



EMPLOYMENT TRIBUNALS

Claimant: Ms N Barber

Respondent: Krinvest Care Group – Mapleford Nursing Home

Heard at: Manchester

On: 28 October 2022

Before: Employment Judge A Johnson
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Did not attend

JUDGMENT

The judgment of the Tribunal is that:

1. Considering the name of the respondent provided in section 2 of the response form, the respondent's name is amended to "Krinvest Care Group – Mapleford Nursing Home".
2. The claimant's complaint of constructive unfair dismissal is well-founded and succeeds.
3. The respondent must pay the claimant the sum of £4,588 in respect of the successful constructive unfair dismissal complaint. This sum represents a basic award of £4,088 and an award for loss of statutory rights of £500.

REASONS

Introduction

1. This claim arose from the claimant's employment with the respondent as a Care Manager and following her resignation with effect from 14 April 2022.

2. The claimant presented a claim form on 14 July 2022 following a period of early conciliation from 1 July 2022 to 14 July 2022. The claimant brought a complaint of constructive unfair dismissal.

3. The Tribunal initially issued a rule 21 “response not received” letter on 27 September 2022. However, subsequent correspondence from the respondent confirmed that a response had actually been presented within time on 17 August 2022. Accordingly, Employment Judge McDonald ordered (on 14 October 2022) that the rule 21 letter would be withdrawn, the respondent’s response would be accepted, and the parties were to confirm by 21 October 2022 whether they were able to attend the final hearing listed for today.

4. The claimant had provided a witness statement and relevant documents in advance of the hearing. The respondent failed to provide any documentation, nor did they confirm whether or not they would attend the final hearing listed for today. They did not indicate whether they had complied with any of the Case Management Orders provided with the notice of hearing letter sent to the parties on 20 July 2022.

5. The final hearing was delayed for 30 minutes in order that the Tribunal could make enquiries concerning the non-attendance of the respondent at the final hearing, and despite several attempts the Tribunal was unable to contact the representative who had previously contacted the Tribunal. As the respondent had been in communication with the Tribunal and had provided a response, there was no reason why the Tribunal could conclude that the respondent was unaware of the final hearing date. Taking into account the claimant’s unrepresented status and the attempts made to secure the respondent’s attendance, together with the preparations already made for the hearing by the claimant, I decided that the case would proceed in the respondent’s absence.

6. I was satisfied that this decision was in the interests of justice and in accordance with the overriding objective. It is essential that parties attend hearings that have been listed (and which they have been notified of), and if they are unable to attend such a hearing they must give advance notice of why they are unable to attend together with evidence supporting these assertions if appropriate. It was clear from the earlier engagement of the respondent and the decision made by Employment Judge McDonald referred to above, that they were aware of the proceedings and the expectations placed upon them, should they wish to continue with their defence of the claim.

The Issues

7. As this was a case involving a complaint of constructive unfair dismissal, the Tribunal applied the usual list of issues which were relevant to such a complaint.

8. Unfair dismissal

a. Can the claimant prove that there was a dismissal?

i. Did the respondent do the following things:

1. Promoting the claimant to Care Manager but without providing her with any duties appropriate to that job role?

2. Removing the claimant's duties which she had carried out in her previous role of Care Supervisor and leaving her with no duties or responsibilities when attending work?
 3. Failing to provide the claimant with appropriate duties when she raised this matter with her manager?
 4. Failing to offer the claimant a grievance or other suitable means of resolving her issues concerning her lack of duties?
- ii. Did that breach the implied term of trust and confidence? Taking account of the actions or omissions alleged in the previous paragraph, individually and cumulatively, the Tribunal will need to decide:
1. whether the respondent had reasonable and proper cause for those actions or omissions, and if not
 2. whether the respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.
- iii. Was the breach a fundamental one? 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.
- iv. Was the fundamental breach of contract a reason for the claimant's resignation.
- v. Did the claimant affirm the contract before resigning, by delay or otherwise? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

Reason

- b. Has the respondent shown the reason or principal reason for the fundamental breach of contract?
- c. Was it a potentially fair reason under section 98 Employment Rights Act 1996?

