EMPLOYMENT TRIBUNALS

Claimant: Mrs J Climer-Jones

Respondent: Cardiff and the Vale University Local Health Board

Heard at: Remotely, by video

On: 15, 16, 17, 18, 19, 22 March 2021

Before: Employment Judge S Moore
Mrs L Bishop
Mr P Bradney

Representation
Claimant: In Person
Respondent: Ms C Davis QC

CORRECTED JUDGMENT ON REMEDY (1)

Headline findings:

1. The Claimant has mitigated her loss from the date of dismissal to the date of the remedy hearing. The compensatory award shall be calculated on the difference between the Claimant's salary and amounts earned from mitigation from the date of her dismissal to the date of the remedy hearing.
2. In respect of future loss the Tribunal considers that the Claimant will be in a position to mitigate her loss of earnings two years from the final remedy hearing. The compensatory award shall be calculated based on two year's future loss.
3. In respect of the notice pay claim the Respondent shall pay the Claimant six week's pay minus the overpayment of salary for 21 – 30 June 2016.
4. The Respondent is ordered to pay the Claimant's outstanding holiday pay for the years 2014-15, 2016 – 2016 and 2017 -2017 at a rate to include unsocial hours allowance.
5. The Respondent is ordered to pay the Claimant expenses incurred as a result of the dismissal in respect of the following:

a) Hire car costs
b) 50% of the car purchase;

c) Petrol costs
d) Accommodation and bridge tolls;
e) Childcare;
f) Online training, uniform and DBS checks

6. In respect of injury to feelings the Respondent is ordered to pay the Claimant the sum of £27,000;
7. In respect of aggravated damages the Respondent is ordered to pay the Claimant £4000;
8. In respect of the personal injury claim the Respondent is ordered to pay the Claimant the sum of £5500.00.
9. Further amounts requiring calculations and pension loss, interest and grossing up shall be awarded at the next hearing.

REASONS

Background and Introduction

1. This is the reserved Judgment on remedy following the liability Judgment dated 21 February 2020. The Hearing has been postponed a number of times due to the Covid-19 pandemic. It took place remotely by CVP on the above dates, with the Tribunal reaching their decision on 22 March 2021. The Judgment was reserved and it was agreed that a further two days would be listed to address any necessary final calculations that could not be agreed once the parties received the Tribunal findings of fact and the Claimant's costs application.

2. There was an agreed bundle of 2630 pages and a supplementary bundle from the Claimant. The Tribunal heard evidence from Dr Medley, the Consultant Psychiatrist who had prepared the joint report on the Claimant in respect of her personal injury claim. On behalf of the Claimant, the Claimant and Mr Climer Jones and as well as the written witness statements we had regard to the Claimant's schedule of loss and the documents in the bundle. For the Respondent we heard from:

- Ms Carys Fox, Director of Nursing Strategic Nursing Workforce,
- Ms E Gerrard, Senior Nurse;
- Mr W Evans, Deputy Payroll Manager;
- Mr W Parsons, Lead Nurse in Emergency and Acute Medicine Directorate.

3. By a consent order dated 11 May 2020 the Respondent paid the sum of £4071.50 basic award and £600.00 loss of statutory rights. All remaining elements of the compensation due to the Claimant remained to be determined by the Tribunal.

4. The Respondent's counter schedule of loss did not agree any figures in respect of the Claimant's gross and net salary. The Respondent agreed the Claimant was owed holiday pay but had not set out the amounts they maintained was owed. The Tribunal directed the Respondent to file a

position paper in respect of the holiday pay which was received on 18 March 2021.

Issues

5. What remedy should be awarded to the Claimant following the decision on liability that:

a) The Claimant had been subjected to unlawful detriments on the grounds she had made protected disclosures, contrary to S47B Employment Rights Act 1996 and;

b) The Claimant had been (constructively) unfairly dismissed contrary to S98 ERA 1996.

c) The Claimant had been unfairly dismissed for the reason of having made protected disclosures contrary to S103A ERA 1996.

Detriments

6. The Tribunal found the Claimant had been subjected to 10 detriments[1] between 3 May 2013 – 30 June 2016. These were set out in a table at paragraph 633 of the liability judgment and repeated here:

Detriment	Date of act or failure to act	S48(3) or S48 (4)
1 (army comment)	25.9.13	S48 (3) - act
3	31.10.14	S48(4) – (suspension) – an act extending over a period namely 22.1.14 to date suspension lifted 31.10.14
4a	20.6.14	S48(4) (accused of two further acts of misconduct) – an act extending over a period of time the last day of which it could have continued was the date the Claimant resigned.
4c	13.3.14	S48 (3) (failure to offer a review) decision taken by Ms O'Brien by 13.3.14
6	20.6.16	S48 (4) (continuation of the disciplinary investigation) – an act extending over a period the last date of which was the date the Claimant resigned namely 20.6.17
7	20.6.16	S48(4) (withholding the findings of the disciplinary investigation) – an act extending over a period the last date of which was the

[1] Paragraphs 467 – 632 of the liability Judgment

		date the Claimant resigned namely 20.6.17
8	20.6.16	S48(4) (reinstating the disciplinary allegations) – an act extending over a period the last day of which was the date the Claimant resigned as the allegations remained live as of the date of dismissal)
9	10.5.16	S48(3) – (decision to renege on an agreement to pay the Claimant enhancements) – an act
10	10.5.16	S48(3) a failure to progress the Claimant's grievance - on 10.5.17 the Respondent did something inconsistent with that failure namely appointed a manager to hear the grievance
12	30.6.16	S48 (3) – an act – namely the date by which the Respondent had decided to withhold holiday pay to offset an overpayment in breach of contract

7. Remedy for unfair dismissal

a) The Claimant did not wish to be reinstated or reengaged to her previous employment.

b) If there is a compensatory award, how much should it be? The Tribunal will decide:

c) What financial losses has the dismissal caused the Claimant?
d) Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
e) If not, for what period of loss should the Claimant be compensated?
f) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
g) Did the Respondent or the Claimant unreasonably fail to comply with it?
h) If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?
i) (The statutory cap of fifty-two weeks' pay does not apply)

8. Wrongful dismissal / Notice pay

a) What was the Claimant's notice period?

b) Was the Claimant paid for that notice period?

9. Remedy for Protected Disclosure Detriment

a) What financial losses has the detrimental treatment caused the Claimant?

b) Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

c) If not, for what period of loss should the Claimant be compensated?

d) What injury to feelings has the detrimental treatment caused the Claimant and how much compensation should be awarded for that?

e) Has the detrimental treatment caused the Claimant personal injury and how much compensation should be awarded for that?

f) Is it just and equitable to award the Claimant other compensation?

g) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

h) Did the Respondent or the Claimant unreasonably fail to comply with it?

i) If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

10. [2]Holiday Pay

a) What was the Claimant's leave year?

b) How much of the leave year had passed when the Claimant's employment ended?

c) How much leave had accrued for the year by that date?

d) How much paid leave had the Claimant taken in the year?

e) Were any days carried over from previous holiday years?

f) How many days remain unpaid?

g) What is the relevant daily rate of pay?

Findings of Fact

11. We made the following findings of fact on the balance of probabilities. We heard detailed evidence and have only made findings where necessary to determine the issues before us.

Pay

12. At the time of the Claimant's dismissal she was employed as a Band 5 Nurse on a 0.96% FTE contract. She generally worked 3 x 12 hour shifts

[2] The withholding of the holiday pay was found to have been a detriment.

per week, mainly on nights with the occasional day shift, usually at weekends.

13. The Respondent had not agreed the Claimant's gross and net pay at the time of her dismissal. The Claimant set out figures in her schedule of loss. These were unchallenged. There were no figures set out in the Respondent's counter schedule of loss for gross weekly and net pay. We have therefore accepted the Claimant's evidence and find her gross annual salary at the date of dismissal was £36,282.19 giving a gross weekly amount of £697.73. We disagree with the Claimant's net weekly calculation as it appears to have been divided by monthly (12) then weekly using a ratio of 4 instead of simply by 52. We find the net weekly pay was £535.92.

Medical history and personal injury claim

14. Pursuant to Orders made by the Tribunal the parties had jointly instructed Dr Medley, Consultant Psychiatrist. His report was before the Tribunal dated 31 January 2021. Both the Claimant and the Respondent had submitted supplementary questions and Dr Medley dealt with these by way of two addendums dated 20 February 2021.

15. The Tribunal also had sight of the Claimant's GP records. The relevant entries are as follows (summarised):

- *11/12/14 – records problems at work, suspended in January for being rude to a senior nurse, burst into tears, req med 3 – a reference for a three month sick note.*

- *10/9/15, GP had requested a review before issuing further sick notes as the Claimant had remained off sick. The entry noted ongoing dispute at work, states cannot go back and will not resign so issue needs sorting and likely to end in her leaving. The GP explained her concern regarding the length of time off sick as the issue 'was only work related and she would be fit to work elsewhere' but the Claimant stated she would resign and could not go back to nursing. Situation must be resolved before can go forward.*

- Thereafter follow consultations on 28/9/15, 23/12/15, 20/1/16 recording continuing stress at work.

- *13/9/16 Depressed mood resigned from job. Tried another job in nursing[3] but felt completely belittled and confidence gone so only lasted 6 weeks. Subsequently felt low and got to the point she felt her husband and son would be better off without her that she has never experienced before, says never thought properly low was on meds more for stress and anxiety, increased citalopram 40 mg*

- *10/11/16. Resigned as a nurse in June. Struggle with anxiety and depression last two months felt much better on citalopram 40 mg but now feels it is slowing down and feeling a bit drowsy. As mood improved is keen to cut down on this now, explain best wean off after six months of feeling better. For now back down to 30 mg for one month, then 20 mg*

[3] This was the Mapfre role see paragraph 41 below

and 10 mg. No suicidal thoughts. Feeling brighter. Mood euthymic, reactive effect, smiling and seems positive. Keen to try counselling not had before.

16. (We note from the further records at the Claimant did not progress the counselling sessions).

