EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**RESPONDENT**
MR S MORGAN	**V BESTWAY PANACEA HOLDINGS LIMITED**

HELD AT PEMBROKESHIRE LAW COURTS ON: 25 – 29 SEPTEMBER 2023

BEFORE: EMPLOYMENT JUDGE S POVEY
MRS M WALTERS
MR G HOWELLS

REPRESENTATION:
FOR THE CLAIMANT: MS FADIPE (COUNSEL)
FOR THE RESPONDENT: MS BALMER (COUNSEL)

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of constructive unfair dismissal is not made out and is dismissed.

2. The complaint of constructive automatic unfair dismissal for making protected disclosures is not made out and is dismissed.

REASONS

1. These are complaints brought by Mr Simon Morgan ('the Claimant') against his former employer Bestway Panacea Holdings Limited ('the Respondent').

Background

2. By way of brief background to the claim:

2.1 The Claimant was employed by the Respondent as Pharmacy Manager of its pharmacy in St Davids. The Claimant worked at the St David's pharmacy ('St Davids') from 2006 until his resignation, which took effect on 25 March 2022.

2.2 The claim was about changes to the budget and working hours allocated to St Davids for the financial year 2021/22.

2.3 The Claimant alleged that the Respondent had fundamentally breached his contact of employment, such that his was entitled to treat his resignation as a constructive dismissal. In addition, the Claimant alleged that he made a number of protected disclosures, in response to which the Respondent breached his contract of employment.

2.4 As such, the Claimant brought complaints of constructive unfair dismissal and constructive automatic unfair dismissal.

2.5 The Respondent resisted the claim in full. It denied that it had breached the Claimant's contract of employment, fundamentally or at all, denied that the Claimant had made any protected disclosures and, as a result, denied that the Claimant's resignation constituted a dismissal.

The Relevant Law

Unfair Dismissal

3. By virtue of section 94 of the Employment Rights Act 1996 ('ERA 1996') an employee has the right not to be unfairly dismissed by his employer.

4. An employee is deemed to have been dismissed where he terminates his contract of employment in circumstances in which he is entitled to do so by reason of the conduct of his employer (per section 95(1)(c) ERA 1996) ('constructive dismissal').

5. To establish whether there has been a constructive dismissal, the principles of contract law apply. The employee must establish the following (per Western Excavating (ECC) Ltd v Sharp [1978] ICR 221):

   5.1. That there has been a fundamental breach of the employment contract by the employer;

   5.2. That the breach caused the employee to resign; and

   5.3. The employee did not delay resigning or act in a manner such as to affirm the employer's breach.

6. Implied into every contract of employment, whether that contract is verbal or written, is a term of mutual trust and confidence between

employer and employee. That is because the relationship of employer and employee is regarded as one based on mutual trust and confidence between the parties.

7. It is a fundamental breach of contract for an employer, without reasonable and proper cause, to conduct itself in a manner '*calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties*" (Courtaulds Northern Textiles Ltd v Andrew 1979 IRLR 84, EAT).

8. It is not necessary to show that the employer intended any repudiation of the contract. The Tribunal must "*look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it"* (Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666, EAT). That assessment is an objective one (per Courtaulds Northern Textiles; Malik v Bank of Credit and Commerce International SA [1997] ICR 606; Morrow v Safeway Stores plc [2002] IRLR 9; Ahmed v Amnesty International [2009] ICR 1450).

Protected Disclosures

9. Section 43B(1) of the ERA 1996 defines a protected disclosure as follows:

> … 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—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

10. Section 103A of the ERA 1996 renders any dismissal automatically unfair if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

11. In a complaint of constructive unfair dismissal the question for consideration is whether the protected disclosure was the principal reason that the employer committed the fundamental breach of the employee's contract of employment that precipitated the resignation. If it was, then the dismissal will be automatically unfair.

The Issues

12. At the outset of the hearing, the parties confirmed that the List of Issues in the Bundle (at [69] – [73]) was agreed as the issues which required determining by the Tribunal. So far as they related to liability, those issues were as follows:

> THE CLAIMS
>
> 1. The Claimant brings the following claims:
>
> A. ordinary unfair constructive dismissal contrary to sections 95(1)(c) and 98 of Employment Rights Act 1996 (ERA 1996"); and
>
> B. automatically unfair constructive dismissal for making protected disclosures under sections 95(1)(c) and 103A ERA 1996.
>
> ISSUES ON LIABILITY
>
> A. Ordinary Unfair Constructive Dismissal
>
> Constructive Dismissal
>
> 2. Was the Claimant constructively dismissed within the meaning of section 95(1)(c) ERA 1996? This involves consideration of the questions at paragraphs 3 to 7 below.
>
> 3. Did the Respondent commit a fundamental breach of the Claimant's contract of employment? The Claimant alleges a breach of the implied term of trust and confidence by the following conduct:
>
> > i. A failure by the Respondent to address the Claimants concerns over safe staffing levels and the dangers that reductions in staff would pose to both patients and staff as set out in paragraphs 5, 8, 10, 11, 13, 14, 16, 17, and 19 of the Particulars. This concluded with the outcome to the Claimant's grievance confirming that none of the Claimant's concerns were going to be progressed (paragraphs 22 and 24 of the particulars). All of this was despite the Claimant's role as the Responsible Pharmacist for the branch (paragraph 2 of the particulars)
> >
> > ii. The decision by the Respondent that staff reductions would take place regardless of the results of any consultation as set out in paragraphs 7 and 16 of the Particulars.
> >
> > iii. A failure by the Respondent to consult with staff members appropriately, especially the Claimant on the planned reductions in

staff as set out in paragraphs 8(a), 9, 14, 15, 16, and 21 of the Particulars.

iv. The Claimant not being invited to participate in the consultation process as set out in paragraph 9, 16, and 21 despite being the manager for the branch in question.

4. If so, was that breach sufficiently serious to amount to a repudiatory breach of contract by the Respondent entitling the Claimant to terminate his employment contract?

5. If so, did the Claimant resign in response to that breach or for some other reason?

6. Did the Claimant's conduct waive any fundamental breach?

Ordinary Unfairness

7. If the Claimant was constructively dismissed by the Respondent, was his dismissal ordinarily unfair pursuant to paragraph 98 of the ERA 1996?

B. Automatically Unfair Constructive Dismissal

Qualifying Protected Disclosure

8. Did the Claimant make a qualifying public interest disclosure(s) within the meaning of section 43B(1) ERA 1996? This involves consideration of the questions at paragraphs 9 to 12 below.

9. Did the Claimant make a 'disclosure of information' within the meaning of section 43B(1) ERA 1996? The Claimant relies upon the following alleged disclosures of information:

i. on 19 September 2021, an alleged disclosure of information made by email to Sam Ghafar (Regional Operations Manager) that the Respondent's proposed reduction in hours would have the effects detailed in paragraphs 5i-iii of the Particulars of Claim *[PoC, §5]* and paragraphs 2-5 of the Further Information *[FI, §2]* ("Alleged PD 1");

ii. on 28 October 2021, an alleged disclosure of information made by email to Mr Ghafar, regarding the levels of annual leave taken by staff and staff workloads, as detailed at paragraph 10 of Particulars of Claim *[PoC, §10]* and paragraphs 6-9 of the Further Information *[FI, §6]* ("Alleged PD 2");

iii. on 28 October 2021, an alleged disclosure of information made by email to Kelly Smith (Area Operations Manager) that details the same concerns as above *[PoC, §11]* and paragraphs 10-13 of the Further Information *[FI, §10]* ("Alleged PD 3");

iv. on 29 October 2021, an alleged disclosure of information made by email to Jacqueline Lunardi (People Director), Louis Purchase (Operations Director) and Gillian Stone (Deputy Superintendent Pharmacist and NHS Standards and Services Manager) regarding the

same concerns as above *[PoC, §11]* and as detailed in paragraphs 14-17 of the Further Information *[FI, §14]* ("Alleged PD 4");

v. on 18 November 2021, an alleged disclosure of information made by email to Mr Ghafar and Roisin Thomas-Hands (Area Operations Manager), expressing concerns regarding additional overlay hours, the reduction in hours at the branch, and lack of managerial support in the form of approving additional hours, as detailed at paragraph 17 of the Particulars of Claim *[PoC, §17]* and paragraphs 18-21 of the Further Information *[FI, §18]* ("Alleged PD 5"); and

vi. on 3 December 2021, an alleged disclosure of information to Ms Lunardi, made in the Claimant's formal grievance letter, detailed at paragraph 20 of the Particulars of Claim *[PoC, §16]* and detailed in paragraphs 22-26 of the Further Information *[FI, §22]* ("Alleged PD 6").

10. If so, did any of the alleged disclosures of information above, in the Claimant's reasonable belief, tend to show that: A person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject (section 43B(1)(b) ERA 1996); that the health or safety of any individual had been, was being, or was likely to be endangered (section 43B(1)(d) ERA 1996); and that information tending to show any matter falling within any one of the above had been, was being, or was likely to be deliberately concealed (section 43B(1)(f) ERA 1996). The Claimant alleges that each of Disclosures 1 to 6 tended to show:

i. A failure by the Respondent to comply with a legal obligation under the General Pharmaceutical Council's ("GPhC") Standards for Registered Pharmacies, namely Principles 1, 2, 3, and 4;

ii. A failure by the Respondent to allow the Claimant to comply with the legal obligations under s.72A(1) of the Medicines Act 1968 ("the 1968 Act");

iii. A failure by the Respondent to allow the Claimant to comply with the legal obligations under the Medicines (Pharmacies) (Responsible Pharmacist) Regulations 2008 ("the 2008 Regulations");

iv. That the health of the both the patients and staff were likely to be negatively affected if the proposed staffing reductions took place, and that the health of staff had already been negatively affected through previous reductions in staff; and/or

v. That information relating to the issues above was being concealed through a sham consultation without any measurable input from the Claimant despite being the Registered Pharmacist for the Branch.

11. If so, were the alleged disclosures made by the Claimant in the public interest (section 43B(1))? The Claimant contends that the disclosures were made in the public interest because of the effect that unsafe staffing levels would have upon both the staff at the pharmacy, and the patients of the pharmacy**.**

12. Were the disclosures made to the Claimant's employer or to another person where the Claimant reasonably believed the relevant failure related solely or mainly to the conduct of that other person or to any other matter for which that person had legal responsibility pursuant to section 43C(1)(a)(b)(2) ERA 1996?

Constructive Dismissal

13. Was the Claimant constructively dismissed within the meaning of section 95(1)(c) ERA 1996? This involves consideration of the questions at paragraphs 3 to 7 above.

Reason for Dismissal

14. If the Claimant was constructively dismissed, was the reason (or if more than one the principal reason) for his dismissal the fact that he made any or all of Alleged PDs 1 to 6?

The Hearing

13. The hearing was conducted in person, save that the Tribunal non-legal members attended remotely by video. We heard oral evidence from the Claimant. For the Respondent, we heard oral evidence from Sammy El Ghafar (at the relevant time, the Respondent's Regional Operations Manager) and Simran Sekhon (the Respondent's Head of Operations).

14. All of the witnesses provided and adopted written statements as their evidence in chief.

15. The Tribunal was also provided with a paginated bundle of documents to which we were referred throughout the hearing ('the Bundle'). In the course of the hearing, the Claimant adduced a further document (the inclusion of which was not opposed by the Respondent), which was added to the Bundle. Finally, we received written and oral submissions from Ms Fadipe for the Claimant and from Ms Balmer for the Respondent.

16. In reaching our decision, the Tribunal had regard to all the evidence we saw and heard, as well as the submissions we received.

Findings of Fact

17. We found that the witnesses we heard from tried to assist the Tribunal to the best of their abilities. We did not find that any of them was obstructive or deceitful. They all genuinely believed in their testimony and were prepared to concede matters of which they had no or limited recollection.

18. Much of the relevant factual narrative of the case was not in dispute. However, there were some factual disputes between the Claimant and the Respondent's witnesses which we have had to resolve. We have

done so based upon the evidence provided to us and mindful that the events discussed occurred up to two years ago.

19. We only make findings required to determine the complaints brought by the Claimant. A number of other matters were raised by both parties in the course of their oral and written evidence. We have not engaged with those, save where they were relevant to the determination of the issues.

Background

20. The Claimant is a pharmacist. He had worked at St Davids since October 2006. He was employed as the Pharmacy Manger and was also the Responsible Pharmacist (as defined and implemented by amendments to the Medicines Act 1968 and the Medicines (Pharmacies) (Responsible Pharmacist) Regulations 2008).

21. The Claimant's line manager was Roisin Thomas-Hands, who was one of the Respondent's Area Managers. Her line manager was Mr Ghafar, who at the relevant time was one of the Respondent's Regional Operations Managers.

22. The Respondent owns and operates 755 pharmacies across the UK (under the trading name Well Pharmacy). Some of the Respondent's pharmacies have a store manager and a pharmacist. Some have a pharmacist who is also the store manager. St Davids was one of the latter. The Claimant was both pharmacist and store manager.

23. The Respondent's financial year runs from July to June. Each pharmacy has an annual budget, the crux of which is the number of working hours allocated for the financial year. Hours are allocated for the pharmacist (who is primarily responsible for dispensing medication by prescription) and, separately, for the other functions undertaken in a given store. As was explained to us, this included over the counter ('OTC') sales and pharmacy services (for example, administering flu vaccines and the common ailments service).

Hours, budgets and MAX:E

24. The budget for each pharmacy is set by the Respondent annually. It is wholly reassessed and recalculated each year. In effect, each pharmacy is allocated working hours on a year-by-year basis.

25. It was not in dispute that St Davids, because of its location, has seasonal variability. In simple terms, it is far busier in the summer months compared to the rest of the year.

26. The Respondent has used computer modelling to assist with the task of allocating working hours for its pharmacies, upon which annual budgets are then calculated. As at summer 2021, the Respondent was using a computer system known as MAX:E to model the working hours for 700

of its pharmacies. A small number of pharmacies were not, at that time, operating on the MAX:E model hours, including St Davids.

27. As explained by Mr Ghafar in his written evidence (at paragraph 31 of his statement), "*MAX:E is a sophisticated computer algorithm which uses a set of data from each individual pharmacy to calculate the optimal number of working hours for that pharmacy for both patient safety and business efficiency purposes. These calculations are run annually for each pharmacy, based on an analysis of the data collected from that pharmacy for the previous 12 months*".

28. The Respondent proposed to move those non-modelled pharmacies onto to MAX:E. In respect of St Davids, this was to be done for the financial year 2021/22. Based upon the data for St Davids for the previous 12 months (2020/21), MAX:E generated an average of 76 working hours per week for 2021/22. This was in addition to 55 working hours per week for the Claimant's pharmacist duties (which were, in effect, protected).

