



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Caparros

Respondent: Cardiff and Vale University Health Board

Heard at: Cardiff **On:** 11 and 12 September 2019

Before: Employment Judge S Moore

Representation:
Claimant: Mrs T Marsh (friend)
Respondent: Mr G Graham (Counsel)

JUDGMENT

JUDGMENT having been sent to the parties on 13 September 2019 and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background and Introduction

1. This is a claim for constructive unfair dismissal. The ET1 was lodged on 2 May 2018. The Claimant was represented by a litigation friend Mrs Marsh and the Respondent was represented by Mr Graham of Counsel. I had a bundle of documents running to 491 pages and an additional bundle of documents provided by the Claimant. I heard evidence from the Claimant and Ms C Dolan (her RCN Trade Union representative) and Mr S Barrett, Ms R Barry and Mrs R Bona for the Respondent.

2. Issues to be determined

- i. Did the Claimant resign because of an act or omissions (or series of acts or omissions) by the Respondent? The Claimant confirmed the breach she relied upon was the imposition of supervised practice in October 2017.
- ii. Did that conduct by the Respondent amount to a fundamental breach of contract?
- iii. Did the Claimant affirm the contract following the breach?
- iv. If so has the Respondent shown the reason for the dismissal?
- v. Was the reason for dismissal a potentially fair one?
- vi. Did the Respondent otherwise act reasonably?

The Law

3. The relevant law is contained in Section 95 (1) c) ERA 1996 which sets out circumstances in which the Claimant will be dismissed if the employee terminates the contract.
4. Following **Western Excavating (ECC) v Sharp [1978] IRLR 27**, the employee must establish:
 - that there was a fundamental breach of contract by the employer;
 - that the employer's breach caused the Claimant to resign;
 - the employee must not delay too long before resigning or he will have affirmed the breach and lose the right to be discharged from the contract.
5. In **Malik & Mahmud v Bank of Credit & Commerce International SA [1997] 3 W.L.R 95** the implied term of mutual trust and confidence was held to be as follows:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

Findings of Fact

6. The Claimant was employed as a Band 5 Staff Nurse on a neurosurgical ward at the University Hospital Wales from 1 March 2008. Prior to the event that led to this Tribunal the Claimant had had an unblemished record and career as a nurse.
7. In the summer of 2015 the Claimant was diagnosed with skin cancer and as a result was absent from work between June and August 2015. The Respondent chose to treat this cancer absence as requiring an informal discussion under their absence management procedure and did not refer the Claimant to Occupational Health. She was certified fit to return to work

and did not raise any issues arising from this decision by her Line Manager although she felt unsupported and emotional regarding the informal discussion and her diagnosis.

8. On 25 September 2015, shortly after the Claimant had returned to work following her absence for the skin cancer treatment she was on duty on the ward. A colleague, Emylou Tobas, asked the Claimant to perform a urinary catheter insertion on a male patient which the Claimant was fully trained to do. The Claimant carried out this process but observed that blood was coming from the tube from the catheter so removed the catheter and pulled the patient alarm bell which resulted in Staff Nurse and Doctor attending and taking over. It was common ground there was bleeding from the patient's penis, the patient alleged he lost one litre of blood although the actual amount was never established. Although she had obtained oral consent from the patient, the Claimant failed to document the above incident and that she had obtained consent. The Claimant accepted that it was her responsibility to document the incident and had failed to do so.
9. On 27 June 2016 the Respondent received a formal complaint from the patient about the incident making a number of allegations including that the catheter had been removed whilst the balloon had still been inflated in the penis which had resulted in loss of one litre of blood, lacerations, scarring and problems since. The Claimant was called to a meeting with Lorraine Donovan on 8 July 2016. She immediately recalled the incident. She was shown the notes of Emylou Tobas (which were difficult to read and limited to two lines) and this prompted her to recall she had failed to document the incident. She immediately admitted to Ms Donovan that she had failed to document the incident. The Claimant was asked to write a reflection. On taking advice from the RCN she instead wrote a statement on 20 July 2016.
10. The Respondent responded to the patient complaint in August 2016, having contacted both the Urologist doctor who had treated the patient at the bedside and the later treating Consultant Urologist. The patient had alleged that the Consultant Urologist had informed him that he needed a circumcision due to scar tissue caused by the abrupt removal of the catheter. When the Respondent checked with the Consultant this was not corroborated by the Consultant who reported a normal urethra and bladder with no signs of scarring.
11. The Claimant heard nothing further formally from the Respondent until 28 November 2016 when she was called to a meeting with Mr Briggs and Lorraine Donovan and told there would be a formal investigation. This coincided with the Respondent being notified there had been a complaint to the Public Service Ombudsman for Wales on 21 November 2016 and I conclude that the formal investigation was instigated as a result.

