



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mrs L Croft

AND

Respondent
Thyme Care Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY
By Cloud Video Platform

ON

29 March 2021

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Mr J Lewis-Bale of Counsel

For the Respondent: Mr G Hine, Consultant

JUDGMENT

The judgment of the tribunal is that the claimant's claims for unfair dismissal, for breach of contract in respect of her notice, and for accrued holiday pay are all dismissed.

RESERVED REASONS

1. In this case the claimant Mrs Lorraine Croft claims that she has been unfairly dismissed, and she brings monetary claims of breach for contract for her notice pay, and for accrued holiday pay. The respondent contends that the claimant resigned her employment, and was not dismissed, and denies the remaining claims.
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 147 pages, the contents of which I have recorded. The order made is described at the end of these reasons.
3. I have heard from the claimant, and I have heard from Mrs Elaine Noble, a director of the respondent, and Mrs Carly Lapham, a Care Manager, on behalf of the respondent.
4. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
5. The respondent company is a care company in West Cornwall which provides home care for adults wishing to maintain independence in their own homes. The claimant was employed from 19 April 2016 until the disputed events of March 2020 when the respondent asserts that she resigned her employment. Nearly a year before in April 2019 the claimant had resigned her employment by written letter, giving four weeks' notice, but was

- persuaded to withdraw her resignation and remained in the respondent's employment. With effect from 1 August 2019 the claimant was promoted from a Community/Administrative Carer and was employed as a Supervisor.
6. In early March 2020 the claimant's mother was gravely ill and the claimant wished to take compassionate leave in order to provide her end-of-life care. The respondent had allowed other employees to take compassionate leave previously, but this was discussed and authorised on an individual basis, depending upon the respondent's work requirements at the time. The difficulty which the respondent faced in early March 2020 related to the Covid-19 pandemic, and the respondent had two employees shielding, two were self-isolating, and another was on leave.
 7. There is a stark difference between the different versions given by the parties as to what then happened. The claimant's recollection is that she telephoned Mrs Noble of the respondent to explain the circumstances relating to her mother and to request compassionate leave, and that this telephone conversation took place on 4 March 2020, which was a Wednesday. She says that she informed Mrs Noble that her mother's medical advice was that she was not likely to survive for many weeks, and she thought that she would need compassionate leave for a few weeks, and a month at the most. Mrs Noble replied that respondent was unable to pay her for that amount of time, but the claimant agreed to take the time off without pay. She was told by Mrs Noble to come into the office to discuss matters on Friday, 6 March 2020. The claimant asserts that she had written a letter which she gave to Mrs Noble when she attended the office on 6 March 2020. This did not indicate that she was resigning. The claimant then says she was given a letter by Mrs Noble confirming the suggested resignation but that she could come back in a more junior capacity as a carer, when she was ready to return to work after she had cared for her mother. She says that she refused to sign that letter to agree to its contents when requested by Mrs Noble, and that Mrs Noble then refused to allow her to photocopy the letter. Mrs Lapham was present at the office at the time, and the claimant asserts that Mrs Lapham agreed with her that she should not sign the letter.
 8. I prefer the version of events given by Mrs Noble and Mrs Lapham because their evidence was consistent with each other, and more consistent with the contemporaneous documents. On balance, the weight of evidence is in their favour, and I find as follows.
 9. There was a meeting in the respondent's office on Wednesday, 4 March 2020 between the claimant, Mrs Noble and Mrs Lapham. The claimant informed the respondent that she required a period of compassionate leave for an unknown period in order to provide end-of-life care for her mother. The claimant confirmed that she would need to leave at the end of that week, on Friday, 6 March 2020, but Mrs Noble was unable to allow the claimant to take indefinite compassionate leave because of her other staffing difficulties. When asked how long she would need to be away, the claimant replied was the effect that it "could be weeks or could be months". Mrs Noble explained that she could afford to allow only a week's compassionate leave because of the other staffing requirements. It was at that stage that the claimant decided to resign her employment in order to be with her mother, and the respondent made it clear that claimant would always be welcomed back as a carer when she had finished the extended period of care with her mother, but that the respondent could not guarantee that her present post would still be available. The claimant confirmed that she would have to leave her job, and in discussing the resignation the respondent agreed to pay the claimant until the end of March 2020.
 10. The respondent then typed a letter to the claimant dated 4 March 2020 in her presence to this effect: "I am so sorry to learn that your mum is poorly and understand that you need to hand in your notice but with a review to returning as a carer in the community. When you are ready please contact me so we can arrange for you to start in your role as a community carer and hours that you wish to do. If you decide not to take a post as a community carer that I wish you all the best. Best wishes". Mrs Noble printed off that letter, and invited the claimant to sign it, but she declined to do so without having discussed it first with her husband. Mrs Lapham commented that she should be allowed to do that. She was not precluded from photocopying that letter, but it was pointed out to her that there was no need and that she could take the original which she held because Mrs Noble could always print off another from her laptop.

