



EMPLOYMENT TRIBUNALS

First Claimant: Mrs W Roberts

**Second
Claimant:** Ms E Sumner

**Third
Claimant:** Mrs K Tomlinson

**First
Respondent:** Prime Care (UK) Ltd t/a Sylvan Home Care Service

**Second
Respondent:** Mr G Borkhatria

HELD AT: Liverpool **ON:** 24th, 25th and 26th
October 2023

BEFORE: Employment Judge Anderson
Mr Williamson
Mr Dobson

REPRESENTATION:

Claimant: Mr Effiong (Lay Representative)

Respondent: Mr Ridgeway (Employment Law Advocate)

JUDGMENT having been sent to the parties on 3rd November 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is the unanimous Judgment of the Tribunal in respect of claims brought by Mrs Wendy Roberts, Ms Emma Sumner and Mrs Karen Tomlinson against Prime Care (UK) Limited t/a Sylvan Home Care Service and Mr Gitesh Borkhatria.
2. Mrs Roberts claims that she was unfairly dismissed and Ms Sumner and Mrs Tomlinson claim that they were unfairly constructively dismissed. The Respondent resists the claims.

Procedural Matters

3. Claims of post-employment victimisation under the Equality Act 2010 had been withdrawn in advance of the hearing, though no dismissal Judgment had been promulgated. The parties were in agreement that this was the correct position. Therefore, the post-employment victimisation claims were dismissed on withdrawal.
4. The remaining position was that all claims against Mr Borkhatria personally had been withdrawn. The Claimants representative confirmed that this was the case. Therefore, the Tribunal ordered that Mr Borkhatria was dismissed as a Respondent.
5. Under s.4 of the Employment Tribunals Act 1996, an Employment Judge may sit with lay members where it is in the interests of justice to do so. Lay members had already been booked to sit in this case, sufficient bundles had been produced and the nature of the case which included issues of smoking at work and reasonableness of how an employer should approach such questions resulted in a determination that it was appropriate to continue to have members sitting on the case. Neither party objected to this course of action.
6. There was a large bundle of documents. The bundle contained a number of documents that were not relevant to the issues that were before the Tribunal to determine. The parties did not refer to many of the pages in the bundle during the course of their evidence. Many points were put to witnesses on a high level basis rather than on the basis of a specific document.
7. This was a hearing in respect of which it was necessary for the Judge to actively manage the proceedings. The most effective hearings are those where a Judge sits there and listens to the evidence. In these proceedings, there were a number of occasions where it was necessary to clarify the

question that was being asked, to remind the parties to stick to the issues or to point out that a point had already been covered.

The Issues

8. There was a list of issues in the bundle at pages 120 to 125. The parties were continually referred back to these issues during the course of the hearing.

9. Despite references to the Care Quality Commission and to complaints made by the First Claimant, no public interest disclosure claim was pursued or had been made. This was double checked at the outset of the hearing.

10. If there are any formatting problems that remain with the list of issues below, please refer back to pages 120 to 125 which was the format used during the hearing.

11. The issues were as follows:

Wendy Roberts

1. Unfair Dismissal: Section 98 Employment Rights Act 1996 ('ERA 1996')

1.1. What was the sole or principal reason for the Wendy Roberts' dismissal?

1.1.1. The Respondents will say Wendy Roberts was dismissed for the potentially fair reason of conduct, namely smoking inside the Respondent's office.

1.1.2. Wendy Roberts will say that her smoking at work was not the real for her dismissal. She had smoked before to the knowledge of the Respondents, and others had not been disciplined for it. She will say the real reason was not a potentially fair reason, it was because she had complained in her grievance about bullying by the Second Respondent and that she had made reports to the CQC in August 2022.

1.2. If Wendy Roberts was dismissed for the potentially fair reason of conduct, can the Respondent show it held a reasonable belief in Wendy Roberts' guilt?

1.2.1. Wendy Roberts accepts that she was smoking.

1.3. If so, was the Respondent's belief based on reasonable grounds?

1.3.1. Wendy Roberts accepts that she was smoking.

1.4. If so, were the grounds for the Respondent's belief obtained followed a reasonable level of investigation?

1.4.1. Wendy Roberts admitted she was smoking, though she will say it was outside of the office on the fire escape and not in the office.

1.5. If so, was the dismissal within the range of reasonable responses open to the First Respondent?

1.5.1. Wendy Roberts will say that she had smoked on the fire escape before, even with the Second Respondent present, and this had not been a disciplinary

matter. She will say that the imposition of any sanction would have been excessive, and so the dismissal fell outside the range of reasonable responses.

1.6. If so, did the First Respondent act reasonably in all the circumstances, including its size and administrative resources, in treating the alleged misconduct as a sufficient reason for Wendy Roberts' dismissal?

1.6.1. Wendy Roberts will say that her suspension was excessive and that the process was a sham;

1.6.2. However, Wendy Roberts accepts that the Respondent otherwise acted in a procedurally fair manner.

1.7. If Wendy Roberts was unfairly dismissed, should either or both the Basic and Compensatory Awards be reduced on grounds of:

1.7.1. A 'Polkey' reduction; and/or

1.7.2. Contributory fault.

1.8. If so, by how much?

1.8.1. The Respondents will seek a 100% reduction to both the Basic and Compensatory Awards should Wendy Roberts succeed in her complaint of unfair dismissal.

2. Victimisation: Section 27 Equality Act 2010 ('EqA 2010')

~~2.1. Did Wendy Roberts do a Protected Act?~~

~~2.1.1. Wendy Roberts relies on commencing Employment Tribunal proceedings against the First Respondent on 21st December 2022, which included the words 'disability discrimination', though it did not detail any disability complaint and Wendy Roberts does not bring any disability complaint.~~

~~2.2. Did the Respondents believe that Wendy Roberts had done or might do a Protected Act?~~

~~2.3. If so, did the following conduct occur:~~

~~2.3.1. The Respondents sent Wendy Roberts a letter dated 20th January 2023 from the Respondents' solicitor regarding alleged breaches of her restrictive covenants.~~

~~2.4. If so, was this a detriment?~~

~~2.5. If so, was the detriment because Wendy Roberts did a Protected Act?~~

~~2.6. If not, was it because the Respondents believed Wendy Roberts had done, or might do, a Protected Act?~~

3. Breach of Contract: Notice Pay

3.1. Can the Respondents prove, on the balance of probabilities, that Wendy Roberts committed the conduct complained of?

3.1.1. The First Claimant accepts that she was smoking, but she will say that she was outside on the fire escape and not in the office.

3.2. If so, did the conduct result in a fundamental breach of contract entitling the First Respondent to dismiss Wendy Roberts without notice?

4. Unfair Constructive Dismissal: Section 95(1)(c) ERA 1996

4.1. Did the following occur:

4.1.1. On 6th July 2022, Gitesh Borkhatria spoke to Wendy Roberts in a way that caused her to become upset so that Emma Sumner signalled to Wendy Roberts to put the call on speakerphone, and Emma Sumner could hear Gitesh Borkhatria:

- i. Asking another question before Wendy Roberts had answered the first;
- ii. Saying, "Have you quite finished?" when Wendy Roberts was attempting to answer; and
- iii. Generally overtalking and not listening to Wendy Roberts.

4.1.2. Gitesh Borkhatria attended meetings with Wendy Roberts and an independent third party appointed to investigate and hear the grievance in the course of her complaint against him, even though he was the alleged abuser / bully so that Emma Sumner could see that the process of investigating a grievance brought by Wendy Roberts was unjust and not impartial;

4.1.3. The First Respondent failed to question Gitesh Borkhatria in the grievance process, despite an allegedly independent third party having been appointed to run the process;

4.1.4. Gitesh Borkhatria sent the outcome of the process, finding him not to have bullied Wendy Roberts, to Wendy Roberts causing Emma Sumner again to conclude that the process was unjust and not impartial;

4.1.5. Wendy Roberts was suspended on 26th October 2022 (the last straw act relied on); and

4.1.6. Gitesh Borkhatria told Emma Sumner on 26th October 2022 in relation to the suspension of Wendy Roberts that, "I had to do what I had to do."

4.1. If the above conduct did occur, in deciding whether there was a fundamental breach of contract the Employment Tribunal should have regard to:

4.1.1. Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between Emma Sumner and the Respondent; and

4.1.2. Whether the Respondent had reasonable and proper cause for doing so.

4.2. If there was a fundamental breach of contract, did Emma Sumner resign in response to the breach of their contract of employment?

4.2.1. Emma Sumner accepts that she also resigned because the workload for her would be excessive in the absence of Wendy Roberts who was the Registered Manager.

4.3. If so, did Emma Sumner delay or affirm the contract before resigning?

4.3.1. Emma Sumner resigned on 3rd November 2022 following the last straw act relied on from 26th October 2022.

5. Victimisation: Section 27 EqA 2010

5.1. Did Emma Sumner do a Protected Act?

~~5.1.1. Emma Sumner relies on being cited in Wendy Roberts' complaint at box 3.1. of her~~

~~Claim Form as someone else who was also bringing a claim. Wendy Roberts' complaint contained the words 'disability discrimination' though it did not detail any disability complaint. Emma Sumner subsequently brought her own Employment Tribunal complaint dated 16th January 2023, but it did not contain any Equality Act 2010 complaint.~~

~~5.2. Did the Respondents believe that Emma Sumner had done or might do a Protected Act?~~

~~5.3. If so, did the following conduct occur?:~~

~~5.3.1. The Respondents sent Emma Sumner a letter dated 20th January 2023 from the~~

~~Respondents' solicitor regarding alleged breaches of her restrictive covenants.~~

~~5.4. If so, was this a detriment?~~

~~5.5. If so, was the detriment because of the Protected Act?~~

~~5.6. If not, was it because the Respondents believed Emma Sumner had done, or might do, a Protected Act?~~

Karen Tomlinson

Length of Service

6.1. By the effective date of termination of 14th December 2022, what was Karen Tomlinson's continuous length of service?

6.1.1. Karen Tomlinson says her employment was continuous from 4th January 2016.

6.1.2. The Respondents say that Karen Tomlinson had worked for the First Respondent from 4th January 2016 and the effective date of termination for that period of employment was on 30th January 2020. Karen Tomlinson did return to the First Respondent on 18th May 2020, but this was a separate and distinct period of employment that did not count towards her continuous service.

Constructive Unfair Dismissal: Section 95(1)(c) ERA 1996

7.1. Did the Respondents do the following:

7.1.1. Put an excessive workload pressure on Karen Tomlinson as a result of the suspension of Wendy Roberts on 26th October 2022;

7.1.2. Send Karen Tomlinson out to double-handed calls with untrained staff, making her feel that she was not safe at work; and

7.1.3. Fail to provide breaks at work on Saturday, 10th December 2022 for care staff, and when they raised the issue they were told by office staff 'just to get on with it' (last straw act relied on).

7.2. If the above conduct did occur, in deciding whether there was a fundamental breach of contract the Employment Tribunal should have regard to:

7.2.1. Whether the Respondents behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between Karen Tomlinson and the Respondents; and

7.2.2. Whether the First Respondent had reasonable and proper cause for doing so.

7.3. If there was a fundamental breach of contract, did Karen Tomlinson resign in response to the breach of their contract of employment?

7.3.1. The Respondents will say that the Claimant resigned in response to an invite to a disciplinary investigation.

7.3.2. Karen Tomlinson will say that she resigned because of the lack of staffing and excessive workload pressure and that she felt unsupported since the dismissal of Wendy Roberts.

7.4. If so, did Karen Tomlinson delay or affirm the contract before resigning?

7.4.1. Karen Tomlinson resigned on 13th December 2022 following the last straw act from 10th December 2022.

7.5. If the Karen Tomlinson was unfairly dismissed, should either or both the Basic and Compensatory Awards be reduced on grounds of:

7.5.1. A 'Polkey' reduction; and/or

7.5.2. Contributory fault.

7.6. If so, by how much?

7.6.1. The Respondents will seek a 100% reduction to both the Basic and Compensatory Awards should Karen Tomlinson succeed in her complaint of unfair dismissal.

Findings of Fact

12. The Tribunal made the following findings of fact on the balance of probabilities.

13. Credibility was an important aspect of this case. The unanimous view of the Tribunal was that most of the witnesses had credibility problems that affected the Tribunal's ability to place full reliance on their written or oral evidence.

14. In relation to Mr Borkhatria, it was difficult to get him to engage with the case, the question he was being asked or his thought processes. Much of his evidence resulted in him restating trite lines, notwithstanding that they were not an answer to the question asked and in some instances, wholly unrelated to the subject that was being asked about at all. Furthermore, he had produced a lengthy and detailed witness statement and yet it was apparent that he was not across the detail of the case at all.

15. In relation to Mrs Roberts, she was at times straightforward in her evidence, however there were gaps, at times in relation to important points. There was also an important inconsistency in relation to when she started work for her new employer, which will be dealt with below.

16. Regarding Ms Sumner, the Tribunal found her evidence to be broadly credible. She did answer questions. There were some recollection problems, but she gave evidence in a straightforward way, clarifying where appropriate. At times her witness statement was difficult to coherently follow.

17. The credibility of Mrs Tomlinson was nuanced. She was an honest witness but much of what she said was based on bold assertion or opinion. It was not always factually based and lacked corroboration. Significant points of detail were not contained within the witness statement.

18. The First Claimants relationship with the Respondent started in 2013. She and Mr Borkhatria worked well together.

19. Mr Borkhatria is based 200 miles away, his professional address in Southend. He would visit the Respondents premises roughly every two weeks.

20. There were two businesses. A Care Home and a Homecare Business. The Respondent for this case is the Homecare Business. There is an office based in the Wirral. This is the office location that the First and Second Claimant's worked from. There are two rooms, a main office and back office which included the servers and had an emergency exit.

21. On the emergency exit door is a sign stating 'no smoking'. It is visible and clear.

22. In March 2020, the Pandemic came. This inevitably impacted upon and disrupted the way that the Respondent's business operated with all staff being required to be more flexible and hands on as a result.

23. This was also the start of a time of change. As the country left the pandemic, care services were encouraged to start moving to more digital systems.

24. At some point in 2021, the Respondent sought to move from 'icare' to 'Birdie' as part of its digital management systems. Any management system attracted a licence fee. In a period of transition, two fees would be being paid.

25. It was the expectation of Mr Borkhatria that relevant training was available via the software provider and that utilising this training, the First Claimant would be able to implement this software in the Respondent. The position of the Respondent in these proceedings is that the First Claimant was resistant to this and failed to do this within a reasonable timescale.

26. The First Claimant was responsible for bringing in icare as the initial software. However, her position in evidence was that she was not resistant to new software, only that she herself was not a software expert who was capable of implementing this, but also that this was at a time when the country was exiting the pandemic and the industry and the Respondents business remained disrupted as a result and that she prioritised service users over this task.

27. The First Claimant raised a grievance on the 22nd June 2022. The grievance was wide-ranging in nature and included points such as being

bullied by Mr Borkhatria, feeling pressured by the new system and how it was being implemented. Multiple other points were included.

28. On the 6th July 2022, or thereabouts, there was a phone call between Mr Borkhatria and Mrs Roberts. This phone call is not covered in Mrs Roberts' witness statement. In Ms Sumners' witness statement she describes Mr Borkhatria as being 'unprofessional'. The Tribunal accepts that it was a difficult conversation in the wider context of Mrs Roberts' grievance and that each party may have been speaking to each other with a degree of formality and that phrases such as 'have you finished' are likely to have been used by Mr Borkhatria. At the same time however, the Tribunal does not find this to be untoward or unusual. These were two parties in a degree of conflict and it was inevitable that the conversation would be strained.

28. A grievance meeting took place on the 14th July 2022. The Respondent had brought in Citation Ltd a HR Company. They supplied individuals to chair the various meetings that took place. The stated position is that Emily Sheldon chaired the meeting but that the final decision was that of Mr Borkhatria.

29. It is worth noting at this point that no witness has been called from Citation notwithstanding their role throughout this matter, including that they are witnesses of fact to the conduct of meetings. The role of HR companies in internal procedures is a common area of dispute in the Tribunal. Disclosure of documents relating to Citation was not raised with the Tribunal as part of case management. No application prior to the hearing was made for specific disclosure of any documents relating to Citation.

30. It follows that no documents (other than the grievance appeal report) have been disclosed in relation to the role of Citation or its individuals.

31. The Claimant's grievance was not upheld by letter dated 4th August 2022.

32. At some point around the 15th August, Mr Borkhatria received a telephone call from a contractor stating that there was smoking in the office. He did not raise this with the Claimant, who was the Manager. The explanation given is that he had trouble accessing the CCTV to see who it was and that the contractor was not away. The Tribunal does not consider these to be explanations as to why if it was serious, it would not be discussed with the Manager.

33. The Claimant appealed this decision by email dated 15th August 2022 on four grounds challenging the decision in its entirety.

34. The appeal took place on the 13th September. Mr Borkhatria did not attend. A report was prepared by Mr Walker of Citation rejecting the appeal.

35. On the 11th October, Mr Borkhatria received an email saying that when he had been in the back office, there had been a smell of smoke. He went

through the CCTV footage from the beginning of October 2022 and identified Mrs Roberts.

36. The CCTV footage in relation to Mrs Roberts showed her opening the fire door, placing a chair at the open door, with the chair facing outside but with the chair itself inside the room. Mrs Roberts can then be seen smoking. Multiple events, around 7 instances over 11 days are identified.

37. The parties strongly contested the point as to whether or not Mr Borkathria was previously aware that smoking took place at this location in this manner. There is an outside smoking area and Mr Borkathria states that he was aware of this only. Both Mrs Roberts and Ms Sumner point to examples of when he has seen smoking in the doorway previously. The Tribunal finds that Mr Borkathria has previously seen individuals smoke in this location. He visits every two weeks, these were regular smokers, they were aware of the existence of CCTV. Furthermore, the issue of Mr Borkathria's knowledge has been consistently raised throughout these proceedings. The Tribunal did not find Mr Borkathria's denials to be credible.

38. Mr Borkathira then visited the premises on the 26th October and took some photographs of the doorway location.

39. The Respondents Handbook identifies smoking in the workplace as something that may lead to a disciplinary.

40. Mrs Roberts was suspended on the 26th October, the same day the photographs were taken.

41. In due course Mrs Roberts informed her daughter Ms Sumner, the deputy manager of the fact of her suspension and that it related to smoking at work.