29. Mr Ghafar explained in his oral evidence that, for all MAX:E's sophistications, it was not able to factor in significant seasonal variations. That was one of the factors which resulted in Mr Gafar putting a business case to his manager, Alice Hare, in June 2021, that a further 70 hours per week should be allocated to St Davids for six months of the year, covering the busier summer months. In effect, Mr Ghafar proposed that the Respondent allocate 76 hours per week for six months of the year (as calculated by MAX:E and to cover the winter months of October to March) and 146 hours per week for the other six months of the year (the MAX:E base of 76 hours plus an additional 70 hours per week for the summer months of April to September). That gave an average allocation of 111 hours per week (again, as already stated, this figure was over and above the 55 hours per week allocated for the Claimant's role as pharmacist).

30. That business case was accepted by the Respondent and the hours allocated to St Davids was set in line with Mr Ghafar's proposal. The annual budget was set accordingly and, in Mr Ghafar's words, "*locked in*."

31. Despite Mr Ghafar's proposal, the number of hours allocated to St Davids was likely, in Mr Ghafar's view, to require a reduction in permanent staffing numbers, as fewer full-time staff would be required in the winter months and temporary staff could be used to cover the busier, summer months (per Paragraph 62 of Mr Ghafar's statement).

32. As a result, the Respondent decided to commence a formal consultation process at St Davids. On 16 September 2021 and prior to the start of that process, Mr Ghafar met with the Claimant.

33. In the course of their meeting on 16 September 2021, Mr Ghafar informed the Claimant of the hours allocated to St Davids for the financial year. The Claimant did not agree with the number of allocated hours and following the meeting on 16 September 2021, put his concerns in writing, in the form of an email to Mr Ghafar on 19 September 2021 (at [140] – [142] of the Bundle). At this stage, no announcement had been made to staff about either the allocated hours or the proposed consultation.

34. In his email, the Claimant raised concerns about the hours allocated to St Davids. In summary, he claimed that the proposed allocation would adversely affect the Respondent's ability to adhere to its regulatory obligations, that the variation in hours between winter and summer was unworkable in practice and that the workforce planning software was flawed. The Claimant did not "*believe that I can manage a safe and effective service with less staff"* and raised concerns for the welfare of his colleagues who, he claimed, "*would be under unreasonable stress and pressure and may consider alternatives."* For the reasons that he had set out, he asked Mr Ghafar not to proceed with the proposal.

35. The Claimant also commented on the possible impact on him of the proposal, as follows (at [141] of the Bundle);

> I consider that I am not capable of managing the branch, to the standards that I feel are appropriate, in the proposed circumstances and I would have to review my own position and explore options if this is enforced by the business. I want to make clear that I am not ready to retire yet, but that any decision I might make to resign would be as a consequence of being placed in a position of having to manage an unmanageable service.

36. Mr Ghafar replied to the Claimant by email on 20 September 2021 (at [139] – [140] of the Bundle). His reply included the following:

> …in a nutshell the decision has already been made as follows.
>
> 1. We will run at Max:E level through the 6 months of Winter - this is based on scripts budget, services budget and retail sales budget plus all associated workload needed to run a pharmacy. It's all averaged over 12 months.... The workload modeller generates a weekly contracted base of 76 hours.
>
> 2. We will run at Max:E level PLUS an additional 70 hours through the 6 months of the Summer to recognise the additional workload associated with the increased footfall... i.e. we will run at 146 hours through the Summer.

37. Mr Ghafar concluded his email by reassuring the Claimant that he and Ms Thomas-Hands "*will work with you to support any decisions we make on how we use the hours allocated to the pharmacy"* (at [140] of the Bundle).

The consultation process

38. The consultation process commenced on 28 October 2021, with a meeting being held with staff at St Davids. The Claimant himself was not directly involved in the consultation process (on the basis that his post was not at risk of redundancy). Rather, he was invited to support staff through the process, both in the early stages of the process and as it drew to its conclusion (see, for example, the email from Mr Ghafar to the Claimant on 23 November 2021, at [124] of the Bundle).

39. The proposal itself had been shared with the Claimant and was reconfirmed by Mr Ghafar in his email of 18 November 2021, who also sought the Claimant's assistance in leading discussions with staff (at [128] of the Bundle). Attached to that email was the proposed base rota for St Davids, the basis of which was also explained to the Claimant by Mr Ghafar.

40. In addition, the Claimant was informed in the same email of the following (at [128] of the Bundle):

> …
> Our current proposal is the 2 days "relief" person will have their base pharmacy as St Davids, and when not required elsewhere would by default be "extra" in St Davids for those days.
>
> With regard to the "additional" agreed hours to support peak trading weeks - I would view the overlay as an additional 1820 hours (70 hours x 26 weeks) vs the base 76 hours per week in this financial year which runs July 2021 to June 2022. How you "flex up" and utilise those hours is at your discretion and does not form part of the consultation process. Clearly we will have spent a portion of the overlay hours already during the period July 2021 to date. Roisin will support you with these decisions.
>
> For complete transparency, Max:e is "reset" every year for the start of the financial year (i.e. next time will be July 2022), and therefore any agreed hours are only valid within a financial year. We should however get early sight of the proposal for the 2022/2023 year and Roisin will update you as soon as possible on any impact in St Davids.

41. The Claimant continued to oppose the proposed allocation of hours. On 28 October 2021, he sent his concerns, by email, once more to Mr Ghafar (at 137] – [139] of the Bundle) and also to Kelly Smith (Area Operations Manager) (at [136] – [137]). On 29 October 2021, the Claimant sent his concerns to Jacqueline Lunardi (People Director), Louis Purchase (Operations Director) and Gillian Stone (Deputy Superintendent Pharmacist & NHS Standards and Services Manager) (at [135] – [136]).

42. A second consultation meeting was held with staff on 17 November 2021. Beforehand, the Claimant met with Mr Ghafar. In the course of that meeting:

42.1. Mr Ghafar confirmed to the Claimant that the number of allocated hours was settled and the consultation process was about how those hours would be implemented (including by way of staff reductions).

42.2. It was agreed that Mr Ghafar would run MAX:E calculations for St Davids for each individual month, rather than as a 12-month average.

43. On 18 November 2021, the Claimant sent a further email to Mr Ghafar and Mrs Thomas-Hands, again raising his concerns at the allocated hours and asking for clarification of a number of points (at [126] – [127] of the Bundle).

44. On 22 November 2021, a member of staff at St Davids resigned to take up another job. As a result, there was no longer any need to consider making posts redundant, since the required savings had been achieved. On 23 November 2023, Mr Ghafar sent an updated proposal to the Claimant (at [124] of the Bundle). Later on the same day, Mr Ghafar sent the Claimant the monthly MAX:E figures as discussed at the meeting on 17 November 2021 (at [123] – [124]).

<u>The grievance process & the Claimant's resignation</u>

45. On 3 December 2021, the Claimant raised a formal grievance to Ms Lunardi (at [152] – [155] of the Bundle). The Respondent appointed Neil Cadden (Senior Regional Operations Manager) to investigate and determine the Claimant's grievance.

46. On 15 December 2021, the Claimant attended a formal meeting with Mr Cadden. The Claimant was accompanied by his trade union representative, Dipen Shah. Agreed notes of that meeting were in evidence.

47. At various times on 17 December 2021, Mr Cadden met with and interviewed Phillip Cook (HR Senior People Partner), Mrs Thomas-Hands, Ms Smith and Mr Ghafar. Also on 17 December 2021, Jordan Probert interviewed Eleanor Saunders, one of the relief pharmacists who had worked at St Davids, as part of Mr Cadden's investigation into the Claimant's grievance. The notes of all those interviews were also in evidence.

48. On 22 December 2021, Mr Cadden sent his grievance outcome report to the Claimant (at [247] – [250] of the Bundle). None of the Claimant's complaints were upheld.

49. On 30 December 2021, the Claimant exercised his right of appeal under the Respondent's grievance policy (at [251] – [260] of the Bundle). The Respondent appointed Ms Sekhon to chair the appeal.

50. On 31 December 2021, the Claimant tendered his resignation (at [261] – [262] of the Bundle). His last day of employment would be 25 March 2022. By a letter dated 5 January 2022, Mrs Thomas-Hands acknowledged the Claimant's letter of resignation but expressed concern that the Claimant "*may have resigned in haste"* (at [263] of the Bundle). By a letter dated 19 January 2023, the Claimant reiterated his decision to resign (at [264]).

51. On 19 January 2022, the Claimant attended a grievance appeal hearing before Ms Sekhon. He was again accompanied by his trade union representative, Ms Shah. The notes of that hearing were in evidence. Ms Sekhon's grievance appeal outcome was sent to the Claimant on 14 February 2022 (at [294] – [296] of the Bundle). Ms Sekhon upheld the findings and decision of Mr Cadden.

52. On 16 February 2022, the Claimant sent his concerns to the General Pharmaceutical Council ('the GPhC') (at [298] – [300] of the Bundle). On 3 March 2022, the GPhC replied to the Claimant and, so far as relevant, informed him of the following (at [301]):

> **...**
> Our decision about your concern
>
> We have reviewed your concern carefully, and discussed it with the GPhC Inspector who covers this particular pharmacy. The Inspector has assessed the risks raised by the information you provided, and contacted the GPhC Director for Wales and informed them of the issue. They have also discussed the issue with the Well Regional Manager. Having done so, they have discussed staffing levels and this is something the inspector is ensuring is at a safe level. In light of this, we don't think it is necessary to undertake a formal investigation into an individual's fitness to practise, and we feel that measures have been taken to reduce the risk of your experiences being repeated.
>
> We will keep your concern in our records because we may need to consider it if we get any further concerns about the pharmacy or pharmacy professional.
>
> Thank you again for raising this concern with us; it is very helpful to have this information.

53. The Claimant's employment with the Respondent ended on 25 March 2022.

Determination of the complaints

54. The Claimant contended that the Respondent breached the implied term of trust and confidence as detailed in the List of Issues, above. We considered the alleged conduct relied upon in turn.

Failure to address the Claimant's concerns

55. It was undoubtedly the case that the Claimant disagreed with the hours allocated to St Davids for the financial year 2021/22. The Claimant alleges that the Respondent failed to address his concerns regarding the impact of the allocated hours on patient and staff safety.

56. In our judgment, the Respondent did consider the concerns raised by the Claimant. However, they did not agree with those concerns. There was a fundamental difference of opinion between the Claimant and the Respondent. In one sense, the Respondent did not address the Claimant's concerns, certainly not in the way that he wished them to. But that was solely because the Respondent did not agree with the Claimant's view that the allocated hours would have an adverse impact on patient or staff safety.

57. It was not disputed that the decision on what level of hours to allocate to St Davids was for the Respondent (in this case, Mr Ghafar, who drafted the proposal and his managers, who approved it). It was a matter for the Respondent how it calculated what those hours should be. We were told (and it was not challenged) that the MAX:E software was used widely in the pharmacy industry, along with other modelling software products. It was entirely a matter for the Respondent that St Davids was brought within the MAX:E modelling system with effect from the financial year 2021/22.

58. Whilst the Claimant had knowledge of St Davids (having worked there for 15 years), the Respondent was not without its own expertise, knowledge and awareness of what staffing levels and budgets were appropriate to ensure it met its legal and regulatory obligations, whilst also running an efficient, effective and profitable business. As noted above, the Respondent operates over 700 pharmacies nationwide. In addition, the Respondent has its own regulatory obligations and responsibilities. We were referred to the "Standards for registered pharmacies," June 2018 published by the GPhC (at [396] – [411] of the Bundle). The standards contain five overarching principles (at [401]) and *"[R]esponsibility for meeting the standards lies with the pharmacy owner. If the registered pharmacy is owned by a 'body corporate' the directors must assure themselves that the standards for registered pharmacies are met"* (at [402]).

59. In the case of St Davids, the allocated hours were, in reality, the product of the MAX:E modelling and the analysis and input of Mr Ghafar, who is himself a qualified pharmacist of over 20 years. Mr Ghafar also had input from his area manager, Mrs Thomas-Hands.

60. The Respondent was entitled to utilise and rely upon the MAX:E modelling software. It was doing so across 700 of its pharmacies. However, importantly, in the case of St Davids, on-the-ground human knowledge was brought to bear on the figures generated for 2021/22 by

MAX:E. As explained above, the Respondent was conversant with the seasonal variations at St Davids (a factor MAX:E was not well versed at recognising). It was for that reason that Mr Ghafar made the business case for budgeting for a greater number of hours to be allocated to St Davids than had been calculated by MAX:E.

61. Mr Ghafar's evidence was that, in addition, the allocated hours were a minimum for St Davids, not a maximum. If need be, the Respondent would put in additional hours to ensure that St Davids could function properly and safely. In his witness statement, he set out in detail the work he undertook regarding the modelling and allocating of hours for St Davids (at Paragraphs 54 – 64). Mr Ghafar also set out his response to the concerns raised by the Claimant, in a detailed and considered manner (at Paragraphs 74 – 86).

62. The Claimant relied upon statutory provisions and regulatory guidance to support his assertion that the allocated hours were insufficient and risked patient safety. The Claimant was the Responsible Pharmacist ('RP') at St Davids. Reliance was placed upon the provisions of the Medicine Act 1968, the Medicines (Pharmacies) (Responsible Pharmacist) Regulations 2000 and the GPhC's "Standards for Registered Pharmacies (per Paragraph 5 of the Claimant's Further Information, at [56] of the Bundle).

63. In his oral evidence, the Claimant acknowledged that none of those provisions explicitly placed any responsibility, legal or regulatory, upon him as RP for setting staffing levels. Rather, the Claimant suggested that, without adequate staffing levels, his ability to meet his obligations as RP would be compromised.

64. In contrast, the GPhC "Standards for registered pharmacies" (which applied to the Respondent) specifically includes guidance on "*Setting staffing levels and responding to concerns about patient safety"* (at [114] – [115]).

65. Much of the focus in the evidence and submissions before us was on Standard 2.1 of the GPhC "Standards for registered pharmacies," which states (at [113] of the Bundle):

> There are enough staff, suitably qualified and skilled, for the safe and effective provision of the pharmacy services provided.

66. This was not, in our judgment, a situation where the Respondent decided the allocated hours and effectively told the Claimant to "like it or lump it." Mr Ghafar took time to explain to the Claimant, on a number of occasions, how the allocated hours had been calculated and how it was believed they would work in practice. The Claimant's detailed and lengthy objections to the allocated hours were considered and responded to.

67. On 17 November 2021, during one of a number of meetings with Mr Ghafar, the Claimant asked that the MAX:E modelling be run for each individual month in 2021/22, rather than as a 12-month average. Mr Ghafar agreed and on 23 November 2021, sent the results to the Claimant, along with his views of what the analysis showed (at [123] – [124] of the Bundle). Again, this was the Respondent actively engaging with the Claimant's concerns in an informed and reasoned manner. The Claimant did not agree with Mr Ghafar's analysis (per his email response of 29 November 2021, at [122] – [123]) but that is not the same as claiming that the Respondent "failed to address" the Claimant's concerns.

68. The evidence suggested that what the Claimant meant by "failed to address" his concerns was that the Respondent failed to undertake a wholesale reversal of the allocated hours. From the outset, the Claimant's opposition to the allocated hours was evident. As noted above, upon being made aware of the allocated hours, the Claimant was informing Mr Ghafar that he would have "*to review my own position and explore options if this is enforced by the business…any decision I might make to resign would be as a consequence of being placed in a position of having to manage an unmanageable service"* (in his email of 19 September 2021, at [141] of the Bundle).

69. The Claimant was of the view that any reduction in hours would compromise safety and reiterated that he would resign if the allocated hours were implemented in his email to Ms Smith on 28 October 2021 (at [137] of the Bundle):

> …
>
> I consider that any overall reduction in hours will compromise customer service, branch standards and patient safety.
>
> …
>
> I consider that to reduce hours in the seasonal way proposed is completely unworkable in practice and would render the branch unmanageable during the winter months. As responsible pharmacist I would consider closing the branch if standards or safety was compromised.
>
> I would have to consider reluctantly handing in my resignation if asked to manage an unmanageable service.

70. The Claimant repeated his view that he would leave the Respondent's employment unless the changes to St Davids' hours were reversed in his email of 29 October 2021 to Ms Lunardi, Mr Purchase and Ms Stone (at [136] of the Bundle):

> …I will not be with the business through next winter if the proposal…proceeds.
> …

> It would be impossible to maintain a safe and effective dispensing service and as Responsible Pharmacist I would have to consider closing the branch at times and/or reluctantly tendering my resignation as the branch would be unmanageable.
> …

71. The Tribunal found force in Ms Balmer's submission that, even taken at its highest, the Claimant's concerns were hypothetical. They were based on what the Claimant believed would happen. At the same time, the Respondent's belief that the numbers allocated to St Davids for 2021/22 were sufficient was similarly forward looking and speculative. The only way of knowing was to test them in practice.

72. We have to consider the parties' respective states of mind at the relevant time, not with the benefit of hindsight. When we do that, the Tribunal concluded that the Respondent was entitled, on an informed, reasoned and coherent basis, to hold the view that the allocated hours were appropriate for St Davids. The Claimant was quite entitled to disagree with both the allocated hours and the reasoning advanced by the Respondent generally and Mr Ghafar specifically to support the allocation of those hours at those levels. However, that disagreement, no matter how genuinely and keenly felt, did not reveal an actionable breach of contract on the part of the Respondent, still less one that was fundamental.

The grievance

73. In her written submissions, Ms Fadipe focussed entirely on the grievance process (rather than the grievance outcome decision itself) to support the allegation that the Respondent failed to address the Claimant's concerns about patient safety (at Paragraphs 55 – 66). This appeared at odds with the Claimant's pleaded case that *[I]n response to… [the grievance] outcome, the Claimant resigned on 30 December 2021…"* (Paragraph 23 of the Particulars of Claim at [26] of the Bundle, emphasis added).

74. Mr Cadden was independent of the Claimant, having not line managed him in any capacity before and having no involvement in the issues raised in the grievance. Mr Cadden met with the Claimant and also interviewed (or arranged to be interviewed) five other employees, including Mr Ghafar and Mrs Thomas-Hands. In his written statement, the Claimant referred to his meeting with Mr Cadden on 15 December 2021 and "*felt that the meeting went OK I had the chance to express my concerns and the impacts of the process so far"* (at Paragraph 71).

75. In the course of these proceedings, the Claimant highlighted a number of alleged shortcomings in the grievance process conducted by Mr Cadden, as distinct from his grievance outcome decision. Much of the cross-examination of Ms Sekhon focused on those alleged procedural shortcomings, as did Ms Fadipe's written submissions.

76. The Claimant's pleaded case cited the "*outcome"* of the grievance, not the procedure (as noted above). On 30 December 2021, the Claimant submitted his appeal against the grievance decision and stated as follows (at [251] of the Bundle):

> My reasons are stated in full by means of the annotations in red on the outcome notification attached.

77. Attached to the email was a copy of Mr Cadden's grievance decision, to which the Claimant had added his own comments in red (at [252] – [260] of the Bundle). According to the Claimant, as of 30 December 2021, these represented his "*reasons…in full"* for appealing the grievance decision. The following day, the Claimant tendered his resignation.

78. Nowhere in those reasons did the Claimant complain about the grievance process or the procedures adopted and followed by Mr Cadden.. Rather, he set out in detail his disagreement with Mr Cadden's conclusions and reiterated his opposition to the allocated hours. He did not suggest that other employees should have interviewed or that Mr Cadden should have pursued other lines of enquiry.. He did not suggest that Mr Cadden had pre-judged the outcome or conducted the grievance process with a closed mind.

79. Admittedly, the Claimant may not have been as aware of the processes and procedures adopted by Mr Cadden then as he has subsequently become. He expressed extensive views in his witness statement on the transcripts of Mr Cadden's interviews with other staff (at paragraphs 72 – 76). None of those views were expressed at the time in his appeal document on 30 December 2021, no doubt because at that time, the Claimant had not seen the transcripts.

80. It follows that, when viewed objectively, the Claimant was not of the view at the time that the grievance process was flawed, only that the decision was wrong. His criticisms of the process only arose later, as documents were made available, whether as part of the grievance appeal process or this litigation. Given that that Claimant resigned the day after he submitted his grievance appeal, any procedural failings (whether real or perceived) could not have played a part in the Claimant's decision to resign.

81. The Claimant invited the Tribunal to draw a negative inference from the fact that the Respondent had not called Mr Cadden to give evidence (at Paragraph 64 of Ms Fadipe's written submissions). It was not in dispute that Mr Cadden has left the Respondent's employment. We were not prepared to draw any such inference. The Claimant did not call Mr Cadden to give evidence either nor was it suggested that the Claimant had attempted to call him nor was there any application for a witness order. It was entirely open to the Claimant to secure Mr Cadden's attendance at the final hearing but he failed to do so. Given that the

Claimant alleged that the grievance was an integral part of one of his claimed fundamental breaches of contract, it could just as easily be argued that a negative inference could be drawn from his failure to make any effort to call Mr Cadden. Either way, the manner in which Mr Cadden conducted the grievance was incapable of being robustly tested and challenged. Instead, it was challenged by proxy via the appeal officer, Ms Sekhon and by reference to transcripts, emails and documents which were not known to the Claimant at the time that he resigned.

82. The Tribunal also found force in Ms Balmer's submission that the Claimant had already decided to resign, regardless of the outcome of the grievance. We detailed above the emails where the Claimant raised the possibility with the Respondent that he would resign. In addition, the Claimant placed in evidence copies of private WhatsApp messages between himself and Stacey Gregory, the Respondent's Pharmacist Manager at its branch in Porthcawl, covering the period from 16 September 2021 to 21 March 2022 (at [356] - [377] of the Bundle).

83. On 15 November 2021, the Claimant sent the following to Ms Gregory (at [366] of the Bundle);

> …I have written my grievance letter but waiting for PDA to proof read. May go for constructive dismissal claim down the line. All in confidence of course.

84. On 24 November 2021, over a week before he submitted his grievance, the Claimant sent Ms Gregory a draft letter of resignation, with the following request (at [366] of the Bundle):

> I would be grateful for any comments you might make before I tender the letter…

85. In response, on 25 November 2021, Ms Gregory responded that the letter "*sets up a Constructive Dismissal case if you choose to go that way"* (at [367] of the Bundle).

86. On 15 December 2021, the Claimant sent the following message to Ms Gregory (at [370] of the Bundle, emphasis added):

> …Had my grievance meeting today with Neal Cadden via teams. I think my relationship with Sam will be permanently damaged (oh well!). Not a nice experience but I think I got my points over. Once I get the outcome (hopefully next week), between me and you, I will resign regardless of the outcome. My trust and confidence in the business has gone. It's sad but I am only fighting for my colleagues and the community now.

87. For those reasons, the Claimant's criticisms of the grievance process and procedure post-dated his resignation and could not have informed his view that the Respondent was in fundamental breach of his contract of employment.

88. In addition, we found that the Claimant had already decided to tender his resignation by 15 December 2021, at the latest, irrespective of the grievance outcome. For that reason, the grievance outcome itself could have played no part in influencing what was already a pre-ordained decision to resign.

89. In the alternative, the Claimant disagreed with Mr Cadden's conclusions in the grievance decision. That disagreement was genuinely and sincerely held but did not demonstrate that the Respondent was not addressing the Claimant's concerns. It patently was. What Mr Cadden was not doing was agreeing with those concerns.

90. As such, the grievance outcome was not a breach of the Claimant's contract of employment, still less a fundamental breach.

91. Self-evidently and for the sake of completeness, the grievance appeal process conducted by Ms Sekhon could not have played a role in the Claimant's decision to resign, as the same was conducted and determined after he had tendered his resignation on 31 December 2021.

<u>The consultation process & the failure to consult with the Claimant</u>

92. It was not in dispute that the Claimant was not directly part of the consultation process undertaken by the Respondent, which began in October 2021. As explained by Mr Ghafar, that was because under the allocated hours for St Davids for 2021/22, the Claimant's post was not at risk of redundancy.

93. Who to consult was, ultimately, a matter for the Respondent. As the Claimant's post was not at risk, there appeared to be no statutory or contractual obligation to formally consult with him. That could not be said of the other staff at St Davids, whose posts and hours were not protected. One consequence of the allocated hours was that savings would need to be found in St Davids and that included likely reductions in staffing. That was the reason for the consultation process.

94. There appeared to be a degree of misunderstanding at the heart of this allegation. The Claimant appeared to believe that the consultation was not just about how the hours would be allocated (the 'how') but also, more fundamentally, about the number of hours to be allocated (the 'what'). That is why he believed he should have been consulted (in order that he his views on the allocated hours, the 'what', could be considered).

95. In that regard, the Claimant was mistaken. As made clear by Mr Ghafar in his evidence, the number of hours allocated to St Davids was "*locked in"* when it was accepted and included in the Respondent's annual budget. The 'what' was not part of the consultation, only the 'how.' The purpose of the consultation was not to consider whether the allocated hours for St Davids for 2021/22 should be implemented or whether, as

the Claimant was contending, the number of hours should be returned to previous levels. It was to consider how the allocated hours should be implemented and, specifically, where and how the required savings from staff costs should be made.

96. Indeed, as early as 20 September 2021, Mr Ghafar was informing the Claimant that he and Mrs Thomas-Hands "*will work with you to support any decisions we make on how we use the hours allocated to the pharmacy"* (at [140] of the Bundle, emphasis added).

97. As there was no proposal to change or reduce the hours allocated to the post of pharmacist, there was no obligation on the Respondent to formally consult with the Claimant, whereas it was obliged to consult with the other staff at St Davids because their posts were at risk.

98. In addition, as the allocated hours and the accompanying budget for those hours were "*locked in,"* the need to find savings in staff costs were inevitable. That was why the Respondent began the consultation process.

99. It follows that the allegation that the decision by the Respondent that staff reductions would take place regardless of the results of any consultation is misconceived and misunderstands the purpose and aim of the consultation process. Staff reductions were always anticipated by the Respondent once the proposal by Mr Ghafar had been approved by senior management, once the allocated hours for 2021/22 were set for St Davids and once the budget for the same was "*locked in*". The consultation was never about whether there would be staff reductions. It was about how those reductions would be realized. Again, it was about the 'how', not the 'what'.

100. The Claimant made a number of allegations about the manner in which the consultation process was conducted in respect of the staff. At one level, whilst he was entitled to his opinion on how the Respondent should have conducted that consultation, he was not directly affected by it, in that he was not party to the consultation process, his post never being under any threat. In that sense, any challenge to the consultation process on the grounds that it was conducted in breach of either employment law or contracts of employment are more properly for those staff who were subject to the consultation to pursue.

101. However, considered more broadly, the Claimant alleged that the manner of the consultation process breached his trust and confidence in the Respondent. In particular, reliance was placed on a letter sent to staff on 28 October 2021, following the first consultation meeting. A copy of that letter was the additional disclosure made by the Claimant in the course of the Tribunal hearing (and inserted at [412] – [415] of the Bundle)

102. The letter appeared to be a pro forma, which contained generic information and had not been populated with information applicable to St Davids or the on-going consultation process (save that the dates of the consultation period were included). Importantly, the number of hours per week that the Respondent was proposing to cut was not filled in. The letter was sent in the name of Mrs Thomas-Hands, who had chaired the meeting on 28 October 2021.

103. Annexed to the letter was a standard FAQ document (at [414] – [415] of the Bundle). In answer to questions about how the proposed changes had been arrived at and why they were being proposed, the FAQ document indicated that the recipient's manager had been involved in both reviewing workflow and proposing work patterns. In the case of staff at St Davids, the recipient's manager was the Claimant.

104. The information in the FAQ document was, in those regards, incorrect. The Claimant says that this was used to legitimise the consultation process and was a clear breach of the implied term of trust and confidence (at Paragraph 68 of Ms Fadipe's written submissions).

105. The Respondent says that the letter was sent in error. On 26 November 2021, Mr Cook (as HR Senior People Partner) went to St Davids to apologise to staff (as he recounted to Mr Cadden in the course of the investigation into the Claimant's grievance, at [202] of the Bundle and as accepted at Paragraph 15 of the Particulars of Claim, at [23]).

106. Mr Ghafar also apologised to staff (as also recounted to Mr Cadden, at [233]). Mr Ghafar was not challenged on that in cross-examination and we had no reason not to accept his account of apologising to the staff.

107. As such, we found that the letter was sent in error. It follows that it was not used to legitimise the consultation process, as alleged by the Claimant. That would suggest a degree of intent or deliberate action on the part of the Respondent in sending the letter. Rather, the Respondent made a mistake and apologised to staff for that mistake.

108. Did that mistake breach the implied term of mutual trust and confidence? In our judgment, when considered objectively, it did not. It was an error and was readily acknowledged as an error by the Respondent at the time. The staff were apologised to by both Mr Cook and Mr Ghafar. The Claimant was aware at the time of Mr Cook's apology. By his own admission, the staff were also very aware of his opposition to the allocated hours. As such, we were unable to find that the contents of the letter would have led staff to conclude that the Claimant supported the proposals.

109. We found that the Respondent conducted a fair and reasonable consultation process with those staff who were at risk. There were consultation meetings and appropriate information was eventually provided to them. Mr Ghafar recounted to Mr Cadden that the staff were

offered the opportunity to restart the process because of delays and issues with the paperwork (at [233] of the Bundle). His recollection was that all staff were happy to proceed without re-starting the process.

Breaches of contract: Conclusions

110. In conclusion, the decisions by the Respondent to incorporate St Davids into its MAX:E modelling software, to allocate the hours as detailed for 2021/22, to not change those allocated hours and to undertake a consultation process with those staff members affected by the allocated hours were all reasonably open to it. All of those decisions were for the Respondent to make and requiring the staff at St Davids, including the Claimant, to adhere to the allocated hours was a reasonable instruction.

111. Whilst the Claimant disagreed with the allocated hours, disagreed with not being consulted and disagreed with the manner in which the consultation was conducted, none of those decisions constituted breaches of the implied terms of the Claimant's contract of employment, still less fundamental breaches.

112. In addition, when viewed cumulatively, the Respondent's actions and decisions, in deciding upon the allocated hours, in deciding on the scope and purpose of the consultation process and in how it considered and responded to the Claimant's concerns and criticisms did not objectively breach the implied term of mutual trust and confidence.

The reason for the Claimant's resignation

113. Although we have found that there were no breaches of the Claimant's contract of employment, we were addressed on the reasons for the Claimant's resignation and so, for the sake of completeness, have made findings on that issue.

114. The Claimant says that he resigned in response to the alleged breaches of contract set out in the List of Issues and considered above. However, as discussed above, in reality, the Claimant had already decided to resign before the outcome of his grievance, if not sooner.

115. From the outset and as detailed above, upon being informed of the allocated hours for St Davids in September 2021, the Claimant's written response to Mr Ghafar on 19 September 2021 recorded that he was, even at that stage, contemplating the possibility of resignation. He repeated that sentiment on 28 October 2021 to Ms Smith and on 29 October 2021 to Ms Lunardi, Mr Purchase and Ms Stone.

116. In private, the Claimant was more candid. On 16 September 2021, he told Ms Gregory that if the Respondent did not listen to him about the proposed consultation, he would "*seriously consider leaving"* (at 356] of the Bundle). On 8 November 2021, he told Ms Gregory that he was "*well pissed off and preparing to resign. Considering whether I could*

claim for constructive dismissal" (at [357]). We have additionally detailed above the messages he sent to Ms Gregory on 15, 24 & 25 November 2021 and on 15 December 2021.

117. We found that, based upon this contemporaneous evidence, the Claimant decided to resign on 24 November 2021 at the latest, when he sent his draft resignation letter to Ms Gregory for her comments "*before I tender the letter"* (at [366] of the Bundle).

118. However, for the reasons detailed above, whenever the Claimant decided in his own mind that his contract of employment had been breached, we have found that there were no such actionable breaches.

Waiver

119. Similarly, notwithstanding our findings on the absence of any breaches, we were addressed on whether or not the Claimant had waived any breaches and have, as a result, made findings on that issue.

120. We again found force in Ms Balmer's submission that the Claimant should arguably have resigned in September 2021 when he was informed of the allocated hours, such was his strength of feeling at the time. He was clear in his view that no cuts to hours should be made and that the consultation process had to stop. The Respondent made it clear to him that the allocated hours would be implemented at St Davids and the consultation process would continue. However, the Claimant did not resign.

121. It was clear from the Claimant's messages to Ms Gregory that he was of the opinion that his contract of employment had been fundamentally breached from as early as 15 November 2021 (given that he "*may go for constructive dismissal claim down the line"*, at [366] of the Bundle). Again, the Claimant did not resign.

122. The Claimant had decided that he was going to resign by 24 November 2021 (as found above). Yet he still did not do so. Instead, he lodged a formal grievance on 3 December 2021, engaged in the grievance process, awaited the outcome of his grievance (which he received on 22 December 2021), lodged his appeal against that outcome (on 30 December 2021) and then resigned on 31 December 2021.

123. Had there been any fundamental breaches of the Claimant's employment contract, the Tribunal would have gone on to find that, by reason of delay, the Claimant waived such breaches.

124. However, such findings are academic as, for the reasons detailed above, there were no such breaches to waive.

Ordinary Unfair Dismissal: Conclusions

125. In order for a resignation to be a dismissal for the purposes of section 95(1)(c) of the ERA 1996, there must be a fundamental breach of the employment contract by the employer, the breach must have caused the employee to resign and the employee must not delay resigning or act in a manner such as to waive or affirm the employer's breach.

126. The Respondent did not breach the Claimant's contract of employment as alleged. It follows that the complaint falls at the first hurdle. The Claimant's resignation of 31 December 2021 was not a dismissal. The Claimant was not constructively dismissed.

127. As such, the complaint of ordinary unfair dismissal is not made out and must be dismissed.

Automatic Unfair Dismissal

128. The Tribunal's finding that there were no breaches of the Claimant's employment contract has a conclusive effect on his complaint of automatic unfair dismissal.

129. The Claimant says that he made a number of protected disclosures. As set out above (and we did not understand the parties to disagree), the key focus in a complaint of constructive unfair dismissal for making protected disclosures is that the reason (or if more than one, the principal reason) for the repudiatory breach of contract that led to the resignation was the making of those protected disclosures by the Claimant.

130. In other words, the Claimant must show on balance that the Respondent fundamentally breached his contract of employment because he made protected disclosures.

131. However, where, as here, there were no fundamental breaches of the Claimant's employment contract (whether individually or cumulatively), the complaint of automatic constructive unfair dismissal similarly falls at the first hurdle. Even if the Claimant made protected disclosures (which was denied by the Respondent), his employment contract was not fundamentally breached in response or at all.

132. We agreed, in part, with Ms Balmer's submission that in reality the reason the Claimant resigned was because of the Respondent's decision to reduce the budgeted hours at St Davids. That decision was taken by the Respondent in the summer of 2021 and communicated to the Claimant on 16 September 2021. The Claimant did not make his first alleged protected disclosure until 19 September 2021.

133. It follows that the allocated hours were decided before the Claimant made any alleged protected disclosures and, self-evidently, could not

have been made in response to those alleged protected disclosures. To that end, the Claimant's case again falls at the hurdle of causation.

134. However, the decisions to not formally consult with the Claimant, to not change the allocated hours in response to the Claimant's concerns and the grievance outcome all post-dated some of the alleged protected disclosures.

135. Again, for the sake of completeness and because we were addressed on them, we have gone on to make findings on whether the Claimant made protected disclosures (albeit that this complaint fails in any event, for the reasons set out above).

Protected disclosures

136. Although the List of Issues identified six alleged protected disclosures, the Claimant effectively made the same disclosure to different audiences. All of them related to the allocated hours and set out the Claimant's various concerns about the impact of those hours on St Davids, in respect of both patient and staff safety. In addition, it was alleged that information relating to those concerns was being concealed by what the Claimant alleged to be a sham consultation process.

137. The Tribunal had no hesitation in finding that the Claimant genuinely believed that the allocated hours for St Davids for 2021/22 would adversely impact upon patient safety and the health and well-being of himself and the staff. That was self-evident from the various communications which the Claimant sent to the Respondent, which began within days of being informed of what the allocated hours would be and concluded with his letter of resignation on 31 December 2021 (and thereafter, his appeal against the grievance outcome).

138. We did not understand it to be in dispute that the Claimant was not saying that patient and staff safety was at risk at the time that he made his alleged disclosure. He was, in effect, warning the Respondent that if the allocated hours were implemented in their proposed form, there would, in his view, be an inevitable risk to patient and staff safety. In other words, his case was that the information he was imparting tended to show that risks to patient and staff safety were likely to occur.

139. The Tribunal also concluded that the alleged protected disclosures did contain and convey sufficient factual content to be disclosures of information. Whilst they also contained much that was the Claimant's own opinion or which could be described as allegation, when read as a whole, each alleged protected disclosure was also replete with factual content, from which the Claimant derived his opinions and the allegations he made about what was likely to happen if the allocated hours remained unchanged.

140. We next considered what the information tended to show. As recorded in the List of Issues (above), the Claimant's case was that the information he disclosed tended to show that the Respondent would be in breach of its obligations under the GPhC "*Standards for registered pharmacies"*, the Medicines Act 1968, and the Medicines (Pharmacies) (Responsible Pharmacist) Regulations 2008; that the health and safety of patients and staff was likely to be negatively affected; and that that information was being concealed.

141. The GPhC standards are not legal obligations (for the purposes of section 43B(1)(b) of the ERA 1996). They are professional standards and despite the observation that the scope of what is a legal obligation should be "*broadly drawn"* (per Parkins v Sodexho [2002] IRLR 109. EAT), in our judgment it cannot be extended by a failure to adhere to professional standards set by the GPhC. Indeed, Ms Fadipe did not refer to the GPhC guidance in her written or oral submissions, perhaps for that reason.

142. Similarly, Ms Fadipe made no reference to the Medicines (Pharmacies) (Responsible Pharmacist) Regulations 2008 in her written or oral submissions. On that basis, the Tribunal was not addressed on which part of the regulations were being relied upon or how it was claimed that the information disclosed tended to show that the Respondent would be in breach of the regulations. All we had were the assertions made in the Further Information provided by the Claimant in the course of these proceedings (at [54] – [64] of the Bundle), which were not developed, addressed or advance by Ms Fadipe.

143. In addition, the Claimant confirmed in cross-examination that he was not familiar with the above legal provisions and, importantly, that he did not have them in mind when he made his disclosures of information. It follows that a likely breach of the Medicines (Pharmacies) (Responsible Pharmacist) Regulations 2008 could not have formed part of the Claimant's reasonable belief of what the information he disclosed tended to show.

144. As such, we were unable to find that the information disclosed by the Claimant tended to show that a breach of the Medicines (Pharmacies) (Responsible Pharmacist) Regulations 2008 was likely (still less, that the Claimant reasonably believed that to be the case).

145. However, Ms Fadipe did cite section 72A(1) of the Medicines Act 1968 in her written submissions (at Paragraph 80). In terms, section 72A(1) (as amended) places a duty on the responsible pharmacist:

> …to secure the safe and effective running of the pharmacy business carried on at or from the premises in question so far as concerns—
>
> (a) the retail sale at or from those premises of medicinal products (whether they are on a general sale list or not), and

(b) the supply at or from those premises of such products in circumstances corresponding to retail sale.

146. In his oral evidence, the Claimant similarly confirmed that he was not familiar with the above provision and, importantly, that he did not have it in mind when he made his disclosures of information. It follows that a likely breach of section 72A(1) of the Medicines Act 1968 could not have formed part of the Claimant's reasonable belief of what the information he disclosed tended to show.

147. We take a detour in the List of Issues to deal in short order with the allegation that the Claimant's disclosures of information were being deliberately concealed by the Respondent through a sham consultation process.

148. Ms Fadipe did not address us on this aspect of the Claimant's case, in either her written or oral submissions.

149. The consultation process was not a sham. It was genuine, appropriate and reasonably conducted. As detailed above, we found that the Claimant had misunderstood and misstated the purpose of the consultation. It was about the 'how,' not the 'what'. In addition, the errors with the documentation were just that: errors. They were not evidence of the Respondent seeking to deliberately conceal or misrepresent information.

150. The Claimant did not agree with the consultation process, because he did not agree with the subject matter being consulted upon (namely, how to implement the allocated hours) and because he believed (wrongly) that he was unfairly excluded from the consultation process. He made those feelings clear in his disclosures. However, we concurred with Ms Balmer in her written submissions that the disclosures relied upon by the Claimant did not remotely suggest that he believed the consultation process was being used to conceal his earlier disclosures.

151. In the alternative, even of the Claimant genuinely believed at the time that the information he was disclosing was being concealed through a sham consultation, that belief was not reasonably held (because the consultation was patently not a sham and the Claimant's concerns were not being concealed).

152. As such, we did not find that the information disclosed by the Claimant tended to show that his belief that the Respondent was in breach of its legal obligations or was likely to adversely affect health and safety was being concealed (as alleged or at all).

153. We conclude with health and safety. Although the List of Issues referred to the health of both patients and staff, Ms Fadipe only addressed the well-being and mental health of the Claimant's colleagues in her written

submission on section 43B(1)(d) of the ERA 1996 (at Paragraph 82). She did not develop this point further in oral submissions.

154. However, it was clear from the content of the information disclosed by the Claimant in his alleged protected disclosures that he believed that there was a risk to both patient and staff safety if the allocated hours were implemented. Was that belief reasonable (in that the Claimant reasonably believed that the information disclosed tended to show that a risk to the health and safety of patients and staff was likely to occur)?

155. In our judgment, that belief was reasonably held. The Claimant set out in detail in his various emails and the grievance how and why be believed that the allocated hours would have an adverse impact on the running of St Davids. From that, he concluded that that there was a risk to the safety of patients (because of a lack of staff hours when compared with the demands on St Davids) and of the staff (because of the additional pressures that they would face in attempting to deliver a service which was under-resourced).

156. We remind ourselves that the Respondent, for detailed, informed and cogent reasons, disagreed with the Claimant's analysis of what was likely to occur. As found above, that disagreement was not in breach of the implied term of mutual trust and confidence. But that does not prevent the Claimant's concerns about what he believed was likely to occur in respect of health and safety fulfilling the criteria for protection under the ERA 1996.

157. We were not addressed by either party on whether the Claimant reasonably believed that the disclosures were made in the public interest. However, given the content of the disclosures and our findings that it was reasonable for the Claimant to believe that there was a risk to the health and safety of the public and staff who were responsible for serving the public (and mindful of the services being provided to the public), we concluded that the Claimant did reasonably believe that the disclosures were being made in the public interest.

158. For those reasons, we found the Claimant did make protected disclosures on the following occasions:

    158.1. In his email to Mr Ghafar on 19 September 2021 (at [140] – [142] of the Bundle);

    158.2. In his email to Mr Ghafar on 28 October 2021 (at [137] – [139]);

    158.3. In his email to Ms Smith, also on 28 October 2021 (at [136] – [137]);

    158.4. In his email to Ms Lunardi, Mr Purchase and Ms Stone on 29 October 2021 (at [135] – [136]);

158.5. In his email to Mrs Thomas-Hands and Mr Ghafar on 18 November 2021 (at [126] – [127]); and

158.6. In his grievance letter to Ms Lunardi on 3 December 2021 (at [152] – [155]).

159. However, we reiterate that the Respondent did not breach the Claimant's contract of employment, fundamentally or at all, in response to him making those protected disclosures. Rather, the Respondent engaged with the Claimant, had regard to his concerns, considered his views and reached a different conclusion. The conclusion it did reach (that the allocated hours were suffice and would not risk patient or staff safety) was informed, considered, rational, cogent and reasonably open to it.

EMPLOYMENT JUDGE S POVEY

Dated: 26 October 2023

Order posted to the parties on 30 October 2023

For Secretary of the Tribunals Mr N Roche