12. On 30 November 2016 there was a letter to the Claimant from Ms R Barry, Lead Nurse, advising her there would be a formal disciplinary investigation. The allegations were that she had failed to document the care provided to the patient on 25 September 2015. She was advised that the allegations were serious and if proven could amount to a gross misconduct offence. The Claimant was very upset about the turn of events and subsequently went off sick until February 2017. Mr Barrett was appointed as the Investigating Officer and sent the Claimant a letter on 9 February 2017 setting out different allegations, namely that the actual clinical procedure was being questioned that the Claimant was alleged to have pulled the catheter out without deflating the balloon. Mr Barrett later accepted that he had made an error in this regard and the allegations were limited to failure to document only. There was an investigation meeting on 20 February 2017 and the Claimant returned to full duties on the ward following a phased return on 23 February 2017.
13. There was a significant delay in Mr Barrett conducting the investigation. Mr Barrett acknowledged and apologised for that delay and gave a number of reasons why there was a delay. No criticism is made of Mr Barrett personally in this regard however the Respondents had a responsibility to ensure the investigation was conducted in a timely manner and they did not do so. Mr Barrett completed his report on 18 September 2017.
14. Ms Barry subsequently signed off a decision for the matter to proceed to disciplinary hearing but as evidenced from an email in the bundle, HR had already decided to proceed with a disciplinary in that they had started to prepare disciplinary packs before Ms Barry actually signed off that investigation report in September 2017. The Claimant was sent an invitation to a disciplinary hearing with all the documentation on which the Respondent intended to rely. The allegations were that the Claimant had failed to document the incident in September 2015. There was a disciplinary hearing on 20 October 2017 and the Claimant was accompanied by Ms Dolan her RCN rep. It was chaired by Mrs Barry and she was accompanied by a panel consisting of Ms Robinson of HR and another Lead Nurse called Jennifer Proctor.
15. Ms Barry and Ms Robinson had previously been involved to a degree but I find that this was only in regard to Ms Robinson's capacity as Lead HR and also that Ms Barry as Lead Nurse for the Director had to be aware of the complaint and given the authority to initiate the investigation. The Claimant had prepared a reflection document ahead of the disciplinary hearing and had adequate and reasonable opportunity to put across her version of events. The outcome of the disciplinary hearing was that the Claimant was given a final written warning. This was Ms Barry's decision alone in terms of the outcome. In addition to the further written warning Ms Barry concluded that the Claimant needed to undertake a period of supervised

practice and she also decided that the Claimant would potentially be referred to the NMC. This was confirmed in a letter dated 25 October 2017.

16. Ms Barry's reason for implementing the supervised practice was that she had not been reassured by what the Claimant had said at the disciplinary hearing in relation to her reasons for failing to document the incident. Ms Barry was of the view that the Claimant had failed to show she understood the importance of document keeping, which is a fundamental part of the nursing role.
17. The Claimant questioned why she would be required to undertake the period of supervised practice. She was very upset about this and the potential impact on her supervision of students as part of her university course. The Claimant had been permitted to work unsupervised since the incident, had a previously unblemished record and there had been no other incidents since the chain of events, furthermore she had re-validated her NMC registration and received a positive appraisal. Under cross examination both Ms Dolan and the Claimant accepted that some form of supervised practice would be necessary. Ms Barry explained in detail in her witness statement and in the outcome letter the reasons why she had decided on the level of supervised practice. These were, in summary, the lack of reassurance that she had that the Claimant had understood the seriousness of the situation and her answers given at the disciplinary hearing.
18. The supervised practice was challenged by Ms Dolan by email dated 20 October 2017. The decision stood and Ms Barry asked Mrs Bona, who was the Practice Development Nurse to develop a supervised practice programme for the Claimant. Ms Barry did not provide Mrs Bona with any formal instructions as to how this supervised practice should look and there was a lack of clarity between Ms Barry and Mrs Bona about the extent of the programme of supervised practice. There was also a lack of communication with the Claimant about how extensive this was likely to be. I accepted Ms Barry's evidence that the decision to implement clinical supervised practice was a reasonable decision for Ms Barry to have reached given that it would have been very difficult to have supervised documentation only without having knowledge of the clinical procedures that would feed into that documentation.
19. Thereafter, as a result of the warning and the supervised practice, the Claimant had to withdraw from her university studies. She was assured that the supervised practice would remain confidential and as a result decided not to appeal to final written warning.
20. On 10 November 2017 the Claimant met Mrs Bona regarding the supervised practice and Mrs Bona had taken some time to prepare some

documentation beforehand which was then presented to the Claimant. I accept that this documentation was prepared by Mrs Bona with the best intentions of helping the Claimant, but the Claimant was overwhelmed and taken aback at the level of supervision suggested by Mrs Bona. The extent of the supervision was not as suggested by the Claimant namely that the Claimant would not have been able to take the patient to the toilet or speak to a patient's relative on the telephone, but there was going to be a degree of supervision extending to her clinical duties. For the reasons I have outlined above (paragraph 18) I find that this was a reasonable position for the Respondent to have taken.

21. The Claimant was also concerned about the assured confidentiality. In the outline plan, supervision would be undertaken by Mrs Bona and also Ms Vine and potentially another Band 6 due to the nature of the Claimant's shifts. There was no final plan made at this point, neither was there any timescale or review period. I accept that the Respondents reasoning that they could not give a timescale as to when it would conclude, but there should have a set review period so that the Claimant knew what she was working towards and when.
22. After the meeting Mrs Bona sent an email to Ms Barry which clearly set out that the Claimant had been very upset and surprised at the level of supervision and what she had tried to explain to the Claimant. The Claimant subsequently went off sick following this and resigned on the 11 December 2017 therefore the supervised practice never took place. Her letter of resignation was over two pages. It cited a number of reasons, in summary these were:
 - There was no evidence her health had been taken into account when she was given the final written warning;
 - Since the disciplinary her dignity in the workplace had been negated;
 - She had experienced work-related stress both pre and post the disciplinary hearing;
 - She was demoralised at what the level of supervised practice included;
 - She was pressured into returning to work sooner than she should have done from a fear of formal absence procedure and was not fit for work and in a vulnerable position when the incident occurred;
 - The supervised practice had no end date, was back to basic and would not allow her to talk or provide basic care for a patient unsupervised which was not in keeping with the disciplinary outcome; was undermining and intimidation, led to micromanagement, bullying and harassment
23. On 27 December 2017 Ms Barry wrote to the Claimant asking her to reconsider and offered a meeting at which point Ms Barry says that they would have revisited the supervised practice to see if they could find a way

forward, but the Claimant declined this option and notified the Respondent as such on 11 January 2018.

24. In the Claimant's witness statement she described that after she decided to resign she decided to look for other work and had started a new teaching role for a training company on 18 January 2018. It transpired under cross examination that the Claimant had first had discussions about this role on 31 October 2017 and an interview on 9 November 2017 which was the same day as the meeting with Mrs Bona. Furthermore, the Claimant accepted the job offer on 4 December 2017 before her resignation. This was not evidence included in the Claimant's witness statement or disclosure. I was invited to find as a result of this evidence that came out under cross examination the Claimant had deliberately misled the Tribunal and also to find that the real reason that she had resigned was because she had secured other employment.
25. The Claimant had been asked to disclose her searches for alternative work and had not done so although she had brought them to Tribunal with the intention of disclosing them at the hearing. The Respondent had reasonable grounds to criticise the Claimant for the way in which this evidence was revealed. I do not find that the Claimant deliberately misled the Employment Tribunal in relation to evidence regarding her new role, although I do find that the Claimant could have been and should have been a lot more careful about how she presented her evidence in this regard.
26. The Ombudsman report was received by the Respondent in June 2017. The focus of the report (whilst it did criticise other minor elements of the patient's care during that period) was about the Claimant's omissions to document, which in the Ombudsman's view led them into difficulty in being able to properly investigate and answer the patient's complaint.
27. There was a delay in referring the Claimant to the NMC and the referral did not take place until the August 2018. The Claimant asserted this was retaliatory given that it coincided with the submission of her Employment Tribunal claim. I accepted Ms Barry's explanation as to why there was the delay in the referral in that Ms Barry was off sick. She had prepared the referral in February 2018. She had reasonable grounds to do so, taking into account as far as Ms Barry knew the Claimant could have nursed elsewhere without having undertaken any supervised practice. Ms Barry went off sick just after and was on long term sick until July 2018 which explained the delay in sending the referral.

Conclusions

28. The Claimant asserted the Respondent had breached the implied term of mutual trust and confidence. She confirmed at the hearing that she was specifically relying on the supervised practice decision.
29. The decision itself to implement supervised practice was in my judgment a reasonable one. I have outlined above the reasons why Ms Barry decided to put the Claimant on supervised practice. Whilst the Claimant questioned the timing of the supervised practice (on the basis she had worked for such a long time on the ward with the Respondent having full knowledge of the complaint unsupervised), I accepted the explanations as to the reasons for doing so. Ms Barry was concerned about the position taken by the Claimant at the disciplinary hearing regarding the reasons she gave for failing to document what had happened. Ms Barry is an experienced nurse and has the necessary and appropriate clinical knowledge as well understanding the professional standards the Claimant should be adhering too. There was no evidence before me that would suggest that the decision on supervised practice was unreasonable let alone amount to a breach of the implied term of trust and confidence.
30. I have also considered the proposed manner of the supervision and how it would be carried out. The Claimant was suggesting that she should only be supervised in respect of her documentation rather than patient care. I accepted the explanation by Ms Bona that supervised practice on documentation could not happen without there being a degree of clinical supervision. I did not find that the planned level of supervision was intended to be as described by the Claimant (her examples of not being able to take a patient to the toilet or talk to a relative without supervision). I accepted Mrs Bonas' evidence that there was no intention for the supervision to be at this sort of level.
31. Furthermore, I have taken into account that the supervision plan was a draft and there was an offer from Ms Barry to discuss and revise the plan, which the Claimant refused. The Claimant's decision to resign was premature. Had she sat down and accepted the offer from Mrs Barry to meet and discuss the supervision plan, it may have reassured her that it was not as extensive as she had understood. She had only attended one meeting with Mrs Bona, where a draft plan had been discussed. There may well have been a different outcome which would have been acceptable to the Claimant.
32. I do not agree with the Claimant that the proposed plan would have led to a breach of confidentiality. The plans proposed who would be undertaking the supervision. There was no evidence to support the Claimant's contention that all patients on the ward would have known or made the link that the Claimant in some way had been disciplined or was under supervision from

- the action plan that was proposed. Again this was a premature conclusion to have reached.
33. There were shortcomings by the Respondent in how they managed the situation. There should have been a better managed and more structured handover from Ms Barry to Mrs Bona regarding the supervised practice plan. There also should have been more explanation to the Claimant about the nature of the supervision which could have avoided the misunderstandings and shock felt by the Claimant at the initial meeting. Notwithstanding this, both the Claimant and her RCN representative accepted that some sort of supervised practice was necessary. Overall, I do not find that these shortcomings amounted to a fundamental breach of the implied term of mutual trust and confidence.
 34. The delay by the Respondent in conducting this investigation and the culmination of the disciplinary hearing was unsatisfactory in my view, but the Claimant did not rely on this in her assertions there had been a breach of the implied term of mutual trust and confidence. It was a relatively uncomplex issue and should not have taken the time it took to conclude.
 35. Turning now to the Claimant's points about the fact her diagnosis of cancer had not been given due consideration. I deal with this even though the Claimant's case was that the reason for her resignation was the supervised practice. This is not a discrimination claim. I am considering whether the decision to implement supervised practice amounted to a breach of the implied term of mutual trust and confidence. Even if I take the Claimant's claim at its highest, that the Respondent did not take into account how it may have affected her on the 25 September 2015 it does not change the fact that the Claimant had omitted to document the incident on that day and the Respondent were entitled to take steps to ensure that there would not be a repeat of this action.
 36. As I have found there was not a fundamental breach of contract by the Respondent it is not strictly necessary to determine the reason(s) for the Claimant's resignation. Nonetheless I will do so. As regards the reason for resignation. There can be more than one reason for a resignation said to amount to a dismissal. The Tribunal must determine whether the repudiatory breach played a part in the dismissal. In my view, the reason for the resignation was a combination of the Claimant's perception of the extent of the supervised practice and but also and significantly that the Claimant had already secured a new role. This was an effective cause of the resignation as can be seen by the Claimant's refusal to engage further in discussions about the supervision plan when offered by Ms Barry. The Claimant's perception of the plan was premature and in a number of ways, she made incorrect assumptions about what would be involved. The Claimant's evidence was that but for the suggestion of supervised practice

she would not have been looking for a new job in the first place and would not have given up her treasured career in nursing lightly. Whilst I accepted this, in my view the Claimant did not give the Respondent a chance to discuss the plan and implement it, largely because she had secured another job, in a teaching role which she had been training towards previously. It was reasonable to require her to undertake supervised practice.

37. For these reasons the Claimant's claim does not succeed.

Employment Judge S Moore
Dated: 5 December 2019

JUDGMENT SENT TO THE PARTIES ON

.....8 December 2019.....

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

NOTE:

This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.