



EMPLOYMENT TRIBUNALS

Claimant: Miss R Clarkson

Respondent: Pobl Group Limited

Heard at: Bristol (by video) **On:** 20 and 21 September 2022

Before: Employment Judge C H O'Rourke

Representation

Claimant: Mr A Harding-Udvar

Respondent: Mr J Green - counsel

REASONS

(Judgment having been sent to the parties on 26 September 2022 and written reasons having been requested on 10 October 2022, in accordance with Rule 62(3) of the Employment Tribunal's Rules of Procedure 2013, the following reasons are provided:)

Background and Issues

1. The Claimant was employed as a project worker, from June 2018, until her resignation, with immediate effect, on 6 November 2020. As a consequence, she brings a claim of constructive unfair dismissal. A claim of disability discrimination had been dismissed by earlier judgment, following a preliminary hearing which determined that the Claimant was not disabled under the terms of s.6 of the Equality Act 2010.
2. The Respondent company is a charity providing support, housing and care services to vulnerable people. The Claimant worked in one of its living accommodation sites, in Newport, Wales. Her line manager was a Ms Kate Robson. The period of time covering the incidents in this claim relates to the onset of the COVID pandemic and the first seven or so months of those events.
3. The issues in respect of this claim are as follows (and as set out in the Case Management Order of 13 October 2021 [36] and confirmed at the outset of this Hearing):

Constructive Unfair Dismissal

3.1 The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating mutual trust and confidence. The breaches were as follows;

3.1.1 Failure to provide equipment to enable her to work from home during the Covid-19 pandemic;

3.1.2 Failure to provide appropriate and sufficient PPE during the Covid-19 pandemic;

3.1.3 Failure to provide the same level of supervision and support as her colleagues;

3.1.4 Changing her rota upon her return to work after a period of sick leave due to her mental health;

3.1.5 Permitting colleagues and a tradesperson to view CCTV footage of her during a disciplinary investigation.

(The last of those breaches was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).

3.2 The Tribunal will need to decide:

3.2.1 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

3.2.2 Whether the Respondent had reasonable and proper cause for doing so?

3.3 Did the Claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end. The Respondent says that the Claimant resigned during a disciplinary investigation into her not wearing PPE, as had been directed.

4.4 Did the Claimant delay before resigning and therefore affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

4.5 In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98(4) of the Act?

The Law

5. I reminded myself, firstly that the burden of proof is on the Claimant in such cases and also of the following well-known authorities:

a. The case of **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 EWCA**, which sets out the test for constructive unfair dismissal and which has been itemised already by me, in my explanation above of the issues.

b. The case of **Mahmud v BCCI International [1997] UKHL ICR 606**, which stated (as subsequently clarified) that:

“The employer should not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

6. Other Authorities. Mr Green, in his written closing submissions, provided references to the leading authorities in respect of constructive unfair dismissal and in particular I refer to the following:
 - a. **Woods v WM Car Services (Peterborough) Limited [1981] ICR 666 UKEAT**, which indicated that the conduct of the parties should be looked at as a whole and its cumulative impact assessed.
 - b. **London Borough of Waltham Forest v Omilaju [2005] IRLR 34 EWCA** stated that the test for a breach of the implied term was an objective one. Also a series of relatively trivial breaches in which the final is a ‘last straw’ can amount to a breach of the implied term. The ‘last straw’ must contribute to the breach of the implied term but must not be utterly trivial, in the sense of being *de minimis*. An entirely innocuous act cannot be a last straw.

The Facts

7. I heard evidence from the Claimant and also on her behalf from Mr Alan Harding-Udvar, a former colleague, who also represented her. She also provided a statement from another former colleague, a Mr Joel Perry, but as he did not attend to give evidence, I gave his statement very little weight. The Respondent’s sole witness was Ms Kate Robson, the Claimant’s former line manager.
8. Background. By way of background to this matter, I set out the following, generally uncontentious matters:
 - a. As stated in the introduction, the elements of this claim arose following the onset of the Covid-19 pandemic in March 2020 and for approximately seven months thereafter. It was common evidence between the parties that this was a particularly difficult and stressful time for all concerned, particularly so as they operated within the care sector. I take judicial notice that there was great uncertainty, in both the Government, the NHS and among those employers who continued to operate their businesses, as to how they should proceed and as to what precautions and steps were necessary to protect both employees and clients or customers. There was a very real and justified fear of potentially fatal consequences if such precautions were not taken.
 - b. It is clear both from oral evidence and contemporaneous correspondence that the Claimant and her colleagues’ general performance of their role was professional, caring and praise-worthy, caring for vulnerable and sometimes troubled people, in a confined environment. Ms Robson referred to them in an email as ‘super-heroes’ [113] and the Claimant, in particular, was credited with saving a resident’s life, by her quick actions [156].

9. Chronology. I set out now a brief, again uncontentious chronology.

20 March (all dates 2020) – the Claimant requested to work from home, due to being asthmatic and asked for a laptop to enable her to do so. That was agreed to by Ms Robson and the Claimant began working from home on 25 March.

25 March – the Respondent issued the first of several instructions on the handling of Covid-19 and the wearing of PPE and requested a stock-take of PPE available.

27 March – the Claimant told Ms Robson that she wished to return to the workplace, which she was permitted to do.

April and May – further guidance on both general precautions and the issue of and use of PPE is provided by the Respondent.

29 April – Ms Robson issued instructions that all staff were to record their temperatures daily, as well as recording those of the clients, with logs to be kept accordingly [108].

5 May – staff were instructed to wear full PPE when carrying out temperature checks and to inform Ms Robson of those clients who refused such checks [116].

12 August – a resident died in his room. Although it was subsequently established that the death was not Covid-related, it prompted Ms Robson to confirm whether or not the temperature checks had been carried out in respect of this person and she found that they had not. As a consequence, on 20 August, she wrote to all staff reminding them of the requirement to record twice daily temperature checks for each client and that *'even if they decline it must be noted on their sheet'*. [175].

Late September/Early October – Ms Robson said that around this time, she discovered that some staff, including the Claimant, were not doing these checks.

2 October – Ms Robson carried out a 'fact-finding' meeting with the Claimant (as well as with other staff concerned). It is clear from the notes of that meeting that the Claimant had either only partially complied with Ms Robson's instructions, or recently not at all. When asked when was the last time she recorded a client's temperature in the requisite 'temperature check file' she said *'off the top of my head, no clue'* and that when it was pointed out to her that she had not done so since 25 August and was asked why, she said *'I don't know, I hold my hands up'* [191].

At some point thereafter Ms Robson reviewed CCTV footage of staff at work and saw several staff not wearing PPE, contrary to instructions and which she considered placed them at unnecessary risk. She accepted that when she viewed the footage, that footage was replicated on another TV screen in the general staff office, something of which, she said, she was unaware.

8 October – having taken advice from HR, Ms Robson decided to instigate a disciplinary investigation against the Claimant and others, stating that the allegations were of potential gross misconduct, due to failure to follow management instructions to take and record client temperatures and to wear PPE in the workplace [193].

16 October – the Claimant and three other employees brought a joint grievance, alleging a failure of a duty of care towards them by the Respondent, by not providing clear instruction and supervision to ensure their welfare and also referred to them having *'gone over and above what is expected and consider ourselves and our achievements to be a massive asset to our employer ...'* [197].

20 October – at a supervision meeting Ms Robson raised with the Claimant that it had come to her attention that the Claimant had left work early on 8 October, leaving a colleague to work alone. The Claimant she couldn't recall, without checking her diary and subsequently, at a catch-up meeting on 22 October, stated that while she had left early, she could not recall why, but thought she must have been ill. She confirmed that she had not called a supervisor to inform her accordingly [222].

22 October – the additional charge of leaving a shift without authorisation was added to the disciplinary process against the Claimant [223].

23 October to 5 November – the Claimant is on sick leave with a 'stress related problem' [225].

3 November – Ms Robson messages the Claimant asking her if she will be returning to work on 6 November, as, if not, she would need to arrange cover. The Claimant did not respond and on 6 November Ms Robson messaged her again, asking her to call her [228]. Having been informed by another employee that the Claimant had referred to coming in for her shift on 6 November, Ms Robson called her, she said because there was no point in the Claimant coming in, as the shift was covered and in any event, she need to do a return to work interview with her, before she could return to work.

6 November – there was a telephone conversation, which the Claimant agreed she terminated. Ms Robson said that the Claimant was 'furious' during the call and would not accept her decision that she return the following Monday, in order that a return to work interview could be conducted. The Claimant said in her statement that Ms Robson was attempting to change her shift pattern, to a time when she could not get public transport. In cross-examination she said that she couldn't remember the reference to coming in on Monday, but could remember being asked not to come in on Friday. She couldn't remember if she'd been angry, but said she *'could very well have been'*.

6 November – a few hours later the Claimant emailed a letter of resignation, referring to breach of trust and confidence, a failure to progress her grievance, bullying, unfair treatment and inappropriate access to CCTV [235]. She said that she would consider a claim for constructive unfair dismissal. She was invited to reconsider her decision, but refused.

10. Constructive Unfair Dismissal - Alleged Breaches. I deal now, in turn, with each of the breaches of contract alleged by the Claimant.
11. Failure to provide her with equipment to work from home. The Respondent denies any such failure, providing evidence of emails arranging issue of a mobile phone to the Claimant and confirming that the Claimant took home a tablet computer with her from the workplace and that the Respondent was further investigating the issue of a laptop. In any event, the Claimant returned to work of her own free will three days later, during which time she was able to do some work. To suggest, as the Claimant does that a failure to immediately provide her, at very limited notice, with a mobile phone and a laptop, is a breach of the implied term of trust and confidence, despite her subsequent decision to return to work after only three days, is utterly untenable. The Respondent was doing its very best at the time to accommodate her needs and could have done no more.
12. Failure to provide appropriate and sufficient PPE during the pandemic. As pointed out at the outset of these Reasons, the burden of proof is on the Claimant to satisfy me, on the balance of probabilities as to the truth of this allegation and she has completely failed to do so. There is ample evidence in the bundle of the Respondent conducting PPE stock-checks, ordering more stocks and asking staff if they have any shortfall. There are only two references in this seven months to any such concerns: the Claimant asking for a barrier cream (which she was permitted to order on Amazon and received) and the provision of more hand sanitizer. At no point does any employee raise any 'red flag' as to a critical shortage, placing them at danger. It seems also somewhat contradictory for the Claimant to make this allegation, when she herself accepted that she'd not been complying with the wearing of PPE. Although she said subsequently that this was because of her asthma, at no point did she raise this issue with the Respondent, or request any variant of the PPE that might accommodate her asthma. Ms Robson's evidence on this point was unchallenged in cross-examination and I can only conclude therefore that this allegation is without foundation.
13. Failure to provide the same level of support and supervision as to her colleagues. The Claimant offered only minimal evidence in respect of this allegation, not itemising what support or supervision was lacking, in comparison to that provided to other colleagues. There was a general assertion that Ms Robson was somewhat 'hands-off' in her management style, generally staying in her office and not routinely walking the floor to see what staff were doing. She agreed that she was predominantly office-based, apart from, on one occasion, having to fill in on a shift. While she could, perhaps, have been more 'hands-on' in managing her staff, any such criticism is a matter that applied to all her staff, not just the Claimant and again the Claimant has failed to set out how any such management style was a breach of the implied term of trust and confidence. Again, Ms Robson's evidence on this point was very largely unchallenged. This allegation is therefore dismissed.
14. Changing of the Claimant's rota. There was simply no evidence that this had taken place and again Ms Robson was not challenged in her evidence in

respect of the relevant telephone call. The Claimant accepted that she was angry during this call and may have misinterpreted what Ms Robson was saying, but I note that this allegation was not raised in the resignation letter, or the claim form, when the Claimant's memory on this matter will have been fresh, but only a year later, in the case management hearing, when it will not have been. I conclude therefore that the Claimant has not made out this allegation.

15. Ms Robson's viewing of the CCTV footage. As stated, Ms Robson accepted that the footage she viewed, in her private office, would have been visible also on another screen in the general office, open to all staff. The Claimant said that that fact meant that in effect her disciplinary process was being laid bare to any employees in the office. Ms Robson said that she had been unaware that such mirroring could happen. It was agreed evidence that the staff knew that they were subject to CCTV recording when at work. The footage she viewed, it is clear, will simply have shown staff going about their routine tasks and her purpose in viewing it was to see whether or not they were wearing PPE. Therefore, any footage that was viewed by staff in the general office will simply have shown them going about their routine tasks and not, for example, revealing any private or potentially embarrassing activity of theirs. Nor can it have been apparent to the Claimant that she, in particular, was being targeted. I fail to see, therefore, how the inadvertent viewing of such footage could amount to a breach of the implied term. Even were it to be such, I am entirely confident that applying **Malik v BCCI**, Ms Robson had, in the circumstances of her concern about staff safety, reasonable and proper cause for doing so.
16. I conclude, therefore that the Claimant's allegations of breach of the implied term are not made out. What is clear to me, however, is that what motivated the Claimant to resign was the bringing of disciplinary proceedings against her, but which does not form part of her claim. I can see, from her and her colleagues' perspective that in the context of the experiences of the previous seven months they will have greatly resented the fact that they were being disciplined, when they considered, rightly I'm sure, that they had, as stated in their grievance '*gone over and above*' what was expected of them. However, past good performance does not prevent an employer from disciplining for misconduct and in the context of the dangers that the staff faced at that time and the clear instructions they had been given, Ms Robson was entitled to embark on disciplinary proceedings, particularly as she considered that the staff would not take the matter seriously, otherwise. In any event, as we know, no disciplinary sanctions were eventually imposed but that of course was too late for the Claimant, who had already resigned.

17. Conclusion. For these reasons, therefore, the Claimant's claim of constructive unfair dismissal fails and is dismissed.

Employment Judge O'Rourke
Date: 17 October 2022

Reasons sent to the Parties: 20 October 2022

FOR THE TRIBUNAL OFFICE