EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Francisca Van Der Lith	**v**	**R1. RB Healthcare Ltd** **R2. Mr R Bhatia**

Heard at: Leeds by CVP **On: 6-7-8 July 2021**

Before: Employment Judge O'Neill

Sitting with Mrs S Sharma and Mrs N. Arshad – Mather

Appearance:

For the Claimant: Ms R Mellor of Counsel

For the Respondent: Ms G Boorer of Counsel

RESERVED JUDGMENT

1. The claim for automatic unfair dismissal (whistleblowing) succeeds.
2. The complaint of detriment (whistleblowing) fails.
3. The complaint of indirect sex discrimination fails.
4. Unlawful deduction from wages (overtime) succeeds.

REASONS

Background

1. The first respondent is a pharmacy business of which the second respondent is the principal director and a working pharmacist. The claimant is a pharmacist who was employed from 3 February 2020 until 31 July 2020. She was engaged subject to a probationary period of three months to expire on 3 May 2020. She was dismissed following a meeting with the second respondent on 1 July 2020, because her conduct and performance were allegedly unsatisfactory during the probationary period which it brought to an end on 31 July 2021. The claimant's disputes unsatisfactory performance and conduct and contends that she was dismissed because she had raised public interest disclosures on 18 June 2020 to the second respondent and on 29 June 2020 to Mr Razwan.

Claims

2. The Claimant brings claims for
    a. Automatic unfair dismissal (whistleblowing)
    b. Detriment (whistleblowing)
    c. Indirect sex discrimination (excessive hours)
    d. Unlawful deduction from wages (overtime)
3. The claims under S45A (Detriment / Working Time) and S101A (automatic unfair dismissal / working Time) Employment Rights Act 1996 (ERA) are withdrawn.

Issues

4. The issues are agreed as being those set out in the case management order of Judge Maidment on 12 February 2021, with the following amendments.
    a) The claims under section 45A and section 101A , are withdrawn.
    b) In respect of the detriment claim made under S47B ERA (whistle blowing detriment) there is a time limit issue arising under section 48 (3).
    c) The claimant relies only on section 43 (1) (d) health and safety.
    d) The claimant does not assert that she made a protected disclosure to Mr Al-Liabi.

Law

5. The relevant sections of the Employment Rights Act 1996 are
    a) S43 – Public Interest disclosure
    b) S48 (3) Time limits
    c) S103A – automatic unfair dismissal
    d) Part II ERA 1996 – sections 13-27 failure to pay wages properly payable
6. The relevant section of the Equality Act 2010 is S19
7. Counsel for the Claimant has referred us to the following authorities
    - *Kilraine v London Borough of Wandsworth 2018 ICR 1850, CA*,
    - *Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4, EAT*,
    - *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731, CA*,
8. Counsel for the Respondent has referred us to the following authorities
    - *Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325, EAT.*
    - *New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA*
    - *Dobson v North Cumbria Integrated Care NHS UKEAT/0220/19/LA,*

Evidence

9. **Documents:** the tribunal had before it a bundle of documents, paginated and indexed and running to 402 pages. In addition, the tribunal had a second bundle, paginated from 403 to 427. During the course of the hearing, the parties emailed two additional documents.

10. **Witnesses:** Oral testimony was given by the Claimant, Mrs Jennifer Anne Wilkinson , a former employee and the following Respondent witness namely:

    Mr Rishi Bhatia - the second respondent and company director

    Mr Ahmed Al- Liabi - area manager

    Mr Mohammed Razwan – locum dispenser / consultant

    The witnesses each produced a written statement which was taken as read and were cross-examined.

11. The Representatives for each party provided very helpful written and oral submissions.

Findings

12. Having considered all of the evidence both oral and documentary we make the following findings of fact on the balance of probabilities which are relevant to the issues to be determined. Where we heard or read evidence on matters on which we make no finding or do not make a finding to the same level of detail as the evidence presented to us that reflects the extent to which we considered that the particular matter assists us in determining the issues. Some of the findings are also set out in the conclusions below in an attempt to avoid unnecessary repetition and some of the conclusions are set out in the findings of fact adjacent to those findings.

13. The claimant was employed as a pharmacist 3 February 2020 until 31 July 2020. She was an experience pharmacist having qualified more than 20 years ago.

14. The respondent's business comprised four branches and employed four pharmacists, including the second respondent who was also the principal director in addition to the dispensers, delivery drivers and other general staff.

15. The claimant was employed at the pharmacy in York, where the pharmacy manager was Sally Anne Downs. The witness, Jennifer Anne Wilkinson was also employed at that branch.

16. The claimant was issued with a statement of particulars. The statement covers hours of work, overtime pay and the probationary period, amongst other things. The statement refers to the Staff Handbook, which includes passages on the respondent's disciplinary and grievance procedure, whistleblowing policy and flexible working.

17. The claimant was subject to a three-month probationary period and the statement reserved unto the respondent the right to extend. In the handbook the employee is promised regular meetings to track progress and highlight any performance issues during the probationary period.

18. In the claimant's case, there are no records of any such meetings, the claimant says there were none, the second respondent agrees there were no formal probationary review meetings before 1 July 2020. The second respondent said

he believed that Mrs Downs had conducted performance meetings with the claimant as she had raised concerns with him about the claimant's performance. We did not hear from Mrs Downs. No records of such meetings were produced, no emails were produced between Mrs Downs and the claimant tracking her progress or highlighting any issues. No emails were produced between Mrs Downs and the second respondent referring to such meetings or expressing any concerns about the claimant. The tribunal accepts the claimant's evidence that before 1 July 2020 there were no meetings with anyone concerning the probationary period, her conduct or performance. The tribunal finds it simply incredible that, if there were such meetings and concerns raised about the claimant's conduct and performance which might lead to her being dismissed as unsatisfactory at the end of her probationary period, there are no records.

19. The second respondent asserts that there was an agreement made with the claimant on 26 May 2020 over the telephone, which extended the probationary period by four weeks. The claimant denies that there was any such agreement. There is no written record of the agreement, there is no letter or email from the second respondent that the claimant setting out the agreement and the new date. The respondent relies on a document he says he created in December 2020 from manuscript notes of telephone calls which he then destroyed. The Tribunal give little weight to these notes. The tribunal finds it inconceivable that a company director who had the benefit of legal advice would have taken steps to destroy contemporary documentation after proceedings had been lodged against him.

20. The tribunal also finds it incredible that there is no email or letter between the respondent and the claimant confirming the alleged agreement to extend the probationary period. In the circumstances we prefer the claimant's evidence that there was no such agreement.

21. The tribunal finds it unlikely that if the claimant's performance was such a cause for concern that the probationary period would be extended by another month at all and /or without a probationary review or warning as to the position the claimant was in. There are no HR records, emails or any other document recording any dissatisfaction with the claimant in the three months probationary period from 2 February 2020 to 2 May 2020. If the claimant's performance or conduct was really a matter of concern the tribunal would have expected the probationary review meeting to have taken place on or before 2 May 2020. The tribunal accepts that Covid put pressure on all those working in the business but the tribunal does not accept that such pressures would have prevented the second respondent from meeting with the claimant at all until 1 July 2020 (2 months after the expiry of the original probationary period) and we find that a virtual meeting could well have been organised. The second respondent also told us that the respondent had a dispensation from NHS to close for two hours a day.

22. On 16 June 2020 the respondent emailed the claimant with a view to putting her forward to serve on a committee of the community pharmacy, North Yorkshire. The tribunal find it unlikely that the respondent would have suggested this had it been the belief of the second respondent and Mrs Downs that the claimant's performance was unsatisfactory.

23. The second respondent called the claimant to a probationary review meeting. The invitation was issued on the morning of 1 July 2020 and the meeting took place later that day. She had no notice of the meeting, no time to prepare or arrange for someone to accompany her. The meeting took place by zoom and the invitation letter indicated that it would be recorded. It was not recorded but the second respondent says he made a handwritten note. The claimant asserts that these are not the original contemporaneous notes, but have been made up after the event and she formed this belief because she had been led to believe a recording would be made available and because she did not see the second respondent making such a note. However, although the claimant says that more was said than is recorded in the note, she is unable to identify any omissions of any significance or to point out any matters of substance which she says are a fiction. The note has been written in different coloured inks and it is obvious from the text that some elements were added after the meeting, for example, the reference to the second respondent solicitors EW and to Sally Downs. Under cross examination the second respondent accepted this was the case. In the circumstances, the tribunal accepts these notes were made on or about the time of the meeting but were not all written during the meeting.

24. The respondent did not inform the claimant during the meeting that she was about to be dismissed. She left the meeting, not expecting this. By email dated 2 July 2020 the claimant was informed of her dismissal, which was to take place at the end of the month.

    The reasons given in the letter were

    - Communication - not returning calls or emails
    - organisation of workday – pace
    - resistance to adopt new processes / procedures
    - inappropriate manner/language with wider company on numerous occasions, e.g., area manager

    These are the only reasons given by the second respondent in his witness statement.

25. In answer to a supplemental question the second respondent elaborated on the reasons for dismissal and provided a list of matters of concern, none of which had been put to the claimant in cross examination, none of which appear in the second respondent statement, none of which appear to have been discussed at the probationary review meeting or contained in the notes thereof. These were sectionalisation of the pharmacy, Accurx, pro delivery manager, texting service, two hour pharmacy closure.

26. The tribunal finds it not credible that if there was any foundation to the alleged concerns about the claimant's resistance to these specific matters that the meeting notes, the dismissal letter and the second respondent's statement would not mention them at all. The tribunal does not believe the second respondent about these matters and find that this was an attempt by him to bolster up the evidence at the Hearing.

27. The second respondent made other criticisms of the claimant during the hearing about labelling and working the tills. If there is any substance in these criticisms, the tribunal would have expected them to have been raised and recorded previously and we find that they have not been. The claimant's former colleague

Mrs Anne Wilkinson, who the tribunal found to be a credible witness, described the claimant in terms as a hard-working team player prepared to take on wider tasks within the dispensary.

28. On or about 15 June 2020 the claimant and Mrs Downs completed a risk assessment of the pharmacy for the purposes of Covid. The risk assessment does not contain any concerns about Covid antibody testing. The tribunal accepts the evidence of the claimant that this risk assessment was completed before the antibody testing had been introduced to the branch. The claimant's evidence in this respect ties in with the email of 17 June 2020, in which the respondent announced its intention to introduce antibody testing in the consulting room at the branch.

29. The claimant says she had concerns about the safety of conducting Covid antibody tests in the consulting room, which is a small enclosed space of about 1 m x 2 m within the pharmacy. The protocol for the test is set out in the email of 17 June 2020 from the second respondent to the claimant and Mrs Downs. Mr Al-Liabi and Mr Razwan were already conducting such tests within the business. The claimant had significant concerns about the conduct of such tests and the health and safety risk to the staff and customers.

30. The claimant's concerns were that there was a higher risk that those presenting for such tests had Covid symptoms, the size of the room was such that social distancing was impossible and further that Public Health England and the WHO disapproved of the tests as posing a threat to society at large. We find that the Claimant reasonably believed that the antibody testing posed a health and safety risk to the staff and the public.

31. There was a telephone conversation between the claimant and the second respondent on 18 June 2020, in which she says she raised those concerns. Mrs Wilkinson confirmed that the claimant was also raising health and safety concerns about the antibody testing with colleagues within the branch.

32. The second respondent accepts that they had a telephone conversation about testing on 18 June 2020, but says that it was exclusively about insurance and that is why, on the following day, he forwarded to the claimant insurance information from Pharmadoctor The bundle of documents contained copies of What's ap messages exchanged between the claimant and her friend Mr Badenhorst and counsel for the respondent suggests in her submission that this exchange indicates that the claimant's health and safety concerns had been allayed by 16 June 2020 and therefore the concerns raised with the second respondent on 18 June 2020 related only to insurance. The tribunal does not accept that inference and finds that this Whatsapp exchange shows that the claimant did have concerns about the safety of the Covid antibody testing. The Tribunal prefers the Claimant's evidence that she explained those concerns to the second respondent in the telephone conversation of 18 June 2020 in similar terms as she explained in her evidence as set out above.

33. In the email of 17 June 2020 from the second respondent introducing the antibody test held out Mr Al-Liabi as a person to go to in the event of questions about the system. On or about 19 June 2020 the claimant had received through the system a booking from a customer outside the area. According to Mr Al-Liabi this was likely to be because the customer had made a mistake in the online booking system. The claimant believed it to be a fault within the online system. The claimant telephoned Mr Al-Liabi to complain about the system.

The telephone call did not go well, each believing that the other was not listening. During the telephone call the claimant raised her voice and Mr Al-Liabi put the phone down on her. Although the telephone call was prompted by the claimant's concerns about the software system, given her views that the antibody testing procedure at York was an unsafe system, the tribunal accept her evidence that she also made known her general concerns about the antibody testing and her reluctance to embrace it.

34. On the following Monday, Mr Al-Liabi, telephoned the claimant to clear the air. He says that the claimant was rude and abrupt and failed to apologise. At one point during his evidence Mr Al-Liabi said the claimant had been abusive but on further questioning, quickly retracted that assertion to say instead that she had belittled him and had failed to show him proper respect. On the Monday the claimant understood that Mr Al-Liabi had telephoned to apologise to her and she believed that his attempts to clear the air amounted to an apology and nothing more was required of her. The only thing Mr Al-Liabi says the claimant said to him on Monday was 'Okay is that all'.

35. The above exchange is the only exchange that Mr Al-Liabi has had with the claimant, which he regarded as inappropriate. As far as he was concerned, there are not numerous examples of rudeness. Mr Al-Liabi accepts that he has never met the claimant or visited the York branch while the claimant was there. There is no email trail, or any other documents produced referring to her alleged failure to respond to his emails or her lack of organisation and the Tribunal give little weight to his evidence about that.

36. On 28 June 2020 the second respondent emailed Mrs Downs to the effect that Mr Razwan would be coming into the pharmacy to provide support and to make some innovations. The tribunal found the second respondent to be evasive during cross-examination about the role of Mr Razwan. The email itself states 'his role within RB is now more support and operational'. To suggest (as the second respondent attempted to do) that Mr Razwan came into the York branch as a locum dispensing technician is disingenuous. It appears to the tribunal that the second respondent intended to use Mr Razwan as a consultant and his role would include recruitment and an overhaul of local practices. The tribunal formed the clear impression that there was a close business relationship between him and the second respondent.

37. Mr Razwan arrived at the York pharmacy on 29 June 2020 for the purposes of interviewing a potential new recruit in the consulting room. According to both Mrs Wilkinson and the claimant he did not wear a mask when he was conducting the interview or showing the interviewee around the pharmacy. Mr Razwan denies this allegation and claims to have been wearing a mask. The Tribunal prefers the evidence of Mrs Wilkinson to the effect that not only was Mr Razwan not wearing a mask, but that both Mrs Downs and the claimant had remonstrated with him about that.

38. The statement of terms and conditions provided that required over time would be paid at standard rate. The final section of the statement of terms refers to the staff Handbook. The staff Handbook is silent as to the procedure for claiming overtime.

39. The second respondent contends that there is a company policy relating to overtime which is contained in an email of 5 October 2018 to Mr Al-Liabi and others, but not sent to Mrs Downs. No copy has been sent to the claimant. The

second respondent says a copy of this email is held on the Teams database but accepts that none of the staff have been directed to it by the statement of terms or Handbook or any other document. Nor does the statement of terms and conditions or the handbook inform staff that personnel policies affecting their terms and conditions are held on Teams.

40. The email dated 3 February 2020 from the second respondent to Mrs Downs, which set out his instructions as to the induction of the claimant, refers only to the Breathe system in respect of booking holiday. The Tribunal finds that the claimant was not made aware of any specific procedure relating to overtime.

41. The Tribunal accepts that it was the company practice that over time should be avoided if possible and where possible compensated by TOIL. The tribunal accepts that although no policy was spelt out to the claimant prior to Covid there was a policy under which the branch managers sought permission from Head Office before granting overtime and obtained a code for inclusion in the wages spreadsheet. An example of the pre-pandemic overtime code was included in the documents in the bundle from February 2020 relating to Lou. This was the only example in the bundle and there were no examples during the pandemic period.

42. The tribunal finds that the policy changed with the onset of the Covid lockdown. The tribunal accepts that the claimant was told explicitly by Sally Ann Downs that over time had been pre-authorised and would in effect be sorted out in due course and further that the claimant should keep her own personal record of the additional hours she worked. The tribunal also accept that the claimant kept a record of her hours on the registered pharmacist log and even if other people might in theory be able to go on to the log, realistically they are unlikely to have done so. It is a legal obligation for the pharmacist to keep such a log. The claimant was the only pharmacist working in the branch apart from locum pharmacists and her entries can be clearly distinguished from those of the locums. In the circumstances, the Tribunal finds the registered pharmacist log to be not only a reliable record but the best record of the hours that she worked.

43. Mrs Wilkinson's evidence was that she had been told something very similar by Mrs Downs. In her case she kept her over time hours recorded in a private diary. Mrs Downs accepted that record which was translated into pay via an overtime code only in Mrs Wilkinson's last week of employment.

44. Under the claimant's statement of terms and conditions her weekly hours for the first three months of employment were 45. From 2 May 2020 the claimant's weekly hours reduced to 40.5.

45. It appears to be accepted by the parties that Covid made life busier and more challenging for everyone. The second respondent accepts that the delivery drivers, the dispensers and Mrs Downs were all required to do additional hours. In an email he describes Mrs Downs as being at breaking point. The second respondent does not accept that the Covid pandemic put any additional workload on the claimant as pharmacist or that she was required to do more hours. In cross examination, he accepted that there were additional duties such as the antibody testing, telephone consultations, additional cleaning which the tribunal infers would have created an additional workload for the claimant. Mrs Wilkinson describes the situation during Covid as requiring all hands to the pump and she describes the claimant in terms as a hard-working team member.

Mrs Wilkinson told the tribunal that Mrs Downs and the claimant were working long hours and staying on after she went home.

46. The Tribunal draws on its industrial experience that people in front facing roles who had to carry on through Covid, (such as those in the pharmacy), were rushed off their feet and absorbing new tasks and processes to deal with Covid. In the circumstances, the tribunal prefer the evidence of the claimant that she was working long hours, as set out in the pharmacist register.

47. The claimant worked alongside Mrs Downs and was told by Mrs Downs that additional hours had been pre-authorised and would be compensated for in due course. The tribunal find that Mrs Downs needed the claimant's support and required her to do the additional hours as a matter of necessity. As Mrs Wilkinson put it, it was all hands to the pump.

48. The claimant was not paid the contractual rate or at all for the additional hours worked and was not given TOIL to compensate for it. The Tribunal note that immediately after her dismissal the claimant did not demand overtime pay and did not question that her final pay statement did not include overtime. The Tribunal accept that the Claimant was very distressed by her dismissal and was not in a frame of mind to do so. The Tribunal do not find that this amounts to a waiver of her contractual rights nor do we find it indicative that the Claimant did not have an entitlement to overtime pay and/or did not believe she had an entitlement to overtime pay.

49. The claimant is a single mother whose child was three at this time. The tribunal accepts that she had a conversation with the second respondent before accepting the post to the effect that after three months her hours would reduce to 40.5 and that her reason for asking for this reduction was her childcare responsibilities.

50. Despite this agreement, the claimant worked hours in excess of 40.5 after 2 May 2020 and this was because of the demands on her and her colleagues in the branch caused by the Covid pandemic.

51. Although there were clearly conversations between Mrs Downs and the second respondent, and informal conversations between the claimant and the second respondent as to the pressure of work they were under in the branch and how hard it was not having enough time with one's child, the claimant accepts that she did not express this to the second respondent as a complaint or make a request for a reduction in hours. No such request was made, and no refusal given.

52. In the circumstances we find that during the pandemic there was a PCP, which required all the employees in the branch to work additional hours. The tribunal applies its judicial knowledge that women with small children are disadvantaged by the requirement to work long hours and the COVID pandemic made no difference.

53. The claimant was such a woman. She was clearly upset that the demands of the job had deprived her son of time with his mother, and vice versa. In her statement she highlights being unable to collect him from nursery, unable to cook his dinner or put him to bed and having to rely on family members and friends to pick him up and babysit.

54. In the circumstances we find that a PCP of long hours has been applied to the claimant and she is disadvantaged by it as a woman because women continue to bear the greater burden of childcare.

55. The claimant's employment came to an end on 31 July 2020. She told the tribunal that she was very distressed and made unwell by the way she had been treated and dismissed. At some point, and she cannot say when, she took advice and instructed solicitors. The probationary review meeting took place on 1 July 2020, the termination letter issued on 2 July 2020, the effective date of termination 31 July 2020. The ACAS early conciliation began on 1 October 2020 and ended on 28 October 2020.

56. Apart from general distress we have not been given any reason as to why it was not reasonably practicable for the PID detriment claim to have been made to ACAS on 30 September 2020. The tribunal finds that if it was reasonably practicable for the claim to have been lodged on 1 October 2020 then there is no good reason for it not to have been lodged the day before.

Conclusions

Detriment (whistleblowing)

57. The detriment relied on is the requirement to attend the probationary review meeting on 1 July 2020. That being the date of the detriment the claimant was required to commence her ACAS early conciliation on 30 September 2020. She was a day late. Apart from general distress we have not been given any reason as to why it was not reasonably practicable for the PID detriment claim to have been made to ACAS on 30 September 2020. The tribunal finds that if it was reasonably practicable for the claim to have been lodged on 1 October 2020 then there is no good reason for it not to have been lodged the day before.

58. The claim is out of time under S48(3). The tribunal is not satisfied that it was not reasonably practicable for the early conciliation application to have been made to ACAS within time and in the circumstances, the claim fails.

Reason for Dismissal

59. Having less than two years' service, the burden of proof is on the claimant to show that the reason for dismissal is that she has made a public interest disclosure.

60. As set out above, the tribunal does not accept the reasons for dismissal given by the respondent. If the claimant's conduct or performance was a cause for such concern that her probationary period was to be ended and the claimant dismissed, then it is inconceivable to the tribunal that there would have been no meetings during the probation period and no record of the performance issues as and when they arose. In addition, if the claimant's conduct of or performance was such a cause for concern it is inconceivable that the respondent would not have taken steps to end the probationary period on or before 2 May 2020 but waited a further two months.

61. The tribunal find that the charges set out in the letter of dismissal are without foundation. According to the meeting notes, there were 'no real concerns as to not communicating with me (ie second respondent)' and under cross examination, Mr Al-Liabi's concerns about email communication were rather insignificant and no examples have been produced.

The second respondent said the concerns about organisation of workday and pace had been raised with him by Mrs Downs. There is no evidence of Mrs Downs having had or having raised such concerns and there are no records to this effect and no written communication between Mrs Downs and the second respondent.

The inappropriate manner/language with the wider company on numerous occasions is an exaggeration and limited at most to one conversation with Mr Al-Liabi which contained no inappropriate language.

62. As to resistance to adopt new processes and procedures the only new process that there is any evidence of the claimant having resisted, is the antibody testing. The tribunal notes that the antibody testing was the subject of the PID.

63. Although the Tribunal do not accept the respondent's stated reasons, that finding does not automatically lead to a conclusion that the reason for the dismissal must be for an inadmissible reason under section 103A, and the burden remains with the claimant because she has less than two years service.

64. The tribunal find that the respondent had no reason to dismiss the claimant before June 2020. In June, three significant things happened which we find prompted the respondent to dismiss the claimant. On 18 June 2020 the claimant raised health and safety concerns about the Covid antibody testing with the second respondent; on 19 June 2020 the claimant raised further concerns about antibody testing with the area manager Mr Al-Liabi. On 29 June 2020 the claimant confronted Mr Rizwan, who had been asked to come into the branch to be operational. The email dated 28th of June 2020 from the second respondent to Mrs Downs expressly says that he does not want Mr Razwan to meet any resistance from the claimant.

Public interest disclosure

65. The Tribunal finds that the disclosure to the second respondent on 18 June 2020 amounted to a public interest disclosure within the meaning of S 43 B. The contents of the conversation contained facts about the conditions at York in which the antibody testing was to be carried out, in particular the confines of the consulting room making social distancing impossible and she also referred to wider health and safety concerns as published by the WHO and others. It satisfies the concept of information as described by the Court of Appeal in Kilraine and was a reasonable belief which tended to show that the arrangements for the antibody testing at the York branch presented a health and safety risk to the staff and to members of the public. In addition the claimant raised general health and safety concerns as published by Public Health England and the World Health Organisation and note that although the GPhC guidance was not published until 21 July 2020 when it was so published, it caused the respondent to suspend its operation.

66. The Tribunal finds that when the claimant confronted Mr Razwan, it fell short of a PID in that it was not made to the employer. Mr Razwan was not an employee of the respondent. He was certainly acting as more than a locum dispenser. However as at 29 June 2020 it was not clear what his status was within the company and whether and to what extent he had express or implied authority over the claimant notwithstanding the email to Mrs Downs of 28 June 2020 referred to above.

Dismissal – S103A ERA

67. Under section 103 A *'an employee who is dismissed shall be regarded…as unfairly dismissed if the reason (or if more than one, the principal reason). For the dismissal is that the employee made a protected disclosure.'*

68. The tribunal find that a reason for the dismissal was the protected disclosure to the second respondent on 18 June 2020. The tribunal also find that of the three things which prompted the dismissal, this was the principal and most significant reason for the dismissal.

69. In the circumstances we find that the dismissal to be unfair.

Unlawful deduction of wages

70. The statement of terms and conditions provides that required overtime shall be paid at standard rate. The statement also provides that the claimant's standard weekly hours from month 4 (i.e. 2 May 2020) are 40.5 and 45 hours a week before then. The Tribunal finds that the claimant was required to work additional hours and accepts the registered pharmacist log as a reliable and best record of her hours. She is therefore entitled to be paid at standard rates for all hours worked in excess of 45 from 23 March 2020 to 1 May 2020 and from the second of work may she is entitled to be paid for hours worked in excess of 40.5. There has been a failure to pay wages properly payable in respect of overtime and the Claimant is entitled to compensation therefore from 23 March 2020.

Indirect Discrimination

71. The tribunal find that during the Covid pandemic the claimant and the other staff at the York branch were required to work additional hours by the branch manager, Mrs Downs and as such a PCP was applied to them.

72. The tribunal applies its judicial knowledge and finds that such a PCP would put women with childcare responsibilities at a disadvantage and that the circumstances in a pandemic would not change that position as the likelihood remains that childcare falls more on women than it does on men.

73. The claimant was disadvantaged by having to work additional hours and as a consequence was unable to collect her child from nursery, look after him in the evenings, put him to bed and was indebted to friends and relatives who stepped in to collect the boy from nursery and baby sit.

74. In the circumstances we find that but for the justification defence the claimant was indirectly discriminated against.

75. The respondent seeks to justify the PCP as a proportionate means of achieving a legitimate aim. The tribunal accepts that the legitimate aim was providing services to customers during a pandemic, and that the claimant was required to meet the demands of the business at this time. Both the claimant and Ms Wilkinson described the pressure on the branch which required all hands to the pump.

76. The claimant argues that such justification is not proportionate in that it fails to balance the business aim against the disadvantage to the claimant taking into account the alternative steps the respondent might have taken to alleviate the disadvantage, i.e. by hiring in a locum pharmacist to assist her.

77. The claimant and Mrs Downs were in a similar position, each with childcare difficulties, each doing their best to fulfil the requirements of the branch. The Tribunal was given the impression that the claimant sympathised with Mrs Downs position as much as her own and felt an obligation to support her. We do not find that such conversations as she had with Mrs Downs amounted to a request for locum cover, nor that it was a request, which had been refused.

78. The claimant said that she has had conversations with the second respondent about the difficulties of childcare during the pandemic, but accepted that such conversations fell short of a complaint and there is no evidence that she asked the Respondents to provide locum cover or to relieve her of her hours or that such a request was refused.

79. In the circumstances we find that the PCP was justified because of the demands of the business during the Covid pandemic and the exceptional circumstances prevailing. The respondent might have reduced the claimant's hours and engaged locum to cover the claimant, but there was no refusal to provide cover and / or to reduce her hours because the Claimant had made no such request or complaint.

80. We conclude that the additional hours were a proportionate to achieve the legitimate aim until such time as the respondents were put on notice of the claimant's childcare difficulties and her requirement to reduce hours. During the pandemic when everyone was undertaking additional hours it was not reasonable to expect the respondents to take such steps to cover the Claimant without having had any formal complaint or grievance or request for a reduction in hours, or locum cover. In the absence of such a request or complaint we find that the PCP was justified and proportionate in the special circumstances of the pandemic.

81. In the circumstances, the claim for indirect sex discrimination fails.

Employment Judge O'Neill

14 July 2021
Sent to the parties on:
15 July 2021
For the Tribunal:

Olivia Vaughan