EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4108358/2021

Hearing held in Glasgow on 29 November 2021, 30 November 2021 and 1 December 2021

Employment Judge M Whitcombe
Tribunal Member Mrs LJ Grime
Tribunal Member Ms L Hutchison

Miss Kirsten Fordham	**Claimant** **In person**
The Scottish Ministers	**Respondent** **Represented by:** **Ms M McGrady** **(Solicitor)**

JUDGMENT

The unanimous judgment of the Tribunal is as follows.

(1) The claim for victimisation contrary to section 27 of the Equality Act 2010 is not well-founded and is dismissed.

(2) All of the other claims were found to be out of time and outside the jurisdiction of the Employment Tribunal by EJ Walker at a preliminary hearing on 16 July 2021 . They are also therefore dismissed.

(3) Oral reasons were given in the presence of the parties at the end of the hearing.

REASONS

Introduction and background

1. Oral reasons for this judgment were given in the presence of the parties at the end of the hearing on 1 December 2021. These written reasons are provided at the claimant's subsequent request.

2. The claimant was formerly employed by the respondent for just over 18 months between 1 April 2019 and 20 October 2020 as a Fiscal Officer in the Crown Office and Procurator Fiscal Service. The functions and constitutional role of the latter body are well-known. The claimant's employment ended when she was dismissed for gross misconduct following a lengthy investigation and disciplinary process. A subsequent appeal was unsuccessful.

3. The relevant misconduct, so far as the respondent was concerned, was the claimant's unauthorised viewing of certain case records without a valid business reason, in breach of several of the respondent's policies. The vast majority of the records accessed related either to people sharing the claimant's own family name or that of her partner. Some of the names corresponded precisely with those of people personally known to the claimant.

Claims

4. By a claim form received by the Tribunal on 12 March 2021 the claimant initially brought claims of unfair dismissal, direct age discrimination, sex

discrimination, sexual orientation discrimination and sexual harassment. The respondent denied all of those claims.

5. At a preliminary hearing for case management on 1 June 2021 Employment Judge Walker recorded that the claims were for sexual harassment, victimisation, direct age discrimination and unfair dismissal. That reformulation no doubt resulted from the way in which the claimant had completed her case management agenda and also from further clarification at that hearing.

6. At a further preliminary hearing on 9 August 2021 Employment Judge Walker found that, with one exception, all of the claims were out of time and that the Tribunal therefore had no jurisdiction to hear them. The exception was the claim for victimisation contrary to section 27 of the Equality Act 2010, in respect of which Employment Judge Walker considered it just and equitable to extend time.

issues for this hearing

7. Consequently, the only claim with which we were concerned was the claim for victimisation contrary to section 27 of the Equality Act 2010. For reasons explained below, the issues were actually very narrow.

8. The relevant protected acts were complaints of sexual harassment made by the claimant to management in about September or October 2019 and also during the course of a disciplinary hearing on 24 August 2020. The respondent accepted that those complaints had been made (subject to a minor dispute about the date of the first of them) and also that they were protected for statutory purposes.

9. The relevant detriments all concerned the disciplinary process. Initially, the claimant alleged that the decision to carry out an investigation was a relevant detriment. However, she abandoned that argument during the

hearing when it became clear that the investigation had commenced prior to the date of the first protected act. That left two other detriments:

a. the decision to move from an investigation to a formal disciplinary hearing; and

b. the eventual decision to dismiss the claimant.

10. Unsurprisingly, the respondents agreed that both of those things were to the claimant's detriment. The respondents disputed that the claimant's protected acts in anyway caused or influenced those detrimental events.

11. On the first day of the hearing the claimant sought permission to amend her claim to add a new detriment in relation to the dismissal of her appeal. We were satisfied that permission to amend was necessary because there was no reference to detriment in relation to the appeal in the ET 1 or in Employment Judge Walker's record of the issues. Further, the claimant had not drawn it to the respondent's attention when the respondent had sought clarity and confirmation of the claimant's position on detriment in pre-hearing correspondence. The respondent had made the basis on which it was preparing its case clear - it would not include the appeal unless the claimant confirmed that the appeal formed part of the detriment relied on. Consequently, the respondent had prepared its case on the basis that the appeal was not in issue and had not prepared witness evidence on that point. Having applied well-known legal principles we refused permission to amend because the balance of justice and prejudice between the parties necessitated that conclusion. Our full reasons were given orally at the time.

12. Consequently, the sole but important issue for us was whether the claimant was subjected to the detriments of (a) disciplinary proceedings and/or (b) dismissal because she had done either or both of the protected acts listed above.

Hearing to consider liability only

13. During the hearing we directed that it would be confined to liability only, despite the respondent's objection. The hearing had been listed to deal with liability *and* remedy, but it became clear to us that the claimant had not assembled any evidence whatsoever to prove financial loss. She also failed to give any oral evidence relevant to injury to feelings or the personal injury which she apparently also claimed. We gave oral reasons for our decision at the time. In short, we concluded that although the claimant was culpable for those failures the hearing simply would not be fair if we proceeded on the basis that she would receive no compensation even if she won. Remedy would therefore be dealt with separately, if the claimant succeeded.

Substitution of a panel member

14. Most of the first day of the hearing was lost because Tribunal Member McAllister declared a personal connection with a manager working for the respondents. Although that manager was not a witness he was known to the claimant who said that he would have been in a line management relationship with some of the respondents' witnesses. Ms McAllister then stepped aside. The claimant did not consent to the continuation of the hearing with the remaining panel of two. Unfortunately it was not possible to obtain a substitute panel member (Ms Hutchison) until the following day. With the agreement of the parties, the original panel carried out some case management on the first day but did not hear any evidence.

Evidence

15. We were provided with a file of documentary evidence running to 619 pages. We took into account only the documents to which we were referred in evidence, which was by no means the whole file. At our

request the respondent also provided copies of some additional policies and procedures during the hearing.

16. All of the witnesses gave evidence on oath or affirmation and were cross-examined. Witness statements were not used in this case and all evidence in chief was given orally.

17. The respondent called:

a. Katie Woods (Assistant Business Manager for the High Court Sexual Offences Team in Glasgow) who had knowledge both of the background to the investigation and also the claimant's first complaint of sexual harassment.

b. Leslie Wilkinson (Business Manager - High Court Division) who took both the decision to commence the disciplinary process following the investigation and also the decision to dismiss the claimant at the end of that disciplinary process.

18. The claimant gave evidence and also called her PCS trade union representative Stephen Murray.

19. The logical running order of witnesses was adjusted in order to suit the availability of Mr Murray.

20. It is necessary to comment on the relative credibility of the witnesses. The respondent's witnesses seemed to us to be truthful and reliable. They gave their evidence in a thoughtful and straightforward manner without any hint of evasiveness or contradiction. Their credibility was not undermined in cross-examination. In contrast, we are not able to say the same about the claimant or Mr Murray. Both of them gave evidence which was directly contradicted on a number of key points by the notes of the disciplinary hearing on 24 August 2020. Both then accepted that the evidence they had given on oath was less likely to be correct than the notes which were agreed at the time. That led us to the conclusion

that we could not trust their recollection of events, even on central points. Further, we did not think that the claimant was entirely frank with us. At times we gained the firm impression that she was tailoring and changing her evidence in an attempt to avoid or minimise the consequences of concessions made or facts already established. She also sometimes showed a tendency to distract and deflect by changing the subject when difficult questions were asked. In summary, we did not simply have concerns about the reliability of the claimant's memory of events, we also had concerns about her truthfulness. For those reasons we preferred the respondent's evidence where it conflicted with that given by or on behalf of the claimant.

Findings of fact

21. We made the following findings of fact. Where facts were in dispute we reached our conclusions on the "balance of probabilities", in other words a "more likely than not" basis.

Policies, procedures and the claimant's awareness of them

22. Due to the nature of the respondent's work, it takes the protection of personal data extremely seriously. It publishes rules on the appropriate use of computer system and enforces those rules by means of a well-publicised disciplinary procedure. The key documents for present purposes are the respondent's Acceptable Computer Use Policy and the Civil Service Code. Civil servants, such as the claimant, are responsible for making themselves aware of the Civil Service Code and for complying with its requirements.

23. The respondent's Disciplinary Procedure at paragraph 4.6 defined gross misconduct as a serious breach of contract, including misconduct which, in the respondent's opinion, was likely to prejudice the respondent's

business or reputation or seriously or irreparably damage the working relationship and trust between employer and employee.

24. The Acceptable Computer Use Policy sets out how staff should use the respondent's computers and associated information systems. It gives examples of breaches of the policy which could justify dismissal including, *"knowingly accessing (or attempting to access) case information (without managerial authority) containing details of family members or close friends".*

25. The respondent requires all employees to complete mandatory training on matters including security and data protection. During the claimant's first week of employment in April 2019 she completed e-learning and online induction training including "Introduction to Security" which referenced the Acceptable Computer Use Policy and stated, *"you should not access any case that you have no right to do so or do not have any business need to do so [sic]'.* The module called "Data Protection" included a statement that *"you should only deal with cases which you require to deal with for your work".* The module called "Our Commitment to Victims and Witnesses" stated *"access data only where it is relevant to the work that you are carrying out. We* are satisfied that the claimant was sufficiently well-trained to be aware of all of those policies and the relevant guidance given in them.

26. Additionally, the Acceptable Computer Use Policy was expressly referred to in section 15 ("Conduct and Discipline") of the claimant's written statement of terms, which the claimant signed on 22 March 2019. Those terms also purported to enclose a copy of the Acceptable Computer Use Policy. While the claimant denied having received an enclosed copy we find that she was put on notice of the existence and importance of that policy and that she had an obligation to familiarise herself with it, obtaining a copy if necessary. If it were true that she did not receive a copy then she could and should have requested one

because it was clearly very important. However, given our doubts about the claimant's credibility we find on the balance of probabilities that she did receive a copy of the policy with her statement of terms. It was also referred to during her training (see above) and during the investigation the claimant confirmed that she had read it during induction training (see below).

Investigations

27. The origin of the events leading to the claimant's dismissal was the discovery on 28 May 2019 by the Management Information Unit Manager of a 2006 case with a recent marking record added by the claimant. The manager thought it suspicious that the claimant shared a surname with the accused and there was no obvious reason why the claimant should have been accessing that file. The manager alerted Katie Woods. Katie Woods spoke to the claimant who explained that she had accessed the case while trying to familiarise herself with the respondent's electronic case management system known as "PROMIS", which records the details of all criminal cases including information relating to criminal charges, productions and court updates. The claimant said that she had decided to search her own name and a case had come up which she thought related to her father. She admitted looking at the file and accidentally updating it. The claimant also confirmed having read the Acceptable Computer Use Policy as part of her induction and became upset. Ms Woods advised the claimant that an internal investigation would require to be undertaken which might lead to disciplinary proceedings and dismissal.

28. Ms Woods submitted a Security Incident Report to the Department Security Officer. They carried out some routine security checks on the claimant's access record since the start of her employment. The subsequent report showed a great many other searches carried out by the claimant on cases sharing her own family name over and above the

case discussed with her on 28 May 2019. The search also revealed that the claimant had made many searches on another family name which we will not list here in the interests of confidentiality. That turned out to be the family name of her partner.

29. A formal investigation was carried out by Stephen Cole, Assistant Business Manager, Specialist Casework. We did not hear oral evidence from him but his conclusions were contained in a written report sent to Lesley Wilkinson on 17 December 2019. The report reiterated some of the background already summarised above and also noted the claimant's explanation. Most of the cases accessed were closed but one active case had been accessed too. The claimant had not made her manager aware of the other searches when initially spoken to on 28 May 2019. A further concern was that on 29 April 2019 the claimant had searched on another name (which we will not record here). That person was possibly a witness and there was a link between a witness with that name and one of the other records searched by the claimant, a record which shared her partner's family name. That caused the investigator to be suspicious as to the reason why those particular cases had been accessed and searched.

30. We find that the investigation was extremely thorough. The investigator took statements from five witnesses including the claimant. He also considered a case management access report, two Security incident Report forms, the claimant's training record and a number of items provided by the claimant herself. The investigator concluded that within the date range 24 April 2019 to 29 April 2019 there had been an increase in activity in cases without an obvious business need. It appeared that the names concerned were known to the claimant. Within a short space of time the claimant had searched the records of 11 different people mostly sharing her own family name or that of her partner. One of those records was live at the time of the search. Katie Woods was concerned that she had not been informed of the full extent of the searches when

she had spoken to the claimant. The claimant had accessed a closed domestic abuse case belonging to her partner and had then accessed the records of the complainer in that case. The claimant said that she could not remember the instructions in her training not to access cases without a valid business reason nor to access cases involving people known to her. She said that she was accessing cases with which she was familiar, and which she knew to be closed, in order to familiarise herself with the system.

31. In Mr Cole's view there was sufficient evidence to suggest that the claimant might have known that she was not authorised to access the relevant case records. Suitable and sufficient numbers of experienced staff were available in the office to give advice if the claimant was unsure of the relevant policy. Mr Cole did not consider it plausible that the claimant had changed her father's record in error, nor did he regard the claimant's explanation for having accessed the records of a particular witness to be credible.

32. The investigator made three recommendations:

a. that a disciplinary hearing should be initiated in relation to the allegations;
b. that access to a particular case should be locked down;
c. that the claimant's case access between 1 August 2019 and the (then) present day should be reviewed.

33. The claimant did not make any specific criticism of the investigator's recommendations, nor did she suggest that he was in any way influenced by a protected act. Her complaint was limited to Lesley Wilkinson's decision to adopt the first of the recommendations listed above. However, for the sake of completeness, we find that the recommendation that there should be a disciplinary hearing was a logical and obvious one given the evidence available to Mr Cole. He concluded, *"based on all of the above, I believe it is reasonable to deduce that [the claimant]*

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minutes reveal an appropriately concerned and supportive approach. At time, the claimant regarded those concerned and supportive actions as a "betrayal".

37. The claimant was very clear that she did not wish for any other action to be taken than for her to be able to move seats. The claimant stated clearly that she did not want the management team to discuss any of the issues with the alleged perpetrator.

The decision to commence disciplinary proceedings

38. Lesley Wilkinson was appointed the "deciding officer". We accept her evidence that, prior to being appointed, she had no prior involvement in the case or knowledge of the allegations. She accepted that she might well have seen the claimant when attending the Glasgow office but had not had any conversation with or about her previously.

39. Lesley Wilkinson reviewed the investigation report and noted the recommendations. She agreed with the recommendation that formal disciplinary action should be taken and made a decision to that effect. We have already found that Mr Cole's recommendation for formal disciplinary action was reasonable and justified. Similarly, we find that Lesley Wilkinson's decision to adopt that recommendation was reasonable and justified. There is nothing inherently surprising about her decision and we see no basis for any adverse inference about her motivation.

40. There has not been any suggestion that Mr Cole had been aware of any protected act when making his recommendation and we also accept Lesley Wilkinson's evidence that she was quite unaware of the protected act which occurred around the week commencing 21 October 2019 when she made her decision to move to disciplinary proceedings. Ms Wilkinson's evidence that she was unaware of that protected act was, in

our assessment, credible as well as firm. The claimant accepted that she had no direct evidence of any awareness on Ms Wilkinson's part. The claimant's argument was based on a supposition that Ms Wilkinson must have discussed the protected act with Ms Woods because they occasionally worked near each other on visits to the Glasgow office. We do not think that follows at all and we prefer Ms Wilkinson's firm evidence on oath to the claimant's speculative suggestion.

Disciplinary hearings

41. The claimant was represented at all of the hearings by her trade union representative Mr Murray. He is the secretary of the relevant PCS branch.

42. The first disciplinary hearing took place on 27 January 2020. Ms Wilkinson decided to make further enquiries in relation to the evidence and mitigation provided by the claimant. Those enquiries resulted in supplementary statements and a supplementary report from the investigator Stephen Cole. The hearing was due to be reconvened on 17 March 2020 but, due to the complications of the pandemic, was not ultimately reconvened until 24 August 2020. The notes of the two effective disciplinary hearings cover a total of 35 single-spaced pages. Mr Murray gave evidence that they were circulated and agreed at the relevant times and could therefore be taken to be tolerably accurate. Where the notes contradicted the sworn evidence of the claimant and Mr Murray both of them accepted that the notes must be accurate.

43. The outcome of the disciplinary process was notified to the claimant at a further disciplinary hearing on 2 October 2020. The minutes are set out in just over eight closely typed pages. Ms Wilkinson's decision to dismiss and her reasoning were also set out in considerable detail in a five page outcome letter dated 26 October 2020. We will summarise the main points below.

44. First, the letter noted the allegations that on 24, 25, and 29 April 2019 and again on 16 May 2019 the claimant accessed and reviewed multiple criminal cases relating to members of her family, close personal contacts and other persons known to her without a valid business reason to do so. That included access to a live case on 25 April 2019. The claimant had been advised prior to the first hearing on 27 January 2020 that such behaviour could be found to be gross misconduct and that a possible outcome of the process was dismissal.

45. At the first disciplinary hearing the claimant had accepted that she did access cases relating to family members and other persons known to her. She also accepted that she had both accessed and updated the closed case of a relative. The claimant's explanation and mitigation had four key elements:

a. she was unaware of the respondent's Acceptable Computer Use Policy that she should not access the cases of relatives or anyone known to her;
b. that she had accessed those cases to educate herself in the use of the system due to a lack of training and support;
c. she had only accessed closed cases;
d. the matter had been dealt with by her line manager by way of a note on a probation report and the claimant was unclear why it was being addressed by the disciplinary process at all.

46. At the hearing before us the claimant sought to raise point (d) for the first time after cross-examination of the respondent's first witness. It had not been dealt with in her own evidence and it was not raised in the claim form or notified to the respondent in any less formal way. As a matter of procedural fairness we ruled that it was too late for the claimant to raise it at that stage of the Employment Tribunal hearing.

47. The respondent investigated mitigation and gathered the following evidence:

a. the claimant's signed contract of employment had made express reference to the Acceptable Computer Use Policy and had purported to enclose a copy for the claimant's retention;

b. the claimant had undergone three separate relevant training packages in the first week of her employment (which we have already noted above) and had also undergone specific training on the computer system prior to commencing her allocated task;

c. further analysis contained in a supplementary disciplinary report demonstrated that the claimant had entered the relevant computer screens on hundreds of occasions prior to 24 April 2019. Additionally, analysis of data between 30 of April 2019 and 15 May 2019 indicated that the claimant had entered the relevant computer screens *"on an equally significant number of occasions"* prior to changing the record in a closed case relating to a relative on 16 May 2019. The respondent clearly doubted the explanation that the claimant had been training herself given that she had entered the screens hundreds of times.

d. Further, and although the respondent did not accept that the claimant was unaware what cases she was not permitted to access, her manager Stacey Ingram was in the office on each of the days that the claimant had inappropriately accessed cases relating to family members and other persons known to her. The respondent concluded that if the claimant had any doubt about the boundaries of legitimate access she should have approached her line manager.

e. It was not accepted that all of the cases accessed by the claimant had already been closed. The claimant had accessed a live case and viewed the charge result on 24 April 2019.

f. The respondent did not accept that the matter had been dealt with in the course of the probation report, nor did the respondent accept that that had ever been the claimant's understanding. The

respondent noted that the claimant had repeatedly asked managers after the probation meeting what the position was in relation to the investigation. The claimant's trade union representative had made similar remarks about the claimant being "left in limbo".

48. The claimant raised additional points at the disciplinary hearing on 24 August 2020. Once again, the hearing was eventually adjourned to allow further investigation into those additional points. They were as follows:

a. the claimant claimed to have been advised by ACAS that it was her line manager's responsibility to check that she had received the Acceptable Computer Use Policy enclosure but she had not;

b. the claimant said that she could not rely on the buddy who had been allocated to support her because he had made unwanted advances which the claimant perceived to amount to sexual harassment.

49. In relation to the first point the respondent investigated further and concluded that it did not accept that the claimant had failed to receive the relevant policy, but even if she had not she could and should have sought out such clearly referenced and important documentation if it were missing.

50. In relation to the second point Ms Wilkinson discussed matters with Stacey Ingram and Anna Conlon, the managers to whom the claimant had originally disclosed the allegation of sexual harassment. The respondent's conclusion was essentially that if there were any problem approaching the alleged harasser in his capacity as the claimant's training buddy then the claimant could and should instead have approached her line manager for any additional training or guidance required. An analysis of diaries revealed that the claimant's line manager had been in the office on 24, 25 and 29 April 2019 and also on 16 May 2019.

The decision to dismiss

51. Ms Wilkinson's decision and reasoning were as follows. Having considered very carefully the arguments, evidence and mitigation put forward by the claimant, Ms Wilkinson was not satisfied that those factors explained or excused the claimant's actions. She regarded the claimant's conduct as *"wholly unacceptable"* and in breach of both the Acceptable Computer Use Policy and also the Civil Service Code. Ms Wilkinson referred to the paragraphs which dealt with honesty and integrity. Ms Wilkinson considered the case to be one of gross misconduct as defined by the disciplinary procedure. Given the severity of the claimant's misconduct she concluded that the appropriate penalty was dismissal with effect from 20 October 2020. She considered lesser penalties such as a final written warning but did not believe that they were appropriate in all the circumstances. The claimant was notified of a right of appeal. The claimant was paid in lieu of her notice period.

Sexual harassment allegations raised during the disciplinary process

52. It is common ground that the claimant and her trade union representative raised allegations of sexual harassment during the course of the disciplinary hearing on 24 August 2020. They did so in the context of putting forward mitigating circumstances for the claimant's actions (see paragraph 48(b), above).

53. A key aspect of the claimant's case before us was that the respondent should have adjourned the disciplinary hearing on 24 August 2020 to carry out a full investigation into the sexual harassment allegations and that those investigations should have been completed before reaching any conclusion in the claimant's own disciplinary process. Although the claimant did not clearly put the point in this way, we interpreted this argument is being in effect an argument that we should draw adverse

inferences in relation to victimisation from the respondent's failure to put the claimant's disciplinary process on hold until Ms Wilkinson had investigated the allegations of sexual harassment raised by the claimant.

54. In relation to that we make the following findings of fact. First, Ms Wilkinson's terms of reference were very clearly defined and related solely to potential disciplinary action in the claimant's own case. Ms Wilkinson was simply not authorised to investigate allegations made against any other employees. Second, and even if it is assumed for the purposes of argument that terms of reference could have been expanded or that another manager could have dealt with the sexual harassment allegations, we do not think that it was appropriate or necessary to do so before reaching a conclusion in the claimant's own case. That is clear from the respondent's eventual reasoning. Essentially, the respondent concluded that if, whether because of sexual harassment or for any other reason, the claimant felt unable to approach her training buddy for advice or guidance, then she could and should have approached her line manager instead. In those circumstances it became logically unnecessary for the respondent to investigate whether or not the sexual harassment had actually occurred. It made no difference to the respondent's reasoning in relation to the claimant's own guilt of quite separate misconduct.

55. We make some additional findings regarding the respondent's overall approach to the allegations of sexual harassment made during the 24 August 2020 disciplinary meeting. In order to understand the context it is important to note the position of the claimant and her representative at the meeting as well as that of the respondent.

56. Mr Murray told the meeting that he had information to give about the alleged harasser's behaviour. Once the gist of the allegations had been described Karin Baxter, HR representative, said that she had not wanted to interrupt but felt she had to stress how *"massive"* the new information

was and that while she understood the claimant's reasons for not wanting to raise it, the information provided had much wider implications. She said that she might need to discuss the matter separately with management and to consider appropriate next steps. Karin Baxter also said that she understood the awkwardness from the claimant's point of view given that the alleged harasser and the alleged harasser's wife also worked in the same office but said, *"the situation absolutely needs to be looked into as, if someone was exhibiting sexual or other inappropriate behaviour towards her, this was wholly inappropriate and should not be allowed to go unaddressed'.* Karin Baxter made it clear that the respondent did not tolerate sexually inappropriate behaviour on any level and that HR would want to investigate it separately, even though the claimant did not wish for it to be investigated. Karin Baxter also noted that the allegations that the claimant was making against the alleged harasser might amount to serious or even gross misconduct on his part if found to be true.

57. The claimant's position, of not wanting the matter to be formally investigated, was noted by her trade union representative who said that had the claimant wanted to pursue that route it would have been raised with HR at the time and due process followed.

58. Karin Baxter said that it would be useful for a separate investigation to take place into the sexual harassment allegations and again reiterated the inappropriateness of the alleged conduct and that it might amount to gross misconduct.

59. Later in the meeting, Mr Murray said that the claimant had previously regarded the matter as ended and was happy that she should simply move seats and that nothing more should be made of it. For her, the matter was finished. Mr Murray reiterated that the additional information was confidential to the disciplinary hearing unless the claimant wished for it to be taken forward. The claimant said immediately that she would

prefer that no action was taken. Mr Murray then said that the claimant regarded the matter as resolved and was happy with the outcome.

60. Karin Baxter said that she respected that decision but might still have to discuss, even hypothetically (which may have meant anonymously), the situation with senior management in HR to check what should be done with the information she had received. She was uncomfortable with the suggestion that she should do nothing. Mr Murray emphasised that it was the claimant's view which needed to be considered.

61. The claimant was offered an adjournment at that point. Both the claimant and Mr Murray advised that they were happy to continue because there was no reason in their view to adjourn the hearing. Either way the disciplinary proceedings would still need to continue and to be concluded in line with the disciplinary policy. Mr Murray made it clear that he was only asking that the information relating to sexual harassment was taken into account in relation to the potential dismissal of the claimant. In his oral evidence to us Mr Murray explained that he was concerned for the claimant's health and welfare if there were to be an adjournment and that she and he both wished for the disciplinary proceedings to move to a conclusion. The claimant's final remark at the meeting was to say that she would *"really respect an understanding to hold off on progressing with the [name of alleged harasser] matter*.*

62. Many of these findings are starkly inconsistent with the oral evidence of the claimant and Mr Murray at the hearing before us. Ultimately, both of them accepted that the minutes of the meeting were accurate and that their evidence on oath had been inaccurate. The gist of their oral evidence had been that they had wanted the disciplinary proceedings to be put on hold until the allegations of sexual harassment had been investigated. The notes make it abundantly clear that the exact opposite is true, that the claimant and her representative were explicitly opposed to any investigation of the sexual harassment allegations and that far

from Human Resources wishing to "sweep matters under the carpet" as the claimant suggested in submissions, Human Resources were actually extremely concerned that the claimant wanted no further action to be taken and wished to take further advice about that, even though they respected the claimant's view.

63. Our overall finding is that there is no trace of irritation, hostility or resentment on the respondent's part following the making of sexual harassment allegations during the disciplinary hearing on 24 August 2020. The respondent clearly took the allegations extremely seriously and would normally have wished to have investigated them. However, the respondent respected the claimant's view, echoed by her PCS representative, that she regarded the matter as closed. The respondent also respected the claimant's wish for no formal action to be taken and her wish for the information to be kept confidential.

64. Given our general concerns about the claimant's credibility, we reject her oral evidence that immediately after the minuted disciplinary meeting she said in an un-minuted continuation of the MS Teams call that she had changed her mind and wanted her sexual harassment allegations to be formally investigated before the respondent reached a disciplinary conclusion in her case. If that were true then it would be inconceivable that it would not result in minutes or a communication from human resources confirming the claimant's position, especially given that it would have been the exact opposite of the position expressed and accurately noted during the disciplinary meeting. We find that the lack of any document confirming the claimant's change of mind is because her evidence is simply not true on this point, and not because the respondent failed to act on her request or wished to suppress it. That would sit most uneasily with the respondent's obvious willingness and desire to investigate, as demonstrated during and after the disciplinary hearing. We think that the claimant's oral evidence on this point was simply a reaction to the fact that the notes of the disciplinary hearing

comprehensively contradicted her original evidence as to the stance taken by her and the requests made by her during that hearing.

65. We end this section by quoting from the disciplinary outcome letter, which seems to us to show a consistently appropriate attitude on the respondent's part. In no way at all did the respondent seek to ignore, minimise or suppress the claimant's allegations of sexual harassment. After explaining the reasons why the respondent did not accept that issues between the claimant and her training buddy amounted to a mitigating factor, the letter went on to say this: *"COPFS do, however, take allegations of this nature extremely seriously and have a zero-tolerance policy on sexual harassment in the workplace. While I note that you did not wish to pursue a formal complaints process when you first reported [the alleged harasser's] behaviour to Stacey Ingram and Anna Conlon in October 2019, and again reinforced that position at the hearing on 24 August 2020, I would encourage you to consider providing a written statement or a complaint such that these allegations can be fully investigated in line with the appropriate COPFS policy and process."*

66. Once again, we find that the respondent demonstrated appropriate concern and a desire to investigate the complaint of sexual harassment if the claimant were prepared to change her mind and to formalise it. The claimant was *"encouraged"* to do so.

67. We note that neither the claimant nor her representative wrote subsequently to the respondent to say that this was a gross misrepresentation of the position having regard to the contents of a subsequent MS Teams meeting during which the claimant changed her mind. We find that to be because the claimant's oral evidence of an undocumented change of mind is false.

Legal principles

Victimisation

68. Section 27(1) of the Equality Act 2010 provides as follows.

"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.

69. It is not necessary to quote the remainder of section 27 because those provisions are not in issue in the present case.

70. The essential question is what, consciously or subconsciously, motivated the employer to subject the claimant to the detriment. In most cases this will require an enquiry into the mental processes of the employer. If the necessary link between the detriment suffered and the protected act can be established then the claim for victimisation will succeed. However, the test is not precisely one of causation. It is certainly not a "but for" test of causation (see ***Chief Constable of*** West ***Yorkshire Police v Khan*** [2001] ICR 1065, HL). The Tribunal must identify the real reason, the core reason or the motive for the detrimental treatment. Ultimately, there is no substitute for the statutory language but the authorities have often explained matters in those ways. There is no need for conscious motivation as a prerequisite for a finding of victimisation and subconscious motivation will suffice ***(Nagarajan v London Regional Transport*** [1999] ICR 877, HL).

71. It is not necessary for the claimant to establish that the detrimental treatment was *solely* caused by the protected act. It will be enough if protected acts have a *significant influence* on the employer's decision - making. For an influence to be significant it does not have to be of great

importance. A significant influence is one which is more than trivial. See for example the cases of ***Nagarajan v London Regional Transport*** [1999] ICR 877, HL, ***Igen v Wong*** [2005] ICR 931, CA and ***Villalba v Merrill Lynch and Co Inc*** [2007] ICR 469, EAT. The EHRC Employment Code is to similar effect at paragraph 9.10.

72. We remind ourselves that it is rare to find direct evidence of victimisation since it depends on subjective thought processes. It may often be necessary to rely on inferences drawn from primary facts and the evidential difficulties facing claimants are well-known. They were alluded to in the well-known passage in ***King v Great Britain China Centre*** [1992] ICR 516, CA at pages 528f to 529c. Tribunals must bear in mind the specific difficulties that arise and be astute to the danger of self-serving explanations from employers or witnesses.

73. More generally, a tribunal should exercise caution when asked to place reliance on recollections, particularly if given some time after the event and in the context of litigation, rather than relevant contemporaneous documents (see ***Gestmin SGPS SA v Credit Suisse (UK) Ltd*** [2013] EWHC 3560 Comm, at paragraphs 15 to 22).

74. At the risk of stating the obvious, detriment cannot be "because of' a protected act in circumstances where there is no evidence that the person who allegedly inflicted the detriment knew about the protected act If authority is necessary for that proposition then it includes ***Scott v London Borough of Hillingdon*** [2001] EWCA Civ 2005, CA.

Burden of Proof

75. The burden of proof in proceedings relating to a contravention of the Equality Act 2010 is governed by section 136 of that Act. The correct approach is set out in section 136(2) and (3). References to “the court” are defined so as to include an employment tribunal.

(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.

76. The Court of Appeal has repeatedly stressed that judicial guidance on the burden of proof is no more than guidance and that it is no substitute for the statutory language.

77. We have taken into account the well-known guidance given by the Court of Appeal in ***Igen Ltd v Wong*** [2005] ICR 931 (sometimes referred to as "the revised ***Barton*** guidance"), which although concerned with predecessor legislation remains good law. It was approved by the Supreme Court in ***Hewage v Grampian Health Board*** [2012] ICR 1054. ***Ayodele v Citylink Ltd*** [2018] ICR 748, CA confirmed that differences in the wording of the Equality Act 2010 have not changed the test or undermined the guidance in ***Igen Ltd v Wong.*** The Supreme Court emphatically confirmed that to be the case in ***Efobi v Royal Mail Group Limited*** [2021] UKSC 33.

78. First, the claimant must prove certain essential facts and to that extent faces an initial burden of proof. The claimant must establish a *"prima facie"* or, in plainer English, a "first appearances" case of victimisation which needs to be answered. If the inference of victimisation *could* be drawn at the first stage of the enquiry then it *must* be drawn at the first stage of the enquiry, because at that stage the lack of an alternative explanation is assumed. The consequence is that the claimant will necessarily succeed *unless* the respondent can discharge the burden of proof at the second stage.

79. However, if the claimant fails to prove a *"prima facie"* or "first appearances" case in the first place then there is nothing for the respondent to address and

nothing for the tribunal to assess. See *Ayodele* at paragraphs 92-93 and *Hewage* at paragraph 25.

80. At the first stage of the test, when determining whether the burden of proof has shifted to the Respondent, the question for the Tribunal is not whether, on the basis of the facts found, it *would* determine that there has been victimisation, but rather whether it *could* properly do so.

81. The following principles can be derived from *Igen Ltd v Wong* (above), *Laing v Manchester City Council* [2006] ICR 1519 EAT, *Madarassy v Nomura International pic* [2007] ICR 867, CA and *Ayodele v Citylink Ltd* (above), which reviewed and analysed many other authorities.

a. At the first stage a Tribunal should consider all the evidence, from whatever source it has come. It is not confined to the evidence adduced by the claimant and it may also properly take into account evidence adduced by the respondent when deciding whether the claimant has established a *prima facie* case of victimisation. A respondent may, for example, adduce evidence that the alleged acts of victimisation did not occur at all, or that they did not amount to victimisation, in which case the Tribunal is entitled to have regard to that evidence.

b. There is a vital distinction between "facts" or evidence and the respondent's "explanation". While there is a relationship between facts and explanation, they are not to be confused. It is only the respondent's *explanation* which cannot be considered at the first stage of the analysis. The respondent's *explanation* becomes relevant if and when the burden of proof passes to the respondent.

c. It is insufficient to pass the burden of proof to the respondent for the claimant to prove no more than the relevant protected act(s) and detrimental treatment. That would only indicate the *possibility* of victimisation and a mere possibility is not enough. Something more is

required. In an analogous direct discrimination context see paragraphs 54 to 56 of the judgment of Mummery LJ in ***Madarassy.***

82. However, it is not always necessary to adopt a rigid two stage approach. It is not necessarily an error of law for a Tribunal to move straight to the second stage of its task under section 136 of the Equality Act 2010 (see for example ***Pnaiser v NHS England*** [2016] IRLR 170 EAT at paragraph 38) but it must then proceed on the assumption that the first stage has been satisfied. The claimant will not be disadvantaged by that approach since it effectively assumes in their favour that the first stage has been satisfied. The risk is to a respondent which then fails to discharge a burden which ought not to have been on it in the first place (see ***Laing v Manchester City Council*** [2006] ICR 1519 EAT at paragraphs 71 to 77, approved by the Court of Appeal in ***Madarassy).*** Tribunals must remember that if and when they decide to proceed straight to the second stage.

83. It may also be appropriate to proceed straight to the second stage when the claimant compares their treatment to that of a hypothetical comparator. Sometimes the reason for the treatment, and the question whether there is a ***prima facie*** or "first appearances" case of victimisation, will inevitably be intertwined with the question whether the claimant was treated less favourably than a comparator, especially a hypothetical comparator. In cases of that sort the decision on the "reason why" issue will also provide the answer on the "less favourable treatment" issue (see Lord Nicholls in ***Shamoon v Chief Constable of the RUC*** [2003] ICR 337 at paragraphs 7 to 12 and Elias LJ in ***Laing v Manchester City Council*** [2006] ICR 1519 EAT at paragraph 74).

84. In a similar vein, the Supreme Court in ***Hewage*** (above) observed that it was important not to make too much of the role of the burden of proof provisions. They required careful attention where there was room for doubt as to the facts necessary to establish discrimination (or victimisation) but they have nothing to offer where the Tribunal is in a position to make positive findings on the

evidence one way or the other.

Reasoning and conclusions

85. As noted at the outset, there is no dispute that the protected acts occurred or that they were protected for the purposes of the legislation. Similarly, there is no dispute that the detrimental acts occurred or that they amounted, in law, to detriments. The sole but important issue is whether the claimant was subjected to those detriments because of either or both of her protected acts.

86. The claimant's submissions were not always clearly focused on that central issue and sometimes sounded more like the sort of submissions that might be made in an unfair dismissal case. Where necessary, and in an effort to assist, we reinterpreted them as submissions as to the reasons why we should find that there had been victimisation. We will deal with the key points made in submissions below.

87. The claimant's case was really based on inference. She pointed to a number of features of the case which might support the inference that she had been subjected to the detriments of disciplinary proceedings and dismissal because of her protected acts. In all respects:

a. we were in a position to make clear findings as to the reason for the detrimental treatment in question and concluded that it was in no sense whatsoever either of the protected acts;

b. expressed in terms of the burden of proof provisions, the claimant failed to prove facts from which we could conclude that, in the absence of an adequate explanation, the detrimental treatment had been because of either or both protected acts. Consequently, the burden of proof did not pass to the respondent Even if it had done, then the respondent would easily have satisfied us that the protected acts were in so sense whatsoever a significant cause of the detrimental treatment.

The first detriment - the decision to commence disciplinary proceedings

88. This part of the claim fails for the simple reason that the relevant actor (Ms Wilkinson) was completely unaware of the first protected act at the time of the detrimental treatment. The second protected act had yet to occur. Logically therefore, neither protected act can have been a cause of the detrimental treatment. They cannot have influenced Ms Wilkinson's thought processes.

89. Even if we had found on the balance of probabilities that Ms Wilkinson had been aware of the first protected act at the relevant time, we would have been quite satisfied that it was not a significant cause of the decision to move to disciplinary proceedings. The evidence against the claimant was strong and, subject to whatever she might have said during the disciplinary process, suggestive of guilt of gross misconduct. No criticism was made of the investigator's reasoning and we do not think that any real criticism can be made of Ms Wilkinson for accepting his recommendation and deciding to move to the disciplinary stage. In our judgment there was certainly a disciplinary case for the claimant to answer. We are quite satisfied that the sole reason for the decision to move to disciplinary proceedings was the evidence gathered by the investigation and its tendency to suggest that the claimant might well have been guilty of gross misconduct.

90. We refer back to our findings of fact above in relation to the investigation and the decision to commence disciplinary proceedings. The decision that there was a disciplinary case to answer was logical, obvious and justified. There is no room for an inference that the protected act was of any significance at all to that decision.

The second detriment - the decision to dismiss

91. In short, we accept and agree with the respondent's reasoning.

92. Data breaches are treated seriously by most employers but given the respondent's profile and constitutional role it was entitled to be especially concerned about breaches of procedure resulting in unauthorised and inappropriate access to sensitive information. The claimant admitted accessing certain case files inappropriately and that they related to family members and other people known to her. In submissions the claimant admitted 81 separate instances of unauthorised access on two separate days affecting nine different people. Even on the basis of that concession (which we understand be rather narrower than the findings of the investigation and disciplinary process) it was an extremely serious matter. Contrary to the assertion maintained by the claimant at this hearing that no live cases were accessed, one live case was accessed. Before turning to mitigation, it would not be at all surprising if an offence of that sort and seriousness led to dismissal for gross misconduct. No adverse inference arises from the mere fact that it did so.

93. During this hearing the claimant herself acknowledged that her misconduct would have justified penalties up to and including a final written warning, though she did not accept that it would justify dismissal. We do not think that this is a case in which the severity of the penalty alone supports an adverse inference. On the contrary, dismissal would not be especially surprising unless there was cogent mitigation.

94. We see no proper basis for an adverse inference from procedural failings. We do not think that there were any procedural failings. Overall it seems to us to have been an extremely thorough investigation and disciplinary process. We note that the disciplinary process was adjourned twice to enable further investigations to be carried out in

response to points raised by the claimant. That strikes us as a feature of a genuine and conscientious process.

95. The claimant argued that her lack of awareness of policies and inadequate training were powerful mitigating factors. The respondent did not agree and nor do we. There was ample evidence that the claimant had attended relevant training courses. On our findings she also received a copy of the Acceptable Computer Use Policy but was in any event to blame if she was not provided with one but did not then seek one, given her training and the reference to it in her written statement of terms of employment. In short, the claimant either was or certainly should have been aware that what she did was wrong. We do not think that lack of training or awareness was a genuine mitigating factor and we do not think that any adverse inference arises from the respondent's similar conclusion.

96. The claimant argued that the failure to suspend her was inconsistent with the decision to dismiss. We do not agree. The respondent certainly had the power to suspend but it was not obliged to exercise that power in favour of suspension. The respondent's procedures certainly did not provide for mandatory suspension in cases of possible gross misconduct. The appellate courts have stated more than once in recent years that employers should not regard suspension as an automatic consequence of an allegation of gross misconduct since suspension is not a neutral act and is generally to the detriment of the employee. We draw no adverse inference from the respondent's failure to suspend in this case. Once matters had been drawn to the claimant's attention and once she understood that her access had been and could easily be monitored, the respondent was entitled to take the view that there was no need to remove the claimant from the workplace in order to protect the respondent's legitimate interests. That did not undermine the rationale of proceeding with an investigation into potential misconduct which had already occurred. We see no inconsistency and we are not

prepared to draw an adverse inference regarding the respondent's motivation for dismissal.

97. The claimant also relied on what she called a "precedent case". In effect, the claimant's argument was that the circumstances of her case were so similar to that of another employee that an adverse inference arose from the more lenient treatment of that other employee. We are not prepared to draw that inference for the following reasons, which contain some additional findings of fact based on the evidence of Mr Murray. First, the nature of the offence in the other case was arguably less serious. It was a case in which there had been a single instance of access to a single case file. Further, the employee concerned self-reported their misconduct to management. In contrast, the claimant's case involved multiple instances of inappropriate access to multiple files on multiple days. She did not self-report nor did she admit the full extent of her misconduct when some of it was detected and drawn to her attention. We think that those are important distinguishing features which make the claimant's misconduct more serious. Further, there were mitigating factors in the other case which were absent in the claimant's case. The other employee was experiencing mental health difficulties at the time of the misconduct which serve to explain a temporary lack of judgment on their part. While the claimant argued that she too had experienced mental health difficulties they resulted from the disciplinary process and dismissal and were not put forward as a potential explanation for the misconduct itself. The other employee also had much longer service than the claimant. We can easily understand why the other case resulted in a final written warning while the claimant's case resulted in dismissal. No adverse inference arises.

98. The claimant also argued, in effect, that the respondent's failure to halt the disciplinary process until such time as it had investigated the allegations of sexual harassment made during the meeting on 24 August 2020 supported an inference that victimisation had a significant effect on

the decision to dismiss. We think that two issues arise: (a) whether an adverse inference should be drawn from the decision not to investigate sexual harassment before completing the disciplinary process and (b) the circumstantial evidence of the respondent's attitude towards the allegations of sexual harassment.

99. We asked Mr Murray, the trade union representative, how he thought that the allegations of sexual harassment, or the failure to investigate them before reaching a decision, had an impact on the claimant's dismissal. We found his answer difficult to understand in the context of the victimisation complaint because he said simply, *"I don't believe it was dealt with properl/* and, *"the bearing would have been that it should have been investigated'.* He did not say or imply that the penalty or the conclusion as to the claimant's guilt had been influenced in any way. However, after some prompting, the claimant did say that in submissions, arguing that she would have received a final written warning but for her complaints of sexual harassment.

100. We find that the respondent's reaction to the allegations of sexual harassment made at the meeting on 24 August 2020 was entirely appropriate. We see no basis for any adverse inference. We refer back to our findings of fact in which we have set out at some length the statements made by the claimant and her representative at the meeting and also those made by the human resources representative. It is very clear to us that the claimant and her representative did not want matters to be formally investigated, did not want an adjournment and wished for the information to be kept confidential. The claimant regarded the matter as closed. On that basis we infer that the reason for raising it was simply to support the argument that the claimant had not been properly trained or supported, such that she was blamelessly in breach of the respondent's rules.

101. In contrast, the respondent clearly wished to investigate the sexual harassment allegations and would have done but for the clearly expressed views of the claimant and her representative. We detected no adverse reaction to the information supplied by the claimant. The respondent's decision not to investigate the allegations of sexual harassment within the parameters of the disciplinary hearing was entirely appropriate. So was the failure to arrange for another manager to conduct a separate investigation. That merely gave effect to the claimant's very clearly expressed views that it should not be taken further and should be kept confidential. The claimant and her trade union representative both accepted before us that, in effect, they were now arguing that the respondent should have ignored their wishes and should have done the exact opposite of what the claimant and her representative requested at the meeting. We do not agree. We find that the respondent showed appropriate concern while nevertheless respecting the clearly expressed views of the claimant, the alleged victim. That was also consistent with the disciplinary outcome letter which explicitly encouraged the claimant to consider making a written statement or a complaint, so that the allegations could be fully investigated in accordance with the respondent's procedures. We cannot reconcile that encouragement with the suggestion that, because of the protected act, the respondent decided to dismiss rather than to impose a lesser disciplinary penalty. To return to the central issue this case, we find no foundation for any adverse inference based on the way in which the respondent reacted to the claimant's allegations of sexual harassment and the statements made by her during the disciplinary meeting.

102. In summary, this appears to us to have been a clear case of gross misconduct on the evidence available to the respondent. The claimant's arguments in mitigation were not well-founded and the respondent was quite entitled to reject them without any adverse inference arising regarding its motivation. We reject the claimant's argument in relation to

a comparable case because we do not agree that it was comparable. It is not surprising or suspicious that the respondent decided not to suspend the claimant once she was charged with gross misconduct. We find nothing inappropriate in the respondent's handling of the claimant's allegations of sexual harassment, indeed we find that the respondent was fully prepared to investigate and encouraged the claimant to make a formal complaint. She did not do so and the only reason why the respondent failed to investigate the allegations of sexual harassment was the claimant's very clear request that it should not do so.

to

103. For all of those reasons we are quite satisfied that the reason for the claimant's dismissal was her gross misconduct alone and that her protected acts were in no sense whatsoever the cause or part of the cause. The claim is therefore dismissed.

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Employment Judge: M Whitcombe
Date of Judgment: 11 December 2021
Entered in register: 14 December 2021
and copied to parties

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