EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms A Z Kweyama	**v**	**Central and North West London NHS Foundation Trust**

Heard at: Watford by CVP **On**: 2 November 2022 and 14 December 2022 (Tribunal discussion in chambers)

Before: Employment Judge George
Mr T Poil
Mr A Kapur

Appearances
For the Claimant: Mr O Onibokun (Legal Representative)
For the Respondent: Ms N Motraghi (Counsel)

This has been a remote hearing. The form of remote hearing was via CVP, a face-to-face hearing was not held because it was not practicable, and the purposes of the hearing could be achieved through remote hearing.

RESERVED REMEDY JUDGMENT

1. The Respondent is to pay to the Claimant compensation for injury to feelings caused by race related harassment and victimisation in the sum of **£17,000**.

2. The Respondent is to pay to the Claimant interest on the award of injury to feeling in the sum of **£5,213.33** calculated from 16 February 2019 to 14 December 2022 at the rate of 8% per annum which is 46 months at £113.33 per calendar month.

3. The Respondent shall pay to the Claimant the sum of **£3,500.00** by way of aggravated damages for injury caused by the introduction into the proceedings of the matters referred to in paragraphs 7 to 9 of the grounds of response dated 13 August 2019. This sum includes an appropriate award for interest on the award of compensation for aggravated damages.

4. The total award for general damages including interest is **£25,713.33**.

5. The Claimant suffered loss of earnings from agency work as a result of the acts of race related harassment and victimisation for the period 23 February 2019 to 19 May 2019.

6. Case management orders will be made to accompany this judgment directing the parties to make submissions on the Claimant's average income earned when working for the Respondent in the 12 weeks prior to 22 February 2019. This figure will be used to calculate the Claimant's loss of earnings resulting from the unlawful acts of the Respondent.

7. Interest will be awarded on the award of compensation for the loss of earning at 8% from the mid-point of the period starting on 23 February 2019 and ending on 19 May 2019 up to 14 December 2022.

REASONS

1. Following the liability hearing which took place on 20 to 24 June 2022, by a reserved judgment sent to the parties sent on 13 October 2022, we found that the Respondent had subjected the Claimant to race-related harassment and victimisation as a result of full factual matters;

    1.1 The comment by LS on 09 February 2019 to the Claimant "you need to get a pool of bleach and bleach your skin so that you come back tomorrow white and the patients will be nice to you."

    1.2 On 10 February 2019, by LS saying "I do not care let her go and bleach her skin I am sick and tired of people coming to work and saying they are not well."

    1.3 On 22 February 2019, by the Deputy Lead Nurse for Offender Care, saying that she was concerned about the Claimant's mental health because some of the words used in her statement to complain about race-related harassment were worrying.

    1.4 By the same Deputy Lead Nurse for Offender Care, telling the Claimant on the same date that her agency role was being terminated.

2. At the remedy hearing, we had the benefit of a remedy bundle running to 105 pages but were also taken to some pages in the original hearing bundle. The remedy hearing bundle is referred as RHB in these reasons and the liability hearing bundle is referred to as LHB in these reasons. The Claimant did not produce a specific remedy statement and we were referred to a number of paragraphs in her original liability statement dated 24 May 2022. The Respondent relied on the witness statement evidence of James Smith dated 28 October 2022. Both Mr Smith and the Claimant were cross-examined and gave oral evidence with reference to their statements.

3. The Representatives made oral submissions and Mr Onibokun had also produced written submissions of 22 pages which were forwarded to the Tribunal and the Respondent on the morning of the hearing.

4. In paragraph 5 of the CSA Mr Onibokun stated that the issues that the Tribunal were invited to determine at the remedy hearing were as follows:

    4.1 What is the amount of lost earnings payable to the Claimant in light of the ET's findings on liability?

    4.2 Did the Claimant sufficiently mitigate her losses, given the circumstances? If not, should any award for loss of earnings be reduced to take cognisance of that failure? And if the answer to this question is in the affirmative, by what percentage?

    4.3 What is the percentage of uplift that the Claimant ought to be rewarded pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (hereafter TULR(C)A) for the Respondent's failure to comply with the ACAS code of practice pertaining to the grievances lodged by her dated 07 March 2019 and 29 March 2019 respectively?

    4.4 Did the Claimant suffer injury to her feelings arising from the Respondent's conduct? If the answer is in the affirmative, what Vento band does the injury fall into? How much ought the Claimant be awarded?

    4.5 Are there any particular features of the proceedings together with the manner in which it was defended by the Respondent that merits an award of aggravated damages to the Claimant: if so, what ought to be the level of any such award for aggravated damages?

    4.6 Did the conduct of the Respondent being a public body found culpable of such serious acts of race discrimination require the Employment Tribunal to exercise its powers to make recommendations pursuant to section 124(2)(c) Equality Act 2010 (hereafter the EQA)?

    4.7 Should the Employment Tribunal also to exercise its discretion against the Respondent pursuant to section 12A Employment Tribunals Act 1996 (hereafter ETA).

5. Ms Motraghi had not seen the Claimant's skeleton argument until very shortly before the hearing and we gave her time to read the relevant documentation. After she had had the opportunity to assimilate the skeleton argument and particularly the issues that Mr Onibokun said the Tribunal needed to address, we invited the parties, and in particular Ms Motraghi, to address us on what issues fell to be decided at the remedy hearing.

6. Although Ms Motraghi made clear that the Respondent did not apply to postpone the hearing and did not consider that we were unable to proceed despite the short notice of those arguments, she expressed concern in particular about the notification that the Claimant was seeking an award for compensation for aggravated damages, the argument that there should be a recommendation and the argument that there should be a penalty awarded under s.12A ETA 1996. She argued that the Respondent's primary position was that the Claimant ought not to be able to advance a claim for aggravated damages or for a recommendation and the Respondent was not in a position to deal with them and they were not properly before us. She also argued that in a number of instances an award of compensation for aggravated damages could be double counting.

7. The Tribunal pointed out to the Claimant and her representative that a recommendation is only available in circumstances where the Tribunal is satisfied that the action could reduce the impact on the Claimant of the unlawful behaviour and there was no evidence in the bundle or witness statements before us to lead to such a finding. Furthermore, it was clearly something on which the Respondent would need to have the opportunity to call evidence so, were the Claimant to pursue her arguments that there should be one or more recommendations, then, potentially the Tribunal would consider that an adjournment of the remedy hearing was needed in the interests of justice.

8. In order to make proportionate use of time and so that Mr Smith's participation in the remedy hearing could be concluded, it was agreed that he should give his evidence and be cross-examined on it. Mr Smith was released and then Mr Onibokun took instructions from the Claimant.

9. The Claimant confirmed through Mr Onibokun that she was no longer pursuing an argument that there should be a recommendation. She also relayed through Mr Onibokun that she had taken on board a point made by Ms Motraghi that the Respondent had proffered a written apology since the liability judgment. That apology is at RHB page 50. In it Jane Hannon, the Managing Director of Diggory Division, has said a number of things including:

> "We are working with our BAME staff network on a "Show Racism the Red Card" campaign which is being rolled out across our organisation. This will go further in making colleagues aware of how they can raise instances of racism and that we can address them and eradicate them by bringing them to light."

10. The Tribunal decided that it was permissible for the Claimant to argue that there were aggravating features which had caused identifiable injury in addition to the acts which we had found to be unlawful. We directed that those arguments had to be made on the basis of our findings in the liability judgment, evidence before us at this remedy hearing and evidence (both statement and oral) before us at the liability hearing. Aggravated damages are compensatory not punitive and it is for the Claimant to evidence that allegedly aggravating features had caused or increased the level of hurt or insult which she experienced. We made clear that this could be done with

reference to all evidence heard so far but that the Claimant should not at the remedy hearing give additional evidence of which the respondent did not have prior notice.

11. Ms Motraghi identified a further problem in the evidence that had been prepared by the Claimant which was a lack of reliable information about what wages she had actually received when working as an agency worker for the Respondent. The Claimant was permitted to give evidence in chief about that, in particular about RHB pages 31 to 33. These were spreadsheets setting out sums said to have been paid by the Respondent Trust to Athona, the agency through whom the Claimant was engaged.

12. The Claimant had provided an email dated 12 February 2019 which had originally had payslips attached (RHB page 33) and another dated 14 June 2022 which appeared to include links to timesheets (RHB pages 35 & 36) . However, the Claimant said that the passwords for those payslips had expired and she was no longer able to open them. The spreadsheets at RHB pages 31 to 32 were said by Mr Onibokun to be an analysis of invoices generated by Athona and submitted to the Respondent and therefore evidenced the sums paid to Athona in respect of the Claimant's services. The Trust was then charged VAT on the value of the Claimant's services by Athona.

13. The Claimant gave oral evidence that the money paid by the Trust to Athona would go through an umbrella company and they would make any necessary deductions and what was left would be paid to her. She confirmed that the umbrella company would deduct tax and national insurance. The Claimant had not provided a copy of her bank statements for the relevant period to show the sums that had been paid into her bank account. Apparently, disclosure of documents which showed that payments had been made through an umbrella company had only been made very shortly before the remedy hearing which meant that the Respondent had only just been alerted to the difficulty that the Claimant's losses could not in any meaningful way be extrapolated from the sums they had paid to Athona.

14. Calculations done on behalf of the Claimant that are at RHB pages 38 to 39 which totalled some £32,841.75 for the 30 weeks the Claimant's services from 25 July 2018 to 21 February 2019. However, it became apparent that these could not be traced through to the schedule of invoices. It was not clear how much of the sums Athona invoiced for the Claimant's services was, in fact, transferred to her. It would be these sums that would be the measure of her loss and not the amount paid by the Respondent. In particular it was not clear how much would be the net sum she received.

15. The Respondent's primary position was that a loss of earning claim was unsustainable for reasons that we will come to in due course. However, it seemed to be common ground that if the Tribunal decided that there was a loss of earnings made out an actual calculation would require further disclosure. In particular if the Claimant no longer had access to the payslips as she claimed there was a need for a third-party disclosure order against Athona and a relevant umbrella company. Although disclosure by the

Claimant of her bank statements might have been of assistance and, therefore, it might be said that she had not put herself in the best position to prove the amount of any loss of earnings, we were of the view that there was some evidence that she had encountered difficulties in obtaining the relevant evidence and that it would not be just for her to be deprived of compensation for loss of earnings to which she would otherwise be entitled if what was needed was information from third parties.

16. The Tribunal ultimately reserved its decision on remedy and given the period of time that elapsed between the date of the remedy hearing and the first date in which the Tribunal could reconvene for a discussion we decided to make an order for third party disclosure against Athona without delay.

17. On 12 December 2022 an extension of time was granted to Athona for provision of the relevant documents and therefore alongside this reserved judgment we make directions for further submissions from the parties as to the appropriate calculation of the average weekly earning of the Claimant with the Respondent that will form the building of the calculation for loss of earnings. It may be that a precise calculation cannot be done from the documents made available by Athona if they do not include payslips direct to the Claimant showing the sums that were actually paid to her by the umbrella company. We urge the parties to take a proportioned approach to whether it is necessary to seek further third-party disclosure orders or whether having seen the remedy judgment and the parameters for calculating loss of earning that we had already decided upon it is possible for the parties to agree an average weekly earnings figure in order avoid a further hearing and to save cost.

Applicable law

18. The law in relation to injury to feelings is well established. We remind ourselves of the case Armitage, Marsden and HM Prison Service v Johnson [1997] ICR 275 EAT where it was said, among other things, that the awards for injury to feeling should be compensatory rather than punitive and that, on the one hand, they should not be so low as would diminish respect for the anti-discrimination legislation but on the other they should not be excessive. We should also remind ourselves of the purchasing power of the value of the award of everyday life and balance that with the need that awards for discrimination should command public respect.

19. The injury must be proved, our findings must be evidentially based and the injury for which compensation is claimed must result from the discrimination which has been proved: MOD v Cannock [1994] IRLR 509 and Alexander v The Home Office [1988] ICR 604.

20. The well-known case of Vento v. Chief Constable of West Yorkshire Police (No. 2) [2003] ICR 318 CA (followed by Da'Bell v. NSPCC [2010] IRLR 19 EAT) set out three bands or brackets into which it was said that awards of this kind could fall. Following the judgment in Da'Bell, which increased the levels of the bands to take into account inflation since the Vento decision,

the lowest band was increased to £6,000, the middle band from £6,000 to £18,000 and the highest band, reserved for the most serious cases, £18,000 and above. In De Souza v Vinci Construction (UK) Ltd [2017] I.R.L.R. 844 CA, it was held that the 2012 Court of Appeal case which applied a general uplift to damages for pain, suffering, loss of amenity, physical inconvenience and discomfort of 10% should apply to awards of compensation for injury to feelings by the employment tribunal.

21. Previously decided cases should, in any event, not be regarded as particularly helpful as a guide to an award of damages because every case is fact specific. However, the ruling in the De Souza case means that that is particularly so in relation to reports of judgments which predate 1 April 2013 (because they predate the general uplift). Following the judgment in De Souza, the Presidents of the Employment Tribunals in England & Wales and Scotland have published Presidential Guidance by which the Vento bands are updated annually. The present claim was presented on 21 June 2019 and therefore the applicable bands are

    21.1 £26,300.00 and upwards for the most serious cases;

    21.2 Between £8,800.00 to £26,300.00 for serious cases not meriting an award in the highest band;

    21.3 Between £900.00 to £8,800.00 for less serious cases, such as an isolated or one-off act or discrimination.

22. The claimant argues that this is a suitable case for an award of aggravated damages. They are, in principle, available for an act of discrimination: HM Prison Service v Johnson. They are compensatory rather than punitive and are available when the respondent has behaved in a high-handed, malicious, insulting or oppressive manner when discriminating against the claimant. In Metropolitan Police Commissioner v Shaw [2012] I.C.R. 291 EAT, Underhill P, as he then was, cautioned against the risk that a separate award of aggravated damages can lead a tribunal, unconsciously to punish a respondent rather than compensate the victim. There is also a risk of duplication of compensation and the tribunal must be satisfied that there is a causal connection between the exceptional or contumelious conduct and the aggravation of the injury. In many cases it will be appropriate rather to include in compensation for injury to feelings an element which reflects the way in which the victim was treated.

23. When there is a substantial issue as to whether the claimant has failed to mitigate, the questions that we need to ask ourselves are

    23.1 what steps were reasonable for the claimant to have to take in order to mitigate his or her loss;

    23.2 whether the claimant did take reasonable steps to mitigate loss; and

    23.3 to what extent, if any, the claimant would have actually mitigated his or her loss if he or she had taken those steps. Whether an employee has

> done enough to fulfil the duty to mitigate depends on the circumstances of each case and is to be judged subjectively. (Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498, EAT)

Remedy issues

24. Following the discussion referred to above the issues for the Tribunal to discuss to decide at the remedy hearing were the following:

    24.1 Has the Claimant shown that she has suffered loss of earnings as a result of the unlawful acts of the Respondent?

    24.2 If so, what is the period of any such loss?

    24.3 Has the Claimant failed to mitigate her loss? This requires the Tribunal to consider what steps, had the Claimant been acting reasonably, she would have taken to obtain alternative work and had she taken those steps, when would she have obtained work?

    24.4 What was the amount of the Claimant's average net weekly earnings with the Respondent?

    24.5 What award of compensation for injury to feelings resulting from the acts found to be unlawful should be made?

    24.6 What interest should be awarded on that sum? What interest should be awarded on any loss of earnings?

    24.7 Should there be an award of compensation in respect of aggravated damages? Should any award for interest be made on that?

    24.8 Does the ACAS code of conduct apply to those who like the Claimant are not employees? Was there an unreasonable failure to comply with the relevant ACAS code of conduct and if so, is it just unequitable to increase the compensation and by how much?

    24.9 Should a penalty be ordered to be paid by the Respondent under s.12A ETA 1996?

Findings of Fact

25. We start with the findings of fact in relation to loss of earnings.

26. In the Claimant's skeleton argument, Mr Onibokun argued that the unlawful acts led to the Claimant "suffering low moods and depression attributable to the direct conduct of the Respondent see her GP's letter at RBH page 30." (CSA paragraph 9).

27. In CSA paragraph 10 it was argued that, as a result of her low mood and depression, the Claimant was unable to apply for work for a period of about 14 weeks. She then is said to have obtained work at HMP Highdown in a facility also operated by the Respondent but it was alleged in CSA paragraph 10 that "that had been terminated by the Respondent's Kerry Martin and others" and "the same individual senior managers of the Respondent ensured that she lost that employment because of the alleged issues with the Claimant's practice".

28. We were referred to LHB page 207 which is an email from the Interim Head of Healthcare to a Surrey Prisons Performance & Information Analyst of the Respondent dated 19 June 2019 which included the paragraph

    "we will probably be contacting Brenda about this member of staff as we had some concerns regarding her conduct / practice which I can't remember the details of but I know someone who can."

29. We were also directed to LHB page 204. This is an email from the Primary Care Clinical Lead at HMP Highdown to the Claimant saying that he wished to confirm that certain hours had been worked with the agency and would be in touch if any shifts needed covering but at present their in-patient unit was fully staffed.

30. The Claimant's allegation is that this communication caused a further period of low mood and depression postponing a final return to work from 15 July 2019 at HMP Bullingdon. (See RHB page 40 to 49 which are payslips in which the Claimant is described as the contractor and the payment by Healthcare Solutions Services Limited is apparently made to a company called George Christine Limited.)

31. During the course of the hearing, it emerged that the Claimant had relatively recently sent additional documentation to Mr Onibokun that had not been disclosed to the Respondent's Representatives. Four email chains were then sent to the Respondent's Representative and to the Tribunal. We take them into account in full but there are two exchanges in particular that stand out. There is an exchange via emails between two individuals working for Epsom and St Helier University Hospital Trust on 28 May 2019 where the Lead Nurse for Safer Staffing reports meeting the Claimant on that date, that the Claimant just having joined the bank, that the Claimant is dual trained (in other words she is both a registered nurse and a registered mental health nurse) and she may well be looking for a substantive post with the Trust in the future. This was responded to enthusiastically the same day and there was a suggestion that dates for shadow shifts would be available in short order. On 08 July 2019 the Claimant then emailed to say that she was available to start shadow shifts imminently.

32. The other email chain starts with an email from someone with the Respondent Trust dated 01 May 2019 attaching forms that would need to be completed to enable the Claimant to work from the bank at HMP Highdown. This was chased up by that individual by 15 May 2019 and the same day

the Claimant replied to say that she would be available for work as from 20 May 2019 to work between 5 and 6 days a week.

33. In the absence of a specific remedy statement, the Claimant had started her evidence by confirming the truth of her original statement and also of her schedule of loss at RHB page 03. This schedule of loss included the statement "the Claimant was unable to work between 22 February 2019 and 06 June 2019 because of depression and anxiety caused by the Respondent's actions." That statement was plainly inconsistent with the emails that were disclosed during the course of the remedy hearing. We consider that this failure to be open and transparent in her disclosure of documents does damage the Claimant's credibility about precisely when she was well enough to seek alternative work.

34. The GP letter at page 30 dated 09 February 2021 reads as follows:

> "This letter is to confirm that during the calendar year of 2019, the above patient consulted one of my colleagues while she was employed at London Heathrow. On review of the case notes, the above-named patent (sic) stated that she was experiencing low mood and stress, which the patient attributes to stressful circumstances regarding her employment at the time. No medication was issued on this occasion."

35. The letter does not go so far as to say the Claimant was unable to work at the time when she consulted her GP or that inability to work was as a result of stress and low mood. There is also the curiosity that it appears to suggest that she had the consultation *whilst she was employed at London Heathrow* and therefore it is difficult to see that it supports the Claimant's account that she suffered stress and low mood after 22 February 2019.

36. The contemporaneous documentary evidence suggests that by 01 May 2019 she was making enquiries about working at HMP Highdown and stated on 15 May 2019 that she would be available to work from 20 May 2019. It is also clear that she must have approached Epsom at some point prior to 28 May 2019.

37. Nevertheless, as Ms Motraghi realistically accepted, there probably was a period when she was not well enough to work – the question is how long. We then need to consider how long it would take to find work had she been acting reasonably from that point onwards. We make detailed findings about the impact on the Claimant of the events of 10 to 22 February 2019 below. However, we accept that the level of distress that she experienced in that period caused a short period during which she was unable to work. It was suggested to her in cross examination that she was not working because she was looking after her sister but we accept that she had been staying with her sister throughout the period covered by the unlawful incidents and not just after them. We do not think that any care she provided for her sister was the reason why she was not looking for work in that particular period.

38. Had there been useful medical records with the Claimant's GP then no doubt the claimant would have obtained them. The Claimant said she could

not now remember whether she went to the GP prior to 21 February 2019 although that is the implication of the GP's letter.

39. The Claimant emphasised that as a mental health nurse herself, she was in the position to treat herself and to know what to do to lift her own mood. Her evidence was that:

> "If you have low mood and depression and anxiety you cannot say I don't have it. It comes and goes. I told the GP I was dipping in and out. That doesn't mean that I didn't have depression. I was trying hard to be strong for myself."

40. She continued

> "I'm unlike someone who has not learnt therapy I know how to lift myself up again. That doesn't mean that I didn't start any depression it was myself with coping mechanisms that lifted myself up… those are the things that come and go. I am better still now it's depressing to go back on this case I wish I'm not going to be depressed I have not come out completely."

41. The Claimant then said that she was not sure whether we were aware that after she had been told to bleach her skin she was depressed but when Kerry Martin told her she was worried about the language she had used in her emails, that had finished her off and then the Claimant said for the first time in these proceedings "I was suicidal". The evidence she gave to us suggested that she was explaining not simply that she had suicidal thoughts but that she had made some plans to put those thoughts into action. This was not a claim the Claimant had made in any of her previous evidence, and she said that she had not visited a doctor.

42. Our view on this is that if the Claimant had had serious intent to do herself harm then as a mental health professional, she surely would have sought professional assistance. Her low mood and depression cannot have objectively been so bad because she was able to have a sense of detachment and objectivity of her condition that enable her to treat herself. We accept that the Claimant felt depressed in the sense that that word is used in common parlance and was tearful and reasonably felt unable to work for a comparatively short period of time while she recovered. The gist of what she said about the comments by KM were that they caused her to doubt herself and to doubt her ability to do the job. Given that the evidence about suicidal ideation and some planning to put that into effect came unforeshadowed in cross-examination we think, on this occasion, that the Claimant was exaggerating somewhat. Thankfully partly due to her family, her friends, her faith, her strength and character and training, she was able to recover from the lowest point of her mood to the point where she was able to offer herself for work again.

43. Based on the late disclosed documentary evidence, we think that that happened shortly before the 01 May 2019.

44. Mr Smith's evidence shows that there was ample work available for nurses with her skills, training and experience within a reasonable travelling distance of the Claimant's home. The Claimant was dual qualified and had

shown herself willing to work in the most challenging environments. We accept that from the point that the Claimant acting reasonably started to look for work with reasonable diligence she would have been able to find work that completely mitigated her loss within a matter of weeks. The exchange prior to the arrangement for her to work at HMP Highdown shows that the Claimant would have been available from 20 May 2019. Since we accept that she was fit ready and willing to work from no later 01 May we think that that is good evidence that she could have found work to fully extinguish her loss by 20 May.

45. The Claimant has argued that the period of her loss of earnings should in fact continue into July because of she alleges is a further period of low mood caused by the loss of work at HMP Highdown.

46. If the Claimant concluded that the explanation given to her at LHB page 204 that the in-patient unit was fully staffed was both inaccurate and due to false information about her fitness to practice being passed to the management at HMP Highdown then that may have caused her to be upset. However, it is not an action that has formed any part of these proceedings. It is quite possible that the Claimant did not included it an allegation against the Respondent within these proceedings for good reason. We have not made and have not been asked to make findings that the email at LHB page 204 was not a valid explanation as to why the work she had at HMP Highdown ceased to be available. We are of the view that any ill-health that the Claimant suffered immediately after being told that no further shifts were available at HMP Highdown is not something that can be laid at the door of the Respondent. Our view is that any periods without work after 20 May have not been shown to have been caused by the acts that we have found to be unlawful and should not be compensated for.

47. For the reasons set out above we have concluded that the period of loss of earnings during which the Claimant had no income but would have been earning with the Respondent had the events of 22 February not taken place is the 23 February 2019 to the 19 May 2019 inclusive. The Claimant was fit for work by the end of April and, acting reasonably, would have found work that would have completely extinguished her losses no later than 20 May. We are satisfied based on the evidence of Mr Smith and the Claimant's later experience that she would have been able to find sufficient hours work in a week at Band 5 that would have extinguished her losses despite the fact that we are unable presently to precisely assess what these are. The reason we can be confident of that is that the work she was seeking would have been compensated at least Band 5.

48. That will give the parties the number of weeks over which the loss should be calculated. The average weekly loss should be calculated by taking an average of the income received by the Claimant net of tax and national insurance taken over the last 12 weeks of the work that she did for the Respondent.

49. Interest will be awarded on any loss of earnings under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 at the rate of 8% per annum on any award for loss of earnings from the mid-point between the 23 February 2019 and 19 May 2019 on the one hand and the decision day which is the decision day which is 14 December 2022 on the other. It is the failure of the Claimant to ensure that reliable evidence about the extent of her losses was available which means that the amount of the award for loss of earnings cannot be finalised with this remedy judgment.

50. We turn to the question of what the Claimant has shown by way of injury to feelings. In the absence of detailed statement evidence about the impact of the Claimant of the incidents we think it is right, in order to do justice to the case, that we consider not only such evidence as such is in the Claimant's original witness statement but evidence she gave at the liability hearing as well as at the remedy hearing.

51. The Respondent conceded that paragraphs 21 and 24 of her witness statement set out some relevant matters. In paragraph 21, she replicated the exact words from the Datix by which she reported the first of the unlawful acts of harassment. That description includes the following information about how she felt about it:

> "The whole incident was handled atrociously by the nurse in charge L not taking into consideration the impact on me as a person. I was expecting support and reassurance from my nurse in charge whilst I was verbally abused by a patient, but I was appalled to get second abuse from her as my colleague telling me something that I cannot change. I was born black I will live black and I will die black, what is wrong by being black. I felt very insulted, discriminated, bullied, harassed, and abused. I was dehumanised in front of my colleagues, I am now going through a lot of stress and has impacted on my health, it is unbearable, it is emotional and psychological, and I did not seek equality and diversity in the workplace as stated in the Equality Act 2010. On the 10 February 2019 I swapped with the nurse from CLNB and the manager on duty authorised that"

52. She goes on to describe the second incident in paragraph 24 of the statement. The Claimant repeats her feelings about the two incidents in largely the same terms as she used in Datix. There is also relevant information in paragraph 27 when she says that due to the psychological impact on her of the incidents she had written to her agency on 19 February 2019 to notify them that she wanted her shifts cancelled because she did not want to have allocated shifts where she would have to work with LS and may come into contact with the detainees who had been racially abusive towards her. She refers to an email at LHB page 150 where the reason she gave for wishing to cancel the shifts is that she had become very depressed after doing the last shifts last week:

> "though I am trying hard to be strong but I need to recover fully psychologically and emotionally, I'm vulnerable but I know I will recover because I am a fighter. I am not going to let this incident to drown me. I will fight to keep my head above the water."

53. Although the Claimant does refer to the detainees in paragraph 27 she had remained at Harmondsworth for a number of shifts after the original incident involving the detainees and it was the incident involving LS or rather the two incidents involving LS that caused her to write to cancel the shifts in the future. It seems to us that for the Claimant, when her colleagues started to tell her that her race was the problem and that the solution to the abuse that she was experiencing from the detainees was for her to change something about her appearance that had a particularly detrimental and damaging effect on her. The gravamen of what was done is that it sends a message that it was the Claimant that needed to change and that her reaction to the abusive she was experiencing was wrong.

54. We think it right also to remind ourselves that the Claimant had never experienced anything of that nature from LS before. On the occasion of the first incident on 10 February 2022 the Claimant had been tearful about it and had needed comforting by MM later in the day. When she was cross-examined about the detail about the day in question and it was suggested to her that she spent the evening meal break with LS and DW she said:

> "there was no way that I could spend my tea break with LS I couldn't even look at her. When she came to tell me to do the evening medication I didn't even look at her after that racial abuse."

55. She talked about her motivation for bringing the Tribunal claim in her oral evidence and said that it was not about the money it was about justice she hadn't wanted to come this far:

> "If the Trust had sent me to be down the road for LS I would have had an apology. It is not about the money it's about the apology. I was reminded about something that I know I'm black."

56. She went on to talk about how people frequently deny such cases happening but that the truth was the incident happened. She described herself as being horrified to learn that the guard had not back her up.

57. Her description of her reaction the following day was that, when she had seen LS in the corridor, she had had a panic attack and become very anxious. She had gone into the office and picked up the phone and called the manager on the phone and said she was unwell, and she was going home. However, she explained that the manager had been kind and arranged for the Claimant to swap with someone at Colnbrook. So, the presence of LS had provoked a visceral reaction from the Claimant who had needed to change her working environment as a result.

58. The Respondent argued that there is no evidence that the Claimant suffered injury to feeling as a result of the incident involving KM. However, our note of the oral evidence of this incident explained in some detail about the events and what happened which are the subject of the findings that we have set out in our liability judgment. She went on to say that:

> "I was in shock and disbelief I thought she was a nice person she stood up when I was leaving and she tried to hug my shoulders and said I must agree with her that I have mental issues and I said I don't."

59. She described there being other managers outside the room where this happened and said "none of them had come in and stop [KM] saying that I had mental illness which I don't have". All members of the Tribunal have a clear note that at this point in giving evidence the Claimant broke down in tears and needed time to recover. Following the restarting of evidence she said that she had processed the incident with LS but "this one", that is to say the incident with KM –

> "I'm still trying to work it out. I work in a team in a prison. Where I work I got a psychologist to process this one for mental health. I told the consultant I never thought … that we tell prisoners that we diagnose with mental health … I never … it can impact on their life so much. I am very careful with what I say. I don't know what caused KM to associate with mental health other than the incident with the bladder problems. Perhaps she doesn't know my background. I was raped since then I have never had a good bladder. I am a mother. I cannot just pee."

60. Based on this oral evidence we find that at the time of the hearing before us, the Claimant was more affected by the KM incident than by the LS incident and, as she said, was still processing how and why it had happened.

61. So in respect of the incidents that caused injury to feelings there are three dates: 10 and 11 February 2019 and then 22 February 2019. On the last of these the comments were made by KM and the Claimant was told that she was no longer to work at Harmondsworth. In between these times the Claimant had originally cancelled her shifts and then rebooked shifts. After the incident with KM she no longer worked at this facility for the Respondent. She was unwell and unable to start looking for work until the end of April 2019 so this must be period of time when she was psychologically most affected by what had happened.

62. She felt sufficiently confident of this Respondent as operator of a workplace environment to apply for shifts with them sometime in May 2019, albeit at a different facility. Nevertheless, it is clear to us that even more than two years after the events in question, the recollection in particular of the incident of 22 February 2012 still powerfully affected the Claimant. We also remind ourselves of the letter at LHB page 160. This is an email from the Claimant to ND on 22 February 2019 to inform him about the instruction by KM not to continue with her bank application she concludes, "My friend you won't see me again there but I will remember your kindness. Please keep in touch. God is in control." These words seemed to us to speak of great sadness at what had happened.

63. When asked about the KM incident in oral evidence at the remedy hearing, the Claimant gave this evidence:

> "Either you go to the GP – I said not going to do it but this is how I feel that I feel useful. Without my mental health - I can't work if I cannot be myself. I don't

> know what KM saw in me to make her say I have mental health issues. I feel useless. I understand how people feel when they are suicidal I managed myself and with the support of friends I was looking after someone else with physical health problems I had to be strong in front of her."

64. Prior to the events in questions the Claimant had enjoyed her work. She must have found the work of providing care to the detainees very challenging, but she seemed to have had good working relations with her colleagues. We accept that the KM incident caused the Claimant to doubt herself and, to some extent, to doubt her fitness to work.

65. Having set out our findings on the period of time over which the Claimant was affected by the incident and the depths at which she suffered at the various points in time we come to assess the award of compensation under the principles set out in the case of Vento.

66. We have concluded that this award falls squarely in the middle band. There were two separate but interconnected sets of incidents involving two different individuals. The first pair of incidents led the Claimant being very offended, tearful and to experience a panic attack the next day when confronted with the wrongdoer. She felt it necessary to seek shifts to avoid the wrongdoer. She was still in a state of expectation that the investigation by the Trust would happen and would deal with the matter when she was told by KM, in an act of victimisation, that her contract would be terminated, and she should not work for the Trust in the future. She had worked there for some 15 months prior to this and had as we said largely enjoyed her work. On the other hand, as an agency nurse she was able to find work elsewhere quite easily and probably had worked in large number of facilities in the course of her career. So the loss of this particular employment is not the same as a loss of a long convivial employment and the impact on the Claimant will ultimately be more transitory as a result. She still experienced some feelings of anguish as a result, in particular of the KM incident, at the time of the hearing some 3 years later. On the other hand, because of her training and her resilience she was able to largely recover from the worst of the psychological effects within a few months. We consider the appropriate level of award to be £17,000.00.

67. To that should be added interest under reg.6(1)(a) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. 16 February 2019 is the mid-point between the two sets of incidents. Interest will be calculated from that date to the date of assessment which is 14 December 2022. This amounts to approximately 3 years and 10 months at 8% per annum at £113.33 per calendar month. Over 46 months that comes to £5,213.33.

68. In her submissions, Ms Motraghi also referred to the case of Alexander v The Home Office and the guidance that there must be some special element that takes the case beyond discrimination case in general. She also referred to the guidance that cases of this kind often fall into three categories: one concerns the manner in which the offence is committed; the

second the motive; and the third where the subsequent conduct of the employer was unnecessarily offensive.

69. In discrimination cases the risk of overlap is particularly acute when considering an argument that there should be award of aggravated damages for the manner in which the offence was committed since a compensatory award for injury to feeling will frequently take into account feelings of upset and there is a risk that a finding of upset caused by the alleged aggravating factor will cover the same ground. We also accept that we have already made a finding that LS did not deliberately intend to offend and that is relevant to the question of the Respondent's motive.

70. The Claimant argues that there are 5 matters that should lead to an award for aggravated damages. The specific matters that the Claimant argues should be reflected in the award for aggravated damage are

    70.1 promoting LS to Band 6;
    70.2 allegedly relying upon inaccurate evidence;
    70.3 the 2018 incident;
    70.4 the reference by KM to the Claimant's mental health; and
    70.5 the email at LHB page 207 saying that there were concerns about the Claimant's practice.

71. It is clear that the fourth of those is an incident of unlawful victimisation and race-related harassment in itself. That has been compensated for in the award for injury to feelings and should not be the subject of an award for aggravated damages.

72. Although there is reference to the promotion of LS in the CSA there is no evidence from the Claimant in her statement or in her oral evidence that we have found that evidence that she has been particularly offended by this. We do not have evidence of when she heard about or what the effect on her was. We also remind ourselves that at the time the Respondent had carried out an internal investigation. Although we were critical of this investigation, the fact remains that, at the time, it did not reveal any supporting evidence to corroborate what the Claimant was saying against LS. Professional fitness for practice proceedings had cleared her. In those circumstances, we do not think that the Respondent can be said to have acted in a highhanded way by promoting LS. However, primarily we reject this argument because there is no evidence of the impact on the Claimant.

73. In CSA paragraphs 40 to 42, the Claimant's Representative criticises the evidence of the Respondent and describes the manner in which the proceedings were defended "particularly harrowing for the Claimant". The obvious problem with this submission is that, in the absence of a recent witness statement, the Claimant has not provided evidence that the proceedings were particularly harrowing for her. The consequence of the inconsistencies in evidence given by or on behalf of the Respondent was that the Claimant's evidence was preferred, and she succeeded. We think there is a risk here that the Claimant is asking us to make an award that

would in effect penalise the Respondent for losing. That is not the purpose of an award of aggravated damages.

74. The next matter relied on is the 2018 incident. We refer to this incident in paragraph 35 of the reserved judgment, but it was not necessary then to record any details about it. It is therefore necessary to explain a little more detail about this incident now.

75. The first mention of the 2018 incident within the proceedings comes in the Grounds of Response, paragraphs 8 to 9, which say as follows,

> "8. There were some agency workers whose conduct were of a concern to the Management Team. One issue which was brought to the Respondent's attention was the behaviour of the Claimant. Of significant concern was CCTV recording which had been reported on Datix (the incident management recording system) on 05 June 2018 which clearly showed the Claimant in one of the nurses' rooms which was used to treat patients. The CCTV footage showed the Claimant removing her trousers and urinating into a wastepaper bin, notwithstanding a toilet being next door and just a few steps away. She then emptied the content of the bin down the sink.
>
> 9. When the Claimant was initially asked about this, she had confirmed that she had not been unwell that day but she did not think she had time to reach the toilet and in any event did not like using the toilets, as patients may have also used them. Unfortunately, due the Claimant's manager being on sick leave followed by numerous other absences in the Management Team, this matter was not actioned by the Respondent at the relevant time."

76. The 2018 incident was also referred to in MP's statement and it was clear that she had been provided with scant details of the incident by Mitie. There is no explanation in the grounds of response as to why this factual allegation is in there. It is not drawn on as the basis of any defence, for example, that had the actions alleged against the Respondent not happened, they would have terminated their relationship with the Claimant in any event once the 2018 incident was "properly" actioned.

77. The fact that this had been raised led to the Claimant calling two witnesses to deal with the allegation in oral evidence. PW provided evidence of this matter but also of the allegations of racism, but AG was called only to give evidence about the 2018 incident. In particular in AG's paragraph 13 she explained the way in which the matter was investigated and gave evidence that, so far as she was concerned, the Claimant had been cleared as fit for as fit to practice on substantial grounds by an investigator who knew the full situation that the Claimant had been in. This is something that the Respondent could have found relatively easily by searching for emails from the relevant period of time. At LHB pages 94 to 96 we can see that the Claimant herself reported the incident and gave full details. She said that the toilet facility was not available in reception in Harmondsworth, that she had tried to get to the toilet in time, but the door had not opened, that she had acted in desperation and was mortified by what had happened. It is clear from the end of this report that she knew that she had been caught on camera and had been told that she had to write a statement.

78. We have set out in paragraph 57 above that the Claimant has a deeply personal history which means that she has continence problems.

79. In the end this matter was not referred to in cross-examination or submissions.

80. We conclude that the 2018 incident was referred to by the Respondent in the Grounds of Response probably because they wished to portray the Claimant in a particular way. No explanation has been given to us as to why the incident was referred to. There are two possible explanations. Initially it may have been thought potentially relevant to remedy at a time when the Respondent had not done enough investigation to realise that the matter had been resolved by management at the time – but that is not followed through in the Grounds of Response. We are driven to the conclusion that it was referred to because the Respondent tended to suggest in some way that a person who had behaved in this way was not credible and it was intended to be used as an attack on the credibility of the Claimant. It certainly appears that this was the view of the Mitie manager who provided the pejorative account of this incident to MP (see our paragraph 97 and 98 of the reserved judgment). We found in paragraph 100 that MP was probably influenced by the information in the way in which she handled the Claimant's complaint. Given that we rejected the allegation that this was unlawful treatment this is not something for which the Claimant has been compensated in our award of injury to feelings.

81. However, the fact that the incident was raised as it was within litigation meant that a hugely embarrassing incident had to be covered by the Claimant in a public hearing. This was totally unnecessary. Had the Respondent done relatively easy investigation they would have realised that the incident had been dealt with on its merits at the time. So far as we can see, it should never had been brought up within the litigation and we find this was raised in an attempt to throw doubt on the Claimant's credibility.

82. We refer to AG's statement evidence and PW paragraph 13. Both gave evidence that the then Primary Care Lead, PW's line manager investigated the matter thoroughly and cleared the Claimant to return to work. The evidence we had on the last occasion was that this same line manager was responsible for Datix handling. The raising of this incident led to the Claimant calling upon her colleagues at no small inconvenience to them to support her in rebutting the insinuations about her practice which were never in the end relied on by the Respondent. We go so far as to say it was reckless of them to raise this allegation without any real thought about its forensic use. We consider that this conduct falls within the description of high handed or oppressive behaviour which is separate to the incident itself and which merits an award of aggravated damages. It caused the Claimant to feel obliged to refer back to incidents in her past that are deeply personal, and she should not otherwise had been required to reveal in a public hearing. We could tell from her demeanour when discussing it how distressed she felt about it.

83. We are alert to the risk that, to a limited extent, the injury to feelings experienced by the Claimant as a result of the comment by KM about mental health treads the same ground as the indignity suffered by the Claimant in having to deal with this particular incident within the litigation. That is because of the Claimant's suspicion that KM somehow knew about the 2018 incident and that was the reason why she cast aspersions about the Claimant's mental health.

84. However, we think this is quite distinct from the indignation the Claimant has suffered at having to deal with that incident within these proceedings. Her description of how she felt on 22 February and how she has felt since when trying to rationalise what KM said to her is separate to the indignity, she has felt in having to respond to the allegations in paragraphs 8 and 9 of the grounds of response. Any overlap of the injury here is extremely marginal.

85. Interest would be available on this part of the award as well as on the award for injury to feeling. However, we have found it difficult to identity the precise date of the injury for which aggravated damages are being awarded in this instance. The Grounds of Response were sent to the Claimant on 30 August 2019 and so that was when those paragraphs first came to the Claimant's attention. Ms Pittarch's witness statement is signed on 30 July 2021 but we are unaware of the date on which witness statements were exchanged. The Claimant has had to deal with the allegation in the way she had prepared the case and in the detail in the statements prepared in support of her case, in particular that of AG. It was not until the liability hearing that it would become clear that the Claimant was not going to be asking questions about the 2018 incident. This means that the acts of the Respondent that suggested reliance on it have continued to have over a period of time.

86. We are also of the view that the main part of the injury suffered by the Claimant is in respect of the unlawful acts of discrimination and victimisation themselves. Because of the difficulty of identifying the exact date on which particular elements occurred and the fact that our assessment of compensation for aggravated damages would include the Claimant's feelings about those steps taken within the litigation over the course of a period of time we think that it could potentially lead to a injustice to the Respondent to award interest on a whole sum from some notional mid-point within the period from presentation of the grounds of response to the date of the hearing. Instead, we have decided to take account of the fact that interest would be awarded in coming to the figure we assess the injury to feelings at. We have decided to make a separate award of aggravated damages of £3,500.00 to include any interest payable in respect of that.

87. There is a short answer to the allegation that the claimant should benefit from an uplift on damages for an unreasonable failure to comply with the ACAS Code of Conduct relating to grievances. That is that the Claimant was not an employee of the Respondent and therefore the ACAS Code did not apply to this situation. We do not make an award under s.207A TULR(C)A 1992.

88. We turn then to the suggestion that we should order a penalty under section 12A ETA 1996. It is at this point that we consider the apology at RHB page 50 is of particular relevance. We note that the Respondent has put in place training and accept that this shows they are trying to rectify the limitations that the Claimant was working under, namely that a member of agency staff it was not clear what route she should take to get an effective investigation of a complaint of so a serious matter as race-related harassment. Although in the CSA Mr Onibokun refers to the case of First Great Western Limited v Waiyego (UKEAT/00564/18) he did not set out in the CSA the basis on which it was argued a penalty should be ordered in the present case.

89. The Claimant added some oral submissions to CSA paragraph 63 and 64. There were that the wrongdoers were senior staff and that an apology could have been offered sooner. Mr Onibokun countered the Respondent's argument that there had been an NMC investigation that exonerated LS and KM and that the Trust was bound by that with an argument that the NMC's outcome was reached after considering flawed evidence.

90. Nevertheless, we do not think that this is the sort of case where there has been a deliberate avoidance of responsibility rather than a somewhat cursory investigation that was too quick to dismiss what the Claimant has said. This is not, in our view, the sort of matter that merits a penalty. There was a casualness and a complacency about what staff, and in particular agency staff, had to deal when treating detainees at Harmondsworth IRC and we sincerely hope that the review referred to in the apology addresses that, but we do not see a basis for a specific penalty under s.12A ETA 1996.

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Employment Judge George

Date: …21 February 2023 ……..

Sent to the parties on: 23 February 2023

For the Tribunal Office