42. Ms Sumner formed the view at that point that she wanted to resign. She believed that she could be next as she knew that she had smoked too.

43. Ms Sumner submitted her resignation on the 31st October after returning from leave.

44. A disciplinary hearing invite was sent on 8th Nov, with a rescheduled meeting taking place on the 22nd November. That was chaired by Stuart Farrar. Mr Borkathria was in attendance.

45. On the 17th November 2022, the First Claimant commenced employment (unknown to the Respondent) with a new employer. She was receiving pay from both employers at the same time.

46. The 'two employers' point was a point that caused the Tribunal great concern. It was not contained within Mrs Robert's witness statement.

However, the fact of the date of the new employment and the fact that the two employments ran alongside each other, was in effect volunteered by Ms Tomlinson at the end of her evidence when answering a question.

47. There was more than one schedule of loss in the bundle. The first schedule did not give credit for a new job, the second one did. However, the second schedule did not give credit appropriately and started from the wrong point. The Tribunal was also concerned about the general lack of disclosure on this point.

48. Furthermore, there are two express terms in the bundle at page 260. The first is a clause that the Claimant devote the whole of her working time to the Respondent and the second is that during her employment the First Claimant agrees to not be engaged or concerned with any other business that provides care services. It was not argued that these clauses are unenforceable.

46. The decision was to summarily dismiss the First Claimant for gross misconduct with an EDT of 28th November.

47. By email dated 30th November, the Claimant appealed the decision to dismiss her. The appeal included a request for CCTV footage to be disclosed and also repeated the point that many people including Mr Borkathria were present when people smoked in that area.

48. The appeal was heard on 21st December, chaired by Sarah Rhodes from Citation with Mr Borkathria present. By letter dated 9th February 2023, the appeal was dismissed. The first ET 1 had already been submitted by this point.

49. In relation to the third Claimant, in making findings of fact, it is more difficult to identify a chronology as specific dates are not given. However, the reasons will adopt at least the order contained within Mrs Tomlinson's witness statement.

50. Mrs Tomlinson recommenced employment with the Respondent in May 2020.

51. In the absence of Mrs Roberts and Ms Sumner, Mrs Tomlinson found herself managed by Yvonne. She was the manager of the care home, the other side of Mr Borkathria's business interests who became temporary manager.

52. During this period, Mrs Tomlinson did make phone calls to Yvonne regarding the quality of service that the Respondent was providing. However, we do not have any documentary or other corroborative evidence as to what specifically was said.

53. In terms of workload, Mrs Tomlinson accepted that she was asked to work overtime rather than ordered to do so. Her concern in saying yes was that she did not want to leave the service users in the lurch.

54. At no time did Mrs Tomlinson contact either formally or informally Mr Borkhatria or raise in writing any of her concerns. No safeguarding processes were started or concerns raised.

55. It is right to say that this was a period of turmoil within the Respondent, two of the most senior staff had left as had others and the Tribunal finds that this would have been disruptive and uncomfortable.

56. The Tribunal also finds that a natural consequence of this turmoil within the Respondent was that work was not as organised as it should be. There was turnover of staff and management/staff needed time to adjust. The Tribunal finds that this was a situation of people attempting to do their best in difficult circumstances. The Tribunal accepts Mrs Tomlinson's evidence to the extent that she was having to work hard to meet the interests of service users and that there were some communication problems. The Tribunal does not accept that service users were placed at risk.

57. On the 10th December, Mrs Tomlinson alleges that staff were not given breaks and were told by office staff to 'just get on with it'. This is described in the list of issues as the last straw. However, this event is not referred to in Mrs Tomlinson's witness statement.

58. Mrs Tomlinson, resigned on 12th December 2022 via Whats App. Her text referenced not having a manager and having to answer to 'two young girls'. She also references Mr Borkhatria as 'not being bothered' and references 'two faced people'. The theme of junior managers continues in that references is made to people who are not qualified to answer to. She references a lack of communication and the fact that her blood pressure is high.

The Law

Express Dismissal

57. In the case of the First Claimant, it is accepted that she has sufficient service and was dismissed.

58. It is for the Respondent to prove that the reason or principal reason for the dismissal was one of those listed within s.92(b) Employment Rights Act 1996. In this particular case, the Respondent relies upon conduct as the reason for dismissal.

59. A reason for dismissal is a set of facts or belief held by the employer which cause them to dismiss the employee: **Abernethy v Mott Hay and Anderson [1974] IRLR 213** per Cairns LJ. This has been subsequently affirmed on numerous occasions and has most recently been analysed by the Supreme Court in **Jhuti v Royal Mail [2019] UKSC 55**.

