Case Number: 1800111/2022

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms Clare Wilson	**V**	**Prelle Healthcare Ltd**

Heard at: Leeds (via CVP) **On: 15 July 2022**

Before: Employment Judge R S Drake
Members – Mrs L J Anderson-Coe
Mr M Taj

Appearances
For the Claimant: In Person
For the Respondent: Ms M Elliott (Director)

JUDGMENT

1. The Tribunal finds that the Claimant was not dismissed either expressly or impliedly/constructively as defined by Section 95(1) of the Employment Rights Act 1996 ("ERA") for the purposes of her claims under Section 94 ERA.

2. Therefore, the claim of unfair dismissal fails and is dismissed. The effective date of termination of employment (by the Claimant's voluntary resignation as we find it to be) was 15 November 2021.

3. The claims of wrongful dismissal in breach of contract under Article 3 of the Employment Tribunals (Extension) Order 1999 succeeds and she is awarded damages in the sum of £1,240.80 which the Respondent shall pay to her

4. The Claimant's holiday pay claim is dismissed as not having been proved by her.

REASONS

The Claims

1. The parties were not legally represented. Therefore, the panel and I took special care to ensure that their explanations of their respective cases, their cross examination, and their understanding of the complex CVP procedure were fostered by our assistance and intervention when necessary. We were able to reach and express our conclusions but advised that the written version takes precedence over what I explained orally on behalf of the panel. Therefore, we set out our Reasons in full now in writing.

2. We had written statements and heard oral cross-examined evidence from the Claimant herself, and from the Respondent's Director Ms Elliott, given by way of taking as read two written statements both undated but affirmed and confirmed today. These testimonies were supported by supplementary testimony, cross examination, and reference to a number of documents in an agreed bundle comprising over 50 pages in total. References to such documents use the same descriptions as applied by the parties.

3. We had before us the claims which are as follows.

    3.1 The Claimant (a Care Co-ordinator) complains of unfair dismissal in that she says she was either expressly dismissed or resigned on 15 November 2021 in circumstances in which, if we found she had resigned, she was entitled to do so without giving notice because of the Respondent's conduct; she cites the following allegations against the Respondents: -

        3.1.1 Failure to acknowledge and accept the Claimant's concern (expressed 8 October 2021) about having to take the "on-call" telephone every other week as opposed to less frequently, which amounted to an informal complaint;

        3.1.2 Being given a new draft Contract on 12 October 2021 (especially objected to as it did not record her personal details to identify her) and being expected to sign it, though being given 28 days to review it and raise any concerns about its terms in that time period;

        3.1.3 Being told by Ms Elliott at a meeting 15 November 2021 that there was no point in completing the new contract as it was expected she would not accept it;

        3.1.4 Not sufficiently substantiating the basis of the grievance outcome as expressed in an outcome letter dated 4 June 2021;

3.1.5 On 6 November 2021, advertising by the Respondent for recruitment of a "Care Co-ordinator" role which she took to be her specific role and not an additional post;

3.1.6 When offering her notice which she had already decided upon and prepared in writing, she was told that she need not give it as the Respondent was "having to let her go", and then being told by Ms Elliott to leave with immediate effect;

3.1.7 Not being given or being allowed to work the notice she was prepared to or had already given;

3.2 The Respondent company (which describes itself as a "Care Services Provider" to clients/patient who are in the care of local authorities in South Yorkshire and North Derbyshire) resists these claims asserting that the Claimant voluntarily resigned in circumstances not amounting to unfair constructive dismissal;

3.3 In terms, the Respondents contend that:-

3.3.1 The words used and actions committed do not constitute dismissal but rather that they amount to resignation by the Claimant;

3.3.2 If any of Ms Elliott's words or actions established by the Claimant can be construed as breaches of contractual terms, they were not sufficiently serious as to constitute repudiatory breach such as to entitle the Claimant to terminate the contract of employment with immediate effect and thus without notice;

3.3.3 They deny that any change of contract amounted to repudiatory breach (because following advice from ACAS, they had merely changed job description and not duties or fundamental terms) but that if there were and/or were any other form of breach, then the Claimant by her conduct since March 2021 has waived such breach and was not entitled to terminate her contract of employment without notice;

