in evidence. Also in re-examination, the Claimant stated for the first time that she had suffered from a "loose motion".

55. The Claimant contended that she could not attend at the disciplinary because "I had mouth ulcers".
56. The Claimant contends that she asked for a postponement of the disciplinary hearing by e-mail, but it has not been produced by the Claimant in evidence.
57. Provisions in the Claimant's contract of employment allows for that contract to be terminated summarily for gross misconduct and the disciplinary policy states that conduct that irrevocably destroys trust and confidence will constitute gross misconduct. That statement is consonant with the common law position.
58. The Claimant's contract of employment required her to work a late shift on the evening in question from 23.00 to 08.00.
59. When it was put to the Claimant she did not receive permission to leave her shift the Claimant stated that she reported the matter to the receptionist because there was no business manager at night, she was unwell and did not need permission to leave.
60. On balance the Tribunal finds the following facts with regard to the incident under review, Mr Sheanon had been very busy that shift. He had tried to locate Dr Noori on two occasions. The second time he considered there was a patient for her to see. It makes no material difference whether patients had been streamed to Dr Noori by the receptionist Ms Morgan, or by Dr Sheanon, or any other person.
61. Mr Sheanon had located Dr Noori on the first occasion and requested her to make sure her location was known so she could be contacted if necessary.
62. The second time Mr Sheanon knocked on the consulting room door in which Dr Noori occupied, he knocked loudly because he was of the view that Dr Noori was asleep. The door was locked. It took Dr Noori several minutes to answer the door, which in the circumstances supports a view that she was asleep. The Tribunal finds Dr Noori's evidence to be unconvincing that it took her a few minutes to catch her breath because the knocking had been so loud. The Tribunal concludes that the account by Dr Noori of the ferocity of the knocking was exaggerated particularly when compared to the account of Ms Morgan.
63. There was an exchange of words between the two. Both raised their voices. Mr Sheanon was angry but not aggressive. Dr Noori in return was furious. The gist of the conversation was that Mr Sheanon accused Dr Noori of being asleep at work, Dr Noori said that she had been a GP for 25 years and had never been spoken to like that before and Mr Sheanon said he had been a nurse for 27 years and had never met such an unprofessional GP as Dr Noori.
64. The Tribunal concludes on balance that Dr Noori left her place of work because, as Ms Morgan recalled, "she was not going to be spoken to like that". The Tribunal finds that this was the principal reason for Dr Noori leaving her place of work. The Claimant left without speaking to anyone other than the receptionist. The Claimant took no steps to make sure her absence was

appropriately noted such that cover could be arranged. Mr Sheanon called the on-site manager and the Respondent's on-call manager. The Claimant did not wait while the on-call manager was contacted. The Claimant did not discuss the patient referred to the ED.

65. The Tribunal concludes that the references to a back problem and/or stomach problem were entirely secondary and the Claimant's medical condition has been expanded upon over time by Dr Noori such that her account is unreliable.
66. The Tribunal concludes on balance that Dr Noori's evidence about her various medical conditions appears to indicate a recognition that there were steps she could have taken but did not do so. The throat spasm with Dr Thomas being an example. It would have been easy to explain to Dr Thomas the circumstances of her leaving, that cover may be required and give some type of hand-over of the patient but she did not do so. Dr Noori was, however, able to converse with Ms Morgan at the time that she was leaving, but could not speak to Dr Thomas because of a throat spasm, which she had not mentioned until her evidence at the Tribunal when these points were put to her, the account also having the unconvincing caveat that she was able to say words and sentences.
67. The Tribunal found Dr Noori's account of the incident itself and her various ailments to become more exaggerated over time, such that it seriously damaged her credibility.
68. The Tribunal concludes that Mr Sheanon did not attack the Claimant or display conduct with which the Claimant, particularly as a GP working on a night shift in an Urgent Care Centre would not be able to address. The Tribunal concludes that the Claimant left work because she did not consider that she should have been "spoken to" in that way.
69. The Tribunal's conclusions concur with the disciplinary decision of the Respondent, that the Claimant left her shift without permission, leaving the department with no GP on duty and she took this action because of the verbal altercation with Mr Sheanon. The Claimant did not consider the impact of her actions on the Respondent's service.
70. The Tribunal objectively concludes that it is a matter of common-sense that a GP who is the only GP on duty and who removes him or herself from the workplace is under an obligation to inform the appropriate persons, seek permissions and make any handover as is necessary and reasonable in the circumstances.
71. Of course there may well be circumstances where that course of action simply is not possible, such as certain illnesses, fainting or a seizure were given by way of example, but the Tribunal concludes that those circumstances were not prevalent in the Claimant's case. The Claimant left because of the way she had been spoken to. The back complaint, later stomach complaint, was secondary and did not provide reason why appropriate action could not have been taken. The Claimant's evidence that she did not know the appropriate

phone number to call was also unpersuasive. There could be a whole range of reasons why the on-call manager or similar would need to be contacted, particularly as the only GP on night shift, and the Claimant should reasonably have made herself aware of the contact number. Because of the Claimant's actions the Respondent was left without appropriate cover when there were potential patients to be seen.

72. It was deliberate action by the Claimant that also had the effect of causing the Respondent to breach the terms of its contract with the Hospital Trust to provide 24 hour GP cover.
73. The Tribunal objectively concludes that the Claimant's actions in all the circumstances amount to gross misconduct. It was a deliberate and wilful act by the Claimant that was in contradiction of the contract of employment and the Respondent's disciplinary procedure, that states gross misconduct is any behaviour or negligence resulting in a fundamental breach of contractual terms that irrevocably destroys the trust and confidence necessary to continue the employment relationship. The Claimant had breached the express term relating to her hours of work. It was a deliberate action by the Claimant and was behaviour that irrevocably destroyed trust and confidence when considering all the circumstances particularly including the nature of the Respondent's business and the position of the Claimant.
74. Alternatively, the Tribunal concludes that the implied term of mutual trust and confidence applies to all contracts of employment as confirmed by the House of Lords in **Malik –v- The Bank of Credit and Commerce International SA** [1997] IRLR 462, where Lord Steyn stated that: "The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee". Lord Steyn also described this as a reciprocal duty. Therefore that standard also equally applies to the conduct of an employee. It is unrealistic for an employer to set out all potential acts of gross misconduct as express contractual terms and conditions, which almost universally are described as being non-exhaustive in any event. This approach is consistent with the decision in **Neary**.
75. As such the Tribunal objectively concludes on balance, for the reasons given above, that the Claimant's deliberate conduct in all the circumstances was conduct likely to destroy the relationship of confidence and trust with the Respondent. Therefore the Respondent could elect to accept that repudiatory breach and dismiss the Claimant without notice as it did.
76. Accordingly, the Claimant's claim is not well founded.

Employment Judge Freer
Date: 14 July 2017