



# EMPLOYMENT TRIBUNALS

**Claimant:** Dr S Mann

**Respondent:** Dr F Mulder and Mr R Laver t/a Helios Medical Centre

**Heard at:** Bristol

**On:** 14 March 2022 and  
30 March 2022 in chambers

**Before:** Employment Judge Street  
Ms G Meehan  
Ms J Kaye

## Representation

**Claimant:** Mr James Bromige (counsel)  
**Respondent:** Mr Simon Tibbitts (counsel)

## JUDGMENT

The hearing is adjourned, pursuant to the claimant's application, for further evidence and submissions, to consider in particular future loss and pension loss.

The following are the findings of the Tribunal far.

### Findings

In respect of the claim for detriment on the ground of protected disclosures contrary to section 47B of that Act, the Tribunal proposes an award of £31,500 in respect of injury to feelings, inclusive of aggravated damages. Further submissions are invited on the question of taxation and grossing up.

Past financial losses have been calculated to 11 March 2022 but continue.

The Tribunal has not determined the ACAS uplift or interest.

The Tribunal has made the following findings:

Notice pay nil – fully mitigated

*Detriment*

Injury to feelings	£21,000
Aggravated damages	£10,500

*Unfair dismissal*

Basic award (4 years x 1.5)	£3,150
Loss of statutory rights	£1,300

## Past losses to 11 March 2022

2019/20	4,144
2020/21	8,424
2021/22	889

Total	£13,457
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Offset for overpayment July 2019	£1,331
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Past losses to 11 March 2022	£12,126
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A further calculation will be required for the final hearing

The calculation and future losses are based on the following

*20 July 2019 to 31 January 2022*

- Dr Mann would have secured salary of £9,000 per session for four sessions per week from 20 July 2019
- Locum earnings are to be included in the calculation of losses
- Locum work would have been negotiated to be £80 per hour with no triage premium from 20 July 2019, over sessions lasting four hours.
- She would have worked some 26 four-hour sessions per annum on that basis
- Locum earnings would have been £8320 per annum, before expenses or tax/national insurance ("NI").
- Self-employed earnings would be based on expenses at 9.69%
- Self-employed earnings would be pensionable.

*1 February 2022 to 31 December 2024*

- Dr Mann would have secured salary of £9,400 per session for five sessions per week from 1 February 2022.
- She would have earned £4,160 in locum fees, before expenses or tax/NI.
- Self-employed earnings would be based on expenses at 9.69%.
- Self-employed earnings would be pensionable.

*1 January 2025 to 31 December 2030*

- Dr Mann had a 75% chance of securing a GP partnership role by 1 January 2025.
- She would not have undertaken locum work as a GP partner.
- She had a 25% chance of continuing as a salaried GP for a further five years.
- As a salaried GP, she would have had salary increases.
- As a salaried GP, her locum work would have continued as above, but her fees would by 2025 have been re-negotiated.
- Self-employed earnings would be pensionable.
- Expenses on self-employed earnings would be 9.69%.

*From 1 January 2030*

- By 1 January 2030 Dr Mann will again have achieved the status and associated remuneration levels that she had planned to achieve by January 2025.
- There will be continuing losses including to pension because of the set back to her career and the associated financial losses over the whole period.

The level of the ACAS uplift has not been considered in relation to the financial losses, because the overall level of the award requires to be taken into account in assessing the just and equitable sum.

## **REASONS**

### **1. Brief History of the case**

- 1.1. The hearing on liability in this case concluded on 5 March 2021.
- 1.2. The judgment was issued on 24 March 2021. The Tribunal held that Dr Mann had been subjected to detriment contrary to section 47B of the Employment Rights Act 1996 ("ERA 1996"), that she had been constructively and unfairly dismissed and that that dismissal was automatically unfair pursuant to section 103A of the ERA 1996, and that she was entitled to notice pay.
- 1.3. The remedy hearing took place on 14 March 2021.
- 1.4. Judgment was reserved.
- 1.5. Given the terms of the findings so far, it has not been possible to finalise the figures in particular in respect of future loss, pension loss and the level of the ACAS uplift. A telephone case management hearing has been scheduled for directions for the future case management to be given.

