



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 8000156/2024

**Held in Glasgow on 25 and 27 June 2024
Deliberations 28 June 2024**

10

**Employment Judge D Hoey
Members N Quinn & A Matheson**

Ms S Shaw

**Claimant
In Person**

15

Greater Glasgow Health Board

**Respondent
Represented by
Ms K Henderson -
Solicitor**

20

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that:

30

1. The claimant was not dismissed as she resigned and accordingly her complaint of unfair constructive dismissal is dismissed.
2. The claimant's complaint that the respondent breached sections 20 and 21 of the Equality Act 2010 was withdrawn at the Hearing and is dismissed.
3. The claim is accordingly dismissed.

REASONS

1. The claimant raised a claim for unfair constructive dismissal and for breach of the duty to make reasonable adjustments. The respondent disputed the claims.
2. At a case management preliminary hearing, matters had been focussed and it was agreed a full hearing would be convened. The full hearing took place in person with submissions being delivered remotely and in writing.
3. The hearing began by a reminder of the overriding objective and the need for both parties to work together to assist the Tribunal in ensuring that everything that was done was fair and just with due regard to cost and proportionality. The rules as to taking of evidence and as to how the Tribunal reaches its decision were explained. The claimant was given time to consider the issues and questions arising and to prepare her submissions and to respond to the respondent's submissions.
4. The submissions were heard remotely over CVP. The parties had been given time to consider their position and exchange their written submissions which had been done. Both parties confirmed they had considered each other's submissions. While the claimant had been unable to connect via video, the claimant was able to attend the submissions stage via telephone. Both parties were content to proceed in that manner and the parties were able to fully participate in the Hearing.

Case management

5. The parties had worked together to focus the issues in this case and that continued as the case developed. The parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality. The case was able to conclude within the allocated time with the parties using one of the days to focus the issues and facts agreed and in dispute.

Issues to be determined

6. The issues to be determined were discussed in detail and focussed by the parties. At the submissions stage, the claimant had conceded that there was

no merit in her complaint in relation to section 20 (the alleged failure to make reasonable adjustments), as (amongst other things) the claimant had accepted that the taking of the step in question would not have removed the disadvantage (because the claimant would not have found alternative employment). The claimant advised the Tribunal that her sole focus was in relation to the constructive dismissal complaint. That complaint had been set out at the preliminary hearing and the issues to be determined were as follows:

5

10

15

20

25

- (1) Was the claimant dismissed? The claimant's case is that she waited weeks and weeks for a response and the claimant did not get the redeployment form which the occupational health adviser had suggested be issued. The claimant argued the respondent breached the claimant's contract by virtue of the delay in progressing matters and the failure to issue the redeployment form.
- (2) Did that breach the implied term of trust and confidence? The Tribunal will need to decide whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and whether it had reasonable and proper cause for doing so.
- (3) Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.
- (4) Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.
- (5) If the claimant was dismissed, it is accepted that the dismissal was unfair and there were a number of issues as to remedy set out.

Evidence

30

7. The parties had produced a joint bundle of 128 pages. The Tribunal heard from the claimant and her then line manager each of who gave oral evidence

and were asked appropriate questions. The Employment Judge assisted the claimant by asking questions and allowing the claimant to rely upon her written notes.

Facts

- 5 8. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are strictly necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict
10 was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case with regard to what was written and said at the time (when viewed in context). The Tribunal is grateful to the parties for focussing the issues and agreeing key facts and making it clear what the disputed position was in relation to such facts.

15 Background

9. The respondent is a health board. The claimant was employed by the respondent as a Band 2, Health Care Support Worker. She commenced her employment in 1995.
10. The claimant worked in a general surgical ward at the Queen Elizabeth
20 University Hospital and stayed in Dumbarton. She worked 12 hour night shifts. Her weekly shift was 34.65 hours.
11. The claimant commenced a period of long term absence from the respondent on 22 December 2020, initially due to Covid and latterly due to Long Covid.
12. It was accepted that the claimant had a disability, namely Long Covid, at the
25 material time, being 25 July 2023 – 31 August 2022 and that the respondent had knowledge of the disability at the material time.

Short period of a return to work

13. The claimant had returned to work for a short period, in December 2022, on a supernumerary basis. While the claimant believed there had been an

agreement with Mr Clark this continue, it was not possible for the claimant do so. She was unable to carry out the full duties required of her role due to her disability. It was not possible for the claimant to carry out the role for which she was contracted in anything other than the contracted basis. The claimant was not accordingly able to return to her contracted role.

Absence management

14. Between March 2021 and March 2023 the claimant's absence was managed by Ms Johnstone, Senior Charge Nurse. From March 2023 onwards Mr Clark, Lead Nurse took over management of the claimant's absence.

15. On 3 March 2023 an attendance management meeting was conducted via conference call attended by the claimant, her Union representative, Mr Clark and Ms Miller, HR Assistant.

16. The outcome letter noted that the claimant had indicated her health position had not changed. It was agreed that a face to face occupational health meeting would be arranged to assess the claimant.

17. A further absence management meeting had been arranged for May 2023 but due to a diary clash Mr Clark did not attend this meeting. He was in fact on annual leave at the time. On 31 May 2023 Mr Clark emailed the claimant to apologise for this saying that there had been a mix up with his annual leave and that an occupational health appointment had been arranged. He suggested a meeting take place on 25 July 2023 which should be able to discuss the report. The claimant had been given Mr Clark's office number if she needed it.

Occupational health report

18. On 14 July 2023 the claimant attended an appointment with Occupational Health. The report was dated 14 July 2023 and advised that:

- a. the claimant was not fit to resume to her substantive post as a nursing assistant at the location and was unlikely to resume to that post in the foreseeable future.

- b. there were no adjustments or restrictions which would facilitate a return to the claimant's substantive post as a nursing assistant at the QEUH.
 - c. redeployment should be considered and advised that any role should be closer to the claimant's home in Dunbartonshire as she had trouble travelling.
 - d. the claimant would not be able to work a 12 hour shift pattern and should be considered for a role with a 7.5 hour working day e.g. patient work, clinic work, day hospital etc.
- 10 19. The claimant was aware that this may limit her redeployment options but agreed the adjustments were required for any future roles.
20. The clinician had some concerns around how the claimant would cope on resuming work and any role considered should be on a trial basis initially.

Absence meeting – 25 July 2023

- 15 21. On 25 July 2023 a long term absence meeting was conducted via conference call attended by with Mr Clark, the claimant, her union representative and HR.
22. The Occupational Health report was discussed and it was agreed that redeployment would be explored. The claimant confirmed that she was in agreement with the advice and advised that a reduction in hours to between 20 18 to 25 hours would be more manageable.
23. Ms Miller from HR sent the redeployment form to Mr Clark to complete on 25 July 2023. Mr Clark was on sick leave from 23 July 2023 until 15 August 2023, having suffered a stroke. Despite having felt unwell on 25 July 2023, Mr Clark wished to progress matters for the claimant and attended the attendance management meeting (which was a remote meeting). He was able to conduct 25 the meeting but required to seek medical input thereafter. He did not see the redeployment form that had been sent to him as he was absent from work when it was sent. While he was able to attend to some duties while absent

from work, the other matters arising were more pressing and the redeployment form was not completed at this time.

24. Mr Clark returned to work on 15 August 2023 on a phased basis. During that time he had to catch up with over 2000 emails whilst continue to manage patient safety and patient care and attend to the professional and managerial needs of his staff. He had not been able to read the email that had been sent to him nor progress the claimant's redeployment form.
25. On 17 August 2023 Ms Johnstone emailed Mr Clark to advise that she had received a reference request for a job out with the NHS for the claimant.
26. Mr Clark was on annual leave from 28 August to 5 September 2023. Given his absence and the pressure of business, Mr Clark had been unable to check all his emails. He had over 2000 emails awaiting his attention and had to focus on patient care which was critical.
27. On 29 August 2023 the claimant's trade union representative emailed Ms Johnstone and Ms Miller asking that the redeployment form be sorted urgently for the claimant in Mr Clark's absence. It was noted that the form had not been issued. Ms Johnstone replied on 29 August 2023 noting that Mr Clark was absent. She offered to help if there was something she could do in Mr Clark's absence. Ms Johnstone said she was around all day if they required her to attend to anything. That email was not followed up by the claimant nor her trade union representative.
28. The claimant resigned before Mr Clark had returned to work and before he was able to progress matters.

Redeployment process

29. Once a redeployment form is completed it is then sent to the redeployment team, and the person would be added to the redeployment register for any available vacancies. All redeployment posts are offered on an initial trial period.

30. The issuing of the redeployment form was the first step in the process of identifying potential redeployment opportunities and starts the process. The worker who is seeking redeployment remains in post until the process has been initiated and completed.

5 31. Once on the redeployment register, if any Band 2 roles were identified which met her requirements the claimant would be matched to the role and arrangements would be made for the claimant to discuss the role with the recruiting manager, and if everyone was in agreement, thereafter trial the role for up to 12 weeks.

10 **Reference request**

32. The claimant had looked for other work closer to her home. On 15 June 2023 the claimant applied for a role with West Dunbartonshire Council.

15 33. On 18 July 2023 the claimant emailed Ms Johnston in relation to a job reference she was seeking in relation to a post she had applied for with West Dunbartonshire Council.

34. On 20 July 2023, Ms Johnstone emailed the claimant to advise that she had not yet received the reference request, thanking her for informing her of her intentions to apply for other employment, and advising that she had informed Mr Clark of this who was on leave that week.

20 **No redeployment roles**

35. There were no suitable redeployment opportunities available for the claimant, with reduced shift length, closer to where the claimant stayed (and with reduced hours, as requested) between 26 July 2023 and 26 January 2024.

Resignation

25 36. On 31 August 2023 the claimant emailed to Ms Johnstone and advised that she wished to resign from that date with a 4 week notice period. She said in her letter another email had been sent to the general manager. The email the claimant had sent to the general manager was headed "Grievance" and set

out her concerns. She had been unhappy that the redeployment form had not been sent to her.

37. On 8 September 2023 Mr Clark wrote to the claimant acknowledging her resignation and advising that her employment would be terminated with effect from 4 December 2023 to allow the claimant to receive the accrued holiday pay due to her.

38. The claimant's complaint was considered and a response sent to her. The claimant commenced other employment.

Observations on the evidence

39. The Tribunal found each of the witnesses generally to be credible.

40. The **claimant** genuinely believed that Mr Clark had intentionally delayed the issuing of the redeployment form. Unfortunately the claimant had not chased the matter or asked what was happening until her union representative sent an email on 29 August 2023. She was told that Mr Clark was absent and was asked what was required. Sadly that was not followed up. The claimant was not aware of the health issues Mr Clark had but it was clear that the health issues Mr Clark had an impact upon this ability reasonably to progress the issuing of the form. Mr Clark was responsible for a busy area of the hospital, including patient safety, and his absence impacted upon his ability to respond timeously to emails. His absence had resulted in a large backlog of emails and he had not been able to progress the emails he had received prior to the claimant's resignation. No attempt had been made by the claimant to speak with him (or his assistant) even although the claimant had been given his office telephone number.

41. The Tribunal did not accept the claimant's assertion that she believed Mr Clark to be a bully or in some way difficult to work with which was why she had not raised matters with him or his office. There was no evidence to support that assertion and the evidence before the Tribunal entirely supported the position set out by Mr Clark, which was that he had sought to support the claimant and act reasonably to facilitate her return to work.

42. The Tribunal found **Mr Clark** to be credible, reliable and clear. While the claimant challenged Mr Clark, he was consistent in his approach. Mr Clark had done his best to support the claimant during what were challenging times for him. Mr Clark had assisted the claimant and done his best to support her.

