EMPLOYMENT TRIBUNALS

Claimant: **Miss J Shrubsole**
Respondent: **Swalecliffe Pharmacy Ltd**

Heard at: **Ashford** **On:** **27- 28 January 2020,**
13 February 2020 (In chambers)

Before: **Employment Judge Corrigan**
Members: **Mr Sheath**
Mr Newlyn

Representation
Claimant: Mr M Arnold, Consultant
Respondent: Mr A MacPhail, Counsel

RESERVED JUDGMENT

1. The Claimant's complaint of unlawful deduction of wages is well founded and the Respondent is ordered to pay £180 to the Claimant.

2. The above award is uplifted by £1000 (4 weeks' pay) due to a failure to provide the Claimant with written particulars of employment.

3. The Tribunal has not found a contravention of the Equality Act 2010 (age related harassment).

REASONS

1. By her claim dated 1 May 2018 the Claimant brings complaints of age related harassment, unlawful deduction of wages in respect of the cost of a training course, and failure to provide written terms and conditions of employment.

2. The Claimant also brought complaints of constructive unfair dismissal, wrongful dismissal and unlawful deduction of wages in respect of holiday pay but these have been dealt with by way of a judgment by consent.

3. The issues for us to determine were set out in the Case Management Order dated 31 August 2017 and discussed with the parties. They are as follows:

Age-related harassment

4. Did the Respondent engage in unwanted conduct by saying to the Claimant: "you are acting like a stroppy child"?

5. Was the conduct related to the Claimant's age (which was 23 years old at the relevant time)?

6. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

7. If not, did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

8. If a contravention of the Equality Act 2010 is found, what compensation should be awarded to the Claimant for injury to her feelings?

Unlawful deduction of wages

9. Was the deduction authorised by a relevant provision of the contract or did the Claimant previously signify her consent in writing to the making of the deduction?

Written statement of employment particulars

10. When these proceedings were begun, was the Respondent in breach of its obligation to provide written statement of particulars of employment?

11. By how much should the award be uplifted?

Hearing

12. We heard evidence from the Claimant on her own behalf. We also heard evidence from Miss Charmaine Schofield, former colleague, on behalf of the Claimant. On behalf of the Respondent we heard evidence from Witness A (Dispenser), Mr Ashwin Sharda (Owner and Superintendent Pharmacist) and Mrs Meeta Sharda (Joint Owner).

13. There was an agreed bundle of 61 pages to which the parties added further documents by agreement during the hearing. There was some concern about admitting document A (Facebook/Messenger messages) as evidence in the proceedings as witness A was reticent to discuss it or have it before the Tribunal as she understandably wanted to avoid discussing information very personal to

her and irrelevant to the case. She was not a party to the proceedings herself. The Tribunal had sympathy for her predicament. Our view was the evidence was needed as it was not possible to understand the Claimant's case or witness A's response to it without looking at the document. The issue concerned was whether witness A was even present when the alleged harassment occurred. If she was not, as the Claimant and Miss Schofield asserted, then this would potentially raise a serious issue in respect of credibility for the Respondent. The compromise reached to avoid exposing her personal life and to enable her to give her evidence, was to make a restricted disclosure order in respect of the document and the personal content related to witness A and her family. The written order has been sent separately to the parties.

14. The parties made oral submissions on the above issues in respect of the claims.

15. Based on the evidence we heard and the documents before us we find the following facts:

Facts

16. The Claimant began her employment with the Respondent on 16 April 2015 as a dispensing assistant. By January 2018 she was 23 years of age.

17. The Respondent is a busy family run pharmacy, and as such is very regulated. It is a high-pressured environment. Pharmacy errors can cause death and it is essential they are accurate. It is also essential that prescriptions are provided on time as customers need their medication. There are daily deadlines to meet with wholesalers to ensure these are met. The Respondent has high standards to ensure the pharmacy has a trustworthy image and meets the regulator's standards in respect of how the pharmacy is run.

18. The Claimant says that she was by far the youngest member of staff. In fact, there are other young people working at the Respondent. Witness A was in her late 20s at the relevant time. Both of Mr and Mrs Sharda's daughters work in the pharmacy and are a similar age to the Claimant. Mrs Sharda also referred to "Saturday girls" who were aged 16 plus. There were also staff in their 40s and 50s. Mrs Sharda made repeated reference in evidence to the staff generically as "girls".

19. The Claimant engaged in self study training which she accepts she completed in April 2017 within 2 years of her departure. She accepts that there was verbal discussion at some stage about the training but she had not been given the training agreement in writing. The Respondent provided an example of a colleague's signed training agreement at page 55 which says that if the colleague left employment within 2 years of completing the course she would be liable to repay the full cost of the course. It does not itself authorise a deduction.

20. The Claimant says she has also never been given a written contract. The Respondent has not been able to produce a contract or training agreement for the Claimant.

21. The Respondent says it is a requirement of the General Pharmaceutical Council that the Claimant have terms and conditions and that, like all staff, the Claimant was given these. A copy of the standard agreement was provided and it does have a clause in respect of deductions from wages at page 53 of the bundle. The Respondent cites as an example another colleague who started three months after the Claimant and was given a contract. The Claimant's witness accepts she had one, and Witness A, the Respondent's witness was also given one.

22. The Respondent produced an example of an employee's file. This was not a conventional personnel file. The focus of the file is in respect of the pharmacy business and activities for example "near misses/incidents" which would be of concern to the General Pharmaceutical Council. However, it did contain a contract. The Respondent says that it is a requirement to have such a file for each staff member. The explanation for not being able now to produce a copy of the Claimant's contract is that it, and those of other former staff, were lost as a result of a significant re-fit which completed in December 2017 (when the Claimant was still employed) followed by a General Pharmaceutical Council inspection in January or February 2018. The Respondent could not say what date the contract was lost nor the precise date of the inspection. They suggest that at some stage when they were updating current staff files the Claimant's file was removed, along with those of other former employees, and the papers left in a pile together and then, as they cannot find them, they surmise that they have been shredded in error. Those responsible for shredding tend to be the two owners and their daughter but they have no recollection of doing so and offered no evidence from their daughter.

23. The Claimant challenged some issues in respect of her employment by letter dated 15 January 2018 and said she was considering a Tribunal claim so the Respondent knew within a week of her departure (and during what would have been her notice period) that matters relating to the Claimant's employment were not completely resolved. We also note that the Respondent had received and responded to the reference request by 15 January 2018, the date on the reference, which included details such as the date the Claimant began employment. We therefore find it surprising that the Respondent did not keep the Claimant's file intact, given the outstanding issues and the importance to the General Pharamceutical Council, when she had only just left her employment. In these circumstances, and in the absence of a copy of the contract being produced by the Respondent, we do not accept the Claimant was given written particulars of her employment. We therefore find she was not given written particulars of employment.

24. Both the Claimant and her witness Ms Schofield said that staff were regularly spoken to abruptly and rudely, or criticised or "told off" for minor matters in front of colleagues. Ms Schofield describes "walking on eggshells". Mrs Sharda accepts that she can be direct when something is amiss and will put pressure on staff to get jobs complete by the end of day, as otherwise herself and her husband have to stay late to complete them themselves. Ms Schofield was told

by Mrs Sharda to "grow up" on one occasion. She was approximately 36 at the relevant time.

25. By early January 2018 the Claimant had been offered an alternative job with better prospects but it was to be additional hours, requiring additional childcare and a lower hourly rate of pay. She had not made a final decision but was erring towards turning it down until the incident below occurred on 5 January 2018.

26. Both parties accept that on 5 January 2018 the Claimant was asked to perform a task she was doing more quickly. The shift was coming to an end and the work needed to be completed. The Claimant felt she was trying to do several things in the dispensary and had also been helping on the till. There is no dispute therefore that the work had not yet been done, but the Claimant believed there was a reason for this.

27. We accept what occurred is as set out in the Claimant's contemporaneous account in the Facebook pages/ messenger conversations we have been shown. The Claimant says Mrs Sharda shouted at her for taking too long, and the Claimant replied she had been helping on the till. She said Mrs Sharda shouted at her again, "telling [her] off" for answering her back. She says that she clarified that she was explaining what she had been doing and then Mrs Sharda called her a stroppy child in front of everyone including customers. This is consistent with her witness statement. It was also supported by Ms Schofield, who we found credible.

28. The Respondent accepts there was an incident in which the Claimant's speed was challenged and in which she was told to stop acting like a spoilt child. Mrs Sharda say the reason was that the Claimant was acting as such by banging drawers and doors and Mrs Sharda was anxious that the recent refit might be damaged. She says it was therefore a simile because of the way the Claimant was behaving. We don't accept this account of the Claimant's behaviour for the following reasons.

29. The Respondent called witness A to support Mrs Sharda's account. However, there was a dispute as to whether she was even there. Neither the Claimant nor Ms Schofield believe she was there. We accept from documents produced by the Respondent that she was working on the premises at some point that day. We also accept that the contemporaneous Facebook messages were written by her and suggest she had at least seen the Claimant at work that day as she asked her "you ok …, you seemed really stressed today".

30. However, we do not accept that witness A genuinely witnessed the incident, certainly not in the detail she now relays to support the Respondent. Her witness statement makes reference to Alison a colleague standing nearby but as the Respondent's documents suggest Alison was not present at the time of this incident. Indeed, the reason for witness A working was because Alison needed to leave at 12 noon. Moreover going back to the Facebook conversation, when the Claimant messaged witness A saying that Mrs Sharda

had shouted at her and called her a stroppy child witness A asked "why" in a manner that suggested she had not witnessed it. She also followed up with a question, "wow, did anyone comment about how she spoke to you?", again suggesting that she had not been there. Had she been there the Claimant would not have needed to describe the incident in the way that she did in those messages. The conversation is clearly between two people about an incident, one of whom did not witness the incident.

31. Some time was spent considering these Facebook pages produced by the Claimant showing the messenger conversations between herself and an unnamed person (which include the account of the 5 January incident above). The Claimant's name and photo can be seen. It was put to Witness A that she was the unnamed person. She accepts that she did have an account but has now deleted it. She otherwise did not accept that she had sent or received those messages. The pages are in two halves as printed and appear to be two different message chains. In the first chain the messages are in chronological order and contain a number of facts that are consistent with witness A's personal life and we accept they are conversations that occurred between her and the Claimant. She herself said that they had never had that level of contact but we cannot accept that evidence on the basis of the first half of the document. It is incredible that that detail would have been fabricated by the Claimant.

32. The second half of the document does appear to be a different thread of conversations and is not dated. We were shown an extract of part of it on a screenshot from a phone dated 5 January 2018, which is not in the first chain of messages at the relevant time in the conversation. However one personal detail of witness A continues into that second chain of messages. We do not know why it appears as a separate thread of messages but we accept on the basis of the continuity of witness A's personal details that the second set of messages are also a genuine conversation between the Claimant and witness A.

33. We also took account of the fact that it is clear from the messages that the unnamed person was a colleague who had at least seen the Claimant that day (5 January). There are also six other staff members mentioned by name in the messages who are therefore not the unnamed person writing the messages. Of all the people we were told were working in the dispensary that day the only two not mentioned in the conversation thread by name are the Claimant and witness A. We therefore find this supportive of the conclusion that this is a conversation between them. All of this undermines the credibility of witness A's evidence in respect of the incident on 5 January and as a result the Respondent's credibility in calling her as a witness to the incident on 5 January 2018.

34. The incident made the Claimant decide to accept the alternative job offer and to hand her notice in. She says she found the incident humiliating as she was referred to as a child in front of colleagues and customers and she believed it would not have been said if she had been older. She says she felt intimidated

at the tone and manner. We accept the incident upset the Claimant and caused her to resign and take the alternative job offer. The Facebook messages show that witness A had picked up on her seeming "really stressed". The Claimant in her replies used terminology like "it was an awful day", that she had "had enough of the place" and also referred to Ms Schofield as knowing how it had "annoyed" her. However, she also made references to standing up to Mrs Sharda in the incident. She did not refer to age or the strong terms she uses now (such as intimidation and humiliation) in the Facebook messages, even though those are very frank discussions.

35. The wording of the resignation letter made no mention of the incident. The Claimant thanked Mrs Sharda for the opportunities she had been given and said she had enjoyed working with the Respondent and appreciated their support. Even following legal advice when the Claimant wrote listing a number of complaints/outstanding sums and threatening Tribunal action (15 January 2018, page 44) she did not mention the incident. She listed her potential claims and they did not include any age-related harassment claim.

36. The Claimant presented in evidence as being appreciative of the potential impact on someone of her age of words such as "child" and "telling off", though we also note the latter is also a phrase she herself used in her Facebook messages. We also find the Claimant to have been over sensitive in taking offence at Mrs Sharda's frequent reference to the pharmacy not being a sweet shop and feeling it was directed at her age. Mrs Sharda explained this comparison is used because the Respondent does need to emphasize to staff that they are dealing with medication, not sweets, in ensuring that their strict procedures are complied with. We accept that explanation.

37. The Respondent deducted the cost of the Claimant's training from her final pay (£180).

Relevant law

38. Section 26 Equality Act 2010 defines age related harassment as unwanted conduct related to [age], which has the purpose or effect of violating the employee's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee. In deciding whether the conduct has the required effect the Tribunal must take into account the employee's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect.

39. We had regard to the comments of the EAT in *Weeks v Newham College of Further Education* EAT 0630/11 that "the word is "environment". An environment is a state of affairs. It may be created by an incident but the effects are of longer duration". We also had regard to the EAT in *Betsi Cadwaladr University Health Board v Hughes and ors* EAT 0179/13 which stated as follows: "The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes

overlooked. The same might be said of the words “intimidating” etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence”.

40. Section 13 Employment Rights Act 1996 provides that an employer must not make a deduction from a worker’s wages unless the deduction is authorised to be made by virtue of a relevant provision of the worker's contract, or the worker has previously signified in writing her agreement or consent to the making of the deduction.

41. Section 38 Employment Act 2002 states that where, in relevant proceedings, the Tribunal finds in favour of the employee and when the proceedings began the employer had not provided the employee with written particulars of employment the Tribunal must make an award of 2 weeks’ pay or 4 weeks’ pay if it considers it just and equitable to do so. The exception is if there are exceptional circumstances which would make such an award unjust or inequitable.

Conclusions

Did the Respondent engage in unwanted conduct by saying to the Claimant: “you are acting like a stroppy child”?

42. We accept the whole incident on 5 January 2018, from the Claimant being berated for not completing a task on time for which she thought she had good reason, being told she was “answering back” when she tried to explain and then being told she was acting like a “stroppy child” within earshot of others, was conduct that was unwanted and tipped the Claimant into deciding to leave her employment.

Was the conduct related to the Claimant’s age (which was 23 years old at the relevant time)?

43. Firstly, there was no reason for the comment as the Claimant was not banging drawers or doors which the Respondent had relied on as a non age-related justification.

44. Secondly, we accept there is a potential adult to child connotation to the phrase “answering back” as well as the term “stroppy child” in this context of the Claimant simply trying to explain herself and stand up for herself. On the other hand, we note the phrase “grow up” was also used to Ms Schofield who is not the age group identified by the Claimant.

45. Mrs Sharda referred to her youngest staff as “girls” but also used the term with staff more generally. In our view this term when used in relation to adult women in the workplace is pejorative on age and gender grounds. We consider this was unwitting and said in a passing way by Mrs Sharda in evidence but this, along with the general behaviour towards staff, suggested to us a hierarchical mindset towards the Respondent’s staff on the part of at least Mrs Sharda. In all the circumstances we infer this mindset had an age-related component.

46. In all the above circumstances we do find the Claimant's treatment on 5 January 2018 was related at least in part to her age.

Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

47. We do not find the conduct had the requisite purpose.

If not, did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

48. We find that the conduct on 5 January 2018 did upset the Claimant and did influence her decision to leave. She was annoyed, as she said in her private Facebook/messenger posts to witness A.

49. However we do not find that this sole incident relied upon by the Claimant created the necessary adverse environment or state of affairs of longer duration. Nor was it sufficiently serious an incident to amount to a violation of dignity. We had regard to the EAT in *Betsi Cadwaladr University Health Board v Hughes* and the strength of the word "violation" meaning more than offending against dignity or hurting it. We also note the similar remarks in respect of the seriousness intended by the words "intimidating" and "humiliating". The language the Claimant used in her resignation letter and Facebook messages do not suggest the level of effect required. The Claimant was upset and annoyed. The concepts of humiliation or intimidation were not in the contemporaneous and very frank comments with witness A on Facebook. They were also not in the initial pre-action letter of 15 January 2018. She also referred to herself standing up for herself to Mrs Sharda in the Facebook/Messenger messages.

50. It follows that we have not found a contravention of the Equality Act 2010

Unlawful deduction of wages

Was the deduction authorised by a relevant provision of the contract or did the Claimant previously signify her consent in writing to the making of the deduction?

51. The Respondent has not produced the training agreement signed by the Claimant. We find in these circumstances there was no authorisation for the deduction of £180.

Written statement of employment particulars

When these proceedings were begun, was the Respondent in breach of its obligation to provide a written statement of particulars of employment?

52. The Respondent has not been able to produce a copy of the contract that it was claimed was given to the Claimant and in the circumstances, we have found no particulars of employment were provided.

By how much should the award be uplifted?

53. We accept there is no evidence that the Claimant asked for written particulars. However, she was disadvantaged around the ending of her employment as the parties' respective rights in respect of the notice period were unclear. We have not had to determine this issue as the parties agreed judgment by consent but there was a dispute that was not helped by the Claimant not having a copy of her contract. The Respondent also made the unlawful deduction in reliance on the contract which she had not received. The Respondent did not produce the contract yet maintained she had one and have put her to all this difficulty to get the £180 which should not have been deducted. In these circumstances we find it just and equitable to uplift by 4 weeks' pay (£1000).

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Employment Judge Corrigan
10 July 2020

Note: