



EMPLOYMENT TRIBUNALS

Claimant

Mrs Jacqueline Marks

Respondent

Age UK Devon

Heard at: Exeter

On: 6 March 2018

Before: Employment Judge Fowell

Appearances

Claimant: Unrepresented

Respondent: Ms E Michaelson, Chair of Trustees

JUDGMENT

1. The claimant's complaint of constructive unfair dismissal is upheld.
2. The claimant is awarded **£4,253.76**

REASONS

Background

1. The claimant worked as a carer or Home Support Assistant (HSA) for elderly clients of the charity (Age Concern) including a Mrs Turvey. In January 2017 there was a proposed change to Mrs Turvey's care plan. The claimant's manager, Nathan Spillings, raised this with her in a telephone conversation on 23 January 2017. By common consent he did not give her much time to consider the changes he wanted to make and took the decision that day to end Mrs Mark's work for Mrs Turvey. As she was employed on a zero-hours contract she lost earnings as a result. Mrs Marks complained about the loss of income and that her account of this conversation was not believed. There were then two informal grievance meetings, a formal grievance hearing and appeal. About two weeks after the last of these meetings she submitted her resignation on notice.
2. I heard evidence from Mrs Marks herself and, on the part of the respondent from Ms Deevette Short, Operations Manager, and Ms Elizabeth Michaelson, the Chair of Trustees. Ms Michaelson also acted as the respondent's representative at the hearing. I was also assisted by a bundle of 81 pages. Having considered that evidence I make the following findings.

Findings of Fact

3. At the time of the disputed conversation Mrs Marks had been working with Mrs Turvey for about six months. Mrs Turvey was in the early stages of dementia but lived at home and had mental capacity. One of her daughters contacted Age Concern on 17 January 2017 to raise some concerns about the care being provided. The full extent of those concerns only became apparent in the course of this hearing. A record was made by Mr Spillings on 24 January 2017, the day after the telephone call in question, in an email to Deevette Short and the Chief Executive, Sophie Littlewood. According to this the concerns were as follows:
 - a. that the hours worked included a lot of unagreed time and that given Mrs Turvey's dementia it was not a suitable arrangement for her to be approving these time extensions;
 - b. concerns over housecleaning;
 - c. concerns over shopping, in particular that she should be taken to Sainsburys or Tesco where there is a wider and cheaper range of produce, rather than to the nearby farm shop; and
 - d. that Mrs Marks had cancelled appointments to take her own mother out.
4. It was not until six days after these concerns were raised that Mr Spillings tackled Mrs Marks about them. He called her while she was at work with another client. Ms Short gave evidence that one-to-one meetings were quite rare with HSAs, and that they would commonly be called at work. Most of the time they would be engaged in cleaning or housework and if they were not able to take the call they could explain the position. On this occasion Mrs Marks did take the call but the conversation did not go well.
5. According to his initial written account, Mr Spillings rang at 0950 and explained what had been said about the farm shop. Mrs Marks then refused to change the shopping venue, said that Mrs Turvey preferred it, and there were problems about getting paid the mileage to travel the further distance to the larger stores; he tried to explain to her that Mrs Turvey's daughters were best placed to judge her needs and went on to say that one of the daughters wanted to rewrite the task sheet to make clear the things that Mrs Marks should be taking on. That, he said, angered Mrs Marks who said that one of the daughters had got it in for her, and wanted someone else, which he disputed, saying that they had asked her to stay as the HSA but just wanted changes to the service. Mrs Marks was very unhappy about this and so he agreed to take some advice from management and come back to her. He therefore rang back about 10 minutes later and had a further 15-minute conversation, commencing at 10.22, in which they discussed her concerns about driving on the dual carriageways and main roads to these larger stores, the possibility about someone else taking her shopping, and mileage arrangements.
6. The last paragraph from his notes provides:

"I discussed [i.e. talked] through the service once more and explained how

the daughters are looking for the service to run and how we would like to go about that. Jackie [the claimant] **seemed to be going with it all and agreeing**. So I summarised the changes to be made and asked if this would be okay. Jackie informed me that the whole situation had been very upsetting for her and she is struggling to understand why she is being singled out and is unsure if she can continue with the service.”

7. This call therefore ended, on his account, with Mrs Marks being upset about the proposals but giving her agreement.
8. In her witness statement in these proceedings Mrs Marks did maintain that Mrs Turvey much preferred going to the farm shop where she could have a cup of tea and make it more of an outing, but has maintained throughout that she agreed, in response to Mr Spilling’s request, that she would implement this change with effect from Friday, 27 January 2017. That account is therefore quite close to his statement if the concluding paragraph above is taken into account. I bear in mind that Mr Spilling’s account was recorded shortly after the event but also after Mrs Marks had complained about his actions, and so he was unlikely to stress the extent of her co-operation.
9. At this point something must be said about the written records presented. The email from Mr Spilling’s comprises two pages (19 and 20) ending with the paragraph just quoted. There is no email signature block or obvious conclusion to it, indicating that it is incomplete. There is however a further document at pages 21 to 24 in the bundle which sets out further detail. This is a wordprocessed document on blank paper on which has been handwritten the words “notes from iCare database” – this being the relevant system for recording records about the clients. Ms Short gave evidence that she had prepared this document for the grievance meeting based on the original email from Mr Spilling’s at pages 19 and 20, removing some what she described as the more inflammatory aspects. To illustrate the difference between the two documents, the opening words from the first account are as follows:

“first call – 09.50am call time – 20 minutes

- explained what the daughters of Mrs Turvey had said, about not going to Fermoys (a local garden shop) and going to Sainsbury’s instead.”

10. In the second version this has been rendered:

“NS called to JM 23rd Jan 2017 - 09.50am call time – 20 minutes

- NS said he explained to JM, Mrs T’s daughters requested changes to be made about the shopping and not to go to Fermoys (a local garden shop) but to do the shopping at Sainsbury’s instead and to carry out a comprehensive shop.”

11. As appears from this example, it is a reworked version, anonymising some details and providing more explanation. It indicates or suggests that the description resulted from some interview or account given by Mr Spilling’s, rather than simply being adapted from his own email. But it also contains some changes of substance. The paragraph indicating some measure of

agreement from Mrs Marks (page 23) states:

“NS said he tried to discuss again the new additional services required for Mrs T once more and summarised what was needed to change and explained how her daughters are looking for the service to run. NS said JM said that the whole situation had been very upsetting for her and she is struggling to understand why she is being singled out and is unsure if she can continue with the service.”

12. That is therefore a distinctly different account, omitting any mention of her agreement or possible agreement. Further, the second account goes on for a further page, indicating that the original email is incomplete. That is a concern. The respondent had an obligation to disclose all relevant records and this is a key document.
13. The second version goes on, having thus indicated that Mrs Marks was unsure whether she could continue with the service:
 - “NS said that if this was the case he could reassign this client. NS said that JM said that she could take it on but this has really upset her. NS said that this was fine if she found it difficult he had an alternative plan with MHR who will take over the whole service (Tues and Fri)
 - NS said JM said okay and hung up the phone.
 - NS updated SL [the Chief Executive] on the situation
 - NS sent JM the text confirming the JM service with Mrs T was to end with immediate effect.”
14. This account is still ambiguous in that Mrs Marks is recorded as saying that she *could* continue to take the service on and Mr Spillings proposing an alternative, but it suggests that they agreed at the end of the conversation that they knew HSA would be assigned.
15. The text message was not sent until 1515 that day, and provided as follows:

“Please call in and let me know any timesheet changes so I can update timesheets for next week.

To confirm. Mrs Turvey service to end with immediate affect (sic).”
16. Whatever may have been in Mr Spilling’s mind, this was very far from Mrs Marks’ understanding. On receipt of this text message Mrs Marks began telephoning him. On the first two attempts he was on the phone. On the third occasion, according to his subsequent records, Mrs Marks was confused and angry about how he had given her work away. He told her that he had already confirmed the change with the family. His record also agrees with her account at this hearing that she was “properly angry” by what had happened. This was therefore the third telephone conversation that day.
17. In fact, Mrs Marks was so put out by the outcome and the fact that she was no longer to be caring for Mrs Turvey, that she attended the offices of Age

UK Devon the following morning to speak to the Chief Executive, Ms Littlewood. She did not have an appointment and was happy to wait for over an hour before she was able to have a brief conversation, the gist of which was that the decision had been made and that Mrs Turvey had been allocated elsewhere.

18. The conversation with Mr Spillings was overheard by a witness, Louise Dobson. On 25 January she recorded her recollection of the conversations in an email. She overheard the first and the last of these three conversations. She described the first as a difficult conversation for Mr Spillings who did his best to acknowledge the positive relationship that the HSA – she did not know who Ms Spillings was talking to - had with the client and they went into detail about travel and mileage to get to Sainsburys or Tesco. Her recollection from hearing one side of this conversation was that Mrs Marks seemed unwilling to make the requested changes. She was not sure how the conversation ended but he then went to seek advice from Ms Littlewood, and she did not hear any subsequent conversation that morning.
19. She also heard a further conversation that afternoon, the third conversation, in which the HSA was being told by Mr Spillings that he had found someone else to cover the client the next day and the HSA was obviously unhappy with the situation. Mr Spillings confirmed that he had spoken to the management team about his conversation and they were aware of the situation. As soon as he put the phone down he called Ms Littlewood and left a message.
20. Ms Littlewood also provided her own written account on 25 January 2017, which is pages 25 and 26. According to this, Mr Spillings told her on 17 January about the call from one of Mrs Turvey's daughters and the concerns about the weekly shopping. She then overheard a telephone conversation that he had with Mrs Marks on the morning of 23 January, that after this call he spoke to Ms Littlewood again, "and we agreed that Nathan would telephone Jackie again to reiterate the changes required and ask whether or not she feels able to accommodate the changes. We agreed that if she was unable to then we would need to relocate Mrs T." She went on to say that she did not hear the follow-up conversation as she was out of the office and her next involvement was when she had a text from Mr Spillings asking her to contact Mrs Marks. This was just after 4 pm, after receipt of the text message. In this fourth conversation, Mrs Marks was very angry and stated on several occasions that she had agreed to visit the alternative shop. This did not accord with Ms Littlewoods understanding, which was based on overhearing the first conversation only.
21. There are therefore a number of difficulties in reconciling these accounts. It is clear that Mrs Marks reacted promptly and vigorously to the text message, that she was taken aback by it and said to Ms Littlewood at the time that she had agreed to the changes. From the original record left by Mr Spillings this is a reasonable interpretation, based on the second conversation, which Ms Littlewood did not overhear. There is also a further contradiction between the account of Ms Dobson and that of Ms Littlewood, since Ms Dobson says that Ms Littlewood did overhear the second conversation and did have a discussion with Mr Spillings afterwards. This was never resolved, or even raised.

22. Following her unsuccessful meeting with Ms Littlewood, Ms Marks remained unhappy. On 7 February she was given a copy of the grievance procedure and that led to an informal grievance meeting on 14 February with Ms Short. Mrs Marks was not presented with any written record of the situation but instead asked for her version of events. She then went into detail about the shopping issue and the related problem with mileage. She also complained about the lack of any notice or explanation.
23. The two of them had a follow-up meeting on 28 February, by which time Ms Short had been able to consider the matter. Ms Short agreed that the text message in question was curt, that no issue had been raised about her performance or her work and that she had lost a client (and hence payment). To compensate her for the latter Ms Short agreed that she would have the next client referral in the Teignbridge area. Ms Short also accepted that the relationship between Mrs Marks and Mr Spillings had broken down, and offered as an alternative that in future any communications about her work should go through her, with the exception of text messages from Mr Spillings. In making this proposal she was aware that Mr Spillings was in an acting role and that a new permanent manager would be appointed before long.
24. Mrs Marks had been hoping for an apology and for the restoration of her client so she was disappointed with the outcome of this meeting and decided to raise a formal grievance. She did so by letter dated 3 March 2017. This was measured and straightforward. She referred to her extremely good relationship with Mrs Turvey and how upset she had been to be moved on so abruptly, together with the impact on her wages. She also pointed to her 17 years work for Age UK.
25. This letter crossed with a letter from Ms Short setting out the outcome of the informal grievance process, and in a follow-up letter from Mrs Marks, dated 15 March 2017, she made clear that she would like the matter dealt with as a formal grievance. She emphasised too that she did not refuse to make the required changes and on the contrary agreed to implement them from 27 January, and that Mr Spillings had offered her an extra half hour for travel to accommodate the extra shopping trip. That has been her consistent position, and she had not at this stage been made aware of anyone else's recollection or record of these conversations.
26. This letter led to a hearing on 29 March 2017. Mrs Marks was accompanied by her son. As before, the meeting was with Ms Short. During the meeting she provided Mrs Marks with a copy of a bundle of documents she had prepared, which included the records compiled of the incident as set out above with the exception of the original email from Mr Spillings, deemed too inflammatory.
27. Mrs Marks was not able to go through this documentation in any detail at the meeting but stated that the information presented did not match the situation she had set out in her letters. Ms Short responded that she could not resolve the situation as it was one person's word against another. At that stage she read the statement from Ms Littlewood and asked Mrs Marks if there was anything she wanted to add. She repeated the complaint about the effect on her earnings.

28. The outcome letter was dated 6 April 2017 (58). It partially upheld her complaint that Mr Spillings had acted unprofessionally taking away her client without notice or justification. It acknowledged that he should have given her more time to consider the changes before reallocating her to another HSA. However, it also concluded that she should have been more positive in response to that request for changes.
29. It upheld her complaint that the tone of the text was unprofessional. As to the loss of income, this was not upheld on the basis that she had some responsibility in the matter. Further, since Mrs Turvey had had a another HSA for eight weeks it would not now be in her best interests to swap back.
30. Again, Mrs Marks was not happy with the outcome and appealed this decision. That led to an appeal meeting on 25 April 2017 with Ms Michaelson and another trustee Mr Brian Dixon. This was by way of a review of the previous decision rather than a complete rehearing. It is unnecessary therefore to go into the detail of that hearing. They upheld the grievance decision, including those elements favourable to Mrs Marks, for the reasons originally given. The outcome was given to her following an adjournment and the Trustees apologised for the stress this had caused her. They also advised that they would recommend that some communication training be given to Mr Spillings.
31. I note at this point that Mr Spillings it is no longer employed by the respondent although the reasons for that were not explored at the hearing and I do not read anything into that fact.
32. As a side issue, because of the drop-in wages, Mrs Marks also felt the need to look for other part-time work to supplement her earnings. That led to a reference request in early March which Ms Short dealt with. The potential new employer provided a standard form and she graded Ms Marks satisfactory for trustworthiness, reliability, empathy for others and use of initiative. She described her as empathetic and caring and understanding the needs of older people. Despite the positive comments this was felt to be a disappointing reference, given her years of service. Ms Short had little regular contact with Mrs Marks during her work and relied in making this reference on previous conversations with Mr Spilling's predecessor.
33. The accuracy of this reference is outside the scope of the issues I am able to deal with, since it is not relied on by itself as a fundamental breach of contract leading to resignation. If it were I should have to conclude that this did not involve any such fundamental breach.
34. Reviewing this body of evidence, I conclude that although there may have been some ambiguity and some continuing reluctance on her part, Mrs Marks did give a grudging ascent to the new arrangements put forward by Mr Spillings after the second conversation. It was not unreasonable for her to raise objections. She was an experienced HSA and had an established relationship with Mrs Turvey. As already noted, Mrs Turvey had mental capacity and Mrs Marks may well have questioned whether this change was in her interests.
35. Mr Spillings appears to have been revolving in his mind whether or not to

change Mrs Turvey's HSA given this resistance, but I do not accept that that is how the conversation ended. I am reinforced in that view by the fact that the text sent to Mrs Marks apparently confirming the outcome of their conversation was not sent until several hours later and that she responded promptly and indignantly.

36. The matter was therefore viewed from the outset by the respondent is one in which it was Mr Spilling's word against hers, and that his was supported by the accounts of Ms Dobson and Ms Littlewood. On examination however, I find that those supporting accounts are of little assistance. Nor does it appear that Mr Spilling's was interviewed to check on his recollection forward any of the inconsistencies noted above were explored at the time. Most significantly however, Mr Spilling's original account was much closer to that of Mrs Marks, and indicates that she was prepared to make the changes requested.

Applicable Law

37. As with any claim of unfair dismissal the starting point is the Employment Rights Act 1996. By section 95(1)(c) a dismissal also occurs where the employee terminates the contract "in circumstances in which [she] is entitled to terminate it with or without notice by reason of the employer's conduct."
38. The approach to those circumstances is well established following the well-known case of **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221**. In short, the employee must establish that:
- a. there was a fundamental breach of contract on the part of the employer;
 - b. the employer's breach caused the employee to resign; and
 - c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim unfair dismissal.
39. The breach of contract in question is the implied obligation of trust and confidence. This was described by the House of Lords **BCCI v Malik 1997 ICR 606** as conduct calculated and likely to destroy or seriously to damage the relationship of trust and confidence. Previous cases emphasised that a fundamental breach is one which goes to the root of the contract.
40. With regard to the question of affirmation, it is well established that an employee may continue to perform the contract under protest for a period without necessarily being taken to have affirmed the contract. There comes a point however when delay would indicate affirmation. In **WE Cox Toner (International) Ltd v Crook 1981 ICR 823**, a company director was accused of gross dereliction of duty on insubstantial grounds by his fellow directors and threatened with dismissal. Six months of angry correspondence followed before the employer finally refused to withdraw the accusation and threats, and a month later he tendered his resignation. The Employment Appeal Tribunal held that he had affirmed the contract by this seven-month period, during which he had continued to work and accept payment.

41. A case on the other side of the balance is **Post office v Roberts 1980 IRLR 347**, where an employee continued working while her union representative was attempting to investigate the true position with her employer, and a delay of six weeks was held to be acceptable.

Conclusions

42. The first question here is whether or not this involved a fundamental breach of contract. The first point I note is that it involved a reduction in Mrs Marks's earnings. Pay is a fundamental part of the contract of employment. I recognise that as a zero hours worker she could not be sure of a continuous level of earnings, but interference with her earnings without good cause, including the removal of a client, goes to the root of her contract. It was recognised by the respondent that the way in which this change was made to her employment was done unprofessionally and without any real consultation or consideration. Much was made, both at the grievance stage and in the pleaded response to the claim, to the fact that she had shown resistance to the changes. The implication is that she had no right to complain about it as a result, alternatively that she should not have raised any objection. As already noted, it appears to me entirely reasonable for her to have raised her concerns. Even though she is a zero-hours worker and changes to clients may be made from time to time by the charity, it does not follow that they can be made arbitrarily or because the manager concerned has been annoyed by a lack of cooperation. It is well established, for example, in cases concerned with discretionary bonuses, that even where the contract provides for an unfettered discretion on the part of the management, there is an implied term that that discretion not be exercised arbitrarily, capriciously or unfairly. In the present case it does appear to me that there was an arbitrary or capricious element to the decision to remove Mrs Turvey from the care of Mrs Marks. She was therefore treated as of little account and so I conclude that this was calculated and likely to destroy or seriously to damage the relationship of trust and confidence. This is illustrated by her reaction to the breach, by immediately telephoning Mr Spillings, then the Chief Executive, then going to camp outside the Chief Executive's office the next morning.
43. Nor do I find that this fundamental breach was cured to any extent by the grievance process. That might have been possible had, for example, Mr Spillings been interviewed about the exchange, and some degree of common ground been reached over the conversation in question. That was never done and Mrs Marks understandably felt that she was not being listened to throughout the process since his original account was never given any scrutiny and was considered more reliable on the basis of the two supporting accounts, which in fact raised more questions than answers. Given my view of what actually occurred that would have been an extremely frustrating situation for Mrs Marks to deal with. No real consideration appears to have been given to altering the decision made by Mr Spillings and allowing Mrs Marks to continue as HSA for Mrs Turvey, something which would almost certainly have resolved the present dispute.
44. There is no real issue in the present case that Mrs Marx resigned in response to this breach and the only remaining question therefore is whether she delayed too long as a result. The relevant cases and approach

have been set out above. It is clear that throughout the period from this incident to her resignation Mrs Turvey was very exercised by the issue. It is also clear that she followed the respondent's grievance process without undue delay from start to finish, beginning with the informal meetings and ending with a grievance appeal meeting. She did continue to work for the respondent throughout this period, albeit on a lower salary, but her resignation came only a little over two weeks after the outcome of the grievance appeal, and overall, although close to the limit of what might be considered acceptable, I conclude in the circumstances that she did not affirm the contract by continuing for this period. Accordingly, having met all the requirements, she has established that this was a constructive dismissal.

45. The next question is whether or not there was a fair reason for the dismissal. Ms Michaelson relied at the hearing on some other substantial reason, reflecting the wording of section 98 of the Employment Rights Act 1996. That phrase however is not self-explanatory. The actual reason has to be made clear. No evidence was produced for example to show that it was particularly beneficial for Mrs Turvey to have a different HSA, in circumstances where, as I find, Mrs Marks agreed to the relevant changes. Nor, for the reasons already given, is it sufficient for the respondent to say that it was entitled to make the change because Mrs Marks showed some resistance to the idea. Accordingly, there was no fair reason and hence the claim of constructive dismissal succeeds.

Compensation

46. In assessing compensation I was hampered by lack of documentary evidence from Mrs Marks. She did however present a schedule of loss setting out her claimed gross (and net) weekly wage at £126.52 and indicating that her self-employed earnings since leaving the respondent's employment amounted to £4,520.
47. There was no claim for unlawful deduction from wages and so any shortfall in her earnings prior to her dismissal cannot be claimed. The loss is forward-looking.
48. There was a small dispute in the respective figures for weekly wage, and after considering the wage slips for the months prior to the breach the claimant's figures were accepted.
49. It is also common ground that she had 16 years complete service, all over the age of 41, at the time of her dismissal, although the schedule of loss incorrectly states that it was 17 years. The basic award therefore comprises 24 weeks loss at £126.52, amounting to **£3,036.48**
50. As to her loss from dismissal to the date of the hearing, that involves exactly 38 weeks. The schedule of loss provides that she had earned £4520 from self-employed earnings during that period. Applying the net weekly rate, her earnings over that 38-week period would have been £4807.76, a difference of only **£287.76**. Accepting in the claimant's oral evidence on this issue I make that assessment of the loss during the period to the hearing, known as the protected period.

51. As part of a compensatory award I also awarded **£500** for loss of statutory rights.
52. As to ongoing loss, the claimant's evidence was that sometimes she earned £110 per week at present, but that this was variable. I noted however that the earnings she has made to date are at a slightly higher level. I there accepted the figure of £110 per week as a reasonable average, indicating ongoing loss of £16.52 per week. Without any documentary evidence showing any pattern of earnings it was difficult to determine any particular future period of loss before she has made up her previous level of earnings, and I settled on the figure of six months as a reasonable upper limit proposed by the respondent. Over 26 weeks this loss totals **£429.52**.
53. The compensatory award is therefore comprised of these three elements; lost the date of the hearing, future loss and loss of statutory rights, which amount to **£1,217.28**
54. There was also a claim for loss of annual holiday but the basis of this calculation was not explained and I was not therefore satisfied that it was appropriate.
55. The relevant totals are therefore:
- | | |
|--------------------|------------------------|
| Basic award | £3,036.48 |
| Compensatory award | £1,217.28 |
| Total | <u>£4253.76</u> |
56. The respondent is therefore ordered to pay that total sum in compensation to the claimant.

Employment Judge Fowell

Date 07 March 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE