



EMPLOYMENT TRIBUNALS

Claimant: Julie Ward
Respondent: Betsi Cadwaladr University Health Board
HEARD AT: Cardiff: 17 & 18 June 2021
BEFORE: Employment Judge Michell

WRITTEN REASONS

(1) Introduction

1. I gave my judgment and reasons for it orally at the conclusion of a two day hearing on 17 & 18 June 2021. Following the parties' receipt of the written judgment, I have been asked by the claimant's representative, Mr Roberts, to provide written reasons. They are set out below.

(2) Background

2. The claimant worked as a senior medical secretary from 1999 until her resignation without notice on 22 May 2020. By a claim form presented to the tribunal on 22 June 2020, the claimant asserts that her resignation amounted to an unfair constructive dismissal. She also alleges breach of contract- namely, a change in the terms and conditions of employment.

(3) Issues

3. A case management hearing took place on 13 October 2020. At that hearing, the issues were clarified. In particular, it was confirmed that the claimant relied on an alleged breach of the implied term of trust and confidence (“the T&C term”). In support of that claim, the claimant alleged:
 - a. Her role and its location had been changed without consultation.
 - b. Mrs Sally Pugh bullied the claimant by saying that she was ‘not fit to do your job’ on 7 April 2020, and by telling her on 15 April 2020 not to log onto her computer because she had already been told she was ‘not going to be doing the same job any more’. (That is not quite what the claimant says in her Particulars of Claim, as explained below.)
 - c. Mrs Christina Billingham bullied the claimant by suggesting she had acted in an “accusatory and abrupt” manner at a meeting on 5 May 2020, in Mrs Billingham’s letter to the claimant dated 18 May 2020.
 - d. Mrs Billingham failed to take the claimant’s concerns about Mrs Pugh’s bullying seriously.
4. The claimant also alleged that the change in her role and its location in itself amounted to a fundamental breach of contract, entitling her to end the contract, as well as claim damages.
5. At the October 2020 case management hearing, today's hearing was listed for a determination on liability only.

(4) Final Hearing

6. At the hearing, which was conducted without technical difficulty via CVP, I heard evidence from the claimant. I also read and gave due weight to three witness statements which were produced in support of her- from Ms Helen Roberts, the claimant’s niece, and work colleagues Dr Bos and Dr Sathyamoorthy. (I was told none of those witnesses could be available.) For the respondent, I heard from Mrs Pugh, Mrs Jillian Williams, Mrs Billingham, and Gaynor Harding. The respondent’s

counsel Mr Walters provided written submissions at the end of the hearing, setting out material law. I was grateful for his assistance, and that of Mr Roberts -who (like Mr Walters) was focused and to the point in his questioning. Both gave oral submissions at the conclusion of the evidence.

7. As regards evidence, the witnesses all did their best to give honest evidence. However, there were occasions when the claimant's evidence was, understandably given the lapse of time, somewhat hazy. The claimant's evidence was also on occasion inconsistent on some important points. In particular, she first said in evidence that she had checked all three computer systems before sending out the letter which led to the 7 April 2020 meeting to which I will refer later. But she later conceded she had not in fact checked WDS system. She denied any previous discussion or issues being raised (either informally or on appraisal) about alleged errors on her part prior to April 2020. However, the paperwork to which I was referred clearly shows such matters were raised with her, both informally and at a formal appraisal meeting.

(5) Factual findings

8. The claimant was a very experienced secretary. She worked for the NHS for some 25 years. By all accounts, she was valued in her role, and had been commended for her 'can do' attitude and high standards of work. She retired in 2016 after her 60th birthday, but then was effectively immediately re-engaged on a part time contract.
9. Unfortunately, it seems that by 2019 the claimant had developed some problems with her health. I heard evidence about this from Mrs Harding, who provided the claimant with line management support for some time.
10. I found Mrs Harding to be a particularly credible witness. She was scrupulously fair in her evidence. She explained that she had managed the claimant for some time up to January 2020, and that she was a valued member of staff, being both friendly, approachable and hard working. She also explained (and I accept) that she had taken

care both in 2017 and 2019 to remind staff of the importance of checking across all three data systems which the respondent had -WPAS, Cyrrpis and WDS- in order to check the addresses and personal data in correspondence before it was sent out. It is the WDS system which holds the GP information, and which would be used to register the practises which patients used. In particular, it is that system which, if the claimant had checked it, contained all the information she would have needed in March 2020 to write the key letter at issue here.

11. I accepted her and Mrs Pugh's evidence that when a change of information is given, it is the responsibility of the secretary and administrative staff to ensure that the appropriate systems are correctly updated. This can be time consuming, but it is necessary.
12. Upon the claimant's return from sick pay in 2019, Mrs Harding noticed changes in the claimant. The claimant had become increasingly tired and irritable. She could be abrupt and snappy, perhaps because of sleep issues that she had been having. On several occasions in the first half of 2019, she observed that the claimant had become unnecessarily upset or angry in respect of matters which ought not to have generated that response.
13. There were also occasions when Mrs Harding needed to talk to the claimant about not checking the three data systems correctly. An incident occurred in July 2019, when the claimant used an incorrect address which was to be sent to a child's GP. She discussed the error with the claimant. She reminded the claimant of the importance of checking systems and proof-reading. The claimant was remorseful. Mrs Harding also noticed other errors in the letter, such as use of the wrong NHS number. When she pointed this out to the claimant, the claimant expressed regret and surprise. Mrs Harding decided to take various follow-up actions, including making sure the claimant understood the need to check all three systems, and that she should not overwrite letters.
14. In January 2020, Mrs Harding had cause again to speak to the claimant. Another error was spotted in a letter drafted by the claimant and sent to a family using the

wrong home address. Once again, she impressed upon the claimant the importance of proofreading, given the obvious danger of sensitive personal data being sent to the wrong place and falling into the wrong hands.

15. Shortly thereafter, Mrs Harding left her previous role as administration manager, and had no further dealings with the claimant.
16. Mrs Harding indicated that she had only used an informal process to deal with the above matters. However she said in her evidence, and I accept, that had she been the person having to deal with the issues that arose after her departure, she would have followed broadly the same path taken by Mrs Pugh in the circumstances and given that the informal route had not produced the desired outcome.
17. Following Mrs Harding's exit from the administration manager role, Mrs Pugh took over the community paediatrics team. Mrs Pugh has a secretarial background. She was something of a 'new broom' and thus took a different approach to Mrs Harding.
18. In early April 2020, Mrs Pugh received a telephone call and email from a social worker, Shirley Viney. Ms Viney told Mrs Pugh there had been a breach of confidentiality. Specifically, details of an adopted child and the adoptive parents had been sent in a letter drafted and sent by the claimant, to the wrong GP address. A family relative of the birth parents worked at that GP surgery. Fortunately, that individual had been on annual leave when the letter arrived. However, the letter would have given the name of the child, date of birth, the adoptive parents' names and addresses, and the birth parents' medical history, so that the adoptive parents would be aware of any underlying issues. This could have proven deeply embarrassing and problematic, opening up the respondent to possible legal action.
19. Mrs Pugh contacted the claimant, and asked her to contact the surgery and ensure that the letter was shredded. Later on, Mrs Pugh checked to see if an amended letter had been sent by the claimant as she had asked. Apparently, it had not been.

20. Mrs Pugh organised a meeting with the claimant, at short notice. She told me, and I accept, that the meeting was intended to be an 'initial assessment' within the meaning set out in the respondent's disciplinary process. It could have led to formal or informal disciplinary action, or no action, or the initiation of a capability process.
21. I accept Mrs Pugh's evidence that by the time of the meeting, the claimant knew about of the letter which would have been discussed. The claimant did not ask for the meeting to be delayed in any way. This is important, given the assertion Mr Roberts made on her behalf before me that insufficient notice was given as to the purpose of the meeting.
22. I also accept Mrs Pugh had genuine concerns, formed partly from the March 2020 letter itself, and partly from what she gathered from the claimant's file about previous incidents (as explained above), regarding the risk which the claimant's work practises might pose. I think those concerns were, in context and viewed objectively, justified.
23. That having been said, it may have been sensible for her to have made clear to the claimant in advance of the meeting that it was to be held as an initial assessment fact finding meeting under the disciplinary process. The 'WP9' procedure governing that process explains that if the employee requests representation, it "will not normally be refused". That is something which, in hindsight at least, might have been useful to flag up to the claimant -even though she had previously read the policy at issue.
24. The claimant's case is that she was told in terms by Mrs Pugh at that meeting "you are not fit to do your job". Having heard from the claimant, Mrs Williams (who took notes), and Mrs Pugh, I do not think those specific words were used. I accepted from Mrs Pugh that she would not have been so blunt. However, it is quite clear from the meeting notes Mrs Pugh created that day that she was fairly forthright with the claimant. In particular, she expressed concerns with the claimant continuing her current role completing typing if she was not routinely checking matters as she ought to have done. Given the issues potentially at stake, I have some sympathy with that view. I do not accept that she overstepped the mark, even though the claimant was plainly upset by what she said.

25. She also explained that the claimant might have to be deployed to another workplace on a temporary basis (i.e. for no more than a few weeks) pending completion of the fact finding process. This was something which is permissible under the disciplinary process, but it would have been useful to have explained that much to the claimant to avoid any possibility of misunderstanding. In fairness to Mrs Pugh, however, I accept her evidence that this would have been the subject to further discussion and explanation at the meeting, had the claimant not walked out of it.
26. It was suggested in cross examination of Mrs Pugh that the disciplinary process was not the appropriate procedure to follow. Although I understand the capability procedure might have been used initially instead, as far as the respondent was concerned the claimant had on her own admission failed to check the respondent's three systems for the correct address, in circumstances where similar issues had occurred with the claimant in the quite recent past; where she had expressly been told to check all three systems, and where she had had expressly said she would (but did not) do so. In those circumstances, and given what might have been the possible consequences of her error, I consider the process followed was legitimately open to the respondent.
27. The claimant peremptorily left the meeting in an upset state. She complained immediately to Dr Bos, consultant, but in fairness to him he did not hear what had been said between the claimant and Mrs Pugh. Nor was he fully apprised as to the administrative background. (He was complimentary about the claimant when spoken to by the respondent, but he did say she 'cut corners' from time to time.)
28. Once the claimant had left, Mrs Pugh completed her notes of the meeting, and went to the claimant's desk to make sure there was no outstanding work that would need to be picked up in her absence. She found papers in a state of disarray. There were various letters which had incorrect NHS numbers or dates of birth, and in some cases looked as if they were overtyped from previous letters to another patient. There were various documents which should have been in patients' files. She considered it would be difficult for others to locate documents in the claimant's absence, given the

absence of methodical arrangement. This, I find reasonably, increased her concerns.

29. The claimant went off sick that day and remained off work until 15 April 2020. On her return on 15 April, Mrs Pugh approached her with a view to continuing their conversation -which plainly still needed a conclusion. She asked the claimant to join her upstairs for a conversation. The claimant was abrupt with her. This was doubtless because she continued to feel aggrieved and upset. The claimant told Mrs Pugh she would 'see you later', as she was cleaning her work area.

30. Mrs Pugh then did say something to her about there being no need for her to clean her work area, as she would not be using it in the immediate future. The reason Mrs Pugh would have given that indication is that she had by that date already written up a risk assessment, and already determined that it was appropriate for the claimant to be temporarily redeployed under the WP9 procedure pending the outcome of the fact finding process. In my judgment, this was a route which was legitimately open in the circumstances under the respondent's procedure. Again, though, that might sensibly have been made crystal clear to the claimant. Had the claimant not picked up her bag, said "I'm going", and (again) abruptly left, that clarity would probably have been forthcoming.

31. I do not think, contrary to what is recorded in the case management note, that the claimant was told she was not going to be doing her job any more. That is not her pleaded case; nor is it the case in her witness statement; nor was it consistent with her evidence before me.

32. On 20 April 2020, the claimant wrote an email tendering her resignation. Amongst other things, in that email she asserts that she was told she did not need to log onto her computer as she had previously been informed she would not be doing her job "for some time to come".

33. Shortly before her resignation email, the claimant sent Mrs Pugh the summary of facts she had been asked to provide on 15 April 2020.

34. The claimant and Mrs Billingham thereafter exchanged various messages, amongst other things concerning possible retraction of the resignation. They then met on 22 April 2020. On that occasion, Mrs Billingham made sure the claimant understood that if she needed further support she would get it. She also explained that if, following a review of the risk assessment, it was thought appropriate for her to be move locations, under the present situation it would not be any different to moving her for social distancing reasons.
35. It appears the claimant understood that the short term plan was for her to be doing some filing work. Mrs Billingham also explained to the claimant that if she was to return to work, the fact finding process would still need to be followed.
36. By an email dated 30 April 2020, the claimant retracted her resignation. Then, on 5 May 2020, she confirmed with Mrs Billingham her intention to return to work. Mrs Billingham explained to the claimant in a meeting with her that she had reviewed the risk assessment and taken advice from HR, and that the plan was to look at alternative work until the initial assessment was completed and the way forward agreed. The claimant did not appear to dissent from that proposed course.
37. At the meeting, Mrs Billingham also explained the various steps she had taken to try and establish what had been said by Mrs Pugh at the 7 April 2020 meeting. She had looked at the various notes, spoken to Mrs Pugh and Mrs Williams, and spoken to Dr Bos as well. Contrary to the claimant's pleaded case, I therefore do not think it is fair to say that Mrs Billingham did not take the claimant's "concerns about Mrs Pugh's bullying" seriously. She did do so, and she made appropriate enquiries. The fact she did not satisfy the claimant's issues does not, objectively viewed, give cause for valid concern.
38. It is clear from the notes of that 5 May 2020 meeting -which I accept reflect the gist of the meeting- that the claimant understood the plan was for her to work at Wrexham (which was near to her), where she would be set various tasks concerning IFiT tracking. Unfortunately, the claimant became upset again at that meeting. She expressed in strong terms her view that Mrs Pugh was not being candid about the

7 April meeting. Her manner became abrupt and -as Mrs Billingham reasonably perceived it- quite rude, and she once again ended up walking out of the meeting.

39. Mrs Billingham began to write a letter setting out her concerns about the claimant's behaviour at that meeting. However, the letter was not sent because before she finalised it, the claimant wrote to her asking where she should go for work the following Monday. In answer, Mrs Billingham explained that the claimant would be temporarily redeployed to the child health centre doing IFiT until the initial assessment was completed and reviewed with regards to next steps.

40. Mrs Billingham and the claimant met again on 12 May 2020. The claimant explained that she did not want to get upset, which is why she had walked out of the previous meeting. She said she was "too emotional", she "can be OK for so long but then needs to go". They discussed the question of whether or not a meeting could take place to 'clear the air' between herself and Mrs Pugh. The claimant indicated she was not ready for such a meeting. Mrs Billingham made the claimant aware that she could bring a grievance or a complaint under the dignity at work policy if she so chose. She also made sure the claimant had access to copies of the relevant policies.

41. On 18 May 2020, Mrs Billingham wrote to the claimant as a follow-up to the meeting on 12 May 2020, recording matters that had been discussed. She explained that in hindsight she should have offered an adjournment when she saw the claimant getting upset on 5 May. She recorded her explanation orally given on 12 May that at times she felt the claimant had (as I find was the case) been abrupt and accusatory. She also recorded the fact the claimant had accepted she had been "bad-mannered" and had reacted in that way because she was upset. She recorded they had both agreed this was not acceptable, and that if the claimant became upset in the future matters should be adjourned.

42. In my view, the letter is a reasonably balanced one. It ends by assuring the claimant that, pending her decision regarding submission of a grievance, any further initial assessment meeting would not take place with Mrs Pugh.

43. On 22 May 2020, the claimant wrote resigning with immediate effect. Amongst other things, she asserted she had been told her contract of employment would change and she would be redeployed into another role. That was not her evidence before me. Rather, she suggested she was unsure about what was happening in respect of her role. However, as indicated above, she had been told that any redeployment was temporary, and made under 'WP9'.

44. Following her resignation, the respondent chose to deal with the claimant's correspondence as a grievance. The grievance was subsequently dismissed. Although Mr Roberts made various criticisms as to how that process was dealt with, they are of little or no direct relevance given that any failings on the part of the respondent in that respect took place after the resignation on 22 May 2020.

(6) Legal principles

Constructive dismissal

45. In order for a constructive dismissal to be made out, three conditions must be met:

- a. There must be a repudiatory breach of contract by the employer. This may be either an actual breach or an anticipatory breach.
- b. The employee must resign in response (at least in part) to the breach. **Nottinghamshire County Council v Meikle**¹.
- c. The employee must not delay too long in resigning (whether on notice or 'on the spot'); otherwise, he/she may be deemed to have waived the breach and agreed to vary the contract.

Repudiatory breach

46. Conduct by the employer can only justify the employee in resigning if that conduct amounts to a repudiatory breach of contract. **Western Excavating (ECC) Ltd v Sharp**². The burden is on the employee to show there was such a breach.

¹ [2004] IRLR 703.

² [1978] IRLR 27.

47. In the case of alleged breach of the T&C term, the claimant must show that the employer has, without reasonable and proper cause, conducted itself in a manner which is calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. See **Malik v. BCCI**³.

48. A breach of the T&C term is by definition repudiatory. See further Cox J in **Towry EJ Ltd v. Bennett and others**,⁴ which illustrates how serious a breach of the T&C term must be:

"It is well established that the test to be applied in determining whether there has been a breach of this term is an objective one. The question is whether, viewing all the circumstances from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract. All the circumstances must be taken into account, in so far as they may be said to bear on an objective assessment of the intention of the contract breaker" (underlining added).

49. The question of whether or not there has been repudiatory breach should be determined according to the terms of the contractual relationship, and not in accordance with a test of 'reasonable conduct by the employer'. **Western Excavating (ECC) Ltd v. Sharp**.⁵

50. Similarly, unless a repudiatory breach of contract can be made out, the claim must fail regardless of whether or not the employer's conduct was unwise or unreasonable in industrial relations terms. **Spafax Ltd v. Harrison**.⁶

51. Because the test as to whether or not there has been repudiatory breach is objective, *"there will be no breach simply because the employee subjectively feels that such a*

³ [1997] ICR 606 (HL) at 621.

⁴ [2012] EWHC 224 (QB).

⁵ [1978] QB, 761, CA

⁶ [1980] IRLR 442, CA.

breach has occurred, no matter how genuinely that belief is held". **Harvey** Div D1, para 433. (The converse also applies- trust and confidence does not in fact subjectively have to have been destroyed or damaged if, viewed objectively, the impugned conduct is likely to cause the requisite damage or destruction.)

52. If some of the alleged incidents founding a 'cumulative breach' claim are found not to have occurred, the tribunal must have regard to those which it has decided did occur and ask objectively whether, in the particular context of the case, they amounted to a breach of contract and whether, in the particular context of the case, that breach was repudiatory. See **Lochuack v. London Borough of Sutton**.⁷

Waiver/affirmation

53. A claimant who unduly delays in resigning in response to a repudiatory breach will be taken to have waived any such breach or affirmed the contract. See **Western Excavating**, per Lord Denning: "*[the employee] must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged.*"

54. In the event that a party has committed a repudiatory breach, it cannot "*choose to retreat*". What it can do is "*invite affirmation by making amends*". In such case, a tribunal ought to take a "*reasonably robust approach to affirmation*", in that a wronged party, particularly if it fails to make its position entirely clear at the outset, "*cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the other party has offered to make suitable amends*". See **Bournemouth University Higher Education Corp v. Buckland**.⁸

Last straw

55. Repudiatory conduct may consist of a series of acts which cumulatively amount to a breach of the T&C term.

⁷ UKEAT/0197/14.

⁸ [2011] QB 323, at paras 40 & 44 per Sedley LJ.

56. If an employee waives or affirms certain breaches, he may still use those 'old' breaches in support of his claim, if he is able to show a 'last straw'.

57. See for example **Logan v Commissioners of Customs and Excise**⁹ which addresses the ability to rely on an 'old' repudiatory breach as part of a later breach of the T&C term. There it was held (at para 31 *per* Glidewell LJ) that if the employer is in repudiatory breach of an express term of a contract but the employee does not leave; and if subsequently a series of actions by the employer might together constitute a breach of the T&C term; the employee is then entitled to treat the original 'old' breach as the start (as opposed to an end in itself) of a series of actions which, taken together with the employer's other actions -both inculpatory and exculpatory- might cumulatively amount to a breach of the T&C term.

58. The 'last straw' itself does not need to be a breach of contract. See **Lewis v. Motorworld Garages Ltd.**¹⁰ However, where a 'last straw' is relied upon, the final act must "contribute something" to the breach of the T&C term. See **Omilaju v. Waltham Forest LBC.**¹¹ See also **Kaur v. Leeds Teaching Hospitals NHS Trust.**¹²

59. Just as the test as to whether or not there has been repudiatory breach is objective, the test as to the efficacy of a 'last straw' is also objective. **Omilaju v. Waltham Forest LBC.**¹³

(7) Application to the facts

60. Applying the above principles, and in the light of my above factual findings, I do not consider the claimant has established that the respondent was in breach of the T&C term. Although I fully accept that the claimant was upset by events, particularly -but

⁹ [2004] IRLR 63, CA.

¹⁰ [1985] IRLR 465, at para 36(c)

¹¹ [2005] ICR 418, at 488 *per* Dyson LJ.

¹² [2018] IRLR 833.

¹³ [2005] ICR 418, *per* Dyson LJ at para 22.

not only- on 7 April 2020, that fact of itself does not mean that the respondent acted in repudiatory breach.

61. I do think there were some matters which, in hindsight, could on occasion have been dealt with in perhaps a more sympathetic or transparent way -subject to the provisos I have set out above. I also fully accept that the claimant was upset by what she subjectively (albeit not wholly fairly) perceived to be unfair treatment. However, that of itself cannot found a successful constructive dismissal case unless it amounts to conduct which (without due cause) was calculated or likely to destroy or seriously damage trust and confidence, as viewed from an objective perspective. In my judgment, it does not.

62. I think Mr Walters was probably right in his submission to me that, by rescinding her first resignation on 30 April 2020, the claimant affectively affirmed any breach taking place prior to that date in any event. She would therefore require a 'last straw' in order to be able to reactivate and rely on any previous repudiatory breach. The only matters on which she relies in her pleaded case which postdate her return to work after 30 April 2020 are Mrs Billingham's alleged failure to investigate the claimant's "concerns about Mrs Pugh's bullying", and the alleged bullying by Mrs Billingham in her 18 May 2020 letter.

63. As regards the first of these matters, see paragraph 37 above. In my judgment there is nothing which could serve as a 'last straw'. The same applies to the 18 May letter on an objective reading of it, and given my factual findings at paragraphs 41 & 42 above. But even if this is wrong, and even if the claimant's return to work did not amount to an affirmation, for the reasons I have said I do not consider that the matters on which the claimant relies, either individually or collectively, amount to a repudiatory breach.

64. As regards the assertion that the respondent fundamentally breached the claimant's contract by changing her job role and location without consultation, that was not quite what the claimant said happened in her own evidence. But in any event, it is clear

that the changes which did take place in the claimant's role were expressed to be only temporary, took place under clause 9.2 of the 'WP9', and in my judgment were legitimate in the circumstances. As such, I cannot see how it can really be argued that the respondent acted in breach of contract, still less in repudiatory breach, by relocating the claimant as it did. (I say this whether the relocation is viewed as part of an alleged breach of the T&C term, or a discrete breach of contract in its own right.)

65. As I said at the hearing, it is a shame that the claimant's long and good service came to an end in such a way. However, for the reasons I have set out, her constructive dismissal and breach of contract claims were not well founded, and as such were dismissed.

Employment Judge Michell

DATE 28 June 2021

Sent to the parties on: 29 June 2021

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For the Tribunal Mr N Roche

Written reasons for this decision will not be provided unless asked for by either party by a written request made within 14 days of the sending of this written record of the decision.

