



EMPLOYMENT TRIBUNALS

Claimant: Mr A Lynn

Respondents: Mrs E Roberts and Mrs K Youles who formerly traded in partnership as Warburton's Chemist

HELD AT: Manchester **ON:** 1, 2, 3 and 4 August 2016

BEFORE: Employment Judge Sherratt

REPRESENTATION:

Claimant: Ms Yin Ohn, Claimant's partner

Respondents: Mrs C Gurevitz, Consultant

JUDGMENT

The judgment of the Tribunal is that the claimant did not make any protected disclosures to the respondents and therefore cannot have been unfairly dismissed under section 103A of the Employment Rights Act 1996.

REASONS

1. The claimant and the respondents are all pharmacists. The respondents are sisters. The claimant joined the respondents as a locum in June 2014. There was an initial question in these proceedings as to the employment status of the claimant but on 21 January 2016 the respondent's representative sent an email to the Tribunal following a preliminary hearing before Employment Judge Slater. The email said: "Having taken detailed instructions from our client we can confirm that we are happy to accept that the claimant was an employee."

2. The claimant contends that he made a number of protected disclosures and that the fact that he made them was the principal reason for his dismissal. The respondents say that the claimant was dismissed due to a loss of trust and confidence in him by the staff and that it was inconceivable that he could continue without the trust of the staff.

3. The issues for determination by the Tribunal, proceeding on the basis of the claimant having been an employee of the respondents, were set out by Employment Judge Slater as part of a Case Management Order made in January 2016:

- (1) Can the claimant prove that he made one or more protected disclosures, the matters relied upon as protected disclosures being listed in the notes of the preliminary hearing held on 8 May 2015?
- (2) Can he prove that the sole or principal reason for his dismissal was the fact that he had made one or more of those disclosures (or a combination of them)?

4. In determining whether the claimant made protected disclosures, the issues for the Tribunal will be:

- (1) Were the alleged disclosures disclosures of information?
- (2) Did the claimant have a reasonable belief that the disclosures tended to show at least one of the six relevant failures set out in section 43B(1)(a)-(f) of the Employment Rights Act 1996?
- (3) Did the claimant have a reasonable belief that the disclosures were made "in the public interest"?
- (4) Were the disclosures made to the employer as alleged?

The Relevant Law

5. Part IV A of the Employment Rights Act 1996 sets out the relevant legislation, in particular at sections 43A and 43B which state as follows:

"43A Meaning of "protected disclosure"

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection

- (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following –
 - (a) that a criminal offence has been committed, is being committed or is likely to be committed,
 - (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
 - (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
 - (e) that the environment has been, is being or is likely to be damaged, or
 - (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
- (2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.
- (3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.
- (4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.
- (5) In this Part “the relevant failure”, in relation to a qualifying disclosure, means the matter falling within paragraphs (1) to (f) of subsection (1).
6. Section 103A deals with protected disclosures and provides that:

“An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.”

7. As the claimant had not been employed for two years he could not bring an ordinary unfair dismissal claim. Given his short service the burden of showing that he was dismissed for an automatically unfair reason is on the claimant.

The Evidence

8. The claimant gave evidence on his own behalf and was cross examined. He called Stephen Jeffers and provided written statements from Gavin Burchall, Simon McSorley, Frances Coupe and Dr K M Thanda.

9. Each respondent gave evidence and was cross examined. The respondents also called Ian Meth who carried out an investigation on behalf of the respondents, and produced a report to them.

10. There was a bundle of documents containing some 200 pages.

The alleged protected disclosures

11. When describing the alleged disclosures I will quote from the Case Management Order made by Employment Judge Horne on 8 May 2015.

“In August 2014 the claimant told Mrs Roberts in conversation that a member of staff was being paid cash in hand. He believed that the information tended to show that the respondent was evading tax liabilities. The claimant may also have made a similar disclosure in a subsequent conversation with Mrs Youles.”

12. In paragraph 10 of his witness statement the claimant says that:

“Whilst Mrs Youles was cashing up at the end of the day in August 2014 she counted an amount of cash to give to myself, for my Medicines Use Reviews, and an amount of cash for Mrs J Rose. When I asked what the money for Mrs Rose was for I was informed that Warburton’s Chemist paid Mrs Rose cash in hand because it worked out ‘better for her’. When I asked Mrs Youles if this was legal I was informed ‘this is what we agreed’. When I spoke to Mrs Roberts I was informed that I would have to speak to Mrs Youles as she does payroll.”

