EMPLOYMENT TRIBUNALS

Claimant: **Ms L. Andrews**

Respondent: **St Mungo Community Housing Association**

Heard at: **East London Hearing Centre**

On: **14 October 2019**

Before: **Employment Judge Massarella**

Members: **Ms J. Hartland**
Ms H.T. Edwards

Representation
Claimant: Ms C. Hunt (Counsel)
Respondent: Mr J. Mitchell (Counsel)

JUDGMENT ON REMEDY

The judgment of the Tribunal is as follows.

1. **The Claimant is awarded £4,006.96 in respect of loss of earnings consequent on the unlawful victimisation.**

2. **The Claimant is awarded £217.80 in interest on that sum at a rate of 8% from 8 February 2019 to 14 October 2019.**

3. **The Claimant is awarded £12,000 for injury to feelings.**

4. **The Claimant is awarded £1,301.92 in interest on that sum at a rate of 8% from 6 June 2018 to 14 October 2019.**

5. **The Respondent is ordered to pay the Claimant the total sum of £17,526.68.**

6. **The Claimant shall be liable for any tax in respect of this award.**

REASONS

Background

1. By a Judgment sent to the parties on 17 June 2019 the Claimant succeeded in her claim of victimisation. A remedy hearing with a time estimate of one day was listed for 6 August 2019. For reasons set out in an order of that date, that hearing was adjourned to 14 October 2019 and case management orders made.

The Hearing

2. The Tribunal had retained the original liability bundle and the parties provided an additional, agreed bundle of documents of fewer than a hundred pages, containing documents relevant to remedy. We also had a schedule of loss and counter-schedule.

3. We heard evidence from the Claimant, who was cross-examined by Mr Mitchell. For the Respondent we heard evidence from Ms Julie Middleton, Head of Resourcing for the Respondent, who had prepared a witness statement and a supplemental statement. Both were cross-examined by Counsel. Ms Hunt for the Claimant then made brief oral submissions; Mr Mitchell did not make separate closing submissions, relying instead on the detailed arguments set out in the Respondent's counter-schedule.

The issues

4. The following issues arose for determination.

    4.1. But for the unlawful victimisation, when would the Claimant have begun to do locum work on the Respondent's bank?

    4.2. What kind of work would the Claimant have done; what is the chance that it would have included work as a deputy manager?

    4.3. Would the Claimant have continued with her work for Westminster Council, had the locum offer not been withdrawn, and at what level?

    4.4. What is the chance that the Claimant would have started working as a speech and language therapist for the Respondent on 1 June 2019?

    4.5. Would the Claimant still have been involved in setting up Change Communication CIC, had there been no victimisation; if not, is she entitled to the expenses associated with setting it up?

    4.6. Did the Claimant unreasonably fail to mitigate her loss in respect of the period from 22 September 2018 onwards?

    4.7. What injury to feelings did the Claimant suffer as a result of the victimisation?

The law

Compensation for acts of discrimination

5. Compensation for discrimination is assessed on tortious principles (ss.119(2) and s.124(6) Equality Act 2010 ('EqA')). The aim is to put the Claimant in the position, so far as is reasonable, that she would have been in, had the tort not occurred (*Ministry of Defence v Wheeler* [1998] IRLR 23). The sum is not determined by what the Tribunal considers just and equitable in the circumstances, as would be the case for an unfair dismissal award (*Hurley v Mustoe (No 2)* [1983] ICR 422).

6. In assessing the loss suffered by the Claimant, the Tribunal may take into account the chance of events having occurred following the unlawful act, and determine the award on the basis of the loss of that chance (*Wheeler*). Where the chance of a future event is very high, or very low, it is permissible to treat the chance as 100% or 0%, as appropriate (*Timothy James Consulting Ltd v Wilton*, UKEAT/0082/14/DXA).

Mitigation

7. The Claimant is required to mitigate the loss she suffers as a result of the unlawful act. She is expected to search for other work, and will not recover losses beyond a date by which the Tribunal concludes she ought reasonably to have been able to find new employment at a similar rate of pay.

8. The burden is on the Respondent to prove a failure to mitigate (*Fyfe v Scientific Furnishing Ltd* [1989] IRLR 331). If the Claimant has failed to take a reasonable step, the Respondent must show that any such failure was unreasonable (*Wright v Silverline Car Caledonia Ltd*, UKEATS/0008/16). The question of reasonableness is to be determined by the Tribunal itself; the Claimant's perception is only one of the factors to be taken into account.

Injury to feelings

9. The matters compensated for by an injury to feelings award include subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (*Vento v Chief Constable of West Yorkshire Police (No2)* [2003] IRLR 102).

10. In *Vento* the Court of Appeal gave the following guidance as to the level of awards for injury to feelings:

> **'Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.**
>
> **i. The top band should normally be between £15,000 and £25,000. Sums in this range 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 £25,000.**
>
> **ii. The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.**
>
> **iii. Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence.**

> **In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.**
>
> **There is, of course, within each band considerable flexibility, allowing Tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.'**

11. The bands have since been increased to reflect inflation, recently by way of Presidential Guidance. The Claimant's case having been presented on 6 November 2018, the relevant Guidance[1] provides:

    11.1. lower band: £900 to £8600;

    11.2. middle band: £8,600 to 25,700;

    11.3. top band: £25,700 to £42,900.

12. The focus of the Tribunal's assessment must be on the impact of the discrimination on the individual concerned; unlawful discrimination may affect different individuals differently (*Essa v Lang* [2004] IRLR 313).

Interest

13. The Tribunal must consider whether to award interest on the sums awarded without the need for any application by a party, but an award of interest is not mandatory: reg 2, Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ('ET(IADC) Regs').[2]

14. Interest is calculated as simple interest accruing from day to day (reg 3(1)). For claims presented on or after 29 July 2013 the relevant interest rate is that specified in s.17 of the Judgments Act 1838: see The Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 1996.[3] The interest rate now to be applied is 8%.

15. As for the period of calculation, for awards of injury to feelings interest is awarded from the date of the act of discrimination complained of until the date on which the Tribunal calculates the compensation (reg 6(1)(a) ET(IADC) Regs). For all other sums interest is awarded from the mid-point of the date of the act of discrimination complained of and the date of calculation (reg 6(1)(b)).

16. Recoupment does not apply to compensation for discrimination.

Findings and conclusions

17. The circumstances of the Claimant's application to join the Respondent's bank of locum workers, the initial offer and its subsequent revocation on 6 June 2018, which the Tribunal found was an act of unlawful victimisation, are set out in the Tribunal's judgment on liability.

18. We deal first with the question of what the Claimant would have earned, had the unlawful victimisation not occurred.

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[1] 'First Addendum to Presidential Guidance Originally Issued on 5 September 2017'
[2] SI 1006/2803
[3] SI 1996/2803

The date on which the Claimant would have started bank work for the Respondent

19. It is not in dispute that, had the offer to join the locum bank not been revoked, the Claimant would have worked on the bank. What is in dispute is when that would have occurred and what kind of work she would have done.

20. A relevant factor in this assessment is that the Claimant was undertaking a course of study at City University during this period; her term-time commitments affected the work she would have been able to do for the Respondent.

21. As for the date on which the Claimant would have joined the bank, we accept the Respondent's evidence that, in order to join the bank, the Claimant needed DBS clearance. In an email of 25 May 2018 she provided dates on which she could provide her DBS documentation; on 4 June 2018 the locum administrator arranged for her to come in on 8 June 2018. Ms Middleton's evidence was that the DBS clearance process, which was carried out externally, would take four to six weeks. On the balance of probabilities, the Tribunal considers that it would have taken four weeks for the Claimant's DBS to be processed, and she would have commenced work on Monday 9 July 2018.

22. The Claimant suffered no financial loss before that point.

The type of work the Claimant would have done

23. There are three types of work the Claimant asserts she would have done for the Respondent: providing cover for a deputy manager role until she resumed her studies in September 2018; alternatively, hourly shift work as a support worker; and a full-time speech and language therapist role from June 2019 onwards.

24. We also consider below work for Westminster City Council, which the Claimant was able to increase because she was not working for the Respondent, which is relevant to the issue of mitigation.

Work covering a deputy manager role

25. The Claimant contends that she would have taken the higher-paid role as cover for a deputy manager; the Respondent contends that she was far more likely to do lower-paid, hourly shift work.

26. The Claimant accepts that she would only have been able to do the deputy manager role until 22 September 2018, when her university term started. She claims three months *pro rata* at the annual rate of £33,000 gross. Given our finding above that the earliest she could have started would have been 6 July 2018, that period is necessarily reduced.

27. Before the revocation of the offer the Claimant emailed the Respondent on 1 June 2018 to ask whether she could be considered for management roles through the bank. She received a response the same day from Mr Tom Nixon:

> 'Yes, you could be considered for all locum roles. For manager shifts, we would need to do some further assessment, including additional psychometric testing and a further interview. We can discuss progressing this once your references have come back and we are a bit further along in getting your file signed off.'

28. There is no mention of a specific management role in this email exchange.

29. Ms Giles, who did not attend the remedy hearing, said in her statement for the liability hearing that she had been told on 6 June 2018 that Kate Tebbet, regional service head, was anxious to fill a deputy manager post quickly and wondered whether the post could be covered by someone on the locum bank. It is clear from Ms Giles's statement that it was the Claimant who Ms Tebbet was referring to. Ms Giles's evidence was that she said it would be very unusual; there had been a couple of occasions when it had happened, but that it had not worked out well.

30. Ms Middleton, who attended the remedy hearing, said that it was 'rare' for a locum to be offered a deputy manager shift. She stated that assigning the Claimant to cover this work would have required a senior manager investing significant time providing an induction to the world's responsibilities and requirements and ensuring that the Claimant was familiar with local procedures and had completed the necessary mandatory training.

31. The Claimant's evidence was that it was 'rare, but possible' for a deputy manager role to be covered on a temporary basis by someone on the locum bank.

32. Ms Middleton in her statement said that the deputy manager role to which the Claimant was referring was a role at Endsleigh Gardens. While it is clear from email correspondence in mid-April 2018 that the Respondent was struggling to cover this role, cover was required from mid-April until 10 July 2018; the Claimant could not have done this role as she was not DBS cleared in time.

33. We accept Ms Middleton's evidence that there was only one temporary deputy manager role which would have been available: a role within Haringey Complex Needs Service. It was advertised as a 12-month secondment at a salary of between £30,106 and £33,286 at 37.5 hours per week. Ms Middleton confirmed in her statement that locums working at the Respondent's business could have applied for it.

34. It is necessarily a speculative exercise to assess what the chance was of the Claimant successfully applying to cover this work. We conclude that there was some chance, since an enquiry had been made by a manager on her behalf as to whether she might be permitted do work of this type; an indication had been given to the Claimant that this was not impossible (before the revocation of the bank offer); and there was at least one role which the Respondent had not been able to fill on a long-term or temporary basis.

35. On the other hand we conclude that the chance was not high: it was accepted by the Claimant that it was rare for a locum to cover a role of this sort; there were a number of hurdles to surmount before she would have been accepted for the role, including assessment and an interview; we see the force of Ms Middleton's evidence that it might not have been worthwhile going through the necessary induction process for such a short period of service; the Claimant had never been a manager or deputy manager within the Respondent organisation and, although she had carried out such roles elsewhere, we find this would have further reduced the chance of her being appointed on a short-term cover basis.

36. Doing the best we can in the circumstances, we consider that the percentage chance was low but not insignificant and we identified it as 20%.

37. It follows that we consider there was an 80% chance that the locum work which the Claimant would have done would have been the lower-paid shift work. We find that there was ample availability of shifts for this kind of work.

Shift work from September 2018 onwards

38. We accept the Claimant's evidence that from 24 September 2018 onwards she would have been able to do shift work for the Respondent around her university course. She claims loss of this work (at the £12.11 hourly rate) until 31 May 2019 according to different working patterns: more hours during the university holidays, fewer during term time. The total claimed is £6,515.16.

The speech and language therapist role

39. We have already alluded to the fact that the Claimant began a BSc in Speech and Language Therapy at City University in September 2015, with the long-term aim of delivering speech and language therapy to people affected by homelessness. She qualified as a speech and language therapist on 1 June 2019. From that date she has been employed in that role by Change Communication, her own company. Her salary is £18,000 per annum for a 21-hour working week.

40. The Claimant says that, had there been no discrimination, she would have started working for the Respondent as a speech and language therapist on 1 June 2019, i.e. immediately upon qualification. She explains her plan was to work within the Respondent organisation to develop a speech and language therapist role which would benefit its service users. She freely accepts in her witness statement that this was a 'long-term aim' and that she would have had to 'persuade' the Respondent to take her on in a role of that sort.

41. Although this may have been her aspiration, we accept the Respondent's evidence that there was no such role at the time and there still is not. This is not a role that the Respondent is either commissioned to deliver, or is funded for, by contrast with such roles as Occupational Therapist and Psychotherapist. There is no evidence that the Respondent had any plans to create such a role, or that it could have been persuaded to do so and, even if it had, the likelihood of its appointing the Claimant to it, as a newly-qualified practitioner immediately upon a qualification, was low. Ms Hunt sensibly accepted in her closing submissions, given the way the evidence came out, that the likelihood of the Claimant persuading the Respondent to create this role 'did sound remote'. We find that it was nil.

42. Consequently, the Tribunal awards no compensation in respect of this head of loss.

Work for Westminster City Council

43. In May 2018 (before her application to the Respondent for locum work and its revocation) the Claimant secured a contract from Westminster City Council for a Homelessness and Brain Injury Project pilot ('the Westminster Project'). The Claimant proposed to Ms Victoria Aseevartham of the Council that she would

provide 12 days' work between July 2018 and March 2019 at a rate of £300 per day (£3,600 in total).

44. On 8 June 2018, just after the revocation of the offer by the Respondent, the Claimant learnt from Ms Aseervatham that additional funding had become available for the project. She met Ms Aseervatham on 10 July 2018 to finalise the terms within the increased budget: she was paid £12,000 to provide 40 days' work over the course of one year for the period 1 July 2018 to 30 June 2019.

45. The Claimant's evidence is that, had the victimisation not occurred, she would have continued with the Westminster Project alongside the bank work for the Respondent, even if she were in the deputy manager role. The project offered her particular opportunities which would have benefited her career in the long-term. We accept that evidence: it is consistent with an email from the Claimant to Ms Aseervartham of 15 May 2018 (before the revocation of the offer), which also referred to work with the Respondent's clients. Ms Middleton was taken to this document in cross-examination and accepted that the Claimant was planning to combine the work.

46. The Claimant goes on to say that, had the Respondent's offer not been withdrawn, she would still have proposed a larger commitment to Ms Aseervatham than had originally been agreed once she learnt of the additional funding, but not as much as she did once the locum offer had been revoked. She estimates that they would have agreed £6,000 for a project requiring 20 days' work between July 2018 and June 2019. We consider that to be a realistic estimate: it was still a relatively modest amount of work which the Claimant could have incorporated into her timetable of work for the Respondent; it was not challenged in cross-examination.

What is the Claimant's loss?

The period up to 22 September 2018

47. Mr Mitchell did not submit that the Claimant had unreasonably failed to mitigate her loss in respect of the period up to 22 September 2018.

48. Had the Claimant worked full-time in the deputy manager role between 9 July and 22 September 2018, i.e. two and a half months, *pro rata* by reference to an annual rate of £31,696 gross, which we adopt as being the midpoint in the salary range for the Haringey role referred to above, she would have received £6,603.33. Applying the 20% chance factor produces a figure of £1,260.66 gross.

49. As for locum bank worker, we adopt the Respondent's calculation of 37.5 hours per week at £12.11 over 11 weeks, which would be £4,995.37. Applying the 80% chance factor produces a figure of £3,996.30 gross.

50. The Claimant is entitled to her loss in respect of that period, subject only to the credit she must give for the additional Westminster Project work which she took on because she was not working for the Respondent: she has earned £6,000 across the year more than she would have earned, had the victimisation not occurred; we calculate that, *pro rata* for the period of two and a half months up

to 22 September 2018, credit of £1,250 should be given in respect of this period.

51. Accordingly, the Claimant's loss in respect of this period is **£4,006.96 gross**.

The period after 22 September 2018

52. Mr Mitchell contends that the Claimant is not entitled to any compensation after 22 September 2018 because she unreasonably failed to mitigate her loss thereafter.

53. Of course, the Claimant did continue to mitigate her loss, to some extent at least, up to June 2019 by carrying out the increased level of work for the Westminster Project: a further £4,750 across the rest of the year. She also did a half-day project for the City of London, for which she was paid £200.

54. The loss claimed in respect of lost shift work from September 2018 onwards is £6515.16. The balance which the Tribunal might award, once credit is given for the Westminster and City work, is £1,565.16.

55. However, Mr Mitchell submits that the Claimant could easily have found equivalent shift work for other service providers, had she sought it out, which would have extinguished such remaining loss. The Respondent led extensive and compelling evidence that there was a high demand in the sector for experienced staff owing to the recent increased funding for rough sleeper services. By way of example only, we were referred to the temporary vacancies in the homelessness sector which one employment agency, Morgan Hunt, had available between June 2018 and May 2019 (excluding the Respondent's vacancies), all of which would have been suitable for the Claimant. These included a range of work from Support Assistant (£9-£10 per hour); Support Worker (£10-£13 per hour); and Team Leader/Deputy Manager roles (£15-£18 per hour). Morgan Hunt confirmed in an email to the Respondent dated 27 August 2019 that they were often unable to source candidates with the right level of experience. That evidence was not challenged and we accept it.

56. We find that it was a candidate's market for those with experience of working in the homelessness sector and that it would not have been difficult for the Claimant to find work as a temporary deputy manager, a specialist support worker or other locum work during this period. Moreover, because the Westminster work was for a limited number of days, she had ample time to take on ad hoc shift work, even taking into account her university commitments.

57. The Claimant accepts that she did not register with any agencies; nor did she apply for locum roles in any other organisation in the sector. Her explanation for this that she believed it was usual practice for employers in the sector to ask about any disciplinary and grievance procedure that the applicant was involved in. Her evidence was that she felt that this would require her to disclose her pending Employment Tribunal claim. She did not want the claim to become general knowledge and she felt that that would be a risk if she applied to other employers.

58. The Tribunal found that evidence unconvincing. The Claimant must have known that Tribunal proceedings are not the same as disciplinary and grievance procedures. Had she been asked at interview whether she was involved in an

ongoing disciplinary or grievance procedure, she knew that she could truthfully answer that she was not. There had been no suggestion of any kind of internal procedure in 2018 and, as we found in our Judgment on liability, there had not even been any disciplinary procedure during her earlier employment in 2004.

59. The Tribunal considers it extremely unlikely that a potential employer would have asked about Tribunal proceedings; and, if they had, we do not believe that the Claimant would have felt obliged to volunteer information about them when applying for locum work. She accepted that she did not disclose the proceedings when she accepted the City of London work.

60. We accept the Respondent's submission that the Claimant could have secured shift work for other providers without any difficulty by 22 September 2018 (i.e. the end of the summer holiday before she commenced her University course) but that she chose not to do so. We find that she acted unreasonably in electing not to make any applications at all for shift work, nor to register with any agencies, in the three months after the revocation of the offer by the Respondent.

61. Accordingly, we find that the Claimant is not entitled to compensation for loss of earnings in respect of the period after 22 September 2018 because she unreasonably failed to mitigate her loss.

<u>The expenses associated with setting up Change Communication CIC</u>

62. In around September 2018 the Claimant and three colleagues began working on a plan for a not-for-profit organisation, providing information and training and support about brain injury and communication in the homelessness sector (witness statement 18). The name of that organisation was Change Communication Charitable Interest Company. This was a distinct legal entity from Change Communication, through which the Claimant had previously worked as a sole trader since 2016. They sent the relevant documents to Companies House in December 2018 and Change Communication CIC, came into existence in May 2019. Her work for the organisation was unpaid during the setup phase.

63. She claims the cost of rent for premises for the company and the cost of registering the company in the amount of £1,690.

64. The Claimant's evidence is that she set up the company because the Respondent revoked the offer of locum work, which in turn meant that her aspiration to create a Speech and Language Therapist role within the Respondent was now impossible. We reject that evidence. As we have already found, the aspiration to persuade the Respondent to create a role of this sort was just that, an aspiration. We do not believe that the Claimant would have pinned all her hopes on it, as she now seeks to suggest. We think it far more likely that the Claimant would have set up Change Communication CIC in any event as a vehicle for her wider ambitions as a speech and language therapist. It was a natural career progression for her which might open up new work streams and reflected a desire on her part to move away from sole trading. The Claimant accepted in cross-examination that she considered that applications for funding were more likely to be successful from the base of an organisation with greater support than from a sole trader.

65. We note, in particular, that her own witness evidence was equivocal: 'I do not know whether I would have been involved [in Change Communication CIC, had the victimisation not occurred] … I think I would have prioritised my work with St Mungo's'.

66. We conclude that the Claimant and her colleagues would have set the organisation up, even had there been no discrimination, and she is not entitled to compensation in respect of the cost of doing so.

What injury to feelings did the Claimant suffer?

67. For the Claimant, Ms Hunt argued that an award in the middle band of £12,000 would be appropriate; Mr Mitchell argued for an award in the lower band of £5,000, having regard to the fact that the Tribunal's finding related to a single act.

68. We prefer Ms Hunt's submission for the following reasons. Although Mr Mitchell is right that there was a single act of victimisation, it was an act with far-reaching consequences for the Claimant. It amounted to the withdrawal of an offer of work which otherwise would have continued over a period of nearly a year; it had a more serious impact on the Claimant that the loss of, say, a week or a month's work would have had.

69. We accept the Claimant's evidence that she felt 'mortified' by the withdrawal of the offer; it was humiliating for her and disrupted her work plans for the following year, which caused her anxiety. Moreover, the explanation of the decision to withdraw the offer was inextricably bound up with serious allegations of historic bullying, which we have already found were unwarranted, and which were deeply upsetting to her. At the time she was in her final year of clinical training and the Respondent's conduct caused her additional anxiety at a time when she was already under pressure.

70. That upset was compounded by the fact that the Claimant felt obliged to inform her Clinical Supervisor and the other Directors of Change Communication about the withdrawal of the offer and the allegation of historic bullying. This was difficult and embarrassing for her. She was particularly concerned that her Clinical Supervisor might doubt her professional integrity as a result. She was also worried that the allegations of bullying might cause her wider reputational damage. In the event, those allegations were aired in the course of the liability hearing and received some coverage in professional press outlets, which caused her anxiety and embarrassment. The reports are still online and she remains concerned, understandably so in the Tribunal's view, that they may have a reputational impact on her in the future.

71. We conclude that the Respondent's conduct caused the Claimant very significant hurt feelings. This is a case which we consider sufficiently serious to merit an award in the bottom half of the middle band. We regard **£12,000** as an appropriate sum in all the circumstances.

Interest

72. We consider it appropriate to award interest on both elements of compensation.

73. With regard to the financial loss of £4,006.96, the midpoint from the date of the discriminatory act (6 June 2018) and the date of calculation (14 October 2019) is 8 February 2019. Simple interest at a rate of 8% is **£217.80**, which produces a total sum of £4,224.76.

74. With regard to injury to feelings, simple interest on £12,000 at a rate of 8% from 6 June 2018 to 14 October 2019 is **£1,301.92,** which produces a total sum of £13,301.92.

Total award

75. The Respondent is ordered to pay to the Claimant the sum of **£17,526.68**.

76. Both parties used gross figures in their schedules; the Claimant shall be responsible for any tax liability in respect of the award.

Employment Judge Massarella
Date: 9 March 2020