11. Mrs Noble and Mrs Lapham both deny that the claimant gave them a letter as she alleges. There is no copy of this letter in the agreed bundle between the parties, but by way of late disclosure the claimant has adduced what she now says is a draft of that letter from a notebook. The letter states "With reference to our conversation tonight I will be leaving on Friday, 6 March 2020 to start my compassionate leave. I'm not sure how long it will last but will keep you updated throughout. You said that you would pay me to the end of March for which I appreciate. Kind regards". The notebook entry which I have seen was originally dated 2nd March 2020. However, the date has been amended to suggest it might have been prepared on 4 March 2020. However, it reads 4nd March (sic), suggesting it was always dated 2 March 2020 with the 2 being overwritten by the 4. As there is some doubt as to the veracity of the date of this suggested letter, I accept the evidence from Mrs Noble and Mrs Lapham that the claimant did not give them any letter.
12. Later that evening Mrs Noble prepared notes of what had happened during that meeting earlier that day, and these are consistent with the above version of events.
13. There was then a second meeting 6 March 2020 at which the claimant brought back a number of items which would ordinarily be returned on the termination of employment. These included her uniform, her on-call badge, her parking permit, training records, and some care files. Given the possibility that the claimant might choose to return to the respondent's employment as a carer, Mrs Lapham suggested that she retained these documents pending that decision, so as not to have to go through a process of reissuing them subsequently. The claimant subsequently requested that she be allowed to borrow a wheelchair for her mother's use, to which the respondent agreed, and which she collected on Monday, 9 March 2020.
14. There were approximately 20 telephone calls or texts or WhatsApp messages between the parties during the next month. Mrs Lapham says that a number of these calls were to or from her because she enquired about the health of the claimant's mother. In addition, she telephoned the claimant on or about 21 March 2022 to ask her to return the office keys because she had left the company, which the claimant did without any objection to that apparent conclusion.
15. The claimant's mother then passed away and by email dated 22 April 2020 she wrote to Mrs Noble to this effect: "I am writing to advise you that my mother passed away and I am therefore in a position to return to work. As I advised you on 6 March 2020, it was never my intention to resign and I therefore expect a return on the same terms of employment. I propose a date of return Monday, 27 April 2020. Regards". On 24 April 2020 she emailed Mrs Noble to ask: "Would you please send me over a copy of my personnel file which will include my letter dated 2 March requesting compassionate leave. If you could send this over by email I would appreciate it, thank you." Mrs Noble replied: "Sorry Lorraine you never gave me or Carly a letter so we have no idea what you mean." The claimant replied: "When I came into the office I gave you a hand written letter requesting compassionate leave which you put on your desk, at the same time giving me your letter stating you were accepting my resignation. What you did with it after that I do not know but it was definitely on your desk when I left."
16. Mrs Noble then sought advice as to what to do, and her advisers suggested that there should be a meeting with the claimant to clarify her suggestion that she had not intended to resign her employment, and her apparent intention to return to work. That was suggested for 22 April 2020. In the meantime, two of the respondent's employees had raised concerns about the claimant's management of them, and the respondent's accountants raised a suggestion that the claimant might have paid herself some previous overtime and expenses payments which should not have been authorised. For this reason, the meeting was postponed until 11 May 2020, to discuss these conduct issues. By letter dated 6 May 2020 the claimant was invited to what was effectively an investigation meeting, and she was informed it might be necessary to pursue a formal disciplinary process, and that her attendance at the investigation meeting was deemed to be "a reasonable management instruction". There was then a meeting on 14 May 2020, and consultants appointed by the respondent's advisers prepared a report which concluded that the claimant's employment had ceased with immediate effect on 4 March 2020, that there was no need to take any further disciplinary action, and it was a matter for the respondent whether it wished to offer

- the claimant re-engagement as a carer or any other role for which there might be a vacancy.
17. It was only after this investigation report was concluded that the respondent issued the claimant's form P45. This document is dated 28 May 2020, and it suggests that the claimant's termination of employment was on 29 April 2020. Mrs Noble explained that she leaves these matters to her accountants, and the April date might have been inserted because the claimant was paid for March 2020, and that date was after the April 2020 payroll had taken place.
 18. In conclusion this was therefore a difficult claim to resolve because of the stark conflict between the different versions given by the parties. It is unfortunate that the respondent did not obtain earlier and more comprehensive advice to the effect that it should have written a letter to the claimant confirming its position, and it would have been good industrial practice to have invited the claimant to be allowed a cooling off period to confirm exactly what her intentions were. In addition, the respondent took a number of actions which are inconsistent with the earlier termination of the claimant's employment, which included allowing her to retain her uniform and other documents, requiring her to attend the potential disciplinary investigation, and issuing a form p 45 which is inconsistent with the dates relied upon by the respondent. Some of this can be explained by the respondent's open offer for the claimant to return in a more junior capacity. Nonetheless, if it were not for the evidence of Mrs Lapham, I may well have decided that the claimant's version was preferable on the balance of probabilities.
 19. However, the evidence of both Mrs Noble and Mrs Lapham was clear, they corroborated each other's recollection, and their evidence is consistent with two contemporaneous documents prepared by Mrs Noble on 4 March 2020, namely the letter to the claimant, and her subsequent notes of the meeting that evening. As stated, for these reasons the weight of evidence is in their favour, and I prefer their recollection and their version of events. That is why I have concluded that the claimant's clear words and clear intention on 4 March 2020 was that she was resigning her employment with effect from 6 March 2020 in order to take compassionate leave to look after her mother. The claimant was unable to say how long would be required and could not accept the one week's compassionate leave offered by the respondent, which is one of the reasons she resigned.
 20. In conclusion therefore I find that the claimant resigned her employment with effect from 6 March 2020, and she was not dismissed.
 21. One final point is that the respondent's holiday year runs from 1 January annually, and that the claimant had taken two weeks' paid leave during February 2020.
 22. Having established the above facts, I now apply the law.
 23. The claimant has brought a claim for unfair dismissal under section 94 of the Employment Rights Act 1996 ("the Act"). However, the claimant was not dismissed by the respondent, and her resignation does not amount to dismissal under section 95(1)(c) of the Act. In the absence of a dismissal, the claimant cannot pursue a claim for unfair dismissal, and it is hereby dismissed.
 24. The claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the potential claim was outstanding on the termination of employment. However, in circumstances where the claimant resigned her employment, and in any event was paid by the respondent for the whole of March 2020 even though her employment ended on 6 March 2020, the claimant's claim for unpaid notice pay is also dismissed.
 25. Finally, the claimant also claims in respect of holiday pay for accrued but untaken holiday under the Working Time Regulations 1998 ("the Regulations"). Regulation 14 explains the entitlement to leave where a worker's employment is terminated during the course of her leave year, and as at the date of termination of employment the amount of leave which she has taken is different from the amount of leave to which she is entitled in that leave year. Where the proportion of leave taken is less than that which he is entitled, the employer is required to make a payment in lieu of leave in accordance with Regulation 14(3). However, in this case the claimant had taken two weeks' paid leave during February 2020, which is in excess of her pro rata entitlement between 1 January 2020 and 6 March 2020. At the

- time of her resignation the claimant did not have any accrued but unpaid holiday pay, and this claim is also therefore dismissed.
26. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 21; a concise identification of the relevant law is at paragraphs 23 to 25; and how that law has been applied to those findings in order to decide the issues is at paragraphs 23 to 25.

Employment Judge N J Roper
Date: 29 March 2021

Judgment & Reasons sent to the Parties: 13 April 2021

FOR THE TRIBUNAL OFFICE