Case Number: 2300016.18

THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Ms Claire Noto		**Bespoke Home Care Ltd**
Held at London South		**On 24 July 2018**

Before: Employment Judge Nash (sitting alone)

Representation

For the Claimant: **In person**

For the Respondent: **Mr Buckle, consultant**

JUDGMENT

The Judgment of the Employment Tribunal is: -

1. The claimant was not constructively dismissed.

2. Accordingly, the claim of unfair dismissal under section 98 Employment Rights Act 1996 is dismissed.

REASONS

1. The Claimant presented her claim to this tribunal on 2 January 2018 following a period of ACAS early conciliation from 8 November 2017 to 8 December 2017. The respondent presented its response on 21 March 2018.
2. At the hearing the Tribunal heard from the Claimant on her own behalf. On behalf of the respondent it heard from Mr Phil Byrne its Managing Director, Ms Karen Biggs its liaison manager, and Ms Jackie Meeten an administrator (and the claimant's mother).

3. The Tribunal had sight of an agreed bundle to 257 pages.

The Claims

4. The only claim was for constructive unfair dismissal under section 98 Employment Rights Act 1996.

5. In her witness statement the claimant raised an allegation that she had not been paid wages from 2014. This allegation was not contained in the originating application and was accordingly out of time. Claimant stated that she did not intend to pursue this allegation before the employment tribunal and intended to pursue this elsewhere.

The Issues

6. The only question for the tribunal was whether the claimant had been constructively dismissed. The respondent accepted that, if the tribunal found that there had been a dismissal, such a dismissal would have been unfair.

7. The first issue was whether the respondent had fundamentally breached the claimant's contract of employment by the following, either separately or cumulatively by: -

    a. Reducing the claimant's wages in early 2017
    b. Requiring the claimant to work full-time from the office rather than being permitted to work away from the office in the afternoons
    c. Giving the claimant a final written.

8. The second issue was whether any fundamental breach was the cause of the claimant's resignation.

9. The third issue was whether the claimant had waved any fundamental breach in respect of the reduction in wages in early 2017.

The facts

10. The respondent's business provides care to elderly and vulnerable people in their own homes. It employs about 24 staff, made up of a small office team and the remainder being peripatetic carers.

11. The claimant and the managing director Mr Byrne were in a relationship and lived together. The claimant played a significant role with Mr Byrne in setting up the respondent company. The business was legally required to have a named manager who was registered with the Care Quality Commission. Due to her experience it was decided that the claimant would be the Registered Manager.

12. In Mr Byrne's witness statement, he stated the claimant had been absent from work full-time since about August 2014. However, before the tribunal he clarified or resiled from this and stated that the claimant had continued to work but not on a full-time basis.

13. The reasons for the claimant's change in working arrangements were twofold. In January 2015 she and Mr Byrne took responsibility for her three young nieces and nephews who came to live with them. From July 2015 this became a formalised special guardianship and they received payment from the Council towards the

children's needs. Secondly, the Claimant started to suffer from a serious painful back condition which required her to undergo a number of operations.

14. Due to these calls on the claimant's time - including picking the children up from school in the afternoon - in October 2015 Mr Byrne and the claimant agreed that the respondent would appoint an acting-up Registered Manager and care coordinator. However, did they did not change the registration with the Care Quality Commission although another person was carrying out the duties of the Registered Manager. Accordingly, sometime in 2015 the claimant stopped carrying out the duties of Registered Manager.

15. There was some dispute between respondent and the claimant about how much work the claimant was carrying out at this time. In later correspondence Mr Byrne claimed that the claimant had carried out very little, if any, work during this period. However, it was clear from a number of emails and text messages in the bundle that the claimant continued to work during this period. The claimant contended that she had been working nearly full time during this period. On the balance of probabilities, the tribunal found that the claimant was working some hours in the office and also carrying out a considerable number of duties from home. However, she was always not working her full 40 hours, as this would have been impracticable due to her childcare responsibilities and her health condition. The tribunal was bolstered in this finding by the claimant stating twice in her originating application that Mr Byrne increased her hours of work in 2017 when, before the tribunal, she stated that he had in fact not increased her hours but rather retracted permission for her to work partly from home. The fact that the claimant characterised being required to work full-time in the office as an increase in hours, indicated that she had not been working on a full-time basis previously.

16. By January 2016 the claimant was working in the office approximately from 9 AM to 2:30 PM, and then working additional hours out of the office. Mr Byrne relied on an email exchange on 6 March 2016 according to which the claimant had decided to resign as Registered Manager. According to these emails, Mr Byrne pointed out to the claimant that she was stepping down from the Registered Manager's salary. The claimant denied having seen these emails and contended that they were forgeries. On her case she and Mr Byrne had agreed that she would step down formally as Registered Manager and be replaced on the register by Ms Biggs who was currently carrying out the role. There was no discussion of any salary change.

17. Both the claimant and Mr Byrne agreed that the claimant had continually been paid the full salary for the Registered Manager role of approximately £47,000 a year since 2014.

18. In November 2016 the relationship between the claimant and Mr Byrne broke down. He moved out of the family home. As a result, the claimant took a few weeks off work. The tribunal found on the balance of probabilities it was most likely that the claimant did not work during these a few weeks due to the disruption in the family and the difficult situation between her and Mr Byrne.

19. Mr Byrne's evidence was that he wanted the claimant to return to work as a care coordinator and they agreed a new contract and salary. He relied on a number of emails between him and the claimant in early November 2016 in which the claimant asked to return to work and it was agreed she would work as care coordinator on a salary of between £18,000 and £22,000. Mr Byrne was to work out of the office for the immediate future in order to make things easier for both of them.

20. Mr Byrne further relied on a letter in the bundle at page 62 dated 12 November 2016. According to this letter, the Claimant's role was as care coordinator reporting to the Registered Manager and she had resigned as Registered Manager in March 2016. The salary was £22,000 a year with overtime on top. The letter contended that the claimant would be returning to work following an absence of over two years. The letter stated that the position was 40 hours a week with approximately half the week worked at home on a temporary basis which would be reviewed against productivity and operational requirements. Mr Byrne also relied on an acceptance slip signed by the claimant dated 13 November 2016. His account was that the claimant returned to work on this new contractual basis in December 2016.

21. The claimant denied having seen either the email or the contract and contended that they were forgeries and her signature was forged. Her evidence was that she would not have agreed to such a cut in salary, or to an incorrect assertion that she had not worked for two years when she had been working on a nearly full-time basis during that time. Further, she would not have agreed to changing her current work arrangements whereby she was able to leave the office by 2:30 PM every day to pick up the children from school.

22. The claimant's case was that she had continued to work in her previous role through the breakup (save for a few weeks off) and there were no changes of role, salary or working arrangements in November 2016.

23. As evidenced by emails in the bundle, both parties agreed that the claimant resigned on 7 December 2016. They also agreed that the resignation did not take effect. Mr Byrne's case was that he dissuaded the claimant from resigning. In contrast the claimant said that she had made the decision to withdraw her resignation and Mr Byrne assented to this.

24. The tribunal had sight of a letter from Mr Byrne to the claimant dated 14 January 2017. This letter confirmed her resignation as Registered Manager and her new role as care coordinator on a reduced salary from 1 January 2017. The letter also confirmed that Mr Byrne was lending the claimant over £2,500 for various family expenses. The letter stated that the claimant had been, in effect, paid her full salary as registered manager for two years, "without undertaking any work". The letter also stated that the working from home arrangements were temporary and would be reviewed.

25. The claimant's evidence was that she had never seen this letter. However, because she no longer had access to her work email, she could not check this.

26. The claimant salary at this time varied. Her take home salary for December 2016 was approximately £1,900 which, it was agreed, reflected a reduction due to unpaid leave.

27. The Claimant's take-home pay for January 2017 was approximately £2,400. The claimant contended that this was her normal take-home for an annual salary of £47,000 and thus was evidence that she had not agreed to a cut in her salary in November. According to Mr Byrne, the agreed new wage had taken effect and salary was so high due to overtime. However, there was no evidence from either party - for instance payslips or timesheets - as to how these salary payments were calculated. There was also no explanation from the parties as to why such documentation was not available.

28. The claimant's take-home salary for February 2017 was approximately £1,400. The claimant contended that this was an unauthorised deduction in that she had lost about £1,000 of her take-home salary. Mr Byrne stated that this was the correct salary for her new care coordinator role without overtime.

29. According to Mr Byrne, concerns grew during January and February 2017 as to the practicability of the claimants working part time out of the office. As a result, he sent the claimant a "letter of concern" on 22 February 17. According to this letter, the claimant had frequently failed to complete her contractual hours, had been unavailable when working from home, had taken unauthorised absences from work and had failed to complete rostered calls within agreed timescales. The letter stated that her actions and performance required immediate involvement. The letter stated that there was no immediate improvement then the company would consider disciplinary action. The claimant told the tribunal that she did not recall this letter and was not sure if she had received it.

30. In March 2017 there was an email exchange between Mr Byrne and the claimant concerning his inability to continue to cover the bills in respect of the former family home bills because he now had the expense of a new property. Mr Byrne stated that the claimant had an income of about £4,000 a month, including £2,200 for the children from the Council. The claimant told Mr Byrne, "… now my wages are lower". The exchange ended with an agreement that Mr Byrne make a deduction in respect of the claimant's housing expenses from her wages. The tribunal understood that this was to reimburse him for continuing to pay the claimant's housing bills.

31. Mr Byrne's account was that, following a meeting on 27 April 2017, it was agreed that the claimant's role would change again to that of care manager. According to Mr Byrne this involved a salary increase to £26,500 per year which was backdated to 24 February 2016. The tribunal had sight of what was agreed to be the claimant's new contract of employment in this role, although it was not signed. The contract stated that the claimant was required to work from the respondent's offices but, "ad hoc working from home can be agreed with management to ensure service delivery". The Claimant's account was that this April contract reflected the unilateral cut in wages imposed by Mr Byrne with effect from January 2017. She had no choice but to agree

to it after the fact, as he was threatening to dismiss her if she did not accept the new situation.

32. In May 2017 the claimant moved out of the former family home as she could no longer afford the bills. This allowed her to be closer to the office and reduce her commuting time. The move was very difficult involving her and the children staying with friends until they were housed by the Council. She took some sick leave at this time.

33. After the Claimant moved nearer to the office, the respondent required the claimant to start working full-time in the office, rather than permitting her to work out of the office in the afternoons. In order to fit around the claimant's childcare responsibilities, it was agreed that she could bring the three children into the respondent's office after school. (The children's grandmother also worked for the respondent in these offices.)

34. On 16 June 2017 a disagreement between the claimant and Mr Byrne about money spilled over into the office. There was an argument and the claimant used foul and abusive language to Mr Byrne in the office. The respondent started a disciplinary investigation managed by its quality manager. Following an investigation, the taking of statements and a hearing, the claimants received a final written warning for abusive behaviour towards Mr Byrne, walking out that day and falsifying records. The claimant at the time apologised and did not appeal.

35. According to the claimant, Mr Byrne had during 2017 continued to make things difficult for her at work in order to pressure her to resign. By July her position was untenable, and she resigned. The tribunal had sight of an email sent by the claimant to Mr Byrne on 21 July 2017 in which she stated, "I feel I have been given no choice but to resign due to a number of issues, including the change in my working hours, the cut in my wages and the constant personal issues between you and myself."

36. Mr Byrne was concerned that the claimant had resigned before and then retracted. Accordingly, he asked the Ms Biggs to discuss this with the claimant. Ms Biggs met with the claimant later that day and invited the claimant to change her mind or to raise a grievance about the matters raised in her resignation letter. The claimant did not wish to do so on the basis that this would make no difference and confirmed her intention to leave. Ms Biggs wrote to the claimant on 26 July accepting her resignation and confirming that her employment would cease on 18 August 2017 as agreed.

37. The Claimant worked the first two weeks of her notice period and took the remainder as annual leave.

38. On 1 September 2017 the Claimant became part owner of a new Care Agency. Her evidence was that the business did not start operating until after October 2017 and she had taken no steps prior to her resignation in preparing this business.

The Applicable Law

39. The applicable law is found at Section 95 of the Employment Rights Act 1996 as follows: –

> **95Circumstances in which an employee is dismissed.**
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . . , only if)—
>
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
>
> (b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, 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.

Submissions

40. Both parties made brief oral submissions.

Applying the law to the facts

41. The first issue for the tribunal was whether there had been a fundamental breach of contract as contended by the claimant.

42. According to the Court of Appeal in Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA,:

> 'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.'

43. Accordingly, a tribunal must consider whether the conduct relied upon by the employee constitutes a fundamental breach of contract. The claimant in this case relied on to the term of mutual trust and confidence which is implied into all contracts of employment. According to the Employment Appeal Tribunal in Morrow v Safeway Stores plc 2002 IRLR 9, EAT, any breach of this term is inevitably fundamental.

44. In assessing whether there has been a breach of the fundamental term of mutual trust and confidence, the employer's subjective intentions are irrelevant. The tribunal must consider whether the intent or effect of the employer's conduct amounted to a

fundamental breach. According to the employment appeal Tribunal in Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666, EAT:-

> "To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.'

45. The tribunal firstly considered whether the claimant had suffered an unauthorised unilateral deduction from her wages. Although the parties' cases as to wages due and paid were confused, neither party disputed that the claimant's wages had reduced significantly between November 2016 and February 2017. In the view of the tribunal, this was capable of amounting to a fundamental breach of contract.

46. The difficulty for the tribunal was that the arrangements between the respondent (in effect, Mr Byrne) and the claimant as to wages during the claimant's employment were confused and complex. It was far from easy to disentangle the personal relationship (and its breakdown) between Mr Byrne and the claimant from the employment relationship between the respondent and the claimant. This was illustrated by the agreement that the respondent would very significantly reduce the claimant's salary from March 2017 in order to, in effect, repay Mr Byrne who was paying for the housing and household expenses for the claimant and the children. (For the avoidance of doubt, this was not the reduction in salary which the claimant contended amounted to a fundamental breach. She accepted before the tribunal that she had consented to this deduction, by way of her email to Mr Byrne of 12 of March 2017 stating, "just do it.")

47. In addition, the tribunal had significant concerns about the reliability of witness evidence from both Mr Byrne and from the claimant. For instance, according to the claimant's witness statement, "In April 2017 Mr Byrne decided that I was to pay the mortgage and bills of the property… out of my wages which then cut my wages to around £200 a month. I had no say in the matter". However, when questioned by the tribunal the claimant accepted, with reference to the documents in the bundle, that she had consented to this deduction. In turn, according to Mr Byrne's witness statement the claimant, "has been absent from work full time since approx. August 2014". Further, in documents he had stated that the claimant had not done any work in the two-year period leading up to November 2016. Before the tribunal, with reference to numerous emails in the bundle, it was accepted that the claimant had worked considerable hours during this period.

48. In the view of the tribunal, the crucial question was whether the claimant agreed, as alleged by the respondent, to a new contract of employment on 12 November 2016 including a reduction in her salary. If so, the reduction in salary in February 2017 would not amount to a breach either of the implied fundamental term of mutual trust and confidence or an express term as to wages.

49. The tribunal reminded itself that the burden of establishing a breach of contract is upon the party that contends that the breach has occurred, in this case the claimant. The tribunal noted that there were a significant number of what the respondent contended were contemporaneous documents recording the new contract of November 2016, these included email exchanges, the contract itself and the letter of January 2017. The claimant contended that there were a number of inconsistencies in these documents, such as references to her having been absent from work either for one year or for two. However, in the opinion of the Tribunal, these inconsistencies were no more indicative of documents which were created together after the fact in order to establish a false narrative, than of documents genuinely created at the stated varying dates. The Tribunal viewed this as a neutral factor. The Tribunal could find no obvious signs that the contested documents were unreliable. The documents were of varying types including email chains, contracts, and letters. In some cases, the Claimant did not in fact contend that they were false, only that she could not recall them.

50. The tribunal considered the plausibility of the respondent's account. The tribunal accepted that the respondent's account was in broad terms credible. The claimant had been receiving the Registered Manager salary despite, on her own case, not carrying out the role for a very considerable time. She and the respondent had split up. The claimant had taken some time off to deal with the consequences of the relationship breakdown on her family. The claimant's relationship with the respondent was unstable and uncertain and continued to be so, as was reflected by her giving and then retracting her resignation in December 2016. In these circumstances, it was credible that the respondent would wish to clarify the situation, bring the claimant's contractual and salary arrangements into line with what was actually happening, and have everything recorded in writing.

51. The evidence as to the changes in the claimant's wages was limited. The tribunal did not have sight of payslips which might have provided, for instance, a job title or an hourly rate or a gross rate of pay. The tribunal only had sight of the claimant's bank statement showing her take-home salary. Neither party provided any explanation to the tribunal of why such documents, which might reasonably be expected to be in the possession of both parties, were not before the tribunal. Accordingly, the tribunal could only place very limited weight on the changes in the claimant salary at this time. It was clear that the claimant's take-home salary had varied very considerably between November 2016 and April 2017 but there was insufficient evidence to draw any reliable inferences from this, particularly in circumstances where the claimant and Mr Byrne's personal finances were difficult to disentangle from those of the respondent.

52. There was no documentary evidence from the claimant of her objecting to the reduction in wages. The only reference to a change in wages was in the email exchange in March 2017. This exchange occurred, the claimant's case, soon after her salary had been unilaterally reduced. In this exchange she stated, "I don't see why I have to pay anything (relating to the former family home) considering you left and now my wages are lower". This was in the context of a somewhat heated exchange

between Mr Byrne and the claimant about rearranging their mutual financial arrangements following the relationship breakdown. Although the email exchanges showed that the claimant had a strong sense of grievance, there was no reference to anything resembling a complaint of unilateral reduction in wages.

53. Further, the claimant agreed to the April 2017 contract. In view of the tribunal, this was somewhat more consistent with the respondent's case - that the April 2017 contract amounted to an increase from the previous contract - than the claimant's case - that she was formally agreeing to a recent deduction in wages to which she had strongly objected in February.

54. In the circumstances, where the tribunal had sight of plausible documents indicating that there was no breach of contract, there was not sufficient alternative evidence allowing the claimant to discharge the burden of showing that there was a fundamental breach of contract.

55. The tribunal next considered whether the respondent's withdrawal of what might be termed family friendly working arrangements amounted to a fundamental breach of contract. On the basis of the letter of 12 November 2016, the arrangement whereby the claimant was permitted to work out of the office in the afternoons, so she could carry out her childcare responsibilities, was expressly temporary and subject to review. Nevertheless, any removal of the family friendly working arrangements might still be capable of amounting to a breach of the implied term of mutual trust and confidence even if it did not amount to a breach of any express term.

56. The question for the tribunal was not whether the respondent's conduct in withdrawing family friendly working was unreasonable, but whether it amounted to a breach of the fundamental term of mutual trust and confidence. There is no duty of reasonableness implied into a contract of employment. In Western Excavating (ECC) Ltd v Sharp the Court of Appeal expressly rejected such an argument. Accordingly, the fact that an employer has behaved unreasonably does not necessarily mean that there is a fundamental breach of contract permitting an employee to resign and claim constructive dismissal. This was confirmed by the Court of Appeal in Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA.

57. The tribunal accepted that the respondent's decision that she had to work full-time hours in the office placed the claimant in a very difficult situation. Following the breakdown in her relationship she was in effect a single parent for three young children. Her financial circumstances had worsened very considerably, and she had just had to move to a new house in difficult circumstances. The tribunal accepted her evidence that the children were, understandably, in some distress at this time. The evidence before the tribunal showed that the claimant's previous working arrangement was very flexible and that to a very significant extent she had been able to collect the children from school and see to them after school. There was no suggestion that Mr Byrne had given up special guardianship of the children. However, there seemed no expectation either from the claimant or Mr Byrne that he would

continue to take any childcare responsibility for the children, who were the claimant's relatives and not his.

58. The tribunal also accepted that if the respondent had concerns about the practicability of the claimant's working so much out of the office it would have good reason to put a stop to this. The tribunal noted that the respondent made some adjustments to mitigate the claimant's difficulties by permitting her to bring the children into the office. In addition, the respondent did not require the claimant to work full-time in the office until she had moved nearer to its premises and the travelling became less problematic.

59. Again, the burden of establishing a breach of contract was on the claimant. The respondent relied upon a number of letters, emails and other documents to the effect that the arrangement that the claimant might work some of her contracted hours out of the office was temporary, and that respondent had raised concerns about the practicability of this arrangement as early as February 2017. The claimant either asserted these documents were forgeries or stated that she did not recall them.

60. This was an employer who having permitted an employee who had enjoyed considerable flexibility for a very long period, required her to give up this flexibility and bring her children into work every day. In view of the tribunal, having three young school-age children, however well-behaved, in the office every day would unavoidably cause some disruption to the respondent's business. It was therefore likely that the respondent would have to have good reason requiring the claimant to work in the office every day. The claimant's case in effect was that the respondent in the person of Mr Byrne was making her life difficult and wanted her to leave. However, this characterisation of his conduct was not consistent with the fact that he did not accept the claimant's resignation in December 2016. Even if the tribunal accepted the claimant's case that Mr Byrne had not actively discouraged her from resigning, it was not in dispute that he had not sought to take advantage of her resignation and had permitted her to retract. Mr Byrne's conduct, as accepted by the claimant, was not consistent with that of a person who wanted to get the claimant out of the business.

61. Accordingly, on the balance of probabilities the tribunal did not find it likely that the respondent's motivation in accepting the inevitable disadvantages of having three school-age children on its premises was its desire to get the claimant out of its business. Therefore, the fact that the respondent was prepared to accept this disruption indicated that there were at least some genuine difficulties with the claimant's working out of the office. This is corroborated by the letter of concern of February 2017. It is also consistent with the very difficult personal circumstances in which the claimant found herself in 2017.

62. In the context in which the respondent had warned the claimant of its concerns about her working out of the office, and the likelihood that there were some genuine difficulties with these arrangements and bearing in mind that the burden was on the claimant, the tribunal did not find that removal of family friendly working amounted to a fundamental breach of contract.

63. Next, the tribunal considered whether respondent's subjecting the claimant to a final written warning amounted to a fundamental breach of contract. It was not in dispute that the claimant had used highly offensive language against Mr Byrne, the Managing Director, in the office. Even if this behaviour had been provoked by Mr Byrne's behaviour outside the office (and the tribunal was not in a position to make such a finding) the claimant's conduct fell foursquare outside of what constituted appropriate office behaviour. The claimant herself accepted this before the tribunal. The tribunal viewed this conduct in context. The tribunal accepted that it was relevant that the claimant and Mr Byrne had been in a relationship which had broken down, and they were both working through their outstanding differences. Further, both accepted that working together was challenging and at times uncomfortable. Nevertheless, even in these circumstances subjecting an employee to a final written warning for highly offensive language in the office did not amount to a fundamental breach of contract.

64. The tribunal finally considered whether the three putative fundamental breaches relied upon by the claimant could amount to a fundamental breach if viewed cumulatively, even if they did not individually amount to such a breach. The tribunal noted that the claimant had, after the fact, accepted what on her case was a reduction in her wages by April 2017. The tribunal did not find that this taken together with the removal of family friendly working and the imposition of the final written warning in circumstances where the burden is on the claimant, amounted cumulatively to a fundamental breach.

65. Accordingly, the respondent did not fundamentally breach the claimant's contract of employment and the claimant was not constructively dismissed.

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Employment Judge Nash
Date: 12 August 2018