



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs J Openshaw  
**Respondent:** Hestia Care Limited  
**Heard at:** Bristol (by video) **On:** 22 and 23 June 2021  
**Before:** Employment Judge C H O'Rourke  
**Representation**  
**Claimant:** in person  
**Respondent:** Mr C Johnson - consultant

**JUDGMENT** having been given to the parties on 23 June 2021 and written reasons having been requested, the same day, in accordance with Rule 62(3) of the Employment Tribunal's Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Background and Issues

1. The Claimant was employed as a care home team leader, in one of the Respondent's care homes, for approximately four years, until her resignation, with immediate effect, on 11 November 2019. As a consequence, she brings claims of constructive unfair dismissal, automatic unfair dismissal on health and safety grounds, detriment due to having made a protected disclosure and breach of contract in respect of notice pay.
2. The issues in respect of the claims are as follows (and as set out in a case management summary of 11 August 2020 [29]):

### Constructive Unfair Dismissal

(1) Did the Claimant resign because of an act or omission of the Respondent? The Claimant stated that the following acts or omissions of the Respondent, all relating to incidents on 19 July 2019, caused her resignation:

- a. Seeking to blame her, or make her feel responsible for those incidents;
- b. Recording a subsequent grievance hearing without her knowledge or consent;
- c. Not responding properly/seriously/promptly to her safeguarding/health and safety concerns relating to both residents' and her own health and safety, as set out in her grievance of 21 July 2019;

- d. The last act above being the 'final straw'.
- (2) Were any such acts or omissions a breach of the implied term of trust and confidence between employer and employee and therefore a fundamental breach?
- (3) Did the Claimant affirm the contract? The Respondent contends affirmation by the Claimant, based on the time lag between the incidents and her resignation (four months).
- (4) If the Claimant was dismissed, was such dismissal otherwise fair, within s.98 of the Employment Rights Act 1996 ('ERA')?
3. Automatic constructive unfair dismissal on health and safety grounds (s.100(1)(c) and/or (d) Employment Rights Act 1996 (ERA). Was the reason (or, if more than one, the principal reason) for the Claimant's constructive dismissal the Respondent's alleged failure to take seriously her health and safety concerns in respect of two residents and her own health and safety?
4. Protected Public Interest Disclosure Detriment (s.43B and 47B ERA).
- (1) The Respondent accepts that the Claimant's written grievance constituted a protected disclosure.
- (2) Did the Respondent make the Claimant feel unsupported/feel to blame for the incidents of 19 July 2019?
- (3) If so, did that subject the Claimant to a detriment?
5. Breach of Contract in respect of Notice Pay. It is agreed that contractually, on any dismissal, the Claimant was entitled to three weeks' notice, or pay in lieu thereof, but, in the circumstances of this case, was she entitled to such notice pay?

#### The Law

6. I reminded myself, in respect of the claim of constructive unfair dismissal, of the following well-known authorities:
- a. The case of **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 EWCA**, which sets out the test for constructive unfair dismissal and which has been itemised already by me, when I set out the issues above.
- b. The case of **Mahmud v BCCI International [1997] UKHL ICR 606**, which stated (as subsequently clarified) that:

*"The employer should 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"*

#### The Facts

7. I heard evidence from the Claimant. On the Respondent's behalf, I heard evidence from Ms Michelle Claire Hart, the Home Manager and who had

heard the Claimant's grievance and Mr Jamie Braganza, a director, who heard the Claimant's appeal against the grievance outcome.

