



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Bradley

Respondent: North Yorkshire County Council

HELD AT: Leeds

ON: 19 and 20 June 2018

BEFORE: Employment Judge Davies

REPRESENTATION:

Claimant: In person

Respondent: Mr Quickfall (counsel)

JUDGMENT having been sent to the parties on 20 June 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

- 1.1 This was a claim of unfair dismissal brought by the Claimant, Mrs S Bradley, against North Yorkshire County Council, her former employer. Mrs Bradley has represented herself and the Respondent has been represented by Mr Quickfall of counsel. Mrs Bradley represented herself with ability. She was well prepared and had a clear focus on the relevant points. That is to her credit and was of real assistance to me in dealing with the case.
- 1.2 The parties provided me with an agreed bundle of documents. There was a difficulty because Mrs Bradley and Mr Quickfall had been provided with an earlier version of the file which had different page numbers on it but we made sure as we went through that we were all looking at the same documents whenever questions were asked.
- 1.3 Mrs Bradley gave evidence on her own behalf. She had also asked for a witness order for another witness to come and give evidence for her. When that witness came she brought a written statement with her and the evidence she proposed to give was not what Mrs Bradley had been expecting her to give. It

was not supportive of Mrs Bradley's position and Mrs Bradley decided not to call her to give evidence. I released the witness from the witness order. For the Respondent I heard evidence from Mrs G Parlby, Deputy Manager at Woodfield House; Ms L Shepherd, Registered Manager at Woodfield House; Mrs M Miles, Provider Service Manager; and Ms C Taylor, Senior Night Care Resource Worker.

The issues

2.1 The issues I had to decide were as follows:

2.1.1 Did the Respondent fundamentally breach the contract of employment by breaching the implied term of mutual trust and confidence in that it:

2.1.1.1 allowed Mrs Bradley to smoke at work for a number of years in ignorance of the Council's smoke free workplace policy, putting her potentially at risk of disciplinary action or a fine;

2.1.1.2 implemented that policy from June 2017 inconsistently as between Woodfield House and Station View homes or as between day staff and night staff, or implemented the policy too quickly;

2.1.1.3 implemented that smoke free workplace policy at all;

2.1.1.4 failed to respond to the Claimant's grievance about these matters?

2.1.2 If so did the Claimant resign in response to that fundamental breach of contract and without affirming the contract?

2.1.3 If the Claimant succeeds in her claim of unfair dismissal, at the time she presented it did the Respondent fail to provide a written contract of employment to her and if so should she be awarded two or four weeks' pay?

The facts

3.1 The Respondent is North Yorkshire County Council. The Claimant worked for the Respondent at its Woodfield House elderly persons' home from 2013 onwards. Initially she just worked as a laundry assistant in the mornings. Then she took on a different job as a domestic assistant working in the afternoons. Although Mrs Parlby wanted her to work the afternoon job straight after the morning job she needed to go home to let her dog out and so she took an hour's break in between the two jobs. There came a point when she did not need to go home for her dog and she then started to work the two jobs back to back. By 2017 she was working 8am to 1pm as a laundry assistant five days a week and 1pm to 3pm as a domestic assistant on four days. At that time the Registered Manager was Ms Shepherd and the Deputy Manager was Mrs Parlby, who was the Claimant's supervisor.

3.2 The Respondent has a number of written policies in place and I was particularly concerned with its smoke free workplace policy. That policy was most recently revised in January 2017. The policy says on its face that it was implemented on 1 June 2006 and reviewed in August 2013 and January 2017. It makes clear that the Council, as part of its approach to safeguarding the health and wellbeing of its employees and visitors, has prohibited smoking in all its

workplaces. It sets out a number of aims. In a section dealing with the law and regulations, it refers to some 2007 Regulations under which it says fixed penalty notices of up to £50 can be imposed on someone who smokes in smoke free premises or that they can be fined if prosecuted and convicted. There are also much bigger fines for the person who manages the premises if they fail to prevent smoking there. The policy also sets out a number of things that it says will be treated as conduct issues. It says that staff will not take smoking breaks or use the flexi-time scheme during the working day in order to take smoking breaks. Further, staff will not smoke during claimed working time. Therefore staff should not take breaks to smoke throughout the day except during their lunch break.

- 3.3 The only other policy I need to mention briefly is the resolving issues at work policy. The particular point of relevance is that when somebody puts in a formal grievance the policy says that the person nominated to deal with it must arrange to meet with the person without “unreasonable delay”.
- 3.4 When the smoke free workplace policy was reviewed and revised in January 2017, the Council took a decision to make sure that it was enforced more consistently across all of its premises. That had not always happened. One of the places where it had not been strictly enforced was Woodfield House. When the policy had first been brought in a number of years ago Ms Shepherd had spoken to a manager. As a result she told staff at Woodfield House that they were allowed to smoke during their paid breaks on the premises and a place was designated out of doors and out of sight for them to do that. When the Claimant started working at Woodfield House in 2013 she was told that she could take her break in the morning and smoke in the outside area where she was shown. She did that and so did a number of her colleagues. When she increased her hours and started doing the afternoon job as well she would take a break at 2pm and have a smoke then too.
- 3.5 The Claimant told me that she was not told when she had her induction about the Council’s smoke free policy. Ms Shepherd did not do the Claimant’s induction. There were some documents in the file that looked like induction documents but they did not have the Claimant’s signature on them. I accept her evidence she was not told at the time about the smoke free policy. It seems that she was unaware of it until she got hold of a copy of the most recent version on 15 May 2018.
- 3.6 That brings me to May of last year. After the Respondent had decided that it was going to be more consistent about enforcing the smoke free workplace policy, there was a staff meeting at Woodfield House on 10 May 2017. The Claimant was not present, but at that meeting Ms Shepherd told the staff that the non smoking policy was going to be enforced and that they could not smoke on Council property or in a paid break. The Claimant’s colleagues told her about it the next day on 11 May 2017 and they were unhappy about it. They discussed how it might work. Some colleagues were aware that at a different home ,Station View, staff were allowed to take an unpaid break off the premises and make up the time at the beginning or end of their shift. There seems to have been a general view that that might be what would happen at Woodfield House. The staff thought that Ms Shepherd would sort it out with Mrs Miles because she had sorted it out with a manager last time.

- 3.7 On 15 May 2017 the Claimant requested a copy of the smoke free workplace policy and she was given one. Her understanding of the policy was that she was allowed to take an unpaid break off the premises to have a smoke and to make up the time. I am not sure if that is strictly correct. It does not appear to me that the policy entitled her to take an unpaid break. Rather, if she was entitled to an unpaid break, she was allowed to go off the premises and have a smoke. Anyway, her understanding was that in accordance with the policy she could take an unpaid break and go off the premises to have a cigarette.
- 3.8 On 23 May 2017 a copy of the smoke free workplace policy was put in the staff room and it was made clear to staff that starting on 1 June 2017 there would be no smoking on the property or in their paid breaks.
- 3.9 The first time the Claimant raised a concern with one of her managers was on 25 May 2017. She went to see Ms Shepherd but Ms Shepherd was not there so she spoke to Mrs Parlby. She told Mrs Parlby that she was not going to take her tea break and would smoke instead. Mrs Parlby said that she would make a note. She did not raise any objection. In fact, after speaking to the Claimant, Mrs Parlby rang Ms Shepherd. Mrs Parlby gave a bit more detail of that when she was cross-examined by the Claimant. She said that she rang Ms Shepherd and told her about her conversation with the Claimant. She told her that she had not agreed to any breaks. She said that she told Ms Shepherd that Mrs Bradley had decided she was taking them anyway. Ms Shepherd told Mrs Parlby to make sure she had recorded their conversation. Then they had a conversation about how they would manage the situation and that everybody would want to take breaks in this way. It was left that the Claimant needed to speak to Ms Shepherd.
- 3.10 The next day, 26 May 2017, Mrs Parlby saw the Claimant in the corridor and chased after her. She told her that she wanted to speak to her about the smoking breaks. There is some dispute about what was said in the conversation. In the oral evidence, particularly when Mrs Bradley was cross-examining Mrs Parlby, both Mrs Bradley and Mrs Parlby had a tendency to talk over one another and to voice their strong opinions on the subject. I can well imagine that in the conversation on 26 May 2017 there were times when one or other of them was not necessarily listening to what the other was saying. They may well have different perceptions and recollections of the conversation. Mrs Parlby made some notes, not whilst she was talking to Mrs Bradley but either later the same day or the next day. She did not send them to Mrs Bradley at the time and Mrs Bradley disagreed with some of what they said. I am not prepared to accept Mrs Parlby's notes as an accurate and balanced account of the conversation. It seems to me that it reflects Mrs Parlby's perception based on a discussion where she and Mrs Bradley were not always listening to one another. Further, not everything that Mrs Parlby wrote in her notes was consistent with the answers she gave Mrs Bradley when Mrs Bradley cross-examined her. So I do not rely on those notes as being an accurate account of the conversation.
- 3.11 The real substance of the dispute was whether the Claimant simply informed Mrs Parlby that she was going to be taking unpaid breaks or whether she asked for permission to do so and was refused. On that point the oral evidence was in fact reasonably clear. Mrs Bradley was quite consistent in saying in her witness statement and in the oral evidence that Mrs Parlby told her that she was going

on holiday and that she did not want her thinking that she could go on the street and smoke. In cross-examination Mrs Parlby accepted that she had said that to the Claimant. She also accepted in response to the Claimant's questions that the Claimant had asked her if she could take an unpaid break and smoke and Mrs Parlby said more than once that she told the Claimant that she could not give anybody permission to have an unpaid break because that was above her level. I find that is what was said.

- 3.12 There was also a dispute about whether or not Mrs Parlby told the Claimant she should speak to Ms Shepherd and I find that she did. That was consistent with her saying that she could not authorise anybody to have an unpaid break and it was consistent with how the conversation with Ms Shepherd had been left. I do not find that it was the first thing she said to Mrs Bradley. I find that the first thing she said was that she needed to speak to her about the breaks, particularly because she was going on holiday. However, I do accept that during the course of quite a long conversation Mrs Parlby did tell the Claimant she needed to speak to Ms Shepherd about it.
- 3.13 By the end of the conversation the Claimant was left with the impression that Mrs Parlby was not authorising her to take unpaid breaks. She was also aware that Mrs Parlby was saying that she could not go out on the street and smoke while Mrs Parlby was away on holiday. It was, it seems to me, clear that the situation was unresolved. That was how Mrs Parlby was leaving it before she went off on holiday but the Claimant needed to speak to Ms Shepherd to get a definitive answer.
- 3.14 That day was a Friday. The Claimant was then away on leave until Monday 5 June 2017 and Mrs Parlby was away until 9 June 2017. When the Claimant came back to work on 5 June 2017, Ms Shepherd was by that time back at work. They may not necessarily have worked the same shifts each day but there were certainly days when the Claimant and Ms Shepherd were both overlapping at work.
- 3.15 Whilst she was on annual leave Mrs Bradley had been pursuing this issue of the no smoking policy. She had rung HR and they had suggested to her that she could put in a grievance. She had therefore been to see the Citizens Advice Bureau who had helped her to write a grievance. It was dated 31 May 2017 and Mrs Bradley delivered it on 1 June 2017 to Ms Shepherd. She started the grievance by saying that she was unhappy with the smoke free workplace policy itself. She thought it was discriminatory and she thought it showed a heavy-handed attitude towards members of staff who smoke. Then she went on to set out the key issues of her grievance, namely: (1) that the policy was being implemented inconsistently because she had understood that at Station View home staff could take a smoking break and make up the time or have it deducted from their wages whereas she said that Mrs Parlby had told her she could not do that and that it was not allowed at Station View any more. She had met a member of staff from Station View on 29 May 2017 who had told her she knew nothing about a change in policy; (2) that she had not had enough time to consider the policy before it was implemented. She thought she should have had at least three months' notice to consider all the other options, one of which was for her to seek other employment; (3) that there was a fire risk because smokers might go and smoke somewhere where they should not; and (4) that the policy was not implemented fairly between night and day staff because it

was likely that the night staff would continue to smoke because there was no manager on site.

- 3.16 Ms Shepherd told Mrs Bradley that she would pass on the grievance to Mrs Miles. She did so the same day, 1 June 2017, and she confirmed that she had done so.
- 3.17 Once she returned to work on 5 June 2017 the Claimant did indeed adopt a practice of working through her tea break and leaving the premises at lunch time for about 10 minutes. She would clock out, take her break and then clock back in. Ms Shepherd saw her doing that and the Claimant knew that Ms Shepherd had seen her doing it. Ms Shepherd did not raise any concern with Mrs Bradley at all about her taking breaks to have a cigarette in that way. Although there was some overlap with their shifts Mrs Bradley did not go and speak to Ms Shepherd to talk about the situation with the smoking policy and she did not ask her if it was ok to take these informal unpaid breaks in the way that she had started doing.
- 3.18 I did not find Mrs Bradley's explanation about why she did not speak to Ms Shepherd particularly persuasive. She said it was because Mrs Parlby had told her that she could not take breaks and make the time up and that was the end of it. All the evidence I heard suggested that Mrs Bradley had a good relationship with Ms Shepherd and she knew she could ask her about this. Also she knew that Mrs Parlby did not have the final say and did not have the authority to approve these unpaid breaks. There was no very good reason for Mrs Bradley not to go and have a word with Ms Shepherd. It seemed to me that to some extent by this stage Mrs Bradley was on something of a mission as far as the smoke free working policy was concerned and perhaps did not do what might have been best for her in the circumstances, which was just to have a quiet conversation with Ms Shepherd about it. In any event, she continued taking the informal unpaid breaks with Ms Shepherd's knowledge and Ms Shepherd did not raise any concern.
- 3.19 Mrs Bradley told me that some time in mid-June she bumped into somebody she knew on the bus and told her about the difficulties she was encountering. Her acquaintance said that she was looking for someone to work some night shifts at the care home where she was a manager. Mrs Bradley told me that she was not actively looking for a job. It was just a coincidence she bumped into her acquaintance and she agreed that the acquaintance could ask for a reference from Ms Shepherd. It may well be that she just bumped into her, but I find that she must have expressed an interest in the job, because her acquaintance did ask Ms Shepherd for a reference and indeed Mrs Bradley started work at that care home very shortly after resigning from Woodfield House. Once she bumped into the person it seems to me that she did pursue this as a job opportunity.
- 3.20 There was another staff meeting on 15 June 2017 and Mrs Bradley was present. Ms Shepherd said that the smoking policy was in place and that Mrs Miles had confirmed that all of the Council's property was a no smoking zone and that they could incur a heavy fine if anyone was found smoking on the premises. Ms Shepherd said that no unpaid breaks could be permitted to accommodate smokers. That was of course a little bit different from what was in fact happening with Mrs Bradley, with Ms Shepherd's knowledge.

- 3.21 By 20 June 2017 Mrs Bradley had not heard anything back about her grievance so she rang HR to find out what the time scales were. They went away and checked and told her that it had to be dealt with in a reasonable time. She tried at that stage to get hold of a copy of the grievance policy from HR but she had some issues accessing the work intranet at home. However, when she was at work on 23 June 2017 she asked the duty manager for a copy of the grievance procedure. The duty manager helped her to find a copy and printed it off for her.
- 3.22 The Claimant thought about it over the weekend and she wrote a letter of resignation on the Sunday, which she handed in on Monday 26 June 2017. She said that she had thought about her job and she was not happy with the way the Council had implemented the smoke free workplace policy. She went on to say that she had written a grievance letter on 1 June 2017 and had had no acknowledgment or reply and had not been given a date for a meeting to discuss it. She thought this was unreasonable and that no-one had taken any notice of it. She described her conversation with HR on 20 June 2017 about trying to get hold of a copy of the policy. She said that she had exhausted all her options and felt she had been forced into terminating her employment. So she did so with immediate effect.
- 3.23 As I have indicated, by the time she came to resign Mrs Bradley had not heard anything from Mrs Miles about her grievance, not even an acknowledgement that she had put it in. Mrs Miles's evidence was that this was simply because of pressure of work on her part. Very shortly after resigning, Mrs Bradley started in a new job at the care home to which I have already referred. She did not start doing shifts straightaway because she needed a DBS check, but she attended training and induction, for which she was paid, and then she started doing some shifts.

Legal principles

- 4.1 The right not to be unfairly dismissed is set out in s 94 of the Employment Rights Act 1996. Section 95 of that Act defines what is meant by dismissal. This includes (s 95(1)(c)) what is usually called constructive dismissal, i.e. where the employee terminates the employment contract, with or without notice, in circumstances where he or she is entitled to so without notice by reason of the employer's conduct.
- 4.2 It is well-established (see *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221) that in considering whether an employee has been constructively dismissed, the issues for a Tribunal are:
- 4.2.1 Was there a breach of the contract of employment?
 - 4.2.2 Was it a fundamental breach going to the root of the contract, i.e. such as to entitle the employee to terminate the contract without notice?
 - 4.2.3 Did the employee resign in response and without affirming the contract?
- 4.3 It is an implied term of the contract of employment that the employer will not, without reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: *Malik v BCCI* [1997] IRLR 462. The EAT has emphasised that this is a demanding test. The employer must in essence

demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract: see *Frenkel Topping Ltd v King* UKEAT/0106/15/LA at paragraphs 12-15. Furthermore, individual actions taken by an employer that do not by themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust and confidence, thereby entitling the employee to resign and claim unfair dismissal.

- 4.4 The essence of constructive dismissal is repudiation by the employer, which is accepted by the employee. The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as being at an end. The employee's resignation must be in response (at least in part) to the repudiation, which must be the effective cause of it: see *Nottinghamshire County Council v Meikle* [2005] ICR 1, CA; *Wright v North Ayrshire Council* UKEATS/0017/13/BI.

Application of law to the facts

- 5.1 I turn to the issues. The first question is whether the matters about which Mrs Bradley complains, either taken separately or when they are all added together, amounted to a fundamental breach of the implied term of trust and confidence.
- 5.2 The first matter was the concern that she had been allowed to smoke for a number of years in ignorance of the policy and therefore put at risk of facing a fine or disciplinary proceedings. I find that that was not conduct that was calculated or likely to undermine mutual trust and confidence. Mrs Bradley was never actually warned or threatened with disciplinary action or a fine and in the circumstances where her manager had authorised her to take smoking breaks in the way that she did, she was not in practical terms at such a risk. I can see that with hindsight she is upset not to have known that that was the policy at the time but I do not find that the Respondent's conduct was calculated or likely to undermine mutual trust and confidence.
- 5.3 The next part of Mrs Bradley's complaint is the fact that the Council was implementing the smoke free workplace policy. It was a longstanding policy. It was concerned with the health and safety of employees and with the commitment of the Council, as a public body, to a smoke free workplace and to encouraging its employees to adopt a healthy lifestyle. I consider that the Council was entitled to take the decision that the policy should be fully implemented or enforced across its premises. Indeed, what it was really doing in January 2017 was removing the inconsistency in approach that there had been up to that date. I do not find that this was conduct that was calculated or likely to undermine mutual trust and confidence.
- 5.4 Next I deal with Mrs Bradley's concerns about inconsistency. When she wrote her grievance the smoke free policy had not yet been properly brought in force at Woodfield. What she wrote was based on something she had heard from somebody at Station View during this transition period, something she had heard from one of the night workers at Woodfield and perhaps some speculation about what might happen. Concerns about what might happen or whether there might be inconsistency in the future are not the same as finding out after the event that in fact the approach is inconsistent. If after 1 June 2017 it had come to Mrs Bradley's attention that the policy at Station View was an

entirely different one and that workers there were still being allowed to take smoking breaks on the premises when workers at Woodfield House were not, that might have been a different matter. But that was not the position when she wrote her grievance or when she resigned. Mrs Bradley has not identified conduct on the part of the Respondent that was calculated or likely to undermine trust and confidence.

- 5.5 Next Mrs Bradley complains about the implementation of the policy being too quick. She knew about it from 11 May 2017, so she had around three weeks' notice. She was also able in practice to take informal unpaid breaks with Ms Shepherd's knowledge once the policy started, so she was able to continue attending work and having a smoking break. In those circumstances, and given the importance for the Council of doing this consistently across all of its premises, I do not consider that the speed of implementation was conduct that was calculated or likely to undermine trust and confidence.
- 5.6 That then brings me to the question of Mrs Bradley's grievance and this seems to me to be the only real point of substance in her complaint. It plainly is not good enough that an employee should hear nothing about her grievance for three weeks, not even an acknowledgement or a holding response. But at the same time Mrs Bradley did not chase this up with Mrs Miles or Ms Shepherd. She was at work and in practice a solution had been found so it was not urgent in the same way that it would have been if she had been unable to attend. The threshold for establishing a breach of the implied term of trust and confidence is a high one. I do not consider that this shortcoming by itself meets that high threshold. The Council was not evincing an intention no longer to be bound by the contract. The failure to acknowledge the grievance for three weeks might have been capable along with other things of contributing to a breach of the implied term of trust and confidence, but as the only substantive point of complaint it does not amount to a fundamental breach of the implied term of trust and confidence.
- 5.7 For those reasons I find that there was not a fundamental breach of contract by the Council. That means that Mrs Bradley cannot show that she was constructively dismissed and she cannot succeed in a claim of unfair dismissal.
- 5.8 Even if I had found that there was a fundamental breach I would have gone on to find that Mrs Bradley did not resign because of a breach of contract, but because she had found a new job where she could smoke and she did not like the Respondent's approach towards smokers as set out in the smoke free workplace policy. She had pursued the job opportunity that presented itself, at a time when her grievance had been more recently submitted, and she started that job as soon as she left. So Mrs Bradley's unfair dismissal claim would not have succeeded on that ground in any event. However, I did not get that far because there was no fundamental breach of contract.

Employment Judge Davies

26 July 2018

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