



EMPLOYMENT TRIBUNALS

Claimant: Ms S Daniels

Respondents: 1. Hilbre Care Limited
2. Ms D McManus

Heard at: Liverpool **On:** 4-7 December 2018

Before: Employment Judge T Vincent Ryan
Mr G Barker
Mr A Wells

REPRESENTATION:

Claimant: Mrs S Kearns, a friend of the claimant
Respondents: Mr J Joshi, Solicitor

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant made three public interest disclosures that the health and safety of an individual had been, was or was likely to be endangered, namely orally on 25 April 2017 to the second respondent in respect of resident PH, and in writing on 23 May 2017 (the letter at page 78 of the trial bundle to which all page references refer unless otherwise stated) and 19 June 2017 in email correspondence with CQC.
2. The first and second respondent subjected the claimant to detriments (delayed payment of SSP due to her and failing to deal with her grievance) on the ground that the claimant had made protected disclosures.
3. The first respondent breached the implied term of trust and confidence in the claimant's contract of employment by delaying payment of SSP due to her and by failing to deal with her grievance; the claimant resigned in consequence of those breaches and without waiving them; she was unfairly constructively dismissed. The claimant's claim that she was unfairly dismissed by the first respondent is well-founded and succeeds.

4. Save as provided above all other of the claimant's claims of fundamental breach of contract, that she made other public interest disclosures and that she suffered other detriments on the ground that she had made them, fail and are dismissed.

REASONS

1. The Issues

The questions for the Tribunal were:

- 1.1 Whether the claimant made a series of disclosures, up to eight as alleged, of matters relating to the health and safety of residents at the Home(s) at which she worked and consequently suffered up to seven alleged detriments because of, or on the grounds of, those disclosures;
- 1.2 Whether the detriments alleged breached the claimant's contract of employment (breach of the implied term of trust and confidence) such that the claimant could resign but claim it was a constructive unfair dismissal. More specifically the tribunal had to decide whether there have been fundamental breaches of contract, the respondent acting in a way designed or likely to seriously damage or destroy the relationship of trust and confidence, whether that was the reason for the resignation and whether there has been such a delay and conduct on the part of the claimant that it could be she has waived her right to rely on the breaches.

2. The Facts

- 2.1 The first respondent, Hilbre Care Limited (R1), runs two Homes and it employed the claimant to work in them; Mrs McManus (R2) is the managing director of the first respondent. Mrs McManus was also a director of other such Homes and other businesses. The first respondent had approximately 31 employees at the time in question. We are concerned with Homes I will call "the Manor" and "the House".
- 2.2 Until 7 April 2017 MG was the registered manager of the Manor, and from that date Mrs McManus became the registered manager of the Manor. Sophie (SHG) who is the daughter of Mrs McManus was the registered manager of the House until the end of June 2017 when she went on maternity leave, and at that time Mrs McManus took over as the nominated person responsible for House and Manor, and as at those dates there was no replacement formal registered manager.
- 2.3 The claimant was employed by the first respondent. She was employed principally to work at the House for 7½-10 hours a week. She had a job description (pages 118-119) and she signed a contract on the commencement of her employment with Hilbre Care Limited. The job description covers her carrying out duties at Hilbre Care Limited's Homes, so for our purposes that includes the Manor. Her role was as an Activities Coordinator, that is she took residents on outings outside of the Homes,

and as a Driver taking residents to and from appointments (such as at the hospital or with the GP); she was not employed as a carer. In addition to carrying out those duties for residents at the House the claimant also attended frequently, but not regularly, at the Manor to take residents to appointments. She was engaged to do one-to-one activities with a Manor resident referred to as MT, principally to take him for a walk to the park when he was able to do that, and occasionally she took another Manor resident, Rita, out for walks; towards the middle of 2017 MT was not going out and the claimant was not required to do activities with him. The claimant was not required to attend at the Manor other than for those activities that I have just described but in respect of them she did work at the Manor and not exclusively at the House.

- 2.4 When the claimant would call to the Manor she would speak to staff, have a cup of tea or coffee, and maybe use her phone recreationally while she was waiting for one of the residents to be ready to go out to an appointment; on some occasions the resident may eventually not go on the appointment or MT/Rita would not go for the activity so that the claimant would return to the House, possibly after a chat and cup of tea. We say that because we find that the staff at the Manor did not consider the claimant as one of themselves, as one of the Manor staff; she assisted as described but everybody knew that her principal place of work was the House. She did not attend staff meetings at the Manor, and she was not required to or expected to do so. She would, however, attend staff meetings, as one would expect, at the House, and there is an example of that at page 76 (minutes of meeting).
- 2.5 The first respondent operates a data recording system called CMS. Some areas of that system are only accessible to managers; those areas relating to residents have open access for staff. Staff had a log-in and a password; by using their log-in and password they could access residents' records, and in that section, they could also make notes in respect of accidents and incidents, access the diaries and the care plans. The claimant had access to the residents' part of the CMS system but not the management part. She knew how to, and did on occasion, enter notes on the A & I section (Accidents and Incidents). The importance of keeping notes and patient records in the health and care environments is well-known, and it is a matter of general knowledge that it is very important to maintain full and accurate comprehensive care records.
- 2.6 The claimant's job description (page 119) requires the claimant to report incidents to the registered manager as soon as possible, and we are taking that in the absence of a formal registered manager it would be her line manager or the appropriate nominated manager for whichever Home in which the resident in question resided. We do not know, nor do we need to know, the background, but there was a feud between on the one hand Mrs McManus and on the other hand her daughter, SHG, and SHG's wife, MG; some at least of the staff at the House and the Manor took sides, and there was a bad atmosphere that was badly and seriously affecting the efficient management of the Homes.

- 2.7 PH was a resident at the Manor, and on 25 April 2017 when the claimant was at the Manor she saw PH on a hoist and felt that her dignity was not being respected; she was partially exposed to view and the claimant felt that PH needed to be covered up, and she did cover her up. The claimant told the senior carer, NM, that someone needed to attend to PH, and that PH was emotionally upset and needed to be comforted by the claimant, who was not able to operate the hoist. The claimant, on her return to the House, told the first respondent's Training Manager, SA, about the incident, and told Mrs McManus. She said that PG had been in the hoist for up to 20 minutes, it was undignified, she had covered her and she consoled PH who was upset. PH is an EMI patient, upset at the incident and lack of privacy and indignity, who needed consolation. We therefore find that her mental wellbeing was affected as described by the claimant and compromised, which was an effect on her health and safety. The claimant disclosed this to Mrs McManus, who was the appropriate person at that time; it was information tending to show that the health and safety of PH had been so effected. The information was in respect of an incident observed by the claimant. The treatment of residents in a home is a matter of public concern and to such an extent that there is a regulatory authority, the CQC, with statutory rights and powers in relation to such matters. The care sector is of interest to residents of such homes and specifically here of the Manor and the House, their families and it affects the provision of health and care services generally.
- 2.8 The Tribunal is not satisfied on the evidence that there was a second hoist incident on 17 May 2017 as alleged by the claimant. Her evidence was uncertain, vague and was not corroborated. There was confusion on her part about the details; it sounded as if she was mistaken about the date and was merely reiterating the events of 25 April.
- 2.9 On 18 May 2017 the claimant, when again at the Manor, saw NM pulling a resident, KW, on the stairs; she subsequently described this incident in a letter to Mrs McManus dated 23 May 2017 at paragraph 6 (page 78 of the bundle). The Tribunal found that was a credible description, and we believe the claimant's evidence of what she says that she saw happen. The claimant returned to the House after the incident on 18 May and reported that incident orally to her line manager, SHG. Also present when she reported it were SA and CW but they were not the appropriate people to whom she ought to make disclosures; the claimant's line manager, SHG, was an appropriate person along with Mrs McManus. SHG shared the claimant's concerns over NM and her care at the Manor, and advised the claimant to send an email to Mrs McManus setting out details of that incident. There is no evidence that the claimant did so at that time, but she then wrote on 23 May 2017 the letter at page 78 that I have mentioned. The claimant set out her concerns to Mrs McManus who was the appropriate manager, being the senior manager at the Manor. We know that Mrs McManus received that letter by no later than 1 June because of the text messages contained in the trial bundle, and that she received other complaints about NM such as a written complaint from a carer, AA.

