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EMPLOYMENT TRIBUNALS

Claimant: Miss K Baxter
Respondent: Ranc Care Homes Limited
Heard at: East London Hearing Centre
On: 20 and 21 February 2020
Before: Employment Judge Reid

Representation

Claimant: Mrs Baxter (lay representative, the Claimant's mother)
Respondent: Mr Hoyle, Croner

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. The Respondent did not constructively dismiss the Claimant.
2. There was therefore no dismissal for the purposes of s95(1)(c) Employment Rights Act 1996 (unfair dismissal) or s136(1)(c) Employment Rights Act 1996 (redundancy) and both claims are therefore dismissed.

Note: The remedy hearing booked for 23rd July 2020 is no longer required and is therefore cancelled.

REASONS

Background

1 The Claimant was employed by the Respondent from 25th April 2010 until she resigned on one month's notice on 25th November 2018, her employment terminating on 24th December 2018. She had resigned following a process to change her role from Hotel Services Manager to Head Housekeeper. The Claimant presented her claim on 14th January 2019 claiming constructive unfair dismissal and a statutory redundancy payment.

The Respondent resisted the claim on the basis that the Claimant had signed the new Head Housekeeper job description and had therefore agreed to it and subsequently affirmed the contract by carrying on working; there was therefore no dismissal on which to base the claims for unfair dismissal and a statutory redundancy payment.

2 The Claimant attended the hearing and gave oral evidence. The Respondent's witnesses who attended to give evidence were Ms Manning (HR consultant) who dealt with the change to the Claimant's job description and Ms Howard (then Director of Quality and Care) who dealt with the Claimant's grievance. I heard oral submissions on both sides and reserved my decision due to lack of time. There was a one file bundle to page 152 which contained the witness statements.

Issues in the claim

3 The first issue in the claim was whether what the Respondent had done (or failed to do) amounted to a breach of contract. If what had happened did not amount to a breach of contract then both claims failed as there was no constructive dismissal. If a breach of contract was however found, the second step was to consider whether the Claimant waived that breach and affirmed the contract, rather than resigning promptly in response to it. The Claimant clarified at the hearing and in submissions that the term she said the Respondent breached was the implied term of trust and confidence in the way in which the changes to her role were handled; she accepted that the Respondent had the right to re-organise job roles. The main thrust of her argument was that the breach of that implied term arose because of the disparity between the statements to her that her role was being changed because she was not performing well and what the Respondent also said was the reason, which was that it was all part of a general re-aligning of roles and the business need to dispense with her role of Hotel Services Manager which was something of an anomaly, she being the only one across all the Respondent's care homes. She said if performance was the reason, she was not told the detail of the performance issues or offered any support to improve.

4 The Claimant confirmed at the hearing having taken a break to discuss it with Mrs Baxter that she did not pursue the argument that the Respondent should have taken into account her mental health or any particular vulnerability she had, when it implemented the change.

Findings of fact

Events up to and including the meeting on 26th October 2018

5 The Claimant was employed by the Respondent at its Brentwood care home with effect from 25th April 2010 (page 34,35) initially as a Domestic Assistant. In 2015 she was promoted to Head Housekeeper (page 43) with a new job description (page 50). In 2016 she took on the role of Hotel Services Manager (page 53), the only one within the Respondent's ten care homes. This new role incorporated the previous Head Housekeeper role but with some additional responsibilities (see findings below). It was unfortunate that no new job description and updated statement of terms was issued at this time because that absence of documentation contributed to the issues which arose with changing the Claimant's job description in October 2018. That 2016 change had been agreed by the CEO at the time, Mr Higginson and the owner Mr Rai. Mr Higginson was no

longer with the Respondent by the time of the 2018 job description review.

6 The Claimant also then subsequently took on additional responsibilities in November 2017 as regards Activities. In September 2018 she wrote to Mr Reiss the new CEO (page 59) and raised the issue of the pay rise she said she had been promised for this extra responsibility. Mr Rees authorised that pay rise (to £9.50 per hour) but did not backdate it. The Claimant took no further action about any issue that it should have been backdated to November 2017.

7 I find that the Respondent during October 2018 was conducting a company-wide review of job descriptions (alongside a review of its contracts, Handbook and HR policies), a task assigned to Ms Manning who had been taken on (initially as a consultant and later as an employee) to provide HR services, being the Respondent's first dedicated HR professional. The trigger for the review of the Claimant's job description and role was therefore not her individual performance but her role was being assessed in the same way as that of all other employees, except that she was the only Hotel Services Manager and she had no job description.

8 The Head Housekeeper role being proposed by the Respondent in October 2018 was at the Claimant's then current rate of £9.50 per hour. This was £0.50 per hour more than the Head Housekeeper role usually paid and the Respondent was not therefore seeking to reduce her pay in this exercise and would be paying her at a higher rate than the other Head Housekeepers.

9 I find that the role of Head Housekeeper in 2018 (page 63) was not the same as the role had been in 2015 (page 50) and so the Claimant was not 'going backwards' to what had been her role three years previously. The 2018 job description contained more management type responsibilities (and fewer cleaning type responsibilities) than had been the case in 2015, namely the overall purpose was now management and leading the team rather than providing a high standard of cleaning, laundry and maintenance, in which context was set the individual listed duties. The new duties included managing budgets and ordering supplies, dealing with upholstery deliveries, general monitoring and reporting of issues, monthly and quarterly audits (with action plans as required), ensuring the show rooms were presentable and responsibility for staff accommodation cleanliness. The Claimant was therefore not going backwards to her old 2015 role and it was not a demotion in that respect.

10 The three areas which were removed from her role in the October 2018 changes were Activities and duties as regards assisting with management of the Kitchen and Facilities/Maintenance. The Claimant accepted in her oral evidence that the additional Kitchen help she had been providing had been temporary ad hoc help (with rotas and ordering) pending the appointment of a new Head Chef in September 2018. She therefore had no expectation of carrying on with this after the new Head Chef was in post. The Respondent discussed this with her in the summer of 2018 (page 58, the note is undated). As regards Facilities/ Maintenance, the Respondent had a Facilities Manager who had their own team and whilst the Claimant had been assisting, she was not as claimed (WS para 14) 'managing the team', but based on her oral evidence, was reporting problems/faults to Maintenance (or was acting as an extra conduit for other members of her team to report such issues), which in any event was a reporting responsibility of any member of the team and had been a duty in her 2015 job description (page 51).

11 The other matter the Claimant raised was being taken away from her was the 'medical supplies budget' but I find based on her oral evidence that this involved the online ordering by her of supplies such as gloves or pads and did not amount to her setting a budget. In any event she accepted this change (C WS para 9).

12 I find there was an absence of clear record keeping of the discussions with the Claimant in the early part of October 2018. There were no notes or records or follow up emails as regards the discussions before the meeting on 26th October 2018. The Respondent referred to a meeting on 8th October 2018 which the Claimant said did not happen and the Claimant said that the Respondent had combined two meetings, one on 19th October 2018 and one on 26th October 2018. The Claimant criticised the Respondent for notes not openly being taken in the meeting but apparently written up afterwards. Again this was unfortunate because had notes been circulated at the time (or follow up emails sent confirming discussions) the Claimant might have had more confidence in the process. In addition it was unfortunate that there was some confusion caused in an early draft of the new job description (C WS para 9).

