EMPLOYMENT TRIBUNALS

Claimant: Mr I Okeke

Respondent: Priory Healthcare. Limited

Heard at: Birmingham **On:** 30th & 31st March 2021

EMPLOYMENT JUDGE Hughes **MEMBERS:** Mr T Liburd
Mrs I Fox

Representation
For the Claimant: In person
For the Respondent: Mr J Gidney, Counsel

JUDGMENT having been sent to the parties on 1 April 2021 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1 This tribunal found for the claimant in respect of some of the claims he brought. Our judgment and reasons were given on 13th August 2020 and related to a hearing which took place on the 3rd to 7th and 10th to 13th August 2020. Written reasons were produced at the claimant's request and should be read in their entirety. It is important to note that the claimant made many allegations and we did not find that the majority of them amounted to direct race discrimination or victimisation. We shall briefly summarise. We found in the claimant's favour in respect of five allegations of direct race discrimination. We found that seven allegations of direct race discrimination were not well-founded. We found that a number of the other allegations did not amount to direct race discrimination but factually arose, in part, because of earlier acts of direct race discrimination. We also found for the claimant in respect of one allegation of victimisation and we dismissed two allegations of victimisation. We held that the claimant had been constructively unfairly dismissed and wrongfully dismissed in breach of contract. In addition, we found that there was a breach of contract in respect of failure to provide the claimant with PMVA Refresher Training. In our judgment we stated that when we convened to consider the issue of remedy, we would be considering the claimant's claim for personal injury damages (our emphasis added). Finally, we said that we would consider whether to order a financial penalty under Section 12A of the Employment Tribunals Act 1996 (as amended). We provided a further

set of written reasons which were issued under a certificate of correction to correct a few typographical errors. The request for those corrections was made by the claimant.

2 The parties were unable to resolve the question of remedy and consequently this Judge made an Order in respect of the remedy hearing. The Order recorded that the claimant had served schedule of loss for approximately £1,600,000 and the respondent had served a counter schedule which was for £33,400.00. In paragraph 1 of the Order which ordered disclosure of all relevant documents. it was made clear: "The claimant's list must include all documents relevant to loss of earnings, attempts to mitigate loss by finding other work, and personal injury (including medical records)" (our emphasis added).

3 At the remedy hearing we were provided with a joint bundle of documents – R1. There was also a bundle of witness statements – R2. The claimant had produced a number of emails relating to the hearing. These were dealt with at the start of the hearing and we called those emails C1. The respondent produced an email which provided details of personal injury claims brought by the claimant against the respondent in the County Court – R3. The respondent's representative also produced written legal submissions – R4. Finally, on the second day of the hearing the claimant handed in a document C2 which concerned two appointments for therapy.

4 We heard oral evidence from the claimant and his wife, Mrs C Okeke. We also heard evidence from Mrs T Carvell who is a Human Resources Officer employed by the respondent.

5 There were two key issues in this case. The first issue concerned whether or not the claimant should be awarded personal injury damages in relation to the five successful complaints of discrimination and one successful complaint of victimisation. The second concerned whether the claimant had failed to mitigate his loss by not finding an equivalent job since leaving the respondent's employment. The way that the respondent's representative put the respondent's case on mitigation meant that in theory it could be linked to the question of personal injury damages. There were other issues for us to consider and we shall deal with those afterwards.

6 We turn to the question of personal injury damages. It is well established law that the claimant must satisfy the tribunal that any psychiatric injury or was caused, at least to some extent, by the acts of unlawful discrimination and victimisation and not by other factors. Another key principle is that there can be no double recovery. This is important in this case for two reasons. The first is that the tribunal must be careful not to double compensate for personal injury by reference to any award made for injury to feelings. The second point is that because there are ongoing claims in the County Court which have not yet been determined, there is also further potential double recovery unless this Tribunal makes it very clear what we have awarded damages for and the matters which we have not awarded damages for. A third point to be made in relation to any damages awarded either for psychiatric injury or injury to feelings is that it must flow from the acts of discrimination found and not, for example, for acts of unfair treatment causing or contributing to the constructive unfair dismissal.

7 We have already summarised our decision from which it will be clear that we found for the claimant in respect of five allegations of direct race discrimination and one allegation of victimisation, which in fact duplicated the same subject matter as one of the successful direct race discrimination allegations. We found that the remaining sixteen allegations did not constitute unlawful discrimination or victimisation. That was obviously important when assessing injury to feelings and psychiatric injury.

8 Next, and by reference to R3, the claimant has brought three personal injury claims against the respondent in the County Court. One claim related to an incident on the 2nd September 2017 and settled for £2,000 damages. The claimant accepted that was the settlement figure. That claim related to physical injuries to his chest, head and face caused by a patient on the ward where he worked. The second claim relates to an incident on 27th March 2018 when the claimant was kicked in the groin by a patient. That incident is covered in our findings of fact in relation to liability. It is recorded at R3 that the claimant's solicitors have informed the respondent that they are obtaining report from a psychologist because there has been mention of "increased anxiety". That suggests that a claim for anxiety in relation to that incident will be included if supported by medical evidence. It also suggests that any such claim in the County Court would be by reference to anxiety caused by the physical assault. The remaining claim relates to an incident on 10th April 2018 where the claimant was bitten by a patient and sustained a kick to the groin. R3 records that no medical evidence has been received in relation to that. It seems likely that those two claims will be heard together.

9 The claimant requested written reasons for our remedy decision but we were intending to provide them anyway because it will be necessary for the County Court to see them in order to ensure that the principle of no double recovery is adhered to.

10 We shall now turn to the medical information that was available to us in this case. We shall start by reiterating that the claimant had been informed both in our written judgment and in the case management Order that he must provide medical evidence in respect of any personal injury claim. The evidence which he produced was:

(a) A letter from Birmingham Healthy Minds dated 27th September 2019 referring to an appointment by telephone on 15th October 2019, with what appeared to be a date for a further appointment on 30th December 2019 handwritten on it [372]. The letter did not state the reason for the telephone therapy;
(b) A patient health questionnaire scoring sheet [143 onwards]. It did not state that it related to the claimant but we were prepared to accept that it did. The claimant scored 15 out of 27 on that questionnaire which was described as being "normal range".
(c) A further letter from Birmingham Healthy Minds dated 21st January 2020 [373]. The letter stated: "Please note we cannot comment on medical matters, compile medical reports, make medical diagnoses or comment on prognosis. If you require a medical report you should contact the GP". It stated that the claimant had self-referred which symptoms of low mood and anxiety and had been offered low intensity cognitive behavioural treatment with telephone support. The letter said that at the start of the treatment the Generalised Anxiety Disorder Rating Scale test was administered. It

explained that this is a measure of anxiety symptoms, and that the claimant had scored 5 on the scale which indicated he was experiencing mild symptoms of anxiety. The letter also referred to a patient health questionnaire scoring of 9 indicating mild symptoms of depression. It then said: "Your most recent score on the GAD – 7 and PHQ 9 is 10 which indicates mild symptoms of low mood and anxiety [373].

(d) A letter from an organisation called Pattigift Therapy CRC dated 24th July 2020. This said that on the referral form the claimant stated he was experiencing symptoms of depression and anxiety and had reported that this was due to race discrimination at work. The letter said that counselling commenced on 10th April 2020 and continued until 25th May 2020. The report went on to say: "The service does not provide mental health assessment reports: this is the sole remit of a physiotherapist or psychologist" [404].

(e) The only report from a Consultant which was provided by the claimant was from Mr Alan P Doherty a Consultant Urologist dated 10th November 2020 [408-411]. We infer this report was produced in connection with the County Court proceedings. For the most part the report concerned the injuries the claimant sustained at work as a result of the actions of patients on 27th March 2018 and 10th April 2019. In the conclusions to the report at paragraph 3 Mr Doherty stated as follows: "I do think that there is psychological element to this injury. He has a loss of self-esteem and to some extent depression although I am not qualified to comment on this. It seems to me as if he is trying his best to address this by having counselling sessions etc. there is no doubt that the physiological effect of this sort of injury and loss of work will affect his libido and his ability to perform sexually". In paragraph 4 Mr Doherty stated: "The effect of his time off work has been mainly psychological. It would be very difficult for him to go back to the sort of work he had before the accident because it has affected him psychologically. He thinks a similar injury may happen again and trigger another two-and-a-half years of loss of quality of life. He seems able to work in a more general capacity as a nurse and indeed has being doing various shifts as an agency nurse".

(f) Finally, document C2 showed that the claimant had appointments with Birmingham Healthy Minds on 13th January 2021 and 8th March 2021.

11 We heard evidence from Mr and Mrs Okeke both of whom were adamant that the claimant's psychological injuries were caused by acts of race discrimination rather than anything else he experienced when working for the respondent. It is fair to say that this was at odds with the evidence set out in paragraph 10.

12 In the written reasons for our liability decision we observed that the claimant had been under a great deal of stress and pressure at work but that there were a great number of factors contributing to that, including injuries sustained at work. Not least was being the subject of a complaint by former patient which caused the claimant to be suspended from work pending a police investigation. That issue was not connected to race discrimination. Indeed, the claimant accepted the respondent had no other course than to refer the complaint made against him to the NMC and to suspend him pending investigation. We did find that when she made the referral to the NMC, Mrs Jean Hammond had made reference to an ongoing internal disciplinary process and that the fact that she did so was direct race discrimination. However, the point is that the major stressor at that point was

being suspended pending investigation because of the complaint by the former patient and investigated by the police, rather than the content of the referral form.

13 We concluded that the claimant had failed to produce medical evidence demonstrating psychiatric injury caused by discrimination and victimisation. The only document referring to "race discrimination" was the letter from Pattigift (see 10(d)), and merely stated that the claimant described his symptoms as being caused by it. There is no doubt the claimant has been in receipt of therapy, but there is no medical report to say that this was necessitated by race discrimination. Indeed, our findings were that many of the matters the claimant characterised as discrimination were not. Mr Doherty's report was caveated by his statement that as a Consultant Urologist he was not qualified to comment on the claimant's loss of self-esteem and depression. However, we thought it telling that Mr Doherty attributed any psychological problems to the physical injuries he sustained.

14 In summary, the evidence painted a complex picture, with a number of causes of stress and anxiety. We think it important to reiterate that compensation for injury to feelings and for any personal injury sustained, is awarded by reference to any damage sustained as a result of unlawful discrimination and victimisation and not as a result of other factors. Consequently, we decided that the claimant had failed to establish an element of personal injury damages over and above that which was properly compensable as injury to feelings. We decided to award the sum of £15,000.00 damages for injury to feelings (see below at paragraph 26).

15 When we had finished giving our oral reasons to the parties and explained our finding on personal injury damages, the claimant said he would obtain a psychologist's report. It was explained to him that it was too late to do so because he had failed to comply with the Order to provide all relevant medical evidence. The claimant also questioned whether he could raise the question of psychiatric or psychological injury in the County Court proceedings. We explained to him that the County Court would be awarding damages for personal injuries sustained in the assaults and for any psychological consequences thereof, not for any personal injury caused by discrimination and victimisation. The latter was a matter for us to deal with and we have done so.

16 We move from there to mitigation of loss. Mr Gidney argued that if the tribunal was unable to conclude any psychological damage resulted from unlawful discrimination and victimisation, then this would not be a factor we could look at in relation to mitigation of loss. To put it another way, it was the respondent's case that we must treat the claimant as we would any claimant when assessing mitigation of loss. We accepted that had to be the correct approach given our findings about psychiatric injury. Of course, it is for the respondent to establish there has been a failure to mitigate loss, it is not for the claimant to prove that he has mitigated his losses.

17 We shall turn to the evidence on financial loss next. Firstly, there was a dispute between the parties as to the correct amount of reference pay i.e. pay when working for the respondent. The respondent had included the claimant's pay slips for the period 28th February 2018 to 31st January 2019 [360 – 370]. For some of that period of time the claimant was unwell and unable to work and was in receipt of SSP. The respondent's representative, quite rightly in our view, suggested that we should discount those pay slips and simply use the pay slips up to 31st July 2018 as being more indicative of the correct level of reference pay. In his evidence

the claimant disputed that. He said that none of the pay slips in the bundle reflected what he had been taking home previously because of various events causing him not to work as much overtime as before. The claimant had failed to include any evidence in the bundle relating to his earnings prior to 28th February 2018 which presented something of a difficulty. Given that the hearing was listed to take place over two days, we suggested that if the claimant could produce his P60 for the tax year 2017/2018 on the second day, then we could use that to calculate the proper amount of reference pay. The claimant did not bring his P60 the following day, which meant we had no other evidence than that contained in the bundle. The claimant at that point agreed that we could use the amount calculated by the respondent using the pay slips up to the end of July 2018. Therefore, the agreed amounts were as follows: Gross weekly pay £569.23 (which for the purposes of calculating things like the basic award is subject to the then statutory cap of £508.00 per week); and net weekly pay of £433.40.

18 The claimant obtained other employment with an agency called First Point Health Care within a week of resigning his employment with the respondent. Therefore, as was rightly accepted by the respondent, it could not be argued that he had failed to mitigate from the outset. It is also material to note that the claimant thought it important to find work in order to maintain his registration with the NMC. The claimant has claimed no state benefits and is not eligible to do so because of his immigration status.

19 The claimant had produced some pay slips for that employment [374 – 379] but these were not consecutive and covered random dates. It was apparent from those pay slips that the claimant was working far fewer hours than he had been with the respondent and was therefore earning considerably less. The claimant had also produced a P60 for the tax year 2019/2020. The respondent's representative suggested that this might be more accurate way of calculating the claimant's average wage whilst working on an agency basis with First Point. We agreed that this was a sensible way to proceed. This gave an average weekly salary of £210.32 net which meant net wage loss of £223.08 per week for the period for which we decided to award losses.

20 The respondent's case was that there were plenty of equivalent jobs available to the job the claimant had with the respondent. Evidence was given on this point by Mrs Carvell [381–402]. Mrs Carvell said that there was a shortage of Registered Mental Health Nurses. She had collected job adverts for suitable positions between February and March 2020 by undertaking a search within a ten-mile travel radius of the claimant's postcode. There were about 65 such adverts, six of which were placed by the respondent. It was accepted by the respondent and by this Tribunal that the claimant could not be expected to return to work for the respondent given his unfortunate experiences with that employer. Mrs Carvell did a similar search shortly before the remedy hearing which was appended to her witness statement using the same parameters. Her evidence was that she had found 72 permanent Mental Health Nursing jobs within a thirty minute commute of the claimant's postcode. It was not clear how many of those jobs would have been with the respondent. The short point is that clearly there are jobs available for Registered Mental Health Nurses which the claimant was eligible to apply for. The key question was whether, by failing to do so, the claimant did not properly mitigate his loss.

21 The claimant's explanation for undertaking agency work with First Point is that it means that he can choose the assignments that he takes by reference to the kind of wards that he works on and the sort of patients he works with. In addition, he said that the ability to be able to pick his own assignments was very important to him because he is anxious about to returning to a work environment which is not supportive.

22 The respondent's representative submitted that the claimant should have found suitable alternative employment at the same rate of pay within a year of his resignation from employment with the respondent therefore any financial loss should be capped to one year's loss of pay. In his schedule of loss, the claimant argued for financial loss to the date of hearing and for two years' future loss.

23 We concluded that the claimant had not failed to mitigate his loss because we could understand that he had sustained injury to feelings and lost trust and confidence in the respondent which could well extend to any permanent employment for a period of time. Another point we thought important to mitigation of loss, was that the claimant has continued to work in order to maintain what he described as his PIN number, which we understand to be his registration with the NMC. It is necessary for the claimant to do this to be able to work in this country because of his immigration status. We thought it was reasonable for the claimant to find employment which he could undertake on his own terms for a period of time in order to maintain his professional qualification and that this was good mitigation. We could understand that the ability to choose assignments would provide a degree of comfort in the short to medium term. However, we noted that in his evidence to us during the liability hearing, the claimant said he had worked in NHS and private hospitals in London for a considerable period of time before joining the respondent, and had experienced no problems at work. Taking the above into account, we thought that future loss of two years' earnings working for an agency on reduced hours was excessive. We decided that it would be reasonable to expect the claimant to obtain alternative permanent employment at the same rate of pay with a different employer within a period of six months, particularly given what appears to be a great shortage of Registered Mental Health Nurses within commuting distance of where he lives .

24 The claimant did not work for one week following his resignation from employment (i.e. a loss of one week's pay of £433.40 net). Thereafter he worked for First Point at a loss of £233.08 for a period of 115 weeks up to the date of the hearing. The future loss is £233.08 for a period of 26 weeks.

25 There was also an element of pension loss. The pension loss is of course only in respect of the employer's contribution to a pension. The payment was in the NEST pension scheme and the appropriate contribution rate as from April 2018 onwards for the employer is 3%. The respondent's representative was able to produce details of the payments made from April to July of 2018. Averaging those amounts, the pension contribution made by this respondent was £9.16 per week. The fact that the claimant has not worked full time hours with First Point Health Care had an impact on the pension situation although First Point also has an obligation to pay into the NEST scheme. From the data available [379] it appeared as of 31st December 2020 First Point had paid £79.80 into the claimant's pension. Clearly there would be further payments going forward giving that we have ordered six months' future loss but it was difficult to say what they would be. We decided

on approximate basis that in total the claimant should give credit for the £160 worth of pension payments when the pension calculation was made.

26 The next head of damage we had to consider was injury to feelings. This is assessed by reference to the Vento bands as uplifted on an annual basis and set out in Joint Presidential Guidance. The claimant was contending he should be awarded £44,000 which was the highest end of the top Vento band at the applicable time. The respondent contended that the injury to feelings fell within the middle band of Vento and should be assessed at £12,000. The respondent representative rightly placed the emphasis on the case of Chapman v Simon [1994] IRLR 124 CA, which is Court of Appeal authority making it clear that the damage must be attributable to the unlawful acts rather than any other factors, a principle which we have mentioned a number of times now. In his written submissions, Mr Gidney pointed out that four of the five acts of discrimination and the one act of victimisation which we found, we attributed to actions by Mrs Jean Hammond. She did not attend to give evidence for the respondent because she had retired. It is fair to say that when we found for the claimant on those allegations (as will be plain from our findings of facts, our discussion, and conclusions), it was because we considered she behaved unreasonably and not as expected and, absent any explanation from the respondent, we inferred direct race discrimination and victimisation. The respondent accepted that this was a proper inference, but argued that the claimant succeeded because of the lack of an explanation, rather than an overt discriminatory act. The final act of direct race discrimination related to a remark made by a colleague, Mrs McGowan, which we found to have been said in the heat of the moment and likely to be subconscious discrimination. We concluded that Mr Gidney was right to point to those factors. This was not a case where a perpetrator had been found to have acted deliberately with racial bias towards the claimant. Taking those points into account, we concluded that £15,000 was the appropriate amount to award. In doing so we were careful to exclude from our consideration any acts which were upsetting to the claimant which did not constitute discrimination or victimisation.

27 We shall next turn to aggravated damages. In the claimant's schedule of loss, he claimed £155,000 for aggravated damages. This was broken down as: something described as "aggravated damages due to breach of contract" of £10,000: "aggravated damages for false allegations and breach of confidentiality" of £75,000; aggravated damages for discrimination and victimisation of £20,000; and "aggravated damages for mental health and well-being" of £50.000. The first point to be made is that aggravated damages are very rarely awarded in Employment Tribunal. If they are awarded, Employment Tribunals are rightly cautioned to make sure that there is no double compensation by duplicating an element of the injury to feelings award. In our collective experience the typical award for aggravated damages, if made, is £2,000 to £5,000. It was all too clear that the amount sought by the claimant was wholly excessive and not an amount which would ever conceivably be awarded by an Employment Tribunal. Secondly, and perhaps it is unnecessary to dwell on this too much, many of the matters the claimant argued merited an award for aggravated damages, are simply not things for which aggravated damages are awarded in any event.

28 Aggravated damages are intended to be compensatory and not punitive in nature (see Commissioner of Police for the Metropolis v Shaw [2012] IRLR 291 EAT. The Employment Appeal Tribunal in HM Land Registry v McGlue [2013] EqLR 701 provided guidance on awards of aggravated damages. In summary, the

conduct must be something over and above kind of conduct which results in damages for injury to feelings. The Employment Appeal Tribunal suggested that it may be appropriate to award aggravated damages where distress caused by an active discrimination is made worse by being done in an exceptionally upsetting way or by motive such as conduct based on prejudice, animosity, spite, or vindictiveness especially where the claimant knew of the motive. They can also be awarded as a result of subsequent conduct, such as the way that a case is conducted at trial or, indeed, in the preparation for a trial. Finally, they can be awarded of the respondent failed to take a serious complaint seriously, or there has been a failure to apologise. It is necessary for the Employment Tribunal to decide if, objectively viewed, the conduct is capable of aggravating the sense of injustice and causing yet further injury to feelings. This must go beyond behaving in a brusque and insensitive manner – see Tameside Hospital NHS Trust v Mylott EAT/0352/09. In short, and for the reasons already explored in our conclusions on injury to feelings, this was simply not a case where aggravated damages was appropriate or merited.

29 The claimant also sought to claim legal costs in his schedule of loss. Strictly speaking, legal costs are an entirely separate issue than losses properly included in a schedule of loss. The legal costs claimed were firstly in respect of actual costs incurred in seeking advice at the start of the case, and secondly in respect of the costs the claimant would have incurred if he had chosen to engage solicitors to bring the case to trial for him. When questioned about the latter by the Judge, the claimant properly accepted that you cannot claim loss for something that is an expense that you have not in fact incurred. We decided that the most effective way of dealing with this supposed head of damage was to decide whether there were any grounds to make a costs award. The respondent argued that there were not, because it could not be said that it was unreasonable or vexatious for the respondent to defend the case, bearing in mind that its defence succeeded on most of the twenty one allegations. Costs are seldom awarded in the Employment Tribunal because of the very high threshold necessary to establish that there are grounds to make such an award. It could fairly be said that the threshold is akin to that which applies to indemnity costs in the County Court. We concluded there were no grounds to do so. It could not be said that the respondent had behaved unreasonably or vexatiously by defending the claim or in its conduct in this litigation and there was therefore no power to make a costs award.

30 The Tribunal also had to consider whether to uplift damages for the respondent's breach of the ACAS Code of Conduct. The claimant suggested the appropriate uplift was 25% and the respondent contended for a 10% uplift. The brief factual background (as set out more fully in our liability reasons) is that the claimant submitted a grievance on 12th April 2018 which the respondent failed to take any action about at all. It is fair to say that following the claimant's resignation the respondent did offer, somewhat belatedly, to invoke the grievance procedure. The claimant at that stage was unwilling to do so which we thought, by that point, was understandable. There were also procedural failings in relation to the disciplinary process which the respondent conducted against the claimant which have been described in our findings of fact on liability and need not be repeated here. The respondent clearly had acted in breach of the ACAS Code. It was not a wholesale breach but was nevertheless quite a serious breach. We took the view that an appropriate uplift would be 15%.

31 We shall now turn to the breach of contract claims. Firstly, there was a claim for wrongful dismissal but any damages were duplicated by award for loss of earnings following the claimant's resignation and therefore no additional damages were payable. The other breach of contract which we found was a failure to provide the claimant with a PMVA refresher training. It was difficult to see how any loss flowed from that breach. The claimant suggested that if he had been provided with such training, it is possible that he would not have sustained injuries at work. On the facts as found, that was an unsustainable proposition. It was quite clear that whether or not the claimant had received up-to-date training, it would have made no difference whatsoever. Furthermore, the way the claimant argued this point, appeared to us to be a duplication (or possibly the reverse) of his personal injury claims in the County Court. We therefore decided that although there was a breach of contract, no loss was caused, and therefore we should award no damages.

32 Once we had finished giving our oral reasons, the claimant asked why we had not awarded damages because the respondent had failed to provide him with discretionary sick pay. The Judge explained that was because we had reached a conclusion that failing to pay discretionary sick pay was not a breach of contract or discriminatory. Put another way, we had not found for the claimant in relation to discretionary sick pay and therefore there was no ground to make an award.

33 We shall run through now our calculation of the compensation before we turn to an entirely separate point. The compensation payable to the claimant in respect of direct race discrimination, victimisation and constructive unfair Dismissal is calculated as follows:

Loss of statutory rights of one weeks' pay = £508.00
Basic award one weeks' gross pay at £508.00 x 2 (years of service) x1.5 (age) = £1,524.00

Past losses:

Loss from the effective date of termination of employment to finding new employment of 1 weeks' net pay = £433.40

Losses as for the date the claimant obtained new employment at £223.08 per week net for a period of 115 weeks' = £25,654.20

Future losses of 26 weeks at £223.08 = £5,800.08

Pension losses £9.16 per week after giving credit for £160 from the new employer = £893.40

Injury to feelings = £15,000.00

Total loss = £49,813.08

ACAS Code uplift of 15% = £7,471.96

Total sum awarded to the claimant = £57.285.04

34 Given that the claimant has claimed no benefits, the Recoupment of Benefits Regulations do not apply to such parts of the award as they otherwise might.

35 We decided not to award interest on the compensation for discrimination because the present rate is so out of proportion to the rate of return on investments.

36 Finally, we turn to an issue which does not directly concern the claimant at all. This pertains to the possibility of making a financial penalty in favour of the Secretary of State under Section 12A of the Employment Tribunal's Act 1996 (as amended). The section was reproduced in full in Mr Gidney's submissions. It is quite an unusual statutory provision. It states that a Tribunal shall have an regard to an employers' ability to pay in deciding whether to order a penalty and subject to subsections (3) to (7) in deciding the amount of the penalty. The first point to be made is that the respondent did not ask us to have any regard to its ability to pay, perhaps unsurprisingly in view of its size and considerable resources. Subsection (3) makes it clear what the parameters in respect of the amount are. The amount is to be at least £100 and no more than £20,000. However, there is no discretion as to the actual amount because subsection (5) states that the amount shall be 50% of the amount of the award or, if the award is more than £40,000, shall be £20,000. An employer can reduce the amount by 50% if the penalty is paid no later than 21 days after the day in which notice of the decision to impose the penalty is sent to the employer.

37 In his submissions, Mr Gidney said that given the size of the award in this case, the penalty in which we have to award is £20,000. We agreed with that analysis – there is no option but to order that sum if an award is made (subject to the possibility of the respondent only being liable to pay £10,000 by paying quickly).

38 Mr Gidney set out the factors that may be taken into account by reference to the Explanatory Notes (because there is no case law on this point). These depend on the individual circumstances of the case. It is stated that they can include: the size of the employer; the duration of the breach of the employment right; and the behaviour of the employer and the employee. They further suggest that a Tribunal maybe more likely to find aggravating features where: the action was deliberate or committed with malice; or the employer was an organisation with a dedicated Human Resources team; or where the employer had repeatedly breached the employment right concerned. The respondent's representative argued that we should make no award because the case was not appropriate one.

39 We rejected that proposition. It will be very clear from our findings of fact, discussions, and conclusions on liability, that we were extremely critical of the way that this respondent conducted its business. There was an abject and wholesale failure to follow proper processes and procedures. This continued, notwithstanding the claimant pointing out those failings. This is a national employer with a dedicated HR team (both centrally and on site). Furthermore, as a result of some of the allegations in this case, it appeared that there were wider causes for concern about the way that this respondent behaved. For example, we found as a fact that for a period of time a large number of employees' pension contributions were not paid properly. There was also evidence that the respondent was failing to keep proper records of the training which its staff had undertaken. Given the nature of the respondent's business (healthcare) that was particularly disquieting.

40 We were so shocked by the way that the respondent had gone about its business, particularly in view of its size and its extensive Human Resources function, that we requested that a very senior member of the respondent's staff

should attend to hear our oral reasons, in the hope that this would bring about systemic change. That is of course of benefit to the respondent because any such change is likely to mean that the respondent will not face similar claims in the future. We noted that in her witness evidence, Mrs Carvell referred to certain steps that have since been taken, and we are pleased to hear that. That said, we do not think that the fact that the respondent may now be putting its house in order, is a reason not to order a financial penalty reflecting the state of affairs at the time of the incidents giving rise to this claim. We concluded that this was the paradigm example of a case where a penalty could and should be ordered. Consequently, we ordered payment of a financial penalty of £20,000 to be made to the Secretary of State.

Employment Judge
20 April 2021