



EMPLOYMENT TRIBUNALS

Claimant: Mrs K Basra

Respondent: Bupa Care Homes (GL) Limited

HELD AT: Leeds

ON: 27 to 29 March 2018

BEFORE: Employment Judge Cox

Representation:

Claimant:

Respondent: Mr Singh, lay representative
Miss Mills, Solicitor

REASONS

1. Mrs Basra presented a claim to the Tribunal that she had been unfairly dismissed by the Respondent, Bupa Care Homes (GL) Limited (“the Company”). She had resigned from her job on 30 August 2017. The success of her claim depended upon her being able to establish that the circumstances of her resignation fell within section 95(1)(c) of the Employment Rights Act 1996 (the ERA). That sub-section states that an employee is to be viewed as dismissed if she terminates her contract in circumstances in which she is entitled to terminate it without notice by reason of the employer’s conduct.
2. Applying the guidance in Omilaju v Waltham Forest London Borough Council (2005) ICR 481, the issue for the Tribunal was whether the Company’s actions or conduct amounted to a repudiatory breach of Mrs Basra’s contract of employment. It is an implied term of any contract of employment that an employer will not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. That is referred to as the implied term of trust and confidence. Any breach of that implied term will amount to a repudiation of the employee’s contract of

employment because it is the very essence of the implied term that it relates to conduct calculated or likely to destroy or seriously damage the relationship.

3. The test of whether there has been a breach of the implied term is an objective one. The Tribunal needed to examine the conduct that Mrs Basra said had breached the implied term and decide whether, looked at objectively, it was likely to destroy or seriously damage the trust and confidence that she was reasonably entitled to have in the Company as her employer. In Tullett Prebon plc and others v BGC Brokers LP and others [2011] IRLR 420, the Court of Appeal emphasised that in applying the test, all the circumstances are looked at objectively but from the perspective of a reasonable person in the position of the innocent party: in that person's reasonable perception has the employer shown an intention to abandon or refuse to perform the contract.
4. The Company conceded that it did not have any potentially fair reason for its conduct falling within section 98(1)(b) or section 98(2) ERA, so that if Mrs Basra was dismissed then her dismissal would be unfair. The sole issue for the Tribunal in relation to liability was therefore whether Mrs Basra had resigned in response to a breach of the implied term of trust and confidence. Mrs Basra initially made 16 allegations of conduct she said constituted or contributed towards breach of the implied term, but some she did not pursue. The Tribunal's findings were limited to the remaining allegations only.

The evidence

5. The Company runs residential care homes. Mrs Basra worked as a Care Assistant at its Airedale Residential Care Home. At the Hearing, the Tribunal heard oral evidence from Mrs Basra and from Mr Henry Mbogu, who also worked as a Care Assistant at the Home for a time. For the Company, the Tribunal heard evidence from Mrs Lisa Jones, the Home's Manager and Mrs Basra's line manager, and from Mrs Judith Reyner, Regional Manager, who dealt with a grievance that Mrs Basra presented to the Company about her treatment. The Tribunal was also referred to correspondence and other documents in a file of documents prepared for the Hearing by the Company's legal representatives.

Requirement to work nights

6. Mrs Basra's first allegation was that in 2016 up to 11 August, when she handed in her grievance, Mrs Jones and Mrs McGuigan, Head of Care and another manager at the Home, regularly required her to work nights to cover staff shortages. In her evidence, Mrs Basra clarified that this requirement was applied in May and June 2016 only.
7. Mrs Basra was not contractually required to work night shifts, which ran from 8pm in the evening till 8am in the morning. Her evidence was that management were pushing her to do more nights and that at a meeting on 11 August 2016 she was told that she had to cover more nights. The Tribunal noted, however, that in her grievance meeting with Mrs Reyner, Mrs Basra put it differently. The note of that meeting records that Mrs Basra said that she volunteered for working in the evenings when she was free to do so. When

Mrs Reyner asked her to clarify whether she was actually being told or forced to do these shifts, her response was that if she could help with any shift she would. Effectively she was telling Mrs Reyner that she was prepared to volunteer for night shifts when she was free. She did add, however, that she felt scared of saying no. On an objective assessment, the Tribunal was not prepared to conclude that Mrs Basra was being required to work at night. She was being asked if she was prepared to do so. She may herself have felt pressured into working nights but in fact she was merely being requested by management to consider whether she would be prepared to work night shifts. There was nothing in this that amounted to or contributed towards a breach of the implied term.

Failure to investigate forged signature

8. Mrs Basra alleged that at some point in the period from April to June 2016 somebody had forged her signature in relation to a medication sign off and that this had not been investigated by the Company. In her evidence Mrs Basra clarified that what she was alleging was that somebody had forged her initials to indicate that she had administered Paracetamol to a resident when she had not in fact administered the drug.
9. The Tribunal accepted Mrs Jones's evidence, which was clear and credible, that she did in fact investigate Mrs Basra's concerns: a stock check was done by Mrs McGuigan to confirm whether or not the Paracetamol had been administered and it was found that it had not. Mrs Jones could not think of any way of identifying who could potentially have falsely entered Mrs Basra's initials and concluded that there had been no risk to the resident as the drug had not in fact been administered.
10. There was nothing here that amounted to or contributed towards a breach of the implied term.

Letting down the team

11. Mrs Basra alleged that in a meeting on 11 August 2016 Mrs Jones had told her that she was letting down the team, the Home and the residents by asking to step down from her role as a Senior Care Assistant to Care Assistant, and tried to make her feel guilty about doing so.
12. On 11 August 2016 Mrs Basra had left on Mrs Jones's desk a letter giving her four weeks' notice that she intended to stand down as a Senior. In that letter Mrs Basra said: "following several conversations with yourself and Gillian [McGuigan] regarding stepping down as a senior to care assistant I am giving you four weeks notice from today 11 August 2016. I have really enjoyed my time as a senior. However I feel that I can no longer carry on with this role due to the ongoing staffing problems which is affecting my health and family life. I hope you can fully support me as a manager with my request as I really enjoy working at Airedale Residential Home and hope we can get through these difficult times".
13. Mrs Basra met Mrs McGuigan later that day. It is significant that Mrs Jones had not read Mrs Basra's letter by the time the meeting took place. Mrs Basra

had been asked to speak to Mrs McGuigan about the possibility of taking on some extra shifts to cover the absence of Mrs McGuigan and her partner, who also worked at the Home, who wanted to take a period of annual leave together. Mrs McGuigan had also asked other employees at the Home whether they would be prepared to provide cover. When she met Mrs McGuigan, Mrs Basra said that she was not able to assist. Mrs Jones overheard her responses to Mrs McGuigan's request and considered that she was being abrupt and disrespectful in the way she was responding. She intervened in the conversation and asked Mrs Basra why it was that she could not provide cover. At this point Mrs Basra explained that the letter she had left on Mrs Jones's desk was giving notice that she was stepping down as a Senior. In her evidence, Mrs Basra said that Mrs Jones's tone then changed and she shouted at her, leaving Mrs Basra very upset. She alleged that Mrs Jones said that she was letting down the staff and residents by not helping and that she had left the Home in a mess by wanting to step down.

14. In contrast, Mrs Jones's evidence was that she said to Mrs Basra that if everybody decided to step down then that would have an effect on the residents in the long term. That was also the conclusion that Mrs Reyner reached in relation to the grievance Mrs Basra lodged about this meeting. In the letter setting out her decision on the grievance, Mrs Reyner said: "your manager has shared with me that she said that if all staff made the decision not to act as part of the team then in the long term the residents will suffer". Mrs Jones also explained to Mrs Reyner that employees needed to work together to cover shifts to enable everyone to take their annual leave and that she had merely been asked asking Mrs Basra to be flexible.
15. In the light of the clear and credible nature of Mrs Jones's evidence and the way in which she responded to questions in cross-examination, the Tribunal accepts Mrs Jones's evidence on this point. It finds that she acted towards Mrs Basra as a firm but fair and competent manager. The Tribunal does not accept that she shouted at Mrs Basra during this meeting nor that she told Mrs Basra that she was leaving the Home in a mess by stepping down as a Senior. The Tribunal does not consider it credible that she would have used those phrases or would have shouted at Mrs Basra, because of the overall impression of calm professionalism and clarity that she displayed in the evidence she gave to the Tribunal.
16. The Tribunal accepts that Mrs Jones's questioning reaction to Mrs Basra's clear position that she was not willing to provide cover was understandable, particularly since at this stage she had not read Mrs Basra's letter. The Tribunal also accepts that Mrs Jones's tone may well have been abrupt, partly because of her inability to understand why Mrs Basra's position had changed from her previous flexible approach. The Tribunal further accepts that Mrs Jones's tone and words were perceived as challenging and unfair by Mrs Basra. Mrs Basra perceived that Mrs Jones was impliedly criticising her decision and she was upset by Mrs Jones's tone, albeit that she did not show it until she left the meeting. The Tribunal accepts Mr Mbogu's evidence that he witnessed Mrs Basra in tears after leaving Mrs Jones's office, and this clearly also confirms that Mrs Basra was in fact upset.
17. Having said that, the Tribunal considers it likely that Mrs Basra was herself conflicted about her decision to stand down as a Senior. She had enjoyed the

role and there was probably part of her that was predisposed to believe that she was being criticised for the decision.