13. According to Mrs Roberts in her witness statement:

“Staff were being paid cash in hand. Anthony certainly never raised this with me during his employment. The first I became aware of it was in his letter of 19 November 2014. I first saw this letter on 20 November 2014. Darcy Bond, our Saturday girl, and Jackie Rose were both paid in cash from the till. This was put through the till as wages and accounted by Karen in the payroll system. I don’t ever recall Anthony ever asking me about paying anyone cash in hand. Had he asked I would have told him that whilst they were being paid in cash it was still accounted for and income tax and NI deducted where necessary. I don’t know why just because he saw them being paid in cash that he thought that their wages were not being properly accounted for with HMRC. Had he asked we would have told him. I think that this is a misconception on Anthony’s part.”

14. Mrs Roberts refers to a letter dated 19 November 2014 which makes reference to a number of allegations. It seems sensible to refer to them all at this point rather than extracting individual sentences from the letter.

15. In the first part of the letter the claimant asserted his status as an employee on the days he worked for the respondent. He then goes on to say that he:

“...would like to contest Warburton’s manufactured allegations against me as unlawful detriment due to my reporting concerns to them on the legality of paying employees cash in hand, failure to adequately dispose of patients’ confidential information, their unaccredited fridges in the dispensary, the danger and inappropriateness of bringing in an employee’s contract soaked in cat urine and other more minor concerns. In good faith I reported all the incidents and concerns to the owners of Warburton’s as they may have been unaware of the nature, seriousness and legality of the infractions, I did so with the expectation that once these issues were disclosed Warburton’s would take appropriate action. I have been waiting to see the reform and changes coming from my disclosures to them but I am now under the impression that rather than remedying the serious issues I have raised they are commencing disciplinary proceedings against me by manufacturing false allegations.”

16. In her witness statement Mrs Youles provides the same response as her sister, Mrs Roberts.

17. There is a dispute as to whether or not the claimant raised the issue. Mrs Roberts in cross examination confirmed that it was never raised with her. Mrs Youles was not asked about it.

18. Based on the evidence I think it likely that the claimant did make a comment but that it was forgotten by the respondents who, on the basis of copy payslips in the bundle, do appear to have been making appropriate deductions from the wages before paying the net sums to the employees in cash. Paying in cash is not of itself illegal.

19. The claimant does not have appear to have identified the legal obligation which he alleges the respondents were in breach of when the discussion took place, and indeed he himself received payments of cash in hand without any deductions for the Medicine Use Reviews.

20. It does not seem to me that in the circumstances described the claimant made a protected disclosure with regard to cash payments.

On a "handful of occasions" from mid August 2014 the claimant told both respondents in conversation that there was a practice of sending prescriptions back to independent prescribers, including Mrs Roberts' husband, in an effort to save money. He believed that this information tended to show that the respondents were engaging in fraud.

21. In his witness statement the claimant says that he:

"...Had a discussion with Mrs Roberts in July 2014 about the list (with prices) near the pharmacist checking area. I was informed that they were the price concession medication for the month. All prescriptions with medication on that list were to be endorsed with the prices and put into 'Chris's pile of prescriptions' for re-authorising. I asked Mrs Roberts if this was allowed as the Department of Health had already set the price concessions. I was informed that this was the 'benefit of having a friend in the right place'. I had a discussion with Mrs Youles the next day about the price list near the pharmacist checking area. I was informed they were the price concessions medication for the month. All prescriptions with medication on that list were to be endorsed with the prices and put into 'Chris's pile of prescriptions' for re-authorising. I asked Mrs Youles if this was allowed as the Department of Health had already set the price concessions. I was informed that if we didn't do this, we would be 'losing money'."

22. The claimant went on to say that he had never seen this practice observed in other pharmacies where he had worked as a locum. The practice involved the prescriber retrospectively authorising payment of a higher price than the Department of Health would normally reimburse if the drug actually dispensed cost the respondents more than the set amount.

23. The claimant's 19 November letter does not mention this allegation.

24. According to Mrs Roberts the claimant at no time raised this issue with her. The practice had been suggested by another locum before the claimant had started. She explained to the claimant how the system worked when he started and the claimant followed the practice. She did not believe he would have done so had he believed there was anything unlawful.

25. From a document in the bundle it was apparent that The General Pharmaceutical Council's caseworker, who investigated the allegation, obtained information from the NHS BA Prescriptions Services Department which confirmed that the practice adopted by the respondents was normal and certainly not fraudulent.

26. I am satisfied that this issue was discussed between the claimant and the respondents when he started so as to make him aware of how things were done but I am not satisfied that the claimant subsequently asked if it was allowed. I conclude that there was no protected disclosure.

On "more than a handful of times" during the period beginning June or July 2014 and ending with the termination of his employment the claimant told both respondents in conversation that confidential patient records were being disposed of insecurely. He believed that secure disposal of confidential records was a legal obligation and that his disclosure tended to show that obligation had been breached."

27. Going to the claimant's statement, after pointing out that a pharmacist must take all reasonable steps to prevent accidental disclosure or unauthorised access to confidential information, he says that:

"It was apparent from Day 1 that confidential information was being thrown into general waste. I discussed this with the ACTs and was informed that they have not been asked to do anything other than what they are doing now and that both Mrs Youles and Mrs Roberts are doing the same. When I mentioned this to Mrs Roberts I was informed that Warburton's Chemist has a shredder. Unfortunately there was too much confidential waste produced to be physically shredded. There were numerous occasions when I openly reported my discomfort to throwing confidential information into the general waste to Mrs Youles, Mrs Roberts and in front of the pharmacy team."

28. This matter is referred to in the 19 November letter.

29. According to Mrs Roberts:

"Anthony never raised this with me during his employment. The first I knew about this was in his letter of 19 November 2014. We do not hold very much confidential waste in the pharmacy. Prescriptions are sent to the PPD and we do not hold paper copies. In any event the pharmacy has a shredder on site to dispose of confidential waste. Any additional confidential documentation is stored securely within the pharmacy to return to the surgery where it came from to be disposed of there. It is stored in the office where only staff can access. Most confidential waste came from Michelle who did a lot of work with Nomads, a monitored dosage system. Anthony was well aware of this during his six months with us. I am unsure as to why Anthony believed that confidential information was not being disposed of properly."

30. Mrs Youles also denied that the claimant ever raised this issue during his employment and she explained the presence of the shredder and how the confidential waste was dealt with.

31. The claimant may well have raised the issue but looking at his own evidence where he “openly reported his discomfort”, this does not seem to me to amount to the words of someone disclosing information which in his reasonable belief tended to show one of the matters set out in section 43B of the Employment Rights Act 1996, particularly where the claimant has also set out the obligation upon the pharmacist to take reasonable steps to prevent accidental disclosure or unauthorised access to confidential information.

32. It seems to me that the claimant has not gone so far as to make a protected disclosure with regard to the disposal of confidential waste.

“Between June 2014 and the end of his employment the claimant mentioned that the respondents were using unaccredited refrigerators which were operating at the wrong temperatures. He believed that this information tended to show that patient health and safety would be put in danger.”

33. According to the claimant’s witness statement:

“An ACT informed me in June 2014 that the temperature of one of the refrigerators was too high and both Mrs Youles and Mrs Roberts were aware of this. The only ACT later confirmed this. I tried to discuss that the refrigerator was not an accredited refrigerator with Mrs Youles and that the temperature was too high. All I was informed was that the refrigerator was new. It could have been coincidental because someone had the door open too long so I asked the ACT to turn up the refrigerator to make it cooler and that we would review the temperature the following day. The refrigerator temperature was within the acceptable range the following day. Through the month both ACTs had reported inaccuracies in refrigerator temperatures several times. This could not have been coincidental, from someone having the door open too long. Therefore, I reported this to Mrs Roberts in good faith, to discuss the issue of possibly changing the refrigerator with Mrs Youles. I was informed that I had to speak to Mrs Youles. It is part of Pharmacy Professional Standards that the refrigerator minimum and maximum temperatures are recorded each day the pharmacy is open. Pharmacy refrigerators must be within 2-8°C in order to maintain the cold chain for refrigerated medication. Any temperature outside this range is unacceptable and steps must be taken to rectify the discrepancies in temperature. This is so that insulin does not get de-natured and become ineffective. This has potential life threatening repercussions.”

