



EMPLOYMENT TRIBUNALS

Claimant: Miss Elizabeth Master

Respondent: Zahoor Altaf and Robina Shahin
Trading As: Asquith House Dental Practice

Heard at: Birmingham

On: 18th & 19th January 2018

Before: Employment Judge Rose QC

Representation

Claimant: Ms. T. Ahari of Counsel

Respondent: Mr. McGrath of Counsel

JUDGMENT

1. It is declared that the Claimant was unfairly dismissed.
2. There has been an unlawful deduction from wages in the sum of £201.04.
3. The Remedy Hearing will take place on the 10 May 2018 at 10.00am or so soon thereafter as the Tribunal can hear the matter.
4. The complaint in respect about outstanding holiday pay will be dealt with at the Remedy Hearing.

REASONS

5. By a Claim form presented on the 16 May 2017, the Claimant complained of unfair dismissal, arrears of pay and outstanding holiday pay.
6. I heard evidence from the Claimant and on behalf of the Respondents I heard from Rebecca Armson, Dr. Zahoor Altaf and Mr Hussain, I also considered a bundle of documents in so far as my attention was drawn to documents within it.

7. The Claims

At the outset of the Hearing I sought clarification with the Claimant's Counsel as to how the claim of unfair dismissal was put. In particular I asked if a complaint was brought under Regulation 7 of the Transfer of Undertaking Regulations and I was informed that no such claim was brought. The Claimant restricted the unfair dismissal claim to a claim of constructive dismissal based upon breaches of express and implied terms, in particular the implied term that an employer will not without reasonable cause act so as to undermine mutual trust and confidence.

8. Procedural Issues

The first procedural matter was to correct the identity of the Respondent which is a partnership and therefore required the two Partners to be identified as Respondents that was a matter of consent.

9. The second procedural matter arose when the Tribunal went through the issues of the unfair dismissal claim with the parties, I pointed out that although this was a case of constructive dismissal, it was still open to the Respondent to plead a potentially fair reason for dismissal and that no such reason had been pleaded in the response. Mr McGrath on behalf of the Respondents indicated that he relied upon some other substantial reason in particular "*the need to alter the hours of staff to allow for a new business model*". To introduce such a point he required permission to amend his response. I dealt with that application on the first morning of the Hearing and gave the following reasons for the decision that I arrived at. I considered that the relevant test was the balance of hardship and injustice that either party would suffer if I allowed or disallowed the amendment and I should take into account the overriding objective. I noted that Mr McGrath had been instructed in the matter for approximately two weeks. The list of issues he had provided did not identify the reason for dismissal expressly as an issue. I noted that by allowing such an amendment would open up new evidential matters. The amendment was obviously made very late in the day. When I asked the Claimant's Counsel to respond, her initial response was that she did not object. However, Ms Ahari then she went on to articulate reasons setting out why she did in fact object. In particular she pointed out that she had not prepared to deal with the case on that basis, however she then added that she would be able to do so. This was the critical consideration in determining the balance of hardship and that although the amendment was late, the Claimant nonetheless through her Counsel did feel able to deal with it and in those circumstances I granted the Respondent permission to amend the response in the formulation I have set out above.

10. The third procedural Issue arose in this way at the beginning of the second day of the Hearing. Having called two of his Witnesses, Dr. Altaf and Rebecca Armson on day one of the hearing, at the beginning of day two Mr McGrath applied to recall Mrs. Rebecca Armson to deal with a new matter. In particular, there had been some discussion about the impact of regulation 4 of TUPE which concerns changing employees terms and conditions as a result of a transfer.

11. Mr McGrath now wanted to adduce further evidence in support of an argument under Regulation 4 (5) of TUOE to the effect that a variation for an economic technical or organizational reason that involves changes in the workforce would mean the variation to the claimant's contract was not rendered void by regulation 4. I noted that there had been some general evidence adduced by Rebecca Armson and by Dr. Altaf about the reasons for the changes that were introduced to the Claimant's working conditions i. Mr McGrath's application was premised on the fact that the evidence to-date that had been insufficient and he wanted to adduce further evidence that related to the state of the practice when it was conducted by the Transferor and then he wanted to refer to the requirements that were imposed upon the Transferee pursuant to a contract that it had with the NHS and that various steps were required to be taken pursuant to the contract. This was objected to by the Claimant's Counsel. Having heard the parties submissions on the application, I declined to allow Mr McGrath to re-call Mrs. Armson. In particular I took into account the overriding objective, the lateness of the application, the effect that the proposal to adduce further evidence would have on the time allocated by the Tribunal to this case, I note that at the time of dictating this Judgment, it is now shortly after 3pm. Two days had been allocated for the disposal of this case. I noted that introducing this evidence would open up a further line of questioning that the Claimant had not come prepared to deal with. It would have involved considering the terms of the contract referred to which did not form part of the documents before the Tribunal. It would require the Claimant to be recalled to give evidence. Finally I took into account the fact that I had already granted the Respondent an indulgence by allowing them to amend the response on the first day of the Hearing. I concluded it was too late for this new line of evidence to be introduced.

12. The Issues

I deal only with the question of unfair dismissal as the arrears of pay has been agreed and the outstanding holiday pay has been deferred to the Remedy Hearing. At the outset of the Hearing, I identified with the Parties the following issues:-

- i. Did the Respondents breach the Claimant's contract of employment by reason of any or all of the following matters: Changing her terms of employment on the 01 March 2017 and on the 04 April 2017 by behaving oppressively through Mr Hussain and in respect of the handling of the Claimant's grievance.
- ii. Did the Claimant resign in response to those breaches? Did the Claimant affirm the contract? Has the Respondent shown a potentially fair reason for dismissal? If so, was the dismissal procedurally fair? Neither party suggested the principles in **Polkey v A.E. Dayton Service Ltd** were of relevance to this case.

Findings of Fact

13. In resolving those issues I made the following Findings of Fact
The Claimant commenced employment with the Dental Practice on the 03 December 2001. The Employer at that time was a Dr Griffiths. The Contract that she signed provided for her hours of work to be Monday, Tuesday, Thursday and Friday between 8am and 5.30pm with one hour unpaid lunch break and on Wednesday between 8am and 1pm, making a total of 39 hours.
13. On the 06 January 2017 she was sent a letter by Dr. Griffiths informing her that there was to be a transfer of the business to Asquith House Dental Practice, which is the partnership identified as the Respondents in these proceedings. In note at paragraph 6 of that letter it is stated as follows:-
“Dr. Zahoor Altaf and Rabina Shahind do not envisage taking any measures in relation to the affected employees in connection with the transfer.”
14. On the 20 January 2017 Dr. Griffiths wrote to the Claimant again and this letter contained the following information *“I have also been informed that they intent to alter the opening hours at the practice and have stated as follows: the practice will increase opening hours and working hours and to facilitate this additional staff will be recruited but leaving the current staff with the same working hours.”* (My underlining).
15. The transfer pursuant to TUPE took place on the 01 February 2017. The Respondents say there were a number of discussions with staff to try and get a collaborative approach as to the way forward. I find as a fact that there were no one-to-one discussions between the Claimant and the Respondents or anyone working on behalf of the Respondents at any time.
16. In terms of the discussions referred to, there are in fact notes of only one such meeting and that took place on the 15 February 2017 and is headed “Asquith House Monthly Practice Meeting Minutes”. At the end of that note, which runs to a page and a half, the final matter referred to is as follows:- *“Opening hours/rota changes, staff discussed extension to operating hours from the start of March, two weeks notice today to amend the rota. Discussed with staff, would like to make transition as fair and as easy as possible for all concerned. Discussed suggested rota to be confirmed, we have also taken on a new staff member Emily who will join us from March”.*
17. With effect from about the 01 March 2017, the Respondents varied the Claimant’s hours of work as follows:-
 - I. “On Monday, Tuesday and Thursday the Claimant would work from 8am to 8pm with one hour’s unpaid lunch break and on Wednesdays she would work from 8am to 1pm. That makes a total of 38 hours which is one less than her original contract.

It also alters the hours to be worked each day including removal of Friday altogether. When imposing those terms, there was no one-to-one discussion between the Claimant and the Respondents, there was no letter foreshadowing this change, the Respondents took no professional advice. Indeed, Mrs. Rebecca Armson, who appears to have had most of the conduct of the matter, admitted herself during the course of her evidence, she had no knowledge of TUPE or its implications.

- II. I find as a fact that the Claimant went along with this change, but really because she felt that she had no choice.
 - III. The reasons that the Respondents put before me for the change in hours were as follows:- They were changing the opening hours of the practice and they wanted to make sure the practice was more compatible with modern NHS requirements. Further the NHS had stated that they wanted things changed; they wanted the opening hours changed, disabled access changed, Saturday opening and emergency services. I find as a fact that those were considerations which the Respondents had in mind when introducing this change ie: the hours I have cited above as of about the 01 March 2017.
18. The overall staffing numbers of the practice under Dr Griffiths were originally were as follows:

Dr. Griffiths, the Claimant, a Receptionist, Dr. Griffiths' Wife (who was a Practice Manager) and two Nurses, Laura Preece and Gemma Lyne making four employees excluding Dr. Griffiths. On the takeover of the practice by the Respondents, the staffing comprised: Dr. Altaf who was the Dentist, the Claimant, Laura Preece and Gemma Lyne. Gemma Lyne then left and a Jane Wallace joined and two further Apprentice Nurses joined. At some stage there a further Dentist was recruited who worked in an adaptation to the building downstairs.

19. Just over a month after the first variation in the Claimant's working hours, she received a letter dated the 04 April 2017 which although brief, I quote in its entirety. *"Staff Notice Regarding Working Hours. Further to message on Group Chat 3/4/2017 please accept this letter as formal notice that the Staff will only be paid from 15 minutes prior to their shift start time so 8.15am for an 8.30am clinical start, this is policy across all our sites and allows enough time for surgery, set up reception, set up prior to patients arriving. We are now settling to new surgery operational hours and staff adjustments. Please accept this notice that you will no longer be required to work Wednesday 8.30am to 1400hours shift with effect of two weeks notice"*

20. This was an unequivocal statement that the Claimant's hours were to be reduced. The Wednesday 1 to be removed and her new working hours would be 32 hours and 15 minutes. There had been no consultation with the Claimant at all prior to this letter.
21. The Claimant lodged a grievance on the 07 April which stated inter alia: *"Thank you for your letter of the 04 April which I have now considered and which I have sought legal advice. I am advised that any changes to my working hours cannot be altered without you giving me 12 weeks contractual notice, as a result I now wish to raise a grievance that (a) since the 01 February 2017 you have fundamentally changed my working hours to include 12 hour shifts (b) you are now trying to reduce my hours by 20% without consultation or correct note. I would therefore like to discuss these matters with you as a matter of urgency and hope we can arrange a meeting as soon as possible to do so"*. It was suggested during cross-examination that the Claimant's real complaint was that she had not been given sufficient notice of the change. The Claimant rejected that and said that she was concerned about the reduction in hours *per se*, I am satisfied that the Claimant's evidence on this matter is correct.
- 23 Dr. Altaf was given the letter of grievance by the Claimant and he stated that Mrs Armson would have a meeting with her. Mrs Armson's position in the Respondent is ambiguous; she is not an employee of the practice but nonetheless, appears to have had most of the day to day dealings with the matters which are in dispute in this case.
24. A meeting did take place in the kitchen of the premises on the 12 April, the kitchen itself seems to have served a number of other purposes other than a kitchen. To the Claimant's surprise, not only was Mrs. Armson present, but also a Sarah Greenhouse. Ms. Greenhouse's role had been that she was providing some assistance to Rebecca Armson in respect of upgrading the computer system and some advertising/marketing. It was, therefore, to put it mildly, odd that she should have had any involvement in a meeting to discuss the Claimant's grievance. The Claimant attended the meeting with two persons present on the Respondent's side. The Claimant complained that this was not what she was anticipating at all. After Dr Altaf had told her that Mrs Armson would meet with her She was anticipating an informal discussion whereas this turned into a formal meeting. I am satisfied that the general tenet of the meeting is as the Claimant has described it in her evidence for the following reasons. One of the features of this case was that it was very rare that the Respondents ever bothered to put any meetings or information in writing but this meeting was an exception to that general rule, the meeting was noted by Rebecca Armson. It was headed *"Consultation with Liz Masters regarding the notice to changing working hours,"* She also noted that she had taken advice from ACAS in advance of that meeting. The meeting set out three options for the Claimant about Wednesday working, all of which involved no Wednesday working.

25. There was a dispute as to how the meeting ended. It is the Respondents contention that it was left for the Claimant to go away and to come back by the 18 April with any suggestions that she might have had herself over and above the three that were set out in the meeting itself. The Claimant's evidence about the matter is that she was to revert to the Respondents by the 18 April as to which of the three options that were put before her were to be accepted by her. For the following reasons, I am satisfied that the Claimant's account is correct. Firstly, because it is entirely consistent with paragraph 16 of her Witness Statement which was made before she knew this was a point that the Respondents were going to raise. Secondly, I was impressed with her answers about the matter under cross-examination. Thirdly, in a letter dated the 26 April 2017 signed by Dr. Altaf and Mrs. Rebecca Armson, (a letter that was in response to a without prejudice Solicitors letter), the following passage appears: - "*The discussion was left with options given for Elizabeth to discuss with her partner and confirm with us on the following Monday*". I find that sentence entirely consistent with the Claimants account of the meeting.
25. As to the rational for the change which was now being imposed, the evidence given by Mrs. Armson was as follows:- "*I felt it was too much to work back to back long shifts, particularly if you had a long commute*", *secondly, she said the purposes of the change was to have one person working the whole day on the Wednesday*". Dr. Altaf was also asked what the reason for this change was and although the answer when set out verbatim makes very little sense, I nonetheless set it out as I regard it as indicative of the evidence that he gave. The question was: "*What was the reason for no Wednesday half day working*"? The first answer he gave simply did not address the question. I intervened and asked the question again. This is the answer he gave: "*Because it was open to her, could do other days as well and those with her involvement, those ideas put across, open to her as well to reply, not accept any of the options, open to her she was actively involved*", that plainly is no real explanation for the change in hours. It can hardly be said to amount to 'reasonable cause'
26. As to the next part of the chronology, it is conveniently dealt with by quoting the Claimants Witness Statement at paragraphs 18-21 and I do as follows: "*The following day (that would be the 13 April 2017) whilst I was still considering matters, I was working on my own on reception, I arrived at work at 8.15am. At 9.00am Mr Hussain called to ask who was present at work. I replied, we all were, to this he replied give me names, which I gave him. At 10.15am he called again and informed me that the telephone should not ring more than four times before I answered it. My reply was that I was on my own on reception with two telephones ringing, a patient at the desk and a delivery man waiting for a signature for a parcel. I was told to answer the phone and put the person on hold. I advised Mr Hussain again that it was not always possible when trying to talk to patients and taking payments. At 11.00am Mr Hussain rang again to ask how many new patients I'd registered that morning, the answer was one. I was asked why only one and that I needed to be asking patients if they would like to register other family members or friends.*"

After this call, I asked Dr. Altaf to please ask his brother to stop making aggressive calls when I'm working on a busy reception. His reply was he speaks to everyone like that. At 12.15pm Mr Hussain called yet again to say that Reception needed to be open over lunchtime and I could eat my lunch whilst manning the desk, which I would be paid for. I explained that I didn't want to do this and that I was entitled to a lunch break away from the desk. He said this would cause a problem and not to tell him what I was entitled to as he'd been running practices for the past 20 years."

26. Each and every one of those matters is flatly denied by the relevant witnesses on behalf of the Respondent that is Mr Hussain and Dr. Altaf.
27. Tied into that evidence is other evidence that the Claimant gave. She said that at the outset of the Respondents taking the business over, that Mr Hussain was involved. Mr Hussain himself was a dentist, however for reasons that I do not need to go into, he was struck off and debarred from practice. He is the brother of the Respondent, he said that his activities were confined to running a company that refurbishes property and in addition he is the owner of six properties from which dental practices are run. His evidence was that his involvement in the Respondent's practice was limited to carrying out some building works at the premises. The Claimants evidence was different. She stated that at the beginning after the transfer, Mrs. Armson told her that Mr Hussain would oversee the finances of the Respondent and that he needed to be told at the end of the day the takings and the number of patients registered. She says she do informed him. Further the Claimant said that each month a monthly payment was made from the practice to Mr Hussain for a loan. The Respondents through Mr Hussain denied this and said it was all untrue, save for one matter, it was accepted that on a few occasions, perhaps two or three the Claimant had rung to tell Mr Hussain of the daily takings.
28. There was plainly a stark contrast between the accounts that I have set out above, it is not one of those situations where a witness has, through the passage of time misremembered or a slip has been made in the witness box, it boils down to one or other of the parties simply not telling the truth. In arriving at the conclusion I have, I was influenced by the following matters:- First, I found it difficult to think why the Claimant would make up the telephone calls and in particular with the detail and particularity that she set out in her Witness Statement. Secondly, on the Respondent's own case, it is accepted that the Claimant called Mr Hussain on two to three occasions to report the takings, why if Mr Hussain had nothing to do with matters, would the Claimant do that? Thirdly, I found both Dr. Altaf and Mr Hussain unsatisfactory witnesses when they gave their evidence. There were frequent occasions when in response to questions in cross-examination the answers that were given bore no relation at all to the question asked and I had to interrupt to ask the Witness to answer the questions. Taking those three matters accumulatively, I am satisfied on the balance of probabilities that it is the Claimants account that was truthful and it is that account that I find as a fact to be what occurred.

29. Turning back to the chronology, again it is to the Claimant's Witness Statement that I turn, at paragraph 22 where the following appears:- "*At this point I'd felt I had reached the final straw, I had been bullied into working longer hours without a break, shown a lack of respect and consideration to contractual entitlements and was being intimidated and spoken to inappropriately by Mr Hussain and was being threatened with the loss of my lunch breaks.*" The Claimant left the practice that day and went off sick and indeed remained so until on the 05 May when she submitted her letter of resignation which is at page 53 of the bundle.
30. The Law
I have reminded myself of the relevant provisions in TUPE in particular, regulation 4 and I have reminded myself of the provisions of Section 95 and 98 of the Employment Rights Act. I remind myself that there is the implied term as to mutual trust and confidence that is that the Respondent will not without reasonable cause act so as to undermine mutual trust and confidence. It is for the Claimant to prove such a breach, further, the Claimant needs to resign in response to a breach and must not delay so as to affirm the contract.
31. Conclusions
The Claimant's case, as her Counsel said at the outset can be put in two ways, either breach of express terms in respect of her hours or breach of the implied term of mutual trust and confidence; again I reiterate that the Claimant's Counsel disavowed putting the case pursuant to Regulation 7.
32. I reached a very clear view in this case in respect of the formulation of the claim of constructive dismissal pursuant to a breach of the implied term of mutual trust and confidence and for those reasons, it is unnecessary for me to deal with a number of the points that arise in respect of the arguments under the breach of the expressed terms.
33. I found that there was a variation of the Claimants contract of employment on or about the 01 March 2017, I found that the Claimant did agree with this, principally because she felt she had little choice. I acknowledge there may have been a reasonable business case for wanting to implement change, however, in the overall scheme of how the claimant was treated – it cannot be said the conduct was 'for reasonable cause' Secondly, there was, without consultation, a further variation with which the Claimant did not agree. It changed her hours and removed Wednesday working. I am satisfied that her complaint was simply not about the lack of notice, but the hours themselves, indeed in her evidence and I quote "*she said she was fed up with the hours chopping and changing.*" I find that statement is eloquent of her complaint in this case. The result of this change in her hours was to reduce her hours by some six hours, ie: the loss of work on Wednesday. I am satisfied that the meeting on the 12 April was concluded in a way that the Claimant was left only with the three choices on the table and it was not left in a way that was open for general debate.

33. I am satisfied that there was then a meeting in which she was presented with a formal meeting rather than the meeting which she had been anticipating. It must have been unnerving to be confronted out of the blue with both Mrs Armson and Ms Greenhouse.
34. She was subject to a number of aggressive and harassing calls from Mr Hussain on 13th April. I am satisfied, in view of the findings I have made about his earlier involvement in the practice, that when he called the practice and spoke to the Claimant, he acted with the authority of Dr. Altaf to be so involved. Following that, the Claimant took her complaint to Dr. Altaf asking him to do something about his brother's conduct which plainly it was in the gift of Mr Altaf to do. Dr Altaf declined to do so. There was then a further call from Mr Hussain suggesting that the Claimant should no longer have her lunch hour as free time, but rather that would be a time when she should be working - that would be the third attempt to vary the Claimant's working hours in under two months.
35. I am satisfied that taking this conduct as a whole, it amounts to a breach of the implied term that an employer will not, without reasonable cause act so as to undermine mutual trust and confidence, it entitled the Claimant to resign and I am satisfied it was the reason that she did resign, she did not affirm the contract and in those circumstances, there being no potentially fair reason that could be put forward by the Respondents it follows that the dismissal was an unfair dismissal.
36. I add that had I dealt with the case in the context of a breach of an express term in respect of the second variation I would have found that it was a variation that resulted from the transfer and given the evidence about the reasons for the imposition of the second variation which I have referred to above in the Findings of Fact, those reasons could not amount to a ETO involving a reduction in the workforce. So she would succeed on that basis too.
37. For those reasons I am satisfied that the Claimant was unfairly dismissed and the matter will proceed to a Remedy Hearing on the 10 May unless the parties are able to reach an agreement on the issue of Remedy in the meantime.

**Employment Judge Rose
30 January 2018**