



EMPLOYMENT TRIBUNALS

Claimant

Respondent

MR R GALANG

v

KESTREL GROVE NURSING HOME

Heard at: Watford, in person

On: 25 January 2022

Before: Employment Judge Skehan

Appearances

For the Claimant: Mr Tahzib, counsel

For the Respondent: Mr Duffy, counsel

RESERVED JUDGMENT ON LIABILITY.

1. The claimant's claim for constructive unfair dismissal contrary to S98 of the Employment Rights Act 1996 is well-founded and successful.
2. This matter had been listed for a remedy hearing and directions have been provided to the parties separately.

REASONS

1. The claimant issued proceedings on 18 September 2020, following a period of early conciliation between 4 August 2020 and 18 August 2020. The claimant claimed constructive unfair dismissal contrary to S98 of the Employment Rights Act 1996 only. At the beginning of the hearing we revisited the issues to be determined as set out by EJ DeSilva on 19 August 2021. It was agreed that the alleged breach of contract related to a breach of the implied term of trust and confidence and arose only from the alleged conduct of Mr Paul Tripp on 5 May 2020.

The Evidence

2. I heard evidence from the claimant on his own behalf. The claimant was assisted during the hearing by a tribunal appointed Tagalog interpreter. I heard evidence from Mr Tripp on behalf of the respondent,. The witnesses gave

evidence under oath. Their witness statements were adopted and accepted as evidence-in-chief and the witnesses were cross-examined.

3. As is not unusual in these cases the parties have referred in evidence to a wider range of issues than I deal with in my findings. Where I fail to deal with any issue raised by a party, or deal with it in the detail in which I heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance. I only set out my principal findings of fact. I was not present during the incidents in question. I have no magic way of determining what happened. I make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.

4. The claimant was employed by the respondent as a domestic assistant in the respondent's nursing home between 31 October 2006 until his resignation with immediate effect on 7 May 2020. The respondent had approximately 120 employees. The claimant was described by Mr Tripp as 'a good worker'. The tribunal was referred to various supervision documents within the bundle recording the claimant's good performance.

5. The claimant says that in late March 2020 he began feeling unwell with symptoms known to be related to Covid 19. He felt cold, experienced body pain and had a persistent cough. He called 111 and was advised to self isolate and he was issued with an isolation note covering the period between 23 March to 29 March 2020. The claimant says that he continued to feel unwell and received further isolation note covering the period from 6 April 2020 to 12 April 2020. Thereafter, the claimant produced a fitness to work note from his GP covering the period 7 April to 15 April 2020 recording 'suspected Covid 19' and a further fitness to work certificate, again stating 'suspected Covid 19' covering the period 15 April to 29 April 2020.

6. The claimant says that he contacted his employer on 3 or 4 May tell them he wished to return to work. He says that he spoke to the assistant manager who told him that she would put him on the rota. The claimant said that he attempted to return to work one day but felt dizzy and unwell and was unable to attend on that day. Mr Tripp had no knowledge of any contact.

7. The claimant returned to work on 5 May 2020. There is documentation within the bundle reflecting a Covid 19 risk assessment carried out with the claimant on this date. This risk assessment reports that the claimant was assessed by the respondent as 'high risk due to his underlying health conditions of diabetes, a heart condition and high blood pressure'. It notes that the claimant has recently been isolating for up to 7 weeks has returned to work without a GP note to say he is safe the work, he had contacted his GP and the advice received was that he could return to work if he feels okay. The GP does not think he needs to have 12 weeks isolation. The risk assessment is signed by the claimant. The claimant had no recollection of any discussion around the risk assessment document saying he simply signed the document where requested by his

manager. I find on the balance of probability that the notes within the risk assessment reflect the discussions between the claimant and respondent on 5 May 2020.

8. During that day the claimant asked his colleague Petrota why the staff working in the kitchen were not wearing facemasks. She said that it had been like that for a while. The claimant said he would raise the matter with the matron and added jokingly that if this was not actioned by the matron he would make a complaint to the CQC (Care Quality Commission). The respondent operates within a highly regulated area and the regulator is the CQC. During that day it was reported to Mr Tripp that the claimant had threatened to report the respondent to the CQC as the kitchen staff were not wearing masks. Mr Tripp says that at this point he decided to speak to the claimant to explain the guidance on PPE and to discuss the claimant's sick leave. Mr Tripp, the claimant and the care manager, Monica, were present at this meeting. Within his witness statement Mr Tripp says 'the meeting was not really progressing as the claimant was becoming agitated and I therefore decided to call the meeting to a close to be continued at another time.' He provides little description of what was said at the meeting.

9. The claimant says that: Mr Tripp began by questioning him about his conversation with Petrota and asked if he had said that he would report the nursing home to the CQC because staff were not wearing masks. The claimant said he was scared and initially denied this. Mr Tripp became angry and started shouting at him. The claimant says that, as he had not done anything wrong, he admitted that he had said this to the Petrota. Mr Tripp told the claimant that he was not a loyal employee and that he was ungrateful he referred to previous help provided to the claimant such as loans and holidays. The claimant felt belittled and hurt by Mr Tripp's comments. Mr Tripp produced the claimant's documents relating to his absence from work and continued to shout at the claimant. He pointed his finger in the claimant's face and called him a liar. Mr Tripp questioned whether his absence was for a genuine reason and accused him of lying to his GP about having Covid and falsifying doctors notes. The claimant says that he felt scared and was shaking he felt that Mr Tripp's treatment of him was cruel and he felt upset throughout the meeting. The claimant told Mr Tripp that if he had made a mistake, disciplinary action could be taken. The claimant was feeling overwhelmed and he wanted the meeting to be over. At the end of the meeting Mr Tripp told the claimant that he was going to be 'on his back every 5 minutes'. The claimant left without saying anything as he was upset. The claimant went to his locker and took out his belongings. He did not feel comfortable returning to work. As he was clocking out of his shift, the claimant saw Mr Tripp and told him that he was leaving. In response Mr Tripp told him that he did not care, in front of other members of staff. The claimant says that this made him feel worse. Mr Tripp denies the claimant's version of events.

10. Following this meeting Mr Tripp sent a letter to the claimant dated 5 May 2020, referring to the meeting and issuing an 'informal warning' in respect of:

- a. Unsatisfactory conduct for falsifying sick notes and absenteeism from work
- b. unsatisfactory conduct by talking to a colleague about reporting the home for breach of PPE when you should have discussed this with management to find out the regulations and guidance relating to PPE.

11. Mr Tripp said that handwritten notes were taken by Monica during the meeting, and he believed he had those notes. Time was provided for Mr Tripp to locate the notes. The claimant said that no notes were taken during the meeting. No handwritten notes were found and no notes had been disclosed during the litigation process. I was referred to a single page of typed notes in the bundle, headed 'minutes of informal meeting' and dated 5 May 2020. These notes record ' Mr Tripp explained that isolation notices that covered two weeks should have covered the period of isolation from Covid 19 and why then were there a further four weeks of sick notes from his doctor stating he had covid 19 symptoms and a further five days of absence with no notice or reason given.' The notes say that no response was provided by the claimant the notes record a discussion relating to the claimant's comments relating to PPE and the respondent's understanding of the requirements in relation to PPE. The notes finish with the comment, 'by this time [the claimant] was getting quite agitated and decide to leave the meeting and said he wanted to go home. Mr Tripp said that under the circumstances that would be a good idea and give it his blessing. This concluded the meeting'

12. The claimant told the tribunal that he was very upset following the meeting with Mr Tripp. He believed he had done nothing to deserve the accusations and threats to make his working life difficult referring to the comment 'on his back every 5 minutes'. The claimant also had a family to support and did not have alternative employment to go to. On 7 May 2020 the claimant sent his resignation to the respondent. This was delivered by hand on 8 May 2020.

