EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100101/2024

Held in Glasgow on 12, 13, 14 & 15 August 2024

Employment Judge S MacLean
Tribunal Member L Millar
Tribunal Member J McCaig

Ms L G Coia	**Claimant** **Represented by:** **Mr W McParland - Solicitor**
Event Medical Group (EMG) Limited	**First Respondent** **Represented by:** **Mr J Turpin - Barrister**
G Hughes	**Second Respondent** **Represented by:** **Mr J Turpin - Barrister**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

1. The Tribunal finds and declares that the first respondent and the second respondent unlawfully discriminated against the claimant, contrary to section 39 of the Equality Act 2010, and her complaints of discrimination contrary to sections 13 and 26 of the Equality Act 2010 succeed.

2. In respect of unlawful discrimination injury to the claimant's feelings, the Tribunal orders that the first respondent and the second respondent jointly and severally pay to the claimant the amount of **SIX THOUSAND POUNDS (£6,000)** for her injured feelings**.**

3. In terms of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, it is further ordered that the respondent shall pay to the claimant the additional sum of **FIVE HUNDRED AND SIXTY NINE POUNDS AND FORTY TWO PENCE (£569.42)** representing the interest on the injury to feelings award of £6,000 calculated at the appropriate interest rate of eight percent per annum for the period between 28 July 2023 and 4 October 2024 being the date of this Judgment.

REASONS

Introduction

1. In the claim form the claimant complains that she had been unlawfully discriminated against on grounds of sex under sections 13 and 26 of the Equality Act 2010 (EqA). She seeks compensation.

2. In the responses, the respondents denied the claims. The first respondent said that it was the employer, and that the claim against Event Medical Group Limited should be dismissed.

3. Before the case management preliminary hearing on 5 March 2024 (March PH), the clamant withdrew the claim against Event Medical Group Limited which was dismissed.

4. At the March PH, Mr McParland, solicitor, represented the claimant and Mr Pendlebury, manager, represented the respondents. It was agreed to proceed to a final hearing which was fixed for 28, 29 and 30 May 2024. Mr McParland advised that he would be calling the claimant, and Ross Murray, former co-worker to give evidence. Mr Pendlebury said that nine witnesses would be giving evidence for the respondents. If the respondents remained unrepresented, Mr McParland offered to assume responsibility for preparing the joint set of documents for the final hearing.

5. On 8 May 2024, Mr McParland requested a witness order for Mr Murray. The second respondent advised the Tribunal by email that Mr Pendlebury was now a witness for the claimant.

6. On 13 May 2024, the Tribunal was advised that Peninsula was appointed to represent the respondents. On 16 May 2024 the respondents' representative applied to postpone the final hearing and to relist for a longer period as they had just been instructed. They also sought to submit an amended response.

7. A case management preliminary hearing took place on 28 May 2024. Mr McParland represented the claimant and Mr Turpin, barrister, represented the respondents. The final hearing was postponed and relisted for 12 to 16 August 2024. Mr Turpin confirmed that the respondents proposed to call four witnesses: Ms Dorward; Mr O'Hagan; Mr Hughes and Mr Stewart. Mr McParland advised that in addition to the claimant and Mr Murray, he would call Mr Pendlebury who it had previously been anticipated would be a witness for the respondent. A witness order was sought for Mr Murray which was issued on 15 July 2024.

8. From 5 August 2024, repeated applications were made by Mr Turpin relating to compliance with orders and seeking strike out of the claim and/or postponement of the final hearing. These application were refused by an employment judge as there was time to prepare, the fairness of the hearing was not undermined, and the prejudice to the respondents was overstated. A late application by Mr McParland for further information was granted as the answers and potentially the documents were modest and a legitimate matter for cross examination.

9. Mr Turpin's application on 9 August 2024, for a witness order for Mr Pendlebury was refused by an employment judge as the respondents had not shown that there was an attempt to ask Mr Pendlebury to attend, including any reasons for refusal. Mr Pendlebury would have no real time to receive the order, read it, and make any application for variation.

10. At the final hearing the parties produced a joint file of documents. Mr McParland advised that he did not propose to add to the file, the documents, that he had received from the respondents in compliance with the recent order. Mr Turpin wished to do so, and the documents were added to the joint file.

11. Mr McParland said Mr Pendlebury was willing to attend without a witness order. Mr McParland advised that assuming the second respondent did not dispute that the messages between the him and Mr Pendlebury were exchanged, the claimant did not propose to call Mr Pendlebury. Mr Turpin advised that the respondents wished to call Mr Pendlebury to give evidence.

