Case: 1807605/2023

EMPLOYMENT TRIBUNALS

Claimant: Mrs S Howard

Respondents: Mrs DMW Proudlove

AT A HEARING

Heard at: **Leeds by CVP video conferencing** **On: 29th & 30th May 2024**
Before: **Employment Judge Lancaster**

Representation
Claimant: In person
Respondents: Mr L Fakunle. solicitor

JUDGMENT

1. The Claimant was unfairly dismissed.

2. Remedy is adjourned to a date to be fixed.

REASONS

1. The decision in this case was reserved at the end of the hearing to be given in writing at a later date after time for due deliberation.

2. The claim is for constructive unfair dismissal, the Claimant having resigned by letter dated 1st June 2023 giving notice to expire on 16th June 2023. She did not however work that notice period because she was off sick from 25h May 2023.

3. Under section 95 of the Employment Rights Act 1996:

> ***"Circumstances in which an employee is dismissed.***
>
> (1)For the purposes of this Part an employee is dismissed by his employer 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."

4. It is therefore for the Claimant to show that her employer had committed a fundamental breach of contract prior to 1st June 2023 such that she would have then been entitled to resign without notice, and that she did in fact resign in response to breach.

5. The Claimant, who I find to be a truthful and credible witness, has given evidence, which I accept, that she resigned because the Respondent effectively accused her of fraud and refused to retract that accusation.

6. That oral evidence is entirely consistent with the conclusion of the resignation letter, which reads:

"After over two years of travelling around 32 miles and our agreement that if I continued to work for you upon moving from my original place of employment, my paid hours would include travelling time and something towards the expense of using my own car, you forwarded an email to me stating that these arrangements would no longer be in place and would be removed from the 1st of May (as I didn't receive this email until the 11th of May I believe there should have been some discussion between us about our agreement and plans moving forward)
You have now accused me of being fraudulent and asking you to sign blank timesheets for me to then take home and fill in with hours you haven't agreed or signed. I can swear under oath that this is not the case. You have also said this to other people trying to make me look dishonest which has left me with no trust of your ability to continue being my employer (or friend) going forward.
There are so many other incidents and reasons why I can no longer be an employee of yours and I'm hoping this resignation gives you time to reflect on your major turnover of previous staff."

7. Although the body of the letter also refers to numerous other incidents of conduct on the part of the Respondent, both towards the Claimant herself and involving other members of staff, I am satisfied that this is to be properly regarded as the context in which the Claimant concluded that this last act had, of itself, indeed breached the implied term as to trust and confidence. That is that the employer must not, without reasonable and proper cause, conduct herself in manner calculated or likely to destroy or to seriously undermine the relationship of mutual trust and confidence that ought to exist between employer and employee.

8. I accept the Claimant's evidence that she was told that she knew that she had filled in time sheets with hours that she did not work, that she had given the Respondent blank time sheets to sign and then filled them in later and had then, delivered them to the payroll company herself. I also accept the Claimant's account, though she honestly does not claim to be able to recall the actual words used, that she has had a consistent and firm belief that she was specifically accused of acting "fraudulently" and that "fraud" or some derivative was definitely the language used.

9. The finding that this is what the Respondent in fact said at this time is entirely consistent with the stance that she has taken throughout, which is indeed to have accused the Claimant of falsely filling in her time sheets.

10. That allegation in the circumstances of this case is a fundamental breach of contract, for the reasons set out below. It is, of course, sufficient that a repudiatory breach is only one of the factors relied upon in coming to the decision to resign, even if there are a host of other reasons; see *Abbycars (West Horndon) Ltd v Ford EAT 0472/07*. I repeat, however, my conclusion that this act was indeed the effective cause of the resignation.

11. The Claimant worked for the Respondent, who is disabled, as a personal assistant (PA) or carer from 1st September 2001. That commencement date is conceded in the Respondent's witness statement, and I discount any suggestion to the contrary either in box 4 of the ET3 or in the recently produced document titled "offer of employment" and dated 2009. There is, of course, a presumption of continuity of employment in section 210 (5) of the Employment Rights Act 1996.

12. Initially the Respondent lived in Leeds, and that is where the Claimant worked, caring for her in her own home near to where she herself lived. Then on 13th May 2021 the Respondent moved to live in Ilkley.

13. At this point I am quite satisfied, on the Claimant's evidence that she agreed to continue working for the Respondent only upon the clear understanding that she would be paid for travelling time as well as for her actual shifts worked. That was the same type of arrangement agreed with the other carer who also continued working after the relocation, Heather Watson. She also has given evidence, which I accept, that she would leave home at the same time as when she had worked for the Respondent in Leeds and which was largely dictated by the time when she had to make the school drop, but would be paid in full even though she would not then arrive to start work at the same time, and that she would be allowed to leave early in order to be able to get home on time whilst also still being paid.

14. I further accept the Claimant's evidence, again corroborated by Ms Watson to whom a similar arrangement was offered although never in fact taken up by her, that there was also discussion about reimbursement of her petrol expenses. I prefer the Claimant's evidence that this in the event amounted to only one cheque payment made by the Respondent's late husband of some £30, and not the total £300 alleged by the Respondent herself. The fact that any payment whatsoever for petrol was made supports the conclusion that it was recognised that there would have to be additional remuneration if the Claimant was to continue in employment for the Respondent after the transfer of the place of work.

15. It is clear from the Claimant's time sheets and pay slips that in practice this agreement was usually reflected in her claiming, and being paid, for 8 hour weekday shifts even though the identified requirement for the Respondent's care as financed by the NHS on an assessment of her needs was for 5 hour shifts. The hours claimed did , however, vary on occasions and weekend working hours were always more flexible.

16. The Centre for Intergrated Living (CIL), who managed the payroll for the Respondent, have on the second day of the hearing, now produced from their

records a document which purports to be terms and conditions from about July 2021, that is after the relocation to Ilkley, and which shows the Claimant's working hours as being "12 hours per week from 3rd June 2021". This is a clumsy alteration inserting this in place of an earlier specified 12 ½ hours, which provision was not however deleted, within a statement of terms and conditions purporting to be from a contract commencing in 2009. I attach no credence to this document. That is because, in the circumstances, I have refused an application to postpone to seek further clarification as to haw this document came to be produced, so that there is simply no evidence as to its providence. Furthermore the Claimant denies having ever seen this document before, and it is completely insistent with the hours for which the Claimant was in fact paid unquestioned through CIL, which were considerable more than only 12 per week . Also Alison Payne from CIL, who was called as a witness by the Respondent and who produced this document from their system, has confirmed that CIL have no record of the Claimant ever being contracted only to work 5 hour shifts.

17. As I have said, the Respondent received funding from the NHS to pay for her care needs and this was based upon an assessment of her requirements. That assessment was carried out annually and the total calculated sum was paid in equal monthly instalments into a designated bank account administered on the Respondent's behalf by CIL. (Since the Claimant left employment this has now begun to be wholly managed by CIL, under a different arrangement, but that is not material for present purposes). Under that assessment Victoria Sykes, who is the responsible NHS health case manager called to give evidence by the Respondent, has confirmed that the hours worked by the Claimant, and which were taken in to consideration were only 5 hours per shift. That most recent assessment, carried out in about December 2022 following a reappraisal upon the death of the Respondent's husband, and also a principal carer for her, on 31st October 2022, was conducted without any actual consultation with the Claimant herself.

18. is not, therefore the case that the NHS were ever told by anyone that the Claimant was providing 8 hours care, when she in fact only provided 5, or that they assessed the funding requirement upon the basis of inflated hours stated. Nor did the NHS have any involvement with the submission of time sheets, authorised for payment by the employer, and which went directly to CIL. Nor were the wages paid by CIL directly related to the amount of the care allowance funded by the NHS. Historically there had been significant reserves in the Respondent's bank account funded directly by her. Provided that there were sufficient funds in the administered account at any given time to pay the wages in accordance with the submitted time sheets there would be no issue as to whether or not that was covered by the care allowance, or was coming out of the Respondent's private funds.

19. I am satisfied, therefore, that the Claimant was contractually entitled to be paid for travelling time, as agreed by the Respondent (who, and not the NHS, is of course personally the employer) and her husband at from May 2021. There is nothing to stop the employer entering into such an agreement with their

employee even though the external funding which they are claiming does not therefore cover all the hours paid.

20. I accept the Claimant's evidence that she did not, as alleged, routinely fill in pre-signed blank time sheets and submit them herself to CIL. I am satisfied that the Respondent submitted the collated signed timesheets for her carers by post to CIL, knowing full well that the Claimant was claiming for all the hours shown, even where theses included an element of travelling time. Apart from one occasion, shortly after the death of the Respondent's husband, when the Claimant accepts that she took the timesheets in to CIL's Leeds office in order to assist the Respondent, they were posted. Ms Payne is able to confirm that fact because had they been submitted electronically that would be recorded and it is known therefore that the Respondent's documents were hard copies. Hand-delivered hard copies would be recorded. Although records can only be checked back to the start of 2023 there were in that period no deliveries-by-hand, which means that these hard copies must have come in the post. If they were posted by or on behalf of the Respondent, it necessarily means that they were in her possession in their completed form before being submitted. And, of course, the Respondent has stated to Ms Sykes that she was perfectly well aware of her obligation to check timesheets before signing them There is further corroboration for the conclusion that this this arrangement was in fact wholly transparent in the evidence of Ms Sykes that as at 6th June 2023 another of the Respondent' s PAs, Carole, expressed upset that the Claimant was being paid for travel time, which suggests that she too had known about the agreement.

21. It is unclear how the issue in respect of the Claimant's travel time then arose as it did in May 2023. At some stage CIL had identified a shortfall in the monies in the Respondent' account which meant that there were insufficient funds to meet that month's salaries. That, however, was addressed by a further injection of cash from the Respondent and no inquiries at all were entered into at that stage to identify how this had arisen. There is no suggestion therefore that this was what in fact had resulted from any additionally agreed travel time payments being made to the Claimant. So when Ms Sykes stated in an email to the Respondent on 11th May 2023 that : "I have had a call from Paul from wages, clarifying times on the PA's timesheets", this is not any indication that this issue had in fact been instigated by any concerns raised by CIL. The best evidence suggests, as recorded in Ms Sykes computerised chronological case notes, is that it was in fact the Respondent herself who first raised the matter in a telephone call to Ms Sykes and that she then pursued it on 11th May 2023.

22. It is also unclear to me precisely why Ms Sykes formed the view, which she evidently did, that it was, or was at least potentially "fraud" if the Claimant did not record on her time sheets only the hours actually worked as a PA to the Respondent. As I have observed there is no suggestion that the time spent in actually providing care to the Respondent was ever in fact overstated for the purpose of the annual or any other funding assessment. I must observe that, whilst I acknowledge she has only recently been requested to make a statement in relation to these matters I did not generally find Ms Sykes' recollection of events to be reliable, and she has admittedly transposed incorrect dates into her reproduced computer log which has been put in evidence.

23. What is clear is that at 8,49 on 11th May 2023 Ms Sykes emailed the Respondent in the following terms:

    “Please see below the hours that the PA’s are employed to work over the two-week period, can you please ensure that all PA time sheets are completed with the time of starting the shift and finish time. Dee it is your responsibility as the employer to check and sign all time sheets following completion before submitting to wages. Please note that CHC will only pay for the hours worked in line with your support plan, they will not pay for any travel time.”

    The scheduled hours shown for the Claimant were only 5 hours per shift and not the 8 which she had, by agreement, in fact been putting in for.

24. That original email was not copied in to the Claimant nor any of the other PAs. At 16,42 that same day the Respondent did, however also send a copy from her iPad to her carers. This was the first intimation that the Claimant had that her hours were to be reduced, effectively from 8 to 5 and that she would therefore not, as previously agreed, be reimbursed at all for her additional travel time. The Respondent also then indicated that she would not authorise payments for any additional travelling hours for the whole of the month of May 2023, even where shifts had already been worked on this basis prior to 11th May. This was evidently because, as she passed on to the Claimant, Ms Sykes had told her that it would be a criminal offence if she- the employer - signed the time sheets. The final timesheet dated 1st June 2023 therefore records only 5 hours for all weekday shifts worked in the previous month.

25. On 22nd May 2023 the Claimant raised a grievance raising a complaint both about the substance of the change to her agreed hours and the lack of any notice or consultation in the implementation of that change.

    “I am writing to raise a formal grievance. I have a problem with the way things have been handled regarding the changing of my paid hours that have been in place for over two years. As you are aware our agreement when you moved so far away from my original place of work was that my travelling time and a small petrol allowance would be included within my time sheets and work pattern. I object to receiving a simple email with everyone’s working hours on including agency staff and a comment on that email that staff won’t be paid for travelling time. I received that email on the 11th of May and have now been told that my time sheets must be filled in with my reduced hours from the 1st day of May. I haven’t received a formal notice of any change to my paid hours or any changes to my contract so have not agreed to any changes. You have now stated that you won’t sign my time sheets unless I make the changes to my contracted hours from the first of May leaving me worried about where I stand with a position I have held for over twenty years. I would be grateful if you could let me know how you intend to resolve the matter of these changes without notice.”

    She also emailed Ms Sykes on 23rd May 2023 in the following terms:

    “Could you please put the changes that you wish to make to my contract in writing to myself to give me chance to either agree or disagree to them. So far I have had an email sent to Doreen’s iPad and forwarded on with everyone's

hours on and the statement that travelling time will not be paid. I have now heard from Doreene that you told her it would be a criminal offence if she signs my time sheet with my agreed hours (I have worked those hours for well over two years) so they now form my contract and so I have to agree to changes. The email I received from Doreene was dated the 11th of May so I can't be expected to backdate any changes to my agreed hours"

Ms Sykes was also shown a copy of the actual grievance letter by the Respondent, but on balance this may not have been until 8th June 2023 and not on 25th May 2023 as originally suggested by an error in the transcription of her computerised log.

In any event the grievance was not ever properly addressed by anybody.

26. It was, I find, the actual response to the Claimant's request that she have an answer to her grievance, namely the accusations of fraud made by the Respondent and her refusal to retract those allegations which led to the Claimants' resignation. Because that accusation was persisted in with no recognition that it did not at all reflect the reality of the contractual agreement nor the way in which it had been administered since May 2021, there was no reasonable or proper cause for making it. It is not at all surprising therefore that the Claimant was angry and upset by the allegations against her. I accept her evidence that she asked the Respondent if she realised how serious the accusation was; and said that it was "like saying I had put my hand in her purse". That conduct is self-evidently likely to have destroyed the relationship of trust and confidence, which is of course precisely what happened, leading to the Claimant being unable to continue working.

27. Had this claim simply relied upon the unilateral alteration of the terms of the contract as to hours and pay, it may have been possible for the Respondent to argue that the reason for that breach was in the category of "some other substantial reason" under section 98 (1) (b) of the Employment Rights Act 1996, and so potentially fair. The expressed opinions and the interventions of Ms Sykes coupled with the threats to the Respondent of possible criminal prosecution if she authorised contractual payments for more than 5 hour shifts might have constituted that other substantial reason in these circumstances.

28. That is not, however the reason for the accusations made by the Respondent of fraud against the Claimant in these circumstances where such allegations could not, I find, ever have been objectively justified. This is the Respondent going far beyond her simply telling the Claimant that in the light of the NHS advice, she could no longer continue to pay the Claimant under their existing arrangement. This is therefore an unfair constructive dismissal.

29. The Claimant is therefore entitled to a basic award for unfair dismissal under section 119 of the Employment Rights Act 1996 calculated at the maximum 20 years continuous service up to the effective date of termination (the period from 17th June 2003 to 16th June 2023) and where for 16 of those years she was not below the age of 41. That is 28 weeks pay (16 x 1 ½ and 4 x 1) calculated in accordance with section 224 of the Employment Rights Act 1996.

30. It is not possible to make this calculation now, and it ought to be capable of agreement between the parties. I note, however, that the average hours worked in any week, taken from the time sheets for the last 12 weeks in which the Claimant received remuneration (that is excluding the time she was of sick at the end employment) that is for the weeks beginning 4th March 2023 until 20th May 2023 is 18.75 hours. The total hours worked as recorded on those timesheets (225) is however an incorrect figure, because for the last 4 weeks covered by the time sheet dated 1st June 2023 the daily hours do not reflect the contractual agreement to pay additional travel time. That agreement was certainly still in force up to 11th May 2023, and its unilateral variation by the Respondent after that date was in breach of contract, not consented to by the Claimant and her signing for the reduced hours on 1st June 2023 can only have been under protest because otherwise the Respondent was refusing to pay her at all for that month. The weekly average hours calculated at 18.75 is therefore an understatement. The hourly rate of remuneration as at the calculation date was £13.21, having recently gone up as appears on the 20th May 2023 pay slip. Using the minimum 18.75 hours figure, I therefore work out the basic award as at least £6935.25. I do not understand for the moment how the Claimant has arrived at a claim of £9271.35 using £337.14 as the figure for a week's pay.

31. I shall also award the Claimant compensation for the loss of her statutory employment rights in the sum of £450.00 together with loss of earnings and pension contributions flowing from the dismissal, subject of course to the cap on the total compensatory award equivalent to 52 weeks' pay (section 124 Employment Rights 1996), which I note the Claimant has calculated at £14801.57.

32. If the amount of compensation is not agreed there will have to be further remedy hearing and separate direction are given by way of a Case Management Order.

EMPLOYMENT JUDGE LANCASTER

DATE 13th June 2024

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