- 2.10 At about this time NM was about to be promoted by Mrs McManus, and several complaints came in about her, if not simultaneously then around the same time. Some of NM's colleagues and Mrs McManus considered that these complaints were at least in part an attack on NM's character because of the proposed promotion: it is not to say they discounted them but they felt that there was a campaign against NM.
- 2.11 On 2 June 2017 there was a routine staff meeting at the Manor. The claimant asked Mrs McManus about the timing of the meeting but referred to it as a health and safety meeting. Mrs McManus said it was not a health and safety meeting; she also suggested that it may be better if the claimant did not attend the Manor pending the investigation that arose at least in part from the claimant's complaints about NM. The Tribunal finds that it would not have been normal for the first respondent to invite the claimant to attend that staff meeting as she was not expected to attend it or needed at it; the text message from Mrs McManus ("maybe it's better that you don't attend") was advisory to diffuse a difficult situation while an investigation into NM's conduct was in hand.
- 2.12 On 13 June 2017 SA told the claimant that Mrs McManus was unhappy with her. On or before that date the claimant had used one of the company's vehicles to take a resident to an appointment. Having returned the resident to the House and having signed out of work the claimant then used the vehicle in the afternoon; Mrs McManus saw the claimant using the vehicle without there being a resident in it. Mrs McManus queried with SA why the claimant was using a company vehicle in the afternoon without a resident after she had finished work; SA took this tale back to the claimant and made the comment that Mrs McManus was not happy with that situation. The Tribunal finds that Mrs McManus was asking SA for a satisfactory explanation about the use of the vehicle, was entitled to do so and that this was not treatment by Mrs McManus of the claimant; it was SA telling tales out of context.
- 2.13 On 13 June 2017 the claimant texted Mrs McManus to say that she wanted to speak with her; there then followed a series of about five texts with the claimant asking to see, and explaining why she wanted to see, Mrs McManus, and saying that she was unhappy that Mrs McManus was unhappy with her. It is clear from the text messages and her oral evidence that Mrs McManus was busy at that time and did not have time to deal with it there and then and certainly not by text, and she said that, and she referred to "pathetic backchat". The Tribunal finds that that was not a reference to disclosures but a reference to the ongoing feud, the whispers, the chit chat, not least probably, but not explicitly, SA going to say that "Della's unhappy with you", etc. That was what the "pathetic backchat" was as far as Mrs McManus was concerned.
- 2.14 The next day, 14 June 2017, the claimant commenced a period of absence through stress; it was a certified absence; she did not return to work prior to her resignation.

- 2.15 On 19 June 2017 the claimant informed the CQC of her concerns and sent confirmatory emails (we have only one side of the correspondence in the trial bundle but we know that the CQC received these emails from an extract that contains the CQC footnote). The claimant disclosed at least a copy of a statement complaining about NM that had been prepared by AA. The Tribunal had thought during the oral evidence and until a careful re-reading of Mrs McManus' statement, that she was not aware of that CQC involvement. In fact, in Mrs McManus' written statement she refers to the CQC visiting site to investigate the claimant's complaint, so Mrs McManus must have been aware that the claimant had gone to the CQC.
- 2.16 On 25 June 2017 the claimant had a private conversation with SHG who was her personal friend and she chose to surreptitiously voice record that conversation; during that conversation SHG is said to have said, "You know what Della is like, she will push you out". We did not hear evidence from SHG; an unchallenged transcript was produced. The claimant alleges that this was detrimental treatment by Hilbre Care Limited and Della McManus. The Tribunal finds it was not: it is just the statement of an opinion by SHG and of her suspicion based upon that opinion; we note that the claimant makes no claim about SHG. SHG was then about to go on maternity leave, and as I have said from that date on Mrs McManus had to pick up management of both House and Manor.
- 2.17 The claimant was entitled to SSP in relation to her absence that started on 14 June 2017 (13 June was the last day at work). She did not receive any payment until 24 July 2017. On 21 July 2017 the claimant for the first time queried with the respondent the fact that she had not been paid; the first respondent informed her that the delay was because it could not collate the hours worked and an alleged increase in working hours from 40 per month to 80 per month; Mrs McManus was said to be suspicious of this and wanted to investigate it; to date she has not done so and the tribunal was not convinced by Mrs McManus that her stated suspicion was as she alleged or had reasonable grounds or supporting evidence. The Tribunal considers that the claimant at this stage was seen as being part of a faction opposing Mrs McManus, headed or involving MG and SHG; MG had resigned; SHG was going on maternity leave; various members of staff, such as NB, had withdrawn statements against NM; NM had had a warning and deferred promotion; the CQC was satisfied; business was settling down. We conclude that Mrs McManus considered that Mrs Daniels was out of fair and proper consideration. We have drawn inferences that had she not made disclosures she would have been viewed more favourably, in fact fairly as an absent employee on sick leave; she would have been considered properly for SSP, which would have been paid sooner; but in fact, she was viewed, having made protected disclosures, as part of a problem to the respondents. In that context as she was out of sight she could be ignored as regards the payment of SSP. We have not seen any calculations/contact with HMRC, to justify the explanation that there was an error in calculation. We are told the figures still do not make sense, but even all these months later there is still no evidence that it has been looked into, so we are drawing an

inference from all of that that there was a relationship between the disclosures and the non-payment of the SSP.

- 2.18 The claimant says that in July or August she went to see her MP. We have no specific evidence of that; she may have done, we do not know, and we do not have any evidence to find there was a whistle-blowing disclosure to the MP.
- 2.19 On 28 July 2017 the claimant raised a formal grievance (page 104). It refers to the earlier disclosures and it again names NM. Because of the claimant's health, she was not able to deal with the grievance for two months, which would be roughly the end of September 2017. Mrs McManus, acknowledged the grievance (page 105) on 31 July 2017, and referred the matter on to her professional advisers, but there is no evidence of any contact from either of the two respondents with the claimant after 31 July 2017 and prior to the claimant's resignation on 16 November 2017. The Tribunal finds that again the respondents did not deal with the claimant for the same reason that they did not deal with SSP; the claimant was a whistle-blower, had made disclosures as part of factional infighting, was out of the way and business was carrying on without her.
- 2.20 The claimant resigned by a letter dated 16 November 2017 (page 112) saying that she had lost trust and confidence in the first respondent as no-one had dealt with her grievances or her disclosures. The Tribunal finds that the stated reasons were the reasons for the claimant's resignation. Dealing appropriately with pay is an express term of a contract; it is part of the implied term of trust and confidence that SSP will be managed properly; the implied term of trust and confidence also requires that a grievance properly raised will be dealt with in accordance with the grievance policy; the tribunal noted that in the investigation into NM (page 89) one of the recommendations for future action was that grievances would be dealt with properly. The claimant's grievance was not dealt with by the respondents regardless of her medical incapacity until the end of September 2017.

3. The Law

- 3.1 Mr Joshi has clearly and ably summarised the applicable law in his written submissions and orally; he has given a copy of his written submissions to the claimant and so I will not deal at great further length with the applicable law.
- 3.2 For there to be a protected disclosure there must disclosure of information, that the person disclosing it reasonably believes to be true (whether or not it is correct) and the disclosure of which is in the public interest. The information must tend to show one of several matters listed in the relevant statute such as that the health and safety of a person has been, is being, or is likely to be endangered. When it comes to remedy, whether the claimant acted in good faith becomes relevant.

- 3.3 There is a whistle-blowing detriment if an employer, colleague or a person in Mrs McManus' position treats a whistle-blower unfavourably on the ground of that protected disclosure.
- 3.4 Constructive unfair dismissal: s.95 Employment Rights Act 1996 provides that a dismissal may include a resignation where it is the result of the behaviour of the employer. The tribunal had to decide if there had been conduct on the part of the first respondent that was designed or likely seriously to damage or destroy the relationship with the claimant so justifying her resignation? Was her resignation because of that conduct? Did the claimant delay so long that they could be said to have accepted the situation and waived the right to claim there has been a breach (where the matter is one of actual affirmation rather than merely the passing of time)? Only in exceptional cases could a breach of the implied term amount to reasonable conduct on the part of an employer; in general, such a breach will therefore render a constructive dismissal unfair.

4. Application of Law to Facts

- 1.1 We find that the claimant made three disclosures that there had been, was or was likely to be endangerment to health and safety of residents at the first respondent's homes; she believed the matters raised to be true because she witnessed the events in question hence her belief was reasonable. The first respondent provides residential care to vulnerable adults, to whom it owes a duty of care, as part of a regulated service for which private individuals pay fees; for all these reasons the safety of the residents is a matter of public interest. The disclosures were made orally on 25 April 2017 to Mrs Della McManus in respect of PH, and in writing on 23 May 2017 (page 78) and in email correspondence with CQC on 19 June 2017. They are the three disclosures; the claimant's other alleged disclosures were not disclosures for the reasons found in the findings of fact; the claimant has not established that they were disclosures of information.
- 1.2 The claimant has claimed seven detriments and the Tribunal finds that only two aspects of the treatment by the first and second respondents of the claimant are detrimental: the first was the non-payment of SSP from 14 June 2017 until 24 July 2017; the payment default has now been made good but it was still a detriment for the claimant to be denied due payment on the ground of her having made a protected disclosure for the said period. The second detriment was the respondents' failure to deal with the claimant's grievance; there is a duty to deal appropriately with a grievance, and an employer and its management cannot ought not allow it lie until the aggrieved employee resigns. For the reasons stated in the tribunal's findings of fact the other alleged detriments are a mixture of opinions, suspicions, tell-tales and attributed views not amounting to treatment of the claimant by either respondent.
- 1.3 The tribunal finds that the respondents' failure to deal with the claimant's grievance, and not paying her SSP to which she was entitled at the time

she was entitled to receive it, were on the grounds of her having made those three disclosures, and they amount to breaches of the implied term of trust and confidence. Non-payment of money due and not dealing with genuine concerns of such a serious nature are fundamental breaches of contract. The conduct destroyed the relationship and was designed and likely to have that effect, or at very least to seriously damage it; the first respondent, through the second respondent, acted as if not in a contractual relationship with the claimant. We find that Ms Daniels resigned because of that treatment, specifically the grievance not being dealt with. She did not wait too long, bearing in mind her illness. She certainly did not affirm the contract. She has not done anything ever to suggest that she was satisfied with the situation, either as regards sick pay or her grievance, so she cannot be said to have affirmed the contract after those breaches.

- 1.4 The unanimous judgment of the Tribunal is that the claimant succeeds as regards the delay in paying SSP, and as regards the non-handling of her grievance amounting to detriments and fundamental breaches of the implied contractual term of trust and confidence, in consequence of which she resigned, and therefore was she was unfairly constructively dismissed.

Employment Judge T Vincent Ryan

Date: 27.12.18

JUDGMENT AND REASONS SENT TO THE PARTIES ON

10 January 2019

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