17. There were no further relevant entries until 3 August 2017 which set out a mental health review. The claimant was described as *feeling stressed, low tearful, sometimes thinks her husband and six year old son will be better off without her, stress with ongoing legal case against the NHS. Wants it concluded works 50 hours a week in secure adolescent unit in Ebbw Vale. Job okay, no fixed ideas of suicide, no previous self-harm would not do so for the sake of son….mood 3/10, poor sleep..on citalopram..would like counsellor..might consider private… .felt low risk suicide.*

18. There were no further entries in respect of mental health consultations with her GP but her medication history showed the Claimant has continued to take anti depressants to date.

19. During her employment with the Respondent the claimant had been off sick with stress from December 2014 until the date of her dismissal in June 2016.

Report of Dr Medley

20. A few weeks prior to her interview with Dr Medley the claimant had become so distressed at her perception of her life continuing to be controlled and dictated by the Respondent that in a fit of hysteria she took a pair of nail scissors and cut off her hair.

21. Dr Medley interviewed the claimant by Skype on 25 January 2021 and his report is dated 31 January 2021.

22. Dr Medley noted the first mention of depression in the Claimant's GP notes was in September 2016. He concluded that this suggested the onset of significant depression in 2016. In November 2016 it was noted that her mood had improved and she wished to cut the citalopram down. Her mood on 10 November 2016 was noted to be euthymic and positive.

23. In Dr Medley's opinion the Claimant became depressed from 2016 onwards to a level that would merit a clinical diagnosis of a depressive episode. Having experienced depressive episodes, technically current depression (initially in 2016 ICD-Code F33.1, moderate, then more recently F330 mild).

24. Dr Medley explained to the Tribunal that references to "mild" and "moderate" depression are not to be understood by the normal meaning of those words. Dr Medley emphasised that a mild depressive illness is by no means insignificant and to have enough problems to be diagnosed with mild depression implies a significant condition.

25. In respect of causation Dr Medley notes that there were mental health problems dating back several years but these were intermittent and

related to tangible stresses at the relevant times. This suggested that the Claimant was a vulnerable individual given sufficient stress. Her history supported by the notes suggest that from late 2010 up to the events at the MAU, she was reasonably happy in mood outside of work and functioning well. Given the Claimant's history she would have in any event been vulnerable to episodes of mental health problems at times of sufficient stress but on the balance of probabilities had events not unfolded as they did from 2013 onwards Dr Medley did not think the claimant would have had suffered an episode of depression in 2016. The Claimant's response to the events was not one initially of a full-blown relapse, this did not occur until 2016. Dr Medley concluded the cause of the relapse in 2016 was the lengthy and unnecessarily protracted disciplinary and other proceedings at work. The various events which were at the start of this, for instance the incident with Sr Walters, whilst upsetting were not likely themselves to have caused anything beyond a transient state of distress. It was actually the proceedings thereafter which undermined the Claimant's confidence and led her to feel suspicious about what was happening. Had the Respondent not instigated the disciplinary and other proceedings and continued with them unreasonably, he did not think that the claimant would have suffered clinical depressive relapse. The length of time thereafter whilst going through the tribunal process has served to exacerbate and prolong the depressive relapse and it was likely to do so until proceedings are complete and further time has passed.

26. The prognosis was that the Claimant would remain vulnerable going forward. With regards to the depression which has developed as a result of the events of the last few years he expects this clinically to resolve to a point and anticipates this taking 6 to 12 months after the current case has been completely resolved and all material issues flowing from it have been settled. It is at this point where Dr Medley believes the depression will be clinically in remission.

27. Dr Medley goes on to say that psychologically and emotionally, aside from the medical diagnosis, it will take a great deal longer for the Claimant to recover. Dr Medley thinks there will be some recovery in terms of self-confidence in due course and with the passage of time the Claimant will regain trust in people. He says it is hard to put a figure on it but he would expect within 12 to 24 months of the resolution of this case the Claimant will experience considerable improvement in this regard.

28. Dr Medley's opinion is that from a psychiatric point of view the Claimant should be able to continue her work in nursing and points to the fact she had continued working with agency contracts that it is evident that she was clinically able to do so. Dr Medley confirms there is nothing from a psychiatric perspective which means she should not continue to do as before although he acknowledges it may not be inviting prospects for her. Dr Medley notes that the Claimant experiences a marked lack of confidence and trust which makes the prospect of returning to nursing unappealing. He reiterates that he thinks there is likely to be an improvement in this regard over the timescale indicated such that she could return to a substantive career if she chooses. Other than the propensity of mental health problems in response to stress the Claimant should otherwise be able to continue in paid employment until normal retirement age.

29. The Claimant disputed elements of Dr Medley's report. The relevant areas of dispute were in summary as follows: –

30. Dr Medley had not discussed her post-resignation work experience during their interview. In her document responding to Dr Medley's report the Claimant set out extensive information regarding her history of employment following her dismissal from the Respondent.

31. The Claimant agreed that her depression would dissipate once the legal case came to an end however she maintained her experiences with the Respondent and since her resignation have caused her to find raising concerns particularly stressful and she was fearful of finding herself in a situation which could be perceived as raising concerns or questioning clinical decisions even if she knew that failure to do so could result in patient harm. The Claimant maintained that it was her increasingly inability to cope with stress and anxiety that nursing invokes that makes her feel she is unable to practice safely anymore.

32. Dr Medley dealt with these challenges in supplementary report dated 20 February 2021 in summary his responses were as follows

33. Without knowing every post Dr Medley felt he gained a sufficiently good understanding of the Claimant's employment after leaving the Respondent's in terms of the number of placements and the difficulties he acknowledged she experiences. He understood the nature of agency work which tends to be short-term placements in which there is less interaction with upper management suits the Claimant better at that current time

34. Financial pressures in reference to the Claimant's impending foreclosure on her mortgage on the family home in 2016 would be likely to worsen depression and he also agreed that someone with stress and anxiety could continue to work for financial reasons. The Claimant asked for clarification on the potential variance in timeframes for recovery from start to finish and whether her post-resignation experience that she had set out since the report were likely to compound the feelings of distress. In response to that Dr Medley confirmed that he maintained his opinion the timescale from a psychological perspective for recovery was 12 to 24 months and acknowledged that the Claimant's post resignation experience has been difficult.

35. Dr Medley stated from a medical psychiatric perspective her current condition will improve and he deferred to the Tribunal to decide taking into account this medical opinion what is reasonable going forward in terms of future career choices.

36. Dr Medley responded to questions from the Respondent's representative in a further supplementary report also dated 20 February 2021. He confirmed that in his opinion the Claimant's depression was mild from January 2016 and then moderate from June 2016 onwards and there was an improvement noted from November 2016 .He goes on to confirm that it was his view the depression did affect the Claimant's ability to work during 2016 when her depression was at the moderate level.

37. From November 2016, the Claimant has not suffered from any clinically recognised psychiatric condition that will prevent her from working clinically as a band five nurse either on a temporary or permanent basis. He noted that she had indeed been working in that capacity on a temporary basis. Nonetheless Dr Medley went on to say that there are residual symptoms of depression and anxiety, combined with the psychological effects of loss of confidence and mistrust in the managerial system, to which the Claimant has become sensitised, which have made it difficult to commit to a permanent role. One aspect of this is a fear of retribution should she raise what she regards as legitimate concerns about patient safety. Another is the Claimant's ability to work flexibly, should she be experiencing greater feelings of stress and anxiety. He agreed when asked by Ms Davis that it is for the tribunal to decide whether this is reasonable.

38. In respect of recommendations to successful treatment Dr Medley advised there were three main elements. Firstly the passage of time particular when the case has been settled and is in the past. The role of a case such as this in maintaining symptoms cannot be underestimated. The constant rehearsing of events tends to reinforce them, and it is unusual to see much sustained improvement until the enforced reminders of gone. This is a precondition for success of the other two strategies. Secondly adequate antidepressant medication, particularly where a patient has a long-standing vulnerability. All thirdly psychological therapy. Dr Medley proposed initially a more general type of counselling, to provide the opportunity for the Claimant to discuss experiences, ventilate her feelings with a professional therapist, which he believed would be extremely helpful, once these proceedings are concluded.

39. On 1 March 2021 Dr Medley prepared a further response in response to further questions from the Respondent's representative.

40. These can be summarised as follows.

a) The Claimant had provided further information about her current problems which added to the depth of the history but it did not lead Dr Medley to change his fundamental opinion;

b) From November 2016 the Claimant has suffered from mild depressive episode (it being diagnosed as mild then moderate see above). Although mild in terms of diagnostic criteria, this remains a significant condition, although not on its own, usually sufficient to prevent someone from working. Combined however with the psychological effects of loss of confidence and mistrust in the managerial system, and, by the Claimant's account, fluctuating impact, he recognised it had been difficult for the Claimant to take on the commitment of a permanent post with fixed shifts.

c) In addition to the residual symptoms of depression and anxiety, the Claimant experiences some psychological effects of loss of confidence and mistrust in the managerial system.

d) Dr Medley anticipated that within 12 to 24 months of the completion of these proceedings, the residual depressive and anxiety symptoms, and the psychological effects will have resolved to the point that the Claimant

would be able to take on a permanent post. He would not expect, however the Claimant's feelings to have completely disappeared, given the time the whole episode has taken, in the understandable sense of grievance she has developed.

e) Dr Medley agreed with the statement made by the Respondent's representative that whether or not the Claimant had acted reasonably in not seeking to undertake/undertaking a permanent/substantive role between November 2016 to date and/or whether it would be reasonable for her to avoid a permanent/substantive role for the next 12 to 24 months was matter for the Tribunal to determine and it is not a clinical matter on which he could opine.

The Claimant's employment history since the termination of her employment

Mapfre

41. The Claimant commenced employment as a Nursing Advisor with a company called Mapfre on 28 July 2016. Mapfre are an insurance company based in Bristol. We did not have sight of a contract of employment and we find nothing turns on this. The email confirming her appointment was in the bundle. This provided that she would receive a salary of £38,000, 1% matched auto enrolment pension, childcare vouchers amongst other benefits. It was the equivalent of a Band 7 role. She had secured the role through application and interview prior to her resignation. This had not been without its complications. The Claimant believed that the Respondent would refuse to provide her a reference. The Claimant told the Tribunal when cross examined about these events that she was surprised she got the role. She had initially decided not to tell them about the situation with the Respondent but this changed when she was offered the job and she realised she would have to say something.

42. The Claimant's concerns were regarding a reference from the Respondent. The Claimant had written to Mrs Harrison on 6 June 2016. We did not see the letter but had sight of the email attaching it. The Claimant's evidence was she had requested two letters from Mrs Harrison. One was to send to the NMC to apply for extenuating circumstances to enable her to retain her registration. This was because the Claimant had been unbale to practice as a Nurse since her suspension and subsequent sickness since January 2014. The other letter was requested in order to facilitate her gaining new employment. We did not have sight of the letter in the bundle (nether the claimant nor the respondent had included a copy).

43. The two letters were provided by Mrs Harrison on 8 June 2016. We did have sight of those letters. The first referred to serious allegations made against the Claimant and that she was suspended on 22 January 2014 and this was not a form of disciplinary action but necessary to protect the interest of all parties involved and to enable the internal processes to be conducted. In relation to the sickness absence this was confirmed as commencing on 4 December 2014 and she continued to be absent for reasons of stress at work.

44. The second letter was dated 7 June 2016 and was much longer. It set out to explain the reasons for the time it had taken to deal with the issues

relating to her sickness absence and her Injury Allowance claim. On any sensible reading of that letter it cannot have been written in response to a request to enable the Claimant to gain new employment. It focussed on the Claimant's application for Injury Allowance. We therefore find that this letter was not written for the purpose of the Claimant securing new employment. Nonetheless we find that given the detriments the Claimant was subjected to she was reasonably fearful that she would not be given a favourable reference by the Respondent. At the time she was constructively dismissed she remained accused of gross misconduct and under active and recently reinstated investigation.

45. The Claimant provided these two letters to Mapfre as well as a news article from 2016 about the Fiona Smith report with the headline "Bullying, harassment and inappropriate behaviour' endemic at Wales' largest A&E". She also provided further letters to Mapfre including the letter from Candy Dodwell dated 20 February 2015 she had discovered in her DSAR documents that confirmed there was insufficient evidence to pursue the disciplinary case against the Claimant, that had been withheld from the Claimant.

46. This correspondence must have reassured Mapfre as the offer was not withdrawn and she commenced employment on 28 July 2016. The Claimant had to commute from Cardiff to Bristol. Previously she had been able to care for her son without having to pay for child care whilst employed by the Respondent. When she had worked nights she had taken her son to school in the mornings, slept for the day then woke to collect him from school. On the occasion she worked a day shift her husband was able to arrange his work around the occasional drop off and collection from school. The Claimant also tended to work weekends with her husband looking after her son. We accepted the evidence of the Claimant and Mr Climer Jones that prior to the Claimant's dismissal they did not pay for childcare.

47. After starting at Mapfre the Claimant incurred childcare but has not claimed these costs as she was unable to recover copy invoices.

48. The Claimant's employment at Mapfre did not last very long. The Claimant described her relationship with her line manager as uncomfortable from the outset and attributed this to a resentment that the Claimant had not been upfront about her situation with the Respondent before the job offer was made. The line manager worked remotely but was able to remotely view the Claimant's computer and speak directly to the Claimant via her headset which the Claimant found intrusive and stressful. It should be borne in mind that as this time the Claimant was suffering from moderate depression and we accepted her evidence that her mental health was declining with almost every phone call and meeting and she was finding it difficult to maintain composure and experiencing panic rising.

49. The Claimant had recommended to her line manager that a particular patient should not be permitted to fly as he had been discharged from a hospital in Thailand and she had been unable to establish he had been treated for the DVT. The Claimant told the Tribunal that her line manager intervened instructing the Claimant to issue a fit to fly instruction which provoked a sense of panic in the Claimant. When the Claimant refused it

was escalated and a doctor subsequently confirmed the Claimant's advice. After a meeting with HR the Claimant felt she could no longer continue, collected her bag and left without notice. We do not make any findings in respect of these events as Mapfre are not party to these proceedings and have not had the opportunity to provide their version of events. However we do accept the Claimant's evidence about her reaction to the events and that she was compelled to leave due to a combination of her mental health and a fear of challenging clinical decisions and retribution. This was attributable to the detriments she had been subjected to by the Respondent.

50. After she left Mapfre the Claimant felt she was a failure and was depressed (later diagnosed as moderately depressed by Dr Medley) with thoughts of suicide and "in a very dark place".

51. Between August 2016 and January 2017 the Claimant was unemployed and in receipt of Job Seeker's Allowance. She applied for non nursing roles including delivery driver and supermarkets and tried upcycling furniture. The Claimant was experiencing financial difficulties and risked losing the family home and for these reasons she reluctantly concluded she would have to look for work back in Nursing.

Regis Healthcare

52. The Claimant had been offered a role with Regis Healthcare in November 2016 but did not commence employment until January 2017 as she was awaiting and enhanced DBS check. She worked in a CAMHS unit for children in Hillview Hospital, Ebbw Vale, Blaenau Gwent. We did not have sight of her employment contract. Her payslips were in the bundle. She earned a gross salary of £2500.00 per month. There was evidence of pension deductions for the People's Pension. Mr Climer Jones worked for the local authority also based in Ebbw Vale. Mr Climer Jones had commenced this role in around October 2016 at this point the Claimant was not in work and looking after her son and he had been catching the train.

53. When the Claimant secured the role at Regis she decided to hire a car for her and Mr Climer Jones to get to and from work. The Claimant's place of work was approximately half an hour to walk from Mr Climer Jones' place of work and they shared a lift in the hire car after dropping their son at wrap around care. The Claimant explained that they were unable to both use public transport due to the requirement to drop and collect her son to wrap around care and then commute from Cardiff to Ebbw Vale. The Claimant was asked about this under cross examination as it was suggested it was unreasonable to have hired a car where public transport could have been taken. We accepted the Claimant's evidence that it would not have been possible to drop and collect her son from wrap around care in Cardiff and arrive and depart work at the Regis hospital in Ebbw Vale by using public transport within the required timeframes. We have also considered our own local knowledge of the journey taking into account the commute by public transport from the Claimant's home address via childcare then onto Cardiff Central train station to catch the train to Ebbw Vale and then the onward journey on foot to the hospital. Such a journey was not possible

within a reasonable working day and we find it was reasonable to hire the car and claim half the hire charge whilst employed at Regis.

54. The Claimant left her role in Regis in September 2017. The Claimant felt generally supported by management but experienced panic attacks which she would retire to her office to deal with during which she would not have been able to perform clinically. The Claimant experienced a number of occasions where she had to take patients on the unit to hospital as a result of self harming and formed the view that the unit was not taking adequate steps to prevent the self harm. We make no findings in this regard; it would be inappropriate to do so as Regis are not a party to these proceedings. She accepted she could have raised concerns but such were her feelings of distrust and fear arising from her experience with the Respondent she did not do so and handed in her notice. Following this a further incident of self harm occurred and the Claimant became overwhelmed acutely anxious and left without working her notice.

Eleventh Hour

55. In late September 2017 the Claimant joined a nursing agency called Eleventh Hour and was paid under an IR35 arrangement by an umbrella agency called Smart Pay which later became Elite Consultancy. She worked for that agency until October 2018 in a number of hospitals across the breadth of South, Mid, North and West Wales including The Princess of Wales, Prince Charles and Llantrisant, the Royal Gwent (Newport), Neville Hall (Abergavenny), Glangwili (Carmarthen), Withybush Hospital (Haverfordwest) and Morriston and Singleton Hospital in Swansea. The Claimant travelled extensively between these locations during this period. Her pattern of work generally was 3 x 12 hour shifts per week. She had periods where she worked at the same hospital for between 3 – 6 shifts then she would be placed in a different hospital. Given the level of travel and the length of the shifts we find it was reasonable to use a car to travel to and from work and that travel to these locations from the Claimant's home address whilst possible by public transport would have been wholly impractical.

Events at Cwm Taff

56. The Claimant was barred from working at Cym Taff health board following her leaving her shift part way through in the A&E department on 12 October 2018. The Claimant left as she considered it was unsafe for her to continue to work in the department due to the number of patients she had been allocated. On this particular occasion the Claimant was experiencing stress and anxiety at the situation and felt herself in danger of a full mental collapse in the clinical area. After being refused assistance by the senior nurse she picked up her bags and left. The Claimant submitted a full report to her agency. She was informed verbally that she was barred from Cwm Taff Health Board as an agency nurse as a result.

Events at Hywel Dda Health Board

57. The Claimant had worked at Glangwili General Hospital in Carmarthen between April – October 2018, as an agency nurse via her employment with Eleventh Hour. The Claimant brought a claim to the Tribunal which

was heard in January 2020 with Judgment promulgated on 26 March 2020. In that Judgment the Tribunal found the Claimant had made a protected disclosure but the subsequent cancellation of her shifts had been for a different reason. At paragraph 4.3.1.2 of the Judgment these were as follows:

"C's shifts were cancelled because Sr Standeven was being supportive of a colleague Sr James (who was annoyed about the prospect of an unwarranted complaint), mindful of the niggling complaints of the HCSW's, and at the time saw no need to be tolerant of C and to either keep her or follow through any performance or conduct procedures with her. Bluntly, Sr Standeven had heard and seen enough. Sr James did not want to work with her. The easiest way out for R was for Sr Standeven to cancel her shifts. The disclosures in the Datix had no bearing on the decision; it was not the ground for the cancellation. At the time of the decision Sr Standeven was unaware of the disclosure. Sr James, likewise was unaware of it."

58. On 26 February 2019 the Claimant requested a reference from the Head of Nursing Workforce at Hywel Dda which was provided on 27 February 2019. The email exchange was friendly and suggested there was no issue with providing the reference. The Claimant had been advised she could continue to work on other wards but did not want to do so having found the experience upsetting.

59. The same Head of Nursing had provided the Claimant a reference to Medgen on 12 December 2018.

Medgen

60. Following this the Claimant signed up with another Nursing Agency called Medgen and worked for them between 30 November 2018 and 25 January 2019. The Claimant was auto enrolled into the pension and did not opt out. The Claimant was placed in hospitals in England in locations in Thornbury, Paulton (near Bath), Weymouth, Southampton, Bournemouth, Eastbourne. We find that in accordance with the Claimant's timesheets she was reimbursed for travel expenses during her employment with Medgen.

61. The Claimant's evidence was that she was dropped by Medgen as she was cancelling too many shifts due to stress manifesting itself in feeling physically sick and vertigo. The Claimant was challenged about this explanation as on a later CV she had suggested the reason for leaving was that Medgen had been cancelling shifts. The Claimant accepted she had made this comment and explained had she disclosed she had been the one to cancel shifts due to ill health she was frightened she would not be taken on. The Claimant was also asked in cross examination why she had not disclosed depression or illness when applying to agencies. The Claimant's evidence was that she had not been formally diagnosed with depression until Dr Medley's report (which she will now to have to disclose in any future applications) and further she had a degree of suspicion and cynicism that if she disclosed illness she would not be offered any work.

Randstad

62. The Claimant subsequently secured work with another agency, Randstad and worked on a regular basis (3 – 5 shifts per week) for this agency between January 2019 – January 2020 in hospitals across Wales from

Newport to Swansea. Whilst working at Morriston Hospital in December 2019 the Claimant was poked in the throat by a lead nurse whilst she was observing the Claimant was wearing a necklace contrary to the uniform policy. The Claimant described this as catching her unawares and caused her to have a small reactionary cough. Following this the Claimant was very upset and went to the toilet and was distressed at feeling helpless to have to accept this behaviour and believed she could not complain because of what had happened with the Respondent when she was assaulted by Sr Walters.

63. Following this shift she informed Randstad she would not work at this hospital again. This was corroborated by an email from Randstad stating they had cancelled shifts "as requested". The same email stated they would be unable to offer future shifts as the Claimant was unable to work to stipulations given at a recent appraisal. These were that as of 2 January 2020 the Claimant should not cancel any shifts up to 31 March 2020 and also if she refused to abide by Randstad's policies or client policies. Randstad had asked for a statement of events at Morriston which the Claimant had provided but the Claimant maintained the agency had not been interested in pursuing the incident. Counsel for the Respondent suggested this was not a reasonable view to have formed. The Claimant was challenged that she was seriously suggesting the agency would not be interested in an allegation of assault. The Claimant in response became very upset and reminded Counsel that when she had been assaulted by Ms Waters 8 years previously and complained that had 'not worked out very well for her' and if the largest NHS Trust in Wales had not addressed the allegation then why would an agency.

64. We accept the Claimant believed she had been inappropriately touched in the throat and that it was reasonable for the Claimant to decide to no longer work at the hospital after this incident after she was subjected to detriments for previously reporting an assault by another senior sister. We make no finding that Randstad would have failed to investigate however we did accept that the Claimant had a reasonable and understandable view that nothing would be done given her experiences with the Respondent and the detriments she was subjected to.

Greenstaff

65. The Claimant was unemployed between January – March 2020 and then joined another agency called Greenstaff, operating under the umbrella name Orangegenie where she remains employed to date. During the COVID-19 pandemic the Claimant secured work at the Royal Gwent Hospital in the Intensive Care Unit. The Claimant is an experienced ICU nurse and worked shifts between 14 April 2020 to 21 May 2020. The Claimant could have secured ICU work in England for more money but chose to work at the Gwent as it was close to home and one of the Trusts with which her employer had a contract.

66. From the end of May 2020 the Claimant's evidence was there was very little agency work which was very unusual. The Claimant attributed this too many hospital areas having been closed during the first wave including theatres, surgical wards etc in an attempt to spread to prevent the spread of COVID-19. This had led to a surplus of substantive staff. As the first

wave dissipated there was also less demand for intensive care nurses. The Claimant was furloughed by the agency until October 2020. At this point in anticipation of the second wave of COVID-19 she was contacted by Greenstaff who had not secured a contract with the Welsh NHS trusts but had work available in the North West of England where the Claimant has worked ever since. The Claimant experienced anxiety and reservations about returning to work in mid October 2020 but did so out of a sense of civic duty due to the COVID-19 pandemic and her six years intensive care unit experience. The Claimant has since worked in intensive care units in Oldham Blackpool and Blackburn.

67. The Claimant's work in the North of England is higher paid than she would have received had she continue to work agency shifts in Wales. The Claimant has claimed half of the accommodation costs for when she stays in the North of England as her employer meets the other half.

68. The Respondent's position is that the Claimant has not all taken reasonable steps to mitigate her loss by accepting work in the North of England. Ms Fox's evidence is that there was ample and plentiful agency work in Wales during this period. On balance of probabilities we have accepted the Claimant's evidence about the lack of work for agency nurses between June 2020 and October 2020. The reason we have accepted the Claimant's evidence is that Ms Fox was only able to say what the situation was within her own Trust having never worked anywhere else and further that the Claimant was furloughed by her current employer which suggests that they would not have done so had they been able to obtain work for the Claimant.

69. The Claimant's last shift for Greenstaff was in the middle of February 2021 where she halted all agency work to prepare for this remedy hearing.

Car Hire / petrol costs/ Bridge Tolls/ Accommodation

70. When the Claimant was employed by the Respondent she lived a ten minute walk away from the Heath Hospital and did not need to use a car or public transport to go to work.

71. The Claimant's claim includes 50% of the cost of care hire whilst she worked at Regis and when she travelled away whilst working as an agency nurse.

72. The Claimant also claims the cost of petrol for the journeys undertaken to travel to work between 16 January 2017 and 11 February 2021. These were claimed as amounts spent, referenced to the date of the purchase of the petrol as evidenced by the bank account statements. What we did not have before us was the actual milage and journeys undertaken in respect of each claim. The Claimant and Mr Climer Jones accepted that one of the claims for £99 may have been an error. The Claimant maintains that overall she has still claimed less than if she had claimed pence per mile.

73. When the Claimant worked on agency assignments in England, she incurred Bridge Tolls for travel across the Severn Bridge.

74. Also incurred whilst working as an agency nurse the Claimant had to stay in accommodation which was a mixture of hotels and Air BNB.

Future in nursing

75. We heard evidence, which we accepted, from the Claimant regarding a number of situations she found herself in whilst working as an agency nurse. The Claimant regards herself as unable to report concerns arising in a clinical environment due to fear of being subjected to detriments following her experience with the Respondent. She has taken steps such as leaving shifts mid way through or not working her notice to avoid what she regards to be clinically unsafe areas. She gave an example of working in a particular A&E department but she found herself hiding in the plaster room so as to avoid questioning a junior sister who the Claimant believed was dangerously managing a hypoxic patient. She described how she was overwhelmed by a sense of panic could feel her heart pounding and her hands drenched in sweat. She then fled the scene hoping someone else would intervene. Following this incident she cancelled all pre-booked shifts to the unit. The Claimant believes that her lack of ability to raise concerns is not sustainable and potentially rendering her on occasions unsafe to practice. This was not conduct she would have engaged in prior to the detriments she was subjected to by the Respondent. The Claimant maintains she is unable to work as a nurse indefinitely in a permanent role. This is not only because of her experience with the Respondent but also subsequent employments and placements.

76. The Claimant described the Respondent as subjecting her to a three year witch hunt, accused her of making false allegations and her allegations of assault were denied despite the CCTV footage which the Claimant believed was gas lighting and a form pf psychological abuse. By the time she resigned she was near total mental collapse. She described the three years of working as an agency nurse since her dismissal as doing so whilst “emotionally on her knees” and that the three years of working as an agency nurse have “ground her into the sand”.

Future Loss

77. The Claimant had initially suggested that she wished to retrain as an architectural technologist. There was limited evidence before the Tribunal about this. The Claimant referenced in her schedule of loss the difference in future loss of earnings comparing a nurse with an architectural technologist. The Claimant had been unable to start the course in September 2020 due to the Covid-19 pandemic but her schedule of loss stated she intended to apply when all proceedings had concluded. The Claimant did not deal with this at all in her witness evidence.

Nursing Agencies

78. The Respondent asserts that the Claimant has not mitigated her loss as she has signed up with four nursing agencies which they assert was too few. The Tribunal heard evidence from Ms Carys Fox who is the Respondent’s Director of Nursing Strategic Nursing Workforce. Ms Fox has worked with the Respondent and or its predecessors since 1978. Mrs Fox had not read the liability Judgment and was unable to answer the

Claimant's questions as to whether any action had been taken as a result of the Judgment.

79. NHS Wales advertise all vacancies on a website called NHS Jobs. In addition NHS Wales has commissioning arrangements in place with Agencies. These are set up via a contract schedule by NHS Procurement. We saw the contracts for 2015 / 2016 and what was described by Ms Fox as the current contract. The 2015/16 document listed approximately 20 agencies based in both England and Wales. The current contract provides that travel costs are not reimbursed. The recruitment procedure requires full details of the agency worker's employment history and that where the employment history is not continuous and shows gaps between employers the supplier shall question the agency worker to establish reasons for gaps. It also provides the agency must obtain two references one from the most recent engagement held by the agency worker and must be provided by the previous line manager. The current contract did not list any agencies but we accepted Ms Fox's evidence that it remained around the 20 number.

80. Ms Fox also listed a number of other resources for healthcare employment including private sector hospitals Spire and Nuffield. The Claimant had applied for a role in Spire, informally through a contact at her son's school but not been successful.

81. The Claimant explained that she had undertaken the vast majority of agency work in Wales, apart from only latterly working in England following the second COVID-19 wave. She would not have been aware which particularly agencies placed work in Wales as the list Ms Fox referred to in her evidence is not available to the public. Further, the Claimant maintained that if she was getting enough work with one agency why would she have wanted to join more. She also had on occasions since her dismissal been acutely unwell but has still been able to secure a lot of work via the 4 agencies. The Claimant's evidence was the Respondent's suggestion she should have signed on with multiple agencies was not reasonable as each time she would have had to go through the extensive recruitment process particularly when she was receiving ample work through the agencies she had signed on with. Also if the Claimant changed agencies all the time she would be deemed unreliable and would not be rewarded with regular shifts if the agencies were aware she was going between multiple agencies.

References

82. Following the Claimant's dismissal she provided the names of the two different individuals within the Respondent on her CV who could be approached by prospective employers for a reference.

83. In January 2019 the Claimant had applied to register with Arcadia Nursing. On 7 January 2019 she was informed by the compliance team that they still required one reference. The Head of Nursing at Hywel Dda had provided one already (see paragraph 59 above). The email from Arcadia asked the Claimant to chase Jason Ball, Wayne Parsons and Elinor Gerrard as they "still didn't relied (sic) to my emails." Both Mr Parsons and Ms Gerrard denied they had been approached by Arcadia Nursing. We accepted they

may not have recalled this due to the passage of time or perhaps had not received the request. However we find no reason to disbelieve the written evidence that the compliance officer at Arcadia Nursing had sought references but not received a reply.

