



EMPLOYMENT TRIBUNALS

Claimant: J Cudlipp

Respondent: Robin Tirrell and Wioletta Spoz T/A Northfield Dental Practice

Heard at: Bristol

On: 09 March 2022

Before: EJ W Brady

Representation

Claimant: Mr Rayner Jones (Solicitor)

Respondent: In person

JUDGMENT having been sent to the parties on 9th March 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was employed by the respondents as a dental nurse. She commenced employment with the practice on 4 January 2005 and began working for the respondents on 8 April 2014 when they took over the practice. She was placed on furlough on 23 March 2020. On 23 March 2021 she resigned from her position giving the respondent 2 weeks' notice and her effective date of termination is the 4th April 2021.

2. The claimant claims unfair dismissal by virtue of constructive unfair dismissal. She states that the Respondent's conduct amounted to a breach of Clause 11 of her contract of employment, which related to her contracted hours of work, and of the implied term of mutual trust and confidence.

Claims and Issues

3. A list of issues had not been agreed upon prior to the hearing. Mr. Jones representing the claimant outlined the issues that the claimant relies on to prove the fundamental breach of contract.

4. Was there a breach of clause 11 of the employment contract. Clause 11 detailed the contracted hours of work. Was the change of day a permanent or temporary change? Did the change, if any, amount to a fundamental breach of contract?

5. Was there a breach of the implied term of mutual trust and confidence?

6. The claimant asserts that the implied contract term of mutual trust and confidence was breached by the following course of conduct:

a. The respondent in a series of WhatsApp messages made a number of derogatory critical comments – page 68 of the bundle marked 02.09.2020 @18:30.

b. Also at page 69 of the bundle @18:57

c. Also at page 69 of the bundle on 30.10.2020 @ 13.11

d. Also at page 72 of the bundle on 01.02.2021 between 16:19 and 17:29

e Also at page 73 of the bundle on 06.03.2021 @ 19:23

f. Also the passage of messages on 6th March 2021

g. Also page 73 of the bundle 16.03.2021 @15:09 and 15:18

h Page 95 – Job description which advertised for 3 days a week Monday, Wednesday and Friday

i. That there was no consultation whatsoever

7. If there was a breach was it a fundamental breach?_

8. Has the claimant affirmed the breach? It was agreed that there was no affirmation because the claimant resigned immediately.

9. The respondent did not accept that there was a permanent change in the claimant's working pattern and therefore did not accept that there was a dismissal. The respondent did not put forward any other potentially fair reason for dismissal.

Procedure

10. The hearing was conducted wholly remotely via VHS.

11. The tribunal had before it the following documents:

a. Hearing bundle of 92 documents

b. Additional bundle 93-96

c. Second additional bundle consisting of 6 job descriptions and a screenshot of the job description at page 96.

d. Bundle of 3 witness statements – Julie Cudlipp, Wioletta Spoz and Robin Tirrell.

12. On behalf of the Claimant, the tribunal heard evidence from the Claimant.

13. On behalf of the Respondent the tribunal heard evidence from the two respondents, Ms. Spoz and Mr. Tirrell.
14. I heard submissions from Mr Jones on behalf of the Claimant, and from the respondents' Ms Spoz and Mr Tirrell.
15. The bundle consisted of 92 pages. An additional pages 93-96 were added to the bundle prior to the hearing. A further additional 6 job descriptions were added to the bundle by the respondent on 9th March 2022 and a screenshot of the job description on 18th March 2021 was added to the bundle by the claimant's solicitor, Mr Jones. Neither party objected to the additional documents that were added to the bundle on 9th March 2022 and I considered it to be in the interest of justice to allow them to be admitted to the bundle.

Facts

16. The respondents are Wioletta Spoz and Robin Tirrell trading as Northfield Dental Practice. They are a small practice consisting of the 2 respondent dentists and 2 other clinicians, a receptionist and 3 dental nurses.
17. The employment contract is at page 29 of the bundle and clause 11 states that the claimant's normal hours of work are Tuesday 8:30-17:30; Thursday 8:30-17:30 and Friday 8:30-17:30.
18. On March 23rd 2020 the dental practice closed as a result of the Covid 19 pandemic and the staff were furloughed. On June 8th 2020, the practice reopened after lockdown. From 6th August 2020 Ms Spoz asked the claimant to return to work but she then supplied sick notes every month, having contracted Covid during the lockdown and then suffering from its after-effects, possibly "Long Covid".
19. During that time a number of WhatsApp messages were exchanged between the complainant and Ms Spoz which were provided in the bundle from pages 61-73. The claimant states that these WhatsApp messages contributed to the breach of the implied term of mutual trust and confidence.
20. From the outset I will say that messages exchanged by way of text or in this case WhatsApp can often be misinterpreted by parties and it is very easy for the wrong emphasis to be inadvertently placed on a message when receiving messages.
21. I was referred to the messages on pages 67 15:26-page 69 19:38 2nd sept which discussed the claimant's holiday. In or around December 2019, the claimant booked a holiday to Gran Canaria and informed Ms Spox of the holiday, and wrote it on the practice planner. During the WhatsApp messages, Ms Spox questioned the holiday and told the claimant that she would not agree to 2 weeks holiday in December because of Covid, backlogs with patients, and very few staff members to cover for holidays. This was despite the holiday previously having been agreed. The Respondent said, "it's booked now and I will be going sorry". In her

evidence, Ms. Spox stated that she believed she could ask employees to change their holiday arrangements having previously agreed to them. The claimant, states that she changed her holiday due to her ill health and in any event, she remained on sick leave during that time so the cancellation of the holiday did not become an issue although it undoubtedly caused some damage to the employer/employee relationship.

22. The claimant also referred to WhatsApp messages sent by Ms Spoz where she discussed the claimant's sickness record. Ms Spoz conceded that some of the messages sent were inappropriate and that the conversation did not go as she intended, but also stated that there are messages in the WhatsApp messages where she was friendly and kind. Such messages are evident at page 72 from 17:19 onwards.
23. The claimant has also raised an issue about the respondent involving her in an insurance claim that she says was suspicious and she should not have been involved in. The respondents asked for the complainant's medical evidence to show that she had covid to assist with their insurance claim. The respondents have explained that this was in order for them to consider whether they could submit a claim to their insurers for the losses that were incurred as a result of the covid pandemic. From the evidence that I have heard, I do not consider this to be an unreasonable or suspicious request.
24. The claimant also claims that the respondent said that she was being "confrontational" when she queried why she had not received her pay on 6th March 2021 and she was told that she needed to consider her role. This particular exchange begins on page 72 on 6th March 2021 at 17:58 when Ms Cudlip asked where her wages were. Ms Spoz replied 3 minutes after receiving the message, and reassured Ms Cudlipp saying, "Hi Julie, its weekend, I'm sure they will be on your account on Monday morning". Ms Cudlipp then queries the response saying, "How is gills showing up? If its been put in it should show whatever the day? Will check mon at 9am". Ms Spoz then replies again saying, "It was a mistake, it should be on your account soon". In her evidence, Ms Spoz explained that there was a change in the standing order and she immediately corrected it once she had realized the error. I have not heard any evidence to suggest that this was a deliberate withholding of wages and the error was corrected immediately.
25. Ms Spoz then states in her message on 6th March 2021 that she finds Ms. Cudlipp confrontational but she then goes on to explain that she is facing stress and seeking medical help. Ms Cudlipp replies, "Sorry about your medical prob but we have all been affected by this". I consider this to be a frank exchange between two colleagues but with no malicious intent.
26. In November 2020 Ms. Spoz referred the claimant to an occupational health department for assessments. The second report from 1st March 2021 stated that the claimant was fit to work and the assessors advised a phased return to work. The report reads as follows: "short phased return programme of graduated hours. The purpose of this programme is to allow

spacing as well as building stamina, work tolerance, and confidence. You may wish to consider that Julie commences with working half days initially building up over a few weeks as tolerated.”

27. On 16th March 2021, the claimant attended the dental practice where she attended a meeting with Ms Spoz and was handed a letter explaining the “flexible furlough” arrangements. During this meeting, the claimant claims that she was told that her working days had been changed on a permanent basis. The claimant states that this was a fundamental breach of the contract clause 11 or if not it was the “last straw” following a breach of the implied term of mutual trust and confidence that had been breached as a result of the WhatsApp messages and culminating in the change of working days.
28. Ms Cudlipp understood from a colleague that another member of staff was working on Thursdays and believed that this was a permanent change to accommodate the other member of staff.
29. The respondents state that there was never any intention to permanently change the working days for the claimant. They both said that she was a valued member of staff and they were desperate for her to return to work. They say that any changes to her contract were on a temporary basis to assist her return to work and to utilize the flexible furlough scheme. The respondents said that when Ms Cudlipp seemed upset that she was not required to work on the Thursday, she was offered to work a Wednesday for the following week. This offer was made on a temporary basis to cover the staffing need for the following week.
30. The letter dated 16th March states that the shift pattern will “vary weekly and you will be notified in advance”. Ms Cudlipp says that she was happy to vary her hours and even work occasional Wednesdays but because she believed that this was a permanent change she left the meeting and then handed in her notice.
31. In a Whatsapp message sent to Ms Cudlipp on 16th March 2021 Ms Spoz confirmed that it was a temporary change of working pattern during the furlough scheme. She also messaged, “I don’t like your attitude, you need to reconsider what is your role in the practice.” In her evidence, she explained that she meant that the claimant was an excellent nurse and she wanted her to be a lead nurse like she was before Covid. (Incidentally, Ms Spoz also said in evidence that she did not trust her English sufficiently to write a job description without it being checked as English is not her first language). Ms Cudlipp took it to mean that Ms Spoz was suggesting she should leave the practice. I do not believe that that was the intention behind the message.
32. Both Mr Tirrell and Ms Spoz gave evidence to say that there are now two dental nurses working in the practice on a Thursday and that any changes to the claimant’s working conditions were temporary to cover the flexible furlough period.

The Law

33. Claims for constructive dismissal are based on section 95 (c) of the Employment Rights Act 1996 provides that an employee can be dismissed for the purpose of unfair dismissal if 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.”
34. . In order to succeed in a claim for constructive dismissal, the employee must establish on the balance of probabilities that:
 - a There was a repudiatory or fundamental breach of the contract of employment by the employer.
 - b The employee terminated the contract because of that breach.
 - c The employee did not affirm the contract after the breach, typically by delay.
35. The claimant firstly relies on a breach of the contract clause 11. The claimant claims that by changing her working days the employer has fundamentally breached the contract of employment.
36. The Claimant also relies on a breach of the implied term of mutual trust and confidence. If a breach of this term is found to have occurred the breach is inevitably fundamental: *Morrow v Safeway Stores plc* 2002 IRLR 9, EAT at para 25.
37. The test for a breach of the implied term of trust and confidence was set out in the case of *Malik v Bank of Credit and Commerce International SA* (in compulsory liquidation) 1997 ICR 606, HL. To prove a breach of this term the person alleging breach has to prove that the other party, when considering the circumstances objectively (from the standpoint of a reasonable person):
 - a Conducted themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee; and
 - b. The conduct must be without reasonable and proper cause.
38. The fundamental breach of contract by the employer need only be a reason for the resignation of the claimant. It does not matter if there are other reasons: *Wright v North Ayrshire Council* [2014] IRLR
39. The case of *Kaur v Leeds Teaching Hospitals NHS Trust* 2018 confirmed that an employee who claimed constructive unfair dismissal because of a continuing cumulative breach of the implied duty of trust and confidence was entitled to rely on the totality of the employer’s acts notwithstanding a prior affirmation of the contract provided that the later act, the last straw formed part of the series. The effect of the final act was to revive their right to terminate their

employment based on the totality of conduct. The court set out a series of questions to ask itself in such cases:

1. What was the most recent act that the employee said had caused their resignation?
2. Had the employee since affirmed the contract?
3. If not, was the act by itself a repudiatory breach of contract?
4. If not, was it nevertheless part of a course of conduct which cumulatively amounted to a repudiatory breach of the implied term of trust and confidence?
5. Did the employee resign in response to that breach?

Conclusions

40. The most recent act that Ms. Cudlipp claims caused her resignation is the change of working days that was proposed on 16th March 2021. On that day a meeting was held and Ms. Spoz handed Ms. Cudlipp a letter explaining the flexible furlough arrangement. That letter states “As agreed you will be working 9-24 hours per week. Your shift pattern will vary weekly and you will be notified in advance”. Both Ms Spoz and Mr Tirrell gave evidence to say that they needed staff, that they were very much looking forward to Ms Cudlipp’s return to work and that she was a highly valued member of staff. Indeed, Mr Tirrell said that she was the “best dental nurse he had ever worked with”. They also both gave evidence to say that they believed they were following the phased return guidance from the occupational health report. As a result, they decided to ask her to work half days on Tuesdays and Fridays and told her that she would not be required to work on Thursdays, however as a result of the flexible furlough scheme Ms Cudlipp would continue to be paid 80 percent of her wages for the days that she was not working. Ms Spoz has described how she went to look at the computer system to check which hours Ms Cudlipp was required for the following week and wrote them on a post-it note. This accords with the letter that was handed to Ms Cudlipp on 16th March 2021.

41. I have also been referred to a number of job advertisements. The advertisement that was supplied by the claimant and is dated 18th March includes Thursday on the advertisement, again showing that a dental nurse was required to work on a Thursday.

42. I do not accept that there was any personal vendetta against Ms Cudlipp and I accept the evidence of both Mr Tirrell and Ms Spoz who say that they were looking forward to Ms Cudlipp returning to work as she was a highly valued member of their team. Ms Cudlipp however was convinced that her working day had been given away to another member of the team during her absence and that that was the reason that she was not being asked to work on a Thursday. I accept Ms Spoz’s evidence that this was a temporary measure and that in the meantime Ms Cudlipp would be paid for her Thursday through the flexible furlough scheme.

43. The offer to work on a Wednesday was made when Ms Cudlipp appeared upset because she wasn’t required to work on the Thursday. It was not a permanent arrangement and was therefore not a fundamental breach of contract.

44. The fact that it was a temporary change was stated in the letter dated 16 March 2021, in the WhatsApp message on page 73 at 15:09 and again in the letter to the Claimant on 24th March 2021.

45. I also accept Mr Tirrell's evidence that the change of hours was implemented to ensure they followed the occupational health advice of a phased return.

46. I, therefore, conclude that there was no fundamental breach of the express contract term and no permanent change in working hours.

47. I then turn to the question of whether the reduction of hours formed part of a course of conduct that cumulatively amounted to a repudiatory breach of the implied term of trust and confidence? When considering this I must consider the circumstances objectively from the standpoint of a reasonable person.

48. I have considered in detail the WhatsApp messages. I can see that at times Ms Spoz has expressed her frustration about the situation and she has accepted that at times she said things that were inappropriate, but looking at the conversations between Ms Spoz and Ms Cudlipp as a whole there are also many examples of supportive texts having been sent by Ms Spoz, for example on page 71.

49. The claimant in her evidence said to Ms Spoz, "If you'd said to me I would have my normal working days back of course I would have stayed". This suggests that the WhatsApp messages were not the main reason for her resignation.

50. I have applied the case of *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)* 1997 ICR 606, HL. To prove a breach of the implied term of mutual trust and confidence, the person alleging the breach has to prove that the other party, when considering the circumstances objectively (from the standpoint of a reasonable person):

- a. Conducted themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee; and
- b The conduct must be without reasonable and proper cause.

51. On occasions Ms Spoz sent inappropriate WhatsApp messages out of frustration during the Covid 19 pandemic, but I do not consider that they were calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. They were followed by friendly and considerate messages so that any inappropriateness was fleeting and sent in the heat of the moment and certainly not a course of conduct or vendetta against Ms Cudlipp. I do not find that a reasonable person would believe that the respondents conducted themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

52. I do not find that there was a breach of the implied term of mutual trust and confidence.

53. Consequently I do not find that the claimant was dismissed.

Case No: 1402096/2021

Employment Judge W Brady
Date: 09 March 2022

Reasons sent to parties: 24 March 2022

FOR THE TRIBUNAL OFFICE