EMPLOYMENT TRIBUNALS

Claimant: Ms A Lawson

Respondents: Indigo Care Services Ltd t/a Orchard Care Homes

Heard at: Leeds (by CVP) **On:** 14 September 2021

Before: Employment Judge Parkin (sitting alone)

Representation
Claimant: Dr O Taiwo, representative
Respondent: Mr R Dempsey, Solicitor

JUDGMENT AT A PRELIMINARY HEARING

The Judgment of the Tribunal is that:

1) The claimant's effective date of termination of her employment was 13 June 2019;

2) Section 111A of the Employment Rights Act 1996 does not apply to the meeting of 28 August 2019;

3) The parties have waived privilege in respect of their settlement discussions on 28 August 2019, the respondent's settlement offer letter dated 10 September 2019, the claimant's response to that offer dated 11 September 2019 and any further correspondence or discussions in connection with settlement proposals which would otherwise be inadmissible under "without prejudice" privilege. For the avoidance of doubt, all such discussions and correspondence are admissible at further hearings in these proceedings

4) The claimant's application to amend her claim to include claims of having been subjected to unlawful detriment and unfairly dismissed for having made protected disclosures, in accordance with her letter dated 18 December 2020, is granted.

REASONS

1. By a claim form presented on 24 February 2020, the claimant claimed unfair and wrongful dismissal, race and disability discrimination in connection with the termination of her employment as a nurse with the

respondent's care home. She contended she had been suspended over false allegations and subjected to unfair disciplinary procedures with no opportunity to defend herself and treated less favourably because of her race, stating that having been taken through a necessary disciplinary extending over several months she had been notified that her employment had come to an end and the leaving date given as 25 September 2019.

2. By its response, the respondent resisted all her claims contending it had suspended her pending investigation over legitimate concerns about neglect of duties and that, following a disciplinary outcome of a written warning to be kept on her file for six months, the claimant had resigned on 13 June 2019 with immediate effect.

3. At a case management hearing on 15 April 2020 before Employment Judge Shepherd, the disability discrimination claim was withdrawn and it was identified that the claimant was claiming unfair constructive dismissal, direct race discrimination and racial harassment. An order for further information/particulars of the claimant's claim was made and the claimant provided further information by letter dated 12 May 2020. At a further case management hearing before Employment Judge Lancaster on 23 June 2020, Judge Lancaster identified the claimant's stance that she was not relying on resignation and constructive dismissal on 13 June 2019 but asserting a mutual agreement to retract the resignation which continued the employment, such that it only terminated on 25 September 2019 (the date shown on the claimant's P45).

4. By a letter dated 22 October 2020 the claimant contended that the respondent had prevented her resignation taking effect by initiating a "protected conversation" procedure. By its response to the further and better particulars, the respondents strongly contended that the claims were all out of time, that its commencement of disciplinary procedure was legitimate, there was no repudiatory breach of contract and no less favourable treatment or harassment due to race.

5. There was a further case management hearing before Employment Judge Smith on 20 November 2020. Judge Smith dealt with the issue of striking out the response for late compliance and rejected that approach as disproportionate. He ordered the claimant to set out an amended pleading relating to her desire to include protected disclosure claims, which she did on 18 December 2020

The Issues

6. At an earlier preliminary hearing on 17 August 2021 which was ineffective, the issues to be determined were identified as:

   6.1 What was the claimant's effective date of termination (i.e. was it 13 June 2019 or 25 September 2019)?
   6.2 Whether oral and documentary evidence in connection with correspondence and discussions following 13 June 2019 is admissible in evidence at any final hearing (in respect of all or any of the claimant's

claims which are proceeding), having regard to both section 111A of the Employment Rights Act 1996 and to the common law "without prejudice" rule; and

6.3 Whether the claimant's application to amend her claim to include claims of detriment and/or unfair dismissal for having made protected disclosures is granted.

The amendment application

7. The claimant's application to amend to include protected disclosure claims, set out in her letter dated 18 December 2020 in which she sat out her proposed amendments to the respondent's chronology of events, states as follows:

"The Claimant avers that, around October 2018, she made reports to the manager as follows:
a. Elizabeth has been making several drug errors, which has been putting residents at risk of harm.
b. Sharon gave overdose of Warfarin to a resident, which place the resident in danger.

The Claimant avers that the above statements meant that she had done protected acts under Section 43B (1) (b) and (d).

It was following the above according to the Claimant that;

1. The Respondent initiated an unnecessary and unfair disciplinary proceedings against her, when it did nothing to Sharon and Elizabeth who are white.

2. The said proceedings had been permitted to be unreasonably longer than necessary, with 2-3 months permitted on at least two different occasions before hearings were rescheduled.

3. The health of the Claimant had begun to suffer as a result.

4. Necessary documentations required for a fair hearing were not disclosed.

5. New allegations were made to substitute the original allegations and only presented to the Claimant at the last hearing, and it was on this new allegation that the Claimant had not been allowed to respond to, that she was sanctioned,

6. With her health suffering and the loss of trust and confidence in the Respondent, the Claimant elected to resign from the employment of the Respondent, but had been prevented from leaving, as the Respondent had wanted to hold hearings that she had not requested for.

7. A non-genuine "Without Prejudice" process was started, but which had not been progressed or concluded by the Respondent.

8. The Claimant avers that she had repeated her colleagues' unprofessional conducts, which had earlier not been addressed by the manager, at the settlement discussions of 28 August 2019, but that nothing appeared to have been done, except for some information about the manager who was said to no longer be at the Home.

9. It is also the Claimant's position that she had been unfairly dismissed because of her complaints of a protected nature.

The Claimant humbly states that the above treatments and others mentioned earlier in her Claim Form or identified in other documentations, were detriments she had suffered due to the fact that she had reported unlawful conducts of her colleagues who do not share her protected characteristic, as she described herself as a black woman of African heritage, and the Respondent's failure to act to prevent risk to patients."

Accordingly, relying upon having made protected disclosures within section 43 **(**1)(b) and (d) of the Employment Rights act 1996, (ie the breach of legal obligation and danger to health and safety heads) she sought to contend that she was subjected to unlawful detriment, the commencement of disciplinary proceedings contrary to section 47B and unfairly dismissed contrary to section 103A.

This Preliminary Hearing

8. The respondent provided a brief bundle of documents (1-26) and its Submissions (skeleton argument). The claimant had earlier indicated that she would not give oral evidence but would make submissions on the documents. At the hearing, the respondent called Mr Paul Johnson, who had provided a witness statement on 6 September 2021 in accordance with the Tribunal's earlier order; he was cross-examined extensively on behalf of the claimant. The following key facts are found for the purpose of determining the preliminary issues.

9. Following a disciplinary outcome from the disciplinary hearings being notified to her on 12 June 2019, the claimant at once sent a letter dated 13 June 2019 addressed to Mr Tom Brookes, Chief Executive Officer, Orchard Care Homes, headed "Letter of Resignation":

> …16: in the light of the above experiences, which now made me to suffer emotional and psychological distress resulting in being advised to stay off work by my GP for the second time on this matter, and with the clear threat to my professional and personal integrity, I have come to the conclusion that, resigning from my role Ave registered nurse at Orchard Care homes would be the best course of action for me and my family, regardless of all the potential risks
> 17: it is my reasonable belief that I have been treated in a way that a colleague who does not share my race or ethnic origin, would have been treated given the same circumstances, while being falsely accused, exposed to prolonged, unnecessary and detrimental disciplinary process, which the management knew or ought to know had no basis or justification.

> 18: As I can no longer retain trust and confidence in the management of Orchard Care homes and with my health deteriorating while still having this unending debilitating disciplinary process, which may amount to harassment hanging over me, I must depart from Orchard Care homes, the source of my stress now, in order to attempt to rebuild my life.
> 19: Mr. Brooks, I made a conscious decision to address my resignation letter to you for obvious reasons and I sincerely hope you would be allowed to see this letter. I shall therefore be grateful to receive in acknowledgement directly from you or directed by you, my looking forward to being advised as to what my entitlements are, if any please..."

10. On 19 June 2019, Sarah Armitage, Regional Director, wrote to the claimant : "Re: Your Resignation:

> "I was surprised to receive your resignation and would like to give you the opportunity to discuss it with me before I formally accept it. As such, I would like to meet you on 5 July 2019… so we can discuss the reasons for resignation and the alternative avenues for resolution which are open to you… I would also like to reassure you that Tom Brookes is aware of your resignation and this invitation to attend a meeting.
> I would be grateful if you could confirm your attendance to Marco Lombardi via the enclosed return envelope… if you do not wish to attend a meeting, I would be grateful if you could confirm this and we will then come of course, process your resignation in accordance with your letter.
> As a valued member of staff, I am sure you know it will be a great loss to The Company should you confirm it is your intention to resign."

11. On 24 June 2019 Mr. Johnson wrote to the claimant:

> "I am writing following a letter to Tom Brookes dated 13 June 2019 outlining reasons for your resignation. Tom has passed your letter to me to investigate the situation and as requested... I am confirming he has seen it and asked me to reply.
>
> I obviously need to speak to a number of colleagues so I can be fully appraised of the situation. Once I am in a position to do so I will write to you again with initial observations and appropriate next steps."

The claimant was offered both grievance and disciplinary appeal meetings, but neither of these prceeded.

12. The claimant provided a Fitness for Work certificate (sick note) identifying work related stress as the basis for the GP's advice that she was not fit for work from 26 June 2019 to 25 September 2019. This prompted the respondent's payroll team to pay statutory sick pay to the claimant, although Mr. Johnson was unaware of this initially.

13. On 26 July 2019, the claimant's representative wrote to the respondent, including:

> "…In view of what we consider as a detailed "LETTER OF RESIGNATION", Miss Lawson is content with any instituted investigation, to rely on her letter, as she would not as for now, be emotionally and psychologically able to have to go through such experiences again…"

14. On 8 August 2019, Mr Johnson wrote to the claimant, asking whether the Claimant wanted to rely upon her resignation letter or her sick certificate, suggesting a meeting (21). By then, he was aware the respondent was paying her statutory sick pay, which it did between 26 June and 25 September 2019. He did not suggest in that letter or at all that the claimant's true date of termination of employment was 13 June 2019 or that the respondent ought not to have been paying her statutory sick pay because the resignation was already effective.

15. Following an approach the respondent considered had been initiated by the claimant, there was a meeting on 28 August 2019 between Mr. Johnson, the claimant's representative Dr Taiwo and the claimant.

16. On 10 September 2019 the respondent sent a settlement offer letter, expressly described as "without prejudice", to the claimant seeking to bring the discussions within the provisions of section 111 of the Employment Rights Act 1996.

17. On 11 September 2019, the respondent's "without prejudice" offer was not accepted by the claimant.

18. On 25 September 2019, the claimant's sick note expired.

19. On 3 October 2019, Tracy Thomas, HR Business Partner, wrote to the claimant:

> "…We hope you may have decided to request the retraction of your notice and wish to enter negotiations to return… If it is still your intention to resign we will, with regret, accept your resignation with effect from the end of your last sick note and process you as a leaver accordingly (26)

The Legal Principles

20. Notice of resignation does not need to be accepted by employer, but it can be retracted or withdrawn by the employee by agreement between both parties. Notice of resignation does not need to be given in writing, but any written note or letter labelled or appearing to contain the employee's resignation will be important evidence to be considered. A P45 is a document issued by the employer for the purposes of the individual employee's tax and National Insurance liability with the HMRC; whilst it provides evidence of the fact and date of termination of employment, it is not conclusive of these. Deciding the effective date of termination is a matter of applying the legal principles to the facts.

21. To fall within the Section 111A, Employment Rights Act 1996 provisions on confidentiality of negotiations before termination of employment, often called "protected conversations", the negotiations must take place before the termination of the employment in question. In any event, they would only render inadmissible reference to the negotiations in the unfair dismissal claim and not the discrimination claims. So far as the "without prejudice" rule rendering inadmissible the content of, settlement discussions on a wider basis is concerned, the parties both confirmed at this hearing that they waived any reliance upon the without prejudice rule. the only decision to be made therefore was whether Section 111A applied.

22. On amendment, the Tribunal applied the long-established principles set out in the guidance of the Employment Appeal Tribunal in Selkent Bus Co Ltd v Moore [1996] ICR 836, approved by the Court of Appeal in Ali v Office of National Statistics [2005] IRLR 201, together with the tribunal's overriding objective at rule 2 of the Employment Tribunals Rules of Procedure 2013. In accordance with Selkent, the approach which the Tribunal took was that it should take into account all the circumstances and balance the injustice and hardship of allowing the amendment and the injustice and hardship of refusing it, having regard in particular to the nature of the amendment, the applicability of time limits and the timing and manner of the application. Where a new claim or cause of action is sought to be added, the fact that it was already out of time when the application to amend was made is not determinative in itself, nor is any failure of explanation for the delay; the paramount consideration remains the relative injustice and hardship in refusing or granting the amendment.

Conclusions

23. Although it was clear that the respondent's senior personnel strongly believed they needed to accept the claimant's resignation and the claimant likewise believed that her employment was continuing during the period of her 3-month sick note, this was wrong in law. Unless there had been a specifically agreed retraction or revocation of her notice of resignation having the effect that the parties expressly agreed that the employment would continue, her resignation terminated the employment forthwith on 13 June 2019; this was the effective date of termination because there never was such an agreement.

24. On that basis, the discussions on 28 August 2019 were after the termination of employment and the statutory inadmissibility provisions under section 111A of the 1996 Act do not apply. The parties waived any reliance upon "without prejudice" privilege and therefore full reference to settlement discussions is admissible at further hearings.

25. The respondent did not oppose the claimant's application to amend her claim to include claims of "automatic" unfair dismissal for making protected disclosures and of being subjected to detriment for making such disclosures, as long as it is still permitted to argue out of time points in relation to all her claims. This was realistic having regard to the ongoing correspondence and discussions following the claimant's resignation.

Applying the Selkent principles and in accordance with rule 2, the application to amend is granted but a further preliminary hearing to determine all the out of time issues is now listed.

Employment Judge Parkin
Date: 4 October 2021

SENT TO THE PARTIES ON
5 October 2021