12. The Tribunal heard evidence from the claimant on her own account. Mr Murray gave evidence on her behalf. The second respondent gave evidence on his own account. Also for the respondents the Tribunal heard evidence from Mr Pendlebury, former finance/events manager; James Clauson, advanced medic and ambulance technician; Gordon Stewart, paramedic, Finn O'Hagan, medic; and Elaine Dorward, medic.

13. The representatives made oral submissions in which they agreed the issues to be decided by the Tribunal. The Tribunal has set out the facts as found that are essential to the reasons or to an understanding of the important parts of evidence. Points made in submissions have been dealt with while setting out the facts, the law, and the application of the law to those facts. It should not be taken that a point was overlooked, or facts ignored, and that a fact or submission was not part of the reasons in the way that it was presented to the Tribunal.

Findings in fact

14. The first respondent is a limited company providing private events with ambulances and staff including first aiders (medics) and paramedics. The second respondent is a director of the first respondent for whom he is employed as event logistic manager. He manages the business and all staff report to him. The second respondent also undertakes shifts as a paramedic. Until recently the second respondent's mother was also a director of the first respondent but had little involvement.

15. Mr Pendlebury was a long term friend of the second respondent. The first respondent employed Mr Pendlebury for around two years as event manager/finance manager. Mr Pendlebury and a logistics manager reported

to the second respondent and were part of the management team. None was issued with terms and conditions of employment.

16. The first respondent also employs approximately 80 staff by offering shifts at private events, a month in advance, on an online shift assignment system (Crewplanner). There are approximate 20 staff who work regular shifts. Staff apply online for shifts. Once allocated there is an expectation that the shift will be worked unless management is notified and the shift is reassigned. Some shifts involve a driver for which there is additional payment. Usually a staff member allocated to the shift will also be allocated as the event driver which involved transporting equipment to/from the event. None of the staff was issued with terms and conditions of employment. Staff are paid an hourly rate and tax deducted by pay as your earn.

17. Around April each year, staff are invited to a meeting, lasting around two hours, to discuss issues including wages and travel time, training, equipment and uniforms. Usually between 20 to 50 staff attend for some or all of the meeting. Before the COVID-19 pandemic, at an annual meeting, four members of staff were nominated to sit on the "disciplinary panel".

18. The first respondent employed the claimant as medic from 12 July 2022. The claimant downloaded Crewplanner to her mobile telephone. After working a few shifts she was provided with a uniform. She was not provided with a terms and condition of employment. The claimant was informed that she could access "Google classroom". The claimant was unable to log onto the website. She attended the annual staff meeting in April 2023.

19. On 28 July 2023, the claimant was allocated a shift at an event in Dundee at which the second respondent was working as a paramedic (28 July event). The claimant attended the hub around 12pm. She spoke to the second respondent and said that she had a surprise to tell him. The second respondent asked the claimant if she was pregnant (the first comment). The claimant responded, "No, who wants kids?" Mr Pendlebury, who was in the vicinity, commented that children were great. The claimant was astonished

and embarrassed by the second respondent's comments. He had not made any comment like that to her before.

20. The claimant told colleagues that she could not believe what the second respondent had said. She commented that the second respondent was a cheeky bastard and if she had put on weight, he was not in a position to talk.

21. During the shift, around 9pm, the claimant asked to speak to the second respondent. The claimant said that she was planning to travel to Australia. The second respondent was already aware that that the claimant had recently ended a personal relationship. He commented that if she was not pregnant, he could give the claimant a hand to get pregnant (the second comment). The claimant was taken aback but ignored the comment. She asked about travel arrangements for shifts for Fringe events. The second respondent said that transport was not being provided about which the claimant expressed concern about the viability of her doing the allocated August shifts. The second respondent referred to previous examples of staff costing the business money and told the claimant that she should contact him when he was in the office, not at an event. The second respondent said if the claimant dropped shifts this would create bad blood. As the claimant turned to leave, the second respondent said that the offer still stands. The claimant walked away. She was shocked as she took the comments to be propositions to have sex. The claimant finished the shift and went home. At home she cried as she felt violated that her line manager said what he did.

22. On 29 July 2023, the claimant attended the hub as she was scheduled to work a shift at an event in Dundee (29 July event). The claimant sat in front of the minibus that was being driven by Mr Murray. The second respondent, who was not working the shift, approached and again asked the claimant if she was pregnant (the fourth comment). She could not believe what had been said and commented, "What the fuck."

23. On 31 July 2023 at 08:22, the claimant sent an email to the first respondent seeking clarification about the transport that would be provided for the Fringe shifts (the claimant's July email). She also raised concerns about the basis

that travel time was being paid for the events on 28 and 29 July 2023, and the allocation of drivers shifts amongst the staff. The claimant asked for these matters to be looked into and remedied, and if she was not being paid or treated fairly, then she would be unable to complete any further work for the first respondent until the issues were remedied and that similar issues would not arise in the future.

24. Within an hour, the second respondent replied by email to the claimant and Mr Pendlebury (second respondent's July email). The second respondent commented about the claimant using his own words against him and making false allegations. She should focus on the financial burden of the Fringe events rather that what she believed she was entitled to. He would "discipline" whoever told her that the driver shifts were allocated unfairly. He said that the claimant was not seeking a solution but seeking payment or threatening to leave. It was her choice but the second respondent would not back track on what had previously been agreed. The second respondent said that the claimant should consider her communication with management. He considered the claimant's comments on the Fringe costs were "actionable".

25. Mr Pendlebury sent an email to the claimant on 1 August 2023 at 12:07pm asking her to clarify that she would undertake her scheduled August shifts. If the claimant was not covering the August shifts allocated to her they needed to be "re-advertised" on Crewplanner. This email was blind carbon copied (bcc) to the second respondent.

26. The claimant replied to the second respondent, carbon copied (cc) to Mr Pendlebury, by email sent on 1 August 2023 at 14:04 (claimant's August email). She expressed disappointment at the contents of the second respondent's July email. In relation to the comment about the claimant's communication with management, the claimant stated, "I would like to raise that as a member of the management team, your own communication style should also be taken into consideration. I would refer to an incident on the 28th in which there was a comment made by yourself regarding whether or not I was pregnant, which you followed up with "if you are not pregnant, I can give you a hand getting pregnant". These comments are not only offensive but

may well be actionable by the HR department for possible sexual harassment. The claimant confirmed that she was resigning with immediate effect and she intended to hand in her uniform and the first respondent's equipment within a few days.

27. On 1 August 2023 at 17:47, Mr Pendlebury sent an email to the claimant, bcc to the second respondent, advising that he would sort out the wage slips and payment. Mr Pendlebury asked the claimant to return the uniform following which a P45 would be issued. As regards possible sexual harassment Mr Pendlebury said that it needed to be addressed one way or the other as even mentioning it could have ripple effects. He was not part of the conversation for long, which he understood the claimant to be referencing. However, if the claimant wished to make a complaint, Mr Pendlebury offered to meet with her to discuss concerns and resolve matters. Alternatively, if the claimant was wishing to take it no further, nothing more would be said about it.

28. The second respondent and Mr Pendlebury had a message exchange. The second respondent expressed concern that the claimant had been paid so quickly as there may be an issue with the uniform that she returned.

29. The claimant did not reply immediately to Mr Pendlebury's email. The second respondent decided that the complaint should be investigated by Mr Pendlebury.

30. On 2 August 2023, Mr Pendlebury emailed the claimant advising that "we" need to look into the matter about comments made by the second respondent. He said that a meeting on 8 August 2023 had been arranged to investigate the matter and that he would be attending himself to hear her recollection of the incident.

31. The claimant responded the following day confirming that she was happy to meet him. Mr Pendlebury advised the second respondent of this and offered to confirm the arrangements of the meeting. Mr Pendlebury drafted an email to be sent to other employees working at the 28 July event, asking them to comment on what they recollected (or not) about any altercation or interaction between the claimant and the second respondent during the 28 July event.

The second respondent approved the draft email. Mr Pendlebury confirmed that he would send it and then contact "the panel". The email was sent on 3 August 2023 at 21:49.

32. Ten minutes later, Mr Pendlebury emailed four employees (three of whom had been sent the earlier email) saying that he was led to believe they had "been part of a disciplinary panel in the past" (3 August panel email). He advised that he was investigating an allegation between the second respondent and the claimant and that an email had been sent to all those who had been in the vicinity. Mr Pendlebury confirmed that he would be meeting the claimant on 8 August 2023 and would be having a follow up meeting with the second respondent before presenting his findings to the panel for a final decision. Mr Pendlebury asked if anyone would be willing to be part of the panel.

33. The team leader at the 28 July event replied at 22.04 saying that she was willing to be on the panel. She said that she was not made aware of the incident and had not heard any hearsay either. Mr Clauson replied by email sent on 4 August 2023 at 09:18 confirming that he wished to be part of the panel. He sent a separate email ten minutes later confirming that the claimant did state that the second respondent had asked if she was pregnant. He went on say that the comment in his opinion should not be taken as a personal insult or a defamatory comment but "rather as a sarcastic comment as she laughed about the comment calling Gareth a 'cheeky bastard'." Mr Clauson said he believed that later that "a frank discussion occurred about travelling arrangements and payments for the Edinburgh Fringe". On the return journey with the second respondent, no comment or discussion was made where the claimant was "the main subject or topic for discussion". At 10:12, Ms Dorward sent an email saying that she was still able to serve on the panel.

