Case No.:1601531/2020
(Admin Code: V)

EMPLOYMENT TRIBUNALS

Claimant: Ms. S. Harries

Respondent: Barchester Healthcare Ltd

HELD BY: CVP **ON:** 20th April 2021

BEFORE: Employment Judge T. Vincent Ryan
Mrs. C. Mangles and Mr C. Stephenson

REPRESENTATION:
Claimant: Mr Harries (the claimant's father)
Respondent: Mr. Gorry, Solicitor

JUDGMENT having been sent to the parties on 22nd April 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The issues: the issues in this case were agreed by the parties as discussed with Employment Judge Jenkins on 3 December 2020 and set out in his minutes of a case management preliminary hearing that was sent to the parties on the following day. This list of issues was discussed at the outset of today's hearing and agreed save that the remedy issues did not arise and claimant withdrew the claim that the respondent breached his contract with regard to the payment of bonus; that claim was dismissed. The agreed issues we resolved were as follows:

   1.1. Did the claimant make one or more qualifying disclosures as defined in section 40 3B employment rights act 1996 (ERA)? The tribunal will decide:

      1.1.1. What did the claimant say or write? When? To whom? The claimant says she made disclosures on these occasions:

         1.1.1.1. 29th of March 2020 – social media post to a friend about health and safety breaches;

         1.1.1.2. 29 March 2020 – texts via Messenger, to the respondent's general manager about health and safety breaches;

1.1.2. did she disclose information?

1.1.3. Did she believe the disclosure of information was made in the public interest?

1.1.4. Was that that belief reasonable?

1.1.5. Did she believe it tended to show that the health or safety of any individual had been, was being or was likely to be endangered?

1.1.6. Was that belief reasonable?

1.2. if the claimant made a qualifying disclosure, was it a protected disclosure because it was made to the claimant's employer or was it made in fulfilment of the requirements set out at section 43G ERA?

1.3. Did the respondent do the following things:

1.3.1. Compel the claimant to sign a nondisclosure agreement;

1.3.2. Give the claimant an ultimatum that she could not work for the respondent and continue with her other NHS job.

1.4. By doing so, did it subject the claimant to detriment?

1.5. If so, was it done on the ground that she had made a protected disclosure?

2. The facts:

2.1. The respondent (R):

2.1.1. The respondent is a provider of residential healthcare. It owns and manages a number of care homes including Awel-y-Mor, a 56 bed home registered to deal with residents over the age of 18, a number of whom have complex needs and many of whom are considered to be vulnerable.

2.1.2. There are approximately 115 staff engaged in nursing, care, catering maintenance and physiotherapy. There are day shifts and night shifts with the latter engaging fewer staff than the former. Some staff work both day and night shifts while others work only days or only nights; some staff are permanent employees and others are agency workers, although the respondent's preference is not to use agency workers so that it can provide more consistent care. Some of the staff also work as agency nurses or healthcare workers for other providers including the NHS.

2.1.3. At the material time the respondent also engaged four nursing students on a work placement to gain experience whilst being paid; these students were enrolled on qualifying courses attached to NHS hospitals.

2.1.4. Awel-y-Mor's general manager is Ms L Hamilton-Shaw; she gave evidence at the hearing and we found her to be a clear and credible, consistent and plausible witness; we found her statement to be inaccurate and conscientious account of her actions and rationale.

2.2. The claimant: the claimant had two spells of employment with the respondent returning latterly as a night shift carer in November 2018. In December 2019 she reduced her hours of work from approximately 30 hours a week to approximately 10 hours per week. The claimant also worked some hours each week on an NHS bank contract.

2.3. Developing Covid 19 situation: the essential background to the claimant's claim is the pandemic and the events that unfolded in the early months of 2020. At this time there was a considerable amount of uncertainty but also publicly expressed views about the safety of vulnerable people especially in care home settings. Detailed, frequent but irregular, guidance updates were being issued by both central UK government and Public Health Wales. This was a situation that required speedy reaction to an evolving and critically serious escalation of the virus. The priority for the respondent was to minimise the risk of infection to both residents and staff. There was concern nationally about a lack of PPE and about implementation of safeguards generally in an ever worsening crisis situation.

