EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Davies**

Respondent: **Dr Capper, Dr Palamarthy, Dr Pradhan, Mrs Jeffries and Mrs Pompa t/a Margaret Street Practice**

Heard at: **Swansea** **On: 3 and 4 December 2018**
Before: **Employment Judge Beard**
Representation:
Claimant: Mr Jenkins (Friend)
Respondent: Mr Airtone (Consultant)

JUDGMENT

The Judgement of the tribunal is that the claimant's claim of unfair dismissal pursuant to section 103A Employment Rights Act 1996 is not well founded and is dismissed.

REASONS

Preliminaries

1. The claimant's claim is of unfair dismissal pursuant to section 103A of the Employment Rights Act 1996. The claimant was represented by Mr Jenkins, a friend. The respondent was represented by Mr Airtone a consultant with Peninsula. The claimant gave oral evidence on her own behalf. The respondent called oral evidence from Dr E Davies and Mrs Rachel Pompa. I was also provided with a bundle of documents which exceeded 250 pages although I was only referred to a limited number of those documents. The issues had been identified prior to this hearing as follows:

   1.1. Did the claimant make a protected disclosure in an email of 20 February 2018? The claimant relies on the entirety of the contents of the email dealing with the security of the premises and computer equipment?

   1.2. The claimant contends that the respondent had failed to comply with legal obligations to set the alarm (this obligation is said to arise out of a duty to ensure the safety of staff on site) and by permitting computers to remain active (this obligation is said to arise from a duty to ensure confidentiality of patient information).

   1.3. The claimant contends that a health and safety issue arose because members of staff were put at risk by the alarm not being set as staff arriving early in the morning during darkness might have met with an intruder.

   1.4. In respect of these matters I have to consider the claimant's belief and whether the claimant reasonably believed that the disclosure covered a legal obligation or health and safety and was also made in the public interest?

1.5. The respondent does not accept that the claimant held the belief in the disclosures required under the Act but does not allege bad faith.

1.6. What was the principal reason the claimant was dismissed and was it that she had made a protected disclosure? The respondent contends that the claimant was dismissed for reasons of conduct, that conduct being relationships with other staff.

The Facts

2. The claimant commenced her employment with the respondent GP practice on 2 October 2017 as an assistant practice manager. She had, in effect, been headhunted by being advised of the post and requested to apply by Mrs Pompa the practice manager. The claimant had significant experience in practice management and 28 years of experience in working in a GP practice. The respondent recruited the claimant because it was attempting to utilise this experience particularly as it had some staffing difficulties and had recruited new staff.

3. The claimant contends that she was not provided with her terms and conditions of employment or the staff handbook until the 9 November 2017. Mrs Pompa stated that these documents were provided on 2 October 2017. I prefer the claimant's evidence in this regard. The document in the bundle shows that it was signed on 2 October 2017. However, it clear to me that the respondent considered that the claimant, in signing that document, was accepting the terms of employment. Those terms included a section which indicated that more detailed terms were to be found in the staff handbook. In the terms and conditions document at p. 27 the document refers to appropriate notice in probation periods. The handbook refers to a probation period of six months and to the respondent's right to avoid the contractual disciplinary and dismissal procedures during the probation period. Mrs Pompa's communications with the partners (set out below) leads me to judge that she considered the probation period to be in operation. In my judgment the respondent considered that the claimant was in a probationary period and that it did not have to follow its set disciplinary procedures because of that.

4. Amongst the requirements of the claimant's role was that she should support the smooth running of the practice by line managing the administration team and by supporting and developing the administration staff. The person specification that accompanied the job advertisement for the claimant's role set out that an ability to supervise, lead, motivate and work within a team environment were essential aspects of the role.

5. There is a dispute as to whether the burglar alarm at the practice premises was in operation; the claimant's evidence was that it was not, Mrs Pompa stated it was, at least from 12 January 2018. Both parties accepted that there had been a fault with the alarm in October 2017. However, the claimant contended that fault was permanent whereas Mrs Pompa described it as intermittent. Mrs Pompa's evidence was on the basis of information she had received rather than direct experience. There was no documentary evidence to support Mrs Pompa's account that there had been an effective repair. However, the claimant was not aware of any repair that had been undertaken as can be seen in the email of 20 February 2018 (which I deal with below). It appears to me that there was an intermittent fault for a significant period and that the claimant was aware of that fault and believed it to be permanent. Further, the claimant believed that it had not been repaired during her employment.

6. On 5 February 2018 Mrs Pompa was made aware by the nurse manager that there was discontent with the manner in which the claimant had dealt with a new rota. This caused Mrs Pompa some concerns and it was matter she intended to raise with the claimant when there was a probation review meeting.

7. On Friday 16 February 2018 Dr E Davies came across a recent employee "E" and the then IT manager "S". E was distressed; S was attempting to comfort her. E explained to Dr Davies that she had experienced a problem with a patient. However, on further discussion it became clear that E considered that she did not receive sufficient support from the claimant as her line manager. S also explained to Dr Davies aspects of the claimant's working methods that she considered inappropriate. As a result of this conversation, and because she was so concerned, Dr Davies contacted Mrs Pompa. Mrs Pompa was contacted by S later that evening via a text message system. S, when asked, supported Dr Davies' view that E was upset saying she "*took some talking dow*n". Mrs Pompa was on annual leave at that time due to return to work on 26 February 2018; she intended to speak to the claimant about matters on her return.

8. On 19 February 2018 L was receptionist on duty at the end of the day, it would usually be her responsibility to lock up. However, one of the GP's in the practice was staying late and told L that he would lock up and, therefore, responsibility passed to that GP.

9. The claimant attended work early on 20 February 2018; it was still dark. She found the door to the premises unlocked. The claimant sent an email that day setting out her concerns about this and other security issues she had found occurring frequently. In that email she set out that there were problems with employees failing to log out of their computers at the end of the day. She complained that this caused problems with the computer system, could cause problems with overnight download of patient reports and of particular concern to her was the risk to confidentiality of patients. The claimant then set out that the door to the building had not been properly locked and set out her concerns that whilst the alarm system was not working this was a particularly important process.

10. When Mrs Pompa returned to work the claimant was not at work because of annual leave. On the 2 March 2018 Mrs Pompa received a formal grievance about the claimant from E. At that stage Mrs Pompa's first reaction was to consider extending the probation period of the claimant and she discussed this possibility via a group text with several of the practice partners. On 5 March 2018 the partners agreed that Mrs Pompa should investigate the grievance.

11. The result of the investigation was that more than one employee provided evidence that they considered that: the claimant was unapproachable, she was, on occasion, rude and the claimant did not offer sufficient support to employees. Mrs Pompa told me that she found these accounts credible because the witnesses were plausible, visibly distressed and had corroborated each other. I had no reason to consider that Mrs Pompa was not telling the truth about her view of the evidence she had heard. To be clear, however, I draw no conclusions as to the claimant's actual conduct or to the accuracy of the accounts given to Mrs Pompa in the investigation only to her reaction to them.

12. Mrs Pompa, with the evidence from the investigation and the previous issue about rotas in mind, considered that the claimant's management ethos was not the same as that of the respondent. Mrs Pompa took advice from the HR advisers retained

by the respondent. Following that advice, the respondent took the decision to dismiss the claimant. The reason given was that the claimant had not demonstrated suitability for her role during the probationary period. The claimant was called into a meeting was not warned that dismissal was a potential outcome, was not told that she could have someone with her at the meeting. However, the claimant was told after dismissal that she could appeal the decision. The claimant was dismissed on 6 March 2018 and paid in lieu one weeks' notice pay.

13. The claimant appealed the decision to dismiss her and the appeal was heard by Dr Capper on 19 March 2018. The claimant contends that an advertisement for her role had been placed prior to this. At the appeal the claimant said that she did not understand why she had been dismissed as no problems had been raised with her previously. Dr Capper told her the reason was an unsatisfactory probation period. The appeal was dismissed and Dr Capper wrote that the claimant's management style was not "what was expected in supporting the staff" and that it was felt that the claimant was "not the right fit".

The Law

14. The Employment Rights Act (ERA)1996 provides:

In section 43A: *(i)n 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.*

In section 43B: (1)In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following— ----------

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

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

In section 43C: *(1)A qualifying disclosure is made in accordance with this section if the worker makes the disclosure —*

(a) to his employer,

In section 103A*: "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."*

15. What amounts to disclosure of information has recently been considered at Court of Appeal level in ***Kilraine - v - London Borough of Wandsworth [2018] EWCA Civ 1436***. Sales LJ, giving judgement sets out, referring to section 43B ERA 1996, that *"In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."*

16. The issue of what consists of the public interest is also to be considered. In ***Chesterton Global Limited & Anor v Nurmohamed [2017] EWCA Civ 979***

Lord Justice Underhill set out that a tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable. The necessary belief is simply that the disclosure is in the public interest: the particular reasons why the worker believes that to be so are not of particular importance. A worker making the disclosure can seek to 'justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it'.

17. The tribunal must answer these questions when considering the burden of proof in a PID dismissal case. Has the claimant shown that there is a real issue that the reason advanced by the respondent is not the real reason for dismissal? If so, has the respondent proved his reason for dismissal? If not, has the employer disproved the section 103A reason advanced by the claimant? If not, the dismissal is for the section 103A reason. This is set out in ***Kuzel v Roche [2008] IRLR 530*** on that approach it is possible to find that an employer has disproved the section 103A reason without establishing its own reason (i.e. both reasons advanced are not the real reason for dismissal).

Analysis

18. In my judgment the claimant made a qualifying protected disclosure on 20 February 2018 in the email, which, although widely distributed was sent to her employer in the person of Mrs Pompa.

    18.1. The email points out concerns about the security of the premises and potential impact on patient confidentiality. The claimant believed, quite reasonably in my judgment, that where premises were insecure and there was no burglar alarm and where computers were left logged on and where there were unlocked paper records that there was a possibility of confidentiality being compromised. In my judgment the use of the word likely in the statute is no more than stating that it could well happen in the correct circumstances, and does not imply a balance of probabilities test or anything close to that. It is in the public interest for patient confidentiality to be maintained. Further, in my judgment, there is a legal obligation placed on the practice to ensure that data is protected.

    18.2. I am not satisfied that the claimant is on as strong a ground as to health and safety of staff. Staff could be at risk on approaching the premises and intruders do not pose any greater risk because of the insecurity of premises. In addition to this it was not a risk she identified at the time. Whilst it is in the public interest to protect health and safety generally it is not in my judgment a particularly likely set of circumstances that the claimant puts forward, however simply applying the test I am of the view that this amounts to a qualifying disclosure.

19. I am not surprised that the claimant has looked for reasons for her dismissal and considered the email of 20 February 2018 as the source. The claimant was not subject to regular probation reviews and she was not warned as to her management style prior to the meeting where she was dismissed. The claimant was obviously and understandably distressed that she was dismissed when there was no warning, prior to the meeting, that dismissal was in prospect. Further the claimant was aware of the contractual procedures for dismissal in the handbook, and because of her view that there was no probation period, would have been very

shocked that such procedures were not followed. I doubt if the respondent had taken these steps that the claimant would have brought this claim.

20. However, that said, I am required to consider the principal reason why the claimant was dismissed. The failings I mention above caused me to question the respondent's motivation, particularly the short period between the sending of the email and the claimant's dismissal. However, I do not consider that those failings are sufficient to undermine my finding that Mrs Pompa believed that there was a probation period and that she was entitled to dismiss without applying the written procedures. I am satisfied that the respondent has proven that the reason for dismissal was a mismatch between the claimant's management style and the expectations of the respondent. The events of 16 February 2018, the material gathered in the investigation into E's grievance and the reasons given to the claimant in both the dismissal and appeal letters point to such a conclusion. In truth I believed the evidence of Mrs Pompa. The respondent, having proven that the reason for dismissal was the respondent's view of the claimant's management style and not the email, has demonstrated that the disclosures were not the principal reason for dismissal and so, on either limb of the ***Kuzel*** test, has proven the reason and disproved the section 103A reason. On that basis the claimant's claim of unfair dismissal is not well founded.

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Employment Judge Beard
Dated: 2 January 2019

ORDER SENT TO THE PARTIES ON

……3 January 2019……..

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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS