



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Walker

Respondent: South Tees Hospital NHS Foundation Trust

HELD at Teesside Justice Hearing Centre ON: 9 to 17 January 2023

BEFORE: Employment Judge Johnson

Members: Mrs D Winter
Mr S Moules

REPRESENTATION:

Claimant: In person

Respondent: Mr A Sugarman of Counsel

JUDGMENT

The Unanimous judgment of the Tribunal is as follows;

1. The claimant's complaint of victimisation contrary to section 27 of the Equality Act 2010 in respect of the comments made to her on 26 May 2021 is well-founded and succeeds. The respondent is ordered to pay to the claimant compensation for injury to feelings in the sum of £1000.
2. The claimant's complaint of victimisation contrary to section 27 of the Equality Act 2010 in respect of the respondent's conduct of the claimant's grievance raised in respect of the incident which occurred on 26 May 2021 is well-founded and succeeds. The respondent is ordered to pay to the claimant compensation for injury to feelings in the sum of £1000.
3. The claimant's complaint of victimisation contrary to section 27 of the Equality Act 2010 in respect of the comments made to her on 11 June 2021 is not well-founded and is dismissed.

4. The claimant's complaint of victimisation contrary to section 27 of The Equality Act 2010 about the respondent's delay in starting its investigation into the claimant's grievance dated 13 April 2022 is not well-founded and is dismissed.
5. The claimant's complaint of victimisation contrary to section 27 of the Equality Act 2010 in respect of the respondent's alleged refusal to permit the claimant to increase her working hours on 17 October 2022 is not well-founded and is dismissed.

REASONS

1. The claimant conducted these proceedings herself, with the assistance over the 3 days of the hearing from her friend, Ms L Preston. The respondent was represented by Mr Sugarman of counsel. The claimant gave evidence herself but did not call any other witnesses. Mr Sugarman called to give evidence the following witnesses:-

Miss Jenna Holmes;

Miss Eilish Shaw;

Miss Shelley Dyson;

Miss Julie Swaddle;

Miss Jennie Winnard and

Miss Jane Herdman

The claimant and the six witnesses for the respondent had all prepared typed signed witness statements, which were taken "as read" by the Tribunal, subject to questions in cross-examination and questions from the Tribunal. There was an agreed bundle of documents comprising three A4 ring binders containing a total of 1547 pages of documents.

2. By a claim form presented on 17 September 2021, the claimant brought complaints of victimisation, contrary to section 27 of the Equality Act 2010. By its response form presented on 21 October 2021, the respondent defended the claims.
3. In 2020 the claimant issued proceedings in the Employment Tribunal against the respondent. In those proceedings the claimant brought 12 allegations of being subjected to detriment for making protected disclosures and 6 allegations of unlawful pregnancy-related discrimination. All of those claims were dismissed, save for one allegation of unlawful pregnancy related discrimination. That allegation related to one of the claimant's colleagues improperly accessing the claimant's confidential medical records, which were held by the respondent. The respondent was ordered to pay to the claimant compensation for injury to feelings in respect of that successful complaint in the sum of £10,000.
4. The respondent concedes that, by issuing proceedings in the Employment Tribunal which proceedings included allegations of a breach of the provisions of the Equality Act 2010, the claimant had undertaken a "protected act" as defined in section 27 of the Equality Act 2010. The 5 allegations pursued by the claimant

in the current proceedings are alleged by her to be acts of detriment because she had undertaken that protected act.

5. The 5 specific incidents of victimisation alleged by the claimant are as follows:-
 - Allegation 1 – comments allegedly made to her on 26 May 2021 by Jenna Holmes.
 - Allegation 2 – the respondent’s conduct of the claimant’s grievance made to 27 May 2021 about the comments made to her by Jenna Holmes.
 - Allegation 3 – comments allegedly made to the claimant on 11 June 2021 by Eilish Shaw.
 - Allegation 4 – the alleged six month delay by the respondent in starting its investigation into the claimant’s grievance dated 13 April 2022 about the further alleged data breach.
 - Allegation 5 – the respondent failing/refusing to grant the claimant’s request to increase her working hours from 28.5 per week to 37.5 per week on or about 17 October 2022.
6. The first 3 of those allegations were contained in the claimant’s original claim form, which was presented to the Employment Tribunal on 17 September 2021. Allegations 4 and 5 were added following the claimant being granted permission to amend her claim to include those new allegations at a preliminary hearing on 20 December 2022.
7. Of the 5 allegations of victimisation, 2 related to the manner in which the respondent conducted grievance raised by the claimant. The other 3 allegations turn upon what is alleged to have happened, or been said between the claimant and Jenna Holmes on 26 May 2021, between the claimant and Eilish Shaw on 11 June 2021 and between the claimant and Gemma Swan on 17 October 2022. In the absence of any meaningful documentation or other contemporaneous evidence, the Tribunal had to assess and compare the credibility of the claimant on the one hand and those 3 witnesses for the respondent on the other hand. In each of those cases the Tribunal found the respondent’s 3 witnesses to be truthful, honest and reliable and whose evidence and answers to questions in cross-examination from the Tribunal was direct, measured and persuasive. Whilst Miss Holmes and Miss Shaw in particular were clearly affronted by the allegations raised against them by Mrs Walker, the Tribunal found that all 3 witnesses gave credible and reliable evidence. The Tribunal found that the claimant’s evidence was embellished and prone to exaggeration, both in terms of what actually happened and its alleged impact upon the claimant. Save for those facts which were specifically admitted by the respondent’s witnesses, where there was a difference between those witnesses’ evidence and that of the claimant, the Tribunal prefer the evidence of the respondent’s witnesses.
8. The claimant is employed by the respondent as a “patient flow co-ordinator”, which role involves ensuring that patients whose treatment is finished are promptly discharged from the hospital so that patients awaiting treatment can be admitted. The respondent’s witnesses all accepted that the claimant is a diligent, competent and hardworking professional. However, many of her colleagues were somewhat wary of her describing her as, “an intense type of person to work with”, “rigid in her approach to her job and only wanted to do things her own way.

The claimant was regarded as being somewhat impatient and short-tempered and prone to angry outbursts when she thought others were not performing to her own high standards. She was described as being “intimidating towards colleagues” and on some occasions as being “mean”. Because of these somewhat unpleasant traits, the claimant was regarded as unpopular among her colleagues.

9. In 2020 the claimant issued proceedings against the respondent in the Employment Tribunal, bringing 12 allegations of being subjected to detriment for making protected disclosures and 6 allegations of unlawful pregnancy-related discrimination. The final hearing of those claims took place in February 2021 at the end of which all claims were dismissed, save for one which related to one of her colleagues improperly accessing the claimant’s personal medical records which were held by the respondent Trust. The final hearing of those claims took place over 4 days. The claimant gave evidence as did her line manager and one of the respondent’s HR managers. Of particular importance was that the claimant included in that claim an allegation specifically against Lauren Walker as the person who had gained access to her confidential medical records. Lauren Walker was named as a second respondent in the proceedings. Lauren Walker gave evidence to the Tribunal. The Tribunal found that Lauren Walker accessing the claimant’s medical records was an act of pregnancy related discrimination and the first respondent was ordered to pay to the claimant compensation for injury to feelings in the sum of £10000.
10. The circumstances surrounding that particular incident were that the claimant had informed colleagues that she was pregnant expecting twins, following which Lauren Walker sought access to the claimant’s confidential medical records. Subsequently, the claimant sadly miscarried and was absent from work as a result. The claimant was due to return to work in August 2020 and during a meeting on 8 July 2020 to discuss her return to work, the claimant informed her line manager and the HR manager who was present, that she did not want any of her colleagues to engage her in conversation about that miscarriage. No complaint is made by the claimant about any of her colleagues doing so, until the alleged incident of Eilish Shaw on 11 June 2021.
11. Following the Employment Tribunal hearing in February 2021, the Judgment was issued in March 2021 and full written reasons provided in June 2021. The claimant accepted in the current proceedings that she had not made any specific request to her line manager or to HR that none of her colleagues should discuss with her those Employment Tribunal proceedings. The clear, unequivocal and consistent evidence from the respondent’s witnesses to this Tribunal was that the claimant, both before and after the hearing, openly discussed those Employment Tribunal proceedings with her colleagues. The claimant had of course not just brought proceedings against her employer, but had specifically insisted upon naming and including in the Employment Tribunal proceedings, the colleague who had accessed her medical records, namely Lauren Walker. Lauren Walker remained a working member of the same team as the claimant. The respondent’s witnesses before this Tribunal stated that they were aware that the claimant had brought proceedings against the Trust and Lauren Walker and that the claim against Lauren Walker related to the access to the claimant’s medical records. The respondent’s witnesses’ evidence to this Tribunal was that they were unaware that the claimant’s complaint was one of pregnancy-related discrimination under the terms of the Equality Act 2010. The respondent’s

witnesses acknowledged that the presentation of those proceedings to the Tribunal, the final hearing and the publication of the Judgment, were at the very least topics of conversation within the teams. The Tribunal found it likely that the level of compensation in the sum of £10000 would certainly have been a topic of conversation. On the basis of anyone accused of unlawful discrimination is likely to be particularly offended at that allegation, the Tribunal had found it likely that those members of the claimant's team would be aware that the claim in respect of the medical records had been couched in terms of unlawful pregnancy related discrimination. There was such an abundance of information in relation to the claim in the public domain that the Tribunal was satisfied that those who were involved in the current proceedings must have been aware that discrimination was the subject matter of that claim.

12. On 26 May 2021 (after Judgment had been promulgated but before detailed reasons had been provided) the claimant was working a shift with her colleague Miss Jenna Holmes. The claimant and Miss Holmes were alone in an office, shortly before 4pm. The claimant's evidence to the Tribunal was as follows:-

"Jenna and I were alone in the office and there seemed to be an atmosphere, it felt like Jenna was building up to saying something to me. I was busy and just carried on with my phone calls and then proceeded to update Medworks with the information I had got from the discussions with the ward. It was when I had finished my ring rounds and whilst I was updating Medworks that Jenna Holmes asked me, "Have you had to work with Lauren since she's been back?" I was confused with her question and asked her what she meant and she said, "What's it been like working with Lauren again? Have you been on shift with her? Have you had to work with her? I said "Just be clear what you are asking me for". Jenna replied "Have you had to work with Lauren since taking her to court?" I was shocked by her question as I had no idea up until that point that she knew what had happened."

13. The claimant goes on to say in her evidence:-

"I asked Jenna "How do you know about that because I have never discussed it with you?" I thought that would shut her up. Jenna didn't answer me. However Jenna persisted and asked, "So have you had to work with her since taking her to work?" I could feel myself getting upset. I again said, "I know I've not discussed this with you and I know I have not discussed it with the rest of the team so whose told you?" At this point Jenna replied, "You must have". I replied "No I haven't, so where did you get this information from? Jenna was stuttering and she appeared panicked. She said she'd overheard it being discussed in the office. I said "By who?". She said she couldn't remember. I again repeated that I had not discussed it with anyone so who had she overheard talking about it? I asked Jenna again, "Who have you overheard talking about this?" I was firm, there was certainly no raised voices, in fact I was beginning to cry. I told Jenna that I had a right to know what had been discussed in the office, given that I myself had not discussed it neither had I discussed it with her. I said "Why do you think this is ok? What has any of this got to do with you?" Jenna repeated again that she couldn't remember who she had overheard discussing the court case but said, "You know I'm nosey, I just wanted to know if you were happy about having to work with her?" Tears at this point were streaming down my face. I replied, "Happy? Would you be happy about working with the person who had accessed your medical records when you were pregnant?" Jenna replied, "No I wouldn't but you were friends." My response was firm. "Do friends access

your medical records?” Jenna replied, “No they don’t but you were friends so why would you take her to court?” I was getting more and more upset about what she was asking. I felt I did not have to justify myself to her. Jenna asked the same question again, “You were friends so why would you take her to court?” I asked her why she was asking me and why she thought this was ok. I again asked her what this had to do with her. Jenna could see I was crying. There were no raised voices. Jenna again said, “But you were friends why would you take her to court?” I couldn’t stop my tears I was so shocked by her questioning of me that I turned away from her and carried on with my work.”

14. Miss Holmes’ version of this incident was entirely different. At paragraphs 7-9 of her statement, Miss Holmes records as follows:-

“On 26 May 2021 I was working a shift alongside Julia. I cannot recall anything significant happening during the shift. I had made my final telephone calls of the day and a silence fell in the room, which I perceived to be an awkward silence. Julia is not always easy to engage in small talk, but I wanted to show I was friendly towards her. I had noticed that Julia had seemed in quite a good mood recently and I was mindful that it could not have been easy for her to return to work and the team after the Tribunal case. I asked a question which I intended to be genuine caring, not nosy, and was absolutely not intended to make Julia feel uncomfortable or angry. I asked her, “How are things with you and Lauren, are you ok now?” Almost before I had finished speaking, Julia’s arm shot up in the air and she gesticulated with it as she shouted, “Stop, just stop, I’m not talking about it.” I realised instantly that I’d terribly offended Julia and immediately apologised – I said, “Oh, I’m sorry”. I felt awful that I had upset Julia and did not know what to say. There was a minute or so of silence, which was incredibly uncomfortable and then Julia raised her voice again and said, “Do you understand why I don’t want to talk about it?” I said, “It’s fine, you don’t have to talk about it, I’m sorry.” Still in a raised voice, Julia replied, “How do you even know it was Lauren I took to court anyway?” I said, “I’m not sure” to which she replied, “Well not one single person in this office knows it was Lauren I took to court so it is important you tell me who told you.” I told Julia that it must have just been something I had overheard from somewhere, but she adamantly insisted (still with her voice raised) that I told her who or where I had heard it from. I said, “Look Julia, I’m sorry. I didn’t mean to upset you, you just looked so happy. I thought things must have been resolved.” Julia responded, “Do I look happy, do I?” I said, “Well you don’t now, and I feel like it’s me that’s caused that so I am really sorry.” Julia then screamed at me, “Would you be happy if you had all this happened to you, if you lost babies and your colleagues went through WebLce to check your blood results because they thought you were lying, for her to turn round and say she was just checking for my address to send me flowers, would you spend X pounds on a court case to come back and get on with her when she has done that to me?” I was mortified by her reaction and did not want to hear these details about the case. I said to Julia that I had not realised all of this had happened. I kept apologising but Julia was furious and continued to rant at me. I was terrified.”

15. The claimant immediately raised a grievance about this incident. When interviewed, the claimant described herself during the incident as having behaved “like a dog with a bone”.
16. The claimant’s allegation in respect of this incident is that Jenna Holmes questioned her, “for around 20 minutes regarding a protected act in a way which I

felt was hostile, inappropriate, insensitive and/or oppressive.” In answers to cross-examination from Mr Sugarman, the claimant accepted that Miss Holmes had previously got on well with her and was generally well liked and not the kind to “stab people in the back.” In her evidence to the subsequent investigation, the claimant said that she had been “close to tears”. In her evidence to the Tribunal, the claimant insisted that she had been both “close to tears” and also that tears were “streaming down her face”, but went on to say that she was not actually crying. The Tribunal was satisfied that by far the majority of what was said on this occasion, was actually said by the claimant. As she herself accepted, she had been “like a dog with a bone”. Miss Holmes admitted that she had initially asked the claimant what it was like having to continue to work with Lauren Walker, having taken her to court. The Tribunal found that to be a somewhat clumsy and insensitive question by Miss Holmes, but certainly not one that was intended to cause any offence to the claimant. Once Miss Holmes realised that the claimant had taken offence, Miss Holmes promptly apologised. Bearing in mind Miss Holmes’ knowledge and experience of the claimant’s quick temper, the Tribunal found it highly unlikely that Miss Holmes would have persevered with any further questions. Nevertheless, the Tribunal found that the claimant genuinely did not wish to discuss the previous proceedings and was genuinely offended by the initial question. The Tribunal found that the claimant’s reaction thereafter in the manner she spoke to Miss Holmes was disproportionate in the circumstances.

17. The claimant immediately raised a grievance, a copy of which appears at page 461 in the bundle. The grievance states as follows:-

“Within half an hour of the DF’s leaving today, leaving just Jenna and myself in the office, Jenna has proceeded to ask me “had I worked with Lauren since she’d been back?” When I asked her why she was asking me she replied, “had I had to work with Lauren since taking her to court.” And “was I happy about having to work with her.” I asked her how she knew this because I had not discussed it with her nor anyone else in the PSC team, to which she replied she’d overheard it being discussed in the office, something Jenna referred to as her own nosiness. The same offence of line of questioning continued for some time. I cannot put into words how sad and deeply offended I am by her behaviour and can tolerate this no more so I would like this matter raising formally under the dignity in the workplace policy.”
18. The respondent’s grievance procedure appears at pages 82-92 in the bundle. The grievance itself must be raised within one calendar month of the issue which forms the subject matter of the grievance. The line manager should arrange to meet with the employee within one calendar week of the grievance being raised to discuss whether the grievance may be resolved informally. If so the line manager must respond to the employee within two calendar weeks of that meeting. If the matter cannot be resolved informally, then the employee must submit the grievance to a more senior manager within one calendar week of receiving an informal stage one response and that manager must meet with the employee within two calendar weeks thereafter. That manager’s response should be made to the employee within one calendar week of that meeting. If the employee is dissatisfied with the outcome then he/she may appeal within three weeks of receiving the outcome letter.
19. The claimant’s grievance was raised on 28 May 2021. The outcome letter is dated 6 December 2021. That is a period in excess of 6 months. The claimant’s

allegation number 2 in these Employment Tribunal proceedings is that this delay amounted to an act of victimisation. The unreasonable delay is the detriment, which the claimant says was because of, or at least materially influenced by, her earlier Employment Tribunal proceedings which amounted to a protected act.

20. Evidence about this delay was given to the Tribunal by Shelley Dyson, Julia Swaddle and Jennie Winnard. The Tribunal had considerable sympathy with Shelley Dyson, who used her best endeavours in a caring, sympathetic and reasonable manner to try and persuade the claimant to resolve her differences with Jenna Holmes by informal procedures. The claimant stubbornly refused throughout the process to consider anything other than the grievance being dealt with via the formal process which would require an investigation, a hearing and a formal outcome. The Tribunal recognised Miss Dyson's efforts in this regard and found that her attempts to resolve the matter informally were entirely reasonable in the circumstances.
21. Julia Swaddle was the commissioning officer in relation to the claimant's complaint against Jenna Holmes. Miss Swaddle was invited to undertake that role in July 2021, but was already due to go on maternity leave in October 2021. The Tribunal accepted Miss Swaddle's evidence that she expected the grievance process to be concluded before she went on maternity leave. There was some delay when the claimant's union representative asked for a different investigator to that proposed by Miss Swaddle. Eventually Miss Orla Hayman (head of medical physics) was appointed to conduct the investigation into the claimant's complaint. During that investigation, Jenna Holmes raised a formal grievance against the claimant, relating to the manner of the claimant's response when Miss Holmes asked her initial question about how the claimant was getting on with Lauren Walker. That grievance by Miss Holmes further inflamed the claimant whose position thereafter was that she would accept nothing less than a withdrawal by Miss Holmes of her grievance against the claimant and a full apology from Miss Holmes for her behaviour on 26 May.
22. The Tribunal found that all those from within the respondent's organisation who were involved in this grievance process were extremely likely to have been aware that the claimant had commenced Employment Tribunal proceedings against the respondent and Lauren Walker; that those proceedings had resulted in a payment of compensation to the claimant and that those proceedings involved not just a claim relating to improper access to the claimant's medical records, but had been couched in terms of unlawful pregnancy discrimination. The Tribunal further found that the claimant's reputation as being somewhat difficult and her propensity to raise grievances and her willingness to issue Employment Tribunal proceedings, had a material influence on the manner in which those persons handled this particular grievance by the claimant. There was a clear hesitancy by the respondent to engage with the claimant in a meaningful and robust manner. The impression gained by the Tribunal was that the respondent was "tip-toeing" around the claimant's grievance because of (even subconsciously) concerns that the claimant may bring proceedings against them. Standing back and looking at the picture as a whole, this was a relatively straightforward complaint, relating to a single altercation between two members of staff which, on the claimant's best case, lasted no more than 10 minutes. Whilst the claimant's stubbornness may well have elongated the process to some extent, to take 6 months over such a relatively straightforward matter was entirely unreasonably. It is trite law that employees are entitled to have their grievances

dealt with reasonably and speedily. The Tribunal was not satisfied with the explanation given by the respondent in respect of the delay in handling this particular grievance. The relatively straightforward issues coupled with the inordinate delay were facts from which the Employment Tribunal could infer (in the absence of an explanation) that the delay was influenced by the protected act of the earlier proceedings. The Tribunal was not satisfied with the explanation given by the respondents in respect of the entirety of this delay. The Tribunal accepted the claimant's evidence that she wanted to have the grievance resolved as quickly as possible and was indeed entitled to expect to have been resolved in a lot less than 6 months.

23. Allegation 3

This allegation relates to comments allegedly made to the claimant by Eilish Shaw on 11 June 2021. Again, there is a direct conflict of evidence between the claimant's version and Eilish Shaw's version.

24. The claimant's version appears at paragraphs 24-25 in her witness statement. The claimant states as follows:-

"On 11 June 2021 I was busy working in the discharge office. Also in the office were Eilish Shaw, my Band 4 PFC colleague and Sister Linda Smith, our immediate supervisor. Linda Smith was working late and was busy ringing round her wards, as was I. I was sat facing the window in the far left corner. Linda was sat behind me and Eilish was sat at the table in the centre of the room on her mobile phone. I was busy working as was Linda ringing our wards chasing any outstanding jobs. I had been on one call after another after another when I became aware of Eilish raising her voice. I had struggled to hear what was being said on my phone due to the noise she was making so I turned to see what she was doing. Eilish was sat at the table in the middle of the room watching something on her mobile phone. I carried on with my phone call but was aware of her raised voice in the background, her tone was very dramatic. Having come off the phone I turned to where Eilish was sitting. Eilish was still making a lot of noise and pulling a face. I asked what on earth all the commotion was about? Eilish replied that she had been forwarded a video by someone. She then said quite loudly, "oh my god ... oh my god ... it's disgusting, come over her and see this." I didn't go over and stayed in my chair. I asked her what on earth she was watching. Again she was pulling a face in disgust and saying, "oh my god ... oh my god .. it's disgusting all the blood." By this time she had been watching the video for nearly five minutes maybe more and all the while providing a narrative. Eilish told me she was watching a video of a woman miscarrying her baby. She described how distressed the woman was. She described the blood loss and she described the woman delivering her dead child. I told her I did not want to see it. I was becoming upset and I was shocked. I could not believe she was watching something so awful and then trying to involve me. Eilish then said she was going to forward the video on and it was at this point I pleaded with her not to do so. I told her that it was not something that she should be forwarding to others and from what she had described the woman was obviously deeply traumatised and for that reason this was not something that should be shared. I then heard Linda's voice from behind me saying something to Eilish. I think she commented on Eilish appearing insensitive towards me. I carried on with my work. I could not believe what had just happened or that Linda had done nothing to intervene. Linda continued with her work as did I. When I got up to

go the bathroom Eilish was still on her phone but was silent. When I came back to the office Eilish was still on her phone. Linda had her back to her and was still busy working. Linda did not stay until 6pm. At the back of my mind I believe that given the extreme nature of what Eilish had done that Linda would inform Shelley Dyson and the matter would be addressed but when Shelley made no attempt to speak to me about it I realised that this was not the case. The incident had a profound effect on my wellbeing. The narrative provided by Eilish Shaw was deeply disturbing and traumatic for me and as a result I began to suffer vivid nightmares which centred around me as the woman that Eilish Shaw had described being videoed, miscarrying my babies. Over the course of the following weeks the frequency of the nightmares coupled with the stress of the Jenna Holmes incident had a catastrophic impact on my mental wellbeing. I was very tearful and not sleeping.”

25. Eilish Shaw denied that any such incident had ever taken place. Linda Smith (the only other person whom the claimant alleged was present) did not give evidence to the Tribunal but did give evidence to the respondent’s subsequent investigation. Miss Smith’s evidence to that investigation was that she had no recollection of any such incident taking place and that she believes that she would have remembered it, had it done so.
26. The claimant did not raise any complaint about this incident until 31 August (two and half months later) during the course of her being interviewed about the Jenna Holmes incident. Even then, she did not raise a formal grievance about it. However, because of the claimant’s description of what had allegedly happened, the respondent decided to conduct a formal investigation. Miss Shaw was invited to speak to Gemma Swan about the matter. Miss Swan described that the claimant had made a complaint to HR about Miss Shaw watching a video of someone miscarrying their child. Miss Shaw’s immediate response was, “I knew for a fact that Julia had fabricated this story and I had no idea why.” Miss Shaw heard nothing further about the matter until she was told in December 2021 that a formal investigation was being carried out under the respondent’s dignity at work policy about that complaint raised by the claimant.
27. Miss Shaw’s unchallenged evidence to the Tribunal was that she worked with the claimant for a further three shifts immediately after the alleged incident on 18, 23 and 24 June. Miss Shaw’s unchallenged evidence was that if she had been watching such a video, then the claimant would surely have challenged her about it.
28. Miss Shaw contacted her mobile phone provider to ask for a log of everything she had been doing on her phone on 11 June 2021. However the provider was unable to provide Miss Shaw’s internet browsing data or any other information because it had happened so long ago. Miss Shaw’s unchallenged evidence to the Tribunal was that in the 10 years she has worked for the respondent she has never been in any trouble and never had any warnings or grievances raised against her. Miss Shaw described the claimant’s allegation about the video as “untrue and nonsensical”. Miss Shaw’s unchallenged evidence was that she was wary of the claimant and knew from experience that she reports the slightest complaints to management or HR. Miss Shaw said, “I also know that she is litigious and has brought tribunal claims against colleagues. I knew that she was sensitive about having miscarried a pregnancy and that she had specifically asked that her colleagues did not mention her miscarriage. I was especially careful not to get on the wrong side of Julia – in fact I was especially nice to her.

I agree that if I had done what Julia accused me of, it would have been insensitive and offensive, but in view of these points it would have made no sense for me to have done so. I know categorically that I have never watched a video of someone having a miscarriage. I would never do so. I am in fact a very squeamish person and a video of that nature I would not enjoy watching, let alone for the supposed 10 minutes.”

29. Miss Shaw subsequently raised a formal grievance herself against what she described as the claimant’s “false allegation” against her. That grievance remains unresolved.
30. The Tribunal found this to be a quite remarkable allegation against Miss Shaw by the claimant. The claimant accused Miss Shaw of lying in her evidence to the Tribunal, when she denied watching such a video on her phone, let alone in the presence of the claimant. Miss Shaw described the claimant’s version of this event as “fabricated and untrue.” It is accepted by the claimant that she did not exactly see what Miss Shaw was allegedly watching. The claimant only heard from Miss Shaw, the words described above. The only other person present had no recollection of the incident happening, but says she would have remembered it had it taken place. The Tribunal attached particular weight to the claimant’s failure to report this incident in its immediate aftermath or indeed until she raised it as part of an investigatory meeting into something wholly unconnected. The claimant accepts that during the period of time between the earlier proceedings and today’s hearing, she has raised in excess of 20 grievances about different matters. Bearing in mind the claimant’s description of what allegedly took place on this day, the Tribunal found it inconceivable that she would not have immediately reported it in the same way that she had reported the less controversial comments made to her by Jenna Holmes. The Tribunal found that the claimant had failed to discharge the burden of proving that her version of this incident was more likely to be correct.

Allegation 5

31. On 28 December 2021 the claimant submitted a subject access request to the respondent’s Information Governance at James Cook Hospital in Middlesbrough. As part of that request, the claimant was seeking assurances from the respondent Trust that there had been no more incidents of unlawful access to her confidential medical records following the incident involving Lauren Walker in September 2019. On 4 April 2022 the claimant was informed by the respondent’s Data Protection Officer that there appeared to have been a further instance where a single person had attempted to gain access to the claimant’s medical records. On 13 April 2022 the claimant submitted a formal grievance about that alleged second breach of confidence relating to her medical records. The claimant alleges that, “The grievance was not investigated for 6 months. In October 2022 the ICO produced a report and acknowledged that this was a further incident of an unlawful Information Governance breach involving her confidential medical records as a patient of the respondent. The claimant goes on to state, “The six month delay in investigating my grievance I believe is as a direct result of my protected act. I strongly believe that the individuals involved in the second further unlawful and inappropriate access to my confidential medical records are connected to Lauren Walker, Eilish Shaw and Jenna Holmes. I have been very distressed over the delay in dealing with my grievance and not knowing exactly what had happened involving the breach of my patient confidentiality for a second time, when it happened and who exactly was involved

and why. I am also extremely upset that this could happen to me a second time after I had already succeeded at the Tribunal over Lauren Walker unlawfully and inappropriately accessing my confidential records.”

32. The Tribunal again considered the requirements in respect of timescales which are set out in the respondent’s grievance policy, to which reference is made in the above paragraphs. Once again, there certainly was a delay in dealing with this particular grievance by the claimant. However, the Tribunal found that the reasons for that delay lay almost entirely at the hands of the claimant herself and of those then representing her. The claimant refused to have any involvement in the investigation of her grievance by anyone associated with the respondent’s HR department. The respondent offered and agreed to submit the matter to an outside agency known as AuditOne. There is a lengthy chain of correspondence shown in the hearing bundle between AuditOne, the respondent and the claimant. It clearly shows that the respondent and AuditOne were endeavouring to get the investigation underway as soon as possible. The claimant persisted in raising unnecessary and trivial questions and objections to whatever means were proposed by or on behalf of the respondent to resolve the grievance. Each of those matters was put to the claimant in cross-examination and each was accepted by the claimant. When asked by Mr Sugarman if she wished to pursue that complaint, the claimant insisted that she did. Specifically, the claimant accepted that the respondent did not cause any delay up to the point of commissioning AuditOne to carry out the investigation. There was obviously some misunderstanding by AuditOne as to whether they were investigating the alleged data breach or different a grievance raised by the claimant relating to alleged inaccuracy of minutes in an earlier investigation. Whilst there were certainly minor delays caused as a result of that misunderstanding, there were more delays caused by the claimant’s intransigence.. The Tribunal was satisfied that the reasons, or causes fo,r the delay were in no sense whatsoever influenced by the claimant having undertaken a protected act by bringing earlier Employment Tribunal proceedings.

Allegation 5

33. The claimant alleges that in October 2022 she requested permission to increase her working hours from 28.5 per week to 37.5 per week. The claimant alleges that, at a meeting with Gemma Swan on 17 October 2022, Miss Swan agreed to the claimant’s hours being increased in that way. The claimant goes on to allege that Miss Swan subsequently changed her mind and that the reason why she changed her mind was because she had realised that the claimant would, if her hours were increased, have to work alongside those colleagues who had indicated a reluctance to work with her because she had brought earlier Employment Tribunal proceedings.
34. The claimant’s evidence is contained in paragraphs 40-41 of her statement:-

“I returned to work on 22 September 2022 and it was agreed by Gemma Swan that moving forward she would be my point of contact. On 7 October 2022 I met with Gemma to discuss my return to work. During the meeting I asked whether there was an option for me to increase my hours from 28.5 hours per week. I was contracted to do full time hours. On my return on 22 September 2022 I had been told by another member of staff that there were hours available and so I took the opportunity to ask Gemma during our meeting on 7 October. Gemma agreed that I could increase my hours to full time and she informed me

that as she had two posts currently out to advert she would amend the hours currently advertised to reflect the hours that I would be taking which would be an additional 9 hours. Following the meeting I sent Gemma the copy of my notes from our meeting.”

The claimant’s “notes” of that meeting are in fact an email sent by her to Miss Swann dated 10 October in which the claimant states:-

“I asked if there was any scope for me increasing my hours to full time from the 28.5 hours I currently do and you said definitely and you said you would just need to amend the post currently out to advert to reflect this.”

35. The claimant goes on to state in paragraph 41 of her statement:-

“A week later I emailed Gemma asking when I could start the full time hours and how it was going to be worked, would it be three longer days or split over four days but I did not get a response. On 17 October 2022, 10 days after our meeting on 7 October 2022 and following three emails sent by myself, Gemma Swan responded apologising for what she believed to be a “misunderstanding”, stating that she had not agreed to the increase in my hours (which she had) and advising that she herself would need to speak to Simon Dove, who she advised was overseeing a recruitment to confirm if any substantive hours would be left over. I emailed Gemma Swan and disputed her recollection of our discussion 7 October 2022. I believe the u turn by Gemma Swan in changing her decision and then not allowing me to increase my hours is because of a number of colleagues not wanting to work alongside me after I had taken Lauren Walker to tribunal and this would have increased a likelihood of such colleagues being rostered to work with me if I had been permitted to work the increased hours. Colleagues like Eilish Shaw and Lauren Walker should not be able to dictate that they will not work with me because I had taken Lauren to the tribunal. This has directly penalised me because I am not able earn for working an extra nine hours per week and this is a further example of victimisation of me directly relating to my protected act.”

36. Gemma Swan’s version of the conversation on 7 October is quite different. Miss Swan States:-

“I met with Julia on 7 October 2022 to discuss her return to work and see how she was settling in. Julia also asked me in that meeting whether it would be possible for her to increase her working hours from the 28 she was notionally doing (in practice she was on a phased return of 4.5 hour shifts, three times a week on average until 31 October 2022). I said there was a recruitment exercise underway in relation to two PFC vacancies, but if there were hours available once that process had finished, she could in principle increase her hours. I was unaware of where the process was up to during the meeting and I said I would find out the details and get back to her.”

37. Miss Swan was not directly involved in that recruitment process, but her unchallenged evidence to the Tribunal was that vacancies were first advertised on the NHS TRAC recruitment systems on 13 September 2022 and that the respondent received 12 applications. One of the vacancies was a permanent one to replace a Band 4 PFC (Jenna Holmes) who had left her position in September 2021. The other was a fixed term contract to cover another Band 4 PFC (Lauren Walker) who was due to start maternity leave in October 2022. A

primary driver to the recruitment exercise was to increase head count within the team by 1.44 whole time equivalent, which had created to 54 hours. Short-listing began on 1 October 2022 and 7 candidates were invited to interview. They were contacted on 6 October to arrange their interviews, which were to take place on 25 October.

38. Miss Swan's evidence to the Tribunal was that the claimant had clearly misunderstood the contents of their discussion on 7 October. Miss Swan's evidence to the Tribunal was that it was not within her gift or power to amend the hours for the posts which had already been advertised, in respect of which applications had been made and in respect of which interviews had been arranged. The Tribunal accepted Miss Swan's evidence in that regard.
39. Offers of employment were made to 2 candidates on 25 October, one a permanent position of 30 hours per week and another of fixed term maternity cover of 24 hours per week. Those candidates began employment on 28 November 2022.
40. The main thrust of the claimant's evidence with regard to this allegation was simply that she considered it unfair that the respondent should advertise these posts without first enquiring as to whether any of the existing staff on reduced hours may wish to increase their hours. The Tribunal found that there was no such obligation on the respondent. The Tribunal found that it was open to the claimant to apply for either of those posts if she so wished or to make a formal application to increase her hours under the respondent's flexible working policy. The Tribunal accepted Miss Swan's evidence that she had no personal objection to the claimant increasing her hours, should there have been any hours available. Miss Swan confirmed that she regarded the claimant as "a hard worker and good at her job." Prior to their meeting on 7 October, the claimant had given no indication to anybody that she was looking to increase her hours.
41. Again, looking at the matter in the round, the Tribunal preferred the version of the conversation on 7 October which was given by Miss Swan. That version was entirely consistent with the respondent's policy and the documents in the bundle. The Tribunal found that the claimant had either misinterpreted or deliberately distorted what had actually been said at the meeting. The Tribunal found that there was no agreement between Miss Swan and the claimant to the effect that the claimant could increase her hours. Accordingly, there had been no change of mind by Miss Swan. There was no breach of any agreement. The respondent has provided an adequate and truthful explanation as to why the claimant could not increase her hours at that time. The Tribunal found that none of the decisions taken by the respondent in this regard were in any sense whatsoever influenced by the claimant's earlier protected act.

The law

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

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

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

136 Burden of proof

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

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

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

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

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

(b) the Asylum and Immigration Tribunal;

(c) the Special Immigration Appeals Commission;

(d) the First-tier Tribunal;

(e) the Special Educational Needs Tribunal for Wales;

(f) an Additional Support Needs Tribunal for Scotland.

42. The purpose of the victimisation provisions in the Equality Act 2010, is to protect those who seek to rely upon the Act or to promote its operation by word or deed. If the reason for particular conduct adverse to an employee is victimisation, then there is implicit in that conclusion or finding that, but for having taken the protected act, the employee would have been treated more favourably. Unreasonable conduct by an employer, failure to adhere to its own rules and out of character behaviour are all matters which might lead to an inference that a decision has been made which is victimisation for a previous protected act. (**London School of Economics and Political Science v Lindsay** – [2013 EQLR 10 EAT].)
43. In **Nagarajan v London Regional Transport** [1999] IRLR 572 the House of Lords confirmed that if a protected act has a significant influence on the outcome, then discrimination is made out. However, in **Peninsula Business Services Limited v Baker** [2017 IRLR 394] the Employment Appeal Tribunal stated that the employee must identify a specific actual protected act, or believed protected act, in order to fix the employer with liability and must also show that the employer knew about that specific act and that it imposed a detriment on the employee because of that specific protected act.
44. In **Onu v Akwiwu** [2014 IRLR 448] the Court of Appeal said that, save in very particular circumstances, where a putative victimiser acts in response to the bringing of proceedings against him, he can be taken to be responding to – or, in the statutory language, acting “because of” all the elements in those proceedings.
45. In **Deer v University of Oxford** [2015 IRLR 481] the Court of Appeal said that if the claimant were able to establish that she had been treated less favourably in the way in which procedures were applied to her, and the reason for that was that she was being victimised for having lodged a discrimination claim, she would have a legitimate sense of injustice which would in principle found a claim in damages. The fact that the outcome of the procedure would not have changed would be relevant to any assessment of any compensation, but it does not of itself defeat the substantive victimisation discrimination claim.
46. In allegation 1, the Tribunal found that, on the respondent’s best case, the initial comment made by Jenna Holmes to the claimant, enquiring as her relationship with Lauren Walker following the earlier tribunal proceedings, was unwanted conduct which caused an element of distress to the claimant such that it satisfied the definition of “detriment” in S.27. The test as to whether any conduct amounts to a detriment must be framed by a reference to the “reasonable worker”. It is not a wholly objective test. It is however enough that such a worker would or might take such a view to the effect that the employer was in all the circumstances put to a disadvantage. The nature of Miss Holmes’ immediate apology and acknowledgement of the upset she had caused to the claimant, was sufficient to show that the comments amounted to a “detriment”. The Tribunal found that Miss Holmes was more likely than not to be aware of the nature and subject matter of the Employment Tribunal proceedings and that they were not simply limited to a complaint about access to the claimant’s medical records. Miss Holmes acknowledged that the claimant’s earlier proceedings were a topic of discussion within the workplace. The Tribunal find it more likely than not that those discussing it would have known or been made aware that the proceedings related to discrimination, whether or not specific reference was made to the Equality Act 2010.

47. In all the circumstances the Tribunal found that the complaint of victimisation contrary to S27 was made out. However, the Tribunal for the reasons set out above, preferred Miss Holmes' description of what had actually happened, to that of the claimant. The Tribunal found the claimant's description to have been exaggerated, as was her description of the impact upon her. The Tribunal took particular note of the respondent's witnesses' consistent confirmation that the claimant had openly discussed the Employment Tribunal proceedings within the workplace. The Tribunal found that the real impact upon the claimant was far less than that which she attempted to describe to the Tribunal. The Tribunal found that the claimant's injury to feelings was minimal and very much towards the bottom end of the lower band of the Vento guidelines. The Tribunal awards the claimant £1,000 compensation for injury to feelings in respect of this allegation.
48. In allegation 2, the Tribunal found that the respondent's investigation into the claimant's grievance about allegation one was unnecessarily and unreasonably delayed and that at least part of the provision for the delay was the respondent's reluctance to engage with the claimant due to her propensity to raise grievances and the fact that she had raised earlier Employment Tribunal proceedings in which she had named an individual employee. Again however, the Tribunal found that the claimant had exaggerated her description of the impact this delay had upon her. The claimant flatly refused to engage with the informal process, which appears to have been specifically designed for this kind of workplace disagreement between colleagues. The Tribunal accepted that Miss Holmes had immediately apologised and had in fact apologised in writing following the outcome of the grievance itself. The Tribunal found that the true value of injury to feelings was again in the lower part of the lower band under the Vento guidelines. The Tribunal awards the claimant £1,000 compensation for injury to feelings in respect of this allegation.
49. Allegation 3. In simple terms, the Tribunal preferred Eilish Shaw's description of this incident to that provided by the claimant. The Tribunal found that the claimant had failed to discharge the burden of proving the balance of probabilities that her version of the incident was more likely to be correct. The only other person present did not support the claimant's version. More importantly, the claimant (who had a reputation for raising grievances) did not do so and in fact only mentioned the incident during an investigation meeting about something wholly unconnected to it. The Tribunal found it highly unlikely that Miss Shaw would have behaved in the way described by the claimant. Whatever did happen on the day, the Tribunal found that it was wholly unconnected to any earlier proceedings (the protected act) brought by the claimant. That claim is dismissed.
50. In allegation 4, for the reasons set out above, the Tribunal found that any delays in investigating the claimant's grievance about the data breach were almost entirely due to the claimant's conduct of the grievance itself. The claimant was not subjected to any detriment by any action taken or not taken, by the respondent or by AuditOne on the respondent's behalf. Because the delays were caused by the claimant herself, they could not have been influenced in any way by the earlier protected acts. That claim is dismissed.
51. In allegation 4 - again, the Tribunal preferred the version of the discussion on 7 October which was given by Gemma Swan. The Tribunal found that there had been no agreement between Miss Swan and the claimant to the effect that the

claimant would be permitted to increase her hours. Because there had been no such agreement, there could be no breach of that agreement by Gemma Swan. Gemma Swan's explanation as to why the claimant could not immediately be allowed to increase her hours was entirely feasible and supported by the contemporaneous documents. Whilst the claimant may have considered it unfair

that the hours were being offered to outside candidates before they were offered to existing employees, that was the respondent's policy and its decision in that regard concerning the claimant was in no sense whatsoever influenced by her earlier protected act. That claim is dismissed.

G Johnson

Employment Judge Johnson

Date: 13th February 2023