EMPLOYMENT TRIBUNALS

Claimant: **Ms C Sawyers**

Respondent: **East Suffolk and North Essex NHS Foundation Trust Colchester**

Heard at: **East London Hearing Centre**

On: **28 November 2022**

Before: **Employment Judge Russell**
Members: **Mr M Rowe**
Ms J Houzer

Representation
Claimant: **Did not attend and was not represented**
Respondent: **Ms M Murphy (counsel)**

REMEDY JUDGMENT

1. **In respect of the claim of harassment related to age, the Claimant is awarded £3000 by way of injury to feelings. She is awarded nothing for financial loss.**

2. **For the claim of unauthorised deduction from wages and/or breach of contract, the Respondent shall pay the Claimant the sum of £110.10**

3. **The Respondent unreasonably failed to comply with the ACAS Code on grievances. An uplift of 10% (£300) is awarded.**

4. **The Respondent shall pay interest of £918.89.**

5. **The total sum payable by the Respondent is therefore £4,328.99**.

REASONS

1 By a Judgment sent to the parties on 28 March 2022, the Claimant's claim harassment related to age succeeded in respect of two detriments: (1) managing the grievance poorly, taking months to start the grievance process and (2) Ms Macey's comments at the meeting on 29 July 2019. Her claim for unauthorised deduction from

wages/breach of contract succeeded in the sum of £110.10 for travel expenses. All other claims of harassment related to age and all claims of direct discrimination because of age fail and were dismissed. The claims of direct race discrimination, harassment related to race and victimisation failed and were dismissed. The claim of unfair dismissal was dismissed on withdrawal. The Tribunal gave extensive written reasons for its conclusions and made findings of fact on the matters alleged by the Claimant.

2 The Claimant's ET1 was lengthy, with an attachment running to some 113 pages. The witness statement produced by the Claimant for the final hearing was even longer, at 181 pages, dealing with matters of liability and of remedy. At the last hearing, the Claimant confirmed on oath that the contents of her statements were true to the best of her knowledge and belief and she wished it to be her evidence. As it was agreed that the hearing would consider liability only, Ms Murphy did not cross-examine the Claimant on her evidence the sections that related to remedy, fully anticipating that she would have the opportunity to do so at a remedy hearing in the event that the claim succeeded.

3 At the conclusion of our liability Judgment, the Tribunal made a number of case management orders requiring the Claimant to send a revised schedule of loss setting out the financial losses that she says was caused by the harassment, any claim for injury for feelings and/or personal injury and the wording for any recommendations sought. We also ordered disclosure of relevant documents, agreement of a bundle and the exchange of witness statements.

4 The Claimant initially complied with the Orders. She provided a revised Schedule of Loss on 6 May 2022 which comprised 17 pages and sought a total in excess of £300,000 including interest. A copy was included in the bundle for today's hearing. The Claimant has not disclosed documents to support her schedule of loss.

5 The Claimant appealed against the liability judgment and sought a stay of the remedy hearing pending the outcome of that appeal. The Tribunal refused to order a stay. The appeal was rejected by His Honour Judge Tayler on 9 November 2022 under rule 3(7) as disclosing no reasonable grounds. The Claimant had also applied in April 2022 for a reconsideration of the liability Judgment. Regrettably administrative oversight meant that this was not forwarded to Employment Judge Russell until some months later. The remedy hearing listed for 18 October 2022 was postponed and the reconsideration application was considered as a matter of urgency. The application for reconsideration was rejected in a Judgment sent to the parties on 28 September 2022 and the parties informed that a remedy hearing would be listed.

6 The Claimant initially stated that she had no available dates until March 2023. The Tribunal did not accept that was a reasonable approach to litigation and the hearing was listed for today. Since then, the Claimant has made repeated applications for a postponement of the remedy hearing, each of which has been refused. Reasons for refusal were given in the Tribunal's letter dated 8 November 2022 with amended dates for exchange of documents and witness statements.

7 Since the refusal of the postponement request, the Claimant has sent a number of emails to the Tribunal, addressed to "**the living men and or women**", purporting to give notice that she does not accept the offer to contract, does not consent to the proceedings and does not give the Tribunal permission to make a legal determination about her and the Respondent, whom she describes as "**the entity I am accosting**". The emails conclude that

they are "by order of Cebonie Sawyers" and are "**subscribed and sworn to before God, [Titus 1:2]**' with the relevant date. It appears that the Claimant is under some misapprehension as to the nature of Tribunal proceedings which are not a contract between the parties or the Tribunal.

8 This remedy hearing has been properly listed, notice of hearing properly sent to the parties and postponement applications have been refused. In the circumstances, the Tribunal decided that it was appropriate to proceed in the Claimant's absence. In doing so, we had regard to rule 47 and the need to have regard to the information available to us. Ms Murphy relied on **Esporta Health Clubs v Roget** UKEAT/0591/12/RN, summarising the principles in earlier cases of **MOD v Cannock** and **Abegaze v Shrewsbury College of Arts & Technology**, as authority for the principle that a Tribunal must have some material evidence of injury to feelings is required before an award may properly be made.

9 The Tribunal agrees. However, at the previous hearing the Claimant confirmed on oath that the contents of her statements were true to the best of her knowledge and belief and were her evidence to the Tribunal. That confirmation was not limited to the paragraphs dealing with liability only. The Tribunal concluded that we do have evidence before us relevant to remedy, including injury to feelings. The difficultly is that the Respondent has been deprived of the opportunity to cross-examine the Claimant as the last hearing dealt with liability only and the Claimant has chosen not to attend today. The Tribunal considered whether it would be fair to proceed today and gave Ms Murphy time to take instructions from her client. The Respondent took the pragmatic decision to proceed with the information available and the Tribunal agreed that this was appropriate and in accordance with the overriding objective.

Law

10 An award for injury to feelings is compensatory. It should be just to both parties: fully compensating the Claimant without punishing the Respondent. Awards for injury to feelings or for financial loss must compensate only for those unlawful acts for which the Respondent has been found liable. The Claimant bears the burden of proving injury to feelings and/or losses flowing from discrimination.

11 An award should not be so low as to diminish respect for the legislation; on the other hand, it should not be excessive. An award should bear some broad similarity to the level of awards in personal injury cases. In deciding upon a sum, we should have regard to the value in everyday life of that money, being careful not to lose perspective.

12 We take as a starting point the guidance given in **Vento v Chief Constable of West Yorkshire Police (No.2)** [2003] IRLR 102, in which the Court of Appeal identified three bands for awards: the top being for the most serious conduct, such as a lengthy campaign of harassment; the middle band for those acts which are serious, but not within the top band; and the bottom band for those acts which are less serious, one-off or isolated. Recent Presidential Guidance takes into account the combined effect of inflation uprating and the **Castle v Simmons** uplift. The Guidance for a claim presented on 9 June 2020 gives a lower band of £900 to £9,000; a middle band of £9,000 to £27,000; and an upper band of £27,000 to £45,000.

13 Ms Murphy invited us to find that the Claimant had not proved any financial loss caused by the two acts of harassment related to age and to assess any award for injury to feelings at the lowest level of the lowest band, namely £900. The Claimant's Schedule of Loss sought financial loss, injury to feelings of £45,000, personal injury of £56,780 as well as significant sums for stigma damage, aggravated damages and exemplary damages.

Conclusions

14 The Tribunal carefully re-read the Claimant's witness statement to determine whether and to what extent the two detriments which succeeded in respect of age were mentioned as causing loss or injury to feelings.

15 At paragraphs 3.63a and 3.64, the Claimant says that she found the comments at the meeting on 29 July 2019 "humiliating and offensive" because they related to her race and age. Part 10 of the 181-page witness statement deals with injury to feelings and makes clear that the predominant cause of the significant injury to feelings that the Claimant describes was the initial incident itself on 25 March 2019. At paragraph 6.3, the Claimant attributes the cause of her illness and stress to that incident and other problems at work which were not found to be acts of discrimination. This is consistent with the Tribunals findings on liability.

16 At paragraph 10.4 of her witness statement, the Claimant refers to the Respondent's conduct of her grievance, stating that the overall conduct of her grievance made her feel further humiliated, as if she did not belong, uncomfortable, insecure and unsafe at work, not respected and like a second-class citizen which contributed to her low self-esteem as she felt that the Respondent supported the offenders and not her. The Claimant goes on to say that the Respondent's overall conduct of her grievance further contributed to her stress, anxiety and depression which she acquired solely from her employment with the Respondent. The Claimant does not specifically refer to either protected characteristic of age or race. Read generously, the Tribunal considers therefore it can apply to both, but we do take into account that the race aspect did not succeed.

17 That then is the evidence before the Tribunal in support of the sums claimed in the Schedule of Loss. In considering the weight to be attached, we remind ourselves that the Claimant could not be cross-examined as she has chosen not to attend and has not disclosed documents or provided a remedy witness statement.

18 The first head of loss claimed by the Claimant is for loss of earnings from shifts prior to the discrimination. Self-evidently that cannot succeed as even on the Claimant's case it occurred before the two acts of harassment which succeeded.

19 The second head of loss is said to be "other financial losses" and will be addressed in a witness statement for the remedy hearing. No such statement has been provided and it is not addressed in the original statement. Some of the items claimed are not properly recoverable in any event, for example – holiday pay in July 2019, holiday used to attend Tribunal hearings and financial losses associated with travel and food for new job applications and visas. None are caused by either of the two acts of discrimination as found by this Tribunal. The financial losses incurred by the Claimant's husband (loss of driving licence, stress and relocation) are not losses incurred by the Claimant and were not caused by the limited acts of harassment which have been upheld.

20 The third section of the Schedule of Loss claims stigma damages in the Claimant's secondary employment with another Trust and, again, states that it will be addressed in the Claimant's witness statement. There is no evidence before the Tribunal to support a finding that the two acts of discrimination which we have found to have occurred, caused any stigma damage at all.

21 The fourth head of loss claimed is for gross loss of earnings from part-time/second employment including future loss due to ongoing stress from discrimination. As set out above, the Claimant's own evidence in her initial statement was that the causes of her stress were the initial incident and other acts not found to be harassment. The Tribunal concludes that the Claimant has not shown that these losses were caused in any material sense by the poor management of the grievance or Ms Macey's comments on 29 July 2019.

22 In considering injury to feelings, the Tribunal considered the limited acts of harassment proved. The Claimant's case was extensive and, looked at holistically, these were relatively minor matters. Both were caused by subconscious rather than deliberate or overt motivation. Both were relied upon as both age and race related harassment and the Tribunal concluded that race did not play any part at all. Looked at overall, the Tribunal They were clearly wrong in acts of discrimination but looked at in the round, they fall within the bottom **Vento** band. The bottom band is broad - £900 to £9000 – doing the best we can, the Tribunal concludes that the case fall at the lower end of the bottom band but not right at the very bottom given that the Claimant has provided some evidence of specific injury to feelings caused by these two acts of harassment. On balance, we conclude that the appropriate award for injury to feelings is **£3000**.

23 As for personal injury, for the reasons already given, the Tribunal do not accept that any personal injury was caused by the two acts of discrimination which occurred.

24 The Claimant includes claims for a basic award and sums caused by her resignation, despite the fact that she withdrew the constructive dismissal claim and all dismissal related claims. The Tribunal declines to make any award for loss flowing from resignation, including loss of statutory protection.

25 Travel expenses of £110.10 are awarded as set out in the liability Judgment.

26 Aggravated and/or exemplary damages are not supported by the findings of the Tribunal. We do not accept that there was oppressive, arbitrary or unconstitutional action by the Respondent. Whilst there have been failings, those were inadvertent and not deliberate. Indeed, as the Tribunal found in its liability Judgment, many at the Respondent were openly supportive of the Claimant albeit she then misinterpreted their actions. Insofar as the Claimant has suggested that there has been improper manipulation of documents or other untoward conduct throughout these proceedings, the Tribunal does not accept that those complaints are well-founded. These are matters considered in the reconsideration decision. There is no evidence of any impropriety in the preparation and prosecution of the Respondent's defence to the claims – a defence which was largely successful. For the same reasons, the Tribunal is not satisfied that there has been unreasonable conduct by the Respondent to merit a preparation time order.

27 The Schedule of Loss claims for ACAS uplift on the injury to feelings. The unreasonable failure by reference to the Code was in respect of the timeliness of the

grievance process but it was not a total failure to comply. A 25% uplift is not appropriate but the Tribunal concludes that as the delay was serious and lengthy, an uplift of 10% (**£300**) is appropriate in all the circumstances based upon our findings of fact.

28 As for interest, the Claimant is entitled to 8% on the injury to feeling from the date of injury. The Tribunal took into account our findings of fact and is satisfied that the appropriate date is 6 June 2019, when Ms Macey closed the Claimant's Datix complaint. On the total award of £3,300, therefore, interest at 8% is £264 per annum. The period from 6 June 2019 to 6 December 2022 would be 3 and a half years, giving an interest sum of £924. However, there is still a week to go to 6 December, so we multiply the daily rate of £73 by the seven days yet to go, to make a deduction of £5.11. The total award for interest is **£918.89**.

29 The total award payable to the Claimant by the Respondent therefore is £4328.99.

Employment Judge Russell
Dated: 19 December 2022