



THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicant: Sarah Louise Winsall
Represented by: Advocate Mark Prialux

Respondent: The Guernsey Cheshire Home LBG
Represented by: Advocate Thomas Crawford

Tribunal members: Susan Gordon Hardy (Chair)
Alan Brown
Joanne de Garis

Hearing dates: 22 and 23 March 2023

Decision of the Tribunal

The Applicant made a claim of constructive unfair dismissal.

Having considered all of the evidence presented, whether referred to in this judgment or not, the representations of both parties, and with due regard to all the circumstances, the Tribunal finds that, under the provisions of The Employment Protection (Guernsey) Law, 1998, as amended, the Applicant resigned from her employment in circumstances that did not give rise to constructive dismissal. In the circumstances the Applicant’s claim is dismissed. The Tribunal makes no order for costs.

.....
Signature of the Chair

.....
Date

Any Notice of an Appeal should be sent to the Secretary to the Tribunal within a period of one month beginning on the date of this written decision.

The detailed reasons for the Tribunal’s Decision (Form ET3A) are available on application to the Secretary to the Tribunal, The Secretary to the Tribunal, Edward T Wheadon House, The Truchot, St Peter Port, Guernsey, GY1 3WH.
(Telephone: 01481 220025)
Email: e&dt@gov.gg.

The legislation referred to in this document is as follows:

The Employment Protection (Guernsey) Law, 1998, as amended (the Law)

The authorities referred to in this document are as follows:

Malik v Bank of Credit and Commerce International SA [1997] IRLR 462
Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493
Salford Royal NHS Trust v Roldan [2010] EWCA Civ 522
GW Stephens & Son v Fish [1989] ICR 324, EAT
Streeter v Sandpiper C.I. Limited (Guernsey E&DT, ED033/19)
Walker v Aurigny Air Services Limited (Guernsey E&DT, ED021/19)

Extended reasons for the decision

1.0 Introduction

- 1.1. Throughout these extended reasons documents within the hearing bundle shall be referred to by their tab and/or page number {tab x, page y}
- 1.2 The Applicant, Sarah Louise Winsall, who it was agreed was employed by the Respondent from 9 October 2017 to 7 March 2022 in the role of Deputy Home Manager, complains that she was constructively unfairly dismissed.
- 1.3 The Respondent denies that the Applicant was dismissed; and alleges that she resigned without notice by email dated 7 March 2022. Accordingly, the Applicant had the initial burden of proving that she was dismissed to the civil standard, that is on the balance of probabilities.
- 1.4 The Tribunal consisting of three members, met on Wednesday and Thursday 22 and 23 March 2023, to hear and determine the Applicant's complaint. All of the material submitted by the parties has been taken into account by the Tribunal, whether specifically referred to in this decision or not.

2.0 Background

- 2.1 The Applicant was employed by a contract of employment dated 15 January 2018, with an employment commencement date of 9 October 2017 {5.1, 99}.
- 2.2 On 23 January 2022 an incident (Incident) was alleged to have occurred whereby a threatening comment was alleged to have been made by the Applicant to a resident of the Home (Allegation).

- 2.3 The Applicant was informed of the Allegation by Robert Shepherd (RS), Chair of the board of directors of the Respondent, at a scheduled performance feedback meeting on 7 February 2022 (7 February Meeting). The Applicant categorically denied the Allegation.
- 2.4 On 8 February 2022 (while the Applicant was signed off work on sick leave) the Home Manager (Manager) was asked to carry out a preliminary investigation into the Incident.
- 2.5 The Applicant was informed by telephone on 14 February 2022 (confirmed by email of 15 February 2022 {4,76}) that an investigation was warranted as a formal complaint had been made. David Leafe (DL), a director of the Respondent with a background in HR matters, undertook the investigation with the Manager and reported to RS.
- 2.6 The investigation proceeded quickly and on 16 February 2022 DL called the Applicant to say the investigation had been inconclusive and the Respondent would draw a line under the matter. He confirmed this by email on 17 February 2022 (“draw a line” email) {4,77}.
- 2.7 The Applicant wanted to understand how the investigation had been conducted. She asked for copies of some of the Home’s procedures and requested a meeting with DL, explaining that she could not accept an inconclusive outcome.
- 2.8 The Applicant, her friend Dominic Wheatley (DW), the Manager and DL met on 28 February 2022 (28 February Meeting).
- 2.9 The Applicant returned to work on 1 March 2022 and resigned her position by way of an email of 7 March 2022, {4,95} citing failures on the part of the Respondent in its undertaking of a disciplinary investigation, and the management of her subsequent return to work.
- 2.10 The Applicant raised the following heads of claim:
 - a. That the Respondent did not provide due notice of the disciplinary meeting on 7 February;
 - b. That the Respondent failed to follow disciplinary procedures, and to keep the Applicant apprised of the potential consequences of the same;
 - c. That the Respondent failed to exercise consistent decision-making throughout the disciplinary process, notably in stating on 17 February 2022 that “a line can be drawn under [the matter]” yet continuing thereafter to progress the matter in a later meeting;

- d. That the Respondent failed to provide clarification that the Applicant was considered exonerated following the investigation in light of an acknowledged lack of evidence;
and
- e. That the Employer failed to appropriately manage her return to work in a manner which allowed her to continue with her role as previously;

on the basis that the Applicant had no option but to resign on the basis of a breach of the implied term of trust and confidence in her employment contract (the T&C term).

2.11 In her resignation email the Applicant stated she felt there had been a total failure to appropriately manage her return to work following a sickness absence of 3 weeks, including:

- 1) No meeting or discussion as to how her return to work would be managed;
- 2) No offer of support to assist with her return to work;
- 3) No advice on where she could seek support following the trauma of the Allegation;
- 4) Insufficient communication from her line manager, the Manager in her first week back at work and no support offered by him.

2.12 The Respondent's case was that the Applicant resigned her position, and that as this is a claim for constructive unfair dismissal and not unfair dismissal, mere failure to follow procedures is not equivalent to repudiation of contract by the Respondent. It was argued there was no repudiatory breach by the Respondent of the T&C term, and even if there was considered to have been a breach of the T&C term relying on a totality of acts, the last act forming part of a series was missing. The Respondent believed the nub of the Applicant's claim was the lack of exoneration but argued that failure to provide exoneration is not repudiatory conduct.

3.0 Evidence Summary

3.1 In his opening speech the Applicant's advocate outlined the basis of the case as set out in 2.10 above. Noting that the Applicant had the necessary period of employment to qualify for protection under the Law, it was submitted that there was a breach of the T&C term in this case, and the manner of the Applicant's return to work was the last straw for her, which led to her resignation.

3.2 The Applicant took the oath and read out her witness statement {2.1/25-34}. She explained that as a registered general nurse (RGN) there would be serious consequences for her arising from a dismissal, which may put her nursing registration at risk, so she was extremely

concerned about the Allegation. She categorically denied the Allegation but said that she understood that the Home could not ignore the complaint, and that it would need to be investigated.

- 3.3 On 8 February 2022, after being informed of the Allegation, she visited her GP and was given a sick note for stress. On 12 February 2022, the Manager explained to her that he would be talking to other staff and residents to see if the complaint was corroborated.
- 3.4 On 14 February 2022 DL called the Applicant to explain his involvement and to say the "*complaint was now formal*". The Applicant expressed concern about the serious nature of the Allegation and DL asked her to remain positive as you are "*innocent until proven guilty*".
- 3.5 On 16 February 2022 DL called the Applicant to say the investigation had been inconclusive and the Respondent would draw a line under the matter. The Applicant called DW to update him as he was supporting her, and she had first mentioned the issue to him after the 7 February Meeting.
- 3.6 On 18 February 2022, the Applicant told DL that she would like to understand how the investigation had been conducted. She asked for a copy of various of the Home's procedures and asked DL for a meeting saying she could not accept an inconclusive outcome.
- 3.7 On 28 February the Applicant and DW met with DL and the Manager at Les Rocquettes Hotel. The Applicant was concerned that the venue was unsuitable for a disciplinary meeting but did not complain at the time as the meeting turned out to be very short. The Applicant explained that she just wanted to understand what had happened so that she could get back to work feeling that the matter has been fully resolved. When she was asked by DL if she wanted to respond to the Allegation, the Applicant explained that this made her very anxious and upset and she felt unable to continue with the meeting, so DW subsequently did most of the talking on her behalf. The Applicant was also upset by a comment by the Manager that he had a home to run and asking when she was coming back to work. When asked by DW about exonerating the Applicant, DL explained that he was not responsible for decision making and that RS was the party responsible to finalise the matter, so the Applicant and DW left the meeting.
- 3.8 The Applicant returned to work on 1 March 2022 as planned. She explained that she found her first week back at work very difficult. She felt the Manager did not carry on as if nothing had happened when she returned to work, and she explained that she felt that he seemed unable to communicate with her effectively and to be avoiding her. The Applicant felt that she needed some reassurance when she recommenced work and that was not provided.