13 Notwithstanding the absence of notes or minutes in the initial stages I find that the Claimant was aware from the beginning of the process why her job role was being changed and why a new job description was to be issued (C WS para 9) namely the anomaly of her role and the lack of a job description from 2016. Given the wider review of all job descriptions generally I find it unlikely that the Claimant was also not aware from colleagues that the review of her job role was part of a larger company-wise review of job descriptions for everyone. Although the Claimant complained that she had not been told that these meetings were 'consultation' meetings at the time (and only told they had been later on, page 65, 75) I do not find that label significant in the context that the Claimant was aware what was being proposed and why and was being involved in the discussions, particularly given the Respondent had limited knowledge of what her additional responsibilities (beyond Head Housekeeper) were, given the absence of a 2016 job description, which meant Ms Manning was reliant on the Claimant to explain her existing role. The Claimant knew what the meetings were about and that the aim was to agree a new job description for her and the absence of that label at the time made no real difference. It however had the unfortunate effect that it made her suspicious subsequently that there was possibly a redundancy situation and the Respondent's subsequent apparent confusion about calling a meeting a consultation meeting after agreement had already been reached on the new job description at a previous meeting did not help (page 75, para 5).

14 The Claimant was responsible for organising a Silver Sunday event at the home on 5th October 2018. This was an important event for the Respondent across all its care homes.

15 The Claimant met with Ms Manning and the Claimant's manager (the Home Manager) Mrs Osborne on 26th October 2018 (page 61). It was unfortunate that Ms Manning opened the meeting with a discussion about issues which had arisen on Silver Sunday because although the Claimant had been aware of issues since 19th October 2018 when they were raised with her (C WS para 11) those issues were not the reason for the change to her role, though they may have subsequently shone a light on how much work the Claimant was trying to cover. This was the only performance issue raised at this meeting. The Claimant was however reassured that whilst the event had gone well there

were concerns about her planning of it. I find that what the Respondent was overall getting at was that the Claimant was in effect spreading herself too thinly (page 62, that explanation repeated subsequently a few days later on page 65)). The Claimant already knew before this meeting that Activities were being removed (C WS para 11-12).

16 Taking into account the above findings I find that the 26th October 2018 meeting was mishandled to the extent that it over-emphasised any problems with Silver Sunday at the beginning of the meeting, when the need for the Claimant to take on just the Head Housekeeping role already pre-existed and was part of a larger review of roles, not just her own and was not triggered by any performance concerns. The Claimant was upset during the meeting but signed the new job description at the end of the meeting (page 62,63). I therefore find she agreed to the new role including the reduction in her duties (which she viewed as a demotion) and the new requirement to change her uniform from the black management dress issued by the Respondent to the green Head Housekeeper uniform which she had worn previously and which I find based on her oral evidence she still wore occasionally after the 2016 job change, because there were some tasks for which that was more practical attire. She was also now subject to the rota. I find based on her oral evidence that she expected the change to take effect the following week and it was not therefore the case (C WS para 16) that she only found out on 1st November 2018 (ie after she signed the new job description) that the effective date of the change was 5th November 2018.

17 She said in her witness statement (para 15) that she signed it because she believed she had no option but she did not ask for time to consider it. She never told the Respondent before she resigned that she wanted to try and withdraw that agreement or ask for more time to reconsider it. Instead she said subsequently on 5th November 2018 (page 66) that she would not accept *further* changes which is inconsistent with saying that she had been forced into signing the job description (because she was effect drawing a line in the sand saying no *more* changes were going to be agreed) and which implicitly accepts that what she had signed on 26th October 2018 was in fact her agreement to its terms.

18 Taking the above findings into account the effect of the Claimant's agreement to the new job description was that the change to her role was now an agreed change to her contract. This meant that any issues about her responsibilities being reduced or the new role being a demotion were now changes made by agreement between the parties. The new job description and the new role were therefore proceeding on an agreed basis.

19 Further, even if the Respondent had breached the implied term of trust and confidence prior to the meeting on 26th October 2018 in the way it had conducted the exercise (which I do not find to be the case, taking into account the above findings of fact), the Claimant accepted the new job description and in doing this waived any past breach by the Respondent of the implied term as regards the way the change had been introduced up to this point because she was affirming the contract firstly by signing the new job description and secondly by continuing to work for the Respondent for around 4 weeks after signing it.

Events after the meeting on 26th October 2018

20 A follow up meeting was held on 1st November 2018 (page 64) and it was re-

explained to the Claimant that she would no longer be responsible for Activities (even though on her own account she had known this since 19th October 2018). The situation as regards Maintenance was also confirmed again. Ms Manning's letter to confirm the new role (see below) was outstanding at the end of this meeting.

21 The matter which remained outstanding after the meeting on 26th October 2018 was the Claimant's request that the Respondent tell her in writing what had been discussed on 19th and 26th October 2018 (page 66). She had already been told she would be given this on 1st November 2018 (page 64). The Claimant chased this in her email dated 5th November 2018 (page 66). She said she was unhappy and wanted to understand the Respondent's long term plans for her. She did not as claimed (C WS para 17) remind the Respondent in this email that she wanted details about the complaints about her performance. In any event she knew what the problems arising during Silver Sunday were because she had already been told what they were and now that she had agreed to the new role these issues would be less likely to arise again because her role had been reduced in size so that she did not spread herself thinly as she had before. The Respondent was not starting any performance management process with her but was effectively moving on, her new role giving her more capacity to manage her responsibilities.

22 I find this email crossed with Ms Manning's letter to the Claimant dated 5th November 2018 (page 65) in that Ms Manning had not received the Claimant's email when this letter was issued by her (though it was not received by the Claimant till 9th November, page 67). I find that the letter at page 65 in any event provided what the Claimant had said in her email she was asking for, namely it confirmed the changes to her role with effect from 5th November 2018. The Claimant's email had not however asked any other particular questions of the Respondent which remained unanswered by the Respondent, though she was clearly unhappy with the situation. The Claimant however said that the notes at page 64 were deficient in not recording her separate request that the performance issues be identified (C WS para 16).

23 The waters were then somewhat muddied by the reference in the 5th November 2018 response from the Respondent to the reason for the change being 'not all aspects of the role were being met, due to the volume of work' and this gave the impression that the Respondent might have other past performance issues in mind, beyond the Silver Sunday issues it had already discussed with the Claimant. It also gave the impression that these were the reasons for the change to her job role because she hadn't been doing all aspects of the role properly, when that was not in fact the case because the reason was the overall review of job roles and the anomaly of her position as sole Hotel Services Manager without a job description. I find Ms Manning's oral evidence of what those other past issues were (beyond Silver Sunday) very vague and her witness statement (paras 18-24) to identify very little beyond the problems associated with Silver Sunday. No action had ever been taken about any past performance problems from which I find they were not significant even if there were some. The Claimant was wanting more information about what exactly were the past performance issues but I find she already knew what the issues arising during Silver Sunday were. I find that this reference mistakenly therefore gave the Claimant the impression that there was more to it than the problems arising on Silver Sunday; whilst that was in fact not the case (ie any problems pre-dating that were at most minimal, no action having ever been taken about them), the Respondent should have been clearer in this letter as to what in fact was being referred to and should have

made it clear that the reason for the change to her role was not her performance but that the issue was she had been spreading herself too thinly and that this was relevant as to how her new role was structured; it was not however the reason her job role had changed. Whilst Mrs Osborne subsequently told her there were no performance issues (C WS para 23) (which in fact was correct, no action having been taken or being proposed because it was not needed) it was understandable that the way the letter had been drafted gave rise to a degree of confusion and some anxiety on the part of the Claimant because the letter was referring, it appeared, to broader concerns than just the Silver Sunday issues she had been told about and appeared to be saying these other problems were the reason for the change to her role, when that was not in fact the case. I find that this aspect of the process was poorly managed by the Respondent.

24 The Claimant replied on 11th November 2018 (page 67). She said that the 5th November 2018 letter was the first time poor performance had been mentioned but that was not entirely accurate because 'serious concerns' with Silver Sunday had been discussed according to the Claimant on 19th October 2018 (C WS para 12). Having already signed the new job description she now claimed she was in fact being made redundant. Her letter said in effect that the letter of 5th November 2018 from Ms Manning was the first the Claimant had heard of the removal of Activities but this had already been discussed with her on 19th October 2018 (C WS para 12). The discussion about removal of Maintenance had already taken place and was not raised for the first time in the letter of 5th November 2018. The letter of 5th November 2018 was not telling the Claimant anything new as regards her responsibilities, it was confirming what had already been discussed. The Claimant criticised the Respondent in her reply for not undergoing a proper performance plan with her but she was not being disciplined or dismissed for poor performance and had agreed the new job description which dealt with the Respondent's concern that she was spreading herself too thinly and needed to concentrate on only the Head Housekeeper role. The Claimant now said (page 68) that she was not accepting the demotion, but she had already agreed to the change on 26th October 2018 and had said on 5th November 2018 in effect that her agreement stood, though she would not accept any further changes. The Claimant was changing her mind about something she had already agreed to. She also now said that this had all happened because she had asked for the pay rise in September 2018 but this was inconsistent with the general review of job descriptions across the company and the fact that the trigger for her review had been that general review for all employees, coupled with the particular anomaly of her role.

25 The Respondent did not respond to the Claimant until 2nd December 2018 (page 70). The Claimant waited two weeks for a reply to her letter dated 11th November 2018 and resigned on 25th November 2018 by letter to Mr Reiss (page 70). Her resignation letter did not mention she had agreed to the new job description. It described the 'final straw' as having to wear the different uniform but she had already agreed to that when she signed the new job description for the role (C WS para 15).

26 Taking into account the above findings of fact, I therefore find that the only period in which a relevant breach of contract (a breach of the implied term of trust and confidence) can be claimed to have arisen is in the period after the Claimant signed the new job description on 26th October 2018, thus indicating her agreement to it and in turn also affirming the contract as regards any past breaches of that implied term in the way the change had been handled up to that point. Her request for written confirmation of the changes was met by the letter dated 5th November 2018 at page 65. The Respondent

then confused matters in the letter dated 5th November 2018 by referring to the reason for the change as the role not being met (albeit in the context of too much work) but without telling her what it was referring to. I find that there was also a delay in the Respondent dealing with her response to that letter but the context of that delay was the fact that the Claimant had already agreed to the new job description and had been provided with the requested written confirmation of the change in the letter dated 5th November 2018. It was unfortunate that the Claimant did not receive a more prompt response to her letter dated 11th November 2018 because it was clear she was not happy but I do not find in context that the delay was sufficient to amount to a breach of the implied term of trust and confidence by the Respondent. I also do not find that the poorly drafted and confusing 5th November 2018 letter amounted to a breach because whilst wider performance matters was not what had been discussed with her and this gave the impression there was more to it than she was being told about, the outcome was the same, namely that no performance issues were in any event being taken forward and with her new role it was anticipated that she could cover all her work. She was reassured by Mrs Osborne after her 11th November 2018 letter (but before she resigned) that there were no performance issues. Ultimately her performance had not been the reason for the review of her role, taking into account the above findings of fact and there were no performance issues going forward to be addressed. In that context there was no need to offer the Claimant any further support with managing her work.

27 The Claimant resigned on 25th November 2018 on notice. She rather dramatically described it as her last chance for fair treatment having gone, after the lack of reply of two weeks (C WS para 24) but this was overstating the effect of the delay in its context. The Respondent quite properly then dealt with the complaint as a grievance (even though her resignation letter asked it not to be) holding a meeting on 4th December (page 73) and sending her an outcome letter (page 75, undated but received by the Claimant on 20th December 2018, page 77). The Claimant did not appeal the outcome though she wrote a further letter (page 77).

Relevant law

28 A constructive dismissal (and thus a dismissal for unfair dismissal purposes) is defined in s95(1)(c) Employment Rights Act 1996 (unfair dismissal) and s136(1)(c) Employment Rights Act 1996 (redundancy) as where the employee terminates the contract (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

29 In *Western Excavating v Sharp* [1978] IRLR 27 it was identified that a constructive dismissal must involve a repudiatory breach of contract, going to the root of the contract or which shows the employer no longer intends to be bound by one or more of its essential terms. The burden of proof was on the Claimant to show that there was a fundamental breach of contract, it contributed to why she resigned (and for this to apply it had to have happened before she resigned) and that she did not delay in resigning after the claimed breach, thus affirming the contract.

30 The term identified by the Claimant was the implied term of trust and confidence under which an employer should not without reasonable cause act in such a way calculated or likely to destroy or seriously damage the mutual trust and confidence between employer and employee. In *Malik v BCCI* [1988] AC 20 it was identified that the

employer's conduct needs to be viewed objectively to establish whether it is likely to destroy or damage that trust and confidence the employee is reasonably entitled to have in the employer, looking at all the circumstances. As to the reasonable and proper cause part of the test, even if the employee's trust and confidence in the employer is in fact undermined, there may be no breach if, viewed objectively, the employer's conduct was not unreasonable (*Sharfudeen v T J Morris t/a Home Bargains EAT/0272/2016*).

Reasons

31 Taking the above findings of fact into account I conclude that the effect of signing the 2018 new Head Housekeeper job description on 26th October 2018 was that the Claimant agreed to the new role and the new job description, whatever the reduction in her duties had been and whether or not it was a demotion. This means that the contract now proceeded by agreement as regards the new role of Head Housekeeper and its associated duties and status and, because of that agreement, there was no imposition on the Claimant of the new role and terms by the Respondent without her agreement. For the Claimant to have withdrawn that agreement would have involved obtaining the Respondent's agreement to withdraw it. The Claimant in effect changed her mind after she had agreed to the new role. There was therefore no breach of contract by the Respondent in the changes to her role because she agreed that change and it was not imposed on her without her agreement.

32 In turn, by signing the new job description on 26th October 2018, the Claimant was also waiving any past breach of the implied term of trust and confidence which had occurred prior to 26th October 2018 in terms of the way the change had been introduced. This is because her signing of the new job description meant that she was (in legal terms) waiving any past breach of that term (because so bound up with the new role which she was now accepting) and by carrying on working until she resigned on 25th November 2018 was affirming the contract, even if there were some aspects she rejected during those weeks (such as wearing the new uniform, C WS para 30). If the Claimant continued to carry on with some of the responsibilities which had been removed (C WS para 30, the examples given are minimal) she did so knowing that they had been removed by agreement and similar to the way she had been asked to step back from Kitchen responsibilities in September 2018 (which she agreed to) but still seemed disinclined to let it go (page 61).

33 As regards what happened after 26th October 2018, taking into account the above findings of fact, the Respondent did not in that period breach the implied term of trust and confidence in the way it handled the aftermath of the 26th October 2018 meeting. The Claimant was very upset and the Respondent should have replied to her letter of 11th November before she resigned on 25th November 2018 but that period of two weeks' delay did not amount to the Respondent ignoring her, in the context of a change to her role to which she had agreed. The letter of 5th November 2018 muddied the waters and was somewhat incompetent but ultimately the Claimant was aware that that no performance issues were being taken forward; in that context offering her support (what she claimed should have happened) would have been making an issue of something which was not an issue going forward in her new role. The test is an objective one and it is insufficient that the Claimant was upset and felt ignored and had lost confidence in the Respondent.

34 There were a number of failings by the Respondent as set out above and matters were not communicated clearly enough throughout but the Respondent did not breach the implied term of trust and confidence, entitling the Claimant to resign and claim she had been constructively dismissed. The matters complained of by the Claimant arising after 26th October 2018 were not serious enough to amount to such a breach, whether taken individually or when taken together. This means that there was no dismissal for the purposes of a claim for unfair dismissal or for a statutory redundancy payment.

Employment Judge Reid
Date: 27 February 2020