Case No: 3312429/2020

EMPLOYMENT TRIBUNALS

Claimant v **Respondent**

Ms Bellanira Ruiz Aristizabal v Service to the Aged Ltd

Heard at: Watford **On**: 9,10,11, and 12 May 2022

Before: Employment Judge Alliott

Members: Ms A Brosnan
Mr N Boustred

Appearances

For the Claimant: Mr Simon Bennett (TU Representative)

For the Respondent: Mr S Jagpal (Consultant)

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claims of sex discrimination and harassment related to sex are dismissed.

2. The claimant's claim of detriment for trade union activity is well founded and the respondent is ordered to pay her the total sum of £1,150 for injury to feelings.

REASONS

Introduction

1. The claimant was employed by the respondent as a Carer on 30 January 2018. At the time of this claim she remained employed by the respondent although she subsequently resigned with immediate effect on 8 November 2020. By a claim form presented on 14 October 2020 the claimant brings complaints of direct sex discrimination, harassment related to sex and detriment for Trade Union activity. The respondent defends the claims.

The issues

2. The issues were set out in a case management summary by Employment Judge Quill on 12 May 2021. They are as follows:

> "Time limits / limitation issues
>
> 1.1. Were all of the claimant's complaints presented within the time limits set out in

1.1.1. section 123 of the Equality Act 2010 ("EQA")

1.1.2. section 147 of Trade Union and Labour Relations Act 1992 ("TULCRA")?
Dealing with this issue may involve consideration of subsidiary issues including: when the treatment complained about occurred; whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "*just and equitable*" basis; etc.

1.2. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before **9 June 2020** is potentially out of time, so that the tribunal may not have jurisdiction to deal with it, subject to consideration of the matters mentioned in the previous paragraph.

1.3. The tribunal might also have to consider the effects on time limits (if any) of an early conciliation certificate which the Claimant obtained at an earlier date, but which is not referred to in the claim form.

<u>EQA, section 13: direct discrimination because of sex.</u>

1.4. Did the respondent subject the claimant to the following treatment:

1.4.1. By Mr Maranan saying to the claimant, at the beginning of 2019, 'you don't have to tell me anything, I know what to do' (Para 3 of particulars; the date is as written, ie 2019)

1.4.2. On 17th February 2020 by Mr Maranan telling Mr Barreto 'don't help Bella'

1.4.3. On 19th May 2020, by Mr Maranan pointing his finger at the Claimant and saying, 'you have to stand up right now I need my computer right now'

1.4.4. On 21st May 2020, by Mr Maranan raising a grievance against the Claimant as set out at paragraph 8 a-c of the particulars of claim.

1.5. Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

1.6. If so, was this because of the claimant's sex and/or because of the protected characteristic of sex more generally?

<u>EQA, section 26: harassment related to sex</u>

1.7. Did the respondent engage in conduct as follows:

1.7.1. By Mr Maranan saying to the claimant, at the beginning of 2019, 'you don't have to tell me anything, I know what to do' (Para 3 of particulars; the date is as written, ie 2019)

1.7.2. On 17th February 2020 by Mr Maranan telling Mr Barreto 'don't help Bella'

1.7.3. On 19th May 2020, by Mr Maranan pointing his finger at the Claimant and saying, ‘you have to stand up right now I need my computer right now’

1.7.4. On 21st May 2020, by Mr Maranan raising a grievance against the Claimant as set out at paragraph 8 a-c of the particulars of claim)

1.8. If so was that conduct unwanted?

1.9. If so, did it relate to the protected characteristic of sex?

1.10. Did the conduct have the purpose or (taking into account the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

<u>Trade Union and Labour Relations (Consolidation) Act 1992, section 146</u>

1.11. Did the respondent do the things alleged at paragraph 23 of the particulars of claim and, if it did, in each case did it thereby subject the claimant to a detriment?

1.12. If so, in each case was the Claimant subjected to the detriment for the sole or main purpose of—

(a) preventing or deterring her from being or seeking to become a member of an independent trade union, or penalising her for doing so,

(b) preventing or deterring her from taking part in the activities of an independent trade union at an appropriate time, or penalising her for doing so,

(ba) preventing or deterring her from making use of trade union services at an appropriate time, or penalising her for doing so

<u>Remedy</u>

1.13. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.”

The law

<u>Direct discrimination on the grounds of sex</u>

3. Section 13 of the Equality Act 2010 provides as follows:

“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.”

4. Section 109 of the Equality Act provides as follows:

“109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal."

5. As per the IDS Employment Law Handbook discrimination at work:- at 15.10

   "Proving discrimination"

   "Where the employer behaves unreasonably, that does not mean that there has been discrimination, but it may be evidence supporting that inference if there is nothing else to explain the behaviour – Anya v University of Oxford and another [2001] ICR 847, CA. Thus an employer might escape a finding of direct discrimination by arguing, before the tribunal, "I'm a bastard to everyone", but this is likely to be harder to demonstrate, though not impossible, in a case where the evidence shows that only one employee was subjected to the employer's unreasonable behaviour."

6. Dealing with less favourable treatment, at 15.17:

   "The test posed by the legislation is an objective one – the fact that a claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment… That said, the claimant's perception of the effect of treatment upon him or her is likely to significantly influence the tribunal's conclusion as to whether, objectively, that treatment was less favourable."

7. As to the issue of comparator, s.23(1) of the Equality Act 2010 provides:-

   "23 Comparison by reference to circumstances

   (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

8. As per 15.38:

   "On the face of it, section 23(1) appears to suggest that all the circumstances relating to the case must be the same before a comparison between the claimant's treatment and that of a comparator can be made. However, the EHRC Employment Code makes it clear that this is not the case. It expressly states that the circumstance of the claimant and the comparator need not be identical in every way. Rather, "what matters is that the circumstances which are relevant to the [claimant's treatment] are the same or nearly the same for the [claimant] and the comparator." – Para 3.23

9. As regards determining the reason for the treatment, and the burden of proof, as per 33.11:

   "As succinctly put by her Honour Judge Eady QC in Fennell v Foot Anstey LLP EAT 0290/15, "Although guidance as to how to approach the burden of proof has been provided by this and higher appellate courts all judicial authority agrees that the wording of the statute remains the touchstone".

10. As per the case of Igen Ltd v Wong [2005] ICR 931, CA, the correct

approach for an Employment Tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (ie on the balance of probabilities) is the second stage engaged, where the burden then shifts" to the respondent to prove – again on the balance of probabilities – that the treatment in question was "in no sense whatsoever" on the protected ground.

11. As per 33.13:

> "Most cases turn on the accumulation of multiple finings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts."

12. In addition, Mr Jagpal drew our attention to two cases as follows:

- Kuzel v Roche Products Ltd [2008] IRLR 538
- Madarassy v Nomura International [2007] EWCA Civ 33

for the proposition that there has to be something more than merely a difference in sexes and less favourable treatment in order to establish discrimination

13. Section 26 of the Equality Act provides 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.

14. Section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides as follows:-

> "146 Detriment on grounds related to union membership or activities.
>
> (1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—
>
> (a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,
>
> (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so,

(ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or

…

(2) In subsection (1) "an appropriate time" means—

(a) a time outside the worker's working hours, or

(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services."

15. A detriment has the same meaning as that where it appears in discrimination legislation. As per the IDS employment handbook on trade unions at 11.9:-

> "In Ministry of Defence v Jeremiah [1980] ICR 13, CA, the Court of Appeal took a wide view of the wording "any other detriment" that appears in discrimination legislation. Lord Justice Brandon said it meant simply "putting under a disadvantage", while Lord Justice Brightman stated that a detriment "Exists if a reasonable worker would or might take the view that the action of the employer was in all circumstances to his detriment". Brightman LJ's words, and the caveat that the detriment should be assessed from the viewpoint of the worker, were adopted by the House of Lords…"

16. In addition, Mr Bennett drew our attention to two cases, namely

- Carlson v POU [1981] IRLR 158
- McWilliam v William Collins [1974] ICR 226

to support the proposition that to deter encompassed discouraging or hindering or restraining from acting or proceeding by any consideration of danger or trouble.

The evidence

17. We were provided with a bundle of 297 pages.

18. We had witness statements and heard evidence from:-

18.1 the claimant

18.2 Ms Julia Gonzalez, a fellow care assistant

18.3 Mr Andy Maranan, a staff nurse at the respondent's premises

18.4 Mrs Ana Eborde, registered home manager at the respondent's premises

18.5 Ms Judi Burwood, a director of JH Health & Care Associated Ltd, a small company providing consultancy and support to providers of Health & Social Care.

18.6 Mr Adei Kotei, Deputy Manager at the respondent's premises.

19. In addition we had a witness statement from Mr Stephen Goldberg, Co-chair of the respondent, who was not called.

The facts

20. The claimant was employed by the respondent on 30 January 2018 as a Care Assistant.

21. The respondent company runs a care home in North London and caters for about 60 service users over three floors. The regulated activities are nursing and personal care, diagnostic and screening procedures and treatment of disease and injury. Each floor had a Registered Nurse in overall charge as well as administering nursing care. A number of care workers would also work on each floor.

22. The claimant normally worked on the third floor. Mr Maranan was a Registered Nurse who normally worked on the second floor. Whilst the members of staff had normal floors to work on, if any floor was short-staffed then, quite regularly, individuals would be assigned to different floors as and when necessary.

23. It appears that at the start of the working day there would be a team meeting on each floor and tasks would be assigned by the Registered Nurse to the carers. It appears that the carers would often work in pairs.

24. From the evidence we have heard during the course of this case it is clear to us that even before the onset of the pandemic and the first lockdown in March 2020, relations between staff members were not entirely harmonious. The claimant gave evidence that shortly after she began her job she had an issue with a female Registered Nurse “Tatiana”. In short, the claimant alleged that Tatiana had been rude to her, caused her a great deal of stress and used intimidating behaviour towards her. The claimant told us that the Registered Nurse questioned her duties, made her feel intimidated and that she reported it to her line manager.

25. In addition, we were provided with an email dated 2 October 2019 wherein the claimant sent a letter of concern to one of the trustees of the respondent. Amongst the issues raised there was an allegation of unfair and discriminatory treatment at the hands of colleagues of Filipino origin. This matter was later alluded to by Ms Burwood who summarised her view of the situation following her report on the grievances (to be referred to below) wherein she states in an email dated 12 June 2020:-

> “I think that the whole Filipino versus Romanian thing is still behind all of this...”

26. In addition, Mr Maranan told us that a male agency care worker had raised a grievance against him in 2018 alleging rudeness.

27. In oral evidence the claimant elaborated that one of the grievances was that the Filipino staff would often speak in their own language. That said, the claimant accepted that she often spoke in Spanish to colleagues but asserted this was only during breaks.

28. It is clear to us and we find that there were cliques amongst the care workers and nursing staff, probably split along Filipino versus the rest lines,

and that there was a culture of grievances being raised by both parties against each other on a fairly frequent basis. It is against that background that we have considered the specific evidence dealing with the alleged treatment placed before us.

29. Due to the issues the claimant had had with Nurse Tatiana the claimant joined the Trade Union “United Voices of the World (UVW)”, which apparently had lots of Spanish speakers, on 13 June 2018.

30. The claimant’s evidence was that for the first 18 months after she joined the union she kept her trade union membership to herself and did not really talk to any colleagues about it. Her evidence was that her only active involvement with UVW during this period was through attending weekly meetings of its Women’s Empowerment Project : “When migrant women rise, we all rise”.

31. The claimant’s case principally involves incidents that took place between the claimant and Mr Maranan. Neither have English as their first language. The claimant is Columbian and a Spanish speaker. Although she had an interpreter present during this hearing, her English was good, and she rarely referred to the interpreter for assistance. Mr Maranan is Filipino. Again, his English was reasonably good.

32. There were aspects of both the claimant’s and Mr Maranan’s oral evidence that we found to be troubling. Given that serious allegations were made by each of them against the other they were understandably defensive of their own conduct.

33. Mr Maranan himself repeatedly described his interaction with the claimant as being assertive. Ms Gonzalez described him as rude, arrogant and despotic in the way he treated people. Her evidence was that he would often order them around saying “do this, do that, why haven’t you done that?“ and so on. Her witness statement states:-

> “If he felt you had done anything wrong, even if it was very little, he would make a point of telling you off. He did not seem like a nice person at all. This was my experience of working with him and it was the same for a lot of other female carers. I do not believe he treated all female carers badly – I recall he seemed to be nice towards those who, like him, were from the Philippines – but I do not remember seeing him treat a male carer badly. I think he had a big ego, so the combination of having power over us female carers in his role as a Nurse and being a man made him behave as he did towards us.”

34. Leaving aside Ms Gonzalez’s opinion as to whether or not Mr Maranan only treated female carers in this way, we find Mr Maranan could be arrogant and rude in the way he dealt with and managed the care workers working with him. We find that that he had an abrasive personality at times. That said, the events which we have heard about took place shortly after the national lockdown due to the covid pandemic when a combination of working conditions and staff shortages cannot have made working in a care home easy and stress free. As a Registered Nurse in charge of a floor, Mr Maranan would have had significant responsibilities for very vulnerable people.

35. The evidence of Ms Kotei was that the claimant was not afraid to vocalise

her views and thoughts. Having interviewed seven of the claimant's colleagues, Ms Burwood reported on 12 June 2020 as follows:-

> "Evidence suggests that at times [the claimant] can be abrupt and direct, some described her approach as "bossy"…"

36. Whilst, of course, we do not criticize the claimant for vocalizing her views and thoughts or, indeed, being abrupt and direct, it is clear to us that these traits brought her into conflict with Mr Maranan. As Mr Maranan said in evidence to us:-

> "She keeps pushing her suggestion in an abrupt way, she disrespects my authority and she keeps telling the nurses what to do rather than getting on with the job."

37. Ms Kotei gave evidence that there was animosity between the two of them. Ms Burwood reported that, from her interviews, other staff's perception was that there was an ongoing issue between the claimant and Mr Maranan that was based on personality rather than work issues.

38. It is against that background that we have examined the individual allegations of treatment.

<u>Alleged treatment 1: Mr Maranan saying to the claimant, at the beginning of 2019 "You don't have to tell me anything, I know what to do."</u>

39. This incident was first reported by the claimant over a year after it allegedly took place. In an interview with Ms Kotei on 4 March 2020, the claimant raised the issue as follows:-

> "I asked Andy to ask Semret to come and help us and he said "Excuse me you don't have to tell me what to do".

40. The alleged comment is in inverted commas which suggests that it is a direct quote, but it is clearly at variants with how the claimant described it on 4 March 2020. In his witness statement Mr Maranan states that he may well have said or used words to that effect. He said he would have done so to anyone who suggested that he call for support. In his oral evidence he seemed to change his account suggesting that he had already sorted the matter out by requesting help. We did not accept Mr Maranan's oral evidence on this point.

41. We find that the context of the comment being made was as follows: The claimant had been assigned to work on the second floor due to staff shortage. The second floor remained short of staff on that day and the claimant suggested to Mr Maranan that he could call the third floor to ask for Semret to assist. We find that Mr Maranan became irritated at a perception that he was being told how to do his job. We find that the actual comment made is more likely to have been as reported by the claimant in her interview on 4 March, namely beginning "Excuse me". We find that Mr Maranan was irritated at a perception that he was being told how to do his job and responded accordingly. We have considered carefully whether the fact that the claimant was female was a material influence on his actions at the time and whether unconscious bias caused him to react as he did . We find that the reason why Mr Maranan said what he said was his perception that he was being told how to do his job. We find that the comment was not

made because of the claimant's sex. We find that an appropriate comparator would be a male carer who is perceived as telling Mr Maranan how to do his job in the same circumstances. We find that Mr Maranan would probably have reacted in the same manner and consequently this was not less favourable treatment.

<u>Alleged treatment 2: On 17 February 2020 by Mr Maranan telling Mr Barreto "Don't help Bella".</u>

42. This allegation is made by the claimant based on what she has been told by Mr Felix Barreto. It is consequently based on hearsay.

43. It is common ground that on 17 February 2020 one of the tasks given to the claimant by Mr Maranan was to take the breakfast trolly down to the kitchen. The claimant told us that as she had to go around to all the residents to take their lunch order, so she asked Mr Felix Barreto to take the trolly down for her. It came to the attention of Mr Maranan that the claimant had not done the task she had been told to do by Mr Maranan and that Felix Barreto had in fact done it.

44. Again, the allegation is in quotation marks suggesting a direct quote. However, when the claimant first reported this to Ms Kotei on 7 February 2020 in an email, she states that Mr Maranan said, "Basically don't help Bella" and this is how she put it in her interview with Ms Kotei on 4 March:

> "He basically said "Don't help Bella".

45. Further, in a letter dated 28 May 2020, sent on the claimant's behalf, it is alleged that:

> "Felix told Bella Nurse Andy had essentially said "Don't help Bella"

and this formulation is repeated in the union grievance dated 6 July 2020:

> "Felix told Bellanira Nurse Andy had essentially said "Don't help Bellanira".

46. In due course Ms Kotei investigated this allegation. We found Ms Kotei to be a straightforward and credible witness. In her outcome letter dated 30 September 2020 she concluded as follows:-

> "When I carried out my investigation, [Mr Maranan] stated that he had given a clear instruction for you to take the tea trolly down and had other duties for Felix. It was not possible for you to carry out the task, you could have explained this to AM when giving the instruction and he could have delegated to someone else. However, I do agree that he went about this in an unprofessional way by advising Felix not to help, even though he did explain the reason why. Whilst I feel there was no direct discrimination, I do feel that this careless remark could have led to an uncomfortable working environment and a feeling of being picked on."

47. We find that words to the effect "don't help Bella" were used by Mr Maranan on this occasion. We find the reason Mr Maranan used these words was irritation that the claimant had not done a task that had told her to do. We note that the task had been done. We have examined quite why Mr Maranan should become irritated about the claimant not doing it herself. In his witness statement Mr Maranan sought to explain it as being a feature of his management that he needed to know what each member of staff was

doing and that if they swapped tasks amongst themselves it became difficult to manage daily activities. A different reason is given by Ms Kotei to the effect that Felix had other duties to do. We find that this is probably Mr Maranan seeking to justify his actions after the event. We find that he was annoyed that his authority had been challenged and reacted accordingly. Again, we have considered carefully whether the claimant's sex was a material influence and whether there was unconscious bias. We find that the claimant's sex was not the reason for Mr Maranan making the comment. We find that the relevant comparator would be a male carer who had disregarded a direct instruction from Mr Maranan. We find that Mr Maranan would have made the same comment as regards that comparator and that consequently this was not less favourable treatment.

<u>Alleged treatment 3: on 19 May 2020, by Mr Maranan pointing his finger at the claimant and saying , "You have to stand up right now I need my computer right now".</u>

48. On 19 May 2020 there was an incident in the dining hall. Apparently the trustees had arranged for a Webinar to address all the carers to thank them for their help and they were to be treated to a pizza. The claimant's evidence was that Ms Eborde came to the third floor and told all the carers to go down to the dining hall. Mr Maranan was left in sole charge. Ms Eborde disputed this in her evidence to us saying that it was left for the staff to decide who could leave the floor. We do not accept Ms Eborde's evidence on this point. We find that management directing all carers to leave the third floor was not best practice. Normally carers would take their breaks in rotation to ensure adequate staffing levels on the floor.

49. On the claimant's account the carers were missing for up to 40 minutes from the third floor. Normal lunch breaks were half an hour and other breaks 15 minutes.

50. Thus, Mr Maranan had been left on his own to cater for up to 16 residents on the third floor for an extended period of time.

51. After about 40 minutes Mr Maranan went down to the dining hall in order to get the carers to return to the third floor. Mr Maranan and Ms Eborde gave evidence that he did this in a measured way using words to the effect "Guys can you please go back up when you finish." By contrast Ms Gonzalez refers to him looking furious, rather like a mad dog, and screaming at them. In her interview with Ms Burwood the claimant puts it thus:-

> "He didn't shout but he was speaking loudly"

52. We find that Mr Maranan was clearly angry at being left for a protracted period in charge of the floor and went downstairs to tell the carers to return to work. We find that he did this, in his own words, in an assertive manner and in a loud voice. Again, in her interview with Ms Burwood, the claimant says her reaction was to say, "Of course but first we finish the pizza". Both Mr Maranan and Ms Eborde refer to the claimant accompanying her comment "of course" with a facial expression that suggested she was unhappy. Mr Maranan's evidence was that it came across to him as being rude and disrespectful.

53. One carer returned to work immediately and the claimant returned shortly

thereafter.

54. Later, Mr Maranan was in the nurse's station working at the computer. He had entered a certain amount of patient information on the patient's care record. He had not saved that information. At some stage the claimant was required to go and deal with a resident. He left the computer without saving his work.

55. Under normal circumstances the carers entered patient data into the care record using one of two tablets. However, on this occasion neither tablet was working properly. In such circumstances they could use the computer in the nurse's station. The claimant told us that she could see that Mr Maranan was no longer working on the computer and so she went to use it. The claimant's evidence was to the effect that Mr Maranan was logged off and that she did not log him off. In her examination of the facts Ms Burwood states in her report that she had the computer records in relation to staff logging in and logging out of care docs. In her report she states:-

> "Records from the system indicate that AM was logged out automatically indicating that the computer had been left idle during AM's session."

56. We have no evidence to contradict that.

57. Thus it is that on his return Mr Maranan found the claimant working at his computer. It is clear that Mr Maranan became extremely angry. The incident was caught on CCTV which was viewed by Ms Burwood. She found that here was a heated exchange between the two of them. Mr Maranan could be seen pointing his finger at the claimant and gesturing for her to move from the computer. From the body language she concluded that the exchange was not calm. She refers to the claimant also responding in a heated manner.

58. We find that Mr Maranan thought that the claimant had logged him off and had lost the data he had been entering into the care records. We find that this caused Mr Maranan to become very angry. There clearly was a heated confrontation. We find that the words alleged, or the gist of the words alleged, were used by Mr Maranan whilst pointing his finger at the claimant. We find that the reason Mr Maranan said and did what he did on this occasion was that he was very angry at the claimant for using the computer and losing his data. Again, we have examined whether the claimant's sex was a material influence and whether unconscious bias played a part. We have concluded that it did not.

59. A relevant comparator would be a male carer who was on the computer in similar circumstances. Those circumstances would include the deterioration of the relationship between the claimant and Mr Maranan on a personal level. We find that Mr Maranan would have reacted in the same way and that consequently this was not less favourable treatment.

60. In her interview on 9 June with Ms Burwood the claimant was asked what happened after the computer incident and her reply is:-

> "I said I will report him and I went to write an email to my manager."

61. We find that Mr Maranan was therefore aware that the claimant was going

to lodge a complaint about him.

Allegation 4: On 21 May 2020, by Mr Maranan raising a grievance against the claimant as set out at paragraph 8 (a)-(c) of the particulars of claim.

62. Paragraph 8(a)-(c) of the particulars of claim does not accurately reflect the grievance raised by Mr Maranan. Sub paragraph (a) is a general allegation concerning the claimant whereas, as will be seen, the grievance only refers to the claimant's reply in the dining room.

63. Sub paragraph (b), although in quotation marks, is not a direct quote and the criticism merely relates to the aftermath of the computer incident.

64. Sub paragraph (c) omits the reference to text messages.

65. We have the grievance submitted by Mr Maranan by email on 21 May 2020. The relevant parts are as follows:_

> "I just came from my rounds in 3rd floor when I went downstairs to inform my staff that they have to go back upstairs as soon as they finish their pizza. Bella replied very rudely "Of course" witnessed by the home manager and other staff from each floors and different departments. I thought her reply was inappropriate, disrespectful and malicious."

66. And

> "After that she went to the staff room ignoring calls from the residents, she also ignored when I call her to attend the resident under her group. The other member of her group attended the resident after she attended another residents. Again I though her action put the residents at risk. "

67. And

> "I am also worried about what the staff reported me (doesn't want to be name but willing to give information if needed) that Bella is organising/encouraging the staff to join a union to fight the home to increase the salary. Text messages (link) has been sent by Bella to the staff regarding this. I though her action is malicious and in breach of her work ethics."

68. It was suggested to Mr Maranan that he had lodged this grievance in retaliation for the fact that the claimant had lodged a grievance against him on 19 May 2020. Mr Maranan denied this and said he did not know that the claimant had lodged a grievance against him. Nevertheless, we find that Mr Maranan was aware that he was likely to be reported to management arising out of the incidents that had taken place on 19 May 2020. We find that that knowledge undoubtedly prompted Mr Maranan into making his grievance against the claimant. We find that in all probability Mr Maranan realised that he had acted unprofessionally in front of witnesses on two occasions and his action in raising a grievance was essentially defensive. The report of the claimant being rude in her response to being told to return to the floor is one of subjective assessment. Ms Eborde gave evidence of the claimant using a facial expression which was "off" and suggested she was not happy. The issue as to what the claimant did following the computer incident was not really canvassed before us. The grievance suggests that the claimant did not attend residents having gone to the staffroom. Accordingly, we are unable to make a finding on this issue. The

claimant has not proved that this did not happen as regards the grievance.

69. The reference to trade union activity does not arise out of the incidents on 19 May. As such, it does represent an accusation made by Mr Maranan against the claimant to discredit her and potentially get her into trouble. We will return to this issue when dealing with the trade union detriment claim.

70. We find that the reason Mr Maranan raised the grievance was reactive and defensive in the knowledge that the claimant was likely to have raised a grievance against him. We find that an appropriate comparator would be a male carer who had been involved in the pizza and computer incidents, was known to be likely to be making a complaint against Mr Maranan and who had the history of antagonism between the two of them. We find that Mr Maranan would have reacted in the same way and consequently the raising of the grievance was not less favourable treatment.

71. In any event, we do not find that it was related to the claimant's sex in any way.

72. As far as the harassment claim is concerned, our findings on the alleged treatment are as already made. We have no doubt that the conduct was unwanted as far as the claimant was concerned. However, for the aforesaid reasons we find that that conduct has been explained and did to relate to the claimant's sex.

73. We are reinforced in these conclusions by the claimant's comments to Ms Kotei in her grievance meeting held on 11 August 2020. The following exchange took place:-

> "Ms Kotei: You work with other staff and you are not having any clashes.
>
> Trade Union Rep: That is not a fair question. Bella is saying that the way Nurse Andy behaved towards her. The issue that Andy's treatment has been unacceptable on a number of occasions.
>
> Ms Kotei: My question to Bella is to find out why she gets that behaviour from Andy that she considers unacceptable. Why should he behave like this towards you?
>
> Claimant: I don't have an idea. I think he is attacking me and I don't know why. I hear some issues from other carers complaining about him but that is personal and I don't know whether this is normal behaviour from him.
>
> Trade Union Rep: Do you feel he treats females and males differently?
>
> Claimant: Probably, I don't know. He is using his authority maybe because I am female."

<u>Trade Union detriment</u>

74. The respondent's Handbook refers to an entitlement to join unions; page 81.

75. At the relevant time the claimant was an active trade unionist seeking to

recruit members, obtain union recognition and negotiate an hourly rate rise. All of these are perfectly legitimate activities.

76. Although the claimant refers to talking to colleagues in lunch breaks, it has not been the claimant's case that any trade union activities were done during working hours and therefore her activities were at appropriate times.

77. Following the submission of the grievance, Ms Burwood was appointed to undertake an independent investigation. She was required to investigate the union allegation and it was not feasible for us to have heard a preliminary issue as to whether or not we should exclude it as, inevitably, that would require us to look at it. In our judgment, it was far more satisfactory to deal with the matter on the merits taking into account all the evidence. It is accepted by Ms Burwood that she approached seven members of staff and, amongst other enquiries, she asked them whether they felt that had been pressured into joining the union. We accept Ms Burwood's evidence that she did not ask the individuals if they were members of the union. We find that Ms Burwood was investigating whether undue pressure had been placed on staff to join the union and she was not investigating the fact that the claimant had been seeking to recruit members and gain union recognition. We find that investigating the manner in which the claimant had gone about recruiting new members was an entirely legitimate investigation to carry out.

78. We now deal with each of the alleged detriments set out in paragraph 23(a) – (k) of the particulars of claim.

79. Detriment 23(a) "Mr Maranan raising grievances against the claimant per paragraph 8".

80. We have already found that the raising of the grievance was reactive and essentially defensive on Mr Maranan's part. We accept that the raising of the grievances was a detriment to the claimant but that, with the exception of the reference to union activity, the rest of the grievances were not raised for the purpose preventing or deterring the claimant becoming or seeking to become a member of an independent trade union or penalising her for doing so or preventing or deterring her from taking part in activities of an independent trade union. However, we do find that Mr Maranan raising a grievance against the claimant highlighting her union activity was a detriment. Although we have found that Mr Maranan's purpose was to discredit the claimant, nevertheless, we find that the purpose was to penalise her for undertaking trade union activities in that he wanted the respondent to take action adverse to her interests. We find that the claimant leant about the enquiries being made on 10 and 11 June 2020 from colleagues but that she was informed in the outcome letters dated 12 June that the allegation had not been substantiated.

81. Detriment 23(b) "The respondent's failure to deal with the complaints made by the claimant per paragraphs 4-7 and 9;"

82. We have found that there was no failure to deal with those complaints.

83. Detriment 23(c) "The respondents carrying out a formal investigation into the claimant's trade union activities per paragraph 11;"

84. We find that this was a detriment but the purpose of carrying out the investigation was to investigate the grievance and was not in order to deter or penalise etc the claimant for trade union membership or activity.

85. Detriment 23(d) “The investigator asking the claimant’s colleagues about their union membership and whether the claimant had pressured them into joining the union per paragraph 11;”

86. We find that Ms Burwood did not ask the colleagues about their union membership. We find that she did ask them whether the claimant had pressured them into joining the union. We do not accept that this is a detriment and in any event it was to further the investigation of the grievance and its purpose was not to deter or penalise etc the claimant for trade union membership or activity.

87. Detriment 23(e) “The grievance outcome report describing the claimant’s trade union activities as “subversive” per paragraph 12;”

88. We find that describing the claimant’s trade union activities as “subversive” was a pejorative term and consequently did constitute a detriment. Whilst it was an unfortunate word to use, we find that the purpose was not to deter or penalise etc the claimant for trade union membership or activity as, in context, it formed part of the rejection of the grievance and was suggesting the claimant be open in her approach.

89. Detriment 23(f) “The respondent’s formal investigation of the claimant per paragraph 11;”

90. We find that this is merely repeating (d).

91. Detriment 23(g) “The respondent’s failure to properly investigate the claimant’s formal grievance (that was brought on 6 July 20202, as mentioned in paragraph 14) (our amendment)”

92. The grievance was made on 6 July. There was a grievance meeting on 11 August and an outcome letter sent on 30 September. We find that this was not a detriment as the respondent did properly investigate the claimant’s formal grievance.

93. Detriment 23(h) “The respondent’s refusal to allow the claimant to be accompanied by a trade union representative as per paragraphs (16 and 18) (our amendment)”

94. The context of this meeting was that it was an investigatory meeting within the disciplinary process and as such the claimant did not have a right to a trade union representative. Consequently we do not find that this was a detriment. In any event, we find that the purpose was not to deter or penalise the claimant for trade union membership or activity.

95. Detriment 23(i) “This allegation has been withdrawn.

96. Detriment 23(j) (Serious delays in dealing with the claimant’s grievances per paragraphs 4-19; “

97. During the course of this hearing Mr Bennett effectively withdrew this as a

detriment. It is apparent that such delays as were encountered occurred due to Ms Kotei being stranded in Ghana for four months due to travel problems consequent upon the covid pandemic and other limitations imposed by covid. Whilst delays could be a detriment, we find they were not a detriment in this case. In any event, we find that the purpose was not to deter or penalise the claimant for trade union membership or activity.

98. Detriment 23(k) “The respondent’s failure to take appropriate action following the finding that the claimant was being harassed by Mr Maranan per paragraph 20”.

99. We note that the outcome was a recommendation that there be a management training programme and communication training. The allegation is that this was not appropriate action but, in our judgment, we find that that was appropriate action in all the circumstances, and consequently we find hat this was not a detriment. In any event, we find that the purpose was not to deter or penalise the claimant for trade union membership and/activity.

Conclusions

100. The claimant’s claims of direct discrimination because of sex and/or harassment related to sex are not made out and consequently are dismissed.

101. With the exception of a partial finding in the claimant’s favour as regards detriment paragraph 23(a) of the particulars of claim, the claimant’s claims for trade union detriment are not made out and are dismissed.

Remedy

102. The claimant became aware of the grievance relating to her trade union activity on 10 and 11 June 2020 and would have become aware of the outcome rejecting that grievance as unsubstantiated shortly after 12 June 2020. Finding the grievance unsubstantiated should have relieved any injury to feelings experienced by her. Consequently we find that the claimant’s sickness absence from 19 June to 3 July was not caused by the detriment found and we do not award any loss of earnings. In any event, the sickness absence is related to stress at work and it seems reasonably clear that absent from the work environment the claimant was able to function normally. Accordingly, we make no award for sickness absence or loss of earnings.

103. Turning to injury to feelings, we have taken into account the general principles set out at paragraph 37.51 of the IDS Employment Law Handbook “discrimination at Work” wherein it is stated:-

> “In Prison Service and others v Johnson 1997 ICR 275, EAT (a race discrimination case), the EAT summarised the general principles that underline awards for injury to feelings:
>
> - Awards for injury to feelings are designed to compensate the injured party fully but not punish the guilty party.
> - An award should not be inflated by feelings of indignation at the guilty

party's conduct.

- Awards should not be so low as to diminish respect for the policy of the discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches.

- Awards should be broadly similar to the range of awards in personal injury cases.

- Tribunals should bear in mind the value in everyday life of the sum they are contemplating, and

- Tribunals should bear in mind the need for public respect for the level of awards made."

104. The relevant Vento guidelines at the time for the lower band were £900-£9,000.

105. In our judgment an appropriate and just figure for injury to feelings would be £1,000. Injury to feelings was for a matter of two days and rectified very swiftly. The 12 June 2020 is 23 months away and at 8% would amount to 15%. Consequently we award £150 interest.

Employment Judge Alliott

Date: 12 October 2022

Judgment sent to the parties on

14 October 2022

For the Tribunal office