



EMPLOYMENT TRIBUNALS

Claimant
Ms C Alderson

Respondents
Mrs Susan Davies and Mr Robert Edward Davies
t/a The Fields Care Home

REASONS OF THE EMPLOYMENT TRIBUNAL

HELD AT MIDDLESBROUGH
EMPLOYMENT JUDGE GARNON (sitting alone)

ON 7 & 8 FEBRUARY 2019

Appearances

For the Claimant Ms J Alderson Mother
For the Respondents Mr A Davis of Counsel

REASONS

1. Introduction and Issues

1.1. By a claim form presented on 20 July 2018 the claimant, born 24 June 1981, brought a claim of constructive unfair dismissal. She was employed from 5 September 2005, latterly as a “senior care supervisor”, and resigned with effect from 14 April 2018.

1.2. The liability issues broadly framed are : -

1.2.1. Did the respondents fundamentally breach the claimant’s contract of employment , in particular by acting , **without reasonable and proper cause**, in a manner calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust between them and the claimant ?

1.2.2. If so did the claimant resign, at least in part, in response to such breach without first affirming the contract?

1.2.3. If so, does the respondent show a potentially fair reason for its conduct?

1.2.4. If so, was dismissal fair under s 98(4) of the Employment Rights Act 1996 (the Act)?

2.The Relevant Law

2.1. Section 95(1)(c) of the Act provides an employee is dismissed if: -

“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.”

2.2.An employee is “entitled” so to terminate the contract only if the employer has committed a fundamental breach of contract, ie. a breach of such gravity as to discharge the employee from the obligation to continue to perform the contract, Western Excavating

(ECC) Ltd v Sharpe [1978] IRLR 27. The conduct of the employer must be more than just unreasonable to constitute a fundamental breach.

2.3. This claimant mentions failure of the respondents to deal with her concerns. In WA Goold (Pearmak) Ltd v McConnell 1995 IRLR 516, two salesmen were constructively dismissed when their employer failed to deal with their grievance over changes to their sales methods. They were “blocked” from even seeing their manager by his PA. Most procedures for raising a grievance require an employee to start by raising their concern informally, so, if they do and are ignored, they may think it is not worth continuing. There is no obligation on an employee to use the grievance procedure before resigning, see Seligman and Latz v McHugh [1979] IRLR 130, but if, as in this case, there are procedures for raising a grievance, the employee cannot complain the employer has failed to deal with her concerns if she refuses or omits to use them (see Hamilton v Tandburg Television).

2.4. In Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, the EAT, said: -
“It is clearly established that there is implied in a contract of employment a term that the employer would not, without reasonable and proper cause, conduct themselves in a manner, calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and an employee. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunals function is to look at the employer’s conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it any longer. Any breach of that implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract.” Malik v BCCI said if conduct, objectively considered, was likely to cause serious damage to the relationship between the employer and the employee, a breach was made out irrespective of the motives of the employer. Whether the conduct was without “reasonable and proper cause” must be objectively decided by the Tribunal. It cannot be enough the employer thinks it had reasonable and proper cause. Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908

2.5. An employer is liable for the acts of its managers towards subordinates done in the course of their employment whether the employer knew or approved of them or not Hilton International v Protopapa. There are countless examples of the ways in which the implied term may be breached, for example, using intemperate language to deliver justified criticism and giving of unjustified warnings Walker-v- Josiah Wedgwood & Sons

2.6. A breach of the implied term of mutual trust and confidence may result from a number of actions over a period of time Lewis v Motorworld Garages [1985] IRLR 465. This is often called the last straw doctrine, which was further explored London Borough of Waltham Forest v Omilaju [2005] IRLR 35. The last straw does not have to be a breach of contract in itself or of the same character as the earlier acts but when taken in conjunction with the earlier acts on which the employee relies, it must amount to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant but an entirely innocuous act on the part of the employer

cannot be taken as the last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of her trust and confidence in the employer.

2.7. Even if there has been a fundamental breach which has not been affirmed, if it is not at least in part the effective cause of the employee's resignation, there is no dismissal, see Jones v F.Sirl Furnishing Ltd and Wright v North Ayrshire Council, EAT 0017/13. Finding another job before resigning, does not negate the effective cause.

2.8. Section 98 of the Act provides:

“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –

(a) the reason (or if more than one the principal reason) for dismissal

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

2.9. The reason in a constructive dismissal case was explained in Berriman v Delabole Slate Company [1985] ICR 546: - *“as requiring the employer to show the reason for their conduct which entitled the employee to terminate the contract thereby giving rise to a deemed dismissal by the employer.”* Where there is a sound business reason for imposing reasonable changes, that may be some other substantial reason, but if it is **the manner** in which they were imposed of which the claimant complains and it is for that a potentially fair reason must be shown. Protopapa was a case in which justifiable criticism was delivered in an unjustifiable way, but there is a dividing line between what the claimant calls “bullying” which may breach the implied term, and what objectively can be regarded as simply robust management. In this case I have no doubt the claimant felt she was being bullied but I must judge objectively whether the actions of the respondent crossed that dividing line. If they did not, there is no fundamental breach, and no dismissal.

3 Findings of Fact

3.1. I heard the evidence of the claimant and her witnesses Ms Linda Coatsworth, the former deputy manager of the Fields Care Home (the home) who resigned in early 2018, and a former colleague Ms Donna Metcalfe. I also read the statements of Ms Julie Corrigan, Ms Beverley Smith and Ms Wendy Kingston. On behalf of the respondent, I heard Mrs Susan Davies the joint owner, the then temporary, now permanent, home manager Ms Jackie Wallace and Mr Maurice Marriott.

3.2. The home enjoyed an excellent reputation and had an exceptionally high rating from Durham County Council of 95% satisfaction with the actual standard of care. The claimant and others received flowers in late 2017 thanking them for their hard work. Until the end of 2017, the home manager was Ms Allison Brennan, a good friend of the claimant.

3.3. The home can accommodate up to 24 residents but at material times there were only 16 to 17. The home manager is in ultimate charge subject to directions from the owners. Immediately beneath her is the deputy manager. Then there are two people, of whom the claimant was one, called senior care supervisors, several senior care assistants, then the ordinary care assistants. The difference between a senior care supervisor and senior care

assistant is that the supervisor is expected to do more office and paperwork. Part of everybody's role is physically to deliver care to the residents, however the manager will focus on office work. In comparison to Ms Brennan, Ms Wallace did less physical caring for the residents, for a reason which will become apparent shortly.

3.4. On the 27 and 29 November 2017 the home had a unannounced inspection by the Care Quality Commission (CQC). The claimant says she had noticed standards had dropped but she clarified not in the period prior to the inspection rather after Ms Wallace took over .

3.5. The CQC report issued in January 2018 was a damning indictment of the home. The turning point in this case was the evidence of Ms Coatsworth. I had been puzzled as to how standards could have dropped so dramatically in comparison with many years of satisfactory ratings. Ms Coatsworth explained everything had continued to be done as it always was, but the home had not had a CQC inspection for 2 years . Only 8 weeks before it Durham County Council visited and found no safeguarding concerns and a generally well operated establishment. The change was in the way CQC assessed homes .Their requirements for accurate recording and such things as risk assessments assumed greater priority .What the claimant rather dismissively refers to as "paperwork" had become very important. Ms Coatsworth told me that after the CQC inspection Durham County Council visited and said many small homes in the region had also seen their rating drop. Mr and Mrs Davies personally had little to do with the day-to-day running in recent years leaving it to Ms Brennan who had been an excellent manager. In any regulated business, it is the job of the manager to keep up with changes in assessment standards and cascade that information to the staff. That plainly had not happened because the home failed badly to meet the new assessment standards.

3.6. The CQC report itself says the looking after of the residents was good, but the claimant focuses **only** on that sentence in the report. It came across loud and clear to me from her oral evidence ,she believed that if the staff were treating the residents with competence and empathy ,paperwork was an optional extra .It is not .Whatever anyone may think, the CQC has significant power and even if they stop short of taking any enforcement action in relation to a home simply by publishing their reports online, as they do, they make it possible for potential users of the service i.e. the families of people who require care, to compare one home with another. If they see the type of report issued in January 2018 rating 4 of 5 areas as "requiring improvement" and 1 as "inadequate" , it will have an effect. The business suffered significantly as a result of this report because new clients became difficult to attract.

3.7. Ms Brennan went on the sick at about Christmas 2017. It was not until 15 January 2018 that Ms Wallace was appointed. Her brief primarily was to develop and deliver an action plan to secure a return to the previous good rating. To do this, she appraised the problems and then implemented new methods. It is highly significant the next CQC inspection resulted in a good report and **it did so without a significant increase in staff numbers.**

3.8. When Ms Wallace appeared on 17 January, nobody knew who she was. She introduced herself but the claimant believes Mrs Davies should have done so because if a new style was to be adopted, staff should be told what it involved. I find it was perfectly in order to allow Ms Wallace to introduce herself, and to give her a free hand to implement change.

3.9. On 22 January at 8:45 am the claimant was instructed by Ms Wallace to carry out a list of jobs including doing drug returns and choking risk assessments. She says this was alongside her day-to-day care of residents, which she had always believed was the priority. From the start the different approach of Ms Wallace in comparison with Ms Brennan was she expected senior care supervisors to do these jobs and **delegate** routine care of residents. The claimant accepts she used this word frequently.

3.10. The home operates a shift system : nights 9 pm to 8 am and days an early shift 8 am to 2 pm or a late shift 2 pm to 9 pm .Sometimes the claimant and others will work a 13 hour 8 am to 9 pm shift. During the day, which is when the claimant almost always worked, a senior supervisor or carer will be on duty with two ordinary carers. Obviously there will be times when more than one resident will require care at the same time. But the entire philosophy of Ms Wallace was for the claimant to work not harder but more systematically doing the paperwork as well as helping when needed the two ordinary carers. Staff to patient ratios like this are not regarded as too low. That is not only the evidence of the respondent. I have dealt with other cases involving residential care and nursing homes where the staff to patient ratio is not as good, but still regarded as adequate, including by CQC.

3.11. On 24 January at 2:10 pm at a meeting of seniors, Ms Wallace said she wanted nothing to do with staff rotas so wanted volunteers to do them . The claimant explained she had too great a workload to volunteer and did not know how to do it because Ms Brennan always had . Ms Wallace replied it was part of her job as a senior to do them .The claimant also expressed concerns about the jobs Ms Wallace wanted them to do whilst “on the floor “ . Ms Wallace told her she needed to be more organised as it too was part of her job as a senior.

3.12. At the end of the meeting the claimant spoke to Ms Wallace and Ms Coatsworth in private. A carer had been advised by a mental health practitioner she should not be working in care. That carer told another carer in confidence who then told the claimant as her senior. Ms Wallace said she could not do anything about it unless the carer herself informed her. The claimant believed this was putting residents at risk. In my judgment Ms Wallace was simply saying she could not accept second-hand evidence and needed to hear it from the informant. That is reasonable. Shortly after, the carer in question was moved to do kitchen work

3.13. On 30 January while working the 8am-2pm shift, the claimant was told she had to do a medication audit to order drugs again. She stayed after her shift to do this and complains she did not even get thank you. I accept the managerial style of Ms Wallace is to expect a supervisor to do the jobs for which she is paid extra , by organising her work to make the time to do it within her normal working hours.

3.14. On 31 January at 10:30 am the claimant noticed Ms Wallace had taken all the thank you cards and letters from family members down from the noticeboard. One of the points made in the CQC report was that the home looked untidy. All Ms Wallace was doing was tidying it up. The cards and thank you letters were kept, but simply not on display.

3.15. At 11am that day, Ms Wallace spoke to the claimant about not booking an ambulance for one of the residents. The claimant said she knew nothing about as the weekly planner

calendar had been taken down from the wall. Ms Wallace replied there was a diary to be checked daily and it was written in there. The claimant says she had never been told about that. Ms Wallace said all staff were told. I asked the claimant why, if the weekly planner had been taken down, she did not make it her business to find out where these important tasks to be done were now recorded. She really had no answer.

3.16. On 1 February at 1:20 pm a new resident arrived for one week's respite care.. The claimant was on a 13 hour shift and trying to have her lunch break. She needed to speak to the family of the new resident, get documentation signed, medication sorted and write a personal care plan. She says Ms Wallace knew she was busy but never offered to help. Again the claimant was expecting Ms Wallace to do as Ms Brennan used to by helping as a member of the care staff. Ms Brennan's managerial methods had led to the bad CQC report.

3.17. At 2 p.m. Ms Wallace sent Ms Coatsworth to say "*the boss wants to know why you haven't done handover in the office*". The claimant replied "*If the boss wants to know tell her to come and ask me herself. I'm trying to sign somebody in, do daily reports, attend to the family and I can't do everything*". This plainly shows the claimant was capable of speaking up for herself. More importantly she does not appear to recognise the importance of not only doing a handover in the privacy of the office rather than in the hearing of residents, but documenting it has been done. Ms Kingston's statement says "*Claire at all times knew the patient's background when we needed information **without having to check handover books***". That may well be so, but if a patient dies and there is nothing in the handover book the home would be in difficulties defending its position. Quite simply the claimant does not appear to recognise the importance of record-keeping. Ms Brennan gave it lower priority but under her management it was not up to CQC standards, and a bad rating followed.

3.18. On 6 February at 10 am at a health and safety meeting, just before leaving Ms Wallace got the risk assessment file, with over 100 items in it, and told the claimant to go through them to make sure they were all there. The claimant says she had not been trained in risk assessment and felt she was being set up to fail. Objectively, all she was being asked to do was to check the papers were there, not to rewrite them. That too was part of her job.

3.19. At 1.35 pm that day, the claimant noticed Ms Wallace had put her down for training in "temperature testing". The claimant always thought this was not the responsibility of care staff but of the maintenance staff. The CQC report commented on inadequate water temperature control for the residents. Ensuring that was not ongoing was part of the claimant's job.

3.20. On 7 February at about midday, Ms Wallace complained care sheets had not been completed correctly. The claimant said there was staff shortage due to sickness, so she was running late but they would be completed. She says Ms Wallace did not pick up **any other carers** on errors. She may have been picking up on the claimant's faults to a greater extent because the claimant was not one of the carers but a senior supervisor who was resisting change more than others were.

3.21. New monthly medication to start on 16 February was delivered on 9 February but had not been recorded. On 14 February at 8 am. Ms Wallace told the claimant she wanted it doing

that day. The claimant thought she could not get it done in time so rang Ms Metcalf to come in at 2 pm instead of 5 pm . At a meeting Ms Wallace told her she had no right to ring for a member of staff to come in while she did the drugs. The claimant explained why she had and said she always had authority from Ms Brennan to ring for staff to come in if she thought it necessary .She told Ms Wallace she had worked the home for 13 years and was getting the blame for the CQC report as if it was all her fault even though she had been through many successful CQC inspections. Again the claimant is missing two points, first her authority to call in staff was never supposed to be used if a more senior person was present , and there was ; second if they did what they had always done in the past the next CQC inspection would come up with the same bad result.

3.22. At that meeting Ms Wallace said some staff had told her the claimant did not seem happy, would go on the sick and look for another job. The claimant said the staff should not have mentioned anything . She was unhappy but unable to afford to go on sick as she had as a mortgage. She said she was looking for another job . In cross-examination the claimant revealed , she had started doing so in early February.

3.23. Also she told Ms Wallace was about a carer (X) having told her of another carer (Y) calling a resident a “cow”. Ms Wallace said until X came to see her she could do nothing. The claimant says she refused to act even though the concern had been passed by X to the claimant as her senior. Again Ms Wallace was simply saying she could not accept second-hand evidence and needed to hear it from the informant. That is reasonable. The claimant told Ms Wallace who X was. Two days later Y was suspended.

3.24. On that day the claimant says she told Mrs Davies about her concerns and Mrs Davies just shrugged her shoulders. Mrs Davies does not remember this and the claimant left me with the distinct impression she never attempted to speak to Mrs Davies in any formal context, but rather tried to catch her in passing.

3.25. On 16 February at 8 a.m. the new monthly drugs were to start. The drug trolley had not been restocked by the night staff. By the time the claimant had done it herself she was late for her morning routine. She says night staff had a good relationship with Ms Wallace and she was being set up .I do not agree. If the night staff had been remiss what the claimant should have done was report it to Ms Wallace.

3.26. At 12:15 pm when she entered the office Ms Wallace asked if the claimant was at work on 19 February and she replied she was. Ms Wallace said they needed to do the wages on that day. On 19 February as soon as she started Ms Wallace said they needed to do the wages and asked the claimant to ring the wheelchair service for a resident . The claimant said there was an 18 month waiting list for wheelchairs but Ms Wallace still made her do it. She also made her chase the “falls team“ in relation to a resident who had only been seen three days earlier . Ms Wallace asked her to do a continence assessment on the residents but as they were already receiving incontinence pads the claimant did not think it important .

3.27. Throughout the morning Ms Wallace sent staff to ask claimant what she was doing and sent a carer to say she wanted the claimant upstairs to do the wages. When the claimant got

there she asked her to do the writing side of the job which she had never done before . Ms Wallace kept looking at the sheets and telling the claimant “you are doing it wrong”. The claimant says herself have been occasions in the past when she has been in charge of the home in the absence of the manager and deputy manager. That could happen again. The claimant needed to learn these managerial duties. The claimant tried to speak to Mrs Davies, herself a qualified nurse, about this when she was actually assisting with care work. She says Mrs Davies just blanked her. I believe Mrs Davies simply did not register this as a complaint because of the context in which the claimant spoke with her

3.28. At 12:30 pm that day claimant’s NVQ assessor Ms Dee Ewart came to see her and asked if she was okay . A note of this made by Ms Ewart is branded by the claimant as “lies” but in cross-examination she agreed with most of it. A significant point was that she was saying she wanted to give up on her NVQ. In the past Ms Ewart had helped her to do the paperwork which the claimant said is not her strong suit. The claimant says Ms Ewart told her three members of staff had told her the way Ms Wallace was treating staff was unacceptable. The note records many staff found the new regime hard. It is plain to me the message Ms Ewart was trying to convey to the claimant was that whatever anybody thought the CQC left the home with no choice. Change was necessary. Although the claimant said in oral evidence she accepted this, it came across to me she viewed it as a necessary evil, not something she would embrace with any enthusiasm at all.

3.29. On 21 February at a meeting to discuss changes someone said some staff had made comments about the day shift being lazy. The claimant made a comment about the night staff drinking tea all shift. Another carer raised her voice to the claimant and Ms Wallace told the claimant to apologise but she said she had nothing to apologise for. Ms Wallace accused of her being childish. After the meeting two carers whom the claimant says did not like her spoke to Ms Wallace privately . After they left Ms Wallace called the claimant to the office and said forcefully her attitude in the meeting was awful. She accused the claimant of yawning not giving a good example. The claimant says she had “*had enough*” so told Ms Wallace she should not be going on about yawning when the claimant had reported something serious the previous week and nothing was done about . Something was done. She said if the resident’s family were aware how their mother was spoken to they would be very annoyed. Ms Wallace replied the family were aware. Ms Wallace was making an entirely valid point. People may yawn because they are tired but do so in a meeting because they are bored and do not think what is being said is important. That was the impression the claimant gave at the meeting. For a senior care supervisor to engage in an argument about the relative merits of day and night staff and to yawn when changes were being discussed is unacceptable.

3.30. On 5 March Ms Wallace said she wanted all the residents’ weights doing. The claimant said she may not have time because due to sickness there would only be two people on duty instead of three. Ms Wallace said she wanted them doing that day. The claimant said the optician was coming to see six residents, there was a bath to be given which would take two carers and a healthcare assistant was coming to do bloods for a resident. Weights should have been done the previous week when the claimant was on holiday but it had been left. The claimant had served meals as well as doing the medication upstairs and downstairs. At 3.50 Ms Wallace brought a phone downstairs and told her to ring the district nurse to see where she

was. The claimant says there was nothing stopping Ms Wallace doing that herself. The events of this day speak volumes. The claimant just did not seem to grasp that her role as a junior manager meant she should delegate serving meals and “ multi task “ to ensure necessary jobs were done, rather than doing them herself or expecting Ms Wallace to.

3.31. On 8 March at 2 pm Ms Wallace sent Ms Coatsworth to read a very important document typed by Ms Wallace to all senior staff, not just to the claimant. It ends with “ Failure to adhere to the above may result in disciplinary” written in uppercase. When Ms Coatsworth read it out it annoyed the claimant who felt she was being targeted and had to leave the job. I have little doubt Ms Wallace by this time were completely frustrated by the claimant’s resistance to change , and perhaps that of some others. A manager is not in my judgment acting without reasonable and proper cause by writing in the terms she did .

3.32. On 13 March the claimant was offered and accepted a new job and said on 14th she was leaving. On 15 March she was not allowed into a meeting. There is no reason why she should have been because she had said the day before she was leaving. On 16 March her mother rang in sick on her behalf and told Ms Wallace the cause. The claimant’s GP had signed her off sick the first time in 13 years. She left when her sicknote expired.

4. Conclusions

4.1. Ms Wallace speaks forcefully and gives orders rather than making requests. She had a clear vision of what needed to be done and I can understand why she perceived the claimant as being resistant. This was a clash of personalities and priorities.

4.2. I have no doubt the claimant believed she was being bullied but I have set out most of the facts she alleged and,objectively judged, no conduct by the respondent , even cumulatively, amounts to a breach of the implied term of mutual trust and confidence. In Woods changes were being enforced and when Ms Woods refused to accept them the employer, in the words of Mr Justice Browne-Wilkinson, as he then was, started “*gunning for her*”. Neither Ms Wallace nor anyone else was doing that. Ms Wallace was indeed pushing her to improve and start to act as a **senior care supervisor**, rather than a good care assistant as she always had under the previous home manager. She would rather have not left and **felt** she had no option, but objectively that is not a constructive dismissal. Therefore her claim fails.

T M Garnon EMPLOYMENT JUDGE
SIGNED BY EMPLOYMENTJUDGE ON 22 FEBRUARY 2019