Case No: 2601726/20

EMPLOYMENT TRIBUNALS

Between:

Mr E Ekakitie **Claimant**	**and**	Sharief Healthcare Ltd **First Respondent** Sharief Healthcare Ltd (Hawtonville Pharmacy) **Second Respondent**

RECORD OF A CLOSED TELEPHONE PRELIMINARY HEARING

Heard at: Nottingham **On:** 20 August 2020

Before: Employment Judge P Britton (sitting alone)

Representation
For the Claimant: In person
For the Respondents: Mr R Maddox, Solicitor

JUDGMENT

1. The claim against the Second Respondent is dismissed upon withdrawal.

2. The claim of automatic unfair dismissal for whistleblowing pursuant to s103A of the Employment Rights Act 1996 (the ERA) is dismissed upon withdrawal.

3. The remaining claims of detrimental treatment by reason of whistleblowing pursuant to s 47B of the ERA and, as today clarified by the Claimant, harassment pursuant to s26 of the Equality Act 2010 (the EQA) continue subject to the orders as hereinafter set out.

Issues; analysis; and reasons for the withdrawal

1. The claim (ET1) was presented to the Tribunal by the Claimant on 25 May 2020. Set out was how he was employed by the First Respondent as a locum pharmacist between 1 August 2019 and 18 January 2020 when all his shifts were cancelled. Thereafter he has not worked for the

First Respondent. Fully particularised were instances wherein he had expressed his concerns of what in effect would be lax control of controlled drugs at various pharmacies operated by the Respondent. Prima facie these could as pleaded constitute protected disclosures under s43B of the ERA. In that sense, I do not accept the Respondent's contention that further particularisation is needed.

2. He also listed the detriment he suffered as a consequence. This would engage s47B. The final detriment was when on 18 January 2020 he was cancelled from all shifts with the First Respondent. And he has not worked since then for it. Thus, he claims that to be the date of his dismissal. Thus, he has also brought a claim for unfair dismissal. But he cannot bring a claim per se under s98 of the ERA as he does not have two years qualifying service. But he can bring such a claim under s103A based upon dismissal for whistleblowing as he does not need qualifying service.

3. But it has emerged today that from shortly after initially being supplied to work via an agency at the start of the engagement, he thereafter was supplied via a limited company he had set up. It invoiced for his services to the First Respondent who then paid the invoices to the limited company. It follows that he was an employee of that limited company. Thus, as he was not an employee of the First Respondent, he cannot pursue the s103A ERA claim against it. This he now accepts: hence the withdrawal of that claim.

4. That brings me back to s47B. Albeit the wide definition of worker pursuant to s43K means he can bring that claim, my judicial observation based upon the law and jurisprudence is that it is limited to a claim for detrimental treatment short of dismissal. Thus, he cannot make the very substantial claim for loss of earnings post at latest 18 January as per his schedule of loss. He does not agree. So far, he has not engaged access to legal advice as per his house insurance policy. This he will now do. However so as to not lose momentum I have decided upon reflection post this hearing to list an attended open PH to determine that issue should the Claimant not concede the point. This is because absent that element of his claim and for reasons which I shall in due course come to, this claim becomes suitable for judicial mediation which as a process I have explained to the parties.

5. The Claimant is also relying upon his pleaded disability relating to his spine and consequent limitations and which he described today. Albeit I am ordering that he supply a GP report and an impact statement, as to which I explained what it entails, prima facie he appears to be disabled. But, how it engages is limited in that as particularised in that sense the detriment he suffered was the removal of a chair he was using to sit on first at the Acklam pharmacy branch circa 23 August 2019 and thence on 7 January 2020 at the Queensway pharmacy

branch. He had worked other assignments for the First Respondent in between those dates at which this had not occurred. Thus, as particularised this links to the raising of the protected interest disclosures (PIDs) on those two occasions albeit he made several PIDs between 25 August 2019 and 7 January 2020 relating to sloppy controlled drug procedures at the various branches he was assigned. to. This was not a special chair and he had not asked for reasonable adjustments. But obviously, given his back condition, to remove the chair would be to his detriment. Thus, apart from these being acts of detriment he also claims they constitute harassment pursuant to s26 of the EQA.

6. But I observed that it is unlikely the tribunal will make a second very substantial award of £33k as claimed for injury to feelings under s26 given the overlap to s47B of the ERA. As to the latter, apart from the chair issue the principal detriment is removal from shifts for a short time in August 2019 and then again first circa 7 January and then on the 18th. In between there are no pleaded acts of detriment other than he learnt second hand that branch managers where he noted the lax controls resented his criticisms. If so, I observed that the award for injury to feelings is unlikely on a combined award basis to get above the middle of Vento band 2. I so observe because if I am right on my observations viz the extent of s37B, then this case becomes suitable for Judicial Mediation.

7. The Claimant had brought the claim also against the Second Respondent relating to his whistleblowing on 28 December 2019. But it is not a legal entity. It is a branch of the first Respondent: hence why the Claimant withdraws his claim against the second respondent.

8. Finally the First Respondent reserves it position as to whether some of the complaints such as that relating to August 2019 are out of time as not forming part of a continuing act, This however is a matter which as per the jurisprudence will be explored at the main hearing should the case not resolve itself prior thereto.

9. I now make the following Orders.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

Disability issue

1. As to disability first by **Friday 4 September 2020** the Claimant will provide succinct particulars confirming how his disability is engaged in the pleaded scenario: that is to say that it relates to the removal of the seat on the two occasions. Second confirming his claim is for harassment as per s26 of the EQA and as to why it engages having

regard to the definition which he is now aware of. This pleading he will send to the Respondent's solicitor and the Tribunal.

2. By **Friday 6 October 2020** the Claimant will sent the Respondent's solicitors and the Tribunal as follows:

   (a) An impact statement.

   (b) A report from his GP setting out a description of the spinal/ muscular skeletal condition; when it first manifested itself; a summary of treatment to date include medications; the physical limitations it imposes upon the Claimant; current prognosis; and finally whether his opinion is that the impairment constitutes a disability or not as per the definition at s6 and schedule 1 of the Equality Act 2020.

3. The Respondent will reply **three weeks** from the receipt of the medical information. It will first comment, if it needs to, on the harassment particularisation. Second, it will state whether or not it concedes he is disabled and if not, any directions it proposes.

4. At present given the prima focus is upon s47B of the ERA I would not see the need for any preliminary hearing on the disability or not issue.

Mainstream issue: extent of s47B and S49 ERA RA.

5. The Claimant having taken legal advise will by **Friday 23 October** inform the Respondent's solicitors and the Tribunal as to whether he concedes that as per s47B and s49 of the ERA his claim for compensation is limited to up to immediately prior to the dismissal and that thus he cannot claim for loss thereafter. It he contends to the contrary, he must set out why including by reference to the jurisprudence. The Respondent will reply **three weeks** from this deadline.

6. At this stage I hereby list to preserve a hearing slot an open attended preliminary hearing to determine the issue, should it still be engaged. Argument can be confined of course to the law. If necessary directions can be given near the time. This will take place at **Tribunal Hearing Centre, 50 Carrington Street, Nottingham, NG1 7FG**, on **Friday, 4 December 2020** at **10:00 am** or as soon thereafter on that day as the Tribunal can hear it. It has been given a time allocation of 3 hours. No further notice of hearing will follow.

7. Should the Claimant concede the limitations of the compensation claim, then that hearing can be converted to a closed preliminary hearing by telephone to discuss the possibility for judicial mediation and otherwise directions for the main hearing.

8. All directions currently made prior hereto are stayed for the time being.

Main Hearing

3. This is currently listed before a Tribunal panel at Lincoln on Monday 1 November 2021 and thence the Wednesday and Thursday of that week. That time is not enough give the Respondent intends at present to call 7 witnesses and that the Claimant's evidence would be extensive. Also, liability would need to be first determined by the tribunal and thence remedy if applicable. The current claim is for over £140k. Thus, I am with the consent of the parties moving it to the Nottingham Tribunal. This case is hereby listed for a full merits (final) hearing before a full Tribunal on **Monday, 19 July 2021 for 10 days, finishing on Friday, 30 July 2021**. The hearing shall take place at **Tribunal Hearing Centre, 50 Carrington Street, Nottingham, NG1 7FG,** at **10:00 am** each day unless otherwise notified.

NOTES

(i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management':
https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf

(iv) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where*

***it considers it in the interests of justice to do so.*" If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.**

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Employment Judge P Britton

Date: 20 August 2020

Sent to the parties on:
24 August 2020

For the Tribunal: