



EMPLOYMENT TRIBUNAL

Claimant: Ms A Krasnova

Respondent: Mr. Starchevskiy

Heard at: London Central (via CVP)

On: 26th October 2021

Before: Employment Judge McKenna
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: In person

JUDGMENT

1. The complaint of constructive wrongful dismissal succeeds. The respondent is ordered to pay the claimant the gross sum of £560 being one week's notice.
2. The breach of contract claim is well founded and the Respondent is ordered to pay the claimant the sum of £782 in respect of her return flight to the UK, covid tests and out of pocket expenses.

REASONS

Introduction

1. By a claim form presented on 23 August 2021, the claimant complained that there had been an unlawful deduction from her pay in relation to notice pay, holiday

pay and the respondent's failure to pay her travel expenses, covid tests and food and accommodation on the termination of her contract as a temporary travel nanny by her resignation on 23rd May 2021.

2. The response form defended the claim solely on the basis that the claimant had been dismissed on 23rd May 2021 following an incident when the claimant was caring for one of his children. It said that the respondent had paid for a Covid test and some of the claimant's travel expense.

3. I heard oral evidence on affirmation from the claimant and Mrs. Alyelken, the respondent's wife. A witness statement was provided from Mrs. Kuncevic, another nanny. She did not attend the hearing. The claimant and the respondent had an opportunity to question the other. Each of them answered questions from the Tribunal. The claimant gave evidence via a Russian interpreter. The connection with the interpreter failed at the submissions stage during the last 10 minutes of the hearing. The claimant said that she wanted to make her submissions in English as she could not afford to take any more time off from her new job. The claimant had demonstrated a good command of English answering many questions in English. I therefore decided that it was in the interests of justice to continue for the final 10 minutes of the hearing without an interpreter noting that I had the benefit of written submissions from both parties and both parties' written comments on those submissions. Both parties had provided documents.

Issues

4. It was not disputed that the claimant was an employee.

5. In the course of the claimant's oral evidence I went through the way in which she calculated the amount claimed including her expenses returning to London. The respondent did not dispute those figures.

6. The whole case therefore turned on the questions of:

- a. had the claimant had been constructively dismissed?
- b. Was she entitled to be reimbursed under her contract of employment for the cost of her return flight to the UK, covid test and food while waiting to return to the UK?

Relevant Law

Constructive Dismissal

7. In order to establish constructive dismissal an employee must show:
- a. that the employer has committed a breach of the contract (**Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27**)
 - b. that it is sufficiently serious to justify the employee resigning or is the last in a series of incidents which justify their leaving
 - c. that they left because of the breach
 - d. that they have not waived the breach or affirmed the contract.

Breach of contract by the employer

8. When considering the question of constructive dismissal the focus is on the conduct of the employer rather than the employee's reaction to it.
9. **Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** established that an employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.
10. If, on an objective approach, there has been no breach then the employee's claim will fail; **Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493**.
11. The conduct does not need to be repudiatory in nature in order for there to be a breach of the implied term of trust and confidence; **Morrow v Safeway Stores Ltd [2002] IRLR 9, EAT**.
12. According to the EAT in **United Bank Ltd v Akhtar [1989] IRLR 507** relying on **Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347** the duty not to undermine trust and confidence is capable of applying to a series of actions by the employer which individually can be justified as being within the contract.
13. The duty not to undermine the trust and confidence in the employment relationship could be subsumed under the wider contractual duty which is imposed on the employer to cooperate with the employee. In **Associated Tyre Specialists (Eastern) Ltd v Waterhouse [1976] IRLR 386** it was found that the Claimant was entitled as a term of her contract of employment to her employers' support in conducting her duties in line with the employers' policy.
14. **Lewis v Motorworld Garages Ltd [1985] IRLR 465** found that the last action of the employer which leads to the employee leaving need not itself be a breach of contract, the question is does the cumulative series of acts taken together amount to a breach of the implied term.

Resignation 'because of' the breach

15. The breach of contract does not have to be the sole reason for the resignation – it is enough that the employee resigned in response, at least in part, to a fundamental breach by the employer; **Nottinghamshire County Council v Meikle [2004] EWCA Civ 859**

Waiver of the breach/affirmation of the contract

16. The contract is affirmed if after the breach the employee behaves in a way which shows that he or she intends the contract to continue. Delay in resigning may mean that the employee has waived the breach or affirmed the existence of the contract; **Mari v Reuters Ltd UKEAT/0539/13**.

Notice pay

17. Where the contract does not contain any expressly agreed notice period, reasonable notice will be implied; ***Richardson v Koefod [1969] 1 WLR 1812***. What is reasonable will depend on the circumstances of the case. Statutory notice periods apply generally where an employee has worked for over a month; **s.86 Employment Rights Act 1996**.

