



EMPLOYMENT TRIBUNALS

Claimant: Mrs T Button

Respondent: Birmingham Community Healthcare NHS Foundation Trust

Heard at: Birmingham **On:** 18 and 19 September 2017

Before: Employment Judge Butler

Representation

Claimant: Miss N Owen, Counsel

Respondent: Miss J Smeaton, Counsel

JUDGMENT

The Judgment of the Tribunal is that the claim of constructive unfair dismissal is not well founded and is dismissed.

REASONS

1. By a claim form submitted to the Tribunal on 26 May 2017, the claimant made a claim of constructive unfair dismissal against the respondent. The claimant was employed as a Podiatrist by the respondent. The basis of her claim was that she had issues with a colleague who subjected her to a course of bullying; a grievance she subsequently raised was withdrawn due to the general reaction she received to it; on seeking to progress her grievance at a later date she was treated less favourably by being given more home visits and was prevented from working in the clinic she was originally attached to.
2. Subsequently, the claimant says was criticised for raising her complaints, excluded from training and development opportunities and bullied by her line manager. She claimed that this course of conduct amounted to a breach of the implied term of trust and confidence in her contract of employment entitling her to resign and claim constructive dismissal.
3. The claim was denied by the respondent.

The Issues

4. The issue in this case is whether the respondent, through its employees, engaged in the conduct claimed by the claimant and whether it amounted to a fundamental breach of the implied term of trust and confidence such that the claimant was entitled to resign and claim constructive unfair dismissal.

The Law

5. Section 95(1) (c) of the Employment Rights Act 1996 (ERA) provides that an employee is dismissed by his employer if:

“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”.

6. Section 98(4) of the ERA provides that whether the dismissal is fair or unfair:

(a) depends on whether in the circumstances.... the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee;

(b) shall be determined in accordance with equity and the substantial merits of the case.

7. In *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221 CA, the Court of Appeal held that in order to succeed in a claim for constructive dismissal an employee must establish that there was a fundamental breach of contract on the part of the employer, that breach caused the employee to resign and the employee did not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal.

The Evidence

8. I heard evidence from the claimant and for the respondent from Ms C Cooper, Equality, Diversity and Human Rights Manager, Mr P Taylor, Clinical Lead Specialist and the claimant’s line manager up to September 2016, and Ms A Walker, Podiatry Lead Clinical, the claimant’s line manager after September 2016.
9. There was an agreed bundle of documents running to 358 pages and reference to page numbers in this Judgment are to page numbers in the bundle.
10. There was a further set of documents relating to a meeting held with the claimant on 11 November 2016.

The Claimant’s Evidence

11. From September 2015 the claimant worked as a Band 7 Podiatrist in a highly specialist wound care position. She was required to work on

occasions with a colleague, Rupinder Parmar, with whom she did not get on.

12. In October 2015 at a staff meeting the venue for the team's Christmas meal was discussed and Ms Parmar allegedly said she did not see why Muslims could not eat normal meat "like the rest of us" in reference to halal food. On another occasion the claimant was working with Ms Parmar who conducted a consultation with an English speaking patient in Punjabi. Again, on 10 December 2015 Ms Parmar conducted a consultation with a non-English speaking patient in Punjabi and, when the claimant asked her to translate so she could write up the notes, Ms Parmar allegedly said they were just chit chatting. When the claimant challenged Ms Parmar about this she did not take too kindly to it and was of the view that she was intentionally targeting, undermining and/or excluding the claimant in a form of bullying. The claimant raised her concerns with Mr Taylor as evidenced by the email chain at pages 76 – 83 and he suggested, having consulted the HR Department, that he speak to Ms Parmar informally. The claimant initially agreed to this but after seeing the email Mr Taylor received from HR (page 77) decided to raise a formal complaint.
13. The claimant felt that she had no other option to submitting a formal complaint and thought the respondent's management did not know what they were doing. She subsequently withdrew her grievance in an email of 16 December (page 93) in which she said the issue was making her ill, unable to sleep, tearful and giving her a constant nervous upset tummy. She thanked Mr Taylor for his support and said "moving forward I do not feel I am able to work in the same clinic as Rupinder and I will be submitting a flexible working application to reduce the days I work within the Department".
14. The claimant said she felt unsupported by the respondent and two staff representatives could not represent her as they had conflicts of interest. She did not try to contact her regional staff representative. The claimant said she thought there was a disbelief that she had raised a grievance and a sense that she was very brave to have done it.
15. As a consequence, the claimant said she was removed from the Clinic and given a disproportionate amount of home visits. Pages 104 and 105 refer to emails where the claimant was attempting to arrange a meeting with Mr Taylor to discuss rotas. She cancelled the first meeting and Mr Taylor had difficulties rearranging due to the Christmas holiday. She did not feel he was addressing the timetable issues and her high volume of home visits remained as before.
16. The claimant then met with Ms Cooper on 10 January 2016 and told her she did not feel her complaints had been taken seriously. At a meeting with Ms Cooper and Mr Taylor on 13 January 2016, Ms Cooper said she wanted to work with the claimant's line manager to educate the team and move forward. The claimant said at this stage she just wanted to draw a line under this issue and move on. She believed the issue was not investigated fully. A subsequent offer of mediation was made to the claimant which she declined.

17. The claimant met with Mr Taylor and Mr Glebioska, Assistant HR Business Partner, on 27 February 2016 and raised concerns about being a lone worker and discovered at that meeting that Ms Parmar had made complaints about her but not what the complaints were.
18. The claimant then worked for five months without complaining about the number of home visits she was having to make. She claimed that Ms Walker asked her to withdraw her flexible working application which she did. A subsequent application by the claimant was approved and she stated she did not receive the letter of approval (page 233) only an email.
19. The claimant maintained that she continued to express concerns about the number of home visits she was having to make compared to other podiatrists. She also said that, when she was off sick for one day, her patients were not covered properly giving her a higher workload when she returned to work in contrast to other podiatrists whose patients were covered when they were off. She further stated that she was not invited to a training event on 27 April 2016 whereas Ms Parmar and other high risk colleagues were invited.
20. The respondent operated a buddy system whereby they would be allocated a colleague who they would telephone upon completion of the home visits to say they were back safely.
21. On 9 May 2016, the claimant forgot to telephone her buddy to say she had returned safely from her home visits but her buddy had not raised any alarm because she had not heard from the claimant. The claimant considered this was illustrative of the respondent having no concern for her safety and perhaps deliberately so because she had raised a complaint about Ms Parmar.
22. The claimant also submitted an incident report in relation to having to attend a patient's home on 22 July 2016 alone to find he had a violent history and had a Court case pending for grievous bodily harm. She considered the respondent to be in breach of its own policies and procedures in allowing her to visit the patient alone. She also complained that she was not given a lone worker device to enable her to raise the alarm if attacked.
23. After the claimant's high risk team amalgamated with another team, she spoke to Ms Walker concerning her problems with Ms Parmar. She was offered mediation which she refused.
24. At a meeting on 24 August 2016 she claimed Ms Walker dismissed her concerns about lone working and asked her to stop influencing other people. The claimant said this made her feel further ostracised by the respondent.
25. The claimant continued to complain about the disproportionate allocation of home visits to her and that she had been ousted from the Soho Road Clinic after complaining about being bullied by Ms Parmar. Further, when everyone in her department was issued with a personal alarm, lone worker devices having been withdrawn by the respondent, she felt this was an

intentional “kick in the teeth” directed at her for raising health and safety concerns.

26. The claimant also stated that home visits by postcode were reallocated giving her fifteen postcode areas to cover where as Ms Parmar was only given four.
27. The claimant stated that Ms Walker turned on her and harassed her when she went off sick. This harassment continued after the claimant resigned after becoming unwell with stress related symptoms. She resigned on 17 November 2016.

The Evidence of Ms C Cooper

28. Ms Cooper said her role was to advise on Race Relations policy and address any issues. She would deal with equality issues in parallel with HR. She met the claimant on 13 January 2016 and Ms Parmar later that month. Whilst she investigated the claimant’s complaint regarding Ms Parmar speaking in Punjabi, there was no vehicle for her to go back directly to the claimant within the respondent’s policies. As a result she did not feed back to either the claimant or Ms Parmar but instead to HR for them to consider her views.
29. She said she concluded there was no racial element to Ms Parmar’s translation of what non-English speaking patients had said but there were possibly issues in relation to her other comments. The email at page 135 of the bundle concluded her involvement and notified the claimant that HR would be in touch with her.

The Evidence of Mr P Taylor

30. Mr Taylor said that the Soho Road Clinic ran vascular and routine clinics and the claimant, Ms Parmar and another colleague were the high risk clinicians. They would work in twos with one giving treatment and the other writing up notes. The claimant had first contacted him on 1 December 2015 about Ms Parmar but Ms Parmar had already raised issues with him about the claimant which he put down to her settling down to working with someone new. There was no policy within the Trust on translating. He confirmed he initially met the claimant on 14 December 2015 and she agreed to an informal approach, later changing her mind so he referred the matter to Mr Glebioska and forwarded his reply to the claimant. He confirmed he did speak to Ms Parmar to explain that the claimant felt undermined and excluded and he had not simply accepted Ms Parmar’s account but took it seriously with appropriate advice from HR. The claimant had then emailed him to withdraw her complaint saying that she could not work with Ms Parmar. In relation to further meetings with the claimant, he was unable to do this on days when he was in clinic.
31. He accepted that the claimant’s level of home visits was intended to be short term but in relation to the buddy system it was up to the claimant to arrange this herself.

32. In his meeting with Ms Parmar, which Mr Glebioska attended, Ms Parmar's account was not simply accepted. She was told she should be aware of what other colleagues might think.
33. He confirmed that the claimant had been asked to attend clinics at Soho Road but had refused. She was further asked on a number of occasions to cover clinics when Ms Parmar was not there. It was not true that she was being pushed out. In relation to the claimant's clinic not being covered properly when she was off sick and Ms Parmar's being covered properly, he made the point that she was off long term whereas the claimant was off for one day. The same applied to another colleague on long term sickness absence. Long term absences required proper coverage of clinics whereas single days could not always be accommodated.
34. Regarding the failure to advise the claimant of the patient awaiting trial for grievous bodily harm, Mr Taylor said an alert regarding the history of violence of that patient was missing. They relied on referrals from others and if they are not satisfactory home visits may be refused. At the time the claimant raised the issue of having a lone worker device, Mr Taylor was not aware that the Trust had decided to withdraw them because no one was using them. He had been unaware that the buddy system had not worked on the one occasion referred to by the claimant.

The Evidence of Ms A Walker

35. Ms Walker said she had previously worked with the claimant before her promotion. She met with the claimant in January 2016 who said she had concerns about Ms. Parmar and was finding the situation difficult. Ms Walker said she would expect a clinician speaking another language to tell the other staff member what was being said, however, there was no policy on translating and it happened frequently as so many patients had little English. She said she thought Mr Taylor was not dealing with the matter, but when she next spoke to him at a Management meeting, he said it was being dealt with, so she took it no further.
36. Miss Walker said she asked the claimant whether her flexible working request was just a reaction to the situation and she might want to think about it. She next spoke to the claimant in April 2016. The claimant asked her why she should cover for Ms Parmar and she did not wish to do this. As a result, Ms. Walker took the clinic and the claimant took one of hers at another clinic. She said the claimant's main concern was not patient knowledge.
37. After two teams merged in August 2016, the claimant was working 3.5 days each week on home visits. Another member did 3 days and others 2.5 days, but this varied from week to week. Moving into September 2016, the Aston clinic was consolidated and Ms Parmar was doing three days on home visits and two days at Soho Road. The claimant was then doing one day at Hall Green and half a day at Balsall Heath.
38. Ms Walker said she had one to one meetings with all staff members. She had a word with the claimant and advised that she was fully aware of her issues but that the whole team needed to move forward. She said

the same to Ms Parmar. At this point, the claimant and Ms. Parmar were not working together and communicated only by email.

39. Ms Walker met with the claimant on 24 August 2016 (pages 186-188) and the claimant said she felt let down and ostracized. Whilst Ms Walker had reservations about how the claimant would work with Ms Parmar and be a team player, the claimant said she had drawn a line under the issue. Ms Walker had no recollection of telling the claimant she should stop trying to influence people.
40. In relation to lone working, Ms Walker said this was not just something which occurred on home visits. She personally had always used the Buddy System and she told the claimant she could have sorted this out. The system had always been in place and most staff members used it. It was discussed at Management Meetings.
41. Ms Walker met the claimant on 22 September 2016 to discuss her flexible working request (page 209). The claimant had turned up to do her Clinic, saw it was with Ms. Parmar and took herself out to home visits since she would not work with Ms Parmar. Given the claimant's qualifications, it was not good use of her time to put her in routine Clinics. The only other alternative was for the claimant and Ms Parmar to work together, but as the claimant refused to work with Ms Parmar, the only other option would be to remove Ms. Parmar from Soho Road, which would have meant she was undertaking home visits five days a week.
42. Ms Walker said she thought the claimant could have easily worked out who would be her Buddy as she seemed to expect Ms Walker to sort it out and it was not her job to do this. Ms Walker denied shouting or snapping her pen when she met with the claimant.
43. In relation to the postcode issue, Ms Walker said she did not favour anyone. There were 150 patients each week to be seen and some postcodes had no patients at all at that time. It was not the area that was important, but the number of patients within each postcode.
44. Ms Walker said it was her responsibility to plan the timetables. She could not simply change people around to suit the claimant because that would not have been fair to others.
45. Ms Walker said that she was surprised that after a year the claimant was not moving on. She did not ever "have a go" at the claimant or give her the impression she wanted her out. She tried to get the claimant to consider mediation again outside of the Trust, but she refused.

The Facts

46. In relation to the issues in this case, I find the following facts:-
 - i. The claimant was employed by the Respondent as a Podiatrist from 06 December 2010 and at the material time was a Band 7 Podiatrist specialising in wound care. She was required at times to work in

Clinics with a colleague, Ms Parmar, with whom she did not enjoy a good relationship. The claimant was concerned that Ms Parmar would speak Punjabi to certain patients without translating what was being said. The claimant also said she challenged Ms Parmar about being disrespectful to Muslims in general.

- ii. The claimant raised the issue with Mr. Taylor, her Line Manager, on 14 December 2015 but then withdrew her complaint stating that she could not work with Ms Parmar. The claimant did not withdraw her complaint in response to any comment by anyone at the Respondent.
- iii. Ms Parmar then raised a complaint about the claimant and both complaints were dealt with informally in accordance with the respondent's Dignity at Work Policy. Ms. Cooper, Equality, Diversity & Human Rights Manager of the respondent, investigated the claimant's with the claimant and Ms Parmar separately. The claimant expressed a view that she wanted Ms Parmar to be suspended and a disciplinary investigation conducted whereas Ms Parmar was content to attend mediation to try to resolve the issues between them. Ms Cooper's investigation concluded that mediation was the best way forward and, whilst Ms Parmar agreed to mediation, the claimant declined to participate. Whilst the claimant was advised that she could pursue her complaint formally in accordance with the respondent's bullying and harassment policy, she declined to do so.
- iv. The respondent then arranged the Clinic timetables so that Ms Parmar and the claimant did not have to work together. This led to the claimant undertaking more home visits.
- v. After two teams were merged by the respondent in September 2016, the claimant requested more Clinic work but was advised this could only be accommodated if she worked with Ms Parmar which she refused to do.
- vi. In relation to the claimant's home visits, she was allocated a Buddy and was given the flexibility to use other staff members as a Buddy if she wished. When she visited a patient at home who apparently had a violent history, it was through no fault of the respondent that this had not been communicated to her prior to her visit. Another Agency had failed to alert the respondent to this patient's potentially violent history.
- vii. At her personal development review meeting on 11 November 2016, the claimant repeated her complaints about Ms Parmar saying she believed the respondent had believed Ms Parmar over her. She also said that Ms Parmar was treated more favourably because she was doing more Clinic work and was told by Ms Walker this was because the claimant refused to work with Ms Parmar. The claimant became upset in the meeting and said the Department was becoming impossible to work in and morale was very low. Ms Walker pointed out to the claimant that she could be negative at work and asked how matters could be improved. The claimant's personal development review was then rescheduled, but the claimant went on sick leave on

14 November with work related stress and declined an Occupational Health Assessment to provide her with support.

- viii. The claimant resigned with notice on 17 November 2016 saying that the respondent failed to deal with her complaints of bullying by Ms Parmar, she was spending most of her time on home visits and she had been excluded from training and development opportunities. Ms Walker offered the claimant a meeting but she did not accept. She did not return to work and her employment ended on 17 January 2017.

Submissions

47. For the respondent, Miss Smeaton said the respondent's Witnesses were more credible than the claimant. The claimant had shown herself to be obstinate and not willing to accept explanations. Mr Taylor said he could perhaps have done things better and this was the hallmark of a credible Witness. In arguing that she was not working in Clinics the claimant had failed to recognize she was still working at Hall Green and Balsall Heath Clinics.

48. Miss Smeaton submitted that the claimant had been difficult to manage as she had a sense of entitlement and her concerns were expected to be believed over those of others. Further, she failed to recognize that she withdrew her grievance yet still wanted her own way. It was relevant that the claimant did not continue with her grievance, she withdrew it and did not raise it again.

49. For the claimant, Miss Owen said the claimant had been honest, open and consistent. Mr Taylor came across as an ineffective Manager who said he could have done things differently. Just forwarding an HR email to the claimant showed his disinterest and that he was not a pro-active Manager. Further, Ms Walker was feisty and unwilling to see any fault in her actions. She had a poor attitude towards the claimant. The notes of her last meeting with the claimant on 11 November 2016 made her approach clear in blaming the claimant for what happened. She described the claimant as "being a poor communicator with a negative attitude". The final straw for the claimant was this meeting which came on the back a history of management failure.

50. Ms Walker had also given the claimant fourteen or fifteen postcodes to cover with home visits whereas Ms Parmar only had four. This implied a heavier caseload. The fact was that Ms Walker was fed up with trying to deal with the claimant and resorted to bullying her.

51. This was a case where the respondent's Managers had failed to manage the team. The claimant had clearly stated her reasons to resigning which were sufficient to constitute a fundamental breach of contract by the respondent.

Conclusions

52. In order to succeed in her claim, the claimant must establish that the respondent's conduct amounted to a fundamental breach of the implied term

of trust and confidence. I do not find on the balance of probabilities that she has satisfied the burden of proof upon her.

53. There were a number of incidents recorded in her evidence where the claimant's allegations against the respondent were neither plausible nor credible. By way of example, she said that when she was away from work on Jury Service, her Clinics had been covered, yet when she was off sick for a day, they were not. She said she thought this was because she had raised a grievance. I find that the reality is that the respondent had an opportunity to arrange cover for an extended absence yet was in obvious difficulty in covering a sudden one day absence. I find it frankly ludicrous to suggest that the respondent deliberately failed to cover the claimant's Clinic because she had raised a grievance. Further, in relation to not being given an opportunity to attend training, it was the claimant's own evidence that she was "potentially excluded" by Management because she had raised a complaint. This is merely speculation by the claimant and I do not find it plausible that the respondent would exclude her from training opportunities merely because she has raised a complaint.

54. A predominant issue in this case is the claimant's actions in relation to her complaint about Ms Parmar. I find there is no evidence that she was ever told to withdraw it and this seems to have been her decision and hers alone. She was offered the opportunity of dealing with her complaint informally and was offered mediation. It is notable that Ms Parmar agreed to mediation. The claimant's evidence on this point illustrates her reluctance to engage in mediation or to realistically make any attempt to bring the dispute with Ms Parmar to an amicable resolution. She said in evidence "I never point blank refused to attend mediation". I note the Claimant did not deny mediation was offered to her, but if she does not choose to accept it, she clearly declines it.

55. I do not find any fundamental breach of any express or implied term of the claimant's contract of employment by the respondent in connection with lone working. The claimant complains that she was not issued with a lone worker device. Mr Taylor's evidence, which was not challenged, was that the respondent had withdrawn these devices because employees were simply not using them. The claimant could use the Buddy system whereby if she did not call her Buddy on returning from lone visits, an alarm would be raised. This failed on one occasion, but was not promptly reported to Mr Taylor or anyone else. In my view, the claimant did not consider this matter to be serious enough to warrant a complaint at the time and was added as an afterthought in connection with her subsequent claim.

56. I consider there to be some merit in Miss Smeaton's submission that the claimant simply wanted everything her own way. She previously worked at Soho Road Clinic with Ms Parmar. She raised a formal complaint about her and then withdrew it. She refused to attend mediation to resolve issues, Ms Parmar having made a complaint about her. In refusing to work with Ms Parmar, the claimant's gave the respondent little choice but to schedule more home visits for her. The claimant attempts to give the impression that she was treated unfairly, but seems to have refused to work at Soho Road even when Ms Parmar was not there. It is unreasonable of the claimant to expect someone else to be moved merely to accommodate her own preferences.

57. In relation to the allocation of home visits, by reference to postcodes, I reject Miss Owen's submission that merely having more postcodes to cover necessarily means a bigger caseload of patients to see. As Ms Walker pointed out, some postcodes had no patients at all and they were divided up so as to present an even number of patients for those carrying out domiciliary visits.

58. Finally, I noted a distinct tendency of the claimant to exaggerate the conduct of others in an attempt to bolster her claim. In particular, she accused Ms Walker of harassment after she had resigned. On reviewing the correspondence, there is absolutely no evidence of harassment by Ms Walker. As her Line Manager, Ms Walker was entitled to speak frankly to the claimant about what she perceived to be her negativity. Due to this tendency to exaggerate, I do not accept the claimant's evidence that Ms Walker became red in the face at her Personal Development Review Meeting, shouted at her and snapped a pen she was holding in her hand. Neither do I accept her evidence that she was told bluntly that there was no point in continuing with a formal grievance against Ms. Parmar.

59. Far from the respondent failing to deal with the claimant's various complaints, it is clear that efforts were made to deal with her complaint which essentially began as a disagreement with a colleague which then escalated into complaints being made by both of them. It was the claimant's decision to withdraw her formal complaint and her decision not to engage in mediation. Much of her evidence I found to be speculation with no substance to corroborate her allegations; she was not kept out of clinics and was not given training opportunities because she had raised a complaint. Even more unlikely is her complaint that one of her clinics was not covered because she had made a complaint.

60. Accordingly, I do not find that the claim of constructive unfair dismissal is well-founded and it is dismissed.



Employment Judge

Date 26 February 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON