



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Sharon Pye

**Respondent:** Bolton Cares (A) Limited

**Heard at:** Manchester (by CVP)

**On:** 13 January 2023

**Before:** Employment Judge K M Ross

## REPRESENTATION:

**Claimant:** Mr L Bronze, Counsel

**Respondent:** Mrs B Clayton, Counsel

# RESERVED JUDGMENT

1. The claimant's claim that she was unfairly (constructively) dismissed by the respondent in breach of s.95 and s98 Employment rights Act 1996 is well founded and succeeds.
2. The claimant's claim for notice pay (wrongful dismissal) is well founded and succeeds.
3. The case will be listed for a Remedy Hearing.

## REASONS

1. The claimant was employed by the respondent and its predecessor Bolton Metropolitan Borough Council from 22<sup>nd</sup> of April 1992. She was required to move to a different workplace by the respondent. She resigned on 6 May 2022 and brought a claim for unfair(constructive) dismissal and wrongful(constructive) dismissal to this Tribunal.

2. At the outset of the hearing the issues were agreed for the unfair(constructive) dismissal claim as follows:
3. Can the claimant prove that there was a dismissal? Did the respondent do the following things:
  - (1) Fail to consult the claimant over the proposal to move her work location.
  - (2) Move the claimant's work location.
  - (3) Did that breach the implied term of trust and confidence? Taking account of the actions or omissions alleged in the previous paragraph, individually and cumulatively, the Tribunal will need to decide:
    - (i) whether the respondent had reasonable and proper cause for those actions or omissions, and if not
    - (ii) whether the respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.
4. Was the fundamental breach of contract a reason for the claimant's resignation?
5. Did the claimant affirm the contract before resigning, by delay or otherwise? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

**Reason**

6. Has the respondent shown the reason or principal reason for the fundamental breach of contract? Was it a potentially fair reason under section 98 Employment Rights Act 1996? Did the respondent act in breach of S98(4) ERA 1996.
7. Did the respondent fail to pay the claimant notice pay in breach of contract?

I heard from the claimant and for the respondent Mrs V Ritchie.

**Facts**

8. I found the following facts.
9. The claimant started working for Bolton Metropolitan Borough Council on 22 April 1992 as a Residential Social Worker. She was transferred into the role of Community Support Worker with the respondent on 1 July 2016. There is no dispute she had over 30 years continuous service at the time her employment ended.

10. There is no dispute either that the claimant was an experienced and effective employee and there was no suggestion whatsoever of any disciplinary action or other matter of concern. Indeed, the opposite was true. One of the reasons the respondent wanted to transfer the claimant was her extensive experience, including working with residents who could be challenging.
11. There was no dispute that the claimant does not drive and therefore was dependent on walking or travelling by public transport to work.
12. The respondent manages a variety of different care services across Greater Manchester. The claimant was employed within the supported living service. This a service whereby individuals are offered care services within their home. I find there were approximately 25 such residential units. The number of staff responsible for each unit varied. Some houses required 4 members of staff and others up to 10 or 12.
13. The claimant worked at the respondent's Wentbridge Road home for approximately nine years. In around 2020 the claimant became aware that a colleague was very upset because she had been asked to move to another home, School Hill. The claimant volunteered to go in her place to work at School Hill. I find it took the claimant approximately the same amount of time for her to travel to School Hill in the morning and go home in the evening on a single bus journey on a service which ran frequently, as in her workplace at Wentbridge. I find it is an indication of the type of person the claimant is that she volunteered to help in this way.
14. At School Hill there were three residents. In addition to the claimant there were three other members of staff. I find the claimant's shift pattern was basically 9 am to 5pm and a sleepover shift which started at 11am and finished at 11am the following day. I find to travel to work the claimant walked five minutes from her home to a nearby bus stop and took bus number 575 for approximately 15 to 20 minutes, alighting at Duke Street. She then walked approximately five minutes to the School Hill home. Her journey time was therefore approximately 30 minutes. She did the same route in reverse on the way home. Page 96. I find that the bus service was frequent and there was a bus approximately every 10 minutes. I rely on the claimant's evidence and find she did very similar journey for the previous nine years when she was at Wentbridge Home.
15. I find that on 29 May 2022 the claimant heard rumours that another staff member would be joining School Hill. The claimant was concerned because she knew they were already fully staffed.
16. The claimant asked her supervisor about the situation and was told she was going to be moved to a home on Limefield Road to accommodate another employee moving to School Hill. I find the claimant was shocked and upset.
17. She had previously worked on a "float shift" at Limefield Road and therefore knew it was too far to walk and the bus route meant she would have to change buses and the second bus service was infrequent.

18. On the previous occasion the claimant had to take a taxi to get to her shift at Limefield Road. On that occasion her employer had paid the taxi fare although after being taxed on the reimbursement, the claimant was out of pocket.
19. The claimant researched the position about transport. She found she would have to take her existing bus and stay on it until Bolton bus station approximately 25 minutes. She would then have to change buses and take a bus number 526 to Smithers Rd, a further 15 to 20 minutes. The claimant would then need to walk five minutes to the home at Limefield Road. Therefore the claimant had a much longer, more difficult journey. The other main problem was bus service 526 only operated once an hour. On a Sunday the bus service 526 didn't start until 10 am approximately.
20. I accept the claimant's evidence that if there was no suitable bus because the service on the second route was only hourly, she would have to walk from Limefield Rd to Bolton bus station at the end of her shift, a journey of at least half an hour, and then wait at the bus station for the bus on the second route, then travel 25 minutes on that bus and then walk 5 minutes to home.
21. I accept her evidence the shortest possible journey travelling from home to Limefield Road was approximately 50 minutes but often it would take longer due to the infrequent nature of the 526 bus service. In the evening working a shift which finished at Limefield Road at 8pm the claimant would not get home until 10pm. p 66.
22. I find that on 3 May 2022 Mrs Ritchie telephoned the claimant. She did not make a record of the conversation. I find that she informed the claimant she would be moved to Limefield home. I find the claimant informed her it would not be possible for her to get to and from work because of the timings of the buses. I accept the claimant's evidence that Mrs Ritchie told her everybody had to travel to work and the move was "non-negotiable". Mrs Ritchie denies using those words. I prefer the claimant's recollection. When giving evidence the claimant made concessions which were not in her favour. Mrs Ritchie was less inclined to do so and sometimes struggled to answer a direct question.
23. Furthermore as a manager I find it is less likely, particularly as she did not take a note of the conversation, that she would have a clear recollection of the conversation so long afterwards whereas for the claimant this was a very significant conversation because it was affecting her livelihood and she is more likely to recall it accurately. There is no dispute that Mrs Ritchie did not expressly refer to a clause in the claimant's contract which the parties have referred to as a mobility clause in this hearing. See page 39 clause 2.
24. However it is not disputed that Mrs Ritchie did say to the claimant she was employed to work for Bolton Cares rather than being employed at a particular house.
25. I accept the claimant's evidence that she was not given any reason for the move in that conversation or why she had been selected. I accept the claimant's evidence she asked to be moved to another house, if she had to be moved, with good links to public transport.(The claimant said in evidence there

were a number of other homes which fell into that category) I accept her evidence Mrs Ritchie just responded that she had “worked all over too” and did not engage with the problem.

26. I find soon after the claimant’s supervisor said there was a possibility of moving the claimant to Landedsman’s house. The claimant explained that this was not on a regular bus route either (see p67-8.) I accept the claimant’s evidence that she was not formally offered a position at that home.
27. I find that on 6 May Mrs Ritchie spoke to the claimant on the telephone again and informed her she would be moved to Limefield House effective from 16 May 2022. I find she did not offer the claimant any other house as a work location or a face-to-face meeting. I find the claimant asked why other support workers at School Hill could not move but she was told that Mrs Ritchie could not go into specifics for personal confidentiality reasons. I find Mrs Ritchie told the claimant (and it is not disputed) that she had made enquiries at Copebank Home to see if the claimant could move there but it was unsuitable as a male support worker was needed.
28. I find that the claimant mentioned Landedsman’s house and suggested she could look again at the timetable. I find Mrs Ritchie said the claimant could not do so. I find Mrs Ritchie did not engage with the claimant about the nature of the travel difficulties the move would cause the claimant. There was no suggestion of the claimant’s taxi fare being paid as had occurred when she worked on a “float” duty at Limefield Road. The claimant said she would have to resign and Mrs Ritchie said she could only accept a resignation “in her hand”.
29. There is no dispute that the same day, the claimant handed in her letter of resignation. P52. The letter stated: “I have come to this decision as you have caused me stress in moving me to somewhere which is difficult to travel to”.
30. On the same day, at the same time as the claimant had handed in her notice, she was given the new rota by the manager for Limefield house, starting 16 May. The working pattern was different to the pattern at School Hill. It was 8am to 8pm on Saturday followed by 8am to 8.30pm on a Sunday(p90). The claimant agrees that the manager did state there could flexibility on a specific occasion but from the claimant’s perspective that did not solve the fundamental problem of the difficulty of the journey.
31. The claimant gave notice due to expire on 3 June 2022. On 16 May 2022, the date the claimant was due to start work at Limefield she was signed off work with stress by her GP and did not return to work- page 55. I find that the respondent normally gave four weeks’ notice of a change of work location- paragraph 25 Mrs Ritchie’s statement.
32. I find that Mrs Ritchie did not discuss the move with any staff potentially affected. Her evidence was the claimant’s move was decided at a managers’ meeting. No minutes were provided of that meeting. Mrs Ritchie said she considered the other employees at School Hill unsuitable to move to Limefield Road. One support worker was already in the process of being moved to another home. Another was a new member of the team although Mrs Ritchie

accepted that employee was a very experienced individual. The third employee had depression and had suffered a family bereavement. Mrs Ritchie stated she had not asked any of the other employees based at School Hill, or any employees at any other Home whether they were willing to move to Limefield Road. She said that extra hours were needed at Limefield as they were short staffed there and she and the other managers wanted the claimant to go there because she was very experienced and suitable to work with the residents there who could be challenging. She agreed the respondent used agency staff at various Homes including School Hill and Limefield Road.

33. The claimant said that at least one of the other employees based at School Hill lived very close to Limefield Road and could walk there and another of the employees could drive meaning it would be easier for them to travel there. Mrs Ritchie said she had no personal knowledge of exactly where employees lived and the need for the claimant to move was based on the need of the service to have someone of her experience at Limefield Road.

### The Law

34. The relevant law is found at section 95C and section 98 of the Employment Rights Act 1996. The case of **Western Excavating Limited v Sharp [1978] IRLR 27** is relevant, as is **Malik v BCCI [1997] IRLR 462** where it was stated in relation to the implied duty of trust and confidence 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 trust and confidence between employer and employee.”

35. In this case there was a clause in the claimant’s contract which stated under Place of Work: “You are employed in the service of Bolton Care and Support (A) and will work at the location indicated in your offer letter or at such other place of employment in the service of Bolton care and support (A) Ltd as required.” p39. The claimant did not dispute she was bound by the terms of that contract.
36. Counsel for each party, Mr Bronze and Ms Clayton, referred me to the cases listed in each of their helpful submissions document. The key cases were **White v Reflecting Roadstuds Ltd 1991 IRLR 331**, **Unite Bank v Akhtar 1989 IRLR 5077**, **Spafax Ltd v Harrison 1980 IRLR 442** as well as **Western Excavating Limited v Sharp [1978] IRLR 27** and **Malik v BCCI [1997] IRLR .**

### Applying the law to the facts

37. I turn to consider the first issue. Did the respondent fail to consult the claimant over the proposal to remove her work location? I find the answer is yes. I find there was no consultation with the claimant. She was informed by Mrs Ritchie that she was moving to Limefield Road and it was not negotiable. The claimant raised concerns about the difficulty she would have in getting to work because of the journey, travelling on 2 bus services, one of which was infrequent and ran only hourly. Mrs Ritchie did not engage with those concerns when the

claimant raised them. Mrs Ritchie did not meet with the claimant in person. The claimant never had a face-to-face meeting with anyone. The claimant was never formally offered an alternative Home by Mrs Ritchie. The only alternative suggested by Mrs Ritchie was Copebank which Mrs Ritchie said was not suitable.

38. I turn to the second question, did the respondent move the claimant's work location? There is no dispute that the answer to that question is yes.
39. I turn to the next issue, did those two matters breach the implied term of trust and confidence. This is the heart of the issue in this case.
40. There is a contractual mobility clause in the claimant's contract. To what extent can the implied duty of trust and confidence curb the power of an employer operating an express mobility clause? Ms Clayton reminded me that lawful conduct is not capable of constituting a repudiation even if it may be unwise or unreasonable. **Spafax Ltd v Harrison 1980 IRLR 542.**
41. I turn to consider whether a failure to consult the claimant over the proposal to move her work location is capable of being a breach of the implied term of trust and confidence. Initially it seems not. **White and Reflecting Roadstuds** stated that **Akhtar** did not establish a principle that a mobility clause is subject to an implied term to act reasonably.
42. However, as advised by Mr Bronze in his submission I have looked carefully at the case of **White**. Wood J states at para 21 states that Akhtar found that the employer should not exercise his discretion in such a way as to prevent the employee from being able to carry out his part of the contract.
43. However, Wood J also states at paragraph 24 *".....no responsible employer will on reflection wished to reach a decision having a material effect on one of his employees whether it is redundancy, mobility switch of jobs or something similar without discussion explanation or consultation-none of these words are intended to be used technically. Arising from these the employee will no doubt have been told "why" and been given some explanation. He will have had his say. He will in many circumstances have received advice and encouragement. He may well have received some form of warning whether informally within a procedure. Disciplinary procedures and grievance procedures may have been given effect, but the principle is one of discussion-communication-and it would be retrograde to allow it to become bogged down in the small print of procedure. However it is important to recognise that where organisations and reorganisation is concerned it is for management to reach the decisions provided that they do so responsibly"*.
44. He goes on to state that a purely capricious decision would not be within the express mobility clause and likewise if there were no reasonable or sufficient grounds for the view that Mr White was required to move there would be no breach of the clause. He goes on to emphasise there is: *"the overriding implied term as to the relationship of confidence and trust between the employer and employee and this is where communication is so important"* paragraph 28.

45. With this in mind, I turn back to the facts of this case.
46. There was no consultation with the claimant. She was simply informed that she was going to be moved. Mrs Ritchie says they looked at the needs of the service user and the service and that was why the claimant was moved. There were no minutes or any other evidence produced to this Tribunal about that. No formal process at all was adopted in relation to moving the claimant, a loyal and experienced employee with over 30 years' service. Mrs Ritchie did not engage with the claimant's concerns that the new location meant she could not reasonably get to work, given the difficulty in travelling to that location on public transport. Even at the Tribunal Mrs Ritchie stated that it would simply be a case of the claimant travelling an extra 20 minutes. The evidence shows that that was not correct.
47. The claimant was not given a face-to-face meeting to discuss the move and her travel problems. There is no dispute that the claimant received a modest wage of approximately £9.50 per hour. In reality the claimant could not carry out the contract at the new location because she could not reasonably travel there.
48. I am satisfied that in the particular circumstances of this case, failure to consult the claimant about moving her work location is capable of amounting to a breach of the implied duty of trust and confidence.
49. I must now go on to consider the next issue :did that action breach the implied duty of trust and confidence? To answer that I must consider whether the respondent had reasonable and proper cause for the action and if not whether they behaved in a way when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.
50. I am not satisfied that the respondent had proper cause for failing to consult the claimant. There was no explanation as to why there was no face-to-face meeting or why she was not given the usual notice four weeks, but most importantly of all, no explanation as to why Mrs Ritchie did not actively engage with the claimant's concerns that she would be unable to travel to work by public transport to Limefield house when it involved two buses and the second service being infrequent, running only hourly and not starting until after 10am on a Sunday. I therefore find that the respondent behaved in a way when viewed objectively was likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. I remind myself that the claimant worked as a career, a responsible job which is remunerated at a low rate of pay and had worked for the respondent conscientiously for over 30 years.
51. I turn to the other alleged breach which was moving the claimant's work location. I am not satisfied that moving the claimant's work location of itself is capable of amounting to a breach of the implied duty of trust and confidence because the respondent had an express clause in the claimant's contract of employment permitting them to move her.



52. However I have found when the respondent exercised that mobility clause in the claimant's contract, it failed to consult the claimant over their proposal and it is that which I have found amounts to a breach of the implied duty of trust and confidence for the reasons I have explained above.
53. I turn to the next two issues. Was the fundamental breach of contract a reason for the claimant's resignation? Did the claimant affirm the contract before resigning, by delay or otherwise? There is no dispute in this case that the reason the claimant resigned was because of the way the respondent treated her, namely caused her stress in requiring her to move work location, given the difficulty in travelling to the new workplace. She did not delay before resigning. She resigned on the same day the move was confirmed and that date.
54. I turn to the next issues. Has the respondent shown the reason or principal reason for the fundamental breach of contract? Was it a potentially fair reason under section 98 Employment Rights Act 1996? Did the respondent act in breach of S98(4) ERA 1996.
55. The respondent relies on the potentially fair reason of conduct namely failure to obey a lawful management instruction. I am not satisfied that the respondent can show this is a potentially fair reason. The respondent required the claimant to move without consultation or any formal meeting. There was no formal letter notifying her of the move. There was no suggestion that the claimant had anything other than an unblemished record. Accordingly I am not satisfied that the respondent can show conduct is a potentially fair reason for dismissal and even if I am wrong about that, they are unable to show a dismissal would have been within the band of reasonable responses of a reasonable employer where there was no history of refusing to obey the instruction, and where there were good reasons the claimant could not attend the new location- her absence from work on sick leave during her notice period due to stress and ultimately her inability to reasonably travel to the new work location on public transport. In addition, the failure to follow any procedure renders any dismissal unfair pursuant to s98(4) ERA 1996.
56. Therefore, for these reasons I find that the claimant was unfairly constructively dismissed and the claim will proceed to a remedy hearing.
57. The claimant also brought a claim for wrongful dismissal (notice pay).
58. I find the claimant was constructively dismissed. I rely on my reasons above that the claimant was entitled to consider herself constructively dismissed by the respondent on 6 May 2022.
59. At common law the claimant is entitled to be paid for her notice period where there is a dismissal unless there was a repudiatory breach of contract which entitled the respondent to end the contract summarily (without notice) I find there was no such conduct for the reasons relied on above.
60. Under the terms of her contract the claimant was entitled to receive 12 weeks notice, having regard to her length of service. p42. Accordingly, the claimant is

entitled to receive damages in the sum of 12 weeks pay. Calculation of the award will be determined at the remedy hearing.

Employment Judge K M Ross  
18 January 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
19 January 2023

FOR THE TRIBUNAL OFFICE

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