EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000271/2024

Held in Inverness on 29, 30 & 31 October and 18 December 2024

Employment Judge J M Hendry
Members A H Perriam
F Parr

E William	**Claimant** **In Person**
L Rowland & Co (Retail) Ltd	**Respondent** **Represented by,** **Mr D Milne,** **Counsel** **Instructed by,** **Ms C Larven,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The Tribunal finds the claim for victimisation well founded.**
2. **The respondent shall pay the claimant the sum of Seven Thousand, Five Hundred Pounds (£7500) for injury to feelings plus Six Hundred and Forty-Four Pounds (£644) as interest calculated to the date of the Judgment.**
3. **The respondent shall pay the claimant the sum of One Thousand, Three Hundred and Eighty-Seven Pounds (£1387) plus interest of Seventy Pounds and Twenty-Two Pence (£70.22) as compensation for her loss of wages.**

4. The respondent shall also pay the claimant the sum of Fifty-One Pounds and Ninety-Eight Pence (£51.98) being accrued but unpaid holiday pay.

REASONS

1. The claimant in her ET1 sought findings that she had been unfairly dismissed from her position as a Trainee Dispenser or Health Partner and that she had been subjected to race discrimination and discrimination on the grounds of her religion or beliefs. In addition, she made a claim for holiday pay and notice. The claim for unfair dismissal was subsequently withdrawn as the claimant had insufficient qualifying service to pursue such a claim.

2. The respondent company resisted the claims. Their position was that the claimant had not suffered any discrimination either on the grounds of race or religion. They argued that the claimant had been paid in full both her holiday pay and any other payments in relation to the termination of her employment. They said that the claimant left her work on 18 December 2023 without authorisation and then despite the respondent making enquiries of her she did not return.

3. The case proceeded to a Case Management Hearing on 21 May 2024. The respondent's agents had prepared a draft list of issues. The claimant was given a short period following the hearing to consider the list and to add necessary factual information to them where required. This she did. In relation to holiday pay the claimant was asked to provide a calculation showing the hours she was due. She was warned that the onus was on her to demonstrate that holiday pay was due and what that figure should be.

4. In relation to the question of her religion the claimant explained that she followed what she described as being the Israelite tradition and was part of an American based church. As part of her beliefs she did not observe Christmas holidays. These holidays and her observances, had she said, become issues at work.

5. It appeared that there were a number of incidents or interactions at work that the claimant believed both amounted to race discrimination and/or religious discrimination. It was decided that a final hearing should be arranged before a full Tribunal.

The Hearing

6. At the start of the hearing the Tribunal queried whether or not the respondent company was taking any issue about the claimant's professed beliefs. In other words, whether or not the claimant had a protected characteristic of religious belief. She had said that she was a member of a particular church. We did so because although the respondent company had not directly challenged this matter neither was it clearly accepted. Mr Milne's position was that the respondents were neutral on the matter and it was a matter for the Tribunal.

7. The respondent's Counsel indicated to the Tribunal that it would be helpful to have a short case management discussion before the hearing commenced. He explained that he had gone through the claims made by Ms William and had turned these into a Scott Schedule which he then provided to us. There were a number of incidents which the claimant had not given a date for. He invited the Tribunal to go through the Scott Schedule with her and try and obtain further information to narrow down or pin point the dates. This, he said, would assist him both in cross-examination and in leading evidence from the respondent's witnesses.

8. The Tribunal agreed that in the circumstances particularly as the claimant was unrepresented and given that some of the allegations made were not dated this would be appropriate. It also allowed the Tribunal an opportunity of explaining to the claimant how the hearing would then be conducted.

9. Another issue that the Tribunal had noted was that Witness Statements had been ordered and the Tribunal had access both to an agreed Joint Bundle of Documents and to the Witness Statements. The claimant, in the lead up to the hearing had prepared a document that she asked to be used as her Witness Statement. However, it was clear from that document that there was a lack of detail/specification that the claimant would have to supplement and that it had not been drawn up in accordance with the Presidential Guidance. A discussion about her position and the allegations she relied on would in our view assist both the Tribunal and the respondent's Counsel to understand her position more fully. The claimant had no objection to this course of action.

10. We accordingly accepted Mr Milne's suggestion that it would be in accordance with the overriding objective to discuss the Scott Schedule with the claimant and try and narrow down dates for the incidents referred to. We will deal with these matters when we come to consider the incidents involved but broadly the claimant's position was that all the incidents occurred in a period between the Summer of 2023 up until her employment ending in December. The claimant was unsure of many of the exact dates but was clear as to the sequence of events. For example, she was able to indicate that Jaidon Campbell, a fellow employee hired at the same time as she was, had become unfriendly towards her in August/September 2023 and that a Miss Cooper, an employee, had returned from her summer holiday in late July early August. She recalled Mr Campbell asking her about that holiday. The alleged harassment about being persistently asked questions about her religion occurred at the beginning of September onwards.

11. In the course of the hearing it became apparent that some additional documents were available which might assist the Tribunal and of consent these documents were lodged (pages 145-155).

Witnesses

12. The Tribunal heard evidence from the claimant and also from Miss Sally-Anne Cameron, formally a Pharmacy Dispenser and now a Pre-Registration Pharmacy Technician and from Miss Sarah Elliott, the Branch Manager at the shop situated at Balloan Park, Inverness where the claimant had worked.

Facts

The Tribunal found the following facts established or agreed:

Background

13. The respondent company, L Rowland & Co (Retail) Ltd ("Rowlands"), provides retail and regulated pharmacy services throughout the UK. It employs approximately 5,000 employees in total. It has a dedicated HR function.

14. It operates a small pharmacy at Balloan Park in Inverness. The pharmacy floor space occupies a relatively small area which allows public access to a counter behind which the Pharmacists and Healthcare Partners (formerly Dispensers) work. There is a small adjoining room which is used as an office/tearoom.

15. The claimant was employed by the respondent as a Trainee Healthcare Partner from 10 July 2023 until termination of her employment on 23 December 2023. The claimant was subject to various Policies and Procedures including Attendance Management Policy, Induction and Probation Policies.

16. The staff regularly communicated through WhatsApp. The claimant regularly communicated direct with the manager Ms Elliott.

17. The Absence Without Leave Policy indicated that if someone was unable to work they should contact the company to explain the reason for non-attendance. The Policy stated:

> "*If after reasonable enquiries you cannot be traced or you cannot give an acceptable reason as to why you have been absent, this matter will be dealt with in accordance with the Disciplinary Policy. The company will contact you in writing to establish why you've been absent, this matter will be dealt with in accordance with the Disciplinary Policy. The company will contact you in writing to establish why you are absent before taking any disciplinary action.*"

18. The claimant is a black woman originally from St. Martin in the Caribbean. She lives in Inverness with her partner and has two children aged 9 and 3. She previously worked in healthcare. Her partner does not keep good health.

19. The claimant is an active member of a Church based in America. Female members of the Church are known as "Daughters of Eve". She takes her religion seriously. She wears a headscarf as part of her religious observance. Christmas is not celebrated in this Church. The claimant keeps Saturdays as her Sabbath day and will not work on a Saturday. The claimant makes no secret of her religion and the phrase daughter of eve is on her WhatsApp account.

20. The claimant initially seemed to get on well with the staff in the branch who she found friendly.

21. New staff are required to undergo training. Mr Jaidon Campbell was employed at the same time as the claimant. He was a young man. He signed his Training Agreement on the 20 July 2023. The claimant did not sign her form until the 1 August 2023. The respondent chased up the training providers on the 22 August for both the claimant and Mr Campbell (JB p74). They did so again on the 11 September (JB p75). The provider sent the training forms to the claimant but their email was returned as they had the

wrong email address (JBp77). The claimant finally started her training on the 17 October.

22. The claimant became disillusioned with the pace of her training. It was delivered online through a company called Buttercups. She could not understand why the other Trainee Dispenser, Jaidon Campbell seemed to be further ahead in his training. In addition to this he was popular with established staff and was given more tasks relating to dispensing medicines than the claimant was given.

23. The claimant began to feel marginalised. She was regularly told to "*grab the broom*" as a signal to clean and tidy. She felt she was being asked to do this more often than other staff and in particular Mr Campbell. The claimant was the only black member of staff.

24. The claimant had a bad experience before she had been employed when she had visited the pharmacy as a customer. She felt she had been picked on by the Pharmacist on duty that day because she was on her telephone in the shop. Because of this experience the claimant believed that the Pharmacist who still worked there was racist. This member of staff was involved in assigning Jaidon Campbell more interesting tasks such as looking up patient names. The claimant's perception was that she was expected to stick to cleaning and tidying.

25. The claimant did have some problems with time keeping during her employment. She had to take her youngest son to nursery. She then had to pick him up in the late afternoon and this clashed with her finishing time. However, the difficulties were dealt with informally between the claimant and the manager Ms Elliott and the claimant was allowed to vary her hours by leaving work 15 minutes early to pick up her son from nursery. No formal disciplinary action was taken in relation to absences. The claimant understood that any difficulties had been resolved amicably with her manager.

26. The claimant was unaware of any issue with her directly messaging Miss Elliott. The claimant understood that the normal mode of communication was via WhatsApp. The claimant was not told to telephone the pharmacy in the morning if she was going to be late. She would txt the manager on WhatsApp. She believed that if she had telephoned at half past eight in the morning her experience was that the telephone would not have been answered until 9am.

27. The claimant's perception was that if staff members saw Mr Campbell make a mistake the matter would be treated lightly but that they made more of a ''fuss'' if she did.

Incidents

28. By August the claimant had become concerned that she had not been put forward for training. She was unaware that the respondent had contacted the training provider Buttercups to arrange her training at the same time as they had submitted Mr Campbell's name. Due to some administrative issue with the provider his training had started before the claimant's did.

29. From the start of her employment the claimant would regularly ask Mr Campbell to get her something for lunch when he went out to buy his own. She thought that she had a good relationship with him. When Miss Cooper returned from her summer holiday in about early August 2024 Mr Campbell told the claimant he was too busy to speak to her but then went over to where Miss Cooper was sitting and asked her about her holiday. The claimant found this disconcerting. At this point Mr Campbell stopped offering to buy the claimant's lunch when he went out. He told her that another member of staff had told him he shouldn't be doing this for her.

30. The claimant felt that other staff were becoming unhappy with her as she would not work shifts on Saturdays because Saturday was her Sabbath.

31. Throughout September the claimant felt she was being asked questions by colleagues which were personal to her religion such as why she wore her hair the way she did. She did not initially find this intrusive but later felt they were becoming so. She made no formal or informal complaint about this.

32. On 12 October the claimant was filing records. The manager was absent. She was unaware that if someone's name began with a Mc or Mac the next letter in the name was used for filing. She had filed all such records under the letter M. When this was discovered two staff members swore and ''tutted'' This embarrassed the claimant. It was unusual for anyone to be criticised for making minor mistakes. The claimant felt singled out. She walked out and telephoned Miss Elliott. She complained about being given menial tasks compared to Jaidon Campbell and about being criticised by other staff. Miss Elliott tried to reassure and comfort the claimant.

33. The claimant sent a message to Sally Ann Cameron apologising (JBp80).

34. On the 13 October Miss Elliott returned to work.

35. On the 19 October the claimant apologised to Miss Cameon on her return to the branch and gave her a hug. Miss Elliott was shown a message from the claimant apologising to Sally Ann Cameron for walking out (JBp80). The matter was not taken further.

36. At around the same time the claimant was making up a dosage box with medication. She made a mistake and staff members present commented on this querying why she had been allowed to do this work.

37. The claimant met Miss Elliott on the 14 November. She had left work mid morning the previous day because she had become unwell. Miss Elliott also recorded some difficulties with time keeping (JB85). Miss Elliott completed a leave record form (JBp.85-88). It was signed by the claimant. The record form

contained the note in the manager's handwriting: "*Eve has messaged me at home if she needs to leave. App has come up. Unfortunately, this can't continue as it impacts my home life. All absences need to be phoned into branch when it opens at 18:30pm.*"

38. The claimant had no recollection of this matter being raised with her at the meeting or appearing on the notes.

39. The claimant did not participate in discussions in relation to Christmas festivities. Staff were aware that she did not celebrate it. On the 28 November she overheard three staff members discussing the purchase of a Christmas tree for the branch from the firm Argos. One of the advertised trees was black in colour and an employee described it as "*yuck*". The claimant believed that the conversation was directed at her and that the language was racially motivated both in relation to her religion and race.

40. The claimant was asked if she wanted to attend the work Christmas party that was being arranged. She had told staff that she did not celebrate Christmas but by being asked she felt pressurised. She was asked on more than one occasion. The event was to be held on a Saturday and the claimant explained that this was her Sabath. When it was clear she would not attend she was invited to go to the manager's house with other staff before the party for drinks. She was upset at what she regarded as a persistent refusal to acknowledge her beliefs.

41. The claimant's WhatsApp profile shows her contact as a ''Daughter of Sarah''. This would have been visible to staff members (JBp80).

42. The claimant overheard Sally Cameron mention ''Daughter of Sarah'' to her. The claimant did not believe she had any reason to do so.

43. In early December 2023 the claimant's father suddenly became unwell. Miss Cameron enquired about the circumstances. The claimant was upset at what she regarded as persistent and intrusive questions from her.

44. On the 14 December the claimant overheard two members of staff discussing her personal situation in relation to her caring responsibilities for her father. She was upset at this as she thought that they did not believe her that he was unwell. She txted the manager Miss Elliott (JB82) on the 15 December: *''Yesterday while leaving my shift, it came to my knowledge that Sandra and Sally were talking about the incident that happened to my dad, and they didn't believe me. And another question would I be able to relocate shop?''* Miss Elliott in her response raised that the claimant had put down the 20 December as a holiday and said that staff didn't normally get holidays at this time of year and asked what it was for. The holiday was later allowed to stand.

45. The claimant (JBp83) responded: ''*…..I'm just gonna say I appreciate you so much and so understanding have a good evening and see you next week xx''* Miss Elliott finished by texting: *''….That's what I am here for any issues give me a phone or a message xxx''*

46. On 18 December the claimant had decided that she wanted to change branch. She was upset at the way she was being treated. She approached Miss Sarah Elliott and asked to speak to her. The claimant appeared upset. She was insistent. She said that she had been treated differently because of her race. Miss Elliott took her into the small adjoining office which was the only area available for a private discussion. It was however small and not very private. The claimant reiterated that she believed that she had been treated unfairly because of her race. She said to Miss Elliott "*move me or dismiss me*". Miss Elliott didn't know how to handle the situation that was developing. She was conscious that the room was not very private. She became flustered. She was also irked at the suggestion that she might have been racist herself despite

having what she thought was a good relationship with the claimant. She told the claimant "*grab your purse and go home*".

47. The claimant picked up her things left the premises telling her that she would see her in court. She was upset and shocked at being told to go home. The claimant believed that she had been dismissed. She looked on the internet that night for work. Miss Elliott did not contact the claimant to return to work or to explain why she was told to go home.

48. Miss Elliott contacted the respondent's HR team and spoke to someone called ''Lauren''. During the later investigation the respondent's records showed (JBp96): "..a*s Eve did not attend work Lauren stated if Eve did not return to work on 19/12/23 the AWOL process will begin. Lauren advised Sarah to speak to Wendy to keep her updated and to inform her on holding a probation review – as Eve stated she is unhappy in branch and feels she is being treated differently due to her skin colour. Lauren advised that a conversation needs to be had as to why she feels this way and allow us to follow up on any required actions.*"

49. She told the HR Adviser at 16.13 hrs that the claimant had not attended work. She told the Adviser that the claimant had said she felt she was being treated differently due to her skin colour. She was told that there should be a conversation as to why she feels this way. Miss Elliott was aware that an AWOL process would now be started.

50. The letter the claimant received on 19 December (JBp.94) stated:

> "*<u>Absent without Leave during Probationary Period</u>*
>
> *On 18th December 2023, I tried to contact you via telephone as you failed to attend work. I tried to contact you to establish the reason for your non-attendance as you have not made contact by telephone or within 1 hour of your normal start time on this particular day.*"

51. The letter was signed on behalf of Sarah Elliott. The claimant was surprised to receive the letter. She was annoyed that it was suggested that she had not turned up to work. It did not record that she had attended work and been told to leave. She telephoned the pharmacy on receipt of the letter (JBp.92) and spoke to Miss Elliott who denied any knowledge of it. She was not asked to return to work. Miss Elliott did not contact HR and stop the process or explain to them that she had told the claimant to go home.

52. The claimant was upset at the terms of the letter because Miss Elliott was aware that she had been told to leave on 18 December. The claimant contacted Ms Littlemore the HR Adviser and was told that the letter had been sent on the instructions of Miss Elliott. She said she had been instructed to write the letter and could not speak about it.

53. Miss Elliott was in contact with HR on the 22 December indicating she had received no contact from the claimant. She was advised that an assumed resignation letter would be sent out.

54. The claimant received a further letter on 22 December (JBp95) indicating that the company was assuming that she had resigned.

55. On 12 January the claimant sent in a letter of grievance (JB97-99): "*I am writing to raise a formal grievance about the recent termination of my employment from Rowlands Pharmacy.*" She made reference to the discussion that she had on 12th October with Sarah Elliott. She made reference to an incident on 14 December and 18 when she asked if it was possible to get a transfer to another pharmacy and was told to "*get your things*".

56. On receipt of the claimant's grievance the respondent carried out an investigation.

57. An investigation was carried out by Wendy Cathcart, Regional Manager. She spoke to the claimant by telephone on 31 January 2024. In relation to the

meeting on 18 December the claimant was asked what she had told her manager about discrimination that she believed had led to the termination of her employment. It was recorded (JBp100):

> "*My contract was terminated when I asked her about discrimination. When other staff made a mistake it's ok, but when I make a mistake it's like the end of the world. She told me to grab my stuff and go".*

She also interviewed other staff members including Sarah Elliott who was recorded as saying (JBp.116):

> "*We all supported Eve as much as possible but it did affect my private life and I had to discuss this issue with her. Some of these issues were strange, they range from childcare issues, car problems, Dad in London was in a car accident, appointments etc. There was a lot of requests. Which I all support apart from holiday requests from the Wednesday before Christmas. I refused to authorise this and Eve was furious with me. She said I had verbally approved all her holidays but I had explained we were not permitted holidays in December. Eve then challenged me further over the holiday refusal and wanted me to either transfer her to another store or sack her. I didn't understand what was going on as I wanted to understand what the issue and what was happening. I explained to Eve that if she had an important appointment and needed the time off, it would be fine however I could not permit holidays at the holiday time. I did not sack her. I sent her home so she could calm down as the situation was very confrontational and upsetting. She phoned me after the event and was very abusive towards me down the phone. At that point I blocked her number on my personal phone.*"

58. The claimant accrued holidays in the course of her employment. She was able to check what had accrued online. Her holiday year was from March to April. The claimant took a screen shot of the company's records after she was told to go home which indicated that she had accrued 74.25 hours as holiday. The claimant was paid 69 hours holiday. She is accordingly entitled to 5.25 hours accrued holiday pay.

59. Following the events at work on the 18 December the claimant had looked for work. In particular she had looked on the internet for work. She contacted Manpower which provides agency work (JBp156). She started an assignment with Milton Hotels at the end of January.

Witnesses

60. We found the claimant to be overall an honest and genuine witness. She was generally credible in relation to her narration of events but much detail was missing which is perhaps unsurprising given the passage of time and the fact she had not made contemporaneous notes. However, we found that her perception of many of the incidents she referred to and the motivation she attributed to others to be impossible to accept. She seemed to have very little or no basis for understanding that she came to that she was being discriminated against on the grounds of her religion or race.

61. The evidence of Miss Cameron seemed to us to be generally credible and reliable.

62. Miss Elliott's evidence was in parts uncontentious. However, in relation to the events leading up to the claimant's termination of employment we found it difficult to accept and to an extent self-serving. We discuss these matters in more detail later but one matter that stood out was that she said that the claimant was furious with her at their final meeting because her holiday had been refused. This did not sit well with either the claimant's evidence or the txt exchanges we saw which suggest that the holiday issue was resolved amicably. The main justification she gave for sending the claimant home was because she was ''furious'' and shouting at her yet despite the proximity of other staff there was no evidence to corroborate this nor was the claimant's alleged behaviour apparently raised with HR.

63. We would add that Miss Elliott is a relatively young and inexperienced manager and we concluded that she found it very difficult to deal with the claimant at the final meeting she had. We came to believe that to an extent she had panicked and told the claimant to go home and then sought to divert attention from her own action by going along with a bogus claim that the claimant was absent

without leave. She could have asked the claimant at any point to come back into the branch to discuss matters.

Submissions

64. The claimant asked the Tribunal to believe her evidence but made no formal legal submissions. The respondent's Counsel had prepared written submissions which he spoke to. We will briefly summarise them.

65. The respondent's submissions were that the claimant had brought fourteen claims of discrimination. These were then dealt with in turn with reference to the relevant law. Counsel sought that they should all be dismissed. Mr Milne first of all pointed out that the claimant despite being invited to cross examine had not challenged much of the respondent's witnesses' evidence. In his submission the Tribunal should give her evidence little, if any, weight.

66. He turned to the claimant's evidence giving reasons why her version of events should be rejected. Her perception of racism was misconceived. It might be that she had suffered from racism living in Inverness but her own evidence was that she now automatically felt she was being discriminated against. In short, she was hypersensitive about events that were entirely innocuous. Her evidence was selective and self- serving. She could not for example recall discussing walking out with Ms Cameron or hugging her. If her version of events was true then why had she apologised? The claimant tried to suggest that the 'x' in her txt was ''a hug'' but that explanation made no sense. She had to try and explain away her inconsistency.

67. When giving evidence about the impact of the alleged discrimination it would be expected that, if true, she would be upset but she went out of her way to say she was not upset. The claimant tried to argue that the reason for her weight loss was the conduct of the respondent's staff. As at 22 October 2023, the claimant's medical records show that she lost 6 stone in 5 months. That

means her weight loss started in May 2023, around two months before she commenced employment with the respondent.

68. Counsel then turned to look at the evidence around the various allegations such as the ''Christmas tree'' incident. The assertion she looked withdrawn which she had disputed and so on. Both of the respondent's witnesses were both credible and reliable. Their version of events accorded with their statements and the documentary evidence. They both gave their evidence clearly and comprehensively. They did not advocate for a particular cause, and sought to give their evidence honestly unlike the claimant.

69. He turned to discuss the relevant law firstly Section 13 of the 2010 Equality Act observing that the test for direct discrimination is objective: regard must be had to what was done, not to the motives for doing it: ***James v Eastleigh BC*** [1990] 2 A.C. 751.

70. Counsel then turned to the relevant law in relation to discrimination referring us to ***Nagarajan v London Regional Transport*** 1999 ICR 877. In relation to the alleged dismissal he referred us to ***East Kent Hospitals University NHS Foundation Trust v Levy*** UKEAT/0232/17/LA per Eady J at [27] – [33]. He then discussed the Awol process adopted by the respondent and to what he described as sloppy HR practice. Objectively there was no basis for a claim for harassment (***Pemberton v Inwood*** (CA) [2018] ICR 1291) and ***Richmond Pharmacology v Dhaliwal*** [2009] I.C.R. 724.

71. In relation to the claim for victimisation he reminded us of the terms of Section 27(1), Equality Act 2010 and the need for a protected act. The key test he submitted is for the employment tribunal to ask itself: 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 his detriment? An unjustified sense of grievance does not pass the test. If *a* reasonable worker would or might take that view, as opposed to *all* reasonable workers, then the test is satisfied: ***Shamoon v***

Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 per Lord Hope at [33] – [35]; ***Warburton v Chief Constable of Northamptonshire Police*** 2022 ICR 925 per Griffiths J at [50].

72. In considering causation, the correct approach for the tribunal to take was to look at the "reason why" the detriment occurred. This requires an analysis of the mental processes of the alleged discriminator. The respondent did not accept there had been a protected act on the 18 October. The respondent accepted that the conversation on 18 December 2023 was a protected conversation. Being told to grab your things was not a detriment in the circumstances. If, however, the ET considers the comment tantamount to a dismissal then it is accepted this amounts to a detriment.

73. The claimant was upset when she left the branch. She declared she would see the respondent in court when leaving. To say she was not upset is not credible in the slightest. The reason she was told to grab her belongings was an act of compassion. It was not by reason of the protected act shortly prior to her physical exit from the branch. The respondent did not dismiss the claimant on 18 December 2023. The words "get your belongings" are inherently ambiguous. They do not meet the test of unambiguity required for notice of dismissal to be given. Counsel then discussed time bar in relation to the claim before the 13 November.

Discussion and Decision

74. The claims before the Tribunal were for direct race discrimination, harassment in relation to race and religion, victimisation and unlawful deductions from wages in respect of holiday pay.

Discrimination

75. Direct discrimination under Section 13 of the EA is committed when:

"***13 Direct discrimination***

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

76. In the present case there were two protected characteristics at issue namely race and religious belief.

77. We also had to consider whether there had been harassment and victimisation. The statutory provisions are as follows:

"***26 Harassment***

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5)The relevant protected characteristics are—

- *….*

- *Race*
- *Religious Belief;*

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."

78. The Tribunal also had to bear in mind the relevant provisions of Section 136 of the Act in relation to the burden of proof.

"***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."

79. In relation to the issue of victimisation we had regard both to the Act and to the case law. A summary of the applicable case law is contained in the relatively recent case of ***Warburton v The Chief Constable of Northamptonshire Police*** (2022) EAT 22. We also found the case of ***Fecitt v NHS Manchester*** (2012) ICR of assistance when considering the effect of the protected act on subsequent events.

80. At the outset we would record that we accepted that the claimant was entitled to the protection of the Act in relation to both her race and her religious beliefs the latter which we accepted to be genuinely held. The initial burden is on the employee and we considered the evidence before us carefully to ascertain if the burden had shifted to the employer.

81. We looked first of all at whether there was evidence of any specific incidents from which it could be inferred that staff were referring to either the claimant's race or religion.

82. There were two matters in particular that stood out. The first was what we will call the Christmas tree incident where the claimant heard a staff member call a black Christmas tree ugly and ''yuck'''. We asked the claimant to explain the context of the incident to us. She accepted that it had been agreed that the pharmacy should have an artificial tree and that staff were looking online (JB p89). She explained that she had her back to the group looking at what was on offer. She could give us no indication of the demeanour of the group for example by way of catching sight of someone looking over at her or pointing at her or sniggering or anything to suggest she was being referred to in the discussion. Nevertheless, we were initially a little suspicious about the reference to a black Christmas tree having never encountered such an object before. We were unaware that it is a ''thing'' and that there are indeed such objects as black Christmas trees and that they were available from the retailer in question.

83. The claimant had no basis for believing these remarks were aimed at her. There was no history of such comments being used to tease or insult her. There was nothing immediately before or after the incident that allows us to infer discriminatory treatment either on religion or race grounds. We understand that ultimately two artificial trees were purchased which were not black. This appears to be a wholly innocuous incident and there was no detectable discriminatory element in the comments that the claimant took objection to. That said we can understand that the claimant who by this point

was very sensitive to any apparent reference to either her religion and race took some exception to it.

84. The second matter was the reference to the claimant being a ‘‘Daughter of Sarah’’ and being asked questions about her religeon. The claimant had made no secret of her religion and had explained to staff both why she wore a headscarf and did not celebrate Christmas. That her religious practices became a matter of interest is something she initially had no difficulty with. On balance we accept that the phrase was probably used. She told us that she was upset at the use of this description of her as there was no reason for it. The remark was attributed to Sally Cameron who denied it. Nevertheless, on balance we accept it was said. The background to this as we have described is that the claimant made no secret that the fact that this is how female followers of her religion are described in her Church. There was no evidence that the phrase had been used in some derogatory way. It was not, for example, repeated or part of a pattern of behaviour or accompanied by disparaging comments or said sarcastically. It was the use of the description itself that the claimant objected to.

85. We accept that a one-off act can be harassment. However, looking at the matter in the round we could not hold that it was reasonable for the conduct to have that the effect argued for by the claimant namely that it either violated her dignity or created an intimidating humiliating or offensive environment. At most it was a silly or gauche remark which was not repeated.

86. We took a similar view of the claimant’s assertion that it amounted to harassment when she was asked about her religion or beliefs. It was illuminating as we noted earlier that she made no secret of them and seemed content to explain them to other staff. No specific incidents were identified by her that caused upset and although she said that Ms Cameron had been involved no specific allegations were put to her nor did the claimant give

evidence about particular incidents for example conversations she found upsetting.

87. We considered the other matters raised by the claimant. The matter that appeared to us to start undermining the claimant's view of her workplace was the related issues of her training, being asked to clean and Mr Cambell getting preferential treatment. She was unaware of the situation that had arisen with the Training provider. We accepted the respondent's witnesses' evidence that as a Trainee the claimant could not be given the full range of tasks until she had completed her training. We also accepted that there was no intentional delay in the claimant starting her training after Mr Campbell. But he did start earlier and seems to us to be a possible explanation as to why he was given more demanding/interesting duties. We also accepted that the claimant was probably asked to clean more than her colleague and it is unfortunate that the difference in treatment wasn't noticed by the manager or raised by the claimant but a difference in treatment is not sufficient on it's own to show discrimination of any sort. There was nothing to suggest these events related to her religion or race.

88. We accepted the claimant's description of staff swearing or tutting when she made errors for example making up the dosage box or misfiling. There is nothing that suggests that the claimant's race or religion were factors. Such reactions seem to us to be part and parcel of almost any work-place. We could not detect anything that might suggest that she was being discriminated against on the grounds of her race or religion in the evidence before us. The claimant herself accepted that she had initially got on well with staff and had a good relationship with Miss Elliott. The relationship between the claimant and her work colleagues seemed sour because of the perceived favouritism she felt was shown to Mr Campbell.

89. We considered all the evidence in relation to the alleged incidents of harassment. It seemed to us that the claimant really had no real basis for suggesting that events in the shop related either to her race or religion. Overall,

the evidence before us was not compelling. We did not need to consider the question of time bar.

Victimisation

90. The starting point is the terms of Section 27 and whether the section is engaged. In this case, there was a dispute as to whether the claimant had made a "protected act" in October. We accept that she had not.

91. We then considered the issue of possible victimisation arising from events on the 18 December. We had no doubt that the claimant's genuine perception was that by this point she was being treated less favourably because of her protected characteristics of race and religion although this seemed to be a view that she had come to relatively late in the day.

92. The events that led to the claimant leaving begin on the 14 December when the claimant became upset at being questioned about her father becoming unwell. This is reflected in the contemporaneous txt to Miss Elliott (JBp82). She ends by mentioning relocation. This is not picked up in the response and unfortunately part of the claimant's next message is incomplete but the exchanges appear friendly with Miss Elliott making no complaint about being messaged and indicating that she was there to deal with issues.

93. The claimant approached Miss Elliott on the 18 December. The evidence of Miss Elliott and the claimant are at odds but there is some common ground Miss Elliott's statement given during the grievance investigation suggested that the claimant was furious with her because she had refused to sanction her holiday request for the 20 December. This does not seem to be supported by the txts, their friendly nature or the claimant's evidence which is that the holiday had been granted.

94. The claimant says that she raised the incident on the 14 December and the racism she said she had experienced. Miss Elliott's position also sits oddly

with the records kept by HR of the contact made by her (JBp96) which made no reference to the claimant being furious with Miss Elliott over refused holiday leave. We accepted that by this point the leave had been granted and was no longer an issue. The only matter relating to the meeting that was recorded was she had stated that she was unhappy and felt that she was being treated differently ''due to the colour of her skin''.

95. Mr Milne asked us to put little weight on this record putting it down to as he put in ''sloppy HR''. He is correct that it is simply a small piece of evidence that must be treated cautiously but it reflects the claimant's position that the meeting was not about holidays but about her complaints of being treated differently because of her skin colour. Interestingly, Miss Elliott describes the contact with HR thus in her statement: *''I'm really upset over the whole situation and to be called a racist is even more upsetting. I called HR immediately after the events for support…''* We did not accept her evidence that she later received an abusive call from the claimant. No evidence of such a call was produced.

96. We would, however, express some sympathy with the situation Miss Elliott found herself in. She thought that she had a good relationship with the claimant. As a relatively inexperienced manager she had to deal with a very difficult situation. Her position was that she told the claimant to go home in order to let her calm down. The claimant does not recall being asked to go home to calm down, and we accept her evidence on this point that she was told simply to grab her things and go home.

97. There were aspects of Miss Elliott's position that puzzled us and seemed difficult for her to explain even without cross examination. We could not understand why if this temporary suspension as the respondent characterised it was the reason for sending the claimant home why there was no follow up txt confirming that either on the day or the following. There was no reference to the claimant being sent home in Miss Elliott's contact with HR despite it being a crucial explanation as to why the claimant might not have shown up the following day. We also could not understand why Miss Elliott at that point went

along with the initiation of the AWOL process given that she knew why the claimant had left work on the 18 December. She then denied knowledge of the process when the claimant contacted her as required by the terms of the letter.

98. We concluded from the evidence that in all probability Miss Elliott felt that she had gone too far and that the meeting with the claimant had not gone well. She did not tell HR the crucial piece of evidence that she had sent the claimant home because it might show her in a poor light but went along with the AWOL process which was something of a charade.

99. One of the matters raised by Mr Milne was the question of dismissal. The question of dismissal had to be judged objectively and Mr Milne submitted that where the words used were ambiguous then this was insufficient to show a dismissal. The context of those words is, however, important. The claimant had asked to be moved or dismissed because she could not work in the branch any longer. To be told then that she should go home has a clear inference that she was being dismissed. In other words one of the alternatives she had offered had been accepted. The claimant for her part was sure that she had been dismissed. She had been told to leave and take her belongings following a demand made by her to move her or dismiss her. Her call logs corroborate her evidence that she contacted the CAB for advice the following day (JBp120).

100. We also found that the claimant acted honestly and in good faith in making the allegations that she had was being discriminated against because of her race although we ultimately did not accept that there was an objective basis to demonstrate this in relation to the claims for harassment.

101. The evidence was not particularly satisfactory and the terms of the discussion between the claimant and Miss Elliott disputed. We had to look carefully at the other evidence to decide if it could cast a light on what had occurred. We considered the competing version of events. We found it difficult to accept Miss Elliott's evidence that the claimant was aggressive/furious and uncontrollable.

In such a small shop and given the layout it is likely that there would have been witnesses to this. Miss Elliott in her evidence explained that she was concerned to have such a sensitive meeting in the only room available. This also supports the claimant's evidence that the issue of race discrimination was being discussed. As we noted earlier we suspect that Miss Elliott found herself somewhat out of her depth but she was also clearly angry at the suggestion she was a racist. We concluded that the claimant had by alleging race discrimination and unequal treatment because of the colour of her skin that the terms of Section 1(d) were engaged.

102. We had to consider what happened and whether it was related to the protected act. This is the question of what has sometimes been referred to as 'causation' although we were aware of the criticism of the use of that word. The issue was whether or not we could say that the events complained about happened ''because'' of the protected act. In ***Chief Constable of West Yorkshire Police v Khan*** [2001] 1 WLR 1947 HL at para 29 the matter is put in this way: "*Contrary to views sometimes stated, the third ingredient ("by reason that") does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach*. For the reasons I sought to explain in ***Nagarajan v London Regional Transport*** [2000] 1 AC 502, 510-512, a causation exercise of this type is not required either by section 1(1)(a) or section 2. 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." In ***Nagarajan v London Regional Transport*** [2000] 1 AC 502 HL, Lord Nicholls said, at 512H to 513B: "*Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how*

the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out." The "but for" test is clearly not applicable, setting the bar too low. But the "operative" or "effective" cause sets it too high if it leads to the error of looking only for the main or principal cause." Lord Nicholls' formulation - whether the protected characteristic or protected act "*had a significant influence on the outcome*" - is the correct test. This approach was reiterated in the case of ***Fecitt***, a whistleblowing case**,** where the test was described as being whether the disclosure had a material influence or more than trivial influence on the events complained of.

103. Applying that test we looked at the reasons given for sending the claimant home and at subsequent events. We did not accept Miss Elliott's position that the claimant was sent home because she was shouting at her or to cool down. Even had we accepted that these were part of the reasoning we would still have been left with the claimant being sent home, in our view dismissed, because she had raised the issue of race discrimination as she was entitled to do.

104. In the event we did not believe that the claimant needed to rely on the burden of proof provisions but if she had, we did not doubt that the claimant had provided us with *prima facie* evidence from which we could draw the inference of race discrimination and that inference was not rebutted by Miss Elliott's evidence.

105. We then considered the detriment which had flowed from these events. The law is set out in the well-known case of ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 HL. Detriment is to be interpreted

"widely". It was clear that the claimant was sent home (and not paid for that afternoon) nor following this as she was said to be AWOL.

106. In our view the claim for victimisation must succeed. The detriment that the claimant suffered was being sent home, not being asked to return to work and then being put through the sham AWOL process.

Remedy

107. We first of all deal with the holiday pay claim of 5.25 hours accrued holiday pay. The onus is on the claimant to demonstrate that she is due accrued holiday pay. We took the view that she had demonstrated that the company's own calculations of accrued holiday pay showed her to have accrued 74.25 hours (JBp119). The company paid 69 hours but led no evidence on this matter. Holiday entitlement had clearly accrued at the date the claimant left (69 hours were paid) the dispute was the amount and no evidence was led to gainsay the company's own calculations and to explain why 69 hours was appropriate. We suspect that part of the reason might be that the company's records would not show the claimant working on 18 December but this would not explain a discrepancy of 5.25 hours. We took the view that the claimant having shown us the calculations she was entitled to rely on it was up to the respondent to show why 74.25 hours was incorrect and that accordingly the claim should succeed. The final payslip we have for the claimant (JBp132) shows a salary of £1387 per month. That gives an hourly rate of £9.90 (£1387/35 x 4). The sum accrued amounts to £51.98 (£9.90 x 5.25).

108. The Tribunal next considered whether to make an award for injury to feelings and if so, what was the appropriate ***Vento*** band? An award for injury to feelings is compensatory. It should be just to both parties. It should compensate fully without punishing the wrong-doer.

109. The Tribunal reminded itself that an award of injury to feelings is to compensate for "subjective feelings of upset, frustration, worry, anxiety, mental distress,

fear, grief, anguish, humiliation, stress, depression." (***Vento v Chief Constable of West Yorkshire Police*** (No. 2) [2002] EWCA Civ 1871 [2003] IRLR 102). In that case the Court of Appeal observed there should be three broad bands of compensation for injury to feelings. The top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award of compensation for injury to feelings exceed the normal range of awards appropriate in the top band. The middle band should be used for serious cases which do not merit an award in the highest band. The lowest band is appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence.

110. The claimant led no medical evidence in support of her claim for injury to feelings. She did her best to appear stoic about the events from the 18 December repeatedly saying she was not angry but disappointed. We looked at the matter broadly. The events she experiences did in our view have an impact on her as the nature of those events would be bound to do. The claimant was clearly shocked at being told to leave. She said that she would see them ''in court''. She lost her employment just before Christmas. She had two young children to support. We were told that her partner did not keep good health but not whether or not he worked.

111. The lower band applicable to events in December 2023 was £1100 to £11,200. The act of harassment was to dismiss the claimant and to initiate the AWOL procedure. The two events are closely linked in time. We concluded that the lower band was appropriate. This was not a continuing state of affairs or part of a pattern of harassment or indeed of discrimination as alleged. We have placed the award of £7500 higher than the middle of the band to reflect these matters.

112. The Tribunal turned to the question of interest. It is required to consider this even if not raised by a claimant. It is empowered to make an award of interest upon any sums awarded pursuant to the Employment Tribunals (Interest on

Awards in Discrimination Cases) Regulations 1996. The rate of interest prescribed by regulation 3(2) is each year the rate fixed for the time being, currently an amount of eight percent in Scotland. Under regulation 6(1)(a) for an award of injury to feelings the period of the award of interest starts on the date of the act of discrimination complained of and ending on the day on which the Tribunal calculates the amount of interest. For the purposes of the award the date of calculation is 14 January 2025 being the date of this Judgement.

113. The Tribunal orders the respondent to pay the clamant the additional sum of £644 representing interest on the award of injury to feelings. Calculated from the 18 December 2023 (the date of the discriminatory act) until the 14 January 2025 being the date of the Judgment. The Tribunal's calculation is (£7,500 x 0.08 x 392/365 days = £644).

114. The claimant was unemployed for a period of approximately a month. We accepted that although she had joined an agency she did not actually start a comparably well paid job until the end of January. She was ''dismissed'' by the respondent company on the 22 December (JBp95) but did not get paid during the period she did not attend work. This amounts to £1387. She is entitled to interest at 8 per centum per annum from the mid point between the act causing the loss (18 December) and the Tribunal hearing (29 October 2024). This is the 24 May 2024. Interest to the date of the Judgment is £70.22 (231/365 days x 0.08 x £1387). The claimant would have been entitled to one weeks' notice but we make no separate award as it is included in the loss of wages awarded.

Employment Judge: J M Hendry

Date of Judgment: 14 January 2025

Date Sent to Parties: 14 January 2025