EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4118429/18 (V)

Held on 5 & 6 May 2021 and 12 November 2021

Employment Judge J M Hendry
Members F Parr
A Sillars

Mrs L McNicholas	**Claimant Represented by Mr H Menon, Solicitor**
Care and Learning Alliance	**1st Respondent Represented by Mr C Edward, Counsel**
Cala Staffbank	**2nd Respondent Represented by Mr C Edward, Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal makes the following awards:

(One) The First Respondent shall pay the claimant the sum of £2059 (£1883 plus £226 interest at 4% to 5 May 2020) as loss of earnings to the date of the Tribunal hearing.

E.T. Z4 (WR)

(Two) The Second Respondent shall pay the claimant: a) the sum of £10,776 (£9622 plus £1154 interest at 4% until 5 May 2021) as loss of earnings.

(Three) the First and Second Respondent shall be liable jointly and severally to pay the claimant the following sums:

a) The sum of £10,000 for injury to feelings with interest from the 5 May 2018 until the 5 May 2021.

b) The sum of £12000 in respect to psychiatric injury with interest from the 5 May 2018 until the 5 May 2021.

c) The sum of £7965.50 being future loss of earnings.

REASONS

1. Following a hearing in July 2019 the Employment Tribunal issued a Judgment in relation to liability dated 9 December 2019 and sent to parties on 10 December 2019. That Judgment had found that the claimant had made various protected disclosures and had been the subject of detriments by the first and second respondents as a consequence of her disclosures. These were as follows:

(i). On the 1 May the First Respondent removed the claimant from the care of Z and banned her from any contact with the family.

(ii). On 4 May the First Respondent extended the claimant's probationary period.

(iii). The First Respondent forced the claimant to resign.

(iv). The Second Respondent dismissed the claimant and that dismissal was automatically unfair in terms of section 47B and s.103A of the Employment Rights Act 1996.

(v). The claimant was reported to the General Teaching Council by the First and Second Respondents.

2. There was a considerable delay in bringing the case to a remedy hearing. The principal reason for the delay was both parties awaited the determination of a referral to the GTCS which although made in 2018 had not yet at the date of the hearing been determined.

The issues

3. The remedy hearing was made more complex by the fact that the referral to the GTC had not yet been concluded. The Tribunal's task was to assess the appropriate measure of compensation the claimant should receive arising from the various proven detriments. This matter was also complicated by the fact that the claimant's mental health had been affected both by these detriments made in the lead up to her dismissal and the referral to the GTCS. However, another factor which we could not ignore was the fact that despite the claimant's protestations the GTCS had not dismissed the proceedings but after investigation they had proceeded with the complaint and it is due to be heard by a panel.

4. The claimant argued that she should be compensated for the reduction in value of her pension incurred by her in having her pension paid early which she said was a result of the respondent's actions. She also argued that we should accept that she would have returned to teaching at a senior level or remained with the respondents if she was able to secure as well paid employment with them which would have allowed her to access her pension on retirement as she planned.

5. Prior to the hearing the claimant's solicitors had lodged a witness statement on their client's behalf together with a report from a consultant physiatrist, Dr Haroon Moosa. This report was contained in the Joint Bundle of Documents prepared by parties for the hearing. The Joint Bundle also contained a detailed Schedule of Loss (JB7) and supporting documents. The claimant's representatives had also lodged an application for expenses (JB65) which required to be determined.

6. The claimant had lodged a detailed revised Schedule of Loss (JB p114-120). Our understanding was that the calculations were not in themselves in dispute nor was the attribution of any award either against R1 or R2 (or jointly and severally) but exception was taken to the underlying basis for making such high awards of solatium and in relation to pension loss any compensation at all. Mr Edward argued that the claimant was simply accessing an accrued benefit early and taking advantage of the scheme and that no loss occurs.

Facts

7. The Tribunal made the following additional findings namely:-

1. The claimant was born on 9 August 1963. She originally came from the Inverness area and had moved to England in about 1980. She had always intended to come back to Scotland at some point before or after her retirement. Her teaching qualifications were recognised on both sides of the border. It was likely that she would have readily been able to obtain a teaching post in Scotland at a senior level.

2. In 2016 the claimant's niece who was living in Inverness died suddenly leaving two children aged 2 and 3. The claimant's niece was a single parent. The claimant felt compelled to come back to Scotland earlier than planned to look after the two children. There were legal proceedings involving the children. There was involvement of Social Services. The claimant was assigned by them as being the person responsible for transporting the children between different relatives who had interim joint custody pending a final decision by the court.

