



EMPLOYMENT TRIBUNALS

Claimant: Ms Susan Higgins

Respondent: Abbeyfield Braintree Bocking & Felsted Society

Heard at: East London Hearing Centre

On: 1 and 2 October 2020

Before: Employment Judge Speker OBE DL

Representation:

Claimant: In person

Respondent: Ms G Nicholls (Counsel)

RESERVED JUDGMENT

It is adjudged as follows:-

1. The Claimant has not suffered any unauthorised deduction of wages and her claim for payment fails.
2. The Claimant was fairly dismissed and her claim of unfair dismissal is dismissed.

REASONS

1 The Claimant Susan Higgins brings two claims to the Tribunal. Firstly, she claims that she has been unfairly dismissed and secondly that she has suffered unauthorised deduction of wages/pay as a breach of contract in relation to part of her work having been taken from her. This hearing lasted two days and judgment was reserved because having heard the evidence of the witnesses and the submissions there was insufficient time for deliberations and for the formulation and announcement of the judgment.

2 During the hearing I heard evidence from four witnesses on behalf of the Respondent namely David Summersgill and Janet Perry, two directors of the Respondent charity, who held the disciplinary hearing and were regarded as having made the decision to terminate the employment, Sandra Ryder, the Claimant's line manager and Ian Norgell another of the trustees, who heard the Claimant's appeal against dismissal. I was also provided with a hearing bundle containing in excess of 280 pages of documents.

3 There had been a Preliminary Hearing before Employment Judge Moor on 17 July 2020 at which the list of issues was prepared and set out.

4 I found the following facts:

4.1 The Respondent is a charity operating sheltered care homes, 3 at present and soon to be 4. One of these is Wickham House at Braintree at which the Claimant was employed. The homes accommodate elderly residents some of whom suffer from dementia. The residents have varying requirements as to their level of support.

4.2 The Claimant commenced employment with the Respondent on 8 February 2013 undertaking duties as a tea time assistant on a part-time basis. On 26 June 2016 she entered into a new contract of employment maintaining her continuity of service, and her job title described her as a general assistant with working in the laundry in addition to the duties as a tea time assistant. That contract was signed on 26 August 2016.

4.3 On 5 November 2018 the Claimant entered into a new contract of employment, again with continuity of service being preserved and this recorded her job as general assistant but only in relation to work within the laundry. She signed that contract on 12 November 2018. At the time that contract was signed the Claimant had not been able to undertake her tea time duties for some time because her husband had been diagnosed in August 2018 with cancer and she needed time to care for him. The Claimant's tea time shifts were being covered by another person. There were discussions between the Claimant and Sarah Newman, support worker about this. On 5 November 2018 the Claimant confirmed that she was not able to continue undertaking her tea time shifts at that time. It was said on behalf of the Respondent that continuity was required in relation to the teatime duties and therefore that the Claimant would be asked to sign a new contract dealing only with her laundry duties. The Claimant delayed signing that contract but eventually did so. It was part of her case that she had wanted to give up those hours only on a temporary basis. She did subsequently communicate that to the Respondent but the contract which she signed stated that her only continuing duties were those of a laundry assistant. It did not say this was a temporary change.

4.4 The Claimant was managed by Sandra Ryder with whom she had enjoyed a reasonable relationship for the first five years of her employment from 2013. It was agreed on both sides by the Claimant and by Sandra Ryder that the relationship was adversely affected following a staff supervision of the Claimant by Sandra Ryder on 2 March 2018. On the conduct section

of the supervision form it was stated as follows *“Sue has good conduct and gets on well with the residents. But sometimes the atmosphere with other staff members can be strained”*. The Claimant took exception to this and following this review she and Sandra Ryder did not have a good relationship.

- 4.5 From July 2018 to 5 November 2018 the Claimant had been on long term sick leave and it was on her return from that absence that the new contract was signed in relation to her no longer undertaking tea time hours.
- 4.6 The Claimant informally raised grievances with regard to the way in which her contract had been changed but did not raise this as a formal grievance until 27 February 2019 when she set out in writing her grievances which concerned allegations against Sandra Ryder, line manager and Michele Quaife, the Respondent’s operations manager. In a letter to Mr Hackett, Chairman of the society, the Claimant alleged contempt, bullying, breach of contract and a claim regarding loss of earnings and she asked for a meeting about her grievance which she asked to be dealt with in a fair, dignified and unbiased formal meeting.
- 4.7 There was some delay in the grievance meeting being held which was partly related to the fact that sadly Mrs Higgins’ husband had passed away and understandably she was grieving and dealing with the funeral. It was offered to her that the proposed date for the grievance meeting namely 17 April 2019 be put back but the Claimant wished to go ahead with it. At the initial grievance meeting held by Mr Summersgill and Ms Perry, two Directors, the Claimant set out all of the issues which she wished to have investigated and she stated that the main things she wished to achieve was the tea time shifts being put back in place and that money be paid to her for losing the shifts from Christmas 2018. Reference was also made by the Directors at the meeting to the need to mend the relationship between the Claimant and Sandra Ryder, although the Claimant stated that she was “not bothered” about that and felt it was “a way of life now” and she did not think the relationship could ever be repaired. Following the grievance meeting with the Claimant, Mr Summersgill and Ms Perry carried out investigations by way of interviews with various employees including Michele Quaife, Sandra Ryder, Jo Stroud, Linda Wood, Sarah Newman, Sharon Colville-Durelle and Sue Bell. There had been some delay in commencing these interviews owing to the fact that the minutes of the meeting on 17 April which were sent to the Claimant for comment were not agreed by her and it took some time to finally agree the form of these minutes incorporating some amendments requested by the Claimant which were eventually agreed.
- 4.8 The minutes produced in relation to the grievance interviews undertaken by Mr Summersgill and Ms Perry were detailed and dealt with a large number of past incidents.
- 4.9 On 24 May 2019 Janet Perry met with the Claimant for the substantive

grievance meeting. The Claimant said she was confident to deal with the matter without anyone else present. Stacey Murr took the minutes. There was lengthy discussion with regard to the minutes of the interviews which had been undertaken by the Directors as part of their investigation. Those with Sandra Ryder and Michele Quaife identified them by name but the other minutes were anonymous as the other employees involved had requested anonymity.

- 4.10 On 31 May 2019 Janet Perry wrote to the Claimant with the outcome of the grievance meeting. The grievance regarding alleged breach of contract and loss of earnings was not upheld. The grievance as to bullying, contempt, lack of compassion and lack of communication during the claimant's absence from work was not upheld. It was stated that following and as a result of the grievance, Janet Perry had sought to focus on how to improve the relationship between the Claimant and her line manager and her line manager because the Claimant had said she could have no communication with them and still carry out her duties. Janet Perry pointed out that that was not acceptable and that the Claimant should liaise with her manager to try to improve the working relationship. It was recorded that the Claimant had agreed that proposal and that improvement to the working relationship was important for all and of course for the rest of those working for the Respondent. The Claimant was told she had the right to appeal against the grievance outcome.
- 4.11 On 7 June 2019 Michele Quaife wrote to the Claimant inviting her to attend a disciplinary meeting on 17 June. This related to the fact that it had come to the Respondent's attention that during the period that the grievance was being investigated, the Claimant had personally undertaken a survey by speaking to various residents and asking them if they had experienced bad treatment within the home. The Claimant had suggested that she was entitled to do this because accusations were being made against her and she needed to provide proof that the allegations against her were untrue. She had not asked the families of the residents for permission and had not asked her line manager or anyone else for consent to undertake the survey. It was regarded as a safeguarding issue.
- 4.12 A disciplinary hearing took place on 17 June. It was held by Michele Quaife and was stated to be about professional boundaries and GDPR. The decision made was that the Claimant was to receive a verbal warning which was to be effective for disciplinary purposes for a period of 12 months. It was also explained in the letter of 17 June that an improvement was expected from the Claimant in relation to issues regarding staff and residents and that no resident was to be put in a position of vulnerability in order for the Claimant to gain information for her own benefit.
- 4.13 On 21 June a letter was sent to the Claimant by Anthony Cramphorn, a trustee and the treasurer of the society, stating that the trustees had decided to conduct a further investigation into the Claimant's activities

carried out by the Claimant with residents and at Wickham House and that the Claimant was to be suspended with immediate effect but to continue to receive full pay.

4.14 On 26 June 2019 a meeting of the operations committee of the society took place and it was attended by four of the trustees namely Roy Hackett, Chair, Tony Cramphorn Treasurer, David Summersgill and Janet Perry. Sandra Ryder also joined the meeting. There was discussion with regard to disciplinary action recently taken against the Claimant resulting in a verbal warning and it was recorded that the trustees debated three possible causes of action:

- (i) Upgrade the warning to a final written warning.
- (ii) Terminate the Claimant's employment with notice.
- (iii) Impose the "gross misconduct" classification and be prepared 'to go to court for unfair dismissal'.