34. There is reference to unaccredited fridges in the dispensary in the 19 November letter.

35. As a matter of fact it would appear that the respondents had two fridges. One was accredited and the other was not.

36. According to Mrs Roberts, without recalling when it was, she:

“...Did recall Anthony bringing up the temperature of the non pharmaceutical fridge to my attention. However, I was already aware of this and was monitoring the temperature of the fridge as I was concerned that it was, on occasion, reading high. This fridge was replaced in November 2014 from the NPA. It was no problem that Anthony raised it. In fact, it only confirmed my feeling that it needed to be replaced. It was only reading one or two degrees high and Anthony continued to use the fridge even when it was reading high so I don't believe that he felt this was a particularly serious issue and neither did I. The temperature of the fridge certainly was not outwith an unacceptable level. As the manager of the pharmacy he had the authority to replace the fridge if he had felt that strongly about it.”

37. According to Mrs Youles the claimant never complained to her about the temperature of the fridges and he continued to use them so she does not believe he was concerned about it or thought it was in any way dangerous.

38. There is no doubt that the claimant and Mrs Roberts discussed the fridges and that notwithstanding what may or may not have been said the claimant continued to dispense medicines that had been stored in them. Given the claimant's stated professional obligations in connection with the dispensing of medicines, it does not seem to me that the claimant could have had a reasonable belief that the health and safety of individuals was likely to be endangered because if he did have such a belief then it seems to me that he would have refused to dispense anything from the unaccredited fridge.

“On a single occasion in mid June 2014 when Mrs Roberts brought into work a contract ‘covered in cat urine’, the claimant pointed out that it was ‘unhygienic and unprofessional’. He believed that this tended to show that health and safety were being put in danger.”

39. According to the claimant:

“In June 2014 the whole team was in uproar. When I enquired why, I was informed that Mrs H Bird was really upset. Mrs Roberts had brought in Mrs Bird's old contract for Mrs Youles with a note attached to it. Mrs Youles had thrown away the note into the refuse bin in the coffee room. Mrs Bird had seen what was written on the note and it stated that the cat had urinated on her contract and that ‘this is what the cat thought of her’.”

40. The claimant went on to explain that the coffee room was the same room where monitored dosing and daily dosing medicines were prepared for in excess of 100 people. Cat urine may contain items potentially dangerous to humans who expect their medication to be given in a clean format. Most of the patients concerned were elderly and could be fragile or be immunocompromised. The claimant went on to say that:

“Everyone complained and had their say, including myself to both Mrs Youles and Mrs Roberts. I even approached Mrs Bird to see if I could do anything to console her.”

41. The claimant does not say what he said to Mrs Youles and Mrs Roberts, but they say that his complaint to them was the wording on the note rather than the urine

on the contract. According to the respondents the contract document had been brought in from home by Mrs Roberts in a plastic wallet and placed in a drawer used by Mrs Youles. It never touched the surfaces where medication was dispensed. The complaints of the claimant were about what was said on the note and not about the cat urine.

42. As a matter of fact, therefore, I am not satisfied that the claimant made a protected disclosure in relation to this incident.

43. Having found that the claimant did not make any protected disclosures, it will not be possible for me to go on to find that the principal reason for the claimant's dismissal is that he had made a protected disclosure, but I will go on to make some reference to the circumstances which led to the claimant's dismissal.

44. The claimant had experience in large corporate pharmacies where he would have been responsible to an Area Manager who would in turn have been responsible to a Regional Manager who would in turn have been responsible to a Superintendent Pharmacist with overall responsibility for the professional conduct of the pharmacists.

45. It was with this background that the claimant was asked to provide his services to manage the staff in a family business consisting of one pharmacy in Fleetwood. It would appear, with the benefit of hindsight, that the skills that the claimant had learned in a large organisation did not readily transfer to the small family business that was Warburton's Chemist where some members of staff did not take to being managed by him.

46. The claimant, with the full knowledge and approval of the respondents, started to appraise the staff and for whatever reason the claimant and Michelle Wright had their differences. The claimant had a session with a view to counselling Mrs Wright, but this was not successful. There was then an attempt by the respondents to mediate between the claimant and Mrs Wright which left the claimant feeling that he was not supported by his employers.