5 The Tribunal did not doubt that Mr Clark had medical issues which clearly materially impacted upon his ability to keep up to date with his emails, particularly given the requirement to place priority on patient care. While the claimant argued Mr Clark ought to have found time to progress her request, perhaps by at least contacting Ms Johnstone, it was clear that Mr Clark had

10 done his best given the pressures he faced to deal with his workload in a proportionate way. Mr Clark had met with the claimant for the attendance management meeting despite being ill. He had done so in an attempt to assist the claimant, which demonstrated that Mr Clark was in fact seeing to assist the claimant and bore no resentment to her. The claimant suggested that his

15 ability to conduct that meeting showed that he should have progressed the issuing of the form, but in reality Mr Clark had been unable to do so due to the medical issues arising. Mr Clark acted entirely reasonably and had sought to be supportive of the claimant.

43. The claimant had put to Mr Clark that he had been negative towards her in

20 the past, with regard to promoted roles, but Mr Clark had noted that was a matter that affected all individuals within post and that he had made a management decision, which was his job. The Tribunal was satisfied Mr Clark had tried to support the claimant and seek to facilitate her return to work. For example, he noted that the absence policy had changed which could have

25 resulted in the disciplinary policy becoming applicable, but he was keen to continue to support the claimant in the way he had done, in a conciliatory way to seek to procure her return to work.

44. Mr Clark had not been able to attend the May attendance management meeting but that was due to a genuine administrative error for which Mr Clark

30 apologised. He had also given the claimant his telephone number which she could have used to speak with him (or his personal assistant) had she wished matters progressed urgently. Mr Clark would have ensured matters had

progressed had he been made aware of the matter (even although he had been working on other more pressing matters at the time)

45. With regard to **material disputes in fact**, the Tribunal did not accept the claimant's assertion that Mr Clark had reneged on an agreement that the claimant be able to work on a supernumerary basis in December 2022. While the claimant had returned to work for a short while on a supernumerary basis in December, the respondent required the claimant to carry out her duties. It was not possible to carry out her duties on anything other than the basis upon which she had been contracted. The claimant was unable to do so. Other than the claimant's belief that an agreement had been reached, there was no other evidence in support of that position. The Tribunal considered that it was more likely than not that there was no agreement to allow the claimant to continue to work on a supernumerary basis indefinitely. It was clear the role the claimant carried out required to be done on the basis upon which the claimant had contracted for the role. She was unable to do so.

46. The key dispute in this case was whether Mr Clark had deliberately withheld the redeployment form since it was that act which the claimant principally relied upon to show that the respondent had materially breached her contract. While that was the claimant's belief, she had, in fact, no factual basis to support that belief. She genuinely believed that to be the case, but regrettably no further attempts had been made to chase the matter. Mr Clark was clear, and the Tribunal accepted his evidence, that had he been asked about the matter, he would have sent the form to the claimant. Given the context, the situation was entirely understandable. Mr Clark had been under significant work related pressures and patient safety was of paramount importance. He had significant health issues which he was managing. His absence from work had resulted in him not being able to read each of the emails that had been sent to him. He had been unable to progress the matter. His actions were entirely reasonable.

30 **Law**

Constructive dismissal

47. It is for the claimant to satisfy the Tribunal that she was constructively dismissed for the purposes of section 95(1)(c) of the Employment Rights Act 1996. Otherwise, the legal effect is that her employment terminated by a resignation which is not to be treated as a dismissal.

5 48. The claimant must prove that the respondent was in repudiatory breach of her contract of employment. That entails proving 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” (**Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221). The
10 Court of Appeal expressly rejected the argument that the predecessor provisions of section 95(1)(c) introduced a concept of reasonable behaviour into the contract of employment. An employee is not able to resign and claim constructive dismissal merely because their employer has behaved unreasonably.

