



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Mrs J McGovern

**Respondent:** Medsolve UK Limited

**Heard at:** North Shields Hearing Centre

**On:** 11 July 2019

**Before:** Employment Judge Speker OBE DL

***Representation:***

**Claimant:** In Person

**Respondent:** Mr Jonathan Day, Director

## RESERVED JUDGMENT

1. The claim of constructive unfair dismissal is unsuccessful and the claim is dismissed.
2. The claims for unauthorised deduction of wages in respect of pay during suspension and payment for a shift on 26 December 2018 are dismissed.

## REASONS

1. These claims were brought by Mrs Joanne McGovern against her former employer Medsolve UK Limited for whom she worked as a registered general nurse. The commencement of the hearing was delayed because the claimant had in error attended at the Court in Newcastle upon Tyne despite the fact that the all of the correspondence to her from the Tribunal had indicated that the matter was being dealt with in North Shields. More particularly the letter sent to the parties by the Tribunal on 21 March 2019 setting out notice of today's hearing and also sending out case management orders made it very clear that the claim was to be heard by an Employment Judge sitting alone at 2<sup>nd</sup> Floor, Kings Court, Earl Grey Way, Royal Quays, North Shields, Tyne and Wear today Thursday 11 July 2019. The case was stood down awaiting the arrival of the claimant at the

Tribunal at approximately 10.45 am. She brought with her, her statements and bundles of documents which were handed to me and to the respondent's representative so that the case eventually commenced at 11.00 am.

2. I went through with the parties the case management orders and the timetable which had been set out in the letter of 21 March 2019 but unfortunately that schedule had not been followed. Some action had taken place with regard to the claimant supplying details of her remedies although without detailed calculation. Discovery had only been dealt with in part in that there had been no exchange of documents. As to the full written statements of the evidence which were to be exchanged by 30 May 2019, the respondent had sent witness statements to the claimant approximately 1 week before the hearing. The claimant had not disclosed any witness statements until the morning of the hearing. As both parties were not legally represented, there was no agreed statement of issues.
3. The respondent had prepared a bundle of documents for use at the hearing. The claimant brought a much briefer bundle of documents which included her hand written witness statement.
4. The claimant confirmed that the claims being brought to the Tribunal were as follows:-
  - i) Unfair Constructive Dismissal
  - ii) Claim for pay in relation to periods of suspension
  - iii) Claim for pay in relation to a shift on 26 December 2018
5. There was an issue with regard to jurisdiction in that there was a disagreement between the parties as to the commencement date of the employment, the claimant stating that it commenced on 3 March 2015 whereas the respondent stated that there had been a break in employment and the correct date of commencement was 9 December 2017 when the claimant had recommenced employment. This was not a point which had been raised in the response but as it was a jurisdictional matter I explained that it needed to be addressed as on the basis of the date put forward by the respondent, the claimant did not have 2 years continuous qualifying service for the purposes of bringing a claim of unfair dismissal. Mr Day confirmed that this has not been raised and that had there been legal representation it may have been. There were discussions to whether it was appropriate to adjourn as the matter might have been suitable for a preliminary hearing. However, applying the overriding objective I directed that this was an issue which would be dealt with during today's full hearing and that evidence would be given with regard to the question of continuous employment.
6. Evidence was given to the Tribunal by the claimant herself. On behalf of the respondent two witnesses gave evidence namely Lisa Dodds, Managing Director and Marie Clark, Recruitment Manager.
7. The facts found are as follows:-
  - 7.1 The claimant has worked as a registered nurse for over 30 years. This has included a lengthy period during which she had obtained work through

various companies and worked shifts mainly at care homes and on many cases on night shift.

- 7.2 Medsolve is a company in the business of providing nursing staff to care homes and care companies.
- 7.3 The claimant was employed by the respondent originally from 3 March 2015 and from then undertook shifts on a regular basis. A schedule produced to the Tribunal contained records of shifts performed from 27 May 2016 but not earlier than that. This schedule showed that after a shift undertaken on 28 July 2016 there was then a gap before the next shift which was on 11 February 2018. There was therefore a 67 week break between these two shifts. There was a conflict between the parties as to whether this amounted to a break in employment or a temporary cessation during which time the claimant, owing to her own personal circumstances, did not take any shifts. The respondent maintained that this amounted to a break in employment. The claimant suggested that she remained “on the books” and was still an employee. The respondent’s case was that when the claimant was employed under the contract produced to the Tribunal dated 9 November 2017, this amounted to new employment. The claimant maintained that this was a new contract form but continued her earlier employment. The contract itself stated that the employment with the respondent company began on 9 November 2017. The contract further stated that “no employment with any other employer counts as part of your continuous employment with the company” but it did not say anything about earlier employment with the respondent company. A finding on this issue is essential as it governs the entitlement of the claimant to present a claim of unfair dismissal.
- 7.4 The contract guaranteed the claimant a minimum of 337 hours of work a year equating to approximately one shift a week. There was no maximum and the claimant could undertake additional shifts but there was no guarantee of these in the contract. This was therefore not a zero hours contract.
- 7.5 Having signed the new contract, the claimant indicated that she was having certain personal problems and would contact the respondent when she would be ready to take shifts and undertake work. During this period the respondent then received notification from Durham Constabulary by notice dated 1 December that there was a current investigation in relation to the claimant for fraud and theft with regard to a vulnerable adult namely her father.
- 7.6 During the early part of 2018 the claimant requested that she be given some work. The respondent’s Compliance Manager Sam Ashmore contacted the police. At that stage there had been no instruction that the claimant could not work with vulnerable patients and she was therefore allocated shifts on 11 and 12 February 2018. On 3 February the police e-mailed the respondent stating that the claimant should not be working with vulnerable adults due to the ongoing investigation. The respondent

informed that claimant that in these circumstances no further shifts would be offered whilst the investigation was continuing.

- 7.7 The claimant had been given update training in view of the time which had elapsed since she had previously undertaken work.
- 7.8 In April 2018 information was received to the effect that the police investigation was concluded. There was a meeting between the claimant, the Compliance Manager and the Managing Director and it was agreed that the claimant could return to work. She was then allocated shifts during April, May, June and July and into August 2018.
- 7.9 On 7 August 2018 when the claimant was working a shift at Chase Park Neuro Centre there was an incident during night shift. The home at which the claimant had worked made a complaint to the respondent and suggested that the conduct of the claimant should be referred to the NMC in relation to her fitness to practise. As a result of this report the claimant was suspended from work pending investigation. This ultimately led to a disciplinary investigation by the respondent. At the disciplinary hearing on 18 September 2018 conducted by Lisa Dodds, the claimant was issued with a final written warning as well as instructions that she would be expected to make improvements in various respects. The respondent's Compliance Manager had recommended to the Managing Director that the claimant be dismissed but the Managing Director had considered that a final written warning was appropriate. The letter confirming the disciplinary hearing gave the claimant the right to appeal. She did not exercise that right.
- 7.10 The claimant continued undertaking shifts throughout September, October, November and into December 2018.
- 7.11 On Boxing Day, 26 December 2018 the claimant was scheduled to undertake a shift at Deneside. On arrival she was informed that another nurse had arrived from a different agency to undertake that shift. It was then indicated that the claimant could not undertake the shift as she was not trained in care of tracheotomies. The claimant contacted Marie Clark who was on call and she confirmed that this was an error as far as the home was concerned and that the claimant should wait for further instructions as it would be possible to find a shift for her that night at a different home. In the event the claimant was then requested to undertake a shift elsewhere, but she said having driven 25 miles on Boxing Day she would not work a shift and would return home. The claimant maintained that she should still be paid for this shift by the home as it was their mistake. However, the home declined to make any payment, as did the respondent.
- 7.12 On 29 December 2018 the claimant undertook a night shift at a home Debruce Court Care Home. She was the senior nurse on the shift. A member of staff called Alice was working on the night shift as was a nurse called Josh who was also the husband of Sam Ashmore the respondent's

Compliance Manager. There were disagreements during the shift about which there was no evidence other than that given by the claimant. She maintained that Josh was deliberately undermining the work of the member of staff Alice and was also criticising the claimant who, as the senior member of staff, had the obligation to ensure that Alice performed her duties correctly. She claimed Josh was suggesting that she was not. This was an unpleasant shift for the claimant. When it came to an end she met Alice for coffee outside the home and they reassured each other that they would give mutual support in the event of any further problems. The claimant was due to work the next night at the same place.

- 7.13 When the claimant arrived home from work she discussed the matter with her husband. At 10.40 am that day, Sunday 20 December she sent a text to the respondent stating as follows:-

“I am resigning with immediate effect. I wish to cancel all my shifts with Medsolve. This is not open for discussion. Joanne McGovern.”

The respondent attempted to contact the claimant to engage with her but she did not respond.

### **Submissions**

8. On behalf of the respondent Mr Day stated as follows:-

- 8.1 Continuous employment - although the company did not have a P45 or evidence of the induction of the claimant late in 2017, the evidence of the respondent's witnesses was that this amounted to new employment in 2017 and that the 67 week break amounted to a break in the continuity of employment. Therefore the claimant would have no 2 year qualifying period and was not entitled to bring a claim of unfair dismissal.
- 8.2 Payment during suspension – the contract indicated that the claimant was on a minimum annual pay. There was a right for the respondent to withhold pay during any period of suspension. There was no right for the claimant to receive such payment.
- 8.3 Shift on 26 December – although the error was made by the care home the claimant had been told that other work would be found for her. She therefore totally failed to mitigate her loss and should not be entitled to receive any payment for that shift as she did not carry out any work.
- 8.4 Constructive Dismissal – Mr Day argued that the claimant had not shown any fundamental breach of contract as a reason for her resigning. Even if there was a breach with regard to the matters complained of in relation to the delay in getting the claimant back to work and the incorrect reliance upon guidance from the police, this was not the reason the claimant had resigned. She did not resign promptly after any of these matters. There was no basis for her to resign following the event on the final night as

there was no breach of contract by the respondent. Any suggestion that the claimant was resigning as result of a last straw because of her confrontation with the Compliance Manager's husband was not substantiated.

9. The claimant on her own behalf criticised the conduct of Medsolve in many respects and submitted that they did not adhere to proper policies and procedures.

9.1 Mr Ashcroft in particular had not assisted her and had allowed long periods to elapse when she was not given any work when he should have made enquiries the NMC and the DBS. The police had been wrong to suggest that she could not work during the investigations. She should be paid during these periods of suspension when she was able and willing to work. The company did not keep her in the loop. As to the shift on 26 December she had travelled to undertake work. She was entitled to be paid for that shift. She maintained that she had not been offered any other shift. She submitted that she had been subjected to unfair treatment for a long period of time

9.2 She should not have received a final written warning as the matter has not been properly investigated and she was not provided with any documentation or evidence. Also the final written warning was said to have taken into account earlier safeguarding issues but these had been outside of work and should not have been relevant. She had not appealed against the final written warning or the disciplinary findings because she felt it would have been a waste of time.

9.3 As to the final incident, she considered it was inevitable that there would be a report made against her by the Compliance Manager's husband and that as she was on a final written warning this would have led to her being dismissed and further referrals made about her. For that reason she resigned. She did not consider there was any point in submitting a grievance. She maintained that there was no one in whom she had confidence who she could consult. She argued that she was therefore constructively dismissed.

## 10. The Law

### **Constructive Dismissal**

#### **Employment Rights Act 1996**

*S.95(1).....an employee is dismissed by his employer if:-*

*[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*

#### **Western Excavating (ECC) Ltd -v- Sharp 1978 ICR 221 CA**

## Findings

11. For the purposes of the claim of unfair dismissal (constructive) it was necessary for me to consider whether the employment commenced on the date suggested by the claimant or the respondent. I referred to the points made in subparagraph 7.3 above. In favour of the claimant's argument was the fact that there was no documentary evidence showing that her employment came to an end after the shift on 28 July 2016. Also there was the fact that the list of shifts produced by the respondent included shifts during the period 2016 which was of course before the claimant signed her new contract in November 2017. The claimant maintained that she remained an employee of the respondent throughout and that she was not taking shifts only because of her personal circumstances and her caring duties in relation to her father.
12. For the respondent it was argued that the contract showed that the claimant was commencing a new period of employment and that the length of the break in itself was evidence of this. The description was of her being re-employed rather than this being continuous employment. This was an important point with regard to jurisdiction. The evidence was less than complete. However, I consider that on the balance of probabilities it was reasonable to interpret the circumstances as indicating that the claimant continued to be an employee of the respondent during the break referred to. This means that she did have the relevant period of qualifying service at the time her employment came to an end and accordingly the Tribunal has jurisdiction to hear the unfair dismissal claim of constructive dismissal.
13. In the leading case of **Western Excavating (ECC) Limited v Sharp 1978** the Court of Appeal ruled that for an employer's conduct to give rise to constructive dismissal this must involve a repudiatory breach of contract. As Lord Denning MR stated:-

*“If the employer is guilty to 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.”*
14. In order to establish constructive dismissal the employee must show:-
  - i) There was a fundamental breach of contract on the part of the employer.
  - ii) The employer's breach caused the employee to resign.
  - iii) The employee did not delay too long before resigning, thus affirming the contract and losing the right to claimant constructive dismissal.

15. The claim form submitted by the claimant did not explain the basis upon which it was suggested that the respondent had been guilty of such a fundamental breach of contract. However, as she was unrepresented, the claimant was encouraged to demonstrate how she had reached the decision to resign and to what she attributed this, whether a breach of an express or implied term of the employment contract. In this context the claimant had a long list of complaints against the respondent which she said ultimately led to her resigning and being entitled to do so:-
- i) Delay by the respondent in clarifying the position as to the pending police investigation.
  - ii) Wrongly relying upon guidance given by the police rather than make its own enquiries.
  - iii) Ignoring the fact that the claimant was short of money and although willing to get back to work was being prevented from doing so.
  - iv) Taking inappropriate action with regard to aspects of the DBS registration of the claimant and in particular referring to her use of incorrect names.
  - iv) Unfair disciplinary process arising out of the report of alleged poor performance and ultimately imposing an unfair penalty namely final written warning.
  - v) Refusing to make payment for a Boxing Day shift.
  - vi) Being in a conflict situation with the Compliance Manager's husband during a shift which led the claimant to the conclusion that inevitably she would suffer further referral to the NMC and be dismissed bearing in mind she was subject to a final written warning.
16. Although the claimant did not clearly say how she maintained that these matters amounted to a significant breach, she did suggest that it was a pattern of unfair conduct and it could be presumed that she was suggesting that there was a breach of the implied breach of trust and confidence which should exist between employer and employee.
17. On the respondent's side it was suggested that there was no substance in the allegation that there was a breach of an express or implied term of the contract. Of relevance was the fact that when facing disciplinary action in August 2018, the evidence was that the Compliance Manager had urged the Managing Director to dismiss the claimant and in fact she had decided not to do so but had imposed a warning. There was also unchallenged evidence to the effect that the respondent had been supportive of the claimant and had persisted in continuing her employment despite the police investigation and that other agencies might not have done so. Also they had provided additional financial support knowing of her difficulties and had assisted with employing her despite the fact that on many



occasions she had cancelled shift work at short notice. They also relied upon the fact that the claimant had not submitted any grievance and that her suggestion that she had no one in whom she could be confident conflicted with the treatment she had received both from the Managing Director and from other employees who testified to having a good relationship with her.

18. I do not find that the claimant has established any significant breach of the employment contract as to justify her resignation. I sympathise with the claimant because of her domestic stresses, pressures and the fact that she had considerable anxiety with regard to the ongoing police investigation and referrals to the NMC. However, regard must be had to the fact that the respondent had statutory obligations to the public at large and to preserve its own registration by ensuring that no one undertook work about whom there was an ongoing investigation bearing in mind that the work being undertaken was with vulnerable adults. It is entirely reasonable that the respondent, when given guidance from the police, should not have placed the claimant for work during a time when there was an ongoing investigation. It was proper for the respondent to carry out these checks on a regular basis and to accept guidance. Not to do so could potentially be placing others at risk and of course jeopardise the continued registration and the existence of the respondent company itself.
19. With regard to the disciplinary action taken against the employer I do not find any evidence of any breach of contract on the part of the respondent. A disciplinary hearing took place and was conducted by the Managing Director with whom the claimant had a good relationship and about whom she said she had no grievance. The Managing Director had exercised discretion in her favour and imposed a final written warning. There may have been some deficiencies with regard to the disciplinary process and the claimant had been dissatisfied with the fact that she did not receive adequate documentation. However, the claimant had the option to appeal against the disciplinary finding and she did not do so.
20. She continued to work on a regular basis for the respondent following the imposition of the final written warning. As far as the incident on 29 December 2018 was concerned, I must consider whether this amounted to something which could be regarded as part of a series of events and a last straw. I find emphatically that it does not. It involved an employee, Josh, about whom nothing had been mentioned in the past. The fact that he was the husband of the Compliance Manager against whom the claimant felt a sense of grievance, did not in itself amount to any breach as far as the respondent was concerned. If the claimant felt that she was being unduly treated or was subject to the threat of subsequent action, then the appropriate steps which she would have taken (bearing in mind she had support from Alice the nurse in the home) was to make an immediate report to her superiors and to lodge a grievance. The suggestion that this conflict situation meant that she would inevitably be dismissed or referred to the NMC appeared to be an unrealistic and unspecified conclusion. It certainly did not give the claimant any valid basis for immediately resigning from her employment without raising the matter with her employers, making a report or submitting a grievance. The fact that she declined to engage with anyone from the respondent company who tried to contact her having received the resignation

text, was a further indication that the claimant did not act reasonably and was not entitled to resign when she did.

21. In these circumstances I do not find the claim of constructive dismissal established and I therefore dismiss that claim.
22. Pay during suspension – the pay of the claimant was based upon shifts worked. Her contract gave her a minimum number of shifts per year and she had exceeded the number of hours. She was therefore only entitled to be paid when undertaking shifts. On the basis of the contract, it was reasonable for the respondent to withhold pay during periods of suspension and that is what occurred in the present case. There has therefore been no unauthorised deduction of pay. The claim for pay during the suspension period is therefore dismissed. I add to this the fact that it appears, although the point was not argued, that any claim for such payment is out of time. If the claimant maintained that she was being deprived of pay early in 2018 or during other suspension periods then she had the right to bring a claim to the Tribunal but any such claim should be within 3 months of any such deduction. On that basis therefore any claim for such unauthorised deduction of wages was out of time and the Tribunal had no jurisdiction to hear it.
23. Shift on 26 December 2018 – the evidence in relation to this shift is to the effect that there was an error made by the home who had requested nursing services. The respondent sent the claimant to undertake this shift and the documentation showed that she was engaged to do it. On arrival another nurse had been engaged. It then transpired that what was required was a nurse who was qualified in care of tracheotomies. The claimant was not so trained and therefore she was not able to undertake the shift. However, the manager on duty confirmed to the claimant that another shift would be found for her that night and that the claimant should await instructions. When spoken to a short time afterwards, the claimant made it clear that she had decided that she would not work after all and even though another shift was available to her she was going home. Accordingly the fact that she did not receive payment was the result of her refusal to undertake the alternate shift which was being offered to her. Although it was unfortunate particularly on Boxing Day night she should have been inconvenienced in this way, the failure to receive any wages was the result of her refusal to undertake the alternative shift offered to her.
24. For the reasons stated, all of the claimant's claims are dismissed.

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**EMPLOYMENT JUDGE SPEKER OBE DL**

**JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON 23 July 2019**

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