13. The claimant's resignation letter stated inter-alia:

After 14 years of service I feel I have no choice but to hand in my resignation as of immediate effect..... On 5 May 2020 I was called into a meeting where Paul Tripp ... was present and was treated appallingly. I believe that your behaviour amounts to a fundamental breach of contract. I believe that you have breached the mutual obligation of trust and confidence. Your behaviour to me was distressing, abusive and amounts to harassment. You threatened to make my work working life extremely difficult. I had done nothing to deserve the treatment I received and all I did was raise issues relating to PPE that can impact on staff and most importantly the service users. I believe that I have been constructively dismissed from my employment.

14. During the course of cross examination, Mr Tripp initially denied that he accused the claimant of lying about his absence but his evidence was muddled in this respect. He told the tribunal that he considered it coincidental that the claimant did not come to work on 23 March 2020, the day when the Prime Minister informed people that they did not have to go to work if they have symptoms of Covid. When asked what he meant by this comment he reiterated that he believed it was a coincidence and said a lot of people were scared of Covid. Mr Tripp thereafter went on to say that in his opinion Covid symptoms could only last for 14 days and it was not possible for anyone to have Covid for longer than 14 days. Mr Tripp accepted that people had died from and were hospitalised with Covid but reiterated that the standard version of Covid lasted only lasted for 14 days. For this reason, Mr Tripp believed that the claimant had falsified the reasons referred to within his sick notes and the claimant was not telling the truth to the NHS or his doctor in relation to experiencing Covid symptoms. Mr Tripp did not suspect that the sicknotes themselves were falsified. Mr Tripp confirmed that both of the matters referred to within his follow up letter were discussed during the meeting.

15. Mr Tripp told the tribunal that he did not know the reason for the claimant's resignation but believed it could possibly be related to embarrassment on the claimant's part in relation to his length of absence from work when others had risked their lives to continue working.

16. The claimant's wife was employed by and continued to work for the respondent. Mr Tripp said that a meeting to discuss the claimant's resignation was convened with the claimant's wife was abandoned due to the attendance of a third party unknown and unidentified to him.

The law

17. 'Constructive dismissal' as set out in Section 95 of the Employment Rights Act 1996. Sub-section 1(c) is the statutory version of a principle originally from common law. The burden is on the employee to prove constructive dismissal. In order to establish that he has been constructively dismissed, the employee must show:

- a. there was a fundamental breach of contract on the part of the employer that repudiated the contract of employment. In this case the claimant relies only upon a breach of the implied term of trust and confidence. This term provides that employers (and employees) will not, 'without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties' Any breach of the implied term of trust and confidence would be considered a repudiatory breach;
- b. the employer's breach caused the employee to resign, and
- c. the employee did not delay too long before resigning, thereby affirming the contract and losing the right to claim constructive dismissal.

- 18 In cases where a breach of the implied term is alleged, the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. The tribunal has to decide whether the conduct in question in a particular case amounts to a breach of the term, by considering:
- a. Whether there was a 'reasonable and proper cause' for the conduct; and
 - b. If not, whether the conduct was 'calculated or likely to destroy or seriously damage trust and confidence'.
- 19 An example given by the EAT to illustrate the 'reasonable and proper cause' element of the test is that any employer who proposes to discipline an employee for misconduct is doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence between employer and employee, whatever the result of the disciplinary process, but if the employer had reasonable and proper cause for taking the disciplinary action, they could not be said to be in breach of the term of trust and confidence. *Hilton v Shiner Ltd Builders Merchants 2001 IRLR 727, EAT.*
- 20 If it is found that the claimant was constructively dismissed, in a claim of unfair dismissal, it is for the respondent to show a genuinely held reason for the dismissal and that it is a reason which is characterised by section 98(1) and (2) of the Employment Rights Act 1996 ("the ERA") as a potentially fair reason. The respondent relies upon 'conduct'. If the respondent shows such a reason, then the next question, where the burden of proof is neutral, is whether the respondent acted reasonably or unreasonably in all the circumstances in treating the reason for dismissal as a sufficient reason for dismissing the claimant, the question having been resolved in accordance with the equity and substantive merits of the case.
- 21 If a dismissal is found to be unfair, the tribunal must consider whether there is blameworthy or culpable conduct or actions on the part of the claimant that caused or contributed to the dismissal and if so whether the basic and/or compensatory award should be reduced by a set proportion as the tribunal considers just and equitable having regard to that finding in accordance with the provisions of Section 122 (2) & 123(6) of the ERA.

