Case Number: 1309019/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
	AND
MS F. CARAPINHA	**SANDWELL AND WEST BIRMINGHAM HOSPITALS NHS TRUST**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL WITH WRITTEN REASONS

HELD AT: Birmingham

ON : 7 & 8 June and 6 & 7 September 2021

EMPLOYMENT JUDGE Algazy QC

Representation

For the Claimant: Mr P.Wilson - Counsel

For the Respondent: Mr M. Collins – Counsel for June dates
Mr A. Rozcycki – Counsel for September dates

JUDGMENT

The Judgment of the Tribunal is that the claim for unfair dismissal is not well-founded and is dismissed.

WRITTEN REASONS

Written reasons were requested by the claimant when judgement was handed down orally at the conclusion of the case and these reasons are provided pursuant to that request.

1. INTRODUCTION

1.1. The Claimant was employed by the Respondent as a Maternity Risk Management Lead Assistant until her employment terminated on 10 June 2020. The Claimant had submitted a resignation letter of the same date by email.

1.2. The Claimant advanced the case that, in all the circumstances, her resignation constituted an unfair constructive dismissal

1.3. The fact of dismissal was denied by the Respondent. A fair basis for the dismissal was advanced in the event that the Claimant was successful in establishing a dismissal, namely some other substantial reason.

1.4. The Claimant was represented by Mr Paul Wilson of Counsel and the Respondent was represented by Mr Mathew Collins of counsel in June 2021 and Mr Alexander Rozycki of Counsel in September 2021.

1.5. The Claimant gave evidence on her own behalf. The Respondent called two witnesses: Nicola Rai, former Lead Midwife for Risk and Governance and Rohet Paul, HR operations Manager.

1.6. There was an agreed bundle. Numbers in square brackets in these Reasons refer to the bundle unless otherwise indicated.

2. THE ISSUES

The issues that the Tribunal had to determine were:-

2.1. Did the flexible working arrangements in place since 2015 constitute a term of the claimant's employment contract? The claimant, in exchanges with the Tribunal through her counsel, made it absolutely clear that her case rested on the flexible working arrangements as an actual term of the contract and no alternative case, such as breach of the implied term of trust and confidence, was advanced.

2.2. Was any act or omission a cause of the Claimant's resignation?

2.3. If answered affirmatively, did the impugned conduct constitute a fundamental and repudiatory breach of contract which the Claimant was entitled to accept. There was no reliance by the respondent on waiver/affirmation.

2.4. If the Claimant was dismissed, was it for a fair reason? The respondent relies on some other substantial reason in relation to the effective running of the claimant's department.

2.5. If the Claimant was constructively dismissed, what remedy was appropriate and what steps did the Claimant take to mitigate her losses following the dismissal?

3. THE FACTS

3.1. I made the following findings of fact and such facts as are contained in the conclusions section. As my findings on the first issue I had to determine are dispositive of the case, the facts set out are limited to the question of whether the claimant had established that her flexible working arrangements constituted a term of her employment.

3.2. The Claimant commenced work for the Respondent on 25 August 2009. She was latterly employed in her latest role as Maternity Risk and Management Lead Assistant following a redeployment process which took place in December 2014. The claimant took up her new job on 2 March 2015.

3.3. The interview for this role is of considerable significance as it is at this interview that the claimant maintains that her flexible working arrangements became a term of her contract.

3.4. In May 2014, the claimant's then 64 year old mother ,who resided in Portugal, became gravely ill. The claimant took six months unpaid leave to care for her mother. During this leave in November 2014 the claimant learned that her then role would cease to exist and that she was to take part in redeployment exercise.

3.5. The claimant returned to the UK in December 2014 with her mother and her then two year old daughter.

3.6. On a date unspecified in December 2014, the claimant's interview took place for her latest role and I set out in full how this is described in the claimant's witness statement:

"March 2015 - Flexible Working Arrangement

9. During the Job interview for the role I accepted, I specifically stated that I would need a permanent flexible working arrangement in order to accept the role. My mothers care needs were extremely volatile at the time I accepted the role and given my new caring responsibilities I simply couldn't accept it without the changes I requested. The interview Panel, one of whom was the director of midwifery, Elaine Newell, accepted my request which included:

• The ability to vary my start and finish times between 10am and 6pm so I could assist my mother with urgent care if she needed it.

• The ability to work from home so I could help my mother with care, but also be able to catch up on any work that I needed to.

10. Mrs Elaine Newell, Head of Midwifery at the time, and my Line Manager, Nicola Robinson, verbally approved the changes the role and provided me with a work laptop so I could perform my role when working from home. Home equipment is only provided to employees who are allowed to work from home. I had never made a flexible working application prior to this and so I assumed everything was in order when they agreed my request, I had informed both the interview panel and my Line Manager of my caring responsibilities. There was no doubt in my mind that the flexible working arrangement needed to be permanent as my mother's condition was not predictable at that time. I simply couldn't had accepted the role without the arrangement being in place."

3.7. In the following paragraph of her statement, the claimant goes on to explain

11. During the years that followed I had to work from home around 2-3 days per month. We had a full package of care in place for the first year (morning afternoon and lunch), but the carer failed to show up occasionally and my mother would refuse to take her medication and so I needed to request leave at short notice in order to assist with my mother's care.

3.8. The claimant sets out her account of the terms she claims at paragraph 31 of her witness statement by reference to her email of 24 May 2019 [157]

- **Flexible start and finish times with my core hours being 10 am till 5:30pm.**
- **Early finish at 15:30 every Thursday to take my daughter to her dance class with this being made up over two days by working 1 extra hour per day.**
- **Short notice requests to work from home or time off to enable me to carry out my caring duties and responsibilities to my mum and my daughter**

In Mr Wilson's submissions at §4, he does not refer to the second bullet point and relies only on bullets 1 and 3 as does the claimant at § 9 of her w/s.
In the claimant's email, she also says:

"Flexible working was offered by Nicola Robinson and Elaine Newell at the time of my job interview to the post and the flexible working arrangements were agreed by Nicola Robinson when I accepted the post in 2015. The flexible working arrangements have changed a few times since initially agreed in 2015 in line with changes to my contracted hours and following long term

sickness. These flexible working arrangements were agreed indefinitely and no term has ever been agreed."

3.9. A letter dated 19 December 2014 was sent by Daniel Hamblett, senior recruitment officer at the respondent offering the claimant the post which she eventually occupied [51/2]. It makes reference to her contracted hours of 37.5 hours per week. Monday – Friday. There is no reference at all to any flexible working arrangements.

3.10. The contract of employment [61- 69] is equally silent as to any flexible working. Paragraph 13 deals with contracted hours:

"*your normal pattern of work will be agreed with you by your manager subject to the needs of the Trust, flexible working arrangements(agreed by you and your manager) and the European working time regulations"*

3.11. The claimant was asked in cross examination why she had not raised this apparent omission in respect of her flexible working from her contract. She told the tribunal that this was a new responsibility and her confidence was clearly reduced, she was a carer looking after her daughter and mother and she had been redeployed whilst abroad. Further, there were two senior members of the respondent on the panel who she trusted to follow relevant procedures.

3.12. The claimant had made request a concerning her start date and so was not unable or averse to raising matters about the contract. I asked the claimant what the issue was about pointing out this apparent failure to record the flexible working arrangements in her contract. She told me that she trusted the two members of the panel.

3.13. The claimant accepted that she had not asked why the flexible working arrangement was not in her contract throughout her entire employment in her new role until 2019

3.14. At paragraph 16 of her witness statement, the claimant makes reference to a sickness absence review which took place on 29 November 2016. I find little or no support for the description of that meeting as regards Ms Robinson that is given in her witness statement. The notes of that meeting are at [83-85] and are countersigned by the claimant.

3.15. The Flexible Working policy of the respondent sets out [481] that:

" **Any agreed flexible working arrangement lasting longer than one week should be recorded on the employees personal file. Flexible working arrangements agreed on a permanent basis should be confirmed in writing to the employee and a copy kept on the personal file."**

No such record was made and there is nothing on the claimant's personal file reflecting the flexible working arrangements.

It is suggested on the claimant's behalf that this was a failure or omission of the respondent which should not affect the claimant adversely.

3.16. In early 2019, Nicola Robinson reviewed the claimant's flexible working arrangements and informed the claimant that she would need to formalise her informal flexible working arrangement via the respondent's flexible working process.

3.17. On 3rd May 2019 the claimant went on sick leave until 12 October 2019. On 23 May 2019 the claimant raised a grievance which

raised, amongst other matters, a complaint about the issue of formalising her flexible working pattern.

3.18. The grievance outcome dated 9 September 2019 advised the claimant that it was reasonable to review the informal flexible working arrangement and that she was to submit a formal request for flexible working in accordance with the respondent's procedures.

3.19. The grievance outcome was appealed. The appeal outcome once again advised the claimant to submit an application for flexible working and arranged for mediation between the claimant and Nicola Robinson. The mediation never took place as Mrs. Robinson left the employment of the respondent.

