EMPLOYMENT TRIBUNALS

Claimant: Ms F Mansur

Respondent: The Board of Governors of Iqra Community Primary School

HELD AT: Leeds Employment Tribunal **ON:** 12 July 2019

BEFORE: Employment Judge Buckley

REPRESENTATION:

Claimant: Mr Findlay (Counsel)
Respondent: Mr McNerney (Counsel)

RESERVED JUDGMENT

1. The respondent shall pay the claimant the sum of **£46,159** in compensation for the claim for detriment on the ground of making protected disclosures.
2. The recoupment regulations do not apply.

REASONS

1. The liability judgment found that the claimant had been subjected to the following detriments:
    a. That the claimant was asked to attend two meetings in July 2017 where it was insinuated that she was responsible for making the anonymous disclosure and where it was said to her that 'if something happens I'm holding you responsible'.
    b. That in September 2017 the claimant was subjected to formal disciplinary action arising out of an incident on 27 September 2017.
    c. That in December 2017 the claimant received a level 2 written warning for the same incident.
    d. That the claimant was the subject of disciplinary proceedings commenced in February 2018 and concluding in June 2018.

e. That the respondent delayed its response to her subject access request in October 2018.
f. That Mr Parwaiz Bashir refused to reconsider the decision to dismiss by letter dated 17 December 2018.

The Law

2. Section 49 of the Employment Rights Act 1996, provides:

(1) Where an employment tribunal finds a complaint under section 48 well-founded, the tribunal –
(a) Shall make a declaration to that effect, and
(b) May make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.

(2) …The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to-
a. The infringement to which the complaint relates, and
b. Any loss which is attributable to the act, or failure to act, which infringed the complainant's right.

(3) The loss shall be taken to include
a. Any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complainant relates, and
b. Loss of any benefit which he might reasonably be expected to have had but for that act or failure to act.

(4) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales…

3. In arriving at its decision about what is just and equitable, one of the things that the Tribunal has to have regard to is what loss is attributable to the act, or failure to act, complained of. The phrase "attributable to", according to the Court of Appeal in **Wilsons Solicitors LLP & Ors v Roberts** [2018] EWCA Civ 52 imports the common law concept of "but for" causation. The Court of Appeal held that post-termination loss can be recovered under s 49 if the 'but for' causation is satisfied.

4. Under s 47B(2) section 47B (protected disclosures) does not apply where the worker is an employee and the detriment in question amounts to a dismissal within the meaning of Part X. Where an employee is dismissed on the ground that he made a protected disclosure his remedy is a claim for automatically unfair dismissal under s 103A. Where the detriment (the cause of action) is not dismissal, s 47B does not have the effect of excluding the financial consequences of any subsequent dismissal, although those losses are subject to the usual rules on causation and remoteness (see para 81 of **Timis v Osipov** [2019] IRLR 52).

5. In **Chagger v Abbey National** the Court of Appeal held that a tribunal could award 'stigma' damages, either by taking it into account in its assessment of future loss of earnings, or where, for example, the claimant would have been dismissed fairly in any event, by making a lump sum award analogous to the lump sum awards sometimes made in personal injury cases to compensate

an injured claimant for the risks of future disadvantage on the labour market: see **Smith v Manchester Corporation** [1974] 1 K.I.R.

6. The issues for me to decide are therefore:
    a. What award should be made for injury to feelings and
    b. What financial losses, if any, are attributable to the detriments (a) – (e)?

7. I heard evidence from the claimant and Karen Crowley, business manager, on behalf of the respondent and was referred to and read documents in two bundles of documents.

Submissions

8. On behalf of the claimant Mr Finlay submits that the claimant should be awarded a significant sum for injury to feelings, clearly not in the bottom Vento band. The liability judgment found that there was a hostile animus to the claimant over a period of time and the claimant's witness statement shows the effect of the detriments, which was such that the claimant, although stoical, ended up on anti-depressants.

9. In relation to losses he submitted that realistically the claimant was prevented from working with children by the respondent's continuing disclosure of the stage 2 warning. He submitted that there should be an award not just for a period out of work but in addition a **Chagger** or **Smith v Manchester** award to reflect the future effect on her employability and an amount for loss of congenial employment.

10. On pecuniary losses on behalf of the respondent Mr McNerney submits as a global point that the fact that this is a detriment not a dismissal claim forestalls any pecuniary loss arising from detriment (f) and that the other detriments have not caused any pecuniary loss, because they have not caused the claimant not to have a job.

11. If this is not accepted, if there is any loss of earnings flowing from the stage 2 warning (detriment (c)), Mr McNerney submitted that there should be either a percentage discount or a complete remission to reflect the chance that an informal warning would have had the same impact.

12. Any loss of earnings should not be awarded for more than a year in any event, because at this stage it is reasonable for the claimant to look for non-teaching assistant work and it is likely with full-time hours that the claimant could find a job relatively quickly earning as much as she did with the respondent.

13. In relation to injury to feelings Mr McNerney submits that some of the detriments are historic and led to no time off work, suggesting that the claimant was not very upset. The medical evidence is virtually non-existent and the claimant was able to apply for jobs straight after her dismissal and after detriment (f). He suggests an award towards the lower end of the lower band of Vento.

Findings of fact

14. I found both witnesses to be straightforward witnesses who were doing their best to give evidence which was accurate to the best of their recollection.

15. In addition to these findings of fact I rely on the findings of fact set out in my written reasons for the liability judgment dated 24 May 2019 including the finding that the Respondent would have given the claimant an informal warning instead of a level 2 written warning.

16. In the meetings in July 2017 the claimant felt 'threatened' and 'targeted'. In September 2017, when she was subjected to formal disciplinary action the claimant suffered from excema and hair loss. She suffered from sleep deprivation. The claimant went on sick leave as a result of stress arising from the disciplinary hearings from 3 January 2018 to 4 June 2018 and was prescribed anti-depressants (mirtazapine). She felt that she had 'sunk into depression' and therefore could not support her daughter through her GCSEs. She states that she felt paranoid and depressed.

17. She states that the anxieties and treatment from the respondent have contributed to low self-esteem and self-doubt. She has lost confidence due to unsuccessful applications and being unemployed for almost a year. She has become subdued and refrained from socializing with friends as they are all in employment with schools and she is not. She was upset that the respondent refused to reconsider her dismissal. She began applying for jobs straight after her dismissal. She states that this was because she had to support her two daughters, but accepted that she would have been able to start work straight away.

18. The claimant was successful at interview on 11 July 2018 and was offered the position of teaching assistant at High Park School to start in September 2018. Based on the pay the claimant received for completing two full days training the claimant calculates that her monthly salary at High Park would have been £1009.70 per month. There has been no challenge to this figure and I therefore accept it. I assume that this is a net figure, which gives a weekly net wage of £233.

19. This job offer was withdrawn before the claimant started work as a result of the reference received from the respondent which states that the claimant was subject to a live written warning for making unwarranted physical contact with a child. Although the reference states that the claimant was dismissed, it does not state why she was dismissed.

20. The claimant provided an email from Reed education, an employment agency, dated 13 February 2019. That email states that the agency has made a business decision that they are not able to represent the claimant, in the light of information provided by the respondent. The email makes clear that it is not the safeguarding concerns raised by the claimant that led to the claimant's dismissal that are the problem, but the incident for which she

received the written warning: the safeguarding concerns 'around yourself not reported by you'.

21. The claimant has also provided an email from 'Teaching personnel' another agency, which states 'we are unable to continue with your registration as your references will not meet our vetting requirements'.

22. Ms Crowley gave evidence that even if the claimant had been given an informal warning, or even if she had been exonerated completely, that this would have to be disclosed to prospective employers because that is the rule in relation to safeguarding issues. When questioned by Mr Finlay, Ms Crowley accepted that once a teacher had been employed for a period of time, there is therefore quite a lot to disclose, because people may get swept up with investigations. She accepted that when a prospective employer was looking at information disclosed in relation to the claimant, there would be a 'world of difference' between a negative outcome or informal action in relation to a safeguarding issue and something that is stage 2 warning. She accepted that the latter would 'jump out'.

23. On the basis of this evidence provided by Ms Crowley, the evidence of the withdrawal of the High Park job and the content of the employment agency emails I find, on the balance of probabilities that it is the Stage 2 written warning that has prevented the claimant from obtaining alternative employment as a teaching assistant. For as long as the respondent continues to inform prospective employers that the claimant is subject to a level 2 warning, I find that the claimant is effectively excluded from the teaching assistant job market. I find, on the basis of Mr Crowley's evidence, that this would not have been the case if the safeguarding issue had been dealt with informally, even though it would still have to be disclosed. On this basis I find, on the balance of probabilities, the High Park job offer would not have been withdrawn if the claimant had been given an informal warning rather than a stage 2 warning.

24. The respondent has not, in the light of the tribunal's liability judgment, changed the reference that it will be providing. It still states that the claimant was subject to a stage 2 written warning, without any caveat in the light of the tribunal's findings. There is no indication from the respondent that there is any intention to change this approach. There has been no apology.

25. The claimant is therefore prevented from continuing with her chosen career as a teaching assistant. The claimant had worked in education for 5 years. She enjoyed her role as teaching assistant. She describes it as her 'ideal profession'. It enabled her to enjoy the teaching profession without the demanding workload and to maintain quality relations with her daughters because she did not have to work outside term time. She was good at her job: the reference from the respondent rates her as good or excellent under each heading.

26. As well as the applications set out above, the claimant applied for a role at St Matthews School in May 2019 and was unsuccessful. A list of her further applications for teaching assistant or similar roles in the bundle show that she

had made 11 further applications between September 2018 and June 2019. More recently she has applied for a teaching assistant post at St Williams School where she had worked previously. She has received no reply but is aware that interviews have since taken place, so it is probable that she has not been shortlisted. She has also applied for non-teaching roles. The claimant is registered with a job centre and is required to comply with their usual rules in relation to job searches and applications. The roles she has unsuccessfully applied for to date include two apprentice dental nurse roles in May 2019, a level two business administration assistant (undated) and a role at Aldi (undated).

Discussion and conclusions

Pecuniary losses attributable to the detriments

27. It was the claimant's case that detriment (d) (and, by implication, detriment (c)) have caused a loss of earnings. It was not argued before me today, and the liability judgment made no findings of fact that the dismissal was caused by any of the detriments. I must therefore proceed on the basis that, but for the detriments, the claimant would still have been dismissed on 18 June 2018.

28. The claimant successfully found alternative employment which was due to commence in September 2018. I proceed on the basis that employment at a school is likely to start on the first Monday in September, which was 3 September 2018. If the claimant had not been subjected to detriment (d), that employment would not have been withdrawn. I find that the claimant suffered a weekly loss of earnings of £233 (the net weekly wage in her new employment) from 1 September 2018 and that this loss is attributable to detriment (d).

29. This is subject to the usual duty to mitigate. I find that the claimant has made reasonable attempts to mitigate so far. I therefore award her loss of earnings from 3 September 2018 to the date of the remedy hearing (45 weeks at £233) in the sum of **£10,485**.

30. In the light of the claimant's continuing failure to find work as a teaching assistant despite the tribunal's liability judgment, I find that a year after her dismissal, it is reasonable for her to accept that she will no longer find employment as a teaching assistant or similar and that she must look elsewhere. She is entitled to spend a reasonable period attempting to find similarly rewarding employment of an equivalent status, but if those attempts are unsuccessful it is reasonable to expect her to apply for more menial work in which she may have to work longer hours at a lower pay. Taking all this into account I find that it is likely that the claimant will be able to mitigate her loss of earnings by finding a job at an equivalent salary by mid-January 2020 i.e. 6 months from the date of the remedy hearing. The future loss of earnings is therefore 26 weeks at £233 = **£6,058.**

31. Further on the basis of my findings of fact, the claimant has been made unemployable in her chosen field by detriment (d). There is no indication that the respondent intends to alter the information that it currently provides to

prospective employers i.e that the claimant was subject to a stage 2 warning for a safeguarding incident. I accept that this is likely to prevent the claimant from obtaining any job working with children. In these circumstances I find that the claimant suffers an ongoing stigma on the labour market attributable to detriment (d) and it is just and equitable, taking into account the losses attributable to detriment (d), to make an award to reflect the losses she is likely to suffer in the future by reason of her increased difficulty in finding employment in accordance with the cases of **Chagger** and **Smith v Manchester**.

32. There is no guidance on the assessment of these awards in employment cases. In coming to a figure I take account of the fact that the effect is not on the entire labour market, but it does cover a reasonably significant part of the labour market including the arena in which the claimant's recent experience lies. I conclude that it is just and equitable to make an award of one year's loss of earnings to compensate the claimant for the losses she is likely to suffer in the future on the open labour market. I therefore award the claimant a further 52 weeks at £233 under this heading: **£12,116**.

33. The total award for pecuniary loss is: 10,485 + 6,058 + 12,116 = **£28,659**.

Injury to feelings

34. The claimant has been subjected to a series of detriments over a period of 15 months arising out of the respondent's hostile animus to her for making public interest disclosures. There has been no apology and the respondent continues to inform prospective employers that she was subject to a stage 2 warning without qualification. One of the detriments has resulted in her never being able to work in a role that she has described as her 'ideal career' and I take account of this loss of congenial employment. The claimant is clearly a stoical person, but although the claimant continued to work throughout most of this period, and felt able to start work straight after her dismissal in June 2018, she took five months off work for stress and was prescribed anti-depressants. The effects on her are set out in more detail in my findings in paragraph 16 and 17 above. Taking into account all these factors, and my findings of fact set out above, I find that this case falls in the middle of the middle bracket and make an award of **£17,500** for injury to feelings.

Total award

35. The total award therefore amounts to **£46,159**.

Employment Judge Buckley

Date 18 July 2019