Deliberations and Decision

- 22 I am grateful for the full submissions made by both counsel and have considered them carefully. I take this opportunity to comment generally in relation to the oral evidence. The claimant was assisted by an interpreter. There was some confusion during the process of cross-examination relating to nuances within questions, however in general terms the claimant's evidence was consistent with his resignation letter, the pleadings and his witness statement.

- 23 Mr Tripp's evidence was by contrast more difficult to decipher. He did not address what had been said during the meeting in his witness statement. Mr Tripp was initially, during cross examination, unwilling to confirm whether or not he had made allegations of dishonesty by repeatedly referring only to 'coincidence'. The typed notes of the meeting contained within the bundle makes no express reference to allegations of dishonesty, lying or fabrication on the claimant's part. It was obvious from Mr Tripp's follow-up letter, and Mr Tripp admits that allegations of 'falsifying sick notes' were discussed. The handwritten notes said to be taken during the course of the meeting were not produced by the respondent during the disclosure process and no satisfactory explanation was provided for their absence. I conclude that while the typed minutes of the meeting contained in the bundle give an overview of the matters discussed, they were likely to be written following the meeting and provide very little assistance in determining what was said or the tone of what was said between the parties, and I place a little weight upon them for that reason.
- 24 I find that Mr Tripp's reluctance to provide a full account of what was said on 5 May 2020 relating to the allegation of dishonesty made against the claimant, alongside the absence of the handwritten notes of the meeting, detrimentally affect his credibility and the weight placed upon his evidence relating to this matter.
- 25 My findings of fact have been made on the balance of probability in light of all the available evidence. I conclude that the claimant's version of events is the more likely and in particular:
- c. Mr Tripp began by questioning the claimant about his conversation with Petrota and asked if he had said that he would report the nursing home to the CQC. The claimant denied this at first and thereafter admitted it.
 - d. Mr Tripp told the claimant that he was not a loyal employee and that he was ungrateful he referred to previous help provided to the claimant such as loans and holidays.
 - e. Mr Tripp thereafter referred to the claimant's absence from work. During the course of this conversation he shouted at the claimant, pointed his finger in the claimant's face. Mr Tripp was angry and behaved in an aggressive fashion.
 - f. Mr Tripp accused the claimant of lying to his GP, lying about having Covid and falsifying doctors notes.
 - g. The claimant told Mr Tripp that if he had a mistake, disciplinary action could be taken.
 - h. Mr Tripp told the claimant that he was going to be 'on his back every 5 minutes'.
 - i. Later, the claimant told Mr Tripp that he was leaving. In response Mr Tripp told him that he did not care, in front of other members of staff.

26 Particular emphasis was placed by Mr Duffy on the period of absence between 29 April and 5 May that was not covered by a sick note and legitimate issues arising from this period. However, I conclude that Mr Tripp placed no such emphasis on this particular period during the meeting on 5 May 2020. Mr Tripp's emphasis was on the period covered by sick notes and the allegations set out above.

27 My next task is to consider whether or not the above actions constitute a breach of the implied term of trust and confidence. I start by asking whether there was reasonable and proper cause for Mr Tripp's actions. For the avoidance of doubt, I consider that it is reasonable and proper for any employer to:

- j. Hold a return to work meeting with an employee to discuss absences from work.
- k. Discuss and seek clarification in respect of any period of absence.
- l. Discuss any reported or rumoured safety concern and clarify requirements.
- m. Raise and consider allegations of misconduct including serious allegations of dishonesty or fraud in accordance with its internal procedures.

28 However the circumstances of this particular matter do not, in my view, identify any reasonable or proper cause for Mr Tripp to accuse the claimant of lying to his GP about having covid or providing false information for his doctors notes. Mr Tripp's reference to his certainty of Covid 19 lasting only 14 days is unsupported by any medical evidence beyond his assertion. There is no investigation into allegations of dishonesty. The claimant is a long-standing employee and there is no reason to suspect dishonesty on the claimant's part. The country was experiencing a Covid pandemic. It is the respondent's own evidence, by reference to the risk assessment notes, that the claimant was offered but refused a further 12 weeks absence from work by reference to the risks created by his underlying health condition. Mr Tripp's allegation that the claimant had lied in relation to the previous absence appears inconsistent with the claimant refusing further time off shielding when offered. The absence of an obvious basis for Mr Tripp's allegation of dishonesty and timing of Mr Tripp raising these concerns when discussing the claimant's CAC comment, suggests that the matters are somehow linked. Further, while it may be reasonable and proper for an employer to raise serious allegations with employees, the tone and manner in which issues are addressed may be relevant. In particular I consider that there is no reasonable and proper cause for Mr Tripp to shout at the claimant, to point his finger in the claimant's face. These are aggressive behaviours. Further there is no reasonable and proper cause for Mr Tripp to make the claimant fear that his working life would be made difficult by Mr Tripp being, 'on his back every five minutes' or responding to the claimant in a way that belittled his employment in front of his colleagues. Taking the entirety of the evidence, into account I conclude that there is no

reasonable and proper basis for Mr Tripp's allegations of lying or dishonesty against the claimant.

29 I now turn to whether the conduct was 'calculated or likely to destroy or seriously damage trust and confidence'. I repeat my findings made above. I consider whether the effect of the way in which the claimant was treated during 5 May 2020, judged reasonably and sensibly, is such that the claimant cannot be expected to put up with it. Allegations of dishonesty without any reasonable and proper cause accompanied by aggressive behaviour, and a threat to 'be on the claimant's back every five minutes' is, in my view, behaviour that is likely to destroy or seriously damage trust and confidence. This is compounded by Mr Tripp's closing remarks to the claimant when leaving of 'I don't care'. I consider Mr Tripp's actions of 5 May 2020 to constitute a breach of the implied term of trust and confidence of trust and confidence, and any such breach is considered a repudiatory breach of the employment contract.

30 The claimant was a long-standing employee having 14 years' service. He was described by Mr Tripp as 'a good employee'. There was no other issue between the parties. The claimant's wife worked within the respondent business. The claimant did not have an alternative job to go to and the country was in the midst of the Covid pandemic. The claimant had a family to support and his evidence that he did not take resigning from his position lightly is accepted on the balance of probabilities. There is no credible reason other than the events of 5 May 2020 for the claimant to resign from his position. The claimant's resignation letter and the entirety of the evidence provided by both parties support the conclusion that the claimant resigned due to the treatment he received during the meeting of 5 May 2020. I conclude that the claimant resigned in response to the repudiatory breach of his contract of employment. I do not consider that there can be any serious argument in respect of delay on the claimant's part. The claimant resigned within two days of the events complained of. I conclude that he had not, by remaining employed during this short time, affirmed the contract.

31 I conclude that the claimant has been dismissed, as defined within section 95 ERA, and go on to consider whether or not that dismissal was fair in accordance with the provisions of section 98 ERA. The respondent made submissions in respect of the fairness of the dismissal in the event of these findings and sought to rely upon the claimant's conduct. The conduct relied upon by Mr Duffy related to the claimant's lack of truthfulness and openness when initially questioned on his CQC comment. I refer to my findings and reiterate that the reason for the claimant's dismissal related to Mr Tripp's breach of the implied term of trust and confidence. The claimant's conduct, in respect of a lack of truthfulness or openness within the meeting of 5 May 2020 or indeed any other alleged potential misconduct played no part in the claimant's dismissal. I conclude that the respondent has been unable to identify a fair reason for the

claimant's dismissal and therefore I go no further in considering that claim. The claimant has been unfairly dismissed.

32 Mr Duffy made submissions in respect of contribution on the part of the claimant in the event of the above findings. I repeat my findings above and conclude that the claimant's conduct cannot be fairly or reasonably considered blameworthy or culpable conduct and I find no contribution on the claimant's part to his dismissal.

33 In conclusion, the claimant's claim for constructive unfair dismissal is well founded and is successful.

Employment Judge Skehan

Date: 29 January 2022

Sent to the parties on: 10 February 2022

For the Tribunal Office