## 2. Evidence

- 2.1. The Tribunal heard from Dr Sonia Mann and from Marc De Battista, her partner.
- 2.2. The Tribunal read the documents in the bundle of 346 pages referred to including the additional bundle of 28 pages admitted following argument on 14 March 2022, discussed more fully below.

## 3. Issues

- 3.1. The issues were initially identified at a hearing on 13 April 2021 conducted by Employment Judge Bax. The costs claims have since been compromised. The issues were again considered at the telephone hearing of 10 December 2021 conducted by Employment Judge Street

### Constructive Unfair dismissal

- 3.1.1. Dr Mann does not wish to be reinstated and/or re-engaged
- 3.1.2. What basic award is payable to Dr Mann, if any?
- 3.1.3. If there is a compensatory award, how much should it be? The Tribunal will decide:
  - 3.1.3.1. What financial losses has the dismissal caused Dr Mann, including as to the level of previous earnings and prospective earnings had the employment continued or by reason of alternatives that have been lost to her?
  - 3.1.3.2. Has Dr Mann taken reasonable steps to replace their lost earnings, for example by looking for another job?
  - 3.1.3.3. For what period of loss should Dr Mann be compensated; to include any impact of stigma?
  - 3.1.3.4. How does the ACAS Code of Practice on Disciplinary and Grievance Procedures apply, was there unreasonable failure to comply with it and is it just and equitable for that to impact on the award; if so by what proportion up to 25%?
  - 3.1.3.5. The effect of the dismissal on her pension.
  - 3.1.3.6. Does the statutory cap apply?

### Wrongful Dismissal

- 3.1.4. What is Dr Mann's entitlement to pay in respect of the contractual notice period?

### Detriment (s. 47B)

The detriments upheld were:

- 3 July 2019 – alleged unilateral cancellation of Dr Mann’s locum sessions by Dr Mulder (without consultation or explanation)
- 3 July 2019 – alleged unprofessional and disrespectful conduct towards / treatment by Ms Friis when the issue of the unilateral cancellation of the locum shifts was raised by Dr Mann
- 12 – 19 July 2019 – failure to deal promptly or at all with Dr Mann’s grievance (Dr Mulder and / or Mr Laver)

- 3.1.5. What financial losses has the detrimental treatment caused Dr Mann?
- 3.1.6. Has Dr Mann taken reasonable steps to replace their lost earnings and pension, for example, by looking for another job.
- 3.1.7. For what period of loss should Dr Mann be compensated?
- 3.1.8. What injury to feelings has the detrimental treatment caused Dr Mann and how much compensation should be awarded for that?
- 3.1.9. Is it just and equitable to award Dr Mann other compensation.
- 3.1.10. Should Dr Mann be awarded aggravated damages?
- 3.1.11. How does the ACAS Code of Practice on Disciplinary and Grievance Procedures apply, was there unreasonable failure to comply with it and is it just and equitable for that to impact on the award; if so by what proportion up to 25%?

#### **4. Findings of Fact**

- 4.1. Dr Mann has 19 years of experience as a General Practitioner (GP) and 10 years of experience working in NHS practices in the Bristol area.
- 4.2. She was employed at Helios Medical Centre from 1 June 2015 until her resignation on 19 July 2019.
- 4.3. At the effective date of termination of her employment, Dr Mann was contracted to work 4 shifts per week at the rate of £8250 per shift per annum. That was £33,000 gross per annum, or £634.62 per week, £499.57 net per week. She had reduced from 5 shifts from the start of June.
- 4.4. She had entitlement on a pro rata basis to paid holidays of six weeks plus bank holidays, and a week’s study leave. She was entitled to sick pay, for a period unspecified in the contract but her expectation was at least two months.
- 4.5. She was a member of the 2015 NHS pension scheme when employed by the respondent and made contributions to the same scheme as a self-employed locum GP. That is a career average scheme, so a drop in earnings will eventually be reflected in reduced pension.

