



EMPLOYMENT TRIBUNALS

Claimant: Mrs Lee Smith
Respondent: Samri Pharma Ltd
Heard at: East London Hearing Centre (by Cloud Video Platform)
On: 19 & 20 October 2021 & 25 October 2021 (Reserved)
Before: Employment Judge Hindmarch

Representation

Claimant: Mrs Shaw (friend)
Respondent: Mr Samri (Director)

RESERVED JUDGMENT

1. The complaint of unfair dismissal is well founded and is upheld.
2. The complaint of wrongful dismissal is well founded and is upheld.

REASONS

1. This claim came before me for a 2 day hearing on 19 and 20 October 2021 by CVP.
2. The Claimant was represented by a friend, Mrs Shaw, and the Respondent was represented by Mr Samri, a Director of the Respondent and a Superintendent Pharmacist. At the outset of proceedings I had a witness statement from Mr Samri and a witness statement from Harriet Boxall, an employee of the Respondent. I also had a number of documents from the Respondent. It transpired that the Claimant's representatives had sent a 371 page bundle and the Claimant's witness statement plus 4 other statements on behalf of the Claimant to the Tribunal office. There was an adjournment for these to be sent to me by email. Unfortunately, the bundle was not paginated which caused some

delay in the proceedings whilst documents were 'turned up' by witnesses. Where I quote from the party and party correspondence I do so verbatim.

3. I heard firstly from Mr Samri and then from the Claimant. The Claimant indicated that her 3 witnesses would not be attending to give evidence and I explained I would give their written statements less weight than I would a witness who attended and presented themselves to be questioned. The Claimant's 4th witness was her representative Mrs Shaw who had not been a witness to any of the relevant events but rather had exchanged a witness statement that was in the form of a commentary on events. It was agreed that she would not give evidence but rather that her statement could effectively go towards her submissions on behalf of the Claimant.
4. After the Claimant had given evidence, Mr Samri asked that his witness Ms Boxall give evidence. This was out of the usual running order but I allowed this. I then heard submissions and we finished at 4pm on 20 October 2021 which meant I had to reserve my decision. I explained to the parties that, where necessary to refer to witnesses who had not been present, I would refer to them by initials only in my decision. The Claimant's witnesses were JL, JA and VB, former colleagues at the Respondent's pharmacy.
5. By an ET1 filed on 5 May 2021, following a period of ACAS early conciliation from 6 April 2021 – 21 April 2021, the Claimant brought complaints of unfair dismissal and for notice pay. By an ET3 filed on 25 June 2021, at that time the Respondent being represented by solicitors who filed the ET3 on its behalf, the Respondent indicated its intention to defend the claims. The Respondent admitted dismissing the Claimant, it said for conduct issues, namely failing to obtain qualifications, persistent time keeping issues and failure to check expiry dates on medicines.
6. At the outset of the hearing I identified the issues I would need to decide as follows:
 - a. Given the Respondent admitted dismissing the Claimant, had the Respondent showed a fair reason for dismissal which fell within the Employment Rights Act 1996.
 - b. If so, was the dismissal procedurally fair?
 - c. If the Claimant was successful, the Respondent raised issues of Polkey and contributory fault.
 - d. If the Respondent was not entitled to summarily dismiss the Claimant, how much notice pay should she have received? It was common ground that the Claimant had worked and been paid for one weeks' notice.

7. It is common ground that the Claimant commenced employment with the Respondent in the role of Counter Assistant on 3 May 2016 and that her employment continued until dismissal with effect on 7 March 2021.
8. The Claimant furnished the Respondent, a community pharmacy with 13 members of staff including Mr Samri, with her CV at job application stage. This appears at document 7 of the bundle. The CV demonstrates the Claimant had 'attended two courses in pharmacy' and had previously worked at another pharmacy from April 2015 to the time she accepted the role with the Respondent.
9. The Claimant was paid at the minimum wage rate and initially contracted to work 20 hours a week. The Respondent issued her with an 'Employment Statement' (a contract of employment) which she signed and which was dated 15 March 2016, document 8 in the bundle. Whilst that contract appeared to be a fixed term contract until 3 April 2017 (clause 1.3) the Claimant's employment continued through to late 2020 without another contract being issued to her.
10. During 2016, whilst employed by the Respondent, and at its request, the Claimant supplied evidence to Mr Samri of the 'courses in pharmacy' referred to in her CV. These are also at document 7 and evidence attendance at four 30 minute workshops, attended whilst working for her previous employer.
11. Mr Samri gave evidence that pharmacy 'counter assistants' are required by law to hold a minimum qualification and, if they do not, the superintendent must ensure that they complete a course. The bundle did not contain any evidence supporting this other than a document from the General Pharmaceutical Council dated October 2020 i.e. some 3½ years after the Claimant's employment commenced. This document, number 21 of the bundle, was dated October 2020 and entitled 'Requirements for the education and training of pharmacy support staff'. It provides in the introduction section 'Pharmacy support staff often assist pharmacy professionals with dispensing and supplying medicines and devices as well as providing information and advice about medicines and pharmacy services. Making sure the supply of medicines to patients is safe and effective is a vital pharmacy service; if these roles are not performed well, they can risk the safety of pharmacy users and the ability of the whole pharmacy team to meet the standards we set. This is why it is important that all pharmacy support staff have the appropriate education and training for their particular role'. The document provides that "support staff must be enrolled on a training course as soon as practically possible and within three months of starting their role. The document continues "we require that the staff involved in:
 - All stages of the dispensing or supply of medicines and medical devices to individuals
 - Advising individuals about the use of medicines and medical devices
 - Assisting pharmacy professionals to provide pharmacy services.

must meet our education and training requirements”. It requires a minimum RQF Level 2 (in England) or an apprenticeship to meet this minimum. “Support staff must complete the course promptly, usually within three years, at a pace which is compatible with safe practice. If it takes longer, providers should consider the reasons for the delay and whether or not an extension is appropriate. They should record their decision and the reasons for it. This is particularly relevant where health or employment issues have contributed to the delay”.

12. As noted above, the Claimant’s CV did not reveal her as having any such qualification, and the certificates were not evidence of this. Whilst the guidance supplied in the bundle was dated 2020, and I was not taken to any document dated 2016, the parties were in agreement that in late 2016 Mr Samri told the Claimant that she would need to obtain a qualification.
13. The Respondent says that throughout the Claimant’s employment it had the need to invite her to disciplinary hearings and on some occasions issue disciplinary sanctions. In the bundle were various letters said to evidence these hearings. The first invitation to a disciplinary hearing is at document 9 and is dated 25 August 2016, only 3-4 months into the Claimant’s employment. The letter refers to issues of ‘1. Qualification. 2. Time keeping. 3. Expiry Date check’. The second is at document 13 and is dated 16 February 2017 and again refers to the same issues.
14. The third is at document 16 and is dated 21 March 2018 and refers to ‘1. Training progress extremely slow’ and ‘2. Time keeping’. The fourth is dated November 2020 and I shall return to that one later in these reasons. The Claimant denies ever seeing these letters and says she was never invited to any disciplinary hearing, nor was she disciplined at any time by the Respondent. She says the first time she heard of ever having been disciplined was on receipt of the ET3. She believes the letters were manufactured for the purposes of these proceedings. I find that these letters were never in fact received by the Claimant and that she was not the subject of any disciplinary process at these times in 2016 – 2018. The reason I conclude as I do is because of the findings I make based on the contemporaneous matters surrounding the Claimant’s dismissal, which I refer to in detail below.
15. Having determined that the Claimant was not invited to any disciplinary hearing in 2016, I do find that in late 2016 Mr Samri and the Claimant discussed her need to obtain a qualification. Mr Samri told the Claimant she would need to pay for the course herself. As it was close to Christmas, the Claimant asked if she could wait until 2017 to do so. Eventually Mr Samri agreed to pay for the course and deducted the payment from the Claimant’s wages. At document 12 of the bundle is an invoice from Buttercups Training Limited dated 9 February 2017 to the Respondent for a ‘Medicine Counter Assistant Course (paper based)’ for the Claimant at a total cost of £102.60.

16. It is common ground that the Claimant never in fact completed the course. In March 2017, due to a staff departure, the Claimant increased her hours with the Respondent to 32 hours a week and at the end of 2017 the Claimant was experiencing severe personal difficulties within her marriage, causing her to eventually leave her husband taking her daughter with her in April 2019. The Claimant completed a few modules of the online course and sought assistance from another Pharmacist JA on a number of Saturdays in 2018, but did not complete the course.
17. In early 2020, the Covid-19 pandemic began. The pharmacy remained open being an essential service. Other staff members left the Respondent's business due to fear, leaving a 'lean' team to run the pharmacy at what was an extremely busy time. The Claimant worked a split shift 9am until 1pm, then 4pm until 7pm, having to sit in her car during the 3 hour break, for a period of 18 months. This resulted in the Claimant working very hard and being very busy such that she had no time to complete the course. These issues would, I expect, have amounted to 'health or employment' issues contributing to a delay in completing the course as referred to in the aforementioned General Pharmaceutical Council guidance.
18. Included in the bundle is a further invitation to a disciplinary hearing dated 9 November 2020, document 23. It refers to allegations faced by the Claimant of "1. Counter Assistant qualification required to carry working at Rochford Pharmacy" and "2. You are still repeatedly arriving late at work". The letter invites the Claimant to a disciplinary hearing on 26 November and says at this there may be a decision made to dismiss. There is no outcome letter as at 26 November 2020. Again, the Claimant denied ever receiving the letter or attending any disciplinary hearing. Again I find her account to be truthful and compelling for reasons I later refer to.
19. I do find that in November the Claimant had a meeting with Mr Samri although not in any sense a formal disciplinary hearing. The pharmacy had recently relocated to new premises and I accept Mr Samri's evidence that he had concerns about the Claimant remaining unqualified. Ms Boxall gave evidence that she had started work at the pharmacy in the summer of 2020 and was already herself underway with her own support staff training. Mr Samri obviously had new staff who were able to undertake the training and he wanted the Claimant to do so. He was concerned that the new premises might be subject to an inspection which would expose the fact the Claimant had not completed the training within the 3 years referred to in the guidance.
20. At the meeting the parties agreed that the need to undertake the course was important. Mr Samri told me in evidence he was prepared (as at November 2020) to give the Claimant another year to complete the course.

21. On 2nd December 2020, document 24, the Claimant's colleague JA sent an email on her behalf to Buttercups Training Ltd to ascertain whether they would allow her to continue with the training course she had paid for back in 2017. There was no evidence before me of any response to this.
22. Mr Samri then issued the Claimant with a new contract of employment. He says he did so to reflect the premises move and the fact that she had not completed the course. The contract is at document 25. It is described as a 'fixed term employment contract' and at clause 3 it provides:
- “3.1 The Employee is employed by the Employer as Trainee Counter and Dispensing Assistant.
 - 3.2 The Employment commences on 1 November 2020
 - 3.3 Unless terminated earlier in accordance with clause 27.2, the Employment shall terminate without the need for prior notice on 01/04/2022.
 - 3.4 The Employment is not continuous with any previous employment”

So, as at this time, the Respondent was contemplating a fixed term of 18 months. Mr Samri in evidence agreed that, whilst this new contract did not recognise the Claimant's previous service, there was in fact no gap in her employment and that she had worked continuously since May 2016.

23. Clause 27.2 provides “The Employment may be terminated earlier than set out in clause 3.3 by...
- b. either party giving to the other 1 weeks' notice in writing after the Employee has completed the first month of the Employment”
24. Clause 20 provides “The Employer will require the Employee to complete the following training at the Employee's cost: a. Counter and Dispensing Assistant”.
25. Somewhat curiously clause 6.3 provides “The Employee warrants that they are Counter and Dispensing Assistant and shall continue at all times during the Employment to be so qualified. The Employee shall immediately notify the Employer if they cease to be Counter and Dispensing Assistant during the Employment”. I say that this clause is curious in that the Respondent knew the Claimant was unqualified, hence the job title change to 'trainee', and thus that she was unable to give this warranty.

26. There is a dispute between the parties as to when the Claimant was given this new contract. Mr Samri says he gave it to the Claimant on 26 November 2020. The Claimant says she received it sometime in-between Christmas and New Year 2020. The Claimant accepts she did not read it carefully and agrees that she signed it on 12 January 2021.
27. On Sunday 28 February 2021, a non-working day for the Claimant, she received an email from Mr Samri at 22:23 at night. The email stated "Dear Lee please find the attached document in regard to contract termination with SAMRI PHARMA LTD. After review and deep thought we have decided to terminate your contract, notice of termination started from first of March 2021 and you last day with SAMRI PHARMA LTD 07/03/2021... sorry for inconvenience we caused to you and good luck to you and it was pleasure working with you. Your termination letter is attached with this E-mail". The attached letter was headed "Re: Termination of Contract" and stated "Thanks for your help and support, and it was a pleasure working with you. I want to inform you your contract will be terminated seven days from the date of this letter, and the last date with us are: 07.03.21." The letter was signed by Mr Samri.
28. The Claimant was shocked but attended for work the following day, and indeed worked her notice period. The Claimant says that she asked Mr Samri why she was being dismissed and was told "sorry but I do not have to give you a reason", and "read the contract you signed, I do not have to give you a reason and I only have to give you one weeks' notice, which I have".
29. Mr Samri says that he had prepared another letter of dismissal setting out the reasons for dismissal which he gave to the Claimant by hand on 1 March 2021 and which appears at document 27. The Claimant says she was never given the letter and did not see it until disclosure in these proceedings. This letter is far more formal than the letter referred to above. It too is dated 28 February 2021 and is entitled "Notice of the outcome of your disciplinary hearing" and refers back to the 26 November 2020. It purports to be an outcome letter following the 26 November 2020 (albeit more than 3 months afterwards) and states that the Claimant is being dismissed for "1. No qualification (counter assistant qualification) 2. Expired Medical products on the pharmacy shelves". The letter gives the right of appeal by 14 March 2021.
30. The Claimant's employment ended on 7 March 2021. She was given one weeks' notice which she worked. It is notable that the 'lateness' referred to in document 23 (the alleged invitation to the disciplinary hearing) is not referred to and is replaced with an allegation of "expired medical products".
31. On 17 March 2021 the Claimant sent a letter by email to Mr Samri, document 28. In the letter she stated "This email is request that I be given a reason as to why you are terminating my employment and why I have only been given one weeks' notice". On the same day (document

- 29) Mr Samri replied to the Claimant stating “SAMRI PHARMA LTD only give fixed term contract, if you read the contract you have signed for, it will give you a full explanation. We haven’t dismissed you, but have terminated your contract, and we have the right to do so, we have followed exactly what is written in the contract, the contract can be terminated, any time as fare we give you notice or you give us notice as agreed in the contract”. Mr Samri said in evidence that he did not mention ‘dismissal’, or the reasons for it here, so that he did not cause offence to the Claimant and that she ‘did not understand’ either the contract or the dismissal procedure.
32. On 26 March 2021 the Claimant sent another letter by email to Mr Samri, document 28. She sought to raise a grievance regarding ‘unfair dismissal’ and stated “I worked continuously throughout the height of the pandemic last year, have had no disciplinaries or complaints in my work and have worked for you continuously since 3rd May 2016 and therefore despite my error (referring to her signing of the new contract of employment without reading it carefully) and trust in your good faith, strongly believe I have been unfairly dismissed”.
33. Mr Samri replied on the same day “Hi Lee sorry if I cause any problem to you, as I mentioned before we only give fixed term contract only, and this is not related to how many years you have contracted to work with us, what is in the contract this what we honour, I do not wright these contract... Lee I am sorry for cause hassle to you. I will back to you tomorrow”. The Claimant heard nothing further. One would have reasonably expected that had the Respondent been truthful about the disciplinary history and the reasons for dismissal now relied on, it would have set out the position in this email.
34. No evidence, other than the invitations to disciplinary hearings and outcomes, was given about the allegations as to lateness and/or expired medical products. Mr Samri in evidence said the most important issue that led to dismissal was the failure to complete the course. His position was that by February 2021 the Claimant had not applied to continue or restart a course and had shown no willingness to progress with it. The Claimant’s position was that, having had a conversation with Mr Samri in November 2020 about needing to do the course, and having secured the assistance of her colleague JA in December 2020 who had emailed Buttercups Training Ltd to see if the course could be resurrected, and having got Christmas out of the way, she would have started the course in the New Year 2021 but was waiting for the Respondent to assist with enrolment.
35. I heard submissions from Mrs Shaw for the Claimant. Her main point was that the Respondent had acted in a cynical or sly manner by asking the Claimant to sign a new contract with a one week notice period 6 weeks before then dismissing her and citing the ability to do so under that contract. The first time the Claimant knew her job was in jeopardy was when she was dismissed by email late in the evening of 28 February

