EMPLOYMENT TRIBUNALS

Claimant: **Mr A Amraie**

Respondent: **B A Williams (Chemist) Ltd**

Heard at: **via CVP** **On: 4/1/2021 to 7/1/2021 and 11/1/2021 to 12/1/2021**

Before: **Employment Judge Wright**
Ms S Goldthorpe
Mr J Matharu

Representation:

Claimant: **In person (on one occasion assisted by his mother and sister)**

Respondent: **Mr M Green – counsel**

LIABILITY JUDGMENT

It is the unanimous Judgment of the Tribunal that the claimant's claims of unlawful discrimination under the Equality Act 2010 and for unauthorised deduction from wages fail and are dismissed.

REASONS

1. On 9/3/2018 the claimant presented his claim of unlawful deduction from wages and unlawful discrimination contrary to the Equality Act 2010 (EQA)

based upon the protected characteristic of race or religion to the Tribunal. The issues were identified at a preliminary hearing on 19/3/2019 and were recorded in that order. A copy is appended to this Judgment. The respondent resists the claims and denies any unlawful discrimination.

2. Due to the applicable tier restrictions/lockdown at the relevant time, the hearing was converted to a CVP hearing. When the case was originally listed as a traditional in-person hearing (everyone physically attending the regional hearing office) it was listed for six-days. Unfortunately, the Tribunal could not sit on day-five as listed. The Tribunal however was able to deliberate on day-seven of the listing and so the length of hearing was maintained.

3. The Tribunal had before it an electronic bundle of approximately 480-pages and additional documents were added to the bundle during the course of the hearing. The Tribunal heard oral evidence from the claimant. The respondent did not challenge the evidence of the claimant's other witnesses and so they were not called to give evidence. For the respondent, it heard from: Mr R Savani (owner and Superintendent Pharmacist); Mrs V Bedi (claimant's supervisor); Ms T Siddique (employee); and Dr R Baxter (a GP whose practice used the respondent, was a client of the respondent and witnessed an incident on 16/10/2017). The respondent sought to rely upon the statement of Ms H Korany (an employee) to the extent that she was not available to be cross-examined.

4. The claimant was a graduate from University College London in MPharm. He was employed by the respondent from 7/8/2017 as a Pre-Registration Pharmacist. He resigned on 26/10/2017.

Matters which arose during the hearing

5. The Tribunal retired on the first morning to read the witness statements and documents referred to in the bundle. At approximately 12:30 the parties were advised in writing that the hearing would resume after lunch, at 13:30. As it was expected the claimant's evidence would continue into the following day, he was advised in writing that during any break or overnight, he would be placed under a restriction and what this entailed. The restriction was explained and repeated to the claimant during the mid-afternoon break and when the case concluded on the first day.

6. It had also been explained that any person who wished to observe the hearing needed to make an application to the Tribunal office.

7. Overnight, the Tribunal received a direct email application from Mr Savva Kerdemelidis asking for permission to observe the hearing stating:

> I act as a legal advisor for [the claimant]. I request permission to join the hearing as a guest and to speak at the hearing if necessary.

8. This caused concern that the claimant had been in contact with Mr Kerdemelidis whilst he was placed under a restriction. This was put to the claimant and he confirmed that he had spoken by telephone to Mr Kerdemelidis on two occasions whilst he was under the restriction.

9. Also, during the course of the second day of the claimant's evidence, the Tribunal observed/heard whispering/prompting[1] during the claimant's answer to questions in cross-examination. The claimant said that it was his mother assisting him and she then removed herself from the room from which the claimant was giving his evidence. This was notwithstanding the instructions sent to the parties detailing the circumstances which evidence should be given remotely. Despite this, two members of the Tribunal heard whispering/prompting during the afternoon session later on the same day. The claimant said he was alone and his mother and sister were observing the proceedings upstairs.

10. The claimant's evidence concluded on day two. Prior to the respondent's witnesses giving evidence on day three the claimant said that his heart rate was elevated. It was explained to him that he could request breaks and breaks would be taken as appropriate or after each witness. During the morning, the claimant mentioned his heart rate again and some medication he had taken, but he did not request any additional breaks or further adjustment.

11. Prior to reconvening on day four, the claimant again sent an email and said he was unwell. He reported his heart rate was elevated, he had a fever, sweating and vomiting; in addition to his anxiety. The claimant referred to his condition being symptoms of COVID-19 and he confirmed he had had COVID-19 in May/June 2020 and November/December 2020.

12. The intention had been to hear from Dr Baxter at 10:00 (the claimant having indicated he had a few questions for Dr Baxter – 10 minutes at the most (Dr Baxter was witness to one incident (an altercation between the claimant and Mr Savani, which the claimant agrees took place and it was not pleaded as an allegation of discrimination) on the 16/12/2017 and his witness statement comprised of 6-paragraphs running to just over one page) and then from Mr Savani, with oral closing submissions in the afternoon. Dr Baxter is a GP and in view of the pandemic and the first week in January 2021 being the roll-out of the national vaccination programme, his role is valuable. It was suggested that as the claimant had prepared questions for Dr Baxter and in light of the circumstances,

[1] Whispering had been heard on the first day during the course of the claimant's evidence however, at that stage, it was not clear where it was coming from.

that one of his relatives put the questions on his behalf. The claimant said his sister would assist him. In the event, the questions for Dr Baxter took over 35 minutes and they were curtailed by the Employment Judge as the questions being put were either irrelevant or to satisfy curiosity. The Tribunal then took a break and an early lunch in the hope that the claimant would be well enough to resume in the afternoon and to conclude the cross-examination of Mr Savani at 13:00 until 16:00.

13. The Tribunal fully appreciates that self-representation in a Tribunal hearing can be a stressful process and that can cause anxiety. The claimant was conducting the proceedings from home, which may have lessened any anxiety or conversely, may have added to it. The concern was that if the evidence and submissions could not be concluded within the time allocation, not only would a resumed hearing not be listed until much later on in 2021 (September or December); that the claimant's anxiety would return when the hearing resumed and the unresolved proceedings from 2017 would add to the pressure the claimant felt he was under.

14. The Tribunal resumed on day-five to consider the respondent's written submission and both parties' oral submissions; and then retired to deliberate. The intention had been to have oral submissions during the afternoon of day-four, with written submissions (if relied upon) to be provided the following day (Friday 8/1/2021 a non-sitting day). The claimant originally requested that time-limit be extended to Monday 11/1/2021.

15. Matters were then overtaken by the claimant's health issues and the parties were given until 9:00 on Monday 11/1/2021 to provide written submissions. The Tribunal resumed at 11:00 and the intention was the written submissions would be read during that time. The respondent sent its written submissions just before 9:00. The claimant sent an email and said he would be providing an oral submission, implying that he did not intend to provide a written submission. Nothing more was said and Mr Green provided an oral closing summary and the claimant did the same.

16. The Tribunal then concluded the parties' participation in the hearing and adjourned for lunch, with a view to beginning its deliberations in the afternoon. At 12:36 the claimant sent an email stating that he had run out of time to provide his oral submission and attached a document setting out his submission in writing. He did say that he accepted the Tribunal may not have regard to it, as it was provided after the 9:00 deadline.

17. Irrespective of the prompting the claimant had received whilst giving his evidence, the quality of the evidence was poor. He answered 'no comment' and struggled to answer questions. He lacked focus or recall in respect of his own allegations. He answered that the evidence was

'misconstrued', 'grossly mis-stated' and 'mistaken'. He said that he was insulted, but could not say what the insults were; other than to say he was referred to as the 'Pre Reg' or called 'Pre Reg' rather than by his first name. The claimant embellished the evidence and contradicted himself. The claimant would not accept matters which were factually correct (although not relevant to the issues). One example was the following extract from the GPhC Pre-Registration Manual (page 315) which provided:

> '2.11 Full- and part-time training
>
> Usually training is full time, which means working between 35 and 45 hours a week.
>
> You must agree any arrangements to work part time with the GPhC in advance. 'Part time' means working at least 17.5 hours a week, over at least three days a week. This might be agreed before you start training or as the result of a change in circumstances during the year.
>
> Things to consider when deciding if a part-time training arrangement is right for you:
>
> • Will you still be eligible to sit your chosen assessment? To enter the registration assessment, you will need to complete at least the equivalent of 39 weeks' full-time training by the assessment entry date for any particular sitting.
>
> • Can you meet the GPhC Criteria for initial education and training? You should complete your part-time training within the time limits given, and there is no extra time allowed if you choose to train part time.
>
> • Will you have enough contact time with your tutor? You should make sure that the hours you usually work each week overlap with your tutor for at least 80 per cent of the time you are working.
>
> • Will your part-time arrangement affect any other trainees? Usually your tutor will only be allowed to supervise one trainee at a time. If changing to a part-time arrangement means your training will overlap with that of another trainee, you should discuss with us whether the arrangement meets our requirements.
>
> Your employer must also agree that their standard training plan can be changed to fit in with this arrangement and still give you the opportunity to meet all the performance standards.'

18. The claimant attempted to put the third bullet point to Mrs Bedi (although it was not an allegation, he presumably wished to establish that she had not overlapped with him for more than 80% of the time). The claimant simply would not accept that as a matter of punctuation, the bullet points followed the colon and the phrase 'things to consider when deciding if a part-time arrangement is right for you'. Despite this being pointed out to him, he continued to insist that as the heading of the section was full-time and part-time working, that the bullet points applied to him, as a full-time worker. This was simply wrong and it demonstrated to the Tribunal the

claimant's inability to listen to an explanation and to accept it, when it was clearly correct.

19. In contrast, the respondent's witnesses were for the most part focused, measured and careful. If they did not recall a scenario (for example what day of the week a particular date in 2017 was) they said so. Furthermore, they did not let the claimant attribute their evidence to them where he misrepresented it. For example, when a witness stated something the claimant had told them, he tried to repeat his statement as the witness' own evidence. The respondent's witnesses made a very clear distinction between what the claimant had told them and their own evidence.

20. The claimant had been directed to provide further particulars of his allegations (what was said, who said it, where it was said, when the event took place, etc) by 9/4/2019, with the opportunity for the respondent to respond to that by 9/5/2019. On the first day, the respondent raised the issue that the allegation of abusive and insulting comments made to the claimant had not been pleaded and there had been no application to amend the claimant's claim to include that allegation. As the respondent had not taken this point earlier and as it had responded to the allegation and addressed it, it was considered in accordance with the overriding objective to proceed. The respondent's point was taken and Mr Green, in reality did no more than to raise it and have it noted.

21. A second preliminary matter arose, which was that in his chronology, the claimant was seeking to rely upon four protected acts is respect of his victimisation claim, rather than the two identified at the preliminary hearing. On this occasion, the claimant was not permitted to expand his allegations beyond those which had been identified at the preliminary hearing. Two protected acts had been identified and that was the case the respondent had responded to. The claimant was not prevented from advancing his allegations of victimisation based upon the two protected acts pleaded. If it had become clear to the claimant that he wished to rely upon additional acts, then the respondent should have been put on notice of that in advance of the final hearing and have been given the opportunity to object to any application to amend and if granted, have had the opportunity to address the allegations.

Findings of fact at the substantive hearing

22. The respondent deducted £450 from the claimant's final pay in respect of an external training course which was booked for the claimant and which, as a result of his resignation, he was no longer able to attend as an employee of the respondent (page 88). Subsequently, the respondent realised that VAT element of the deduction should not be charged to the

claimant and said it would reimburse the claimant £75. The correct deduction was therefore £375.

23. The respondent relies upon a contractual clause entitled 'deduction of remuneration' (page 76). The clause reads:

> 'The Company reserves the right at any time during or in any event on termination to deduct from your remuneration any monies owed to the Company by you including but not limited to any missing property including petty cash that was in your control or was your responsibility, excess holiday, outstanding loans, advances and the cost of repairing any damage or loss to the Company's property caused by you. In the event of shortages arising of cash or of stock the Company reserves the right to recover an equitable amount from any payments due to any employee concerned.'

24. The clause refers to 'any monies owed' and gives a non-exhaustive list of examples. The deduction is therefore authorised by this contractual clause.

25. The claimant's placement started on 7/8/2017. His own evidence is that he had decide to leave once he had secured an alternative placement by the 19/8/2017. The reason being, in his view the respondent had reneged on an agreement that he would work alternative Saturdays, rather than working every Saturday (claimant's witness statement paragraphs 7-9).

26. This was evidenced by the text messages between the claimant and his friend Khadhija between 19/8/2017 and 28/10/2017 and it is clear the claimant intended to leave after the 13-week review (pages 136-150). The claimant hoped to join Khadhija's place of work and they discussed other vacancies.

27. Before the claimant resigned, another friend sent him a form to enable him to change his placement and to work for a different employer on 23/10/2017 at 16:50 (page 175-184). During those exchanges the claimant admitted some of his errors and he expressed his general dissatisfaction with the manner in which he was being trained by the respondent.

28. The Tribunal finds the claimant was dissatisfied with the requirement that he work every Saturday and had decided to leave from that point onwards. This was then compounded by, as the claimant perceived it, the training which was provided. The claimant had decided to leave after the 13-week review, however, his resignation was then accelerated by the invitation to the disciplinary hearing to address performance issues and that resulted in his resignation on 26/10/2017.

29. The claimant sought advice from Pharmacist Support and from the CAB on 30/8/3027. The Tribunal finds this was in relation to the claimant's

upset that he was expected to work every Saturday and his desire to complete the 13-week assessment with the respondent and with a view to him then transferring his training elsewhere. The claimant did transfer to an alternative pharmacy (Harbs), he commenced work on 6/11/2017 and he completed his 13-week assessment on 1/2/2018. He became a Pharmacist on the Register on 1/6/2019, having passed the pre-registration examination on 27/9/2018[2] (Chronology).

30. The claimant was also upset at being asked to do repetitive and in his view, demeaning tasks, such as filing and attaching labels to prescriptions. He felt that these tasks were beneath him. It was his view that he was not being properly trained and he wanted exposure to the more technical and interesting aspects of the training, such as work shadowing. The respondent took the view that the claimant needed to 'start from the bottom' and prove himself with the more mundane tasks, before he moved onto the more challenging part of the training. The Tribunal accepts that other Pre-Registration trainees did mundane work during the first 13-weeks and the work shadowing came later in the process.

31. The claimant sought to compare the training at the respondent, with that of Ms Korany who had previously been a Pre-Registration Pharmacist, been supervised by Mrs Bedi and had qualified. It was Mrs Bedi's view that the claimant wanted to better Ms Kornay or at least be at the same stage as she had been at the 13-week review. Mrs Bedi confirmed that it was not essential that all the competencies had been met by the time of the 13-week review and it was possible to revisit the competencies and for them to be met later on. Mrs Bedi said in evidence that the training was a year's course and that trainees were expected to learn and to apply that experience throughout the year.

32. Adopting the claimant's order of allegations, the next issue was the claimant not being able to use a consultation room to pray. The prohibited conduct was direct discrimination, harassment or in the alternative, this was a detriment as a result of a protected act (victimisation). This was not pleaded as an allegation of indirect discrimination.

33. The respondent did not say the claimant could not pray. The claimant's preferred prayer location was one of the consultation rooms. It was the claimant's case he had been given permission to use a consultation room by Ms Korany. His use of a consultation room for prayer came to the respondent's attention when he was praying and a colleague either tripped

[2] The chronology was that the claimant would have sat the examination on 27/6/2018 and have become a pharmacist on 1/8/2018 had he remained in the respondent's employ.

or nearly tripped over him[3]. The claimant had been offered use of the kitchen area. The claimant was of the view that this area went against the teachings of Islam and it was not a suitable area for prayer. Ms Siddique also prayed and her view was that the kitchen area was not ideal, but was acceptable.

34. The claimant's case was that as the kitchen was next to a toilet, not only was this unsuitable, but that it invalidated his prayer. During the hearing however, the claimant changed his objection and said that it was potentially people walking through the kitchen to use the toilet[4] whilst he was praying, that invalidated his prayer. There was however a second toilet facility which staff could use. Ms Siddique said her colleagues observed her praying and would not interrupt her or walk through to the toilet. The respondent's case was that the claimant had the use of the whole of the kitchen area and could pray in gangway three, which faced the right direction, was large enough and where the claimant was less likely to be disturbed. Confusingly, the claimant's own evidence was that he had prayed in the public area of the pharmacy and so had more chance of someone disturbing him by walking past.

35. The claimant accepted the floorplan of the pharmacy was accurate, although it was not to scale. Ms Siddique said, and it was accepted, that there was a cloakroom between the toilet and kitchen area. This meant that there were two doors, which could be closed between the toilet and cloakroom and cloakroom and kitchen. The claimant's preferred location for prayer was to use one of the consultation rooms. It was his view that patients could wait (on his case up to five minutes) whilst he completed his prayers. The respondent took the view that the consultation rooms were intended for that purpose, not for prayer. Although the claimant did not agree, the respondent was entitled to refuse to allow the claimant to continue to pray in a consultation room.

36. The Tribunal finds the respondent did as much as it needed to, to discharge its responsibility to provide an area for prayer for the claimant. The kitchen area was suitable, notwithstanding the claimant's view and his insistence that the kitchen was next to the toilet; was simply factually incorrect.

37. Furthermore, the Tribunal finds the respondent had provided space for other or previous employees to pray.

[3] The claimant set great store by this, as he saw it, inconsistency. It was explained to the claimant that the issue was that his use of the consultation room for prayer had come to the respondent's attention, not the circumstances of how it had come to the respondent's attention.
[4] There was a second toilet.

38. The claimant's next allegation was he was called stupid and told that he was not capable of qualifying as a pharmacist.

39. In his witness statement, the claimant claims Mr Savani told him to:

> 'Shut up, you shut your mouth, you are stupid, ..' (paragraph 28a)

40. The claimant said this took place in a meeting on 16/10/2017[5]. The claimant did not however give evidence-in-chief that it was Mr Savani who said he was not capable of qualifying as a pharmacist.

41. Mr Savani denied he had called the claimant stupid; or, indeed that he had said the claimant was not capable of qualifying. The Tribunal finds that Mr Savani was a measured and calm person and that it would be very difficult to upset his equilibrium. The respondent never questioned the claimant's intellectual qualities and indeed, the Tribunal found the claimant to be articulate and intelligent; although he was unable to follow clear instructions, insisted on doing things in his own way and he did not accept authority.

42. The Tribunal also took into account Dr Baxter's evidence that he had observed the claimant was agitated and aggressive towards Mr Savani and it was his view that Mr Savani did not react to that.

43. The claimant's recollection also lacked consistency in that when providing further information in respect of this allegation, he attributed it to Mrs Bedi and gave the dates as 26/9/2017 and 13/10/2017. The claimant referred to his text messages to Ms Siddique on 13/10/2017 to substantiate his account (pages 151-153), yet the message states that it was three weeks earlier Mrs Bedi had said she would not sign the claimant off if he questioned her. Not, that Mrs Bedi has said the claimant was not capable of qualifying as a pharmacist.

44. The respondent did have concerns about the claimant's 'people' skills in dealing with his superiors, colleagues and patients, but not with his intellect. The Tribunal finds that the claimant was a graduate undertaking the vocational part of his training and was inexperienced in the workplace. The respondent had concerns about the claimant, but neither Mr Savani or Mrs Bedi called him stupid or told him that he was not capable of qualifying.

45. The claimant alleges he was 'threatened' with disciplinary action. In fact, he was invited to a meeting of a disciplinary nature on 23/10/2017 (page 78). The Tribunal finds he was put on notice, with reasonable justification,

[5] Initially the claimant had said the letter inviting him to a disciplinary meeting referred to him as 'stupid'. This was clearly incorrect.

of the respondent's concerns regarding his 'people' skills and was invited to a meeting to discuss his performance and conduct. There was no 'threat'.

46. Although it is not an allegation, the claimant took issue with the lack of notice for the meeting as the letter was dated 23/10/2017 and the meeting was scheduled for 25/10/2017. On 24/10/2017 the claimant thanked Mr Savani for rescheduling the meeting to 30/10/2017 (page 84). Contrary to the case the claimant attempted to advance at the hearing, the meeting had clearly been rearranged at the claimant's request. This is another example of the claimant's inconsistency and misrepresentation of the facts.

47. The respondent had clearly mentioned its concerns to the claimant (by way of one example, such as not having a confidential discussion with a patient on speakerphone when the conversation could be overheard) as he referred to them in the messages to his friend (page 182-183). The Tribunal finds there were issues with the claimant's performance, they had been raised with him, he had not improved and so the respondent formalised the situation by inviting him to a disciplinary meeting to discuss them.

48. The next allegation is that there was a threat to report the claimant to the Regulator[6]. According to the claimant, this event took place on the 16/10/2017 and followed the incident over the mouthwash. The claimant's evidence is that there was no conduct on his part, that would warrant a report to the Regulator. In the further particulars, the claimant attributes this comment to Mr Savani in a discussion in a consultation room.

49. The respondent's ET3 (paragraph 15 page 32), referred to the claimant taking it upon himself to override the prescription and change the mouthwash, conduct which was illegal, and *could have* resulted in prosecution by the Regulator.

50. In fact, the Tribunal was told and it accepts, that the prescription was not overridden by the claimant. Amending it was discussed and this was an example of a learning point for the claimant. As the mouthwash prescribed contained alcohol, the correct approach was to explain this to the patient and invite her to have the prescription amended, if she chose to do so. This was achieved through discussing the incident and the appropriate approach was then discussed with the claimant, Mrs Bedi and Mr Savani. The Tribunal can accept that during this discussion, a referral to the Regulator may have been discussed, along the lines of, *had the prescription been amended and an alternative mouthwash supplied, this could have resulted in having to report this to the Regulator*.

[6] The Regulator is the General Pharmaceutical Council or GPhC.

51. The Tribunal finds there was no matter arising that needed to be reported to the Regulator and as such, there was no threat to report the claimant.

52. The claimant had been given access to Ms Korany's training file from when she had been a Pre-Registration trainee. When the claimant resigned and left the respondent, Ms Kornay noted the folder was missing. Not only was it her property and she wanted it back, but it also contained confidential information about patients. Ms Kornay messaged the claimant making enquiries, but did not receive a reply. Ms Siddique also made enquiries about the folder with the claimant. The claimant denied having the folder and the Tribunal makes no finding that the missing file was anything whatsoever to do with the claimant.

53. When Mr Savani accepted the claimant's resignation on 26/10/2017, he asked the claimant to return all the respondent's property (page 87). On 22/12/2017 the claimant asked Mr Savani what colour the folder was, so he could check if he had mistakenly taken it, although he went onto say that he had no need for it (page 90).

54. Ms Korany then reported the matter to the police on 1/2/2018 (page 91-94). Ultimately the police, having contacted the claimant who denied having the file, closed the report on 4/2/2018 (page 101).

55. Flowing from that, there was a delay in payment of the claimant's final salary and it was not in fact paid until 12/2/2018. Mr Savani gave the reason for the delay in making the payment was that the property had not been returned as requested and he was awaiting a decision from the police in relation to the report. The main reason for the delay in the payment cannot have been the police investigation as the matter was not reported until the 1/2/2018 and the payment had been outstanding from at least the pay date in November 2017[7].

56. It is correct to say that the claimant did not return the respondent's property (the lab coat and pens) until the 16/12/2017 and that at that time, the location of the folder was unknown. Although the Tribunal does not condone the respondent withholding the payment in the circumstances, it finds that the respondent did so in the hope that it would result in the folder being produced.

57. The Tribunal therefore finds that the reason for reporting the missing folder to the police was in part to protect the respondent should there have been any data breach and also, it was a final attempt to coerce the claimant into returning the folder.

[7] If not the October 2017 pay date.

58. The abusive and insulting comments were alleged by the claimant to have been were set out in the further particulars on page 49. The first one related to the argument over working Saturdays. The claimant claims that Mr Savani said words to the effect that if you don't like it here, pack your bags and go elsewhere. Mr Savani denies making any insulting comments, as does Mrs Bedi. It is clearly self-evident that any comment made, was made in relation to the argument about working Saturdays. The comment, if made, was not made in respect of any protected characteristic.

59. Any comment made by Mr Savani in respect of a rude patient was similarly, not made by reference to any protected characteristic.

60. Mr Savani agreed there had been a discussion about the training the claimant was receiving, one Saturday as the claimant was leaving work. Mr Savani admitted he asked the claimant to talk to Mrs Bedi and attempt to resolve any concerns, noting that the claimant was very focused on completing his training. Even if Mr Savani did comment using the words attributed by the claimant (for example, saying the claimant was over-reacting), those comments are not related to any protected characteristic.

61. It is the claimant's case he was referred to as the 'Pre-Reg' by Mrs Bedi and he found this insulting as she did not use his first name. Mrs Bedi accepted that she may have referred to the claimant as 'Pre-Reg'. Again, referring to the claimant by his status, rather than his name is not related to any protected characteristic. The Tribunal accepts referring to an employee by their job title rather than their first name, may in fact be appropriate and professional, depending upon the circumstances.

62. The final allegation of an abusive or insulting comment, is a physical act of the claimant alleges, Mr Savani grabbing him by his shirt against the pharmacy counter. In his witness statement, the claimant refers to being 'pushed' and 'grabbed and pushed'. In the hearing the claimant referred to a 'gentle push'. Mr Savani denies this and says it was the claimant who was aggressive towards him. Dr Baxter's evidence was that the claimant was the aggressor. Ms Smith when giving evidence to the Regulator said the situation became uncomfortable, but that she did not see any physical contact. The Tribunal finds, having observed both the claimant and Mr Savani and taking into account the evidence of Dr Baxter and other members of staff, that the claimant was not happy at being kept waiting by Mr Savani, he wanted to return the respondent's property to Mr Savani and wanted his property back (his BNF book). The claimant was agitated and assertive and was the aggressor. Mr Savani, the Tribunal finds, was in control. Even if there was accidental physical contact, that was due to the claimant's demeanour and Mr Savani's perception the claimant was

about to go behind the counter and was nothing whatsoever to do with the claimant's race or religion.

63. The final allegation was cancelling the claimant's training course, the cancellation charge led to the deduction from the final payment of salary. During the hearing, the claimant proposed that the course was cancelled by Mr Savani on 3/10/2017 as that was the date shown on the invoice (page 88). On the claimant's case therefore, the cancellation pre-dated his resignation; which was Mr Savani's explanation for cancelling the course. In his letter to the claimant of 26/10/2017 Mr Savani said he had cancelled the course (page 87). A cancellation invoice was produced, payment was due by the 2/11/2017 and Mr Savani's cheque was dated 31/10/2017.

64. As the claimant's case on this allegation had emerged during the hearing[8], the respondent produced documentation to show that an amended invoice was sent to Mr Savani via email on 31/10/2017 and he replied to say that he was posting the cheque on the same day.

65. The Tribunal therefore finds the course was not cancelled until the claimant resigned and that was the reason for the course being cancelled.

66. In respect of the claimant's claim of victimisation, the two identified protected acts are: a disclosure to Mrs Bedi on 5/10/2017; and a disclosure to Mrs Bedi and Mr Savani on 16/10/2017. These were particularised as the discussion about prayer arrangements and subsequently, the mouthwash incident on 16/10/2017.

67. The respondent's position is that a discussion about prayer arrangements cannot amount to a protected act for the purposes of s. 27 (2) EQA. In addition, discussing a patient's faith and the appropriateness of the content of a prescription, similarly, cannot amount to a protected act.

68. The Tribunal finds that a discussion about a location for praying, is not a protected act. It is a discussion about the physical location for prayer. A discussion about the suitability of mouthwash prescribed, is also not a protected act. The claimant himself gave an example of prescribing medication which contained sugar, for a diabetic patient. The issue clearly was the mouthwash prescribed, not the religion of the patient. The discussion did not contain any other thing for the purposes of or connection with the EQA and it did not amount to an allegation there had been a contravention of the EQA. In any event, if the Tribunal is wrong on this and the conversations did amount to a protected act, the Tribunal will

[8] It changed from the act of cancelling the training course was an act of discrimination, to Mr Savani had cancelled the course on the 3/10/2017 and that was discriminatory.

set out its conclusions in respect of whether or not the claimant was subjected to a detriment as a result of victimisation under the EQA.

The Law

69. The protected characteristic is race (Persian[9]) or in the alternative religion (Muslim) per s. 9 and a. 10 EQA. The complaint is of dismissal or detriment per s. 39 (2) (c) and (d) EQA.

70. The prohibited conduct is under s. 13, s. 26 and s. 27 of the EQA, namely direct discrimination, harassment and victimisation.

> 13 Direct Discrimination
>
> 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.
>
> 23 Comparison by reference to circumstances
>
> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.
>
> 26 Harassment
>
> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

[9] The claimant describes himself as Persian, although his race was recorded as Iranian in the case management order.

S. 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 S. Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

S. 136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

71. In respect of harassment under s. 26 EQA, in Richmond Pharmacology v Dhaliwal 2009 IRLR 336 the EAT set out a three-step test for establishing whether harassment has occurred: (i) was there unwanted conduct; (ii) did it have the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person and (iii) was it related to a protected characteristic?

72. At paragraph 22 of Richmond Pharmacology, the EAT said:

> 'We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

73. Section 27 EQA provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act.

74. A protected act is defined in section 27(2) and includes the making of an allegation (whether or not express) that there has been a contravention of the EQA. It is for the claimant to prove that they did the protected acts relied upon before the burden can pass to the respondent, Ayodele v Citylink Ltd 2018 ICR 748 (CA):

> 'Before a tribunal can start making an assessment, the claimant has got to start the case, otherwise there is nothing for the respondent to address and the nothing for the tribunal to assess.
>
> There is therefore no burden of proof on an employer unless and until the claimant has shown that there is a prima facie case of discrimination which needs to be answered.'

75. In Scott v London Borough of Hillingdon 2001 All ER (D) 265 the Court of Appeal held that knowledge of the protected act on the part of the alleged discriminator was a precondition. The burden of proving knowledge lies upon the claimant.

76. The burden of proof in s. 136 EQA provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred.

77. The authority on the burden of proof in discrimination cases is Igen v Wong 2005 IRLR 258. That case makes clear that at the first stage the tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

78. In Shamoon v Chief Constable of the RUC 2003 IRLR 285 it was said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. It is suggested that tribunals might avoid arid and confusing disputes about

identification of the appropriate comparator by concentrating on why the claimant was treated as she was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

79. In Madarassy v Nomura International plc 2007 IRLR 246 it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase 'could conclude' means that 'a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination'.

80. In Hewage v Grampian Health Board 2012 IRLR 870 the Supreme Court endorsed the approach of the Court of Appeal in Igen Ltd v Wong and Madarassy v Nomura International plc. Which said that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

81. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in Igen v Wong approved the principles set out by the EAT in Barton v Investec Securities Ltd 2003 IRLR 332 and that approach was further endorsed by the Supreme Court in Hewage. The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

82. The Court of Appeal in Ayodele v Citylink Ltd 2017 EWCA Civ 1913 confirmed that the line of authorities including Igen and Hewage remain good law and that the interpretation of the burden of proof by the EAT in Efobi v Royal Mail Group Ltd EAT/0203/16 was wrong and should not be followed.

83. In Dresdner Kleinwort Wasserstein Ltd v Adebayo 2005 IRLR 514 the EAT said that the shifting of the burden to employers meant that tribunals are entitled to expect employers to call evidence which is sufficient to discharge the burden of proof. The EAT said that one of the factors to be taken into account, in an appropriate case, could be the respondent's failure to call witnesses who were involved in the events and decisions about which the complaint is made, in cases where the burden is found to have passed to the employer.

84. A detriment has been held to be 'putting under a disadvantage' and 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment' (MoD v Jeremiah 1980 ICR 13), 'disadvantaged in the circumstances and conditions of work' (De Souza v AA 1986 ICR 513 CA, or simply a 'disadvantage' (Porcelli v Strathclyde Regional Council 1986 ICR 564).

85. The claimant claims the respondent made unauthorised deductions from his wages contrary to s. 13 Employment Rights Act 1996 (ERA):

> 13 Right not to suffer unauthorised deductions.
>
> (1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

Conclusions

86. The claim of unauthorised deduction from wages in the sum of £375 fails as the cost of the training course cancellation was authorised by the claimant's contract.

87. The reason for the claimant's decision to resign was initally due to the fact he did not want to work every Saturday and he had argued with Mr Savani about this. He was generally unhappy and he perceived he was expected to do tasks with he felt were beneath him. In fact, those tasks were reasonable to expect a Pre-Registration trainee to carry out in the first 13-weeks and the same had been expected of Ms Korany and then of Ms Siddique. The respondent had raised performance issues with the claimant and he did not improve. That led to inviting the claimant to a disciplinary meeting. The claimant was upset and angry about this and as a result, he resigned. There was no failure to provide training and the training provided was suitable at that stage of the claimant's career.

88. The training programme was generally the same for all Pre-Registration trainees and the claimant was not treated less favourably because of his race or in the alternative, his religion. There was no unwanted conduct related to a protected characteristic. The conduct in the sense that the claimant was invited to a disciplinary meeting was unwanted, it was not however motivated by his protected characteristic. The Tribunal accepts that there were issues with the claimant's performance, which resulted in the disciplinary meeting being arranged. The respondent's non-

discriminatory explanation, that the performance issues were the reason for scheduling the meeting, was accepted.

89. The location offered for the claimant to pray was adequate. It was not next to a toilet. The claimant was not treated less favourably than an actual or hypothetical comparator. Offering the claimant an adequate location to pray, at his request, cannot amount to unwanted conduct so as to constitute harassment. Furthermore, there was no detriment established by the claimant.

90. The claimant has simply not made good his allegation that he was told he was not capable of qualifying as a pharmacist or that he was called stupid. The allegation is not accepted and therefore, the burden of proof does not transfer to the respondent under s. 136 EQA as there are no facts established by the claimant from which the Tribunal can decide, in the absence of any other explanation, that a contravention of a provision occurred.

91. The claimant was invited to a disciplinary hearing to address performance issues as informal coaching had not worked. The Tribunal accepts that was the reason for inviting the claimant to a meeting. The objective disciplinary issues had nothing whatsoever to do with the claimant's race or in the alternative, his religion.

92. The Tribunal finds there was no 'threat' to report the claimant to the Regulator. Any discussion about a referral to the Regulator, was in general terms and was made as a reference point for the claimant.

93. A report was made to the police. This was because the respondent and Ms Korany believed the claimant had the folder in his possession when his employment ended. The motivation in reporting the matter to the police was to encourage or persuade the claimant to return the folder. The claimant's race or religion had no bearing on the decision to report matters to the police. The Tribunal expressly reaches no conclusion in respect of what happened to the folder.

94. The was a delay in making the final payment of wages and issuing the P45. Although the Tribunal is unimpressed at the course of action taken, it is satisfied that the motivation was to encourage the claimant, on then respondent's view, to return the folder. The claimant's race or religion had no bearing on the respondent's failure to pay the final salary and to issue the P45 promptly.

95. The Tribunal prefers the more measured evidence of the respondent that insulting comments were not made. This was a professional and regulated environment, where members of the public could walk in at any

time (as Dr Baxter did during the altercation on the 16/12/2017). The Tribunal accepts the respondent's denials, save that Mrs Bedi did say she may have referred to the claimant as the Pre-Reg. Nevertheless, even if the phrases were used as per the claimant's version of events, they do not amount to less favourable treatment because of his race or religion or in the alternative, they were not used related to the relevant protected characteristics.

96. The training course was cancelled. The respondent's non-discriminatory explanation is accepted. The claimant had resigned and there was therefore no need, for the respondent to incur the cost of the training course and so it was cancelled.

97. The Tribunal had found that the claimant did not do any protected act on the 5/10/2017 or on the 16/10/2017. Even if the Tribunal is wrong on that point, the claimant was not subjected to a detriment because he had done a protected act. Raising the prayer arrangements cannot be both a protected act and a detriment. In respect of the other allegations, there is no link to the disclosure on 5/10/2017 and 16/10/2017 and the alleged detriments. Of the events which the Tribunal found happened, they were not detrimental and they did not occur as a result of the allegations.

98. The events which pre-date the alleged protected acts cannot logically be detriments because the claimant has done a protected act.

99. For those reasons, the claims fail and are dismissed.

100. A provisional remedy hearing was listed for 14/5/2021. As the claim has failed the Tribunal proposes to vacate that hearing date.

Employment Judge Wright

15 January 2021

Extract from the Case Management Order of Employment Judge Nash on 19/3/2019

The claim

(3) The claimant was employed by the respondent, as a Rre-Registration pharmacist from 7 August 2017 until his resignation with effect on 26 October 2017. By a claim form presented on 9 March 2018 following a period of early conciliation from 27 December 2017 to 10 February 2018 the claimant brought complaints of

a. Unfair dismissal.
b. Race discrimination
c. Religious discrimination
d. For wages being £450 training costs.

(4) The claim for unfair dismissal was dismissed upon withdrawal as the claimant lacked two years' service.

The issues

(5) The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

Time limits / limitation issues

a. Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")?

b. Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred; etc.

EQA, section 13: direct discrimination because of race and or religion

c. The claimant is an Iranian for the purposes of his race claim, and he is a Muslim.

d. Has the respondent subjected the claimant to the following treatment:

i. Constructive dismissal
ii. Prayer arrangements

iii. Informing the claimant that he was not capable of qualifying as a pharmacist and was “stupid”
iv. Threats of disciplinary action
v. Threats to report him to the GPHC, the professional body
vi. Contacting the police
vii. Delay in payment of final wages and P45
viii. Abusive and insulting comments to the claimant.
ix. Cancelling the claimant’s training course?

e. The claimant is ordered to provide further details of his complaints at paragraph (iv) below.

f. Was that treatment “*less favourable treatment*”, i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances? The claimant relies on the following comparators :- Mrs Siddique (currently working for the respondent), and his two predecessors as pre-registration pharmacists - Tiffany, and a man whose name he does not know. The respondent accepted that it knew who these people were. In the alternative he relied upon hypothetical comparators.

g. If so, was this because of the claimant’s race and/or religion?

EQA, section 26: harassment related to race and/ or religion

h. Did the respondent engage in conduct as follows:

i. As per the direct discrimination claim at paragraph (vi)

i. If so was that conduct unwanted?

j. If so, did it relate to the protected characteristic of race and/or religion?

k. Did the conduct have the purpose or (taking into account the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Equality Act, section 27: victimisation

l. Did the claimant do a protected act? The claimant relies upon the following:

    i. A disclosure on 5.10.17 to Mrs Bedi
    ii. A disclosure on 16.10.17 to Mrs Bedi and Mr Savani

m. Did the respondent subject the claimant to any detriments as follows:

    i. [The Claimant will set out which of the acts of direct discrimination at paragraph (vi) he relies upon as detriments for his victimisation claim].

n. If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?

Unauthorised deductions

o. The respondent agrees that it made deductions from the claimant's wages in the sum of £450.

p. The issue is whether this deduction was contractually permitted?

Remedy

q. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.