8. Chronology. I set out the following chronology of events, making findings of facts, as necessary:
- a. November 2018 – the Claimant was promoted, from care assistant to team leader and therefore responsible for several care assistants when on shift. She agreed, in cross examination, the contents of the job description for that role [49], which included her *'acting as a role model, carrying out tasks in a professional way and being consistent and unbiased with staff'*. She also agreed that she had extensive experience in the sector, of over twenty years.
  - b. 15 July 2019 (all dates hereafter 2019) – Ms Hart responded to an email of the Claimant, of 11 July, apologising for the delay in responding. The Claimant's email [65] complained about an agency care assistant, first name Hoodoo, stating that she *'likes to do what she wants and no one is telling her different'* and that she (the Claimant) did not feel she could manage her and that residents had complained about unnamed staff. Ms Hart's response is incomplete, but the Claimant responds stating *'OK understood. I got it wrong, Hoodoo was right'* and suggesting (with a *'lol'*) that *'can we not choose the agency that is on our shift?'* [64].
  - c. 19 July – the Claimant was team leader on a night shift (8pm to 8am) at the Home, with three care assistants in her team. By way of identification, I will use their first names, by which the assistants were referred to during the Hearing. Tia was an employee of the Respondent, whereas Linda and Hoodoo were agency staff. The Home cares for elderly residents, many with dementia. During the night, by text, the Claimant reported the following matters to the Home Manager, Ms Hart:
    - i. That she was being 'ignored' by Hoodoo and Linda and that they were not obeying her instructions, to include as to whom each of them should work with (Linda with the Claimant and Hoodoo with Tia) [text 51].
    - ii. She referred to *'it seem(ing) my word will be up against two other, however I will not be intimidated or bullied'* [52].
    - iii. Ms Hart texted (to the agency) that Linda and Hoodoo had been *'totally disrespectful'* and that *'they need to listen to my staff and my staff need to be polite ... I'm not having the three of them screaming at each other'* [54]. Ms Hart offered to the Claimant that she was happy to come in to the Home, if needed, which the Claimant declined, stating that she was *'just documenting'* [55].
    - iv. On Ms Hart stating to the Claimant that she was the team leader and if Linda and Hoodoo *'don't like it, they cannot come back'*, the Claimant responded *'that's fine, it's not your fault tbh I am at fault as before today I have worked with them and allowed them to do what they want to an extent. However Linda and Hoodoo have got just as big a mouth as mine. However they are still agency ...'* [57].

- d. On 20 July, the Claimant sent Ms Hart an email setting out her account of the events of 19 July [66]. She said she was *'looking to you for support'*. She said that it was the worst night she had experienced in twenty years of care work. In thirty-two numbered paragraphs she then set out details, a summary of which is as follows:
- i. There was a shouted argument between her and Hoodoo in respect of the Claimant's decision as to the form of dressing to be applied to a resident, to dress a cut he sustained, following a fall.
  - ii. The argument continued thereafter, also involving Linda, with her suggesting to the Claimant that she should apologise. The Claimant considered that they were bullying her.
  - iii. She considered that Linda had breached safeguarding policy by moving a resident out of bed, on her own, when that resident's care plan stated that this should be done by two members of staff.
  - iv. During the night there were repeated incidents of Linda and Hoodoo ignoring her instructions, or taking unauthorised time off.
  - v. That *'throughout the night, when the buzzers went, Hoodoo and Linda did not respond.'*
  - vi. When she was assisting a resident, she buzzed for support to help in using a hoist. She said that Tia and Linda were in a different part of the building, but Hoodoo was nearby, but did not respond. When she went to look for Hoodoo, she encountered her coming out of the laundry and she *'rushed past me'*. At that point, the Claimant noticed a *'stench'* coming from another resident's room, where a resident had soiled himself and also pulled a wardrobe down upon himself. The Claimant attempted to deal with this, hurting her shoulder in moving the wardrobe and rang an emergency bell for assistance. Linda and Tia came, but Hoodoo did not, despite, the Claimant said, her being available to do so.
- e. Ms Hart treated this matter as a grievance and carried out an investigation, speaking to the three other members of staff. She was criticised by the Claimant for the time taken to do so (12 August, in the case of Hoodoo), but said that the agency staff had been difficult to contact, as they were obviously not employees of the Respondent and were working elsewhere. A summary of what the staff said is as follows:
- i. Linda [74] – Linda provided a statement, referred to the 'dressing' incident and said that they had all disagreed with the Claimant as to her choice of dressing, as it would pull the resident's skin. She said that in response, the Claimant shouted at them and when Tia asked whether she had checked whether there was any other form of dressing available, said that she had not. The Claimant told Hoodoo not to argue with her, as she was the team leader and knew what she was doing and then *'pushed her (Hoodoo) and told her to follow her into the office'*. When Linda said that she subsequently challenged the Claimant on her behaviour towards Hoodoo, stating that she had *'overreacted towards Hoodoo by pushing and shouting at her'*, she said that the Claimant stated that she needed to let Hoodoo know *'she was in*

*charge*'. Linda also said that later, following another confrontation between the Claimant and Hoodoo, the Claimant said to Hoodoo that *'you are condescending and I think you have mental issues'*. She said that the Claimant said she refused to work with Hoodoo, who should go home. She concluded by stating that having worked with the Claimant for a year by that point, that night had been the worst in her career, that the residents' care had been adversely affected and the Claimant had misused her position.

ii. Hoodoo [71] was interviewed by Ms Hart and in summary, in answer to questions from her said the following:

1. That on her arrival on shift, the Claimant said, on first seeing her, in a disappointed manner, *'Oh no, not you' ... not in a joking way. She was serious*'.
2. In respect of the dressing incident, she corroborated Linda's account, stating that the Claimant was shouting at them, stating *'I am the team leader'*, for some time, upsetting the resident they were treating and others. She said that it was like *'she had steam coming out of her ears ... and looked and sounded like a mad woman'* and *'pushed me once very firmly towards the office'* and which hurt.
3. She agreed that the Claimant had referred to her as having *'mental health issues'*.
4. In respect of the emergency bell being used by the Claimant to summon assistance, for help with the resident who had pulled the wardrobe on himself, she said that she did not hear the bell, as she was possibly in another resident's bathroom, washing and dressing him, but that if she had, she would have *'immediately run'* and that she was *'professional and would never not help in an emergency'*.
5. She said that she wished, as an outcome, for the Claimant to apologise to her.

iii. Tia provided a statement [70] which, in summary, said the following:

1. She referred to the dressing incident and corroborated the other two witnesses' account, in particular as to the Claimant shouting and pushing Hoodoo and stating that she wouldn't work with her and that she should go home.
2. She also overheard the Claimant arguing with Linda, but she *'stayed out of it all'*.
3. She responded to the emergency bell for the wardrobe incident.
4. She said that in the morning, when the day staff came in *'you could see Janice was talking about the night which made everyone feel not very good. However, I am not on either side because I like them both. I would not like this to go any further. The arguing is not needed from any of*

*them, but however the night was an awful night and we were all treated not nice.'*

- f. 19 August – Ms Hart held a grievance hearing with the Claimant, with a note-taker in attendance. The meeting was recorded and a transcript of that recording was subsequently provided to the Claimant [76]. The Claimant has said that until she saw the transcript she was unaware of the recording taking place and had obviously not been asked if she agreed to it being done. Ms Hart was unsure as to whether or not she had referred to the recording being done, but agreed that the transcript made no reference to it being discussed. She said that the recording device (a Dictaphone) was on the desk in front of the note-taker. The notes are lengthy, highly verbatim, to include sighs etc. and somewhat disjointed, but, in summary, they record the following significant points:
- i. The Claimant reiterated her complaints as to the staff's ignoring of her instructions. She said that they had '*personalities like me*' but due to working long hours, were '*grumpy*'.
  - ii. She accepted that she had said the '*Oh no, not you again*' comment to Hoodoo and continued by saying that she (the Claimant) '*then walked off again ... and it wasn't until later ... I thought ... what is my part in this, this is all going on ... that could I have upset her and fact, like that's not nice, cause I might have thought that way.*' When questioned further on the tone of this comment to Hoodoo, she said that it '*could have been tongue-in-cheek, or comical, but I can't swear what my tone was like.*'
  - iii. In respect of the dressing incident, she said that she had been angry with Hoodoo and that her (the Claimant's) voice had been '*heightened*', as a consequence.
  - iv. That she '*contributed*' to the staff's attitude of feeling that they could do what they wished, but denied that she had changed her management style, but instead that the staff's attitude had changed. In cross-examination, at this Hearing, she said that she had made the '*contributed*' point '*because they took my kindness for weakness*'.
  - v. She denied that her referring to her having an equally '*big mouth*' to Linda's and Hoodoo's, was saying something derogatory about herself, insisting that she simply stood up for herself. In cross-examination, she said that none of them were '*wallflowers and not afraid to speak up*'.
  - vi. She believed Tia to be '*quite honest and of good integrity*' and in cross-examination agreed that she had no reason to doubt her account.
  - vii. In respect of Hoodoo not reacting to the emergency bell, when challenged that she had said in her grievance that she'd seen Hoodoo rushing past her and that therefore she may have had some task to do urgently, that she had worded that description wrongly. She refused to accept that Hoodoo may not have heard the bell. She agreed, in cross-examination that she had had nothing else she could add in respect of this complaint.

- g. At the conclusion of the grievance hearing, there was then a break, after which Ms Hart addressed issues raised by the staff in respect of the Claimant's behaviour. The Claimant said, in cross-examination that she was confused by this turn of events, was *'a cat in headlights'* and had not given a full account. However, when challenged as to what else now, she could add, she said *'nothing – I was truthful in my answers.'* A summary of what is said is as follows:
- i. In respect of the dressing incident, the Claimant denied that she had been angry with Hoodoo, or anybody, or had been shouting. She that while the other staff disagreed with her as to the choice of dressing, none of them were offering any alternative suggestions. When asked whether shouting would be a good way of communicating she said *'yeah, brilliant. I think we should do it a bit more'* and laughed, then going on to say, *'of course I don't, course I don't.'* She went on to say *'that wasn't the shouting bit. The shouting bit was in the office'*.
  - ii. She agreed that Linda had suggested to her that she should apologise to Hoodoo, but that she had nothing to apologise for. She said that she could not remember having referred to mental health issues, to Hoodoo and when she was informed that Linda and Hoodoo had recounted this, she said that they *'talked to each other'*.
  - iii. When asked if she had behaved professionally on the night, she said, in hindsight that when *'me and her were rowing'* she had not.
  - iv. She denied pushing Hoodoo, suggesting that she and Linda had made this up. When it was implied to her that Tia had also witnessed such an act, she said *'if Tia said I had, I'm saddened .. no, not saddened, if she says I have, she genuinely thinks I have, I'm not aware of that, so I have some form of blackout moment, that's what I'm thinking'*.
  - v. While she denied telling Hoodoo to go home, she stated that she had given her the option of doing so.
  - vi. She agreed that she herself had assisted a resident out of bed, on her own, despite the care plan saying otherwise, just as she had accused Linda of the same.
- h. 17 September – Ms Hart provided her decision in respect of the grievance [102]. In respect of the Claimant's complaint that the staff had disrespected her, Ms Hart concluded that that complaint was partially upheld, but that while the staff had been challenging and their behaviour upsetting *'that said, as the team leader on duty, it is undoubtedly your duty to remain calm and professional and to guide the team you are leading. There are incidents during the shift where it would seem that your own behaviour, manner and tone were very concerning and did not contribute to good teamwork.'* In respect of the Claimant's two safeguarding concerns, Ms Hart concluded, in respect of the resident being moved by Linda alone that the outcome was inconclusive and said subsequently, in evidence that having discussed the issue with other staff that that resident's care plan was later changed, as inaccurate, to reflect the possibility that if co-operative, she could be moved by one

member of staff. In relation to the allegation about Hoodoo not responding to the emergency bell, Ms Hart concluded that following investigation, using the Respondent's digital care note recording device, it was established that at the time, Hoodoo was indeed caring for another resident in his bathroom. Ms Hart said that she herself had tested her ability to hear the alarm from that bathroom and said she could not. She therefore did not uphold this complaint. No disciplinary action was taken against any member of staff, to include the Claimant. In cross-examination, in this Hearing, she said that there was no evidence that the three staff had colluded in their evidence and that their statements were quite different. She also denied that she had 'led' them in any way.

- i. At some point following that outcome the Claimant appealed against it [105]. She said that the grievance had been turned against her, leading to her feeling that she was being disciplined. She said that in respect of her first complaint, the staff's behaviour towards her, her seniority had not been taken into account and that she should have been supported, accordingly and also that previous misbehaviour by Hoodoo should have been taken into account. In respect of the second complaint, Linda moving the resident on her own, she relied upon the strict wording of the care plan for that resident. Finally, as to Hoodoo and the alarm bell, she disputed Ms Hart's conclusions. She also added, in respect of the wardrobe incident that the wardrobe had been relocated in the room, but not then secured to the wall, as it should have been. As a result of the incident, she had been injured, needing medical attention, but no investigation had been carried out.
- j. 9 October – Mr Braganza responded, acknowledging the appeal and arranging an appeal hearing for 15 October.
- k. 15 October – the meeting proceeded [110]. It was again recorded, this time the Claimant asking whether that was the case or not. Mr Braganza said that until the question was asked, he was unaware of the recording being done, it seemingly being a decision by the note-taker to do so, to facilitate her keeping of minutes. A summary of relevant points from that meeting are as follows:
  - i. The Claimant asserted, contrary to the opinion she expressed of Tia in the grievance hearing that she was '*biased ... and is good friends with them...*' and although '*nice was easily led*'.
  - ii. She suggested that other members of staff should have been questioned, not just the four of them (but, as pointed out by Mr Braganza, there would have been little point in doing so, as nobody else witnessed the incidents).
  - iii. She reiterated her previous complaints.
- l. 30 October – Mr Braganza provided his decision [139], dealing with each of the points of appeal, in turn. He explained that he was unable to provide a copy of the recording of the grievance hearing, as the recording had been deleted after the notes were made (although, subsequently, it seems that they may have been recorded over, at the appeal hearing.) In respect of the staff disrespect appeal point, he



considered that Ms Hart had taken all evidence into account and agreed with her conclusion. He pointed out that the Claimant's seniority had been taken into account, but not to her benefit, as more was expected of her, as the Team Leader. He found no evidence of the alleged past poor behaviour by Hoodoo. In respect of Linda moving the resident on her own, he stated that no harm had come to the resident and that residents' care needs fluctuated. He said, in evidence that no care plan could be absolutely watertight, but he was satisfied that overall, residents received the appropriate care. He also pointed out, in cross-examination that the Claimant had herself moved a resident in similar circumstances. In respect of Hoodoo not responding to the alarm, he upheld Ms Hart's conclusions, for the same reasons. While not ideal, he said that the alarm could not be heard in the resident's bathroom, he pointed out that nonetheless, two other members of staff did hear it and responded. In respect of the Claimant's shoulder injury, he said he was aware of her filing an incident report, but both he and Ms Hart stated in cross-examination that the Claimant had provided them with no medical evidence whatsoever of any injury, or fit notes for any absence and therefore there was little to investigate. He said in the letter that the wardrobe had been secured on 22 July. He also pointed out in cross-examination that when, following her resignation, the Claimant raised all of these matters (and more) with the Care Quality Commission, the HSE and the local authority [150-157], the Home responded to queries from all those bodies, to their entire satisfaction. While rejecting the appeal, he hoped that all concerned could now move on, with the Claimant continuing to be a valued member of the team.

- m. 11 November – The Claimant resigned [148], stating that she felt her position to be untenable and that she no longer considered the working environment a safe one to be in. She said that she felt she had been the one under scrutiny, rather than having her concerns addressed. She complained as to the failure to give her copies of the voice recordings and also the failure to investigate her injury.

9. Constructive Unfair Dismissal. Turning now to each claim, I find as follows:

- a. Based on the evidence before her, Ms Hart was perfectly entitled to consider the Claimant's behaviour to have been at least poor on the night in question. Indeed, had she been so minded, she would have been entitled to have taken disciplinary proceedings against the Claimant, particularly in relation to the allegations of pushing, shouting and abusive comments to Hoodoo, for which there would have been persuasive evidence (to include the Claimant's own evidence, as set out above). She had no valid reason to doubt the other staff's accounts and the Claimant herself admitted to having been easy-going with them in the past, but now, somewhat abruptly, feeling that she needed to let them know 'who was boss'. However, Ms Hart chose not to take any disciplinary proceedings and even partially upheld this complaint of the Claimant's, which was, in the circumstances, a very fair decision, seeing fault on both sides, but recognising that in the Claimant's position, more was expected of her. If the Claimant felt blamed or that she was being made to feel responsible for the incidents, then, to the extent that she

did, that was entirely her fault. Such decision by Ms Hart cannot have been therefore a breach of contract, fundamental or otherwise.

- b. The recording of the grievance hearing was inept and of course the Claimant should have been informed in advance in respect of it. It appeared from the evidence that the note-taker was doing this entirely off her own bat, without Ms Hart's specific instruction. However, in any event, there was no question of the recording been covert or underhand, as the Claimant was provided with the full transcript in due course and there is also no question that she suffered any detriment as a consequence. When asked, she was unable to point out any specific errors in the transcript and said that she had spoken the truth throughout. I don't consider this action by the Respondent to be a breach of the implied term of trust and confidence, or conduct '*calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*' as say, for example, a covert recording might have been, designed to entrap an employee, but merely, in this case, poor administration of the hearing and supervision of the note-taker.
  - c. All H&S/safeguarding concerns in relation to residents were promptly dealt with by the Respondent, as spelt out in Mr Braganza's appeal decision and his evidence. In any event, these concerns, as raised by the Claimant were not truly genuine concerns of hers, but instead 'ammunition' for use against Linda and Hoodoo, as evidenced by her obviously vindictive repetition of them to the CQC and other bodies, only after her resignation and which were readily accepted by those organisations, as already dealt with and raising no serious concerns. In respect of her own injury, no medical evidence was, or has even now, been provided and therefore there was nothing to investigate. The wardrobe was promptly secured and this was clearly a 'one-off' incident, unlikely to be repeated. The Claimant has provided no evidence whatsoever of any adverse effects on her mental health, or suggested what action the Respondent could have taken in that respect, if any and only raised this issue, for the first time, in evidence at this hearing.
  - d. There was therefore no 'final straw', or succession of fundamental breaches of contract in this case. Simply put, the Claimant felt aggrieved that her complaints about Linda and Hoodoo and in particular, her obvious animosity towards Hoodoo, were not unquestioningly supported by the Respondent, merely because she was team leader and also that her own weaknesses as a manager were exposed. Having boxed herself into this corner, she felt she had no option but to resign.
  - e. The claim of constructive unfair dismissal therefore fails and is dismissed.
10. Notice Pay. There can be no claim for notice pay, as the Claimant was not dismissed.
11. Automatic Unfair Dismissal on Health and Safety Grounds. There is no question of the Claimant having been constructively dismissed for having raised health and safety concerns. As stated, her concerns were not

genuine, or truly motivated by the resident's needs, but were purely to place blame on colleagues. In any event, as is clear, such concerns as were raised were isolated and self-contained and promptly dealt with and were simply no longer of any concern to the Respondent, or motivated them in any form to behave in any adverse way towards the Claimant. The only reason why the focus of the Respondent's attention turned towards the Claimant was because of her own behaviour on the night in question. Nor were such concerns the reason, or even the principal reason for her resignation, but instead the primary issue was her perception of the lack of support given to her in respect of her grievance. There was no question, applying sub-section (d), of any '*serious or imminent ... circumstances of danger*' facing the Claimant, justifying her resignation.

12. Public Interest Disclosure. While the Claimant did make a protected disclosure there is no evidence whatsoever, as set out above, in my findings in respect of the other claims that she was subjected to any detriment as a consequence.
13. Conclusion. The Claimant's claims of constructive unfair dismissal, dismissal on health and safety grounds, breach of contract in respect of notice and detriment on grounds of protected disclosure fail and are dismissed.

**Employment Judge O'Rourke**  
**Date: 25 June 2021**

Reasons sent to the Parties: 30 June 2021

FOR THE TRIBUNAL OFFICE