



EMPLOYMENT TRIBUNALS

Claimant: Mrs P Broom

Respondent: Evanscare Ltd

Heard at: London South **On:** 25, 26 & 27 October 2021

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: in person, assisted by her husband Mr Broom

For the respondent: No attendance

JUDGMENT WITH REASONS

Claims, appearances and documents

1. This was a claim for unfair dismissal and unauthorised deductions (holiday pay and one day's pay).
2. The claimant appeared in person, assisted by her husband.
3. The respondent did not appear. The clerk telephoned Mr Evans of the respondent organisation who informed the clerk he was traveling up to Glasgow and was unaware of the Hearing. (The respondent did not appear for day 2 of the Hearing either or make enquiries of what had happened on day 1).
4. The Tribunal was satisfied that the Notice of Hearing was sent by email to both parties on 27 April 2021. The respondent's email address as communicated and conveyed on the ET3 had been used.
5. The Tribunal had not received any request to change its mode of communication with, or an alternative email address for, the respondent. In fact, during the Tribunal's enquiries on the morning of the first day of the Hearing, the clerk enquired of Mr Evans if the Tribunal had the correct email address (this was read back to Mr Evans) and it was confirmed to be correct. Further, the claimant had not received any error message in relation to the email address; neither had the Tribunal.

6. The Tribunal enquired of the claimant if there had been any communication between the parties about preparation, for example documents or the Bundle and was informed that there had not been any and nothing had been received from the respondent.
7. This Hearing had already been postponed once before (though that was not because of the parties).
8. In the light of the foregoing, it was not considered to be in the overriding objective to delay or postpone the Hearing. This would not be fair and just on the claimant who was in attendance and ready for trial in circumstances where there was no good reason and/or an insufficient explanation for the respondent's non-attendance. If there had been doubt about the listing, the respondent could and should have undertaken reasonable enquiries of the Tribunal. The case was presented on 7 May 2019. This Hearing was taking place almost 2.5 years later. The respondent had attended the Case Management Hearing on 25 November 2019 (at which various case management Orders were made and the case set down for the April Hearing), but it appeared had not done anything since. To not have communicated with the claimant or the Tribunal or undertaken any preparation in almost 2 years since, was irresponsible and very surprising. The postponement of the Hearing in April 2021 had been because the Case Management Orders had not been sent out following the Case Management Hearing on 25 November 2019, but a revised timetable had been set on 27 April 2021. The claimant had sent its witness statements to the respondent on 10 August 2021.
9. The claimant was ordered to prepare a paginated bundle. This was done before the evidence commenced on day 2. The bundle ran to 89 pages. Both parties were informed by email that the evidence would commence at 10.00am on day 2. The clerk also telephoned the respondent twice, but the respondent did not attend the calls.
10. The Tribunal heard from the claimant, her husband Mr Broom, Ms Shula Rich who had accompanied the claimant at a meeting and Ms Amanda Harris a former employee of the respondent.

Findings of fact

11. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.
12. Only findings of fact relevant and proportionate to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

13. The Tribunal also adds that whilst there were missing documents, the Tribunal questioned the claimant in oral testimony in relation to relevant evidence having regard to the issues. There had been no disclosure by the respondent at all which was not the fault of the claimant.
14. The respondent is a care home. The claimant was a night care assistant working there from 9 August 2011 until her resignation with effect from 16 December 2018.
15. The claimant worked three 12 hour shifts per week. The claimant's pay was £91.98 per shift (net).
16. The claimant had not provided a signed copy of a contract but produced a template which she said in oral testimony was the same as what she would have signed. This evidence was accepted.
17. The template contract confirmed the respondent's holiday leave year was April to March. The entitlement was 5.6 weeks. Based on a 3-shift week, the claimant's annual leave entitlement was 16.8 shifts.
18. The contract also confirmed the claimant was entitled to 1.5 times pay on bank holidays.
19. The disciplinary procedure annexed referred to suspension *with pay* in gross misconduct situations.
20. The claimant's line manager was Ms Julie Mahoney.
21. The claimant's employment was unremarkable until certain events in 2018 save that the claimant asserted a variety of pay irregularities in various years for which she did not receive the correct pay (at the time the pay was due) but had not sought to action formally.
22. In the bundle (pages 39-40) there was a schedule of irregularities of the claimant's pay from 2011 to 2018. Most of the asserted discrepancies were for 2017 but there were 3 entries for 2018 (7 May (underpaid bank holiday), 31 May (non-payment for a shift) and 27 August (underpaid bank holiday)). These were for £45.99, £91.98 and £45.99 respectively. The claimant confirmed in oral testimony that she had been paid these sums eventually and before resigning. Her issue, she said was about the frequent/regular basis upon she needed to pursue underpaid sums. This testimony was corroborated by Ms Harris who had worked for the respondent for 8 years who said her pay was underpaid or not paid on average 10 times a year.
23. In or around May 2018, the claimant asked about manual handling training and safeguarding training. This was something required by way of updating or a refresher. The claimant says she pursued this again but ceased to enquire about it from around July onwards. She said the manual handling training was required to be done in person and the safeguarding on a portal. She said both were very important.

24. In September 2018, the claimant made a request for annual leave for the end of October 2018 and the beginning of November 2018. The claimant believed her request was for 3 days (29, 30 October and 1 November); however, 2 days had been entered into the respondent's system.
25. The process for taking leave was for a form to be submitted to a manager. However, this had ceased happening as the forms were no longer available, so a note was completed and submitted instead. The approval of that leave would be known by a notice board detailing the forthcoming leave of staff. However, Ms Harris also explained in oral testimony that the board was not always there or up to date.
26. Ms Harris's evidence (in its entirety) was considered reliable notwithstanding she had resigned around the same time as the claimant because of a dispute over holidays. She expressly rejected the suggestion that she was a hostile witness. The Tribunal found her to be a balanced and credible witness who had responded in a frank way to questions from the Tribunal which she was not previously aware of.
27. The claimant believed that her holiday for 3 days had been approved. She was not told otherwise.
28. After the claimant had taken leave on 1 November 2018 and returned to work on 5 November, it was treated as unauthorised leave. The claimant manually altered the leave status on the notice board as she noticed that 1 November 2018 had not been added. It was not alleged by the respondent that this has been done to misrepresent the position.
29. The written application for leave was not before the Tribunal and had not been available during the consequential disciplinary proceedings.
30. The claimant was suspended from her night shift on 6 November 2018, without pay, by Mr Reece Langridge (kitchen assistant), who was also who the deputy Manager's son. It was not clear upon whose instruction Mr Langridge was acting. The suspension however took place in the presence of Ms Veronica Bell and Ms Mahoney who did not intervene. The claimant said in her witness statement the discussion had started on the previous day and continued at the start of her shift on the next day (6 November 2018) and it was heated. She said in evidence Ms Bell and Ms Mahoney argued and shouted. This evidence was accepted.
31. An investigation meeting took place on 7 November 2018 before Mr Paul Evans (the owner of the respondent) and two other managers Ms Bell and Ms Mahoney. This was because the respondent asserted that the claimant had become argumentative in relation to her assertions that she had correctly applied for and had had approved 3 days of leave not 2 and for the taking of that day as leave.

32. A transcript of this meeting was produced. It was accepted that it was covert. This recorded that the claimant had not been paid for 6 November 2018. It was stated by Paul Evans “*I’m not going to pay you for shouting at people*”.
33. The claimant was invited to a disciplinary hearing by a letter dated 8 November 2018, to take place on 12 November 2018.
34. The claimant was accompanied at the disciplinary hearing by Ms Rich (as a friend). The claimant apologised at this meeting. Ms Rich said the claimant did so as she was asked to do so repeatedly. Importantly, the claimant said at this meeting Mr Evans said the disciplinary hearing should not have taken place and was excessive. This was corroborated by Ms Rich. She said the meeting was a heated meeting. There was no outcome announced at the end of the meeting or in writing after the meeting.
35. The claimant resigned by a letter dated 15 November 2018. Whilst not explicit, it was apparent from the letter that this was with notice. The claimant stated she would be unable to work for the next 3 weeks as she had been signed off as sick and she was due to have a review with her doctor in 3 weeks’ time.
36. In her resignation letter, the claimant also sought to cancel pre-booked leave for 15 November and 10 December 2018. The claimant’s evidence that she had taken 7 days leave on 27, 28 & 30 August, 3 & 4 September and 29 & 30 October 2018 was accepted (page 38 of the bundle).
37. The claimant was certified as sick by fit notes dated 13 November and 4 December 2018 covering the period until 17 December 2018.
38. The claimant commenced a new role (at better pay) from 18 February 2018 and remains in that employment.

Applicable Law

39. Under S. 95 Employment Rights Act 1996 (‘ERA’), an employer is treated to have dismissed an employee in circumstances where he is entitled to terminate the contract by reason of the employer’s conduct.
40. The legal test for determining breach of the implied term of trust and confidence is settled. That is, neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee ***Malik v BCCI 1997 ICR 606.***
41. The correct test for constructive dismissal was set out and established in ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 as follows:***
- Was the employer in fundamental breach of contract?
 - Did the employee resign in response to the breach?
 - Did the employee delay too long in resigning i.e. did he/she affirm the contract?

42. In ***Woods v WM Car Services (Peterborough) Limited 1981 ICR 666*** it was confirmed that any breach of the implied term of trust and confidence was repudiatory.

43. In ***Ishaq v Royal Mail Group Ltd UKEAT/0156/16/RN***, the EAT, following a review of relevant authorities, approved the principle that it is enough that an employee resigns in response, at least in part, to a fundamental breach by the employer citing the Court of Appeal decision in ***Nottinghamshire County Council v Meikle 2004 EWCA Civ 859***.

44. Right not to suffer unauthorised deductions. S.13 Employment Rights Act 1996 ('ERA') says:

(1) An employer shall not make a deduction from wages of a worker employed by him unless:

- (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
- (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

- (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
- (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

45. Enforcement is provided for by S. 23 ERA.

46. Compensation related to entitlement to leave. Working Time Regulation ('WTR')¹⁴ says:

(1) This regulation applies where:

- (a) a worker's employment is terminated during the course of his leave year, and
- (b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

47. Enforcement is provided for by Regulation 30 WTR.

Conclusions and analysis

48. The Tribunal concluded that the respondent did ignore/reject the claimant's training requests for manual handling and safeguarding. The Tribunal noted that the schedule of the claimant's training was significant over the years (pages 74 to 79) which demonstrated the importance of training. There was no evidence before the Tribunal why this did not take place.

49. The Tribunal concluded that the disciplinary action for the taking of holiday on 1 November (and for the resultant argument about it) was not done with reasonable or proper cause. This was because the Tribunal was far from satisfied that the respondent's process for the taking of annual leave was clear and/or would not lead to errors. The evidence of Ms Harris was particularly relevant as she explained the notice board would sometimes not even be available or be up to date. In addition, Mr Evans accepted at the disciplinary hearing that it should not have taken place and was excessive. At the investigation meeting, Mr Evans had said he was going to get evidence 'off everybody from what happened the other day.' There was no evidence before the Tribunal that this had happened, there was no reference to it in, or enclosures sent with, the invitation letter. The evidence in relation to the argument which had also led to the meeting being scheduled appeared to the Tribunal to be one which was mutual. There was insufficient evidence before the Tribunal of insubordination.

50. The Tribunal concluded that the claimant did experience a series of irregularities of pay over a long period of time. Whilst some of these appeared to cease at the end of April 2017, there were further occurrences in 2018, twice in May and in August. Whilst the shortfall/underpayment was resolved before the claimant resigned, the claimant had been underpaid on several occasions.

51. The Tribunal also concluded that the non-payment of pay for the night shift of 6 November 2018 was a pay issue which the Tribunal understood had not been cured. This was sufficient on its own to breach the implied duty of trust and confidence.

52. Alternatively, combined with the foregoing conclusions or, the cumulative effect of the foregoing conclusions, the respondent did breach the implied term of trust and confidence. The last straw was either non-payment of wages for 6 November/suspension without pay or calling the claimant to a disciplinary hearing which on the respondent's own admission was not required and was excessive.

53. The claimant was thus constructively unfairly dismissed. No potentially fair reason has been advanced by the respondent.
54. In relation to holiday pay, the Tribunal concluded that the claimant had taken 7 days of an accrued total of 12 days from 1 April to 16 December 2018. A balance of 5 days at £91.98 was thus due. That comes to **£459.90**. That claim succeeds under Regulation 14 WTR or S.13 ERA 1996.
55. The claimant's pay for 6 November 2018 was also an unauthorised deduction. The claimant was suspended and there was no contractual authority to suspend without pay. The pay due is **£91.98**. This was properly payable but not paid.
56. The claimant's basic award is $7 \times £275.94 \times 1.5$ based on 7 years' service during all of which she was over the age of 41. That sum comes to **£2897.37**
57. The claimant was out of work for 9 weeks. The compensatory award for loss of earnings amounts to **£2483.46**. In addition, the Tribunal awards **£350** for loss of Statutory protection.
- 58.** The Tribunal also awards an additional 2 weeks pay as the claimant did not, based on the evidence before the Tribunal, at the time the claim was issued, have an up-to-date statement of employment particulars under S.38 Employment Act 2002. That amounts to **£551.88**.

The claim for constructive unfair dismissal under S.94/95/98 Employment Rights Act 1996 is well founded and succeeds.

Public access to Employment Tribunal decisions

All 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.

Employment Judge Khalil

22 November 2021