EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no: 4123686/2018

Held at Edinburgh on 14 October 2019

Employment Judge: W A Meiklejohn

Mr Claudinei Goncalves de Oliveira	**Claimant** **In person**
Carr Gomm	**Respondent** **Represented by Mr C Meaden, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is as follows –

(i) The claimant's claim that he was dismissed by the respondent on 26 November 2018 having been withdrawn by the claimant in the course of the Preliminary Hearing held on 1 July 2019, that claim of unfair dismissal is dismissed;

(ii) The claimant was not an employee of the respondent as at 5 December 2018;

(iii) The claimant was not dismissed by the respondent on 5 December 2018;

(iv) The claimant did not make protected disclosures to the respondent on 12 November 2018, 1 December 2018 and 3/5 December 2018;

(v) The claimant's claim that he was automatically unfairly dismissed by the respondent on 5 December 2018 is dismissed; and

(vi) The claimant's claim that he was subjected to detriment by the respondent on the ground that he had made a protected disclosure is dismissed.

REASONS

1. This case came before me for an open Preliminary Hearing in Edinburgh on 14 October 2019. The claimant appeared in person and Mr Meaden appeared for the respondent.

Background and issues

2. There had been two previous Preliminary Hearings on 1 March 2019 (before Employment Judge Macleod – the "first PH") and 1 July 2019 (before Employment Judge Sutherland – the "second PH"). Following the first PH the claimant had provided answers to questions relating to his alleged protected disclosures. The position was discussed at the second PH and the Note following the second PH recorded that the claimant had specified that the protected disclosures relevant to his claims were as set out in the table at paragraph 5 of that Note, namely –

- On 12 November 2018 at a meeting with Mr M Sulkowski, the information disclosed being that *"The requirement that the claimant work sleepovers was in breach of his contract of employment".*

- On 1 December 2018 in a telephone conversation with Mr Sulkowski, the information disclosed being "*That the instruction issued on 1 December 2018 by MS to the claimant to abandon his shift at Ettrick Road Care Home ("ER") and immediately return to Morningside Drive Care Home ("the 1 December instruction") would give rise to a staff shortage and*

thereby create a risk that ER residents would not be not properly prescribed medication (including methadone)".

- On 3 December 2018 by email to Mr K Milligan and on 5 December at a meeting with Mr Milligan, the information disclosed being (a) "*That the fact and manner* [of] *the 1 December instruction was in breach of his contract of employment. He was shouted at by MS and threatened with disciplinary action. That MS has no contractual right to require him to change location during a shift."* and (b) *"That the 1 December instruction created a prescription risk."*

3. It was decided at the second PH that a further open PH should be listed to determine the following preliminary issues –

   (a) Whether the claimant was an employee at the time of the alleged dismissal on 5 December 2018 ("issue a.")

   (b) Whether the claimant was dismissed on 5 December 2018 ("issue b.")

   (c) Whether the claimant made protected disclosures on 12 November 2018, 1 December 2018 and 3&5 December 2018 as specified above ("issue c.")

   These were the issues to be decided at this Preliminary Hearing.

4. Following the second PH a Judgment was issued dismissing the claimant's claims of direct and indirect discrimination, these claims having been withdrawn by the claimant at the second PH. That Judgment might also have dismissed the claimant's claim that he had been unfairly dismissed on 26 November 2018, which claim was also withdrawn by the claimant in the course of the second PH, but did not do so and therefore the Judgment above records the dismissal of that claim.

5. Accordingly the only claims still being pursued by the claimant were –

- Automatically unfair dismissal in terms of section 103A of the Employment Rights Act 1996 ("ERA") (Protected disclosure)

- Detriment under section 47B ERA (Protected disclosures)

There was a measure of doubt as to whether the claimant had intended to pursue a detriment claim but I considered that there was sufficient material within his ET1 to support the view that a detriment claim had been advanced.

6. The claimant could only pursue his automatically unfair dismissal claim if he was an employee as at 5 December 2018 (issue a), he was dismissed on 5 December 2018 (issue b) and he had made protected disclosures (issue c). The claimant could only pursue his detriment claim if he had made protected disclosures (issue c).

Evidence

7. I heard evidence from the claimant and from Mr Sulkowski. Both parties provided bundles of documents to which I refer by page number prefixed by "C" in the case of the claimant's bundle and by "R" in the case of the respondent's bundle.

8. It is not the function of the Tribunal to record every piece of evidence presented to it and I have not attempted to do so. Instead I have focussed on the matters which I considered to be material to the determination of the issues.

Findings in fact

9. In September 2018 the claimant responded to an advertisement on the respondent's website for the full time position of Support Practitioner. He was interviewed on 13 September 2018 and was successful. His employment commenced on 25 October 2018. He was based at Morningside Drive where his line manager was Mr Sulkowski.

10. On or around 12 November 2018 the claimant was told by Mr Sulkowski that he would require to undertake sleepovers. This was expected by the respondent of all Support Practitioners whether full time or part time. It was not expected of Managers nor Relief Workers.

11. This was an issue for the claimant as he had childcare responsibilities for his 10 year old son. His position was that he had not been aware of the sleepover requirement either from the job advertisement on the respondent's website nor from his interview. He produced the notes taken by his interviewers (Mr D Currie – C49-50 - and Mr A Taylor – C50-51). These made no reference to sleepovers; however the notes were a record of the claimant's answers to questions put to him during his interview rather than a full record of what was said during the interview. Mr Sulkowski accepted that the claimant had been surprised to be told about the need to do sleepovers and I was satisfied that the claimant had been unaware of this requirement until told by Mr Sulkowski.

12. Mr Sulkowski offered to adjust the days upon which the claimant would do sleepovers to fit in with his childcare responsibilities. He also advised the claimant of the Relief Worker role which entailed the same type of work as a Support Practitioner but without any requirement for sleepovers.

13. There was a further conversation between Mr Sulkowski and the claimant on 15 November 2018 the outcome of which was that the claimant agreed to become a Relief Worker with effect from 26 November 2018. The claimant regarded this as demotion and, according to his ET1, "*felt grieved and angry with line manager Matt Sulkowski's unfair decision".*

14. As a Relief Worker the claimant's line manager became Mr Currie who was Relief Worker Co-ordinator. A Relief Worker had a "*home"* service which in the case of the claimant was Morningside Drive. When working a shift in a particular service a Relief Worker would be answerable to the manager of that service.

15. The claimant described himself as a "*free agent"* in his role as a Relief Worker in the sense that he had the right to accept or decline shifts as he chose. He was expected to wear a badge and to observe the respondent's policies and procedures while working as a Relief Worker.

16. There was flexibility in the arrangements for offering shifts to Relief Workers. Mr Currie would slot Relief Workers into available shifts where not all the shifts required in a service could be covered by full time or part time Support Practitioners (which implied that there was no guarantee that a Relief Worker would be allocated a minimum number of shifts or indeed any shifts at all). This was based on Relief Workers telling Mr Currie when they would be available and/or Mr Currie consulting with the Relief Worker. Relief Workers might also identify shifts they wished to cover by speaking with a service manager.

17. The nature of the services provided by the respondent meant that there was a need for 24 hour cover and there was an on-call rota amongst the 11 or 12 managers including Mr Sulkowski. Mr Sulkowski was the on-call manager over the weekend of 1-2 December 2018.

18. The claimant was given Relief Worker shifts at Ettrick Road on 1-2 December 2018. He was told about this on 30 November 2018 by Mr Sulkowski when he arrived for a Relief Worker shift at Morningside Drive.

19. During his shift at Ettrick Road on 1 December 2018 the claimant spoke with the service manager (Ms S Smith) and a staff member (Mr J Walls). He became aware that shifts were available at Ettrick Road between 4 December 2018 and 5 January 2019 and wrote his name down for 16 shifts over this period. He also became aware that a resident's medication (methadone) would require to be administered at 4pm. In terms of the respondent's Medication Policy (R69-89 at page R76) "*Where possible, two staff signatures should witness the administering of a controlled drug".*

20. Around 2.30pm Mr Sulkowski phoned Ettrick Road. The purpose of his call was to tell the claimant to go to Morningside Drive to cover for a late shift (1.30 – 9.30pm) employee who had not turned up. Mr Sulkowski spoke firstly to Mr Wall to check that the claimant could be released from Ettrick Road and then to the claimant.

21. When Mr Sulkowski told the claimant to leave Ettrick Road and come to Morningside Drive the claimant objected. He understood that he was being asked to work until 9.30pm which conflicted with the childcare arrangements he had made. He pointed out that if he left Ettrick Road there would not be a second employee to witness the administering of methadone at 4pm, the claimant believing that this was a legal requirement (and in so finding I preferred the evidence of the claimant to that of Mr Sulkowski who did not recall this being mentioned).

22. According to the claimant Mr Sulkowski raised his voice and demanded that the claimant do as instructed. The claimant said that Mr Sulkowski threatened him with disciplinary action. Mr Sulkowski denied raising his voice and being intimidating, which I accepted – the claimant did not like what he was being told by Mr Sulkowski to do and formed an overly negative view of Mr Sulkowski's behaviour towards him. However, it was clear that the conversation became strained as the claimant was not willing to do what Mr Sulkowski was asking. Mr Sulkowski agreed that he had told the claimant that he would be speaking to Mr Currie, the claimant's line manager. He did not accept that he had said he would speak to HR.

23. The claimant was incorrect in his belief that Mr Sulkowski was asking him to work until 9.30pm. I accepted the evidence of Mr Sulkowski that he expected the claimant to work at Morningside Drive only until his (ie the claimant's) shift was due to finish at 6pm. The claimant was also incorrect in his belief that Mr Sulkowski could not require him leave Ettrick Road and work elsewhere midway through his shift. As on-call manager it was for Mr Sulkowski to prioritise the deployment of staff across the respondent's services.

24. The claimant had clearly been unhappy at being asked by Mr Sulkowski to move to another service part way through his shift. He did not recognise Mr Sulkowski's authority to require this of him as Mr Currie was by then his line manager. He had a negative perception of Mr Sulkowski based on his belief that he had been demoted by Mr Sulkowski.

25. Mr Sulkowski emailed Mr Currie – the email (R57) is dated 3 December 2018 but refers to his conversation with the claimant "*today (Saturday)".* In his email Mr Sulkowski said that the claimant had been "*really challenging on the phone".* Mr Sulkowski also told Mr Currie that the claimant had said "*he wants to speak with you on Monday".*

26. On Monday 3 December 2018 Mr Sulkowski sent a text message to the claimant (R63) referring to "*your request to talk with your line manager"* and offering a meeting the following day. The claimant sent an email to Mr Sulkowski at 23.39 on 3 December 2018 advising that he had raised a formal grievance complaint about him (Mr Sulkowski). This was a reference to an email the claimant had sent to Mr L Kerr on 3 December 2018 (R58-60) in which he stated that he was not comfortable working at Morningside Drive and that his decision was "*final".* This followed a telephone call made by the claimant to Mr Kerr.

27. Mr Kerr advised the claimant by email (still on 3 December 2018 – C60) that a senior manager would be in touch with him and Mr Milligan then emailed the claimant (C62) inviting him to an informal meeting on 5 December 2018. The claimant replied at 22.42 on 3 December 2018 (C65-67) –

    - Complaining about not having received a contract of employment

    - Complaining about being told to go back to Morningside Drive

    - Complaining about Mr Sulkowski's decision to demote him to Relief Worker

- Referring to his grievance (ie his earlier email to Mr Kerr)

28. The claimant met with Mr Milligan on 5 December 2018. The claimant was unhappy at the outcomes from this meeting and at 03.45am on 6 December 2018 sent an email to Ms L Mackay, the respondent's HR Operations Manager. He made reference to a number of points which had been covered at his meeting with Mr Milligan and to his ongoing grievances –

    - Mr Milligan's support for the actions of Mr Sulkowski in demoting him and also on 1 December 2018

    - Mr Milligan's refusal to allow him to return to Ettrick Road to do the shifts for which he had put his name down in December 2018/January 2019

    - Non receipt of his contract of employment

    - Mr Sulkowski's behaviour towards him – "*demoting me; intimidation; threats"*

    - Mr Milligan's statement that he was part of or "*belonged to"* Morningside Drive

    - The absence of reference to sleepovers at interview

29. The claimant's account in evidence to the Tribunal of what Mr Milligan had said to him at their meeting on 5 December 2018 included the following –

    "*I'm telling you today you're not going to go back to work at Ettrick Road. You're not going to work those shifts. I need you to go back to Morningside Drive."*

    The claimant's position was that these were words of dismissal and a breach of the obligation of mutual trust and respect. The claimant did not resign in

response to this alleged breach – in his ET1 submitted on 17 December 2018 he ticked the "*Yes"* box in answer to the question "*Is your employment continuing?".*

30. Mr Milligan was unable to attend the Hearing and, following refusal of a postponement application, Mr Meaden produced an affidavit signed by him (R90-92). I noted this but did not attach any evidential weight to it as the claimant had not had an opportunity to cross-examine Mr Milligan.

Submissions

31. The claimant argued that he had been an employee of the respondent as at 5 December 2018. He referred to the cases of ***Pimlico Plumbers Ltd and another v Smith [2018] UKSC 29*** and ***Uber BV and others v Aslam and others [2018] EWCA Civ 2748***.

32. The claimant also argued that he had been dismissed on 5 December 2018. The respondent, he submitted, had wrongly believed that it was safe to dismiss him as having less than two years' continuous employment. This did not however apply where the dismissal was for making protected disclosures.

33. Referring to the specific disclosures he had made, the claimant argued that they were disclosures of information which in his reasonable belief were in the public interest and evidenced breach by the respondent of legal obligations to which it was subject. The claimant might himself have breached his professional duties had he not made his disclosures.

34. Mr Meaden submitted that the claimant, in agreeing to become a Relief Worker, had become in his own words a "*free agent"*. As such he felt he could decline Mr Sulkowski's instruction on 1 December 2018. There was no mutuality of obligation and the claimant could pick and choose whether to work for the respondent. He was not an employee - Mr Meaden referred to ***Carmichael & another v National Power plc [1999] UKHL 47***.

35. Mr Meaden argued that there had been no dismissal. The claimant was offered shifts and refused them. He did not like how Mr Sulkowski communicated with him and said he would not work at Morningside Drive.

36. Mr Meaden submitted that the claimant had not made any protected disclosures. Being told on 12 November 2018 of the requirement to work sleepovers affected only the claimant and his personal life; there was no public interest. On 1 December 2018 the claimant took things the wrong way; even if the claimant had told Mr Sulkowski about the medication issue, there was again no public interest. The same applied to the alleged disclosures to Mr Milligan on 3/5 December 2018 – Mr Meaden referred to ***Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 314***.

Applicable law

37. The statutory definitions of "*employee", "worker"* and "*contract of employment*" are set out in section 230 ERA. The claimant would only be an employee if he had entered into or worked for the respondent under a contract of employment. He would be a worker if he and the respondent had entered into a contract under which he undertook "*to do or perform personally any work or services*" for the respondent. ***Pimlico Plumbers*** and ***Uber*** were cases where the claimants were found to be workers as opposed to employees.

38. For there to be a contract of employment there must be mutuality of obligation – in ***Carmichael*** the appellants worked as power station guides on a casual basis. The Tribunal found that, when not working as guides, they were *"in no contractual relationship of any kind"* with C.E.G.B (the operator of Blyth Power Stations before National Power plc). The House of Lords found that the Tribunal had correctly concluded that their case "*founders on the rock of mutuality of obligation*".

39. Only an employee is protected against unfair dismissal where the reason (or, if more than one, the principal reason) for the dismissal is that the employee made

a protected disclosure – section 103A ERA. A worker (which includes an employee) is protected from detriment on the ground that he has made a protected disclosure – section 47B ERA.

40. A protected disclosure is a qualifying disclosure as defined in section 43B ERA –

"*(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…."*

The matters which follow include compliance with a legal obligation and endangerment of the health and safety of any individual.

41. In ***Chesterton*** the Court of Appeal made clear that what matters is whether the worker's *"subjective"* belief [that his disclosure was in the public interest] was *"objectively"* reasonable.

Discussion and disposal

42. I deal first with issue a – was the claimant an employee of the respondent at the time of the alleged dismissal on 5 December 2018? In my view, he was not. I considered that the claimant was correct to describe his role as a Relief Worker in terms of being a "*free agent*" in the sense that he was (a) not guaranteed any work and (b) not obliged to accept any work which the respondent might offer to him. The consequence of that was that the relationship between the respondent and the claimant was not one of employment. There was no mutuality of obligation (to offer and/or accept work).

43. I turn next to issue b – was the claimant dismissed on 5 December 2018? In my view, he was not. The claimant was clearly unhappy that Mr Milligan had been supportive of Mr Sulkowski when they met on 5 December 2018 and had told him (the claimant) that he would not be working the Ettrick Road shifts, but that did not amount to a dismissal. Mr Milligan was effectively explaining to the claimant

how the respondents operated in relation to Relief Workers – a Relief Worker had a *"home"* service which for the claimant was Morningside Drive. The respondent decided where (ie within which service) to offer work to a Relief Worker although the Relief Worker's preference and availability could be relevant factors. I was satisfied that what Mr Milligan said to the claimant on 5 December 2019 (see paragraph 29 above) did not constitute words of dismissal. There was no constructive dismissal because, even if what Mr Milligan said could be argued to breach the obligation of mutual trust and confidence, the claimant had not resigned in response.

44. Turning lastly to issue c – whether the claimant made protected disclosures on 12 November 2018, 1 December 2018 and 3&5 December 2018 – I found that the claimant had not done so. The information said by the claimant to amount to protected disclosures is set out in paragraph 2 above and I will deal with each of the alleged protected disclosures in order.

45. Firstly, on 12 November 2018 – the claimant disclosed that the requirement to work sleepovers was in breach of his contract of employment. The time limit of two months in section 1(2) ERA for the respondent to issue a statement of particulars of employment to the claimant in respect of his position of Support Practitioner had not been reached. There was however a relationship of employer/employee while the claimant worked in this position, and therefore a contract of employment.

46. I was not convinced that the evidence demonstrated that it was not a condition of this contract of employment that the claimant should do sleepovers. I found the evidence of Mr Sulkowski that all Support Practitioners were required to do sleepovers to be credible, given the nature of the services provided by the respondent.

47. I considered that the correct approach was to look at the wording of section 43B –

- Was there a disclosure of information?

- Did the claimant believe the disclosure was in the public interest?

- Was that belief reasonable?

- Did the disclosure tend to show one or more of the relevant matters (breach of legal obligation etc)?

48. I was satisfied that the claimant did make a disclosure of information on 12 November 2018 as narrated at paragraph 2 above. He was not merely expressing an opinion. I was also satisfied that the disclosure related to a relevant matter, namely compliance with a legal obligation.

49. I then considered whether the claimant believed that the disclosure was in the public interest and whether that belief was reasonable. I understood the claimant's argument to be along the lines that it was in the public interest that the respondent should not misrepresent the nature of the duties of the role of Support Practitioner when advertising the role and interviewing for appointment to the role. Following ***Chesterton*** I reminded myself that I had to decide whether (a) the claimant subjectively believed that his disclosure was in the public interest and (b) whether objectively that belief was reasonable.

50. I was satisfied that the claimant did believe that this disclosure was in the public interest in the sense that job advertisements should not be misleading and significant elements of the role should not be withheld or concealed. However, I did not consider that this belief, viewed objectively, was in the public interest. In ***Chesterton*** Lord Justice Underhill described these factors as a "*useful tool"* –

"*(a) the numbers in the group whose interests the disclosure served….*

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing exposed – a disclosure of wrongdoing directly affecting a very

important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer….the larger or more prominent the wrongdoer (in terms of the size of its relevant community, ie staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest…."

51. Applying that to the present case, I had no information from which to work out the number of people in the group whose interests were served by the disclosure nor indeed any argument from the claimant as to what that group actually was. Taking a broad approach, that might be all persons qualified to undertake the role of Support Practitioner with access to the respondent's advertisement. If the advertisement appeared on the internet, that could conceivably be a very large number. Taking a narrow approach, it might be all such persons in the geographic area (however defined) where the job was to be located with childcare responsibilities for a school age child, for whom the requirement to undertake sleepovers would be a significant issue, in which case the number would probably be small.

52. It seemed to me that a narrower approach made more sense – if the respondent's advertisement was misleading then the group potentially misled was arguably the people who applied for the position or perhaps the people who were suitably qualified and likely to be interested in applying. I did not have evidence as to the number of applicants for the position but, looking at the matter in the round, I considered that it was unlikely that this would be a sufficient number to amount to public interest.

53. Turning to the nature of the interests affected, I believed that the alleged omission to mention the requirement for sleepovers was at the trivial end of the important/trivial spectrum. While I recognise that it was important to the claimant it could not in my view be said to be a matter of public interest.

54. Turning next to the nature of alleged wrongdoing, I had no evidence upon which to decide whether it was deliberate or inadvertent. However, it seemed to me improbable that the respondent had deliberately withheld or concealed the requirement to undertake sleepovers in the Support Practitioner role either when advertising or interviewing, given that this was something that all Support Practitioners employed by the respondent were required to do.

55. Finally I considered the identity of the respondent as alleged wrongdoer. I understood the respondent to be a recipient of public funds in respect of the services it provides but considered that this did not automatically mean that there was public interest in any alleged wrongdoing by the respondent. With due respect to the respondent, I did not believe that it was sufficiently large or prominent that any wrongdoing would obviously engage the public interest.

56. Accordingly I found that the claimant's belief that his disclosure on 12 November 2018 was in the public interest was not reasonable and therefore he had not made a disclosure which fell within the section 43B ERA definition.

57. Secondly, on 1 December 2018 – the claimant disclosed that the 1 December instruction would give rise to a staff shortage and create a risk that residents would not be properly prescribed medication. I was again satisfied that this was a disclosure of information rather than an expression of opinion and that it related both to compliance with a legal obligation and to the health and safety of one or more individuals.

58. I considered that the group concerned was arguably only the individual residents due to receive medication at 4pm on 1 December 2018, but I recognised that a wider group could be contended for, including the residents' families and those who might be adversely affected by a failure to deal with the administering of the

residents' medication properly. The evidence did not allow me to form a view on the potential size of this group but it seemed to me that, on balance, it was unlikely to be of a sufficient size to constitute public interest.

59. The claimant also faced a difficulty in relation to the nature of the allegation. The alleged failure he was referring to was the need for a second signature when a controlled drug was administered, and this was not an absolute requirement (see paragraph 19 above). What I have said about the identity of the respondent as alleged wrongdoer also applies here.

60. Accordingly I decided that the alleged disclosure relating to the 1 December instruction did not meet the statutory definition of a protected disclosure because the claimant's belief that it was made in the public interest was not objectively reasonable.

61. Finally, on 3/5 December 2018 – the claimant disclosed that the 1 December instruction breached his contract of employment, that he was shouted at and threatened with disciplinary action and that the 1 December instruction created a prescription risk. The last point is essentially the same one as was made in respect of the 1 December instruction itself and so, for the same reasons, I did not consider that the claimant's belief that this was made in the public interest on 3/5 December 2018 was reasonable.

62. Turning to the rest of this disclosure, I was prepared (although not without considerable hesitation) to accept that this was a disclosure of information rather than an expression of opinion and related to compliance with a legal obligation. However, it related only to the claimant's own employment and I did not consider that anyone other than the claimant was affected. There was no group whose interests the disclosure served. It was not objectively reasonable for the claimant to believe that the disclosure was made in the public interest.

63. The consequence of my conclusions on issue a, issue b and issue c is that the claimant's claims of automatically unfair dismissal under section 103A ERA and detriment under section 47B ERA cannot succeed and fall to be dismissed.

Date of Judgment: 08 November 2019
Employment Judge: W A Meiklejohn
Entered Into the Register: 12 November 2019
And Copied to Parties