3.20. A performance development review for the claimant [138- 143] signed off by the claimant on 5 March 2019 [143] contains these words

"Flexible working arrangements have been utilised by Fran (previously agreed by myself & previous HOM) due to her being a main carer for her mother and daughter. The importance of communication to inform the wider team have been discussed and Fran acknowledges the importance of this. We have agreed to formally register and agree these moving forward so this is clear to anyone else within the directorate"

This would appear to be more consistent with an informal arrangement than an immutable contractual term.

3.21. When asked about this document in cross examination, she told the tribunal that it had been a matter of agreement and that frequently arrangements were not documented. She then went

on to say that the grievance process had confirmed that the arrangement was a permanent one. I asked the claimant about that last claim as it did not appear to me that the grievance had acknowledged that the arrangements were permanent. The claimant's evidence then changed from saying that it was accepted as permanent in the grievance to saying that that was omitted from the grievance outcome. I took the claimant to her grievance appeal at [186] which does not claim that the grievance concluded that the Flexible working arrangement was permanent but that that conclusion was omitted from the outcome. The claimant's response was that so many discussions were omitted, that she had asked for the minutes of the grievance and that she believed that everyone would keep their word and that was not done. She said that she didn't feel that it not being on the outcome did not mean that it was not permanent.

3.22. A meeting took place on 1 May 2019 with the claimant at which Louise Wilde and Nicola Robinson attended. The notes were track changed by the claimant with her amendments [147/148]. The following section concerning flexible working was not altered by the claimant:

"I highlighted the current arrangements need to be made more formal, that this is important for Fran and also for me as her line manager. However moving forward this now needs to be formally requested by Fran and agreed with the senior management team"

The claimant in her amendment asserted that **"… those conditions were accepted and formed part of her contract"**

3.23. In her grievance [154-156], the claimant raised this issue amongst others:

> **"2. Withdrawal of flexible working arrangement, which is being in place since the start of my employment in Maternity Risk Management"** [154]

And she sought this resolution:

> **"I would like to keep my flexible working arrangement, which has been in place since I accepted my current post in 2015"**

3.24. The grievance outcome [175 -179] noted at [176]:

> **"I believe that there has been miscommunication between yourself and Nicola around her request and your response review your working arrangement. I believe the need for a review is still valid particularly based on your substantive contracted hours….**
>
> **"I believe that the manner in which your working arrangement had been established and managed to date wasn't clear and fairly loose and for all concerned this needs to be articulated and confirmed. To be clear from my discussions with you both your flexible working arrangements have not been withdrawn however there needs to be a clear and open conversation to review it. I would recommend that this meeting is facilitated and confirmed in writing using the provisions outlined in the flexible working policy"**

3.25. The grievance appeal outcome at page[223] notes that :

It was established that you have been in receipt of an informal flexible working arrangement and that this arrangement has been in place since 2015. The flexible working arrangement was not a set pattern, but allows you the flexibility to adjust your hours to come into work late, leave early or work from home when your caring needs necessitates this."

3.26. The claimant also gave evidence that she had made repeated requests for confirmation of the permanence of the flexible working arrangements to Nicola Robinson which were refused or not responded to. When asked to identify these requests the claimant was unable to do so. She told the tribunal that she had looked but could not find the evidence as she did not have access to her emails over the last five years. When it was pointed out that she had access to her emails throughout the grievance and grievance appeal process, the claimant said that she had not collected all the evidence she had at the time and the outcome doesn't make reference to all the matters that she had raised. I asked the claimant about the lack of reference to those requests in her lengthy appeal document and her response was that she did not have support as she was not even supported by the union and that she could have added more evidence but that she did not have the requisite knowledge. She accepted in cross examination that she still had access to her emails by the time of her flexible work application and that there was still no reference to such requests in that application.

3.27. The claimant's evidence was to the effect that Ms Robinson was denying the existence of the term. The respondent in its closing submission asserts that there was no such agreement and no request and that it would have formed part of her grievance appeal if the claimant had in fact raised the matter with Ms Robinson.

3.28. The claimant was unable to provide any evidence to substantiate her suggestion that she had made email requests asking Ms Rai to find out the terms of her flexible working agreement which was refused.

3.29. In an email to Nikki Rai on 10 June 2020, the clamant makes this assertion:

> **"Under the Employment Law in UK, a verbal agreement that has been allowed to continue for some years, by implication and by custom and practice becomes a permanent change and a binding employment term.**
>
> **In my case it's not a change to my contract, it is a permanent term in my contract agreed at the start of my employment in my current role. my acceptance of the post was conditional of this agreement and without it I would have had to reject the job offer as I would not be able to balance my caring responsibilities with work. this was discussed during the job interview and agreed at the time of the offer"**

3.30. As adverted to above, I do not set out the facts in respect of the various interactions between the claimant and Ms Rai as they do not have any bearing on whether or not there was a concluded contractual agreement as regards flexible working that was made at the interview for the claimants last role at the respondent.

3.31. The claimant resigned in a letter dated 10 June 2020 following, what she considered to be, Ms Rai's rejection of her application to formalise her flexible working arrangements. In that letter she makes specific reference to her previous manager, Nicola Robinson, denying the existence of the agreement in May 2019

which led to her grievance. The claimants position was that her line manager had rejected her application to formalise an existing agreement and that she felt again victim of the same breach of contract.

3.32. Proceedings were issued on 9 September 2020.

4. THE LAW

4.1. The statutory definition of what is known as constructive dismissal is contained in Section 95(1)(c) of the Employment Rights Act 1996 ("ERA").

"(1) For the purposes of this Part an employee is dismissed 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".

4.2. The law in this area is well-established. Lord Denning in **Western Excavating v. Sharp [1978] ICR 221** said this:-

"If 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, 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."

4.3. The test is an objective one:

"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy

or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."

Per Lord Nicholls in **Malik v Bank of Credit and Commerce International S.A** [1998] AC 20 @35C

4.4. The resignation needs to be, at least in part, in response to the employer's fundamental breaches - See **Meikle v Nottinghamshire CC [2005] ICR 1**

5. CONCLUSIONS

5.1. As I have said, I have heard evidence on the issues relating to whether there was in fact a breach of contract which caused the claimant's resignation and the respondent's alternative position that if there was a dismissal, it was in fact fair. I do not need to and do not make findings on those matters.

5.2. The burden is on the claimant to establish, on the balance of probabilities, that the terms contended for constituted a specific term of her employment contract.

5.3. Based on my findings of fact, I am not satisfied that the claimant has discharged that burden to the relevant standard.

5.4. I consider it more likely than not that the claimant's concerns regarding flexibility were raised by her and that the respondent's representatives agreed that they would seek to accommodate the claimant where possible. I reject as fanciful Mr Wilson's valiant attempt to graft on to such an exchange the language of offer and counter-offer leading to a concluded agreement and that such terms formed specific freestanding terms of the claimant's contract of employment.

5.5. I reject the arguments set out at §§ 14 and 15 of the claimant's written submissions that the evidence established the acceptance of a counter-offer by the respondent or that the *".. permanent flexible working arrangement became, at least in principle, part of the terms of FC's contract of employment with the trust"*

5.6. I conclude that if that were indeed the case, such a significant amendment to the employment contract would have been recorded and placed on the claimant's personal file. This was not done, I find, as there was no such specific contractual agreement.

5.7. The lack of any record of the claimant's work pattern as alluded to in §13 of the contract of employment is perhaps explained by the fact that there was an informal arrangement in place as was discussed at the interview and that to formally note the strict hours that the claimant ought to adhere to might have caused confusion. However, I do not need to arrive at a conclusion in that specific regard and do not do so.

5.8. The variation of the flexible arrangements referred to by the claimant in her email of 24 May 2019 [157] is also not supportive of there being fixed contractual terms set in stone from the commencement of the employment. Rather it is consistent with informal arrangements varied from time to time.

5.9. The grievance and grievance appeal investigated the claimant's claims and did not find that there was a concluded contractual agreement but rather an informal arrangement. Having heard all the evidence independently, I arrive at the same conclusion. Mr Wilson submits that the interviewing panel's subjective intention is not relevant. So too is the claimant's subjective intention or understanding. An understanding that she could have clarified when she received her offer letter and subsequent contract or at any point before the matter became an issue in 2019. Mr Wilson further submits that it was incumbent on the respondent to put the contractual agreement on record. The respondent's failure, if failure there be, is entirely explicable by the fact there was no such contractual agreement in place.

5.10. My conclusion that the claimant has not established, to the required standard, that she had a contractual agreement regarding the terms she claims is also informed by my assessment of the credibility of the claimant as a witness and historian of events. I have referred to a number of instances above where the claimant was unable to substantiate aspects of her evidence or which is contradicted by the contemporaneous documentation. Even though the respondent did not lead evidence from the interviewing panel, the claimant's uncorroborated and unsubstantiated assertion of a contractual term as regards flexible working did not discharge the burden on her in all the circumstances above referred to.

5.11. Accordingly, the claim fails and is dismissed.

Employment Judge Algazy QC
10 September 2021