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EMPLOYMENT TRIBUNALS

Claimant: Ms Kathryn Ellis
Respondent: James Moor T/a Lime Tree Care Group
Heard at: East London Hearing Centre
On: 13 December 2018
Before: Employment Judge Brown

Representation

Claimant: In person
Respondent: James Moor

JUDGMENT

The judgment of the Tribunal is that:-

1. The Respondent automatically unfairly constructively dismissed the Claimant.
2. The Claimant contributed to her dismissal in the order of 40% by her conduct in swearing at her manager and, therefore, the basic and compensatory awards shall be reduced by 40%.
3. Had the Respondent acted fairly, the Claimant would not have been dismissed and would not have resigned.
4. The Claimant made reasonable efforts to mitigate her loss and to find alternative work.
5. The Respondent shall pay the Claimant a total of £4,104 in compensation for unfair dismissal comprising:
 - a. A basic award of £648 (that is, £1,080 reduced by 40%) and;

- b. A compensatory award of £3,456 (that is, compensatory award of £5,760 reduced by 40%).

The prescribed element is £3,240.

REASONS

1 The Claimant brings a claim of constructive unfair dismissal against the Respondent, her former employer. I discussed the issues with the parties at the start of the hearing and the issues which arose were as follows:

- 1.1 Did the Respondent, without reasonable or proper cause, act in such a way as was calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (breach of the duty of trust and confidence) by doing the following:
- 1.1.1 When the Claimant raised health and safety concerns or protected disclosures and concerns about the conduct of the manager, Ms Hills, with the Respondent and asked to be able to do so without Ms Hills being present, the Respondent stopped the meeting and then reconvened it when Ms Hills was present.
 - 1.1.2 Ms Hills' behaviour in the meeting was confrontational and aggressive and amounted to bullying.
 - 1.1.3 The Respondent suspended the Claimant, which was unreasonable and unjustified.
 - 1.1.4 The Respondent instituted a disciplinary procedure with the Claimant which did not comply with the ACAS Code of Practice on disciplinary and grievance procedures because:
 - 1.1.4.1 There was no reasonable investigation
 - 1.1.4.2 The Claimant was not offered an opportunity of an investigatory meeting
 - 1.1.4.3 The Claimant was not provided with witness statements of evidence
 - 1.1.4.4 The Claimant was not given the opportunity to be accompanied at a meeting or prepare a defence

- 1.1.4.5 The letter inviting the Claimant to the disciplinary hearing indicated that the Respondent had already decided that the matter amounted to gross misconduct.
 - 1.1.4.6 The letter inviting the Claimant to the meeting stated that Ms Hills would be a decision maker and indicated that the outcome of the meeting was predetermined.
 - 1.1.4.7 The Respondent and Ms Hills would be judging their own case and the disciplinary hearing would not be fair.
 - 1.1.4.8 On 26 February 2018 the Respondent had asked the Claimant whether she would resign and, when the Claimant said that she would not, the Respondent responded that he would then “go down the disciplinary route”, indicating that the Claimant would be dismissed if she did not resign.
- 1.2 If the Respondent did act in those ways, and if that did amount to a breach of the implied term of trust and confidence, did the Claimant resign in response to that? The Respondent contended that the Claimant intended to resign in any event.
- 1.3 The Respondent did not contend that the Claimant had delayed in resigning, or that the Claimant otherwise affirm the contract.
- 1.4 If the Claimant was constructively dismissed, has the Respondent shown the reason for dismissal. The Claimant contended that the reason or principal reason for dismissal was her protected disclosures about residents not having been fed or given medication. The Respondent contended that he disciplined the Claimant because of her conduct in swearing at her manager, Ms Hills, and that, therefore, the Claimant’s conduct was a fair reason for the way the Respondent acted.
- 1.5 If the Respondent has shown a fair reason for dismissal, did the Respondent act fairly in dismissing the Claimant for that reason under *s98(4) Employment Rights Act 1996*?
- 1.6 If the Claimant was unfairly dismissed, what was the likelihood that the Claimant would have been dismissed fairly, or resigned, in any event? The Respondent contended that the Claimant would have resigned in any event and/or that there was a chance that it would have dismissed her for her conduct in swearing at her manager.
- 1.7 Did the Claimant cause or contribute to her dismissal? The Respondent contended that the Claimant caused her dismissal by swearing at her

manager.

2 The parties agreed that the Claimant earned £180 gross and net per week when she worked for the Respondent. The Claimant told the Tribunal that she had been unemployed until 1 October 2018 and that she had not been aware, when she claimed for 22 weeks' loss, that she could update the schedule of loss that she already submitted. The Respondent, on the other hand, contended that the Claimant should have obtained work much more quickly than the 22 weeks. The parties agreed that the Claimant had worked for the Respondent for 6 years.

3 I heard evidence from both the Claimant and the Respondent, who cross-examined each other. Both made written statements to the Tribunal. There was a bundle of documents and both also made submissions to the Tribunal.

Findings of Fact

4 The Claimant was employed by the Respondent at the Respondent's Lime Trees Care Home as a Care Assistant and as an In-house Re-Enablement Worker from 2012 until 2 March 2018. Lime Trees is a care home for adults who have learning disabilities, physical disabilities, challenging behaviour and brain injuries. Some residents are highly dependent on care and are unable to feed themselves and take medication themselves.

5 On 21 February 2017 the Claimant called the Respondent on the telephone and asked to speak to him. When he arrived at work that day, she came to his office. The Respondent agreed, in evidence, that the Claimant then raised concerns with him about residents not having been fed, or given medication. The parties also agreed that the Claimant raised concerns about a notice that Wendy Hills, her manager, had put on the notice board about a chopping board which had been left on a cooker and had melted. The Respondent and the Claimant agreed that the Claimant told the Respondent that she wanted to talk about the issues with the Respondent in private and without Ms Hills being present. During the meeting, Ms Hills telephoned the Respondent. The Claimant again made it clear that she did not want Ms Hills to come to the meeting. The Respondent stopped the meeting and the Claimant returned to work. Later the same day, Ms Hills told the Claimant to return to the Respondent's office. The Respondent and Ms Hills discussed the chopping board matter with the Claimant. The Claimant did not want to attend that meeting and wanted to leave. Ms Hills told her to sit down. I find that the meeting became heated. The Claimant lost her cool and eventually said to Ms Hills, "Oh fuck off, you can stick your fucking job." The Claimant walked out of the room.

6 The Claimant told me that she felt that Ms Hills was not listening to what she was saying and forced the Claimant to stay in the meeting, when the Claimant did not want to stay.

7 The Claimant's original job description as Care Assistant stated that she was responsible to the proprietor - that is, to the Respondent - and to her manager. The Respondent agreed that the Respondent did not have a policy that the Claimant was unable to raise concerns about care and health and safety with the Respondent directly - he agreed, on the contrary, that the Claimant could raise health and safety concerns with him directly.

8 The Respondent suspended the Claimant on 21 February at about 3.15pm, because of her conduct towards Ms Hills. Later that day, he wrote a letter to the Claimant dated 21 February 2018, page 66. The letter said:

“On 21 February 2018 at 3.15pm you were suspended from duties at Lime Trees. This followed on from your outburst towards your manager regarding a notice that had been displayed in the staff room relating to damage cooking/kitchen equipment. You swore at your Manager, Wendy Hills and told her to F**** OFF and made offensive remarks which indicated you resigning from your position before leaving the office without finishing the meeting. I have considered your behaviour and in line with the company policy regarding staff conduct employed by Lime Trees Care Group can confirm that this constitutes as gross misconduct. We will not tolerate behaviour of this description within the place of work. You are required to attend a disciplinary hearing on Friday at 4.00pm at Lime Trees which will be held by myself and Wendy Hills.

James Moor”

9 The Respondent has a disciplinary policy, page 54 of the bundle. It says, amongst other things, at paragraph 4.4, page 55

“In all situations before disciplinary action ... is taken the employee will be informed verbally by a Proprietor of the Company or Unit/Home Manager that an allegation has been made against him or her. The employee will also be given notice in writing informing him or her that she or he will be required to attend a disciplinary interview on a specified date, time and place. The employee will be given at least 48 hours’ notice of the proposed disciplinary interview within the written notice which will also briefly state the nature of the allegation.”

At Paragraph 5.1, page 56, the policy states,

“The employee will be reminded of his or her right to have a friend, colleague or professional representative present for support if they so wish during this disciplinary interview.”

At Paragraph 9.1, page 58, it states,

“In circumstances of gross misconduct, or if all previous stages of the disciplinary process has been exhausted (sic) and if the conduct or performance is still unsatisfactory and the employee still fails to reach the prescribed standards, DISMISSAL will normally result. Only a proprietor can take the decision to dismiss.

10 Gross misconduct resulting in dismissal is defined at page 59 of the disciplinary procedure. This specifies that the examples given are not exhaustive.

11 The Respondent stated, in his witness statement, that the 21 February letter was not sent until 23 February 2018. The Respondent conceded that the Claimant did not receive it until after 23 February 2018, as the Claimant asserted, Bundle page 75.

12 The Claimant did not attend the meeting on 23 February because she had not received the letter. On 26 February the Respondent called at her house and asked why she had not attended the meeting. The Claimant had only just received the 21 February letter. The Respondent asked the Claimant whether she intended to resign and the Claimant replied that she did not. The Respondent then said that he would “go down the disciplinary route.”

13 Having read the letter inviting her to a disciplinary hearing and having considered the position and taken some advice, the Claimant resigned, by sending a letter of resignation, Bundle page 68:

“Dear Mr Moor,

I am writing to resign from my employment with Lime Trees Care Group with immediate effect.

The reason I am resigning is that you have made it impossible for me to return to work. You have treated me in a way which has destroyed our employment relationship. The following are just the most recent examples of the breaches of the implied term of trust and confidence:

1. When I went to see you to express my concerns about health and safety breaches and the conduct of Wendy Hills, you suspended the meeting and called Wendy Hills in to confer with you before reconvening the meeting despite my express request to speak to you in private. You then expected me to speak to you about these matters in front of Wendy Hills. The atmosphere was tense and I felt intimidated and uncomfortable. The inclusion of Wendy Hills in the meeting deprived me of the opportunity to “blow the whistle” on the health and safety breaches;
2. When I was called back into the meeting Wendy Hills’ behaviour was confrontational and aggressive. Her behaviour amounted to bullying and caused me upset and distress;
3. The decision to suspend me was unnecessary and unjustified. Suspension is not a neutral act. It carries with it a cloud of suspicion and stigma. Suspension was unjustified in the circumstances;
4. The disciplinary procedure you followed did not comply with the ACAS Code of Practice on Disciplinary and grievance procedures in that:
 - 4.1 There has been no “reasonable” investigation;
 - 4.2 I was not offered the opportunity of an “investigatory meeting”;
 - 4.3 I have not been provided with any witness statements or evidence;
 - 4.4 I have not had any opportunity to be accompanied to the disciplinary

meeting or to prepare a defence.

5. The letter inviting me to the disciplinary meeting indicates that you have already decided that my conduct amounted to gross misconduct. Having failed to intervene when I was being bullied in front of you it is clear that you have made up your mind that I must go.
6. Having been involved in the meeting on 21st February when I was treated so badly by Wendy Hills and having expressed the view that my conduct amounted to gross misconduct it is wrong that you should decide the outcome of my disciplinary hearing. How can you now approach the matter with an open mind? It is also wrong that the person who bullied me in your presence should also be a decision maker. How can she deal with the case fairly when I try to explain that I only swore because she was being so horrible to me? She will want to protect her own position. The comment that "we will not tolerate behaviour of this description within the workplace" indicates that the outcome of the disciplinary meeting has been pre-determined;
7. You and Wendy Hills are effectively judge and jury in your own cause. There does not seem to be any prospect of me receiving a fair hearing.
8. Your comment, when you came to see me on 26th February, indicate (sic) your desire for me to leave your employment: You asked if I was going to resign; I said "No"; you then said that you would have to go down the disciplinary route, then (indicating that this would achieve the same outcome).

You have completely destroyed my trust and confidence in you as my employer and as a result of your behaviour I cannot return to work or continue to work for you. I therefore resign with immediate effect."

14 The Respondent told the Tribunal that he had intended to dismiss the Claimant in any event. However, in oral evidence, he also told the Tribunal that, if the Claimant had attended a disciplinary hearing and apologised, then he may not have dismissed her. He agreed that the Claimant had worked for the Respondent for 6 years and that he had previously had a good relationship with her. He said that her CV was impressive and that he gave her a good reference after she left his employment because the reference was truthful and was an accurate reflection of her work at the Respondent's home.

15 The Respondent did tell the Tribunal, however, that the Claimant had expressed deep dissatisfaction about her work to a colleague, Mary Gray, on 20 February, page 63 and that she had told Mary Gray that she intended to resign. The Claimant in evidence said that she did not intend to resign and that she had not said that she would.

16 The Respondent agreed, very fairly, in evidence, that the matters that the Claimant raised in the meeting with him on 20 February about residents not being fed and not being given medication were serious issues of a health and safety and he assured the Tribunal that, as a responsible proprietor, the Respondent had investigated those

thoroughly thereafter. The Respondent conceded, in evidence, that if he had not invited Ms Hills to the meeting, the Claimant would not have sworn at her; but he also said that if the Claimant had not sworn, then he would not have dismissed her. The Respondent said that the Claimant would have resigned in any event, in his belief, because of the dissatisfaction that she had expressed to Ms Gray.

Relevant Law

17 s 94 *Employment Rights Act 1996* states that an employee has the right not to be unfairly dismissed by his employer. In order to bring a claim of unfair dismissal, the employee must have been dismissed.

18 By s95(1)(c) *ERA 1996*, an employee is dismissed by his employer if the employee terminates the contract under which he is employed in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This form of dismissal is known as constructive dismissal.

19 In order to be entitled to terminate his contract and claim constructive dismissal, the employee must show the following:

19.1 The employer has committed a repudiatory breach of contract.

19.2 The employee has left because of the breach, *Walker v Josiah Wedgewood & Sons Ltd* [1978] ICR 744;

19.3 The employee has not waived the breach- in other words; the employee must not delay his resignation too long, or indicate acceptance of the changed nature of the employment.

20 The evidential burden is on the Claimant. Guidance in the *Western Excavating (ECC Limited) v Sharp* [1978] ICR 221 case requires the Claimant to demonstrate that: first, the Respondent has committed a repudiatory breach of his contract; second, that he had left because of that breach; and third, that he has not waived that breach.

21 Every breach of the implied term of trust and confidence is a repudiatory breach, *Morrow v Safeway Stores* [2002] IRLR 9.

22 In order to establish constructive dismissal based on a repudiatory breach of the implied term of trust and confidence, the employee must show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them, *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606, *Baldwin v Brighton and Hove City Council* [2007] ICR 680 and *Bournemouth University Higher Education Corporation v Buckland* [2009] IRLR 606.

23 If the Claimant establishes that s/he has been dismissed, the ET goes on to consider whether the Respondent has shown a potentially fair reason for the dismissal and, if so whether the dismissal was in fact fair under s98(4) *ERA 1996*. Conduct is a potentially fair reason for dismissal. In considering s98(4), the ET applies a neutral burden

of proof.

24 By *s103A Employment Rights Act 1996* it is automatically unfair to dismiss an employee where the reason or principal reason for dismissal is that the employee made a protected disclosure.

25 Protected disclosures are defined in *ss43A & 43B Employment Rights Act 1996*.
By *s43B ERA 1996*

"43B Disclosures qualifying for protection

In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

....

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject...

...

(d) that the health and safety of any individual has been, is being, or is likely to be endangered...".

26 If the Claimant has been unfairly dismissed the Tribunal will go on to consider whether the Claimant contributed to her dismissal in any way and, if she did, the extent to which the award should be reduced. Further if the Claimant was constructively dismissed unfairly, the Tribunal can also consider the likelihood that the Claimant would have been dismissed fairly, or that the employment would have come to an end in any event, and can reduce the award by a percentage to reflect that.

