EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
DR A DAVIES	**V**	**CRESCENT DENTAL LTD.**

HELD AT: **CARDIFF** **17, 18, JULY 2018**

SWANSEA **29, 30, 31 JANUARY 2019**

BEFORE: **EMPLOYMENT JUDGE W BEARD**
MEMBERS: **MRS J KIELY**
MR M PEARSON

REPRESENTATION:

FOR THE CLAIMANT: **Mr Manley (Counsel)**

FOR THE RESPONDENT: **Mr Williams (Counsel)**

JUDGMENT

1. The claimant's claim that she was subjected to detriment on the ground of having made a protected disclosure pursuant to sections 47B and 48 of the Employment Rights Act 1996 is well founded.

2. The claimants claim of sex discrimination pursuant to section 13 of the Equality Act 2013 is not well founded and is dismissed.

3. The claimant's claims of maternity discrimination, race discrimination, breach of contract and unlawful deduction of wages are dismissed upon withdrawal.

4. This matter will be set down for a telephone preliminary hearing to give directions for the preparation towards a remedy hearing.

REASONS

Preliminaries

1. The Tribunal was provided with a bundle of documents in excess of 400 pages in addition further documents were introduced in the course of the hearing. However, the Tribunal was only referred to a small proportion of those documents during the course of the hearing.

2. The claimant gave oral evidence. The respondent called oral evidence from: Mrs E Anyadike; Mrs Sonia Patel, Mrs I Williams and Dr Mark Waters.

3. The claimant's claim is that she suffered detriment because she had made a public interest disclosure. The claimant contends that she made a qualifying disclosure by raising health and safety/legal obligation issues about the approach to sterilisation of equipment. The claimant identifies, termination, the manner of investigation and seeking to justify termination as detriment.

4. The respondent contends it terminated the claimant's contract on the grounds of conduct. The respondent contends that there was no qualifying disclosure. In closing submissions the respondent contended, alternatively, that there was a course of conduct which led to the claimant's dismissal cumulatively.

The facts

5. The tribunal must express, with regret, that, apart from Sonia Patel, we found that the claimant and the other witnesses for the respondent did not give reliable evidence and we had significant doubts as to their credibility in parts. Accordingly, we have, in the main, relied on the documents we were taken to as a source of evidence for our conclusions.

6. The claimant worked at the respondent dental practice subject to a contract which both parties are content to accept means that she is a worker within the meaning given in the Employment Rights Act 1996 and the Equality Act 2010. For the purposes of this judgement we shall refer to this as the claimant's employment and the respondent as her employer.

7. The respondent is a dental practice. Dr Waters is the senior Dentist and owns the respondent, he also owns a care facility. The claimant is a qualified Dentist who was also seeking to continue post graduate education along with her role with the respondent. The respondent engaged the claimant to be a Dentist in its practice. The claimant began her employment on 22 July 2016 and the contract was terminated on 22 June 2017. The respondent received a telephone call from the claimant's previous employer indicating that the employer considered the claimant problematic. The respondent ignored that information and brought the claimant into the practice in any event.

8. In November 2016 an issue arose about the claimant maintaining records. A dental nurse had reported that the claimant had incorrectly recorded treatment on a dental record. Dr Waters arranged a meeting with the claimant. After the claimant had been invited to the meeting but before the meeting took place Dr Waters was sent an email about the claimant's conduct. The email reported that the claimant in discussion with a dental nurse had said that "someone had dobbed her in". The report of the conversation set out that the claimant had identified the person she thought responsible for reporting her and that the claimant had said she would take that person down with her.

9. There is a dispute as to when the meeting took place on 21 or 23 November 2016. The claimant contends the 23 November was the date of the meeting. We reject that evidence; the meeting is shown by contemporaneous emails to have taken place on 21 November (p. 52). The claimant also contends that the notes of the meeting we have been shown were not contemporaneous but recorded as later recollections. An email shows (p.54a) that minutes, at least in an early draft form, were in preparation on 23 November 2016; in our

judgment the minutes reflect the matters discussed at the meeting. The claimant in evidence did not dramatically differ from the recorded elements. We also come to this conclusion because of the date of the email and the fact that the notes indicate Dr Waters recommending a course for the claimant to undertake and he reminded the claimant of that issue in the email (p.52). We consider that the claimant's evidence that she was not sent the minutes is likely to be correct.

10. The meeting did not generally deal with record keeping, its initial purpose, but concentrated on the claimant's relationships with the dental nursing staff. The notes indicate that the claimant admitted some fault in letting off steam when talking to the nurses.

11. In the early months of 2017, the claimant began treating her then boyfriend (now husband) at the practice, with four treatments in total. Some of the treatment was medical and some cosmetic. The medical information was recorded fully, the cosmetic information less so. The claimant admitted (in a meeting which we deal with below) that the notes recorded at the practice about this treatment were not adequate. The claimant informed us that she had sent the relevant information, not recorded in the notes, to the RAF dentist with whom Mr Davies was registered. Dr Waters was aware of this failure in record keeping soon after the third appointment, however he decided to do nothing about it at that stage an issue we deal with further below.

12. In March 2017 the claimant raised a complaint about a particular dental nurse (referred to hereafter as nurse A). The complaint was that the nurse had informed the claimant that she ordered a particular composite for fillings when she had not done so. Nurse A also raised a grievance in relation to this as to the way in which the claimant approached the matter with her. It appears that despite discussions there was no formal resolution in respect of either the matter raised by the claimant or the grievance made against her.

13. On 5 April 2017 the claimant raised an issue about sterilisation of equipment involving nurse A (p. 65). A meeting was held between the claimant and Isobel Williams. The claimant raised many complaints about the conduct of nurse A at this meeting. However, the claimant raised the following complaint specifically: the claimant had instructed nurse A to sterilise a dental mirror using a piece of equipment called an autoclave, nurse A had not sterilised the mirror in that way but had, instead, cleaned the mirror with a sterilising wipe. On the 10 April 2017 the issue was discussed with nurse A at a meeting with Isobel Williams. At that meeting it appeared that nurse A admitted not following the instruction the method of sterilisation. In evidence both the claimant and Dr Waters indicated that if such an instruction is given to a dental nurse the instruction should be followed by the nurse. It was accepted by the respondent that the matters raised by the claimant were serious. It was specifically accepted that the claimant could delegate responsibilities for sterilising equipment to nurse A if she provided appropriate instructions (p. 220).

14. The respondent did not accept that the claimant's complaint raised health and safety issues. The tribunal found Dr Water's evidence on this particularly

troubling. He accepted that sterilisation of equipment was to prevent the danger of cross infection. He accepted that these were standards set down by a professional body to avoid such dangers of cross infection. However, he then went on to say, when it was put to him that if such cross infection occurred the outcome could potentially be serious, that there was no real risk. He modified his evidence in a number of ways when asked questions on this. For instance, he agreed that the risk of infection would be greater if an extraction was undertaken, but then qualified that by saying the incident in question did not involve an extraction. We were particularly concerned to discover that nurse A had recently been appointed to have overall responsibility for ensuring sterilisation standards but, according to Dr Waters, this did not concern him particularly in respect of this incident. Our overall conclusion was that Dr Waters was engaged in an attempt to obfuscate issues when he gave evidence on this. In our judgment the claimant was clearly providing a complaint as to the proper methods of sterilisation and as such health and safety was at the heart of that issue.

15. On the 11 April 2017 Isobel Williams approached nurse A in the staff room. When asked by Isobel Williams why she appeared subdued nurse A made several allegations against the claimant. A meeting was held with the claimant on 12 April 2017 no details of the allegations were provided to the claimant at this meeting other than they related to nurse A and were of race and religious discrimination. The claimant indicated her view that the grievance raised was a direct response to the claimant having raised issues about nurse A's practice.

16. The claimant was called to a further meeting on 13 April 2017 with Mrs Anyadike who was appointed by the respondent to investigate matters. At this meeting the specific allegations were put to the claimant and she provided a response to them.

17. There is a dispute as to whether the claimant agreed to the race allegations being dealt with separately and before the practice allegations made against nurse A. There are notes on the 12 April meeting which tends to indicate that the claimant endorsed such an approach (pp. 71 and 74). However, it is also clear that the claimant was seeking a different approach by the 13 April meeting when the specific allegations had been put to her (p. 78). In our judgment there was never a true meeting of minds on the approach to be taken to dealing with matters.

18. The only step taken by the respondent in investigating this matter was to hold a joint meeting with the claimant and Nurse A. It is unclear what the purpose of the meeting was as it would appear that neither the claimant or Nurse A had agreed to the meeting as mediation for example. The meeting was not a success either as mediation or as investigation. The respondent then contacted the police reporting the claimant on the basis of the allegations from Nurse A. It appears that this was done without the involvement or permission of Nurse A. The respondent then appears to have put all matters on hold.

19. The claimant began looking for work elsewhere whilst continuing to work for the respondent. She contends that she was offered employment which was withdrawn. The claimant contends this is as a result of the respondent

providing information to undermine her application. Her evidence is that she was told that the Local Health Board had informed the prospective employer about a police investigation into racism and following this the offer of employment was withdrawn. The tribunal is unable, on the basis of this evidence, to say who informed the Local Health Board. The issues had been reported to the police and was known to the respondent, the source could have been from either. We view this as the claimant interpreting minimal evidence into a fact, i.e. that the respondent had provided this information directly. This impacts on our view of the reliability of the claimant's evidence.

20. On the 10 June 2017 the claimant had been speaking to colleagues in the staff room about a board game that she had played the previous weekend. It is clear from the evidence that this board game was very unsavoury and involved creating statements by combining elements of those statements on two groups of cards. The resulting completed statement would be seen as very offensive. It is apparent that some members of the respondent's staff were disturbed by this and, although no formal complaints were made, raised the issue with the management of the respondent. The respondent, as a result, conducted an investigation into these matters. Following the investigation the claimant was asked to attend a meeting with Dr Waters.

21. Dr Waters had a short conversation with the claimant in the garden on 21 June 2017. The claimant contends that in this conversation Dr Waters became aware the claimant was pregnant. The claimant's position is that she told Dr Waters that she would discuss her health condition with Dr Waters in the coming months. Her view that Dr waters understood this to relate to pregnancy as he gave her "a look of realisation". Dr Waters has no recollection of this conversation, however he does say, as is common ground, that the practice was aware of the claimant having a long-term health condition in any event. The claimant contends that when she had become aware that she was pregnant and had told some colleagues and had told them to keep the matter confidential but that she believes they did not. Ms Patel was one of the individuals the claimant told, she was clear in evidence that she had kept the issue confidential. In our judgment there is insufficient evidence to conclude that the respondent and particularly Dr Waters was aware the claimant was pregnant. A cryptic comment about a health condition does not naturally lead to a belief in pregnancy especially when it is known that the claimant had a pre-existing condition. We do not consider that there is any evidence to support the view that something the claimant had said in confidence was transmitted to the respondent. We view this as the claimant's tendency to fill in gaps in evidence with highly speculative conclusions again causing doubts on her reliability.

22. On the 22 June 2017. At this meeting Dr Waters raised the issue of the claimant treating Mr Davies and not keeping the appropriate records. Dr Waters was asked why this issue had not been raised before with the claimant and why, in particular, was it being raised at this point. His answers were that he had let the matter fall behind because of various issues including his own appearance before the General Dental Council. We found that evidence unconvincing for a number of reasons. Firstly, record keeping was part of the complaints levelled against him by the GDC. Secondly, the meeting was arranged to deal with the comments made by the claimant, we can see no connection with that issue which would remind Dr Waters of the

previous failure in record keeping. Thirdly, Dr Waters in his evidence was keen to point out the importance of record keeping in the professional rules governing the Dental profession, however those rules refer to "contemporaneous" recording. Dr Waters could not explain why this failure to record contemporaneously was so important in June when it had not been when he was aware about it in February. We did not consider his evidence credible in this regard. In our judgment the records were raised as an issue because the respondent had specific evidence which it could rely on rather than the evidence of opinion which might affect the strength of other complaints and therefore this was a more robust means of justifying the termination of the claimant's contract.

The Law

23. Section 4 of the Equality Act 2010 provides:

> *The following characteristics are protected characteristics—*
> *----------*
> *sex;*

24. Section 13 of the Act provides:

> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

25. In respect of direct discrimination, the Tribunal has to consider whether the Claimant's treatment has arisen out of her gender (in this case because she was pregnant)? The tribunal is required to examine evidence in a broad way in dealing with issues of discrimination. We are not concerned with an overt motive (whilst such a finding would obviously be relevant) so much as examining the mental processes (conscious or subconscious) of those alleged to have unlawfully discriminated. We must consider the approach in ***Anya –v- University of Oxford & Anr. [2001] IRLR 377*** which demonstrates that it is necessary for the employment tribunal to look beyond any particular act or omission in question and to consider background to judge whether the protected characteristic has played a part in the conduct complained of. This is particularly important in establishing unconscious factors in discrimination. ***Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** indicates that the tribunal in examining whether there has been less favourable treatment compared to a real or hypothetical comparator should note that a bare difference in treatment along with a difference in the protected characteristic is insufficient. It is always necessary to find that the protected characteristic is an operative cause of the treatment. In ***Zafar v Glasgow City Council [1998] IRLR 36*** it is made clear that unreasonable treatment should not necessarily lead the employment tribunal to a conclusion that the treatment was due to discrimination. Unfairness does not, even in an employment situation, establish discrimination of itself. Further a tribunal is not entitled to draw an inference from the mere fact that the employer has treated the employee unreasonably ***see Bahl v The Law Society and others [2004] IRLR 799***.

26. The Employment Rights Act (ERA)1996 provides:
    26.1. In section 43A:

> *(i)n this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H*.

26.2. In section 43B:

> *(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,*
> ---

27. In ***Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436*** it is made clear that when considering whether there has been a disclosure the proper test is whether there is "sufficient factual content and specificity such as is capable of tending to show" the claimant is raising one of the matters protected e.g. health and safety.
    27.1. In ***Fecitt & Ors v NHS Manchester EWCA Civ 1190*** Elias LJ held that liability arises if the protected disclosure is a material (more than trivial) factor in the employer's decision to subject the claimant to a detrimental act. Dealing with an argument related to the applicability of interpretation of discrimination law this area he considered that the reasoning in EU analysis is that unlawful discriminatory considerations should not have any influence on an employer's decisions and that the same principle is applicable where the objective is to protect whistleblowers.
    27.2. This creates an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair.
    27.3. The PID provisions also raise issues on the burden of proof. In respect of detriment there is a reversal of the burden of proof once a claimant has proved that they have made a protected disclosure and suffered a subsequent detriment, section 48(2) Employment Rights Act (ERA) 1996 places the burden of proof on the respondent to prove, on the balance of probabilities, that the treatment was "*in no sense whatsoever"* on the ground of the protected disclosure.
    27.4. In our judgment, following the above, the tribunal will have to consider whether the alleged detriments were on the grounds of the claimant having made a disclosure. Taking account of the mental processes (conscious or unconscious) of the decision maker.

28. The meaning of public interest has been dealt with by the court of appeal in ***Chesterton Global Ltd & Anor v Nurmohamed & Anor (Rev 1) [2017] EWCA Civ 979***. The case indicates that the tribunal must look at the character of the disclosure in deciding whether the claimant could reasonably believe it to be in the public interest. It is suggested that the following four elements could assist in deciding that character (a) the numbers in the group whose interests the disclosure served; (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a

disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect; (c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people; (d) the identity of the alleged wrongdoer- the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" . However, the court of Appeal also indicates that care ought to be taken in the approach with the tribunal considering considering all the circumstances of the disclosure.

29. Detriment is to be considered in the same manner as it would for discrimination cases i.e. that a reasonable worker would or might take the view that he had been disadvantaged in the circumstances in which he thereafter had to work ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285.*** There is support for this approach to be found in ***Pinnington v The City & County of Swansea and Anr. UKEAT/0561/03*** where HHJ McMullen refers to ***Shamoon*** in dealing with the issue of detriment (paragraph 81) albeit obiter and also in **Dr I M Korashi V Abertawe Bro Morgannwg University Local Health Board *UKEAT/0424/09***

30. There must be a link between the detrimental treatment and the disclosure. Also, this must be “deliberate” in the sense of a conscious or unconscious motivation on the part of the respondent ***London Borough of Harrow v Knight [2003] IRLR 140***.

Analysis

31. Dealing first with sex discrimination. Having found that the respondent was not aware of the claimant’s pregnancy we cannot conclude that pregnancy was an operative cause of the decision to terminate the claimant’s contract. On that basis the claimant’s claim, which is based on a discovery of her pregnancy as the motivation for the termination of her contract does not cross the first hurdle. In our judgment the claimant’s claim of sex discrimination is not well founded and is dismissed.

32. It seems clear to us that, in complaining about the failure of Nurse A to sterilise equipment as instructed the claimant made a qualifying disclosure which was a protected disclosure.

33. The disclosure clearly covered potential health and safety issues.
    - 33.1. In the context: Nurse A was the sterilisation lead at the practice: the claimant was indicating Nurse A had failed to follow a specific instruction on a sterilisation process: in the context of a dental surgery sterilisation of equipment is part of the protocols which have to be followed: such protocols are imposed to protect against cross contamination.
    - 33.2. Both parties agreed that the dentist’s instruction on sterilisation should be followed.
    - 33.3. Therefore, when the claimant raised the matter of a failure to follow an instruction it carried with it the context of the health and safety matters with which sterilisation is concerned.

33.4. There was a description of a factual circumstance sufficient to amount to amount to "information" in the context. Those factual circumstances which the claimant reasonably believed related to an issue of health and safety.

34. The claimant was reasonable in believing this disclosure was in the public interest.
    34.1. We cannot accept the respondent's submission that the risks were so low that the claimant could not have believed she was raising these matters in the public interest. Upholding protocols designed to protect patients from cross contamination obviously has a public interest element.
    34.2. The person complained about was the person with responsibility for sterilisation, this places her in category that is different from the general dental nurse.
    34.3. The action, on the claimant's account was deliberate. Again, this raises the issue above that of an accidental failure.
    34.4. In our judgment the disclosure was in the reasonable belief of the claimant in the public interest.

35. Termination of the claimant's contract is a detriment in our judgment. Any reasonable person would consider the ending of a contract in this way as disadvantageous to them.

36. There is sufficient evidence for us to consider that there is some connection with the disclosure and the detriment.
    36.1. The respondent was, in our judgment, becoming dis-enamoured of the claimant from, at the latest, March 2017 onwards when the claimant raised issues about Nurse A and the issue of ordering composite for fillings. It is clear to the tribunal that given the experience in November 2016 that the respondent considered the claimant had problems with the professional approach to be taken to workplace relationships which was gradually reinforced over time.
    36.2. The disclosure made in April led to the claimant becoming, in the respondent's estimation, more problematic. It is clear that race discrimination complaints, whatever their veracity, were connected with the claimant raising the disclosure. We take the view that the respondent understood this connection.

37. In those circumstances we consider that the claimant has proven disclosure and a detriment with sufficient connection so that the burden is placed on the respondent to demonstrate that the termination was in no way whatsoever connected with the disclosure. In our judgment the respondent has not demonstrated that the termination of the contract was for record keeping. We have no doubt that the workplace relationships, the fact that discrimination claims had been raised, the general problem with the claimant talking about the unsavoury board game all played a part in the respondent's decision. However, we are not able to conclude that the disclosure was in no way whatsoever a reason for this detriment. The respondent has not provided us with the genuine reason in the evidence given and although we conclude that the underlying reason was multifactorial we cannot exclude the claimant making the disclosure as part of that.

38. Given those finding we consider that the claimant's claim of detriment on the grounds of having made a public interest disclosure is well founded. There shall be a further hearing to consider the appropriate remedy in this case.

_____

Employment Judge Beard

Date: 18 February 2019

JUDGMENT SENT TO THE PARTIES ON

.....23 February 2019.....

.....
FOR THE TRIBUNAL OFFICE