- 4.6. Having reduced her salaried GP shifts from 5 to 4 per week from 1 June 2019, she should have been paid £2750 per month gross but continued to be paid £3437.50, based on the previous five shifts weekly.
- 4.7. She was overpaid for the months of June and July because her earnings continued at the previous rate.
- 4.8. In addition to her contracted salaried work, Dr Mann undertook locum work to the respondents. It was a well-established practice for the surgery to rely on locums to cover shifts and salaried GPs were regularly used for that as well as others.
- 4.9. After her resignation on 19 July, Dr Mann took some weeks to recover. She had been off sick since 3 July.
- 4.10. She resumed locum work at other practices in late August 2019. She was anxious about making up the loss of income at short notice.
- 4.11. She was concerned about her financial position, given the uncertainty of locum work with its risk of cancellation. She overbooked herself, leading to her being overstretched, in order to make sure she had an adequate income.
- 4.12. She started doing locum work at a local practice in November with a view to becoming a salaried GP.
- 4.13. The response was served in December 2019.
- 4.14. On reading the allegations – extreme, unfounded, potentially career-ending and at the least threatening severe damage to her reputation - she had an immediate recurrence of the anxiety and distress associated with the events of July 2019, with flashbacks.
- 4.15. She found herself lacking confidence and resilience and the ability to tackle the issues that arose at work, fearing a recurrence of the treatment she experienced at Helios when she reported concerns. She was again losing sleep, lying awake with racing thoughts, waking her husband to help her. She found she could not raise even simple issues, asking him to check her emails before sending them.
- 4.16. She started seeing a therapist privately in February 2020.
- 4.17. She stopped working in that local practice. She resumed locum work at other practices.
- 4.18. She kept an eye out for salaried roles consistent with living where she did and her obligations to her family. There were few possibilities. She applied for a salaried GP position with partnership prospects and accepted the role when offered. She was warmly recommended for the post by a fellow GP and former colleague at Helios, who wrote,

“I can tell you with all honesty that she is a truly superb doctor – both with regards to her clinical skills as well as her interpersonal and communication skills. I couldn’t recommend her highly enough for any GP role.”

- 4.19. That is consistent with the documented and oral evidence of the Helios partners, notwithstanding the terms of the ET3. Both saw her as a real asset to the practice.

- 4.20. The initial letters to her about the job offer from her prospective employers were warm and expressed excitement and pleasure at her joining the practice.
- 4.21. The job offer was withdrawn a week before her starting date, on Dr Mulder refusing a reference.
- 4.22. She has experienced locum positions being withdrawn from her, or refused, but then readvertised.
- 4.23. The stigma of having reported safety concerns and the stigma arising from being unable to rely on Helios for a fair and honest reference has seriously damaged her prospects of employment and advancement.
- 4.24. She had plans for partnership, aiming to achieve that as her younger child reached secondary school age. She had been offered partnership at Helios but refused, in part knowing that both partners were due to retire and not wishing to be a sole practitioner.
- 4.25. She has continued to work on a locum basis and doing private GP medical work. 2020 was a difficult year in that locum work dried up. She and her husband took a mortgage holiday. She had no support from the government.
- 4.26. She no longer hopes for a partnership and has no plan at present to return to salaried employment as a GP, given the difficulty that she has had in feeling confident and resilient enough to cope with the circumstances of such employment.
- 4.27. The GP practice at Helios was taken over by Mendip Vale Medical Group in April 2021 and insofar as it continued, closed on 31 March 2022.

## 5. Law

### *Unfair Dismissal Remedy including automatically unfair dismissal*

- 5.1. The first consideration for a Tribunal in unfair dismissal is of reinstatement or reengagement.
- 5.2. Where that is not sought by the claimant, as here, a financial award can be made, comprising the basic and compensatory elements.
- 5.3. By s123(1) of the Employment Rights Act 1996, the amount of the compensatory award shall be,

“such amount as Tribunal considers just and equitable in all the circumstances, having regard to the loss in consequence of the dismissal in so far as attributable to action taken by the employer.”

- 5.4. The award is to fully compensate the claimant, as if she had not been dismissed, but not to award a bonus or to punish an employer or to mark disapproval of the employer's conduct.
- 5.5. The task is to put the employee in the position she would have been in had there not been the wrongful conduct. It is not to reflect feelings of sympathy for the employee or the Tribunal's view of what a fair severance payment

would be (*Lifeguard Assurance Ltd v Zadrozny and anor* 1977 IRLR 56, EAT). In support of that principle, we are referred to *Morgans v Alpha Plus Security Ltd* [2005] ICR 525, EAT (“*Morgans*”), where the EAT relied on the House of Lords ruling in *Dunnachie v Kingston upon Hull City Council* [2004] ICR 1052. In *Morgans*, Burton J stated,

“If there is no loss, no compensation can be recovered even for the most unfair of unfair dismissals.... But the basic award marks the disapproval of the tribunal.” (para 22.2)

- 5.6. By section 124 of the ERA 1996, compensation is capped, including at the level of one year’s gross salary, if lower than the current statutory cap. The cap does not apply to an automatically unfair dismissal under sections s100, 103A, 105(3) 105(6A). Those are protected disclosure and health and safety cases.
- 5.7. There can be no award for the manner of the dismissal.
- 5.8. The award does not attract interest.
- 5.9. No award can be made for injury to feelings or personal injury (*Dunnachie, above*). We are referred to *GAB Robins (UK) Limited v Gillian Triggs* [2008] EWCA Civ 17 in respect of the distinction between losses flowing from the dismissal and the losses flowing from antecedent breaches of the implied term of trust and confidence.
- 5.10. The case of *Chagger v Abbey National plc* [2010] IRLR 47 (“*Chagger*”), a case of detriment contrary to section 47B of the ERA 1996 (protected disclosure), established that, in the case of a discriminatory dismissal, the period for which the employee would have worked for the respondent employer did not represent an automatic cut-off in assessing compensation. A claimant could recover for the consequence of any disadvantage he suffered on the labour market by reason not only of having been dismissed by his previous employer but also of his having brought proceedings against his previous employer, termed “stigma loss”,

“The fact that there has been a discriminatory dismissal means that the employee is on the labour market at a time and in circumstances which are not of his own choosing. It does not follow therefore that his prospects of obtaining a new job are the same as they would have been had he stayed. For a start it is generally easier to obtain employment from a current job than from the status of being unemployed. Further it may be that the labour market is more difficult in one case compare with another. Jobs may be particularly difficult to obtain at the time of dismissal and yet by the time they become more plentiful, the employee would have been out of a job and out of the industry for such a period that potential employers will be reluctant to employ him. In addition, he may have been stigmatised by taking



proceedings, and that may have some effect on his chances of obtaining future employment.

The result of those factors is that the discriminatory dismissal does not only shorten what would otherwise have been the period of employment, it also alters the subsequent career path that might otherwise have been taken.”

5.11. Where such stigma losses can be shown, it is a factor to be taken into account in the calculation as part of the assessment as to how long it is likely to take the complainant to find another equivalent job.

5.12. Again, from Chagger,

“The mere fact that third party employers contribute to or are the immediate cause of, the loss resulting from their refusal to employ does not, of itself, break the chain of causation. If those employers could lawfully refuse to employ on the grounds that they did not want to risk recruiting someone who had sued his employer and whom they perceived to be a potential troublemaker, there is no reason why that would not be a loss flowing directly from the original unlawful act.”

