



EMPLOYMENT TRIBUNALS

Claimant: Ms O Stachowicz

Respondent: The Good Care Group London Limited

Heard at: Nottingham by CVP

On: 22 & 23 August 2022

Before: Employment Judge Cansick

Representation

Claimant: In person

Respondent: Ms A Rumble, Counsel

RESERVED JUDGMENT

The claimant's claim of constructive unfair dismissal is not well founded and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a Professional Carer until her employment ended on 4 March 2022. The respondent is a provider of live-in and home-based care services.
2. The claimant claims she was constructively dismissed as a result of initially being dismissed for gross misconduct and then on appeal being reinstated with a final warning. The claimant considers that this conduct left her with no choice but to resign. The claimant argues both matters, either individually or together, constituted the reason for constructive dismissal.
3. The respondent asserts that there was no constructive dismissal and that the initial dismissal and the reinstatement in no way constituted a breach of the implied term of mutual trust and confidence.
4. All parties appeared by CVP. The claimant gave her evidence from Poland. She was assisted by a Polish interpreter who also appeared by CVP, but from

within the UK. The respondent was represented by Ms A Rumble of Counsel. The respondent's sworn witness evidence was given by Ms Laura Williams, Ms Erika Aldridge and Ms Malone-Robertson.

5. I also had access to an agreed bundle of documents which ran to 236 pages. The respondent provided a further supplementary bundle of some 41 pages.

Preliminary Issues

Name of the Respondent

6. The name of the respondent was incorrectly on the ET1 as The Good Care Group. With the agreement of the parties, I ordered the name be changed to The Good Care Group London Limited, the correct name of the respondent.

Evidence of Dismissing Officer, Ms Erika Aldridge

7. Prior to the hearing the respondent had applied and been granted a witness order for Ms Aldridge. Ms Aldridge had then applied to have the order set aside, which had been left to be decided today. After hearing from Ms Aldridge and the parties I refused the application. I agreed though that Ms Aldridge could give her evidence first. During her evidence, she adopted her statement which was only provided to the claimant and the Tribunal that morning. She, however, refused to answer any questions. I consider the effect of such later in this decision.

Issues to be decided

8. There was a discussion at the outset of the hearing about the relevant issues. The issues were:
 - 8.1. *Did the initial dismissal for gross misconduct and reinstatement with a final warning, together, or individually breach the implied term of trust and confidence?*
 - 8.2. *If a breach of contract, was it a reason for the claimant's resignation?*
 - 8.3. *Did the claimant affirm the contract before resigning? Did the claimant's words or actions show that they chose to keep the contract alive even after the breach?*
 - 8.4. *If the claimant has been constructively dismissed, should any reductions to the award be applied?*
9. It was agreed that if it was found that the claimant was constructively dismissed then remedy would be dealt with at a separate hearing.

Findings of fact

10. The claimant began employment with the respondent on 6 October 2017.
11. On 13 January 2022, the claimant began a temporary placement to provide care to a patient that the parties referred to as B or BG. BG suffers from

Parkinson's disease and related dementia. He required full support in all aspects of care, including moving and handling.

12. The respondent received a complaint about the claimant on the 25 January 2022. The complaint came from another carer assigned to BG, Ms Isabel Silva. The complaint was made to the respondent's Care Manager, Ms Charlotte Morel, who was responsible for BG's care. The complaint raised the following:
 - 13.1. That the claimant was rude and shouted at BG when he refused medication.
 - 13.2. That when hoisting BG onto the bed the claimant was rushing him, took his t-shirt in a rough way that led to him complaining his arm was hurting.
 - 13.3. That the claimant was rude to a speech therapist visiting BG.
 - 13.4. That the claimant is unable to work as a part of a team and is rude to the client and others around her.
13. The respondent initiated an investigation following the complaint. The investigating officer was Ms Williams, the respondent's Operational Investigations Manager. Statements were considered from Ms Silva, Ms Morel and three other carers.
14. Ms Silva, in addition to the matters in her initial complaint, described the claimant screaming at the client to take medication and shouting at him when he refused breakfast. She also detailed difficulties she had working with the claimant, including the claimant refusing to split the care plan and telling Ms Silva to be quiet when discussing issues with her.
15. Another carer stated they had not witnessed any poor moving or handling by the claimant.
16. A further carer detailed an occasion when BG was on the commode and the claimant grabbed his arm when he was getting up and shouted at him. She detailed the claimant shouting at BG and members of staff. Also detailed were occasions it was considered the claimant was rude and an occasion she shouted at the carer.
17. The third carer who gave a statement, detailed that the claimant spoke to BG in an abrupt manner. The witness considered that the claimant ignored the guidance relating to checking if BG could stand. This resulted in him being hoisted numerous times when he may have been able to stand with his walking stand. The carer also detailed that the claimant when transferring BG would hold his hands and pull him forward to stand. She described how the claimant would push BG from behind to lean forward when on the commode, which had been advised against. The carer also stated she had been snapped at by the claimant. It was further detailed that the claimant was not prepared to work as part of a team, did not want to share duties and if she did not want to do something would refuse.
18. The following were considered by Ms Williams as recurring concerns from the statements:

- 19.1. Physical abuse. in breach of the respondent's safeguarding policy, on the basis that a number of allegations had been raised about the claimant rough handling BG. The alleged rough handling carried out by the claimant caused the client pain and occurred on more than one occasion.
 - 19.2. Verbal abuse in breach of the respondent's safeguarding policy, on the basis that a number of allegations had been raised about the claimant screaming, shouting or otherwise communicating in an inappropriate manner towards BG and her colleagues. The claimant's alleged behaviour towards BG a vulnerable adult put him at risk of suffering emotional harm and was not conducive to his requirement for a calm atmosphere.
 - 19.3. Not working in line with the respondent's values of respect, teamwork and professionalism, on the basis that consistent concerns had been raised that the claimant did not work effectively with her colleagues and behaved in an unprofessional manner.
19. On 2 February 2022, an investigation meeting took place. The claimant denied all the allegations raised. She stated she did not understand why they were made. Later that day the claimant emailed the investigating officer stating she did not agree with the meeting notes. A further meeting was arranged for 3 February 2022, to allow the claimant to discuss proposed amendments to the notes. At the meeting the claimant chose not to talk through proposed amendments or to provide such in writing as suggested. She again stated she refuted the allegations made against her.
20. Following the meeting Ms Williams produced an investigation report and recommended formal action be taken.
21. On 4 February 2022, the claimant was suspended from work, with pay, in order to enable a full and proper investigation. The respondent wrote to the claimant inviting her to attend a disciplinary hearing on 10 February 2022. The claimant was informed three allegations were being considered: physical abuse, verbal abuse and not working in line with the respondent's values of respect, teamwork and professionalism. Attached with the letter were the statements considered in the investigation, minutes of the investigative meeting and other documents.
22. The disciplinary hearing was chaired by Ms Aldridge, Regional Manager for the respondent. At the disciplinary meeting the claimant denied the allegations. The respondent concluded all three allegations were upheld. It was considered the verbal and physical abuse amounted to gross misconduct and the not working in line with the respondent's values of respect, teamwork and professionalism amounted to misconduct. The respondent considered there was insufficient mitigation and the appropriate sanction was to dismiss the claimant without notice.
23. The claimant was informed of the decision from the disciplinary meeting by a letter sent on 11 February 2022.

24. On 14 February, the claimant appealed the decision to dismiss her.
25. The appeal hearing was chaired by Ms Malone-Robertson, who is a Registered Operations Manager for the respondent. The hearing took place on 22 February 2022. The claimant denied the allegations. She also raised new issues including:
- 26.1. That she had previously sent three emails to Ms Morel, the Care Manager, where she had raised difficulties and suggested instead of starting by using the walking frame (as per the care plan) that they could use the hoist instead and that other carers agreed with this approach.
 - 26.2. Regarding not being a team player, the claimant raised the issue that she had never been in a double placement before.
26. Following the hearing the respondent substituted the decision to dismiss the claimant with a final written warning and a Performance Improvement Plan (“PIP”) for six months. Ms Malone-Robertson stated she considered the mitigation put forward and the length of time the claimant had worked with the respondent. She considered the allegation of physical abuse and verbal abuse amounted to bad practice rather than abuse. She, however, made clear that the finding of gross misconduct could still have been valid on the facts of the matter. Ms Malone-Robertson still considered the allegation of not working in line with the Respondent’s values of respect, teamwork and professionalism was made out.
27. The claimant was informed by Ms Malone-Robertson of the outcome of the appeal by telephone on 4 March 2022. The claimant informed Ms Malone-Robertson that she no longer wanted to work of the respondent.
28. The respondent also wrote to the claimant informing her that she was reinstated. In the letter it stated:
- Your mitigating factors were taken into consideration and I believe there is an opportunity for another chance with supportive strategies in place. With that being said, it is evident that aspects of manual handling were not followed and bad practices adopted with care provision which cannot happen again, improvements are also required where teamwork and communication style is concerned which is where the Performance Improvement Plan for 6 months will be most imperative to ensure this is rectified and in line with The Good Care Group’s values.*
29. The claimant replied by email stating:
- I can’t accept it and there is not option for me to work again for TGCG. The impact on my mental and physical health has been tremendous. I don’t think I will generally be able to work as a live in carer again.*
30. The conversation on the telephone and subsequent email on 4 March 2022, constitute the claimant’s resignation.

Relevant law

Constructive dismissal

31. An employee is entitled to treat themselves as constructively dismissed where they terminate their employment contract following the employer seriously breaching that contract in a way which goes to the root of the employment contract (Western Excavating (ECC) Ltd v Sharp [1978] QB 761).
32. The serious, or repudiatory, breach of contract may be to express provisions of the employment contract or to provisions which are implied into the contract by case law. All employment contracts contain a term that “*the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*” (Malik v BCCI SA (in Liquidation) [1998] AC 20, as amended by Varma v North Cheshire Hospitals NHS Trust [2007] 7 WLUK 116).
33. Whether or not there has been a breach to the implied term of trust and confidence is an objective question and the employer’s intentions are irrelevant. If the employer commits conduct which is likely to destroy or seriously damage mutual trust or confidence, then it will be deemed to possess the subjective intention (Leeds Dental Team Ltd v Rose [2014] ICR 94) and the employee is likely to be able to accept that repudiatory breach and terminate the employment contract (Morrow v Safeway Stores Plc [2002] IRLR 9).
34. The determination as to whether a breach is sufficiently serious as to constitute a repudiatory breach is an objective test, and it does not matter that the employer might genuinely believe a breach to not be repudiatory (Tullett Prebon Plc v BCG Brokers LP [2011] EWCA Civ 131). The overall repudiatory breach may be a single act or a collection of smaller breaches or a series of events which are not individually breaches but which amount to a breach when put together (Garner v Grange Furnishing [1977] IRLR 206).
35. To accept a repudiatory breach of contract and claim constructive dismissal, an employee must resign or treat the employment contract as having ended in response to the breach. It is sufficient for these purposes for the breach to have played a part in the decision to resign (Wright v North Ayrshire Council [2014] ICR 77). The tribunal is able to ascertain the true reason for the employee’s resignation (Weathersfield Ltd v Sargent [1999] ICR 425).
36. When faced with a repudiatory breach of contract, an employee can choose to either accept the breach, which ends the contract, or affirm the contract and insist upon its further performance. Failure to resign or act in a way which treats the employment contract as ending risks the employee either affirming the contract or waiving a breach of the contract of employment. When considering whether a contract has been affirmed, the tribunal will look at all of the circumstances of the case (WE Cox Turner (International) Ltd v Crook [1981] ICR 823).
37. Employees should be careful when choosing to continue to work for a period if they intend to rely upon a repudiatory breach of contract in a constructive dismissal claim. In Quilter Private Client Advisers Ltd v Falconer [2020] EWHC 3294 (QB), Calver J said, at para 121:

“It is undoubtedly the case that if the employee decides to accept the repudiatory breach, he must do so unambiguously and with sufficient dispatch. If his purported acceptance is delayed, he runs the risk of a court finding that his action has not been sufficient to discharge the contract. However, in my judgment it is what happens during the delay which is the critical feature: provided the employee makes unambiguously clear his objection to what has been done by the employer, he is not necessarily to be taken to have affirmed the contract by giving a short period of notice, and continuing to work and draw pay for a limited period of time ... It all depends upon the facts of the particular case whether the employee has nonetheless unambiguously accepted the repudiation of the employer and with sufficient dispatch. The length and circumstances of the delay require to be examined in each case.”

Conclusions

38. I remind myself that the burden of proof rests on the claimant to demonstrate that they have been constructively dismissed. I also remind myself that consideration of whether there has been a breach is through an objective person approach. I do not, therefore, consider the matter from either the eyes of the claimant or the respondent.
39. I first need to consider whether the conduct breached the implied term of trust and confidence. I consider the matters alleged by the claimant as breaching the contract individually and then cumulatively.
40. Regarding the initial dismissal for gross misconduct no evidence was put forward during the investigation to dispute the allegations other than a denial. Ms Williams was on this evidence justified to refer the matter to a disciplinary hearing on the basis which she did so.
41. I have not given weight to the reasons behind Ms Aldridge’s findings at the disciplinary hearing, as the claimant did not have an opportunity to challenge such, as a result of Ms Aldridge not giving evidence. I do, however, consider that on the facts before Ms Aldridge, particularly in the statements, there was reasonable and proper cause for her making the findings of gross misconduct and the resulting dismissal. Given the evidence before the respondent and the manner in which proceedings were conducted, I do not consider that the initial dismissal breached the implied term of trust and confidence. The respondent had reasonable and proper cause to act in the way they did.
42. Turning to the appeal, I note that the claimant raised new mitigation for the first time, which was considered by the respondent. Ms Malone-Robertson detailed such. The evidence before Ms Malone-Robertson allowed for the substitution of the finding of verbal and physical abuse to one of bad practice and for the removal of the finding of gross misconduct. I also consider there was justification in maintaining the finding of misconduct regarding not working in line with the respondent’s values.
43. The reinstatement with a final warning and PIP was justified on the findings made in the appeal. Ms Malone-Robertson took into account matters in mitigation including the length of service of the claimant. I do not consider the reinstatement was such that it breached the implied term of trust and

confidence. That a decision was reached more favorable to the claimant should have only increased trust and confidence between the parties. The respondent had reasonable and proper cause for the decision made on appeal.

- 44. I further consider the effect of the two matters together and for the same reasons detailed individually do not consider they breached the implied term.
- 45. The claimant suggested that the statements from the other carers and the investigation itself were a conspiracy against her. I do not consider there was evidence establishing that was the case.
- 46. I have considered the claimants case carefully, however, neither of the matters complained about, either individually or cumulatively, when viewed objectively, were a breach of the contract.

Employment Judge Cansick

Date: 02 December 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE