EMPLOYMENT TRIBUNALS

Claimant: Ms S Balogun

Respondent: The Secretary of State for Justice

Heard at: Manchester **On:** 12 October 2023 & 12-14 March 2024

Before: Employment Judge Phil Allen
Mr B Rowen
Mr S Moules

REPRESENTATION:

Claimant: Mr B Culshaw, solicitor (on the first day) and In-person (for the remainder)

Respondent: Ms L Amartey, counsel (on the first day) and Ms J Moore, counsel (for the remainder)

JUDGMENT having been sent to the parties on 25 March 2024 and written reasons having been requested by both parties in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant is employed by the respondent as an Administrative Officer. She has been employed since 21 January 2008. Since 2014 she has been a member of the Pre-Court and Listing team at Manchester Magistrates Court. It is agreed that the claimant did a protected act by raising a grievance on 17 November 2021. The claimant alleged that she was subjected to a detriment because she had done so. The respondent accepted that Mr O'Bryan lodged a formal grievance on 1 February 2022 (dated 27 January 2022) and the claim arises from that grievance and/or what was said in it.

Claims and Issues

2. The claimant's claim when entered included other claims, in addition to her claim for victimisation. Her claims for direct race discrimination and harassment related to race (the claimant is a black woman) were dismissed on withdrawal with a Judgment dated 29 July 2022, sent to the parties on 15 August 2022 (71).

3. Preliminary hearings (case management) were conducted on 28 July 2022 and 8 December 2022. The case management order made following the first hearing (59) confirmed the issues and attached a draft list of complaints and issues. At the second hearing, the claimant's application to amend her claim for victimisation was refused. The case management order made following that hearing (112) stated that there was a single claim of victimisation which remained. The single detriment relied upon was recorded as being "*Unsubstantiated complaints raised about her*" because of the protected act relied upon (the grievance of November 2021).

4. The first day of this final hearing took place on 12 October 2023. The case had been listed to be heard in one day and it was immediately apparent that the case would not be heard in the time allocated. On the first day of hearing, the claimant was represented by Mr Culshaw, a solicitor who had first been instructed the day before the hearing.

5. At the start of the hearing there was a disagreement about the issues to be determined. In the bundle of documents for the hearing, there were two lists of issues: one prepared by the respondent; and one prepared by the claimant. At the start of the hearing, the claimant's solicitor handed up a further proposed revised list of issues prepared on the claimant's behalf. The respondent objected to the claimant's revised list of issues.

6. When the lists of issues were discussed, it became clear that the Tribunal needed to determine two things: whether the issues identified by the claimant's solicitor were part of the pleaded case; and, if not, whether leave to amend should be granted. Submissions were heard and a decision was reached. We did not find that the case as pleaded included the additional detriment upon which the claimant's solicitor sought to rely. We refused the application to amend. The parties were informed of the decision with brief reasons. The written reasons for our decision were confirmed in a case management order dated 12 October 2023 and sent out after the first day of hearing.

7. After we reached our decision on the issue addressed above, the claimant's solicitor highlighted that what was referred to in paragraph 37 of the grounds of claim was unsubstantiated complaints in plural. He, accordingly, listed a number of matters contained in Mr O'Bryan's grievance document which he contended should be considered by the Tribunal as being the unsubstantiated complaints upon which the claimant relied. The respondent contended that the list provided was problematic because it was not the claim brought and was not the claim as it had been clarified in the lists of issues. The respondent contended that what the claimant was now seeking to rely upon were additional allegations. We heard submissions from each of the parties about the list of matters raised by the claimant's solicitor at the hearing. We decided that the claimant was only able to pursue her claim that the alleged detriment was Mr O'Bryan's assertion in his grievance of the unsubstantiated allegation that the claimant had accused him of being "*all over*" a colleague. She was not able to pursue her claim based upon the other alleged unsubstantiated complaints which her solicitor had listed in the hearing. The reasons for the decision were briefly explained to the parties. The written reasons for our decision were confirmed in the case management order dated 12 October 2023 and sent out after the first day of hearing.

8. The parties were ordered to agree a revised list of issues prior to the hearing reconvening. They did so and a revised list of issues was provided for the start of the second day of hearing (574). The liability issues were agreed as being as follows (all being in relation to victimisation):

1.1 It is accepted that the claimant did a protected act by raising a grievance on 17th November 2021.

1.2 It is accepted that Mr O'Bryan lodged a formal grievance on 1st February 2022, dated 27th January 2022, in which he stated that the claimant had accused him of being "*all over*" a female colleague.

1.3 Has the claimant proven that Mr O'Bryan lied when he said the claimant had accused him of being "*all over*" a female colleague?

1.4 If so, did the respondent subject the claimant to a detriment by doing so?

1.5 If so, has the claimant proven facts from which the Tribunal could conclude that it was because the claimant did a protected act?

1.6 If so, has the respondent shown that there was no contravention of section 27 [of the Equality Act 2010]?

9. The list of issues also included issues which related to remedy. It was agreed on the first day of hearing (and included in the case management order sent out following that first day), that the hearing listed would determine liability issues only. The complexity of the potential remedy issues meant that a separate remedy hearing would be required if the claimant succeeded in her claim.

Procedure

10. As described in the claims and issues section above, the hearing commenced on 12 October 2023 when only one day had been set aside for it to be heard. The hearing was adjourned part-heard at the end of that first day. No evidence was heard on that day, the applications explained above having taken most of the day to be determined, and it having been agreed (in the light of the claimant's preference) that all evidence should be heard during the same single period of the hearing. As the Tribunal panel had spent time reading the witness statements and documents, it was considered appropriate for the case to be part-heard, with the same panel hearing the evidence and submissions when the case reconvened.

11. On the first day, the claimant was represented by Mr Culshaw, solicitor. When the hearing reconvened, the claimant represented herself. On the first day, the respondent was represented by Ms Amartey, counsel. The hearing was listed for the additional dates even though the respondent's counsel had a prior engagement on those dates, as we considered that the importance of arranging the remaining dates for hearing in the near future merited the hearing being listed on those dates even taking into account the respondent's representative's reason for potential non-availability. When the hearing reconvened, the respondent was represented by Ms Moore, counsel.

12. The hearing was conducted as a hybrid hearing. Both parties, all witnesses, and the panel, were present in Manchester Employment Tribunal. The respondent's solicitor attended by remote video technology. That arrangement was agreed by the Tribunal in advance of the hearing. The same arrangements applied for both parts of the hearing.

13. An agreed bundle of documents was prepared in advance of the hearing. The bundle initially ran to 554 pages. Some additional pages were added to the bundle for the second day of hearing (as well as clearer copies being provided of some other pages) with the agreement of both parties. The bundle ultimately ran to 575 pages. Where a number is referred to in brackets in this Judgment, that is reference to the page number in the bundle. We read only the documents in the bundle to which we were referred, including in witness statements, or as directed by the parties.

14. We were provided with witness statements from the claimant and (for the respondent) from Matthew O'Bryan and Leanne Lockwood. We read the witness statements on the first day of hearing. Those statements remained unchanged for the second day of hearing, as had been ordered/agreed.

15. On the morning of the second day of hearing (the first reconvened day), we heard evidence from the claimant, who was cross examined by the respondent's representative, before we asked her questions. The claimant was also given the opportunity to raise what she would have asked herself by way of re-examination. Ms Lockwood gave evidence for the respondent on the afternoon of the second day, was cross examined by the claimant, we asked questions of her, before she was re-examined by the respondent's representative. The same process was followed on the third day (the second reconvened day) for Mr O'Bryan.

16. After the evidence was heard, each of the parties was given the opportunity to make submissions. At the start of the second day, the respondent's counsel had provided a short document outlining the legal principles which she said applied and she provided copies of four cases upon which she relied (as well as some extracts from the Equality Act 2010). At the end of the evidence, the claimant asked for additional time to prepare for submissions, and we therefore adjourned at the end of an extended morning session on the third day, and resumed on the fourth day, so that the claimant had the time she sought to prepare her submissions. Both parties provided written submissions on the morning of the fourth day (as had been agreed). Those submissions were read, and the parties were also provided with the opportunity to make oral submissions on the morning of the fourth day, which they both did.

17. After an adjournment for us to reach our decision, we informed the parties of our decision and the reasons for it in the afternoon of the fourth day of the hearing (the third reconvened day). The written Judgment was provided. The parties have both subsequently requested written reasons, so these written reasons have been prepared.

Facts

18. We were presented with a lot of evidence, much of which was not directly relevant to the limited issues which we needed to determine. The bundle of documents and the claimant's witness statement included evidence which went beyond the issues we needed to determine, and which addressed matters which had been withdrawn/dismissed and/or for which leave to amend had not been granted. This Judgment does not seek to address every point about which evidence was provided or upon which the parties disagreed. It only includes the points which we considered relevant to the issues which we needed to determine.

19. The claimant started her employment on 21 January 2008 at Trafford Magistrates' Court. In 2015 she moved to work at Manchester Magistrates' Court. She is an Administration Officer. She works within His Majesty's Courts & Tribunals Service (known as HMCTS). From 2020 she additionally volunteered to take on duties as Equality, Inclusion and Diversity Lead. Her substantive duties were in the Pre-Court Team.

20. Mr O'Bryan commenced working as an Administrative Officer based at Manchester Magistrates' Court in the Pre-Court Team in May 2018. In August 2020 he became the temporary Team Leader for the Pre-Court Team. As a result, he became the line manager for the claimant and others. In October 2021 he became the Team Leader for a different team (still based at Manchester Magistrates' Court). In December 2022 (that is after the events about which we heard evidence) he resigned and commenced new employment with a different Civil Service department. Mr O'Bryan agreed in cross examination that he and the claimant were very close prior to January 2021 and there were no issues with the claimant prior to that date.

21. We were provided with the Ministry of Justice Grievance policy and guidance (399), which it was agreed applied to grievances raised in this case at the time. Within a section on the process for resolving grievances (407), there is reference to the fact that workplace mediation may help to resolve the problem and should be considered at any stage of the process. The process in the document also refers to employees trying to resolve any problems themselves at first instance, with matters to be raised with their manager only when all reasonable attempts to resolve the problem had proved unsuccessful. The policy says the manager should then attempt to resolve the matter through management action. The policy thereafter provides for the usual stages of: a written grievance; a grievance meeting; a decision; and an appeal.

22. Mr O'Bryan placed some emphasis, when asked about the procedure, on a flow chart which provided an overview of the process (410). It was his evidence that he had not been aware of the policy prior to the issues about which we heard evidence. That overview chart recorded, as an entry between those for employees resolving issues themselves and a formal grievance being submitted, "*Management action including Workplace Mediation. If unsuccessful*". The procedure did not contain a section which explicitly addressed fact-finding investigations, such as that undertaken by Ms Qualters.

23. On 4 January 2021, Ms Browne moved to the Pre-Court Team from another department. She was provided with some training. Mr O'Bryan's evidence was that

he asked Mark Bines to assist Ms Browne with her induction training on 4 and 5 January 2021. It was Mr O'Bryan's evidence that he went to speak to Ms Browne on 6 January and had a brief chat with her and Mr Bines. During his cross-examination, Mr O'Bryan referred to needing to address an HR issue on 4 and 5 January which had meant he was unavailable. It was the claimant's evidence that she observed both Mr Bines and Mr O'Bryan providing face to face training to Ms Browne on both 5 and 6 January 2021. We did not hear evidence from either Mr Bines or Ms Browne.

24. It was the claimant's evidence, that training should not have been provided face to face at the time due to the Covid-19 pandemic and the restrictions in place at the time. She said training should have been provided using Microsoft Teams. We were provided with an email from Mr O'Bryan providing a guide to remote training (448), which the claimant believed was advice that training should be provided remotely where possible, and Mr O'Bryan described as being simply tips for providing remote training.

25. On 6 January, the claimant spoke to two of her colleagues about the training being provided to Ms Browne. She spoke to Hyacinth Thompson, an Administrative Officer in the Pre-Court Team. She spoke to Aaron Gallagher, someone who had worked with Ms Brown in her previous team. In the limited evidence given by the claimant in her witness statement about what was said, she said she discussed how inappropriate it was.

26. It was the claimant's evidence that, on 6 January, Mr Gallagher told Mr Bines and Mr O'Bryan to stop, albeit she accepted in cross-examination she had not witnessed any such conversation. We did not hear evidence from either Ms Thompson or Mr Gallagher (but their accounts as recorded during investigations were contained in the bundle). Mr O'Bryan denied that he had a conversation with Mr Gallagher on 6 January.

27. The claimant's evidence was that both Mr Bines and Mr O'Bryan asked the claimant if she had told Mr Gallagher "*to which I admitted and told them it was cringy*". In her evidence before us, the claimant said that when she had referred to "*cringy*" she had meant the Covid guidelines not being followed, and it being double standards: do as I say and not what I do. It was a word which she said she used to mean embarrassing and why am I seeing this?

28. Mr O'Bryan's evidence about when he first spoke to the claimant about the training was unclear and inconsistent. When he was being cross-examined and was expressly asked by us, he was very clear that he first spoke to the claimant about it on 6 January. However, in other documents and on other occasions, he denied that a conversation about the issue took place with the claimant prior to 11 January.

29. It was common ground that the claimant and Mr O'Bryan spoke on 11 January. The conversation (at least following an initial discussion) took place in the post room. That conversation was, in part, about other issues not related to those we needed to determine. It was Mr O'Bryan's evidence that it was a private conversation without anyone else being a party to it. The claimant's evidence was that Ms Thompson was also a part of the conversation.

30. It was Mr O'Bryan's evidence that the claimant said that "*Mr Bines and I had been "all over" Ms Browne and she found it "cringy"*". The claimant acknowledged the discussion on 11 January, but denied it was about the training. As already explained, she agreed that she had described the conduct as "*cringy*" but on a different date. In cross-examination, the claimant denied that she had ever said that Mr Bines and/or Mr O'Bryan were "*all over*" Ms Browne. She explained that comment as being non-sensical when the locations of the individuals were considered during the training, as she described Mr Bines as being between Mr O'Bryan and Ms Browne and therefore the claimant did not see how she could have described Mr O'Bryan as being "*all over*" Ms Browne. Mr O'Bryan's evidence was that he could clearly recall what the claimant had said to him and those were the words she had used.

31. In his evidence, Mr O'Bryan described the conversation as having really upset him and as having played on his mind between 11 and 12 January.

32. We were shown some text messages between Mr O'Bryan and Ms Qualters on 11 and 13 January (135). Ms Qualters was Mr O'Bryan's manager's manager, but, as he was acting up, Mr O'Bryan thought it appropriate to raise matters directly with her. In a text, on 11 January, Mr O'Bryan expressly referred to other matters such as the alleged cliques, but not explicitly to the alleged "*all over*" comment. It was Mr O'Bryan's evidence that he spoke to Ms Qualters and another manager in telephone conversations as well as messaging. Later, on 11 January, Ms Qualters attended the office and Mr O'Bryan spoke to her. On 13 January, Mr O'Bryan texted Ms Qualters and said (137), "*Im just writing up on what has happened to Sheri due to the accusions I will be taking this further and want to put in a formal complaint as this is technically classed as Slander*". Ms Qualters' texted response said that Mr O'Bryan would have her full support.

33. At 14.30 on 13 January Mr O'Bryan emailed Mr Johnson (Team Leader in the Pre-Court Team) and Ms Qualters (139) and said that he wished to make a formal complaint. He attached a lengthy document which set out various matters, but which commenced with addressing the issues relevant to this claim (140). He said that the claimant had criticised him in the open plan office on 11 January and then:

> "*I took her to the post room to comply with Social Distancing as you are allowed 2 people in that room. I told Sheri that I do take my role seriously and whatever the issue I would deal with it. She mentioned that the previous Wednesday 6th January 2021, I will be quoting her words.*
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> *"You and Mark were all over Katie (the new starter) and it was Cringy."*

34. Later in the same document (141) it was stated that in the meeting "*this morning*" the claimant had "*again brought up the Katie accusation*". It might have been thought from the document that it referred to a further meeting on 13 January (the date when it was sent), but in fact in his evidence and, in particular, in his answer in re-examination, Mr O'Bryan's evidence was that the 11 January was the "*this morning*" referred to. It was not clear from Mr O'Bryan's evidence why he used the word "*again*" or when it was he said was the second such discussion suggested by the use of the word.

35. During his cross-examination in the hearing, Mr O'Bryan answered some questions asked about apparent inconsistencies in the accounts he provided in the internal procedures, by emphasising that the account which he gave in the document on 13 January 2021 was the one written at a time closest to the events and being the one upon which he relied.

36. We were provided with an exchange of emails between Ms Qualters and Mr O'Bryan between 19 and 22 January 2021 which followed from 13 January email (145). Ms Qualters informed Mr O'Bryan that she would be speaking to the claimant about the issues. There was reference to the possibility of addressing the matter formally through mediation or through the formal grievance policy. Mr O'Bryan said:

> "*I've read through the Grievance information on the intranet and it says to try to resolve it informally to begin with so if we try that route this time round please just stress that I will take it further next time if there anymore accusations about preferential treatment of any member of staff as I do not treat anyone differently"*

37. In the emails, Ms Qualters told Mr O'Bryan that she had spoken to the claimant and informally was not going to work. She said she had told the claimant that Mr O'Bryan would be lodging a grievance (146). Mr O'Bryan asked what he needed to do next? Ms Qualters told him that he did not need to do anything yet, as she needed to discuss it with others (145). She said, "*I'm thinking of getting mediation for all the team*".

38. We did not hear evidence from Ms Browne herself. We were provided with a note of questions Ms Qualters asked Ms Browne and the answers given as part of the fact-finding (159). Ms Browne was recorded as having described it as a "*generally ridiculous situation*". There was no evidence whatsoever that Ms Browne had herself felt uncomfortable or had raised any complaint about the training she received or the manner of her training, either in relation to Mr Bines or Mr O'Bryan.

39. Within the notes provided from the fact-finding investigation, were summaries of interviews with Ms Thompson (159), Mr Bines (160), and Mr Gallagher (161). In the latter there was reference to the claimant apparently having said to him that Mr O'Bryan and Mr Bines were all over Ms Browne, although the note said that Mr Gallagher did not know word for word. As the respondent's representative very fairly highlighted, we did need to take into account the lack of clarity in the notes and the absence of any witnesses involved in them, when assessing their weight.

40. It was common ground between the parties, that at the end of her fact-finding investigation, Ms Qualters had a meeting with both the claimant and Mr O'Bryan together. They were told that there was a difference of opinion about what had been said and they were going to need to agree to disagree. No further action would be taken.

41. In September 2021, Ms Qualters emailed Mr O'Bryan about mediation (181) and he agreed to try it. In her submissions, the respondent's representative highlighted the content of those emails. We would observe that the reason for mediation being proposed in those emails was not as a result of a continuation of the fact-finding investigation undertaken earlier in the year, but rather was because of

difficulties which Mr O'Bryan was having in managing the claimant. Mr O'Bryan asked to be kept up to date, and Ms Qualters agreed that she would (179). The claimant was not copied into or sent those emails. We were not provided with any evidence which showed Ms Qualters progressing the proposed mediation (we did not hear evidence from her).

42. It was the claimant's evidence that the first-time mediation was raised with her was on 9 November 2021 at the time when a grievance form was requested. She refused mediation as she did not think it was appropriate at that time. In her witness statement, Ms Lockwood had suggested that the claimant had rejected mediation in September 2021, but at the start of Ms Lockwood's evidence (and in the light of having heard the claimant's evidence), Ms Lockwood corrected her statement and agreed that there was no evidence that the claimant had rejected mediation prior to November 2021. There was no evidence that Mr O'Bryan knew anything about the progress of mediation or the claimant's rejection of it, prior to his interview with Ms Lockwood in January 2022. In his witness statement, he referred to assuming that there had probably been delays in arranging for an external mediator because of the effects of the Covid-19 pandemic. Mr O'Bryan did not follow up the lack of mediation.

43. On 1 October 2021 Mr O'Bryan became the Team Leader for a different team (still based at Manchester Magistrates' Court). Mr Johnson became the claimant's line manager.

44. The claimant raised a formal grievance on 17 November 2021 (201). She alleged discrimination. It was not in dispute that the claimant did a protected act when she raised the grievance. As a result, it is not necessary for us to record what was alleged within it (it did clearly assert discrimination). The claimant made no reference in her grievance document to the matters which formed the issues in this claim. It was Mr O'Bryan's evidence, that he did not see the content of the grievance document until he saw it in the course of these proceedings.

45. Ms Lockwood was appointed to investigate the claimant's grievance. It was her evidence that she volunteered to do so and was appointed by the commissioning manager. She is a Delivery Manager. This was the first discrimination-related grievance which she had investigated. We heard evidence from Ms Lockwood and found her to be a genuine and credible witness who made concessions where appropriate during cross-examination.

46. On 20 December 2021, Ms Lockwood interviewed the claimant. Notes were taken by a note-taker. They were not verbatim. We were provided with the full notes incorporating amendments made by the claimant after the first draft of the notes had been sent to her (204) and (at the start of the second day) with the notes which showed the amendments made by the claimant as tracked changes to the first draft of the notes (557). It was Ms Lockwood's evidence that, for much of the meeting, the claimant spoke and explained the grievances she was raising. The notes did not specifically record questions asked or where things were said in response to a question, but it was Ms Lockwood's evidence that most of the content was the claimant's own account. In that meeting, the claimant referred to the issues with Ms Browne's training which had occurred on 5 and/or 6 January 2021.

47. What the claimant said during the meeting, in relation to the events relevant to this claim, was set out in the notes:

> "*on 5th and 6th Jan, Sheri noticed Katie was sitting diagonally from her on the next bank of desks, with two 'gang' members conducting training with her. Sheri thought this was extraordinary as normally only one person conducts the training. As well as this, they were stood up in a straight line along the side of her. Sheri described the training as the 'gang' members playing a game of who can give her the last word and who could give her the most information. Sheri, during this time, had to get up away from her desk to refocus a few times as it was not only very lengthy over 2 days and but also very distracting…*
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> *On 6th January, Sheri went to another member of staff from the same team and narrated the situation whilst it was happening describing what was happening with the 'gang' and Katie… she stated that look what happens if your face t fits in or not with the team/'gang' and if it does not stop soon, she will speak to Katie's best friend Aaron. The training was still happening, and Sheri then spoke to Aaron from another team, she narrated it to him and told him to look at the training that was going on … Shortly after this conversation, the 'training' stopped. Matthew with Mark beside him asked Sheri if she had told Aaron he was training Katie and Sheri said yes, I did because it was cringing!!! He said I had brought out the green-eyed monster in Aaron."*

48. When Ms Lockwood was asked what she had understood had been meant by the claimant when she referred to the green-eyed monster, she explained that she understood that Mr Gallagher and Ms Browne were friends and that by telling him that two male members of staff were training her, that would make him jealous.

49. The reference to gang members, was confirmed by the claimant as being a reference to Mr Bines and Mr O'Bryan. Whilst not relevant to the issues we needed to determine, an aspect of the claimant's grievance was that there was a clique in the office and, in this meeting, she referred to those she perceived to be a part of that clique as being members of a gang.

50. Later in the account given in the meeting the claimant went on to say:

> "*When Sheri met with Fiona, Fiona suggested that Sheri had implied that Matthew was a sexual predator. This was the first Sheri had heard of anything being accused and it coming to her attention … Sheri thought this was accused to switch the narrative as the two gang members were called out for training inappropriately … Fiona done the investigation and Fiona's outcome was Sheri and Matthew would have to agree to disagree on the sexual predator allegation. Sheri said the situation was sorted out to a degree"*

51. Within that part of the meeting there was reference to an implication by the claimant that Mr O'Bryan had been a sexual predator. Those words appeared to have been used in the meeting by the claimant herself. In the Tribunal hearing, it was not in dispute that: the claimant had not accused Mr O'Bryan of being a sexual predator; and Mr O'Bryan had never alleged that she had done so. It appeared that the phrase had been used by Ms Qualters initially as an incorrect phrase

summarising the training-related issues, and that had been adopted on occasion during the investigation. In her own witness statement provided for Ms Lockwood's internal investigation (230), Ms Qualters referred to the claimant as having denied saying the sexual predator comment. It was very clear to us that the use of the phrase sexual predator within the respondent's internal proceedings had been an inaccurate summary of what was alleged, and its use had clearly not been helpful in de-escalating the situation.

52. On 20 January 2022 Ms Lockwood emailed Mr O'Bryan and introduced herself as the investigating office for a grievance submitted by the claimant (467). He was informed that he had been identified as a person involved or as a witness. Ms Lockwood asked to meet with Mr O'Bryan. Mr O'Bryan responded by email and informed Ms Lockwood that there had been a previous grievance which he had raised. He also asked for a summary of what he was accused of in a later email. Ms Lockwood provided a summary within which she referred to staff-training and the fact-finding exercise conducted by Ms Qualters (and queried whether that was the grievance to which Mr O'Bryan had referred). Ms Lockwood did not state that the grievance alleged discrimination.

53. It was Ms Lockwood's evidence that the only communication she had with Mr O'Bryan in advance of her meeting with him, was the exchange of emails in the bundle.

54. On 27 January 2022 Mr O'Bryan met with Ms Lockwood and a statement was produced recording what he had said (232). What he said about the investigation and later potential mediation, was (235):

> "*Matthew sent Fiona an email outlining and raising concerns he had with Sheri, one being the 'Cringy, all over Katie' comment. He then had a meeting with her, and Fiona said it would be up to him if he took the matter further. She provided him with the grievance process, but Matthew ultimately decided to have the investigation done in-house. Fiona then set up a fact finding and held private meetings. This then resulted in Fiona holding a meeting with himself and Sheri. He felt Sheri had lied about the accusations. Katie agreed that the training wasn't inappropriate and didn't have an issue with it. Fiona gave the outcome that Matthew and Sheri would have to agree to disagree …*
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> *After this situation, Matthew said things eventually started to get bad again, he felt he needed to ask Dan to line manage Sheri as at this point Sheri wasn't approachable and she didn't respect him as a manager and the decisions he was making. Matthew said he always feels anxious and he is walking on eggshells with Sheri. Mediation was offered as Fiona had spoken to HR. Matthew was apprehensive as he did not feel it would change things but was willing to give it a go in the hope that things would change for the better. Matthew was unaware that Sheri had declined this until it was mentioned in the meeting between himself and Leanne"*

55. In his witness statement the claimant said the following (at paragraph 63), in a paragraph which was clearly about the meeting on 27 January (as it followed what was said in paragraph 62 which introduced that meeting):

> "*I understood that the claimant had not lodged her grievance against me directly, however, I was upset to learn that the claimant was alleging that she was being discriminated against or bullied because of her race and gender and that she was relying on a lot of incidents which involved me"*

56. Accordingly, it was clearly stated in his statement of evidence (which he confirmed a being accurate under oath) that Mr O'Bryan was upset to learn in that meeting that the claimant was alleging that she was being discriminated against (as that is what the statement said). In cross-examination Mr O'Bryan stated in answers that he did not know that discrimination had been alleged when he was spoken to about the grievance, but we did not accept that evidence as it contradicted what was written in his own witness statement.

57. It was both recorded in the notes and was Mr O'Bryan's evidence in the hearing before us, that the meeting with Ms Lockwood on 27 January 2022 was the first time that he had been told that the claimant had not agreed to engage with mediation. In his witness statement, he said that he was very much under the impression, as of 27 January 2022, that this was in the pipeline and was going to be arranged. We accepted that evidence, but noted what was said about the reason Mr O'Bryan thought the mediation had been arranged as recorded in a meeting held much closer to the time and quoted/recounted above.

58. As part of her investigation into the claimant's grievance, Ms Lockwood spoke to others. She also produced an investigation report (243). It is not necessary for us to refer to the majority of what she recorded as it was not relevant to the issues we needed to determine. However, importantly:

a. Ms Lockwood's summary of the claimant's position was (246)

> "*In January 2021, a new member of staff, Katie, was being trained by Mark and Matthew. Sheri thought this was extraordinary has usually only one person conducts the training. Sheri found it distracting over 2 days. Sheri overheard them discussing … which she found strange due to Katie not being new to the organisation. On 6 January 2021, Sheri went over to another member of staff within her team to discuss the training that was taking place, and then as the training continued, Sheri went and spoke to Katie's friend Aaron. Matthew asked Sheri whether she had spoken to Aaron about the training and she said yes because it was cringing. She told them that she didn't think they trained others in the same way because their 'face' did not fit"*

b. Her summary of Mr O'Bryan's position was (250)

> "*Matthew's version of events is very different to Sheri's. Matthew says that he wasn't involved in training Katie at all. Mark took the training forward, and due to a HR matter, Matthew did not get around to introducing himself to Katie until the Wednesday … Matthew was stood up at the desk due to social distancing, and they may have touched upon some induction matters but it wasn't a big part of Katie's training, because she had transferred from another team. By her own admission, Sheri got distracted by the training of another member of*

> *staff, that didn't involve her in any way. In addition, she then went and spoke to other staff members, including from another team, about Matthew and Mark in a negative way, using words such as, it was cringy, and inferring that they treated Claire differently to Katie because her face didn't fit. This event is linked to event 10 when Matthew submitted his own grievance regarding Sheri's behaviour on this occasion. As part of her fact-find, Fiona confirmed with Katie that she didn't find the training inappropriate in any way"*

59. Ms Lockwood recommended that the claimant's grievance should be partly upheld, but that was for a matter unrelated to these proceedings (253).

60. Following his meeting with Ms Lockwood on 27 January 2022 and (notably) on the same day, Mr O'Bryan decided to raise a grievance. In his witness statement he explained this as follows:

> "*Once our investigation interview had concluded, I reflected on all that had been discussed during the meeting and felt that in the light of the fact I was now aware that the claimant had made serious allegations about my conduct (including to revisit old allegations which had already been investigated) and because it was clear she had no intention of trying to resolve our issues informally by way of mediation, I had no other option but to lodge a formal grievance against the claimant.*
>
> *I did not decide to lodge a grievance against the claimant to upset her or to be malicious but I felt it was necessary to do so as I had already attempted, in line with the Grievance Policy, to resolve the issue myself and then sought management assistance both of which proved unsuccessful. The Policy confirms that a formal written grievance should be lodged if the other two processes fail, which they had"*

61. In his witness statement Mr O'Bryan also said

> "*The reality of the situation is that had I been made aware in September 2021 that the claimant had refused to engage in mediation with me, I would have lodged my grievance, in line with the Grievance Policy, at that time, before the claimant had lodged her grievance in November 2021"*

62. On 1 February 2022 Mr O'Bryan emailed his grievance to Ms Qualters (238). He completed a grievance notification form (239). Within it he said (amongst other things) the following:

> "*I believe Sheri was trying to slander my name by suggesting that I was and I quote "all over Katie" ...*
>
> *I believe Sheri holds a personal grudge towards me and I am unsure of the reason why. Fiona had spoken to HR about the behaviour issues of Sheri and the lack of respect given to me as a Manager and was advised to go through Mediation. I was apprehensive to do this as I felt it would not make a difference but was willing to try. This was declined by Sheri which proved to me that she has a personal grudge against me and does not want to improve*

working relationships and that is why the working relationship has broken down …

I believe Sheri has a personal grudge against me and I feel the Katie allegation in particular was deeply hurtful to me and could have blackened my name and for this allegation in particular I feel that Sheri should receive a warning for trying to slander my name. I feel if this results in no action she is free to do this again … I had a Fact find previously raised by myself to which no action was taken towards Sheri and I feel that matters only got worse after that and I was not respected as a Manager … A final conclusion I would be happy with is Sheri receiving an official warning for making lies up about me and trying to ruin my reputation (with the Katie comment in particular) as a Manager without any evidence"

63. A fact-finding meeting into Mr O'Bryan's grievance was held on 15 February 2022 (255). Within it the following things of particular note were said:

a. The account given by Mr O'Bryan was that the claimant had approached him with Mr Gallagher in the open office area in the first week of January and said Mr Bines and he were "all over" Ms Browne and others in the open office had heard what was said. We considered this to be important as it was an account that was entirely inconsistent with Mr O'Bryan's account as recorded on 13 January 2021 (455) and was also not consistent with Mr O'Bryan's evidence at the Tribunal hearing. In evidence during cross-examination, Mr O'Bryan emphasised the length of time since the events by the time of this account and his faded recollection;

b. It was recorded that the claimant on 11 January had said that Mr Bines and Mr O'Bryan were "*all over Katie*" and it was "*cringy*";

c. The events following Mr O'Bryan's first complaint were recounted. It was recorded that the meeting with Ms Qualters had been when the discussion had concluded. After further issues, which Mr O'Bryan perceived had arisen after about a month after, he had raised the issues with Ms Qualters who had suggested mediation;

d. It was said that after Mr O'Bryan had learned of the claimant's grievance and had received an email to be interviewed *"Matthew then decided he needed to make the next step and lodge a grievance against Sheri for all the issues stated above due to the fact there was no resolution via discussions/fact finding and mediation never took place. He feels the relationship broke down and was now untenable*".

64. Mr Ward investigated Mr O'Bryan's grievance. He spoke to the claimant and a witness statement was provided of what she said to him (291). He provided a report (265). Within that report:

a. Mr Ward's summary of the claimant's position was "*Sheri stated she did not say the words "all over Katie" regarding Mark and Matthew and*

she was mainly concerned that Covid rules were not being followed re social distancing"; and

b. In relation to his interview with Mr Gallagher, what it was regarded he said was (something we noted) (273): "*I do recall Sheri coming over to myself voicing her concern with the way the male members of the team were interacting with Katie, I was Katie's friend therefore Sheri came to me as a potential ally. I can't remember what was said verbatim, but it was something along the lines of: I don't like the treatment Katie is receiving from the two male members of the team – she felt it was boarding on harassment"".*

65. Mr O'Bryan's grievance was considered by Ms Johnson following Mr Ward's report. The outcome of Mr O'Bryan's grievance (with which Mr O'Bryan disagreed) was recorded in a document dated 22 August 2022 (325). The grievance was not upheld. Mr Johnson did not find for Mr O'Bryan on the allegation he raised about the training-related comments, and he observed that the evidence did not support the allegation and he stated that no witnesses referred to, recalled hearing the comments being made (albeit the allegation itself was worded differently to the allegation we were considering).

66. Mr O'Bryan appealed, with his appeal contained in a document emailed on 6 September (331) and in a form completed on the same date (341). His appeal was heard by Ms Stanistreet and was not upheld. The form containing Ms Stanistreet's decision was provided to us (358), with the decision letter from Ms Stanistreet of 6 October (362).

67. We did not hear evidence from any of the people who investigated or heard Mr O'Bryan's grievance or grievance appeal.

The Law

68. Section 27 of the Equality Act 2010 says:

"(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…"

69. The first legal question is whether the claimant did a protected act, but that was not in dispute in this case. If the claimant has done the protected act, the next question for us to decide is whether the respondent subjected the claimant to a detriment because of that protected act, in the sense that the protected act had a material or significant influence on subsequent detrimental treatment.

70. That exercise has to be approached in accordance with the burden of proof. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates. It provides as follows:

> **"(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 sub-section (2) does not apply if A shows that A did not contravene the provision".**

71. At the first stage we must consider whether the claimant has proved facts on a balance of probabilities from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful victimisation. This is sometimes known as the prima facie case. It is not enough for the claimant to show merely that there has been detrimental treatment and a protected act. In general terms "*something more*" than that would be required before the respondent is required to provide a non-discriminatory explanation. At this stage we do not have to reach a definitive determination that such facts would lead us to the conclusion that there was an act of unlawful victimisation, the question is whether we could do so.

72. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. We must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged victimisation. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever materially or significantly influenced by the protected act.

73. If we conclude that the protected act played no part in the treatment of the claimant, the victimisation complaint fails even if that treatment was otherwise unreasonable, harsh, or inappropriate. Unreasonable behaviour itself does not necessarily give rise to any inference that there has been discriminatory treatment.

74. The respondent's representative, in her legal principles document, relied upon what was said by Underhill LJ in **Chief Constable of Greater Manchester Police v Bailey** [2017] EWCA Civ 425, an authority she provided to us. She highlighted that Judgment said that it was trite law that the burden of proof was not shifted simply by showing that there was a detriment and a protected act. She also quoted what Underhill LJ said, which was (in full and when referring to the wording of the Equality Act):

> "*use the term "because"/"because of". This replaces the terminology of the predecessor legislation which referred to the "grounds" or "reason" for the act complained of. It is well-established that there is no change in the meaning, and it remains common to refer to the underlying as the "reason why" issue. In a case of the present kind establishing the reason why the act complained of was done requires an examination of what Lord Nicholls in his seminal speech in Nagarajan v London regional Transport [1999] UKHL 36, [2000] 1 AC 501, referred to as "the mental processes" of the putative discriminator (see at p.511 A-B). Other authorities use the term "motivation" (while cautioning that this is not necessarily the same as "motive"). It is also well-established that an act will be done "because of" a protected characteristic, or*

> *"because" the claimant has done a protected act, as long as that had a significant influence on the outcome: see, again, Nagarajan, at p.513B"*

75. In the bundle of authorities the respondent provided, were also two other cases referred to in her legal principles document. Those were **Woods v Pasab Ltd** [2013] IRLR 305 and **Page v Lord Chancellor** [2021] IRLR 377. The former included an extract from the Judgment in the **Chief Constable of West Yorkshire Police v Khan** [2001] IRLR 830 in which it was said that "*it is the real reason, the core reason, the causa causans, the motive, for the treatment complained of that must be identified*".

76. The **Page** Judgment emphasised what had followed from the decision in **Martin v Devonshires Solicitors** [2011] ICR 352 and subsequent case law that:

> "*where an employer takes action against an employee in response to a complaint of discrimination, they are not to be treated as acting "because of" that complaint if the true reason for the action is not the fact that the employee has complained but some other genuinely separable feature of the complaint (such as the manner in which it is made) …*
>
> *dismissal (or any other detrimental act) in response to a complaint of discrimination does not constitute victimisation if the reason for it was not the complaint as such but some other feature of it which can properly be treated as separable"*

77. The word detriment in section 27 is to be interpreted widely. The key test is for us to ask ourselves: is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment? The test is framed by reference to a reasonable worker, so it would be enough if a reasonable worker would or might take such a view.

78. In the legal principles document, which she provided, the respondent's barrister made the following submissions on the meaning of detriment:

a. any alleged detriment must be capable of being objectively (a word upon which she placed emphasis) regarded as such (she relied upon **St Helens Metropolitan Borough Council v Derbyshire** [2007] IRLR 540); and

b. "*an unjustified sense of grievance cannot amount to 'detriment'*" (**Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL11 and also the **Derbyshire** case).

79. In her submissions on the facts of this case, the respondent's counsel contended that the claim properly turned on a factual dispute, namely whether the claimant could prove that Mr O'Bryan lied in his grievance. Both parties provided very well written submissions and we were grateful to them for doing so. We considered all that was written and stated but will not reproduce all that was said in this Judgment.

Conclusions – applying the Law to the Facts

80. Turning to the list of issues, issues 1.1 and 1.2 stated matters which were not in dispute.

81. Issue 1.3 asked: has the claimant proven that Mr O'Bryan lied when he said the claimant had accused him of being "*all over*" a female colleague? This was a case in which there was a clear dispute between the evidence of the claimant and Mr O'Bryan about this issue. Whilst the respondent's representative acknowledged that we did not need to find that the claimant had lied about it to prefer Mr O'Bryan's evidence, nonetheless in practice we needed to decide on the balance of probabilities whether Mr O'Bryan had lied about what the claimant had said. He was very clear, when giving evidence before us, that he clearly remembered what he alleged she had said, this was not an issue about recollection.

82. The Tribunal did not find this an easy issue to determine and considered it to be finely balanced.

83. We considered that the most important factor, when balancing the evidence of the claimant and Mr O'Bryan, was the inconsistency in Mr O'Bryan's recollection of events. As described in relation to the facts, his account recorded on 15 February 2022 (255) differed significantly from the account he provided on 13 January 2021 (140). The evidence which he gave the Tribunal, and in particular his confirmation that there was a discussion on 6 January 2021 (about which he was very clear when asked), also differed from his statement of 13 January. The accounts differed about when the first conversation took place and who was present when it occurred. In summary, we considered his evidence about when the key words were said to have been said to be inconsistent. In contrast, the claimant's account was consistent. We found her to be a credible witness and accepted what she said about why she would not have used the words alleged as (for her) they did not describe what had occurred. We also noted the outcome of the respondent's own procedure when considering Mr O'Bryan's grievance, which did not find in Mr O'Bryan's favour (albeit on a differently worded question). Accordingly, on balance, we preferred the claimant's evidence that the words were not said, to Mr O'Bryan's evidence that they had been.

84. We did consider the submissions and arguments about the use of the word "*cringy*" and why it was that the claimant used that word. The claimant's contention was that she used the word to describe an embarrassing situation where Covid restrictions which were in place had been breached or not followed. The respondent's contention was that it could not have been used in that way. There was also evidence that the claimant and others had identified concerns about the interactions relating broadly to what might be considered inappropriate conduct (not about Covid or purely Covid), as recorded in Mr Gallagher's accounts (161 and 210) and the claimant's own wording (173). We found that the claimant's concerns were about both Covid-related matters and also personal interactions. We did not accept the claimant's own evidence that the only issue was Covid-related. However, nonetheless, we still found that the claimant did not say to Mr O'Bryan what was alleged.

85. In her submissions, the respondent's representative said that we needed to find a logical explanation of the motivation to lie. It was emphasised that Mr O'Bryan's allegation was in effect a more serious allegation against himself. We understood that submission but did not find that we did need to determine what had been Mr O'Bryan's motivation for lying. We were faced with a dispute of facts and found that Mr O'Bryan did not accurately state what the claimant had said to him based upon the inconsistencies in the accounts and evidence he gave, irrespective of whether it was illogical for him to have done so.

86. We accordingly found that Mr O'Bryan lied when he said in the grievance that he raised that the claimant had accused him of being all-over Ms Browne.

87. Issue 1.4 asked whether the respondent subjected the claimant to a detriment by doing so? The respondent submitted that he did not. We have found that the claimant's former line manager lied about her when he submitted a grievance. We have no doubt that was a detriment for the claimant. An employee having a former manager lie in a grievance raised about them, is clearly a detriment.

88. We also found that the phrase asserted was an escalation of the complaint when compared to the "*cringy*" word which it was acknowledged had been said. We did not find that what was asserted and what was agreed were entirely comparable. "*Cringy*" is a word which requires unpacking and further consideration. "*All over*" is a more serious and significant allegation. We would have found the additional words used as a lie to have been a detriment when compared to what it was the claimant had acknowledged had been said, even had we not found that the lie, in and of itself, had amounted to a detriment for the claimant. We would also observe that what Mr O'Bryan explicitly sought in the grievance was the claimant being given a warning (and the lie was included in support of that).

89. Issues 1.7 and 1.8 both addressed the final question, but applied the steps set out in applying the burden of proof.

90. Did the protected act have a material or significant influence on the detrimental treatment found (that is, of lying in the grievance)? We found that the most persuasive element of the evidence on this question, was that Mr O'Bryan left the meeting at which the claimant's grievance had been discussed and, that very day, wrote his own grievance which included the lie. The timing was highly persuasive. We also heard Mr O'Bryan's own evidence about why he did so, which we have recounted in the facts section above. We found that the protected act did have a material or significant influence on the detrimental treatment found.

91. We accepted what the respondent's representative contended and summarised at paragraph 22 of her submission document. We considered the real reason or the core reason for the inclusion of the lie in the grievance. What we have stated in the previous paragraph is what we found as a result.

92. In terms of mediation, we accepted that was a factor in Mr O'Bryan deciding to raise his grievance and include the detrimental statement within it. We accepted that Mr O'Bryan first found out that mediation was not being progressed when he met with Ms Lockwood on 27 January 2022. Had we found that the <u>only</u> reason why he had raised his grievance (and included the lie) at that time had been because he

had discovered mediation had been rejected, that would not have been unlawful victimisation. We noted that Mr O'Bryan himself gave two reasons for raising his grievance. We did not find that, in practice, Mr O'Bryan had genuinely not previously brought his grievance because of mediation, as that was inconsistent with the end of the fact-finding process, which was not paused due to mediation, but was concluded. We accepted that the discovery that mediation had been rejected was a reason for the grievance being raised by Mr O'Bryan in 2022, but not the sole reason. As confirmed, we found that the protected act was a material influence on Mr O'Bryan's decision to raise his grievance and include the lie within it.

93. In reaching this decision we needed to consider the application of the burden of proof, as we have explained. This was not a case where the burden of proof, and the detailed application of it, was of particular importance. We found that the claimant had shown the something more required to shift the burden of proof, when the timing of the detriment and the grievance were taken into account and what was said within it (including the lie). As the claimant shifted the burden of proof, we then considered whether the respondent had shown that the detrimental treatment found was in no sense whatsoever to do with the protected act. We did not find that the respondent had done so, when considering Mr O'Bryan's explanations and all of the evidence.

Summary

94. For the reasons explained above, we found that the claimant was subjected to the unlawful victimisation she alleged. We will need to determine what remedy the claimant is entitled to (if anything) at the later hearing, listed for 9 August 2024.

Employment Judge Phil Allen
8 April 2024

WRITTEN REASONS SENT TO THE PARTIES ON

22 April 2024

FOR THE TRIBUNAL OFFICE