Discussion and Decision

27 I found that the Claimant did make protected disclosures to the Respondent when she first met with him on 21 February 2018, when Ms Hills was not present. She disclosed information to him which, in her reasonable belief, tended to show that the health and safety of residents was being endangered - she told the Respondent that some residents had not been fed, or given medication. I concluded that the Claimant believed that these residents had not been fed or given medication and that, in the Claimant's reasonable belief, her disclosure was made in the public interest; that is, the interests of residents, their relatives and the public in general, who are interested in care homes being run in a proper manner.

28 I made no decision about whether, in fact, the residents had been properly fed or given medication - that was not the subject of these proceedings and I did not hear evidence on it.

29 My relevant decision was about whether the Claimant made protected disclosures when she met with the Respondent on 21 February - and I found that she did. The disclosures were made to her employer, *s43C ERA 1996*.

30 The Claimant asked, when she was making the protected disclosures, that she would be able to discuss those and other matters with the Respondent alone, and without

the home manager, Ms Hills, being present. I concluded, on the evidence, that the Respondent did not accept the Claimant's request and reconvened the meeting when Ms Hills was present. I found, as the Respondent conceded, that the Respondent was, himself, an appropriate person to whom the Claimant could raise these protected disclosures. However, I concluded that the Respondent did not respect the Claimant's wishes and overrode them - and required the Claimant to confront Ms Hills, about whom she had complained, instead of allowing her to make her protected disclosures to the Respondent.

31 I considered that the Respondent's actions, in requiring the Claimant to confront the person about whom she was complaining, was likely to, and did, result in tension between the Claimant and Ms Hills and that this eventually led to an angry outburst from the Claimant. I found that the Claimant did swear at Ms Hills, she said, "Fuck off you can stick your fucking job". I found that those swear words were clearly misconduct and were offensive to Ms Hills and to the Respondent.

32 The Respondent wrote a letter to the Claimant thereafter inviting her to a disciplinary meeting. As the Respondent again conceded, the letter did not tell the Claimant about her right to be accompanied and also said the meeting would be conducted by both the Respondent and Ms Hills, who was the person to whom the Claimant had sworn. I found that the wording of the letter, on a reasonable reading, suggested that the decision had already been made to dismiss the Claimant. The letter suggested that the Respondent had already decided that the conduct was of gross misconduct and that such conduct would not be tolerated. I considered the letter did not give the Claimant the 48 hours' notice of the meeting, to which she was entitled, in that it was posted on the same day as the disciplinary meeting was due to commence.

33 I considered that the actions of the Respondent, in requiring the Claimant to confront the manager about whom the Claimant was making protected disclosures, when the Claimant specifically asked that she could raise her concerns privately with the Respondent, was highly likely to, and did, seriously damage the relationship of trust and confidence between the Claimant and her employer. The resulting confrontation was, predictably, highly uncomfortable and provocative. There was no reasonable cause for the Respondent requiring the Claimant to meet Ms Hills in this way. The Respondent could have interviewed the Claimant and Ms Hills separately and made a decision on the protected disclosures having done so. I also considered sending a letter to the Claimant, giving her no notice of the disciplinary hearing - in that the letter was not posted until the day of the hearing - and telling the Claimant that the disciplinary hearing would be conducted by the person about whom the Claimant had sworn, not telling the Claimant that she could be accompanied, and using language to suggest the decision had already been made, was, without reasonable or proper cause, likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

34 I found that the Claimant resigned in response to those matters. She made clear that she did so in her detailed letter of resignation. There was no issue of affirmation in this case and, therefore, I found that the Claimant was constructively dismissed.

35 I then went on to consider what was the reason for dismissal and whether the Respondent had shown that the reason, or principal reason, for dismissal was a potentially fair reason.

36 On the facts, I found that the principal reason for the constructive dismissal was the Claimant raising protected disclosures with the Respondent, which prompted the Respondent to require the Claimant to confront Ms Hills. I considered that that was detrimental action towards the Claimant, who had raised protected disclosures, and resulted in the explosive encounter between the Claimant and Ms Hills.

37 The Respondent conceded, in evidence, that the Claimant would not have sworn at Ms Hills had he not required her to meet with her and discuss the complaints she was raising. If that had not happened, the Claimant would not have sworn, she would not have been invited to a disciplinary hearing and she would not have resigned in circumstances which amounted to constructive dismissal.

38 If I am incorrect in my decision on the principal reason for dismissal, I find that the principal reason for dismissal was the Claimant's conduct, which is a potentially fair reason. Nevertheless, under s98(4) ERA 1996, I found that the Respondent did not act fairly in sending the letter inviting the Claimant to a disciplinary hearing. The letter was in breach of the ACAS Code of Practice 1 Disciplinary and Grievance Procedures 2015, in many and serious respects. It did not tell the Claimant of her right to be accompanied. It did not allow the Claimant a reasonable time to prepare her case. On a reasonable reading, it indicated that the decision had been made already. I found that the Respondent unfairly dismissed the Claimant under s98(4) ERA 1996.

39 I found, nevertheless, that the Claimant did contribute to her dismissal by swearing at Ms Hills on 21 February. I found that this was culpable conduct which did contribute to the constructive dismissal. Nonetheless I found that, if the Respondent had not acted detrimentally towards her in relation to her raising protected disclosures and other complaints, and if the Respondent had respected her request to have a private meeting with the Respondent, then the Claimant would not have sworn. I found her conduct to have contributed to her constructive dismissal by less than 50%.

40 Given that swearing is a serious matter, I decided that the appropriate reduction in compensation for contributory fault was 40%.

41 I found that, if the Respondent had acted fairly in treating the protected disclosures confidentially, then there would not have been a confrontational meeting and there would have been no dismissal. I accepted the Respondent's evidence that the Claimant had 6 years' unblemished service.

42 I did not find that the Claimant was going to resign in any event. She had not resigned on 21 February in the private meeting with the Respondent. She said that she would not resign when the Respondent came to her house. The Claimant only resigned having read the 23 February letter. This was the last straw and prompted her resignation. Without it, and without the confrontational meeting, I found that the Claimant would not have resigned.

43 Therefore, I made no *Polkey* deduction.

Remedy

44 The Respondent argued that the Claimant had not mitigated her loss and ought to have been able to obtain alternative work earlier than she did on 1 October 2018. The Claimant told me, and produced evidence, that she had signed on at the Job Centre on 1 March 2018, page 30. The Claimant told the Tribunal, in detail, about the efforts she had made to find alternative work. She produced her Job Centre diary, at Bundle pages 30 – 33 and page 78 onwards. I accepted her evidence that she called Care Homes, but she was only offered night shift work, which the Claimant had not worked for some time. I accepted her evidence that she did not apply to the Respondent's sister's care home because she reasonably believed that the Respondent's sister would not have employed her, after the Respondent had accused her of gross misconduct.

45 I accepted the Claimant's evidence that she applied to Tesco and other local supermarkets; she worked trial shifts in pubs. I accepted her evidence that she had undertaken an IT course to help her obtain other work. I found that she did make reasonable efforts to find work, but that she did not obtain work until 1 October 2018.

46 While the Claimant had previously said that she was claiming only for 22 weeks loss, she explained that she did not understand that she could update her schedule of loss.

47 I am required to compensate the Claimant for the loss she has suffered. On the evidence, the Claimant lost earnings from the date of her resignation until she obtained alternative work on 1 October 2018.

48 I calculated the compensation due to the Claimant as follows.

49 The parties agreed that the Claimant had worked for the Respondent for 6 years. The basic award is calculated as $6 \times £180 = £1,080$. I reduced the basic award by 40% for contributory fault, giving a basic award of £648.

50 The compensatory award included the Claimant's loss of earnings: $30 \text{ weeks} \times £180 = £5,400$. The Claimant was also entitled to loss of statutory rights, calculated as $\text{weekly pay} \times 2$ (1 week per year an employee must work to gain employment rights) $£180 \times 2 = £360$. $£5,400 + £360 = £5,760$. This needed to be reduced by 40%, giving a compensatory award of £3,456. The total award for unfair dismissal is £3,456 (compensatory award) + £648 (basic award) = £4,104. The prescribed element of the award is £3,240 ($£5,400$ reduced by 40%) - that is the amount to which recoupment will apply.

Employment Judge Brown

Date: 1 February 2019

FOR THE TRIBUNAL OFFICE