



EMPLOYMENT TRIBUNALS

Claimant: Mrs D Domingo

Respondent: Cardiff and Vale University Local Health Board

Heard at: Cardiff **On:** 5, 6 & 7 February 2020

Before: Employment Judge S Jenkins
Mrs C J Mangles
Mrs L Bishop

Representation:
Claimant: Mr J Davies
Respondent: Mr S Tibbits (Counsel)

RESERVED JUDGMENT

The Claimant was not victimised for the purposes of Section 27 of the Equality Act 2010 and her claim therefore fails and is dismissed.

REASONS

Background

1. The hearing was to deal with the Claimant's claim of victimisation under Section 27 of the Equality Act 2010. Her claim was initially brought in January 2018 and involved various other matters all of which had been dismissed at various preliminary hearings.
2. We heard evidence from the Claimant on her own behalf, and from Rhodri John, Operation Support Manager; Cathy Ikin, Directorate Manager; and Ceri-Anne Lawless (née Hughes) (to whom we refer below as Mrs Lawless, although she was Ms Hughes at the relevant times), then Head of Workforce and Organisational Development; on behalf of the Respondent.

We also considered the documents in the hearing bundle to which our attention was drawn.

Issues and Law

3. The issues for us to consider had been identified at a Preliminary Hearing before Employment Judge Beard on 30 July 2019, and these were:
 - (a) did the Claimant do a “protected act” in respect of the matters set out in her claim form and further and better particulars submitted on 31 October 2018;
 - (b) did the Respondent subject the Claimant to detriment as set out in the claim form and in the further and better particulars;
 - (c) if so was this because the Claimant had done a protected act.
4. Those issues clearly drew on the provisions of section 27 of the Equality Act 2010, which provide as follows:

“27 Victimisation

- (1) *A person (A) victimises another person (B) if A subjects B to a detriment because—*
 - (a) *B does a protected act, or*
 - (b) *A believes that B has done, or may do, a protected act.*
- (2) *Each of the following is a protected act—*
 - (a) *bringing proceedings under this Act;*
 - (b) *giving evidence or information in connection with proceedings under this Act;*
 - (c) *doing any other thing for the purposes of or in connection with this Act;*
 - (d) *making an allegation (whether or not express) that A or another person has contravened this Act.*
- (3) *Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*
- (4) *This section applies only where the person subjected to a detriment is an individual.*
- (5) *The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.”*

5. In terms of protected acts, we noted, as is often the case, that the parties had not expressed themselves in the language of Section 27, and therefore it was for us to consider objectively whether protected acts had been made. We were mindful of the particular terms of Section 27(2) and noted that the two sub-paragraphs which could be relevant were: (c) *“doing any other thing for the purposes of or in connection with [the Equality Act]”*; and (d) *“making an allegation (whether or not express) that there had been a contravention of [the Equality Act]”*.
6. We noted that there were six asserted protected acts:
 - (i) Comments at a meeting on 4 August 2017, which we understood actually to have taken place on 3 August 2017;
 - (ii) A letter dated 8 August 2017;
 - (iii) A letter dated 4 September 2017;
 - (iv) A letter dated 29 September 2017, which we believe actually to have been dated 27 September 2017;
 - (v) A further letter dated 31 October 2017; and
 - (vi) A meeting on 6 November 2017.

The Respondent accepted that the letter on 31 October 2017 amounted to a protected act.

7. The detriments asserted in the further and better particulars arose from August 2017 onward through to January 2018 when the claim form was submitted, and broadly relate to detriments arising from the Respondent's failure to investigate, or the delay in commencing the investigation of, the Claimant's complaints.
8. We were mindful, as identified by Employment Judge Beard, that if we considered there had been any detriments we would need to consider whether they had occurred because of any protected act done by the Claimant.
9. Finally in terms of issues, we noted the burden of proof set out under Section 136 of the Equality Act 2010, which required us to consider whether there were facts from which we could decide, in the absence of any other explanation, that victimisation had occurred. If we did then the burden of proof would switch to the Respondent to show that that was not the case.

Findings

10. In terms of our findings, we noted that there was not, in our view, a significant variation as to what actually happened in fact, although there were some significant differences of interpretation of what had happened as a matter of fact. Where there was a dispute that we needed to resolve

we did so on the basis of what we considered more likely to have taken place on the balance of probabilities.

11. In terms of background facts, we noted that the Claimant is a very experienced nurse, having worked both in the UK and overseas, and had taken up her position as a Band 6 nurse with the Respondent on 3 January 2017 within its Radiology department. The Claimant had not worked in that department before and therefore underwent a process of training, as would be expected.
12. We heard indirectly of issues within the Radiology department and about the Claimant's performance in the period up to August 2017, but they were not relevant to the issues we had to decide and therefore we do not comment on them. As part of the background to the case however we noted that the Claimant suffered, at the relevant time, with an ear problem which led to an operation in September 2017.
13. In terms of the facts which were relevant for our deliberations we noted that, on 3 August 2017, a meeting had taken place with the Claimant and the person who appeared to be her manager, Pam Saunders, and another more senior member of staff within the department, about the Claimant's progress in her role and with her training. There was no record of that meeting and no direct evidence of it was put before us, but the Claimant appears to have taken offence at a comment allegedly made during that meeting which was that the Ms Saunders did not believe that the Claimant had a hearing problem and that she could hear but did not listen. Ms Saunders subsequently disputed that the comment was made, certainly in those terms, but whether that was made or not was not actually relevant for our purposes.
14. The Claimant went off on sickness absence from that point and never in fact returned to work. She wrote a formal letter to Ms Saunders, entitled "Formal Notice", dated 8 August 2017. In that, she set out her concerns over the alleged comment, that she had a hearing problem, that she felt that her integrity had been attacked, and that she felt that she had been spoken to in an intimidating and interrogating tone. The letter also referred to an aggressive working environment within the department, to a toxic atmosphere, and to bullying behaviour.
15. That letter came to Ms Saunders's attention on her return from leave on 21 August 2017, and soon after that she prepared a response in conjunction with Mrs Ikin and sent that response to the Claimant on 5 September 2017. In that, Ms Saunders largely rebutted the points raised by the Claimant and suggested a meeting be arranged to discuss the Claimant's issues and to resolve any misunderstandings.

16. In the meantime, a meeting had been arranged with the Claimant under the Respondent's long term sickness policy, and that meeting took place on 4 September 2017 with Maria Jones, a more senior member of staff of the department, and an individual from the Respondent's HR Department in attendance. The Claimant was accompanied by a work colleague.
17. The focus of this meeting was on the Claimant's health, but the Claimant did make a reference to being stressed due to work issues which she had raised in a written concern. Ms Jones explained that that would be dealt with under another process, which we took to mean the response that was underway from Ms Saunders. Another long term sickness meeting was then arranged for 12 October 2017, although it did not take place at that time.
18. On 27 September 2017, the Claimant sent a further letter to Ms Saunders, entitled "Second Formal Notice". In this the Claimant again referred to the alleged comment about her hearing, and also to a comment that the hearing issue was impacting on her ability to undertake her role. The Claimant stated that she found those remarks intimidating and insulting. The letter also made further references to a toxic environment within the department, to inappropriate behaviour by three individuals, and to bullying and intimidation.
19. At the start of October 2017, the Claimant was certified as sick for a 56 day period, and also an Occupational Health report was received which referred to the Claimant's hearing issue, the fact that there had been a recent operation, and also to stresses at work.
20. Ms Saunders replied to the Claimant's letter of 27 September 2017 by letter dated 10 October 2017. In that, she noted that correspondence did not appear to be achieving a resolution and therefore proposed a meeting to discuss the issues raised which could be by way of a mediator-assisted meeting. She promised to provide further information on the mediation process, which was subsequently sent, and she also referred the Claimant to the Respondent's Dignity at Work and Grievance policies.
21. The long term sickness meeting scheduled for 12 October 2017 was postponed due to the Claimant's health issues and was reconvened for 6 November 2017, again with Maria Jones dealing with it from the Respondent's perspective.
22. In the meantime the Claimant sent a further letter, entitled "Third and Final Formal Notice", on 31 October 2017. In this she complained of a lack of responsibility on the part of the Respondent for what the Claimant perceived to be false claims, and again referred to harassment and bullying behaviour. Ms Jones was away on leave upon receipt of that letter and it only came to

her attention on the morning of 6 November 2017, the day on which the meeting under the long term sickness absence policy was due to take place, and when it did indeed take place.

23. In that meeting, Ms Jones was accompanied by Mr John from an HR perspective, and the Claimant was accompanied by her husband, Mr Davies. The meeting was in two parts, the first part dealing with the long term sickness concerns and then the second part dealing with the concerns raised by the Claimant in her written notices.
24. Following the meeting a brief note of the second part of it was sent to the Claimant by Ms Jones. It transpired however, that the Claimant or her husband had covertly recorded that meeting and the Claimant's husband subsequently produced a handwritten transcript. The Claimant disputed the accuracy of the notes, and later, we understand during the course of these proceedings, a typed transcript was produced by the Respondent following receipt of the recording from the Claimant.
25. In the event, our only concern about this meeting and the accuracy of the notes was to consider the content of the meeting insofar as it was relevant to the Claimant's claim of victimisation, i.e. whether the meeting involved a protected act, and if so whether any detriment had arisen from it. In that regard, we noted that the Claimant again raised concerns over the management of the department and raised a specific concern over a comment alleged to have been made by another member of the department, referring to her as "you Asian". The Claimant repeated her previous concerns over the toxic environment and the way she and others were treated. The notes of the meeting indicate that the Respondent was keen to pursue mediation as there were a number of references to that.
26. The crucial finding we needed to make in respect of this meeting was in respect of the way matters had been left at the end of that meeting. The Respondent's perspective was that mediation was to be considered and that the Claimant was to report back on whether she agreed to undergo a process of mediation or otherwise. The Claimant's perspective however was that the Respondent was to commence investigation at that stage.
27. Having read the transcript and considered the Claimant's evidence to us, we considered that the Respondent's perspective was the accurate description of the situation that had been reached, and whilst there were comments from the Claimant's husband at the meeting that suggested his position was that an investigation had to be undertaken, the Claimant's own comments did not suggest that there was a rejection of mediation or an expectation that there would be an immediate investigation.

28. We found support for that conclusion from the Claimant's evidence that she had not been unwilling to explore mediation but had not felt well enough to pursue it. We also noted subsequent email exchanges regarding the accuracy of the notes, and attempts by the Respondent to arrange further meetings during which the Claimant's concerns would be discussed, which suggested to us that there was no agreement to proceed to an investigation at that point.
29. There were attempts to arrange further meetings with the Claimant on 30 November 2017 and 11 December 2017 to discuss both the long term sickness issues and the Claimant's concerns, but they were not able to be held, and ultimately it appeared that the next meeting under the long term sickness policy did not take place until April 2018.
30. Within the bundle, in the correspondence section, we could see that the Claimant emailed Ms Jones on 5 December 2017 stating that the notes of the meeting of 6 November had a number of inaccuracies and omissions which she felt had led to a further loss of confidence, and she stated that she required an accurate report of that meeting before attending the next long term sickness meeting. We could see that Ms Jones responded on 11 December confirming that the concerns regarding the notes could be discussed at the next meeting, and she repeated that in an email of 20 December 2017 when she was looking to rearrange the meeting for 2 January 2018.
31. In the meantime, the Claimant sent a letter to the Respondent's Chief Executive on 19 December 2017, repeating her concerns and also stating her concern that her three "Notices" had not been responded to. In this letter the Claimant referred to one incident of physical harm having taken place within the workplace. Enclosed with the letter were the Claimant's three previous notices, together with a further document entitled "Statement of Truth", which summarised what the Claimant contended had been inaccuracies and omissions from the notes of the meeting on 6 November 2017.
32. The Respondent's Chief Executive sent an immediate holding response on 19 December 2017, stating that he would respond at the earliest opportunity. A substantive response was prepared by Mrs Lawless in early January, but it was not signed by the Chief Executive until 16 January 2018, and was not dispatched for a further period after that, not being received by the Claimant until 25 January 2018.
33. In the meantime, the Claimant had sent a further letter to the Chief Executive on 18 January 2018, which was received by him on 21 January. However, we were satisfied from Mrs Lawless' evidence, and from the email evidence within the bundle, that the draft response, signed on 16 January

2018, had been prepared prior to receipt of the Claimant's second letter and that the Chief Executive's letter signed and dated 16 January 2018, albeit not received by the Claimant until after her second letter had been sent, had been sent in response to the Claimant's first letter of 19 December 2017.

34. Within the substantive response from the Chief Executive the range and seriousness of the concerns was noted, and it was also noted that there had been a reference to an incident of physical harm. The letter confirmed that the Chief Executive would ask Mrs Lawless to instigate a fact-finding review.
35. The Chief Executive sent a further letter dated 26 January 2018, apologising for the delay in responding to the letter of 19 December 2017 and referring to the commissioning of the fact-finding review. Mrs Lawless then wrote on 1 February 2018 identifying the person to carry out the review and enclosing the terms of reference. In the event the review was not completed for many months, until October 2018, but that was not relevant to the issues we had to consider.

Conclusions

36. Applying our findings to the issues we had identified, we first considered whether the protected acts had been made as asserted by the Claimant, taking them in turn.
37. We first looked at the meeting on 3 August 2017 and, as we have noted, there was no evidence before us about what was said at that meeting. We were not therefore able to conclude that there had been a protected act made at that meeting.
38. With regard to the Claimant's letter of 8 August 2017, we noted that this did refer to the Claimant's hearing, which we noted the Claimant had subsequently sought to pursue as a disability as the basis of a disability discrimination claim. Notwithstanding the fact that, at a prior Tribunal hearing, it was considered and concluded that the Claimant had not been suffering from a disability in that regard, it was not a requirement for a victimisation claim under Section 27 that the alleged allegation under the Equality Act had to be a substantiated one.
39. We noted also that there was reference within that letter to intimidation, and we felt therefore that there was sufficient material within that letter for us to conclude that it did indeed contain an allegation that there had been a contravention of the Equality Act, and therefore that a protected act had been made at that stage.

40. Moving to the meeting on 4 September 2017, we could not see from the record of this meeting, which was not disputed, any reference to any issue of concern relating to any particular protected characteristic and we therefore did not conclude that a protected act had been made at that meeting.
41. With regard to the Claimant's letter of 27 September 2017, as with the Claimant's earlier letter, we noted that references were made within it to the Claimant's hearing and to the fact that comments allegedly made by the Respondents staff had led to the Claimant feeling intimidated and insulted. Again therefore, we considered that there was sufficient within that letter for us to conclude that it contained an allegation of a contravention of the Equality Act such that there had been a protected act.
42. We noted, as we have said, that the Respondent accepted that the letter of 31 October 2017 was a protected act and we therefore moved finally to consider the meeting on 6 November 2017. We noted the specific reference to the allegation of a comment of "you Asian", and the broader references to behaviour within the department, and again we felt that there was sufficient evidence for us to conclude that there had been an allegation of a contravention of the Equality Act within that meeting.
43. To sum up therefore, we were satisfied that there had been protected acts on 8 August 2017, 27 September 2017 and 6 November 2017, in addition to the one that was accepted to have been made on 31 October 2017.
44. We then moved to consider whether there had been any detriments in the form of a failure to investigate or a delay in investigation. In that regard, we did not consider there had been any detriment experienced by the Claimant in the period following the submission of her initial letter on 8 August 2017. We noted that the letter was responded to promptly by Ms Saunders, allowing for a period of holiday absence, and we considered that the provision of a response within that time period was in line with what would have been expected. We noted that the Claimant took issue with the response, but the fact that a particular claimant did not like the response in the circumstances did not amount, in our view, to detrimental treatment.
45. We took a similar view in relation to any delay following the Claimant's letter of 27 September 2017. For completeness, we noted that the period from early September, when the first response to the Claimant's first letter had been received, to October, when the first long term sickness meeting took place, was explained by the Claimant's sickness at the time. Similarly, the delay after that period was also explicable on the ground of the Claimant's sickness absence, as we noted that the Respondent had been attempting to arrange a further meeting with the Claimant at a much earlier date.

46. In terms then of the response to the Claimant's letter of 27 September, we noted again that there was a relatively prompt response from the Respondent, in our view in line with what was to be expected. We noted that that response proposed mediation, which again we did not consider amounted to any form of detrimental treatment, and we noted that meetings at which the possibility of mediation would be discussed were delayed during the period from the end of September through to November, due to the Claimant's health. We did not therefore consider that there was any detrimental treatment in that regard.
47. With regard to the options following the meeting on 6 November, as we have found, we considered that the meeting had ended on the basis that there would be further dialogue about whether mediation would take place or not. There was no response on the part of the Claimant to that point, and further attempts to meet during the period of November and December were not successful, partly due to the Claimant's ill health and partly due to the Claimant's entrenched position with regard to her unwillingness to meet due to her dispute over the contents of the meeting notes. Again however, we did not consider that any detriment arose in that respect.
48. We looked then finally at the period of time following the receipt of the letter to the Chief Executive on 19 December 2017, and concluded that we did consider that a detriment had arisen at that point. The Chief Executive had said he would respond at the earliest opportunity, and yet, despite a partially understandable delay due to the Christmas and New Year period, a response was not received by the Claimant until near the end of January 2018. We considered that that did amount to a detriment as the period was longer than would reasonably have been expected and, applying the guidance of the House of Lords in Shamoon -v- Royal Ulster Constabulary [2003] IRLR 285, we felt that there was indeed a detriment in that respect.
49. The final point for us to consider though was the issue of causation; did the protected act cause the detriment that we have identified? As we have noted, we only identified one detriment and that was the delay on the part of the Respondent in responding substantively following the receipt of the letter from the Claimant on 19 December 2017. In our view the delay in that respect, whilst not ideal, arose from a mixture of delays over the Christmas and New Year period, delays in processing the letter following the initial drafting of it in early January, and then further delays in dispatching the letter once signed, which, in our view, is relatively common in large organisations of the type such as the Respondent. Overall, we were satisfied that, whilst there had been a detriment in the form of the delay in responding substantively to the letter of 19 December 2017, we did not consider that that delay was caused by the protected act but was due to unconnected reasons.

50. Our ultimate conclusion therefore was that, whilst there had been protected acts, and in one case some detriment, we did not consider that any detriment had been caused by any of the protected acts. As a consequence, the requirements of Section 27 of the Equality Act 2010 with regard to a victimisation claim had not been made out and therefore the Claimant's claim failed and fell to be dismissed.

Employment Judge S Jenkins

Dated: 1 April 2020

JUDGMENT SENT TO THE PARTIES ON 2 April 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS