EMPLOYMENT TRIBUNALS

Claimant: Mr E Ekakitie

Respondent: Meiklejohn Pharmacy Ltd

Heard at: Watford Employment Tribunal (in person and by video)

On: **4 to 6 July 2022**

Before: Employment Judge Quill; Ms G Bhatt; Mr L Hoey

Appearances
For the Claimant: In Person
For the respondent: Mr C McDevitt, counsel

Judgment having been given orally on 6 July 2022, and sent to parties on 21 July 2022, below are the written reasons, as requested, at the hearing.

REASONS

Procedural History

1. In this case the claimant commenced ACAS early conciliation on 9 August 2020 and that continued to 17 August 2020. The Claimant presented his claim on 17 September 2020. In other words, within a month of the end of early conciliation.

2. Since his claim relates to alleged acts and omissions on 13 May 2020 and later his claim is in time.

3. The respondent produced a response to the claim and according to box 8 of the response form at page 26 of the bundle, the Respondent was represented at the time.

4. As presented, the claim form mentioned unfair dismissal, detriment contrary to section 47B of the Employment Rights Act 1996 ("ERA"), and arrears of pay.

5. In defending the claims, the respondent stated at paragraph 6 of the grounds of resistance that an hourly rate of £22 per hour had been agreed and that was later reduced to £20 per hour.

6. Following preliminary hearings, various case management decisions were made, and these were not, therefore, issues for this panel to determine.

   6.1 Firstly, that the unfair dismissal claim and the arrears of pay claim could not continue.

   6.2 Secondly, that the claimant was not an employee or a worker within the meaning of section 230 ERA.

   6.3 Thirdly, he was nonetheless a worker within the definition in section 43K ERA.

7. Therefore, the claimant's complaints of detriment on the grounds of protected disclosure could continue but they were his only remaining claims.

8. The alleged protected disclosures were clarified and are listed at pages 104 and 105 of the bundle. The detriments were also clarified and they appear at paragraph 14 of the case management summary on page 46 of the bundle.

9. On the first day of the hearing. Both parties confirmed that they agreed that they were the only protected disclosures and the only detriments.

The Alleged Protected Disclosures

10. Disclosure 1.

    Disclosure I made to Mrs Indira of Meiklejohn Pharmacy on 13th May 2020 via text message at 6:38am.

    Therein I clearly informed her that her order to her staff members not to wear face mask on 12th May is putting the British public to health and safety risk of coronavirus infection. It was in fact true that the government provided her pharmacy with free mask for her staff but Mrs Indira had refused to use them to protect patients.

    I rely on ERA below for this whistleblowing claim

    Section 43B paragraph (d) that the health or safety of any individual has been, is being or is likely to be endangered.

11. Disclosure 2.

    Further disclosures on that same day 13th May 2020 to Mrs Indira via same series of text messages that the delivery drivers where coming into the dispensary area without wearing any facemask puts the staff members and patients being British public to health or safety hazard of coronavirus infection via droplet transmission.

    Again I rely on ERA below for this whistleblowing claim

    Section 43B paragraph (d) that the health or safety of any individual has been, is being or is likely to be endangered.

12. Disclosure 3.

    In the same series of text messages above I further disclosed that these staff members were also not using the hand gloves provided by the government in the pharmacy to prevent spread of coronavirus.

    I also rely on ERA below for this whistleblowing claim

    Section 43B paragraph (d) that the health or safety of any individual has been, is being or is likely to be endangered.

The Alleged Detriments

13. Detriment 1.

    Unjustified criticism of his work by Mrs Panchal;

14. Detriment 2.

    Unjustified failure / refusal to pay for his first two days work at the agreed rate;

15. Detriment 3.

    Inability to continue in his role.

The Hearing and the Evidence

16. We had a bundle of 274 pages.

17. We had written statements from:

    17.1 For the Claimant, himself.

    17.2 For the Respondent, Ms Panchal and Ms White.

18. Each of them swore to the accuracy of their written statements and answered questions from the other side and from the panel.

19. Day 1 was hybrid. The Claimant and EJ Quill were present in the physical hearing room and everyone else attended remotely. Days 2 and 3 were fully remote by video. There were some audio problems on Day 1. There were no significant technical problems on Days 2 or 3.

20. All of the evidence and submissions was heard on Day 2.

The Facts

21. The claimant is a qualified pharmacist. His CV appears at pages 118-120 of the bundle.

22. Amongst other things, he worked as a superintendent pharmacist between December 2010 and May 2012, and more recently he had been working as a locum pharmacist and that was how he came to the respondent's attention.

23. The respondent is a company which operates a small family-owned chain of pharmacy premises. Ms Indira Panchal is a director of the business and has been since 1998. She has been superintendent pharmacist since 1991.

24. There are four branches in total. In around May 2020, Ms Panchal wanted to engage a locum pharmacist to work at one of the branches at which she was not present on a day-to-day basis.

25. Ms Patricia White started as medicines counter assistant at that branch in around January 2020 and was part way through her probation at the times relevant to this dispute (namely May 2020).

26. Ms White's shift was 9am to 1pm. Her colleague, Ms Neal, did the afternoon shift and started at 2pm. There was, therefore, no time when both Ms White and Ms Neal were present in the shop at the same time.

27. On around 6 May 2020, a business called FTA Recruitment introduced the claimant to Mrs Panchal by forwarding his CV to her. On 6 May 2020, FTA told the claimant that Mrs Panchal would like to see him that week with a view to potentially his potentially starting as a locum on the Monday of the following week, which was 11 May 2020.

28. Ms Panchal and the Claimant met. It was agreed that the claimant would start the following Monday. His hours were to be from 9am to 5:30pm five days a week. The written correspondence says that the agreed rate was to be £20 per hour. According to the documents, the agreement with FTA was that the respondent would pay £24 per day to FTA, and that was the only payment that they make to FTA. In other words, the payments for the claimant were to be paid directly from the respondent to the claimant, and not via FTA.

