EMPLOYMENT TRIBUNALS

Claimant: **Ms V Pearson**

Respondents: **(1) The Belsteads Group Ltd.**
(2) Ms Kerry Pollard
(3) Mr Alec Cussell
(4) Ms Joanne Turner

Heard at: **East London Hearing Centre**

On: **5 and 6 December 2023**

Before: **Employment Judge B Elgot**
Members: **Mr D Ross**
Mr J Webb

Representation
Claimant: Mr E Johnson, Lay Representative
Respondents: Mr P Maratos, Legal Consultant

None of three individual respondents attended. Mr Peter Adams, Managing Director of R1 attended to observe and give instructions to Mr Maratos on 5 December 2023 and the Accounts Manager of R1, Ms D Denmark, attended on 6 December 2023.

JUDGMENT having been sent to the parties on 13 December 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 The Respondents' representative, in an email to the Tribunal dated 14 December 2023, requested written reasons for the remedy judgment sent to the parties on 13 December 2023. The Claimant has succeeded in the claims set out in the Liability Judgment dated 27 July 2023. The reasons for our unanimous decision on remedy are as follows:-

2 As discussed with, and explained to the parties, we decided at this Remedy Hearing to award compensation in relation to those claims which succeeded only against R1, R3 and R4 as set out in the Liability Judgment sent to the parties on 7 August 2023.

3 This is because there is an outstanding out of time application by R2, represented throughout by Peninsula Legal Services, for a reconsideration, pursuant to Rule 70 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, of

the Liability Judgment against her. We are certain that the said judgment, in relation only to R2, must be reconsidered at a hearing (the Rule 70 Hearing) by this Tribunal. It cannot be dealt with in writing and it clearly requires the attendance and evidence of R2 who did not attend the Liability or Remedy Hearings in this case which took place on 18-20 April 2023 and on 5-6 December 2023.

4 The Rule 70 Hearing will take place using **CVP** on **14 February 2024** commencing at 10 am and is listed for one day. A Notice of Hearing will be sent out in due course.

5 Thereafter, the liability of any or all four of the Respondents to pay additional compensation in respect of those claims which have also succeeded against R2 will be determined at a second and separate remedy hearing.

6 We refused the Respondents' application for a postponement of the second day of this Remedy Hearing on 6 December 2023 because we were satisfied that substantial progress could be made in making some interim award of compensation to the Claimant. It is not fair or equitable that she should continue to be kept out, potentially for several months, of all the remedy due to her.

7 We emphasise that we have throughout our deliberations and calculations, when fixing the remedy awarded in relation to the successful claims of detriment caused to the Claimant by the acts and/ or omissions of R1 R3 and R4 done on the ground of protected disclosures in the public interest (PID detriment claims), been aware that we must consider carefully the total compensation which it is appropriate to award overall when the remaining matters of remedy against all four Respondents are finally determined.

8 The liability of R2, for which compensation remains to be calculated as explained above, is summarised in paragraph 160 of the Liability Judgment and consists of the issue of detriment caused by the mis-handling of the Claimant's Personal Improvement Plan (PIP) (see paragraphs 125-132 of the Liability Judgment) and the issue of failures in handling the disciplinary investigation and dismissal process (see paragraphs 134-137 and 73-84 of the Liability Judgment)

9 The interest payable at the usual court judgment rate of 8% (simple interest accruing day by day) was calculated by the Employment Judge in chambers after the Remedy Hearing. This course of action was agreed between the parties, because there was insufficient time to do these calculations at the Remedy Hearing itself. Those calculations have not been challenged. The Tribunal is satisfied that interest should be paid in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.

10 <u>Documents and Witnesses</u>

10.1 By direction of the Tribunal the Claimant was required to re-calculate and update her Schedule of Loss by 5 pm on 5 December 2023 and this was duly received. The background 'Details' at the top of that Schedule are not disputed.

10.2 The Respondents did not avail themselves of any opportunity to serve a Counter-Schedule(s).

10.3 The Claimant also served on the Respondents and the Tribunal an 'Impact Statement' describing the injury to her feelings. This document was received on 4 December 2023. It was adopted as her witness statement at this remedy hearing and she was cross-examined on it.

10.4 The Claimant makes no claim for financial losses in her updated Schedule of Loss and this element of remedy was not mentioned in her Impact Statement, in oral evidence, during cross examination or in submissions by Mr Johnson. Her claim is for injury to feelings caused by proven PID detriment under sections 47B and 47B (1A) Employment Rights Act 1996, for pregnancy and maternity discrimination (against R1 and R3) and for harassment related to the protected characteristic of sex (against R1 and R3).

There is no reason why financial loss cannot be claimed at the next Remedy Hearing Such a claim is not precluded by the Remedy Judgment.

10.5 The Claimant gave sworn evidence on her own behalf and the Tribunal had the benefit of oral submissions by both representatives. There were no witnesses for the Respondents. We had the original bundles from the liability hearing.

11. Injury to Feelings

11.1 We have reminded ourselves that an award for injury to feelings in relation not only to the successful PID detriment claims but also the successful complaints of pregnancy and maternity discrimination and harassment related to the protected characteristic of sex is an award which is intended to compensate the Claimant for the hurt and distress she suffered in consequence of the Respondents' actions. It is not punitive in nature against the Respondents or intended to impose a financial penalty or fine for their conduct. It is about the effect the discriminatory behaviour (including PID detriment) had on the Claimant and the injury she experienced, rather than the seriousness of the Respondents' conduct.

11.2 Injury to feelings compensation can be awarded even if no financial losses are claimed and/or experienced.

11.3 We have made findings in the Liability Judgment about the Claimant's own mis-conduct and the consequences which flowed from it. We emphasise and reiterate that these findings of fault do not in our judgment negate or '*cloud*' (to use Mr Maratos's word) the injury caused to the Claimant by the discrimination and PID detriment she was subjected to. Those are separate matters.

11.4 PID Detriment. We find that the Claimant began her employment with R1 with a high degree of optimism that she would flourish and succeed in her new job in a specialised type of care role which she had not carried out before; she had a steep learning curve but was ambitious to make a fresh start and succeed. She undertook specialist training as she describes in paragraphs 5 and 6 of her witness statement. She reasonably expected support and guidance from the Respondents particularly in forming good productive work

relationships with a challenging group of young people (YPs) who were residents at Little Belsteads (LB). She received praise and positive feedback for much of her work.

11.5 The Claimant set high standards for herself, her colleagues and the YPs particularly around strict compliance with the regulations applied nationally and within the social care environment during the covid 19 global pandemic and periods of national lockdown. She describes vividly in her impact statement that once she perceived, after her first protected disclosures on 4 April 2020, that she was considered a '*trouble maker'* for speaking up and '*raising genuine and valid concerns about COVID issues for young people who in any event often had underlaying health concerns'* she felt she suffered a *'mental blow…I was trying to do the right things, for good of LB yet I felt knocked back for doing it. It was very humiliating.'* We find this evidence of the injury to her feelings to be credible and cogent.

11.6 In relation to the detrimental extension of her probationary period on 24 April 2020 we find, by reference to paragraph 160 of the Liability Judgment, that this is a successful complaint against R1, R3 and R4 and our reasons are in paragraphs 90 -110 of the Liability Judgment. The Claimant was detrimentally treated by senior management of R1 including the Registered Manager of Little Belsteads (R3) and one of her own line managers (R4) without any consultation with the Managing Director as R1's protocol requires. She was not forewarned, aside from previous mild criticisms of her *'over-loud'* behaviour, of the disadvantage and significant disappointment she would quickly thereafter receive; she suspected that the non-completion of her initial probationary period was connected to her 4 April 2020 disclosure but her query in this respect (on page 2010 of the bundle) was not answered in specific terms or investigated. She describes how R3, about whose actions she primarily blew the whistle, just looked through her, upon meeting her at the time, as if looking at a '*ghost*'.

The Claimant was confused by the fact that she had undertaken seven previous supervisions prior to her first disclosure in which she was not informed of any significant conduct or performance concerns during the first six months of her employment but was then shocked by the decision of R1, R3 and R4 not to confirm her permanent employment at the end of the probationary period. It was she said '*a complete bolt from the blue'*. She was disappointed, felt vulnerable and confused about whether she could count on her continued employment with R1, and was left in a state of limbo. Her probation was however eventually confirmed on 1 June and she signed the confirmation no later than 29 June 2020. As we state at paragraph 109 of the Liability Judgment, she thereafter received further positive encouragement that her work was going well. She was appointed and retained as a key worker for one of the YPs.

11.7 We award £3000 for injury to feelings which is at the lower end of the Vento lower band as it then applied.

11.8 In quantifying the awards for injury to the Claimant's feelings in relation to each incident of discrimination or PID detriment we have noted the guidelines set

by the Court of Appeal in the decision of Vento v Chief Constable of West Yorkshire Police No.2 (2002). These are sometimes called the 'Vento bands' and we have applied the guidelines (reviewed annually) for awards which were in place for claims brought on or after 6 April 2020.

12. We award a higher amount of £7500 for injury to feelings caused to the Claimant by R1 and R3 when she was subjected to detriment by the instigation on 7 July 2020 of a workplace investigation on the ground that she made protected disclosures on 4 April 2020. The relevant paragraphs containing our findings of fact about this incident are numbered 111-118 of the Liability Judgment. We find that a wide- ranging investigation was launched which flowed from only a single criticism of the Claimant raised by one YP. The scope of investigation grew exponentially and disproportionately into an unnecessarily broad enquiry of wider safeguarding concerns at Little Belsteads. The Claimant suffered open scrutiny and consequent humiliation because the ongoing investigation, conducted formally at a senior level by the Registered Manager of the home (R3) and by the internal group Quality Assurance Manager, Ms Southey (SS), was publicised to her colleagues and the YPs, all of whom were interviewed. It was apparent that she was a major focus of the questions being asked and we have found that R1 and R3 have failed to show the alternative grounds on which this investigation was undertaken other than on the ground that the Claimant made protected disclosures on 4 April 2020.

12.1 We find the investigation to have been intrusive and extremely worrying for the Claimant causing her anxiety, embarrassment, and distress; she describes it in her witness statement in paragraph 60 as feeling like a '*witch hunt with a set agenda in mind'* and she emphasises in paragraphs 61 and 62 that she was not kept informed of the evidence obtained either in her favour or against her before she was placed on a performance improvement plan on 14 July 2020; we find that this failure to let her know about the nature, extent and progress of the investigation was particularly injurious to her. She says at paragraph 59 of her witness statement '*what she [SS] kept secret from me and never raised or gave me an opportunity to challenge was what was said by the seven staff members. That did not form any part of that interview.'* The Claimant did not know what her colleagues were saying about her.

12.2 We award £7500 for injury to feelings which is in the top part of the lower Vento band which then applied.

13 Cumulative total: The total sum for injury to feelings caused by the PID detriments is £ 10,500 which is at the lower end of the middle Vento band for claims presented between 6 April 2020 and 5 April 2021.
We are satisfied that the cumulative total for injury to feelings does not exceed the proper amount taking into account the injurious impact on the Claimant which appears from the evidence. There are separate awards for the two discrete episodes of pregnancy discrimination and for the one occasion of harassment related to the Claimant's sex and we have separately analysed below our reasons for each of these awards for injury to feelings.

14. There is an error in paragraph 5 of the Remedy Judgment which holds R4 jointly and severally liable for the award of compensation for injury to feelings (plus uplift and interest) in respect of the instigation of the workplace investigation carried out by SS.

In fact, as summarised in paragraph 160 of the Liability Judgment, this is an award for which only R1 and R3 are liable. The Employment Judge will issue a certificate of correction as soon as possible.

15 ACAS Code

15.1 Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 relates to claims listed in Schedule A2 of that 1992 Act. The Schedule includes claims under section 48 of the 1996 Act (PID detriment claims). Section 207A(2) of the 1992 Act requires us to consider whether it is just and equitable to increase any award we make to the Claimant by no more than 25% where we are satisfied that the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, that the employer has failed to comply with the relevant Code in relation to that matter, and that the failure was unreasonable.

15.2 We are satisfied that the ACAS Code of Practice on Disciplinary and Grievance Procedures at Work applies to the actions of the employer which resulted in the PID detriments to the Claimant described above. This is because those actions were publicised as being taken to address issues or at least perceived issues of the Claimant's conduct and/or performance and/or to address informal complaints and problems (not formal grievances) raised by the Claimant herself.

In both respects we find that the employer has unreasonably failed to comply with the ACAS Code of Practice and Guidance in relation to failures to consult with and keep the Claimant informed about the extension of her probationary period, the decision not to confirm her permanent employment and the launch of a wide- ranging investigation into her professional performance and her working relationships with colleagues and YPs. The Respondents failed to provide her with a supportive and respectful opportunity to fully know about the criticisms of her and her work or to state her case having seen the evidence against her.
Her own enquiries, for example in an email at page 335 on 27 April 2020 about her probation extension, went unanswered so far as we can ascertain from the documents in the bundle.

15.3 We are satisfied that it is just and equitable in all the circumstances to fix the increase in compensation at 15%. The maximum of 25% is not appropriate because there has not been a total failure of compliance. The Claimant received the reassurance of a *'really good monthly report'* signed off by Claire Ellis (one of the Deputy Managers) on 3 May 2020 (page 336), she had a detailed and informative supervision with R4 on 1 June 2020 albeit that her probationary period was not discussed, and on pages 340-342 of the bundle dated 1 June 2020 there is a written confirmation that her probationary period has been satisfactorily completed. Surprisingly this confirmation is not signed by the Claimant until 29 June 2020 but we received no explanation from any of the parties as to the reason for this discrepancy.

15.4 The Claimant was one of the staff interviewed by SS during the investigation into what Ms Southey described as *'the way that staff deal with the young people'* and *'safeguarding of the young people'.* She was therefore given some opportunity to put forward her views but there was no explanation about the reasons for or extent of the investigation and it was not made clear that its primary purpose was to follow

up complaints raised by YPs about the Claimant's own practice. We find that the Claimant saw and heard none of the other evidence in the statements gathered by R3 and/or Ms Southey. She was not made fully aware that, at the conclusion of the investigation, she faced the detriment of sanction or reprimand about her performance let alone the risk that she would be placed on a performance improvement plan (PIP) as occurred on 14 July 2020, recorded on pages 367-370.

15.5 By reference to section 207A (3) we find that there has been no unreasonable failure by the Claimant, as employee, to comply with the Code in relation to these matters and thus no reduction of her award is just and equitable in all the circumstances.

16. Contributory Fault Section 49(5) of the 1996 Act provides for a just and equitable reduction in compensation for PID detriment awards where the Tribunal considers that any act or failure to act to which the complaint relates has to any extent been caused or contributed to by the actions of the Claimant.

16.1 We have reminded ourselves that the Claimant's conduct must be found to have contributed to the detriment she suffered because of the specific acts of the Respondent to which her complaint relates i.e. the extension by one month of her probationary period on 24 April 2020 and the commencement of the workplace investigation on 7 July 2020.

16.2 In neither case are we satisfied that any relevant contributory conduct occurred and no reduction is appropriate. The Claimant's probation was extended 'out of the blue' as we have stated in paragraphs 90 -110. Particularly at paragraphs 104-106 we emphasise that in the seven supervisions with R4 in which the Claimant participated between the commencement of her employment on 7 October 2019 and the extension of probation on 24 April 2020 there was no communication to her of any concerns about her work or working relationships which could be called fault on her part. It was not until the supervision meeting on 27 March 2020 that she was given negative feedback for her loud voice and over-assertive manner at times; less than a month later she was congratulated on having addressed these issues and become quieter and '*less chaotic'.* Nonetheless her probation was extended by R1, R3 and R4 and her permanent employment was not confirmed. This was not because of contributory fault on her part which justifies a reduction in compensation. It was because her whistleblowing was a predominant factor in the decision to subject her to this detriment.

16.3 Similarly, the decision by R1 and R3 to initiate the detrimental workplace investigation was not an action caused by or contributed to by any identifiable fault of the Claimant. We refer to paragraphs 112 -118 of the Liability Judgment which sets out our finding of fact that there was only one complaint against the Claimant raised by a single YP, not classified by the LADO as a safeguarding concern and not seen by the Claimant's colleague who wrote the complaint log on behalf of the YP as being a safeguarding matter, '*just a difference in working practice'.* The launch of a wide ranging and broad enquiry to which the Claimant was exposed was not caused by her relatively mild error and no reduction of compensation for contributory fault is appropriate. We have found that the investigation was done on the ground that the Claimant made the two part protected disclosures on 4 April 2020.

17. Pregnancy Discrimination

17.1 We are certain that the failures of risk assessment and implementation around the beach trip to Walton on the Naze on 11 August 2020 on a very hot day involving long hours of work and travel were a significant disruption to the health and comfort of the Claimant during her early pregnancy causing her discomfort, upset and stress. It occurred at a time when she felt physically and emotionally vulnerable and R1 knew this to be the case because the Claimant told her managers of her anxiety and concern. Our reasons for finding R1 liable for pregnancy and maternity discrimination in all the circumstances are set out in paragraphs 149 -151 of the Liability Judgment.

17.2 In terms of the injury to the Claimant's feelings we find that she genuinely felt that her health concerns had been neglected and ignored and this caused her injury including significant discomfort at the time and temporary harm on this one occasion.

She emphasised her understanding at the time that she had been treated less sympathetically by R1 than other pregnant employees who had been excused attendance on the beach trip and this caused her additional upset. R1 produced no evidence to the contrary.

This beach trip was however a single event and we find that the Claimant soon recovered her equilibrium.

17.3 There was a separate and second incident of pregnancy discrimination on 10 September 2020 when the Claimant was told by R3 that she could only in her future career become a senior worker if she returned to work full time after maternity leave. The relevant paragraph of the Liability Judgment is paragraph 155. We are satisfied that this tactless, probably inaccurate, and discriminatory remark injured the Claimant's feelings because it raised an implied threat that her promotion and progress within R1's organisation was placed at risk if the consequence of her maternity was a decision to return to work on a part time basis.

17.4 She is awarded compensation for injury to feelings in relation to each event of pregnancy and maternity discrimination in the amount of £3000 payable by R1 in relation to the discriminatory failure of care around the event of the beach trip and in the additional amount of £3000, payable as a matter of joint and several liability by R1 and R3, in relation to the part time worker remark.

The total award of compensation for injury to feelings caused by pregnancy and maternity discrimination is £6000 which is within the top part of the lower Vento band applicable at the time.

There is no relevant ACAS Code which applies to this award and therefore an uplift is not given.

18. Harassment because of protected characteristic of sex

18.1 We find that the offensive and demeaning remark described in paragraph 158 of the Liability Judgment was made on or around 1 August 2020 by R3 the most senior manager at LB who was the 'Head of Home' The remark was made in the context of similar 'jokey' conversations, not denied by the Respondents, about the high frequency and disruptive effect of pregnancies amongst LB staff at that time, as reported by the Claimant at paragraph 38 of her witness statement where she says R4 '*told me I was not allowed to get pregnant for at least six months'.* There was an atmosphere of some frustration summarised as '*oh no not another one'* in relation to pregnant employees.

18.2 The single one-off remark, made by R3 in front of other staff at a work meeting, that '*we should all be careful what seat we sit on',* with its implication that pregnancy is somehow contagious and unwelcome, constitutes unwanted conduct related to the Claimant's sex which had the purpose and effect of violating her dignity and creating an intimidating, hostile, degrading or humiliating and offensive environment at work for her.

18.3 We award £5000 compensation for injury to her feelings, payable as a matter of joint and several liability by R1 and R3, because we accept the Claimant's evidence that she felt very uncomfortable and demeaned on this occasion.

There is no relevant ACAS Code or Guidance which applies in relation to this incident of harassment under section 26 Equality Act 2010 and therefore we have applied no percentage uplift to the award of compensation for injury to feelings.

19 Aggravated damages

The claim by the Claimant for aggravated damages in relation to the matters dealt with at this Remedy Hearing does not succeed.

The Claimant does not make any complaint of exceptionally offensive, high handed or aggressive conduct by the Respondents over the period of her employment during which the discrimination and PID detriments occurred. Her representative confirmed this position.

The Claimant does however rely on the frustration, difficulties and delay caused by the actions of the Respondents and their representative during the period from 28 November 2023 when the Respondents' application for further postponement of the Remedy Hearing was refused by the Tribunal and thereafter including a subsequent application by R2 dated 30 November 2023 for the reconsideration of the Liability Judgment against her; this has come as an unexpected turn of events and a shock to the Claimant. It is an application which is almost four months out of time and has necessitated the listing of a separate one-day hearing on 14 February 2024 thus prolonging these proceedings and creating further anxiety, worry and expense for the Claimant who is nursing her fourth child, a very young baby.

We have indicated in open tribunal, and need not repeat here, the professional difficulties potentially amounting to a conflict of interest for the Respondents' representative in this situation.

It is axiomatic that the Claimant must take advice and pursue in due course the appropriate application(s) for costs if she wishes to do so. The Tribunal has its own powers.

However, we do not find that this recent conduct has been deliberately misleading or exceptionally unpleasant consisting of deliberate discrimination and/or unlawful behaviour against the Claimant. It does not fall into the rare category where aggravated damages are given and we make no such award to date.

This does not preclude an application for aggravated damages at future hearings

20. Failure to provide written particulars: s 38 Employment Act 2002

Paragraph 3 of the Liability Judgment and paragraph 8 of the Remedy Judgment record our decision that the Claimant did not receive a statement of her initial employment particulars in compliance with section 1 of the 1996 Act until ten months into her employment with R1. She is awarded the minimum amount of compensation equal to two weeks' pay as claimed in her original schedule of loss/remedy statement dated 18 April 2023.The total sum is £796 payable by R1 as the Claimant's employer. We decline to award the higher amount of four weeks pay because we are satisfied that the Claimant did throughout know the basic terms of her contract of employment, for example, holiday entitlement and maternity leave and pay entitlement, there was no deliberate intent to mislead or misinform her, and she eventually was sent the relevant documentation for reference.

21. The total sum, including interest, calculated as set out in paragraph 9 of the Remedy Judgment is **£30,162.92** which is payable by each of the Respondents (as a matter of joint and several liability) as stated in the Remedy Judgment which will be duly corrected as per paragraph 14 above.

Employment Judge Elgot
Dated: 7 February 2024