THE EMPLOYMENT TRIBUNALS

BETWEEN

Miss Dara Ahmed ***Claimant***

and

1.MedExpress Enterprises Ltd

2.Mr Darshan Acharya

3.Ms Victoria Lee

4.Ms Karen McCann

5.Mr Dwayne George D'Souza

Respondents

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

REGION: London Central **ON**: 17, 18, 19, 20, 21, 24, 25,26, 27 and 28 January 2022

Employment Judge: Mr Paul Stewart

MEMBERS: Mr Philippe de Chaumont-Rambert and Mr James Carroll

Appearances:

For Claimant: Mr Joe Sykes, a Consultant

For Respondent: Mr Paul O'Callaghan of Counsel

JUDGMENT

Unanimously, we dismiss all claims

REASONS

1. This case was heard over two weeks. Closing submissions were delivered on Wednesday 26th January with the Tribunal spending the rest of that day, and the following day and a half in chambers. This judgment was delivered on the afternoon of 28th January 2022.

2. The hearing was conducted over the Cloud Video Platform. The parties were able to participate satisfactorily.

3. The Tribunal heard evidence from the following witnesses called on behalf of the Claimant:

   3.1. Ms Liyya Patel who held the position of Superintendent Pharmacist and worked in the first Respondent's premises in Worship Street near Liverpool Street station in London.

   3.2. The Claimant who held the position of Pharmacy Assistant and worked in the first Respondent's premises in Sun Street in the same district as Worship Street. Of Egyptian origin, the Claimant had been recognised to be a refugee by the UK government and granted asylum.

   3.3. Ms Eva Ahmed who held the position of Pharmacist working in first Respondent's premises in Sun Street. As this witness shares a second name with the Claimant, we propose, without intending any disrespect, to refer this witness as "Ms Eva";

   3.4. Ms Alia Iqbal who worked in first Respondent's premises in Sun Street as an Accounts Assistant.

4. The three witnesses called on behalf of the Claimant (other than the Claimant herself) were the subjects of three of four witness orders made by Employment Judge Stout on 14 January 2022.

5. The Tribunal adjourned the Hearing on the first morning in order to read into the witness statements and documents referred to in the Bundle of Documents that had been prepared for the Hearing by Mr Sykes, the Claimant's representative.

6. At 1406 hours that afternoon, Mr O'Callaghan sent our Clerk an email which reads as follows:

   > Dear Tribunal
   >
   > I wish to update you about events arising since this morning's preliminary discussion.
   >
   > I took instructions and emailed Mr Sykes at 11.50 with the personal email and mobile telephone number belonging to Miss Ilaria Capitani.
   >
   > At 12.31 I received a telephone call from Miss Capitani who was very upset. Miss Capitani informed me that she had just received a telephone call from a male caller who refused to give his name. The male caller told Miss Capitani that she was required to give evidence at the

> employment tribunal and that if she declined to get involved she would be imprisoned. I explained to Miss Capitani that the Claimant had obtained a witness order on Friday and that the hearing began this morning. I explained that the caller was the Claimant's representative Mr Sykes and that it is possible that she would be asked to give evidence during the course of this week. I explained that I would call her back this afternoon at the conclusion of today's proceedings.
>
> Miss Capitani called me again at 13:03 in a state of distress. She told me that Mr Sykes had emailed her employer's general email address which is ……. [*address stated but not reproduced*]
>
> The email from Mr Sykes stated that Miss Capitani was required to attend the trial on '18th and 19th January 2022'. This is despite me confirming that the Claimant's cross-examination would take place tomorrow all day.
>
> The email contained sensitive personal information but also contained the following threat 'If this Order is not complied with, Ms Capitani may be fined or imprisoned. We can apply for the matter to be transferred to the High Court of Justice in the Strand, for these purposes'.
>
> Miss Capitani's employer replied to Mr Sykes at 13:13 and stated that Miss Capitani should be contacted via her personal email address. The employer further stated that Mr Sykes should 'avoid emailing our reception about personal issues regarding our employee' as 'this goes against Ms Capoitani's privacy and anyone who is involved'. I am informed that Mr Sykes ignored this request and continued to send emails to the employer. The employer has now blocked Mr Sykes' email address.

7. In discussion that had taken place before the Tribunal adjourned on 17 January, it had emerged that Mr Sykes had told all four witnesses that imprisonment was one of the potential sanctions that could follow their non-attendance. Imprisonment is not mentioned as being a sanction in the note attached to the witness order nor, indeed, is it mentioned as a sanction in section 7(4) of the Employment Tribunals Act 1996. We asked Mr Sykes how he came to use the threat of imprisonment, a threat he admitted he had used in respect of all four witnesses. He explained his behaviour by asserting that, some 25 years ago, when first he began obtaining witness orders, imprisonment was one of the sanctions for non-compliance with the order and he had continued to mention imprisonment as a sanction notwithstanding, he said, a change in the sanctions applicable to non-compliance.

8. At the time, Mr Sykes' explanation appeared somewhat impressive because of its apparent candour, that a consultant specialising in employment law had overlooked a change in the sanction for non-compliance with a witness order. However, before we should indicate our appreciation for such candour, we checked on the sanctions that, 25 years ago, were available to encourage compliance with witness orders in the Industrial Tribunal as the Employment Tribunal was then known.

9. The Industrial Tribunals (Constitution and Rules of Procedure) Regulations 1993 at Rule 4, paragraph (2) provided a power to such tribunals to require the attendance of any person as a witness. In the same Rule at paragraph (6), it was stated:

> Every document containing a requirement imposed under paragraph … … (2) shall contain a reference to the fact that, under paragraph 1(7) of Schedule 9 to the 1978 Act, any person who without reasonable excuse fails to comply with any such requirement shall be liable on summary conviction to a fine, and the document shall state the amount of the current maximum fine.

10. In the interpretation section of the Regulations, we see that "the 1978 Act" means the Employment Protection (Consolidation) Act 1978. Schedule 9 of that Act provided the power at paragraph 1(1) for the Secretary of State to make such regulations as may to him appear to be necessary or expedient with respect to proceedings before the industrial tribunal while, at paragraph 1(2)(d) such regulations could include provision for requiring persons to attend to give evidence. Paragraph 1(7) provides:

> (7) Any person who without reasonable excuse fails to comply with any requirement imposed by the regulations by virtue of sub-paragraph (2)(d) … … shall be liable on summary conviction to a fine not exceeding £100.

11. Indeed, it is not just for 44 years that we can go back and see that a fine, and not imprisonment, was the sanction used in the legislation to encourage compliance with witness orders but 51 years: the Industrial Relations Act 1971 had its provision for imposing compliance preserved, notwithstanding substantial repeals of parts of that Act by the Trade Union and Labour Relations Act 1974. The 1971 Act's provision was for a person who, without reasonable excuse, fails to comply with a witness order to be liable on summary conviction to a fine not exceeding £100.

12. So, for - at least - the past 51 years, the sanction to encourage compliance with a witness order has been a fine. The maximum amount of the fine has increased from the £100 mentioned in the 1971 and 1978 Acts to £1,000, the sum set out as the maximum fine in the first note appended to each of the four witness orders that Mr Sykes obtained from Employment Judge Stout on 14 January 2022. Far from impressing us with his candour, Mr Sykes' explanation for threatening recipients of witness orders with imprisonment – that he was repeating what had been the sanction for non-compliance when he started out on his career as a representative in this Tribunal 25 years ago - now, on examination, appears to be an assertion that simply cannot be truthful.

13. Whilst we did not hear from Ms Capitani directly and, indeed, did not see the fit note which we understood Counsel for the Respondents had intended to attach to his email to the Tribunal, we accept that Ms Capitani made such a report and that Counsel accurately communicated it to us.

14. Mr Sykes, at 1458 hours on 17 January 2022, emailed the Tribunal with his response to Mr O'Callaghan's email which he described in the first of 8 paragraphs as being "inaccurate and incomplete in the key points". In paragraphs 2 to 5 of his email, Mr Sykes gave his account of his interaction with Ms Capitani before saying, at paragraph 6:

> 6 Sixthly, as to the penalty for noncompliance, we relied on the old wording. We have checked the wording of EJ Stout's Witness Orders (attached) and find the penalty to be no more than £1,000 in the Magistrates Court. We have so advised the witness.
>
> 7 Finally, what is missing from the Respondents' inaccurate complaint, and unfounded attempt to reiterate their verbal request without formal application to set aside the duly issued Witness Orders, is any evidence they have attempted to assist the court in persuading Ms Capitani to attend the hearing. We asked her to attend on the 18th to confirm her attendance, and on the 19th for hearing. She has not confirmed her attendance.
>
> 8 Our view is that if she does not attend at 10am tomorrow 18th January 2022, the matter of her noncompliance should be transferred by Order to City of London Magistrates Court.

15. Mr Sykes had, indeed, checked on the wording of the Witness Orders he had obtained and had advised Ms Capitani accordingly in an email sent to her at 1440 hours on 17 January, which reads as follows:

> Dear Ms Capitani
>
> We have checked the penalty for non-compliance. We confirm it is a fine of up to £1,000 following conviction in the Magistrates' Court. The reference to fine or imprisonment was a reference to older wording.
>
> Yours faithfully
>
> Equity Law Solicitors

16. On the morning of 18 January, Mr Sykes announced that, in view of the resistance Ms Capitani was exhibiting to complying with the witness order, he no longer sought to call her as a witness. Given the unwarranted use of the threat of imprisonment that Mr Sykes accepted he had made, the Tribunal then determined to discharge or revoke the witness order in respect of Ms Capitani lest events persuaded Mr Sykes to reconsider his decision not to call the witness. We would have been minded to revoke all the witness orders given Mr Sykes' behaviour but, by that stage, Ms Patel had given evidence and there was no indication that the other two were resistant to attending. The overriding objective suggested strongly that, in such circumstances, the Claimant should not have the best case she wished to place before the Tribunal sabotaged by the activity of her representative, however reprehensible it might be.

17. The witnesses called on behalf of the Respondent were:

    17.1. Ms Victoria Lee, the third Respondent and HR manager of the first Respondent.

    17.2. Ms Faye Clarke, the Pharmacy Operations Manager who was the Claimant's line manager although she was not based at the Sun Street site every day,

    17.3. Mr Darshan Acharya, the second Respondent and, presently, a customer service advisor. Previously, he was a pharmacy assistant working at the Sun Street site. He was the subject of a number of allegations of inappropriate behaviour that formed the basis of a grievance raised by the Claimant on 1 December 2019,

    17.4. Mr Dwayne d'Souza, who was the founder of the first Respondent and, since 2013, its CEO,

    17.5. Ms Karen Vergara-McCann, the fourth Respondent and the Senior Lead Dispenser working in the Sun Street site who dealt with day-to-day issues with staff, escalating to Ms Clarke as necessary, and

    17.6. Ms Chen Visaya, who worked at the Sun Street site in an unidentified role. She and Ms Vergara-McCann are both from the Philippines and shared residential accommodation.

18. The Tribunal would also have heard evidence on behalf of the first Respondent from Ms Chloe Papadopoulos had not there been agreement between the representatives that her statement, with the exclusion of the second paragraph,

could be read. We duly read the remaining five paragraphs of her statement from which we deduced that she worked in the Sun Street site in a role that was unidentified.

19. For ease of reference, henceforth in these Reasons, we will refer to the first Respondent as "the Respondent" and to the other four Respondents, all of whom were employed by the Respondent, by their names.

The Facts

20. The Respondent runs an online pharmacy describing itself as "the new convenient way to get your prescription medication online and delivered straight to your home or office". It operates out of two sites near Liverpool Street station, one site being in Worship Street and the other (with which we are concerned) in Sun Street.

21. The Claimant, then aged almost 28, started working for the Respondent on 7 October 2019 just a month before Mr Acharya, approximately a year her junior, began his employment.

22. On 1 December 2020, the Claimant submitted a formal grievance in writing to Ms Lee. This important document we reproduce in full:

> **Formal complaint concerning the incident at Sun street, which occurred on Friday the 27th of November, 2020.**
>
> **Incident:** Time: approximately 9:40 am.
>
> I was dispensing at the small black table, when team member Darshan, as he was walking, brushed against my behind with his body. I dismissed it because it was the Black Friday sale, we were very busy and there were a lot of in the pharmacy, although there was plenty of space for this not to happen. However, he kept moving back and forth behind me, and then 10 minutes later, and he was passing, he touched my behind with his hands. I froze for 3 seconds, and then shouted at him: "what the hell?". He then said "sorry" and continued his way. Pharmacy manager Karen McCann asked, "what is going on?", and he said, "my hands just touched her leg." I said, "for the third time since this morning?" and left the pharmacy for 5 minutes.
>
> I would like to clarify that, since we are approximately the same height, his hands would not have touched my legs unless he bent, which he did not do. He touched something completely different, and I felt extremely distressed by this situation. I feel extremely uncomfortable and unsafe in the office.
>
> 1. This behavior is not an isolated incident. His inappropriate sexual comments and inappropriate behavior has been reported several times throughout the past year, with absolutely no change or improvement. Please find below a recap of his pattern of inappropriate and behavior.
> 2. December 2019: Team member Darshan started talking about his brother (out loud, while he was packing). He said that his brother inherited all "the good genes", while he (Darshan); inherited all the bad ones. He then said: "But at least down there I'm bigger"
>
>   Pharmacy manager Karen, and well as former Responsible Pharmacist Paras, dismissed it as a bad joke, even though every woman in the office was horrified.
> 3. I have previously reported, as well as another female colleague, the fact that Darshan always makes an excuse to shred paper whilst we are printing, which means that he would be sitting right to the person's leg while they are printing. This still occurred, even after he was reported for it (he was reported three times).

4. A couple of months ago, Darshan started a conversation (out load and in front of everyone) about the type of porn he watches. At no point did anyone ask him about this, and there was absolutely no reason for him to start to this conversation. However, he then proceeded with specifying the he [*sic*] really enjoys "bondage and BDSM porn". Again quite disturbing for every female team member who heard this.
5. Darshan called pharmacy manager Karen McCann "baby" when she received a phone call once. He said, "Who's calling you baby?"
6. Darshan elbowed female team member Agnessa in the chest while she was dispensing. She was in a lot of pain and cried afterwards, and he never apologized for it. Neither the pharmacy manager nor the Responsible Pharmacist had a conversation with him regarding this.
7. Darshan talks about his previous sexual experiences to team members, when no one asked him to. It's too vulgar for me to explain but I would elaborate if required.
8. Darshan went to the travel clinic when Eva was having her lunch (Monday 30/12/2020), and said "a beautiful woman should not be having lunch on her own."
9. Eva mentioned to me that Darshan brushed his body against her behind several times before.
10. Locum Pharmacist Lupite told me on a Saturday that Darshan is "really creepy" and that she doesn't want to work with him on her own on Saturdays.

His pattern of bad behavior has been normalized in the office, for so long, however, Friday's incident has crossed a major line. This is clearly a serious safeguarding issue now, and I categorically refuse to be disrespected this way.

I hereby signal this incident as workplace sexual harassment, and I kindly request for the appropriate procedure that this situation mandates, to be followed.

Kind regards, Dara Ahmed 01/12/2020

23. As a result of the submission of this grievance, Ms Lee was appointed the grievance investigator and began a series of interviews with members of staff, starting with the Claimant whom she met on 4 December 2020. She interviewed, in total, eight of the Claimant's colleagues during early December and interviewed the Claimant a second time before sending the Claimant an outcome letter on 10 December 2020.

24. We will not set out the outcome letter in full – it runs into four pages - but, having heard all the evidence and read the letter, we conclude that Ms Lee had conducted a thorough and impressive investigation and gave rational reasons for not upholding the Claimant's grievance.

25. The letter concluded with setting out the facts that:

    a. the Claimant had the right to appeal against Ms Lee's decision.

    b. any appeal would be heard by Mr D'Souza.

    c. If the Claimant wished to appeal, she should write to Mr D'Souza within five working days of receipt to the outcome letter, stating the grounds for her appeal in specific detail.

26. On 10 December 2021 and before she received the outcome letter, the Claimant alleges that Ms Capitani, another pharmacy assistant, told her that Mr Acharya made a statement in Ms Capitani's hearing referring to the Claimant and saying:

> I can fuck her up if I want to.

27. The Claimant told us she reacted to this information by indicating that she wanted to call the police but that Ms Capitani stopped her, indicating she would not back up the Claimant should the police be called as she, Ms Capitani, was under investigation and feared losing her job.

28. Then came the outcome letter in which Ms Lee rejected the Claimant's grievance about the incident on 27 November 2020 (the allegation being that Mr Acharya had used his hands to touch the Claimant's bottom) with what the Claimant described as three implausible excuses. The first of these was that CCTV footage showed that Mr Acharya had grazed her bottom with the back of his hand only. The second was that the CCTV footage had been deleted rather than being preserved while the third was that:

> … the CCTV had been deleted by being accidentally recorded over or being automatically deleted after 15 days.

29. The Claimant was not strictly accurate in that assertion of what Ms Lee had said as regards the deletion of the CCTV footage. What Ms Lee had written in the outcome letter was:

> During the investigation, I tried to view the CCTV footage myself. However every 3 days it records over itself and the time between the 27th November and when you raised your grievance on 2nd December 2020, the CCTV footage was not retrievable.

30. The Claimant interpreted several events that followed the arrival of the outcome letter as indicative of the Respondent singling her out for hostile treatment. The first of these events was a complaint that she says was made in early December 2020 that she did not assist with stock and deliveries. While some mention of the Claimant's failure to assist with stock and deliveries was made in early December (Ms Vergara-McCann having indicated that the Claimant was encouraged to provide such assistance) it also formed part of the comments on the Claimant's performance made by Ms Iqbal acting as the Claimant's manager in the Claimant's performance review performed in June 2020. The Claimant in her evidence admitted she did not assist. Her explanation for not helping was that she "did not want to go down to the basement with the largely male crew, in which Mr Acharya was always present." She added this comment "You would have thought that the company had realised that by now."

31. We note that the Claimant in June 2020 did not (and could not) explain her aversion to helping out with stock and deliveries by reference to Mr Acharya's presence in the basement given that, according to the Claimant, for approximately four months between mid-March and the first week of July, she either worked at home or in a different office and therefore had no contact with Mr Acharya.

32. We further note that, in the Amended Particulars of Claim, the allegation was made that, following 10 December 2020 (and the arrival of the outcome letter) the Respondent made the office a "still more hostile environment for the Claimant" by (among other things) "stating **falsely** in a performance review in early December 2020 the Claimant did not assist with stock and deliveries" [*emphasis added*]. It appears from the evidence we heard from the Claimant that there was nothing false about the statement referred to.

33. On the morning of 6 January 2021, the Claimant messaged Ms Lee with a query as to whether, albeit that she had missed the deadline set for submitting an appeal, she could appeal Ms Lee's grievance decision. Ms Lee's response some 11 hours later was to say that, with the deadline being passed by almost 4 weeks, an appeal would not normally be entertained but she asked why the Claimant wished to appeal – "Has further evidence come to light?"

34. Ms Lee met the Claimant on 13 January 2021 but, as she noted later in a letter dated 15 January, the Claimant had not supplied her appeal points in writing. Ms Lee asked for this to be done by 21 January.

35. Also on 13 January 2021, Mr D'Souza posted on the company's intranet site ["*Slack*"] a link to a Citizen's Advice web page giving advice on what to consider before claiming constructive dismissal. We were shown an exchange of messages between Ms Lee and Mr D'Souza in which Ms Lee sought to have Mr D'Souza delete the post before realising, after receiving some advice from someone with knowledge as to how a message on Slack could be deleted by someone other than its author, that she could delete it herself, something which she then did.

36. The Claimant saw the posting and thought the post was aimed at her. She later saw the exchange of messages which passed on the subject of the posting between Ms Lee and Mr D'Souza, messages which she described as:

> … a tongue-in-cheek dialogue on Slack between Dwayne and Victoria in which they present his post as an accident [E51]. As there were a series of electronic steps involved in posting the article, it appears unlikely to have been an accident. The dialogue is plainly fabricated.

37. We have had the benefit of seeing and hearing evidence from Ms Lee and Mr D'Souza. We do not share the Claimant's view that the dialogue was either tongue-in-cheek or plainly fabricated. There is no evidence, in our view, that contradicts their assertion that the posting on Slack of the link to the Citizens Advice webpage was accidental. If it was a deliberate posting aimed at the Claimant, it is difficult to understand how such a posting might be perceived to benefit the Respondent.

38. On 15 January 2021, Ms Lee sent a message to the Claimant repeating a request she had made the previous year for:

> … your documents for right to work as I was aware that your documents were due to expired [*sic*] 28th November. You stated to me that you were meeting with the home office to sort this out.
>
> 1. Can you produce your right to work in the UK?
> 2. If you do not have the papers to work in the UK, Have the home office send you any documents to verify your right to work within the UK.

39. In reply that day, the Claimant said she had received her Leave to Remain letter a couple of weeks previously from the Home Office. She still awaited "the card" but would send through the letter. When she got round to sending the document she had received, it was a document headed "YOUR ASYLUM DECISION".

40. The wording of this document indicated that it was not proof of the right to enter or remain in the UK having been granted: for that, what was needed was a card known as the Immigration Status Document / Biometric Residence Permit.

41. On 20 January 2021, the Claimant asserted that the only reason she had not received the BRP [the Biometric Residence Permit] card was because of covid delays. Ms Lee asked for a photo of the card as soon as the Claimant received it because, as she pointed out, the document the Claimant had sent through did not itself prove that the Claimant had the right to work and the Respondent could "get into very serious trouble if employees do not have the right to work and we allow them to continue to work". The Claimant was off work suffering from anxiety from 18 January through to 1 February. Ms Lee informed her on 28 January that she could not return to work on 2 February 2021 without producing the BRP card. When, on 1 February, the Claimant provided photographs of the front and back of the BRP card, Ms Lee informed her she could return to work if she was well enough.

42. On 22 January 2021 and well past the five days she had been given within which to appeal, the Claimant contacted Ms Lee indicating she wished to appeal. As Ms Lee put it in her statement:

> 12. … The appeal was significantly out of time and I had previously indicated to Ms Ahmed within the grievance outcome letter that an appeal should be submitted to Mr D'Souza within five working days of the outcome. Nevertheless, the company agreed to hear the appeal because we wanted to resolve Ms Ahmed's concerns and retain her in the business.

43. The Grounds of Appeal supplied by the Claimant were interpreted by Ms Lee as containing several new allegations, one of which was an allegation that she had been victimised by Ms Vergara-McCann. Ms Lee considered these new allegations warranted a further investigation and thus she re-commenced her role as investigator.

44. Ms Lee found some evidence that the Claimant and another employee, Ms Agnessa Stubbla, had created an atmosphere which one other female employee described as a "mean girls" atmosphere. One male employee referred to there being always some kind of drama and that he preferred to keep out of it while Ms Visaya hinted that when the Claimant was not present there was less drama. Ms Lee noted that the Claimant, in her performance review in June 2020, had stated – in response to a question as to how she could improve – that she thought she needed to stop letting 'office drama' distract and demotivate her.

45. In her witness statement, Ms Lee wrote:

> 17. As part of a way forward, we offered Dara [the Claimant] the opportunity to transfer to a different department or work from home. Dara had previously expressed an interest in working for the customer service department. As a management team, we hoped that we could find a way to keep Dara working for the company whether that be in a different department or even working from home temporarily. Dara did not take up these offers of support.

46. In the performance reviews conducted in both June and December 2020, the Claimant's punctuality had been highlighted by Ms Faye Clarke as needing improvement. On 3 February 2021, Ms Clarke spoke to the Claimant about her timekeeping. In a complaint about the conversation, the Claimant described what happened as being Ms Clarke delivering a Formal Warning, a description with which Ms Clarke did not agree. Ms Clarke's description of the event, which we accept, was that she had told the Claimant on many occasions that she had arrived at work late and that such lateness was not acceptable. Ms Clarke had

enquired of the Claimant as to whether her lateness was due to stress and offered her the opportunity to work from home as a form of support.

47. Ms Clarke offered the Claimant further support in the form of a 'Personal Development. Plan' which was intended to allow the Claimant to grow into the type of employee that would achieve a better score in her performance review, something that would impact on the amount of bonus she might command. Sadly, the Claimant interpreted this offer of assistance in a negative light, as a threat that she be put on a Personal Improvement Plan, something which she associated with a form of disciplinary action.

48. On Friday 5 February 2021 at 1622 hours, the Claimant wrote to Ms Lee saying:

> Dear Victoria,
>
> I am writing to you to let you know that I hereby resign from my role as a pharmacy assistant at Medexpress.
>
> Although my contract states a notice period of one month, I would kindly ask to negotiate my notice period to be able to leave sooner, (for obvious reasons), so I would like my last day to be the 15th of February 2021.

49. Ms Lee responded 5 days later indicating that the Respondent wanted her to fulfil her contractual commitment and work a full month's notice until 5 March. However, as it happened, the Claimant was off sick during the notice period.

50. Some 98 minutes after communicating her resignation to Ms Lee, the Claimant made an anonymous disclosure to the General Pharmaceutical Council ["*GPhC"*] to the effect that the Respondent's pharmacy:

> … reuses returned medications and sells them to other patients. Since the pharmacy started selling covid kits, patients sometimes return their kits, and the pharmacy manager instructs the assistants to reuse the kits for other patients. There have been complaints about the kits not looking brand-new (broken swabs, etc). The pharmacy manager instructs us to enter the returns as "binned" in the spreadsheet, but they are being reused. This also poses a health and safety hazard given the current situation with the pandemic. Patients who are potentially testing positive are returning the kits and we are reselling them to other customers.

51. The form on which the above was written asked for the date on which "the incident" took place and, to that question, the Claimant had provided the answer "04/02/2021".

52. On 20 February, Mr D'Souza became aware from correspondence with Ms Eva on the Slack intranet that the Claimant had made a disclosure to the General Pharmaceutical Council ['the GPhC'] about two matters, the first that the Respondent was re-using medication Covid19 test kits and, second, relating to the health of Ms Karen Vergara-McCann. This second disclosure was to the effect that Ms Vergara-McCann continued to suffer from an illness that was supposed to be consigned to the past and that she was taking medication for this illness which rendered her "not fit to be office manager".

53. Although the Claimant had indicated on the form on which she had made her disclosure that she was not happy to give her contract details to the GPhC and wished the complaint she was making to be treated as anonymous, she had chosen to tell at least one pharmacy assistant with whom she was friendly (Ms Agnessa Stubbla) what she had done, and Ms Stubbla had informed Ms Eva.

54. This development came three months after October 2020 when the Respondent had introduced a policy dealing with whistleblowing which employees (including the Claimant on 19 October) had signed indicating they had "read, understood and will comply with the procedures" contained within the policy. The stated purpose of this policy was:

> … to ensure that concerns about conduct and dangerous, illegal fraudulent or negligent procedures are raised appropriately, and employees or locums who have raised them will not be victimised and will be protected.

55. Examples of what could be reported under the policy were given and the process for when "you suspect that there is malpractice in the pharmacy which requires reporting" was initiated by first raising the concern with the Superintendent Pharmacist / Pharmacist-In-Charge or Director. The Claimant had not complied with the policy and, as the GPhC had not directly contacted the Respondent, Mr D'Souza needed to find out more detail about the matter raised with the GPhC so as to be able to address it. He asked Ms Lee to obtain further information.

56. Ms Lee wrote to the Claimant on 1 March 2021 as follows:

> Dear Dara
>
> Re: GPhC Whistleblowing
>
> It has come to the company's attention that you may have raised complaints against the company to GPhC regarding the following matters:
>
> 1. Reusing of return medication
>
> 2. Karen McCann's mental health condition.
>
> We are investigating the issue and would like to inquire if you raised matter internally inline with our standards operating procedures? Please can you provide the content of your complaint.
>
> Kindest regards
>
> Victoria Lee

57. The Claimant responded on 3 March 2021 with:

> Hi Vic
>
> What complaint is this? What does this have to do with me or my appeal I don't get it?

58. Ms Lee responded the same day saying:

> Hi Dara,
>
> The complaint was made to the GPHC and it has been reported that this complaint originated from you.
>
> Can you please confirm whether you made a complaint to the general pharmaceutical council regarding these issues and send us a copy of the correspondence so that we can address the issues this issue.
>
> This is a separate issue and not related to your appeal.
>
> Thanks

59. The Claimant did not send a copy of the content of her complaint and, as there had been involvement by a solicitor acting on behalf of the Claimant by this stage

(not the Claimant's present solicitors), Ms Lee emailed the solicitor, attaching a copy of her letter to the Claimant of 1 March 2021 and saying that the Respondent would be grateful if the Claimant would submit a response. The solicitor responded saying she had sent Ms Lee's email to the Claimant but asked her to note that this matter was outside the remit of her instructions.

60. On 10 March 2021, the Claimant presented her first ET1 to the Tribunal in which she complained of unfair constructive dismissal, sex discrimination, sexual harassment, victimisation and automatic unfair dismissal. On 6 April 2021, the Claimant presented her second ET1 to the Tribunal claiming (again) unfair constructive dismissal and sex discrimination but adding complaints of race discrimination and protected disclosure detriment.

Discussion

61. Both Mr Sykes and Mr O'Callaghan had helpfully prepared a List of Issues, Mr Sykes dating his 30 November 2021 and Mr O'Callaghan providing his in the Supplemental Bundle which added 182 pages to the 660 pages of the Main Bundle of documents that the parties considered we needed to see. Unfortunately, the advocates did not manage to agree on one List so we intend to work our way through the List as prepared by Mr O'Callaghan and then see if Mr Sykes' List has been covered.

Direct discrimination on the ground of sex contrary to section 13 of the Equality Act 2010

62. We start with a consideration of the claim of direct discrimination on the ground of sex contrary to section 13 of the Equality Act 2010. The Claimant relies on a hypothetical male pharmacy assistant and we are asked to decide whether the Respondent treated the Claimant less favourably because of her sex as follows:-

62.1. Failing to fully investigate the Claimant's grievance dated 1st December 2020 between 1st – 10th December 2020.

62.1.1. As set out in paragraph 20 above, we considered the Claimant's grievance to have been fully investigated.

62.1.2. It is correct that Ms Lee was not able to watch the CCTV footage by reason that, by 1 December 2020, the date on which the Claimant had raised a grievance concerning the events of 27 November 2020, the CCTV footage had been over-recorded. However, Ms Lee was able to obtain a description of what had been available to see on the footage because Ms Karen Vergara-McCann had, as she put it, "out of curiosity" and making use of an app on her phone, watched the footage that evening in the accommodation she shared with Ms Chen Visaya and had shown it to Ms Visaya. Both these witnesses gave evidence before us and we discerned no reason to disbelieve their evidence of what they said they could discern on the footage.

62.1.3. Ms Vergara-McCann in her statement, said that Mr Acharya:

"appeared to grazed the Claimant with his hand backwards"

and, when cross-examined, that:

"one of his hands grazed her back – no groping"

62.1.4. Ms Visaya in her statement said that she:

"didn't see any Mr Acharya touch Dara – it was mostly his coat that grazed her when he walked by."

62.1.5. And, when she was cross-examined, she:

"recalled him wearing his coat – his hand and the coat grazed her and there was no groping at all – he was holding the dispensing label on the hand close to Claimant."

62.1.6. We did not accept that the Respondent's investigation would have been more fully investigated had the Claimant been male.

62.2. Informing the Claimant on 4th December 2020 that Eva Ahmed's evidence relating to Mr Acharya's conduct would be disregarded as it was not provided by Ms Ahmed via a formal grievance.

62.2.1. We do not see that this approach to Ms Eva's evidence is indicative of less favourable treatment. As we see it, Ms Lee would have adopted the same approach to Ms Eva's evidence had the Claimant been male. In any event, it is clear that Ms Eva acknowledged that Ms Lee had offered her the opportunity to raise a grievance about Mr Acharya should she wish but that she, Ms Eva, did not so wish. Furthermore, Ms Eva expressed the view to Ms Lee that alleging that Mr Acharya was guilty of sexual harassment was:

"a step too far. He may not know what he's doing. He may not have realised he's making people uncomfortable."

62.2.2. This was an approach she continued to adopt when giving evidence to this Tribunal saying that she had never agreed with the Claimant that, whatever Mr Acharya was doing, he was doing it on purpose. She had found Mr Acharya to have been socially awkward, but he became better after management had spoken to him in the wake of the Claimant's grievance.

62.3. Rejecting the Claimant's grievance on 10th December 2020.

62.3.1. We do not see that Ms Lee would have treated the grievance of a male comparator any differently given the findings she made on the Claimant's grievance.

62.4. Dismissing the Claimant's allegations relating to 27th November 2020 on the basis that CCTV evidence did not support the allegations.

62.4.1. It was not just the hearsay evidence that Ms Lee received from Ms Vergara-McCann and Ms Visaya on the content of the CCTV that caused Ms Lee to dismiss the allegations made by the Claimant concerning 27 November 2020.

62.4.2. It is true that that was all the evidence she had to go upon as regards the footage provided by CCTV because the delay between 27 November and the arrival of the Claimant's grievance on 1 December

had meant that, with the CCTV system operated by the Respondent, the footage had been overwritten.

62.4.3. Ms Lee had also spoken to Mr Acharya, the Claimant and others who were present in the room on that particular day, which – because it was Black Friday - happened to be the busiest day of the year for those working in that room.

62.4.4. Given the results of her investigation, we do not consider Ms Lee would have failed to dismiss such allegations had the Claimant been male.

62.5. Failed to take any action against Mr Acharya following the Claimant's complaint / grievance.

62.5.1. The Respondent did not fail to take any action against Mr Acharya following the Claimant's complaint / grievance. Although in Ms Lee's investigation, the evidence suggested that Mr Acharya did not touch the Claimant intentionally, Ms Lee wrote an email to Mr Acharya on 11 December 2020 providing him with a summary of the types of behaviour that she had identified during her investigation of the Claimant's grievance which she said he should stop immediately and avoid in the future.

62.5.2. Additionally, on 5 February 2021, all members of staff were required to watch a video presentation entitled "Behavioural Workplace Training" which had to be completed by the end of the following week. We therefore do not accept the premise that there was no action taken against Mr Acharya.

62.5.3. Had the Claimant been male, we do not see that Ms Lee would have acted differently.

62.6. On or after 10th December 2020 informing the Claimant that she did not assist with stock and deliveries.

62.6.1. This had been an issue which had featured in the Performance Review of the Claimant that had been carried out in June 2020. The Claimant accepted she had not been assisting with stock and deliveries.

62.6.2. We fail to see that a hypothetical male who had not been assisting with stock and deliveries would have escaped that issue being brought to his attention.

62.7. 'Reporting' the Claimant in or around the third week of December 2020 for 'unprofessional behaviour'.

62.7.1. This relates to a comment - "Tell her that's amazing" – which the Claimant made to Ms Vergara-McCann in December 2020 upon learning that she would not receive discretionary sick pay.

62.7.2. The person to whom the Claimant was suggesting Ms Vergara-McCann should tell was Ms Clarke who had some input into the decision on sick pay.

62.7.3. Such report that was made was the subsequent report by Ms Vergara-McCann to Ms Clarke that the Claimant had said those words and the action taken by Ms Clarke was to inform the Claimant that she considered the comment to be unprofessional and disrespectful.

62.7.4. Whether or not that was an appropriate response is not a matter we need to comment upon but we did not see that Ms Clarke would have behaved differently to a male pharmacy assistant.

62.8. Shouting at the Claimant in front of colleagues in early January 2021.

62.8.1. This relates to an allegation made by the Claimant that Ms Vergara-McCann had shouted at her in January 2020.

62.8.2. Ms Vergara-McCann accepted she had shouted but explained that she had done so in order to attract the attention of the Claimant, who was wearing headphones. Ms Vergara-McCann wanted the Claimant to answer the telephone, something that was part of her duties.

62.8.3. We do not accept that Ms Vergara-McCann would have treated any differently a male employee wearing headphones and not performing one of his duties, that of answering the telephone.

62.9. Posting a Citizens Advice link on Slack relating to constructive dismissal.

62.9.1. We do not accept this was an action that was targeted at the Claimant. In our view, the accidental posting might have happened had there been a male pharmacy assistant in the exact same position of having made a grievance that had not been upheld.

62.9.2. We did not think the Claimant was treated less favourably than such a hypothetical male comparator.

62.10. Failing to conclude any investigation or hearing into the Claimant's grievance appeal lodged on 22nd January 2021.

62.10.1. The Claimant asserts that there was no conclusion to such investigation and that that there was no hearing into her grievance appeal.

62.10.2. We note that there was an exchange of messages following the Claimant, on 22 January 2021, putting in writing her grounds of appeal. On 3 February 2021, Ms Lee wrote asking:

> What expressly are you looking to gain from bringing further evidence to us? Are you looking to substantiate your points or is there something else that you are looking for Dara?

62.10.3. The reply she got from the Claimant on 8 February expressed some exasperation that she was still being asked why she was appealing. The Claimant then said this:

> Seeing as how this has taken so long without being properly addressed or dealt with, and seeing as how the situation has gotten progressively worse since I've submitted my report dated the 22nd of January, unfortunately I no longer see the possibility of this situation being resolved internally.

62.10.4. Whether it was reasonable for Ms Lee and the Respondent to regard this as being the final word on the subject of the appeal that an employee who, three days previously, had resigned is debatable. However, what is clear to the Tribunal is that Ms Lee and the Respondent would have regarded such words from a hypothetical male comparator as final. In other words, we could not see that the Claimant had been treated less favourably than a hypothetical male comparator.

62.11. Issuing a verbal 'formal warning' for attending work late on 3rd February 2021 and threatening that there would be a 'serious conversation'.

62.11.1. We could not see that, whatever were the precise words that Ms Clarke used in speaking to the Claimant when, as the Claimant accepts, she was 10 minutes late for work on 3 February 2021, the result would have been any different had the Claimant been male. She had, by then, a history evidenced in the previous two performance reviews of timekeeping that needed improvement.

62.11.2. Interestingly, the Claimant in her witness statement when dealing with the words used by Ms Clarke on her being late does not make a comparison with a hypothetical male with a track record of lateness being treated differently. Instead, she compares the treatment she received for being late with the company's tolerance of what she considers a wide range of serious misconduct by Mr Acharya.

62.12. Delivering a 'low job rating' on 5th February 2021 and threatening a performance improvement plan.

62.12.1. We do not accept that the Claimant was "threatened" with a "performance improvement plan".

62.12.2. Page 72 of the Supplementary Bundle is a note of a 1 to 1 Slack meeting that the Claimant had with Ms Clarke on 5 February 2021. It is clear that Ms Clarke attempted to explain to the Claimant the new way in which the bonus system was working that year and that, were the Claimant to undertake a "personal development plan", the unsatisfactory score that she had received could be improved to a level she would be pleased with.

62.12.3. We found no evidence to indicate that a hypothetical male comparator would have been treated in some way more favourably.

62.13. On 18th February 2021, requesting that the Claimant provide 'witnesses' in support of her allegations set out within the grievance appeal including details of dates and times.

62.13.1. We failed to see how this might be regarded as less favourable treatment on the grounds of sex.

62.13.2. The Claimant had produced grounds of appeal in which Ms Lee discerned there to be new allegations. Not only was the Respondent waiving the right to reject the appeal on the basis that it was out of time, but it was proposing to investigate those matters raised in the appeal that had not been included in the original grievance. For Ms Lee to

investigate those new matters, however, she needed further and better particulars of the new allegations and the names of those who might have witnessed the events that were the subject of the new allegations.

62.13.3. We saw no evidence to suggest that a hypothetical male pharmacy assistant would have been treated more favourably.

Harassment on grounds of sex contrary to s.26 Equality Act 2010

63. Here, the question is whether the Respondents engaged in unwanted conduct related to sex which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her by:

63.1. Informing the Claimant on 7th December 2019 that Mr Acharya had stated in front of colleagues that his brother inherited the good genes while he inherited the bad ones whilst making a sexually inappropriate remark 'but at least down there I'm bigger'.

63.1.1. The way the Claimant had put the matter in her statement was as follows:

> On 7th December 2019 at an early evening office party I was told a pharmacy assistant, Darshan Acharya, had that day told staff while he was packing including Sharmila (female) and the manager Karen McCann (female), as well as the Responsible Pharmacist Paras Shah, that his brother inherited 'the good genes' while he inherited the bad ones. He had added, while pointing between his legs, '*But at least down there I'm bigger*.'

63.1.2. The first point to note is the Claimant was not present and relied on the hearsay evidence of certain persons that, in her statement were not identified.

63.1.3. Of those that the Claimant asserts were among the staff, neither Sharmila nor Mr Paras Shah gave evidence.

63.1.4. The third person identified by the Claimant, Ms Vergara-McCann, gave evidence that she had heard Mr Acharya say that his brother had inherited 'the good genes' but she denied that she heard him say 'at least I am bigger down there'.

63.1.5. We heard evidence from Mr Acharya who admitted he had drawn a comparison between himself and his brother but denied that he had asserted he was 'bigger down there'.

63.1.6. Therefore, like Ms Lee before us, we were not satisfied that the remark had been made by Mr Acharya. In addition, on the evidence, we were not satisfied that any of the individual Respondents had been responsible for informing the Claimant of the remark to which she took exception. Therefore, we could not be satisfied that any of the Respondents were responsible for the alleged harassment of informing her of Mr Acharya's remark.

63.2. Mr Acharya sitting very close to the Claimant on a bench whilst shredding papers as she printed in February 2020.

63.2.1. The allegation is that Mr Acharya used the shredder on two occasions in February 2020.

63.2.2. The physical layout of the office – that is the position of the shredder in relation to the printer and the place where the Claimant sat - and the numbers of people who worked therein made close contact inevitable between someone using the shredder and a person sitting and working in the position that the Claimant was in.