47. The mediation session took place on 15 October 2014. The claimant wrote to the respondents on 23 October. His letter sets out the background to his conclusion that Mrs Wright could do whatever she wanted to whenever she wanted to because he was new and a locum. He felt that the results of the mediation session had created an unsafe work environment for himself and his patients as he had no control over the dispensary and his staff. He felt he had no support professionally. By not setting boundaries staff felt they had free reign to do what they wanted to. The outcome of the mediation was a threat to his professional status and personal standing and could not be tolerated by any reputable pharmacist. Until the issue was resolved he did not think it safe or appropriate for him to work as a responsible pharmacist but was willing to work as a second pharmacist and hoped to return to his duties when it was deemed safe. Around this time the claimant had some time off work. He sought mediation to try and resolve the differences.

48. There were some text messages within the bundle when the respondents were asking the claimant whether cover needed to be arranged. The claimant on Monday 27 October said that he wanted cover as it would be unsafe for himself and patients to work on his own until the matter with his grievance had been resolved. In

a later message he said he could not be the responsible pharmacist until his grievance had been resolved. He could come to work but required someone else to be the responsible pharmacist.

49. There was a problem on 30 October when the booked locum did not appear able to come in. The claimant's text on 30 October at 11:53 said that he felt happy being the responsible pharmacist in the morning when Michelle Wright was not in but he was unsure about the afternoon.

50. It appears that the claimant spent a lot of that morning on his phone seeking alternative locum cover for the afternoon and that the staff were not happy with this.

51. The claimant wrote again on 4 November seeking mediation involving Mrs Wright but also a separate mediation with the owners of the business. He wrote on 6 November when he had been informed that Mrs Wright had refused to have a mediation session with him. He was uncertain as to how he would be able to return to the position of responsible pharmacist manager if the issues were not remedied.

52. The respondents were taking advice from an independent HR consultancy and they instructed Mr Ian Meth from that consultancy to investigate matters. He started his investigation but before he saw the claimant the letter of 19 November referred to above was produced to him.

53. Arising out of the investigation carried out by Mr Meth he produced a report and then he had a discussion with the partners, Mrs Roberts and Mrs Youles.

54. According to them Mr Meth gave them three options. The first was to keep the claimant on and monitor things, the second was further mediation and the third was to terminate their arrangement with the claimant, which they say was the first mention of this. They had a discussion in which they expressed their view that the claimant was a good pharmacist but had been consumed with the goings on in the pharmacy. They barely spoke about alleged whistle-blowing. They felt that if they could resolve matters then he could continue. They decided to keep him on.

55. As the day went on Mrs Roberts started to have doubts and spoke to the staff about a number of issues and the following day she spoke to the six members of staff present. They did not feel they had trust in the claimant's ability as a pharmacist and would not feel comfortable with him remaining in the business.

56. Mrs Roberts spoke to Karen Youles and Ian Meth and at some stage a decision was taken to terminate the claimant's employment.

57. A letter was sent to the claimant on 26 November 2014 terminating the claimant's arrangement with Warburton's Chemist with immediate effect.

58. According to the letter they had looked very closely at whether or not they could resurrect the relationship by further mediation but the staff were unanimous that they were unwilling to work with the claimant. His conduct and actions within the pharmacy were such that it was apparent that the claimant had lost their trust and confidence and that it could not be regained. They had to take action because it was inconceivable to them that he could continue to operate the pharmacy without that trust. They made reference to the claimant saying he no longer had control over the

dispensary. They did not see how they could continue to operate with someone in charge of the pharmacy who was unable to maintain control of it.

59. The letter went on to say that the alleged disclosures under whistle-blowing legislation were not a reason for the decision. Whilst they were prepared to give the working relationship a further chance it was the vociferous nature of the staff's refusal to work with the claimant that made them reach their decision.

60. I am satisfied that the claimant was dismissed because of a breakdown in the relationship with the staff which meant that the respondents had lost confidence in him being able to operate their pharmacy as the responsible pharmacist.

61. The claimant's claims are therefore dismissed.

Employment Judge Sherratt

9 August 2016

JUDGMENT AND REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

[AF]