EMPLOYMENT TRIBUNALS

Claimant: Ms Albena Yankova Breneska

Respondent: Wincanton Group Limited

Heard at: Watford Employment Tribunal **On:** 11 & 12 February 2025

Before: Employment Judge Young
Non Legal Members: Mr L Hoey
Mr A Scott

Representation
Claimant: Litigant in person
Respondent: Mr Charlie Hill (Counsel)

JUDGMENT

1. The Claimant's claim for breach of contract/ wrongful dismissal is not well founded and is dismissed.

2. The Claimant's claim for post-employment victimisation is not well founded and is dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent, a facilities company as a Hygiene Steward to work directly on the Respondent's contract with HMRC at the UK Hayes IPC site, from 1 September 2020 until 31 May 2023. Early conciliation started on 17 August 2023 and ended on 28 September 2023. The claim form was presented on 16 October 2023.

Hearing & Evidence

2. The hearing took place over two days. The Employment Tribunal received an agreed bundle of 440 pages. The Claimant provided a written witness statement, and we heard oral evidence from the Claimant. The Respondent had two witnesses, Ms Ana-Maria Ghitica, operations manager at the Respondent's Cygnia site since September 2021 and Ms Hannah Waterhouse People Partner in the Public and Industrial sector. We had

written witness statements from both and heard their oral evidence.

3. The Claimant had initially presented claims for sex discrimination, victimisation, automatic unfair dismissal, wrongful dismissal and unlawful deductions of wages and failure to pay redundancy pay. All the Claimant's complaints were struck out except the Claimant's complaints of victimisation and wrongful dismissal. By email sent at approximately 09:45 on day 1, 11 February 2025, the Claimant sent in an application for reconsideration of EJ Anstis' decision to refuse her application to amend her claim to include a whistleblowing detriment claim. The email application did not explain the grounds for the reconsideration but referred to page numbers.

4. When the Claimant was asked at the hearing, what were the grounds for her reconsideration application, initially the Claimant said she was not sure that EJ Anstis had all the documents in respect of her application and that she was not sure that EJ Anstis had the documents she had sent with her application to amend on 5 December 2024. Then the Claimant said that her English was not too good and did not understand EJ Anstis' judgment on why her application to amend was refused. She said that she needed the written reasons for his judgment. She said there was not enough time for EJ Anstis to hear her application. Mr Hill explained that the reference to the shortness of time was in respect of the strike out application that was heard in October 2024. The Claimant's application to amend was heard in January 2025.

5. The Employment Tribunal explained to the Claimant that they could not reconsider EJ Anstis' judgment because we did not have the written reasons and so we did not know why he made the decision that he made. The Claimant said that she accepted this and that she would apply for written reasons of EJ Anstis' decision on her amendment application.

6. The Claimant then said that she wished to ask a question, and she asked how she could appeal to the employment appeal tribunal. Employment Judge Young explained that the Employment Tribunal had not made a decision yet on anything for her to appeal. The Claimant said that she wished to appeal.

7. The Respondent provided a list of issues to the Employment Tribunal at the start of the hearing, and the Claimant had also been provided with a copy. Following discussion, the list was amended to include section 108 of the Equality Act 2010 in respect of post-employment victimisation and the issue of knowledge in respect of the protected act by the Respondent regarding refusal or failure to provide a reference. The Claimant was asked if she agreed or disagreed that all the issues that needed to be considered were contained in the proposed list of issues, after discussion the Claimant agreed that it contained all the issues to be considered.

8. After timetabling the witnesses, the Employment Tribunal took a break for an hour to read the documents. The Claimant was then sworn in. The Claimant said that she did not want to sign the statement on the witness stand as it was not the version she printed out. The Claimant was given 15 minutes to read the witness statement on the witness stand to ensure that it was correct and told that if it was not correct and she needed to make changes, she should tell the Employment Tribunal, and we would consider

whether changes were permitted. After 15 minutes the Claimant said that the witness statement seemed ok, and she signed it. The Claimant then raised for the first time that she wanted to refer to a list of page numbers that she said should be read with her witness statement. The Claimant confirmed that she had provided copies for everyone. The Claimant said that the references were to documents in the bundle because she got the bundle late. The Employment Tribunal asked Mr Hill if he agreed to allowing the Claimant to refer to the list and the additional documents in the bundle. Mr Hill requested the lunchtime break to take instructions and consider the documents. After the lunch break Mr Hill agreed that the Claimant could refer to the new documents and the list of references for her witness statement. We referred to the new documents as the Claimant's bundle in accordance with the Claimant's handwritten pagination. The Claimant's bundle contained 12 pages including a list of page references to the bundle that should have been included in her witness statement.

9. On day 2, 12 February 2025, we heard oral closing submissions from the Claimant and the Respondent. Both parties were given 15 minutes for submissions. The Claimant went first. The Claimant's submissions were very short and amounted to that despite the chain of events that took place where she was demoted, and manipulation happened this is why she was victimised. That once she became permanent her notice pay was 2 months. She said that she had done her best to ensure that a reference was provided by the Respondent by ensuring that they had the information about her new job early, but her reference was refused because she was suffering from discrimination since the first day of her employment and because she made a protected disclosure. She then asked if she could have permission to disclose the Employment Tribunal bundle to the Competition and Markets Authority ('CAM'). Employment Judge Young explained that she did not know and that if the CAM made a request to the Employment Tribunal for documents, then they would deal with that request.

10. The Respondent's submissions addressed both merits and quantum. In essence, Mr Hill said that the Claimant's notice period was one month and that his primary argument was that it didn't change. His secondary argument was as the Claimant did not object to the proposed change to her notice period, then her notice period was deemed to be one month because of the notice given by the letter she received on 13 January 2023. If the Employment Tribunal did not accept that a reasonable notice period was 1 month based upon Ms Waterhouse's evidence. A request had been made to pay the Claimant £0.52 to the Respondent's payroll by Ms Waterhouse, but it might take some time. The Respondent would make the payment to the Claimant before the judgment was given. In respect of the victimisation claim, there was no protected act, and the Claimant had not proved that there was a clear link between the protected act and the refusal to provide a reference. Ms Ghitica's evidence was that the 14 April 2022 email did not contain anything in it that she regarded as a breach of the Equality Act 2010, the screenshot is not evidence that an organisation made a request at all, the Respondent's evidence was not challenged that the request for the reference went to the ESS Team, or they did not have access to the Claimant's statement of 14 April 2022.

11. On the issue of quantum, Mr Hill said that the Claimant accepted that she was not claiming financial loss and an award of losses in respect of the

Claimant looking for work was not appropriate as the Claimant obtained work quickly and claim for accommodation in the schedule of loss was also not appropriate. If any compensation should be awarded, it should be limited as the Claimant obtained the role through other means. The Employment Tribunal should award a nominal figure if awarding injury to feelings of no more than £1000.

12. The Claimant was given an opportunity to respond to the Respondent's submissions. In summary the Claimant said that she didn't agree with what Mr Hill said. However, she could not tell the Employment Tribunal what it was she disagreed with. She said she would appeal and wanted written reasons. She said that there were things missing that we did not consider. The Employment Tribunal told the Claimant she needed to tell us what it was that was missing that we could consider. The Claimant referred to the absence of references to sex discrimination in the notes of the investigation meeting, which the Claimant had referred to in her oral evidence and a statement 2 on page 227 of the bundle which the Claimant had not mentioned at all. The statement 2 did not have any reference to allegations of sex discrimination or any allegations of discrimination at all.

Claims & Issues

13. The Employment Tribunal were considering the following claims:

    a. A breach of contract claim that the claimant should have been paid 2 months' notice rather than one month's notice and

    b. A claim for unlawful victimisation in the alleged failure or refusal by the respondent to provide in June 2023 a reference for the claimant in respect of work at Heathrow but Wilson James for which the relevant protected act is said to be an e-mail dated the 14th of April 2022 and its accompanying statement.

