



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103758/2022 Hearing at Edinburgh on 13 and 14 October 2022

Employment Judge: M A Macleod

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Sharon Brady

**Claimant
In Person**

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M-Brace Orthodontics Limited

**1st Respondent
Represented by
Mr T Oxtan
Consultant**

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Raja Mahesh

**2nd Respondent
Represented by
Mr T Oxtan
Consultant**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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REASONS

1. The claimant presented a claim to the Employment Tribunal on 6 July 2022 in which she complained that she had been constructively unfairly dismissed by the respondents.
2. The respondents presented an ET3 to the Tribunal in which they resisted all claims made by the claimant.
3. A Hearing was fixed to take place in person on 13 and 14 October 2022. The claimant appeared on her own behalf, supported by her husband

Mr Francis Brady; the respondents were represented by Mr Thomas Oxton, Consultant, of the British Dental Association.

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4. Productions were presented to the Tribunal by the respondent, to which additions were made. Some of the additions were not paginated, which created difficulties for the Tribunal both in handling the documents during the Hearing and in identifying the documents in the course of the Judgment. The claimant produced a bundle of documents of her own, which did contain some duplicates but which also provided new information. Only those documents to which I was referred may be considered to form part of the evidence before the Tribunal. Productions in the respondents' bundle are referred to by the prefix "R", and the claimant's by "C".
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5. The claimant gave evidence on her own account. Mr Raja Rathnasabapathy Mahesh gave evidence for the respondent.
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6. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

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7. The claimant, whose date of birth is 1 November 1972, commenced employment with the respondents on 18 December 2017 as a Dental Receptionist. Her contract of employment (R108) stated that her employment with Mr R R Mahesh of M-Brace Orthodontics Ltd began on that date, and that her first 3 months were to be probationary. Her job title was "Dental Receptionist – Job Share", her duties being set out in the job description attached at Appendix 1 (R115). Her normal place of work was
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- 4 North Bridge Street, Bathgate, West Lothian EH48 4PS, and it was said that she could be required to work at other practice locations, currently at 3 Heritage House, North Street, Glenrothes, Fife KY7 5SE, according to the needs of the practice.

8. Paragraph 8 of the contract provided that the claimant's salary was to be paid at £9.25 per hour, with review at the end of the probationary period, making her annual salary £18,037.50.

9. Paragraph 10 of the contract provided that the claimant's hours of work, exclusive of lunch breaks, were to be 37.5 hours per week, Monday to Friday, on a job-share basis.

10. Paragraph 15 of the contract provided (R111):

"If you are unable to attend work, for any reason whatever, you must contact the line manager in person by telephone at the earliest possible time on the first day of absence and not later than 7:30AM to give the reason for absence and, if possible, to say when you hope to return to work. Due to the nature of the business, you must contact the Line Manager again, before the end of the first day of absence to confirm whether you will be returning to work. This is solely to allow cover to be arranged. You must speak to the line manager personally. Contacting the practice by text message will not be acceptable and could lead to disciplinary action being taken. Unauthorised absence will not be paid and may result in disciplinary action being taken."

11. The notice period was set out at paragraph 26 (R112):

"After your probationary period of 3 months, the period of notice that you must give the practice, should you wish to terminate your contract of employment is 8 weeks. You will also be entitled to receive 8 weeks' notice of termination of employment from the practice.

The practice reserves the right to waive notice periods and make a payment in lieu. If you terminate your employment without giving your contractual period of notice, the practice reserves the right to make a deduction from your final pay. That deduction will be the amount of extra money the practice has had to spend as a direct result of you leaving early, subject to a maximum of the amount which you would have been paid in salary during the contractual notice period...."

12. Paragraph 31 of the contract dealt with deductions from pay (R113), and stated that the respondents reserved the right to make deductions from pay in certain circumstances, including “*if you terminate your employment without giving your contractual period of notice*” and other noted
5 circumstances.
13. Finally, paragraph 33 intimated that “*The practice reserves the right to make reasonable changes to your terms and conditions. You will be informed within one month of the change taking effect by personal written notification. In addition, any master document relating to your terms and*
10 *conditions will be updated.*”
14. The contract was signed by the 2nd respondent on 21 January 2018, and by the claimant on 22 January 2018. By signing the claimant confirmed that she was accepting her contract of employment and the Staff Handbook, by which she would be bound.
15. The Staff Handbook (R56ff) contained an Absence Policy at Section 2.6 (R78ff). Within that section there was a set of provisions under the heading “Statutory sick pay (SSP) and practice sick pay” (R79), which stated that staff would receive practice sick pay, inclusive of SSP, during
15 each calendar year according to length of service. For example, for those employed for 4 or more years, pay would be at the rate of nil pay for week
20 1, full pay for weeks 2, 3 and 4, and half pay for weeks 5, 6, 7 and 8.
16. On 28 April 2019, the respondents wrote to the claimant (R118) to advise that her pay was being increased from 1 April 2019 to £19,987.50, as an appreciation for her hard work and dedication to the practice. Shortly
25 before that, in March 2019, the respondents had opened a new practice in Airdrie.
17. On 14 April 2020, when the effects of the coronavirus pandemic were becoming apparent, the respondents wrote to the claimant to obtain her agreement to implement furlough leave (R123). That was extended on 26
30 June 2020 to include flexible furlough leave, which permitted staff to work during furlough (R126).

