



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103129/2022

Held at Aberdeen on 5 June 2023

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**Employment Judge N M Hosie
Members P Kennedy
A Atkinson**

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Mrs L Bristow

**Claimant
Represented by
Ms E Matheson,
Solicitor**

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Craigard Care Ltd (In Administration)

**Respondent
No Appearance**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

35 The unanimous Judgment of the Tribunal is that:-

1. the claimant was unfairly dismissed by the respondent;
 2. the claimant's complaints of unlawful disability discrimination, in particular direct discrimination, discrimination arising from disability, indirect discrimination and a failure to make reasonable adjustments are well-
- 40 founded; and

E.T. Z4 (WR)

3. the respondent shall pay to the claimant, by way of compensation, the sum of Twenty Nine Thousand, Two Hundred and Eighteen Pounds and Eighty-Eight Pence (£29,218.88).

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REASONS

1. Mrs Lesley Bristow brought complaints of constructive unfair dismissal and various complaints of disability discrimination. Initially, the claim was defended and after various procedures a 5-day Final Hearing was fixed and was due to commence on 5 June 2023.
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2. However, the respondent Company went into Administration on 3 March 2023 and the Joint Administrator advised the Tribunal on 9 May that it was not his intention to defend the proceedings and that he did not propose being in attendance or represented at the Hearing.
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3. Accordingly, the case proceeded on an undefended basis and it was decided that only one day would be required for the Hearing.

20 The evidence

4. The Tribunal heard evidence from Mrs Bristow at the Hearing. She gave her evidence in a measured, consistent and convincing manner and presented as entirely credible and reliable. In addition, a bundle of documentary productions was lodged by her solicitor ("P").
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The facts

5. Having heard the claimant's evidence and considered the documentary productions, the Tribunal was able to make the following findings in fact. The claimant's Carpal Tunnel Syndrome constituted a disability in terms of s.6 of
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the Equality Act 2010 (“the 2010 Act”). This had been conceded by the respondent.

- 5 6. The claimant commenced her employment with the respondent as a Night Duty Care Assistant on 22 November 2018. She resigned on 31 March 2022.
- 10 7. The claimant has been affected by Carpal Tunnel Syndrome in both her wrists since 2013. In June 2020, she was referred for surgery. On 28 January 2021, she required to take time off to undergo surgery on her right wrist. In April 2021, she underwent surgery on her left wrist. Following both these surgeries she developed pins and needles in both wrists and was referred urgently for physiotherapy. She was absent from work for a total duration of 14 months.

Meeting on 4 November 2021

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8. On 4 November 2021, the claimant met with her line manager, Fiona Mackenzie, to discuss a return to work. A record of that meeting was one of the productions (P.160). She declined the request for her medical records as she had been advised by her G.P. that the sick notes she had provided contained sufficient information.
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Meeting on 17 February 2022

- 25 9. The claimant met with Ms Mackenzie again in her office with a view to discussing a return to work. She wished to discuss a phased return. Her doctor had recommended that she begin with light duties starting with 2-3 hour shifts. Janene Whyte, Ms Mackenzie’s Manager, was in the office at the time. When the claimant asked Ms Mackenzie about being allocated light duties, Ms Whyte responded and stated, *“Don’t think you can just swan in here when you feel like it and say you’re coming back to work. It doesn’t work like that, we don’t have light duties. If you can’t do a full shift, there’s no job here for you. If you think you’re going to work with the girls going home*
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knackered and you leaving fresh as a daisy, that's not going to happen", or words to that effect. Ms Whyte was aggressive and dismissive towards the claimant and told her there was no such thing as light duties and if she was unable to complete a 12 hour shift there was no job for her. Ms Mackenzie was unable to answer or interject.

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10. The claimant was very upset at what Ms Whyte said. She was in a state of shock. She was aware that at least two other employees had come back on "light duties". She had hoped to return to work as part of the night shift on 20 February as she was familiar with the nurse and staff who were working that night. However, when she contacted the nurse she was advised that she had been told that she no longer had a job.

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11. On 25 February 2022, Ms Mackenzie telephoned the claimant and a meeting was arranged for 3 March 2022. During the call the claimant advised Ms Mackenzie that she was aware of others who were offered a phased return and shorter shifts. However, Ms Mackenzie was not prepared to discuss this with her.

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12. On 2 March, the day before her meeting, the claimant began experiencing symptoms of stress. She was "scared" that Ms Whyte would be at the meeting again and that she would be treated the same way. She was unable to sleep that evening and experienced vomiting.

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13. She telephoned the respondent and advised them that she was unwell and would not be able to attend the meeting that day.

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14. On 4 March 2022, she went to see her G.P. She advised her of how she had been treated at her work place on 17 February 2022 and how that had affected her. She advised her G.P. of her intention to resign. Her G.P. gave her a sick note to cover her notice period.

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Resignation

15. Later that day, the claimant handed in her resignation letter (P.167/169) and sick line to the respondent. The terms of her resignation letter were consistent with the evidence which she gave at the Tribunal Hearing.

Claimant's submissions

16. The claimant's solicitor made comprehensive written submissions. These are referred to for their terms.

Constructive unfair dismissal

17. Having resigned it was for the claimant to establish that she had been constructively dismissed. This meant that under the terms of s.95(1)(c) of the Employment Rights Act 1996 she had to show that she terminated her contract of employment (with or without notice) in circumstances such that she was entitled to do so without notice by reason of her employer's conduct. It is well established that that means that the employee is required to show that the employer is guilty of conduct which is a fundamental 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 either case must be sufficiently serious to entitle her to leave at once: **Western Excavation (EEC) Ltd v. Sharp** [1978] IRLR 27.

18. We were also mindful that an employer has an implied duty to maintain the employee's trust and confidence (**Woods v. WM Car Services (Peterborough) Ltd** [1982] IRLR 413). This duty was of particular relevance in the present case. There is implied into all contracts of employment a term that employers will not, without reasonable and proper cause, conduct

themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

19. Browne-Wilkinson J in **Woods** described how a breach of this implied term might arise: “*To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.*”

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20. The manner in which the claimant was treated at the meeting on 17 February 2022 was a clear breach of this duty by the respondent and it was not surprising that the claimant became nervous at the thought of returning to her work place and eventually decided that she could not do so. It was clear that she was constructively dismissed.

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21. Further and in any event, we also found that this conduct was discriminatory and this also entitled the claimant to resign.

22. We are also satisfied that her constructive dismissal was unfair.

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Time-bar

23. We were satisfied that the various claims were timeous.

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Discrimination claims

24. As we recorded above, it was accepted that the claimant was disabled in terms of s.6 of the 2010 Act, in respect of her Carpal Tunnel Syndrome.

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25. The claimant brought complaints of direct discrimination, in terms of s.13 of the 2010 Act; discrimination arising from disability in terms of s.15; indirect discrimination in terms of s.19; and a failure to make reasonable adjustments in terms of ss.20/21.

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26. We were satisfied that these claims were well-founded, for the reasons detailed in the submissions by the claimant's solicitor.

Remedy

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27. Helpfully, the claimant's solicitor had submitted a detailed Schedule of Loss (P.178/181).

28. We are satisfied that the claim of **£957.78** for the Basic Award is well-founded.

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29. We are satisfied that the claim for financial loss of **£17,316.44** is well-founded. It had been the claimant's intention to retire, in any event, on her 70th birthday on 27 July 2023. We were also satisfied that she had taken reasonable steps to secure alternative employment, unfortunately without success.

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Injury to feelings

30. Her dismissal and the discriminatory treatment caused the claimant considerable distress. In addition to her own evidence, we had an up-to-date medical report from her G.P. (P.197-199).

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31. In all the circumstances, and having regard to the guidance in ***Vento v. Chief Constable of West Yorkshire Police*** [2003] IRLR 102, we were of the view that an award of **£10,000** was appropriate in respect of injury to feelings.

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32. Interest at the rate of 8% falls to be applied to that award for the period of 431 days from the effective date of termination to the date of hearing. This amounts to **£944.66**.

5 33. We were not satisfied that there was a basis for the 25% uplift sought by the claimant's solicitor, particularly as the claimant was constructively dismissed.

34. Accordingly, the total award is **£29,218.88** made up as follows:-

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Basic Award:	£ 957.78
Financial Loss:	£17,316.44
Injury to Feelings:	£10,000.00
Interest:	<u>£ 944.66</u>
	<u>£29,218.88</u>

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35. Finally, we would very much like to thank the claimant's solicitor for her researches, for the manner in which she presented her case and for her comprehensive written submissions.

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Employment Judge: N M Hosie

Date of Judgement: 16 June 2023

Date sent to Parties: 16 June 2023

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