18. To summarise, the Tribunal does not accept that Mrs Jones shouted at Mrs Basra. The Tribunal does not accept that Mrs Jones said to Mrs Basra that she was leaving the Home in a mess. The Tribunal does accept that Mrs Jones's tone with Mrs Basra was abrupt and led Mrs Basra to be upset by what she perceived to be criticism of her decision.

Failure to process grievance

19. Mrs Basra alleged that in August or September 2016, somebody, possibly Mrs Jones, failed to lodge the grievance she had made in the system or pass it on for consideration.
20. On 11 August 2016, the day after her meeting with Mrs Jones, Mrs Basra lodged a grievance in these terms:

"Dear Lisa

It is 9.43pm and I am writing this email because I have just had a chance to sit down and reflect on what happened in today's meeting with yourself and Gillian. I have been feeling very upset by the way your tone and style came across today leaving me feeling humiliated. You told me that I had left the care home in a mess as I have handed in my notice to step down as a senior. I did not appreciate this and it is very unfair. In the letter I told you that my health is being affected and you have totally disregarded this by your comments you have made as stated above. I feel that I do not have the support or care from yourself as business needs come first over one's health. I've always tried to go the extra mile and help out wherever possible for the organisation because I really enjoy my job role. I also communicated that I need to cover nights as does everyone else as this is part of my job role. I can only say in my defence that I applied for a day job which were between the hours of 8am to 8pm as this fits around my personal life. I should not be expected to be told that I need or have to cover nights as this is not correct. Please can you make this clear in your communication response to this email as verbal communication gets lost in translation. I hope we can move forward from the above events and look forward to your response to my grievance. I would appreciate an email letter as I would like this documented.

Regards"

21. The Tribunal notes that although in her grievance Mrs Basra said that Mrs Jones had at the meeting disregarded what she had said in the letter, Mrs Jones had not actually read that letter at the time of the meeting.
22. The Tribunal accepts Mrs Jones's evidence that on the same day that she received the grievance she acknowledged receipt of it, forwarded it to her Regional Director, Mr Vince Hart, and logged it with the Human Resources (HR) department of the Company. Mrs Basra heard nothing further from the Company. She had to phone the Company's HR Service Centre twice, on 1 September 2016 and again around a week later, to find out what was

happening. On both occasions she was told that the Company had no log of her complaint on the system. The Tribunal was provided with no evidence as to why the grievance had not been logged or why this delay had happened, although the Tribunal accepts that when Mrs Reyner was eventually sent the grievance by Mr Hart on 13 October 2016 she immediately contacted Mrs Basra to arrange a meeting.

23. From Mrs Basra's perspective, however, there was a substantial and unexplained delay in dealing with her grievance and it was dealt with only after she chased it up. The Tribunal will return to this finding when it makes its overall assessment of whether there was a breach of the implied term of trust and confidence.

Grievance not upheld

24. On 25 October 2016 Mrs Reyner confirmed that she did not uphold Mrs Basra's grievance. Mrs Basra alleged that Mrs Reyner had not approached the grievance with an open mind, as evidenced by her opening the grievance hearing by saying to Mrs Basra: "I know what you are like".
25. The Tribunal did not accept that Mrs Reyner opened the grievance meeting with this comment. She denied saying it. When the Tribunal asked Mrs Basra to explain the context in which these words had been used, she could not do so. On their face, these words do not make any sense. Having read the transcript of the grievance meeting that Mrs Reyner had with Mrs Basra and heard her evidence, the Tribunal is satisfied that she did in fact approach the grievance with an open mind. She asked open questions to elicit details of Mrs Basra's complaints about the Company and she made efforts, in good faith, to deal with the grievance thoroughly.
26. Mrs Reyner broke the grievance down into four allegations: that Mrs Basra felt that Mrs Jones had upset her leaving her feeling humiliated at the meeting on 11 August 2016; that her manager did not appreciate the adverse affect that working in the Home as a Senior had on her health; that Mrs Basra was employed for day shifts only, not night duty, which she was repeatedly asked to cover; and that she felt that management in the Home did not care about her.
27. The Tribunal accepts Mrs Reyner's findings on Mrs Basra's grievance were substantiated in relation to allegations two to four. There was no evidence to substantiate the allegations that Mrs Jones did not care about Mrs Basra or her health; indeed, she held a health clinic at the Home providing employees with a forum to raise issues about their health, which would have given Mrs Basra an opportunity to raise any concerns had she chosen to attend. There was also no evidence that Mrs Basra was being forced to take on night shifts that she did not want to do.
28. The Tribunal is not convinced, however, that Mrs Reyner's findings in relation to the first allegation were substantiated. Her conclusion appears to have been that Mrs Jones had no intention of upsetting Mrs Basra and the Tribunal accepts that that may well have been the case, but the allegation was that Mrs Jones's tone and style had had the effect of leaving Mrs Basra feeling upset and humiliated and Mrs Reyner did not properly address that. In

particular, she did not make any findings on what Mrs Jones said at the meeting or how it was said. To that degree the Tribunal finds Mrs Reyner's conclusions unsatisfactory in relation to Mrs Basra's grievance. It will return to this finding when it assesses whether there was a breach of the implied term of trust and confidence.

Delays in grievance appeal

29. The next allegations that Mrs Basra made related to the handling of her grievance appeal. She said that the Company delayed in dealing with her appeal and that the last straw was that on 15 August 2017 Mrs Reyner wrote her a letter saying that she had never submitted one.
30. The Tribunal is satisfied that Mrs Basra did submit an appeal, as she was entitled to do under the Company's grievance procedure, to Ms Yates by a letter dated 30 October 2016. She posted the letter on 1 November 2016 although it does not appear to have arrived in Ms Yates's office until 4 November. Ms Yates informed Mrs Basra by letter on 10 November that she was assigning the grievance to another member of management to deal with because her own diary was crowded and she did not want the hearing of the appeal to be delayed. On 16 November 2016 she informed Mrs Basra that Mr Phillip Lewis had been appointed to deal with the grievance. The letter went on: *"my PA Colette Eckersley tried to contact you on 14 November 2016 at 12.30pm. Phillip's secretary Sandra Cattermole also tried to contact you on 15 November 2016 at 9.30am and 11.50am to arrange a convenient time for a meeting. Can you please call Sandra on [giving telephone number] to arrange a mutually agreeable date time. If we don't hear from you within the next seven days we will assume you no longer want to proceed with your appeal."*
31. The Tribunal accepts Mrs Basra's evidence, which was not contested, that she did in fact call Sandra after she received that letter and explained that she was flexible about when she could attend a meeting. Sandra explained that the manager involved was now busy and that the meeting would need to be postponed until after the festive season but the Company would be in touch at that time to give her the date of the grievance meeting.
32. Mrs Basra heard nothing further and by February 2017 she had gone off on sick leave due to work-related stress and other medical conditions. Mrs Basra kept in touch to update the Home on her medical condition but she did not consent to the release of her GP records and initially she did not want to be referred to occupational health either. By 25 July Mrs Jones was inviting her to an ill health meeting to discuss her condition and her return to work but warning her that there was a potential that she might be dismissed because of her sickness absence.
33. On 30 July 2017 Mrs Basra responded by email, saying she was hoping to be returning to work by the end of August at the latest. She added: *"regarding my grievance with yourself, which I appealed!! I have still not heard anything and its been several months. Please can you chase this up for me?"* In response to that email Mrs Reyner wrote to Mrs Basra on 15 August saying that she was confirming that an appeal was never received by the Company

and “due to the timescales which had now passed an appeal will not be heard”. The Tribunal assumes that the word “timescales” refers to the provision in the Company’s grievance procedure that an appeal needs to be lodged within seven days. In response to that letter Mrs Basra wrote to Miss Whitehead, Mrs Reyner’s Secretary, to say that she had in fact received two letters from Ms Yates, on 10 and 16 November 2016, acknowledging her appeal.

34. On 23 August Mrs Reyner again wrote to Mrs Basra and said: “As confirmed in my letter dated 15th August 2017 and referenced in Ruth Yates letter dated 16.11.17. We did give you the right of appeal within 7 days. Unfortunately, you did waiver this right as we were never in receipt of an appeal during this period. In conclusion, we will not be taking this appeal any further as it is now out of the timescale”. It appears that the reference in this letter to the letter of 16 November 2017 is in fact a reference to Ms Yates’s letter of 16 November 2016 in which Mrs Basra was asked to respond within seven days, but it is clear that Mrs Reyner is again saying that the Company had not received an appeal.
35. In response, on 26 August Mrs Basra wrote to Mrs Reyner and said: “I find this totally unacceptable the way I have been treated by your organisation”. She referred again to the letter of 10 November which had acknowledged her appeal and to the later letter asking her to contact the Company. In response to that, she told Mrs Reyner, “I spoke to Sandra, within the short 7 day timescale given to me so that I could arrange a suitable time and date for my appeal hearing. I was told that due to the Christmas period and operational commitments of Phillip, it may be after Christmas before we could sit down and my appeal be heard. It was agreed with Sandra that she would send me a letter with a appeal date after Christmas and I would try and remain flexible around the business needs of Bupa”. Mrs Basra is clearly giving details of the person she says she spoke to in response to Ms Yates’s letter.
36. On 30 August Mrs Basra resigned, by means of an email to Mrs Jones. In the email she says:

“Its with deepest regret that I have come to a decision that I am no longer able to continue with my employment as Care Assistant with Airedale Residential Home Pudsey and therefore resign with immediate effect. Please accept this as my formal letter of resignation and a termination of our contract. I feel that I am left with no choice but to resign in the light of my experiences regarding the bullying, discrimination and not respecting me as a valued member of the team. I have exhausted every opportunity to clear things and make them amicable but feel to much has gone on and as a result my health has not been at its best. Further more, I feel my grievance has not been taken seriously and I can no longer imagine coming back to work for an organisation that is not prepared to change its work culture. I don’t believe things will or have changed since my time off sick and can imagine staff retention, always to be high and members of staff leaving, because of all the stress and bad management practice. I have really enjoyed my time working with the residents and some team members that shared the same work ethics about care like myself. I am deeply disappointed that I have been given no choice but to resign. I feel that if I carried on working in the environment I left it would have caused

me to breakdown, resulting in a serious health condition, that would have detrimental impact on my quality of life. Finally, I think there are lessons to be learned and hope, further training and actions are taken so that all the good work that went on in the home by the staff does not have a negative impact on the residents, who always need to be put first as they are the reasons why we work in care and we should never forget that”.

Summary and conclusions

37. Having made these findings on Mrs Basra’s allegations, the Tribunal has assessed whether the Company’s conduct amounted to a breach of the implied term of trust and confidence.
38. In summary, the Tribunal has identified that there was a substantial delay in the Company dealing with Mrs Basra’s grievance. It was only her actions in following it up that led to it being heard at all. The findings on the grievance were not sufficiently detailed or substantiated in relation to the way Mrs Basra was treated by Mrs Jones at the meeting on 11 August 2016. When Mrs Basra appealed against the grievance outcome there was a repeated failure to acknowledge that she had ever done so, in spite of the fact that she had twice provided evidence of the Company’s acknowledgement of her appeal and also confirmed that she had followed up the second letter from Ms Yates. The Tribunal is not persuaded by the Company’s submission that if Mrs Basra had interpreted these letters reasonably the only conclusion that she could have come to was that there had been some form of administrative error. The Tribunal accepts that in writing those letters Mrs Reyner was acting in good faith on the basis of information with which she had been provided by the Company’s Human Resources department. Nevertheless what she was saying was not correct and, objectively assessed, could reasonably be construed by Mrs Basra as a refusal by the Company to acknowledge the existence of her grievance appeal. In sum, the Tribunal finds that the Company’s actions could reasonably and objectively be construed by an employee in Mrs Basra’s position as displaying a reluctance to engage with the initial grievance, a failure to make a substantiated finding in relation to one aspect of that grievance and a refusal to allow Mrs Basra to exercise the right to appeal provided by the Company’s own grievance procedure.
39. Taking these findings overall, the Tribunal is satisfied that there was no reasonable and proper cause for this conduct and that it was likely to destroy or seriously damage the relationship of trust and confidence between the Company and Mrs Basra. From Mrs Basra’s letter of resignation and her evidence to the Tribunal, the Tribunal accepts that this conduct also formed a significant part of the reason why she resigned.
40. As a consequence, the Tribunal concluded that Mrs Basra had been entitled to resign without notice by reason of the Company’s conduct, and had therefore been dismissed. Since the Company did not argue that there was a potentially fair reason for her dismissal, Mrs Basra’s claim of unfair dismissal succeeded.

Compensation

41. Mrs Basra sought compensation for her unfair dismissal rather than re-employment. The parties agreed the amount of the basic award, her net pay at £202 and her period of future loss as 12 weeks. The Tribunal awarded the agreed basic award of £1,252.62. In relation to the compensatory award, Mrs Basra's loss of earnings for the 30 weeks to the date of Hearing amounted to £6,060 and her future loss of earnings amounted to £2,424. The Tribunal awarded £500 for her loss of statutory rights. This resulted in a total compensatory award of £8,984.
42. The total award of compensation that the Tribunal ordered the Company to pay to Mrs Basra for her unfair dismissal was £10,236.62.

Employment Judge Cox
Date 29 May 2018

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Judgments and reasons for the Judgments are published in full online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant and Respondent.