29. The claimant's case, which is disputed by Mrs Panchal, is that they spoke before he started work and they orally agreed that the respondent would pay him £22 per hour, rather than £20.

30. There is nothing in writing about this. Having heard from both witnesses, on balance, we prefer the claimant's evidence on this point. The Claimant's assertion is consistent with what is said in the grounds of resistance, as quoted above. It is consistent with a text message sent at 6:42am on 13 May 2020 (page 264 of the bundle) in which Mrs Panchal said:

> I'll only be paying £20/hr since you've left all work for me to do and to cancel at such notice. Not professional

On balance of probabilities, we infer that the reason she used the work "only" in that text was because she had orally agreed to pay more than the £20 that had been negotiated via the agency.

31. For the avoidance of doubt, we have no reason to think that the respondent's willingness to pay £22 an hour was in any way dishonest or was intended to result in the agency receiving less than it was lawfully entitled to receive.

32. Since we have not accepted Mrs Panchal's evidence on this particular point, we have of course taken that into account when making any findings which depend to any extent on the respective credibility of the witnesses.

33. The claimant was sent the respondent's locum pharmacist guide on Sunday 10 May. He was asked to bring a copy of it with him when he started work. The guide appears at pages 138 to 150 of the bundle. The claimant accepts that he did read it, and that he did so either on the Sunday or the Monday. The guide includes sections on amongst other things, health and safety, clinical governance ordering products.

34. At this time (11 May 2020) the UK was approximately two months into the first wave of the Covid 19 pandemic. The NHS had produced a standard operating procedure for community pharmacies dated 22 March 2020 (page 189). This had the status of guidance. It is the guidance that was in force for the entirety of the claimant's work for the respondent. The replacement guidance was only produced on 18 May 2020 (page 207 of the bundle) which was after the Claimant had ceased working for the Respondent.

35. We are satisfied that the respondent complied with this guidance. Amongst other things, the guidance stated (page 196), that in general it was not recommended that pharmacy staff need to wear face masks to protect against the virus. At that time, the guidance was that masks would only be required in high-risk situations, such as supporting a person showing symptoms of Covid 19 (which would only be done in an emergency).

36. We also accept that in accordance with the guidance, the respondent's staff were instructed to seek to prevent anyone with Covid 19 symptoms from entering the pharmacy's branches (including the one which the Claimant worked at).

37. The guidance discusses (pages 198 and 199 of the bundle) personal protective equipment ("PPE"), including gloves as well as face masks. At that time, the guidance suggested that PPE was not required where there was more than 2m between the staff member and the patient.

38. Ms Panchal's evidence – which we accept - was that she discussed this guidance with her staff and she pointed out to them that masks were not compulsory. However, she did have a supply of masks for employees. Not only did she permit her staff to wear them, she encouraged and supported the use of masks by the Respondent's employees. Neither she nor the Respondent formally instructed the employees that they must wear the masks at all times or else would face disciplinary action. In other words, there was some element of discretion allowed to the staff, provided they followed the NHS Guidance. Ms Panchal's and the Respondent's policy on this was the same on each of 11 May, 12 May and 13 May. In other words, we reject the Claimant's assertion that there was a change in policy in relation to masks during the time he was working there.

39. In terms of gloves, it was Ms Panchal's opinion, taking into account the NHS guidance (amongst other things), that gloves were not required. It was her view that instead of wearing gloves staff should use their bare hands and should frequently wash those hands, and that this was safer than gloves.

40. With the assistance of the local authority, she ensured that posters of the type shown at page 253 were displayed in prominent positions on the premises instructing people to wash their hands and to do so for 20 seconds at a time.

41. On 11 May 2020, the claimant attended work. He did not wear a mask. Although, the claimant claims that he did so, our finding is that he did not. We believe the evidence of Ms White and Ms Panchal on this point. In the contemporaneous text messages at the time exchanged on 13 May 2020, the claimant did not dispute the assertion that he had not worn a mask on 11 May (two days earlier).

42. The Claimant's main contention is that he did wear a mask, to the extent that the claimant implies that the reason he did not wear a mask that day (or for part of that day) is that he did not have one available and he had to purchase one, then we do not accept that assertion. We accept the respondent's evidence that it did have a limited supply of masks supplied by the government, and it had made these available for staff, including the Claimant. Furthermore, we accept that the claimant was shown on day one, 11 May, where these items were located.

43. The claimant worked at the premises for two days, Monday 11 May and Tuesday, 12 May 2020. He did wear a mask in the afternoon of 12 May. This was observed by Ms Panchal. This was not observed by Ms White because she only worked mornings and he did not wear it in the morning of 12 May.

44. It is the respondent's case that there was no contact between delivery drivers and the staff at the pharmacy during this time. We accept Ms White's evidence that - as far as she saw - those deliveries which she, Ms White, was authorised to accept were delivered to a designated drop-off point within the shop and that the drivers did not insist on a signature for those, but rather signed the forms themselves to confirm the delivery.

45. However, we also accept the claimant's evidence that only the pharmacist could accept delivery of certain items. We accept that the delivery of at least some such items on 11 &/or 12 May involved the delivery driver coming into the dispensary area and taking a signature from the claimant. This did not happen while Ms White was present and so it must have happened in the afternoon on either 11 May or 12 May, or both. However, we accept the Claimant's evidence that it happened.

46. The claimant was the responsible pharmacist for the branch. It was his responsibility to ensure that deliveries were made safely. There was no obstacle to the claimant's wearing a mask if he wished to do so. There was no obstacle from the Respondent to the Claimant coming up with a different delivery protocol.

47. It is our finding that the other members of staff wore masks when they were in the pharmacy on 11 and 12 May. We say this based on Ms White's own direct witness evidence to that effect that that's what she personally did. We also base it on Ms

Panchal's evidence that whenever she went to the shop on those days Ms White or, as the case may be, Ms Neal were wearing masks.

48. Ms Neal was not a witness. It is possible that when Ms Panchal was not around, Ms Neal removed her mask. Our finding on the balance of probabilities is that that is not what happened. The evidence that Ms Neal did not wear a mask comes from the claimant. However, the claimant's evidence to us is that both members of staff - Ms White and Ms Neal - were not wearing masks. Furthermore, he claims that each of them told him, on 12 May 2020, that Ms Panchal had instructed them not to wear masks. Ms White contradicts that evidence, in so far as the matters are within her own knowledge.

49. We reject the claimant's testimony about:

    49.1 Ms White not wearing a mask;

    49.2 Ms White telling him that Ms Panchal had told her not to wear a mask

    49.3 Ms Panchal visiting the shop on 12 May and seeing that Ms White was not wearing a mask.

50. Given that we have rejected his testimony on these specific points, his testimony is insufficiently reliable for us to make a finding that Ms Neal did not wear a mask, given that she always had one on when Ms Panchal saw her on those two days.

51. Furthermore, the claimant himself accepted that the staff were wearing masks on his first day, 11 May. We find it inherently implausible that for some unexplained reasons, Ms Panchal would have told Ms Neal to not wear a mask on 12 May.

52. Although Ms Neal has not given evidence, we have no reason to think that she would have told a lie to the claimant given that the lie would have been easily discovered by the Claimant checking the facts with Ms Panchal.

53. We do not believe his account that Ms Neal failed to wear a mask, and we do not believe that she told him that Ms Panchal had instructed her not to wear a mask. It would have been a lie for Ms Neal to say that Ms Panchal had told her not to wear masks and we therefore find that she did not make that comment.

54. During the course of 11 and 12 May 2020 and there were some problems with the claimant's work which Ms Panchal discussed with him. These included the fact that on the first day (at least) he had forgotten to bring his smartcard, which was an item he was supposed to use when accessing the relevant computer systems to do his work as a pharmacist. Over the course of both days, Ms Panchal spoke to him because, in her opinion, he was slow to carry out his tasks. Ms Panchal had to do some of the work from the Claimant’s branch (that is, work which the Claimant was supposed to be doing) at her own branch.

55. Ms White’s opinion was that the claimant was going through a smaller number of prescriptions than other locums usually did. The claimant points out – and we accept - that Ms White is in no position to know whether there were good reasons for this. Required items might have been out of stock, for example.

56. However, even though the value of Ms White's corroboration is limited, we accept what Ms Panchal said in her oral evidence and in the final sentence of paragraph 16 of her witness statement. She raised issues with the claimant about his performance on 11 and 12 May 2022. As she says in paragraph 18 and as she said in her oral evidence, she did not say to him that he could not do the job as a pharmacist. She was hopeful that these were just teething problems. She told him that she would need improvement from him, but she sought to do so in a considerate manner and did not suggest she was on the point of terminating his engagement. She was not at the point of potentially terminating him. She was content for him to work on 13 May 2020 and was expecting him to do so.

57. After 12 May 2020, the claimant did not return to work. On 13 May 2020 there was an exchange of text messages between the claimant and Ms Panchal which include all three alleged protected disclosures and also include some of the alleged detriments.

58. This exchange is shown between pages 262 and 272 of the bundle. We accept the timings of those messages are accurate. The same morning, Ms Panchal contacted the CCG and asked for some information about gloves. She received a reply from the CCG (pages 273-274) and forwarded that to the claimant at 8:44am on 13 May 2020.

59. The text of the messages speaks for themselves, and we have taken what is written there into account when reaching our above-mentioned findings of fact. In the bundle, the messages are shown at pages 154-168 without timings, and again at 262-274 with timings. We have looked at both sets of pages, where necessary, to be sure that we have the sequencing right, and to make sure we can take account of the full message where the printed copy it is split over two pages in the bundle. We are satisfied that the timings on 262-274 are accurate.

60. We will discuss the specific words used in more detail as part of our analysis below.

61. After 13 May, there was no further correspondence between the parties, except for 20 May 2020, when the claimant sent an email attaching his invoice. The email appears at page 152 of the bundle and the invoice is at page 153. This invoice included the hourly rate of £22 per hour, which we have found was the agreed rate. However, the invoice was incorrect. The claimant claimed for the correct number of hours at the correct hourly rate, but the arithmetic was wrong. The grand total was around 40% (£200) too high. This was an accidental error by the Claimant.

62. The respondent made no response to this invoice. We accept this is Ms Panchal's evidence in so far as she says that part of the reason that she did not reply to the invoice was because the invoice was incorrect and she believed this meant that the Respondent had no obligation to pay it.

63. However, we do not accept that she was too busy to arrange for someone (herself or a colleague) to write to the claimant to point out the arithmetical errors and/or to specify the amount which the Respondent acknowledged it was obliged to pay.

64. Our finding is that Ms Panchal deliberately decided to ignore the invoice because it was incorrect and because she believed that the error in the invoice meant that the respondent was not obliged to pay it unless and until there was a correction.

65. The issue of whether the correct hourly rate was £22 or £20 was never discussed between the parties in correspondence after the end of the assignment

The law

66. In relation to protected disclosures the qualifying disclosure is defined by s.43B of the Employment Rights Act.

> (1) In this part a qualifying disclosure means any disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following:
>
> (d) That the health or safety of any individual has been, is being or is likely to be endangered; or …

67. In order for a communication to be a qualifying disclosure

67.1 Firstly, there must be a disclosure of information.

67.2 Secondly, the worker must believe that the disclosure is made in the public interest.

67.3 Thirdly, if the worker does hold such a belief, it must be reasonably held.

67.4 Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f) of section 43B(1).

67.5 Fifthly, if the worker does hold such a belief, it must be reasonably held.

Unless all five of these conditions are satisfied there will be not be a qualifying disclosure. See Williams v Michelle Brown AM UKEAT/0044/19/OO.

68. There must be a disclosure of information. A disclosure of information can be made as part of making an allegation, see for example Kilraine v London Borough of Wandsworth. Neutral Citation Number: [2018] EWCA Civ 1436. The information disclosed has to have sufficient factual content and specificity such as to be capable of tending to show one of the matters listed in s43B. However, the worker does not need to specifically use the words from the section in order for the disclosure to qualify.

69. The public interest parts of the requirement were considered in Chesterton Global Ltd v Nurmohamed. Neutral Citation Number: [2017] EWCA Civ 979. Some of the relevant points that were highlighted are:

69.1 The Tribunal has to ask whether the worker believed at the time that they were making it that the disclosure was in the public interest and whether, if so, that belief was reasonable.

69.2 The Tribunal must not substitute its own view of whether the disclosure was in the public interest for that of the worker. The Tribunal might need to form its own view on that question as part of its analysis of what (on the balance of probabilities) the employee, in fact, did believe at the time. However, it is not the Tribunal's view of the public interest that is determinative of this point.

69.3 The necessary belief is simply that the disclosure is in the public interest. The particular reason(s) that the worker believes that it is in the public interest are not of the essence. What matters is that the claimant's subjective belief was objectively reasonable.

69.4 While the worker must have a genuine and reasonable belief that the disclosure is in the public interest, that does not have to be the predominant motive for making the disclosure.

69.5 Parliament has deliberately chosen to not define the phrase "in the public interest" and the reason for that is that it is Parliament's intention to leave it to Employment Tribunals to apply that phrase as a matter of educated impression.

70. A protected disclosure is a qualifying disclosure which is made by a worker in accordance with any of s.43C to 43H ERA. That includes disclosures made to the worker's "employer", within the expanded definition of that term set out in section 43K ERA.

71. There is a right not to be subjected to detriment.

> **47B.— Protected disclosures.**
>
> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
>
> (a) by another worker of W's employer in the course of that other worker's employment, or
>
> (b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.
>
> (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
>
> (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

72. The remedy is to bring a tribunal claim.

> **48.— Complaints to employment tribunals.**
>
> (1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(2) On a complaint under subsection (1),(1ZA),(1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

73. In London Borough of Harrow v Knight 2003 IRLR 140, EAT, the EAT set out the requirements for a successful detriment claim):

73.1 the claimant must have made a protected disclosure

73.2 they must have suffered some identifiable detriment

73.3 the employer, worker or agent must have subjected the claimant to that detriment by some act, or deliberate failure to act and

73.4 the act or deliberate failure to act must have been done on the ground that the claimant made a protected disclosure.

74. The detriment provisions do not cover situations where an individual is an employee and the alleged detriment was dismissal, because such an allegation is covered by section 103A instead. However, where the claimant is not an employee, then the detriment provisions do cover the situation where the alleged detriment is a termination of the working relationship.

75. The term 'detriment' is not defined in the ERA. When considering whether something amounts to a detriment then, where necessary, a tribunal can take into account what types of things have been found to amount to detriments in claims brought under the Equality Act. As discussed in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL, what matters is that the worker is shown to have suffered a disadvantage of some kind. It does not necessarily have to be a huge disadvantage, but it has to be a real disadvantage, not just something the worker incorrectly perceives to be a disadvantage.

76. A detriment can be a deliberate failure to act. The latter requires a decision by the tribunal that the employer made a conscious decision not to take action.

77. Since the question is not whether the employee has been treated less favourably, there is no need for any actual or hypothetical comparator when deciding whether the employee has been subjected to a detriment. However, the comparison with how others have been treated might be relevant evidence when analysing the employer's alleged reasons for the way in which it treated the whistleblower.

78. The words "on the ground that" in s47B ERA were considered by the Court of Appeal in Fecitt v NHS Manchester 2012 ICR 372. The tribunal has to decide whether the protected disclosure materially influences the employer's treatment of the whistleblower. Provided there is an influence that is more than trivial, then that is sufficient, even if the employer also had other motivations.

79. Section 48(2) does not mean that, once a claimant asserts that he or she has been subjected to a detriment, the respondent must disprove the claim. It means that once all the other necessary elements of a claim have been proved on the balance of probabilities (that there was a protected disclosure, that there was a detriment, that the respondent subjected the claimant to that detriment) the burden shifts to

the respondent to prove that the worker was not subjected to the detriment on the ground that they had made the protected disclosure.

80. Where an individual gives evidence to the tribunal as to the reasons for their actions, then we are not obliged to believe their evidence. On the contrary, when deciding whether we believe the person's answers, it is important for us to be aware that someone who subjects another person to a detriment because of a protected disclosure is unlikely to admit that to the tribunal. They are also unlikely to admit it even in internal documents. It may be appropriate for a tribunal to draw inferences as to the real reason for the person's action on the basis of its principal findings of fact.

81. The EAT discussed the approach to drawing inferences in a detriment claim in International Petroleum Ltd v Osipov [2017] UKEAT 0058/17/1907

    81.1 the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure that he or she made

    81.2 by virtue of S.48(2), the respondent must be prepared to show why the detrimental treatment was done. If it does not do so, inferences may be drawn against it

    81.3 however, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

82. In Ibekwe v Sussex Partnership NHS Foundation Trust [2014] UKEAT 0072/14/2011, the court discussed burden of proof at paragraphs 18 to 22. Amongst other things, it mentioned how – in an alleged unfair dismissal case – the employer's failure to prove its case on the reason for dismissal did not inevitably lead to the finding that section 103A was made out. In relation to detriment:

> I do not accept that a failure by the Respondent to show positively why no action was taken on the letter of 5 April before the form ET1 was lodged on 12 June means that the section 47B complaint succeeds by default (*cf.* the position under the ordinary discrimination legislation, considered by Elias LJ in Fecitt). Ultimately it was a question of fact for the Employment Tribunal as to whether or not the 'managerial failure' to deal with the Claimant's letter of 5 April was on the ground that she there made a protected disclosure.

Analysis and conclusions

83. We will address first of all whether Disclosures 1, 2, 3 (as quoted above from the Claimant's further information document, pages 104-105 of the bundle) meet the statutory definition for "protected disclosure".

Disclosure 1

84. For ease of reference, the Claimant described the alleged protected disclosure as follows:

Disclosure I made to Mrs Indira of Meiklejohn Pharmacy on 13th May 2020 via text message at 6:38am.

Therein I clearly informed her that her order to her staff members not to wear face mask on 12th May is putting the British public to health and safety risk of coronavirus infection. It was in fact true that the government provided her pharmacy with free mask for her staff but Mrs Indira had refused to use them to protect patients.

85. Therefore, for Disclosure 1, we are considering what is said about masks, specifically. Anything said about gloves is relevant for context but is not part of the specific alleged disclosure of information for Disclosure 1 (information communicated about gloves is dealt with when discussing Disclosure 3).

86. The actual wording of the 6:38am message was:

> Madam I'm concerned no one staff member at the pharmacy is allowed to use face mask. I learnt they have been told not to use gloves as well. It's important for safety that these PPE are used by pharmacy staff to protect everyone. I have a strong headache this morning and won't be able to travel to work today

87. Before receiving a response from Ms Panchal, he followed it up, at 6:40am, with:

> I'm not sure I can continue to work under those conditions with the rise in covid 19 death I'm worried for my safety

88. It is factually accurate that the text message at 6:38am stated that no staff member was allowed to use a face mask. The message does not say in express terms that Ms Panchal told them not to do so. It does not say in express terms that she told not to do so on 12 May. We are satisfied that the information in the message of 6:38am sufficiently matches the wording used for Disclosure 1 as set out by the claimant on page 104.

89. In applying the five stage test to this item:

    89.1 it does contain information, namely that the respondent had either instructed its staff not to wear masks or otherwise prevented them from doing so.

    89.2 It does contain information that suggested that a safety requirement should be that staff were allowed to use such PPE (ie masks) and this was being breached.

    89.3 We are not satisfied, however, that the claimant actually believed that this disclosure was being made in the public interest. On the contrary, we are satisfied that the claimant was aware that staff had been wearing masks on both 11 May and 12 May 2020. We do not accept that the claimant could have believed that it was in the public interest for him to send a text message to Ms Panchal that contained a false accusation, or disclosure of false information.

    89.4 Furthermore, and in any event, even if we had been satisfied that the claimant did believe that sending this disclosure was in the public interest it would not be reasonable for him to have such a belief.

90. As this text of 6:38am (even if we were to read it in conjunction with the follow-up at 6:40am, which is not the allegation as far as Disclosure 1 is concerned) does not meet all five stages of the required test, it is not a qualifying disclosure, and therefore not a protected disclosure.

Disclosure 2

91. For ease of reference, the Claimant described the alleged protected disclosure as follows:

> Further disclosures on that same day 13th May 2020 to Mrs Indira via same series of text messages that the delivery drivers where coming into the dispensary area without wearing any facemask puts the staff members and patients being British public to health or safety hazard of coronavirus infection via droplet transmission.

92. The only message directly commenting on delivery drivers is at 6:50am:

> Delivery drivers walking into the back pharmacy without mask are serious risk to pharmacist and staff by droplet transmission

93. He then followed that up with four messages in quick succession, the first also timed at 6:50am, and the other three at 6:51am. These were:

> So is staff working in such close proximity
>
> So it's a real threat to pharmacist
>
> I know a few lives have been lost in pharmacy
>
> So the concern is serious

94. For fuller context, after the 6:38am and 6:40am messages, and prior to those at 6:50am and 6:51am, the Claimant had written, at 6:45am:

> It's about my safety I need to be able to work in a safe environment

95. And at 6:46am:

> No one is to loss their lives to covid being a front line staff

96. And at 6:47am:

> I believe you know the death rate is real and we are not meant to wait for incidents before protecting everyone

97. And at 6:48am:

> I won't be staying home once the government has ensured ppe is compulsory to all front line staff

98. After the 6:51am messages, he wrote, at 6:53am:

> I had to buy my own when I didn't find any ppe

99. And three messages, one at 7:02am and two at 7:03am:

> It's actually your pharmacy that is not safely practicing and following covid regulations. You specifically told the staff members not to use gloves
>
> That's failing patient safety
>
> So treathening me with gphc is trying to cover up issues

100. And at 7:04am:

> In that case your pharmacy is unsafe as people working in there can transmit covid to others

101. And at 7:05am:

> I know from the fact that people in such close proximity without face mask will pose a threat to others

102. The allegation for Disclosure 2 does not specifically refer to a time of 6:50am. Nor does it say that the alleged protected disclosure is in a single message. On the contrary, it implies it is over a series. In fact, in express terms, it is only the 6:50am message which refers to deliveries, but we have taken the whole exchange into account for the purposes of our decision on Disclosure 2.

103. Applying the five stage test:

103.1 There is a disclosure of information about what the delivery drivers were doing and that this was said to be a risk to health and safety.

103.2 We accept that the claimant did have a genuine belief that the information in his text about delivery drivers was something that tended to show that health and safety was endangered.

103.3 We are satisfied that that was a reasonable belief for him to hold.

103.4 We are satisfied that the claimant believed that this disclosure was in the public interest. We are satisfied that the claimant believed that potentially more could be done to reduce the risks posed to (staff and) the general public from delivery drivers potentially having covid and either directly infecting members of the public in the shop at the time, or else indirectly, infecting the public (by infecting a staff member who in turn infected other people).

103.5 As mentioned in our findings of fact, on 11 May and 12 May 2020, it was the claimant who was responsible for the branch and therefore it is the claimant who had the ability to control how deliveries were carried out. Furthermore, as mentioned in our findings of fact, the claimant chose not to wear PPE at any time on 11 May at all, or in the morning of 12 May, despite having had the opportunity to do so. He wore a mask only on the afternoon of 12 May. As per the findings of fact, the deliveries to which the Claimant is referring took place in the afternoons, but it is unclear whether that was the afternoon of 11 May or 12 May or both. In any event, the mere fact alone that an employee is in a position to do something about the risk in question does not

prevent the employee having a genuine belief that making the disclosure to the employer was in the public interest. Furthermore, our decision is that this this was not an unreasonable belief for the Claimant to hold as of 13 May 2020. Not unreasonably, he believed that coronavirus was a serious risk to public safety and that special measures should be in place to minimise the risk of transmission of the virus from delivery drivers to those in the shop (staff or public) or vice versa. He believed that this was an important issue and that such measures were something that would potentially benefit the health and safety of the public.

104. These messages (including the 6.50am text) were sent to Ms Panchal, director of the respondent.

105. Our decision is that Disclosure 2 was a qualifying disclosure and that it was made in circumstances such that it was a protected disclosure.

Disclosure 3

106. For ease of reference, the Claimant described the alleged protected disclosure as follows:

> In the same series of text messages above I further disclosed that these staff members were also not using the hand gloves provided by the government in the pharmacy to prevent spread of coronavirus.

107. The Claimant's messages have been quoted above. The 6:38am message includes a comment about gloves. It seems reasonable to regard the 6:40am comment about "those conditions" as referring to what he had said about gloves (as well as other things) in his 6:38am message.

108. His further messages were sent after Ms Panchal's 6:42am message. It seems likely that she was replying only, at 6:42am, to what he wrote at 6:38am. She said:

> That is a poor reason as one first day you yourself did not wear a mask or gloves. At the end of the day you couldn't do the job full stop I'll only be paying £20/hr since you've left all work for me to do and to cancel at such notice. Not professional

109. Relevant to the issues for Disclosure 3 and in the context of their discussion about gloves, she wrote, at 6:46am:

> Wearing of gloves is not essential as longs as hands are washed regularly They keep a distance from or you need They have been working in peak of things and non have been ill

110. The references to "They" are to the other staff in the shop (this being before the Claimant referred to delivery drivers). In making our findings of fact, we took into account the full exchange, including considering the Claimant's argument that the non-denial was a tacit admission that staff had been told not to (or otherwise prevented from) wearing masks. We declined to draw that inference, and we are satisfied that, in context, Ms Panchal was specifically commenting, in this message, about the admitted fact that the Respondent's guidance to staff was that bare hands, washed frequently, was preferable to gloves.

111. The Claimant's 7:02am message also referred specifically to gloves. It seems likely that Ms Panchal's own 7:03am message (sent after both of the Claimant's 7:03am messages) was a reply to his 7:02am. She wrote:

> Yes because we've I been told they are I more safer to wash I hands regularly by NHSE

112. She followed that up with two at 7:04am:

> We've been told as there is a shortage of ppe
>
> So please don't undermine me I know what I've been told by NHSE

113. For completeness, as mentioned in the findings of fact, she also forwarded to the Claimant a message received from the CCG. However, that happened after the Claimant's last message, and therefore is not directly relevant to our analysis of whether Disclosure 3 meets the statutory definition.

114. What is relevant for (Disclosure 2 and) Disclosure 3 is that, taking the series of messages as a whole, it is clear that the claimant is not referring simply to his own health and safety.

115. Even in the 6:38am message, he does say "everyone". Further, for example, at 6:47am, he speaks about the death rate and that clearly is a reference to the dangers to the general public. He refers to the possibility of future incidents and that appears to include perceived future risks to the public.

116. Applying the five-day stage test for Disclosure 3.

    116.1 The information which the claimant disclosed was that Ms Panchal had been instructing staff not to use the gloves. He did not specifically say that they were not using the gloves provided by the government. The information communicated that there was (said to be) a risk to health and safety arising from the fact that gloves were not being used. On balance, we are satisfied that the information disclosed in the texts sufficiently matches that alleged by the Claimant for Disclosure 3 (page 104).

    116.2 As we have covered in the findings of fact, it was factually accurate that staff were not using the gloves and that they had been told by Ms Panchal that rather than use the gloves, they should use bare hands (and wash them). We are satisfied that the Claimant did genuinely believe that he was disclosing information about something that was a risk to public safety.

    116.3 It was not unreasonable for him to hold that opinion.

    116.4 However, we are not satisfied that the claimant believed that he was making this disclosure in the public interest. The claimant himself had not worn masks or gloves despite the fact that they were available to him. Had he felt that the wearing of masks and gloves throughout the whole of his two days working in the branch was in the public interest and then he would have done so. Similarly had the claimant genuinely believed that the non-wearing of gloves for the whole day endangered his own health and safety, then he would ensured that he did so himself.

117. Therefore, our finding is that the Disclosure 3 is not a qualifying disclosure and therefore not a protected disclosure.

118. Thus, our decisions are that Disclosure 2 was protected disclosure, and the other two were not.

Alleged Detriments

119. Apart from the messages from Ms Panchal that we have already quoted, she also sent the following.

120. Straight after her 6:46am message, at 6:47am, she wrote:

> Well then you should not work at all and stay at home

121. It seems likely that her first two messages (6:42am and 6:46am) were her response to his initial 6:38am message, and that this third one (6:47am) was responding to what he wrote at 6:40am.

122. She sent three messages at 6:48am, seemingly being a continuation of her own 6:47am message, but potentially having by now she had read some or all of the Claimant's messages sent up to this point. She wrote:

> Best place to be safe All my pharmacies are safe the underlying issue is you could not do the job it's simple and my staff and I could see that
>
> Stay home
>
> I don't need excuses we all could see

123. At 6:49am, responding to what the Claimant's comment that he would not remain home if the government made PPE compulsory, she wrote:

> Well stay gone as they are not going to say that

124. At 6:51am, Ms Panchal wrote the following. She may well have seen the 6:50am message from the Claimant (which referred to deliveries) by this stage, though that it seems likely that it was written in direct response to the Claimant's 6:48am message (that he would not remain home if the government made PPE compulsory):

> As I say stay at home best place for you to be especially on Monday you did not wear any ppe this is just a mere excuse so please I really don't want to know any further

125. By the time Ms Panchal sent her next message, at 6:56am, it seems likely that she had caught up fully with everything the Claimant had sent to her up to that point. In particular, her 6:56am message seems to be a direct response to what he wrote at 6:53 (about buying is own PPE). Ms Panchal wrote, at 6:53am:

> Good fir you

126. She then followed up at 6:59am (there having been nothing intervening from the Claimant) with:

> You are not fit to practice really I will be talking to GPhC really as the safety to patients with you working is an issue and I'll let them handle

127. The parties agree that "GPhC" referred to General Pharmaceutical Council and that General Pharmaceutical Council is the regulator for pharmacists, including the Respondent, Ms Panchal and the Claimant.

128. We have already mentioned Ms Panchal's 7:03am message, and the first two sent at 7:04am. There was also a third at 7:04am which read:

> You cannot do the job as a Locum full stop

129. At 7:05am, she wrote:

> Stay at home best place for you to be really

130. That was the last message she sent, apart from, at 8:44am, sending the text of the CCG's reply to her, with the simple introduction "This is from the CCG".

131. The claimant's message at 6:38am said that he was not coming to work that day and mentioned having a strong headache. The claimant stated in evidence during the tribunal hearing that prior to sending the 6:38am message he had already decided that he was not going to return to the pharmacy at all, on any date, even after his headache improved. We accept his evidence on that point.

132. The Claimant's evidence to the tribunal was that, if Ms Panchal had responded positively to his text messages, and suggested that she would implement appropriate measures, then he would potentially have changed his mind have been willing to continue to work for the Respondent

133. However, as per our findings of fact, the Claimant's accusation that Ms Panchal and/or the Respondent had told staff not to wear masks was false and the claimant knew that Ms Panchal and/or the Respondent had not given that instruction to staff.

134. We do not accept the Claimant's assertion Ms Panchal could have said or done something that would have persuaded the claimant to come back to work. He had made up his mind, and he was not intending to change his mind. Ms Panchal was not able to revoke an instruction for staff to not wear masks, since she had given no such instruction (as the Claimant was aware). We do not believe that the Claimant was contemplating that she might have respond to his messages by saying that she agreed that staff had been banned from wearing masks, and that she would henceforth change that instruction.

135. In the exchanges immediately after 6:38am and 6:40am, Ms Panchal stated that the claimant himself had not been wearing mask or gloves and that she thought he was just making excuses. Her reasons for those particular remarks are (a) that she had personally observed him not wearing the items (prior to the afternoon of the second day) and (b) it was her genuine opinion that he was making excuses for what was (in her opinion) poor work on the days that he had been there. She believed his absence and the "excuses" (as she perceived them) were a reaction to the criticisms of that work which she had made to him.

136. She also stated that he could not do the job. Her reasons for stating the claimant could not do the job were that that was her genuine opinion. She had had concerns and had expressed those concerns to him. She had been willing for him to continue on 13 May and had been hoping for improvement (and/or that it was just teething troubles). What changed by the time of the messages saying that he could not do the job was that he had messaged to say that he could not come to work that day because of a headache. It was not what he wrote about covid, or deliveries, or masks or gloves (or any PPE) that caused her to conclude that he could not do the job; it was that she regarded his notification that he would not be coming in that day as showing that the Claimant did not think that he could meet the required standards. She did not believe him about the headache. His comments about covid, etc, were not the reason for her remark. The reason for her remark was the fact of his absence, in circumstances in which she thought his stated reasons for that absence were not genuine.

137. She also stated should be paying £20 an hour (which meant, as we have found, £20 rather than £22). We have rejected her evidence that her reason for stating that she would now pay £20 was that she had only ever agreed to £20. However, it does not follow that, just because we do not believe her stated reason, we have to conclude that the true reason was that the Claimant had made a protected disclosure.

138. Technically, since she made this comment at 6:46am, and that was before Disclosure 2 (the 6:50am message referred to deliveries), the claim that this was a detriment on the ground of a protected disclosure would fail because of the chronology in any event.

139. However, our decision, having heard from the witnesses, and taken into account everything that preceded her 6:46am message, is that Ms Panchal was angry at the claimant's poor performance over the first two days and the fact that he had said he was not going to come to work on day three, because of a headache. She did not decide that she would accuse him of being a poor worker because he had made comments about masks or gloves or covid or health and safety. She did not decide that she would paying £20 an hour because of anything in those messages either. Rather, because she genuinely perceived him as a poor worker, and because she genuinely believed that he was making a false excuse for not coming to work on day three, she believed that she was justified in reverting to the £20 per hour that had been notified via the agency, rather than the £22 that the Claimant had negotiated.

140. Within the exchanges, Ms Panchal at this stage agreed with the claimant that he should stay home. This was not a detriment as the Claimant had already decided before 6:38am that he was not going to return to work there.

141. Ms Panchal's 6:49am remark ("Well stay gone as they are not going to say that") was curt, as were some of her other texts. She acknowledges that her messages were abrupt. She says, and we accept, that this was at least partially due to the stresses of running four branches, and the knowledge that she had little time to make arrangements for the Claimant's branch to open, now that she knew the Claimant was not going to be there.

142. Ms Panchal's 6:49am comment was not the reason that the Claimant's engagement terminated. He had already decided that he was not going to carry on working for the Respondent. In any event, the words she used did not amount to an unequivocal termination; she was simply reacting to his comment which implied that he would not return to work unless and until the government made PPE compulsory. The remark was not a detriment; it was just responding to the information which the Claimant had supplied to her, rather than telling him about anything that she or the Respondent was intending to do.

143. In any event, our decision is that she did not make this 6:49am remark on the grounds of any protected disclosure. She made this remark before the 6:50am text about deliveries, but that is not the only reason for saying that it was not on the ground of a protected disclosure.

144. Her reasons for making it were that, having first stated that he was not coming in on 13 May because of headache, the Claimant had now suggested that his absence would be more prolonged, and because Ms Panchal believed that his absence was because he could not do the job, not because of headache, or because of anything he had said about covid or PPE.

145. The response given at 6:52am by Ms Panchal simply matched what she had said already about the claimant's staying home. She even started the message with the words "as I say". The end of the message ("I don't want to know any further") was curt; the reason for that was, as stated in the message, she believed that the Claimant was falsely implying that he did not have masks available, when he did, and falsely claiming other staff had not been able to wear masks when they had.

146. At 6:59am, when Ms Panchal said that the Claimant was not fit to practice, this was an escalation of what she had said previously about the claimant not being able to do the work which the Respondent required of him. This was a detriment. Her reasons for making this comment were as mentioned above; namely her frustration at what was - in her opinion - his lack of capability on the two days he had worked, combined with her frustration that, on the third day, he was notifying her that he was ringing in sick. She was not influenced to make the comments about his being not fit to practice because of what he had said about delivery drivers (or about gloves).

147. In the same 6:59am email, she also said that she might report him to GPhC. The analysis is the same as for the remark about fitness to practice. It was an escalation in comparison to her prior comments, and it was a detriment. She was not influenced to make the comment by what he had said about delivery drivers (or about gloves).

148. Furthermore, her 6:59am text was before his 7:02am comments about gloves (although, as discussed, gloves were mentioned in his 6:38am message, and Ms Panchal had replied to that).

149. Ms Panchal sought to persuade the claimant that he was wrong to think that gloves were required and forwarded to him the message from the CCG which she received as a result of contacting the CCG promptly about the gloves issue, after he had raised it. Ms Panchal was not seeking to cover anything up in relation to

the way her pharmacy was using gloves. She specifically mentioned to the CCG that one person working at pharmacy had raised the issue of gloves. Ms Panchal had no reason to seek to subject the claimant to a detriment in relation to what he said to her about gloves and our finding is that she did not do so.

150. The invoice was not paid, and the Respondent made no attempt to contact the Claimant to discuss it at all. It did not say, for example, that it would pay if he re-issued it for £20 per hour instead of £22 or that it would pay if he corrected the arithmetic. The correct amount would have either been £300 (at £20 per hour) or £330 (at £22 per hour), but the invoice demanded £510.35.

151. Ms Panchal's believed that the invoice could be ignored because of the error. Her decisions to be uncooperative were not influenced by what the Claimant had said about deliveries or gloves or covid. She saw it as the Claimant's responsibility to issue a correct invoice. She would have had the same attitude to the invoice had he performed poorly (in her opinion) on the first two days and not turned up on the third day, but had made no comments about masks, gloves, deliveries, covid, health and safety, etc.

152. For the reasons mentioned above, all the detriment claims fail.

    152.1 In terms of "unjustified criticism of his work by Mrs Panchal", there was criticism on the first two days of the assignment (11 and 12 October) which pre-dates any of the alleged disclosures. We have commented above on the criticisms made in the text exchange of 13 October. In short, we have been satisfied by the evidence of why that detrimental treatment occurred, and it was not significantly influenced by the protected disclosure.

    152.2 In terms of "Unjustified failure / refusal to pay for his first two days work at the agreed rate", we have discussed both elements of that, namely the Respondent's assertion that the rate should be £20, and the lack of response to the invoice issued. As explained more fully above, in both cases, we are satisfied that the Respondent's acts and omissions were not significantly influenced by the protected disclosure.

    152.3 In terms of "inability to continue in his role", the Claimant decided to end his assignment with the Respondent before he made any protected disclosure. He made that decision before he sent his first message (at 6:38am) on the morning of 13 October 2020.

153. Even had we decided that Disclosure 3 was a protected disclosure, the detriment claims would have failed for the same reasons just mentioned. What the Claimant said about gloves did not influence any of the alleged detrimental treatment.

154. In terms of the Claimant's comments about staff not being able to wear masks, these comments were false in Ms Panchal's opinion and the Claimant knew them to be false in Ms Panchal's opinion. To the extent, if at all, that these comments angered her or influenced her, it was the fact that the information was untrue, not the fact that the information alleged wrongdoing/endangering safety that caused annoyance. However, in any event, the criticism of his work pre-dated this, and

for the reasons mentioned above, she would not have authorised payment of the invoice, even if he had not made the comments about masks.

Employment Judge Quill

Date: 2 October 2022

REASONS SENT TO THE PARTIES ON

4 October 2022

FOR EMPLOYMENT TRIBUNALS