EMPLOYMENT TRIBUNALS

Claimant: **Ms Sheila Moorcroft**

Respondent: **SHC Clemsfold Group Limited**

Heard at: London South (by Cloud Video Platform)
On: 12 July 2021

Before: Employment Judge Street
Dr S Chacko
Ms J Saunders

Representation
Claimant: Mr Henman, friend and lay representative
Respondent: Mr Williams, solicitor

JUDGMENT

Further to the Judgment dated 16 June 2021 in respect of unfair constructive dismissal, wrongful dismissal, discrimination arising from disability, failure to make reasonable adjustments and harassment related to disability, the Respondent is order to pay the Claimant the sum of £80,865, made up as follows,

Unfair dismissal	£5,210
Discrimination	£67,982
Grossing up	£7,673
Total	£80,865

Preparation Time

The Respondent is ordered to pay the Claimant £1,173.67 in respect of preparation time.

Penalty
The R is not ordered to pay a penalty under section 12A of the Employment Tribunals Act 1996.

REASONS

Judgment and Reasons were given orally. Written reasons were requested at the hearing, and the following written reasons are therefore provided:

1. **Evidence**

1.1. The Tribunal heard from the claimant and read the documents referred to in the bundle previously provided.

2. **Issues**

2.1. The claimant claims compensation in accordance with her revised schedule of loss totalling £85,449.68, including loss of earnings to 1 March 2022, loss of statutory rights, injury to feelings, aggravated damages, personal injury compensation, and 25% uplift under the Trade Union and Labour Relations (Consolidation) 1992 ("TULRCA"), section 207A. She did not seek reinstatement or re-engagement. She also applied for preparation time costs and a penalty against the employer.

3. **Findings of Fact**

3.1. Mrs Moorcroft was born on 21 November 1947. She started employment with the Respondents on 15 March 2010. The effective date of termination of her employment was 8 July 2019. She had completed 9 full years' service. Her age at the date of termination was 71.

3.2. Mrs Moorcroft had settled working conditions that suited her well, with easy travel from home, hours that accommodated her caring responsibilities and an agreement that she work at Bouldings Lodge, given her medical history, that being a reasonable adjustment made for her on her return to work after cancer treatment. Her emotional and mental health were stable in that setting.

3.3. We rely on the findings made in the Judgment on the merits in respect of her health and disability. In summary, Mrs Moorcroft had been prescribed

medication for depression and anxiety since 1999, with medicine for control of panic attacks and insomnia since 2012. That continues to date. She had continuing treatment with an under-active thyroid condition and high blood pressure. She is overweight. She is, of course, a cancer survivor, with the psychological context that introduces. She remains under treatment and observation for cancer. She was diagnosed with non-diabetic hyperglycaemia in August 2019.

3.4. She was referred for reconstructive surgery in 2018. In October of that year, she was identified as a potential candidate for it but it was too high risk at that time. She needed to lose weight, by some 16 kilos. She was commended for losing 10 kilos in May 2019 and encouraged to lose a further 10 kilos. The surgeon was clear that there is no guarantee even that that he would agree to perform the surgery and may require a second opinion. Her weight subsequently increased with her over-eating.

3.5. In June 2020, her GP wrote,

> "In February 2019, I signed Mrs Moorcroft off sick, due to the stress and anxiety she was suffering following some distressing incidents and accusations that had occurred at her work. Mrs Moorcroft was clearly distressed and upset. She was anxious and ruminating and lost all confidence. I think her sleep pattern has never been great but this became much worse, and further impacted on her stress. Mrs Moorcroft had been trying to lose weight prior to planned reconstructive surgery. Her distress and low self-esteem meant that she ate more and more and when she couldn't sleep at night, she would eat. This led to her diagnosis of non-diabetic Hyperglycaemia in August last year.
>
> When I last saw Mrs Moorcroft in January this year she was still suffering considerably and her sleep was awful. We tried altering her medication in an attempt to improve things."

3.6. There were other factors in around 2018 and 2019 also affecting Mrs Moorcroft's well-being. As she says in her witness statement, she had concerns about her own health. She was still hoping for reconstructive surgery. She is a carer for her partner who has COPD. Her sister's partner was diagnosed with cancer in late 2018 and advised in early 2019 that it was terminal, passing away in January 2020.

3.7. In late 2018, her middle daughter was suspected to have bowel cancer, of which there is a family history. She was happily given the all clear in due course. Mrs Moorcroft's eldest daughter's mental health deteriorated in early 2019 and she was found to have a growth in the abdomen requiring surgery in March 2019 for the removal of a cyst.

3.8. Her sister was diagnosed with breast cancer in late 2019.

3.9. Mrs Moorcroft admits that all these contributing family emotional pressures were in the background. The work-related stress added to her depression, anxiety and panic attacks. They improved after she resigned, but the stress

of the proceedings meant she has not been able to leave the stress behind her.

3.10. After her resignation, Mrs Moorcroft felt relief at the ending of contact with SHC Clemfold. However, she continued to suffered tiredness, depression and anxiety and deep distress, with real difficulties in sleeping, loss of confidence and loss of self-esteem. She felt isolated and her anxiety extended to neutral situations where she feared being listened to. She lost the trust in other people that had been a feature of her life. She lost her enjoyment of life and work over a sustained period.

3.11. Her physical health has somewhat improved but she continued to be fragile emotionally. She continues to find social engagement difficult and has become withdrawn.

3.12. She found having had interviews that she could not cope with the demands of a nursing role, given her health and loss of confidence, selfesteem and self-assurance. She was offered full-time roles but none that would accommodate her caring responsibilities. Ultimately, she concluded that given her continuing stress levels and poor emotional health, she should look for alternative work in caring. She found a night-time caring role in an assisted living care home and started work on 1 October 2019, one night a week. The work was interrupted by Covid restrictions for 12 weeks.

4. **Law**

Unfair Dismissal Remedy

4.1. The first consideration for a Tribunal in unfair dismissal is of reinstatement or reengagement.

4.2. Where that is not sought by the Claimant, a financial award can be made, comprising the basic and compensatory elements.

4.3. By s123(1) of the Employment Rights Act 1996, the amount of the compensatory award shall be, "such amount as Tribunal considers just and equitable in all the circumstances, having regard to the loss in consequence of the dismissal in so far as attributable to action taken by the employer."

4.4. The award is to fully compensate the claimant, as if they had not been dismissed, but not to award a bonus or to punish an employer. A reduction can be made to reflect the chance that the individual would have been dismissed fairly ("Polkey", from Polkey v AE Dayton Services Ltd [1987] IRLR 50 (HL)) in any event or for contributory conduct. Ability to pay is not a consideration.

4.5. Compensation may be awarded beyond retirement age if the evidence shows that the employee would have stayed on past that age (Barrel Plating and Phosphating Co Ltd v Danks 1976 ICR 503 EAT)

4.6. By section 124 of the ERA 1996, compensation is capped, including at the level of one year's gross salary, if lower than the current statutory cap. The cap does not apply to an automatically unfair dismissal under sections s100, 103A, 105(3) 105(6A). Those are protected disclosure and health and safety cases.

4.7. There can be no award for the manner of the dismissal. The award does not attract interest. No award can be made for injury to feelings or personal injury.

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Discrimination Remedy

4.8. Section 124 of the Equality Act 2010 ("EA 2010") provides by way of remedy for discrimination, a declaration, as given in making the initial judgment, financial compensation and scope to make recommendations.

4.9. An order for monetary compensation is only made where it is just and equitable to do so. The measure of damages is the same as it would be in a civil court. There is no upper limit on what can be awarded.

4.10. Where compensation is awarded, it is on the basis that "as best as money can do it, the claimant must be put into the position she would have been in but for the unlawful conduct of [her employer"]' (Ministry of Defence v Cannock [1994] IRLR 509, EAT, per Morison J at 517, [1994] ICR 918, EAT).

4.11. Losses must be attributable to the specific acts of discrimination found by the Tribunal based on the pleaded claim.

4.12. Heads of damages include pecuniary losses, that is, personal financial losses, and non-pecuniary losses, such as injury to feelings and in some cases personal injury. Financial losses include loss of earnings and benefits derived from the employment. Where failure to mitigate is demonstrated, a deduction can be made in respect of earnings that were not but should have been achieved.

4.13. It is rare to assess compensation over a career lifetime. The usual approach is to assess loss up to a point where a Tribunal is satisfied, having regard to all the uncertainties and vagaries of life, that the individual is likely to get an equivalent job. There is a speculative nature to this, since it calculation is both speculative and predictive. There is no certainty about what will happen, but rather a range of possibilities and chances of different things occurring. The assessment is not a question of fact, but a question of carrying out an assessment on the basis of the Tribunal's best estimate about the future.

4.14. The task is to put the employee in the position he or she would have been in had there been no discrimination. The fact that there has been a discriminatory dismissal means that the employee is on the labour market at a time and in circumstances which are not of his own choosing. It does not follow therefore that their prospects of obtaining a new job are the same as they would have been had he or she stayed where they were. in addition, there may be stigma by reason of taking proceedings, and that may have some effect on the chances of obtaining future employment. (Chagger v Abbey

National plc & anor [2009] EWCA Civ 1202 ("Chagger") Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102, [2003] ICR 318 ("Vento")).

4.15. When an act of discrimination results in the loss of employment, for example, a tribunal will have to calculate future loss, and in so doing have to make decisions about the chances that employment would have continued had the discrimination not taken place. It is important that this is done by reference to calculating the percentage probabilities, and not on a simple balance of probabilities (Chagger). The assessment must be made by focusing on the degree of chance and not on a balance of probabilities approach; in other words, it would be wrong to conclude that something was more likely than not to have happened and then to deem it to have happened rather than considering the chance of it happening and applying a percentage factor to reflect that chance (Chagger).

4.16. For personal injury, the Claimant will need to demonstrate that the discriminatory acts actually caused the psychiatric or other damage in order to prove liability and be awarded compensation. There is no absolute requirement for medical evidence, such evidence is particularly valuable in explaining causation. There is a risk of double counting with the injury to feelings award, given that it is not always easy to identify where injury to feelings ends and physical or psychiatric injury starts.

4.17. When it comes to the assessment of damages in relation to a proven psychiatric injury, tribunals are required to approach the assessment of damages on the same basis as a common law court in an ordinary action for personal injuries (HM Prison Service v Salmon [2001] IRLR 425).

4.18. There is no rule that the losses must be reasonably foreseeable. The losses are those of the individual claimant, having regard to his or her personal circumstances and the consequences of the unlawful conduct.

4.19. The Vento case is the source of guidance on the level of compensation for injury to feelings which have since been updated by Da Bell v NSPCC and Simmons v Castle ([2013] 1 All ER 334), but are still referred to as the "Vento" Guidelines. They identify three broad bands of compensation for injury to feelings as distinct from psychiatric or personal injury.

4.20. Having regard to the Presidential guidance issued by the Presidents of the Employment Tribunals issued in in respect of claims issued after 6/04/20, The lower band is for less serious acts of discrimination. Awards in this band are currently between £900 - £9000

4.21. The middle band is for cases which are more serious but do not come into the top band. These awards tend to be from £9000 to £27,200

4.22. The top band is for the most serious cases such as where there has been a lengthy campaign of harassment. These awards are between £27,200 and £45,000, but are relatively rare.

4.23. A case would have to be highly exceptional for any sum higher than this to be awarded.

4.24. This claim was presented on 26 November 2019

4.25. At that time the relevant Presidential Guidance, for claims presented on or after 6 April 2019, was –

Lower	£900 to £8,800
Middle	£8,800 to £26,300
Top	£26,300 to £44,000

4.26. There can be no double recovery, so where different claims or different heads of damages might lead to overlapping awards, the overall award must be a sensible reflection of the assessment, avoiding compensating for the same loss more than once.

4.27. Section 207A TULRCA can apply to discrimination awards, if there is a breach of a relevant ACAS Code of Practice as part of an act of discrimination. The Code of Practice is that on Disciplinary and Grievance procedures.

4.28. The power to make such an uplift raises different issues and needs to be considered separately to questions of injury to feelings and aggravated damages (Mr Q QU v Landis & Gyr Limited UKEAT/0016/19/RN)

4.29. In Allma Construction Ltd v Laing UKEATs/0041/11 25/01/12, Lady Smith suggested a tribunal should approach an uplift under this section in this way,

- Does a relevant Code of Practice apply
- Has the employer failed to comply and how
- Was the failure unreasonable and why
- Is it then just and equitable in all the circumstances to increase the award and why
- If so by how much and why.

4.30. In Mr Q Qu v Landis & Gyr Ltd, it was argued but not accepted that the ACAS Code prescribes minimum procedural standards in a disciplinary and grievance context, rather than considering the quality of the Respondent's decision making. However in that case it was held that the findings made by the Tribunal were not about the quality of decision making but failings in the process that was adopted, and an implicit finding that the grievances were not considered in good faith. There was a breach of the Code, even though the formally correct steps had been taken.

4.31. In considering what is just and equitable to order under section 207A, the Tribunal must have regard to the overall size of the award and what is proportionate. The breach of the Code of Practice must be identified. The award is the just and equitable amount up to 25%.

4.32. Interest is calculated as simple interest. The current statutory rate is 8%. (1/365 or 0.00273973 per day). The period of accrual of interest in injury to feelings runs from the act of discrimination to the hearing. For other sums it is from the mid-point of the period since the act of discrimination.

Aggravated Damages

4.33. Aggravated damages may be awarded in particularly serious cases of discrimination. They are compensatory only and should not be awarded to punish the respondent.

4.34. They are seen as part of injury to feelings and Tribunals should avoid compensating claimants under both heads for the same loss.

4.35. The ultimate question according to the then President of the EAT, Mr Justice Underhill, in Commissioner of Police of the Metropolis v Shaw [2012] ICR 464 EAT is whether the overall award is proportionate to the totality of the claimant's suffering. It is an aspect of injury to feelings reflecting the making more serious the injury to feelings by some additional element which would fall into one of three categories

> (a) the manner in which the wrong was committed, that is, where it is done in an exceptionally upsetting way – high-handed, malicious, insulting or oppressive way
>
> (b) bad motive, provided that the claimant was aware of it , for example conduct based on, prejudice, animosity spite or vindictiveness is likely to cause more distress
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> (c) Subsequent conduct, such as where the defence is conducted at a trial in an unnecessarily offensive manner, a serious complaint is not taken seriously, where there is a failure to apologise, or the respondent has defended in a way that is wholly inappropriate and intimidatory.

4.36. The actions are not required of themselves to be discriminatory

4.37. Tribunals must to be wary of focusing on the quality of the respondent's conduct – that is, assuming that the more heinous the conduct, the more devastating its impact on the claimant. Tribunals must not lose sight of the ultimate purpose of aggravated damages, which is to compensate for the additional distress caused to the claimant by the aggravating features in question. The award must overall be fair and proportionate, in respect of nonpecuniary loss.

Grossing up

4.1. The effect of income tax must be taken into account in the assessment of damages.

4.2. Grossing up provides an estimate of the tax payable on this award, in this financial year, so that the claimant receives what the tribunal has found to be due, in full, having had to pay tax required . The aim is to get to a figure that will leave the claimant with the sums intended by the Tribunal.

4.3. Where compensation for injury to feelings is included in a termination payment, it is taxable under s406 ITEPA to the extent that the £30,000 allowance has been exceeded.

4.4. The relevant tax year is the year in which the award is received by the claimant

Wrongful Dismissal Remedy

4.1. The sum due in respect of wrongful dismissal is the notice pay to which the Claimant was entitled. Where there are concurrent wrongful and unfair dismissal claims, the tribunal has a choice as to how to proceed in calculating compensatory awards. It is a matter for the discretion of the tribunal as to whether the unfair dismissal compensatory award is calculated before deducting the sum due for the wrongful dismissal. If calculated in that way, the ACAS uplift would apply in respect of the whole period of loss (Shifferaw v Hudson Music Co Ltd UKEAT 0294/15/DA). The same applies in respect of wrongful dismissal and the financial loss element of discrimination. The same loss cannot be compensated in two jurisdictions: there cannot be double counting.

Preparation Time

4.2. Under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237, Schedule 1, Rule 76,

> “(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> > (a) a party (or that party’s representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; ….”

4.3. By Rule 75(2), a preparation time order is an order that a party (“the paying party”) make a payment to another party (“the receiving party”) in respect of the receiving party’s preparation time while not legally represented. “Preparation time” means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

4.4. Awards of costs are intended to be compensatory, not punitive (Lodwick v Southwark LBC [2004].

4.5. An award does not automatically follow on a finding of unreasonable conduct. There remains a broad discretion and it must be exercised judicially (Oni v Unison UKEAT/0371/14/LA 2015, “Oni”). The Tribunal should take into account the “nature, gravity and effect of a party’s unreasonable conduct.” In

McPherson v BNP Paribas (London Branch) 2004 ICR 1398 CA, Lord Justice Mummery gave guidance that the costs-seeking party is not required to prove that specific unreasonable conduct by the other party caused particular costs to be incurred. In D'Silva v NATFHE (Now known as University and College Union) and ors EAT 0126/09, the EAT confirmed that it was not necessary to establish a direct causal link between the unreasonable conduct and the amount of costs ordered.

4.6. There is therefore no requirement that the costs awarded must be found to have been caused by or attributable to the unreasonable conduct found, though causation is not irrelevant. In Barnsley Metropolitan Borough Council v Yerravalka [2012] IRLR 42, the following guidance is given,

> "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct. …and in doing so, to identify the conduct, what was unreasonable about it and what effects it had."

4.7. The Tribunal has a broad discretion and should avoid adopting an overanalytical approach. The means of a paying party may be considered twice: first in considering whether to make an award of costs; secondly, if an award is to be made in deciding how much should be awarded (Oni).

Penalty

4.8. Under S12A ETA 1996, where the employer has breached any of the worker's rights and it is of the opinion that the breach has "one or more aggravating features", the Tribunal may award a penalty, payable to the Secretary of State. According to the explanatory notes, the Tribunal may consider the size of the employer, the duration of the breach, the behaviour of the employer and employee as well as whether the action was deliberate or committed with malice, whether the employer was an organisation with a dedicated human resources team or the employer had repeatedly breached the employment right concerned.

4.9. By section 12A(5), the amount of the penalty in this case would be £20,000.

5. Submissions

5.1. Mr Henman spoke to his written submission.

5.2. Mr Williams addressed only the 25% uplift contended for under TULRCA and the preparation time order.

5.3. They were both helpfully concise.

6. **Reasons**

6.1. The wrongful dismissal award is not shown separately given that it directly overlaps with that element of financial losses in the discrimination award. Gross pay was agreed at £360 per week and net pay at £336. There have been some modest part-time earnings at £72 per week.

Unfair Dismissal

6.2. The Claimant did not seek reinstatement or reengagement.

6.3. This is not an automatically unfair dismissal and the statutory cap applies correctly identified by Mr Henman at £18,720.

6.4. In respect of unfair dismissal, the Tribunal made the basic award, calculated on the agreed basis of £360 per week gross, and included the figure proposed by the Claimant, for loss of statutory rights. Mrs Moorcroft had nine years' service and the multiplier was 1.5 throughout.

Basic	£4860	
Statutory rights	£350	
		5210

6.5. We consider the financial losses under discrimination because of the very substantial overlap between the matters that were discriminatory and those that led to the finding of unfair constructive dismissal and to avoid double counting.

Discrimination – financial losses

6.1. There is no claim of failure to mitigate losses.

6.2. It is clear that the impact of the Respondent's conduct had a profound effect on Mrs Moorcroft at the time and she has not been able to return to work at an equivalent level.

6.3. The unchallenged claim had been for loss of earnings at the same rate to the projected retirement date of 1 March 2022. The Tribunal was unable to accept that. At present, Mrs Moorcroft is not working and has been unable to find work that accommodates her disabilities. She has a past history of illness and there are many other stress factors in her life, as very honestly and frankly admitted in her impact statement. She is not young. She is already over the age at which others retire and no longer working. In the judgment of the Tribunal, reluctantly reached given that the Claimant's position was unchallenged, it was unrealistic to say that there is in effect a 100% chance of reaching her projected retirement age, had she remained with the Respondent. There must be some probability that she would be forced to stop work earlier than her chosen date of 1 March 2022. The award for future loss was therefore reduced by 25%, itself representing a low estimate of that risk.

6.4. Loss to date of hearing:

105 weeks from 8/07/19 x £336	£35,280
Less earnings	
64 weeks at £72.00	£4,608
Total losses to date of hearing	£ **30,672**

6.5.Losses to projected retirement date

13/07/21 to 21/03/22: 33 weeks x 336 =	£11,088
less 25%	£2,772
Total future losses	**£8,316**

6.6. Total loss of earnings

£30,672 + 8316 **=** **£ 38,988**

Injury to feelings, Personal Injury and Aggravated Damages

6.7. We agree that this is a middle rate Vento band and that was not challenged. It had been put on the Claimant's behalf at £10,000. In addition, there was a claim in respect of personal injury and for aggravated damages.

6.8. In our judgment, £10,000 was too low. It is also inconsistent with the claim for aggravated damages, which is a part of injury to feelings and intended to be compensatory not punitive. Applying the law to the facts, the threshold for an award of aggravated damages is not met in this case, as to manner, motive or subsequent conduct.

6.9. The specific findings of discrimination in summary relate to the changing of the management of her absence, retrospective and unannounced, from one based on a well-being meeting to the Capability Procedure, with the reference to moving to Stage 3 and a risk of dismissal; the change in the disciplinary sanction from demotion to transfer from Boldings and the insistence on that, without consultation or consideration of alternatives, in breach of the reasonable adjustment already agreed; the failure to obtain or consider medical evidence and the wrongful reliance on the witness statements as the reason for insisting that the transfer was necessary.

6.10. The injury to feelings award must reflect the level of personal distress, not the Tribunal's dismay at the Respondent's conduct.

6.11. We take into account that Mrs Moorcroft had been wrongly found responsible for gross misconduct offences impacting on patient well-being. At the time of the conduct held to be discriminatory, the disciplinary proceedings were re-opened by the Respondent, in order to change the sanction imposed. There was no procedure followed: there was no meeting or consultation. Mrs

Moorcroft had in May presented further evidence in relation to both allegations of misconduct, in 2018 and 2019 and there was a refusal to consider it, even though the disciplinary was being re-opened. That evidence is compelling as to there having been miscarriages of justice. The decision on the sanction involved removing a previously agreed reasonable adjustment as to her working at Boldings Lodge. It was unwelcome. It was based on a misunderstanding as to the evidence in the disciplinary investigation, in particular the six witness statements, probably based on a failure to read them, and reflected the failure to make proper findings. The sanction imposed on Mrs Moorcroft was to be the same as the sanction imposed on the other nurse, notwithstanding the significant differences in their culpability. Mrs Moorcroft had made minor – and we do not minimise the importance of medical records, but must assess the facts - recording errors on the first night of the period of several days investigated. She had not administered the wrong medicine, omitted to administer any medicine, administered the wrong dose or failed to renew prescriptions, for a highly dependent patient. The Respondent acted as if she had been held responsible for that and had decided on a report to the NMC that might end her nursing registration and career if upheld.

6.12. Mrs Moorcroft went off sick acutely anxious and distressed, suffering a severe loss of confidence and the sense of loss that goes with a threat to her cherished career. She felt frustrated and helpless in the face of the refusal to listen to her or consider her evidence. Her sleep was badly affected and continues to be badly affected. That then disrupted her ability to manage her pre-existing mental health impairment and emotions. That in turn led to her over-eating. That did not help her efforts to lose weight in order to have the hoped for reconstructive surgery. She has found herself having difficulty in going out and avoiding social contact.

6.13. She gave this compelling account at the remedy hearing, finding it difficult to do so without tears,

> “I still have the depression and sleeplessness but I have managed not to eat in the night, which is progress, after the business with SHC Clemsfold. I have tried to have positive thoughts to continue my work as a nurse, but have not been able to continue. I have sort of separation anxiety, the few times I have tried to do anything, like Sainsbury on my own, I have found my mind wandering and feel very alone, because I have lost my great trust in people, it makes me tearful….
>
> I was a normal healthy person. All of a sudden, they didn’t believe me, nobody would listen, now I have this thing in my mind that I can’t trust anyone, I have this horrible anxiety feeling all the time that nobody is going to listen to what I say any more, and I was terribly upset at the thought that I had done someone harm and I knew I hadn’t but I did not have proof until later, I am almost becoming a recluse, don’t want to talk to people on the phone, don’t want to go out, …

> Because of my insomnia, I ate myself to overweight so I could not have reconstructive surgery and it brought on diabetes, I just could not sleep, waking with horrible thoughts, all these years of nursing, how could I be accused of such a horrible thing, so now diabetes and no reconstruction, so I feel part of a person not a whole person like I used to.

6.14. We find the award appropriately put at £17,750 for injury to feelings

6.15. We do not make an award for personal injury. There is an absence of clear medical evidence in respect of the cause of the deterioration of Mrs Moorcroft's existing condition or any new condition. Such evidence would have to be based on an evaluation of other causes, and there were other causes at play.

6.16. The only medical opinion as to cause is the brief reference in the GP report prepared by Dr Stevens dated 8 June 2020. We agree that the medical evidence shows mental health somewhat under control at the point when the problems started, and deterioration since in particular during and after the discriminatory events. We do therefore accept that the Respondent's conduct had an impact on Mrs Moorcroft's mental health. That report however does not include an evaluation of the whole picture as we know it to be.

6.17. It is clear from impact statement that there were a number of other factors at play, her own health, her home circumstances and responsibility for her partner for whom she cares, her sister's partner's diagnosis with terminal cancer, her sister's health, and her niece's mental and physical health, her own daughter's health. She acknowledges those to be sources of emotional pressure and increased levels of stress anxiety and panic attacks.

6.18. She was due to have reconstructive surgery if she could lose weight. She was commended for losing 10 kilos. However, although she had made some progress, it is not established that she would have been able to have the surgery had it not been for the respondent's conduct. There was still some way to go in losing weight to reduce the risks of surgery, and no guarantee of surgery even if she added to her loss of 10 kilos by losing a further 10 kilos. The surgeon was careful to avoid any such reassurance that surgery would be recommended.

6.19. On the evidence before us, we cannot make a finding that Mrs Moorcroft suffered personal injury as a result of the respondent's conduct, but we have taken into account the impact on her mental and emotional state in the level of the award of injury to feelings.

6.20. The total discrimination award at this stage is £56,738, including the loss of earnings and the injury to feelings elements.

Increase under TULRCA

6.21. The scope for an uplift is clearly available. The Respondent was reopening, or continuing a disciplinary procedure, in order to review the sanction applied.

The ACAS Code with its principles in respect of fairness and transparency applied. In doing so they failed to conduct a meeting with her, or to consult, failed to establish the facts, worked on assumptions instead of evidence, about the findings against her and about the evidence for them. They failed wholly to allow her to put her case. There was particular reason to be careful because of potential loss of her nursing registration. She had adduced evidence of serious miscarriages of justice, arising from the failures in both disciplinaries to identify and consider the relevant evidence and also to make appropriate and accurate findings as to the degree of culpability. The failure to meet or consult with her was particularly egregious, as was the removal without thought of a reasonable adjustment.

6.22. The panel considered a 20% uplift. However, we are enjoined to consider the impact on the award as a whole and the uplift must be a just and equitable amount. On a smaller award, a 20% uplift might have been appropriate. This is already a substantial award. The Tribunal decided a 10% uplift was fair and proportionate. That adds £5,674 to the award.

Discrimination award **62,412**

Interest

6.23. The prescribed rate of interest is 8%.

6.24. The calculation in respect of injury to feelings, from the date of the act or acts of discrimination is as follows: first act of discrimination: 5/06/19, 768 days before 12 July 2021. Other acts of discrimination were within two months of that.

768 x 0.08 x 1/365 x 17750 = £ 2988

6.25. On past loss of earnings, from the midpoint:

768/2 x 0.08 x 1/365 x 30672 = 2582

6.26. Total interest 2988 + 2582 = 5570.

Total award

Discrimination	£**62,412**
Interest on discrimination	£5,570
Unfair Dismissal	£5,210
Total	**£73,192**

Grossing up

6.27. The simple approach to grossing up has been taken. The Claimant's full personal allowance is available this year. Tax will be due at the claimant's marginal tax rate of 20% after the £30,000 tax free threshold and the £12,500 personal allowance.

6.28. The proposed outcome is to find this figure, the true net loss:

Grossed up sum x (1-marginal tax rate) = true net loss

6.29. That converts to this equation:

Grossed up sum = (true net loss) divided by 1- marginal tax rate.

The calculation therefore was

73192, less £30,000, less £12,500 = 30,692

100 – 20 = 80

30692 /80 x 100 = 38365

6.30. The additional sum required to provide for tax on the award in the claimant's hands is £7,673

Summary:

Discrimination	£62,412
Interest on discrimination	£5,570
Unfair Dismissal	£5,210
Grossing up	£7,673
Total	£80,865

Preparation time order

6.31. The conduct in respect of disclosure is well over the threshold of unreasonable conduct to justify the making of a preparation time order. It is quite plain that the disclosure of material relevant to the only other salaried nurse who was involved in the second disciplinary was relevant and she was also the comparator in the discrimination claim. On that material being produced at the start of the second ay, it was clear that her role in the errors was very different from that of Mrs Moorcroft and that there had been a failure to appreciate that very substantial difference.

6.32. Mr Henman has produced the evidence of his endeavours to get the Respondent to comply with the fundamental duty of disclosure. It reached the point of applying for strike-out.

6.33. Reasons given for not disclosing this material were that it was not relevant or had been lost. It is highly relevant. To say otherwise is not simply an error of judgment as suggested. No reasonable advisor with a proper understanding of the duty of disclosure could refuse disclosure. Any company with a professional HR department should understand the relevance of these documents. Nor had the documents had been lost which was Mr Williams' first suggestion to us at the start of the hearing: this is from the Judge's note -

> Mr Williams
> We have tried our best to disclose these documents. We are not trying to hide anything. Ms Fehilly came to this late. She has made repeated trips to Suffolk to find the documents and has been unsuccessful. Unlikely now that they are in existence
> I don't know if she is still in our employment.
>
> Mr Henman – she is a bank nurse (for you).
>
> Mr Williams
> Searches have been made of the electronic system and the physical archive which is why Ms Fehilly has made those journeys
>
> Mr Henman
> Annex 2 page 68 email from Mr Burgess, "I have been told these documents are not relevant and will not be disclosed". It is not the fact that they have not got them. 21/04/21 email.
>
> Mr Williams
> That is what he says. That is what he has decided. ok
>
> Employment Judge
> "That is not what you just said."
>
> Mr Williams
> "We have made every effort. Except for the ones that we have decided are irrelevant."
>
> Employment Judge
> "Which is it – can't find or won't give?"
>
> Mr Williams
> "I shall stand with Mr Burgess then"

Employment Judge
"Why?"

Mr Williams
"I understand she wants to draw a link between the disciplinary in August and the later one, and we don't and we don't draw the connection between these nurses either"

EJ
"They are apparently available and disclosable and I am going to make an order for disclosure."

6.34. That was an entirely inappropriate exchange. Mr Williams came very close to misleading the Tribunal, saved from doing so by Mr Henman's alertness. The Respondent or their representatives were choosing not to disclose in frank breach of the duty to disclose, pre-determining issues of relevance to suit themselves. That is a wrongful and dangerous approach.

6.35. The documents were produced by Ms Fehilly on the second day along with a flood of other documents. It is to Mr Henman's credit that he sorted through to produce a manageable extra bundle for the Tribunal. This was unreasonable conduct. It could have derailed the hearing. The failure to disclose would have seriously undermined Mrs Moorcroft's ability to prove her case.

6.36. The preparation time order is made in the sum claimed, which was not challenged, £1,173.67.

Penalty

We have considered making a penalty. It has to be £20,000 under section 12 A. While there is no doubt about the twice repeated breaches of the claimant's rights as a worker here in the failures of the two disciplinary actions, in our judgment it is not appropriate to order a further substantial sum which does nothing to mitigate the claimant's position, given the order already made for compensation and the order made for preparation time costs.

Employment Judge Street

Date 12 July 2021

REASONS SENT TO THE PARTIES ON

30th July 2021

Andy Frost
FOR THE TRIBUNAL OFFICE