- 3.9 On cross-examination the Applicant accepted that she did not make the Home aware of her concerns about lack of support on her return to work, but as she had been signed off she would have expected some consideration to have been given to her well-being. The Respondent's advocate highlighted that during the process the Respondent was concerned for her welfare and had sent her polite emails, but the Applicant felt that these did not go beyond what was normal consideration.
- 3.10 Dominic Wheatley (DW) (called on behalf of the Applicant) took the oath and read out his statement {2.2/36-39}. He explained that he was a witness only to the 28 February Meeting, and not to prior events. However, he had discussed matters with the Applicant previously as she had informed him about the Allegation after the 7 February Meeting. DW felt the 28 February Meeting was not held at an appropriately private venue, but it was too late to do anything about it. He had thought that it was going to be an informal meeting to clear the air in order for the Applicant to return to work. He attended the meeting as the Applicant's supporter.
- 3.11 According to DW, the 28 February Meeting quickly became antagonistic. DL asked about the Allegation, which was very upsetting to the Applicant. The Applicant was also upset by a comment by the Manager asking when she was coming back to work. DL raised that he thought the Applicant should be exonerated. DW was frustrated that the meeting was in effect a waste of time because DL explained that he was not responsible for decision making and that RS would have to finalise the matter.
- 3.12 For the Respondent, Robert Shepherd (RS) took the oath and read out his statement {3.1/40-57}. He explained that he was Chair of the Respondent's board of directors and that he heard about the Allegation on a Sunday when he was at home. It was a serious complaint which gave rise to safeguarding issues. Before the 7 February Meeting with the Applicant, he discussed the complaint with another director and felt he had to mention it to the Applicant. RS said that he had to consider further whether it was a formal complaint, so he asked the Manager to investigate and speak to the person who made the complaint. He realised that he should stay out of the investigation stage as he would be a decision maker in the event of any disciplinary hearing, so he asked DL to lead this.
- 3.13 RS confirmed that the "draw a line" email, from the Home's perspective, meant there was no intention to proceed any further.
- 3.14 After discussing DL's report on the matter RS sent an email {4, 93-94} to the Applicant on 1 March 2022 to formally conclude the investigation into the Incident. He confirmed they had found no evidence to support the Allegation and had instructed the Manager to "carry on as if this had never happened". He stated "We appreciate how hard the last

few weeks have been for you. I would now like to bring this matter to a close and move forward'.

- 3.15 On cross examination RS was asked questions about the process adopted by the Respondent, such as whether it could have been in both parties' interests to suspend the Applicant. RS said he took the view that suspension would have been disproportionate in the circumstances. He took the view that the complaint was made in good faith, so they needed to conduct a preliminary investigation as to whether there was a "*case to answer*". RS explained that in his view finding no "*case to answer*" did not mean that the Applicant would be exonerated.
- 3.16 In terms of communicating with the Applicant, RS accepted that in retrospect, it might have been better just to say that they had decided to draw a line under the matter, but in an effort to offer the Applicant due process they mentioned that she could request another meeting and take the matter further if she wanted.
- 3.17 RS was asked what processes were put in place as regards the Applicant's return to work. He explained that there was a low key approach: carry on as if nothing had happened. When the Applicant's advocate mentioned that Employment Relations have provided guidance that after sickness a return-to-work meeting would be appropriate, RS said that he wished they had held a return-to-work meeting.
- 3.18 David Leafe (DL) (called on behalf of the Respondent) took the oath and read out his statement {3.2/58-71}. He explained at the time of the events he was a Director of the Respondent and had experience in HR matters. He was asked by RS to conduct the investigation and report back to the board. He said he approached the Allegation with an open mind - it was a serious allegation from a safeguarding perspective. DL explained that as the Applicant was off sick, he contacted her by telephone intending to be friendly. He confirmed he mentioned "*innocent until proven guilty*" but said he did not mean this in a legal sense.
- 3.19 On 16 February 2022 he told the Applicant that the investigation had concluded and then sent the "draw a line under it" email but explained that she could progress the investigation if she wished.
- 3.20 Regarding the 28 February Meeting, DL said it was clear that both sides had a different agenda. The meeting was challenging. It seemed that the Applicant only wanted to be exonerated. DL raised the Allegation as he wanted her to confirm face-to-face that she denied the Allegation. DL explained his objective was to reach a conclusion which would bring the Applicant back to work. After the meeting DL felt frustrated as the meeting had not gone as he hoped and he understood the Applicant was upset, but his role in investigating the matter was

now done and he passed back his report to RS.

- 3.21 On questioning from the Tribunal, DL admitted he was not sure whether the Applicant would turn up for work the day after the 28 February Meeting. He said he had called the Manager on 1 March 2022 to check she had.
- 3.22 In his closing speech the Applicant's advocate submitted that the Applicant is relying on the "last straw" and breach of the T&C term as set out in **Walker v Aurigny Air Services Limited** ED021/19 {4,127-137}, the legal test for the Tribunal being whether the conduct of the Respondent was sufficiently serious to repudiate the contract of employment. The Applicant's advocate submitted that there was a failure to follow best practice by the employer and that the return-to-work process was not properly handled. Although this is a constructive dismissal case, procedural considerations are still relevant as proper procedures provide certainty to both parties, particularly where there is an imbalance of power. Proper procedures would have avoided misunderstandings and because there was no consistency in the process, it was submitted that there was a breach of the T&C term.
- 3.23 The Applicant's advocate submitted that the cumulative breaches by the respondent amounted to repudiation and according to **Omilaju v Waltham Forest London Borough Council** [2005] EWCA Civ 1493 (**Omilaju**) in a series of acts the essential ingredient of the final act is that it contributes something to the breach, even if it is relatively insignificant. Here the last straw was failure to manage her return to work. Overall, a lack of procedures and lack of managing her return to work, left the Applicant with no confidence in the employer. This breach was the reason for her resignation and there was no unnecessarily long delay in her resigning.
- 3.24 In his closing the Respondent's advocate submitted that the Applicant terminated her contract of her own accord, and that the Respondent went out of its way to preserve the relationship of trust and confidence. The Respondent had to balance different interests. They owed a duty to the complainant as they did not want to discourage whistleblowing. It was submitted that the nub of the Applicant's claim was the lack of exoneration, but it was contended that failure to provide exoneration is not repudiatory conduct.
- 3.25 In justifying the Respondent's approach of not providing exoneration to the Applicant, the Respondent's advocate relied on **Salford Royal NHS Foundation Trust v Roldan** [2010] EWCA Civ 522 (**Roldan**) where the judge said that where there are:

"conflicting accounts of an alleged incident, with no, or very little, other evidence to provide corroboration one way or other..... employers ... are not obliged to believe one employee and to disbelieve another", continuing "... there will be cases where it is perfectly proper for the

employers to say that they are not satisfied that they can resolve the conflict of evidence and accordingly do not find the case proved”.

- 3.26 In terms of the heads of claim from the Applicant, the Respondent’s advocate submitted that:
- a. Lack of due notice of 7 February Meeting;
This was not a disciplinary meeting, and the Applicant agreed to attend.
 - b. Failures of disciplinary process;
At that time, the Respondent was not treating the matter as a disciplinary matter, but rather was investigating whether there was “*a case to answer*”.
 - c. Respondent failed to exercise consistent decision-making;
It was up to the Respondent to determine how to investigate the matter. It was submitted that they endeavoured to complete a speedy and confidential investigation.
 - d. Respondent failed to provide clarification that the Applicant was exonerated;
Drawing a line under the matter was the best the Respondent could do, as the complaint could not be erased.
 - e. Failure to manage return to work;
The Respondent was not bound to follow Employment Relations guidance. The return to work was reasonably managed and even if it was not considered to be reasonably managed the Respondent’s actions in this regard did not amount to a breach of T&C term.

4.0 Legal Framework

- 4.1 Since the Respondent denied that the Applicant was dismissed it was for the Applicant to prove on the balance of probabilities that she had terminated her contract of employment with or without notice in the circumstances that she was entitled to terminate it without notice by reason of the Respondent’s conduct, pursuant to s5(2) (c) of the Law.

For an Applicant to be able to claim constructive dismissal, four conditions must be met:

- (1) There must be a breach of contract by the Respondent. This may be either an actual breach or an anticipatory breach.
- (2) That breach must be sufficiently important to justify the Applicant resigning, or else it must be the last in a series of incidents which justify her leaving.

- (3) She must leave in response to the breach and not for some other, unconnected reason.
 - (4) She must not delay too long in terminating the contract in response to the Respondent's breach, otherwise she may be deemed to have waived the breach and agreed to vary the contract.
- 4.2 The Applicant's case was that the Respondent's actions taken on a cumulative basis, were such that the Applicant had no option but to resign on the basis of a breach of the T&C term.
 - 4.3 The helpful analysis of English case law on this matter made in the Tribunal case of **Streeter v. Sandpiper** (Guernsey E&DT, ED033/19) (**Streeter**) has been adopted by the Tribunal here. In **Streeter** the Tribunal found that English authorities may be used to guide the way through what can potentially be difficult legal questions.
 - 4.4 The Tribunal notes that in **Malik v Bank of Credit and Commerce International SA** [1997] IRLR 462 "the T&C term" was stated to mean that an employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee.
 - 4.5 It was also noted in **Streeter** that some constructive dismissal cases, which arise from the undermining of the T&C term, involve the employee leaving in response to a course of conduct, carried on over a period of time where the particular incident which causes the employer to leave may, in itself, be insufficient to justify her taking that action, but when viewed against a background of such incidents, may be considered sufficient to warrant treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship.
 - 4.6 In **Omilaju** the Court of Appeal held that in such a series of acts, the essential ingredient of the final act is that it contributes something to the breach, even if relatively insignificant.
 - 4.7 In terms of the time frame for the employee to act, there is no fixed time within which she must do so. A reasonable period is allowed depending on the circumstances (see **G W Stephens & Son v Fish** [1989] ICR 324, EAT) where three months was held not to be excessive).

5.0 Facts Found

- 5.1 The Tribunal has some sympathy with the Applicant's view that the Respondent adopted a somewhat *ad hoc* approach to investigating the

Allegation but given the safeguarding issues arising there was a need to act quickly, and the Respondent had to take any whistleblowing allegation seriously.

- 5.2 It finds that the Respondent sought to act in a friendly and informal manner in conducting the investigation, due to the existing relationship with the Applicant and given the circumstances of her being signed off on sick leave. The Respondent adopted a process of preliminary enquiry into whether there was a “*case to answer*”, which the Tribunal finds reasonable in the circumstances although it notes that this did not reflect the Home’s own written procedures.
- 5.3 It is clear from the evidence that the Applicant placed emphasis on certain comments made to her in informal telephone calls made by DL. Whilst these calls were well-intentioned, greater efforts could have been made by the Respondent to confirm the Applicant’s understanding of DL’s email messages.
- 5.4 The Tribunal finds that the Applicant’s return to work was not managed appropriately. There were no return-to-work protocols put in place after the Applicant had been on sick leave for three weeks and clearly still had concerns about the matter. However, it notes that during the investigation the Applicant continued to express her desire to return to work, and she did return to work as planned, even after the 28 February Meeting. She did not raise a grievance on her return about lack of support or the absence of return-to-work protocols being put in place, and no particular issue seemed to arise in her first week back.
- 5.5 In response to the Applicant’s claim that the Respondent did not provide due notice of the disciplinary meeting on 7 February, the Tribunal does not find that the 7 February Meeting was a disciplinary meeting and it accepts that RS acted in good faith in raising the Allegation at that meeting, as he had only just become aware of it.
- 5.6 In response to the Applicant’s claim that the Respondent failed to follow disciplinary procedures, and to keep the Applicant apprised of the potential consequences of the same, the Tribunal does not find that there was a failure to follow appropriate procedures or to keep the Applicant apprised. The Tribunal finds that the Respondent took reasonable steps to investigate the Allegation, and after reaching the view that there was no “*case to answer*”, informed the Applicant quickly that no further action would be taken.
- 5.7 In response to the Applicant’s claim that that the Respondent failed to exercise consistent decision-making throughout the disciplinary process, notably in stating on 17 February 2022 that “a line can be drawn under [the matter]” yet continuing thereafter to progress the matter in a later meeting, the Tribunal does not find a failure to exercise consistent decision-making. Throughout his investigation DL sought to keep the Applicant informed as to the steps being taken by the

Respondent in connection with the matter and these actions were reasonable in the circumstances. When the Applicant requested copies of policies and a meeting, the Respondent sought to fulfil these requests. There was regular communication between the parties and the investigation progressed in a timely manner.

- 5.8 In response to the Applicant's claim that the Respondent failed to provide clarification that the Applicant was considered exonerated following the investigation in light of an acknowledged lack of evidence, the Tribunal finds that, as per **Roldan**, it was not necessary for the Applicant to be exonerated as she had been told there was no evidence to substantiate the Allegation and no further action would be taken on the matter.
- 5.9 As such, based on the balance of probabilities, the Tribunal finds that that the Respondent's conduct did not amount to conduct likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee.

In terms of the provisions of the Law:

- (1) There must be a breach of contract by the Respondent. This may be either an actual breach or an anticipatory breach.

There being no such breach the remaining components of the test in (2) – (4) (see 4.1 above) fall away.

6.0 Conclusion

- 6.1 For the reasons set out above, the Tribunal unanimously concludes that the Applicant was not constructively dismissed. In those circumstances the Tribunal dismisses the Applicant's claim and makes no award.
- 6.2 No order is made for costs.

.....
Signature of the Chair

.....
Date