



EMPLOYMENT TRIBUNALS

Claimant: Mrs Susan Murgatroyd

Respondent: Amore Elderly Care Ltd

Heard at: Leeds Employment Tribunal (via CVP)

On: 8 February 2021

Before: Employment Judge K Armstrong

Representation

Claimant: In Person

Respondent: Mr Joel Wallace, counsel

NOTE OF ORAL JUDGMENT

1. The Claimant was not unfairly dismissed.

NOTE OF ORAL REASONS

Claims

1. In her ET1 Claim form dated 28 September 2020 the claimant brings a claim for unfair dismissal.
2. Damages are agreed in the sum of **£3353.30**. Therefore the only issue for the Tribunal is the question of liability.

Conduct of the hearing

3. The hearing took place via video link – namely Kinly Cloud Video Platform. The Respondent was represented by Mr Joel Wallace, counsel. The Claimant represented herself, and had two family members present for support. There were a number of members of the public and the press present to observe.
4. The Tribunal took regular hourly breaks and an hour for lunch. The Claimant had some difficulties connecting to the hearing at first but after taking some advice from technical support she was able to connect using

her smartphone and could hear, see, be heard and be seen. All parties were able to engage fully in the hearing.

Issues for the tribunal to decide

5. The Claimant's claim is one of constructive dismissal. The issues for the Tribunal were identified as set out in the Respondent's opening note dated 8 February 2021. The claimant had read this document before the start of the hearing and was satisfied that the list of issues reflected the substance of her claim. The issues were identified as follows:
 - 4.1. What was the most recent act (or omission) which triggered resignation? –
C relies on the direction or request to return to working at Cooper House Care Home on 6 and 13 May 2020
 - 4.2. Has C affirmed the contract of employment since that act?
 - 4.3. If not, was the act by itself a repudiatory breach?
Was there a breach of the implied term of trust and confidence or the implied term to take reasonable care of employees' health and safety –
 - 4.4. If not, was it nevertheless part of a cumulative breach?
 - 4.5. Did the C resign in response to that breach?
 - 4.6. Was the dismissal for a potentially fair reason; and
 - 4.7. Did dismissal fall within the range of reasonable responses?

Evidence

6. I have considered a bundle of documents put together by the Respondent comprising 81 pages, witness statements of the Claimant, and Miss Natasha Clarke (manager, who heard the Claimant's grievance) and Miss Rebecca Ashton (operations director) for the Respondent. I have also considered the opening note and bundle of authorities provided by Mr Wallace this morning.
7. The witnesses all gave oral evidence on oath and were cross-examined.

Background

8. The claimant commenced employment with the respondent on 15 September 2015. She worked as a care home administrator at Cooper House, a residential elderly care home operated by the Respondent. The Respondent employs around 100 workers at this site, working in shifts of around 20 staff at any one time, The claimant resigned on 14 May 2020, and confirmed this in writing on 18 May 2020. She worked a period of notice and the end of her employment was 12 June 2020. The Claimant resigned in circumstances which she says amounted to an unfair constructive dismissal.

9. I pause at this stage to observe that these facts take place against the backdrop of the early months of the COVID-19 pandemic, at what must have been an extremely challenging and stressful time for all those working in the care home sector, including all the witnesses I have heard from today. I make my decision, however, based solely on the facts in this case and the evidence I have read and heard today as part of this claim.

Findings of fact

10. Cooper House, like many other residential care homes, was affected by the COVID-19 pandemic. I accept the Claimant's evidence that on 3 April 2020 a resident was returned from hospital without having been tested for COVID-19.
11. On 14 April 2020 on returning to work after the Easter weekend the Claimant found out that ten residents had died over the weekend. I accept Miss Ashton's evidence on this point, which is that 18 residents of the care home died from the start of the pandemic until the middle of May with either suspected COVID-19 symptoms or following a positive test. I accept her evidence that other deaths occurred which were not potentially COVID-related. I therefore accept the Claimant's evidence that ten residents had died over the weekend, and it is accepted that at least a proportion of those would have been potentially covid-related.
12. The Claimant says that her manager, Kim Suttle, simply said to her 'I'd keep your door shut today', and that there was no risk assessment in place to cover her role. Miss Ashton gave evidence that there was a risk assessment in place covering all staff at the care home, although no specific assessment regarding the Claimant, and that this included standard provisions such as social distancing and the provision of PPE. This was not put to the claimant, but I accept on the balance of probabilities that the Respondent, being a sizeable undertaking operating a number of homes had a risk assessment in place covering employees at Cooper House, but that there was no specific risk assessment for the Claimant's role.
13. It is not disputed that the Claimant left the site on 14 April 2020 and commenced working from home, with the agreement of her manager, Kim Suttle.
14. At the same time, the Receptionist at Cooper House commenced working from home. The receptionist was not required to return to work from site until after the Claimant's resignation. The receptionist had a primary-school-aged daughter who had received a shielding letter and therefore was unable to attend school. The Claimant says that she feels that she was treated less favourably than her colleague, but I am satisfied that there was good reason for the receptionist to be prioritized over the Claimant for home working. The Claimant's pregnant daughter had been living with her but had moved out on 3 April 2020, and in any event was not classed as clinically extremely vulnerable.
15. On 24 April 2020 Ms Suttle asked the claimant to return to working from the care home. The Claimant said she would prefer to wait until the next government review and this was agreed.

16. On 6 May 2020 Ms Suttle again asked the Claimant to return to work on site, as the deputy manager was going on annual leave for 2 weeks. This is the first alleged breach on which the Claimant relies. The Claimant says that during the conversation on 6 May 2020 she felt she was being pressurized and did not feel that the risk from COVID-19 had sufficiently reduced for her to be safe to return to the care home. The Claimant told Miss Suttle that she would resign if she was not given any option but to return to the site at this time. Miss Suttle said she would speak to the operations director, Miss Ashton, which she duly did. The Claimant says that Miss Suttle came back to the Claimant and informed her that Miss Ashton had said 'she's not holding us over a barrel.' However, in any event, she was not required to return to work on site immediately.
17. The Respondent has not provided any witness evidence from Miss Suttle regarding the alleged comment made by Miss Ashton. Miss Ashton denies making this comment. I do not find based on the hearsay report from the Claimant that Miss Ashton made that comment. However, I accept that this phrase was used during a conversation with the Claimant and I note that during her later grievance appeal process Miss Suttle accepted that it may have been something that she said. I therefore find that Miss Suttle did use this phrase during the conversation with the Claimant on 6 May 2020, although I am unable to make a finding as to whether she attributed it to Miss Ashton or not.
18. The following day, 7 May 2020 the claimant submitted a grievance. It appears at p43 in the bundle and I do not propose to recite it at length in this judgment. There was a pay issue raised which was resolved during the grievance. The Claimant said that she felt pressurized to return to working on site when others were not required to, and that she was able to complete her job from home.
19. In evidence, the Claimant accepted that there were elements of her role which she was unable to perform from home, namely reconciliation of finances, answering the telephone and answering the door to the home. The Claimant also accepted that with the Receptionist working from home full time, the demand for her to be present to fulfil those roles would have been higher.
20. Saturdays – did attend the site.
21. On 13 May, Kim Suttle again asked the Claimant to return to work at Cooper House. The Claimant says that she was 'required' to return to work. She says that Miss Suttle told her that things had 'calmed down' in relation to the virus at the home. However, it was accepted by Miss Ashton that that week there had been 5 positive tests in residents and 4 positive tests in staff.
22. Miss Ashton says that the Claimant was offered a risk assessment each time that she was asked to return to work. This was not put to the claimant but she does not say in her witness statement that this is the case. Miss Ashton's oral evidence was that each time she discussed C's return to work with Miss Suttle, Miss Ashton said that C would be offered a RA. She then relied on KS to relay that to C. I have no evidence from KS on this point. I am satisfied on the balance of probabilities that the Claimant was not

specifically offered a 'risk assessment' in either the conversation on 6 May or 13 May by KS. However, I am satisfied that there was a site-specific risk assessment in place.

23. At 17.08 on 13 May 2020 (the same day), the claimant received a response to her grievance from HR. It appears at p48 in the bundle. The Claimant has raised issues that there was a delay in responding to her grievance, in that it wasn't acknowledged until 13 May, but in evidence said that the delay in itself wasn't a reason for her resignation. She said that the delay did lead to her feeling unsupported at the time.

24. The email of 13 May 2020 is from Becki Birkenhead, regional HR advisor. I do not propose to recite it at length in this judgment, but she apologises for the delay in responding – saying that she had just come back from maternity leave and had been very busy due to the pandemic. She then goes on to acknowledge the grievance regarding pay and says she will follow this up. She explains that the only colleagues who are working from home are those who are able to completely fulfill their roles from home, or where they have been advised to shield. She goes on to say:

'We are confident that we are able to make adjustments to your role as administrator that will mitigate your risk of being present in the service. Kim will be more than happy to complete a risk assessment with yourself to facilitate the discussion about the specific adjustments we are able to make for you.'

While we appreciate that when you went off the home had high confirmed cases of covid-19, I would like to reassure you that this is no longer the case

I do hope that this clarifies matters for you.

We understand that this is a worrying time for many and do want to support colleagues. If you have any questions regarding the measures being taken at the service or by the business or how this affects you personally then I would encourage you to get in touch with your line manager, Kim. I would like to reassure you that we are keen to support your return to work and that you have been missed at Cooper House.

25. The following day, 14 May 2020, the Claimant had a telephone conversation with Becky Birkenhead – HR advisor. The content of that conversation is set out in an email on p51. The distinction between the Claimant and other employees who were working from home was again discussed. Miss Birkenhead went on to say:

You expressed that you did not feel safe attending work. You explained that Cooper House had been through a particularly difficult time with Covid-19 outbreaks and was aware that there are still colleagues who are testing positive. I explained that we were confident that we could mitigate risk for you and could ensure that you would have no contact with other people while you were at work. I also explained that we would be happy to complete a risk assessment with you to support this

- It was also discussed that although we do need you to return to work, we are in no way trying to pressure you or force you to do so if this is causing you anxiety. I

advised that if the situation is causing you emotional distress then you could book an appointment to see your GP, who may be willing to provide you with a sick note to cover anytime that you may need to take off work

26. The Claimant accepted that it was clarified in the phone call that this was not a grievance hearing, and that the claimant could proceed to a formal grievance hearing if she wished to do so.

27. After the telephone call, but before the record of it was emailed out, the claimant tendered her resignation by an email timed at 12.33pm on 14 May 2020. She stated as follows:

I've just had a conversation with Becki from HR and covered a few points around long standing work issues, which have never been acknowledged or addressed, the Covid 19 situation and pay.

In my opinion we haven't reached a mutually satisfactory outcome and I feel I have no alternative but to resign from my position as administrator at Cooper House. Becki was aware of my feelings and intention to resign.

I'm required to give four weeks notice and my last day of employment will be 11th June.

28. In her email in which she sets out the content of their conversation, Mrs Birkenhead acknowledges the Claimant's resignation, expresses some regret at it, and says that the resignation will be formally acknowledged after a cooling off period.

29. On 18 May 2020 the claimant confirmed her decision to resign. She states as follows (p53):

On 14 th April I left the Home believing there to be serious and imminent risk from Coronavirus that I couldn't reasonably be expected to avert. Since 10 th May I am aware of three members of staff who have tested positive. This is in the last eight days. I therefore feel that the risk hasn't reduced sufficiently for me to return to office based working even with a risk assessment in place.

On 8 th May I raised a grievance and have been advised by Employee Assistance, Care First, that it would be unadvisable to return to working at the Home until this has been properly addressed as, by doing so, I would be accepting the situation with no further recourse.

This is not how I imagined my time at Cooper would end but with the pressure I have been placed under I feel I have no alternative but to resign and consider myself constructively dismissed.

30. The Claimant has not given a proper explanation as to why she felt she had no option to resign rather than engaging with the offered grievance process and risk assessment process. Her oral evidence was that it was because she felt under so much pressure to return to the home that she had no other option. Her evidence was that this pressure came from the two

conversations she had had with Miss Suttle. These preceded the email and conversation with Miss Birkenhead, in which C was explicitly offered a risk assessment.

31. Miss Ashton accepts that there were risks involved in C returning to the work place – for example the need to convey messages to residents, the use of a shared toilet, and opening the door, but says that these could have been explored through a risk assessment had C engaged with that process. Because this assessment has not been done, I do not have the evidence before me as to how manageable or otherwise the risk was as at 14 May 2020. I note however that C herself accepts that by the 4 June 2020 it was sufficiently safe for her to return to work as at that date, without any further risk assessment.
32. On 3 June 2020 there was another conversation between the Claimant and Miss Suttle. I accept the claimant's account of this, in that Miss Suttle said she needed C to help her grow the business after they had lost so many residents. The claimant responded the following day and said that she would retract her resignation. In her evidence to me, the Claimant said that by that point in time, she was willing to return to work at Cooper House as she perceived the risk from COVID as being lower.
33. The following day, Miss Ashton had a conversation with the Claimant. Although the contents of the conversation are not significantly disputed, both witnesses have different perceptions of what was intended in the discussion. Having considered all the evidence, I am satisfied that a conversation took place in which the Claimant said that she had withdrawn her resignation out of 'a sense of duty' and that she meant this as a positive decision, because she wanted to help Cooper House and felt a sense of commitment to it arising out of the years she had spent working there. I accept that Miss Ashton said something along the lines of wanting the claimant to be sure about her decision to return and wanting her to take some time to consider it. This was followed up with an email the next day at p56. Whilst I accept that the Claimant perceived this conversation as Miss Ashton implying that she did not want the claimant to return to work, I find that this was not in fact the case, and I am satisfied that it was objectively reasonable for Miss Ashton to have a discussion with the Claimant about her reasons for withdrawing her resignation to ensure that she genuinely did want to return to work.
34. On 5 June 2020 the Claimant emailed Miss Ashton to confirm her decision to resign (p57).
35. The Claimant's last day at work was 12 June 2020.
36. The claimant did engage with the grievance process after her resignation. A grievance meeting took place on 17 June 2020, chaired by Miss Natasha Clarke, the manager of another care home owned by R. The minutes appear in the bundle from page 58. There is a dispute about whether Miss Clarke apologized 'on behalf of the company' for the way that the grievance had been handled or whether she apologized because of how the claimant felt she it had been handled. Ms Clarke says it was the first, and this is supported by the typed minutes of the meeting. The Claimant says the latter and this is supported by the handwritten minutes of the meeting. On

balance, I am satisfied that Ms Clarke did apologise for how the matter had been handled by the Respondent. I prefer the handwritten minutes which were taken during the meeting rather than the typed minutes which were produced later that day and undoubtedly involved some 'tidying up'. However, I do not find that much of significance turns on this as I accept Mr Wallace's submission that in any event this was an expression of regret by Mrs Clarke, and not any sort of binding admission of fault.

37. The grievance was partially upheld. The outcome letter is dated 6 July 2020 and appears at p62. The claimant had received a 15p per hour pay rise which eliminated the pay difference which she had complained about. The grievance regarding the Claimant's desire to remain working from. Home was not upheld. Mrs Clarke felt that a resolution could have been reached that would have allowed the Claimant to return to work safely.
38. The grievance was partially upheld in that on one occasion when the claimant had attended the site on a Saturday, a resident had been brought by a staff member into the office where she was working and this was not appropriate. However Ms Clarke was of the view that this could be avoided in future.
39. The grievance was partially upheld in that there was a delay in dealing with the pay query and acknowledging the grievance.
40. The Claimant appealed the grievance outcome on 13 July 2020 (66). The appeal meeting took place on 31 July 2020 and was chaired by Paul Lakeland, operational director for another region of r's operation. The outcome was sent to C on 21 August 2020 (77a). The grievance was not upheld in relation to less favourable treatment, as the other individuals were not comparable to C. The Claimant had appealed on the basis that she would have returned to site on 16th May. A remote workers risk assessment had been carried out. No on site risk assessment was carried out as C had not expressed a wish to return to the home – which she confirmed in her ev to me. Mr Lakeland was satisfied that if C had returned to work a RA would have been carried out and therefore this element of the appeal was not upheld. Mr Lakeland did not uphold C's appeal in relation to being requested to return to work on 6 May. He found that it was reasonable to request C to return to work. In regards to the comment of being 'held over a barrel', Mr Lakeland upheld this grievance as Miss Suttle accepted she may have used that phrase and it was inappropriate. He did not accept that Miss Ashton put a 'negative spin' on C returning to work in their conversation on 4th June. He did not accept that Ms Clarke had apologized for the way that C had been treated at the end of the grievance hearing. Overall, the grievance was partially upheld.

Relevant law and conclusions

41. Returning to the list of issues identified at the outset of the hearing. Following evidence, Mr Wallace on behalf of R did not make any submissions that C had acted to affirm the breach. C identified the breaches which triggered her resignation as being the requests to return to working at Cooper House on 6 and 13 May 2020, in what she perceived to be an unsafe situation.

42. The term which is alleged to have been breached is either the implied term of trust and confidence or the implied term to take reasonable care for the health and safety of the employee.
43. Therefore the only real issue for the Tribunal is whether this act is a repudiatory breach of one of those fundamental terms, and if so I then need to consider whether the dismissal was for a potentially fair reason and falling within the range of reasonable responses.
44. I turn to s.95 ERA 1996 :
- Circumstances in which an employee is dismissed**
- (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . . , only if)—
- ...
- (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.
45. Breach relied on in this case is the implied term of trust and confidence: *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978 and *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462 that implied into every employment contract is a term,
46. "...[T]hat the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee..."
47. Mr Wallace refers to a number of authorities in his written submissions, which I have considered, including *IBM UK Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212, [2018] IRLR 4 [45];
- An employee cannot complain about the exercise of an employer's discretion (eg refusal to make a discretionary payment), unless the employee shows that the exercise of discretion was irrational:
48. Mr Wallace submits that whether or not to permit C to work from home was an exercise of R's discretion, and that in the circumstances of this case it cannot be said that the Respondent exercised that discretion irrationally.
49. Alternatively, the breach is of the implied term to take reasonable care of the health and safety of employees, although Mr Wallace submits that any breach of this would in any event likely amount to a breach of the implied term of trust and confidence.
50. Having considered all the evidence before me, I am satisfied that the Respondent has not fundamentally breached the contract of employment such as to entitle the Claimant to treat herself as having been dismissed.
51. I remind myself of the statement of the law in *Western Excavating (ECC) Ltd v Sharp* 1978 ICR 221, CA, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. I must consider whether the employer is guilty of conduct which is a significant breach going to

the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract – if it is 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.'

52. Whilst I accept that during the conversations on 6 and 13 May 2020, the claimant was not explicitly offered a risk assessment prior to her return to work, it is clear from the emails from HR that she was offered this by Miss Birkenhead in the email dated 13 May and in the telephone conversation the following day. She was also offered, and indeed took up, a grievance hearing at which these concerns were discussed. The Claimant herself accepts that by the end of May she was prepared to return to work. There is no evidence that the proposal of deferring her return to the work place by another 2 weeks or so was ever raised with Miss Suttle or discussed with her as an alternative to the Claimant's resignation on 14 May 2020. I accept the submission by the Respondent that the Claimant's resignation forestalled any meaningful discussion around what systems could be put in place for her return to the workplace.
53. I appreciate that the Claimant would have been concerned at the situation at the care home, and I understand why she would have been concerned by the request for her to return to work. However, I am not satisfied that on the facts of this case, the Respondent's actions in asking her to return to the work place, and offering her a risk assessment before this took place, amounted to a fundamental breach of contract, such that she was entitled to treat the contract as being at an end.
54. I have considered the events and discussions which took place on 3 and 4 June 2020 around the Claimant's retraction, and then confirmation, of her resignation. The Claimant says that she resigned because of events around the 13 May 2020, not the conversation on 4 June 2020, and therefore does not rely on the conversation with Miss Ashton as a reason for her resignation. In any event, on the basis of the findings I have made regarding that conversation, I would not have found that conversation amounted to a breach of the fundamental term of trust and confidence in any event. The respondent does not invite me to find that the Claimant had affirmed the contract by retracting her resignation on 4 June 2020 – she was entitled to work out her notice and claim constructive dismissal, and the Respondent did not I think ultimately accept that unilateral retractin of her resignation. I do however take that withdrawal into account in my decision. It is evidence, I find, that the Respondent had not in fact acted so as to completely destroy the employer and employee relationship as at 14 May 2020, otherwise the Claimant would not, in my view, have retracted that resignation.
55. I therefore find that the Claimant was not constructively dismissed and her claim for unfair dismissal fails.

Employment Judge **Kate Armstrong**

19th February 2021 _____

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

DATE: 25/02/21