Fairness

- d. If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?
- e. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

Unfair dismissal - Remedy

- f. What basic award is payable to the claimant, if any?
- g. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?
- h. If there is a compensatory award, how much should it be? The Tribunal will decide:
 - i. What financial losses has the dismissal caused the claimant?
 - ii. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - iii. If not, for what period of loss should the claimant be compensated?
 - iv. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - v. If so, should the claimant's compensation be reduced? By how much?
 - vi. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - vii. Did the respondent or the claimant unreasonably fail to comply with it?
 - viii. If so is it just and equitable to increase or decrease any award payable to the claimant?
 - ix. If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
 - x. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
 - xi. Does the statutory cap apply?

Evidence used

9. The respondent failed to attend the hearing and they also failed to provide any witness evidence or documentary evidence despite having been subject to Case Management Orders which were provided in the Notice of Hearing sent to the parties on 20 July 2022.

10. The claimant provided a witness statement and gave oral evidence under oath to me during the hearing. She also included witness statements from two other witnesses:

- a) Aaron John Yuile (former Clinical Lead Nursing at the care home); and,
- b) Paula Wadsworth (former Staff Nurse at the care home).

Unfortunately, neither of these witnesses had attended the hearing and their statements were undated and unsigned. I explained to the claimant that these documents had little evidential value. Under the circumstances, I would focus upon the claimant's own witness evidence and consider the arguments advanced by the

respondent in the response, together with the document which the claimant had prepared for the hearing.

11. In terms of the documents provided for the hearing, they were as follows:

- a) Email from Kate Beebe dated 25 February 2022 to the claimant confirming her appointment as Care Manager from 1 March 2022.
- b) Contract addendum dated 23 February 2022.
- c) Claimant's list of duties that she says were taken away from her.
- d) A series of WhatsApp messages sent during March 2022 and April 2022 using the Mapleford WhatsApp group and provided by the claimant (six pages in total).
- e) Email from the claimant to the respondent on 25 October 2022 giving notice of her resignation.
- f) Email from Joanne Randall dated 19 April 2022 acknowledging the claimant's resignation.
- g) Email from Kate Beebe dated 19 April 2022 acknowledging the claimant's resignation.

12. I was satisfied that during the hearing the claimant gave credible and reliable evidence. It should be noted that she gave evidence under oath and I examined her concerning the response and despite the respondent not attending the hearing. The grounds of resistance in section 6.1 of the response challenged the claimant's claim in the three short paragraphs. The claimant acknowledged that some of the background information provided in the grounds of resistance was correct and I found that her replies to my examination concerning the response were measured and reasonable.

Findings of Fact

13. The claimant was employed by the respondent and its predecessors who owned the Mapleford Care Home from 14 October 2003 until her resignation on 14 April 2022.

14. The claimant originally began working for David Lewis. Later the business was sold to Paul's Care Services who ran Mapleford until their liquidation in July 2017 when her employer then became the respondent, Krinvest Care Group.

15. It is understood that her employment transferred from one employer to another in accordance with the provisions of TUPE and her continuity of employment was maintained throughout. The respondent acknowledged that the claimant had been continuously employed from 2003 until the date of her resignation. Throughout her employment the claimant had worked at Mapleford Care Home in Huncoat near Accrington.

16. The claimant confirmed that although she had identified the respondent as Joanne Randall Mapleford Care Home, the correct employer was as stated by the respondent, Krinvest Care Group – Mapleford Nursing Home. The claimant explained that Joanne Randall was a senior manager employed by Krinvest and it is noted that the respondent did not dispute that the claimant was their employee. Accordingly, the respondent's name was amended in accordance with the name provided in the response by the respondent.

17. The claimant initially started work in 2003 as a Kitchen Assistant and through a number of roles reached the level of Care Supervisor. In 2022 the claimant was informed by Kate Beebe, (the respondent's Head of Commercial Strategy), in an email dated 25 February 2022, that she would be appointed as a Care Manager with her hourly rate being increased to £10.22 per hour from 1 March 2022. The claimant's hours of work remained 25 hours per week. A contract addendum confirmed the variation to the job title of Care Manager. The claimant did not sign the form confirming the amendment to her job role because her name had been incorrectly spelt. However, there is nothing to suggest that the respondent did not treat the claimant as proceeding into the Care Manager role from 1 March 2022.

18. It is understood that the claimant had not only worked for the Mapleford Nursing Home for many years, but her mother had also been a longstanding employee and had only resigned as a Care Manager in January 2022. Her mother's resignation was prompted by safeguarding issues allegedly relating to difficulties with the building, including the longstanding failure to repair a lift within the building. It is noted that the claimant has not specifically brought a whistleblowing complaint and any disclosures which may have been made by her mother were not part of the issues under consideration, although the claimant did question whether the problems which arose in 2022 may have been connected with her mother's actions at the beginning of the year.

19. The claimant provided details of all of the jobs that she had carried out as a Care Supervisor prior to her appointment to Care Manager. They were as follows:

- Sorting out rotas for day and night shifts.
- Sorting out staff annual leave.
- Updating care plans for residents.
- Arranging agency workers to cover if required.
- Carrying out audits in care, such as ensuring the mattresses on beds were in order.
- Carrying out audits in the building such as the fire exits being clear and the furniture in bedrooms being in good condition.
- Completing weekly care charts dealing with the meals, baths, turns, bowel movements, diets and fluids of residents.
- Monthly care charts of a similar nature.

- Filing paperwork.
- Dealing with residents' monies.
- Dealing with healthcare professionals.
- Helping with the wages.
- Updating the personal emergency evacuation plans.

20. The claimant mentioned that Ameel Salim, was the Admin Clerk who was tasked to deal with wages, but she provided assistance and doublechecked his figures to ensure that they were correct.

21. The claimant also remained on call 24 hours a day seven days a week using her own mobile phone to enable staff to remain in contact with her. She clearly had a longstanding attachment to the Mapleford Nursing Home and committed a great deal of her time to supporting the business and its staff.

22. Following her appointment as Care Manager in March 2022, the claimant was not given a job description nor was she provided with a supervision meeting explaining verbally what would be required in her new role. Instead, over a period of weeks the claimant found her existing roles which she carried out as a Care Supervisor were gradually given to other members of staff and she was left with no work to carry out herself. No new roles commensurate with her Care Manager roles were provided instead. The claimant ultimately decided that she would have to create jobs for herself to do and she spent time reviewing policies and procedures for the Care Home. I accepted however, that this was not an appropriate use of her time and did not utilise her previous and current job roles in a full and satisfactory way.

23. The claimant provided credible evidence that the Interim Manager, Kirsty Rogerson, had met with the claimant in early 2022 and when the claimant provided her with a list of all the activities that she carried out she expressed surprise that the claimant had not been asked to be the Deputy Care Home Manager. The claimant said that she had not been offered this role, and surprisingly it turned out that Mr Aleem had actually been offered the deputy role at around this time despite him occupying a lower graded role than the claimant.

24. As the claimant became frustrated with the absence of a job description or designated duties, she had a meeting in the office on an impromptu basis in March 2022 with Joanne Randall. This meeting was referred to in the grounds of resistance. The claimant explained to Ms Randall that she had not been given any work and she was having to create work for herself by updating the policies and procedures. The meeting was clearly informal and unplanned as Jubed Ali and Ameel Salim were present in the office when the meeting took place and remained there. The claimant confirmed that Ms Randall did not say anything to reassure her other than to say, "we'll work through it" and did not offer any form of grievance procedure or any other avenue for the claimant to resolve this matter, and the meeting ended without resolution.

25. In the absence of any progress in her being provided with job roles the claimant decided to hand in her resignation, giving two weeks' contractual notice with effect from 14 April 2022.

26. On 14 April 2022 the claimant sent an email to Joanne Randall and Kate Beebe confirming that it was the final day in work and confirming that she was handing back her uniforms, maintenance keys and other property belonging to the business. Of particular note she said the following:

"Thank you for the pay rise, Kate and Jo, as well as the Care Manager title but unfortunately all my responsibilities have been taken from me so I've not been able to succeed in this role so I felt I had no other choice than to leave. As I said to Jo last week that making up files is not me, I'm more experienced and more qualified for that!"

27. Both Ms Randall and Ms Beebe replied to the claimant on 19 April 2022 wishing her the best of luck and failing to address the reasons given for the resignation.

28. The claimant was able to secure alternative employment very quickly and explained that she did not suffer a loss of earnings.

The Law

Constructive Unfair Dismissal

29. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer 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.

30. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:

- (i) that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach);
- (ii) that the breach caused the employee to resign – or the last in a series of events which was the last straw;
- (iii) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

31. All contracts of employment contain an implied term that an employer shall 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.

32. It is open for an employer to argue that, despite a constructive dismissal being established by the employee, that the dismissal was nevertheless fair. The employer will have to show a potentially fair reason for the dismissal and that will be the reason why the employer breached the employee's contract of employment.

Discussion and Conclusions

Respondent's name

33. I was satisfied that the claimant had remained employed by her employers for a period of more than 18 completed years of service. At the date of termination she was employed by Krinvest Care Group – Mapleford Nursing Home. This had clearly been asserted within the response and the claimant accepted that this was the correct name. Accordingly, an amendment was made on this basis.

The constructive unfair dismissal complaint

34. The claimant was employed in the role of Care Manager at the date of her termination, which was effective on 14 April 2022 when she resigned. The claimant was employed at the hourly rate of £10.22 per hour gross working 25 hours per week. The claimant had been appointed to this role from 1 March 2022 and unfortunately, she was not provided with a clear definition of her new roles, but moreover her existing roles as Care Supervisor were removed. This left the claimant in a position where she was without duties and understandably felt that she had not been given an effective job within the organisation. Despite raising this matter with the respondent there had been a failure to resolve this matter or to offer the claimant a grievance to ensure that a way forward could be identified.

35. Accordingly, I am satisfied that the claimant's resignation amounted to a dismissal and it was clearly caused by the removal of her duties and the failure to provide new duties commensurate with the new Care Manager role that she had been offered and given.

36. I also find that as a consequence the respondent breached its duty of trust and confidence towards the claimant and that this amounted to a fundamental breach.

37. This breach was the cause for the claimant's resignation, and I noted that the claimant did not affirm her contract once she had given notice that her employment was going to come to an end. She also clearly explained why in her email (as well as in previous conversations) that her reason for terminating her employment was the removal of her existing roles as a Care Supervisor and the failure to provide any new roles as a Care Manager.

38. The respondent failed to show any potentially fair reason for the dismissal and did not appear from the response presented, to be offering any reason as to them behaving fairly towards the claimant in this matter.

39. Indeed, I am satisfied that the respondent did not act at all fairly towards the claimant in this case. Its managers:

- a) Removed her duties without explanation;

- b) did not provide her with any new job description or details of those duties;
- c) did not provide her with any supervision meeting explaining her new roles and which of her old roles might be retained; and,
- d) did not provide any offer of reassurance when the matter was raised as being an issue to the claimant.

I am not satisfied that the limited grounds of resistance provided in section 6.1 of the response demonstrated that the removal or roles without any new roles being provided amounted to a temporary measure which would ultimately result in the claimant being given the roles which she sought and which she had been denied following her appointment on 1 March 2022. The respondent failed to provide evidence in support of this assertion at the final hearing and I therefore prefer the claimant's evidence. The respondent had simply not managed this situation at all well and had understandably left the claimant in a position where she felt that she had not been given an effective job that reflected the role that she had been appointed to. These failures on the part of the respondent would have seriously undermined any employee's trust and confidence in their employer.

40. Accordingly, the complaint of constructive unfair dismissal by reason of the respondent's conduct is well-founded and succeeds.

Remedy

41. In terms of remedy, I am satisfied that the claimant had completed 18 years of service at the effective date of termination on 14 April 2022. Her hourly rate was £10.00 per hour and this worked out at £255.50 per week gross once the 25 working hours per week were applied.

42. Because the claimant had initially worked for four years before the age of 22, she was only entitled to half a week's pay for that period, meaning that the first four years of employment amounted to two weeks' pay (4 x ½ weeks' pay), together with the 14 years where she was aged 22 and above (14 x 1 weeks' pay), making a total of 16 completed years of service for the purpose of calculation of the basic award.

43. Accordingly, allowing 16 completed years of service and applying the £255.50 per week gross pay, the basic award amounts to £4,088.

44. The claimant said that she did not suffer any continuing loss of earnings following the effective date of termination, but it was appropriate to award her a sum for the loss of statutory rights given that she had a lengthy period of service with the respondent when she was forced to resign and it would take time for her to complete two years' continuous service in her new role. I awarded the sum of £500.

45. Accordingly, the total award in this case is £4,588.

Employment Judge Johnson
Date: 31 October 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
1 NOVEMBER 2022

FOR THE TRIBUNAL OFFICE

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NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2405576/2022**

Name of case: **Ms N Barber** v **Krinvest Care Group –
Mapleford Nursing Home**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 1 November 2022

the calculation day in this case is: 2 November 2022

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note:
www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.
3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.
4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.
5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.
6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.
7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.
8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.
9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.