EMPLOYMENT TRIBUNALS

Claimant Mrs. S. Shanker

Respondent Ayur Beauty Plus Limited

v

Heard at: Watford **On**: 25 to 27 September 2018

Before: Employment Judge Heal

Appearances
For the Claimant: Mr. M. Shanker, claimant's husband.
For the Respondent: Mr. M. Curtis, counsel.

JUDGMENT

The complaint of unfair dismissal because of public interest disclosure is dismissed.

REASONS

1. By a claim form presented on 12 July 2017 the claimant made complaints of unfair dismissal because of public interest disclosure, and, included in that, a failure to provide a written statement of terms and conditions. The issues were those identified on 2 August 2018 by Employment Judge Wyeth:

Public Interest Disclosure Claim

1.1 What did the claimant say? The claimant maintains that she told Krishna Shah that:

1.1.1 it was dangerous to leave wax candles in the salon overnight as it was a risk to health and safety;

1.1.2 it was illegal to practice without a current operating licence and public liability insurance;

1.1.3 certain staff were being asked by Krishna Shah to carry out treatment that they were not qualified to perform and that this put customers and staff at risk;

1.1.4 the respondent was failing with respect to employee rights to written terms of employment, holidays, sick pay and notice periods.

1.2 If any or all of these are proven, was information disclosed which in the claimant's reasonable belief tended to show one of the following?

1.2.1 a criminal offence had been committed;

1.2.2 the respondent and/or Krishna Shah had failed to comply with a legal obligation;

1.2.3 for health or safety of staff and customers has been put at risk.

1.3 If so, did the claimant reasonably believe that the proven disclosure(s) was/were made in the public interest? The claimant relies on the following as going to show the reasonable belief:

1.3.1 with regard to the first reported disclosure, the respondent's premises were connected to residential premises and any fire hazard would put members of the public at risk;

1.3.2 with regards to the first three purported disclosures, members of the public as customers could be harmed or at risk and not be able to recover sufficient compensation;

1.3.3 with regard to the final purported disclosure, members of staff are also members of the public.

1.4 was the making of any proven protected disclosure of the principal reason for the dismissal?

1.5 as the claimant did not have at least two years continuous employment, the burden is on the claimant to show jurisdiction and therefore to prove that the reason or more than one the principal reason for the dismissal was the protected disclosure(s).

2. I have had the benefit of a bundle provided by the respondent running to 210 pages. I was told that correspondence towards the end of the bundle contained without prejudice correspondence. Rather than enter debate about how it got there I told the parties that I would not look the correspondence unless anyone specifically asked me to do so. If that arose, then the issue of without prejudice correspondence could be dealt with. No-one has referred to it and I have not looked at it.

3. The claimant provided me with a statement of case which with respondent's consent I have treated as an opening statement or skeleton argument.

4. A number of documents both in and out of the respondent's bundle were produced late and were the subject of objection. I deal with those matters below.

5. Mr. Shanker also produced to me a document headed 'claimant's evidence list' because he said it contained some photographs that were clearer in colour than they

were in the black and white version in the bundle. The respondent did not object to my receiving the colour photographs in evidence.

6. I have heard oral evidence from the following witnesses in this order:

Mrs Savita Shanker, the claimant;
Mr. Mahesh Shanker, the claimant's husband;
Mr Dilip Shah, sometime director of the respondent;
Mrs Krishna Shah, director and working manager of the respondent and
Ms Meera Shah, manager of the respondent.

7. I was also given a signed witness statement from Ms Devina Shah. Mr Shanker objected to my receiving that document in evidence. After submissions from both sides I decided to accept it in evidence. Although the signed version was produced only today, the claimant had been given some advance notice of this evidence by means of an email in the bundle. Ms Devina Shah had told the respondent that she might not be able to give evidence in person on 15 September and confirmed that she would not be able to do so on 20 September. I am told that Ms Shah is in Italy. I note that, as Mr Shanker says, the witness statement is unspecific about times and the identity of the employee in question. The evidence is relevant in that it goes to a central point in issue: the events of 17 February 2017. I have admitted the evidence, subject to the weight that is appropriate to give it, given that the witness is not being called in person and cannot be questioned further.

8. Apart from Ms Devina Shah, all the other witnesses gave evidence in chief by means of a prepared typed witness statement and were then cross-examined and re-examined in the usual way.

9. A number of other 'housekeeping' matters arose on the first day of the hearing.

9.1 Pages 85-98j were removed from my bundle by consent of the respondent.

9.2 There were a number of documents in the bundle which were really in the nature of witness statements although the witness was not being called by the claimant. The respondent did not object to page 186. It did object to 187 and 188. They went to the issue of whether a contract had been provided to the claimant. Pages 189, 190 and 191 were not relevant to the issues. I did not admit any of those documents: they had been produced late. Only 187 and 188 were relevant: but these were from witnesses who could have been called to give evidence and there was no explanation as to why they were not being called.

9.3 I did admit a WhatsApp document which the respondent submitted to show that Devina Shah existed and that she was the author of her statement. Mr Shanker objected to this document being admitted on the basis that it was produced at the last minute. However, he accepted that Ms Devina Shah did exist. It seemed to me relevant and in the interests of justice to have evidence that she was the author of her statement.

10. The respondent served on the claimant at 2:20 pm on Sunday 23 September 2018 the document that appears at page 152c of the bundle. On its face that is a transcript of a conversation between Jignesha Chauhan, Meera Shah and Krishna Shah, translated from Gujarati into English. This appears to give first hand evidence by Ms Chauhan about the alleged incident on 17 February 2017. The text makes it clear that the transcript is not a complete account of the conversation. It appears to be selective. Ms Chauhan is not being called to give evidence before me; this document is not signed by her although it is in fact in the nature of the witness statement. If the recording is in dispute, the only way I can resolve that dispute is by listening to the recording, however this recording is in Gujarati which I do not understand.

11. Therefore, I have no means of resolving any dispute about the wording of the recording. I am told that the respondent only saw the relevance of this document late when the dispute about the presence of a client on 17 February arose. I refused to admit this document however because of the concerns I have set out above.

Concise Statement of the Law

12. In order to establish that she has made a public interest disclosure, a claimant must first show that there has been a disclosure of information. It is not sufficient that the claimant has simply made allegations about a wrongdoer. The ordinary meaning of giving information is conveying facts. Sometimes there are cases however of mixed primary facts and opinion which on balance can still qualify as disclosures of information. Just because something contains allegations does not mean that it does not also contain information. The question is simply whether it is a disclosure of information.

13. Once a disclosure has taken place I consider whether or not it can be characterised as a *qualifying* disclosure. I have to consider the nature of the information revealed. It is necessary that the claimant had a reasonable belief that the disclosure was in the public interest and tended to show one of the six statutory categories of failure. What is required is only that the claimant has a reasonable belief. It is not necessary for the information itself to be actually true. This statutory test is a subjective one because the Act states that there must be a reasonable belief of the worker making the disclosure.

14. Where there are a large number of disclosures the requirement is that there was a reasonable belief in relation to each one: it is not sufficient that the claimant believed in the general gist of her complaints.

15. It is necessary too that the claimant reasonably believed that the disclosure was in the public interest. Sometimes there will be a mixture of personal and public interest in which case it is a matter of fact for the tribunal as to whether there was sufficient public interest to qualify under the legislation.

16. Where a worker makes a disclosure in the context of a private workplace dispute, whether that will be in the public interest will depend on the features of the situation which will engage the public interest which might include the number of persons whose interests are engaged in the workplace dispute. I would also have to consider the nature of the interests affected and the extent to which they are affected

by the wrongdoing disclosed. I would have to consider the nature of the wrongdoing itself, for example, is it deliberate or inadvertent and also the identity of the alleged wrongdoer. For example, the larger or more prominent the wrongdoer, the more obviously should disclosure about its activities engage the public interest.

17. Section 103A provides that an employee who is dismissed shall be regarded 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. The burden of proving the reason or principal reason is on the employer unless, as in this case, the claimant lacks the qualifying period of employment and therefore she has to show that the tribunal has jurisdiction to hear her claim. In that case the burden of proof lies on the claimant.

Facts

18. I have made the following findings of fact on the balance of probability. What that means is this: where there are disputes on the facts, I do not possess a fool-proof method of discovering perfect truth. Therefore, I listen to and read the evidence which I have admitted and which has been placed before me by the parties. On that evidence and that evidence only, I decide what is more likely to have happened than not.

19. This is not a case in which I can make findings of fact on the basis that one party is consistently more reliable than the other. At different times in the evidence I have had reason to doubt the evidence of one side or the other. Therefore, I have worked through the chronology, making findings on each issue on the basis of what is more likely to have happened not. This case has been fact sensitive in the extreme: there are many disputes of fact and little objectively reliable evidence to shed light on the resolution of the disputes. But I have to make findings and I have done the best I can in the circumstances.

20. The respondent is a limited company carrying on the business of beauty therapy in Pinner.

21. The claimant is a beauty therapist. A mutual friend put her in contact with the respondent and she worked a trial day for the respondent on 28 July 2016.

22. Having been away on holiday, the claimant then started work as an employed beauty therapist with the respondent on 1 September 2016.

23. I find that Ms Meera Shah did *not* tell the claimant when she started that her employment was subject to a three-month probation period. I find this because I have rejected the respondent's evidence that it provided her with the alleged (or in fact any) written contract (see below) and also because I note that Ms Meera Shah in her witness statement does not refer to this, although she does set out a list of other matters which she did cover at the start of the claimant's employment.

24. By early October 2016, I find that the claimant still had not been given a written statement of terms and conditions of employment. She provided Ms Meera Shah with contracts from her previous employments to show Ms Shah what sort of document she expected to be given.

25. Although a written statement of terms and conditions appears in my bundle I do *not* accept that that document was given to the claimant as her terms and conditions. Where there are spaces for the names of the parties, the date when the period of continuous employment began, the rate of pay and the hours of work, none of those matters have been filled in. The document remains a blank template. There is nothing to link it to the claimant and no covering letter or email to show that it was sent to her.

26. This statement of terms and conditions contains a clause that no holiday would be taken in the probation period, although the claimant was in fact permitted to take holiday during the first three months of her employment. That is some further evidence that these were not the terms agreed between the parties at the outset.

27. In any event the statement of terms and conditions does not say that holiday may be taken but unpaid which is what the respondent later says was agreed.

28. I note that although it is in issue that the claimant subsequently complained that the respondent was failing with respect to employee rights in relation to written terms of employment generally and not just in relation to herself, no written statements of terms and conditions have been provided to me for any other employee. I conclude on balance that none were provided either for the claimant or for other employees.

29. The respondent used lit candles (tea lights) in its reception area. This was in part to create an ambience, but it was also in part a religious practice because many, perhaps all, of the staff are Hindu. I accept the claimant's evidence that on occasion these tea lights were left alight in the evening after the salon closed and that she was concerned that this gave rise to a health and safety risk. The risk was perhaps not high, but in the event that a candle was knocked over, or something flammable came into contact with it, then there was a serious risk of fire.

30. Mrs Krishna Shah accepted that it was possible that the claimant had said something to her about candles being left alight at night. I find that the claimant did say to her that candles should not be left alight at night and that she pointed out the fire risk to Mrs Shah.

31. On 9 and 10 November the claimant attended a 'Crystal Clear' course. This trained staff to use a particular machine for treatments. The nature of this treatment is such that specific insurance and an operating licence are required to cover it. The respondent did not have this insurance. It sheds some light on the respondent's attitude to insurance and licencing that it refused to permit use of this machine without those safeguards being in place.

32. I find that the respondent did have appropriate public liability insurance and an operating licence and that they were displayed as required. This is consistent with the respondent's care not to allow use of the Crystal Clear machine without proper and specific insurance. I find that the claimant did ask Mrs Krishna Shah about public liability insurance when they were discussing the insurance needed for the Crystal Clear machine. The claimant says that Mrs Krishna Shah did not answer her. I have found Mrs Krishna Shah a somewhat cautious and unresponsive witness who at times did not answer but remained silent, so I do not consider the claimant's account as

implausible as Mr Curtis suggests. It may be that Mrs Shah said nothing because she did not know the answer and remained silent out of caution so as to make her own checks later. I accept that the claimant said to her that it was illegal to practice without an operating licence and insurance because it put staff and customers at risk.

33. However, I do not consider that it was reasonable for the claimant to conclude from that, without more, that there was no insurance or licence. Some straightforward further enquiry would have shown that there was insurance and a licence in place. This too is in the context that, as the claimant knew, the respondent refused to use the Crystal Clear machine without insurance.

34. On balance I find too that the respondent (for the same reason) would not take the risk of permitting untrained staff to carry out treatments for which they were not qualified. It was lawful for the claimant's colleague Shiri to conduct treatments under supervision. On balance however, I find that the claimant did have concerns about the matter: she raised it with Krishna Shah saying that other salons in which she had worked did not allow unqualified staff to carry out treatments.

35. In mid-November 2016 the claimant asked Mr Shah about leave over the Christmas holiday period. I find that Mr Shah did tell the claimant that the respondent did not give it. This is consistent with the approach to providing terms and conditions and holiday pay.

36. The claimant responded that she should have been told about these conditions before she began work for the respondent.

37. From 20 November to 2 December 2016 the claimant made a trip to India. Before she left she asked about holiday pay. I find that Mrs Krishna Shah did tell the claimant that the respondent did not pay holiday pay. I reject the respondent's claim that she had been told that it did not give paid leave during the probation period. I do so because I have rejected the respondent's evidence about the contract it says it gave the claimant and also the evidence that Meera Shah told the claimant about a probation period at the outset of employment.

38. The claimant responded that there must be some mistake because she had been paid holiday pay at other salons where she had worked.

39. I find too that the respondent did tell the claimant that it did not pay sick pay or for work on bank holidays. On balance, it only paid those sums in the final month because the claimant had made threats about ACAS.

40. On 2 to 16 February 2017 the claimant went on sick leave to have an operation. She produced a hospital letter to show the cause of her absence. The claimant gave it to Meera Shah who told her that the respondent did not pay sick pay. The claimant told her that sick pay had to be paid and that she felt that not to pay was illegal.

41. On 17 February 2017 the claimant asked Meera Shah about the Crystal Clear machine. The claimant wanted to be able to use it. She had been trained in it but was not allowed to practice the skills she had learned. Ms Shah told her that it was not possible to use the machine because the respondent did not have insurance to cover

its use. The claimant thought that Ms Shah had been rude to her and began to be cross.

42. I do not find that the claimant also made disclosures on this date about other matters besides the Crystal Clear machine. She did not make disclosures about her employment contract, about public liability insurance, holiday pay or sick pay. She could not explain to me why such matters would have come to her mind. I wondered if she became angry so that these past concerns arose again to her mind, and at first the claimant said yes but she denied being cross and could not explain further why the matters came to mind. I note, crucially, that her claim form only describes an incident in which she asked about public liability insurance to use the Crystal Clear machine and makes no reference to the other alleged disclosures. So, I find that the only topic of discussion was as the claim form describes: it was about the Crystal Clear machine only.

43. The claimant denies that she was cross and in her witness statement said that no customer was present. However, I note that in cross examination when it was put to her that Mrs Krishna Shah told her to calm down, she said that '*Jigna was talking more than me. Krishna said 'Shsh'. Then the client came and paid the money and went out*.' It is clear from that evidence that considerably more took place on 17 February than the claimant is prepared to concede.

44. I find that there was indeed an incident in which the claimant became angry while a client was present, and Mrs Shah at least felt threatened.

45. Mrs Shah was deeply upset by this incident. She discussed it with Meera Shah the following day, a Saturday. Sunday 19 February was a working day for the salon. The claimant attended work as usual. Nothing was said which assuaged Mrs Shah's disquiet over the incident and by the end of the day she had decided to dismiss the claimant.

46. Accordingly, and without following any process, she spoke to the claimant and dismissed her. I find that the reason she did so was her reaction to the incident on Friday 17 February. Had the claimant had two years qualifying service, it is highly likely that this would have been an unfair dismissal. However, this matter does not arise for an employee with 5 months' service.

Analysis.

47. Working through the issues and my findings of fact, I have found that the claimant did say to Mrs Shah that it was dangerous to leave candles alight at night. I consider that this is a disclosure of information (candles were left alight) and it tended to show that health and safety of anyone present around the premises was at risk through fire. Even though the candles were on a shelf and in containers that does not mean that they could not be dislodged: the precise mechanism of that does not matter, it seems to me. They were live flames left unattended. There was an appreciable and real if not great risk. The claimant reasonably believed that. The disclosure was in the public interest: there is an obvious public interest in preventing fire. She made the disclosure to her employer. This was a protected disclosure.

48. The claimant did say to Mrs Shah that it was illegal to practice without a current operating licence or insurance. In the context this is linked to the claimant asking whether there was insurance or a licence but is only an assertion or allegation, containing no information. If I am wrong about that, I have found that the claimant did not have a reasonable belief that her 'information' showed a failure to comply with a legal obligation: reasonable inquiry would have shown her that the respondent was not in breach. This disclosure was not protected.

49. I have found that the claimant did make the disclosure at issue 1.1.3 above. This was more than an allegation since it was so closely related to the particular circumstances of Shiri and a discussion about her. I consider that it was reasonable for the claimant to hold the belief that it was a breach of a legal obligation to carry out treatments when unqualified to do so, and it would have been far more difficult for her to get to the bottom of whether it was really permissible for Shiri to practice in the circumstances. It was also reasonable for the claimant to believe that the disclosure was in the public interest since Shiri would be treating members of the public.

50. So, I consider that the claimant did make a protected disclosure in this respect.

51. The claimant asked for a statement of terms and conditions. She said that she *felt* the failure to provide one was not right. I have found that she did not assert this again on 17 February. The claimant asked about holiday in November. The claimant said that she should have been told about these terms and conditions (i.e. no holiday pay) because she would have thought twice about working for the respondent, but she did not make a disclosure about the failure to pay holiday pay being a breach of a legal obligation. In her discussion about her India trip; she said that other salons paid holiday pay and there must be a mistake, but this does not amount to a disclosure of information about a failure to comply with a legal obligation.

52. On 16 February the claimant did tell Mrs Krishna Shah that sick pay had to be paid by law. In the context I consider this a disclosure that the failure to pay her sick pay for her past absence was a failure to comply with a legal obligation. The claimant reasonably believed it to be in the public interest because although the breach had an effect on her personally, the context was that of an employer which had asserted that it did not pay sick pay as a deliberate, general rule. Although this is a small private employer, nonetheless the right to sick pay is an important protection for the welfare of staff. If staff are not paid sick pay, they may well continue working when they are unwell, or return to work too soon without having recovered from an illness or operation, to the detriment of their health. The respondent's rule had an impact on the well-being of the staff as a whole, not just the claimant. I consider this a protected disclosure.

53. Having worked anxiously through all that however, I reach the question whether the principal reason for the dismissal was the disclosures proved. I have found on the facts that it was not. The respondent has accepted numerous assertions by the claimant of various rights – sometimes correctly, sometimes incorrectly - without reacting in any disciplinary or hostile manner. The claimant's employment simply continued. Despite the claimant's case that her dismissal came out of the blue, I find that it did not. There was an altercation of some seriousness which a customer witnessed, on 17 February. Had it not been for that I find this employment would have

continued. It was that incident and not any of the disclosures, protected or otherwise, that caused the dismissal.

54. Although I have found that the claimant was not given a written statement of particulars of employment, I make no award under section 38 of the Employment Act 2002 because I have no found in favour of the claimant in her substantive claim.

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Employment Judge Heal

Date: …05.11.18……..

Sent to the parties on: ....21.11.18.....

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For the Tribunal Office