3.3.4 Further, that if the Claimant can demonstrate that any event there had been a "last straw" as described by her, they deny that it was sufficiently serious to revive any earlier breaches, and in particular that the Claimant's resignation was not in response to the alleged breach or breaches but was because she was not prepared to sign the new contract;

3.3.5 That their conduct did not amount to breach of contract giving rise to a right to pay in lieu of notice or to accrual of any holiday pay entitlement during any notional notice period;

3.3.6 By resigning without giving notice when she was not objectively justified in doing so, she was in breach of contract and cannot claim pay in lieu of notice nor any notional accrual of holiday pay during such contractual notice period.

The Issues

4. The Respondent's primary and main assertion is that the Claimant resigned and was not dismissed and is therefore not entitled to claim either unfair (or wrongful) dismissal; this, with the above claims, serve to identify the issues which the Claimant necessarily had to establish, as the onus rested with her: -

   4.1 Did the Respondents do the things complained of in paragraphs 3.1.1 to 3.1.7 above?

   4.2 Did those things amount to breach(es) of the implied term of trust and confidence? Thus, we concluded it would be necessary to decide whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the necessary trust and confidence between the parties, and/or it had reasonable and proper cause for doing so;

   4.3 Was any breach, individually and/or cumulatively, a breach which was fundamental? We recognised it would be necessary for us to determine whether any established breach was so serious that the Claimant was entitled to treat the contract as being at an end;

   4.4 What was the effective cause of resignation if not the alleged breaches?

The Applicable Law

5. We set out passages from statute and case law relevant to the issues in this case leaving out extracts which are not.

   Section 95(1) of the **Employment Rights Act 1996** ("ERA") provides that: -

   "for the purposes of this part of this Act, an employee is dismissed by his employer …. only if

   (a) the contract under which she is employed is terminated by the employer (whether with or without notice) … *our emphasis – this is not argued in this case)*
   (b) …
   (c) The employee terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct …" (*again our emphases*)

6. Section 95 (or its predecessor in identical statutory enactment – Section 57 EPCA 1978) is elaborated and explained by the legally well-known decision of the Court of Appeal, Lord Denning MR presiding, in **Western Excavating (ECC) v Sharp [1978] ICR 221**. In that case Lord Denning said and held as follows:

   "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself/herself as discharged from any further performance. If he/she does so, then he/she terminates the contract by reason of the employer's conduct and he/she is constructively dismissed" (our emphases)

   This case is also authority for the proposition that the breach must be the direct and principal cause of the resignation and resignation must be timely.

7. By reason of my findings below, we are not setting out the full content of **Section 98** ERA since it is unnecessary to do so unless dismissal were or had been proved.

8. The Court of Appeal held in the case of **Sothern v Franks Charlesly & Co [1981] IRLR 278** that sometimes there may be a dispute as to whether the words used by an employer (or by an employee in the case of resignation) in fact amount to a dismissal (or resignation respectively). Where those words are ambiguous, the Court or Tribunal is to determine how they would have been understood by a reasonable listener in the circumstances. This is an objective test. By contrast, if the words used are unambiguous, then their interpretation is to be judged by understanding the way they were actually understood by the party hearing those words. Thus, this is a subjective test. This approach has been applied on many occasions since and more recently in the cases of **Kwik-Fit Ltd v Lineham [1992] ICR 183** and **Willoughby v CF Capital [2011] IRLR 985**.

9. Further guidance is set out in the Court of Appeal decision of **Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978** at para 55 which advises the posing of the following questions:-

   "(1) What was the most recent act or omission on the part of the employer which the employee says caused or triggered her resignation?

   (2) Has she affirmed the contract since that act?

   (3) If not was that act or omission by itself a repudiatory breach of contract?

   (4) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a remain repudiatory breach of the implied term of trust and confidence?

   (5) Did the employee resign in response to that breach?"

   We refer below to the EAT's decision in **Omilaju v Waltham Forest [2005] CA ICR 481**, (which is cited with approval in **Kaur,**) in which Underhill J presiding said:-

"In short, I believe that the Judge was right to find as he did that what occurred in this case was the following through in perfectly proper fashion on the face of the papers of a disciplinary process such a process properly followed, or its outcome cannot constitute a repudiatory breach of contract or contribute to a series of acts which cumulatively constitute such a breach. The employee may believe the outcome to be wrong, but the test is objective, and a fair disciplinary process cannot viewed objectively destroy or seriously damaged the relationship of trust and confidence between employer and employee" (*our emphases again*)

We regard this approach as appropriate when looking at the less confrontational process inherent in a Grievance Procedure and so take this passage as analogous guidance.

Findings of Facts

10. We find that all witnesses gave their evidence to us sincerely and in the belief, they were being truthful. Despite us giving the Claimant opportunity to modify or explain certain key admissions better to her advantage, the Claimant stuck to her version of events. There was little or no conflict of evidence apparent in relation to most of, but unfortunately not all, the key issues as identified above, those issues being the interpretation to be put on provable events. The standard required to be met by the Claimant was that of a "balance of probabilities," but we have to say we find that much of her interpretation and her explanation of events is marked by her subjective view of them, whereas we must judge them and the evidence on the basis of objectivity where, as in this case, there was obvious ambiguity. How would a reasonable bystander interpret them is the key question. Where there were material conflicts of evidence, as indicated below and for the reasons set out, we prefer the version of events we describe below.

11. We find the following facts, based on the evidence listed by description as Annex numbers in the agreed bundle or Annexes to the Respondent's Grounds of Resistance ("GoR"), and for the reasons described: -

11.1 The Claimant and Ms Elliott enjoyed a cordial and amicable relationship both at work and socially throughout the Claimant's employment; She was a Bridesmaid at Ms Elliott's Wedding in September 2021; Both ladies confirmed this in their testimonies;

11.2 Since March 2021 right up to 15 November 2021 the Claimant had been expected to and did have use of the "on-call" phone from which practice, though she expressed minor unhappiness about this in October, she had not demurred from or refused to accept; The Claimant accepted this in her oral testimony;

11.3 The Claimant commenced employment with the Respondents as a Care Co-ordinator on 3 September 2018 managing the activities of a number of Carers who provide services to patients in the Sheffield area pursuant to a contract between that local authority and the Respondent. Neither of the parties produced the contract with the Claimant, but the Respondent produced a copy of the version given to the Claimant (on 12 October 2021) which bears the changes to

job description wanted by the Respondent, but shows no other changes to terms and conditions generally; (Docs 1-2 of the Annex to the Respondent's GoR); This is unchallenged by the Claimant so can be accepted by us in our findings;

11.4 The Claimant's line manager was Ms Elliott; On 11 October 2021, the Claimant contacted Ms Elliott who was at home unwell but willing to take calls; the Claimant said she was unhappy about taking the "on-call" phone every other week and according to the Claimant, Ms Elliott told her simply to return the phone and she would take the duty - (Claimant's statement para 4 refers); If the Claimant felt she had cause to complain, that cause was remedied by Ms Elliott in so doing;

11.5 The Claimant was invited to a meeting with Ms Elliott scheduled for after her return from leave; In the meantime, the Claimant saw an advertisement for ***a*** Care Co-Ordinator *(our emphasis*) sought to be recruited by the Respondent and assumed it was her post; the Respondent draws our attention that it is for ***a*** post not a post already held by an existing or leaving employee, and that it was for an additional post because they had just been commissioned by Barnsley Council to provide care for a patient moving from Sheffield to Barnsley; We accept this explanation as it is plausible and realistic, and thus reasonably likely; It was not the Claimant's post and Ms Elliott tried to explain this; We were told that the advertisement was annexed to the Claimant's documents in the form of a screen shot, but we are unable to find it; However, this absence is of no concern to us now, because the parties agree in their testimonies that the advert text used the words "***a*** care Co-ordinator" not a specific area related job, or one which could reasonably be interpreted as being the Claimant's post;

11.6 The meeting asked for by the Claimant turned into a meeting also asked for by Ms Elliott and took place 15 November 2021, some 33 days after the Claimant had been given the new contract for consideration; There is dispute as to what exactly happened or was said in this meeting, but for the reasons we explain, we find the following happened: -

> 11.6.1 Before the meeting, the Claimant had already decided to resign, and she confirmed that in response to questions I put to her; She had even word processed a resignation letter and came with a copy printed out and was ready to hand it to Ms Elliott; For reasons not made clear to us, the letter has not been produced in evidence by the Claimant but we can find according to her own testimony that all it said was that she was terminating her employment but that she gave no reason for doing so; This finding is based solidly on her oral testimony today.
>
> 11.6.2 Ms Elliott had gone to this meeting prepared as she thought to discuss any concerns the Claimant had with the draft contract submitted to her 10 October 2021, so she was taken aback when she learned from the Claimant of the latter's intention to leave her employ which was communicated orally when Ms Elliott challenged her to show her the letter she had prepared;
>
> 11.6.3 The Claimant said she was not prepared to do the on-call phone work, despite having done it since March, and Ms Elliott tried to explain that the new form of contract did not require her to do extra work of this

kind, so there was no need to object to signing the new contract; The Claimant was still resistant and when challenged about the letter in her hand said - "Do you need this Notice I have printed off from me?" - thus confirming her intention (now orally expressed) and that it was already fixed;

11.6.4 Ms Elliott at this point seems to have misunderstood and conflated the matter of notice of termination and notice of time to consider the new contract, but we find that in this context the Claimant's words were ambiguous because of their context, and so we resort to the objective test of what she meant; We find that she meant to resign and did so by preparing a notice to that effect and giving every possible indication of intention to hand it over; We find her words in this context even if she had not handed over the letter were such that she was resigning by confirming that was what the letter said;

11.6.5 The Claimant asked if she was to leave immediately or stay and thus indicated a willingness to conform to her obligations during notice, but Ms Elliott decided to let her depart and insisted she do so; Ms Elliott did not require the Claimant to work, but did not pay her in lieu of notice;

11.6.6 It was for the Claimant to establish what holiday she had taken and if there was a shortfall between what she had taken and what had accrued and would accrue during notice that she would thus have a valid claim for holiday pay; No evidence of accrual or entitlement was produced by her but we note the respondent's evidence in this respect and accept it as it was largely unchallenged; Ms Elliott explained that she believes that the Respondent has overpaid holiday entitlement by 2 days which they are prepared to forego; This figure matches almost completely the accrual which according to the Claimant's revised explanation at this hearing would give rise to being just more than 2 days which would be rounded down to 2 days and thus be subsumed/extinguished by the sum overpaid.

Application of Law and Conclusions

12 Starting with the main issues as identified in paragraph 4 above, we make the following findings applying the law to the facts.

13. Starting with the interpretation or words said and action committed on 15 November and applying the **Sothern** principles (as approved in **Kwik-Fit** and **Willoughby**)

13.1 The words used as we find in paragraphs 11.16.1 to 11.16.5 above are ambiguous - but

13.2 We see the actions done by the Claimant as unambiguous and that they support an objective finding that the Claimant resigned and was not expressly dismissed.

14. Moving on to the **Kaur** guidelines to interpretation of Section 95 (1)(c) ERA, we make the following findings applying them to the facts as found above:

14.1 Mrs Elliott not only took on board the Claimant's concerns about doing on-call telephone duty more regularly than she liked, she took back the phone early on, and made it clear there was no expectation in the new contract for the Claimant to have to do such work; was no failure to take action in relation to the concerns, informal and formal complaints raised by the Claimant about the conduct of AV; indeed, the opposite is found – see findings 11.5, 11.9. 11.13 and 11.16 above; This was not breach of contract nor repudiatory action but quite the opposite;

14.2 Ms Elliott seeking to introduce a new form of contract was not seeking material or fundamental change of such a nature as the Claimant would be entitled to reject it since it comprised of cosmetic rather than substantive change and in effect by her own admission merely changed her job title; Nothing of the changes amounted to fundamental nor repudiatory breach of contract;

14.3 Being told at the meeting that Ms Elliott did not expect the Claimant to sign the new contract was merely a statement of the obvious fact, since by the time this was said, the Claimant had made clear her intention to give notice of termination or employment; This was also not fundamental nor repudiatory breach of contract;

14.4 Any expression of concern by the Claimant about having the on-call phone was met by what is found in paragraph 14.1 above;

14.5 The advertisement of a role was not of the Claimant's role as we have found in paragraph 11.5 above, so again this does not amount to fundamental nor repudiatory breach of contract;

14.6 For Ms Elliott to tell the Claimant she need not give her notice merely reflects the fact that was obvious at the time which was that the Claimant came to the meeting having decided to leave and gave every possible indication of acting on that intention, so again no fundamental nor repudiatory breach of contract by the Respondent;

14.7 Applying the **Kaur** and **Omilaju** principles, it is clear that what we find in relation to the on-call telephone, expectation as to its use cannot amount to breach of contract by the Respondent but as the practice dates from March 2021 and was not formally objected to or given rise to an earlier resignation in response, it has to be regarded as having been waived if ever it were to be capable of being interpreted as breach of contract; In any event we find it cannot;

14.8 We considered the test in **Western Excavating** and in particular whether the Claimant had established the key test emphasised by us by the underlined passages in that Judgment quoted above. Were there "significant breaches going to the root of the contract of employment, or which show that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself/herself as discharged from any further performance. We find that on the basis of the above conclusions, the Respondent did not cause irretrievable breakdown

of trust and confidence between the parties; indeed, again quite the opposite – Ms Elliott gave the Claimant the principal remedies which she was seeking.

15. However, it is clear that as we have found the Claimant was prepared to give notice and/or work it but the Respondent did not let her and did not pay her in lieu, the Respondent was in breach of contract but only at this point and not before;

14. With regard to the issues identified in paragraph 4 above, our findings are:-

14.1 The Respondent did not do the things complained of above in a manner calculated to undermine trust and confidence and/or the Claimant has not shown that their explanations for such actions are not satisfactory or are unreasonable;

14.2 Nothing Ms Elliott did do amounted to breach of the implied term of trust and confidence; I conclude the Respondent did not behave in a way that was calculated or likely to destroy or seriously damaged the necessary trust and confidence between the parties, and Ms Elliott had reasonable and proper cause for doing what they did;

14.3 None of the specific complaints amount sufficiently to breach, individually and/or cumulatively; In any event, the Claimant accepted at the start that the only but key focus of her claim was the on-call phone issue and the advertising of a role she thought was hers - none of the things she complained of and certainly not the last event were established as breach of so serious nature that the Claimant was entitled to treat the contract as being at an end;

14.4 The effective cause of resignation was not the alleged breaches, but the objections to on call phone work, and advertising of what she thought, erroneously as we find it, her job.

16 Accordingly, we cannot find that the Claimant has established that the Respondents committed fundamental breach or breach of fundamental terms of the contract of employment so as to enable her to show that she resigned in circumstances in which she was entitled to resign without notice and thus come within Section 95(1)(c) ERA. She was therefore not constructively dismissed for, in respect of each complaint and/or cumulatively, for the purposes of Sections 95 and 98 ERA.

17 We are satisfied that the Claimant should have been allowed to work or be paid in lieu of notice and that according to what was unchanged in her contract and in contrast to her claim for 7 weeks' pay, she is entitled to 3 weeks' calculated at a rate of £413.60 per week and thus she is awarded damages in the total sum of £1,240.80; We are satisfied, should I need to say so, that despite misgivings about the Claimant's coyness

in resisting specific evidence disclosure obligations, all parties have acted reasonably throughout these proceedings and all parts of the process leading up to their conclusion.

18 In the Schedule of Loss but completely unsupported by evidence, the Claimant claims accrual of 3.5 weeks holiday for the year 1 April to 31 March and that she had taken only part leaving 2 weeks balance unpaid. Her accrual for three weeks' notice would be two days. We accept the Respondent's testimony that they paid all her accrual and two days more but were prepared to forego this overpayment. We find the overpayment extinguished any little entitlement there might have been to further accrued holiday pay.

_____

Employment Judge R S Drake

Signed 19 July 2022

Sent to the parties on:

10 August 2022