15 *The implied term of trust and confidence*

49. The claimant relies on a breach of the implied term of trust and confidence. It is uncontroversial that the following fundamental term is implied into every contract of employment. It is a fundamental breach of contract for either party, without reasonable and proper cause, to conduct itself in a manner ‘calculated
20 or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee’ (**Courtaulds Northern Textiles Ltd v Andrew** [1979] IRLR 84, **Malik v BCCI** [1997] ICR 606).

50. Not every breach of a statutory right will amount to a breach of the implied term of trust and confidence (see **Doherty v British Midland Airways Ltd**
25 [2006] IRLR 90) and the facts should be considered as a whole in assessing whether or not the conduct individually or cumulatively meets the test.

51. If the claimant establishes a repudiatory breach of contract then she must also demonstrate that the breach caused her to resign and that she did not delay too long before resigning, thereby affirming the contract and losing the right
30 to claim constructive dismissal.

52. Where there is more than one reason for an employee's resignation then it is not necessary for the employee to prove that the repudiatory breach of contract was the sole, predominant, principal, major or main cause of the resignation. The crucial question is whether the repudiatory breach "played a part in the resignation" (**Wright v North Ayrshire Council** [2014] ICR 77).
5 The repudiatory breach need only be one of the factors relied on when resigning.

Submissions

53. Both parties provided detailed submissions which were supplemented by oral
10 submissions (and reference to each other's submissions), which were fully taken into account.

Decision and discussion

54. The Tribunal spent a considerable period of time considering the evidence that had been led and the submissions made by both parties which were fully
15 taken into account. Having considered the evidence led, the Tribunal was able to reach a unanimous view.

The claimant's case

55. The claimant's case is that she waited 5 weeks for a response and the claimant did not get the redeployment form. The claimant argued the
20 respondent breached the claimant's contract by virtue of the delay in progressing matters and the failure to issue the redeployment form.

56. At the preliminary hearing the claimant had said that her case was based solely upon the delayed return of the redeployment form. However, in the course of the claimant's submissions she argued that this was the last straw
25 as she believed there had been a number of matters which taken together led her to resign, the failure to send her the form being the last straw.

57. The Tribunal considered the claimant's case as she had set out during the submissions.

58. The claimant believed that there had been a number of factors that had shown Mr Clark to be unfavourably disposed towards her and that he had deliberately not sent her the redeployment form, to cause her harm, which was the last straw for her.

5 **Tribunal finds no breach of trust and confidence – individually or cumulatively**

59. The Tribunal was unanimous in the view that there was no breach of the implied term of trust and confidence at all from the evidence. While the claimant genuinely believed Mr Clark to have some animosity towards her, in reality Mr Clark, as the claimant's line manager had made some difficult decisions. One such decision was in relation to promoted role. There was no evidence Mr Clark had acted in any way other than in a professional manner. In fact the evidence before the Tribunal showed that Mr Clark had acted in a way that was supportive of the claimant and had sought to help her. The claimant was unable to view his actions in such a way due to her belief that Mr Clark was not acting in her interests. That was not the reality of the situation.

60. The claimant was unhappy that she believed Mr Clark had agreed the claimant would return to work on a supernumerary basis and he then required her to work a full shift. She believed he had broken the agreement that she believed had been reached. The Tribunal did not consider that to be the position. While there had been agreement the claimant could return to work, it was clear she was unable to return to the role for which she had been engaged and the role she had been carrying out required full time work and a full shift. There was no written evidence of any agreement that the claimant could work on such a basis indefinitely. Mr Clark had no knowledge of the position given the time that had passed. It was more likely than not the agreement was that the claimant would do so tasks for a short period with a view to returning to her contracted role, which was what the respondent required.

61. There was no evidence that supported the claimant's assertion that she was treated unreasonably or unfairly. While the claimant did not like having to work

her full shift, and she was medically unfit to do so, that was what her contract had required. A short return on a supernumerary basis had not altered the position.

5 62. The claimant was also unhappy that Mr Clark had not attended the attendance management meeting that had been scheduled for May. That was due to an error as Mr Clark was in fact on holiday and his diary had not been updated. Mr Clark apologised for the mix up and made it clear that he wanted to assist the claimant. He had given the claimant his office number and arranged for a face to face occupational health report which could be discussed at the meeting he fixed for July. That was a common sense and fair way to deal with matters since the occupational health report would inform how matters progressed.

15 63. There was nothing from the evidence which supported the assertion that Mr Clark had animosity towards the claimant and had acted in any way unfairly or unreasonably towards her. Mr Clark supported the claimant and had tried to assist her return to work. The claimant's belief that Mr Clark had acted negatively towards her was misplaced and not substantiated on the evidence. It was notable, for example, that at no point had the claimant (or her trade union representative) raised any concerns about Mr Clark or how she had been treated. The evidence clearly supported the position as advanced by Mr Clark, which the Tribunal had no hesitation in accepting.

20 64. Mr Clark's failure to send her the redeployment form following the meeting on 25 July 2023, and prior to 31 August 2023, did not breach the implied duty of trust and confidence either as an individual act or as a final straw following the course of conduct on which the claimant relied.

25 65. Prior to this incident, the Tribunal was satisfied that Mr Clark had supported the claimant. While the claimant was unhappy with a number of work related issues, there were no issues that had been raised formally or issues about which Mr Clark knew. He had believed there was a good professional working relationship and he had tried to be supportive. That was the reality. The

30

claimant may have been unhappy as to certain management decisions, but Mr Clark had acted fairly and reasonably towards her.

5 66. The Tribunal does not accept the claimant's argument that Mr Clark deliberately withheld the redeployment form from her. The Tribunal did not accept that it was unreasonable for Mr Clark not to have either asked someone else to progress the form or for him to have dealt with it in the period he was actually working in this period. Mr Clark tried fairly to focus on key priorities at the time. Mr Clark had a large number of emails to work through whilst seeking to prioritise patient care and patient safety and manage those that reported to him. He did his best. His actions towards the claimant, viewed objectively, in no way seriously damaged or destroyed the trust and confidence of the employment relationship.

10 67. The claimant chose to end her employment. It was open to the claimant to have chased the form by speaking with Mr Clark or by raising the issue with his office. It was also open to the claimant to have involved her trade union in seeking to pursue matters further. Mr Clark had been unable to send the redeployment form to the claimant as quickly as he (and the claimant) would have liked. In reality the claimant was not prejudiced since there were no vacancies at the time and the claimant's employment was continuing. While the claimant (and Mr Clark) would have wished that matters had progressed more expeditiously, on the facts, there was no breach of contract.

The claimant was not dismissed; she resigned

15 68. From the facts presented to the Tribunal, the claimant resigned and was not dismissed. There was no act of the respondent taken individually or cumulatively which could amount to a breach of contract. The claim is not well founded.

Other issues

20 69. During submissions the claimant candidly accepted that the return of her redeployment form would not have facilitated a return to work since it was accepted there were no suitable vacancies at the time (and continued to be

30

no vacancies for a 6 month period). The completion of the redeployment form would not have avoided the substantial disadvantage to which the claimant was subject since there were no steps at the time the respondent could take and the delay in completing the form was not unreasonable given the context.
5 The claimant's employment would have continued irrespective of the failure to send the form sooner.

70. On that basis, the claimant withdrew the discrimination complaint and wished to focus upon her constructive dismissal complaint, arguing that the failure to return her form, together with the prior actions of Mr Calrk, entitled her to resign. The concession the claimant made was entirely fair and reasonable
10 since the evidence had shown that the respondent had taken reasonable steps at the time to remove the disadvantage relied upon.

71. The Tribunal noted that the discrimination claim had been lodged over 70 days late and had it been necessary to do so, from the evidence, the Tribunal
15 would have upheld the respondent's submission for the reasons given and would not have found the claim to have been lodged in such period as was just and equitable.

Claims dismissed

72. The claim is accordingly dismissed.
20

Employment Judge: D Hoey
Date of Judgment: 28 June 2024
Entered in register: 01 July 2024
and copied to parties