2021. There were no prior warnings. I also heard submissions from Mr Samri which were read out from the Grounds of Resistance filed with the ET3.

The Law

36. s98 Employment Rights Act 1996 provides:

“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

- (a) the reason (or if more than one, the principal reason) for the dismissal, and
- (b) that it is...a reason falling within subsection (2).

(2) A reason falls within this subsection if it-

- (b) relates to the conduct of the employee

(4) [Where] the employer has fulfilled the requirement of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

Here we are concerned with a dismissal for conduct reasons.

37. British Home Stores Ltd v Burchell (1978) IRLR 379, EAT requires me to consider whether the employer genuinely believed the facts upon which his suspicions were based, was that belief reasonable and were the employer's investigations sufficiently thorough to reach a balanced view of that of a reasonable employer.

38. Notice entitlement is dealt with under s86 Employment Rights Act 1996.

“(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed by one month or more –

- (b) is not less than one weeks' notice for each year of continuous employment if (her) period of continuous employment is two years or more but less than twelve years...

(6) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other.”

Conclusions

39. I do not find that there was in fact any misconduct. There were no disciplinary rules issued to the Claimant. There was no evidence of lateness or expired medical products. It is true that she did not complete her course within the 3 years set out by the General Pharmaceutical Council. She commenced the course in March 2017 and did not complete it by March 2020. I accept her evidence that she had family difficulties and that the pharmacy then entered a busy time not least because of the Covid-19 pandemic. It was not until November 2020 that Mr Samri raised the necessity of completing the course once more. No doubt he was also very busy himself up to that time. On his oral evidence he was willing at that point to allow the Claimant a further year to complete the course. In fact, the new contract signed by the Claimant in January 2021 refers to a fixed term of 18 months from 1 November 2020 to 1 April 2022 and has as a condition the requirement to complete the course, such that Mr Samri may in fact have been anticipating it would take up to 18 months.
40. I have found there was no disciplinary hearing in late November 2020. Instead there was a discussion about the need to complete the course. I accept that by 28 February 2021 the Claimant had not enrolled on the course. Nevertheless I find the termination of her contract for failure to complete the course was premature. If one objectively examines the emails between the Claimant and Mr Samri conveying the dismissal and thereafter, it is clear that Mr Samri was (mistakenly) of the view that under the new contract he did not have to follow any procedure before dismissing the Claimant, nor did he had to give her any reason for dismissal. He thought he could simply give a week's notice, within the fixed term, under clause 27.2. This approach did not recognise his obligations and the Claimant's rights given that she already had 2 years continuous and unblemished service. Given the content of the exchanges at the time of dismissal, and soon thereafter, it is clear that Mr Samri was relying on the new contract terms believing he could simply terminate the employment without following any procedure and without giving reason for dismissal. I find the real reason for dismissal was Mr Samri's mistaken belief he was permitted to do this under the contract. That mistake is not a fair reason for dismissal and the dismissal is therefore unfair.
41. As to notice, the Claimant's statutory protection cannot be usurped by the new contract. She had over 4 years' continuous service at the time of dismissal and therefore she was entitled to 4 weeks' notice, of which she worked and was paid for one of those weeks.

42. The claim will now be listed before me for a remedy hearing.

**Employment Judge Hindmarch
Date: 29 October 2021**