4.15 Reference was made that the Claimant had demonstrated a bullying attitude to staff and residents, disrespect for her line manager, the operations manager and several trustees and had been disruptive to staff rotas and had no great allegiance to the society. It was felt that the trustees had lost confidence in her approach to the staff and residents. It was stated that there was much debate at the meeting and it was foreseen that there may be a claim made for unfair treatment. There was also discussion as to the likely costs to the society and the need to report safeguarding issues to Essex County Council. It was noted that the Claimant had not had any safeguarding training and that the Respondent's procedures were 'not very robust'. It is recorded that the meeting agreed to proceed with option 2, namely to terminate the Claimant's employment with notice. Parts of the notes of the meeting were redacted presumably on the grounds of confidentiality. The document indicated the decision to give the Claimant formal notice of termination of employment on the basis that relations with the employee had reached an untenable point and that the society no longer had any confidence that she would devote the whole of her time, attention and abilities to the organisation and its affairs.

4.16 The Claimant was unaware that this meeting had taken place or that the decisions referred to had been reached.

4.17 On 29 July 2019 the Claimant was invited to a further disciplinary hearing. The letter stated that the trustees had concluded that there was a clear prima facie evidence pointing to an irretrievable breakdown in the working relationship and this view had been reached following investigation and evidence gathering in relation to the recent disciplinary and grievance procedures. It was stated that the trustees made it clear that the further disciplinary hearing was not intended to address individual or specific conduct related acts or omissions, but to consider whether the situation

made her continued employment untenable due to the ongoing potential for unacceptable, disruption to Abbeyfield its staff and residents. She was told that her employment may be terminated for “some other substantial reason” in accordance with the Employment Rights Act. The meeting was to be conducted by Janet Perry and Dave Summersgill with Stacey Murr attending as note-taker. In advance of the meeting the Claimant was provided with five further statements/minutes of those who had been interviewed in relation to the grievance investigation.

- 4.18 The disciplinary hearing took place on 5 August 2019. It was a lengthy hearing dealing with the Claimant’s relationship with her manager and with other members of staff and various incidents which were described in detail. One of the major issues was that the Claimant did not treat her manager with any respect and would not engage with her often entirely refusing to do so or even speak to her. There were other members of staff who reported periods when the Claimant refused to speak to them and some instances when she was aggressive and intimidating. The Claimant raised various issues with regard to the thoroughness of the investigation and the lack of signature on various documents or the amendments to them.
- 4.19 A disciplinary investigation report with regard to the investigation with members on 24 June 2019 (two days before the meeting of trustees referred to) was provided to the Claimant and this set out references to those employees referred to in the report including Sandra Ryder, Michele Quaife and other members of staff. It was stated that the conclusion from that investigation was that here was a complete breakdown of relations between employer and employee which was the reason why the Claimant was being summoned to the disciplinary hearing.
- 4.20 On 6 August 2019 Janet Perry wrote to the Claimant following the disciplinary meeting, confirming that the decision of the trustees was that the relationship between employer and employee had broken down irretrievably and that the Claimant’s employment would be terminated with immediate effect as from Tuesday 6 August 2019 on the grounds that they were satisfied there was some other substantial reason to justify this under the Employment Rights Act 1996. The Claimant was paid one month’s notice. She was told that she had the right to appeal.
- 4.21 The Claimant exercised her right of appeal. Arrangements for this were made by Janet Perry. The Claimant was informed that the appeal would be heard by Anthony Cramphorn and Ian Norgell, two trustees who it was said had had limited involvement with the Claimant or her history. The grounds upon which the Claimant was appealing had been identified in writing and set out in a letter from Janet Perry dated 29 August 2019. The appeal hearing took place on 9 September 2019. The notes of that hearing had not been included in the bundle of documents despite it running to 286 pages but were produced during the hearing at a late stage. However it was acknowledged on both sides that nothing turned upon those notes. The result of the appeal was communicated to the

Claimant on 12 September. The appeal was unsuccessful and the decision to dismiss was upheld. The Claimant had alleged in writing after the appeal that this disciplinary process was biased, partial and unprofessional, that the disciplinary panel went “with the minority” in accepting some of the words of some of the employees, that the Respondent had no human resources department, that the disciplinary sanction was not reasonable and that the decision was not justified or supported by the evidence presented.

- 4.22 Throughout the various processes a large number of incidents were involved and discussed at the various hearings in some detail. It is not necessary for the purposes of this decision to go through the detail of those various allegations and cross-allegations.

Submissions

5 Counsel for the Respondent provided detailed written submissions. She argued that the claim for unauthorised deductions/breach of contract should be dismissed because the Claimant had agreed a new contract and this was not under duress. As to the unfair dismissal claim she submitted that this was a situation where dismissal was because of the breakdown in the relationship between the Claimant and Sandra Ryder and that that was irretrievable. Steps had been taken to discuss the possibility of improving that relationship, but the Claimant had stated that it was irretrievable and that she saw no purpose in seeking to amend that relationship. It was argued that the Respondent had carried out a fair process and opportunity had been given for the Claimant to improve her behaviour over a period of time even though the time between the first disciplinary hearing and the Claimant being summoned to a further hearing was only a matter of days. She argued further that despite the wording of the meeting of trustees on 26 June 2019 the decision was not pre-determined but that in any event the Tribunal was referred to the case of *Gallacher v Abellio Scots Rail Ltd EAT 0027/19* this being a case where there was complete breakdown in working relations and that an employer in such a situation is able to dismiss without following a proper procedure on the basis that it would be unreasonable. She further argued that on the basis of *Polkey v AE Dayton Services Ltd [1987] IRLR*, if the Tribunal found that there were errors of procedure to make the dismissal unfair, then any award of compensation should be reduced by 100%. Ms Nicholls also argued about the possibility for contributory fault.

6 The Claimant stated that she believed that everything was down to the fact that she had raised a grievance against Sandra Ryder and Michele Quaife and that her dismissal was in retaliation to this. She referred to Michele Quaife having said that if employees asked for help and the Respondent cannot deal with the situation, then the employees can always leave.

7 She submitted that she had been employed by Abbeyfield for six and a half years and had seen other employees leave when their issues had nothing to do with her. She pointed out respects in relation to which the Respondent’s procedures were inadequate and to Sandra Ryder having admitted that she had not read the ACAS bereavement guidelines which were relevant to the Claimant’s argument that she had received no proper support from her employer or from her manager during the time that her husband was terminally ill and subsequently died. She stated that she had hoped to be able to

work at Abbeyfield until her retirement in a year's time and that, because of her age and the current climate, it is unlikely that she would be able to get another job. She referred to Abbeyfield's stated ethos of caring, openness, honesty and respect not being followed and that they had failed in all of these values. Her husband had done no wrong but he had been disrespected. This had affected the way in which she had been able to care for her terminally ill husband to whom she had been married for 47 years. If as she believed the Respondent was suggesting, she was so bad in the way she behaved in Abbeyfield, then how was it that whilst in her other job at B & Q, there were no criticism of her.

The Law

8 Sections 94 and 98 of the Employment Rights Act 1996

S94(1) An employee has the right not to be unfairly dismissed by his/her employer.

S98(1) In determiningwhether the dismissal of an employee is fair or unfair it is for the employer to show-

(a) the reason (or if more than one, the principal reason) for the dismissal; and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held .

S98(4) Where the employer has fulfilled the requirements of subsection (1) , the determination of the question whether the dismissal is fair or unfair(having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

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

Findings

Breach of contracts/unauthorised deduction of pay

9 Having considered all the evidence in relation to the claim made by the Claimant I find that she agreed to give up working the tea time hours which previously had been a part of her contract. This followed a recorded discussion with Sarah Newman and was represented by a new contract in writing which the Claimant signed. Although there were a few days of delay in her signing it, the Claimant attributed this to the fact that she had other matters on her mind because of the situation of her husband's illness. However, I find no basis for the suggestion that the contract was signed under duress and was not a

free agreement into which the Claimant entered.

10 The Claimant subsequently raised a grievance partly in relation to that change in her contract and that was fully investigated and that aspect of the grievance was not upheld. The Claimant continued to work on the basis of the new contract which was for laundry duties only. Accordingly, this was her new contract. There has been no unauthorised deduction of pay and no breach of contract by the Respondent. The claim for monies for this aspect of the claim has no merit and is dismissed. She has suffered no breach of contract. There has been no unauthorised deduction of pay under section 13 of the Employment Rights Act 1996.

Unfair dismissal

11 Having considered all of the evidence in this case I conclude that the reason for the termination of the Claimant's employment was the breakdown in her relationship with her manager and the lack of trust and confidence which the Respondent felt they could not have in her. This was because of the lack of a proper relationship between the claimant and her manager and also with regard to the Claimant's attitude with other employees and her conduct and the steps which she had taken to conduct a survey with vulnerable residents.

12 Although there were very many issues which appeared to be of a conduct nature alleged against the Claimant, it was ultimately determined that her continued employment was untenable for the society because of the lack of a working relationship between her and her manager and her refusal to take any steps to improve that relationship despite numerous requests to do so.

13 It is appropriate for a charitable organisation such as the Respondent, which cares for vulnerable people, to consider very carefully the way in which they expect staff to have a proper working relationship and for those who manage and to cooperate with and communicate effectively with their manager. It appeared over a period of time that the Claimant would not comply in this respect.

14 If this were a case where I decided that the reason for termination of employment was by virtue of the Claimant's conduct, then the disciplinary process should have been suitable in relation to investigation of misconduct. The Claimant has a disciplinary policy and there were respects in which this was not followed. There were also key issues where the process could be criticised. This included the fact that some of the directors who were involved in investigation and hearings undertook various roles raising the reasonable conclusion being that there was lack of independence and impartiality. However, I take into account the fact that there is a limited number of trustees, that they are voluntary and, although in many respects having significant professional experience, it would be unreasonable to think that they could stay unaware of problems that were being experienced with regard to relationships within the home.

15 There was also a significant issue with regard to the apparent predetermination of the outcome for the Claimant taking into account that there had been a meeting involving four of the trustees where a document showed very clearly that a decision had been reached that the Claimant's employment was to be terminated. Although it was argued that this was not what the document meant, I found that unconvincing. If this had been a

case where I found that dismissal was by virtue of the Claimant's conduct then I would certainly have found that the dismissal was unfair.

16 However I find on the convincing evidence from the Respondent that the reason for dismissal was the total and irretrievable breakdown in the relationship and that this was 'some other substantial reason' as provided for in s98(1)(b) of the 1996 Act. I take into account various legal authorities with regard to cases where dismissal is for "some other substantial reason". One such case which was not quoted to me was *Ezsias v North Glamorgan NHS Trust [2011] IRLR 550* which was a case where there had been a breakdown in the working relationship between a surgeon and his colleagues. The EAT held that the contractual disciplinary procedures should apply only to issues of conduct or competence and not to allegations of a breakdown in working relationships. Those procedures do not apply to cases where, even though the employee's conduct caused the breakdown of the relationship, the employee's role in the events which led up to the breakdown was not the reason why action was taken against him. Employment Tribunals will be on the lookout to see whether an employer is using the rule book of "some other substantial reason" as a pretext to conceal the real reason for the employee's dismissal and I take that into account in the present case and I find that their reason is genuine.

17 In the case of *Gallacher v Abellio Scots Rail Ltd EAT 0027/19* it is acknowledged that where there has been a complete breakdown of working relationships, an employer may be in the position of being able to dismiss without following a fair procedure.

18 Applying these cases to the present proceedings I find that the reason why the Claimant's employment was brought to an end was because of some other substantial reason namely the breakdown in the relationship and the feeling that this could not be remedied. I do not find that this was a pretext to conceal some other motive and I find no substance in the argument that this was retaliation with regard to the Claimant having raised a grievance. Applying s98(4) of the 1996 Act I find that the Respondent acted reasonably in all the circumstances in treating this as a sufficient reason to dismiss the claimant. I take into account the size and administrative resources of the Respondent and make this finding in accordance with equity and the substantial merits of the case.

19 I also applied the test approved in the case of *British Leyland (UK) Ltd v Swift 1981 IRLR 91 CA* and applied in *Iceland Frozen Foods Ltd v Jones 1983 ICR 17 EAT* and followed in many more recent cases namely the band of reasonable responses test.

20 As stated by Mr Justice Browne-Wilkinson in the *Iceland Frozen Foods* case: '*The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair*'. In accordance with my conclusions I find it does fall within the band and the dismissal is therefore fair.

21 Accordingly and in all these circumstances my finding is that the Claimant was fairly dismissed on the basis of some other substantial reason which was not a finding that she was fault or guilty of misconduct. It was the breakdown in the relationship which meant that this was the reason why the Respondent brought the employment to an end.

22 I appreciate that this is disappointing for Mrs Higgins as it appears that she gave

six and a half years of service during which time she worked efficiently and well and without any apparent complaints with regard to the quality of her work or her diligence in undertaking the tasks allotted to her. She also had to deal with the very sad dynamics in her family with her husband being diagnosed with a terminal illness, her nursing him and then having to cope with his demise. It was suggested that these factors could have affected the way in which she related to her manager and others within the home. However, there was clear evidence that these relationship problems had continued for some time and could not all be attributed to the period of her husband's illness. An organisation such as the Respondent in running homes for vulnerable people must regard highly the need for everyone in the home to have goodwill towards others, that the staff must respect other staff and in particular that employees must consent to being managed by their managers. There is the clearest evidence that Mrs Higgins felt unable or unwilling to comply with this basic need and because of this it was fair for her employment to be ended as it was. Therefore, the Claimant was fairly dismissed and her claim is unsuccessful.

**Employment Judge Speker OBE DL
Date: 12 October 2020**