18. Mr Mahesh approached the claimant and discussed with her the possibility of altering her role. Following that discussion, on 30 January 2021, he wrote to the claimant offering her the post of Practice Administrator at the starting salary of £13.50 per hour, for 2 days a week (15 hours) commencing on 1 February 2021 (R130). The claimant accepted that offer.

19. On 19 September 2021, a Sunday, Mr Mahesh emailed the staff, including the claimant, at 3.36pm (R140). In that email, he enclosed a copy of the respondents' annual leave policy for 2022, and said:

10 *"As you would have noticed, the practice is introducing amended enhanced holiday entitlement to reward loyalty to the practice, which now extends beyond the existing 5 years scheme. I trust that this would be helpful to staff and is a benefit that everyone can be entitled to.*

15 *Also, I will need to organise a quick consultation with everyone regarding the 'Practice Sick Pay' scheme currently in operation. It is financially not sustainable for the practice to continue with this protracted support scheme, especially given the current situation and the recent changes in the 'Statutory Sick Pay' that the practice can claim back. Having reviewed the usage of this, it is not something that is beneficial to all staff. After an individual meeting with everyone, I will be issuing an amendment to the*

20 *terms of employment in this regard with all the above changes."*

20. The claimant did not respond to this email, although there is no doubt that she received it. In her evidence, she was a little unclear as to whether she had read that email at the time, though since it arrived on a Sunday she would not have read it on the day it was sent.

21. On 7 November 2021, Mr Mahesh again emailed the staff (R145), once more on a Sunday afternoon. In that email, he talked about the appraisal process which would be put in motion in January 2022, and enclosed a copy of the appraisal form to be used. He then gave the staff an explanation as to the financial pressures on the business:

5 *“As some of you maybe aware, that all dental & orthodontic practices currently receive Covid emergency funding at present, worked at 85% of the average earnings in the year 2018-19. As I have explained at previous practice meetings, when an associate leaves the practice, the funding leaves with them and the support does not tak into account that I am now working 5 days a week instead of 4 and I have an additional therapist & one back from maternity leave since then. I am attaching herewith the recent letter sent by Hamza Yusuf, Scottish Health Secretary, confirming that this emergency funding will be withdrawn on*

10 *31st March 22, so that the SDR in full will return from 1st April 2022. Understandably, this has caused some unrest with all practice owners and BDA has given stark warning about the future of NHS dentistry in Scotland.*

15 *I do anticipate that there will be quite some re-organisation within the practice at that time and with the appraisal completed by the end of January 22, I will be in a better position to equip the practice to face this challenge. It would be helpful to know what aspirations and plans staff have so that I can take it into consideration, during the re-organisation.”*

22. Mr Mahesh wrote to a smaller group of staff, including the claimant, again on 7 November 2021 (R148). Under the heading “Roles of PM/PA” (a reference to Practice Manager and Practice Administrator), he stated:

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“As mentioned in my previous email to all staff, there will be some practice re-organisation next year. I do not think that a PA’s role is just to deal with GP paperwork and claim – I am finding that some are just glued on their computer, concentrating on just transmission/errors and so on. As I said, I am an NHS committed practice – 80% NHS and 20% private. For that split, I would expect my admin staff to spend at least 40% of their time towards private and only 60% towards NHS. It is not justifiable for me to have such positions where more than 110% of the staff’s time is spent on NHS forms (given that we are always 10% behind). Hence, please look at the duties of the post and ensure that you are undertaking all the roles as detailed in that job description...”

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23. He also encouraged Practice Administrator and Practice Manager staff to look into courses or training to enable them to undertake their role in an efficient manner.
24. Mr Mahesh then expressed the wish to meet with the claimant prior to appraisal, and sought to arrange a meeting on 2 December 2021, by email dated 24 November 2021 (R150). He said that the purpose was to discuss her job roles/duties, and enclosed a copy of her job description. He invited her to come to the meeting prepared with all the duties from her current role, how she had undertaken them to assist the practice and the benefits to the practice. He also asked her to bring a list of all the courses and training which she had carried out since she started in post.
25. They met on 2 December 2021. Brief handwritten notes of the meeting were taken by Mr Mahesh (R151). He noted that the claimant had been working in the PA role for 10 months ("10/12"), and that over the preceding several months she had not carried out any other duties than those relating to the receptionist position, owing to the pressures of that role. He said to her that he did not think that she had fully covered the duties of the PA over the whole period.
26. He also noted that the claimant had put herself forward for the TC (Treatment Co-ordinator) role, but had withdrawn from the process after being called for interview and to be given further training.
27. On 2 February 2022, Mr Mahesh wrote to all staff (R154) saying that now that the appraisals had been completed, he needed to organise a quick meeting with everyone over lunch to discuss further training, up-skilling and re-organisation, within the next few weeks before the end of February.
28. There was a further meeting between Mr Mahesh and the claimant on 11 February 2022. Mr Mahesh kept brief notes of that meeting (R152). He indicated that she would be moved back into the receptionist role full time with a pay rise which, he said, would mean that her overall salary would

be brought up to approximately the same pay rate as she had had while covering that and the PA role.

29. He explained that there was a business case for re-organising the practice, and that he wanted to move people into roles where they could assist in the development of the practice. The claimant did not respond verbally to this explanation during the meeting, though she was not happy with the proposed change so far as it affected her.

30. On 27 February 2022, Mr Mahesh wrote to the claimant (R155) intimating a variation to her terms and conditions of employment. There were a number of headings in this letter, not all of which are relevant to this claim.

31. Mr Mahesh set out the amendment to the practice sick pay section of the Staff Handbook, and in particular the effect that the practice had no company sick pay scheme or occupational scheme in operation. SSP would be paid on completion of the relevant form. All other terms and conditions were to be unchanged.

32. The last two headings, under paragraphs 6 and 7, were directly relevant to the claimant.

33. Paragraph 6 stated, under the heading "Change of Roles – Termination of Practice Administrator role":

"As discussed during our meeting, unfortunately due to practice re-organisation, there is no opening for the 'Practice Administrator' role within the practice anymore. Hence, the post that you started on 1st February 2021 on 2 days per week basis will terminate on 30th April 2022, with a 12-weeks' notice. There has been no chance for you to undertake this role in the last year due to staff shortage and apart from a few weeks, there has been no opportunity for you to fulfil this role properly in the last year. NES [NHS National Education for Scotland] also have no plans to run the practice manager's course until 2023. We are sorry that you have not been able to progress in the role of the Practice Administrator."

34. Paragraph 7 stated, under the heading “Wage Raise”:

5 *“Following our recent discussion, I can confirm that with effect from 1st May 2022, when you would be working 5 days as an orthodontic receptionist, your salary as a receptionist has been increased to £11.50/*
per hour, just over 12% pay raise compared to your previous wage as a
receptionist – an appreciation of all your hard work and dedication to the
practice. This would also ensure that there is not much changes to your
monthly wages when you give up the role of practice administrator. From
10 *1st May 2022 onwards, based on your current contracted hours of 37.5*
hours per week as orthodontic receptionist, your salary would be £22,425/
per annum and the monthly gross salary would be £1868.75/, prior to any
tax & national insurance deductions.

All other terms and conditions of employment will remain unchanged.”

15 35. The claimant was then asked if she would *“sign the enclosed copy of this*
letter, confirming receipt of this letter and your acceptance of the variation
to your terms and conditions of employment, and returning it to myself, for
our records.”

20 36. Mr Mahesh signed the letter and dated it 28 February 2022; the claimant
signed the schedule – *“I confirm that I am in agreement with the above*
variation to my terms and conditions of employment.” – on 28 March
2022, one month later.

37. On 12 April 2022, the claimant submitted her letter of resignation (R159),
which stated:

“Dear Mahesh,

25 *Please accept this as notice of my resignation from the position as*
Receptionist at M-Brace Orthodontics with my last working day being
10/5/2022.

I would like to say thanks for the opportunity you gave me but due ot the
recent changes within my contract and the lack of opportunity to progress

within M-Brace I feel now is the right time to move on and further my career prospects elsewhere.

Kind regards,

Sharon Brady”

5 38. Mr Mahesh responded to this letter on 12 April 2022 (R160), acknowledging receipt and expressing disappointment with her decision as she had been a valuable member of the team.

39. He addressed the terms of the claimant’s letter:

10 *“I am also sorry that you feel that there has been a lack of opportunity for you to progress within M-Brace – the practice did offer you the opportunity to apply for the newly created role of treatment coordinator but you had pulled out before the interview. The practice had also given you the role of practice administrator without you having any prior experience and was willing to offer you training in this new role. Due to*

15 *practice re-organisaiton, there was no role for a practice administrator and hence, your role was affected in the short term – however, the practice has given you 3 months notice of this change (even though your notice period was only 8 weeks), continued to pay your higher rate of salary for the PA role even though you have not undertaken the duties of*

20 *the practice administrator in the last 6 months and had offered to raise your wage as a receptionist so that your final pay was not affected by this change, in appreciation of your value to the practice. The practice had also offered to support you with the practice manager course (unfortunately, this course was not being run this year and hence, had to*

25 *be considered for next year) or with any other course that you deemed necessary to progress with your career – it is customary for a person to have the necessary qualifications before taking a new role but the practice was willing to train & support you towards a new role without it being offered in open competition...”*

40. He also reminded the claimant that her contractual notice period was 8 weeks, and so her last date of employment would be 7 June 2022. He explained that the reason for this is to ensure that any replacement could be recruited and trained before the claimant left, to ensure that treatment to patients would not be affected.

41. The claimant replied to that email on 18 April 2022 (R161). She noted that he had referred to *“all the career opportunities that were offered to myself and yet I’m still in the same role as Receptionist after more than 4 years.”* She stressed that she had considerable experience of management over a number of years, including running her own business: *“I don’t think your aware of the vast range of Managerial experience I have which far out ways (sic) Dental Nursing experience. I have run a successful business alone for 12 years, managed 8 members of staff, dealt with human resources, rotas, stock control and cash flow. I was also a Trainee Financial Advisor with the bank and building society for 7 years being responsible for offering financial services to business clients. This is the reason I have been approached by a team at the NHS to fulfil the position of Medical Secretary for a Consultant due to my experience and skills I have gained throughout my working life.*

Your contract of employment (which I signed in protest and management was aware of) changes all the time being dictated to by yourself with no consultation with any of your team and constantly moving the goal posts which you expect everyone to agree to and are not open to any opinions on it. We have also been told by yourself in the past if we’re not happy with any of the way things are in the practice then you will support them until they find another job therefore, leaving staff feeling undervalued and demotivated.”

42. She argued that the 8 weeks’ notice period was only for skilled professionals, and that a receptionist should be replaced more easily.

43. Mr Mahesh replied (R162) on 18 April 2022 expressing disappointment, but addressing at length the contractual obligation on the claimant to provide 8 weeks' notice. He offered a compromise of 6 weeks' notice.
44. On that same day, Jan Palmer, Practice Manager, wrote to the claimant (R163), reiterating that her final day would be 7 June, taking account of accrued annual leave. She proposed that the final day could be moved to 31 May 2022, but *"I need to make you aware of your contractual obligations and failure to provide 8 weeks' notice will cause a breach. This will also mean there will need to be adjustments and deductions made depending on your leaving date."*
45. The claimant's response, that evening (R163) was to confirm that her starting date with the NHS was now 16 May 2022, and accordingly she intimated that her final day would be 10 May 2022, as said in her first email. She went on: *"As far as breach of contract goes I have been advised by a Unite Union representative I can leave earlier if I have reason to do so and am entitled to any pay due up until my last working day along with any holidays accrued."*
46. Mr Mahesh received no further correspondence directly from the claimant and wrote again on 27 April 2022 (R164) to say that the practice had the right to deduct 1 to 2 weeks' wages in the event of breach of the contractual obligations upon the claimant. He asked the claimant to clarify exactly what her position was, in order to decide whether or not to make the deductions from her wages.
47. On 29 April 2022, the claimant submitted a grievance to the respondent (R167). She stated:
- "as you are probably aware you have breached the Employment Rights Act 1996 by withholding any money whatsoever I have honestly earned through my commitment to M-Brace over the last month. By law I am legally obliged to give you one weeks notice for every year I have worked for you. I have now lost all trust and confidence in you as the leader of M-Brace."*

This is not only about my wages being withheld but because of all the changes within the practice and the coersive controlling behaviour. I feel I had no other option but to unfairly seek alternative employment.

5 *I proposed to your Line Manager verbally on two occasions that I would commit to your **ENFORCED** terms of working six weeks notice and yet you are still insisting on deductions on my salary.*

I have not been happy from the start of the pandemic due to the way the practice laws were breached during Covid along with other issues that will be discussed at a later date.

10 *Due to the stress and anxiety caused by this whole situation I am seeking a medical consultation today.”*

48. Mr Mahesh wrote to the claimant on 1 May 2022 (R168) acknowledging receipt of the grievance, and enclosing a copy of the grievance procedure. He asked the claimant to confirm whether she was well
15 enough to attend a grievance meeting, chaired by Jan Palmer, that or the following week.

49. The claimant did not attend any grievance meeting owing to her absence on sick leave.

50. He also wrote a longer letter on that date (R172) in which he set out
20 clarification of the contractual position, and said that he expected written confirmation of the claimant's agreement with regard to a notice period. He continued:

25 *“Having not received a formal written response to my emails, as reiterated by Jan, I had no other alternative but to withhold 4 days' pay from your wages for April 2022. This amounts to a sum of [£223.60/]. This amount was to be repaid on completion of your six weeks' notice period. The reason for the deduction was to cover the additional costs of using a locum receptionist if you breached your contract of employment with regard to notice period. I am sure you would appreciate the reasons for
30 this, considering your management role in the practice.*

I note that you have now confirmed in your letter dated 29th April 22, that you have agreed to work your 6 weeks notice period and hence, I had instructed my payroll (who had to work on the Bank Holiday weekend) to adjust your wages for April 22 and to repay you the deducted amount of £223.60/, which was debited from my account on 30th April.

To avoid any doubt, your last day of employment at M-Brace Orthodontics will be Tuesday 24th May 22, 6 weeks from your resignation letter dated 12th April 22 and you will be bound by all the contractual terms during this period.

- 10 51. Following discussions about her observance of the sickness notification procedure, Ms Palmer wrote to the claimant on 3 May 2022 to advise that her failures may amount to a breach of contract as well as a disciplinary issue (R171). The claimant replied that day to advise that she had submitted self-certification on 1 May 2022, and that she had called Ms
15 Palmer on the first day of her absence to explain that she was contacting her doctor. She went on: *“I have now raised an early conciliation case with ACAS and would appreciate any future correspondence to be through this pathway as receiving this type of email is aggravating my illness by the irrational acts of being totally unreasonable and
20 unsupportive at this difficult time. I’ve also been advised that keeping in contact is an opportunity to check on the wellbeing of your staff and offer any support, not to threaten them with disciplinary action.”*
52. The claimant submitted a Statement of Fitness for Work (R174) dated 4 May 2022, in which her doctor confirmed that she was unfit for work until
25 24 May 2022.
53. In her evidence before the Tribunal, the claimant complained that part of the reason for her resignation related to the changing facilities within the surgery. She said that there were a number of lockers which were placed in a room in the surgery, and that staff were able to keep their personal
30 belongings there. However, there were no private changing facilities for

staff, which was awkward since they were required to change clothes upon arrival and departure.

54. Mr Mahesh's response to this was that the lockers were available for daily storage, and could be locked while staff were working, but that they were not individually allocated, and staff were not permitted to take the keys away from the surgery at the end of the day. He also said that there were staff toilets which were available to be used for changing clothes.
55. In relation to the claimant's pay, Suzie Paton, of Capital Payroll, emailed Mr Mahesh on 27 June 2022 (R175) to apologise for the late BACS payment made to the claimant. She explained that in April there had been a change to the payroll after the payroll run, so that a BACS payment could not be made. The claimant was missed from the payroll in May 2022, and she apologised for that omission.
56. On 29 April 2022, the claimant's payslip (R177) states that the claimant was paid £1,225.77 (net); however, a second payslip was issued, again dated 29 April 2022 (R178) confirming that the claimant would be paid £1,449.37 (net). The difference between the two figures is £223.60.
57. The claimant maintained that she did not receive the additional payment of £223.60 until 3 May 2022. Mr Mahesh was insistent that he paid it from his account on 29 April 2022. In order to establish the position, he contacted NatWest Bank. Janette Martin, Relationship Manager and Healthcare Specialist, emailed Mr Mahesh on 5 September 2022 (R180). She confirmed that two debits had been paid to the claimant from the respondent's business account, namely £1,225.77 on 29 April 2022, and £223.60 on 3 May 2022. The additional payment was processed on a non-banking day, which accounted for the delay.
58. I note in passing that I found the respondents' persistence in arguing that both payments were made on 29 April 2022 in the face of this evidence to be unhelpful and confounding. The simplest way to put it, it seemed to me, is that the payment of £223.60 was made from the respondents' account on 29 April, but plainly did not reach the claimant's account until

3 May 2022. Quite why that might be is perhaps difficult to understand, but it is of no account. There was a delay in the claimant receiving the payment.

5 59. The claimant notified ACAS of her intention to raise proceedings on 1 May 2022.

10 60. The claimant applied for a number of positions in the NHS, culminating in her application dated 15 March 2022 for the position of Medical Secretary. She was interviewed on 1 April 2022, and was offered the position on or around 8 April 2022. She submitted her letter of resignation to the respondent on 12 April 2022. She commenced employment with the NHS on 16 May 2022. Her final day of employment with the respondent was 10 May 2022.

15 61. The claimant's new post was a full time position (37.5 hours per week) earning £21,709 per annum. Her payslip for 30 June 2022 (R182) demonstrates that she was paid £1,405.92 (net) for that month.

Submissions

62. The parties made short oral submissions which were taken fully into consideration by the Tribunal in reaching its decision. These are not summarised in any detail here, but are referred to in the decision.

20 The Relevant Law

63. Section 95 of the Employment Rights Act 1996 ("ERA") sets out the circumstances in which an employee is treated as dismissed. This provides, *inter alia*

25 “(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—

...

(c) 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.”

5 64. Where a claimant argues that there has been constructive dismissal a Tribunal requires to consider whether or not they had discharged the onus on them to show they fall within section 95(1)(c). The principal authority for claims of constructive dismissal is **Western Excavating -v- Sharp [1978] ICR 221**.

10 65. In considering the issues the Tribunal had regard to the guidance given in **Western Excavating** and in particular to the speech of Lord Denning which gives the “classic” definition:

15 “An employee is entitled to treat himself as constructively dismissed 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. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in
20 either case must be sufficiently serious to entitle him to leave at once. Moreover, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.”

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66. The Western Excavating test was considered by the NICA in **Brown v Merchant Ferries Ltd [1998] IRLR 682** where it was formulated as:

30 “...whether the employer’s conduct so impacted on the employee that, viewed objectively, the employee could properly conclude that the employer was repudiating the contract. Although the correct approach to constructive dismissal is to ask whether the employer was in breach of contract and not did the employer act unreasonably,

if the employer's conduct is seriously unreasonable that may provide sufficient evidence that there has been a breach of contract."

5 67. What the Tribunal required to consider was whether or not there was evidence that the actions of the respondents, viewed objectively, were such that they were calculated or likely to destroy or seriously damage the employment relationship.

10 68. We were also referred to, and took account of, the well-known decision in **Malik v Bank of Credit & Commerce International SA [1997] IRLR 462**, in which Lord Steyn stated that "The employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee."

15 69. It is also helpful to consider the judgment of the High Court in **BCCI v Ali (No 3) [1999] IRLR 508 HC**, in which it is stressed that the test (of whether a breach of contract amounts to a breach of the implied term of trust and confidence) is "whether that conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after discovering it and can walk out of his job without prior notice."

20 70. In **Jones v Collegiate Academy Trust UKEAT/0011/10/SM**, the EAT stated: "It is important to note that an objective test is to require whether the conduct complained of is calculated or likely to destroy or seriously damage the relationship; the subconscious of intent of the respondent is irrelevant as the Employment Tribunal correctly held... The subjective perception of the employee is also not relevant. The respondents' conduct must be repudiatory in order to establish a breach of the implied term; it must be conduct by the respondent which objectively considered it likely to undermine the necessary trust and confidence in the employment relationship."

71. **Omilaju v Waltham Forest London Borough Council [2005] 1 All ER 75** is helpful in considering whether or not the resignation of an employee is a response to a last straw in a series of acts by the employer which amount, together, to a fundamental breach of contract. It is noted in that judgment: “The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.” This endorses the view of the court in **Lewis v Motorworld Garages Ltd [1985] IRLR 465**: “The breach of this implied term of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?...This is the ‘last straw’ situation.”
72. The Tribunal also took into account the Employment Appeal Tribunal decision in **Wright v North Ayrshire Council UKEATS/0017/13/BS** from June 2013. In that case, having examined the line of authorities relating to claimants who resign for more than one reason, Langstaff J cautioned against seeking to find the “effective cause” of the claimant’s resignation, but found that Tribunals should ask whether the repudiatory breach played a part in the dismissal.

Discussion and Decision

73. The issues before the Tribunal in this case were relatively simple: the claimant complains that she was unfairly constructively dismissed, and that there were a number of actions on the part of the respondent which she regarded as repudiatory breaches of contract, in response to which she was justified in resigning.

74. In his submissions to this Tribunal, Mr Oxtan identified 4 alleged breaches of contract:

1. Activities going on in the practice;
2. Demotion;
- 5 3. Removal of company sick pay; and
4. The role of Jan Palmer

75. I address each of these in turn below. Before doing so, however, I remind myself of the terms of the claimant's letter of resignation. In it, the claimant said:

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"Dear Mahesh,

Please accept this as notice of my resignation from the position as Receptionist at M-Brace Orthodontics with my last working day being 10/5/2022.

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I would like to say thanks for the opportunity you gave me but due to the recent changes within my contract and the lack of opportunity to progress within M-Brace I feel now is the right time to move on and further my career prospects elsewhere.

Kind regards,

Sharon Brady"

20

76. Essentially, the letter identifies two reasons for the claimant's resignation: the changes to the claimant's contract and the lack of opportunity to progress within the organisation.

77. The allegations made before the Tribunal were related to the 4 areas now addressed.

25

1. Activities within the Practice

78. The claimant's claim form, in the paper apart attached, set out a narrative upon which she was basing her claim. As I understand it, this aspect of the claimant's claim is set out as follows (13):

5 *"These changes within my new employment contract as well as activities
going on in the practice since the covid pandemic and continue (sic) to
this day were my reasons for feeling I had no alternative but to seek new
employment. The activities included the practice having no proper
changing facilities with 1 staff toilet for approx. 12-14 members of female
staff. This was for changing clothing up to 4 times a day. Mr Mahesh
10 recently walked in on staff members changing including myself who were
forced to change in the surgeries with no locked doors. The female
lockers were also searched on a regular basis by Mr Mahesh which left
me feeling violated with my personal hygiene products being exposed.
This was voiced to management as I felt totally uncomfortable about it but
15 it continued."*

79. The issues raised here were that the claimant and others were not provided with suitable changing facilities in the surgery, that Mr Mahesh walked in on them on one occasion, that female lockers were searched on a regular basis and that personal hygiene products were exposed.

20 80. In her evidence, the claimant did speak about the lack of suitable
changing facilities within the surgery. She also said that Mr Mahesh had
searched the female lockers, including hers, which left her feeling
vulnerable. She said nothing in evidence in chief about Mr Mahesh
having walked in on her, but when asked about it in cross, accepted that
25 it was not deliberate, but that it made her uncomfortable.

81. Mr Mahesh denied these allegations, and pointed to the fact that there are female toilets available for changing. He also said that the lockers were made available to staff during the day, but not overnight, and no lockers were allocated to a particular member of staff. He denied that he
30 inappropriately searched lockers, but he accepted that he had drawn to

staff's attention the untidy state of those lockers. He also denied that he had walked in on anyone changing.

5 82. It is difficult to resolve those differences between the parties which exist. I formed a favourable impression of both the claimant and Mr Mahesh when they gave evidence. They both appeared to me to be experienced individuals who took seriously the obligation to tell the truth before the Tribunal. Inevitably over a period of time different people develop different perspectives on the same situations, and it appears to me that that is what has happened here.

10 83. What the claimant is offering to prove is that these issues played a significant part in her decision to resign. Nothing is mentioned in the letter of resignation about these matters. The claimant's grievance letter, submitted shortly after her resignation on 29 April 2022, makes no reference to them either.

15 84. I am driven to the conclusion that at the time she resigned, the activities in the surgery did not form a significant part of her reason for resigning. It is clear, particularly given the emphasis in her claim and in her evidence before me, that the claimant resigned because she felt that she had been required to accept a change to her contract and had become frustrated with the lack of opportunities to progress within the company. I am not
20 persuaded, therefore, that the claimant resigned as a result of the concerns which she had in relation to the changing facilities or the lockers, or Mr Mahesh's actions in relation to these matters.

2. Demotion

25 85. In my view, this was a significant factor in the claimant's decision to resign. The claimant was very pleased to have been offered the opportunity to become a Practice Administrator, and it is clear from her evidence that she retained the hope that she may be able to progress to become a Practice Manager. However, she was very unhappy when she
30 was advised that the PA role was being removed from her contract, and

that she was to be returned to the receptionist position full time which she had been appointed to on recruitment.

5 86. The claimant was undoubtedly very unhappy to have the PA role removed from her. She resigned shortly after it was confirmed to her that this would be happening.

87. However, the question for the Tribunal is whether or not the respondent's actions amounted to a repudiatory breach of contract.

88. It is important to consider the steps which the respondent took in preparing for this change, and the manner in which it was implemented.

10 89. Mr Mahesh emailed all staff, including the claimant, on 7 November 2021 in which he explained the financial pressures being endured by the surgery, and the consequent need to consider re-organisation of the business. He then met with the claimant on 2 December 2021 to explain that he did not feel, in all the circumstances, that she had not been
15 carrying out the role of PA for several months (and indeed the claimant accepted that she had been so busy as receptionist for at least two months, she had been unable to carry out those PA duties) and that re-organisation was necessary.

20 90. He emailed all staff, including the claimant, on 2 February 2022, to advise that he would be meeting with all staff to explain the re-organisation of the business. He met with the claimant on 11 February 2022, at which he confirmed that her PA role would be removed from her, and that she would return to the receptionist role full time, but with a pay rise.

25 91. On 27 February 2022, Mr Mahesh issued a letter offering a variation of the claimant's contract of employment, in which the change of the claimant's role was placed in writing before her. She was asked to consider its terms and then to sign acceptance. She did so, on 28 March 2022. She then resigned on 12 April 2022.

30 92. That sequence of events is important, in that it demonstrates that the respondent was seeking to explain to the claimant and others the need

for changes to be made. Mr Mahesh took time at each stage to explain his position, and gave her advance notice of his intention to vary her contract.

5 93. In my judgment, the claimant's claim amounts to a complaint that changing her terms and conditions, which in her view represented a demotion, comprised a repudiatory breach of her contract of employment. There are two possible interpretations to this: that in the manner in which the respondent went about this process they breached the fundamental implied term of trust and confidence inherent in the employment contract
10 with the claimant, or that by changing the terms and conditions they breached the original contract which included her role as PA.

15 94. Considering all of the evidence, I cannot conclude that the manner in which the respondent went about effecting the change to the claimant's terms and conditions amounted to a repudiatory breach of contract. Mr Mahesh was entitled to take a managerial view that the business
20 should be re-organised, and having made that decision was entitled to implement it. He explained the position in advance to all staff, including the claimant, and met with her on two occasions to discuss the matter. In my judgment, the respondent cannot be criticised for the manner in which they sought to implement the changes which they considered necessary for the survival of the business.

25 95. So far as the change itself is concerned, in my judgment that cannot be regarded as being a breach of the claimant's contract of employment: she was offered a variation of contract, and she accepted it. She said nothing at the time about accepting the variation under protest. However, a contractual variation which is executed by the agreement of both parties does not constitute a breach of contract; by contrast, it constitutes a valid variation of that contract. The claimant agreed, in express terms, to that
30 variation. Had she not accepted the written variation of contract and the respondent had gone ahead and unilaterally varied the contract, then the issue would be susceptible of a different interpretation. The evidence,

however, makes clear that she agreed to the variation, and must therefore be taken to be bound by it.

5 96. While I accept that the variation of her contract did upset the claimant and did form a significant part of her reason for resigning, in my judgment it has not been proved that the claimant resigned in response to a material breach of contract.