84. In March 2019 the Claimant was trying to secure work with an agency called Tripod Nursing. The Claimant had stated on her CV that a reference could be obtained from Wayne Parsons who was the Lead Nurse in the Emergency and Acute medicine directorate since July 2018. This was a directorate within which the Claimant was employed whilst at the Respondent. Mr Parsons was sent an email by Tripod Nursing on 13 March 2019. The email stated as follows:

"Good morning

I have been provided with your details to complete a reference for Jude Climer-Jones, for the time that she worked alongside you.

Please could you complete the attached reference."

85. The attached reference form Mr Parsons was asked to complete was not in the bundle.

86. Mr Parsons replied on 18 March 2019. He stated as follows:

"I do not feel it would be appropriate for me to fill in the reference other than to say that Jude worked here the same time as me. I didn't actually clinically work with Jude. If all you want is confirmation of her working at the UHB, then I will be happy to oblige."

87. Tripod Nursing replied the same day and asked Mr Parsons if there was any way he could confirm the dates which the Claimant worked at the Heath Hospital. Mr Parsons replied that to the best of his knowledge it was 2004 to 2016. These dates were incorrect and accordingly did not match the dates the Claimant had provided to Tripod. The Claimant had not spoken to Mr Parsons beforehand to ask him if he would be willing to be a referee. The Claimant also agreed that she had not worked with Mr Parsons clinically but if there had been concerns clinically (there was no evidence throughout these proceedings of concerns regarding the Claimant's clinical ability) as a senior manager he would have known about this.

88. The Claimant appears to have assumed that as he was the lead nurse she would have expected him to organise someone who did work with the Claimant under his department and jurisdiction to provide a reference. The Claimant agreed that most lead nurses do not work regularly on the "shop floor".

89. Mr Parsons told the Tribunal he would never give a reference for someone he had not worked with clinically. He was authorised to give a reference without checking with HR. He was aware of the Tribunal claim at the time the reference request was received and he shared an office with Mr Durham and described meetings with Ms O'Brien. We accepted his evidence that his knowledge of the claim did not play any part in his decision to give anyone a reference and he would have answered in the

same manner for anyone else that had requested a reference in the same circumstances.

90. Ms Fox told the Tribunal she would be concerned if she received a reference which only contained dates and would go back and ask why she had not received a reference in full. She agreed that the lead nurse would not have knowledge of the nurses' clinical ability within the unit they manage unless they worked together regularly and did not routinely work along side staff. Whilst we found this surprising that the Lead Nurse in charge of a unit such as the main EU unit in a large city would not have clinical knowledge of the nurses who worked under their management, we accepted the evidence of Ms Fox and Mr Parsons and they have the relevant expertise. It must therefore follow Mr Parsons has not given routine references for nurses unless he had cause to work alongside them clinically. Mrs Fox agreed that a Junior sister would have more knowledge of a band 5 on the ward if worked together regularly

91. The Tribunal also heard evidence form Ms Gerrard who had also been contacted by Arcadia Agency (see paragraph 82 above). Ms Gerard was sent an email from Arcadia on 11 December 2018 requesting a reference for the Claimant. The covering email stated the candidate 'must have worked under your supervision'. This time we had sight of the form that had been attached. In section 1 it asked how long the applicant had' worked for you or under your supervision'. Ms Gerrard's evidence was that she replied to Arcadia and advised she was felt she was not a suitable person to provide a clinical reference. It was unclear whether she had explained her reasons for doing so to Arcadia and she had been unable to locate the email to Arcadia. Ms Gerrad told the Tribunal that the reasons she felt unable to provide the reference was that she had not directly supervised the Claimant "to any extent" and she had not worked with her for many years. She agreed she had worked with her clinically.

92. Under cross examination Ms Gerrard agreed she had been a junior sister when she worked at Llandough with the Claimant in 2011 and that would have meant she was the nurse in charge on shift. Ms Gerrad appeared to have interpreted the reference to "supervision" as being something other than day to day supervision. She explained she understood it to mean more in an education type scenario and direct supervision whereas nurses in charge do not generally directly supervise nurses on shift. Ms Gerrad did not speak to anyone when she received the reference request and the only reason she did not wish to provide one was the time lapse. Had Arcadia responded and said they were happy to accept dates she had worked with the Claimant she would have given one.

Pension

93. The Respondent's staging date for auto enrolment was 1 March 2013 but they were permitted to delay the enrolment until 1 May 2016. The Respondent was legally required to undertake automatic full enrolment every three years. The automatic re-enrolment date for the Respondent was therefore 1 May 2016, extended to 30 September 2017 under dispensation available to certain employers.

94. On 22 March 2013 the Claimant opted out of the NHS Pension Scheme due to financial reasons. The Claimant's personal and family finances were in difficulty and she was unable to afford the contributions.

95. The Claimant maintains that she always intended to opt back into the NHS Pension and but for her dismissal she would have done so.

96. The Tribunal had sight of some correspondence the Respondent says was sent to all staff regarding auto enrolment. The Claimant maintains she never received any of the correspondence.

97. The first was a letter dated 1 March 2013. The Respondent called Mr W Evans to give evidence on this point. Whilst Mr Evans did his best to assist the Tribunal he was not in post when these letters were said to have been sent and had been unable to find any documentary evidence to whom they had been sent. He understood they had been sent by mail merge. Copies of the actual letters to employees had not been retained neither had he been unable to find the database that would normally be a record of the recipients of a mail merge.

98. Even if the letter had been received by the Claimant, at that point in time she was a member of the scheme. The letter explained auto enrolment. If the employee was already a member of the scheme (which the claimant was at that time) the changes outlined in the letter would not apply but the Respondent was required to provide certain information. If the employee was not in the scheme (that is eligible but had decided to opt out) the letter informed the employee they were permitted to delay the auto enrolment to 30 September 2017 and they would be automatically enrolled on that date.

99. The letter said they would be writing to employees in that category separately to explain in detail how the changes will impact and the options open to them. Mr Evans accepted he had been unable to find any such letter sent to employees who had opted out.

100. The Claimant did not accept that the re auto enrolment date was 30 September 2017. She relied upon information she had located on the Respondent's website that referred to a date of 1 May 2016. We had sight of this page by way of a screen shot the Claimant took of it on 15 October 2020. Along the top of the web page it stated this site was archived and will no longer be updated. It stated that the auto enrolment date would be 1 May 2016.

101. All of the correspondence with the Pension Regulator confirmed the date for re-enrolment for staff was 30 September 2017 and we find that was the correct date.

102. The important factual issue for us to determine was whether the Claimant would have stayed "opted in" had she remained employed by the Respondent but for the dismissal. In other words, had she not been unfairly dismissed and remained in employment as of 30 September 2017, she would have been automatically opted back in and would have had to have actively opted out.

103. On the balance of probabilities we have determined that the Claimant would have not opted out on 30 September 2017. The reason we have reached this conclusion was her actions in respect of all other auto enrolled pensions since her dismissal in that the Claimant has consistently remained "auto enrolled" and has not opted out of any of the schemes. We have taken into account that the Claimant's financial circumstances following her dismissal were very challenging, with her being at risk of losing the family home and having to take in lodgers but even in these circumstances maintained opting into the various pension schemes on offer. Therefore we accept the Claimant's evidence that she would have remained opted in had she not been dismissed by the Respondent.

Band 6

104. The Claimant has asserted that she had she not been suspended she would have started applying for Band 6 roles. The Claimant had her son in 2011 aged 42 and wanted him to be in pre school before she started to apply for a Band 6 role due to the extra responsibility. The Claimant had secured two equivalent Band 7 roles after her dismissal at Mapfre and Regis.

105. Mr Parsons' evidence was that clinically the Claimant may have met specifications for many band 6 roles. His statement went onto to say as follows:

"**However that would have only guaranteed consideration for a role and wider criteria would have been taken into account when making an appointment. For example, most roles require an individual to have good interpersonal and engagement skills and to be a team player. The extent to which each shortlisted candidate possess these (and other) qualities would have been assessed during the interview process.."**

106. The Claimant had understood Mr Parson's reference to the role requiring good interpersonal engagement skills and to be a team player to imply that she would not have been suitable for not having those skills. It was put to Mr Parsons that in making the above statement he was inferring that the Claimant was deficient in those skills and this was coded language about the Claimant. Mr Parsons denied that was the case and said he had referenced it as an example. He was also asked if this part of his statement in highlighting these skills had been affected by Claimant's actions in bringing the Tribunal claim to which he responded no.

107. Counsel for the Respondent objected to this line of questions on the basis of lack of clarity and that it was a very serious allegation that the witness should be permitted to properly address and understand the question. There was a reference that such questioning could give rise to grounds for an appeal. The Tribunal was of the view that given the extensive criticism of the Claimant's interpersonal skills at the last hearing this was a reasonable question to have asked given how Mr Parsons had worded the statement. Having checked Mr Parsons had understood the line of questioning (which he had) Mr Parsons clarified the answer remained as set out above.

108. We accepted Mr Parson's evidence that the references to interpersonal skills was him setting out examples of other skills than clinical abilities

when deciding if someone would be appointed to a role and was not coded to refer to the Claimant not having such skills.

109. The Respondent maintained that the Claimant could have applied for any vacancy during her suspension. It was common ground she had not done so. The Claimant's position was there had been no point as she was suspended and then remained under investigation for allegations potentially amounting to gross misconduct. Mr Parsons accepted under cross examination that for him personally the fact that someone was under investigation for gross misconduct would have made a difference to considering that individual for promotion.

110. We find it wholly implausible that the Claimant would have been considered for a Band 6 promotion following her suspension given she was under investigation for allegations that were said to amount to gross misconduct and the findings of fact we made about keeping the Claimant away from the workplace.

111. Mr Parsons had checked records to see if there were any advertised band 6 roles between January 2014 – June 2016 but had been unable to find any. Given the passage of time we found this plausible and accepted his evidence in this regard. He gave speculative evidence that there would have been two opportunities at most for a Band 6 position within the Directorate in any one year and they would have attracted between 6-8 candidates. He also accepted that there would have been Band 6 posts available between January 2014 and June 2016 within the EU directorate.

112. The Claimant suggested in her schedule of loss that she missed out on four opportunities during her suspension to be promoted to a Band 6. She suggested in cross examination of Mr Parsons that a number of individuals got promoted to Band 6 roles during 2014 and named Natasha Whyshall, Ellie (surname unknown to a Junior Sister), Kerry (surname unknown) and Vanessa (surname unknown). Ms Davis objected to this question on the basis the case was put as loss of chance to be promoted due to suspension and in relation to specific named people there was no suggestion that there were specific opportunities that others applied for which the Claimant had been denied for the opportunity to apply.

113. There was no evidence in the bundle regarding the promotion of these individuals or if any such promotions had actually taken place.

<u>Lodgers and bank transfers between the Claimant and her husband</u>

114. The Claimant had provided disclosure of her and Mr Climer Jones' bank statements from the date of dismissal to February 2021. The Respondent had considered these in detail and highlighted certain transactions that were raised in cross examination.

115. The Claimant had taken in lodgers some years previously but not at the time of her dismissal. Following her dismissal and their financial difficulties they held off taking in lodgers into the family home for as long as possible but eventually had to take in lodgers once again.

116. Ms Davis put to the Claimant that she only included lodger income in her schedule of loss after the Respondent flagged the limited company records the Claimant had set up. On 31 January 2019 the Claimant and her husband had set up a limited company called "Climer & Jones Ltd". The nature of the business on the Companies House website was letting and operating real estate, HR provisions and hospital activities. It was in essence a dormant company and no income was ever put through the company. The rental from lodgers was paid into Mr Climer Jones bank account and accounted for appropriately. As a result of the Respondent questioning the Claimant about the limited company and whether she had received any income from the company, the Claimant had understood that she needed to give 'credit' in her schedule of loss for money received from renting out a room in the family home to lodgers after her dismissal. These were included on the schedule of loss and the Claimant was cross examined about the lodgers. The Claimant had lodgers for a period of 21 months following her dismissal as she and her husband were in financial difficulty. The lodgers income was not put through the limited company and it was not operated as a business.

Roath Park bank transfers

117. The Claimant was asked about bank transfers between her and her husband's bank accounts with a reference Roath Park. The Claimant explained this was the name of the branch of the bank and it was likely she set up a transfer with that name. The transfers were between husband and wife monthly to cover bills and they treated their income as one pot of money. If the Claimant had been paid she may have needed to transfer money to her husband to cover a bill scheduled to come out of his account and vice versa. We accepted the Claimant's evidence about these transactions on the bank statements. Roath Park is an area of Cardiff with bank branches. There was no evidence of any undeclared income merely transfers between husband and wife to cover bills depending on the times of the month the bills were due to come and when they were respectively paid.

Purchase of car

118. On 9 January 2019 the Claimant purchased a car in the sum of £2800. The Claimant had previously been using hire cars. She was asked why she had not leased a car or borrowed money on finance prior to this and it was suggested this was unreasonable to have hired cars rather than bought one earlier as the hire costs some months were as much as it would have cost to repay a loan. Alternatively Mr Climer Jones should have taken out a loan to buy a car. The Claimant's evidence was with her credit record and as an agency nurse she was unable to get credit and Mr Climer Jones could not have afforded a loan. They could afford £400 at the beginning of the month but could not afford to buy a car outright and they wanted something more than a 'banger' but to suggest they could go and lease a vehicle was "delusional". If the car had not been purchased the Claimant would not have been able to travel to her agency placements.

Other costs incurred

119. The Claimant seeks costs of online training, uniforms, DBS checks and "mandatory union membership" and "Vale healthcare occupational".

Notice pay

120. The Claimant had accrued 6 year's complete years of service at the time of her dismissal on 20 June 2016. The Respondent accepted that she was entitled to receive notice pay. The counter schedule asserted the amount due was 4 weeks at a rate of £2,276 gross per week. Neither of these figures can be correct. The notice pay due is 6 weeks minus the amount paid to the Claimant representing wages between 21 - 30 June 2016

Annual leave

121. The Respondent accepted the Claimant was due sums due in respect of untaken annual leave but there was a dispute as to how much.

122. The Respondent's holiday year runs from 1 April to 31 March. The purpose of this claim, the period under consideration is from 1 April 2014 to 20 June 2016. This spans the holiday years 2014/15, 2015/16 and 2016/17.

123. We had sight of the Respondent's annual leave guidelines in place as date of the claimant's dismissal. This provided that between nought and five years service employees were entitled to 27 days annual leave and eight days bank holiday. After five years service employees were entitled to 29 days annual leave and eight days bank holidays. The claimant worked 36 hours per week compared to full-time hours of 37.5 hours per week and her holiday entitlement therefore needed to be pro rated accordingly. As the claimant had less than five years service between 1 April 2014 and 29 April 2014 (where she gained five years service) she was entitled to 252 hours leave for a full holiday year and therefore this required apportionment for her entitlement for the year 2014/2015.

124. The Respondent's policy provides that holiday pay is calculated on the basis of what the individual would have received had they been at work. Staff who work unsocial hours receive a monthly working time directive payment. For 0- 5 years service the rate is 11.59% and for staff with more than five years service was 12.55%. The additional payment is made throughout the year when the individual staff take leave.

125. If there was a month where unsocial hours were not worked no unsocial hours payment would be made and no working time directive payment would be made.

126. The Respondent submitted that holiday pay should be calculated by reference to basic pay only. The Tribunal took some considerable steps to try and understand the respondent's position in this regard. We directed that the respondent filed an updated position paper and they did so on 18 March 2021. It remains unclear to the tribunal why calculating the unpaid holiday pay due to the claimant that the unsocial hours payments should not be included in the calculations.

127. Our findings in respect of the unpaid holiday pay are contained in the liability Judgment at paragraphs 417-430 and the conclusions at 605-611. We found that the withholding of the holiday pay was a detriment and the Respondent were not entitled to off set the so called overpayment and in doing so were in breach of contract.

128. The Respondent's position that the holiday pay must only be paid on basic rate of pay therefore contradicts the Tribunal Judgment on liability as we found there had been a contractual agreement authorised by Ms Harrison and conveyed in Mr Durham's letter dated 16 July 2015 and that had been reneged upon (detriment 9). Accordingly the Claimant's holiday pay must be calculated to include the unsocial hours allowance.

129. Furthermore in respect of outstanding holiday pay for the year 2014/2015 the respondent's position was that this was not part of the claimants pleaded case and it falls outside of matters to be considered at the remedy hearing. The counter schedule of loss stated that the Claimant's claim had not pleaded the case in relation to 2014/2015 leave year nor such a case had been advanced before the tribunal. The Respondent cites a schedule of loss that did not include the 2014/15 claim. We have revisited the detriments as set out in the liability judgements and note that it does not specify any particular holiday year at detriment 12. It merely states that the respondent has withheld holiday pay. As explained in the liability Judgment the schedule of detriments had taken some extensive effort to agree and contained the claims that were to be determined by the Tribunal. Accordingly we do not find that a schedule of loss produced earlier in the proceedings overrides the schedule of detriments. For these reasons we find that there was no carveout of the holiday year of 2014 in 2015 and that this unpaid holiday pay must be compensated as part of this remedy hearing.

The Law

130. Section 49 ERA 1996 provides:

49 Remedies

(1) Where an [employment tribunal] finds a complaint [under section 48(1), (1ZA), (1A) or (1B)] 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) [Subject to [subsections (5A) and (6)]] 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 complaint 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 or (as the case may be) Scotland.

131. Section 123 ERA 1996 provides:

123 Compensatory award

(1) Subject to the provisions of this section and sections 124[, 124A and 126], the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

……..

(4) In ascertaining the loss referred to in subsection (1) 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 or (as the case may be) Scotland.

132. The statutory cap under S124 is disapplied in claims brought under S103A.

133. The Claimant is under a duty to mitigate her loss and the burden of proof is on the Respondent to show the Claimant has failed to mitigate her loss. We were referred to the case of **Ministry of Defence v Cannock [1994] ICR 918 and Wilding v British Telecommunications Plc [2002] ICR 1079.**

134. Awards must be purely compensatory and not penal.

135. We were referred to a number of authorities regarding the loss attributable to the act or failure to act (the “but for” test) and also apportionment. These are questions of fact for the Tribunal. Essentially, the Claimant should be put in the position she would have been in but for the unlawful conduct of the Respondent.

136. The Court of Appeal gave guidance to Tribunals when assessing future loss of earnings after a discriminatory dismissal in **Wardle v Credit Agricole Corporate and Investment Bank [2011] EWCA Civ 545.** Where it is at least possible to conclude that the employee will, in time, find an equivalently remunerated job (which will be so in the vast majority of cases), loss should be assessed only up to the point where the employee would be likely to obtain an equivalent job, rather than on a career-long basis, and awarding damages until the point when the tribunal is sure that the claimant would find an equivalent job is the wrong approach. This case was also relevant when considering whether an ACAS uplift should be awarded having regard to the overall size of the award.

137. In **Virgo Fidelis Senior School v Boyle [2004] IRLR 268** the EAT held that a protected disclosure detriments is a form of discrimination and it is appropriate to apply Vento guidelines.

138. Guidance on assessment of compensation in injury to feelings is contained in **Vento v Chief Constable of West Yorkshire Police (No2) [2003] ICR 318.** There are three bands. The top band (£19,800 to £33,000) is for the most serious cases where there has been a lengthy campaign of discriminatory harassment. The middle band (£6,600 to £19,800) is for serious cases that do not merit an award in the highest band. The lower band (£660 to £6,600) is for less serious cases such as a one off incident or an isolated occurrence. The Claimant's claim was presented in October 2016 and as such the Presidential Guidance (Vento Bands) provides the appropriate calculation for the Vento Bands for claims issued before 11 September 2017.

139. **Cannock** is also authority for the principle that the Tribunal should not simply make calculations under different heads, and then add them up. A sense of due proportion is required and to look at the individual components of any award and then looking at the total to make sure that the total award seems a sensible and just reflection of the chances which have been assessed (per Morison J at para 132).

140. Aggravated damages can be awarded where aggravating features have increased the impact of the discriminatory act on the Claimant. Underhill P in **Commissioner of Police of the Metropolis v Shaw UKEAT/0125/11/ZT** cites the phrase 'high-handed, malicious, insulting or oppressive' behaviour'. Subsequent conduct such as conducting the trial in an unnecessarily oppressive manner, failing to apologise, or failing to treat the complaint with the requisite seriousness can also give rise to aggravated damages.

Psychiatric Injury

141. It is established in the case **of Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] IRLR 481** that if the claimant subjected to discrimination suffers psychiatric or physical injury the Tribunal has jurisdiction to compensate.

Conclusions

Pecuniary Loss

142. We have concluded that the Claimant's losses to the date of the remedy hearing are wholly attributable to the actions of the Respondent under S123 ERA and / or attributable to the acts which infringe the Claimant's rights under S49 (2) (b ERA.

Intervening acts / chain of causation

143. We do not consider that the Claimant's own voluntary and independent acts and / or the voluntary independent acts of third parties acted as intervening acts which broke the chain of causation for the following reasons.

144. The Respondent relied upon events at Mapfre, Regis, Medgen, Randstad, Cwm Taf, Hywel Dda, Glangwili, Morriston, Royal Gwent and Swansea Bay as "plainly voluntary actions independent of the Respondent's actions and unforeseeable". We do not set these out again here as they are contained in Ms Davis' submissions at paragraphs 32.1 – 32.10 and our findings above at paragraphs 41-72.

145. We do not agree that these were actions independent of the Respondent's actions and unforeseeable. We have concluded that the Claimant has been unable to hold down a substantive position due to a combination of psychiatric and psychological conditions which are attributable to her treatment by the Respondent and the detriments she was subjected to.

146. At the time the Claimant was employed with Mapfre she was suffering from a diagnosed psychiatric condition namely moderate depression. At all other material times since her dismissal she has been suffering from mild depression.

147. We accepted the Claimant's evidence that since her dismissal she finds raising concerns stressful and remains fearful of finding herself in a situation which could be perceived as raising concerns or questioning clinical decisions even if she knows that failure to do so could result in patient harm. Since her dismissal the Claimant has on occasions been unable to cope with the stress and anxiety that nursing invokes that makes her feel she is unable to practice safely anymore.

148. We also take into account Dr Medley's evidence that the Claimant has experienced effects of loss of confidence and mistrust in the managerial system, to which the Claimant has become sensitised, which have made it difficult to commit to a permanent role. One aspect of this is a fear of retribution should she raise what she regards as legitimate concerns about patient safety. Another is her ability to work flexibly, should she be experiencing greater feelings of stress and anxiety.

149. We have taken into account the circumstances surrounding the events the Respondents say should break the chain of causation or amount to an intervening act. However we have concluded that these matters arose due to the Claimant's reaction to situations she was faced with rather than external factors, and that reaction was on each occasion caused by a combination of the psychiatric and psychological symptoms that are attributable to the actions of the Respondent by subjecting her to the detriments. The cause of the Claimant's subsequent inability to retain a substantive role and to raise concerns whilst employed as an agency nurse is due to the detriments she was subjected to by the Respondent. Given what the Claimant experienced after raising concerns at the Respondent we conclude that it was wholly foreseeable that someone subjected to the detriments experienced by the Claimant would experience difficulty and / or an inability to raise concerns without fear of retribution.

Apportionment

150. We reject that the Tribunal should apportion loss of earnings between the Respondent and other employers as we have concluded above it was the Claimant's reactions to situations she faced, caused by the Respondent's conduct rather than conduct of any other employer. Further, we have made it clear above we have not made findings of fact attributing blameworthy conduct to the various employers who employed the Claimant subsequent to her dismissal.

Mitigation

151. We do not agree that the Claimant has failed to mitigate her loss for the following reasons:

152. The Claimant has continued to work in nursing despite suffering from moderate and mild depression and the psychological symptoms as well as the impact on her family life requiring her to travel extensively and stay away from her home. We accepted that she did so for financial reasons and in particular so the family home would not be repossessed.

153. We do not find that the Respondent, through Mr Parsons and Ms Gerrard, refused to provide the Claimant with a clinical reference. The Claimant did not follow an appropriate procedure for requesting a reference from the Respondent. Mr Parsons and Ms Gerrad had reasonable reasons for declining to provide a reference. Mr Parsons did not take appropriate care when confirming the Claimant's employment dates which meant one of the agencies were give conflicting information but the main reason the Claimant failed to secure employment with Tripod and Arcadia was that she was unable to secure an additional clinical reference. However we consider this made no difference to the Claimant's mitigation as she was able to secure other references and secure work with agencies.

154. We conclude the Claimant took reasonable steps to mitigate her loss in her efforts to secure agency work and once she had secure and stable employment with Greenstaff that it was a reasonable step to stay with that agency. It would not have been a reasonable step to have signed up with multiple agencies for the reasons given by the Claimant at paragraph 83 above and also the requirements of the All Wales NHS agency contracts given the challenges the Claimant faced in obtaining references.

155. The Claimant took reasonable steps to mitigate her loss by successfully signing up with four nursing agencies and attempting to sign up with two more. It was not unreasonable to sign up with the number of agencies given the Claimant received constant work from those agencies. Had the agencies not been able to provide the Claimant work we could understand the Respondent's position in this regard however this was not the case, in fact it was the opposite.

156. The Claimant has not failed to mitigate her loss by accepting work in England rather than Wales. Between June 2016 – October 2020 the Claimant has mainly worked in Wales. It is only recently she has accepted placements in the North of England as this is where her employer has secured contracts. The Claimant's evidence which we accepted is that she earned more on these contracts in any event than she would have done accepting placements in Wales. We think on balance it was a reasonable

step to mitigate her loss by continuing in stable employment with Greenstaff rather than try and sign up with a new agency in Wales to secure work particularly as many Welsh based agencies place nurses in England also as well as English based agencies placing work in Wales.

157. The Claimant took reasonable steps to mitigate her loss by choosing to work for agencies where she could pick and choose assignments depending on how safe she felt to practice and release herself from engagements. She could not have done this with a permanent role and this was in effect a coping mechanism that enabled her to remain in work and mitigating her loss. We also accepted her evidence that between June and October 2020 there was a shortage of agency work. We were particularly persuaded by the fact that the Claimant was furloughed and her employer would not have placed her on furlough of work was available.

158. Ms Davis submitted that there was no medical evidence to support a finding that the Claimant was physically or mentally unable to take a full time substantive or employed role or undertake successful regular agency roles and that there can be no other finding than she has failed to mitigate her loss. Ms Davis relies upon Dr Medley's opinion that from November 2016 the Claimant had not suffered from any clinically recognised psychiatric condition that would prevent her from working clinically (see paragraph 37 above).

159. This submission, with respect, would require us to consider Dr Medley's report in a vacuum and only take into account the clinical diagnosis ignoring all of the other psychological factors that we heard evidence on and we are unable to agree with it. The Claimant has worked in two permanent roles and numerous agency placements since her dismissal but this has come at a considerable personal and psychological cost to the Claimant and she only did so, in our Judgment, to prevent the loss of her family home. In these circumstances we conclude the Claimant has taken reasonable steps to mitigate her loss.

Travel costs and expenses

160. Under S49 (3) ERA 1996 the Tribunal may consider any expenses reasonably incurred by the Claimant in consequence of the [loss attributable] to the act.

161. The Claimant maintains that she reasonably incurred travel costs (including care hire, petrol and bridge tolls) as well as accommodation costs whilst working as an agency nurse.

162. The Respondent submits that:

- The petrol costs are not supported by receipts and there appears to have been a concession that the amounts claimed may be inaccurate;
- It is inherently implausible that cars hired or purchased by the Claimant were exclusively used for work and for no other purpose;
- There was no need for the Claimant to travel outside of Wales and incur substantial travel and accommodation costs and her choice to do so amounts to an unreasonable failure to mitigate her loss. The Claimant's

explanation that she could not have used public transport to engagements within Wales due to the supposed unreliability of the Welsh public transport system, is not a reasonable explanation;

- It cost more to hire a car than purchase a car on hire purchase.

163. We have concluded as follows.

164. The Claimant reasonably incurred travel expenses whilst working as an agency nurse for the same reasons we have set out as above.

165. Further we comment on the submission that the Claimant should have used public transport to travel to her assignments. We have noted the geographical distances the Claimant covered in mitigating her loss when working as an agency nurse and our own local knowledge as to the transport links. The Claimant was not working a 9-5 Monday to Friday role. She was working shifts in hospitals across Wales. To travel by public transport from her home in Cardiff to say Swansea or Bangor is technically possible but would have been likely to take many hours each way arriving very late home and requiring overnight stays the night before.

166. We agree that it is implausible the car would be used exclusively for work. Taking a broad-brush approach we award 50% of the cost of the car purchase.

167. We agree that in principle the Claimant should be able to recover the petrol costs of travelling by hire car. We are not satisfied that we have sufficient evidence to award these costs. There has been an acceptance that one of the claims for £99 may not have been accurate. We do not find the Claimant has been dishonest in respect of this head of claim. It is valid however the Tribunal will make an award based on the approved mileage rate of pence per mile and will require a schedule setting out the start and end point, assignment as well as dates for each journey claimed.

168. We agree that accommodation costs should be awarded. Had the claimant not travelled and stayed overnight she would not have been able to work as an agency nurse and thus have mitigated her loss.

Other costs incurred

169. We award the Claimant the sums claimed for online training, uniforms and the DBS checks. We do not make any award for “mandatory union membership” as this would be unlawful to compel someone to be a member of a union and we had no other details. We also decline to award compensation for the expense “Vale healthcare occupational” as we had no evidence on what this expense was.

Band 6 Promotion

170. We have concluded there was zero chance that had the Claimant gone for a promotion whilst she was under investigation for gross misconduct that she would have secured the role on the basis of the evidence we heard from Mr Parsons and Ms Fox as well as the Respondent’s actions of

keeping the Claimant out of the workplace (see paragraph 666 of the liability Judgment).

171. However in our judgment, there is insufficient evidence for us to make a finding that the Claimant has lost the opportunity for a Band 6 promotion. We had no evidence on any specific vacancies that had arisen during this time. Even if he had done so we would then have had to embark on an exercise of estimating the likelihood of the Claimant securing that role which we consider is beyond the realms of the usual speculation a Tribunal has to grapple with in cases such as these.

Future loss of earnings and pension loss

172. We are required to assess what would have happened but for the unlawful acts or failures to act by the Respondent and the unfair dismissal. To do so requires a degree of speculation in which we must assess likelihoods both on the upsides and on the downsides.

173. The Claimant seeks compensation for future loss on the basis of a career change and wishes to retrain as an Architectural Technologist. We heard no evidence on this specifically but it was without doubt that the Claimant's position was that she no longer wished to work in nursing either on a substantive basis or as an agency nurse and the only reason she has done to date is for financial reasons.

174. The Respondent's position is that the Claimant should not be awarded any future loss and that she should have been in a position of fully mitigated her loss of earnings 12 months following the termination of her employment (so by June 2017).

175. The Respondent relies upon Dr Medley's evidence that from a psychiatric point of view the Claimant is able to continue her work in nursing and that has been the position since November 2016. From this date the Claimant has not suffered from any clinically recognised psychiatric condition that would prevent her from working clinically although Ms Davis acknowledges there are residual symptoms of depression and anxiety combined with the psychological effects of loss of confidence and mistrust.

176. We have given this matter very careful consideration.

177. We have concluded that the Claimant will not ever be in a position where she could return to permanent clinical nursing position within the NHS as a direct result of the detriments she was subjected to by the Respondent. We also find that it is reasonable for the Claimant not to return to agency nursing until she is able to undertake the appropriate treatment to resolve her psychological issues, practice safely and feel able to challenge unsafe practices without fear of retribution. In the particular circumstances of this case we do not consider that the Claimant is 'electing' to no longer undertake agency work moreover she is incapable of doing so any further and this does not amount to limiting attempts at mitigation by relying on receipt of compensation from the Respondent.

178. In our judgment, on the balance of probabilities and having regard to all of the evidence before us, we have concluded that two years from the conclusion of these proceedings the Claimant should be in a position to fully mitigate her loss for the following reasons:

179. The Claimant's depression will not be in remission for a period of 6 – 12 months following the conclusion of this case. We do not agree that even though the Claimant is clinically able to perform a nursing role that this amounts to a failure to mitigate in choosing not to do so for the reasons set out at paragraph 159 above;

180. The Claimant now has a formal diagnosis of depression and will have to declare this on future job applications;

181. With the recommended treatment set out in paragraph 38 above, the Claimant should recover to the extent she should be able to challenge decisions without fear of retribution and resolve her psychological issues to a position whereby her level of mistrust will abate to enable her to secure employment;

182. Despite suffering from moderate depression, the Claimant was able to secure two senior Band 7 roles. She must have performed well at interview and had an impressive CV. Her concerns about being able to retain such positions should dissipate with the appropriate treatment as recommended above.

183. We anticipate that although the Claimant cannot return to a clinical setting her skills and experience would be well suited to a non clinical role in the private sector.

184. Future loss of earnings is therefore is to be calculated from the date of the remedy hearing to 30 June 2023, provided the part heard remedy hearing can be completed by 30 June 2021. Pension loss is to be calculated from 30 September 2017 to 30 June 2023.

185. We do not agree with the Respondent's submissions that the Claimant has failed to disclose fundamental documentation that has thus deprived the Respondent and the Tribunal of the opportunity to weigh up, probe and challenge and test the Claimant's evidence. The Respondent refers by way of example to the lack of contracts with Mapfre or Regis, lack of agency agreements (other than with Elite) and no documentation regarding the termination of her employment or engagements but there was other evidence disclosed by the Claimant, including HMRC records and bank statements, payslips, emails setting out employment terms and circumstances surrounding her departures that we consider to be satisfactory evidence of earnings and mitigation. Where evidence has not been provided we have declined to make awards.

186. We also do not consider that income from lodgers should be taken into account when assessing the Claimant's income. This was not income from work or a business.

Non Pecuniary Loss

Injury to feelings

187. In the counter schedule of loss the Respondent acknowledges they accept the findings of the Tribunal that the Claimant was subjected to detriments over a long period of time and acknowledges the criticisms made of it by the Tribunal.

188. Ms Davis warns the Tribunal in her submissions under the heading "preliminary matter of importance" that the Tribunal must guard itself against falling into error by allowing its obvious and perhaps inevitable feelings of sympathy to the Claimant to cloud its analysis of the law and evidence and / or cause the Tribunal to fail to have proper regard t the evidence or lack of.

189. We acknowledge that the role of the Tribunal is not be sympathetic to the Claimant but to make the appropriate awards in accordance with the relevant legislation and authorities.

190. The Claimant was subjected to 10 detriments over a lengthy period between September 2013 –June 2016. She was assaulted by a senior staff member which was subsequently denied by senior managers despite the CCTV evidence and was subjected to disciplinary proceedings for making a false and malicious complaint. She was suspended for raising concerns about patient safety as a result of a pre determined plan between senior staff to discipline her. She remained suspended and under allegations of gross misconduct for 16 months even though the respondent knew there were insufficient grounds and had been advised by their HR Team to drop the allegations. There was collusion at a high level to keep the Claimant out of the workplace during an external investigation into allegations of bullying. The Respondent failed to follow their own Dignity at Work and grievance procedures which led to a protracted and duplicated number of investigations into the Claimant. The Respondent reneged on an agreement that the Claimant would not be financially at a detriment from the protected procedures.

191. This is one of the most serious and sustained cases of systemic bullying this Tribunal has seen. The effect on the Claimant has been devastating. She has experienced suicidal thoughts on more than one occasion and only recently cut off her hair with nail scissors such was her level of distress. The Claimant has experienced the highest degree of hurt feelings, distress and impact on her family life.

192. For these reasons we consider that an award in the top Vento band to be appropriate and set the injury to feelings award at £27,000. In doing so we have had regard to the totality of the award and the need to ensure the everyday value of the sum awarded.

Aggravated damages

193. We consider this is a case where it is appropriate to award aggravated damages and such damages are compensatory rather than punitive. The aggravating features in our Judgment are as follows:

194. There has been no apology to the Claimant. No witness of seniority from the Respondent was called to give evidence on steps taken if any to address any of the findings of the liability Judgment. Mrs Fox, Director of Nursing had not even read the liability Judgment. The Claimant wanted to ask witnesses whether they had read the Judgment and whether any action had been taken as a result but none were able to assist the Claimant.

195. In particular there has been no apology from the Respondent or Mrs Harrison that Mrs Harrison's witness statement alleged that the Claimant had said she hoped that [Mrs Harrison] would "drop dead", when this was wholly incorrect (see paragraphs 382 and 383 of the liability Judgment). We consider that this amounted to the Respondent conducting their case in an unnecessarily offensive manner in asserting in evidence a very serious and plainly wrong allegation that the Claimant had made such a shocking statement.

196. The Claimant's character and behaviour was exaggerated during the hearing (see paragraph 431).

197. The Respondent continued to deny the Claimant had been assaulted during the hearing despite the CCTV footage. The Claimant felt "gas lighted" as a result of this continued denial which added to her feelings of distress.

198. In the circumstances we consider it is appropriate to award the sum of £4,000 in respect of aggravated damages.

Personal Injury

199. We accepted Dr Medley's expert opinion that the cause of the Claimant's depression from 2016 was the protracted disciplinary and other proceedings unreasonably pursued by the Respondent which amounted to detriments.

200. We have had regard to the Judicial College Guidelines, 15th edition, Chapter 4.

201. The Claimant has suffered from depression of varying levels of seriousness over the following periods:

- January – June 2016 – mild
- June to November 2016 – moderate
- November 2016 to date – mild

202. Dr Medley estimates it will take 6-12 months for the depression to be in remission provided the Claimant is able to access the recommended treatment. This would take the Claimant to June 2022. In total therefore a period of 6 years.

203. We consider that the Claimant's depression falls into the "Moderate" category under the JCB guidelines and award the Claimant the sum of £5,500 in respect of the personal injury.

Punitive damages

204. The Claimant seeks punitive damages based on the submission that the Respondent's conduct was oppressive, arbitrary or unconstitutional action by the servants of the Government.

205. Having regard to the decision in ***Virgo Fidelis Senior School v Mr Kevin Boyle UKEAT/0644/03/DM*** in principle exemplary damages can be awarded in certain circumstances.

206. The Claimant bases her claim on a submission that the Respondent has failed to adhere to the "All Wales Whistleblowing Policy" however there was no evidence led on this policy and why the Tribunal should find that the Respondents were acting as servants or agents of the executive in exercising powers or contravening the said policy. The Policy was not before the Tribunal in evidence.

207. For these reasons the Claimant has not met the burden of proof in respect of this head of claim and we decline to make any award.

ACAS Uplift

208. Has the Respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

209. The Respondent accepted that given the liability findings the Respondent has failed to comply with the ACAS Code but submits that given the substantial overlap between the facts relied upon for the non pecuniary loss there should be no uplift at all.

210. The non pecuniary awards namely the injury to feelings and aggravated damages have been awarded in respect of the detriments which did not include the dismissal but did encompass some of the failures by the Respondent to follow their own disciplinary and grievance procedures. Other than detriments 1, 9 and 12 all of the detriments featured failures that could also be deemed to be failures to follow the ACAS Code of Practice on both disciplinary and grievance procedures. Specifically in respect of the disciplinary procedure:

- There was an unreasonable delay in establishing the facts of the case;
- The period of suspension was not brief and was not kept under review;
- The Claimant was not informed of the evidence gathered and that the Respondent had reached a view there was no case to answer.

211. In respect of the grievance procedure there was a complete failure to follow both the Respondent's procedure and the ACAS Code until shortly before the Claimant's dismissal in June 2016 when someone was appointed to investigate the grievance (the grievance had been raised in April 2014).

212. In our judgment, there is still a case for the statutory uplift as the award for the non pecuniary loss specifically excludes the dismissal. The Claimant was unfairly dismissed in circumstances where there were such serious and repeated breaches of the ACAS Code we have deemed it just and equitable to increase the award. In doing so we are mindful of the considering the totality of the award and set the amount of the increase at 10%.

Interest and grossing up

213. Further calculations will be made to address the amounts due and any necessary calculations.

Employment Judge S Moore

Date 15 April 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....21 April 2021.....

FOR THE TRIBUNAL OFFICE