34. On 7 August 2023, Mr Pendlebury prepared a draft email to be sent to the claimant which was approved by the second respondent. The email was sent to the claimant on 7 August 2023 at 11:38 advising that a witness would be present at the meeting the following day and that the claimant had a right to be accompanied at the meeting by a representative of her choosing. The claimant could bring a colleague or a union representative to provide support.

35. The claimant replied expressing concern about that someone else would be attending. Following clarification, it was confirmed that "Cathy" would be present as she was an independent advisor "on situations in this". The claimant thanked Mr Pendlebury for clarifying as she was concerned that it meant the second respondent or the logistics manager, whom the claimant was concerned would not keep matters confidential. The claimant confirmed that she would attend the meeting with someone but it would not be a union representative or a legal consultant due to the time constraints. Mr Pendlebury sought advice from the second respondent. Mr Pendlebury then replied that due to "GDPR and confidentiality", the claimant was prevented from being able to have someone who was not a colleague or a trade union representative. In the circumstances, the claimant advised that she would need to postpone the meeting so she could seek advice. The meeting did not proceed.

36. The employees working at the 28 July event were aware of the complaint. There was discussion and speculation among the staff about what was going on with the investigation and the potential outcome.

37. Around 14 August 2023, after working on shift with Mr Clauson and another colleague, Mr Murray contacted the claimant and advised her that Mr Clauson had commented to a colleague about not being able to have a joke. The second respondent would be fine. He needed to hope that HCPC (the Health and Care Professions Council) did not find out. The claimant was doing it for attention and it was not that bad.

38. Mr Murray also told the claimant about a conversation with another named colleague about the second respondent being suspended but it would be fine as Ben (Mr Pendlebury) had Jim (Mr Clauson) and Elaine (Ms Dorward) on the panel. They did not like the claimant so will handle it well and it can be said that it was dealt with.

39. The claimant felt embarrassed and upset that matters were being discussed with staff who were not involved in the process. It confirmed her impression that she would not be listened to and the matter was already decided.

40. Around 15 August 2023, Mr Pendlebury emailed the claimant about rescheduling their meeting. The claimant explained that she was waiting for guidance on next steps. She was hesitant to meet. Mr Pendlebury drafted a reply which the second respondent revised. The email concluded that the claimant should confirm a suitable date to meet the following week if she wanted to make a formal complaint. The claimant did not reply.

41. On 25 August 2023, Mr Pendlebury emailed Mr Stewart, who has been working at the 28 July event but had not replied the email sent on 3 August 2023, about what he remembered. Mr Stewart was told that it was very important to detail what he remembered, not what he heard.

42. Mr Pendlebury also met with the second respondent following which a note of questions and answers was prepared (note of 25 August interview). The second respondent said that he made only the first comment. He referred to the claimant discussing with him that she had "chucked out and dumped her boyfriend" and was considering emigrating to Australia. He said that the reference to asking whether the claimant was pregnant throughout the evening was that the claimant would "repeat the joke several times to me" and others during the evening, it became a bit of a running comment between staff at the event.

43. Mr Pendlebury drafted an investigation report, the scope of which included "biased assignment of shifts" and the complaint of sexual harassment. It stated that there the claimant did not make an official complaint but efforts were taken to set up the meeting. Evidence comprising emails, witness statements and the note of the 25 August interview was appended.

44. The draft investigation report was sent to the second respondent on 26 August 2023. He responded, "Oh bring your laptop. Might have a few wee changes to the report. Otherwise it is shit hot." Mr Pendlebury commented that he made sure to highlight that the claimant was wrong and malicious in her comments. The second respondent said, "wait to see Jim's reply ha ha, he's hinted that it is going to be direct lol". Mr Pendlebury replied "I'm dying to hear that lol". The second respondent commented, "yeah copy and paste lol".

45. On 27 August 2023 at 06:37 Mr Pendlebury emailed the investigation report to the panel. It stated that due to the nature of the allegation of possible sexual harassment Mr Pendlebury saw fit to gather a panel to review the report, which it would receive before meeting, and give a recommendation based of the facts contained in the report. The investigation report was not restricted to facts. It contained opinions and conclusions ostensibly of Mr Pendlebury. It made the recommendation that the statements in the claimant's August email had no foundation.

46. At 4.30pm that day, the panel met and discussed the investigation report. Mr Clauson decided that he would chair the meeting. Ms Dorward said that she would take minutes (which were provided on 16 September 2023). The panel discussed the allocation of driver shifts, travel time, and then transport to the Fringe events.

47. Lastly the panel discussed the sexual harassment complaint. The minutes recorded that the panel, who had been working on that shift, were aware that the second respondent had asked the claimant if she was pregnant after she said she had a surprise to tell him. As regards the second comment, no one could recall that being said. The panel considered that the claimant was not upset in any way. The complaint was only brought after the claimant's email where she was seeking more money. Mr Clauson then decided to telephone the second respondent and ask a couple of questions (the details of which and the answers were not noted). The panel considered that the second respondent answered the questions clearly and truthfully. The panel noted efforts had been made to contact the claimant. The conclusion was that the second respondent should inform HCPC of the decision. It was suggested that he "takes a moment to think of any future conversation to all members of staff. Especially with his position as director of EMG".

48. On 2 September 2023, Mr Clauson emailed a draft document to Mr Pendlebury and copied it to Ms Dorward. He asking the panel members to confirm if they were happy with it, and for Ms Dorward to send the minutes to Mr Pendlebury.

49. The draft document referred to the "disciplinary" panel reviewing the complaint: driving shift allocation; non-payment of travel time; transport to the Fringe and sexual harassment. It referred to the unanimous decision. All the complaints were rejected.

50. In relation to the allegation of sexual harassment, the draft document stated that it was the unanimous decision of the panel that the comment "are you pregnant" was made without causing any harm or offence. With regard to the second comment, the panel concluded there was no evidence to substantiate this statement. It also concluded that "this additional comment was tantamount to malicious intent and constructed to cause Mr Hughes emotional distress and reveal a [faucet] of Ms Coia's character." The panel said that the "spurious" allegation was made after her email about additional payment which the panel had rejected.

51. The panel recommended the second respondent contact HCPC to inform them of the allegation made by the claimant and the panel's findings as there was a possibility that the claimant may not let matters rest and cause further "malevolence" to the second respondent. It was also recommended that he "thinks before replying" to comments thus avoiding any future complaints.

52. On 5 September 2023, following discussion with the second respondent about the wording, Mr Pendlebury emailed the claimant to advise that as it was four weeks since it was originally proposed to meet, and despite attempts to reorganise, she had failed to put forward a date, he was now considering the matter closed. The claimant was not informed of the investigation report or the panel's decision.

53. Mr Pendlebury messaged the second respondent to ask if he was going to inform HCPC or was not worthwhile. He replied that it happens all the time so it was good they did not have to. The minutes were needed. The second respondent also commented that they needed to take bits out as it should not be for the committee to argue black and white. Also the claimant had not made a complaint.

Observations on witnesses and conflict of evidence

54. The claimant, in the Tribunal's view, gave her evidence in an understated straightforward manner. While there were some discrepancies in her evidence, the Tribunal considered that this was understandable given the passage of time. The Tribunal felt that in relation to the material issues, the claimant's evidence was credible and reliable.

55. By contrast, the Tribunal felt that the second respondent embellished his evidence. His responses often included information of which he wanted the Tribunal to be aware, that was ancillary or irrelevant to the issues that the Tribunal was to determine. In relation to some matters, particularly the second respondent's involvement in the investigation, the Tribunal felt that his evidence was unconvincing for the reason set out below.

56. The Tribunal heard evidence from several witnesses. However when making findings the Tribunal focussed wherever possible on the contemporaneous correspondence which the Tribunal found more reliable.

57. In relation to certain essential findings, the Tribunal has the following observations.

58. In the file of documents, the respondents produced over 140 pages of policies from the employment handbook all of which were subject to revisions in January 2024. The claimant's evidence was that she had not seen the policies until these proceedings. She accepted that she had not logged into Google classroom but maintained that the respondents were aware of her difficulty in so doing. There was conflicting evidence among the respondents' witnesses about when and who prepared the policies; how staff were made aware of them; and how and where they were accessed.

59. While earlier versions of policies may have been posted in Google classroom and possibly, at some stage, moved to Microsoft SharePoint, the numerous policies which cross-referred each other were more appropriate for a large organisation with a different management structure than first respondent and an HR resource. The Tribunal considered that even if an earlier version of

the policies were online, the claimant was unaware of them and she was not alone. The Tribunal considered from their evidence the second respondent, Mr Pendlebury, Mr Clauson and Ms Dorward were unaware of the policy under which the claimant's complaint was being addressed. The 3 August panel email referred to them giving a decision. The investigation report referred to the panel giving a recommendation. The document which Mr Clauson prepared (although Ms Dorward appeared not to recognised it) makes reference to a decision.

60. It was undisputed that on 28 July 2023, the second respondent asked the claimant if she was pregnant. The Tribunal considered that the second respondent's explanation that he made this comment as a health and safety concern and the potential of a pregnancy risk assessment to be incredible. There was no mention of this in the note of the 25 August interview and at the final hearing, he did not know what was involved in such a risk assessment.

61. In the Tribunal's view the second respondent had a tendency to speak before thinking and considered that his comments were humorous. He appeared to lack awareness that his comments were at times inappropriate, particularly given his position within the organisation.

62. The Tribunal considered that the claimant was taken aback about the first comment and when telling colleagues about it she was processing what had been said. Her comments about the second respondent being a "cheeky bastard" and/or fat bastard were indicative of her being upset rather than laughing about the first comment.

63. There was a dispute about whether the second and third comments were made. The claimant's position was that the second respondent made these comments when they spoke after 9pm on 28 July 2023. The second respondent denied this. There were no witnesses to what was discussed.

64. While the first comment had surprised and upset the claimant, had that been the only remark, the Tribunal felt that the claimant would have marked it down to experience and moved on. The Tribunal's impression from the notes of the 25 August interview, was that the second respondent knew that "the joke" had

been repeated to other staff and it became "a running comment between staff at the event". The Tribunal therefore thought it more likely than not that that the second comment was made because the second respondent understood that the claimant had recently ended a long-term relationship. He also appeared frustrated that the claimant question his business decisions during an event and he was asserting authority This was in the Tribunal's view further demonstrated in the tone of the subsequent communications between the second respondent and Mr Pendlebury.

65. In relation to the third comment, while it was not mentioned in the claimant's August email, and her evidence about the sequence of the discussion was clouded, on the balance of probabilities the Tribunal felt that it was more likely than not that it was said as a parting shot by the second respondent to have the last word and put the claimant in her place.

66. In relation to the fourth comment on 29 July 2023, the claimant said that this comment was made while Mr Murray was sitting in the van. The second respondent disputed that it was said. His position was that he was not at the hub until after the claimant had left for the shift.

67. The Tribunal considered that it was more likely than not that the second respondent was at the hub, albeit he was not on shift, given that the logistic manager was present and there had been an issue with one of the ambulances the previous evening.

68. The Tribunal appreciated that the fourth comment was also not mentioned in the claimant's August email. The Tribunal observed that the fourth comment was a reiteration of the first comment, and was likely not a separate comment in the claimant's mind. At this point the second respondent was aware that staff knew about the first comment. It was likely, in the Tribunal's view, that he continued to consider that it a joke as he did not reflect, even at the final hearing, that the first comment was in any way inappropriate. Also the absence of any comment in the note of the 25 August interview re-enforced to the Tribunal that first comment was unrelated to health and safety. The

Tribunal considered that second respondent thought it was a joke and he was the one making it.

69. There was an issue about the second respondent's involvement in the investigation and "complaint" process. The second respondent said that he self-referred to be investigated by Mr Pendlebury. The second respondent denied being involved directly in the investigation or outcome. His position was that Mr Pendlebury conducted the investigation and a previously nominated "disciplinary" panel decided the outcome. Mr Pendlebury said that he did not have much experience in HR. The second respondent was involved from the start. He was monitoring the investigation. Emails would be drafted by Mr Pendlebury for the second respondent's approval. This included the investigation report. Mr Clauson said that in his view the investigation was unbiased and the decision of the "disciplinary" panel was unanimous.

70. The Tribunal was mindful that some of the witnesses had left the first respondent's employment while others remained employed. The Tribunal's impression from the documentation was that the second respondent had a confrontational attitude towards former employees. For example, his attitude to recovering uniforms from former employees and potentially withholding wages. Also issues about performance and misconduct arising after employees left the first respondent's employment. The Tribunal was not in a position to form views about those allegations. Wherever possible the Tribunal again relied on contemporaneous correspondence.

71. The Tribunal considered that given Mr Pendlebury's seniority, it was unnecessary for the second respondent to be involved in the investigation to the extent he was. The contemporaneous documentation confirmed that the second respondent was aware of and approved drafts. He was involved and influenced the investigation throughout.

72. The Tribunal acknowledged that the "disciplinary panel" had been previously nominated at an annual staff meeting. This appeared to have been sometime before 2020. They had not convened before. The panel was to comprise of

three members who were self-selecting. According to the 3 August panel email, the investigation was into "an allegation" by the claimant against the second respondent. It was an allegation of sexual harassment.

73. The Tribunal observed that the only member of the potential panel who was not working at the 28 July event was not on the panel. The others had been present and were sent the earlier 3 August email. Mr Clauson's reply did not in the Tribunal's view suggest that he had an open mind about what had happened. It was therefore surprising that he should chair the meeting and write the decision.

74. In relation to the information passed by Mr Murray to the claimant, while there was disputed evidence about the veracity of the information, the Tribunal did not doubt that was the information was conveyed to the claimant. There was no reason for the claimant to embellish her evidence. The Tribunal felt that it was more likely than not that Mr Murray communicated his perception of what was discussed. The Tribunal considered that there was ample evidence that employees were aware of the investigation and who was on the panel. For example Mr Stewart, who was working at the 28 July event, was emailed by Mr Pendlebury on 25 August 2023 asking him to email what he remembered and not what he had heard. Mr Clauson denied saying what was attributed to him. The Tribunal felt that it was highly likely that there would be speculation among employees about what was going on and the likelihood of any repercussions. Before receiving the investigation report, Mr Clauson had already "hinted" to the second respondent that he was going to be direct.

75. The Tribunal's impression was that Mr Clauson was unwilling to make any concessions, no matter how trivial, as he believed that his involvement beyond reproach. The Tribunal considered that the panel lacked any training or clear understanding of the scope of its role. The panel did not read or consider which policy was being followed. The panel relied on the investigation report which on the face of it dealt with issues other than the allegation on 28 July; went beyond fact finding and recommendations; and recorded opinions ostensibly of Mr Pendlebury. That said, the Tribunal felt

that unwittingly the panel had been drawn into a process which was flawed and determined from the start.

Deliberations

76. The complaints are brought under sections 13 and 26 of the EqA. The Tribunal referred to the list of issues. The claims of direct discrimination and some of the harassment claims are based on the same conduct. The concept of detriment does not include conduct that amounts to harassment. Accordingly the claimant cannot succeed in a direct discrimination claim and harassment claim based on the same conduct.

77. As the oral submissions addressed the direct discrimination claims first, this was the Tribunal's approach when deliberating.

Direct discrimination

78. The Tribunal referred to section 13 of the EqA which provides that an employer directly discriminates against a person if it treats that person less favourably that it treats or would treat others, and the difference in treatment is because of a protected characteristic.

79. The first issue for the Tribunal was whether the respondents subjected the claimant to the treatment that she alleged. Having heard submissions, the Tribunal found for the reasons explained above that on 28 July 2023, the second respondent said to the claimant: are you pregnant (first comment); if you are not already pregnant than I can give you a hand getting pregnant (second comment); the offer still stands you know (third comment); and on 29 July 2023, are you pregnant (fourth comment).

80. The Tribunal then asked if this was less favourable treatment. This involves a comparison exercise where the circumstances for the comparison includes those that the alleged discriminator takes into account when deciding to treat the claimant as he did.

81. Mr McParland suggested Mr Murray as a comparator as he held the same role as the claimant and was in his twenties. The Tribunal considered it was

more appropriate to consider how the second respondent would have treated a male medic in their twenties advising that he had a surprise. While the Tribunal considered that the second respondent was likely to attempt a humorous reply, the Tribunal did not consider that he would ask the comparator if he was having a child and if not offering sex to help achieve that.

82. The Tribunal concluded that was less favourable treatment and the reason was that the claimant was a woman. The Tribunal found that the claim of direct sex discrimination succeeded.

Harassment

83. The Tribunal then turned to section 26 of the EqA. This is where a person A engages in unwanted conduct related to a relevant protected characteristic and that conduct has the purpose or effect of (i) violating B's dignity or (ii) creating an intimidating, degrading, humiliating or offensive environment for B.

84. Under this claim there were three elements. The first related to the first to fourth comments. Having concluded these comment were detriments, the Tribunal did not ask if, in the alternative, it was conduct amounting to harassment relating to a protected characteristic.

85. The second element related to allegations that (a) Mr Clauson said to another colleague, in Mr Murray's presence, that, "It's bad these days, you can't have a joke anymore. Gareth will be fine though, he just needs to hope HCPC doesn't find out. She's just doing it for attention. What he said wasn't even that bad" and (b) an employee told Mr Murray, "Gareth is suspended under this investigation. He's saying fine though as Ben has Elaine and Jim on the Board, neither of whom like Lesley so they'll handle it well at company level. We can say it was all dealt with and that would have been that".

86. The Tribunal found that there was discussion and speculation by employees about the claimant's complaint and the investigation. The Tribunal made findings about the information that Mr Murray conveyed to the claimant. The

Tribunal considered that was his understanding and perception of conversations which he overheard or in which he participated.

87. Subject to the remarks below, the Tribunal could understand that the claimant found these comments concerning particularly as they coincided with an email from Mr Pendlebury asking for dates of a meeting. The Tribunal noted that the claimant had more than one discussion with Mr Murray. The Tribunal did not consider that Mr Murray's conduct was unwanted and related to sex.

88. The third element was the manner in which the respondents investigated/mismanaged the complaint. The Tribunal appreciated that it was only at the final hearing that the claimant understood the true effect of the investigation and outcome.

89. The Tribunal found that the respondents initially waited to see if the claimant would pursue the complaint. Once the second respondent decided that there was to be an investigation, the claimant was willing to participate believing Mr Pendlebury was dealing with it. The respondents then set about an investigation in sexual harassment which resulted in a biased investigation report which the panel sanctioned.

90. The Tribunal considered that this conduct was unwanted. The claimant was leaving casual employment. As requested she set out the issues that she had discussed with the second respondent at the 28 July event. His response about communication with management, prompted her to resign immediately and make observations about the second respondent's recent communication with her. She was hesitant about raising the comments. The claimant did not ask for an investigation, but agreed to speak to Mr Pendlebury in the hope that she would be listened to. The requirements for the proposed meeting became a barrier. This was compounded by the information received from Mr Murray which reinforced her perception that her concerns were not being treated seriously, and that she was being discussed by former colleagues. She was embarrassed and disgusted.

91. The Tribunal did not consider that the investigation was initiated to ascertain the facts, reflect on what happened, or consider training needs. The purpose

of the way in which the investigation was conducted was not, in the Tribunal's view to violate the claimant's dignity, although it did have that effect, but to protect the second respondent if HCPC became aware or other proceedings were raised.

92. Viewed objectively, the Tribunal considered that it was reasonable to have that effect. The manner of the management and investigation was not to resolve or learn from the matter but pressure the claimant to withdraw the complaint or disengage from the process. The Tribunal considered that this conduct was related to sex. The tone of the messages between the second respondent and Mr Pendlebury infer that the claimant was seen as silly young woman who needed to be put in her place.

93. The Tribunal concluded that the second respondent had harassed the claimant for reasons related to sex.

Remedy

94. The Tribunal upheld the complaints of discrimination under sections 13 and 26 of the EqA and considered that it was appropriate in its judgment to make declarations to that effect.

95. The claimant seeks compensation for injury to feelings. An award for injury to feelings is compensatory and should be just to all parties. The award should compensate fully without punishing the wrongdoer. Feelings of indignation at the wrongdoer's conduct should not be allowed to inflate the award.

96. The Tribunal reminded itself that an award of injury to feelings is to compensate for "subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, stress, depression."

97. In *Vento*, the Court of Appeal observed there to be three broad bands of compensation for injury to feelings. The middle band should be used for serious cases which do not merit an award in the highest band. The lowest band is appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence.

98. Mr McParland sought an injury to feeling award in the upper end of the lower band. For claims presented after 6 April 2023, the *Vento* bands are a lower band of £1,100 to £11,200. Mr Turpin said that this was too high. He also argued that in relation to some of the harassment claims the second respondent was not personally liable.

99. The Tribunal agreed that this is a case that appropriately falls into the lower band. There were different types of discrimination and it was not a one-off act. The subjective feelings described by the claimant in her evidence at the final hearing were entirely plausible and credible. The claimant had worked for the first respondent for a year. She was planning to leave but not immediately. She raised issues in an appropriate manner. It was understandable that the behaviour of the second respondent who was a director, line manager and who also worked on shifts would make her feel awkward and embarrassed. The Tribunal considered that the second respondent was responsible and in control of how the complaint was managed, investigated and resolved.

100. Applying a broad brush, the Tribunal assessed the amount payable to the claimant for injury to feelings as £6,000. The Tribunal considered that the second respondent was personally liable for the discrimination and therefore the Tribunal ordered the amount to be paid by the first and second respondent jointly and severally.

101. The Tribunal turned to the question of interest. It is empowered to make an award of interest upon any sums awarded pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The rate of interest prescribed by regulation 3(2) is the rate fixed for the time being, currently an amount of eight per cent per annum in Scotland.

102. Under regulation 6(1)(a) for an award of injury to feelings the period of the award of interest starts on the date of the act of discrimination complained of and ending on the day on which the Tribunal calculates the amount of interest. Where the Tribunal considers that a serious injustice would be caused, if interest were to be awarded for the periods in regulation 6(1), it may, under

regulation 6(3), calculate interest for a different period, as it considers appropriate. The Tribunal received no submission to that effect from either party, and it did not consider it appropriate to do so. The Tribunal cannot alter the interest rate of eight per cent per annum, as that is prescribed by law, and it is a matter in respect of which it has no judicial discretion to vary the interest rate, only the period to which that rate refers.

103. Accordingly, the appropriate rate of interest is eight per cent. The Tribunal orders that the first respondent and the second respondent shall jointly and severally pay to the claimant the additional sum of interest upon the injury to feelings award of £6,000, calculated at the appropriate rate of interest of eight percent for the period between 28 July 2023, the date of the discriminatory act and 4 October 2023 being the date of this Judgment, a period of 433 days. The Tribunal's calculation is £6,000 x 0.08 x 433/365 days, that is £569.42.

S MacLean
Employment Judge

4 October 2024
Date

Date sent to parties **08 October 2024**