63.2.3. Mr O'Callaghan points out that the Claimant does not suggest Mr Acharya actually did anything inappropriate. His mere proximity made her feel uncomfortable. He asserts most employees would not find the use of a shredder by another employee to create an intimidating, hostile, degrading, humiliating or offensive environment for them.

63.2.4. Mr O'Callaghan drew our attention to section 26 of the Equality Act dealing with Harassment and, in particular, to sub-section (4) which states:

> In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (b) the perception of B;
>
> (c) the other circumstances of the case;
>
> (d) whether it is reasonable for the conduct to have that effect.

63.2.5. He asserts that is not reasonable for the conduct complained of by the Claimant to have the effect she attributes to it.

63.2.6. We agree. We bear in mind the views of Ms Eva when questioned by Ms Lee on 6 April 2021 that she did not think Mr Acharya "may know what he's doing. He may not [*have*] realised he's making people uncomfortable."

63.3. Failing to take any effective action following the Claimant's complaint to Mr Shah in February 2020 relating to (b) above.

63.3.1. The Claimant asserts she complained to Mr Shah and "told him Mr Acharya was sitting unnecessarily close to me. Mr Shah spoke to Mr Acharya, but nothing came of it."

63.3.2. Given that we consider it was not reasonable for the conduct complained of by the Claimant to have the effect she attributes to it, we do not find that the absence of any change in behaviour resulting from the Claimant's complaint was harassment.

63.4. Informing the Claimant in July 2020 that Mr Acharya had told Agnessa Stubbla of his sexual experience with a woman with 'weird nipples' in June 2020.

63.4.1. We did not hear from Ms Stubbla. We merely have the Claimant's report - based on what she says she was told by Ms Stubbla – that Mr Acharya disclosed this information.

63.4.2. Mr Acharya gave evidence and denied that he spoke to Ms Stubbla about his sexual experience in July 2020 or at any other time. We accept his evidence.

63.4.3. If, indeed, Ms Stubbla informed the Claimant of such disclosure by Mr Acharya, we are satisfied on the evidence we heard that Ms Stubbla's information was not accurate.

63.4.4. Section 109 of the Equality Act 2010 provides that:

> "Anything done by a person (A) in the course of A's employment must be treated as also done by the employer."

63.4.5. Ms Stubbla was, so we understand, a pharmacy assistant. She was not employed to report, accurately or otherwise, on what another employee disclosed about that employee's sexual experience. Therefore, we do not hold that Ms Stubbla's report to the Claimant was in the course of her employment.

63.4.6. Thus, the Respondent as the employer of Ms Stubbla is not to be treated as having made Ms Stubbla's report.

63.4.7. If we are wrong about that, we do not consider it to be reasonable for the Claimant to assert that Ms Stubbla's report was conduct which has the purpose or effect of violating the Claimant's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. On any view, the information was imparted to the Claimant on the basis that she would be interested in the same.

63.5. Informing the Claimant in late August or early September 2020 that Mr Acharya referred to the type of porn that he watched in front of female staff.

63.5.1. The Claimant asserts that it was Ms Stubbla who informed her of Mr Acharya making this reference in front of female staff to the type of porn he watched.

63.5.2. We make the point again that we did not hear from Ms Stubbla.

63.5.3. We heard from Mr Acharya. He denied having spoken to Ms Stubbla about watching pornography. He did accept he had discussed with Ms Stubbla a song of the singer Rihanna entitled "S & M". We accept his evidence.

63.5.4. We repeat the point made at 63.4.6 above that Ms Stubbla was not acting in the course of her employment in disclosing, if she did, such information to the Claimant.

63.5.5. Further, we do not think it reasonable for the Claimant to have regarded the report made by Ms Stubbla as indicative of harassment.

63.6. Eva Ahmed reporting Mr Acharya for 'sitting very close to her on the bench while he was shredding' in or around September 2020.

63.6.1. When questioned by Ms Lee, Ms Eva had stated she had no issues with Mr Acharya.

63.6.2. The reporting is that said to be made by Ms Eva made to the Claimant of Mr Acharya sitting very close to her while shredding.

63.6.3. However, when giving evidence in chief, Ms Eva denied that Mr Acharya was "too close when shredding". It was clear that she did not wish to associate herself with the Claimant's complaint concerning Mr Acharya. She said she thought that describing Mr Acharya as having been engaged in sexual harassment was "a step too far".

63.6.4. Thus, we are unable to find that Ms Eva actually did report to the Claimant that Mr Acharya was sitting too close to her whilst he was shredding.

63.6.5. If we are wrong about that, we consider Ms Eva was not acting in the course of her employment by making such a report.

63.6.6. Further, we do not think it reasonable for the Claimant to have regarded the report made by Ms Eva as indicative of harassment.

63.7. Informing the Claimant in or about November 2020 that Mr Acharya called out to Ms McCann (R4) as she was on the telephone using the following phrase '*who's calling you, baby?'*

63.7.1. According to the Claimant, she was informed that Mr Acharya had used that phrase by Ms Agnessa Stubbla.

63.7.2. We did not hear evidence from Ms Stubbla.

63.7.3. Mr Acharya gave evidence and denied having used such a phrase and Ms Vergera-McCann could not recall Mr Acharya "ever calling out to me 'baby' or anything along those lines".

63.7.4. Therefore, we conclude, on the balance of probabilities, that Mr Acharya did not use such a phrase.

63.7.5. If we are wrong about that, we consider it was not reasonable for the Claimant to have regarded Ms Stubbla's report as indicative either of harassment by Mr Acharya or of harassment by Ms Stubbla and, by extension, the Respondent.

63.8. Failing to take any action against Mr Acharya following an alleged assault on Ms Stubbla in mid-November 2020.

63.8.1. In her statement, the Claimant described the incident which gives rise to this allegation in these terms:

> 20. In or about mid-November 2020 Agnessa, Eva and I were working at the shelves. Mr Acharya came forward and stood with his back to us, close to us, and opened a box. He was at the table that is to the left of the printing chair. He did not need to be there. Agnessa passed by him, concentrating on writing on a bottle label. Mr Acharya abruptly jabbed his elbow backwards into Agnessa's breasts. She cried out in pain. No action was taken by the company in response to the assault.

63.8.2. Mr Acharya in his statement described the incident thus:

17. It is true that I accident bumped into Agnessa Stubbla in mid November 2020. This was addressed immediately the day it had odccured, while I was busy completing the day's tasks and restocking empty shelves with boxes of medication.

18. Miss Stubbla was focusing with her own task of dispensing the remaining orders of the day. At the exact moment I had forced open a box she had approached from behind me at speed and my elbow by pure accident glanced into her chest.

19. We were both caught off guard and completely unaware of each other and it involved her being mildly winded while I was left feeling embarrassed and also forcefully told off by the Claimant to stop restocking. I had apologised to Miss Stubbla and nothing else was said during the last hour of the working day, nor had any further complaint been made against me. It was only an unfortunate accident.

63.8.3. On the Claimant's account, it is apparent that, at the time Mr Acharya jabbed his elbow backwards, Ms Stubbla was behind him and concentrating on writing on a bottle label which suggests she might not have given Mr Acharya as wide a berth as she would have had she been paying attention to the course she was taking. Nobody has suggested that Ms Stubbla complained about the incident or regarded it, as did the Claimant, as being a deliberate assault. Indeed, when asked by Ms Lee in the course of her investigation of the Claimant's grievance. Ms Stubbla said it was an accident. Insofar as she had a complaint, it was to the effect that, contrary to his evidence to us, Mr Acharya had not apologised.

63.8.4. Ms Lee called the jabbing of Mr Acharya's elbow into Ms Stubbla's breast a collision which was an accident. She could not see that it was intentional, and neither can we.

63.8.5. We cannot see that it is reasonable for the Claimant to regard this incident as indicative of harassment by Mr Acharya of her.

63.9. Informing the Claimant on 14th or 21st November 2020 that Mr Acharya had invited a locum pharmacist, Lupite, to stay and have lunch following her shift.

63.9.1. In the Claimant's list of issues, the way this is put is:

On a Saturday shift, on or about 14th (or 21st) November 2020, a locum pharmacist Lupite told the Claimant she did not want to work alone with Mr Acharya as he had repeatedly insisted on her previous bi-weekly Saturday half-day shift that she stay and have lunch with him, which she found oppressive. The Claimant felt that conduct was disturbing.

63.9.2. And, in the Claimant's grievance, the issue formed point 9:

9. Locum Pharmacist Lupite told me on a Saturday that Darshan is "really creepy" and that she doesn't want to work with him on her own on Saturdays.

63.9.3. Paragraph 21 of the Claimant's witness statement contains her evidence on the subject:

21. On a Saturday shift, on 14th or 21st November 2020, Lupite, a locum pharmacist, told me she did not want to work alone with Mr Acharya. She said he had repeatedly insisted that she stay and have lunch with him on her bi-weekly Saturday half-day shift. She found his attitude oppressive. I felt that conduct was disturbing.

63.9.4. We did not hear from Lupite but we heard from Ms Faye Clarke who told us that "whilst Lupite did state that Mr Acharya asked her to have lunch with him, she didn't think this to be enough of an issue to report it." Ms Clarke also told us that she had never heard Lupite report that she did not want to come in on Saturdays.

63.9.5. The best evidence we have of the relationship between Lupite and Mr Acharya comes from Mr Acharya. In his statement, he referred to Lupite as Lupita, and said this:

> 20. It is true that I asked Lupita to join me briefly for lunch in the office as a friend. Mine and Lupita's relationship was friendly, she has never raised a complaint of sexual harassment nor felt uncomfortable in my presence as far as I am aware. I have worked alongside Lupita without incident and as we are friends I have her personal mobile number. Since this incident the company has arranged for training to be given to avoid any misunderstandings.

63.9.6. And, when cross-examined, he said that point 9 in the Claimant's grievance dates from when he and Lupite had only just met. As he put it:

> I have asked her about this and she laughed – she finds me highly amusing, we are always laughing together.

63.9.7. We accept Mr Acharya's evidence. Whatever might have been the initial reaction of his new colleague, Lupite, to him, that reaction had dissolved and a friendship had been established. If it be the case that Lupite expressed her view to the Claimant that Mr Acharya was "really creepy" and that she did not want to work with him on her own on Saturdays, that must have been in the initial stages of their relationship.

63.9.8. We cannot see that it is reasonable for the Claimant to regard this incident as indicative of harassment of her by Mr Acharya or by Lupite or, by extension, the Respondent.

63.10. Mr Acharya allegedly brushing against the Claimant's '*behind with his body'* on 27th November 2020 at 9.40am.

and

63.11. Mr Acharya touching the Claimant's 'bottom sexually with his fingers' on 27th November 2020 at 09.50am.

63.11.1. The Claimant described these incidents in her statement thus:

> 22. On 27th November 2020 at or about 9.40 am Mr Acharya took his perverted interest in being close to Eva and myself a step further. He walked very close behind me two times, the third time brushing against my bottom with his body. His conduct was unnecessary. There was enough space to pass by.
>
> Approximately ten minutes later, Mr Acharya again walked very close behind me. This time he touched my bottom sexually with his fingers. I felt a stroke down there.
>
> 24. I froze, then screamed across the office, *'What the hell?'*

63.11.2. Ms Faye Clarke described the events of that day thus:

> 11. I do recall the incident of 27th November 2020 – as soon as the incident happened Mr Acharya contacted me and said that he felt really awkward that the issue had occurred. He stated that it was purely accidental.

12. He seemed sincerely sorry and offered to go home for the rest of the day. As for the office space, it was the busiest day of the year and we had 15 employees working that day. I would say that the MedExpress workplace would be accurately described as a hive of activity and as such I do believe that it is entirely possible that employees may bump into each other whilst going about their duties.

63.11.3. That day was "Black Friday", a day so-called because online retailers deem it to be a day when bargains are to be had. Black Friday was the cause for the Respondent having its busiest day of the year. On Ms Clarke's evidence, there was a reasonably high risk of people bumping into each other.

63.11.4. Mr Acharya in his statement described the incident which caused the Claimant to freeze and scream thus:

22. Between 9am and 10am that day I and several other members of the team were busy dispensing orders. The Claimant was standing to the right-hand side of me and the dispensing table that we were using for dispensed orders.

23. While dispensing I had been called over by Miss Stubbla's brother Hector for assistance. At this exact point in time I had one label stuck to one finger on my right hand which was placed out in front of me and held at chest height while my left hand held an uncapped orange marker pen that was used by me to dispense medication with.

24. I proceeded to walk past the Claimant at speed and in between walking between her and another individual the back of my left hand grazed against the Claimant. I cannot say for sure if it truly was the Claimant's bottom, I only reacted the moment I made contact and as I turned to face the Claimant to apologise, she exclaimed loudly.

25. The space behind the Claimant, the person walking past and myself was exceptionally tight and narrow, there were also boxes on the floor running along the same wall that had the shelving and this impacted the space to move freely. I immediately proceeded to apologise, the Responsible Pharmacist Miss Sonia Bains was stood to my right hand side at this point but made no comment, Miss McCann was on the floor almost directly behind the Claimant and did ask what had happened.

63.11.5. Mr Acharya, in giving his evidence, appeared to believe that the incident described by the Claimant in her paragraph 22 followed 10 minutes after, not 10 minutes before, the event which caused the Claimant to freeze and scream. By that stage, he was out of the room. He defended himself on that basis. However, if that incident preceded the event by 10 minutes, it would appear that it did not register with Mr Acharya at all.

63.11.6. The event which caused the Claimant to freeze and scream was that which caused Ms Vergara-McCann "out of curiosity" to view the CCTV footage that evening on her phone and to show the same to Ms Visaya.

63.11.7. Ms Lee wrote, in her outcome letter to the Claimant of 10 December 2020 that:

I find myself unable to prove that Darshan intentionally touched you on the 27th November 2020 and therefore find that I am unable to support your point that Darshan sexually harassed you in relation to the incident you specifically raised within your grievance on the 2nd December 2020.

63.11.8. On the evidence we heard, we were not only unable to be satisfied that Mr Acharya intentionally touched the Claimant on 27 November but reached the firm conclusion that such touching was accidental.

63.11.9. However, an inadvertent touching can still have the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them, section 26(1)(b) EqA 2010.

63.11.10. In considering effect, we had regard to what the editors of Harvey on Industrial Relations and Employment Law had to say on the subject at §423:

> Where the claim simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention—which could be entirely innocent – is irrelevant. The test in this regard has, however, both subjective and objective elements to it: EqA 2010 s 26(4) says that the following must be taken into account: the perception of the complainant, the other circumstances of the case and whether it is reasonable for the conduct to have had the effect. The assessment requires the Tribunal to consider the effect of the conduct from the complainant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that requisite effect; the objective element. The fact that the claimant is peculiarly sensitive to the treatment accorded him or her does not *necessarily* mean that harassment will be shown to exist.

63.11.11. We consider the Claimant to have been particularly sensitive to any action or utterance on the part of Mr Acharya, whether she witnessed it herself or merely heard of it from others. Her readiness to accept hearsay reports of Mr Acharya's activities and to consider herself to be sexually harassed by these reports denotes an approach to Mr Acharya that was unreasonable. Ms Eva, a friend of the Claimant, viewed the categorisation of Mr Acharya's behaviour as sexual harassment to be:

> "… step too far. He may not know what he's doing. He may not have realised he's making people uncomfortable."

63.11.12. In a workplace where there were some fifteen employees working in a confined area on the busiest day of the year, it was not only Ms Clarke who could have concluded that it was entirely possible that employees may bump into each other whilst going about their duties. Any objective observer could have identified the risk of such an eventuality.

63.11.13. We consider that, in the conditions under which both Mr Acharya and the Claimant were working where there was a recognisable risk of employees bumping into one another, the labelling of Mr Acharya's accidental touch of the Claimant as being sexual harassment was unreasonable.

63.12. Informing the Claimant on 30th November 2020 that Mr Acharya had said to Eva Ahmed that *'a beautiful woman should not be having lunch on her own'.*

63.12.1. The Claimant dealt with this allegation in her grievance letter thus:

7- Darshan went to the travel clinic when Eva was having her lunch (Monday 30/12/2020), and said "a beautiful woman should not be having lunch on her own."

63.12.2. And her written statement contained the following description:

26. On 30th November 2020 Eva told me Mr Acharya had approached her in the travel clinic, a room used for staff lunches. He brushed against her body [F17]. Then he said, '*A beautiful woman should not be having lunch on her own*.'

63.12.3. We do not consider Ms Eva's report to the Claimant had the purpose either of violating the Claimant's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

63.12.4. In considering whether Ms Eva's report had the effect, we regard as relevant the fact that Ms Eva, as a friend of the Claimant, would have believed herself to have knowledge of what might interest the Claimant before making her report. We do not think she would have made such a report had she sensed that the Claimant would regard the actual report as sexual harassment of her by Ms Eva and, vicariously, by the Respondent.

63.12.5. As regards the comment of Mr Acharya detailed in the report, we do not regard it as reasonable for Mr Acharya's comment to be classified by the Claimant as sexual harassment of her.

63.13. Informing the Claimant on 30th November 2020 that Mr Acharya had brushed his body against Eva Ahmed several times including an occasion where Ms Ahmed was bending down to look in a fridge in the kitchen.

63.13.1. The Claimant dealt with this incident in her statement thus:

27. Eva added Mr Acharya had brushed his body against her bottom several times. That included an incident in which he saw came up and stood directly behind her while she was bending down to clean a below-bench kitchen fridge. She told the company about the fridge incident. I found what she told me about these incidents very offensive.

63.13.2. Like Ms Eva, we regard it as a step too far to classify this behaviour as being sexual harassment.

63.13.3. We repeat our comments listed in sub-paragraphs 63.12.3 to 63.12.5 above.

63.14. Informing the Claimant that Mr Acharya had stated that he wanted people to call him 'Big D' in or about the first week of December 2020;

63.14.1. The Claimant in her grievance letter of 10 December 2020 did not mention this report of Mr Acharya's behaviour.

63.14.2. In her witness statement, the Claimant said this:

30. In or about the first week of December 2020 Ms Stublla reported to me that Mr Acharya had said he wants people to call him '*Big D'* in a further reference to his male private parts.

63.14.3. We did not hear from Ms Stubbla (as we understand this employee's surname is spelt).

63.14.4. Mr Acharya gave evidence and told us:

> 31. The allegation that I told Ms Stubbla that I wanted to be called 'Big D' is false and untrue. My interactions with Miss Stubbla have been formal and courteous including both before and after the incident regarding my elbow. I had no need or desire to talk to Miss Stubbla in such a manner and only ever spent my time working alongside her when it was required of me.

63.14.5. We accept his evidence.

63.14.6. If Ms Stubbla made such a report to the Claimant, we can only assume that she did so because she thought the Claimant would be interested. We do not accept that Ms Stubbla's report had either the purpose or the effect of sexually harassing the Claimant.

63.14.7. We do not consider it reasonable for the Claimant to consider the comment reported to her by Ms Stubbla as being sexual harassment of the Claimant.

63.15. Failing to investigate the Claimant's grievance dated 1st December 2020 between 1st and 10th December 2020.

63.15.1. As we have already indicated, we consider the Claimant's grievance of 1 December 2020 to have been investigated.

63.15.2. If we are wrong to have arrived at that view and there was such a failure, we reject the proposition that such failure constitutes sexual harassment of the Claimant. It did not have the purpose that is set out in section 26(1)(b) and, given the efforts that Ms Lee took in conducting her enquiry into the Claimant's grievance, we consider it was not reasonable for the Claimant to have regarded Ms Lee's efforts as having the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

63.16. Informing the Claimant on 4th December 2020 that the Respondent would not take into account Eva Ahmed's evidence as it had not been provided as part of a formal grievance.

63.16.1. The Claimant dealt with this allegation in her witness statement thus:

> 37. On 4th December 2020 at the grievance hearing the HR Manager, Victoria Lee, stated the company would *not* take into account Eva Ahmed's evidence of Mr Acharya's conduct towards her. That was on the pretext Eva did not want to put in a grievance for herself.
>
> 38. Ms Lee confused a witness to a grievance with a grievant. Ms Lee was taking notes of what the employees said, and those notes were the potential basis of witness statements for the grievance.
>
> 39. On this false basis, Ms Lee prevented serious evidence of overt sexual harassment and widely acknowledged inappropriate and 'creepy' behaviour having to be recorded in the grievance outcome. However, she and therefore the company had the notes, and had to report what was in them in the grievance outcome. They did not.

63.16.2. Ms Lee had a different recollection: in her statement, she said:

> I did not tell Ms Ahmed that the Respondent would not be taking into account Eva Ahmed's evidence as part of the grievance investigation. I actually told Ms Ahmed that Eva was welcome to raise a grievance herself and this is noted. Eva stated that she had no issues with Darshan.

63.16.3. We accept Ms Lee's evidence. She was investigating the Claimant's grievance. If that investigation revealed Ms Eva to have no issues with Mr Acharya, it follows that Ms Lee would not be able to take account of issues with Mr Acharya that the Claimant asserted Ms Eva had previously expressed. Ms Lee's assertion that Ms Eva had no issues with Mr Acharya is supported by the note she made on 6 April 2021 of Ms Eva's view that the categorisation of Mr Acharya's behaviour as sexual harassment was a "step too far", a note of a view with which, in her oral evidence, Ms Eva expressed agreement.

63.17. Informing the Claimant on 4th December 2020 that comments allegedly made by Mr Acharya that were not specifically directed at the Claimant would not be investigated as part of the grievance.

63.17.1. The Claimant's evidence on this is contained in her statement in the following paragraph:

> 43. Ms Lee also gave the excuse that she did not need to investigate comments made by Mr Acharya not specifically directed at me. I was shocked and distressed to hear that. They were comments made in the workplace. They obviously risked upsetting female staff. They needed to be addressed by her – she was the HR Manager. Following the preliminary hearing on 24th September 2021, at which the Respondents relied on this argument, Employment Judge Joffe in her Judgment rejected it, citing caselaw.

63.17.2. Ms Lee in her statement contested the Claimant's account saying:

> 40. I did not tell Ms Ahmed that I would not investigate comments allegedly made by Mr Acharya relating to other employees and the notes clearly demonstrate that I was interested in conducting a full investigation of Mr Acharya's conduct.

63.17.3. We accept Ms Lee's account. We agree with her comment that her notes clearly demonstrate that she was interested in conducting a full investigation of Mr Acharya's conduct, as did her outcome letter.

63.17.4. For completeness, we should mention that the preliminary hearing on 24 September 2021 conducted by Employment Judge Joffe did not decide anything other than whether the Respondent was entitled to have parts of the Claimant's claims struck or to have deposit orders made. Having parts of the claim struck out would have meant that the Respondent would not have had to produce evidence to answer to those parts of the Claimant's claims in the full merits Hearing conducted before us. Employment Judge Joffe's decision meant such evidence was produced and, in respect of this particular issue, accepted in preference to the Claimant's evidence.

63.18. Informing the Claimant on 10th December 2020 that Mr Acharya had told Ilaria Capitani that 'I can fuck her up if I want to';

63.18.1. The Claimant relied on her hearsay evidence of what she said Ms Capitani had told her.

63.18.2. In the letter in which she set out her grounds of appeal, the Claimant asserted:

> A team member (who prefers not to disclose their identity, due to previous breeches of confidentiality) approached me and told me that DA [*Mr Acharya*] told them, about me, "this girl needs to understand that I can fuck her up if I want to". They said he said it twice, on two separate occasions. This is a direct threat to my safety.

63.18.3. In her statement, the Claimant said:

> 44. On 10th December 2020, before the grievance decision, Ilaria Capitani, a female pharmacy assistant, told me Mr Acharya had told her that day: '*I can fuck her up if I want to*.'

63.18.4. And, later in her statement, she said:

> 60. … In the week beginning 14th December 2021 Ilaria [*Capitani*] again told me Mr Acharya had said, '*I can fuck her up if I want to*.' This time Ilaria believed he was serious about hurting me.

63.18.5. Mr Sykes signed the Claimant's Amended Particulars of Claim on 12 July 2021 which included at paragraph 12.25 the following:

> On 10th December 2020, before the investigation outcome was issued, the Claimant was told by a female colleague Ilaria Capitani that Mr Acharya had told her that day, '*I can fuck her up if I want to*.' The Claimant was only stopped from calling the Police by Ms Capitani stating she could not support her as she was under investigation and feared losing her job.

63.18.6. That allegation must have been drafted and disclosed earlier to the Respondent because Ms Lee was able, on 14 April 2021, to contact Ms Capitani on the Slack system and put to her the precise allegation. In response, Ms Capitani wrote:

> I did not mention the police, as I also told her Darshan didn't mean physically, and it was only a comment made on her being late, taking extra minutes for lunch and things like these. I also remember telling and reassuring her that he did not mean that physically and never hinted to anything aggressive but only report her about work if he wanted to.

63.18.7. Ms Lee, when cross-examined, was asked why she had not suspended Mr Acharya given the allegation, responded by pointing out that her investigation had not substantiated that allegation.

63.18.8. Mr Acharya was cross-examined on a document in handwriting which contained a statement signed by both him and Ms Capitani on 15 April 2021 with an additional note marked N.B. [*Nota Bene*] that was signed by Ms Capitani. The statement reads as follows:

> 1652 – I can conclude that I Darshan Acharya have spoken to Ilaria Capitani and can use this statement as evidence
>
> Signed Mr Darshan Acharya
>
> [Signature of Mr Acharya]
>
> MISS ILARIA CAPITANI
>
> [Signature of Ms Capitani]

> N.B. Please note that myself, ILARIA CAPITANI, I don't and never felt uncomfortable or intimidated by Mr DARSHAN ACHARYA
>
> 15/04/2021 at 17.07
>
> ILARIA CAPITANI [Signature of Ms Capitani]

63.18.9. Mr Acharya claimed the handwriting for the statement that follows 1652 was his. He had gone to see Ms Capitani because, at the time, he considered himself to be on his own. His employer was not representing him, he had had to engage his own solicitors and his parents were not underwriting the expense. He said that Ms Capitani would break down every couple of days and he had sought to help her in her housing accommodation and had taken her to Citizens Advice. He denied that he had approached anyone to get their evidence changed and asserted that the Claimant had been doing her best "to coerce a witness" [meaning Ms Capitani] "and support a lie".

63.18.10. Mr Acharya asserted he had:

> supported Ms Capitani in every way – she confirmed that the Claimant was constantly calling her out of hours – she was very scared – of the Claimant

And he claimed the handwriting that followed the initials N.B. was that of Ms Capitani.

63.18.11. As to that claim, we had reservations. Certainly, the signature of Ms Capitani appeared consistent with the signature which Ms Lee obtained from Ms Capitani on the notes of her conversation with her on 4 December 2020. The handwriting of the N.B. bears some similarities to that which Mr Acharya acknowledges was his. However, we are not handwriting experts and we did not have the benefit of hearing from such an expert.

63.18.12. And Ms Capitani, as recounted above, refused to attend this hearing and therefore we were not able to hear from her either as to what she heard, or did not hear, Mr Acharya say about the Claimant on 10 December 2020 or whether she recognised the handwriting that follows N.B. as being hers.

63.18.13. Mr Acharya denied the allegation that he had made such a comment to Ms Capitani or anything of that nature.

63.18.14. Without hearing from Ms Capitani, we do not have first-hand evidence that contradicts Mr Acharya's denial of having made such a comment to her or anything of that nature. We conclude, therefore, on the balance of probabilities that he did not make such a comment or anything of that nature.

63.18.15. That conclusion leads us to the further conclusion that, if Ms Capitani twice informed the Claimant that Mr Acharya made such a remark, she was not being truthful for whatever reason.

63.18.16. Further, irrespective of the truth of Ms Capitani's reports concerning Mr Acharya's comment concerning the Claimant, we do not

accept that Ms Capitani was acting in the course of her employment when making such reports and, therefore, the Respondent does not bear vicarious liability for the comments she made.

63.19. Rejecting the Claimant's grievance on 10th December 2020.

63.19.1. As enunciated above, we regard the investigation into the Claimant's grievance that Ms Lee conducted to have been both thorough and impressive and her reasons for not upholding the Claimant's grievance to have been rational.

63.19.2. Therefore, we do not accept that the rejection of the Claimant's grievance had the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

63.19.3. Further, we cannot see how the conclusion of a grievance investigation begun by the Claimant submitting a grievance can be said to have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her given that we had no evidence that anyone other than the Claimant was the recipient of the grievance outcome.

63.19.4. We consider it is not reasonable for the outcome of the Claimant's grievance to have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her merely because the outcome was not as the Claimant would have wished.

63.20. Dismissing the Claimant's allegations relating to alleged incidents on 27th November 2020 on the basis that CCTV evidence did not support the allegations.

63.20.1. Ms Lee was not able to view the CCTV evidence herself because the delay between the date of the alleged incidents and the arrival of the Claimant's grievance meant the CCTV evidence was no longer available for her to view.

63.20.2. Ms Lee interviewed two female employees of the Respondent who had, on the evening of 27 November, viewed the CCTV evidence on the phone of one of them.

63.20.3. She interviewed other people, including Mr Acharya, on the events that gave rise to the Claimant's allegations.

63.20.4. In our view, her conclusion that she should dismiss the Claimant's allegations relating to those incidents was rational.

63.20.5. Therefore, we do not accept that the rejection of the Claimant's allegations constituted harassment.

63.20.6. We consider it is not reasonable for the rejection of the Claimant's allegations to have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive

environment for her merely because the outcome was not as the Claimant would have wished.

63.21. Failing to take any action against Mr Acharya as a result of the Claimant's grievance.

63.21.1. We do not accept that there was a failure to take any action against Mr Acharya.

63.21.2. Ms Lee emailed Mr Acharya on 11 December 2020 as she felt that it was important that lessons were learnt to moderate any future conduct. While her letter informed Mr Acharya that she had not found proof regarding the Claimant's points and that the evidence from her investigation suggested that Mr Acharya had not touched the Claimant intentionally, it informed him that there were had been some key learnings that had been highlighted from the case which she felt duty bound to bring to his attention. She continued:

> I would like to make you aware that although I couldn't find evidence to prove Dara's point, I would like to say that she raised points of inappropriate conduct in the office which cannot be overlooked from an employer's perspective.
>
> I know that when I spoke to you briefly on 9th December, I mentioned these below key learnings and you seem to have an awareness of them.
>
> Here is a brief summary of the kinds of behaviours [that the investigation has identified] you must immediately stop and avoid in the future within our work place:
>
> 1. Compliment people on their dress, appearance or looks – this could easily be misconstrued
> 2. Please give people a wide berth – do not try to squeeze past them – again easily misconstrued – please walk around people rather than squeeze by
> 3. Please avoid making inappropriate jokes or talking about controversial subjects regarding sex, race, religion
> 4. Please can we remove the paper shredder to avoid further discussion about this (a simple fix)
> 5. Please do not ask any employer to have lunch with you – easily misconstrued. But if they request to have lunch with you and you want to, then that would be perfectly fine.
> 6. Please do not ask anyone to stay late with you – easily misconstrued

63.21.3. And, later in her letter, she wrote:

> For clarity moving forward it is my expectation that I do not have to manage any further complaints regarding any of the six points above with you or anything similar in nature. Any further repercussion may result in further investigation and potentially entering the company disciplinary process.

63.21.4. On receipt of this letter, Mr Acharya must have realised he was in receipt of an informal warning that, if his behaviour did not conform to the prohibition on the six types of behaviour mentioned by Ms Lee, formal disciplinary proceedings might result.

63.21.5. In addition, as part of the grievance outcome, the Respondent provided training to the entire team, including Mr Acharya, regarding harassment and a harassment policy was created for the employee handbook so as to avoid any future misunderstandings.

63.21.6. Given our findings that the investigation was thorough and impressive and the conclusions drawn by Ms Lee were rational, we consider it was not reasonable for such action as was, or was not, taken against Mr Acharya to constitute harassment.

63.22. Informing the Claimant during the week commencing 14th December 2021 that Mr Acharya had stated to Ilaria Capitani '*I can fuck her up if I want to'* for a second time.

63.22.1. We dealt with the first time Ms Capitani so informed the Claimant (on 10 December 2020) at paragraph 63.18 above.

63.22.2. In so doing, we strayed into dealing with the second time Ms Capitani so informed the Claimant sometime in the week beginning 14 December 2020.

63.22.3. We fail to see that repetition by Ms Capitani of a report we have concluded was untrue alters our conclusion that such a report did not amount to harassment by any of the Respondents.

63.23. Criticising the Claimant in December 2020 during her performance review as she did not assist with stock and deliveries.

63.23.1. We repeat our observations from paragraph 62.6 above:

63.23.2. This had been an issue which had featured in the Performance Review of the Claimant that had been carried out in June 2020. The Claimant accepted she had not been assisting with stock and deliveries.

63.23.3. The action of management in the course of a performance review of bringing to the attention of an employee an aspect of her job that she was admittedly not performing cannot, in our view, be said to be harassing that employee.

63.23.4. The allegation being made here might have carried weight had it been the case that the criticism of the Claimant had been false as had been asserted in the Amended Particulars of Claim. However, we repeat the observation made in paragraph 32 above that the Claimant's evidence made clear there was nothing false about the criticism.

63.24. Reporting the Claimant in the third week of December 2020 for '*unprofessional behaviour'.*

63.24.1. We indicated when dealing with this allegation as an instance of discriminatory behaviour that whether or not that was an appropriate response to the rather sarcastic comment made by the Claimant upon her learning that she would not receive discretionary sick pay is not a matter for us to comment upon. If the Respondent wishes to set standards it regards as professional and, in consequence, regards such

a comment as unprofessional, it seems to us that such identification of that behaviour as unprofessional is within its prerogative.

63.24.2. We do not interpret such identification as being conduct that related to sex.

63.24.3. Neither do we interpret the conduct as having either the purpose or the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

63.24.4. Additionally, we do not regard it as reasonable for such conduct to have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

63.25. Shouting at the Claimant in front of colleagues in early January 2021.

63.25.1. The Claimant dealt with this allegation in her statement in this way:

> 64. In early January 20201 I was shouted at in front of colleagues for supposedly not taking telephone calls. That was when I was working on email orders made post-sale that I had been assigned to process.

63.25.2. The Claimant neglected to mention the fact, as we find, that she was wearing headphones and the fact that the person shouting was Ms Vergara-McCann, occupying a position with managerial control over the Claimant, who had discerned that shouting was necessary to attract the Claimant's attention so as she could attend to one of her duties, that being to answer the telephone.

63.25.3. We could not see how being shouted at in such circumstances could constitute conduct related to sex.

63.25.4. Neither do we interpret the conduct of Ms Vergara-McCann as having either the purpose or the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

63.25.5. Additionally, we do not regard it as reasonable for such conduct to have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant

63.26. Sharing a Citizens Advice Bureau link on slack on 13th January 2021 relating to '*constructive dismissal'.*

63.26.1. Given our finding that there was nothing deliberate in the posting of the Citizens Advice link relating to '*constructive dismissal'* on Slack, we do not find such posting, and thereby sharing, of the link had the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

63.26.2. As to the effect of such a posting, we do not consider that the effect of violating the Claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant because it was not reasonable for the conduct to have had that effect.

63.27. Failing to conclude any investigation or hearing following the Claimant's grievance appeal lodged on 22nd January 2021.

63.27.1. On 5 February 2021, the Claimant resigned and, on 8 February 2021, wrote that she no longer saw the possibility of this situation being resolved internally.

63.27.2. By that time, the Claimant had resigned and, although she was required to work out the one month's notice from 5 February, sickness prevented her from attending work.

63.27.3. In such circumstances, it does not seem to us that the failure to conclude any investigation was conduct that was related to sex.

63.27.4. Neither did it have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

63.27.5. In her absence, it could not, and did not, have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

63.28. Issuing a formal verbal '*formal warning'* on 3rd February 2021 due to the Claimant's lateness and stating that there would be a '*serious conversation'.*

63.28.1. Assuming for the moment that the words used by Ms Clarke in speaking to the Claimant when, as the Claimant accepts, she was 10 minutes late for work on 3 February 2021 amounted to a formal verbal '*formal warning'*, we do not see that such conduct relates to sex.

63.28.2. We cannot see that a manager, faced with an employee who was 10 minutes late in arriving and had a history of bad time-keeping, was engaging in conduct that either had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her by issuing such a formal verbal '*formal warning*'.

63.28.3. We do not consider it was reasonable for such a warning in such circumstances to have the effect referred to in subsection (1)(b) of section 26 of the Equality Act.

63.29. Awarding the Claimant a '*low job rating'* and threatening to place the Claimant on a performance improvement plan on 5th February 2021.

63.29.1. We did not see that either of these matters constituted conduct relating to sex.

63.29.2. In our view, the evidence supported the decision to place the Claimant on the job rating she received.

63.29.3. We have already commented that the Claimant failed to appreciate that she was not being offered to be placed on a performance improvement plan but rather she was being offered the opportunity to undertake a "personal development plan" that might improve the job

rating she had obtained which, in turn, determined the level of bonus to which she was entitled.

63.29.4. Such conduct neither had the purpose nor the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

63.30. Requesting that the Claimant provide '*witnesses*' in support of her allegations to include dates and times of alleged events on 18th February 2021.

63.30.1. This was a request made by Ms Lee of the Claimant.

63.30.2. We fail to see how the request of a female Human Relations officer that the Claimant provide '*witnesses*' in support of her allegations to include dates and times of alleged events is conduct related to sex.

63.30.3. We do not consider that such a request had either the purpose or the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

63.30.4. We do not consider it reasonable for such a request to that the effect mentioned in the previous paragraph.

63.31. Requesting that the Claimant obtain '*signed testimonies'* in support of the Claimant's appeal on 22nd February 2021.

63.31.1. This was a request made by Ms Lee of the Claimant.

63.31.2. We fail to see how the request of a female Human Relations officer that the Claimant obtain '*signed testimonies'* in support of her allegations to include dates and times of alleged events is conduct related to sex.

63.31.3. We do not consider that such a request had either the purpose or the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

63.31.4. We do not consider it reasonable for such a request to that the effect mentioned in the previous paragraph.

Victimisation on grounds of sex contrary to s.27 Equality Act 2010

64. It is accepted that the Claimant's grievance dated 1st December 2020 was a protected act. The Claimant is put to proof that she made verbal complaints that amounted to protected acts prior to or after the submission of the grievance dated 1st December 2020.

64.1. We did not understand the Claimant to have made any protected act prior to the submission of her grievance. We accept that, at various times thereafter, she expressed herself in terms that amounted to a protected act.

65. Did the Respondents subject the Claimant to the following detriments because she did the above protected acts?

65.1. Failing to take any effective action relating to an alleged complaint to Mr Shah regarding Mr Acharya sitting unnecessarily close to the Claimant.

65.1.1. The detriment alleged is the failure to take effective action following the complaint to Mr Shah. We have already determined, at 63.3.2, that it was not reasonable for the conduct complained of by the Claimant to have the effect she attributes to it, that of harassment.

65.1.2. In our view, the absence of any action initiated by Mr Shah does not amount to a detriment.

65.2. Failing to fully investigate the Claimant's grievance dated 1st December 2020 between 1st and 10th December 2020.

65.2.1. The Claimant's grievance was fully investigated.

65.2.2. Therefore, we do not accept there to have been such a detriment.

65.3. Stating on 4th December 2020 that that they would not take into account Eva Ahmed's evidence relating to Mr Acharya as Ms Ahmed had not raised a formal grievance.

65.3.1. We accepted the evidence of Ms Lee – see 63.16.3 above - that she did not tell Ms Ahmed that the Respondent would not be taking into account Eva Ahmed's evidence as part of the grievance investigation.

65.3.2. Therefore, it follows that we do not accept there to have been such a detriment.

65.4. Stating on 4th December 2020 that they did not need to investigate comments made by Mr Acharya that were not specifically directed at the Claimant.

65.4.1. We accepted the evidence of Ms Lee - see 63.17.3 above – that she did not tell Ms Ahmed that she would not investigate comments allegedly made by Mr Acharya relating to other employees.

65.4.2. Therefore, it follows that we do not accept there to have been such a detriment.

65.5. Rejecting the Claimant's grievance on 10th December 2020.

65.5.1. We repeat what we said at 63.19.1.

65.5.2. We do not accept that the rational rejection of the grievance initiated by the Claimant constituted a detriment merely because the outcome of the grievance was not as the Claimant wished.

65.6. Dismissing the Claimant's allegations relating to alleged incidents on 27th November 2020 on the basis that CCTV evidence did not support the allegations.

65.6.1. We repeat what we said in respect of the allegation of harassment at 63.20.

65.6.2. We do not accept the rational rejection of the Claimant's allegations constituted a detriment.

65.7. Failing to take any action against Mr Acharya as a result of the Claimant's grievance.

65.7.1. We repeat what we said in respect of this allegation when it was cited as harassment, see 63.21 above.

65.7.2. We do not accept there to have been such a failure.

65.7.3. It follows we do not accept there to have been such a detriment.

65.8. Informing the Claimant in December 2020 that she did not assist with stock and deliveries during her performance review.

65.8.1. We repeat what we said in respect of this allegation when it was cited as harassment, see 63.23 above.

65.8.2. Therefore, given the detriment asserted is informing the Claimant of a failure on her part to do something that she accepted she had failed to do, it follows that we do not accept the inclusion of this issue in her performance review to have been a detriment.

65.9. Reporting the Claimant in the third week of December 2020 for '*unprofessional behaviour'.*

65.9.1. The Claimant in her witness statement said at paragraph 63 that she "was reported for '*unprofessional behaviour*' simply for saying '*That's amazing*' in workplace conversation"

65.9.2. In the context in which it was said, that remark – made to the Senior Lead Dispenser, Ms Vergara-McCann – was regarded by her as "rude" and was reported by her to Ms Clarke, the Pharmacy Operations Manager, who then described it to the Claimant as "unprofessional behaviour" because, as she told us in her statement, she felt this comment was both unprofessional and unacceptable.

65.9.3. In our view, that was within the reasonable range of responses for a manager when in receipt of a report of such a comment.

65.9.4. We repeat what we said in respect of the allegation that such reporting was harassment at 63.24 above.

65.9.5. We do not regard such reporting to be a detriment.

65.10. Shouting at the Claimant in front of colleagues in early January 2021.

65.10.1. We repeat what we said in respect of the allegation that such shouting was harassment at 63.25 above.

65.10.2. We do not regard the shouting complained of to be a detriment.

65.11. Sharing a Citizens Advice Bureau link on slack on 13th January 2021 relating to 'constructive dismissal'.

65.11.1. We repeat what we said in respect of the allegation that such sharing was harassment at 63.26 above.

65.11.2. We do not regard the sharing complained of to be a detriment.

65.12. Failing to conclude any investigation or hearing following the Claimant's grievance appeal lodged 22nd January 2021.

65.12.1. We repeat what we said in respect of the allegation that such a failure to conclude any investigation or hearing following the submission of the grievance appeal at 63.27 above.

65.12.2. Given that (a) the Claimant resigned on 5 February 2021, (b) the Claimant wrote on 8 February 2021 that she so longer saw the possibility of the "situation" being resolved internally, (c) the Claimant by reason of illness did not work out her month's notice, and (d) Ms Lee on behalf of the Respondent had been proceeding with her investigation with reasonable dispatch, we do not regard such failure in such circumstances to be a detriment.

65.13. Issuing a formal verbal '*formal warning'* on 3rd February 2021 due to the Claimant's lateness and stating that there would be a '*serious conversation'.*

65.13.1. We repeat what we said in respect of the allegation that such issue and such statement was harassment at 63.28 above.

65.13.2. We do not regard such issue and such statement to be a detriment.

65.14. Awarding the Claimant a 'low job rating' and threatening to place the Claimant on a performance improvement plan on 5th February 2021;

65.14.1. We repeat what we said in respect of the allegation that such an award and the offer of the opportunity to undertake a "personal development plan was harassment at 63.29 above.

65.14.2. We do not regard either the award of a 'low job rating' or the offer of the above opportunity to be a detriment.

65.15. Requesting that the Claimant provide '*witnesses'* in support of her allegations to include dates and times of alleged events on 18th February 2021.

65.15.1. This was a request made that would have facilitated the investigation of those new matters included in the Claimant's grounds of appeal.

65.15.2. We do not view such a request to have been a detriment.

65.16. Requesting that the Claimant obtain '*signed* testimonies' in support of the Claimant's appeal on 22nd February 2021.

65.16.1. This was a request made that would have facilitated the investigation of those new matters included in the Claimant's grounds of appeal.

65.16.2. We do not regard such a request to have been a detriment.

66. In respect of all of the alleged detriments set out above, we do not regard any of them to be actions taken by the Respondents, or any one of the Respondents, because of the protected act.

Claim 2 – Public Interest Disclosure

67. The issues for the Tribunal are as follows:-

67.1. Did the Claimant disclose a matter tending to indicate a breach of legal obligation?

67.2. If so, which legal obligation is relevant?

67.2.1. We understand the Respondent to have conceded the Claimant's disclosure included an allegation relating to health and safety within the meaning of section 47 (d) ERA 1996 in that it was asserted that the First Respondent illegally resold returned medication and Covid-19 test kits. It was further asserted that the 3rd Respondent instructed the Claimant and pharmacy staff to enter the returns on a spreadsheet falsely as '*binned'.*

67.3. Did the Claimant have a reasonable belief in the truth of her disclosure(s)?

67.3.1. The Respondent has not sought to impugn the disclosures on the basis that that Claimant did not have a reasonable belief in the truth of her disclosures.

67.3.2. We therefore accept she had such a reasonable belief.

67.4. Were the disclosures made in the public interest?

67.4.1. Disclosures of the sort made by the Claimant are in the public interest.

67.5. Mr O'Callaghan has extracted from paragraph 18 of the Claimant's list of issues the three detriments that she asserts she was subjected to on the ground that she had made a protected disclosure. They are as follows:-

67.5.1. By Ms Lee writing to the Claimant on 1st March 2021 querying whether the Claimant had made a complaint about the Respondent to the GPhC.

67.5.2. By Ms Lee sending an iMessage to the Claimant on 10th March 2021 requesting the Claimant provide the Respondent with her email address.

67.5.3. By Ms Lee sending a one-word response on 10th March 2021 '*Victoria*' in reply to the Claimant's querying the identity of the author of the iMessage referred to above.

67.5.4. By Ms Lee emailing the Claimant's former lawyer, Tom Street & Co Solicitors on 10th March 2021.

67.5.5. By committing a '*gross invasion of the Claimant's privacy'* and/or '*breach of and disrespect for the anonymity of a serious protected disclosure'.*

67.6. Were any of the above acts or omissions capable of amounting to detriments?

67.6.1. The acts or omissions listed in 67.5.1 to 67.5.4 are conceded to have taken place.

67.6.2. We do not regard any one of them to be capable of amounting to a detriment for the following reasons:

67.6.2.1. The Respondent had introduced a whistleblowing policy three months before the Claimant's disclosures which the Claimant had signed on 19 October 2020 as indicating she had "read, understood and will comply with the procedures" contained within the policy.

67.6.2.2. The Claimant had not complied with the procedures contained within the policy ahead of making her disclosures.

67.6.2.3. The Claimant purported to hide her identity from the GPhC but told one or more of her fellow pharmacy assistants that she had made disclosures to the GPhC as set out in paragraph 52 above.

67.6.2.4. As a result, Ms Eva heard of the disclosures and brought the same to the attention of Mr D'Souza.

67.6.2.5. Given that a complaint to the GPhC was likely to be one that affected health and safety and given that Mr D'Souza had not been contacted by the GPhC, it was clearly in the interests of health and safety that the Respondent discover as soon as possible what was the subject matter of the complaint so as to put right whatever might wrong. That was the same reasoning that lay behind the whistleblowing policy the purpose of which was stated to be "to ensure that concerns about conduct and dangerous, illegal fraudulent or negligent procedures are raised appropriately".

67.6.2.6. We accept Mr O'Callaghan's submission that an employer is entitled to investigate the allegation and, in particular, to ask for the evidence that gave rise to the allegation so that it could properly be investigated. And we further accept his submission that the Respondent simply made reasonable enquiries in a polite and measured way.

67.6.3. In respect of the allegation that the Respondent, by committing a '*gross invasion of the Claimant's privacy'* and/or '*breach of and disrespect for the anonymity of a serious protected disclosure',* subjected the Claimant to a detriment, we do not accept that the anonymous sending of a complaint to the GPhC confers on the sender a right of privacy that survives the sender's publicising her action.

67.6.4. Neither can we see that there was any detriment in the erstwhile anonymous sender being asked questions about the complaint if she was responsible for her anonymity being breached.

67.7. 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?

67.7.1. We do not accept any of the alleged acts or omissions to be detriments.

67.7.2. We do, however, accept that the Respondent's acts or omissions were properly the result of the disclosures of the Claimant to the GPhC and of her dismantling of whatever anonymity she sought to obtain by not identifying herself in such disclosures through telling one or more of her fellow pharmacy assistants of her disclosures

Direct Race Discrimination contrary to s.13 Equality Act 2010

68. The Claimant relies on a 'hypothetical non-North African non-Egyptian Pharmacy Assistant'.

69. Did the Respondents treat the Claimant less favourably because of her race as follows:-

69.1. Did Mr Acharya state to Paras Shah, within the Claimant's earshot '*He has a weird African name. It reads from right to left'* on or around August 2020?

69.1.1. The Claimant's evidence on this point is contained in her statement:

> 99. In or about August 2020 Mr D Acharya having spoken to a patient, told the Responsible Pharmacist Paras Shah, within my earshot, '*He has a weird African name. It reads from right to left*.' This was a clear slur directed at me. He obviously knew my national origins were in an Arabic country in which the written word runs from right to left. In the UK, words are typed written and spoken from left to right.

69.1.2. Mr Acharya's evidence on the point was:

> 35. I am aware that the Claimant has also alleged that I made a racist comment by referring to a '*weird African name'*. It is common practice in pharmacy for medical staff to query the legitimacy of a name, as an online pharmacy we are not afforded the same luxury as a community pharmacy in being able to converse with a client face to face. I am myself from an African background and Medexpress itself is a hugely diverse place to work with Filipino, Greek, Portuguese, Indian, and Italian colleagues all getting on well.
>
> 36. The comment, "*he has a weird African name"* is not only false but has also been heavily misconceived and grossly taken out of context. In addition to this, raising a unique name and being unable to determine its legitimacy with the then Responsible Pharmacist Mr Shah is common practice and should be allowed to avoid breach of guidelines presented in our terms and conditions and ensuring that the patient's details are accurate.
>
> 37. Due to patient safety being a top priority ID checks are a fail-safe way of avoiding us breaching guidelines. The Claimant is fully aware of this, and I feel that she

would have known that I was only querying the name as part of the protocol to query unique or unusual names.

69.1.3. The Claimant in cross-examination accepted that what Mr Acharya had described in his statement was a common practice of querying the name that was to go on the label to be attached to the medication being dispensed. She went on to say that she was offended by, as she saw it, Mr Acharya making fun of a weird African name. She accepted that Mr Acharya was of Indian ethnicity.

69.1.4. In his cross-examination, Mr Acharya was not asked questions on this matter.

69.1.5. We accept Mr Acharya's evidence on the importance placed within the pharmacy of ensuring the correct name is placed on the label to be attached to medication being dispensed.

69.1.6. We have to determine whether these words being uttered – and we will assume that Mr Acharya came out with both the short sentences complained of – within earshot of the Claimant meant that the Claimant was being treated less favourably than a hypothetical non-North African non-Egyptian Pharmacy Assistant would have been treated.

69.1.7. Our view is that it is likely that Mr Acharya would have uttered exactly the same words had the person within earshot not been the Claimant but a hypothetical non-North African non-Egyptian Pharmacy Assistant.

69.2. Did Mr Shah tell the Claimant '*You look white, with a really good tan'* in or about September 2020.

69.2.1. We have the Claimant's evidence on this point: in her statement, she said:

> 100. In or about September 2020 Mr Shah told I, '*You look white, with a really good tan*.' The implied meaning was that appearing white Caucasian was racially superior to appearing dark-skinned North African. He is dark-skinned. His tone was enthusiastic about the white skin colour.

69.2.2. In her oral evidence, she said that Mr Shah had not only said the words contained in the paragraph of her statement quoted above but added "not like me"

69.2.3. We did not hear from Mr Shah.

69.2.4. On the evidence we heard, we accept that Mr Shah said the words that the Claimant specified in her oral evidence.

69.2.5. The implied meaning of Mr Shah's statement may, or may not, be as the Claimant has outlined. It is possible for the comment merely to be how Mr Shah perceived, and chose to describe, the Claimant's skin tone and no more.

69.2.6. We could not see that, by making that statement, Mr Shah was treating the Claimant less favourably than he would have treated a hypothetical non-North African non-Egyptian Pharmacy Assistant.

69.2.7. A hypothetical non-North African non-Egyptian person may have a skin hue that is lighter or darker than the Claimant or a skin hue that matches that of the Claimant. And, if it were to match the Claimant's, we think it entirely possible that Mr Shah might make the same statement.

69.3. Failing to take any action in respect of the Claimant's verbal grievance to Faye Clarke from or about late September 2020.

69.3.1. The Claimant in her written statement said [referring to the statements set out in 69.1 and 69.2 above]:

> 101. From late September 2020 the company failed to take any action in respect of my verbal grievance at that time to the Operations Manager Faye Clark about the two incidents. Ms Clark commented, referring to the hurtful words, '*Maybe they didn't mean it*.' That was not an adequate response by management.

69.3.2. Ms Clarke wrote in her statement:

> 25. I am unaware of any racist language spoken by Mr Acharya or indeed anyone else. I never said to the Claimant that '*Maybe they didn't mean it'* in our 1-1 meeting on 22/09/20. Ms Ahmed did say that she felt that there was a lack of professionalism sometimes - occasionally people make comments about race, religion, sex etc which she feels are not appropriate at work. We discussed whether this was on purpose - she stated no, but it shows a lack of awareness and consideration for offending others. I suggested that we raise this at the planned team mediation meeting to encourage people to be mindful of their comments and be professional in the workplace.

69.3.3. We accept the evidence of Ms Clarke. It was the Claimant who said that occasionally people make comments about race, religion, sex etc which showed a "lack of awareness and consideration for offending others". Further, earlier in Ms Clarke's statement, she had confirmed the evidence of Ms Lee in respect of a mediation meeting held on 16 October 2020 by saying:

> 23. On 16th October 2020, in response to Ms Ahmed's comments in September myself and Victoria Lee held a mediation meeting and at the end we spoke to the entire team about not taking about subjects like sex, religion, politics or any subject that was inflammatory and may risk upsetting and offending any member of the team. On the 5th February 2021, at 2pm (before Ms Ahmed resigned at 5pm) we provided Harassment training to the team in response to the grievance raised December 2020.

69.3.4. Therefore, we do not accept that no action was taken in response to the verbal grievance to Ms Clarke.

69.4. Refusing to permit the Claimant to return to work following sick leave on 28th January 2021.

69.4.1. The Claimant dealt with this allegation in her statement thus:

> 105. On 28th January 2021 Victoria refused to permit me to return to work on 2nd February 2021 following sick leave. That was despite the letters dated 30th November 2020 from the Home Office. The letters granted me refugee status. The further document clearly stated I had '*the right to take a job without the permission of any Government Department*.'

69.4.2. Ms Lee in her statement dealt with this issue:

72. On 28th January 2021 I told Ms Ahmed via slack that the company would not be legally compliant with right to work regulations until we saw and copied the biometric residence permit. I let Ms Ahmed know as soon as I could in the hope that she could resolve it before she was due to return from sick leave on 1st February 2021 and I offered to help if required.

73. Ultimately it is the employee's responsibility to provide the right to work documentation and Ms Ahmed had been aware of this since 17th November 2020 when her biometric card expired.

74. On February 1st 2021 I thanked Dara for supplying me with the biometric card and I asked her to return to work if she was well enough in line with company procedures.

69.4.3. The Claimant failed to appreciate that the first letter of the two letters she relies on, both dated 30 November 2020 from the Home Office, actually made clear in bold type the reliance she could place on it:

> **This letter <u>does not</u> confirm you have leave, give you the right to work or allow you access to benefits.**

69.4.4. And, if she had appreciated the natural meaning of those words, she might have been led into the realisation that, if she could not rely on that letter, then an employer wishing to comply with the duty placed on it to ensure its workforce had the right to remain in this country could not rely on that letter.

69.4.5. Indeed, the second letter from the Home Office dated 30 November 2020 told her:

> You have been notified that your claim for asylum has been considered and you have been granted refugee status. To allow us to issue evidence of this leave you must have your biometrics (scanned fingerprints and photograph) taken.

69.4.6. It seems to us that Ms Lee was justified in refusing to permit the Claimant to return to work until the Respondent saw and copied the biometric residence permit. We do not consider that a hypothetical migrant non-North African non-Egyptian Pharmacy Assistant would have been treated differently.

69.5. (e) Stating that the Claimant was not coming back to work because the Claimant had *'visa issues'* on or about 1st February 2021;

69.5.1. The Claimant in her statement said:

> 110. On or about 1st February 2021 I was told by Agnessa via Eva that the Pharmacy Manager Ms McCann had stated I was not coming back to work because I had '*visa issues*.'

69.5.2. Ms Vergara-McCann in her statement said:

> 12. I did not have a conversation with Eva Ahmed about the Claimant not returning to work because of visa issues. I explained that I had forwarded Eva's birth certificate to HR as I had a copy of it while she was not at work as she works part-time. Everyone in the company was asked to submit a valid right to work document before coming in to work as per email from HR.

69.5.3. Neither Ms Eva nor Ms Vergara-McCann were asked questions relating to this point.

69.5.4. We did not hear from Ms Agnessa Stubbla.

69.5.5. We were not satisfied that Ms Vergara-McCann made the comment that the Claimant, relying upon a double hearsay, asserts she had made.

69.5.6. If we are wrong about that and Ms Vergara-McCann made such a remark, we do not see that a migrant 'hypothetical non-North African non-Egyptian Pharmacy Assistant' would have been treated more favourably.

69.6. Requiring the Claimant to provide a photograph of a residence permit on 1st February 2021.

69.6.1. The Claimant in her statement merely states:

> 111. On 1st February 2021 Ms Lee told me, '*You can go back to work'* after I sent her a picture of the residence permit.

69.6.2. We do not see that this adds to what we have noted already concerning the Claimant's lack of appreciation of the need of the employer to see the Biometric Residence Permit.

69.7. Rudely challenging the Claimant's self-description as '*international pharmacist'* on 18th February 2021.

69.7.1. The Claimant dealt with this point in her statement as follows:

> 112. On 18th February 2021 Ms Lee rudely challenged my self-description as 'International Pharmacist' (which reflected in short form my MSc in Clinical Pharmacy International Practice and Policy from University College London, of which the Respondent was aware from the CV) stating: '*we are not aware of any such qualification and indeed you are unable to use the title of pharmacist within the united kingdom as your qualification is not valid here.*'
>
> 113. The comment ignored Ms Lee's knowledge of my qualification. It implied I was prepared to attempt to practice as a UK Pharmacist. That was of course illegal. The tone and content of her words were derogatory, a hard put-down.

69.7.2. Ms Lee dealt with the issue in her statement as follows:

> 71. On 18th February 2021 I wrote to Ms Ahmed on instruction from Mr D'Souza and in order to explain that Ms Ahmed was unable to use the title 'pharmacist' within the United Kingdom as she was not qualified to use the title in the UK. I did not intend to be rude nor did I say that Ms Ahmed would be working illegally as a pharmacist.

69.7.3. Mr D'Souza, in his statement, explained his instruction:

> 11. The reason why we asked for information on the Claimant's right to work is because we have a legal duty to ensure that all members of staff are legally entitled to work. I was concerned that the Claimant no longer had the right to work, and we were employing her illegally. I asked Victoria to investigate the matter with the home office and the Claimant and I asked Victoria to ensure that we were complying with our legal obligations as we do with all employees.

> 12. As an employer, we have employed and promoted many female members of staff from a variety of ethnic backgrounds, and we have excellent diversity within our team. We have employed over the years members of staff who have been registered as Pharmacists in other countries including the Philippines and Australia.
>
> 13. When working in the UK their titles are not recognised until they have registered with the general pharmaceutical council. The claimant was not employed to work as an "International Pharmacist" but as a Pharmacy Assistant as per her contract. The use of the title "International Pharmacist" would be confusing to other members of staff or customers. I felt it was important to make this distinction for reasons totally unrelated to the Claimant's race.

69.7.4. This issue arises out of the Claimant's Slack message to Ms Lee of 17 February 2021. In that message, the Claimant raised a discrete point as follows:

> Re: performance review of December 2020: Faye Clarke mentioned that I was "very good" at customer service and asked me whether I wanted to change my role. I strongly expressed that I was only doing it to help but as an international pharmacist, I've signed up to work as a dispenser and not to be downgraded to a customer service role. While I am happy to perform any task my managers deemed necessary, unfortunately, at this point in time, I am simply not in the right headspace to deal with customers on a full time basis.

69.7.5. Ms Lee, in her reply the following day, responded to the Claimant's point as follows:

> I am unclear why you think that working in customer service is a downgrade in your role? We have doctors, pharmacists and nurses [part time and full time] who all provide customer service and are extremely valuable to the company. Communicating with our patients is an important part of our clinical pathways and vital to the success of our business. With your background in clinical pharmacy this would be more aligned with your skill set than a dispensing assistant role. Your role as a pharmacy assistant is described in your job description as "providing customer service on online charts, emails and phone calls". We believe the customer service role sits within your job description already.
>
> We note in your letter you describe yourself as an "international pharmacist": we are not aware of the existence of any such qualification and indeed you are unable to use the title of pharmacist within the United Kingdom as your qualification is not valid here.

69.7.6. Given that the title of pharmacist denotes accreditation from the General Pharmacy Council, the description "international pharmacist" is somewhat ambiguous and suggests some element of accreditation, we can see why the Respondent sought to prevent the Claimant, who was not accredited as a pharmacist, from using such a description.

69.7.7. We were satisfied by this evidence that a 'hypothetical non-North African non-Egyptian Pharmacy Assistant' seeking to use the description of "international pharmacist" would have been treated in the same way as was the Claimant.

69.7.8. As for the assertion that Ms Lee was being rude, we did not view her second paragraph quoted above as being rude. But, even if we are wrong about that, we do not consider that Ms Lee would have used different language to make her point to a 'hypothetical non-North African

non-Egyptian Pharmacy Assistant' seeking to use the description of "international pharmacist".

Harassment (race) contrary to s.27 Equality Act 2010

70. Did the Respondents engage in unwanted conduct related to race which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her by:

70.1. Stating to Paras Shah, within the Claimant's earshot '*He has a weird African name. It reads from right to left'* on or around August 2020.

70.1.1. Given our acceptance of Mr Acharya's evidence on the importance placed within the pharmacy of ensuring the correct name is placed on the label to be attached to medication being dispensed and our finding that it is likely that Mr Acharya would have uttered exactly the same words had the person within earshot not been the Claimant but a hypothetical non-North African non-Egyptian Pharmacy Assistant, we do not accept that Mr Acharya uttered those words with the purpose of violating the Claimant's dignity or of or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

70.1.2. We do not accept that it was reasonable for the Claimant to have perceived the utterance of Mr Acharya to have had the effect of violating her dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The other circumstances of the case suggest to us that the Claimant had decided that anything reported to her about Mr Acharya or anything she heard him say or observed him doing had to be viewed in a negative light.

70.2. Mr Shah telling the Claimant '*You look white, with a really good tan'* in or about September 2020.

70.2.1. We do not accept that Mr Shah, in saying these words, had the purpose of violating the Claimant's dignity or of or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

70.2.2. We do not accept that it was reasonable for the Claimant to have perceived Mr Shah's utterance as having the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

70.3. Failing to take any action in respect of the Claimant's verbal grievance to Faye Clarke from or about late September 2020.

70.3.1. The remaining four allegations of harassment on the grounds of race all seem to us not to have had the purpose of violating the Claimant's dignity or of or creating an intimidating, hostile, degrading, humiliating or offensive environment for her and nor was it reasonable for the Claimant to have perceived these matters as having the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

70.3.2. The four allegations are:

70.3.2.1. Refusing to permit the Claimant to return to work following sick leave on 28th January 2021.

70.3.2.2. Stating that the Claimant was not coming back to work because the Claimant had *'visa issues'* on or about 1st February 2021.

70.3.2.3. Requiring the Claimant to provide a picture of a residence permit on 1st February 2021.

70.3.2.4. Rudely challenging the Claimant's self-description as '*international pharmacist'* on 18th February 2021

Constructive Dismissal – S.95(1)(c) Employment Rights Act 1996

71. Did the Claimant resign from her employment in circumstances in which she was entitled to terminate her contract of employment without notice by reason of the Respondents conduct, such that she is properly regarded as having been dismissed by the Respondent within the meaning of s.95 (1)(c) ERA?

71.1. The Claimant did not assert in her letter of resignation that she was resigning in response to any breach of the contract of employment by the Respondent.

71.2. Not only was she silent on the subject of any breach of contract that entitled her to resign but she expressed reliance on the contract when she asked to negotiate her notice period to be able to leave sooner than at the conclusion of her notice period of one month. Had she been resigning in circumstances in which she was entitled to resign without notice by reason of the Respondent's conduct – in contractual terms, because of a fundamental breach on the part of the Respondent entitling her to treat the contract as discharged, she would not have needed to ask to negotiate a shorter period of notice. As we see it, seeking to rely on the contract is incompatible with treating the contact as discharged by dint of the Respondent's fundamental breach.

71.3. But, in any event, we were unable to see that there had been any breach of contract on the part of the Respondent that entitled the Claimant to terminate the contract with or without notice.

71.4. Therefore, we reject the assertion that the Claimant's resignation was a dismissal.

71.5. On the basis that we might be wrong on that count and that the Claimant was constructively dismissed, we are asked to express a view on the fairness of such a constructive dismissal having regard to section 98(4) ERA 1996. That is somewhat difficult to say the least given that we do not have a reason for dismissal. Section 98(1) requires the employer to show the reason for dismissal and section 98(4) requires us to consider whether the employer, in treating that reason as sufficient reason for dismissing the employee, acted reasonably or unreasonably having regard to the matters set out in that subsection.

71.6. This is not a case where the Respondent has argued an alternative case based on there being a dismissal.

71.7. It is difficult to speculate whether, if we be wrong in saying there was no constructive dismissal, such a dismissal as occurred was fair or unfair. However, we are not able to see anything in the circumstances leading to the Claimant's resignation that would indicate the Respondent acted unreasonably.

72. If the Claimant was constructively dismissed, was the dismissal unlawful by reason of section 39(2)(c) Equality Act 2010.

72.1. We found no indication that the Claimant was either discriminated against on the grounds of sex or of race, so we can say that, if we are wrong about there being no dismissal and there was a dismissal, the same was not unlawful by reason of section 39(2)(c) Equality Act 2010.

Jurisdiction (Time Limits)

73. The Claimant presented the first claim on 10th March 2021 without an EC extension. Any acts or omissions that occurred prior to 9th December 2020 are *prima facie* out of time.

74. The Second claim was presented on 6th April 2021. Any acts or omissions that occurred prior to the 5th January 2021 are *prima facie* out of time.

75. We are asked to consider:-

75.1. 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 / section 48 (3) (a) & (b) and s.111 (2) (a) & (b) of the Employment Rights Act 1996?

75.1.1. The first ET1 was presented on 10 March 2021. It alleged unfair dismissal, discrimination on the grounds of sex, sexual harassment, victimisation and automatic unfair dismissal. The Claimant had resigned on 5 February 2021. Therefore, the presentation of the claim of unfair dismissal was within time.

75.1.2. The Claimant had received the outcome of her grievance on 10 December 2021. Her complaints about the investigation into her grievance could not have been made before that date and the period of three months beginning with the day after she received the outcome must be within time.

75.1.3. Complaints of earlier incidents said to be acts of discrimination, victimisation or of sexual harassment are, at first sight, out of time.

75.2. Were there acts and / or conduct extending over a period?

75.2.1. We did not discern that the acts and / or conduct extended over a period.

75.3. Was it reasonably practicable for the Claimant to bring her claim(s) within the primary limitation period?

75.4. If not, did the Claimant bring her claim(s) within such further period as we consider reasonable?

75.4.1. Given the complaint of unfair dismissal was presented within time, these questions do not require answers.

75.5. In relation to the Equality Act claims, should time be extended on a just and equitable basis in respect of any claims that were brought out of time?

75.5.1. The Claimant's statement did not provide details of reasons as to why her claim in respect of matters that, at first sight, were brought out of time were out of time. However, we take the view that it would be just and equitable for time to be extended in respect of those matters that constituted her grievance.

Remedy

76. The Claimant has not succeeded in any of her claims and, indeed, the hearing was only on the issue of liability. Therefore, we have not heard evidence or submissions in respect of remedy.

77. That concludes our determination of the issues listed by counsel for the Respondent. We turn our attention to the issues listed by Mr Sykes and we find that, while there are minor differences in wording, the issues as set out by Mr O'Callaghan appear to encompass all that Mr Sykes had set out.

Conclusion

78. For all the reasons we have set out above, we dismiss all the claims.

7 July 2022

Employment Judge Paul Stewart

DECISION SENT TO THE PARTIES ON

07/07/2022.

FOR SECRETARY OF THE TRIBUNALS