3. The claimant was involved in various aspects of the care of the children being a close member of the family. She did not formally have residency/custody rights.

4. The claimant gave up her teaching job as a Director of Learning for Key Stage 4 at Easington Academy in County Durham. At that point she was being paid a salary of £48,899. The claimant was also qualified as a science teacher.

5. The claimant had sought after expertise in the education sector. She was suitable for an appointment for promoted posts in Scotland. The claimant believed that her commitment to her niece's children was likely to be a long-term matter which she estimated to last a few years rather than a few months. The oldest child began attending primary school in September 2018. The youngest child attended nursery school at that point.

6. The claimant was aware that her break from pensionable service in teaching would not result in losing pension continuity if she returned to pensionable service within 5 years of that break (JBp.152). The claimant did not want to resume pensionable employment as a teacher given her commitment to her niece's children. She intended to resume teaching within this period or if the opportunity arose become employed by the first respondents in a senior post by another body providing support for children with special needs. If she had been able to obtain such a post at a salary broadly equivalent to her teaching salary she would have intended staying in this sector otherwise she would have returned to teaching.

7. The claimant is married. Her husband has been unable to work since 2013 and is retired. He is not yet in receipt of a state pension.

8. In 2018 the claimant's finances were stretched. She was covering the cost of a property she and her husband owned in Peterlee and had an outstanding mortgage for a buy-to-let property in Newcastle. She tried to sell the property after she lost her employment but was unsuccessful. The claimant in Scotland entered a property near Dingwall. She had to give up this property after termination of her employment. At this time she was

involved in a lengthy legal process relating to residency of her late niece's young children (JBp.151).

9. The claimant was approved as a supply teacher with Highland Council in 2017 qualifying for a salary of £36,480 pro rata (JBp.193). She did not take up any teaching assignments. The claimant was aware that the first respondent would auto enrol her in their pension scheme and she would be able to transfer her pension contributions to her teacher's pension (JBp.181).

10. The claimant began exploring the possibility of obtaining a more senior position with the first respondent or as a supply teacher or a combination of roles to make up her salary to a level that she had previously earned in England.

11. The claimant was advised following the termination of her employment that she would only get a factual reference. The claimant believed that this would not be sufficient to obtain alternative employment in the same area.

12. In early July 2018 the respondents lodged an application to the GTCS raising allegations of the claimant's fitness to teach (JBp.264-265). This occurred two days after the claimant had initiated the early conciliation to raise employment tribunal proceedings. The letter giving notification of an investigation. It suggested that a PVG referral might be necessary.

13. The GTCS carried out an Interim Investigation (JBp266-277) which was issued on the 21 February 2019. It found that the matter should proceed to a full investigation.

14. A further report dated September 2019 indicated that the grounds for a PVG referral had not been met (JBp278-288).

15. The claimant was advised by the GTCS on the 3 September 2019 that the matter was being referred to a panel as part of their complaints process.

16. A further ‘‘Interim Report’’ on the initial allegations was finalised on 16 April 2020 (JBp290-300).

17. A ‘‘Final’’ Report was completed dated 20 July 2020 (Jbp309-320) and the claimant advised that the matter was progressing to a ‘‘Fitness to Teach panel’’ (JB p324-326).

18. On the 26 August 2020 the GTCS advised the claimant that the complaint would be heard by a Fitness to Teach Panel.

19. The claimant believed that she was unemployable in any role involving the teaching care of children as to obtain such a post she would have to declare the impending referral. The referral included fresh allegations that had not been raised with the claimant. It was alleged that she had formed an “inappropriate relationship with the parents of a child referred to as vulnerable”. The claimant was at this stage the impact had potential impact the referral caused to her career and to her chance of securing future employment given that the allegations there related both to behaviour towards children and adults. The claimant believed that the stigma of being referred was such that she would never be likely to teach again. The stigma of being referred in itself had a long-term impact on the claimant and on her confidence. The claimant believed that the referral contained an inaccurate version of events. During the GTCS investigation the investigators recommended that she should be referred to the relevant Scottish Ministers under the Protection of Vulnerable Groups (Scotland) Act 2007 because they had suspected that she had caused emotional harm to children (JBp.277).

Mental Health

20. The claimant did not have any significant past history of mental health problems until her dismissal. For many years she had held down a stressful and demanding teaching position. He mental health was robust.

21. The claimant had felt stressed just before the death of her niece in 2016. She had been supporting her in a difficult personal relationship. The claimant consulted her GP and was given an antidepressant called Fluoxetine at 20 mg and thereafter at 40 mgs after her niece's death. Her condition gradually improved and she reduced her medication herself. She had stopped taking Fluoxetine by September 2017. The claimant did not take Fluoxetine beyond September 2018 despite continuing family stress and anxiety in particular in relation to the future of her niece's children.

22. In March 2018 the claimant lost her dog. She was not at that point taking medication. She was upset at this event. She would go out at night looking for it. She was working at this time and found it exhausting so took three weeks off work to recover.

23. Following events at work in mid-2018 culminating with her resignation from R1 and dismissal by R2 the claimant felt sick, cold again and was shaking. She was shocked, bewildered and confused at the allegations raised against her. She began having physical symptoms. After leaving one meeting she suffered a panic attack. The various detriments constituted an 'Index' event that led to psychiatric injury.

24. The claimant experienced physical symptoms such as having pins and needles and breathlessness. These symptoms were exacerbated when in July she discovered she had been reported to the GTCS. The claimant has found those proceedings which are continuing to be stressful. She has also found the continuing Tribunal proceedings stressful. These matters are a barrier to her full recovery.

25. From the time of the Index event the claimant found it difficult to sleep. She had recurring bad dreams and a poor sleep patten. The claimant suffered psychiatric injury. She was later diagnosed as suffering from

Adjustment Disorder as a consequence of the various unlawful acts to which she was subjected by R1 and R2.

26. The claimant was prescribed Mirtazaine 30 mgs an antidepressant. In addition, she takes over the counter medicine to help her mood and sleep. Her mental health difficulties have left her anxious and socially withdrawn. She has periodically experienced flashbacks of meetings with managers from R and R2.

27. The claimant is unlikely to fully recover until the GTCS proceedings and Tribunal proceedings are resolved.

28. In January 2019 the claimant's GP arranged counselling for her. This was six sessions of ''Talking Changes'' She was told that she needed face to face therapy which could not be delivered because of the Covid lockdown although she has had two video sessions.

29. Following an overdose of medication in March 2020 the claimant was assessed by the Psychiatric Liaison Team at Sunderland Royal Hospital who put in place a Care Plan for her which is supervised by the Lanchester Road Hospital in Durham. This is continuing.

30. The claimant was referred for counselling and attended six sessions from May onwards. That was interrupted by the Covid Pandemic and Lockdown.

31. At the date of the remedy hearing the claimant was being prescribed Mirtrazapine 30mgs at night and Propranolol 80ms daily which is a betablocker. The latter medication assists with the physical symptoms of anxiety.

Witnesses

8. The Tribunal heard evidence from two witnesses. The claimant gave evidence about her financial affairs and the impact of events on her financially particularly with regards to her pension and the emotional impact of the various detriments and their effect on her mental health. We found the claimant a wholly honest witness who gave her evidence in a clear professional manner and who we regarded as credible and reliable.

9. The Tribunal also heard evidence from an expert witness called by the claimant namely Dr Haroon Moosa a Consultant Psychiatrist working for Lancashire Care NHS Foundation Trust. He prepared a lengthy Report for the hearing (JBp424-458) The Report has been prepared with obvious care and is detailed. We have attempted to summarise the findings broadly under the section headed Mental Health.

10. Dr Moosa was a careful thoughtful witness who we regarded as being credible and reliable. We accepted his conclusions that the Index event which contributed to the claimant's mental ill health was the termination of her employment and the manner in which she was treated by her employers of which the detriments were the core elements.

Submissions

Claimant's Submissions

11. The Claimant's counsel supplemented the detailed Schedule of Loss with oral arguments. He reminded the Tribunal of the facts of the case reviewing the authorities and referring to the original Judgment both in support of his contention that the detriments were particularly serious and had occasioned significant psychological injury and financial loss to his client. The claimant in his view had been ''stitched up'' and the referral to the GTCS was ''retaliation'' for the whistleblowing. He urged the Tribunal to accept that there was no natural cut off point for either head of claim and that the consequences of the

detriments had to be ‘‘taken on the chin’’. He took the Tribunal to the Final Report (JB309/310) prepared for the GTCS and to the merits of those allegations. He was critical of the attitude of those advising the GTCS who had prevented the panel dealing with the matter seeing the Tribunal Judgment because he ventured it was critical of R1 and R2. It could be seen from the investigation that the same witnesses that had given evidence that the Tribunal had rejected were repeating the same flawed evidence before the GTSC. In his submission they were exacerbating the effects of the original detriments. He argued for a whole life loss in the unusual circumstances here.

12. Mr Menon then referred to the Schedule of Loss taking the Tribunal through the various elements of loss. The awards relating to the detriments should be dealt with separately under injury to feelings caused during the employment and injury arising from termination. He referred the Tribunal to the explanatory notes attached to the Schedule (JBp115) incorporating them into his submission. He then turned to examine Dr Moosa’s Report and the impact of events on the claimant. His position was that an award of £35,000 was appropriate for the latter as this was a deliberate and calculated course of conduct.

13. Counsel then considered future loss of earnings staring with the premise that we should accept that the claimant intended returning to the profession within 5 years if she could not gain comparatively well-paid employment with R1 or R2. She was effectively the household breadwinner. She would have been able to secure employment in the salary range £45-48,000). Reference was made to the various tables used for calculation of loss. He then addressed the question of pension loss (JBp117) on the ground that the claimant would have regained employment within this period. The claimant he pointed out has only 29 years’ service out of 35 required for the full state pension and this is an appropriate head of claim.

14. The claimant's Counsel then argued that the initial legal expenses of the GTCS process should be recoverable namely the requirement for the claimant to have representation at the GTCS hearing which directly arose from the final detriment.

15. He submitted that it would be appropriate to award interest on any award in line with practice in discrimination claims.

16. Mr Menon then made an application for expenses referring the written applications and accompanying schedules (JB 475-480).

Respondent's Submissions

17. Mr Edward indicated at the outset that he took no issue with the legal propositions expounded by Mr Menon. He started by examining the detriment being the reference to the GTCS Any consequences of such a reference could not properly be visited upon the respondents. Such consequences did not flow directly or naturally from the detriment. He examined the referral noting that four witnesses interviewed were completely independent and not associated with the respondents. The GTCS delays were not the responsibility of the respondents.

18. Turning to the Schedule of Loss Counsel advised that he had no difficulty with the methods of calculation. Past lost was he said unobjectionable but he took issue with the basis on which future loss was calculated. There was he said very little evidence to support the contention that the claimant would return to full time teaching in the evidence She registered as a supply teacher in September 2017 but did not pursue this avenue. This, he suggested, casts some doubt on her intention to return to teaching. He suggested that the claimant had changed her career and had intended to stay in Scotland. Counsel also queried if there was sufficient evidence that the claimant would fill posts on the salary range suggested which seemed more applicable to the higher salaries paid in England.

19. Counsel also expressed difficulties with the medical evidence which did not in his view support life-long loss. The Report does not say the claimant will never work again. The impediments to her recovery appear to be the GTCS referral and the current Tribunal proceedings. In December 2019 it was being suggested that a return to teaching could take place within 12-24 months.

20. Mr Edward then addressed pension loss. The claimant was not intitled to CPI uprating. Her pension was index linked. He did not see any legal basis for a recovery based on pension loss. The claimant has had the benefit of this sum and it is not properly a separate head of claim the matter has to be assessed as a ‘‘package’’. (Aegon v Roberts) There was he continued no basis for a claim of loss of state pension it was in any event not pled in the ET1.There was no evidence she would lose the full pension. Counsel submitted that the injury to feelings had to reflect the original Judgment and it’s terms. It should not be swayed by Mr Menon’s submissions of a campaign of retaliation against the claimant or that they were in his words ‘‘gunning’’ for her. He then turned to examine the injury to feelings element considering the medical evidence and concluding that the actions of the GTCs was at least as significant in any injury to feelings and long term upset. In his submission looking at the matter in October 2018 this was a ‘‘middle band’’ case and an award of £12500 was appropriate. He reminded the Tribunal that there was no claim for injury to feelings in unfair dismissal claim. There was no claim for personal injury and no evidence of serious psychological injury for example that a psychosis had been triggered.

21. In relation to the claim for expenses to the GTCS Counsel indicated that he opposed any award. His position was that it was up to the claimant who she instructed, if anyone, to attend the GTCS. Legal representation was not required.

22. The application for expenses was opposed. It would not be appropriate to grant them. There were serious allegations that were no challenged such as taking care of a child overnight. There was a prima facie case for referral. There was evidence from third parties, the application was legally assessed before proceeding and the claimant made no attempt to mediate the case when it was initially referred to ACAS under the early conciliation process.

23. We would also record that we considered the response lodged by the respondent's against to the Schedule (JBp113).

Discussion and Decision

24. There was no dispute as to the principles that we should apply in assessing remedy. We bore in mind that the purpose was compensatory and not punitive and that the aim of compensation is that ''as best as money can do it'' to put the claimant into the position she would have been in but for the unlawful conduct.

25. It was common ground that any compensation should be made on the basis of the test reiterated by the Court of Appeal in the case of ***Essa v Laing Ltd*** namely that the claimant should be compensated for the damage or loss which was caused by or arose naturally and directly from the wrongful act or as in this case acts causing detriment. In relation to injury to feeling the Tribunal had regard to the case cited to us of the ***Commissioner of Police for the Metropolis v Shaw*** (UKEAT/125/11) which is authority for the proposition that compensation for unlawful detriment should be dealt with on the same basis as a claim for unlawful discrimination. There are broadly two elements namely injury to feelings (and in this case psychiatric injury) and financial loss.

26. We had to consider whether the claimant's loss was in some way interrupted by supervening events in particular the proceedings before the GTCS. We were referred by Mr Menon to the cases of ***Beart v HM prison Service***

UKEAT/0279/04/SM and to ***Ashan v The Labour Party*** UKEAT/0211/10/ZT which he submitted bolstered his argument that there should be no cut off here as contended for by the respondent's Counsel.

27. In ***Beart*** (a case dealing with disability discrimination) the issue was whether or the chain of causation was broken by her later unfair dismissal. This argument was rejected by the court which held that it was not. At paragraph 40 of the Judgment H.H.J Ansell recorded: *''There was the clearest evidence in this case that the psychiatric harm caused by the act of discrimination and its impact upon the Respondent's ability to work continued far beyond the date of the unfair dismissal and in the absence of a fair dismissal we see no reason why the chain of compensation should be broken at that date''.* Mr Menon argued that this was an analogous case. The case of ***Arshan*** raised a number of difficult issues in relation to causation. In that case the claims arose from the claimant's suspension by the Labour Party and the losses that properly flowed from what was found to be race discrimination. The EAT considered both ***Essa*** and ***Beart***. It accepted the employer's position that the fact that the claimant was not selected to stand for Parliament in 2004 was not connected to earlier events but to ''subsequent unconnected events'' and thus the chain of causation was broken. Mr Menon urged us to find that the actions of the GTCS did not break the chain of causation. As in ***Beart*** the claimant was still suffering the psychological effects of the employers' actions.

28. This is not an easy matter to assess. We do not wholly accept Mr Menon's position nor indeed Mr Edward's. As in ***Beart*** we accept that the claimant is still suffering injury because of the events leading up to her dismissal and it's after effect including the reference to the GTCS. However, we cannot ignore the fact that the GTCS which is a statutory body with it's own processes and appeals has begun proceedings. Whatever the Tribunal's views on the merits of the evidence against the claimant (which were set out in the merits Judgment) they must have been persuaded that there was sufficient material before them to proceed after they had concluded their own interim

investigation on 21 February 2019 (JB p277). It was in their competence to lawfully act in that way presumably after an assessment of the *prima facie* case against the claimant. Mr Menon's argument was that we, as a Tribunal knew that that case was not made in good faith and that this did not constitute an intervening event. We noted that in ***Arshan*** the Judge referred to later ''unconnected events'' interrupting causation. This matter a difficulty in that we have found that the referral was not made in good faith and was a detriment and accordingly we cannot just ignore the GTCS complaint.

29. We were tempted to agree with Mr Menon's analysis but on reflection find that we cannot do so. Although a referral may not be made in good faith that does not necessarily mean that there is no factual basis alloying the referral to be ultimately upheld. The evidence that led to us finding a detriment was the claimant's evidence that the respondent's would know that such a referral in itself would be damaging. If the referral had been disposed of in the claimant's favour then she would have been in a stronger position to succeed in this argument. We were not asked to sist the case to await the determination of the referral so we must reach our decision on the basis of what is before us which is that the current 'live' referral has a continuing effect on the claimant's ability to put these events behind her and for her condition to resolve.

30. We were also mindful that in damages there should be no double recovery if possible and that we needed to examine the effects of the detriments singly and cumulatively and as best we could remove the impact of the continuing GTCS referral and Tribunal proceedings. In some cases upset or distress caused by unlawful acts can subside within relatively short periods but it is clear that in this case the claimant was left with long terms feelings of humiliation and loss of self- esteem as recorded in some detail in Dr Moosa's report.

31. The Tribunal, with reluctance, reached the view that although psychological injury attributable to the detriments continued unresolved the GTCS referral

must be considered particularly the lengthy period the claimant has waited to have those matters resolved before the GTCS and the impact of that alone. We must disentangle this in some way from our assessment of loss both as to injury to feelings and financial loss. In relation to the latter it is the GTCS's investigation that the claimant believes effectively makes her unemployable and has been the most damaging. It strikes at her own self- image as a professional. She believes that this prevents her from working both in the teaching profession or in support services and thus that is a break in causation for financial loss but the effects of the respondent's actions do still continue to have an impact.

Injury to Feelings

32. The assessment that the Tribunal required to make was to look at the impact the various detriments had made on the claimant particularly to her mental health. The claimant held down a demanding and no doubt stressful teaching position for many years without any indication that she had difficulty in coping or was not in robust mental health. We take fully into account her background circumstances leading up to these events for example the fact that she was supporting her mother and her husband did not keep good health. We noted that before the events we are concerned with the claimant had previously became unwell following the death of her niece and the difficult situation that caused regarding the care and future care of her niece's children.

33. Dr Moosa was challenged regarding the conclusions he had drawn. He had access to the claimant's medical notes and was in a position to consider the claimant's medical history. He compares her past (being able to cope with a highly pressurised role) and stressful events such as her divorce with her now fragile mental health. He acknowledges, as did the claimant, that the suicide of her niece caused her to seek medical assistance from her GP for mental health problems and led to her being be prescribed an anti-depressant at a relatively low dose. She gradually weaned herself off the medication and did not take it beyond September 2017 although she again asked for and was

prescribed a course of anti-depressants in March 2018 when her dog was lost.

34. We accepted the claimant's evidence and that of Dr Moosa that she had not suffered from any significant or continuing mental health issues until the events leading up to the termination of her employment. At that point the various events seemed to overwhelm her.

35. In his report the Consultant Psychiatrist went on to consider whether the claimant was suffering from any recognisable psychiatric illness and if so it's date of onset and whether it was an exacerbation/aggravation of any pre-existing condition. We had to consider how the condition diagnosed by him affected the claimant's day-to-day activities and employment. Finally, we had to take a view on whether the dismissal and detriments suffered by the claimant assigned by the Tribunal caused or exacerbated or aggravated or otherwise contributed to any current psychiatric condition.

36. The chronology of events was known to the Tribunal from the merits hearing although that hearing did not focus on the impact of those events on the clamant in the same way as the evidence at the remedy hearing did. The psychiatrist took a history from the claimant which accorded with the evidence we heard from her and our own knowledge gleaned from the merits hearing as to the impact of events on her. The claimant made reference in her statement to experiencing a panic attack and feeling "utterly devasted" and used words like ''intimidated'', ''cornered'' and ''unsupported'' to describe events (p418) He concluded that the ultimate dismissal was the Index Event that led to psychiatric injury. The consultant psychiatrist concluded the claimant was suffering from adjustment disorder. He wrote:

> "*Adjustments Disorder (ICD 20 code; F43.2) "R states the subjective distress and emotional disturbance, usually interfering with social functioning and performance arising in the period of adaptation to a significant life change or a stressful life event. Individual pre-disposition or vulnerability plays an import role in the risk of recurrence*

> *and the shaping of the manifestations of adjustment disorders, it is nevertheless assumed that the condition would not have arisen without the stressor. The manifestations vary and include depressive mood anxiety or worry (or a mixture of these), a feeling of vulnerability to cope, plan ahead or continue in the present situation, as well as some degree of disability and the performance of daily routine.*"

His view was that the onset of the condition followed on the significant stress and trauma she experienced when she was dismissed in 4 May 2018.

37. However, we need to consider not only the impact of the GTCS referral but subsequent events which have prevented the claimant recovering in Dr Moosa's opinion. These events cannot be underplayed. There have been threats to report her to the Scottish Protecting Vulnerable Groups Scheme which has forced her to disclose the referral to family members. In addition, she had had to endure the long running process she is in with the GTCS and the failure by her to either short-circuited or have the proceedings ended. There is also the continuing stress that she must feel because of the financial impact of having to defend herself in these proceedings and the cost of the Tribunal proceedings.

38. Dr Moosa would not be directly drawn on the question of how long it might have taken for the claimant to recover from the events of May 2018 if there had been no GTSC referral. He agreed with the suggestion of the respondent's Advocate that if there had been no further stressors then a recovery period of between 12 and 24 months would be reasonable if appropriate support could be put in place.

39. In summary although we do not discount the initial referral to the GTCS we do not accept that we can ignore the severe impact those proceedings have and would have had anyway and on her ability to recover from the detriments caused by the respondents. At the date of the members meeting the proceedings had been continuing for over three years with the concomitant impact on the claimant's mental health that we have described.

Quantum

40. In approaching our assessment of these matters we noted that there was no dispute that the applicable uprated ‘‘Vento Bands’’ that applied in 2018 as et out in the detailed Schedule of Loss.

41. Despite our sympathy for the claimant we cannot agree that this is a case where the top band is engaged. We considered the reference in **Vento** that the top band should be reserved for only the most serious cases such as when there has been a lengthy campaign of discriminatory harassment. That is not the case here where the detriments cover a relatively short time span and whilst upsetting and undermining of the claimant are not either cumulatively or singly serious enough for that band.

42. As noted earlier we had some considerable debate about this matter and how the referral and role of the GTCS impacts on these matters which we had to try and disentangle. Our view was that ending the causation of loss at the date of the referral was not the correct approach given that the merits Judgment had held that the referral itself was a detriment. A better approach we concluded was to look at the point at which the continuation of the complaint was a matter in the hands of the GTCS. That properly seems to be in February after they had completed an interim report and concluded that the matter should proceed. That decision is in our view significant and is the intervening act that halts the chain of causation. What this means is that we considered that if the complaint had at that point been rejected it would have taken the claimant between 12 months and 24 months to fully recover from the Index event. We have no doubt that the continuing GTCS referral had had a significant effect on the claimant’s health and mental well- being but that cannot be fully laid at the door of the respondents.

43. We came to the view, although reluctantly, that this was a serious case but one that is appropriately dealt with in the middle band to compensate the

claimant for the anger distress and upset felt by her. We cannot separate the responsibility of the two respondents who we observed in the original Judgment acted effectively as one organisation nor were we asked to do so. In our view the appropriate award is the sum of £10,000. We also considered the appropriate sum for psychiatric injury bearing in mind that there should be no double recovery. It was accepted that the bands for Psychiatric Injury we should consider should be between £17,500 and £51,400. Our understanding is that this would cover a stand -alone claim and we must take into account the award for injury to feelings and to discount the impact of the GTCS post the referral. Using as a guide Dr Moosa's view that recovery (absent any stressors) would be 12-24 months we concluded £12,000 would be the appropriate sum to award.

Other Awards and Schedule of Loss

44. It was accepted that past loss of earnings with R1 would be properly calculated at £1833 and £9622 with R2. As discussed above we make no award for loss relating to the early cashing in of the claimant's pension or loss of a future occupational Pension or State Pension. The claimant is however entitled to loss of income for a period ending with the GTCS becoming seized of the issue in February 2019. There is an element of speculation in any assessment of future earnings. The claimant hoped to increase her paid hours but we had no evidence particularly from the respondent's whether this was likely or not. We were left with what the claimant had been earning up to May 2018. Her future loss of earnings with the first Respondent would accrue at the rate of £153.37 (as assessed in the Schedule) and £66.36 per week with the second. The period is 42 weeks which gives us £6441.50 (£153.37 x 42) loss of future earnings with the first respondent. The claimant only worked during the school year with the second respondent. The school year in Scotland starts usually the second week of August and taking off two weeks for the October Holidays and a week at Christmas/New Year and this gives us 23 weeks. The loss is therefore £1524 (£66.26 x 23) with the second which was agreed to be joint and several.

45. We accepted the calculations given in the Schedule and the application of interest at 4% on the detriment awards given that they are akin to discrimination awards.

46. We do not regard the claim for expenses in relation to the GTCS referral is well founded. We held that the application was made in bad faith and malicious but once the GTCS is engaged they appear to have some assessment of the matter and conclude there is as it were a possible case to answer then the that interrupts causation and it would not be appropriate to award compensation especially as the process is continuing.

Application for Expenses

47. The claimant's Counsel made an application for expenses (costs). The Rule governing such applications is Rule 76:-

> "*When a costs order or a preparation time order may or shall be made*
>
> *76(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that -*
>
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or(b)any claim or response had no reasonable prospect of success*."

48. Although there have been changes to what could be described as the expenses regime over the years an award is still the exception rather than the rule. There are good policy grounds for this ensuring that litigants are not deterred from making claims by the fear of incurring expenses if they lose.

49. The terms of Rule 14(1) of the earlier 2001 Rules used the same formulation as later versions of the rules namely that the trigger test was acting '*vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by a party has been misconceived*'.

50. In most cases the unsuccessful party will not be ordered to pay the successful party's costs; see ***McPherson v BNP Paribas (London Branch) [2004] IRLR 558*** per LJ Mummery at paragraphs 2 and 25:-

> "*Although Employment Tribunals are under a duty to consider making an order for costs in the circumstances specified in Rule 14(1), in practice they do not normally make orders for costs against unsuccessful applicants. Their power to make costs orders is more restricted than the power of the ordinary courts under the Civil Procedure Rules; it has also for long been generally accepted that the costs regime in ordinary litigation does not fit the particular function and special procedures of Employment Tribunals. It is, therefore, not surprising that the Employment Tribunal Rules of Procedure do not replicate the general rule laid down in CPR Part 38.6(1) that a claimant who discontinues proceedings is liable for the costs which a defendant has incurred before notice of discontinuance was served on him. By discontinuing the claimant is treated by the CPR as conceding defeat or likely defeat. The Tribunal rules of procedure make provision for withdrawal of claims in Rule 15(2)(a), but the costs consequences are governed by the general power in Rule 14*."

51. The then President of the EAT, Mr Justice Burton in ***Salinas v Bear Sterns International Holdings Inc UK/EAT/0596/04DM*** noted at paragraph 22.3 that "*something special or exceptional is required*" before a costs order would be made and, even if the necessary requirements of Rule 14 are established, there would still remain a discretion of the Tribunal to decide whether to award costs. The matter is one for the Tribunal's discretion. In ***Benyon & Others v Scadden [1999] IRLR 700*** it was made clear that the discretion given to Tribunals and courts is not to be fettered.

52. The starting point is to examine the facts found by the Tribunal in the Judgment dealing with the merits of the case and the ultimate decision made. This is a case where the Tribunal found that the principal reason the claimant

was treated the way she was related to her making Protected Disclosures and that the allegations made against her even if true would have been dealt with internally by guidance or counselling. The claimant was, although a highly experienced secondary school teacher, new to this sector and although highly regarded, initially at least, had only been working full time for R2 since December 2016 and for R2 in 2017 by the time of the first incident in early 2018.

53. The managers of R1 and R2 we found to be unsatisfactory witnesses in many ways. The respondent's main client/funder was the Highland Council which put those mangers in a sensitive difficult position when disclosures were made about the Council's staff and practice. There was no acknowledgement by them of this pressure. The core finding is that we concluded that the claimant would not have been dismissed in ''ordinary'' circumstances and that it was the desire to pacify the reaction of the Council to the disclosures that was the principal reason for the claimant's treatment including her summary dismissal.

54. However, it was argued that the respondent would not have had any reason to act in this way had it not been for the complaints that had been made. This was an important factor. Unfortunately, we were hampered in any assessment because of the deficiencies in the investigation and no evidence led from the authors of the complaints or from Mr Coulston of Highland Council who seems to have been closely involved in matters.

55. We simply cannot go as far as the claimant's Counsel invites us to when considering the actions of the respondent's managers. We recall that whatever deficiencies there were in the respondent's respective positions and evidence the claimant herself accepted that she may have misjudged some matters. She believed that the complaints were self-serving. Nevertheless, those complaints made against her practice came from third parties and were not fabricated by the respondents although completely mishandled by them. Even if we were to hold that the Rule was engaged, which although reluctantly

we do not, expenses remain the exception in Tribunal cases and we would not have awarded the claimant expenses here.

Employment Judge **J Hendry**

Date of Judgement **26 November 2021**

Date sent to parties **29 November 2021**