10 97. The claimant appeared to suggest that she had not been given opportunities to progress within the business, but it is not at all clear from the evidence what opportunities she was referring to. It is known that she applied for the Treatment Co-ordinator post but withdrew, having been offered an interview. That opportunity was offered to her but for her own reasons she chose not to pursue it.

15 98. I discern from the claimant's evidence that she was hopeful that she might be able to take up a Practice Manager's appointment at some point in the future, and she compared her position to that of other PAs within the business. The difficulty is that she had not undergone the necessary training for the Practice Manager position, and, perhaps more significantly, was working only part time as a PA. The remainder of her time was taken up with the important role of receptionist, and accordingly she was in a unique situation (on the evidence I heard) of having that role as well as the PA role at the same time. There was no evidence, further, that there was any vacancy for a Practice Manager at the material time.

20 99. Accordingly, I am unable to find that the claimant's variation of contract, or demotion as she would put it, amounted to a repudiatory breach of the claimant's contract of employment.

25

3. Removal of Company Sick Pay

30 100. The removal of the respondent's company sick pay scheme was the subject of consultation by the respondent over a period of time. Mr Mahesh gave clear evidence that he had discussed with staff whether they would prefer to continue with the company sick pay scheme, which

only a few of them would be likely to benefit from, or to receive a pay rise instead of that scheme, which would benefit all staff. He said that the staff took the view that the latter would be more beneficial.

5 101. Again, therefore, Mr Mahesh went about the business of altering the company sick pay scheme in an appropriate and careful manner. He included the appropriate variation within the claimant's offer letter on 27 February 2022, making clear what the effect would be, and again the claimant accepted that offer in writing.

10 102. In my judgment, this alteration to the claimant's terms and conditions of employment cannot be said to have been imposed unilaterally, but was in fact implemented by way of a written agreement by the claimant to vary her terms and conditions of employment. Even if it were imposed unilaterally, which it was not, it is not obvious that the change amounted to a detrimental one for staff. It was the removal of a right to which staff
15 may never have access (if they were not absent due to illness) and its replacement by a benefit available to all staff.

20 103. There is simply no basis for the claimant's assertion that this was a repudiatory breach of contract. The claimant accepted the express variation of her terms and conditions of employment, after taking a month to consider the matter and sign the offer letter.

104. Accordingly, I do not find that the respondent was guilty of a fundamental breach of contract, or indeed any breach of contract, in implementing this variation to the claimant's terms and conditions of employment.

The Role of Jan Palmer

25 105. As I understood it, the claimant was complaining that Ms Palmer was, effectively, acting as agent for Mr Mahesh and that he should be responsible for her actions. It is not clear, however, precisely what actions the claimant was complaining about in this regard. Reading the paper apart to the ET1, I am uncertain what aspect of Ms Palmer's
30 conduct she as alleging amounted to repudiatory conduct.

106. It may be that the claimant is referring to the exchanges with Ms Palmer about the length of her notice period, in which there was disagreement, and over which the claimant considered that the respondent behaved very unfairly and without cause.
- 5 107. However, this conduct, such as it was, cannot amount to repudiatory conduct provoking the claimant's resignation, because it took place after she had intimated her resignation. She cannot, in other words, have had it in mind when she resigned that the respondent had behaved itself in an unreasonable manner in response to that resignation.
- 10 108. It is notable, in my judgment, that the claimant's letter of resignation makes no reference to her having lost trust and confidence in the respondent, but that her letter of grievance, submitted some time later, states that she had "now" lost trust and confidence in her former employer. That is significant in demonstrating that the events which took
15 place after her resignation were very important in her mind, up to and including the point where she came before the Tribunal.
109. Beyond that, I do not consider that the claimant has advanced a clear argument on this point and therefore I dismiss this aspect of the claim as being without foundation or clear basis.
- 20 110. The other aspect of the claimant's claim seemed to relate to the payment of her salary late, on 3 May 2022. However, this amounts to very little, since the claimant did receive the outstanding monies due to her, albeit several days late, and as explained in evidence this was due to an error made by the Payroll company responsible for processing the
25 respondent's wages, and a short delay in the money being transferred from the respondent's bank account to the claimant's.
111. I am not persuaded that there is evidence of any wage loss suffered by the claimant. There appears to have been wage delay, but not wage loss.

112. I have therefore reached the conclusion that the respondent did not constructively dismiss the claimant, and that her claim of unfair dismissal must fail and be dismissed.

5 113. I would wish to acknowledge the conduct of the claimant and her husband during the course of the Hearing. It is plainly an important matter to them, and, apart from one slightly excessive reaction to evidence given by Mr Mahesh, for which an apology was tendered, they behaved themselves with courtesy and restraint. Mr Mahesh gave his evidence in a moderate and restrained manner, and at the conclusion of questions was able to
10 express his best wishes to the claimant for the future, which was, so far as I could observe, accepted with equal graciousness by the claimant. I commend them for this.

15 Employment Judge: Murdo Macleod
Date of Judgment: 11 November 2022
Entered in register: 15 November 2022
and copied to parties