EMPLOYMENT TRIBUNALS

Claimant:	**Mr S Williams**	
Respondent:	**Green Willow Funerals Limited**	
Heard at:	**Cardiff**	**On: 25, 28, 29 and 30 October 2019**
Before:	**Employment Judge S Jenkins** **Members:** **Mr W Davies** **Ms J Southall**	

Representation:
Claimant: In person
Respondent: Mr R Kember (Counsel)

JUDGMENT having been sent to the parties on 31 October 2019, and reasons having been requested by the Respondent, in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background

1. The claims before the Tribunal were for "ordinary" unfair dismissal pursuant to Section 94 Employment Rights Act 1996 ("ERA"), unfair dismissal on the ground of having made a protected disclosure pursuant to Section 103A ERA, harassment on the ground of sex pursuant to Section 26 of the Equality Act 2010, and breach of contract in respect of notice.

2. We heard evidence on behalf of the Respondent from Dr Gary Morgan, Mr Roger James, Mr John Littlechild (all Directors), Mr Gary Foreman (Chief Executive), Mr Paul Dowding (General Manager) and Mr Jack Jones

(formerly Kevin Eastman) (former employee). On behalf of the Claimant we heard evidence from the Claimant himself, from Mrs Natalie Williams (the Claimant's wife), Mr Paul Williams (the Claimant's father), Mrs Alison Lovett (a former colleague) and Mr Andrew Hawkins (a friend of the Claimant). We were also provided with written statements from other of the Respondent's employees on the part of the Claimant which appeared to have been prepared for the internal proceedings which led to the Claimant's dismissal in 2017. In the event, those written statements had little relevance for us and we attached little weight to them.

3. We also listened to two audio recordings during the course of evidence, the dates of both of which were unknown. One was a brief extract from a longer conversation between the Claimant and his wife on the one hand and one of the Respondent's employees, Carl Sheahan, on the other; whilst the other was a recording of a voicemail left with the Claimant by an environmental health officer reporting on a visit to the Respondent's premises.

4. In relation to documents, we considered the documents to which our attention was drawn in a bundle spanning 415 pages, albeit there were also some additional lettered documents interposed, and documents at FB1 to FB119 which appeared to be documents recently supplied to the Respondent by the Claimant, although some of those documents duplicated those in the main bundle.

Issues and Law

5. The issues for us to consider had been set out by Employment Judge Sharp at paragraphs 14 to 19 of her Summary sent to the parties following a preliminary hearing held on 29 November 2018. It was however clarified that what was referred to there as a claim of harassment on the ground of sexual orientation had, in fact, been amended to a harassment claim on the ground of sex. We also noted that we would need to consider, if we decided in the Claimant's favour in the unfair dismissal claims, whether the Respondent's contention that subsequently acquired knowledge of other wrongdoing by the Claimant during the course of his employment would have justified his dismissal and would therefore lead to no award of compensation.

Findings

6. Our findings of fact, made on the balance of probabilities where there was any dispute, were as follows.

7. The Respondent is a funeral director, owned by a charity, and the Claimant commenced employment in 2007. Up until events in October 2019, which

formed the background to his dismissal, there had been no material issue with regard to the Claimant's conduct or performance. As we were dealing with a protected disclosure unfair dismissal claim as well as an ordinary unfair dismissal claim, we considered that it would be helpful if we set out our findings first of all in relation to the asserted protected disclosures before moving on to the more general findings.

8. These alleged protected disclosures were particularised at pages 54 to 56 of the bundle, and we heard and read evidence on them. There were, in fact, 14 separate alleged disclosures and we found that 13 of them, even if they occurred as alleged by the Claimant, did not constitute protected disclosures for the purposes of Section 43B(1)(b) of the ERA. Most of these related to concerns raised by the Claimant at various meetings and in various emails. However, the documentary evidence set out at Sections FB1 to FB119 of the bundle did not support the Claimant's contentions that he had made protected disclosures.

9. We were satisfied that the raising of concerns, taken at their highest in the Claimant's particulars, involved a discussion of operational matters which were appropriately addressed at the time and which could not be said to constitute a disclosure of information which showed or tended to show any form of breach of legal obligation. We comment on two particular areas of concern raised by the Claimant as they appeared to be his two main concerns.

10. The first of those was the practice of the Respondent of not taking funeral bookings unless third party disbursements, such as crematorium fees or obituary notice fees, were paid up front. The Claimant contended that such a practice breached the National Association of Funeral Directors ("NAFD") Code and indeed the Respondent's own policies. However, the Claimant accepted in his evidence that there was nothing specific in either document which prohibited such a practice and that he was relying on broader statements within the NAFD Code that funeral directors would not pressurise or exploit clients or should do nothing to bring the funeral profession into disrepute.

11. Whilst we accepted that the Claimant disagreed with the practice, we did not consider that the Claimant had made a disclosure that the Respondent had failed to comply with any legal obligation, as his communications at the time did not support that contention. In any event, we did not consider that the Claimant could reasonably have believed that there had been any breach of legal obligation due to the clear lack of any prohibition on the practice within the relevant documents.

12. The second specific area of concern revolved around the practice of stacking coffins on top of each other. The Respondent accepted that this

did happen on occasions, in extreme circumstances and for limited periods, due to lack of space, and also that it was not ideal. There was however, nothing specific on the point in the NAFD Code, and when the Claimant communicated it to regulatory bodies, one refused to comment without receiving specific detail, whilst the other, whilst stating that the stacking of coffins was not good practice, said that it would depend on the scenario and rationale.

13. There was therefore no evidence to suggest that the stacking of coffins involved any breach of legal obligation, and we were not satisfied that the Claimant could have reasonably believed that he had disclosed information that the stacking of coffins amounted to a breach of legal obligation.

14. The Claimant also raised as a protected disclosure the Respondent's Board's unwillingness to meet with him, following email requests made by him on 31 October 2017 and 7 November 2017, without the Claimant setting out details of what he wanted to discuss. Whilst we could understand the Claimant's rationale for not providing the details in writing, the fact was that no detail was provided by the Claimant about any issue of concern until he lodged various grievances on 27 November 2017.

15. A primary requirement of Section 43B(1)(b) of the ERA is that a claimant has to disclose information, and the lack of such information in this case, whatever the intention of the Claimant behind the non-disclosure, meant that that event or circumstance could not constitute a protected disclosure.

16. Ultimately, the only alleged protected disclosure set out by the Claimant that we considered could amount to a qualifying disclosure were his grievances submitted on 27 November 2017. We noted that the Respondent accepted that the references within these grievances to allegations of sexual harassment could be a protected disclosure under the ERA. However, we were not ultimately satisfied that the dismissal had been caused by that protected disclosure and we discuss that further below.

17. Turning to the other relevant events, our findings were as follows.

18. On 19 October 2017 an incident arose at the Respondent's funeral home at St Isan Road. The Claimant was not dismissed for that incident so our findings are not directly relevant to the issues we had to decide, but they are relevant as background.

19. In relation to the incident, it was not in dispute that one coffin was stacked on top of another at that location by two employees. Unbeknown to the Claimant those employees were acting on the instructions of the Mortuary Manager and the Respondent's Chief Executive. On seeing the stacked coffins, the Claimant directed that the employees should un-stack them and

place them separately on biers. That request was not complied with on the basis that the two employees felt that they were acting on instructions from more senior managers. This led to the Claimant shouting at the employees to comply, and that shouting was later considered by the Respondent, amongst other separate allegations, to be substantiated as misconduct, albeit that that only led to the imposition of a final written warning.

20. The events of that day however led to the commencement of an investigatory process with Mr John Littlechild, one of the Respondent's Directors, being earmarked to carry out that investigation. Complaints were received from the two employees involved in the incident on 19 October 2017, and, shortly after, complaints were also received from four other members of staff. Mr Littlechild met with some of them, albeit it did not appear that he met with all of them. He certainly met with one of the employees on 31 October 2017. The dates on which the other meetings took place were not clear, but we concluded that they happened either right at the end of October or at the beginning of November 2017.

21. Mr Littlechild met with the Claimant on 9 November 2017 to discuss the issues that had arisen. Up to that point the Claimant had remained in work, but he was suspended the following day, 10 November 2017. The Claimant was also sent a letter by the Respondent, inviting him to a disciplinary hearing to discuss the allegations of inappropriate behaviour towards other employees. The hearing was to take place on 17 November 2017.

22. The letter provided detail of the allegations concerned and statements of the individual employees were provided. However, after that letter was sent, further information was provided to the Respondent of an incident which took place on 9 November 2017. That incident did lead to the dismissal of the Claimant and our findings in respect of it therefore are of direct relevance.

23. A statement about the incident was provided to the Respondent by one of its employees, known at the time as Kevin Eastman, but known now as Jack Jones. He asserted that, on 9 November 2017, he had been asked by the Claimant to pick up a coffin from Glyntaf Crematorium from the Claimant's father, who is also in business as a funeral director, and to give the Claimant's father £750 cash in payment. Mr Eastman further confirmed that he was called by the Claimant, whilst travelling to the Crematorium, and was told only to give the Claimant's father £650 and to bring £100 back. Mr Eastman's evidence was that, after waiting for the Claimant's father for a period of time, he collected the coffin, handed the £650 over to the Claimant's father, and brought £100 back to the Claimant.

24. The Claimant refuted Mr Eastman's assertions. During the initial part of the investigation process he denied all knowledge of the issue, but later said

that the family of the deceased had arranged to buy the coffin themselves, which, whilst it appears to be rare, does seem to happen from time to time, and that Mr Eastman had made arrangements to pick up the coffin from an unknown person, not the Claimant's father, initially arranged to be in Merthyr but subsequently arranged to be at Glyntaf.

25. The Claimant denied any involvement with regard to the provision of cash by the deceased's family. The Claimant's father himself also denied any involvement with the issues. There was however evidence before us, in respect of calls made from the Claimant's mobile to his father and to Mr Eastman at the relevant times, those being just before and just after lunch on 9 November. There was also evidence of text messages having been sent between the Claimant and Mr Eastman, and one specific chain of texts culminating in a text from Mr Eastman enquiring as to where the Claimant's father was, with the Claimant responding that he was 5 minutes away.

26. The Claimant and his father explained the calls that were taking place between them on the day as relating to the need for the Claimant to visit an aunt who was ill in a nearby hospice at that time. We make no findings as to whether that was happening at the same time, but we noted that that explanation was not advanced by the Claimant at any time prior to the proceedings before us, and we considered that the evidence supported the conclusion that what happened on 9 November was as set out in the evidence advanced by the Respondent.

27. We were satisfied that Mr Eastman's evidence was coherent, and it was also consistent with his contemporaneous statement provided in November 2017. We also noted, as we refer to further below, that the Respondent obtained further evidence regarding the receipt of money, from another employee and from a conversation with one of the family members relating to the requirement by the Claimant to the family to bring in cash. Furthermore, we were satisfied that the times of the calls and texts, and the specific text exchange between the Claimant and Mr Eastman, all painted a picture of the events having occurred as contended by the Respondent.

28. The 9 November 2017 incident was considered by the Respondent to potentially amount to a further disciplinary offence, potentially a more serious disciplinary offence of diverting a business opportunity for personal gain. The Claimant was therefore invited, by letter dated 16 November 2017, to a further investigation meeting with Mr Littlechild on 20 November 2017 and the initially planned disciplinary hearing was postponed. In the event the investigatory meeting took place on 22 November 2017 with the Claimant being accompanied by his friend, Mr Hawkins. Following that meeting Mr Littlechild felt there was a case to answer.

29. A letter was then sent to the Claimant on 24 November 2017, arranging a disciplinary hearing on 30 November 2017 with Dr Gary Morgan, one of the Respondent's directors. The letter indicated that the hearing was to consider allegations of inappropriate behaviour, diverting business opportunities for personal gain, and also failures to comply with instructions and to return company property, the latter two points having arisen from actions by the Claimant during his suspension. In the event, one of those other assertions did not appear to have been substantiated and the other led to the imposition of a final written warning and we therefore did not consider them any further. The Claimant was reminded of his right to be accompanied by a union representative, work colleague or friend, and he was informed that a potential consequence of the disciplinary meeting was that he could be dismissed.

30. The disciplinary hearing took place on 30 November with the Claimant again being accompanied by Mr Hawkins. The various matters raised by way of disciplinary allegations were discussed and Dr Morgan felt that there was a need for further investigation surrounding the provision of cash for the coffin on 9 November 2017. The meeting was therefore adjourned for further investigations to take place, and as Dr Morgan was on holiday the reconvened hearing was arranged for 12 December 2017.

31. Prior to that, a meeting was undertaken with the employee who had received the cash from the customer, and she stated that she had received £750 from the deceased's daughter, had counted it out and had given a receipt to the daughter, had placed the cash in the envelope, signed her name on it and written the amount, and had placed it in a drawer in the office and informed the Claimant that it had been received. There was also evidence of a conversation which Mr Foreman, the Respondent's Chief Executive, had had with a member of the deceased's family, who had stated that the Claimant had asked his sister to take in £750 cash for the provision of a coffin.

32. As we have already stated, we considered that those matters supported our conclusion that the events of 9 November 2017 had taken place as the Respondent had asserted. The matter was then discussed further at the reconvened disciplinary hearing on 12 December 2017, at the conclusion of which Dr Morgan considered that the allegations had been made out, that in respect of the events on 9 November that an offence of gross misconduct had been committed, and that dismissal was the appropriate sanction in respect of that. We noted that a final written warning was issued to the Claimant in respect of two of the other allegations, but we also noted that there was no consideration by the Respondent of the combination of all the disciplinary allegations and that it had concluded that the allegation of diverting business opportunities on its own amounted to an incident of gross misconduct justifying the Claimant's summary dismissal.

33. There was a further allegation of misconduct on the part of the Claimant following the verbal information of the decision by Dr Morgan which we noted in the disciplinary outcome letter was stated by Dr Morgan to have justified his dismissal in any event. In light of our conclusions however, it was not necessary for us to make any findings on that point, although we did observe the reference made to those events within the disciplinary outcome letter, sent on 15 December 2017.

34. In that letter, the Claimant was given the right to appeal, and he did appeal, submitting a letter on 18 December 2017 and a further letter on 4 January 2018. Due to the incident which had arisen after the notification of dismissal on 12 December 2017, the Respondent decided that the appeal should be considered on the papers due to its concerns over the safety of its employees should the Claimant visit its premises. The Claimant, in his letter of 4 January 2018, agreed with that, although he did say that he felt that holding the appeal on papers without him being required to attend the Respondent's premises was for his own safety rather than the safety of others. In the event the documents in the case were considered by another of the Respondent's directors, Mr Roger, James who upheld Dr Morgan's decision.

35. With regard to our specific findings in relation to the allegations of sexual harassment, we noted that they had not been particularised until just prior to the hearing, with the further particulars being found at Sections FB2 to FB5 of the bundle. We noted that the Claimant's original claim form, and indeed his own witness statement, provided just a general assertion about allegations of sexual harassment by Mr Eastman. We also noted Mr Eastman's evidence before us, both in the form of his witness statement and his answers under cross examination, which formed a strong denial of the allegations that had been made against him. We noted that the documents at Sections FB2 to 5 of the bundle referred to several other witnesses having observed the events complained about, but only one of those other potential witnesses was in attendance, i.e. Mrs Lovett, and she only mentioned any issues of sexual harassment in a very general form. She provided no detail although she was stated as having observed four of the alleged incidents. No other witnesses were called who might have been able to give further evidence on the points.

36. We noted the content of the extract of the call with Mr Sheahan but noted that it was only a limited extract which did not include any part of the commencement of the discussion, and we therefore did not consider it sufficiently reliable for us to rely upon in support of the Claimant's complaints.

37. Ultimately, our conclusions in respect of the sexual harassment allegations were that the specific allegations set out at Sections FB2 to FB5 of the bundle had not been made out. We did find that there was a general atmosphere of banter and horseplay within the workplace, and we noted within the bundle an email from the Claimant himself sent to staff on 7 December 2016, headed "Banter", which noted that an issue had arisen at the time where the relevant incident had not crossed the line from banter. However, as we have stated, our overall findings in relation to sexual harassment were that the events as complained about by the Claimant had not been made out.

Conclusions

38. Turning to our conclusions, and applying our findings to the issues identified at the Case Management Hearing in November 2018, we were first of all satisfied that the Respondent had satisfied us that the reason for dismissal was the Claimant's conduct. Considering whether dismissal for that reason was fair and applying the Burchell test, we were satisfied that there had been a genuine belief on the part of the Respondent, in the form of Dr Morgan, and that that belief was not influenced by any ulterior motive and was certainly not driven by any protected disclosure which we touch on further below.

39. We considered that Dr Morgan's belief was based on reasonable grounds in the form of the evidence we have referred to in our findings. We also considered that those grounds were formed from sufficient investigation, as we noted the various meetings that had been undertaken by Mr Littlechild with various witnesses and with the Claimant himself, and the steps taken by Dr Morgan to implement further investigative steps following the adjournment of the first disciplinary hearing and prior to its reconvening on 12 December 2017.

40. In terms of procedure, we noted that the Claimant understood the allegations he had to meet in advance of the disciplinary hearings and that he was given an opportunity to meet them. We noted that Mr Hawkins had felt that the meetings were challenging, and we considered from reading the notes of the hearing that they were, but we also noted that the Claimant appeared to have been forthright in his responses during those particular meetings.

41. We noted that the Claimant had alleged that grievances he had brought on 27 November 2017 should have been dealt with first, before the disciplinary hearing was pursued. However, we did not consider that the content of those grievances materially impacted on the disciplinary allegations the Claimant had to meet, and therefore there had been no obligation on the Respondent to put the disciplinary process on hold at that point.

42. With regard to the appropriateness of the sanction of dismissal, we noted that we had to consider whether the Respondent's decision fell within the range of reasonable responses. We noted Dr Morgan's assessment in his dismissal letter and we also noted that the Claimant accepted, when put to him on a hypothetical basis, that diverting business opportunities could lead to a conclusion of gross misconduct. In our view, the established misconduct was serious, and we certainly did not consider that the sanction of dismissal fell outside the range of reasonable responses. Having concluded that the misconduct as alleged was established, that also led us to conclude that any claim by the Claimant in respect of notice, however formed, would have to fail, as it had been legitimate for the Respondent to have dismissed the Claimant without notice in light of the events of 9 November 2017.

43. Whilst not strictly necessary for us to go further in relation to the protected disclosures, bearing in mind our conclusions on the reason for dismissal, we did not consider, in any event, that the disclosure made by the Claimant on 27 November was the reason or principal reason for his dismissal. As we have noted above, that disclosure was the only one we felt was a qualifying disclosure and we noted that it had been made by the Claimant after having received the letter of 24 November 2017 inviting him to a disciplinary hearing. In our view, those grievances were raised either in retaliation for the allegations made against him, or to delay the proceedings, and the disciplinary process was well under way at that particular point. We did not therefore consider that the decision to dismiss the Claimant was in any way influenced by the protected disclosure.

44. Finally with regard to the sexual harassment claims, as we have noted, we did not consider that any of the allegations set out at Sections FB2 to FB5 of the bundle were made out in fact. We did, as we have recorded, note that there was an atmosphere of banter and horseplay within the workplace, but we did not consider that that in any way could be said by the Claimant to have been unwanted, or could in any sense have led to a conclusion of harassment for the purposes of Section 26 of the Equality Act 2010.

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Employment Judge S Jenkins
Dated: 30 December 2019

REASONS SENT TO THE PARTIES ON

31 December 2019

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS