



EMPLOYMENT TRIBUNALS

Claimant: Mrs C Dutton

Respondent: Virgin Care Limited

Heard at: Carlisle

On: 28 November, 2018

Before: Employment Judge Nicol (sitting alone)

Representation

Claimant: Mr J McHugh, Counsel

Respondent: Ms L Gould, Counsel

RESERVED JUDGMENT

After hearing the parties, it is the judgment of the Tribunal that the claimant was not dismissed by the respondent for the purposes of the Employment Rights Act, 1996, and her complaint that she was unfairly dismissed is not well founded and is dismissed

REASONS

1 This is a complaint by Carol Dutton, the claimant, against Virgin Care Limited, the respondent, arising from her employment by the respondent as West Lancashire Quality Lead and Safeguarding Lead. The claimant alleges that, although she resigned, she was unfairly dismissed by the respondent. The claimant's employment with the respondent commenced on 1 September, 2015, and the effective date of termination was 31 March, 2018, when the claimant had been in continuous employment for two complete years.

2 The respondent denies that the claimant was dismissed. The parties provided an agreed list of issues which, after discussion, was accepted by the Tribunal. They are discussed later in these Reasons but, briefly, the first issue for the Tribunal to decide is whether the claimant was dismissed for the purposes of the Employment Rights Act, 1996. Without prejudice to its denial that the claimant was dismissed, the respondent accepts that, if the Tribunal finds that the claimant was dismissed, the dismissal was unfair. In that event, the Tribunal must decide whether there are factors

that might affect the remedy to which the claimant could be entitled and, finally, the appropriate remedy, if any.

3 The Tribunal heard evidence from the claimant and from Michelle Lee, Managing Director for West Lancashire and East Staffordshire, on behalf of the respondent. The witnesses gave their evidence in chief by submitting written statements that were read by the Tribunal at the start of the hearing and, subject to any necessary corrections, confirmed on oath or affirmation at the start of each witness's oral evidence and, as permitted by the Tribunal, answering supplemental questions. These witnesses were cross-examined. The Tribunal agreed to receive a signed, written statement from Anita Andrews, Operations Director, on behalf of the respondent although she was not present during the hearing. This was on the basis that the statement might not receive the same weight as it would have done if the witness had been present and available for cross examination. The Tribunal had before it a bundle of documents produced by the respondent marked 'Exhibit R1'. Both parties made oral closing submissions. From the evidence that it heard and the documents that it has seen, the Tribunal finds the following facts.

4 The respondent operates health and care services nationally, which are mostly commissioned by the NHS and local authorities.

5 The claimant is a Registered General Nurse and has experience in general nursing. She was originally employed by the respondent as the Lead for Nursing and Governance, in the respondent's west region, business unit 6. Her tasks included responsibility for regional safeguarding adults and children lead. The claimant lived in north Cumbria and, in accordance with her contract of employment, was home based. Her work involved travelling around a region that stretched from Lancashire to Oxfordshire. Travelling time counted against her contracted working hours.

6 In May, 2017, the respondent was commissioned to deliver additional services in Ormskirk and Skelmersdale, West Lancashire. The claimant was asked to be in the team that would cover this and be responsible for governance and safeguarding whilst still working in her business unit.

7 Also in May, 2017, the respondent developed plans to restructure the organisation. The claimant, among others, was placed at risk of redundancy but was able to apply for positions in the new structure. The claimant was invited to apply for one position but she considered that it involved national travel and financial responsibilities for which she did not have adequate experience so did not apply. The claimant wanted to apply for positions in the new Business Unit 13, which covered West Lancashire, because it was the nearest one to her home. The role of Quality Lead was available and the claimant could be slotted in to it. However, it was only a half time role and she was then working full time. A Safeguarding Lead role was also available, which was also a half time position, and the claimant asked to be also considered for this post. At one stage, it was suggested that the postholder would be required on site for 3 days a week but this was not practical with a 2.5 day job. This suggestion was dropped and the claimant was slotted in to the two roles. Her terms and conditions of employment were otherwise unchanged and she remained home based.

8 The claimant's line manager was Mrs Lee, who was also responsible for the provision of services in East Staffordshire. She was also home based but travelled around her areas.

9 Within her area, the claimant was a member of the senior management team. She was responsible for, among other things, ensuring safe working practices and meeting the requirements of regulators, especially, the Care Quality Commission ('CQC'). Many of the respondent's employees with whom she was working were new to the respondent and to its practices but the claimant was not their line manager. She therefore had to find ways of operating that resulted in the guidance and advice which she was giving being adopted. The claimant was concerned that the respondent was not in a position to successfully undergo an inspection by the CQC. Part of the claimant's problems related to her not being on site and poor communication systems. Although she raised her concerns with Mrs Lee at 1 to 1 meetings, there was not any evidence before the Tribunal of issues that the claimant was having or the steps that she was taking to obtain support between meetings.

10 Following the reorganisation, the claimant had her first 1 to 1 meeting with Mrs Lee on 21 July, 2017. She prepared for the meeting by completing a 1 to 1 form but it does not appear that it was referred to during the meeting, although Mrs Lee subsequently added comments to it. During the meeting, the claimant and Mrs Lee discussed the claimant's job description and the need for her to make frequent trips to London for meetings. Mrs Lee also mentioned the need for the senior leadership team in West Lancashire, which included the claimant, to be more visible in the area. The claimant says that she was told that 80% visibility was required.

11 In the 1 to 1 form, the claimant complained that she was experiencing problems with the other service leads who reported to Mrs Lee because they appeared to be ignoring and/or not responding to correspondence and telephone calls from the claimant. Mrs Lee did not indicate what she would do about this.

12 Mrs Lee also dealt with the claimant's appraisal by email. The claimant was signed off as having satisfactorily completed her objectives.

13 Although due monthly, the claimant's next 1 to 1 did not take place until 19 October, 2017, because of other commitments. Prior to this, the claimant obtained 360 degree feedback on her performance and also provided feedback for Mrs Lee's appraisal. In this, the claimant indicated a need for more communication between them so that they achieved a better understanding of each other.

14 At the meeting, the claimant expressed concern about a possible further reorganisation involving West Lancashire and East Staffordshire. Mrs Lee indicated that she was not intending to change the claimant from home based working although the need for eighty per cent visibility was discussed.

15 The claimant's mid-year appraisal was scheduled for 23 November, 2017, but this was changed to 6 December, 2017, and then converted to a 1 to 1 meeting.

16 In her 1 to 1 form, the claimant set out that she had problems with visibility, even when on site, because of a lack of Wi-Fi and poor mobile telephone coverage. The claimant also indicated that she was struggling with her role and that the people she

was dealing with were not put under pressure to work with her by their manager. She was travelling for five or five and a half hours per day whenever she travelled to Ormskirk or Skelmersdale and this time formed part of her working day as she was home based.

17 At the meeting on 6 December, 2017, there was a discussion on the practicalities of the governance lead role in West Lancashire. The claimant made notes which included 'things will be more difficult going forward', 'it's not about changing my base' and 'we are moving to a corporate estate strategy – being visible 80% on site'.

18 The claimant states that following this meeting she gave her position a lot of thought. From her statement, she did not consider that it was possible for her to be present eighty per cent of her time because of the time she spent travelling from home whilst she was home based and she therefore resigned.

19 Mrs Lee made a note of the meeting but its contents were not agreed.

20 The Tribunal was satisfied that during this meeting the issue of visibility was discussed and that eighty per cent visibility was discussed. However, it was also satisfied that there was confusion as to what was meant by this. In particular, whether it was visibility on site (that is, a physical presence on site) or visibility to site (that is, availability to those on site by alternative means, such as telephone and video conferencing). There was not any evidence to suggest that it was put to the claimant that she should vary her contract of employment so that she could be on site eighty per cent of her paid time. In other words, it was not suggested that she should either cease to be home based or that travel time should be excluded from her working hours.

21 The outcome of the meeting was that the claimant would give further thought to the situation and that there would be a further discussion about her working arrangements, the support she needed and the support that she could give. Therefore, there was the opportunity for the claimant to clarify and set out her concerns so that they could be properly considered and solutions sought.

22 Before a further meeting took place, the claimant submitted her resignation in a letter dated 1 January, 2019.

23 In that letter, the claimant states 'I have maintained "high visibility" by being on site as much as reasonably possible and by being readily contactable during and after normal working hours whilst based at home'. She then states she 'would be required to be on site 80% of the time' but acknowledged that 'there was no intention of changing the terms and conditions of my home based working contract'. It is clear from the letter that the claimant had found the change of role 'challenging and difficult' and that it had been recognised that she was 'doing the best that I can based on the situation I am in'.

24 When asked by the Tribunal about what was in her mind when writing her letter of resignation, the claimant appeared initially to concentrate on the organisational difficulties she had faced rather than the alleged change to her contract of employment and only moved to this when pressed.

25 It was suggested that the claimant did not submit a grievance because it would have been submitted to Mrs Lee and she was the person who would have been the

alleged cause of the grievance. The Tribunal did not accept this as it would have been open to the claimant to raise her grievance, either informally or formally, with someone higher up the management chain or through a different route, such as with the HR department. At this stage, there was not any evidence to suggest that the claimant had any complaint about anyone else. It is of interest in this connection that about six weeks after her resignation the claimant complained to Ms Andrews that, among other things, the issues in her resignation letter had not been addressed.

26 Mrs Lee responded to the resignation the same day expressing her surprise and an intention to consider the points raised before their next meeting.

27 The claimant then indicated that she was unfit due to an upper respiratory tract infection and was advised by Mrs Lee to take sick leave.

28 A meeting took place between the claimant and Mrs Lee on 11 January, 2018. As this followed the claimant's resignation, it is not entirely clear whether there was a joint understanding of the purpose of the meeting. It had been intended that there should have been a mid-year appraisal at about this time but the claimant did not think that this was appropriate in the circumstances. However, there was some discussion on the claimant's performance and she was upset that Mrs Lee was marking her down from the claimant's own assessment of her performance. There is nothing to suggest that the claimant was aware of this prior to her resignation or that it played any part in her decision to resign.

29 On the claimant's own evidence it is apparent that Mrs Lee was trying to keep the claimant in the employment of the respondent. This included discussion about the eighty per cent visibility and the alternative position that the claimant had rejected at the time of her redeployment.

30 From the claimant's statement, 'we discussed the reason for my resignation, which was ML's requirement for me to be 80% visible in West Lancashire'. The Tribunal noted the wording used and that the claimant does not state '80% presence'. She then goes on to say that Mrs Lee referred to 'the outcomes of that 80% visibility' and asked the claimant if she would reconsider her resignation. The claimant responded that she could not 'be "visible 80% of the time in West Lancashire"'. Again the reference to 'visibility' and not 'presence' with the reference being in quotes, which suggests that the claimant is quoting what she said.

31 The claimant was asked to review the job description for her role before it was advertised. It was suggested that the role might be based at one of the centres for which the claimant had responsibility. This was eventually adopted and it appeared to have some support from the claimant. However, there was not any evidence to suggest that the claimant was put under any pressure to change her own arrangements during her notice period.

32 During her notice period, the claimant's health suffered and she had to take sickness absence leave.

33 Prior to starting work for the respondent, the claimant had a contract with the CQC as a specialist advisor but had not been able to take up any offers of work because they were all made at short notice. After her resignation, the claimant applied

to the CQC, among others, for a position and has now obtained a position with the CQC, although on a lesser salary than when she was with the respondent.

34 The claimant complains about various matters that she alleges arose during her notice period. Although the situation might have been handled better, the Tribunal was not satisfied that these events confirmed that the relationship between the claimant and the respondent had broken down before the claimant submitted her resignation.

35 The full contentions of the parties were set out in their closing submissions. The claimant contended that she was constructively dismissed by the respondent and that she was entitled to treat her contract of employment as having been terminated because of fundamental breaches of that contract, particularly in respect of the requirement for eighty per cent visibility and the support that she alleges that she did not receive. The respondent refuted these contentions and denied that it had dismissed the claimant. The respondent also contended that it had given the claimant the opportunity to have any grievances addressed but the claimant chose not to pursue this.

36 Section 95 of the Employment Rights Act, 1996, ('the Act') states that

(1) For the purposes of this Part an employee is dismissed if (and, subject to subsection (2) and section 96, only if):

(a) the contract under which he is employed is terminated by the employer (whether with or without notice)

...or

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.'

37 In a case where the claimant may have been constructively dismissed, the Tribunal must consider whether the actions of the respondent amounted to a fundamental breach of contract such as would entitle the employee to treat his/her contract of employment as at an end.

38 If the claimant was dismissed, the respondent accepted that the dismissal would have been unfair.

39 Dealing with the issues identified by the parties

39.1 Did the respondent insist that the claimant needed to show '80% visibility' in West Lancashire?

The respondent wanted eighty per cent visibility but it is the definition of 'visibility' that is critical. However, this seems to have been an ideal and the evidence does not suggest that it was insisted on prior to the claimant's resignation. It is likely that it would have been the subject of further discussion had the resignation not been submitted.

- 39.2 If so, what did the respondent mean by the claimant needing to show '80% visibility'?

The Tribunal was satisfied that the respondent would eventually have wanted eighty per cent visibility but how that would be achieved was not clear. It was physically impossible for the claimant to be on site for eighty per cent of her time whilst home based at her then current address so alternative means would have been necessary. Mrs Lee was also home based and was in a similar position to the claimant. In any event the claimant was working with at least two sites. It is therefore probable that visibility would have meant visibility to the sites by such means as could be used but would not necessarily require a physical presence.

- 39.3 Did the claimant fail to provide the claimant with adequate management support?

Other than at 1 to 1 meetings, it is not apparent what requests for support the claimant made but it seems unlikely that any were made. The claimant had senior management responsibility. Support was one of the issues that the claimant was to consider at the time of her resignation but she chose to resign rather than deal with the issue. The Tribunal therefore finds that there was not a fundamental breach of the claimant's contract of employment and that this did not amount to anything that in combination with other events would amount to such a breach.

- 39.4 Did the respondent propose any changes to home based working in the claimant's contract?

There was not any evidence to support this.

- 39.5 If so, did the respondent fail to consult the claimant about any proposed changes to home based working?

On the basis of the Tribunal's findings, this does not arise. However, even if it could be inferred that the eighty per cent issue did require such a change, the matter was at an early stage and discussions were still in progress.

- 39.6 If so did the respondent's actions amount to an actual or an anticipatory repudiatory breach of the claimant's contract of employment? In particular did the actions amount to a breach of the implied term of mutual trust and confidence?

Again, on the basis of the Tribunal's findings this does not arise.

- 39.7 If the breach was an anticipatory breach, did the respondent cure that breach?

Again, on the basis of the Tribunal's findings this does not arise. It is clear that after the claimant resigned, the respondent did not insist on any immediate changes to the claimant's contract and attempted to clarify any misunderstanding. The claimant was invited to rescind her resignation.

- 39.8 If so, did the claimant resign in response to the alleged breaches?

On the basis of the Tribunal's findings there was not a breach for the claimant to resign in response to.

39.9 If breaches are established, did the claimant affirm the breaches prior to her resignation?

Again, on the basis of the Tribunal's findings this does not arise.

39.10 If it is established that the claimant was dismissed, what was the reason for dismissal and was it a potentially fair reason?

Again, on the basis of the Tribunal's findings this does not arise.

39.11 If the reason was a potentially fair one, did the respondent act reasonably in all the circumstances in treating that as sufficient reason to dismiss the claimant?

Again, on the basis of the Tribunal's findings this does not arise.

39.12 If the claimant's dismissal was unfair, what is the chance, if any, that she would have been fairly dismissed in any event and should any compensation be reduced accordingly?

Again, on the basis of the Tribunal's findings this does not arise.

39.13 What is the appropriate award for remedy?

Not relevant on the basis of the Tribunal's findings.

40 The Tribunal finds that the claimant resigned at a time when her situation was unclear in that she refers to the need for eighty per cent visibility without properly understanding what was required of her. At that time, she knew that she was having further discussions with her manager and she acknowledges that nothing had been said to indicate that her contract of employment would be changed, with or without her agreement.

41 The Tribunal was satisfied that the claimant felt under pressure in her final role with the respondent. It seems clear that she was struggling in the role and having difficulty in establishing the necessary relationships with those with whom she was working. The split between two sites and the need for trips to London coupled with her travelling times meant that she had little time to establish personal relationships by being physically present. So far as the Tribunal could understand, they were what might be termed front line staff and it is possible that they would see the claimant as interrupting service delivery and so needing to take time out to react with her. She suggested that they were avoiding contact with her but it was not clear if this was deliberate, caused by pressure of other work or poor communications. The claimant seeks to blame Mrs Lee for not been sufficiently supportive in bringing pressure on the others to work effectively with the claimant. There is little evidence of specific incidents being brought to Mrs Lee's attention or of requests made for support other than in respect of comments made before and during meetings. The claimant was a member of the senior management team in her area and, as such, would be expected to be able to understand and deal with relationship problems either directly or by escalation.

42 The Tribunal therefore finds that there were not reasons, taken individually or in combination, to justify the claimant resigning and then to claim constructive dismissal.

43 With regard to the implied term of trust and confidence, as indicated above, the claimant did not give the respondent a proper opportunity to remedy any breach in the way in which it dealt with her. She resigned at a time when she was not clear what was going to happen and before the respondent imposed any condition on her that was a breach of her contract of employment. However, she was given an opportunity to clarify matters which she chose not to do. Had she not resigned at that time, it is quite possible that the respondent would have reviewed the claimant's role and would have come to the conclusion that changes were necessary but that point had not been reached when the claimant resigned. Even if that stage had been eventually reached, it cannot be anticipated that the respondent would not have dealt with it in a manner that complied with the claimant's contract of employment. The Tribunal finds that the respondent was not in breach of the implied term when the claimant resigned.

44 Accordingly, at the time when the claimant resigned, she was not entitled to consider that the respondent had acted in a manner which the claimant could treat as a repudiation of her contract of employment. The Tribunal therefore finds that the claimant was not dismissed by the respondent and that her complaint that she was unfairly dismissed should be dismissed.

Employment Judge Nicol

Date 11 January 2019

RESERVED JUDGMENT AND REASONS SENT TO
THE PARTIES ON

..14 January 2019

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FOR THE TRIBUNAL

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