60. In **ASLEF v Brady [2006] IRLR 576** the Employment Appeal Tribunal considered held that where disciplinary proceedings had been commenced

opportunistically because of political antipathy towards the Claimant rather than the alleged misconduct (a fight at a barbecue) this meant that the dismissal was for that reason. A potentially fair reason could be put forward as a pretext for dismissal for other reasons and the Tribunal is entitled to find if the evidence so concludes that the reason put forward by the employer was not the real reason.

61. If the Respondent does prove a potentially fair reason for dismissal, then reasonableness under s.98(4) ERA 1996 must be considered. The classic formulation of a conduct case based on **BHS v Burchell [1978] IRLR 379** requires the Tribunal to consider a) whether the Respondent formed a belief that the employee had committed the act of misconduct and whether that belief was held on reasonable grounds b) whether the Respondent had undertaken such investigation as was reasonable in the circumstances of the case and c) whether the decision to dismiss was within the range of reasonable responses open to an employer.

62. It is also necessary to look at whether the employer followed a fair procedure in dismissing the Claimant.

63. The range of reasonable responses test applies throughout the Burchell test. The leading authority of **Sainsbury's Supermarket v Hitt [2003] IRLR 23** makes it clear that I must apply the range of reasonable responses test to the investigation and not substitute my own view as to what a reasonable investigation would have been.

64. The burden of proof for the purposes of s.98(4) is neutral.

65. Key to understanding the Burchell test is the concept of a range of reasonable responses. It is not for the Tribunal to substitute its own view for that of the Respondent. Rather the Tribunal must answer the questions posed from the perspective of whether or not the actions taken fall within the range of reasonable responses open to an employer, having regard to the size of the undertaking and the administrative resources available to it.

Constructive Dismissal

66. In respect of the Second and Third Claimants, each claim that they were constructively dismissed.

67. In order for the contract of employment to exist, it is necessary to imply a number of terms. One of those terms is the implied term of mutual trust and confidence. It is a fundamental term. It can be breached either in a single event or with a series of events (last straw cases).

68. The correct approach to last straw cases was set out by Underhill LJ in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833** at para 55.

69. In respect of the implied term, it is necessary to apply the Malik test. The Tribunal must ask itself whether the Respondent without reasonable and

proper cause acted in a manner calculated or likely to destroy or seriously damage the implied term of trust and confidence.

Wrongful Dismissal

70. Upon termination, an employer is required to give an employee appropriate notice. The correct level of notice can be implied by s.86 Employment Rights Act 1996, or a larger period of notice can be provided for by contract.

71. It is a defence to a claim for notice pay for the employer to claim that the employee was in fundamental breach of contract. The most common form of this repudiatory breach is where a finding is made that the employee has committed an act of gross misconduct.

72. Whether an employee has committed an act of gross misconduct is a matter for the Respondent to prove on the balance of probabilities.

Conclusions

Mrs Roberts

73. In relation to Mrs Roberts, unlike the other claims, this is an express dismissal case.

74. ASLEF v Brady is an authority that is frequently used by Claimant's in Tribunal as a means of trying to take the Tribunal down a path that distracts from the apparent misconduct. It is fair to say that it is frequently cited but not necessarily successfully so.

75. However, in the present case there is a significant body of evidence that the smoking issue was viewed opportunistically by Mr Borkhatria.

76. The Tribunal has made a finding of fact that the smoking at this location was a matter already in the knowledge of Mr Borkhatria. The implication of this is that by taking action in relation to something that he already knew was going on, this is indicative of the dismissal being opportunistic.

77. On top of this, there was the inability of Mr Borkhatria to engage with this point substantively in evidence. His position was that he was asking the Tribunal to believe that there was no issue at all. This does not sit with the contemporaneous documents at the time. Mrs Roberts had expressed herself in strident terms over an extended period of time, including in relation to a case management system that Mr Borkhatria viewed as important to the future of the business, the delayed implementation of which had cost the business money. At no time was Mr Borkhatria's oral evidence that things were difficult but that he was doing his best to muddle through.

78. The reason for this dismissal was the antagonism that existed between the First Claimant and Mr Borkhatria. The Tribunal so finds, notwithstanding the natural caution that is inherent in applying ASLEF v Brady.

79. It follows that the dismissal was not for a potentially fair reason and therefore was unfair.

80. In the alternative, if the Tribunal were to proceed on the basis of conduct being established as the reason for dismissal and to continue to consider the remainder of the Burchell test, we would nonetheless find the dismissal to be unfair. Despite what is stated in writing, it is apparent that Mr Borkhatria did not turn his mind to mitigating factors such as length of service, the Claimant's historic dedication to the Respondents business. Indeed, the evidence was poor in this regard generally, with Mr Borkhatria struggling to engage with such questions.

81. The Tribunal turns to the question of remedy. Reinstatement/Re-engagement was not sought. It was agreed with the parties that the Tribunal would deal with issues of Polkey and contribution at the same time as liability.

82. Turning to compensation, the Tribunal has a discretion to reduce the basic award where it is just and equitable to do so in light of findings on contributory fault.

83. Although we have found that smoking was the not the reason or principal reason for dismissal, it was nonetheless culpable and blameworthy conduct. The basic award is reduced by 50%. Mrs Roberts was aware that she should not smoke in that specific location and accepted that fact before the Tribunal. Clear signs were in place. There was an alternative smoking area. At the same time, this was conduct that we found that the employer was aware of and did not challenge at the time. We do not mention this last factor as taking into account the conduct of the Respondent, which would be impermissible at this stage, but rather taking into account the conduct of the Claimant and mitigating that conduct.

84. The parties are agreed that the full basic award based upon the First Claimant's age and length of service is £7708.50. Therefore, 50% of the basic award is £3854.25.

85. There is no compensatory award payable. It was gross misconduct for Mrs Roberts to start paid employment for a different employer, whilst claiming a wage from both employers. There was a short period in respect of which Mrs Roberts was claiming two sets of wages at the same time.

86. The Respondent would have been entitled to dismiss the Claimant for receiving pay from two employers at the same time. It is contrary to an express term of the contract, but in addition and probably more importantly, receiving two sets of wages for the same period is something that the Respondent would have been entitled to treat seriously and the Tribunal

finds would have resulted in summary dismissal at the same point in time had the Respondent been aware of it.

86. Mrs Roberts was wrongfully dismissed in that the allegations in respect of smoking did not amount to gross misconduct in light of the Respondent's knowledge of the smoking taking place.

87. No damages are payable in respect of wrongful dismissal due to the subsequent gross misconduct and the fact of new employment. The Claimant has not proven any damage has been suffered. The principle in **Burlo v Langley & Carter [2006] EWCA Civ 1778** does not apply as this is a contractual point, not a compensatory point under s.123 Employment Rights Act 1996.

Ms Sumner

87. The Tribunal does not find that the conduct complained of amounts to a breach of the implied term of trust and confidence.

88. The Tribunal accepts that in some circumstances an employers treatment of a fellow employee could amount to a breach of the implied term. However, the fact that the conduct is not being specifically directed to the employee claiming a breach of the implied term is relevant to assessing whether the threshold for a breach of the implied term has been established.

89. In the present case, nothing has been shown that Mr Borkhatria's hostility towards the First Claimant extended to the Second Claimant. Indeed, the evidence that was given referenced Ms Sumner and Mr Borkhatria being able to work effectively together.

90. The thrust of the case articulated before us is that Ms Sumner saw the treatment of her mother and felt that she could be next. The Tribunal does not accept this general point. Whilst such a contention may seem superficially attractive, this was not made out on the evidence before us.

90. The Tribunal does not find that the 6th July phone call in any way formed part of Ms Sumners reasons for resigning. This has been relied upon retrospectively

91. In terms of the conduct of the grievance points relied upon (4.12 to 4.14), again, these are relied upon retrospectively. They are technical in nature. These specific events are not directly referred to in the resignation letter.

92. The Tribunal takes the view that Ms Sumner resigned in response to the suspension of her mother and that earlier events did not form part of her reasoning.

93. The height of the point is Ms Sumner being informed that her mother has been suspended. The Tribunal has made findings regarding the conduct of the Respondent towards Mrs Roberts. Those findings remain. However, the test for constructive dismissal is different. Ms Sumner did not have all of the facts to hand at the point at which she made the decision to resign on the 26th October and further given that the conduct related to someone else, albeit someone that she was close to, it does not meet the high threshold needed to establish a breach of the implied term as it relates to her contract of employment.

94. It was accepted by Mr Effiong that as the suspension was the last act relied upon as it was the last straw, that 4.1.6 the phrase 'I had to do what I had to do' occurred after this and could not form part of the constructive dismissal claim.

94. The Tribunal does not find that the Respondent was in breach of the implied term of mutual trust and confidence. The threshold for a breach of the implied term has not been met.

95. In the alternative, if the Tribunal is wrong in its conclusion regarding the 6th July phone call and the conduct of the grievance not forming part of Ms Sumners resignation, then the Tribunal would not have found there to have been a breach of the implied term of trust and confidence, even if these events were taken into account. Even viewed cumulatively, the high bar for a breach of the implied term is not met. The conduct is not 'calculated or likely' to breach the implied term. There was a strained relationship between Mr Borkhatria and Mrs Roberts. Ms Sumners employment was not at risk.

96. If it is said that it is artificial for Mr Borkhatria to have a problem with Mrs Roberts but not her daughter, then the answer to this point is that the Tribunal has simply not had the evidence placed before it by any party that would be the basis for such a finding on the balance of probabilities.

95. The claim of constructive unfair dismissal is dismissed.

Mrs Tomlinson

96. Mrs Tomlinson has sufficient service to bring a claim of unfair dismissal. Her most recent employment commenced in May 2020 and her employment terminated in December 2022. On any analysis, she has two years complete service. When the relevant dates were put to the Respondent's representative, this was conceded.

97. For a period between January 2020 and May 2020, Mrs Tomlinson either worked on an ad hoc basis or did not work at all. There were entire weeks when her employment was not governed by a contract of

employment. This would affect the length of any basic award, but for the reasons above, it does not affect her right to bring a claim.

98. The Tribunal finds that whilst Mrs Tomlinson was in a sub-optimal situation due to the disruption in the business, this was not of a nature or level that amounted to a breach of the implied term of trust and confidence.

99. The Tribunal does not conclude that Mrs Tomlinson was put under 'excessive workload pressure'. In evidence, Mrs Tomlinson accepted that any overtime was undertaken voluntarily. Even if there were some staffing shortages, these were not serious enough or sustained enough to amount to a breach of the implied term.

100. Mrs Tomlinson has not proven on the balance of probabilities that she was unsafe at work or that rest breaks had not been provided. This is not to say that things were perfect at work. They were not. This was a business under pressure, with two senior managers leaving and a temporary manager in place. That is naturally unsettling to any employee. Not does it suggest that at all times, every care procedure or process was carried out perfectly. However, the fact that things aren't perfect does not amount to a breach of the implied term. When there are problems in a business, it doesn't follow that every employee is entitled to rely upon the implied term of trust and confidence and resign.

101. Whilst Mrs Tomlinson may have had occasional conversations with her line manager, these were expressions of dissatisfaction, consistent with matters not being as good as they were previously. At no time did Mrs Tomlinson perceive the situation or risks to be sufficiently serious to put the complaints in writing or escalate them to Mr Borkhatria.

102. It has not been proven on the balance of probabilities that a service user was at risk or that matters had reached a level of that was made it impossible to remain in employment. The service was stretched and staff were having to work hard to meet the needs of service users. This was compounded by a lack of good communication from interim management. Had service users been at actual risk, the Tribunal would have expected an experienced care professional such as Mrs Tomlinson to formally raise this, escalating these matters to the regulator.

102. The Tribunal does not treat the absence of a grievance or something akin to a grievance as determinative. However, it does inform the Tribunal in terms of its fact finding exercise as to the level of seriousness of events. Also, it is difficult to see how it can be said that the Respondent is acting in a manner 'calculated or likely' to breach the implied term in these circumstances. This was also occurring over a relatively short period of time. It was not sustained and the seriousness of the situation has to be seen in this context.

103. This also fits with the chronology of how Mrs Tomlinson's case has developed. Her ET 1 is very brief. It alleges a lack of safe working

environment. Her witness statement, whilst proving more information, did at times lack some specific detail. The witness statement is also contradictory of the list of issues when it comes to the last straw relied upon.

104. The last straw relied upon is a failure to provide work breaks on the 10th December and being told to 'just to get on with it.' Given the absence of this from Mrs Tomlinson's witness statement, but also the references in the witness statement to other events being the cause of the resignation, the Tribunal does not find this issue to be proven or contributing to the alleged cumulative breach. The Tribunal has therefore proceeded on the basis that the alleged safety issues were the last straw. Looking at all of these matters cumulatively and for the reasons stated above, the Tribunal does not find that they are sufficient to amount to a breach of the implied term of trust and confidence.

105. The Tribunal does not doubt that Mrs Tomlinson was having a difficult time at work and she was particularly exercised by what she perceived as poor interim management, who were effectively junior to her. She was entitled to look for work elsewhere. The Tribunal does not find that this situation amounted to a constructive dismissal.

104. The Tribunal notes that the case is put on the basis of the implied term of trust and confidence, but for completeness, the outcome would not alter if a different implied term (e.g. safety at work) were relied upon. There was no repudiatory conduct/breach.

105. The claim of constructive unfair dismissal is dismissed.

Employment Judge Anderson

4th December 2023

JUDGMENT SENT TO THE PARTIES ON

4 December 2023

FOR THE TRIBUNAL OFFICE

Notes

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.