EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000380/2023

Held in Edinburgh on 12-15 & 18 March 2024

Employment Judge Sangster
Tribunal Member Brown
Tribunal Member Cardownie

Dr H Hiram	**Claimant** **In Person**
NHS Education Scotland	**Respondent** **Represented by** **Mr D James** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

- The respondent's decision not to appoint the claimant as a VT for the year 2023/24 amounted to victimisation and discrimination contrary to the Employment Rights Act 1996 (NHS Recruitment — Protected Disclosure) Regulations 2018.

- The respondent also victimised the claimant and subjected her to a detriment as a result of making a protected disclosure in the feedback it provided to her on 28 April 2023.

- The respondent is ordered to pay the claimant the sum of **£55,532.21** by way of compensation, as well as the sum of **£13,004.71** in respect of injury to feelings.

- The claimant's remaining complaints do not succeed and are dismissed.

REASONS

Introduction

1 The claimant is a dentist. From 2015 to 2022, the claimant was engaged by the respondent to provide vocational dental training to dental graduates. Her claim principally relates to her application to be Vocational Trainer for the year 2023/24, which was declined by the respondent on 13 April 2023. She brings complaints of victimisation, detriment as a result of making a protected disclosure and breach of section 3 of the Employment Rights Act 1996 (NHS Recruitment — Protected Disclosure) Regulations 2018.

2 The complaints are resisted by the respondent.

3 A joint bundle of documents, extending to 370 pages, and two short supplementary bundles were lodged in advance of the hearing.

4 The Tribunal made a number of case management decisions at the outset of the final hearing, for example in relation to the admissibility of documents. Reasons for those decisions were given orally at the time and are not repeated here.

5 The claimant gave evidence on her own behalf.

6 The respondent led evidence from:

a. Gillian Gorman (**GG**), formerly Interim Associate Director of HR for the respondent;
b. Andrew Mackinnon (**AM**), VT Advisor; and
c. Calum Cassie (**CC**), previously Assistant Postgraduate Dean in the East of Scotland. Currently Associate Postgraduate Dean for the respondent

7 The other individuals referenced in this judgment are:

a. Jimmy Boyle (**JB**), former Associate Postgraduate Dean for the respondent;
b. Billy Cameron (**BC**), Assistant Postgraduate Dean in the West of Scotland for the respondent;
c. David Felix (**DF**), Dental Postgraduate Dean for the respondent
d. Karen Gallacher (**KG**) Clinical Services Manager for Greater Glasgow and Clyde Health Board; and
e. Julie Reilly (**JR**) Operational Manager for Greater Glasgow and Clyde Health Board.

Issues to be determined

8 Parties lodged a list of issues. This was discussed at the start of the hearing and amendments to this were agreed. The issues to be determined were accordingly as follows:

Victimisation (Section 27 EqA)

9 Did the claimant do protected acts by:

a. bringing proceedings under the Equality Act 2010 (**EqA**) against the respondent, namely case number 41014027/22 on 19.7.22? It was conceded by the respondent at the outset of the hearing that this constituted a protected act.

b. Making an allegation, to KG and JR, that Greater Glasgow Health Board had contravened the EqA, on 9.3.22?

10 Did the respondent:

a. Fail to recruit the claimant to be a Dental Vocational Trainer for the training year 2023/24?

b. Fail to give the claimant the opportunity to receive any training or support which the respondent deemed necessary to consider her appointable as a Trainer?

11 If so, did it do so because the claimant had done the protected acts listed in paragraph 9 above?

12 When did the acts/omissions complained of in paragraph 10(a) and (b) above take place?

13 Were any or all of the claimant's complaints presented within the time limits set out in sections 123(1)(a)&(b) of the EqA?

14 If not, should time be extended on a just and equitable basis?

Whistleblowing (s.47B ERA)

15 Does the claimant's relationship with Greater Glasgow and Clyde Health Board fall within the terms of section 43K of the Employment Rights Act 1996 (**ERA**)?

16 In respect of the content of -

a. a telephone call on 9.3.23 with KG as described in paragraph 21 of the Grounds of Claim and expanded upon in the Further and Better Particulars lodged by the claimant on 27.10.23

b. an email dated 9.3.23 (21.20) sent to KG as described in paragraph 21 of the Grounds of Claim and provided by the claimant to the Tribunal on 27.10.23

c. an email dated 17.3.23 sent to GG as described in paragraph 31 of the Grounds of Claim.

d. the additional statement attached to the email referred to in (c) above, as described in paragraph 28 of the Grounds of Claim.

e. a conversation during a meeting between the claimant and the respondent's complaints team on 22.3.23 as described in paragraphs

32 & 33 of the Grounds of Claim and expanded upon in the Further and Better Particulars lodged by the claimant on 27.10.23

Did the claimant disclose information?

17 If so, did the claimant believe that the disclosure/s -

a. contained information tended to show any of the matters contained at section 43B (1)(b)and/or (c) of the ERA?; and

b. was/were made in the public interest?

18 If so, were those beliefs reasonable?

19 If any of the above are qualifying disclosures, are any or all of them protected disclosures because it was made to a relevant party in accordance with ss43C to 43H ERA?

20 If so, did the respondent subject the claimant to any or all of the following actions on the ground that she had made one or both of the protected disclosures, in contravention of her rights under section 47B of the ERA?

a. A failure to recruit the claimant as a Dental Vocational Trainer for the training year 2023/24.

b. Being subjected to allegedly humiliating comments from AM as described in paragraph 29 of the paper apart to the ET1.

c. A failure to give the claimant the opportunity to receive any training or support.

d. Not being given a fair trial as described in paragraph 43.5 of the paper apart to the ET1

e. Being denied freedom of expression as described in paragraph 43.5 of the paper apart to the ET1.

f. Accusing the claimant of using a confrontational tone and seeking to invalidate the merit of the claimant's additional statement as described in paragraph 43.6 of the paper apart to the ET1 and expanded upon in the Further and Better Particulars lodged by the Claimant on 27.10.23.

g. Denial of a fair recruitment process as described in paragraph 43.7 of the paper apart to the ET1.

21 In respect of any of the acts identified in paragraph 20 above:

a. Were they detriments? and

b. Was the respondent the claimant's employer in terms of s47B ERA?

22 Is the claimant's complaint brought within time in accordance with section 48(3) ERA?

23 If not, then was it reasonably practicable to have done so?

24 If so, then has it been brought within such further time as the tribunal considers reasonable?

Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2018

25 Was the claimant an applicant in respect of an NHS Employer in accordance with the Regulation 2 of the Regulations?

26 If yes, in respect of the content of the asserted disclosures set out at paragraph 16 above, did the claimant disclose information?

27 If so, did the claimant believe that the disclosure/s -

a. contained information tended to show any of the matters contained at section 43B (1)(b)and/or (c) of the ERA?; and

b. was/were made in the public interest?

28 If so, were those beliefs reasonable?

29 If any of the above are qualifying disclosures, are any or all of them protected disclosures, having been made in accordance with one of ss43C to 43H ERA 96?

30 If yes, has the respondent discriminated against the claimant because it appeared to the respondent that she had made a protected disclosure in contravention of Regulation 3 of the Regulations, by taking any of the actions set out at paragraph 20 a.- g. above.

31 If so, has the claimant's complaint been brought within time in accordance with Regulation 5(1) of the Regulations?

32 If not, then has it been brought within such further time as the Tribunal considers just and equitable in accordance with Regulation 5(2)?

Remedy

33 Is it just and equitable to award any compensation to the claimant?

34 Should the respondent be ordered to pay the claimant compensation for injury to feelings (and if so, at what level) and interest?

Findings in Fact

35 It should be noted that this Judgment does not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues which the Tribunal must consider in order to decide if the claim succeeds or fails. If a particular point is not mentioned, it does not mean that it has been overlooked, it simply means that it is not relevant to the issues. The relevant facts, which the Tribunal found to be admitted or proven, are set out below.

The Respondent

36 The respondent is a special Health Board. It is an education and training body, providing services to the NHS.

Vocational Trainers

37 The respondent engages experienced, practicing dentists to act as Vocational Trainers (**VT**s). A VT supervises and trains new dental graduates, known as Vocational Dental Practitioners (**VDP**s), for a period of 12 months, at the VT's dental practice. All VDPs must participate in a year of vocational training, while continuing their education on a day or block release basis, in order to be able to practice NHS dentistry in Scotland.

38 The respondent produces guidance for dentists who are considering applying to become VTs, setting out the requirements which require to be met for an

individual to become a VT. Aside from the physical requirements of a suitable dental practice, the guidance states a number of requirements, including that applicants must:

a. Ensure that adequate support is provided to the VDP by the VT, with the VT being based in the training practice for a minimum of 21 hours per week; and

b. Ensure that there is good support from reception/secretarial staff, and that the VDP has exclusive assistance from a GDC registered and, preferably, qualified Dental Nurse;

39 The guidance also states that *'Any disciplinary or probity actions initiated by the GDC and/or health board will be taken into account when suitability to become, or remain as, a trainer is being assessed. This may impact on the outcome of the review panel decision on appointability.'*

40 The VDP's salary is paid by the respondent. The VT receives a training grant from the respondent for undertaking training (£17,069 for the year 2023/24). All fees earned by the VDP in the period of training accrue to the VT.

41 All VTs are allocated an Adviser, who supports the VT as well as the VDP. They visit the dental practice twice a year. The Adviser reports into the relevant Assistant Postgraduate Dean for their area, who reports to the Associate Postgraduate Dean, who in turn reports to the Dental Postgraduate Dean.

Claimant's Background

42 The claimant qualified as a dentist in 2002. She started her own practice in February 2014 and remains the sole qualified dentist in the practice. On 1 August 2015, she was engaged by the respondent as a VT. The claimant then worked continuously as a VT until July 2022. She enjoyed undertaking the role.

43 Advisers prepare 'Adviser Statements on Trainer Performance' periodically. In the period from 1 August 2015 to July 2020, the claimant had one Adviser.

She received positive Adviser Statements throughout that time, scoring 49 out of a maximum score of 50 in the most recent one.

44 AM became the claimant's Advisor on 1 September 2020. On 31 September 2021, AM prepared an Adviser Statement in respect of the claimant in respect of the period from 1 September 2020 to 31 September 2021. He allocated the claimant an overall score of 52, out of a maximum score of 65. In relation to the sections in relation to 'Trainer Attendance' and 'Trainer Support', the claimant was allocated the maximum score of 10. In relation to 'Staff Support' the claimant was allocated a score of 2 (out of 8) which, according to the pre-printed text on the form, indicated *'staffing difficulties encountered (sickness/resignation etc) resolved after discussion with Adviser'*. In the comments section AM stated that the VDP had been well supported by the claimant. He highlighted that there had been some staff changes, leaving the VDP working with inexperienced nurses, but the situation was gradually improving as the nurses gain more experience and training. In response to the question *'Does the adviser feel that any application for future training requires assessment by a review panel'*, AM responded *'No'*.

45 On 11 February 2022, just over 4 months after completion of the previous Adviser Statement, AM completed a further Adviser Statement on Trainer Performance in respect of the claimant. This stated that it was in respect of the period from 1 February 2021 to 11 February 2022. In that statement he allocated the claimant an overall score of 26 out of a maximum score of 65. In relation to 'Trainer Attendance' and 'Trainer Support', the claimant was allocated 0. In relation to 'Staff Support' the claimant was again allocated a score of 2 (out of 8). In the comments section he raised concerns about the amount of time the claimant was spending in the practice and the VDP being left with a trainee nurse for long periods. In response to the question *'Does the adviser feel that any application for future training requires assessment by a review panel'*, AM responded '*Yes*'. A view which was endorsed by BC, who countersigned the document.

46 The claimant complained to JB about the content of the February 2022 Adviser Statement.

2022/23 VT Application

47 By the time she received the February 2022 Adviser Statement, the claimant had already submitted her application to be a VT for 2022/23.

48 JB chaired the Recruitment Panel, which considered applications on the papers only – no interviews were conducted. On 31 March 2022, the claimant was informed that her application to be a VT for 2022/23 had been unsuccessful. One of the principal reasons for the refusal of her application was the Adviser Statement completed by AM, and endorsed by BC, in February 2022. The claimant's reasons for disputing the Adviser Statement had also been provided, in writing, to the Recruitment Panel.

49 The claimant requested a review of the decision not to appoint her as a VT for 2022/23. The review was conducted by a panel, chaired by DF, which included CC, DF and one other person. The review panel considered matters, by reviewing matters on paper, and upheld the original decision. DF wrote to the claimant on 22 April 2022 to advise her of this. His letter confirmed the following:

a. That a Recruitment Panel had declined the claimant's application to become a VT for 2022/23;

b. DF chaired a panel, consisting of himself, CC and one other, to review whether that decision was correct or not;

c. The panel concluded that the original decision, that the claimant should not be appointed as a VT for the training year commencing 1 August 2022, should be upheld. Detailed reasons were provided; and

d. DF had received communication from Acas in relation to the claimant and intended to contact them.

50 On 19 July 22 the claimant commenced Employment Tribunal proceedings against the respondent. She asserted in her claim that the failure to recruit her as a VT for the year 2022/23 constituted race discrimination. Parties reached an agreement to settle those proceedings, following mediation, in November 2022.

Interactions with Greater Glasgow & Clyde Health Board - 9 March 2023

51 On 9 March 2023, the claimant had telephone conversations with JR and KG, who both work for Greater Glasgow and Clyde Health Board (**GG&C HB**), the Health Board the claimant worked for as a dentist. The terms of those discussions were summarised in an email, sent by the claimant to KG, as well as the Chief Executive of the Health Board, at 21:20 that day. The email stated as follows:

'I am writing to complain about an incident that occurred this morning and was later repeated/reinforced this afternoon. This morning, I received a telephone call from Julie Reilly who phoned me at my dental practice in Kirkintilloch. Ms Reilly advised me that it was you who instructed her to phone me. Ms Reilly refused to speak to my nurse and insisted on speaking to me personally.

This was the beginning of what transpired to be an offensive and alarming experience for me.

After insisting on speaking with me directly, Ms Reilly stated that the reason for her phone call was to enquire whether I had organised emergency cover at my practice tomorrow. Ms Reilly went on to say that she had been alerted to the fact that my dental practice was going to be closed tomorrow. I was aware that I had posted this information on my practice Facebook page (reassuring patients that all answer machine messages would be picked up). However, when asked, Ms Reilly refused to tell me where she had learned that my practice would be closed. I am unsure why she was unwilling to share this information, the effect of which compounded my feeling of humiliation.

I received a phone call from you later this afternoon after leaving a message on your voicemail. You repeated the same question that Ms Reilly had asked me, that is, did I have emergency cover at my practice? I gave both you and Ms Reilly the same explanation: I did have cover in place for tomorrow should any of my patients require to be seen by a dentist. I was confused as to why you would question this given the fact that I have never let my patients uncared for in the past. In any case, the practice Facebook post made it clear that I could be contacted by telephone for any reason whatsoever.

I am a single-handed general dental practitioner who has never failed to be available for my patients since opening my dental practice almost 10 years ago. On the rare occasion that my practice has been closed, I have made alternative emergency arrangements for my patients. On said occasions, I have posted on social media that the practice shall be closed. Before today, I have never received a phone call from the health board demanding to speak to me personally about my emergency cover arrangements (having been told that the health board have been secretly alerted about the closure).

This is, however, the first me that I have closed the practice (and posted about this on social media as per usual) since making a claim against NHS Scotland at Employment Tribunal last year. My claim included one for racial discrimination which is, of course, a protected characteristic under the Equality Act 2010. Accordingly, I am making a formal complaint about the way that I was treated today. The behaviour displayed by both you and Ms Reilly towards me was unwanted by me and extremely upsetting to be in receipt of. This is a complaint of harassment and victimisation which I wish to be taken seriously.'

2023/24 VT Application

52 In January 2023, the claimant applied to be a VT for 2023/24. The application consisted of a short application form (3 pages), with supporting documentation. The form covered basic personal details, qualifications, experience and role, as well as information regarding practice and a section for additional comments. The applicant's working hours were stated (totalling 38 hours) as well as the surgery availability for a VDP (totalling 32 hours). Given the times stated, the application demonstrated that the VT and the VDP would be in the practice together for 24 hours per week.

53 In accordance with the respondent's normal practice, the applications were initially screened by the VT Hub. The VT Hub checked whether all sections of the application form had been completed and whether the requisite documentation had been lodged. They then followed up with applicants to obtain this, if not. Applications were then passed to the Assistant Postgraduate Deans, who conducted more in-depth screening of the

applications, with BC reviewing the applications submitted from dentists in the West of Scotland and CC reviewing the applications submitted from dentists in the East of Scotland. In relation to each application, they would then make a recommendation to the Recruitment Panel in relation to the application. This can range from 'Criteria Met' to 'Criteria Not Met' or simply 'Refer to Panel'.

54 BC raised with JB that the claimant had submitted an application and that he felt that he should not screen her application, given that he had chaired the Recruitment Panel the previous year, which had refused the claimant's application and legal proceedings had been raised in relation to that. As a result, JB asked CC to screen the claimant's application. CC did so, along with those from dentists in the East of Scotland. CC recommended that the claimant's application should be considered by the Recruitment Panel.

55 DF was made aware that the claimant had submitted an application to become a VT for 2023/24 and that the recommendation from screening by CC was that the application should be reviewed by the Recruitment Panel. He and JB had discussions with GG in relation to this and how the claimant's application should be handled, given the Employment Tribunal proceedings in relation to her previous application. Both thought that the claimant may not be aware that the disputed Adviser Statement from February 2022 would be reviewed by the Recruitment Panel, when considering the claimant's 2023 application. Their understanding was that, for any 'Returning VT' (someone who had held the role of VT in the last 4 years), the Recruitment Panel would be provided with the last Adviser Statement from when the individual was a VT. They understood that the claimant would be unhappy when she discovered this. They determined that, in the claimant's case, the Recruitment Panel should be provided with **all** the previous Advisor Statements, including the disputed one. DF instructed GG to write to the claimant to advise her of this. She did so on 7 March 2023, and asked the claimant to confirm whether she was content with that proposal. She also stated in her email:

'Additionally, that should you require any advice and support from members the dental team to further support you or your development, then the dental

team will be happy to provide that. I can facilitate arrangements for this to take place if you advise me that it is an opportunity you would like to take up.'

56 The claimant felt that GG making this offer demonstrated that her application was doomed from the start. She was unclear what 'advice', 'support' or 'development' was envisaged or considered required.

57 The claimant provided comments to GG by email dated 13 March 2023. In her email she stated

'I thought your email highlighted some unusual and frankly alarming concerns about the proposed recruitment process for returning VT trainers, particularly me.

To summarise, NES' 'normal application process' for such a cohort of applicants includes, inter alia, reviewing applicants' previous advisor statements from prior applications regardless of circumstance. You have specifically forewarned me about this because, as all parties are aware, I raised a grievance with NES on or around February 2022 in relation to the content, reliability and veracity of last year's statement. The natural inference is that you already anticipate this being a problem for me and likely to destroy my chances of success.

Your email specifically highlights my 'concerns' (to clarify, these concerns were raised last year as part of last year's recruitment process and neither party raised them again until your email below) around the detrimental impact of the statement. However, and somewhat perversely, your proposal for addressing my concerns is to ensure the same statement - it is noted that its derisory, disapproving and unfounded comments were vehemently denied by me last year but nevertheless the statement remained and became the principal reason for my application being rejected - receives the same consideration this year as last year. This is not only perverse but absurd. It is also the first time you have offered any type of 'solution' whatsoever or, for that matter, allowed me to make representations regarding it. For the avoidance of doubt, the meeting that Mr Boyle offered to take place with my previous advisor to address the comments in the

statement (as well as to offer support) never materialised despite my best efforts to participate in said meeting (my ignored attempts are clearly documented and recorded). Further, Dr Felix did not meet with me, or even attempt to discuss the contents of the statement with me, prior to making the final decision not to recruit me as a trainer last year.

In light of the above and returning VT trainer applicants' upcoming application assessments. I should be grateful if you could please confirm the following:

(a) that NES still intend to include last year's statement in this year's application process despite past and, to confirm, persistent objections with regards the veracity of said statement;

(b) whether NES intends to hear any further representations or consider any available evidence: (i) prior to applications being considered; or (ii) at any point thereafter;

(c) without prejudice to the above, whether NES intends asking the author of the statement in question whether he (i) wishes to make any changes to the statement following consultation with me or otherwise; or alternatively (ii) reaffirms the content of the statement; and

(d) In all cases, NES intends keeping the independent governors mentioned above, and whose responsibility it is to review the applications, fully apprised of the background and updated as appropriate.

I trust the above is self-explanatory and as I am sure you will agree, I should be better placed to provide substantive comments on the putative process once these queries are answered.'

58 GG discussed the claimant's response with DF and JB. GG then responded to the claimant on 14 March 2023, stating that the claimant could submit an additional summary statement, as an addendum to the February 2022 Adviser Statement, which the Adviser would then have the opportunity to comment on. Both statements would then be provided to the Recruitment Panel, with the disputed Adviser Statement.

59 The claimant forwarded her written statement to GG on 17 March 2023, setting out the basis upon which she disputed the content of the February 2022 Adviser Statement (the **Response Document**). It extended to 5 typed pages. In the statement, after a short introduction, the claimant addressed each element of concern highlighted in the Adviser Statement in turn, under subheadings in the document as follows: VDP Activity Levels; Nursing Staff; Time Spent in Practice; and Trainer Sessions. She then, under the heading 'Potential Health & Safety Breaches' highlighted that no concerns had been raised with her prior to the February 2022 Adviser Statement and, despite the terms of the February 2022 Adviser Statement, there was no further contact with the claimant after that and the VDP successfully completed her training in July 2022 without any action being taken. The claimant's written statement was factual, and the manner in which it was written was entirely appropriate: it was not written in a 'confrontational tone'.

60 In the section under the heading 'Time Spent in Practice', the claimant stated that the VDP usually worked on her own (without the claimant being physically present in the practice) for one day each week. She stated that she had adopted this practice throughout the time she had been a VT and no concerns had ever been raised previously. She stated that she was taking short breaks away from work, by way of annual leave, prior to and around the time of the February 2022 Adviser Statement as her husband had been hospitalised with a brain haemorrhage. She stated that she was *'naturally very worried and also acquired additional responsibilities during this time. By way of explanation, one of my children is autistic and requires additional support. With my husband in hospital, I was required to take on the tasks with my son that my husband had previously carried out.'*

61 In the section under the heading *'Nursing Staff'* she stated *'For the avoidance of doubt, not all of the nurses were trainees during [the VDP's] training at my practice. [The VDP] often worked with a qualified nurse. In any case, the nurses who were still trainees were proficient at their jobs. Two out of the three nurses who were employed by me at the time the Statement was written remain employees at my practice over a year later. One of these nurses is*

awaiting to be signed off as a qualified nurse whilst the other nurse has been qualified for some time already.'

62 In her cover email, sent at 20:40 on Friday 17 March 2023, the claimant stated that, having reflected, she felt that the process was unfair. She highlighted that she had been given the opportunity to lodge an additional written statement in 2022 and her application had still been rejected, to her extreme detriment. The same process was being followed again, in relation to the current application. She stated that her previous objections to the Adviser Statement, and the mediation process with the respondent which followed, amounted to protected disclosures and she was being placed at a *'substantial and seemingly perpetual disadvantage'* as a result of making that disclosure, by the unfair recruitment process proposed and the respondent's reliance, again, on the disputed Adviser Statement.

63 GG responded, on 20 March 2023, stating that the process previously outlined would be followed and that she would forward the claimant's complaint to the respondent's Complaints Manager, given that the claimant had raised a complaint regarding protected disclosures. The complaints team dealt with complaints of that nature.

Meeting with Complaints Team – 22 March 2023

64 On 22 March 2023, the claimant met with the respondent's complaints team to discuss the complaint she had made to GG on 17 March 2023. The claimant explained to the complaints team that, even with the additional comments appended to the Adviser Statement, she felt this was an inadequate solution. The claimant explained that she did not think it was appropriate to use the unfounded and unproven Adviser Statement in the first place, but knew that the respondent still planned on doing so. She stated that she had requested any support or training that was deemed necessary by the respondent, but this had not been provided. The claimant complained that the lack of support was unfair, given its apparent importance with regards to the success of the claimant's job application (which by this point was still in progress). The claimant stated that, by being denied the opportunity to discuss/receive any necessary training and support (which appeared to be fundamental to whether

or not she would be appointed) prior to a decision being made, she was being subjected to discrimination/victimisation due to having brought Employment Tribunal proceedings, asserting race discrimination, the previous year.

AM Comments – 22 March 2023

65 GG provided the claimant's statement to AM and invited him to make any additional comments in response, highlighting that these would be passed to the 2023 Recruitment Panel, with the claimant's statement. AM responded on the evening of 22 March 2023. His email included the following *'I don't plan on commenting on all the points made individually. In the majority of cases I have already made comments on my trainer statement last year which I believe to be factual. I assume my trainer statement will be made available to the review panel again this year. I stand by the statement comments and scores. Advisors also receive various comments over the year that are confidential. Unfortunately I could not add them to my statement. I received this information and have no reason to doubt them…'*

66 GG forwarded AM's comments to the claimant on 23 March 2023, confirming that they would be submitted to the Recruitment Panel, with the claimant's written statement.

67 The claimant was incredibly upset when she read AM's comments. She found them humiliating. She was unaware of any adverse comments in relation to her and could not understand why, if such comments had been made:

a. AM would form any conclusion without even speaking to her to obtain her view;

b. He believed that those comments were correct, and he had *'no reason to doubt them'* when they were clearly averse to her, an experienced dentist; and

c. He saw fit to raise them for the first time in that context, when he knew doing so would likely be extremely detrimental to the claimant's 2023 application, and she had no means of responding.

Recruitment Panel – 24 March 2023

68 Whilst the Recruitment Panel would ordinarily be chaired by JB, JB asked CC to chair the Recruitment Panel in March 2023. He did so because he had chaired the Recruitment Panel the previous year, the claimant had raised Employment Tribunal proceedings in relation to the decision of the Panel, asserting it constituted race discrimination, and the claimant had applied again. CC was aware of this. He took extensive advice from the respondent's HR team, in relation to how the claimant's application should be handled, as a result.

69 In addition to CC, there were two other members of the Recruitment Panel: a practising dentist and a lay representative, representing patient views. In addition, there was an observer, to ensure consistent and fair process. The Recruitment Panel met over 4 days, from 21-24 March 2023 inclusive. The Recruitment Panel reviewed each application to ascertain whether the individual should be appointed as a VT or not. In relation to each application, the panel were provided with:

a. The application, with supporting documentation;

b. Adviser Statements, where relevant; and

c. Any evidence submitted by Health Boards (Health Boards are given a list of all applicants and asked if they have any concern about their appointment).

70 The claimant's application was considered on 24 March 2023. CC directed that the claimant's application be considered on the last day was aware it would be *'more contentious'*. In addition to the above documents the Recruitment Panel were provided with the following in relation to the claimant's application:

a. The claimant's statement regarding setting out why she disagreed with the content of the February 2022 Adviser Statement, which she had sent to GG on 17 March 2023;

b. AM's additional comments, dated 22 March 2023; and

c. The letter from DF to the claimant dated 22 April 2022.

71 CC had met with a senior representative of the respondent's HR Team in advance of the Recruitment Panel to discuss the claimant's application. They (GG or another senior representative) provided CC documents a. to c. above and informed him that these should be provided to the Recruitment Panel, when considering the claimant's application. CC understood that the direction that these documents should be provided followed a discussion between the HR Team and DF, and that he would require to obtain approval from DR and the HR Team if he wished to withhold any of those documents from the Recruitment Panel (although he did not consider that he ought to do so). CC was informed of the content of the claimant's emails dated 13 & 17 March 2023 during the course of those discussions. He was also made aware that the respondent's complaints team was investigating the allegations made by the claimant in her email of 17 March 2023, as this involved complaints regarding protected disclosures.

72 CC provided the Recruitment Panel with hard copies of the documents. He had not provided hard copy documents to the panel members in relation to any other applicant. This prompted one of the panel members to question why they were being provided with additional information in relation to this particular applicant. They stated that they 'suspected there was a bit of background' in relation to the claimant. CC confirmed that there had been a previous dispute, involving the claimant's previous application.

73 Following an adjournment, to consider the claimant's application, the Recruitment Panel reconvened. Applications were not scored by the Recruitment Panel against essential and/or desirable criteria. No scoring matrix was completed. No records were kept of why the Recruitment Panel reached the decision they did in respect of the claimant's application. Rather, decisions were based on 'instinct' and 'what felt right'. The Recruitment Panel concluded that 'instinctively it didn't feel quite right' to appoint the claimant as a VT. A box was ticked to confirm that she was not appointable. No further records were kept as to the reasons for this decision.

74 On 13 April 23 the claimant received a short email stating simply that her application had been unsuccessful. She was informed that she could request feedback, if she wished. The claimant requested this.

75 CC took advice from the respondent's HR team regarding the feedback request. He prepared the feedback on 28 April 2023, which was then provided to the claimant. This stated as follows

'…the Panel was unable to approve your application because-

- *Comments from your Health Board – the application contained negative feedback from your Health Board. This said, 'There has been a recent acrimonious interaction between Dr Hiram and two senior team members with the GGC Oral Health Directorate, incidents have been logged by staff members involved in relation to the aggressive nature of the interaction with Dr Hiram. GGC are currently in the process of providing a formal written response to Dr Hiram in relation to her concerns raised post incident.'*

- *Your response to the Adviser Statement – the panel understood that you disagreed with much of the statement, and more importantly did not seek to address any of the concerns raised, even by way of clarification, whilst disagreeing with the content and this was of concern as was the somewhat confrontational tone.*

The panel could not ascertain from your submission evidence that addressed what specific reflections learnings or insights you had gained and would be applying to enable you to deliver a safe and supportive training placement.'

76 The claimant was really upset at the fact that she was not appointed. She had very much enjoyed acting as a VT and could not understand what she had done to make her unappointable, or what she could do to fix the issues for subsequent years, so she could undertake the role again. She felt it impacted her reputation and detrimentally impacted her experience/credentials. The decision had significant financial implications for her practice. As well as the loss of the Training Grant (£1,422.42 per month), the claimant lost the income generated by the VDP. In the period from August 2021 to July 2022, the fees

accrued to the claimant from the VDP were, on average £8,001.47 per month. The expenses incurred in having a VDP were approximately £350 per month.

77 On 22 June 23, the claimant was offered the role of Enhanced Skills Practitioner by GG&C HB. This followed an interview held on 21 June 2023. KG had been one of the members of the panel interviewing the claimant for that role.

78 The claimant engaged in early conciliation from 5-20 July 2023 and presented her Employment Tribunal claim on 28 July 2023.

Observations on Evidence

79 CC stated in his evidence that he knew that there had been a previous dispute involving the claimant, but did not know what that dispute was about and did not know that discrimination had been asserted. The Tribunal did not accept this. The Tribunal concluded that CC was well aware of the full circumstances of the previous dispute for the following reasons:

a. All witnesses spoke to the dental leadership team being a close and cooperative team. It consisted of only 4 individuals – DF, JB, CC and BC.

b. CC was a member of the review panel chaired by DF in April 2022. They were reviewing the decision to refuse the claimant's application. Acas were already involved at that point. The Tribunal concluded that DF would have mentioned that, and the nature of that dispute, to CC, to provide context for the review they were undertaking.

c. The claimant raised Employment Tribunal proceedings in July 2022, asserting that the decisions of the Recruitment Panel and the Review Panel constituted race discrimination. The Tribunal determined it was inconceivable that this would not have been discussed within the dental leadership team, particularly given that they were a close knit team and all 4 individuals had been involved in decisions in relation to the claimant's application, so all 4 would likely require to give evidence, if the matter proceeded to a final hearing.

d. CC stated that he knew that JB was asking him to undertake screening of the claimant's application as JB had been involved in the previous dispute with the claimant. Again, the Tribunal concluded that it was inconceivable that JB would not have mentioned the nature of that dispute, particularly given that he was asking CC to chair the panel who would consider the claimant's further application.

e. CC stated in evidence, on several occasions, that he was aware that the dispute had been resolved and that there was a non-disclosure agreement attached to the settlement terms, indicating that he had been provided with significant detail in relation to the previous dispute. The Tribunal concluded that, if he was provided with that level of detail, he would also have been informed of the nature of the dispute.

f. CC stated that he was 'very aware of the sensitivity' in relation to the claimant's application and that he was taking significant and detailed advice from HR throughout 'for obvious reasons' as he realised it would be a 'contentious decision' and that 'there may be repercussions', again the Tribunal concluded that this demonstrated insight into the previous dispute and the nature of this.

80 The Tribunal also concluded that CC was aware of the terms of the claimant's emails of 13 and 17 March 2023 to GG. CC was taking extensive and detailed advice from the HR team as to how to address the claimant's application. They required to inform him of the allegations the claimant was making in her emails to provide appropriate advice to him.

81 The Tribunal found however that CC was not aware of the detail of the claimant's discussion with, or email to, GG&C HB on 9 March 2023. They are separate organisation and there was no evidence which indicated that they informed the respondent, or CC in particular, of the claimant's complaints. Similarly, there was no evidence from which pointed to CC being informed of the terms of the claimant's discussion with the respondent's complaints team on 22 March 2023. The complaints team deal specifically with public interest

disclosure complaints, in accordance with defined procedures. They did not interview CC and there was no evidence of them having any contact whatsoever with CC after their meeting with the claimant on 22 March 2023.

Submissions

82 Both parties lodged detailed written submissions. The Tribunal took time to read these submissions. Parties were then given the opportunity to make further, supplementary submissions, which both did briefly.

83 Mr James, for the respondent, in summary submitted that:

a. The evidence of the respondent's witnesses ought to be given significant weight. Little weight should be given to the claimant's evidence.

b. The claimant's complaint to GG&C HB on 9 March 2023 was not a protected act.

c. The claimant did not make any protected disclosures.

d. The principal issue in the case is causation The asserted detriments were not materially influenced by any established protected acts or protected disclosures. Those making decisions did not know about the asserted protected acts or the asserted protected disclosures.

e. The complaints have, in any event, been lodged out of time.

84 The claimant, in summary, submitted that:

a. The protected acts were established. The evidence demonstrated that the claimant was not recruited as a VT as a result of the protected acts and she was also not given the opportunity to receive any necessary training or support as a result of these.

b. Each of the protected disclosures were also established. All of the requisite elements were established in relation to each. The claimant was subjected to the detriments asserted as a result of making these protected disclosures.

Relevant Law

Victimisation

85 Section 27 EqA states:

'(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'

Protected Disclosure

86 Section 43A ERA provides:

"In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

87 A qualifying disclosure is defined in section 43B ERA as *"any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:*

a. That a criminal offence has been committed, is being committed or is likely to be committed;
b. That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
c. That a miscarriage of justice has occurred, is occurring or is likely to occur;
d. That the health or safety of any individual has been, is being or is likely to be endangered;
e. That the environment has been, is being or is likely to be damaged; or
f. That information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

88 Section 43C ERA states that:

'A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to –

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person...."

89 In ***Kilraine v London Borough of Wandsworth*** [2018] EWCA Civ 1436, at paragraphs 35 and 36, the Court of Appeal set out guidance on whether a particular statement should be regarded as a qualifying disclosure:

"35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a 'disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the matters set out in sub-paragraphs (a) to (f).' Grammatically, the word 'information' has to be read with the qualifying phrase 'which tends to show [etc]' (as, for example, in the present case, information which tends to show 'that a person has failed or is likely to fail to comply with any legal obligation to which he is subject'). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."

"36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill J in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters, and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

90 In ***Simpson v Cantor Fitzgerald Europe*** [2020] ICR 236, the EAT confirmed these principles, stating:

'43...As the Court of Appeal in Kilraine v Wandsworth London Borough Council [2018] ICR 1850 made abundantly clear, in order for a statement or disclosure to be a qualifying disclosure, it has to have sufficient factual content and specificity such as is capable of tending to show breach of a legal obligation.

69. The tribunal is thus bound to consider the content of the disclosure to see if it meets the threshold level of sufficiency in terms of factual content and specificity before it could conclude that the belief was a reasonable one. That is another way of stating that the belief must be based on reasonable grounds. As already stated above, it is not enough merely for the employee to rely upon an assertion of his subjective belief that the information tends to show a breach.'

Detriment

91 Section 47B ERA states that

'A worker has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.'

92 In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] IRLR 285 confirms that a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. An 'unjustified sense of grievance' is not enough.

93 Whether a detriment is 'on the ground' that a worker has made a protected disclosure involves consideration of the mental processes (conscious or unconscious) of the employer acting as it did. It is not sufficient for the Tribunal to simply find that 'but for' the disclosure, the employer's act or omission would not have taken place, or that the detriment is related to the disclosure. Rather, the protected disclosure must materially influence (in the sense of it being more than a trivial influence) the employer's treatment of the whistleblower (***Fecitt and others v NHS Manchester*** [2012] IRLR 64).

94 Helpful guidance on the approach to be taken by a Tribunal when considering claims of this nature is provided in the decision of ***Blackbay Ventures Ltd (t/a Chemistree) v Gahir*** [2014] IRLR 416 at paragraph 98.

Discrimination under NHS Recruitment Regulations

95 Section 3 of the Employment Rights Act 1996 (NHS Recruitment — Protected Disclosure) Regulations 2018 (the **NHS Recruitment Regulations**) states that:

'An NHS employer must not discriminate against an applicant because it appears to the NHS employer hat the applicant has made a protected disclosure.'

96 Section 49B(3) ERA states that, for these purposes, discrimination means refusing an application or in some other way treating an applicant less favourably than the NHS employer treats or would treat other applicants in relation to the same contract, office or post.

Burden of Proof

97 Section 136 EqA and section 4(2) of the NHS Recruitment Regulations state that if there are facts from which an Employment Tribunal could decide, in the absence of any other explanation, that there has been discrimination, the Tribunal must make such a finding, unless the respondent shows it did not do so.

98 There is accordingly a two-stage process in applying the burden of proof provisions in discrimination cases, as explained in the authorities of ***Igen v Wong*** [2005] IRLR 258, and ***Madarassy v Nomura International Plc*** [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish a first base or prima facie case of discrimination, harassment or victimisation by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the Tribunal to conclude that the complaint should be upheld. If the explanation is adequate, that conclusion is not reached.

99 In ***Madarassy***, it was held that the burden of proof does not shift to the respondent simply by a claimant establishing that they have a protected

characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not of themselves sufficient material on which the Tribunal "could conclude" that on a balance of probabilities, the respondent had committed an unlawful act of discrimination. The Tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case (as explained in ***Laing v Manchester City Council*** [2006] IRLR 748***,*** an EAT authority approved by the Court of Appeal in ***Madarassy)***.

Time Limits

100 The relevant time limits in relation to complaints of discrimination is set out in section 123(1) EqA and r5 of the NHS Recruitment Regulations.

101 These provisions state that such complaints should be brought within either:

a. the period of 3 months, starting with the date of the act to which the complaint relates; or

b. such other period as the Tribunal thinks just and equitable.

102 Section 123(3) EqA states that conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided on it.

103 The 'just and equitable' test is a broader test than the 'reasonably practicable' test. What is just and equitable depends on all the circumstances.

104 In ***British Coal Corporation v Keeble*** [1997] IRLR 336 the EAT indicated that task of the Tribunal, when considering whether it is just and equitable to extend time, may be illuminated by considering section 33 Limitation Act 1980.

105 In ***London Borough of Southwark v Afolabi*** [2003] IRLR 220 the Court of Appeal confirmed that, whilst that checklist provides a useful guide for

Tribunals, it does not require to be followed slavishly. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] EWCA Civ 640, the Court of Appeal confirmed this, stating that it was plain from the language used in s123 EqA ('such other period as the Employment Tribunal thinks just and equitable') that Parliament chose to give Employment Tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list.

106 In ***Adedeji v University Hospitals Birmingham NHS Foundation Trust*** [2021] EWCA Civ 23, the Court of Appeal approved the approach set out in Afolabi and Morgan and, at paragraph 37, Underhill LJ confirmed, that:

'rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language. The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.'

Discussion & Decision

Protected Acts

107 The respondent conceded that the claimant did a protected act by bringing proceedings under the EqA against the respondent in July 2022 (**PA1**).

108 The Tribunal considered whether the claimant did a protected act on 9 March 2023, as asserted. They concluded that she did. As set out in paragraph 51 above, in her email to KG, dated 9 March 2023, the claimant made an allegation that JR and KG contravened the EqA. She specifically referenced the EqA and the protected characteristic of race, stating that she believed their actions had constituted harassment and victimisation. She gave

unchallenged evidence that the terms of the email reflected what she had stated on the telephone to KG earlier that day. In light of this, the Tribunal concluded that terms of that call, and the terms of the claimant's subsequent email to KG, fell within the scope of s27(2)(d) EqA and constituted a protected act (**PA2**).

Protected Disclosures

109 The Tribunal then considered whether the claimant made qualifying disclosures, as defined in s43B ERA and, if so, whether they were also protected disclosures.

110 The Tribunal was mindful that five elements require to be considered in determining whether each asserted disclosure amounted to a qualifying disclosure. The Tribunal noted that, unless all five conditions are satisfied, there will not be a qualifying disclosure.

111 The Tribunal's conclusions in relation to each asserted disclosure, and whether it was a qualifying and protected disclosure, are set out below.

a. **The claimant's telephone call with, and email to, KG on 9 March 2023.** As stated above, the Tribunal accepted the claimant's unchallenged evidence that the terms of her email to KG on 9 March 2023 (as set out in paragraph 51 above) replicated what she stated to KG on the telephone earlier that day. In her email she stated that JR had telephoned the claimant's practice and insisted on speaking to her directly. JR said that she had been alerted to the fact that the claimant's practice would be closed the following day and asked whether the claimant had organised emergency cover. KG repeated the same question in a further call, later that day. The claimant stated that she had never previously received a telephone call of this nature in 10 years of practise and believed it was related to the fact that she had raised an Employment Tribunal claim asserting race discrimination the previous year. This was a disclosure of information. The Tribunal concluded that the claimant believed that the information disclosed tended to show that there had been a failure to comply with a legal obligation, namely

obligations under the EqA not to subject individuals to acts of victimisation or harassment, which were expressly mentioned by the claimant in the call with KG and in her email. The Tribunal concluded that that belief was, in the circumstances, reasonably held by the claimant. The Tribunal concluded that the claimant believed that the information disclosed was in the public interest, as she understood GG&C HB were a large public body with accompanying public sector equality duties, including the elimination of victimisation and harassment. The Tribunal concluded that the claimant's belief was reasonably held in those circumstances. The Tribunal accordingly concluded that this was a qualifying disclosure. The disclosure was made in accordance with s43C(1)(b) ERA, so it was also a protected disclosure (**PD1**).

b. **The claimant's email to GG on 17 March 2023.** As set out in paragraph 62 above, in her email to GG on 17 March 2023, the claimant stated that her objections to the Adviser Statement amounted to a protected disclosure and that she was she was being placed at a substantial and seemingly perpetual disadvantage by the respondent relying again on the February 2022 Adviser Statement in the current recruitment process. This was a disclosure of information. The Tribunal concluded that the claimant believed that the information disclosed tended to show that there had been a failure to comply with a legal obligation, namely an obligation not to subject those who have made protected disclosures to detriments. The Tribunal concluded that that belief was, in the circumstances, reasonably held by the claimant. The Tribunal concluded that the claimant believed that the information disclosed was in the public interest, as the respondent is a public body. The Tribunal concluded that the claimant's belief was reasonably held. The Tribunal accordingly concluded that this was a qualifying disclosure. The disclosure was made in accordance with s43C(1)(a) ERA, so it was also a protected disclosure (**PD2**).

c. **The claimant's statement regarding the February 2022 Adviser Statement, which was attached to the claimant's email dated 17 March 2023.** The majority of the claimant's statement set out why she disagreed with the February 2022 Adviser Statement. While she

disclosed information in doing so, the information disclosed was not capable of tending to show one of the relevant failures set out in s43B(1) ERA and the claimant could not have held any reasonable belief that it did: the claimant was simply stating why she did not accept that the Adviser Statement was correct, to clarify her position. Her explanation was not, therefore, a qualifying disclosure. The claimant, separately, asserted that the final section of the statement, under the heading 'Potential Health & Safety Breaches' amounted to qualifying disclosures. In that section the claimant stated that no concerns had been raised with her prior to the February 2022 Adviser Statement and, despite the terms of the February 2022 Adviser Statement, there was no further contact with the claimant after that and the VDP successfully completed her training in July 2022 without any action being taken. While information was disclosed, the Tribunal concluded that it did not have sufficient factual content and specificity capable of tending to show that the health and safety of any individual had been, was being, or was likely to be, endangered. It was simply a statement that there was no further contact with the claimant after the February 2022 Adviser Statement and the VDP had then successfully completed her training in July 2022, without any action being taken. The information disclosed did not tend to show that the health or safety of any individual had been, was being, or was likely to be (in the context of it being probable or more probable than not), endangered and the claimant could not have held any reasonable belief that it did tend to show this. It was not therefore a qualifying disclosure.

d. **The claimant's statements to the respondent's complaints team on 22 March 2023.** The Tribunal's findings in relation to what the claimant stated to the complaints team are set out in paragraph 64 above. She stated that, by being denied the opportunity to discuss/receive any necessary training and support (which appeared to be fundamental to whether or not she would be appointed) prior to a decision being made, she was being subjected to discrimination/victimisation due to having brought Employment Tribunal proceedings, asserting race discrimination, the previous year. This was a disclosure of information. The Tribunal

concluded that the claimant believed that the information disclosed tended to show that there had been a failure to comply with a legal obligation, namely an obligation under the EqA not to subject individuals to acts of discrimination/victimisation or harassment. The Tribunal concluded that that belief was, in the circumstances, reasonably held by the claimant. The Tribunal concluded that the claimant believed that the information disclosed was in the public interest, as she understood the respondent was a public body with accompanying public sector equality duties, including the elimination of discrimination/victimisation. The Tribunal concluded that the claimant's belief was reasonably held in those circumstances. The Tribunal accordingly concluded that this was a qualifying disclosure. The disclosure was made in accordance with s43C(1)(a) ERA, so it was also a protected disclosure (**PD3**).

Victimisation/Detriment/Discrimination

112 The Tribunal then considered the actions/omissions asserted by the claimant in order to determine whether they amounted to a detriment and, if so, whether they were done:

a. because the claimant had done a protected act, contrary to s27(1) EqA; and/or

b. on the grounds that she had made a protected disclosure, contrary to s47B ERA

or, alternatively, whether they amounted to discrimination (as defined in s49B(3) ERA), because it appeared to the respondent that the claimant had made a protected disclosure.

113 In considering the actions/omissions asserted, where there was an overlap, the Tribunal considered these together. The conclusions reached by the Tribunal are set out below.

114 **A failure to give the claimant the opportunity to receive any training or support.** While the claimant referred the Tribunal to emails attempting to

secure a meeting, at which she stated she intended to request training and support, her request for this was made in December 2021 and efforts to secure that meeting were taken until around March 2022. This was well before any protected act (19 July 2022 and 9 March 2023) or protected disclosure (9, 17 & 22 March 2023). Failure to provide training or support could not have been because the claimant did a protected act or on the grounds of a protected disclosure prior to them occurring. The Tribunal therefore considered whether the respondent had failed to give the claimant the opportunity to receive any training or support in the period from 19 July 2022 onwards. The Tribunal concluded that they did not. The claimant has not pointed to any training or support she ought to have been provided by the respondent in that period. Rather, she expressly stated in evidence that she did not feel that she required any training or support and indeed was offended when this was offered by the respondent (for example in GG's email of 7 March 2023). In these circumstances, the Tribunal concluded that the claimant did not establish the detriment asserted. The complaints in relation to this accordingly do not succeed.

115 **Being subjected to allegedly humiliating comments from AM.** This was not asserted as an act of victimisation. Instead, the claimant relied upon this solely as a detriment on the grounds of making a protected disclosure. The Tribunal accepted comments made by AM in his email constituted a detriment. A reasonable person would or might take the view that they have been disadvantaged by the comments. There was no evidence however that AM was aware of any of the established protected disclosures. It was not asserted that he had been informed of the claimant's complaint of 9 March 2023 to GG&C HB, the terms of the claimant's email to GG on 17 March 2023, or the terms of the claimant's discussion with the respondent's complaints team on 22 March 2023. In these circumstances, the complaint in relation to this asserted detriment does not succeed.

116 **Denial of a fair recruitment process/fair trial.** This, to some extent, overlaps with the point below, so is addressed there. The Tribunal however separately considered the process followed by the respondent in relation to the provision to the 2023 Recruitment Panel of the February 2022 Adviser Statement, the

Response Document and the further comments from the Adviser. The Tribunal found this did not amount to a detriment as the process followed by the respondent was suggested by the claimant herself. In her email of 7 March 2023, GG explained that the February 2022 Adviser Statement would be provided to the Recruitment Panel. While, in her response of 13 March 2023, the claimant expressed some concerns in relation to that, she did not state that it should not be done. Instead, she suggested that there be an opportunity for her to submit additional comments and the Adviser to be asked whether he wished to make any additional statements. This is what was done. While the claimant later objected to that, in her email of sent on the evening of Friday 17 March 2023, by the time it was received by GG (on Monday 20 March 2023), it was too late to change the process which the claimant had previously agreed to: The Recruitment Panel were meeting to consider applications from 21-24 March 2023 inclusive. In these circumstances, the procedure adopted by the respondent did not amount to a detriment: it was not something about which a reasonable person would or may complain. The complaint in relation to this asserted detriment accordingly does not succeed.

117 **A failure to recruit the claimant as a Dental Vocational Trainer for the training year 2023/24**. The Tribunal found that this conduct was established. The Tribunal concluded that this amounted to a detriment. It was something about which a reasonable person may complain. The claimant was an 'applicant' for the purposes of s49B(2) ERA, as she was applying to an NHS employer for a contract to do work personally. The refusal of her application constituted 'discrimination' as defined in s49B(3) ERA. In considering causation, the Tribunal took into account its conclusions (set out at paragraphs 79-81 above) that CC was aware of PA1 and PD2. The Tribunal concluded however that CC was not aware of PA2/PD1 or PD3. The Tribunal was mindful of the burden of proof provisions in s136 EqA and r4(2) of the NHS Recruitment Regulations. The Tribunal considered all the evidence, other than the respondent's explanation for the conduct. The Tribunal determined that there were sufficient facts, and inferences which it was appropriate to draw from those facts, upon which the Tribunal could conclude, in the absence of an explanation from the respondent and on the balance of

probabilities, that the decision not to recruit the claimant as a VT for the training year for 2023/24 was an act of victimisation, or that it amounted to discrimination for the purposes of the NHS Recruitment Regulations. In reaching this conclusion the Tribunal was conscious that something more than evidence of a protected act/protected disclosure and detriment/refusal of the application is required. The Tribunal took into account a number of factors in reaching this conclusion, including the following:

a. The fact that the respondent did not observe the provisions of the Equality and Human Rights Commission's Code of Practice on Employment - for example, a marking system was not provided to or agreed by the Recruitment Panel – instead, as CC confirmed in his evidence, they based their decisions on 'instinct' and 'what felt right'. In addition, records were not created or kept detailing why the Recruitment Panel reached the decisions they did. The Tribunal concluded that it could be inferred that this was not done to mask discriminatory decisions.

b. The fact that DF's letter dated 22 April 2022 was produced to the Recruitment Panel on 24 March 2023. No explanation was provided to the Tribunal as to why this was done and why CC, as chair of the Recruitment Panel, did not object to this. No such additional information was provided in relation to other applicants. The Tribunal concluded that there was no legitimate reason for this letter to be produced to the Recruitment Panel when they were considering the claimant's application. It informed the Panel that DF, the Dental Postgraduate Dean, as well as CC, the chair of the current Recruitment Panel, had previously considered the claimant's application and refused it, after it had been refused by a previous Recruitment Panel. It also alluded to previous legal proceedings in relation to the previous application process and prompted a discussion in relation to that. The Tribunal concluded that it could be inferred that this letter was provided to adversely influence the Recruitment Panel because the claimant had done protected acts or made protected disclosures.

118 The Tribunal accordingly concluded that the burden of proof shifted to the respondent to prove that they did not victimise the claimant or discriminate

against her, as defined in the NHS Recruitment Regulations. The Tribunal did not accept that the reasons put forward by the respondent for refusing the claimant's application (as stated in the reasons prepared by CC on 28 April 2023) were legitimate, or that they constituted a valid basis upon which the application could be refused. In relation to each, the Tribunal reached the following conclusions.

a. **Comments from Health Board**. CC's evidence was that these were taken into account, and relied upon to refuse the claimant's application, despite there being no valid basis to do so. The respondent's guidance *'Becoming a Vocational Trainer'* stated that *'Any disciplinary or probity actions initiated by the GDC and/or health board will be taken into account when suitability to become, or remain as, a trainer is being assessed.'* There was no evidence of any such action being initiated by the GDC or the health board. The information from GG&C HB indicated simply that there had been a *'recent acrimonious interaction'*. Whilst it was stated that the incident had been 'logged' by staff members, there was no suggestion of any disciplinary or probity action being initiated by GG&C HB in relation to the claimant's actions. Instead, it was clear that the claimant had in fact complained about the interaction and that GG&C were in the process of providing a formal written response to the claimant in relation to the concerns she had raised. The comments did not provide any legitimate basis for refusing the claimant's application to become a VT.

b. **Claimant's Response to the Adviser Statement.** As stated above, the Tribunal concluded that, in the Response Document, the claimant factually addressed the points of concern raised in the Adviser Statement, and did so in an appropriate manner: The tone of the Response Document was not confrontational. It did not provide any legitimate basis for refusing the claimant's application to become a VT.

c. In evidence to the Tribunal, CC stated that the Recruitment Panel felt that the claimant had not addressed or clarified the concerns raised in the February 2022 Adviser Statement, so they remained concerned as to whether she could deliver a safe and supportive training placement. CC stated that the Recruitment Panel's concerns related to the claimant's

attendance at the practice and the nursing support available to the VT. He was unable however to provide any credible explanation as to why the Recruitment Panel had these concerns and why any concerns which the Panel may have had in relation to these issues were not satisfied by the terms of the Response Document.

d. In relation to nursing support, he accepted that the respondent's guidance stated that it was merely 'preferable' that the VT be supported by a qualified Dental Nurse. It was not a requirement. He agreed that a score of 2 indicated that, any matters which there had been, had been resolved and that, in any event, the claimant had stated in her Response Document that both nurses in her practice were now fully qualified. He could accordingly not provide any credible explanation as to why the Recruitment Panel considered this remained an issue which would merit the refusal of the claimant's application to become a VT in 2023, or why the Recruitment Panel felt that that nursing support had not been explained or addressed by the claimant in her Response Document.

e. In relation to the claimant's attendance at her practice, CC agreed that the claimant had stated in her 2023 application form the hours that she would be in the practice going forward, together with the hours available for a VT, and that this covered the minimum requirement. He accepted that the scores allocated to the claimant for both attendance and support in the Adviser Statements had dramatically decreased, from the maximum of 10 to the minimum of 0, in the space of 4 months. He also accepted that the claimant had explained in her Response Document, in response to that particular point, that her husband had been hospitalised as a result of a brain haemorrhage at the start of 2022, which was very worrying for her and also led to her having additional responsibilities, particularly in relation to her autistic child. CC could not provide any credible explanation as to why, in light of these points, the Recruitment Panel considered this remained an issue which would merit the refusal of the claimant's application to become a VT in 2023, or the basis upon which the Recruitment Panel considered that attendance had not been explained or addressed by the claimant.

119 The Tribunal accordingly did not accept that the issues, stated by CC as being the Recruitment Panel's outstanding concerns, were genuinely held by the Recruitment Panel, or that they provided a legitimate basis for refusing the claimant's application to become a VT.

120 Given that the Tribunal did not accept that the respondent had shown any genuine or legitimate reasons for refusing the claimant's application, the Tribunal found that that the respondent had not discharged the burden of proof on them to demonstrate that the decision not to appoint the claimant was in no way whatsoever because of protected acts or protected disclosures. It is also noted, in relation to this point that the respondent only led evidence from CC in relation to the decision not to appoint the claimant, despite the decision being taken by a panel of 3. The Tribunal heard no evidence about the motivation of the other two decision makers. As the respondent has not discharged the burden of proof, it is necessary for the Tribunal to conclude that the complaint should be upheld.

121 Even if the Tribunal had not reached this decision however, the Tribunal were satisfied, from the facts and the inferences appropriate to draw from the facts, that PA1 and PD2 each significantly influenced the decision not to appoint the claimant. In reaching this conclusion, the Tribunal took into account the following:

a. CC was well aware of PA1 & PD2, as set out above. PA1 was discussed amongst the Dental Leadership Team and PD2 was discussed in the course of the extensive discussions CC had with HR in relation to the claimant's 2023 application and how this should be handled.

b. The fact that the respondent took steps to adversely influence the other panel members, by providing them with the April 2022 letter from DF to the claimant, prompting a discussion to ensure that they were also aware of the fact that the claimant had raised legal proceedings in relation to her previous application.

c. The fact that, as set out in paragraph 118 above, the reasons put forward by the respondent, over a month after the Recruitment Panel met, as the reasons for not recruiting the claimant, were not genuinely held or

legitimate. The Tribunal concluded that it should be inferred, instead, that they were put forward to mask the real reasons for not recruiting the claimant, namely the previous proceedings she raised asserting that the Dental Leadership Team's previous refusal of her application constituted race discrimination (PA1), and she was continuing to raise concerns in relation to her current application (PD2). In reaching this conclusion the Tribunal also took into account the fact that, when describing the Recruitment Panel's deliberations, CC stated that the panel formed their conclusions based on instinct, that the claimant's application was rejected because *'instinctively it didn't feel quite right'*, rather than stating the points later asserted, and no records were kept detailing any reasons for why the panel reached the conclusions it did.

d. The fact that the respondent further sought to undermine the claimant and justify their own actions in refusing the claimant's actions, by stating that her statement was confrontational, when it was not.

122 The decision not to recruit the claimant as a VT in 2023 therefore amounted to victimisation, discrimination under the NHS Recruitment Regulations and a detriment for making protected disclosures, contrary to s47B ERA.

123 **Freedom of expression/accusing the claimant of using a confrontational tone and seeking to invalidate the merit of the claimant's statement.** As stated above, the Tribunal concluded that the tone of the Response Document was not confrontational. The Tribunal concluded that CC, in stating this to the claimant on 28 April 2023 was seeking to undermine the merits of the claimant's Response Document, to justify the decision not to recruit her as a VT. The Tribunal found that that decision not to recruit the claimant was significantly influenced by PA1 and PD2. The Tribunal concluded that CC's further steps to justify that decision, and undermine the claimant's Response Document, was also significantly influenced by PD2. It accordingly also amounted to a detriment for making protected disclosures, contrary to s47B ERA.

Timebar/Jurisdiction

124 The Tribunal considered the relevant time limits and whether the established complaints were brought within those time limit. The Tribunal concluded that the relevant time limits started to run on the following dates:

a. In relation to the failure to appoint the claimant, from 24 March 2023; and

b. In relation to the feedback provided by CC following the recruitment process, from 28 April 2023.

125 The Tribunal found that the established detriment complaints constituted a 'series of similar acts or failures' for the purposes of s48(3)(a). The decision not to recruit, and the feedback provided in relation to that were clearly linked. Time in relation to the detriment complaints accordingly started to run from the last of the established detriments, namely 28 April 2023. The complaints in relation to that were lodged in time.

126 For the purposes of complaint of victimisation and the complaint under the NHS Recruitment Regulations, the Tribunal has a wide discretion to allow claims to proceed, notwithstanding the fact that they are not submitted within 3 months of the date of the act to which the complaint relates, where the Tribunal is satisfied that they are submitted within *'such other period as the employment tribunal thinks just and equitable'*.

127 The Tribunal noted that the claimant understood that time started to run from the date she was informed that she had not been recruited as a VT for 2023, namely from 11 April 2023, rather from the date of the decision. Early conciliation took place from 5-20 July and the claim was presented on 28 July 2023. She understood that her claim was accordingly presented on time. She remained of this view even during submissions, when it was apparent that she could not understand why the respondent was asserting that there may be an issue in relation to timebar.

128 The Tribunal noted that any delay in raising the complaints was very short and that cogency of evidence was not impacted.

129 The Tribunal considered these points, and the prejudice each party would suffer as a result of allowing or refusing an extension of time. The Tribunal noted that the claimant would be denied a right of recourse, if time is not extended, and that the respondent was able to respond to each of the allegations levelled against them at the final hearing. Taking into account the prejudice which each party would suffer as a result of refusing an extension of time, and having regard to all the circumstances, the Tribunal was satisfied that the complaints were raised within such other period as was just and equitable.

130 The Tribunal accordingly has jurisdiction to consider the complaints of victimisation and under the NHS Recruitment Regulations.

Remedy

131 The claimant lost the gross sum of £9,073.89 per month as a result of not being a VT in 2023/24. This represented the Training Grant, plus the average income generated by the VDP (calculated with reference to the sums received in 2021/22), less the additional expenses incurred as a result of having a VDP. Over the year, this amounted to the gross sum of £108,886.68. Assuming an income tax rate of 47% and national insurance at 2% the net sum would be £55,532.21. The Tribunal make an award for this sum. The Tribunal considered the respondent's submission that there was no guarantee that the claimant would have been allocated a VDP, even if she had been found to be appointable. The respondent did not however give evidence as to number of VT's found to be appointable in 2023 and the number of VDPs that year. The Tribunal also noted that the claimant's evidence was that, in previous years when she had been deemed appointable as a VT, she had been allocated a VDP. Given this, the Tribunal considered an award for the full net sum of £55,532.21 was appropriate.

132 The Tribunal also considered it appropriate to make an award for injury to feelings. The Tribunal noted that the claimant was extremely upset at the decision not to appoint her, as well as the feedback subsequently provided to her, and this had an ongoing impact on her, as she remains distressed by the

respondent's decision. It impacted her reputation and professional experience/credentials. The Tribunal concluded that one award was appropriate given that, whilst the Tribunal upheld a number of different complaints, they related to the same factual issue, namely the decision not to appoint the claimant as a VT for the year 2023/24. In the circumstances, the Tribunal considered that an award in the mid Vento band was appropriate, namely £12,000, plus interest of £1,004.71 (calculated from 24 March 2023 to the calculation date, at the prescribed rate of 8%).

Employment Judge Sangster

Employment Judge

08 April 2024

Date of Judgment

Date sent to parties 09/04/2024