2.4. Social Media: the claimant was a user of Facebook. She communicated with her "friends" via Facebook; her group pages were generally closed save for people who she permitted to follow her or whom she followed; she did not identify her places of work in her Facebook posts by name, although it is accepted that her actual friends and many acquaintances will have known where she worked. She also messaged others via Facebook's messaging service Messenger and WhatsApp where she was in groups with certain colleagues. The claimant shared the concerns of many people at a time of pandemic, and specifically with regard to working conditions and the availability of PPE in care settings. She posted pictures on Facebook of her working in an NHS ward in full PPE.

2.5. It was not until 9 April 2020 that the local authority instructed the respondent that facemasks must be worn "on a sessional basis" as opposed to only when dealing with a resident who was suspected as having confirmed to have the virus (which had been the case previously). The tribunal has no reason to doubt the respondent's evidence was whilst there were difficulties nationally in sourcing PPE, it always had sufficient PPE to satisfy the relevant guidelines at the applicable time. By the same token the tribunal has no reason to doubt the claimant's evidence that she and some of her colleagues were concerned at the availability and use of PPE at Awel-y-Mor; her genuine perception was that the staff was not being provided with the PPE they required when they required it; to her mind the respondent was not protecting its staff to the standard that she experienced in an NHS setting in her other job. The circumstances of a care home and those of a critical care hospital are different as are some of the policies, guidelines and rules.

2.6. 29th March 2020:

2.6.1. At 14:52 on 29th of March 2020 the claimant posted on Facebook to her closed group the message that appears at page 83 of the hearing bundle. In this message she expressed her regret that one of her colleagues was leaving her job with the respondent "due to the lack of support and workload". She went on to comment about wages, "no support, lack of PPE… No new meetings to discuss what's going on and what can be improved and how we are coping on nights". One of her friends commented. Those posts were referred to in a WhatsApp group for night staff when the claimant was asked whether Miss Hamilton-Shaw had answered the Facebook posting (although we note she was not a member of the group or a "friend") and the claimant remarked that she had not but she knew that Ms Hamilton-Shaw had seen it; the claimant confirmed her intention to delete the comment on Facebook then. In the accompanying WhatsApp conversation there are comments about how hard the night staff worked and without a pay-rise, but that was not a comment made by the claimant at that time, and a subsequent message criticising a named colleague (M) who was said to do "nothing to help much. She sits there and read her book while we answer the buzzes and saferounds checks. There is no teamwork from her". The claimant then commented that she had added those comments to her message to Ms Hamilton-Shaw. The tribunal finds that these conversations via Facebook and WhatsApp were private conversations, complaining generally in context and substance, which was not intended to be seen by anyone outside the claimant's closed group and therefore not by the respondent. The claimant did not disclose information other than that a colleague was leaving her employment and that was to other colleagues.

2.6.2. Following on from the above the claimant had a conversation with Ms Hamilton-Shaw via Messenger (referred to in the list of issues as texts but either way they amount to the same undisputed conversation which we refer to as being via Messenger). These messages are at pages 84 to 86 of the hearing bundle. It was Ms Hamilton-Shaw who started the conversation having been informed by a third party about the Facebook postings mentioned above. The claimant commented on staffing levels and the work which was said to be demanding; she said that the home was understaffed with four people working at night and criticised M's performance; she raised issues over the wearing of personal PPE when it was not otherwise available. The respondent concedes that this conversation via Messenger includes protected disclosures of information regarding endangerment of health and safety.

2.7. 1st April 2020:

2.7.1. In the Messenger conversation there was discussion about the need for a meeting between the claimant and Ms Hamilton-Shaw. In the light of the social media conversations and particularly via Facebook, Ms Hamilton-Shaw held an informal supervision session with the claimant to reinforce the need for caution on social media when discussing matters

that may be of concern to staff, residents and the families of residents. The respondent did not want to cause concern publicly to any of those people about the measures being taken by the respondent to address health and safety during the pandemic. Ms Hamilton-Shaw considered that the claimant had breached the respondent's known contractual social media policy but did not wish to discipline the claimant for that breach.

2.7.2. The claimant's Main Terms of Employment commences at page 43 of the hearing bundle; the applicable policy requires employees when using social networking websites to refrain from making comments breaching confidentiality or affecting the respondent's reputation or that would be detrimental to its interests; it is stated that breaches of that policy may be regarded as gross misconduct leading to disciplinary proceedings which could lead in turn to summary dismissal. With this knowledge Ms Hamilton-Shaw still considered that it would be preferable to deal with the matter informally by way of supervision, particularly in the difficult situation in which everyone found themselves. The claimant was not disciplined. She was reminded of her contractual duty.

2.7.3. In accordance with the respondent's usual practice with which the claimant did not object, she was asked to sign a record of the supervisory discussion. The claimant did so voluntarily. That record is at page 93 of the hearing bundle and is described as a record of supervision sessions. It records the name of the employee and of the supervisor along with the date of the session on the topic of supervision, which in this case is "use of social media"; the issue raised was the improper use of social media and inappropriate comments, and the agreed course of action was for no further inappropriate comments to be made on social media with the claimant speaking directly to Ms Hamilton-Shaw or the deputy manager if she had any issues that she wished to raise; she was to discuss issues and concerns directly with management. The claimant added her signature to that form to confirm its accuracy. There was no provision preventing the claimant from making any disclosures of any information to anyone other than making "inappropriate comments" on social media. This is not a nondisclosure agreement as it was mistakenly described by the claimant and her representative.

2.8. 2nd April 2020: on or around 2 April 2020 the four student nurses who were working for the respondent (see 2.1.3 above) explained to Ms Hamilton-Shaw that they had been told they were no longer to work in separate care settings as a safety measure in the light of the pandemic. One of them showed a screenshot of the guidance on her telephone to Ms Hamilton-Shaw. Prior to this there had been general discussion about the wisdom of carers confining their activities to one care setting but there was no formal or official guidance or regulation. The nurses had the option of working for the respondent and abandoning or postponing their studies, or returning to a hospital setting where they were required to perform ward duties and they could continue with their hospital-based studies; they decided to complete their shifts with the respondent until the end of April 2020 before returning to the NHS

hospital setting; during this period and thereafter they no longer worked in two care settings.

2.9. The situation regarding the student nurses led the respondent to make further enquiries of Public Health Wales and the local authority. The local authority's Environmental Health Officer effectively reiterated the advice that had been given to the student nurses. This advice affected a number of employees with the respondent. In addition to the claimant there was a nurse and there were two carers who carried out agency shifts elsewhere and therefore worked in two care settings. The nurse approached Miss Hamilton-Shaw to say that she would no longer accept agency placements and would prefer to work at Awel-y-Mor. Another of the carers was asked not to accept further agency shifts if she wanted to continue working for the respondent (which is what she did).

2.10. 9th April 2020: in the above context Ms Hamilton-Shaw spoke to the claimant on this date. She explained the situation and advice received as above. She gave the claimant the option of working for the respondent or to continue working bank shifts for the NHS but explained that the claimant could not do both in the light of the risk it posed as advised. The claimant did not wish to place any of her colleagues or the residents at risk and as she would be committing her time to working in hospital Covid wards she said she would resign her employment with the respondent. She also commented upon her opinion that the NHS provided better PPE and that the NHS pay was better than the respondent's; these were factors in the claimant's decision to opt for the NHS and to resign her employment with the respondent. Ms Hamilton-Shaw accepted the claimant's explanation and resignation which was tendered with immediate effect. The claimant was given a choice of working for the respondent or working for the NHS at that time and in the circumstances described (as advised by the authorities), and not an ultimatum requiring her resignation. The reason that the claimant was given the choice was a reason related to guidance and advice received by the respondent about the risk of cross-infection carried by staff working in two care settings. The claimant could have carried on working at Awel-y-Mor if she so wished.

2.11. 10th April 2020: the claimant's letter of resignation of this date is at page 96 of the hearing bundle, citing staff and patient safety as the reasons for resignation in the light of the advice received.

2.12. 14th April 2020: advice and guidance to care homes continued to evolve and a recommendation was given by the authorities to avoid the risk of staff moving between two care settings. The respondent adopted the procedure of requiring staff to confirm in writing that they were not working in any other such setting. The advice received from Public Health Wales and the local authority, and this procedure, resulted in the loss of several staff to the respondent.

2.13. When she confirmed to her friends on Facebook why she had resigned the claimant explained that the rate of pay was better in the NHS and more

hours of work were available for her; furthermore she felt that the PPE was better.

2.14. 22nd May 2020: the claimant presented a grievance post termination of employment.

3. The Law:

3.1. S.43A ERA defines protected disclosures, in the context of public interest disclosures generally referred to as "whistle blowing". S. 43B ERA lists the types of disclosures that qualify for protection at 43B (1) (a) – (f) ERA including disclosures that a person failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, and that the health and safety of any individual has been, is being or is likely to be endangered. Any such disclosure must be made appropriately as required by sections 43C – s. 43H ERA.

3.2. A worker has the right not to be subjected to any detriment by the employer done on the ground that the worker has made a protected disclosure (S. 47B ERA). The tribunal has to consider whether the alleged detrimental conduct of the respondent was materially influenced by any disclosure made in the public interest by the claimant.

3.3. It is good practice to decide why an employer acted as it did before becoming involved in lengthy esoteric debate about whether there has been a protected disclosure, so as to ensure the relevance of any such finding; if the tribunal were to find that the employer's actions were not influenced by any potential disclosure but have a clear and obvious innocent explanation for action or inaction then there is no need to over-deliberate to establish whether in fact the comment or observation made by the employee amounted to a qualifying or protected disclosure. The tribunal should establish the employer's motivation and rationale for action or deliberate inaction.

4. Application of law to facts:

4.1. The claimant's Facebook postings did not disclose information to the respondent but was in effect a complaining conversation amongst colleagues about working conditions including pay. The claimant's colleagues in her closed group were not "responsible persons" where disclosures could not be made directly to the employer; they were not legal advisers or other persons prescribed as being authorised recipients of public interest disclosures. At that time the claimant had no good reason to anticipate being subjected to any detriment or that the disclosures would lead to destruction or concealment of evidence. The claimant had not previously made such disclosures and they did not amount to disclosures of an exceptionally serious failure.

4.2. The respondent has conceded that the Messenger correspondence between the claimant and Ms Hamilton-Shaw amounted to the making of protected disclosures of information tending to show endangerment to health and safety. It's concession was appropriate. In the circumstances and because of

the findings of fact regarding the reason for the respondent's actions, and description of actions, the tribunal does not need to further analyse those disclosures. They were protected.

4.3. The tribunal therefore concluded with regard to the first issue that the claimant made protected disclosures to the respondent on 29 March 2020.

4.4. Contrary to the claimant's allegations, we find that she was not compelled to sign a nondisclosure agreement and she was not given an ultimatum. The claimant was asked to sign a standard supervisory note in accordance with established practice and she was given a choice about continuing her employment.

4.5. The supervision was informal and a light touch in circumstances where the respondent was entitled to invoke disciplinary proceedings which may have led to a finding of gross misconduct and summary dismissal. The fact that the respondent opted instead to adopt an informal coaching approach was not a detriment. In any event the supervision was because of inappropriate comments on Facebook and not materially influenced by the protected disclosures made in the subsequent Messenger conversation with the general manager.

4.6. The choice given to the claimant's to continue with her bank placements at an NHS hospital or to remain working for the respondent was not materially influenced by the Messenger conversation and protected disclosures. The reason for the choice was the same reason given to all of her colleagues who worked in more than one care setting at that time, namely public health and the reduction of risk of cross infection in accordance with official guidance and best practice. The claimant opted to resign; she did not have to do so but she could not work on two sites.

4.7. The claimant was not subjected to detriment. We discussed whether having to choose to work for one employer when previously the claimant had enjoyed working for two employers amounted to a detriment. We considered that, in the context of the pandemic, working in two care settings put the claimant at greater risk of being infected by the virus and heightened the risk of her unintentionally cross infecting other people, perhaps fatally in both instances. Minimising or reducing that risk is clearly beneficial and not detrimental. Perhaps that is an argument that could be analysed further however the fact remains that the choice given to the claimant was not an ultimatum, nor was it materially influenced by any protected disclosure that she had made. The choice was in line with regulatory guidance and best practice in an extreme emergency.

Employment Judge T.V Ryan

Date: 05.05.21

REASONS SENT TO THE PARTIES ON 7 May 2021

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FOR THE TRIBUNAL OFFICE Mr N Roche