14. The issues in this case are as follows:

    Breach of contract: Notice Pay

    1) What period of notice pay was the Claimant entitled to under the terms of her employment contract?

        a. The Claimant will say she was entitled to two months' notice pay.
        b. The Respondent will say she was entitled to one month's notice pay under the terms of her original employment contract and/or alternatively by way of variation of her employment contract on or around 1 March 2023.

    2) Did the Respondent make any payment to the Claimant in respect of such sums?

    3) What, if any, sums remain due under the terms of her contract of employment?

    Victimisation (sections 27 & 108 Equality Act 2010)

4) Did the Claimant do a protected act within the meaning of section 27(2) Equality Act 2010 ("EQA"), by way of an email dated 14 April 2022 and its accompanying statement?

    a. Were the factual allegations capable of amounting to a breach of the EQA?
    b. Were the allegations of breach of the EQA sufficiently clear?
    c. Were the allegations made in bad faith?

5) Did the Respondent subject the Claimant to the following alleged detriment because she had done such a protected act?

    a. Did the Respondent fail or refuse to provide a reference for the Claimant in respect of proposed work at Heathrow Airport for Wilson James in or around June 2023? The Respondent will say that the Claimant never made a request for a reference.
    b. Alternatively, the Respondent will say that the Respondent's central administrative team would not have been aware of the Claimant's protected act in April 2022.

6) Did the refusal or failure to provide a reference arise out of and was closely connected to the Claimant's employment?

    Remedy

7) What, if any, outstanding notice pay is the Claimant entitled to?

8) What, if any, remedy is the Claimant entitled to by virtue of any alleged victimisation?

Findings of Fact

15. The Employment Tribunal makes these findings of fact on a balance of probabilities. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant.

16. All references to page numbers in square brackets are a reference to the electronic agreed bundle. Other references to page numbers are a reference to the Claimant's bundle of documents.

17. We did not find the Claimant to be an untruthful witness, but the Claimant was not a reliable witness and did not give reliable evidence. The Claimant would often mix up her timelines in respect of when events happened and there were occasions which we detail below where the Claimant expressed things that had not happened as if they had happened. The Respondent's witnesses Ms Ana Maria Ghitica and Ms Hannah Waterhouse were truthful witnesses whose evidence was consistent with the documentation.

18. The Claimant was employed from 1 September 2020 under a fixed term contract as a Hygiene Stewart. Although the fixed term contract of employment stated that the Claimant's job title was a Hygiene Team Leader, we accept Ms Waterhouse's evidence that this was an administrative error. [113-126] The Claimant signed the contract of employment on 8 December 2020 [124]. However, the Claimant's fixed term contract expired on 27 November 2020 [113], but the Claimant remained employed. By email dated 27 May 2022 13:15 [page 2 of the Claimant's bundle] the Respondent confirmed to the Claimant that she was now a permanent member of staff. However, the Claimant was not issued with a new contract of employment. We accept Ms Waterhouse's oral evidence that this was an oversight, and the Claimant should have been given a new contract.

19. The Claimant said that in November 2022, she had a meeting where Ms Ghitica told her that she was to be demoted and that there was nothing she could do. The Claimant said that she was told that she would receive a new contract of employment, but she never received that contract. The Claimant did not rely on any other contract of employment as setting out her terms and conditions of employment. We do not make any findings on whether the Claimant was told any of these things, but we do find that the Claimant understood that the terms and conditions in the fixed term contract to apply to her when she was permanently employed as the Claimant accepted this in evidence. We find that those the contractual terms in the Claimant's fixed term contract were the Claimant's contractual terms when she was employed by the Respondent as they were the terms and conditions by which the Claimant worked.

20. The notice period in the Claimant's fixed term contract states "*Termination of Employment (Period of Notice) ……*

    Where given by the Company:

    Notwithstanding that this contract is for a fixed term, the Company reserves the right at its entire discretion to terminate your employment at any time prior to the expiry of the fixed term defined above by giving you not less than one month's notice in writing. This could occur for operational reasons, or for any other reason that the Company deems appropriate." [120]

21. The fixed term contract also states *"Payment in Lieu of Notice (PILON)*
    The Company reserves the right to make a payment in lieu of notice for all or any part of your notice period on the termination of your employment. This provision, which is at the Company's absolute discretion, applies whether notice to terminate the contract is given by you or the Company. Any such payment will consist solely of basic salary (as at the date of termination) and shall be subject to such deductions of income tax and National Insurance contributions as the Company is required or authorised to make". [120]

22. The Claimant's evidence was that as she was a permanent employee after the expiry of her fixed term contract, she believed that the notice period that the employer had to give her was 2 months. However, the Claimant could not explain why she believed that her notice period was 2 months. The Claimant accepted that the reference in the fixed term contract to 2 months' notice applied to the notice that she had to give as an employee when

terminating her employment. We find that the Claimant's evidence that the notice period the Respondent had to give her was 2 months was not credible, the Claimant had no rational basis for this assertion. We accept Ms Waterhouse's evidence that for someone in the grade of the Claimant's role, notice periods were shorter and if an employee was paid monthly like the Claimant, then the shortest notice period applied which was a month.

23. On 13 January 2023 the Claimant was sent a letter stating that *" Wincanton is proposing to make certain changes to its policy on notice periods. These changes relate to the notice period to be given by either us as your employer (in the case of your employment being terminated) or you as an employee (in the case of you resigning).*

    The reason for this change is twofold. We want to be able to attract and retain colleagues in our business and therefore would like to move to notice periods which are more competitive in the marketplace; we also want to simplify and align periods of notice across the company.

    Not everyone will be impacted by this change. We are contacting everyone to let them know about the change to ensure this process is inclusive. If you are impacted by this change, then this will mean a change to your contract of employment, for which we need your consent." [180]

24. The Claimant's grade at the time in January 2023 was M1 and the letter then referred to a table which contained a column for the grades of roles, a column for service, a column for the notice period to be given by the employee and a column for the period of notice to be given by the employer. In the row next to M1 on the row for *" thereafter"* which was a reference to those employees who had completed their probation period, the notice period for employer was stated as "*1 month or statutory minimum whatever is greater"*. [180]

25. In the rest of the letter, it states:

    "If you agree to this change, please indicate your acceptance by completing the attached form via the link at the end of this email and returning to People Services. The change shall be immediately effective from Wednesday 1 March 2023. You should then keep your signed copy of this letter safe together with your Contract, which shall be amended by this letter.

    We are asking all colleagues to consent to these changes and will review the responses by Friday 17 February 2023. If we do not hear from you by this date, then we will assume that you are happy with the proposed amendments and apply the change.

    If you do not agree to the change and wish to object, we will then undertake a consultation process with you.

    Please email Employee.Relations@wincanton.co.uk to register your objection.
    If you have any questions, please contact the People Lead in your business area.
    https://forms.office.com/Pages/ResponsePage.aspx?id=g9lT4YzS4UKOfZfKjyHSKJojvbxf7oxMtEoasRWzl9FUMEFJQkRYTDJBWkFUTEExUzBBRVVHSVo3OSQlQCN0PWcu " [181]

26. The Claimant's fixed term contract [123] states under the heading *"Alterations to Your Contract of Employment"*

    "The information contained in these documents will be reviewed on a regular basis and the Company reserves the right to make reasonable alterations to your Contract of Employment, as the needs of the Company dictate.

    Minor changes of detail (e.g. in procedures) may be made from time to time and will be effected by a general notice to employees. You will be consulted regarding significant proposed change(s) and will be given not less than one month's written notice before significant changes are made. You will have the opportunity to comment on the proposed change(s) and all suggestions / comments that you make will be carefully considered before a final decision is taken. Such changes will be deemed to have been accepted unless the Company receives from you, an objection in writing before the expiry of the notice period. Refusal to accept any lawful or statutory changes may result in your dismissal."

27. The Claimant's witness statement said that she did not object because her accounts were blocked and she asked her Team leader, Roderick to print from his account the requested form. The Claimant said that he told her that he was not aware of what the Claimant was talking about and after showing him the letter he told her that no one else had received that kind of letter. The Claimant said that she hadn't received a new contract and for which one they are writing to her. She said she was trapped again and to avoid any viruses to be transmitted in her computer she did not respond until further clarification. However, in oral evidence the Claimant said for the first time that the reason she did not object was because she had not received a contract of employment so she did not know what her terms and conditions were and so she couldn't object because she did not know what the change to her contract of employment was. This was not in the Claimant's witness statement as an explanation for why she did not object. The Claimant accepted in evidence that she did not seek further clarification, she did not write any correspondence to the Respondent asking any questions about her contract of employment after receiving the 13 January 2023 letter nor did she click on the link.

28. We accept the Claimant's reason for not objecting was because she did not know what her terms and conditions in her new contract of employment were going to be when she received a new contract. However, we find that the Claimant understood that the terms and conditions that applied to her were the terms and conditions in the fixed term contract which stated that her notice period was 1 month. The letter made it clear that if there was a change to the notice period from the employer on her grade it would be to 1 month, so there was no change to the Claimant's notice period from the employer, the letter was ineffective. There was no need for the Claimant to object as there was no change to her contract of employment.

29. Following an invitation dated 14 April 2022 from Ms Ghitica to attend an investigation meeting to discuss the Claimant's alleged misconduct, the Claimant sent an email on 14 April 2022 to Ms Ghitica [241] which contained the phrase *"This statement may help resolve the H&S , bullied, harassment*

and discrimination issues at workplace." [145 & 241]. The Claimant accepted in evidence that her statement that was attached of 4 pages [144-149] did not make any reference to behaviour that may be said to have breached the Equality Act 2010. The Claimant's evidence was that it was obvious that the behaviour recalled in the statement was a breach of the Equality Act 2010. However, we do not find it was obvious, there was nothing in the phrase in the email or the statement that referred to the Equality Act 2010 nor was there a mention of a protected characteristic of any one in the context of there being a contravention of the Equality Act 2010. In the context of an investigation into the Claimant's behaviour, there was no obvious reason for the Respondent to know that the Claimant was complaining of sex discrimination, which is what the Claimant said in her oral evidence. We accept Ms Ghitica's evidence that she did not read the email or statement as raising any points of discrimination, she regarded the statement to contain issues raised about standards of cleaning and conversations between colleagues and she was surprised by the words of the email. We find there was no information in the 14 April 2022 email, that made a reference to a protected characteristic.

30. The Claimant was given notice of redundancy by letter dated 3 May 2023. The Claimant obtained an interview for a role as a RGS Security Logistics Officer based at Heathrow airport with Wilson James on 25 May 2023. The day before her interview the Claimant sent an email dated 24 May 2023 to her team leader Roderick asking for time off for her interview [293]. The email had 4 attachments which included the interview appointment letter. The email stated *"Dear Roderic could you please arrange with the other managers my payid time off from work tomorrow due to invitation for work interview. By surching the location I would appreciate if you can assume that the 12:00pm living my work place will be appropriate time. I would be grateful if you can print the information provided for early organisation*" [293]

31. The Claimant's evidence was that this email referred to a request for reference. We find there was nothing in this email that referred to a request for a reference.

32. The Claimant's witness statement also said that the Claimant requested a reference from Ms Ghitica after her interview with Wilson James. The Claimant said that Ms Ghitica told her in response that she should call her if she wanted a reference. The Claimant admitted that she did not call Ms Ghitica at any time to ask for a reference and that Ms Ghitica did not refuse her a reference. We accept Ms Ghitica's evidence that other colleagues did not receive references or job approvals. The Claimant gave no explanation as to how she knew this and did not challenge Ms Ghitica's evidence on this point. We also accept Ms Ghitica's evidence that she did not receive a request for a reference from Wilson James or the Claimant.

33. The Claimant gave evidence that she was told by Wilson James that she was not to request a reference herself from the Respondent, but that Wilson James would request a reference for her directly from the Respondent. We accept the Claimant's evidence on this point.

34. The Claimant's employment ended on 31 May 2023. The Claimant was paid notice pay of 28 days in her pay for May 2023. The Claimant accepted in evidence that she was paid the remaining 3 days' pay in her salary for June

2023 with her redundancy pay.

35. The Claimant was offered the job by Wilson James on or around 7 June 2023. At around the same time, the Claimant took a screenshot of the portal she said she had been given access to by Wilson James of the status of her employment. In that screenshot there is a reference to messages to the Claimant with her name but there is no date on the screen shot nor is there any reference to Wilson James. The screenshot has a list of former employers of the Claimant. The reference to Wincanton PLC has next to it a box containing the words *" requested, awaiting response*" [185]. There is also a box that states, *"1 gap referees"*. We accept that screenshot is of the portal regarding the Claimant's recruitment process with Wilson James. However, we do not accept that the screenshot was evidence of a reference request. We note at the top of the screenshot is 5 years background history and just below that is the reference to *" requested, awaiting response*". We find that it was the background history that was being asked for by Wilson James from the Claimant and that is why the Claimant had access to the portal and that is why the Claimant took a screenshot so that she knew what it was she had to obtain as part of the vetting process.

36. The Claimant said in oral evidence that she was contacted by Wilson James vetting on 11 July 2023 and told that they had received no response from the Respondent regarding a reference. The Claimant said this meant that the Respondent refused her a reference, because she knew for a month that Wilson James had made a request for her reference from early June to July 2023 and relied on her screenshot. The Claimant said that in the end she used a friend who had known her for 10 years to provide an alternative reference and did not need the reference from the Respondent to work for Wilson James. However, the Claimant did not say that she was told that the Respondent had refused her a reference, just that they had not responded yet. We find that on a balance of probabilities that was when the Claimant received the call from Wilson James on 11 July 2023, that Wilson James had to her that they did not have a reference from the Respondent not, that they had requested a reference. We find the screenshot is not evidence of a reference request from Wilson James.

37. We accept Ms Waterhouse's evidence that reference requests are dealt with by the Employee Shared Services ('ESS'), the ESS team. The Claimant accepted that the request for a reference from Wilson James would have been dealt with by the Respondent's central HR department which is the ESS team. However, the Claimant did not know who in the ESS team would have made the decision to refuse the reference from Wilson James. The Claimant gave evidence that lots of managers including HR managers left by the time the request was made in response to the question of why she said that the reference was refused because of her 14 April 2022 email and statement. We find that the ESS team in June 2023 did not know about the Claimant's 14 April 2022 email and statement as it was likely that the staff present in June 2023 were not the same staff present when the Claimant sent the 14 April 2022 email and statement, as those ESS staff had left the Respondent by 2023. Furthermore, we accept Ms Ghitica's evidence that the ESS team would not be aware of the Claimant's 14 April 2022 email and statement.

38. We accept Ms Waterhouse's evidence that the Respondent searched for the

reference request from Wilson James but did not find it. We find that if a request was sent to the Respondent, it likely came through a general email address, that Ms Waterhouse referred to on the Wincanton website. We accept Ms Waterhouse's evidence that the Respondent had a process for allocating emails that came through on the general email address and that it would have been allocated to the Employee Shared Services ('ESS') team who deal with references. Furthermore, the Claimant did not contest Ms Ghitica's evidence that the ESS team did not know about the Claimant's 14 April email and statement. We find that the Respondent did not respond to a request for a reference from Wilson James because they did not receive the request.

The Law

Post employment victimisation

39. Section 27 Equality Act 2010 ('EQA') sets out as follows:

> *"(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 all the allegation is made, in bad faith."*

40. The EAT in Chalmers v Airpoint Ltd UKEATS/0031/19/SS (unreported 2020) upheld the Tribunal's decision that a reference to actions which 'may be discriminatory' in a grievance was not sufficient to amount to a protected act.

41. In Durrani v London Borough of Ealing EAT 0454/12 the Employment Appeals Tribunal ('EAT') upheld the Tribunal's decision that references to 'being discriminated against' referred to general unfairness rather than detrimental action based on the Claimant's race, although the EAT emphasised that the case should not be taken as 'any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of s.27 EQA'. All will depend on the circumstances of the particular case.

42. Concerning section 27(1)(d) EQA, the allegation must contain facts if verified could be capable of amounting to a breach of the Equality Act 2010. In Fullah v Medical Research Council and anor EAT 0586/12, a black employee brought an internal complaint of harassment against his manager. He complained of being 'physically, verbally and psychologically bullied and

harassed, discriminated and victimised both directly and indirectly; and stated that he 'was at a loss to understand why' and when his complaint was rejected on appeal, he stated that he believed that his manager had subjected him to bullying, harassment, discrimination and victimisation over the course of four years. However, he did not mention any protected characteristic. The Tribunal in that case concluded that there was no protected act and the EAT agreed. While the complaints indicated the possibility of a tribunal claim based on race, the tribunal considered the context, including the fact that a year later, the claimant had made explicit claims of race discrimination. The EAT in that case accepted that the word 'race' did not have to appear, but the context must indicate a relevant complaint and here that context was lacking.

43. Section 39 (4) EQA applies to employers and states:

> *"An employer (A) must not victimise against an employee of (A)'s (B)*
> *….*
> *(d) by subjecting B to any other detriment."*

44. The issue of causation is fundamental to proving victimisation. In the seminal case of *Nagarajan v London Regional Transport [1999] ICR 877, HL:* The House of Lords ruled that victimisation will be made out, even if the discriminator did not consciously realise that he or she was prejudiced against the complainant because the latter had done a protected act.

45. Lord Nicholls put it like this in Nagarajan *"Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances."*

Detriment

46. MOD v Jeremiah [1980] ICR 13, CA: a detriment exists 'if a reasonable worker would take the view that the treatment was to his detriment'.

47. A detriment must be capable of being objectively regarded as such- Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 , 'an unjustified sense of grievance cannot amount to 'detriment'.

48. Section 108 states that:

> "*(1) A person (A) must not discriminate against another (B) if—*
> *(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and*
> *(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act…..*
>
> *(3) It does not matter whether the relationship ends before or after the commencement of this section…..*

(6) For the purposes of Part 9 (enforcement), a contravention of this section relates to the Part of this Act that would have been contravened if the relationship had not ended.

(7) But conduct is not a contravention of this section in so far as it also amounts to victimisation of B by A"

49. Section 108(7) EQA on the face of it reads as post-employment discrimination cannot amount to post employment victimisation. However, in the Court of Appeal decision of Rowstock *Ltd and anor v Jessemey 2014 ICR 550*, Underhill LJ giving lead judgment in Jessemey, took the view that s108(7) is a drafting error and that post-employment victimisation is not proscribed under the Equality Act 2010. The House of Lords decision of Rhys-Harper v Relaxion Group plc (conjoined appeals) [2003] ICR 867 had found that post-employment victimisation was unlawful under the pre Equality Act 2010 legislation. (Rhys-Harper was decided under the Sex Discrimination Act 1975). In particular in one of the appeals conjoined with Rhys-Harper, in Kirker v British Sugar the Claimant claimed post-employment victimisation on the basis of references, which the House of Lords (as it was then) ruled that amounted to post employment victimisation.

50. Underhill LJ provides an analysis at paragraph 45 of Jessemey that the Equality Act 2010 could not have intended to remove the right recognised by Rhys-Harper. In those circumstances, the words in s108(7) could be interpreted in line with rights conferred by EU legislation in respect of post-employment victimisation, and this must have been what the drafters of s108 intended. Thus, to treat post victimisation claims as being dealt with elsewhere in the Equality Act 2010, (which the explanatory notes of the Equality Act 2010 suggest), can be ignored. Underhill LJ concluded that at the end of section 108(1) the words "in this subsection discrimination includes victimisation" can be read into the subsection to give effect to the intention of parliament to provide a right to post employment victimisation.

51. The Court of Appeal in Scott v London Borough of Hillingdon 2001 EWCA Civ 2005, CA, confirmed that knowledge of a protected act is a precondition of a finding of victimisation and that, where there was no positive evidence that the respondent knew of the claimant's alleged protected act, there was no proper basis for a tribunal to infer that the claimant had been victimised.

Analysis & Conclusions

52. We considered the Claimant's and the Respondent oral submissions in coming to our conclusions.

Notice pay

53. Dealing first with the Claimant's claim for 2 months' notice pay. We found that the Claimant's terms and conditions were contained in the Claimant's fixed term contract. The term in respect of notice to be given by the employer was set at 1 month. We found that the Claimant was given 28 days' notice before termination. However, the Respondent had the right to pay some notice pay in lieu of notice in accordance with the term in the Claimant's fixed term contract which they did of 3 days the following month in June 2023. The Respondent accepted that they had not paid £0.52 but by the time of this

judgment the Respondent attempted to pay the Claimant the £0.52 but the Claimant did not accept the amount because she said the sum was incorrect. We found there was no basis for the Claimant saying that she was entitled to 2 months' pay. We therefore conclude that the Claimant's contractual entitlement to notice pay was 1 month for which she has been paid. In the circumstances the Claimant's breach of contract complaint for wrongful dismissal is not well founded and is dismissed.

Victimisation

54. Now dealing with the post-employment victimisation complaint. The Claimant needed to show that she had carried out a protected act contained in her email dated 14 April 2022 in order to be successful that she had been victimised because of it. We considered which categories under section 27(2) that the Claimant's 14 April 2022 email and statement potentially fell within. We concluded sections 27(2) (c) & (d) EQA were the appropriate categories into which the Claimant's 14 April 2022 email and statement potentially fell.

55. However, we could not find there was any reference to information that amounted to either an allegation that the Equality Act 2010 had been contravened or anything in connection to the Equality Act 2010. We considered the Claimant telling us that her English was not too good when she expressed that she did not understand Employment Judge Anstis' judgment. However, the Claimant was able to make herself clear in her correspondence, e.g. that she needed time off for an interview. Her written English was sufficiently clear in her emails. The Claimant claim form make reference to detriments because of sex discrimination, so the Claimant knew how to set out a complaint of sex discrimination. We conclude there was no protected act

56. Mr Hill set out in his oral submissions that the Respondent accepted that a refusal or failure to provide a reference was a detriment and that if there was a protected act it was not made in bad faith and furthermore that the request for a reference was closely connected to the employment relationship.

57. We consider that if there was a failure or refusal it falls within the MOD v Jeremiah test as a detriment and that the refusal or failure took place after the end of the Claimant's employment on or around 7 June 2023. We also conclude that the 14 April 2022 email was not made in bad faith and that the reference request, although took place after the end of the Claimant's employment in accordance with the House of Lords ruling in Rhys Harper v Relaxion Group PLC arises out of and is closely connected to the employment relationship. It is within the meaning of section 108(1)(a) EQA.

58. The Claimant's evidence was that the Respondent had refused to provide her with a reference not that the Respondent failed to provide a reference, in any event we found that the Respondent did not receive the reference request and so we conclude that there was no failure or refusal by the Respondent to provide the Claimant with a reference.

59. Even if we are wrong that the 14 April 2022 email was not a protected act, and the Respondent did fail or refuse to provide the Claimant with a reference. We found that the ESS team did not know about the Claimant's

14 April email and or statement and since the Claimant did not know who made the decision to refuse her reference, we cannot consider the motivation of anyone who could have made the refusal. There can be no causation in respect of the refusal or failure to provide a reference and the Claimant's protected act, if it was a protected act.

60. In the circumstances the Claimant's complaint of post-employment victimisation is not well founded and is dismissed.

Approved by:

Employment Judge Young

Dated 13 February 2025

JUDGMENT & REASONS SENT TO THE PARTIES ON

4 March 2025

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing, or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

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