

THE INDUSTRIAL TRIBUNALS

CASE REF: 18386/21

CLAIMANT: Patricia McGregor

RESPONDENT: Wood Green Management Limited

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claim of unfair dismissal is dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge: Employment Judge Sturgeon

Members: Mr R McKnight
Mr B Heaney

APPEARANCES:

The claimant represented herself.

The respondent was represented by Ms Clare Louise Mooney of Copacetic Business Solutions.

THE CLAIM

1. The claimant claimed that she was unfairly constructively dismissed by the respondent company. The claimant alleged that the breach of contract/last straw incident related to a meeting the claimant had with Keith Smith, Group HR Manager, and Mark Donnelly, a director of the company, when she understood that she was being accused of fraud for failure to clock in according to company policy. The respondent denied that the claimant was unfairly constructively dismissed. The respondent asserted that the claimant was the subject of an ongoing investigation and, following a preliminary investigation, had been invited to a disciplinary hearing. The respondent denied that this meeting was a breach of the claimant's contract.

ISSUES

2. The issues for the tribunal were as follows:-
 - i. Was there a fundamental breach of the claimant's contract of employment which warranted the resignation of the claimant?

- ii. Did the claimant leave in response to the breach or did she delay in resigning?

PROCEDURE AND SOURCES OF EVIDENCE

3. This case had been case managed and detailed directions had been given in relation to the interlocutory procedure and the witness statement procedure.
4. Each witness swore or affirmed and then adapted their previously exchanged witness statement as their entire evidence in-chief before moving on to cross-examination and brief re-examination.
5. At the substantive hearing, the claimant gave evidence on her own behalf.
6. On behalf of the respondents, the tribunal heard evidence from Mark Donnelly, Kathy McCrossan and Natasha Meek.
7. The tribunal also received a bundle of documents containing the claimant's witness statement, all of the respondent's witness statements, all pleadings in the case and all discovery exchanged between the parties.
8. The tribunal heard evidence on Tuesday 5 October 2021. Oral submissions were also heard on the afternoon of Tuesday 5 October 2021. The panel met immediately thereafter to reach a decision. This document is the decision.

STATEMENT OF RELEVANT LAW

Constructive Dismissal

9. By Article 127(1)(c) of the Employment Rights (Northern Ireland) Order 1996 ("the Order"), a resignation by an employee can, in defined circumstances, constitute a dismissal by the employer. This is generally known as constructive dismissal. Article 127(1)(c) of the Order states as follows:-

"(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."

10. Harvey on Industrial Relations and Employment Law ("Harvey") at Div DI 3 para 403 states as follows:-

"In order for the employee to be able to claim constructive dismissal, four conditions must be met:

1. *There must be a breach of contract with the employer. This may be either an actual breach or an anticipatory breach – see **Western Excavating (ECC) Ltd v Sharp 1978 IRLR 27.***
2. *That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify*

his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law.

3. *He must leave in response to the breach and not for some other unconnected reason.*
 4. *He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract."*
11. Under the "last straw" principle, an employee can be justified in resigning following a relatively minor incident if it is the last in a series of acts, one or more of which amounted to a breach of contract, and cumulatively the acts amounted to a sufficiently serious breach of contract to warrant resignation amounting to dismissal.
 12. There is also an implied term in the employment contract that the employer will not conduct itself in a manner likely to damage the relationship of trust and confidence between the employer and the employee. This is generally known as the implied duty of trust and confidence. If the employer breaches that term, it can amount to a repudiation of the contract – see **Woods v WM Car Services (Peterborough) Ltd 1983 IRLR 413 & Malik v BCCI HL 1997 IRLR 462.**
 13. In the case of **Fyfe & McGrouther Ltd v Byrne 19777 IRLR 29,** the EAT held that there was a breach of the implied duty of trust and confidence and that the employee had been constructively dismissed where the employer "*had indicated in the clearest terms that they no longer had any confidence in him or his honesty and it is not unreasonable that he should consider that by adopting this attitude in a situation for which he was not responsible they had destroyed any basis of confidence that could ever exist between them and him in the future*". This principle was applied by the EAT once again in the case of **Robinson v Crompton Parkinson Ltd 1978 IRLR 61** in a case where the employer had made an unjustified accusation of theft against the employee. The EAT held in the **Robinson** case that the implied duty of trust and confidence had been breached and the employee had been constructively dismissed.
 14. A breach of the implied duty of trust and confidence always amounts to a fundamental breach of contract and will entitle the employee to resign in response to that breach – **Morrow v Safeway Stores plc 2002 IRLR 9.**

THE RELEVANT FINDINGS OF FACT

15. Having considered the evidence given by all witnesses and the content of the relevant documents referred to by the parties, along with the submissions of counsel for both parties, the tribunal found the following relevant facts proven on the balance of probabilities. This judgment records only those findings of fact necessary for determination of the issues.
16. Wood Green Care Home is a Care Centre, based in Newtownabbey, which provides care for people with residential and nursing needs living with dementia.
17. The claimant commenced employment with the respondent, as an activities assistant, in May 2019.

18. It was common case between the parties that, in November 2020, the claimant's son's resigned from employment with the respondent. Precise details of that termination were not disclosed to the tribunal.
19. Over the course of the weekend of 27, 28 and 29 November 2020, reports were made to Mark Donnelly, a director with the respondent company, from several concerned staff members. These reports implied to Mark Donnelly that the claimant was telling both staff and patients, within the home, that it was the intention of the claimant to close the home down, that the respondent's treatment of the claimant's son was unacceptable and that the claimant was giving certain family members preferential treatment in relation to visiting slots during the Covid lockdown.
20. It was Mark Donnelly's view that these comments had the potential to unsettle staff and patients, within the home, and he felt that the comments merited further investigation.
21. Accordingly, by letter of 30 November 2020, the claimant was suspended from her employment. The claimant was informed that the purpose of this suspension, on full pay, was for the respondent to conduct an investigation *"into allegations of inappropriate behaviour on your part and the potential implications for our business"*.
22. The claimant was told, within this letter, that *"if proven, these incidents could represent gross misconduct and may result in a serious disciplinary outcome including the termination of your employment"*.
23. The claimant was further informed, within the letter, not to attend her place of work other than for attending a disciplinary or further investigatory hearing. The claimant was also informed that this period of suspension *"should be considered as a neutral act to allow the business to conduct a full and thorough investigation and to avoid embarrassment for those involved in this process including you"*.
24. After the claimant's suspension, Mark Donnelly also became aware of potential discrepancies in relation to the claimant's clocking in and clocking out of work. He noticed that there were variances in that she was paid for hours that she may not have worked. He also became aware of her potentially working shift patterns that had not been approved by her manager.
25. Accordingly, the claimant was invited for a preliminary investigation meeting at the premises of the respondent company, on 15 December 2020.
26. In attendance at this preliminary investigation meeting was the claimant, Keith Smith, the group HR manager at the time, and Mr Mark Donnelly, Director. Mark Donnelly was there in a note taking capacity.
27. As a result of the investigation meeting, the respondent concluded that there was a case to answer in respect of the allegations raised.
28. By letter and email of 16 December 2020, the claimant was invited, by Keith Smith, to a disciplinary hearing on Friday 18 December 2020 at 9.00 am.
29. By email, also of 16 December 2020, the claimant informed Keith Smith that she

could not attend on that date as she had a family funeral to attend. The claimant's son's father-in-law, who was a resident of the home, had sadly passed away.

30. Keith Smith responded to the claimant indicating to her that the panel could make themselves available on Thursday, 17 December 2020 instead as opposed to Friday 18 December 2020.
31. The claimant replied to Keith Smith's email indicating that a meeting the following day was too short notice for her to arrange a union representative and therefore she could not agree a time on 17 December 2020.
32. Keith Smith emailed the claimant again on the afternoon of 17 December 2020 asking if she was available on Monday 21 December 2020 to attend a disciplinary meeting.
33. The claimant replied to this email indicating that she wished to give notice of her resignation and she also commented that it was a "*foregone conclusion what the outcome is*".

CONCLUSIONS

34. The tribunal applied the relevant principles of law to the findings of fact, set out above, in order to reach the following conclusions:-
35. The question for this tribunal was whether or not the respondent breached the claimant's contract of employment and, if so, was that breach sufficiently serious to justify the claimant resigning.
36. Looking at the first element, the tribunal must assess whether or not the respondent breached the claimant's contract of employment by suspending the claimant and inviting her to an investigatory meeting, and subsequently a disciplinary meeting, in relation to the allegations which had been made against her. This tribunal finds that it was not a breach of the claimant's contract to invite her to an investigatory meeting and a subsequent disciplinary meeting.
37. The panel's reasons for so reaching this conclusion are as follows:-
 - i. The respondent is a care home which cares for elderly patients and those with dementia.
 - ii. Mark Donnelly, Director, had been contacted by a number of staff, over the weekend of 27, 28 and 29 November, as those staff had concerns and were unsettled by comments allegedly made by the claimant (see paragraph 20 above).
 - iii. It was Mark Donnelly's opinion that there was a general feeling of unsettlement across all the staff in the home.
 - iv. Given the delicate environment of a care home, in which elderly patients must feel secure and comfortable, Mark Donnelly took a prudent decision to suspend the claimant in order to investigate the comments further.
 - v. Also, given that another lockdown was potentially looming at this time, the

tribunal considers that this was a reasonable action for Mark Donnelly to take in the circumstances.

- vi. It was made clear to the claimant, in her suspension letter, that the course of action did not represent a disciplinary outcome but rather it was a neutral act.
 - vii. The tribunal further considers that it would have been careless of Mark Donnelly not to investigate these allegations further.
 - viii. The tribunal also concludes that it was in line with the respondent's disciplinary policy, at section 2.1, that suspension was an appropriate step to take, *"in potentially serious cases of alleged misconduct where there is a potential risk to colleagues, service users or to the business"*.
38. Throughout the course of the hearing, the tribunal noted that the claimant made a number of criticisms regarding the disciplinary procedure. The tribunal was obliged to consider whether these criticisms, if well founded, were also capable of breaching the claimant's contract of employment.
39. Firstly, the claimant criticised the length of time which the respondent took to carry out its investigation. This amounted to 14 days during which time the claimant indicated that she suffered a great deal of stress. Given that care homes were facing particularly unprecedented challenging times, in 2020, with the Covid-19 outbreak, the tribunal makes no criticism of this length of time. That said, the tribunal would have expected the respondent to have been more proactive in reassuring the claimant that the investigation was still in the process of being completed. This may have helped to alleviate any anxiety which the claimant was naturally feeling at this time.
40. The claimant further criticised the disciplinary procedure used by the respondent as she commented, in her witness statement, that she was not supplied with any minutes of the suspension meeting. No minutes of this meeting were presented to the tribunal at the hearing. While the tribunal would have expected to see a copy of these minutes within the tribunal bundle, the tribunal does not regard the absence of these minutes as being sufficient for the claimant to resign and claim constructive dismissal.
41. The claimant made a further criticism of the disciplinary procedure in that she stated that Mark Donnelly carried out the investigation, the investigation meeting and that he was due to carry out the disciplinary hearing also. The minutes of the investigation meeting confirmed Keith Smith conducted the investigation meeting with Mark Donnelly as the note taker. It would also appear that both of these individuals were to carry out the disciplinary meeting. The Labour Relations Agency Code of Practice dictates that a disciplinary hearing should be conducted by someone other than the person who investigated the allegations. While the tribunal considers that it was not in line with the best practice, it does not consider that it merits a fundamental breach of the claimant's contract forcing her to resign.
42. The tribunal considers that the timing of the respondent's letter to the claimant, inviting her to a disciplinary hearing, could have been more tactful in the circumstances. As the claimant was due to attend her son's father-in-law's funeral on Friday 18 December 2020, at the very least, the tribunal would have expected the respondent to be more sympathetic to the claimant and not expected her to attend a disciplinary meeting the day before a funeral particularly so given that the

claimant's son's father-in-law was a resident of the care home.

43. Finally, the tribunal also noted that the claimant was not given 48 hours' notice of the disciplinary meeting – she was initially sent an invite letter on the afternoon of 16 December and was expected to attend at 9am on 18 December. This was less than the required 48 hours' notice under the respondent's policy.
44. The tribunal concludes that each of the actions of the respondent, set out at paragraphs 37 to 44 above, were not each sufficiently serious on their own to merit the claimant resigning and claiming constructive dismissal. This tribunal must also consider whether or not the actions, when considered cumulatively, merited the claimant resigning and claiming constructive dismissal. This is a finely balanced exercise and criticism can certainly be made of the respondent for failure to provide the claimant with minutes of the suspension meeting, for failing to give the claimant 48 hours' notice of her disciplinary meeting and for intending to have the same people conduct the disciplinary hearing as those who had carried out the investigatory hearing. However, the tribunal does not consider these shortcomings of the respondent, when viewed cumulatively, as enough to either warrant the claimant resigning and claiming constructive dismissal nor does the tribunal believe that they amount to a breach of the implied term of trust and confidence. The tribunal notes that these were all procedural flaws none of which were brought to the attention of the respondent, by the claimant, at the actual time of happening nor were they cited by the claimant, in her resignation letter, as the reason for her resignation.
45. For all of the reasons set out above, the tribunal concludes that the claimant was not constructively dismissed and her claim is therefore dismissed.

CONCLUDING COMMENTS

46. Going forward, the tribunal would encourage the respondent to better follow its policy and procedures in relation to any disciplinary exercise. In this case, the respondent intended to have the same people conduct the disciplinary hearing as those who had carried out the investigatory hearing. While in small practices such a situation may be unavoidable, the respondent is a large organisation with a number of directors who could easily have formed part of a fresh panel for the disciplinary hearing. The tribunal would also encourage the respondent to adhere to guidelines set out within the disciplinary policy in the time afforded to employees to attend hearings.



Employment Judge:

Date and place of hearing: 5 October 2021 in Belfast.

This judgment was entered in the register and issued to the parties on: