EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Maria Ibezim	**v**	**University College Hospital NHS Foundation Trust**

Heard at: London Central
On: 16 – 20 September 2024

Before: Employment Judge Hodgson
Ms S Brett
Ms R Butler

Representation

For the Claimant: Mr T Street, solicitor
For the Respondent: Mr O Lawrence, counsel

JUDGMENT

1. **The claims of direct discrimination are dismissed on withdrawal.**

2. **The claim of unlawful deduction from wages is dismissed on withdrawal.**

3. **The claims of victimisation fail and are dismissed.**

REASONS

Introduction

1.1 The claim, submitted on 31 July 2023, brought allegations of race discrimination and failure to pay wages.

1.2 By order of 15 January 2024, EJ Davidson allowed amendments to include allegations of victimisation.

The Issues

Victimisation

2.1 The claimant relied on three alleged protected acts as follows:

- 2.1.1 protected act one – on 9 January 2023, by the claimant orally alleging to Mr Kelvin Chung that she had suffered race discrimination by Ms Catherine Ashelby;
- 2.1.2 protected act two – on 24 January 2023 by raising a formal written grievance about Ms Ashelby; and
- 2.1.3 protected act three – in May 2023, by raising a further written complaint of race discrimination through the union.

2.2 The claimant alleged the following allegations of detrimental treatment, as clarified at the hearing.

- 2.2.1 Allegation one - on 6 February 2023 by Ms Flora Chiu-Wah Tong monitoring the claimant.
- 2.2.2 Allegation two – By Ms Ashelby requesting Ms Sarah Jones, in March 2023, to falsely testify that the claimant's training portfolio/documents within the training portfolio were missing.
- 2.2.3 Allegation three – on 2 March 2023 by Mr Chung banning the claimant from the clean room.
- 2.2.4 Allegation four – by Mr Chung, on or about 7 March 2023, refusing the claimant's request for work placement in the quality assurance unit in the aseptic unit.
- 2.2.5 Allegation five – on either 18 or 25 April 2023, by Ms Sarah Jones snatching "one particular piece of paperwork" contained in the claimant's personal file which contained her private paperwork.
- 2.2.6 Allegation six – on 21 November 2023 by failing to offer the claimant a band 5 position at the completion of her apprenticeship programme, it being her case that this was an omission.

Evidence

3.1 The claimant gave evidence.

3.2 For the respondent we heard from the following: Dr Chistopher Holt, pharmacy, QA lead; Ms Andrea Ridley, medication safety officer; Ms Amandeep Setra; Ms Flora Chiu-Wah Tong, qualified pharmacist; and Ms Sarah Jones, former lead technician for training.

3.3 We received a bundle of documents, and a supplementary bundle.

3.4 Both parties filed written submissions.

Concessions/Applications

4.1 On day one of the hearing, one of the members was unavailable. With the consent of the parties, EJ Hodgson undertook a case management discussion to identify the issues and to timetable the case. The case proceeded before a full tribunal on day two.

4.2 A number of matters were dealt with in the initial discussion. The claims of direct discrimination and unlawful deduction from wages were dismissed on withdrawal. It was agreed the claim did not contain any allegation of victimisation. The sole remaining claims, as permitted by the amendment granted by EJ Davidson on 15 January 2024, were allegations of victimisation.

4.3 The amendment, and the issues, as identified by EJDavidson, failed to clarify the claims of victimisation. At the start of this hearing, the majority were clarified during the case management discussion and are set out above in the issues.

4.4 The final allegation of victimisation concerned the failure to offer the claimant a band five job in November 2023. The claimant was ordered to clarify the following: who was responsible; whether it was an act or omission; and the date of the detrimental treatment. The clarification provided is recorded in the issues.

4.5 During the hearing, some minor adjustments were made to the issues, at request of both parties.

4.6 The respondent conceded that the alleged protected acts two and three were protected acts, but denied that protected act two was a formal grievance.

4.7 Throughout the hearing we referred to the claimant, at her request, as Sister Ibezim. We invited the parties to consider if the title of the claimant should be changed in the proceedings, and if so to apply for an amendment, but no request for an amendment was received.

The Facts

Background

5.1 The respondent has employed the claimant since July 2020. She is a band three pharmacy assistant working in the CYTOS unit. Her role includes the preparation of pharmacy products which are prepared in a room which is designed to be sterile; it is known as the clean room. This cytotoxic clean room is generally used for preparation of dosages for patients of the chemotherapy day units. It is not appropriate for them to be prepared in a clinical open area because the dosages contain cytotoxic agents (which cause damage to cells).

5.2 Before staff enter the clean room there are procedures to follow. There are a series of rooms were operatives wash and dress ready for entry into the clean room. The treatments prepared are often for vulnerable people, including cancer patients, and it is important that all efforts are made to avoid contamination.

5.3 The process is licensed, and that licence can be removed if standards are not maintained. Employees are required to undertake training, and to maintain documents, which evidence that training. Those documents are kept in paper form, and are kept locally.

5.4 There is a quality assurance (QA) team which has responsibility for supporting quality throughout the respondent trust and ensuring that statutory requirements are met. It operates under a specialist licence issued by Medicine and Healthcare Products Regulatory Agency (MHRA).

5.5 The QA team undertakes "self-inspection" audits of relevant operations, including the work undertaken in the clean room. There are three parts to the inspection: operational inspection; document inspection; and environment and physical monitoring. Operational inspection involves observing colleagues undertaking day-to-day pharmaceutical production tasks. Document inspection involves an audit of records including worksheets, prescriptions, and logs. Physical monitoring involves reviewing temperature, microbiological data and other related environmental issues.

5.6 On 16 January 2023, Dr Chistopher Holt asked Ms Flora Chiu-Wah Tong, a quality pharmacy specialist working in the QA team, to undertake an internal audit of CYTOS. The previous inspection had been undertaken on 30 June 2022. This further inspection was routine. Ms Flora Chiu-Wah Tong followed normal procedures. On 27 January 2023, she contacted the lead pharmacists of chemotherapy services to arrange an inspection in the week commencing 6 February 2023.

5.7 The audit took place on 6 February 2023. Ms Chiu-Wah Tong followed standard practice. At the time of the observation, there were four people in the clean room. Ms Flora Chiu-Wah Tong observed all of those individuals, one of whom was the claimant.

5.8 The claimant was working in the grade B area. This area has four separate cabinets which are designed to have an airflow that maintains sterile conditions. The claimant was working in one of those areas.

5.9 Ms Chiu-Wah Tong noted aspects of the claimant's technique which she found concerning. The claimant left sterile wipes and wrappings on the surface of the cabinet, with one syringe laid on top of the rubbish (normally the wipes and wrappers should be placed in the bin immediately). The claimant was filling multiple syringes with a luer to luer device. (This is an adapter that connects syringes and allows transfers of solutions in what is considered a closed system. It minimises product exposure to the

environment. Having regard to the airflow in the Cabinet, the best practice is for the syringe to be pointed upwards. The claimant was pointing the syringe downwards.) The claimant was also failing to put a cap on the connector which created a risk of contamination. The claimant was humming, which may cause distraction in an environment which should be quiet. The claimant sneezed, but did not leave the room to change here mask. Finally, the claimant, when spraying items to sterilise them, used too much alcohol and wiped them on her leg before putting them in a cabinet. This practice undermined sterility.

5.10 This observation was a normal part of the audit. On leaving the clean room, Ms Chiu-Wah Tong spoke with Ms Ashelby who confirmed the accuracy of Ms Chiu-Wah Tong's observation.

5.11 Ms Chiu-Wah Tong returned to the unit on 14 February 2023 and met with Ms Sarah Jones, lead technician for training, who was responsible for the training folders for technical staff. She reviewed all training records for the individuals present during the audits. She noted that part of the claimant's training manual was missing and asked for it to be located. It is common ground that part of the training record was missing, albeit the claimant alleges that training had been undertaken in around 2020. Her case on this point is unclear. The allegations suggest she alleges the records were deliberately removed. Her oral evidence accepted the paperwork had not been issued.

5.12 On 3 March 2023, the Quality Production Operational Group (QPOG) met. Ms Chiu-Wah Tong confirmed her findings. It was not her role to decide what action should be taken.

5.13 Mr Kelvin Chung, as principal pharmacist, decided the appropriate course of action. At the meeting he confirmed there were no concerns about the claimant performing general assembly duties and she should continue with those, but she should be removed from dispensing until she had completed her training and demonstrated appropriate cleanroom behaviours. He had made this decision before the meeting, and he communicated it to the claimant on 2 March 2023.

5.14 The claimant has since completed or re-completed her training, and has returned to dispensing.

External course

5.15 In September 2021, the claimant decided to undertake a pharmaceutical technology and quality assurance course at the University of Manchester. She was not required to do this by her employer, but she informed her employer. She expected that she would be able to undertake work placements with her employer in order to complete the course. However, she neither sought, nor obtained agreement. At some point, she sought a work placement with the respondent, but she gives little detail. She

repeated her request in September 2022 and alleges this was "blocked" by Ms Ashelby.

5.16 In or around February 2023, Ms Ashelby, lead technician for aseptics, asked Dr Chistopher Holt to discuss with the claimant the course. He met with the claimant and on 10 February 2023, the claimant sent a copy of her assignment. He responded with an extract of points to be considered. Thereafter, the claimant requested work experience within QA. Dr Holt was, in principle, in favour but wished to develop a systematic department-wide approach which would allow all colleagues fair access to opportunities. He stated that any rotation would need to be open to all senior advisory technical officers. He met with Ms Ashelby and Mr Chung to discuss the matter further. Mr Chung was concerned that the timing was inappropriate having regard to staffing levels. Dr Holt considered the concern to be legitimate.

5.17 On 7 March 2023, Mr Chung sent an email to the claimant explaining that a short-term rotation was not possible, but it would be reviewed within six months. The claimant thereafter offered to use her holiday to gain experience. Dr Holt did not consider this would address the staffing issues, as those providing experience would be giving up work time to support her. Dr Holt remained of the view that any work experience would have to be provided within a framework that was accessible to all. It is apparent Mr Chung was pressing Dr Holt, and it was Dr Holt who decided to reject the claimant's proposal.

5.18 On 9 January 2023, the claimant met with Mr Chung. We have no direct evidence from Mr Chung. There are minutes of some relevant meetings and the emails provide some insight. In evidence, the claimant states, "I raised my concerns to Mr Kevin Chung… and specifically alleged on 9 January 2023 and in my subsequent grievance of 24 January 2023 that I felt that Ms Ashelby's treatment of me related to my race."

5.19 On 24 January 2023, the claimant sent to the respondent a document headed "report ongoing discrimination issues." It is not described as a grievance, albeit it clearly contains complaints. It complains about her treatment, in June 2024. Following an absence caused by a rail strike, the claimant's pay was deducted. She also complains about ongoing discrimination in the form of being denied the opportunity for promotion to band four. The particular form of discrimination is not specified. The document did not refer to events of 9 January 2024.

5.20 There was a formal grievance filed on 25 May 2023. It raises various allegations against Ms Ashelby. One complaint concerned the treatment in 2022 when the claimant was unable to make it into work because of a rail strike, which had led to a deduction from salary. In addition, she alleged that Ms Ashelby had arranged the audit and that during that audit there had been excessive monitoring of the claimant. She alleged Ms Ashelby wanted to get rid of her.

The events of 18 or 25 April 2023

5.21 During a routine work meeting on either 18 or 25 April 2023, the claimant was reviewing some personal documents. Ms Sarah Jones, lead technician for training (pharmacy production), noticed that some of the documents appeared to be training documents. All training documents were kept in a separate training file. It is common ground they were removed and placed in the training folder. There is dispute about the extent to which the records were discussed and whether there was agreement that they should be placed in the training folder. Ms Jones' account is that there was a discussion and she and the claimant agreed that they should be put in the training folder, and that they jointly moved the documents and put them in the training folder. The claimant's account is that they were snatched. We find it is inherently unlikely that Ms Jones' simply took the documents without giving any form of explanation. If the claimant's perception was the documents were snatched, we are satisfied that was never the intention of Ms Jones. The claimant fails to prove that the documents were snatched.

5.22 Ms Jones acted in accordance with standard procedures in ensuring that the documentation was put in the training folder so that a complete record was maintained.

Recruitment in November 2023

5.23 Ms Andrea Ridley, director of pharmacy operations, gave evidence on the band 5 recruitment exercise which took place in November 2023. At a staff meeting in November 2023, she was informed that the band five recruitment had been advertised, but the window for applications was short at three days. Ms Ridley recognised staff frustration and arranged for there to be an extension to the application window. The roles were advertised internally and externally.

5.24 The claimant did not apply for any band five role in November 2023.

The law

6.1 Victimisation is defined in section 27 of the Equality Act 2010.

Section 27 - Victimisation

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

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

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

(a) bringing proceedings under this Act;

> **(b) giving evidence or information in connection with proceedings under this Act;**
> **(c) doing any other thing for the purposes of or in connection with this Act;**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.**
>
> **(4) This section applies only where the person subjected to a detriment is an individual.**
>
> **(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.**

6.2 Prior to the Equality Act 2010 the language of victimisation referred to less favourable treatment by reason of the protected act. Under the Equality Act 2010, victimisation occurs when the claimant is subject to a detriment because the claimant has done a protected act or the respondent believes that he has done or may do the protected act.

6.3 We have to exercise some caution in considering the cases decided before the Equality Act 2010. However, those cases remain helpful. It is not in our view necessary to consider the second question, as posed in **Derbyshire** below, which focuses on how others were or would be treated. It is not necessary to construct a comparator at all because one is focusing on the reason for the treatment.

6.4 When considering victimisation, it may be appropriate to consider the questions derived from Baroness Hale's analysis in **Derbyshire and Others v St Helens Metropolitan Borough Council and others 2007 ICR 841**. However as noted above there is no requirement now to specifically consider the treatment of others.

> **"37. The first question concentrates upon the effect of what the employer has done upon the alleged victim. Is it a 'detriment' or, in the terms of the Directive, 'adverse treatment'? But this has to be treatment which a reasonable employee would or might consider detrimental… Lord Hope of Craighead, observed in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 at 292, paragraph 35, 'An unjustified sense of grievance cannot amount to "detriment"'.**
>
> **40. The second question focuses upon how the employer treats other people…**
>
> **41. The third question focuses upon the employers' reasons for their behaviour. Why did they do it? Was it, in the terms of the Directives, a 'reaction to' the women's claims? As Lord Nicholls of Birkenhead explained in *Khan*'s case [2001] IRLR 830, 833, paragraph 29, this**
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> > **'does not raise a question of causation as that expression is usually understood ... The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or**

> **unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'"**

6.5 Detriment can take many forms. It could simply be general hostility. It may be dismissal or some other detriment. Omissions may constitute unfavourable treatment. It is, however, not enough for the employee to say he or she has suffered a disadvantage. An unjustified sense of grievance is not a detriment.

6.6 The need to show that any alleged detriment must be capable of being objectively regarded as such was emphasised in **St Helens Metropolitan Borough Council v Derbyshire 2007 IRLR 540**. **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 IRLR 285** was cited and it was confirmed an unjustified sense of grievance cannot amount to detriment. That in our view remains good law. In **Derbyshire**, Lord Neuberger confirmed the detriment should be viewed from the point of view of the alleged victim. Rather than considering the 'honest and reasonable test as suggested in Khan' the focus should be on what constitutes a detriment. It is arguable therefore that whether an action amounts to victimisation will depend at least partly on the perception of the employee provided that perception is reasonable. It is this reasonable perception that the employer must have regard to when taking action and when considering whether that action could be construed as victimisation. Detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment. The detriment cannot be made out simply by an individual exhibiting mental distress, it would also have to be objectively reasonable in all the circumstances. The stress and worry induced by the employer's honest and reasonable conduct in the course of his defence cannot, except in the most unusual circumstances, constitute a detriment. The focus should be on the question of detriment.

<u>Reasons for unfavourable treatment.</u>

6.7 When the protected act and detriment have been established, the tribunal must still examine the reason for that treatment. Of course, the questions of reason and detriment are often linked. It must be shown that the unfavourable treatment of a person alleging victimisation was because of the protected act. A simple 'but for' test is not appropriate.

6.8 It is not necessary to show conscious motivation. However, there must be a necessary link in the mind of the discriminator between the doing of the protected act and the treatment. If the treatment was due to another reason such as absenteeism or misconduct the victimisation claim will fail. The protected act must be a reason for the treatment complained. It is a question of fact for the tribunal. **Chief Constable of West Yorkshire police v Khan 2001 IRLR 830 HL** is authority for the proposition that the language used in the Sex Discrimination Act 1975 is not the language of strict causation. The words by reason that suggest that what is to be considered, as Lord Scott put it, is "the real reason, the core reason, the

causa causans, the motive, for the treatment complained of that must be identified." This in our view remains good law.

6.9 It is not necessary for a person claiming victimisation to show that unfavourable treatment was meted out solely by reason of his or her having done a protected act.

6.10 Lord Nicholls found in **Najarajan v London Regional Transport 1999 ICR 877**, HL, that if the protected act has a significant influence on the outcome of an employer's decision, discrimination will be made out. It was clarified by Lord Justice Gibson in Court of Appeal in **Igen and others v Wong and others 2005 ICR 931** that in order to be significant it does not have to be of great importance. A significant influence is an influence which is more than trivial.

Subconscious motivation

6.11 The House of Lords in **Nagarajan** rejected the notion that there must be a conscious motivation in order to establish victimisation claims. Victimisation may be by reason of an earlier protected act if the discriminator consciously used that act to determine or influences the treatment of the complainant. Equally the influence may be unconscious. The key question is why the complainant received the treatment.

6.12 Section 136 Equality Act 2010 refers to the reverse burden of proof.

> **Section 136 - Burden of proof**
>
> **(1) This section applies to any proceedings relating to a contravention of this Act.**
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**
> **(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.**
> **(5) This section does not apply to proceedings for an offence under this Act.**
> **(6) A reference to the court includes a reference to--**
> **(a) an employment tribunal;**
> **(b) …**

6.13 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

Appendix

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on

the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

Conclusions

The protected acts

7.1 We have limited evidence as to what happened on 9 January 2023. We accept there was a discussion with Mr Chung. The claimant says she raised matters of discrimination. She subsequently raised her concerns on 24 January 2023. These largely concerned Ms Ashelby. She alleged in June 2022 there was a deduction from the claimant's wages when she failed to attend work. In her written note of 24 January 2023, she refers to this as being discrimination.

7.2 We find, on the balance of probability, the claimant used the word discrimination on January 2023 and raised the complaints she later referred to on 24 January.

7.3 The respondent has admitted that the act of 24 January 2023 was protected. During submissions, Mr Lawrence suggested that there may be some doubt, as there is no direct reference to a protected characteristic.

7.4 An act may be protected, pursuant to section 27 Equality Act 2010, when a person does anything for the purpose of or in connection with the act or makes an allegation that a person has contravened the act. This does not require some form of formal pleading. We find the reference to discrimination was a reference to discrimination within the meaning of the Equality Act 2010, and Mr Chung understood this, as is apparent from his later correspondence. It matters not the claimant failed to identify the specific protected characteristic relied on. She was making an allegation pursuant to the Equality Act 2010. The position is the same for both 9 January and 24 January. Both were protected acts.

7.5 The respondent accepts that the grievance of May 2023 was a protected act.

Allegations

Allegation one - on 6 February 2023 by Ms Flora Chiu-Wah Tong monitoring the claimant.

7.6 On 6 February, Ms Chiu-Wah Tong, undertook the audit. As part of that audit she was required to observe the claimant and her colleague. In that sense, she was monitoring the claimant.

7.7 No reasonable employee would have considered Ms Chiu-Wah Tong's action to be a detriment to the claimant. The inspection was routine and part of a necessary and legitimate process. The observation undertaken by Ms Chiu-Wah Tong was a necessary and important part of the audit. The observation continued for a relatively short period and was consistent with the time dedicated to others. As the claimant was working in a cabinet, it was necessary for Ms Chiu-Wah Tong to stand to one side to observe what was being done. The inspections were important to ensure compliance. Compliance was important to ensure standards were maintained. No reasonable employee would consider such an observation to be a detriment.

7.8 The claimant appears to suggest that, in some manner, the observations were unfair and unfounded. That position is without merit. Ms Chiu-Wah Tong observed actions which caused her concern and she recorded them reasonably and appropriately.

7.9 As the treatment was not a detriment for the purposes of victimisation, this allegation must fail.

7.10 In any event, we accept that Ms Chiu-Wah Tong had no knowledge, whether constructive or otherwise, of the claimant's protected acts. In no sense whatsoever was her motivation, whether conscious or subconscious, because of a protected act.

7.11 Finally, we accept her explanation which is that she recorded her legitimate concerns following an appropriate observation which she was required to undertake in accordance with her duties.

Allegation two – By Ms Ashelby requesting Ms Sarah Jones, in March 2023, to falsely testify that the claimant's training portfolio/documents within the training portfolio were missing.

7.12 We have not heard from Ms Ashelby but we have had evidence from Ms Jones.

7.13 The essence of this allegation is that someone removed relevant training records relating to manual 4 from the claimant's training record. It is alleged that, in some manner, Ms Jones was requested by Ms Ashelby to give a false account that the documents were missing. Ms Jones denies that any such request was made, or that she acceded to any request. We accept Ms Jones' evidence. There is no evidence that Ms Ashelby made the request. This allegation fails because the factual circumstances have not been proven.

7.14 We should say a little more about the evidence. The missing training records been have been described as training manual 4. We accept that sometime around September 2022, Miss Jones undertook an audit of the training records, in anticipation of the audit which in fact took place in February. She found no documents missing. However, that is not conclusive of a proposition that the claimant's records were complete. It is possible that she overlooked the missing documents in the claimant's file. The claimant suggests Ms Jones inspection is conclusive evidence that the documents were in the file and thereafter removed. We reject that argument. The claimant's contention is inconsistent with the claimant's own evidence. Before us, she indicated that the relevant training had occurred in or around 2020, but that the documentation had not been completed. It follows, if it was not completed, it was never on the file.

7.15 We accept Ms Chiu-Wah Tong's evidence that when she undertook the audit of the paperwork training records and manual 4 was missing from the claimant's file. This led to further investigation and Mr Jones undertook an extensive search, but was unable to find the documentation. This is unsurprising given the claimant's evidence that she had not been given the relevant paperwork.

Allegation three – on 2 March 2023 by Mr Chung banning the claimant from the clean room.

7.16 We find that Mr Chung did remove the claimant from dispensing. He made the decision no later than 2 March 2023. That decision was then discussed and ratified at the formal meeting on 3 March 2023. He told the claimant of his decision 2 March 2023.

7.17 The claimant continued with her other duties but the effect of the decision was to remove her from the clean room. This was unwelcome to the claimant and could potentially be seen as a detriment.

7.18 The claimant's submissions focus on the alleged influence of Ms Ashelby over the decision. We should summarise those matters relied on in the claimant's submissions, as turning the burden.

7.19 It is said that Ms Ashelby was hostile. It is said the date of the decision is uncertain. It is alleged the decision lacked natural justice. It is said there was a failure to communicate in writing. It is said the allegations were not put to her. She disputes the validity of the observation on 6 February 2023. She says there is a lack of clarity as to best practice. She alleges there was a failure of two key witnesses to give evidence. She alleges the paperwork was in place. She alleges the deviation from normal practice was minor.

7.20 We will deal with each of the submissions.

7.21 We do not accept there is direct evidence of hostility from Ms Ashelby. We were referred to the report from Mr Chung in which he opined that Ms

Ashelby should have more regard to diversity issues. We have not heard from either. His reason for giving that opinion is unclear. His opinion may be unreasonable. It appears the claimant's submissions is that, in some manner, Mr Chung was influenced by Ms Ashelby. Ms Ashelby is alleged to have been hostile to the claimant to the point of wishing to see her leave, and that hostility caused MsAhelby to influence Mr Chung. We find Mr Chung's report, if anything, provides evidence that he had concerns about Ms Ashelby and this makes the possibility of his being influenced by her inherently unlikely.

7.22 Broadly, the claimant argues that there were allegations that should have been put to her and the failure was an failure of natural justice. We do not accept this. The claimant was not subject to any disciplinary procedures. The respondent's focus was to undertake an audit in order to establish whether procedures were followed. As a result of that audit there were concerns about the claimant's practice and the audit identified that important training records were missing. Compliance was important in order to maintain the respondent's licence, and for that reason action was taken. However, the action did not stop at removing the claimant, Mr Chung discussed with the claimant the need for further training which permitted her return. Her return was actively pursued by the respondent. This is not, in our view, an example of any unreasonable procedure. It may be arguable that the respondent could have set out its concerns in writing. However, we are satisfied that the claimant fully understood the difficulties, and was fully engaged with the process of addressing those difficulties, so that she could return. In the circumstances we do not find that the conduct was unreasonable. We do not find that the conduct was unexplained.

7.23 Paragraph 17 of the claimant's submissions states she denies "humming, sneezing, using the syringes in the way that has been alleged, leaving syringes without caps on them and wiping excess alcohol on her clothing.

7.24 The relevance of this is unclear. It is unclear whether she denied the observations at the time. It is possible it is being suggested that she could have denied the observations, had the points been put to her. It appears she may be suggesting Ms Chiu-Wah Tong and/or Ms Ashelby fabricated or invented the observations. If that is the claimant's position, we reject it. We accept that Ms Chiu-Wah Tong's observations were valid and reported accurately. Had the claimant, at the time, or later, disputed those observations, it is likely it would have caused the respondent more concerned.

7.25 We do not accept there is any real lack of clarity about best practice. The procedures adopted were designed to ensure sterility in pharmaceutical procedures in order to protect patients receiving treatment. All concerned had a good understanding of best practice. It appears to be the claimant's case that there is no specific manual which states what should happen if there is a breach of best practice. That may be so. There was a discretion. There are occasions when it is appropriate for professionals to

consider the whole picture and consider what is the best way of proceeding in order to ensure the integrity of a process. That is the approach taken by the respondent. It is not unreasonable or surprising.

7.26 The respondent is criticised for not calling Mr Chung and Ms Ashelby. Both have left. It is not uncommon for those who have left their employment to avoid involvement in these types of proceedings. The question for the tribunal is whether the respondent has established its reason and whether that is supported by cogent evidence. It is not always necessary for specific individuals to be called when there is clear evidence supported by colleagues and documentation. In fact a failure to call witnesses rarely, in itself, will lead to an inference of victimisation or discrimination.

7.27 We do not accept the submission that the deviations in procedure were so minor, they did not justify her removal from the clean room. Her removal was based on the totality of the circumstances including the observations and the absence of the training manual 4. Her removal was a legitimate and reasonable response by the respondent.

7.28 We reject the claimant's allegation that the relevant training manual 4 had, in some sense, been tampered with or removed by the respondent. We have considered this above.

7.29 In summary we reject the claimant's submission that there are facts from which we could find there was victimisation. We reject the suggestion that there is unexplained unreasonable conduct that could lead to the drawing of any inference.

7.30 Mr Chung did, of course, know that there was a protected act, as he was directly involved with the first and second protected acts.

7.31 We note that we have not heard from him. However, the respondent has produced cogent evidence which explains the system, the context of the decision, and the reason for the decision. We have seen the minutes which support the rationale. We are satisfied, on the balance of probabilities, that the respondent's explanation for why the claimant was removed and clean room is made out.

Allegation four – by Mr Chung, on or about 7 March 2023, refusing the claimant's request for work placement in the quality assurance unit in the aseptic unit.

7.32 Mr Chung did not refuse the claimant's request for a work placement. It follows that this allegation should fail on that basis. The decision was in fact taken by Mr Holt and we have considered whether his action could be victimisation.

7.33 The claimant sought work experience because she was pursuing a qualification; the course required her to obtain work experience. She may have expected the respondent to assist, but her pursuit of the qualification

was private, and the respondent had no obligation to assist. We accept Dr Holt supported the concept of providing work experience, but he recognised that this would lead to significant commitment from other members of staff and he wanted to ensure that the system was in place to allow reasonable access for all. That was a reasonable approach. His concern to avoid allegations of favouritism is appropriate. He did consider whether the claimant could be assisted and he did consider the potential commitment of staff. It appears that staffing commitment was significant and could have led to the claimant having experience of one day a week for the academic year for a period of three years. That would have the effect of putting a burden on the respondent's staff and Dr Holt considered that burden to be unreasonable. He therefore refused to assist at that time. Mr Chung, in fact, sought to press Dr Holt, but to no avail.

7.34 This allegation fails. Given all the circumstances we do not accept that a reasonable employee would have considered it a detriment.

7.35 In addition, we find there is no fact which would turn the burden, even assuming that Dr Holt knew of the protected acts.

7.36 Third, the respondent establishes an explanation which is an answer to the claim.

Allegation five – on either 18 or 25 April 2023, by Ms Sarah Jones snatching "one particular piece of paperwork" contained in the claimant's personal file which contained her private paperwork.

7.37 At a routine meeting, either on 18 or 25 April 2023, Ms Jones had observed training paperwork in the claimant's personal papers. Those papers should have been in the claimant's training folder. Discussing that paperwork with the claimant, and ensuring that the documents were put in the training folder is, in no sense whatsoever, detrimental treatment. If anything, this is of some assistance to the claimant, it being important that the training manual is complete.

7.38 It is possible that the manner in which those documents were taken was inappropriate. We accept Ms Jones' evidence that in no sense whatsoever did she believe she snatched the documents. The claimant may have had a different perception. The claimant has failed to prove that the documents were snatched. We have preferred Ms Jones' evidence on this point, the claimant's account being unclear and less likely.

7.39 Motivation can be conscious or subconscious. Are there any facts on which we could find that, if the documents were snatched, it was because of the protected act. The height of the claimant's case appears to be that Ms Jones may have been annoyed in some manner. However, the basis for that alleged annoyance is unclear. There is no fact from which we could find the motivation , conscious or subconscious was because of the protected act.

7.40 There is insufficient evidence to establish the Ms Jones snatched the documents. It is for the claimant to establish the fact of the treatment, on that and the balance of probability, and she fails to do so. Ms Jones establishes her explanation. She requested the documents to be put on the claimant's training file, and the claimant agreed.

Allegation six – on 21 November 2023 by failing to offer the claimant a band 5 position at the completion of her apprenticeship programme, it being her case that this was an omission.

7.41 The claimant did not apply for any band five role. This allegation is, effectively, not pursued in the submissions. Instead it is suggested that the real complaint is failure to bring the vacancy to her attention. Such an allegation would require amendment.

7.42 This allegation fails. The claimant was not offered a band five position because she did not apply and there was no mechanism by which she could be offered the band five position. In no sense whatsoever was the failure to offer her the position because of any protected act; it was because she did not apply.

Summary

7.43 It follows all the claims fail. As they fail substantively, we do not need to consider further whether the claims are out of time and if so, whether time would be extended.

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Employment Judge Hodgson

Dated: 11 November 2024

Sent to the parties on:

20 November 2024
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For the Tribunal Office