EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Cooney**

Respondent: **Somerset Care Ltd**

Heard at: **Bristol** **On:** **27 and 28 March 2019**

Before: **Employment Judge Hargrove**

Representation
Claimant: **In Person**
Respondent: **Ms S Bowen, Of Counsel**

JUDGMENT

It is adjudged as follows:

1. The claimant was not dismissed from her employment and in consequence her claims of unfair dismissal and breach of contract are not well founded.

2. The respondent is ordered to pay £8.00 to the claimant as an unlawful deduction from wages in respect of overtime.

REASONS

1. The claimant was employed by the respondent as an Activities Organiser and the Moorhaven Residential Care Home from January 2001 to a date in 2018 which is the subject of dispute.

2. On 12 July 2018, she presented a claim to the tribunal. The claims are of unfair dismissal, breach of contract in respect of notice pay, unpaid wages

and holiday pay and what were ticked as "other payments" but which have not been identified.

3. Moorhaven has a maximum capacity of fifty-four residents of whom twenty-five to thirty had dementia. The claimant was at all material times the sole activities organiser. There were also a number of care staff: Lorraine Loch, who I will refer to as LL, was the Manager or Area Manager, Jane Townson was the CEO, Sue Andrews was the Director of HR, Wayne Kurpyta was an HR Advisor who dealt with the claimant's grievance pre-dating the termination of her employment, which is the principal subject of debate between the parties. I have heard evidence only from the claimant and Mr Kurpyta for the respondent. There is a bundle of documents amounting to some 140 pages.

4. The claimant was issued with a contract of employment on 6 June 2001 which is at pages 66 – 69 of the bundle. The material parts for the purposes of this hearing are at pages 68 and 69. There was a provision about uniform at page 68.

> "The appropriate uniform will be provided which remains the property of the Company. This must be worn at all times on duty. On leaving the Company you will be required to return the uniform. You will be charged for the cost of the uniform if it is not returned and a deduction will be made from your final salary payment".

The other relevant passage is at 69 which states:

> "The Company reserves the right to amend the above terms and conditions of service and will give at least one month's notice in writing of any change.

5. The following issues arose during the hearing.

   (1) Does the claimant prove that the claimant was expressly dismissed by the respondent on 21 May 2018, on which date she was sent home?

   (2) Alternatively, did the claimant resign from her employment on 28 May 2018 on which date she handed in the five tunics provided to her for work and her name badge thereby terminating her contract?

   (3) Was that resignation, if there was a resignation, in response to a repudiatory breach of contract by the respondent or not?

   (4) In the further alternative was the claimant expressly dismissed by the respondent by letter of 26 June 2018 received on the 27 June 2018 at page 138 of the bundle?

   (5) If the claimant was dismissed, does the respondent prove a reason for dismissal? The reasons relied on were either gross misconduct or some other substantial reason namely a breach by the claimant of the implied term of trust and confidence.

(6) If either of those reasons is established, was the dismissal for that reason fair or unfair applying section 98(4) of the Employment Rights Act?

(7) If the dismissal was unfair what are the percentage chances that had a fair procedure taken place dismissal would have occurred and if so when?

(8) Does the respondent prove that the claimant was guilty of blameworthy conduct contributing to her dismissal which would make it just and equitable to reduce or further reduce basic and compensatory awards?

(9) Other remedy issues including for wrongful and unfair dismissal, unpaid wages and holiday pay.

6. This is a chronology of the relevant events.

(1) The claimant was required to wear a yellow tunic under her contract of employment. She was the only activities organiser although others had been employed in such capacity for short periods in the past. Other care staff on similar contracts also had to wear tunics but, as I understand, of a different colour when on duty working at the home.

(2) The policy changed in January 2019. The respondent decided that it was no longer appropriate for staff to wear uniforms. On 9 January 2018 a circular was made available to all staff explaining in some detail the reasons for the change in policy which I accept was based upon advice from the Alzheimer's Society and was set out in six bullet points at page 75 of the bundle. It was announced that "therefore, as of 1 February Moorhaven will be a non uniform home. We will be required to follow the workwear policy for homes where no formal workwear is required".

(3) For reasons which the tribunal, having heard all of the evidence, finds difficult to understand, the claimant objected by letter of 15 January 2018 at pages 76 – 78. Jane Townson the Chief Executive responded in detail on 29 January 2018 (pages 80 – 81). The claimant wrote to the Manager LL on 31 January 2018 claiming that the letter failed to address most of her points. The letter had invited her to raise any further questions to her line manager and she did so (pages 83 – 84). LL acknowledged it on 5 February 2018 and passed it on to Sue Anderson, the Head of HR. The claimant also complains about that. Sue Andrews responded by letter of 6 February (see page 86). As to the contractual point which the claimant had raised, she said:

> "To clarify I can confirm that the provision of uniform is not a contractual term of your employment. Your contract refers to the wearing of workwear where appropriate. However, this does not prevent the Company from taking the decision to review this where it deems this to be appropriate. Therefore there has not been a variation to your contract of employment and all terms and conditions remain unchanged".

> "As Jane explained in her letter the rationale for the decision to remove workwear is that this is in the best interest of residents and their wellbeing and as such I hope that you will be able to support the decision going forward".

(4) Although the first sentence in the passage I have quoted is not entirely accurate, the conclusion it reached, as I will explain in due course, is in fact correct. It was not a contractual term that the claimant had the right to wear a tunic. The claimant responded to that letter by writing back to LL on 12 February 2018 at pages 87 – 89. Again, she claimed that the answer that she obtained from Sue Andrews had failed to answer the other points in her letter dated 31 January. She then cited the Employment Protection Consolidation Act 1978 (which has expired and being replaced By Employment Rights Act 1996). She claimed that she had rights which she had explained earlier which were included in the terms of her contract of employment.

> "Please may I have answers to my questions which I would reiterate and clarify in the context of my contract where necessary.
>
> 1 I would like to know the reasons the Somerset Care firm have broken my work contract by the two reasons given in my letter
>
> Time
>
> Provide uniform
>
> Twenty-three days is not a month non uniform enforcement is not uniform provision – taken from my contract".
>
> (She cited the two clauses which I have already cited from the contract.)
>
> 2 When will new contracts be issued?
>
> 3 Will a new non uniform start date be given?
>
> 4 Will financial help for uniform replacements be given to each member of staff?
>
> 5 Why is Somerset Care taking away my right to accept or decline their change of policy which is part of my contract and as such should be issued to me in the form of a new or revised contract especially as it is creating a sudden and unexpected financial burden which Somerset Care have chosen to ignore and have failed to offer any reimbursement for clothing costs"

(5) Following a conversation between LL and the claimant on 13 February, the claimant raised a grievance in writing on 26 February which is set out at pages 92 – 94 of the bundle. Citing from that grievance document she states:

> "I am raising a grievance for unjustifiable action which disadvantages the employee and residents of Moorhaven: Breach of contract, failure by senior management to answer repeated questions and concerns. Corporate bully tactics". She said that she would like the grievance to address allowing her to continue wearing her uniform, to be issued with a new or amended contract, and, compensation for breach of contract. "Compensation for management using threatening bully tactics to which I did not succumb like my colleagues. Total disregard of my questions by management. Replacing my uniform with non uniform clothing. Expected damage cost to personal tops by pin name tags property of Somerset care".

(6) The grievance was referred to Mr Kurpyta who responded on 9 March inviting the claimant to a grievance meeting on 15 March. The meeting in fact took place on 20 March 2018 and there is a note of the discussion about which there is no substantial dispute at page 99. The claimant was attended by a colleague Jenny Richardson.

(7) On 9 April Mr Kurpyta sent a letter to her stating there would be a delay pending his investigation.

(8) On 8 May 2018 Mr Kurpyta wrote giving the outcome to the claimant at pages 103 to 109. In the outcome letter Mr Kurpyta comprehensively rejected the claimant's grievance.

(9) Before moving on with that part of the story I should return to another matter which had occurred in April. A complaint had been made against the claimant by a fellow member of staff arising from a party in the home for the Queens birthday on 21 April. Concerning that complaint, the claimant was spoken to about it by LL on 8 May 2018. That is the same day on which the grievance outcome letter was sent. There are notes of that meeting at page 113. The claimant presented a note headed "To Whom It May Concern" responding in detail to the complaint. That note is at pages 114 – 115. The relevance of this matter is that the claimant complains that this note was not followed up by the respondent in the same way as she claims that her grievance matters were not properly dealt with by the respondent. It is to be noted however, that it is not of itself in respect of the incident of the 21 April and what had been complained about against her is not a separate act which is said to contribute to a breakdown of trust and confidence.

(10) In the paragraph of Mr Kurpyta's rejection letter of 8 May, he had stated at page 108:

> "As I have bene unable to uphold your grievance I must inform you that from Monday 21 May 2018 you will be unable to attend work wearing your Somerset care uniform and must comply with

the changed non uniform. Failure to attend work from Monday 21 May 2018 in non uniform may result in disciplinary action being taken".

(11) The claimant did not accept the grievance outcome and appealed it by a letter which was received on 16 May 2018, although it is wrongly dated 16 April 2018. The appeal letter is at page 101 and addressed to Ms Paling and it gave the following reasons for the appeal.

> "1 Incorrect facts written in the outcome by Mr Kurpyta.
>
> 2 Points of contract validity verses point of policy.
>
> 3 Failure to adequately address all points of grievance.
>
> 4 Acceptance of bad damaged liability but lack of care for staff with policy change.
>
> 5 Lack of impartiality."

(12) There is in truth, very little in those grounds that had not been covered in the earlier matters. Insofar as the earlier investigations may not have dealt with everything, the matters left were essentially trivial. That is the view of the tribunal.

(13) Elly Green from HR responded on 22 May 2018 fixing the date for the appeal to be heard on 30 May 2018.

(14) On 25 May the claimant wrote saying that she was unable to attend the hearing on 30 May. On the same day Elly Green wrote to the claimant cancelling the appeal.

(15) It is to be noted that throughout the period from the application of the policy of not wearing tunics from 1 February 2018, the claimant had in fact been permitted to continue to wear a tunic notwithstanding the change in policy. I find that all other staff had abided by the terms of the new policy and most of them had returned their tunics to the respondent. Notwithstanding the instruction from Mr Kurpyta in his letter of outcome, the claimant continued to wear the tunic after receipt of the letter of 8 May. She was entitled to do that because he had given her notice again that she was no longer to wear it from 21 May. Highly significantly in my view, she chose to turn up for work wearing it on 21 May. I do not accept that because she had put in an appeal she was entitled to continue to defy the instruction. On that day a supervisor Paula Radcliffe spoke to her and made a note which is at pages 123 – 124. The note was handed to the claimant. She left and never returned to work thereafter. I accept that on 18 May the respondent's senior management team made a decision that the claimant should be allowed to continue to wear the tunic. This was conveyed to the claimant on at least two occasions on 21 and 22 May. The claimant did not return to work thereafter but on 28 May called at the home and handed to a shift supervisor, Laura Wilkes, five tunics and her name badge. She asked for and received a signed receipt.

(16) At the end of May the claimant received payment for working for the full month of May including the period from 21 May when she was not at work. There were no other communications of any kind between the parties until 26 June 2018 when the claimant wrote to the respondent at page 136.

> "Since Somerset Care Ltd have stopped paying my wages since 21 May 2018, please clarify my employment status with Somerset Care Ltd".

(17) On the same day Mr Staples the Deputy HR Manager responded

> "I am writing to confirm that we are taking your return of uniform and name badge on 27 May 2018 as your resignation from your role and therefore your final date of employment will be the same 27 May 2018".

This date should be 28 May 2018.

(18) Subsequently, the claimant was sent a copy of her P45 which also cites a leaving date of 27 May 2018. This document is at page 129 of the bundle.

Conclusions

7. The Tribunal makes the following conclusions:

(1) I am going to take the issues slightly out of order because I have decided that at the forefront of this Judgment should be a ruling on whether or not there has been a repudiatory breach of contract by the respondent at any stage.

(2) For there to have been a constructive dismissal there has to be a fundamental breach of contract of such gravity that the employee is entitled to leave either immediately or on notice. It requires the identification of a term and a fundamental term of the contract which is supposed to have been breached. That may be an express term or an implied term, usually the implied term of trust and confidence. That implied term is that the employer will not, without reasonable and proper cause, act in such a way as to either have the purpose or effect of causing a breakdown of trust and confidence on the part of the employee. The authority for that is a well known case of Malik v BCCI a Supreme Court decision.

(3) The express term upon which the claimant relies is the term is the term of the contract which I have already set out in these Reasons. I firmly reject the claimant's contention that in announcing a change of policy about the wearing of tunics the respondent breached or materially changed the claimant's contract of employment. The clause as it stood imposed an obligation upon the employee to wear the tunic provided by the respondent. It does not give the claimant a contractual right to wear it regardless of any change of policy of the employer. The respondent was entitled to change this policy in that respect and to change it even

without consultation, particularly in circumstances where notice and reasons were given. The fact the change may involve minimal extra cost on the part of the employee because, in addition to supplying their own other clothes they would have to provide a replacement of the tunic, does not render it an obligation under the contract of employment. It does not amount to an amendment to the contract. All other clothing was obviously to be provided at the employees' expense even if the contract does not say it. Contracts do not usually make any such provision. Even if I were to find that it was a breach of contract it was most certainly not a fundamental breach or a breach of a fundamental term. The respondent had very good reason for the change backed up by advice from the Alzheimer's UK Society and the claimant was well aware of that advice from the start. Even if there was a change in the terms of the contract, which I have rejected, requiring notice the claimant complains that she was not given the notice required under the other term in the contract one month's notice. How that affects matters or is capable of constituting in itself a breach of an express term when the claimant was permitted to continue to wear her tunic for at least four months before being given notice, again fails me. There was equally, I find, no conduct of the respondent which was capable of amounting to a breach of the implied term of trust and confidence. Both informally, and in the grievance process, the respondent dealt in good faith with all or substantially all of the claimant's concerns. The truth of the matter is that the claimant will not accept the conclusions. That refusal is I find, wilful. There is no evidence that any other member of staff objected or did not comply with the policy change as said the claimant was allowed to continue to wear her tunic and I reject her argument that the claimant was entitled to ignore the instruction merely because she had appealed the grievance on 16 May 2018 which as I have stated was an appeal which in my judgement had no prospects of success or merit whatsoever.

(4) I conclude that the fact that she deliberately breached the instruction in the letter demonstrates that she was not prepared to continue to work for the respondent without wearing the tunic whatever the outcome of the appeal, and in fact the respondent had backed down, which the claimant nonetheless did not accept.

(5) Dismissal on 21 May or resignation on 28 May? In the meantime, the incident of 21 May had occurred. My conclusion as to that incident is that the claimant was clearly not dismissed. She was told to go home without pay and return wearing the correct clothing, which was, I find, an action taken by the person imposing it who did not have then knowledge of the change in the policy in respect of the claimant, which had been made by the SMT on 18 June and was done with reasonable and proper cause. In any event, that instruction was countermanded on that day and the next day but, as said, the claimant unreasonably refused to accept it.

(6) The continuation of the claimant's employment is confirmed by the letter sent concerning the appeal process which was to take place on 30 May. The claimant does not accept that she received the letter of the 25 May which confirmed in writing that the claimant had been contacted on the

afternoon of 21 May and notified that the decision about the wearing of tunics had been overturned and she was now able to work in her uniform. Even if it be correct that the claimant didn't receive it, I accept that it clearly shows that the respondent had not dismissed the claimant on 21 May.

(7) The next point I considered to be relevant are the terms of the staff review document prepared by Paula Radcliffe on 21 May at pages 123 – 124 which was handed to the claimant on that day. That document clearly points to the correct interpretation of the events of 21 May and so I will cite it in full.

> "I have been informed that you have received a letter to inform you that as from 21 May you were working in a non uniform home/Company so you will need to return the Company uniform and only wear what is in the Company policy. Today you will need to leave and return wearing the correct clothing. This will be without pay as you are not complying to Company policy and could lead to disciplinary action".

Alison does not agree to this and has declined to sign.

(8) I interpret this statement as indicating very clearly:

First, the claimant was not dismissed on that day.

Secondly, that she was asked to leave the premises and return to work wearing the correct clothing, which was clearly inconsistent with dismissal.

Thirdly, she was not at that time suspended without pay. She was notified that she would not be paid for the short period of absence necessary for her to change her clothes. I reject the claimant's evidence that in response to a request by telephone to Mr Kurpyta during this meeting he indicated that she was suspended or suspended without pay. It was the return home for the purpose of changing that was without pay. I reject the contention that that is capable of being an action tending to show a breach amounting to or contributing to a breakdown of trust and confidence.

Fourthly, she was instructed to return her uniform and only wear what was in the Company policy.

(9) As to that document the claimant during this hearing has drawn attention to the version disclosed by the respondent at pages 124(a)(b) which is different in two respects. In the second document those boxes are ticked to indicate that the hearing took ten to twenty minutes, and in another to indicate discussion of practice. I accept that Paula Radcliffe must have filled those two boxes in after handing the copy to the claimant. The claimant thinks it is of some significance. In my view, it demonstrates that the claimant's unreasonable attitude to the respondent that she should suggest that there was something sinister

in those additions, which are entirely innocuous, and it is not in dispute that the hearing did in fact take ten to twenty minutes.

(10) On at least two occasions on 21 and 22 May the claimant was notified by telephone of the respondent's volte face on 18 May, when the SMT had decided to permit the claimant to continue to wear the tunic. That too is entirely inconsistent with the dismissal.

(11) There was a further telephone call during the meeting on 21 May made by Paula Radcliffe to Dianne Allen. Dianne Allen asked to speak to the claimant and according to the claimant at paragraph 28 of her witness statement said to the claimant "stay. I know nothing about any of this". This must be a reference to the fact that the claimant turned up wearing her uniform and had been sent home. The claimant responded, and she agrees she responded, "I'm off". That is a significant response from the claimant so far as the issue was to whether she later resigned is concerned.

(12) There is no case that the claimant actually, verbally, or in writing resigned from her employment but a resignation may sometimes, even rarely, be infirmed from the conduct of the employee.

(13) The authority for that lies in the case of Harrison v George Wimpy and Co Ltd [1972] ITR page 188 where the President said "where an employee so conducts himself as to lead a reasonable employer to believe that the employee has terminated the contract of employment, the contract is then terminated". The claimant had clearly demonstrated for a number of months that she did not accept the change of policy and was not prepared to stop wearing a tunic, notwithstanding that the policy and the claimant's objections had been dealt with both formally and informally through a grievance procedure, very thoroughly. Her appeals raised almost exactly the same grounds and had no prospects of having the decision overturned. Having been justifiably directed to go home and change, she left and never returned even when it was clearly indicated that the respondent had backdowned on the application of the policy. Without any justification, the claimant seems to have formed the view that the respondent was untrustworthy and unreliable in that respect. She refused to accept what she was told. She also said "I'm off" when speaking to Dianne Allen on the telephone. Taken out of context, that may be ambiguous but taken in conjunction with the others it is significant. The circumstances of the return of the tunic and the name badge are highly significant. In addition, the events after the 28 May are significant in context because the claimant failed to get in touch with the respondent. The fact that the respondent did not get in touch with the claimant (apparently) is not important, although it would have been wise if they had sent her a letter. I accept that they attempted to contact her by telephone, which rang out unanswered or unavailable to answer. The claimant says that other staff had returned their uniforms without having been treated as being resigned. The comparison is odious. The circumstances of them returning their uniforms in response to requests or perhaps orders from the respondent is entirely different.

(14) In those circumstances I am satisfied that looked at objectively the respondent was entitled to conclude that the claimant had resigned from her employment as from 28 May.

8. In case I am wrong in the conclusion about resignation, I state what my conclusions would have been if I had reached a different conclusion. I would have found that the employment continued, but that the employment was terminated by dismissal by the respondent on 26 June 2018. Such a dismissal would have been unfair because no procedure was followed at that time, but I am satisfied that the claimant would have been dismissed fairly either for misconduct in failing to return to work without good reason, or for some other substantial reason, namely a breakdown of trust and confidence caused by the claimant in refusing to obey a reasonable instruction, within a matter of weeks and that the claimant contributed to her dismissal by blameworthy conduct such that it would not be just and equitable to award any basic or compensatory award.

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Employment Judge Hargrove

Date: 17 April 2019
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