Breach of contract claim

18. An employee may bring a claim in the Employment Tribunal for breach of the contract of employment or of contracts “connected with employment”; **Employment Tribunals’ Extension of Jurisdiction (England and Wales) Order 1994**. Such a claim must be one which “arises or is outstanding on the termination of the employee’s employment”; **Article 3 (c)**. That means that the employee must have an enforceable claim at the date of termination of the relevant contract. Specific exclusions apply, for example, terms relating to intellectual property or the requirement that an employee reside in a particular property.

Findings of Fact

19. Having heard the evidence and considered the documents on both sides I made the following findings of fact on the balance of probabilities. I did not have sufficient evidence to reach findings of fact on all the matters raised by the parties many of which were in any event beyond the jurisdiction of the Tribunal.
20. The respondent offered the claimant a position as a dedicated nanny to look after one of his two children, child A. Her initial duties were to travel with his family on holiday to Turkey. Her daily rate of pay was £80. Another nanny had been employed to look after his other child. The contract entered into on 16th May 2021 provided that the claimant was required to prevent child A from harm, apply sun cream throughout the day and to give her water every 20 minutes. Other provisions referred to the conditions which the claimant had to ensure for child A’s naps. The contract also said that the claimant was expected to help the other nanny carrying for his other child, child B, with “chores such as washing bottles, preparing milk, ironing children’s clothes, cleaning toys etc
21. The contract also stated that the respondent would pay for “roundtrip flight tickets, food and drinks, transportation to and from airports, payment for all related Covid tests”. The agreement contained a notice clause but did not specify a period of notice.
22. Additionally, the parties agreed a schedule setting out the claimant’s working hours. She was required to work 4 day shifts and 3-night shifts. The day shifts were from 7am to 7pm and the night shifts were from 3pm until 7am.

23. The claimant's evidence which was largely accepted by the respondent was that shortly after their arrival the respondent sought to vary the claimant's duties. She was asked to work 12 to 14 hours each day rather than a mix of shorter day and night shifts as agreed in the schedule. She finished around 9pm or 9.30 pm each night rather than at 7pm only 4 days per week. She was not asked to work any night shifts. The respondent did not deny that the claimant had to work longer hours than agreed but said that as the claimant could rest while child A napped, she did not really have to work for the entire 12-14 hours. I found however that the claimant was expected to remain on duty and at the respondent's holiday residence throughout the entire extended day shift including child B's naps. I found that the claimant objected to the charges.
24. Additionally, the claimant was told by the respondent that she was expected to massage child A. The claimant refused to do so on the basis that she had not been trained in child massage. She was also asked to send frequent WhatsApp messages to the respondent's wife every 20 minutes in relation to her care of child A. Increasingly she was also required to look after child B rather than supporting that child's nanny with chores. The respondent did not deny that he had varied the claimant's duties from those recorded in her contract. He said that this was an extension of their earlier agreement and that it was reasonable both to ask her to work a few extra hours and to share the care of child B. He said that he did not regard these as "very significant changes". He did not regard the need to send 20 minutely updates via WhatsApp to be unreasonable.
25. The claimant's evidence which I accepted was that she found the increased hours tiring. She was effectively not given the entire half day off per week specified by her contract and only given 5 hours off as she was required to work two extra hours on that day.
26. On 23rd May 2021, the claimant resigned by text message sent at 11.07 am saying:
- "I want to leave. I did not count on such a load and such treatment. Your second nanny gets more payment and less stress"
27. Her oral evidence which was consistent with the contemporaneous text messages was that she had resigned at 11.07 am due to a combination of her increased hours and extended duties.
28. The respondent replied to the claimant's text message saying that they should discuss the matter. The claimant replied:
- "I am a person who always adheres to agreements on principle and I do not like uncertainty and change horses on the crossing. Therefore if you said all the four bodies in London right away, you would have enough time to find someone else."
29. There was a further exchange of texts where the respondent offered to discuss the matter. The claimant made it plain that she was no longer willing to work as a nanny and offered to work for the respondent in a different capacity as a housekeeper. The respondent did not accept her offer. He sent a text message to the respondent saying:

“You have offered to leave. I have agree because situation created is conflict one and except as a nanny, I do not require your services. I’m ready to pay ticket to Russia”.

30. The claimant replied saying that she did not need to go to Russia. The respondent arranged for the claimant to stay in a hotel while her covid test could be carried out to allow her to return to the UK. There were further text messages relating to covid requirements applying to various travel routes back to the UK.

31. An alleged incident took place on 23rd May 2021 at 12.30 pm which was after the claimant had resigned and before the claimant moved to the hotel. This concerned child B. The respondent’s wife said that she saw the claimant roughly push child B’s buggy and that she later made a report to the Turkish police. The claimant denies that the incident took place. Both parties made repeated allegations and counter allegations against each other at the hearing. It is appreciated that this is an understandably emotive issue but I did not have sufficient information to make findings of fact on this matter.

32. Additionally, as this was after the claimant had resigned and the employment contract had ended, the Tribunal has no jurisdiction over this matter. The alleged incident clearly caused great distress to the respondent and his wife. The claimant was also upset by what she saw as a false accusation against her. The alleged incident led to a number of heated remarks being made by both parties and by Mrs Alyelken during the hearing including their wish to pursue defamation claims. I explained that these were not matters for the Tribunal.

33. The claimant sent a text message to the respondent saying:

“I refer to terms and conditions of my employment signed on 16 May 2021. I wish to remind you that you are under obligation to cover all my travel expenses incurred during the entire period of our agreement...”

34. The respondent’s text message to the claimant who was by now in the hotel was as follows:

“Due to the abuse of my 7 months old baby on the 23.05.21 around 12.30 as I informed you at the time of your horrific actions towards my baby any form of agreement you claim has become void due to the physical abuse displayed. Nevertheless I financially covered your hotel supply and PCR test as we were concerned for the safely of our kids and the family from your actions and threats post incident.”

35. The claimant replied:

“your allegations are untrue, as we know. You are trying to avoid making the payment to cover my travel expenses back to the UK.”

36. Further text messages followed. It is not necessary to consider these text messages in detail as they contained inconclusive discussions about possible routes for the claimant to return to London. Relations then completely broke down. The respondent admitted that he did not pay for the claimant’s flights and other expenses including Covid tests. The claimant had to bear those costs herself.

Submissions

37. The claimant's case was that she had entered into a contract of employment with clearly defined responsibilities. The respondent had sought to vary those terms and she had resigned as a result.

38. The respondent accepted that he had changed the terms of the claimant's contract. He said that those changes were reasonable and that the claimant had performed poorly. He admitted failing to pay the claimant's travel costs but said that the agreement had been voided by the incident with Child B.

Discussion and Conclusions

39. I had to decide this case on the information available to me during the hearing. I did not have the benefit of any direct evidence from Mrs Kuncevic. I did not therefore attach any weight to her evidence. I found both the claimant and the respondent's wife to be genuine witnesses although their recollections clearly differed particularly in relation to the alleged incident with child B after the claimant's resignation.

40. Having heard all the evidence I found on the balance of probabilities that the claimant was constructively dismissed and that the respondent had failed to pay the travel and other expenses owed to her under her contract of employment. My reasons for reaching that conclusion were broadly as follows.

41. Firstly, the claimant and respondent had agreed very particular terms. The claimant's contract specified very precise hours of work and stated that she would look after child A only and would have to provide limited help to the nanny looking after child B. The contract did not require her to work outside those set hours not to look after child B.

42. There was a mismatch of expectations. The respondent clearly regarded the contract of employment as a starting point setting out a floor of obligations which he could build upon. The claimant's view was that the contract of employment represented a ceiling upon her responsibilities. I accepted the claimant's evidence that she had been anxious from the outset to have her obligations clearly defined and that she would not have entered into a contract requiring her to work longer hours. This was particularly so given that the work was to be carried out in a strange location where she did not know anyone else.

43. I found that the changes to the contract therefore represented a sufficiently serious breach of the implied duty of mutual trust and confidence which entitled the claimant to resign. Those changes fundamentally altered then nature of the contract of employment and were the reason for the claimant's resignation. Her resignation was accepted by the respondent. I found that the claimant did not affirm the contract or waive the breach. She remained at the respondent's holiday residence only while arrangements could be made for her return travel to London. She had offered to work for the respondent in a different role but that offer had been rejected by the respondent.

44. Secondly, the respondent did not at any time seek to deny that the claimant had resigned. He expressly accepted her resignation in writing via a text message.

Although he and his wife sought at the hearing to criticise the claimant's performance during her employment, he had not taken any steps to terminate the contract prior to her resignation.

45. Thirdly, the respondent did not deny agreeing to pay the claimant's travel and associated costs in the contract of employment and nor did he deny failing to pay them at the end of the employment relationship. He suggested that he and his wife's concerns about her alleged poor performance and the incident with child B after the claimant's resignation entitled him to "void the contract".

46. For those reasons I found on the balance of probabilities that the claimant had been constructively dismissed. She was entitled to reasonable notice which I deemed to be one week and remained entitled to be paid for her travel expenses. Those expenses arose on the termination of her contract relating at they did to her repatriation back to the UK.

Award

47. In the absence of any challenge to the claimant's figures I made the following awards.

48. The claimant's gross weekly salary based on her daily salary of £80 per day taken from her contract of employment was £560.

49. Her travel expenses came to £782.

50. The total of these figures is **£1,342**.

Employment Judge B McKenna

23rd November 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

26 Nov. 21

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.