EMPLOYMENT TRIBUNALS

Claimant: Mr M Maqbool

Respondent: R T Elliott Limited

HELD AT: Leeds **ON:** 25 January 2017

BEFORE: Employment Judge Jones
Mr D C Dowse
Mr J Howarth

REPRESENTATION:

Claimant: Mr J Searle of Counsel
Respondent: Mr J French of Counsel

JUDGMENT having been sent to the parties on 1 February 2017 and a request in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 having been made, the Tribunal provides the following

REASONS

Evidence

1. The Tribunal heard evidence from the claimant and from Mr F Sheikh, director of the respondent, and Mr M Aurangzeb, a pharmacist currently working as superintendent pharmacist at the pharmacist shop where the claimant previously worked. In addition the Tribunal read a report in respect of the claimant's mental health from Professor Rasjid Skinner, consultant clinical psychologist, dated 15 April 2016 with further notes of 4 November 2016, a nurses report of 8 October 2016, an accountant's report submitted by the respondent of 11 November 2016, a variety of documents relating to available jobs and a number of extracts relating to changes in respect of Government funding to pharmacological services.

Findings of Fact

2. Following the claimant's resignation he suffered a reactive depression. The claimant had a pre-existing condition of anxiety which was longstanding, but the consequence of the events surrounding his loss of employment and the associated detriments which we have found to be caused by the protected disclosures he made led to a highly anxious state and panic symptoms, inability to sleep and suicidal ideation when considering the future. The claimant had an existentialist state of loss, he having lived for his work for many years. He had moved to live very nearby the chemist shop where he was working for the respondent some years ago and the loss of this employment was particularly significant. The claimant stopped his heart medication and resumed smoking briefly, thinking he might as well die. He experienced profound anhedonia, taking no pleasure in his house and watching TV. On examination the psychologist noticed signs of marked depression with anxiety and agitation and his mood was flat amongst his being agitated and anxious.

3. Professor Skinner considered that the claimant required treatment for his condition such that within 12 months of 18 sessions of Cognitive Behavioural Therapy the claimant would be recovered to his previous state of health.

4. The claimant has obtained employment since his resignation as a locum. He initiated requests from locum agencies in February 2016 and obtained a series of postings which culminated in earnings to date of £20,334.18. In the meantime the respondent engaged Mr Aurangzeb from April 2016 as a locum on a salary of £55,000. He was paid on a daily rate. He took over as superintendent of the pharmacy from September 2016 and is engaged on an 18 month contract. The superintendent duties had been taken over by the directors of the respondent for a period, and as we indicated in our earlier reasons the directors own a number of other pharmacist businesses around the country in which they essentially use locum pharmacists to provide that service.

5. In respect of the market rate for jobs which the claimant undertook we are satisfied that it is in or about the region of £70,000. There were two jobs advertised in Yorkshire for that rate: one in Dewsbury and one in West Yorkshire, in October and November 2016 respectively, the latter for a superintendent pharmacist the former for someone with three years' community experience to manage a busy health centre pharmacy. The respondents were operating their businesses throughout the country by use of locum staff similar to that set out in the contract in the bundle which was signed by Mr Aurangzeb.

Injury to Feelings

6. We have summarised the consequences of the detrimental treatment above. It is important to state that we are not awarding injury to feelings in respect of the dismissal but only in respect of the detriments which surrounded the resignation of the claimant, including the retraction of an offer to reinstate him.

7. The parties have respectively contended for £25,000 and £7,000. We are satisfied that the award falls within the middle bracket of the updated guidance set out by the Court of Appeal in **The Chief Constable of West Yorkshire v Vento**.

That bracket, as updated, falls in round terms between £7,000 and £20,000. The claimant's serious hurt and distress as described in the medical report was over and above the norm, due to the central importance of his work. We are satisfied he still suffers from significant injury to his feelings. In the circumstances we are satisfied an award of £15,000 is appropriate. To that we apply interest at 8% for 55 weeks being £1,269.23. We have also added to that award a 25% uplift for the breach of the respondent in failing to comply with the Code of Practice on Discipline and Grievance Procedures. This was a serious breach. The claimant had repeatedly raised the issue of wanting his grievance in respect of the written particulars to be addressed, and for the reasons we have set out in our earlier findings it was fumbled and wholly inadequate. In our judgment the maximum uplift is appropriate to reflect the wholesale failure to comply with the Code.

Unfair dismissal

8. In respect of the basic award it is common ground that the claimant should receive £9,500 and in respect of the compensatory award £450 for loss of statutory rights. We award four weeks' at the capped rate of £475 for the failure to provide written particulars of employment giving rise to an additional sum of £1,900. Four weeks rather than two is appropriate because of the number of requests which had been ignored by the directors from the claimant for these. That is to be added after we have uplifted by 25% the remaining compensatory award for the reasons we have set out.

9. In respect of losses of earnings, the first question we must address is what would have happened to the claimant's employment had the respondent not acted unlawfully? The second question we must address is whether the claimant has reasonably mitigated his losses to date, if has not when he should have reasonably done so, and if he has reasonably mitigated his losses to date when would he be able to mitigate them reasonably such as to extinguish or reduce any continuing losses?

10. On the question of mitigation of loss the burden is upon the respondent to prove that the claimant has failed reasonably to mitigate his loss.

11. We have had regard to a number of factors in determining what was likely to have happened in the absence of the unlawful treatment of the claimant. The respondent had been purchased by new shareholders in 2015 and we are satisfied they were likely to take a different approach to the way they ran this particular pharmacy to the predecessors. In the accountant's report a dire financial position is painted as of the account year ending 31 December 2015 with a net profit of £11,844, albeit that observation has to be seen as against some previous years' accounts which demonstrated a changing picture and the year end for 2014 had set out a profit of £30,329. Nevertheless the respondent's shareholders had paid £950,000 for this business and we are satisfied would, in time, implement their changes with a view to maximising the profit the business would achieve. In the first instance this would be aimed at making savings in respect of items such as drugs and other costs as suggested in the accountant's letter, not previously disclosed, of 3 December 2015, which suggested a 50% reduction in overheads to be made by reducing procurement of medical supplies and looking for cheaper telephone, utility

and computer systems. No reference is there made to redundancy which, we add, is significant in respect of our findings that the £50,000 was allied to redundancies by the directors in December when they discussed matters with the claimant.

12. However subsequent events, we are satisfied, would have involved the respondent looking at other ways of making profit, including aligning the way the shop was operated with the other businesses owned by the directors of the respondent. This involved payment for locum pharmacists at £55,000-£60,000, considerably less than was paid to the claimant. That may well have its impact upon the quality of service, including patient/pharmacist relations and harmony between staff and the manager and superintendent, but ultimately that was a choice for the directors and shareholders.

13. In addition we have had regard to the changes in funding from the Department of Health. 6% cuts were announced in January 2016 which was expected to see a reduction in the number of pharmacies in areas where there were clusters of 1 in 4. This pharmacy was a highly productive one issuing 13,500 prescription products per month, so had a good chance of surviving the financial pressures. Nevertheless the underlying changes to the funding of pharmaceutical provision would, we are satisfied, have furthered the desire of the directors of the respondent to make additional economies.

14. The respondent contends that it would have made the claimant redundant because he was too expensive. Mr Searle suggests that is opportunistic and the reality is that the respondent would not have implemented any such significant change. For the reasons we have set out we are satisfied that the directors would have sought to persuade the claimant to change the terms of his engagement which would have involved requests to reduce his income. He was working 40 hours per week, albeit on four and not five days and he would from time to time work as a locum on Saturdays. This was an arrangement which was tailored to his circumstances; the claimant had a heart condition which had created problems some years before. There would have been some incentive for the claimant, if approached in a measured way, to negotiate a reduction in his salary. The closeness of the premises to his home, his good relationship with the patients and other staff and specific periods off work for his health were all compelling factors which might have led to him agreeing to a salary reduction no doubt in conjunction with reduced hours. The respondent would have had to act lawfully. A business reorganisation to reduce labour costs would have involved a process of consultation that would have taken some time and included a period of grace before any significant changes came into effect. Had the claimant not resigned we are satisfied he he would have agreed to changes to his conditions to a salary commensurate to that of Mr Aurangzeb or he would have resigned, rejected such offers and left the employment of the respondent by today's date.

15. Turning then to mitigation of loss. We are satisfied that the claimant has made all reasonable efforts to mitigate his losses to date. He quickly contacted agencies and took up a number of appointments such that he earned £20,334 over the last year. The respondent contends that the claimant could have obtained employment with Asda at £55,000 per annum, but the claimant points out that he would have to travel a significant distance on top of working a nine hour day. Given the medical

position we are satisfied the claimant reasonably could decide not to take up those other offers of employment with Asda or to have sought employment in the terms of the jobs which are advertised and set out in the bundle. In short, we are satisfied that the claimant has reasonably mitigated his loss to date. We reject the submission that the capital reserves the claimant had precluded him from looking for and accepting proper work offers. He has always had a strong work ethic regardless of his financial situation.

16. In respect of the future, however, we are satisfied that the claimant is in a different position. By now he would either have left the respondent because he was not satisfied with the money they were offering and therefore have obtained employment elsewhere, possibly on in excess of what the respondent was seeking to retain him for at what appears to be the market rate of £70,000. Had that occurred no continuing losses would be attributable to his unfair dismissal. He would have moved to pastures new in any event. Alternatively, he would have remained with the respondent on a salary of £55,000. Now the litigation is behind him we are satisfied he will be able to take up more and better paid work to extinguish any continuing loss so that he will receive a comparable income to that he would have received had he remained with the respondent.

17. As the losses we have computed fall below the statutory cap for the compensatory award, we make no additional award for losses of earnings for the protected disclosure detriment claims. Those which would arise would duplicate those for which we have made an award under Section 123 of the ERA.

Employment Judge Jones

Date: 17 February 2017

Date sent: 17 February 2017