5.13. In Chagger, it is stated that normally the stigma loss will not require separate quantification because it will feed into the overall assessment of the claimant’s loss of earnings to the extent that it affects the time which it has taken, or may take, or should have taken him to find alternative employment but there may be unusual circumstances in which it represents a distinct head of loss on its own (para 99). Where there is otherwise no future loss, stigma loss maybe the only head of future loss. The onus is on the claimant to prove the loss, and such a case presents difficulties of assessment,

“In the unlikely event that the evidence of the stigma difficulties is sufficiently strong, it would be open to the tribunal to make an award of future loss for a specific period. But, in the more likely scenario that the evidence showed that stigma was only one of the claimant’s difficulties, it may be that a modest lump sum would be appropriate to compensate him for the stigma element in his employment difficulties.

5.14. In other words,

“...it maybe in practice the fact of being a whistleblower, if known to potential alternative employers, has a severely limiting effect on his or her future prospects of employment in that profession; in an extreme case it may end any such prospect altogether. Future loss may therefore be a major aspect of compensation, especially if the individual is obliged to take less remunerative work instead in the long term.” (Harvey on Industrial Relations and Employment Law, C111 D(3) para 128).

- 5.15. In *BMI Healthcare Ltd v Shoukrey* UKEAT/0336/19 (25 February 2021 unreported) establishes that full career loss damages claims should be subject to a full factual investigation of all the possible future prospects or lack thereof of the claimant in these extreme circumstances (para 45).
- 5.16. In assessing future loss in a discrimination case, the tribunal has to consider whether the employment would have continued but for this termination. That is to be done by reference to the percentage probabilities, not simply on balance of probability. The same approach applies in relation to where the loss of employment arises from protected disclosure.
- 5.17. The case of *Dench v Flynn and Partners* 1998 IRLR 653 CA establishes that the obtaining of new work does not act as an “automatic guillotine” to sever the causal link between the dismissal and any future losses the claimant may experience. So where for a period during which the claimant’s earnings exceeded the previous earnings, a future award could still be made recognising the inherent insecurity of the employment. An alternative would have been to increase the award for future loss based on an assessment of the risk of losing the new job. A 20% chance of that would have reached the same figure as the £5000 “profit” by which earlier earnings had exceeded losses.

*Detriment – Remedy in respect of protected disclosure*

- 5.18. If a claim in respect of protected disclosures is well founded, the Tribunal must make a declaration and may make an award of such amount as it considers is just and equitable in all the circumstances of the case having regard to:
- (a) the infringement to which the complaint relates
  - (b) any loss which is attributable to the act, or failure to act, which infringed the claimant’s right (not to be subject to a detriment) (s49(2) ERA 1996)
- 5.19. There is no limit on the compensation that can be awarded.
- 5.20. Interest is not payable on awards in respect of protected disclosure.
- 5.21. Compensation is not limited to situations where there have been actual financial losses (*Skiggs v South West Trains Ltd* [2005] IRLR 459, EAT). That is a case relating to the employer’s unreasonable infringement of the right to time off for the purpose of union duties but the wording of the provision is equivalent (the comparison being between (s172(2) Trade Union and Labour Relations (Consolidation) Act 1992) and s49(2) above). In the *Skiggs* case, the EAT held that,

“Where the statute provides that compensation is to be awarded having regard not only to “any loss sustained by the employee” but also to the employer’s default, “compensation” is wide enough to include the

concept of a cash reparation to the individual for the fact that a wrong has been done to him, independently of any special consequential loss he can prove he has also suffered. ...An Employment Tribunal can properly consider whether it is just and equitable to make some reasonable and proportionate award by way of reparation ...for the wrong done ...without infringing the principle that the purpose must be compensation to the individual, not the imposition of any form of fine or collective punishment on the employer.”

- 5.22. That is different from the position with regard to unfair dismissal, where as pointed up in *Hardy v Polk (Leeds) Ltd [2004] IRLR 420*, “the statute does not say that the award will be such an amount as the tribunal considers just and equitable by reference to the conduct of the employer.”
- 5.23. It is a question of fact for the tribunal to determine what losses are attributable to the unlawful treatment.

### *Injury to Feelings*

- 5.24. Where the claim is for detriment under section 48 of the ERA, 1996, The award can include compensation for injury to feelings. The compensation is approached in the same way as for discrimination claims (*Virgo Fidelis Senior School v Boyle 2004 ICR 1210, EAT*). In *Virgo Fidelis*, the EAT confirmed that subjecting a whistleblower to a detriment was a form of discrimination and that detriment suffered by whistleblowers should normally be regarded by tribunals as a very serious breach of discrimination legislation.
- 5.25. Non-economic loss such as injury to feelings is not recoverable in unfair dismissal cases, although such awards are routinely made in detriment cases. Injury to feelings cannot be compensated where the detriment is dismissal.
- 5.26. That does not preclude awards in respect of detriment prior to dismissal. As explained by the Court of Appeal in *Melia v Magna Kansei Ltd 2006 ICR 410*, that restriction to the unfair dismissal compensation applies in respect of the employee’s termination of the contract, in a constructive dismissal case. Conduct of the employer prior to the termination can be compensated as detriment and is not taken out of the scope of section 47B. The guidelines applying in discrimination cases with regard to injury to feelings apply similarly in whistleblowing cases.
- 5.27. Injury to feelings awards are compensatory and should be just to both parties. The matters compensated encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (*Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102 (“Vento”)*). Feelings of indignation at the discriminator’s conduct should not be allowed to inflate the award. The Tribunal focus must be on compensating the claimant rather than on punishing the wrongdoer.

- 5.28. The Vento case is the source of guidance on the level of compensation for injury to feelings which have since been updated by other authorities, but are still referred to as the “Vento” Guidelines. They identify three broad bands of compensation for injury to feelings as distinct from psychiatric or personal injury. The bands are now uplifted pursuant to Presidential Guidance to reflect inflation.
- 5.29. The lower band is for less serious acts of discrimination.
- 5.30. The middle band is for cases which are more serious but do not come into the top band.
- 5.31. The top band is for the most serious cases such as where there has been a lengthy campaign of harassment. They are relatively rare
- 5.32. A case would have to be highly exceptional for any sum higher than this to be awarded.
- 5.33. This claim was presented on 18 October 2019.
- 5.34. At that time the relevant Presidential Guidance, for claims presented on or after 6 April 2019, was –

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

- 5.35. Only the most exceptional cases are capable of exceeding that level.
- 5.36. While the guidance relates to the seriousness of the misconduct of the culprit, in considering which band applies, the purpose of the award is to reflect the impact of the conduct on the claimant. Due regard may be had to the effects of that conduct and in particular to effects which prove to be lasting. The task for the tribunal is therefore to determine the effect of the discrimination on the life of the claimant.
- 5.37. The manner in which an employer handles a complaint of discrimination is likely to be relevant to the level of an award for injury to feelings. In *Shaw v Commissioner of Police of the Metropolis v Mr H Shaw* [2012], ICR 464 EAT the claimant suffered an unjustified disciplinary investigation, the stress of a transfer to avoid the colleague about whom he had complained and had had to wait 14 months for investigation of the grievance. The case confirms that that matters arising out of the discrimination suffered, that were consequent on it, could be taken into account in the assessment of injury to feelings. The delay in investigating a grievance may prolong the injury to feelings and serious failings in the handling of a grievance may lead to an award of aggravated damages.

### *Aggravated Damages*

- 5.38. Aggravated damages may be awarded in particularly serious cases of discrimination. They are compensatory only and should not be awarded to punish the respondent.
- 5.39. They are seen as part of injury to feelings and Tribunals should avoid compensating claimants under both heads for the same loss.

- 5.40. In *HM Prison Service v Salmon 2001 IRLR 425 EAT*, it is said that,
- “Aggravated damages are awarded only on the basis and to the extent that the aggravating features have increased the impact of the discriminatory act or conduct on the applicant and thus the injury to his or her feelings”. In general, they are only appropriate in cases where the respondent has behaved in a high-handed, malicious, insulting or oppressive manner in committing the discriminatory act (*citing Alexander v Home Office 1988 CA ICR 685*).
- 5.41. In *Virgo Fidelis Senior School v Boyle (above)*, the EAT confirmed that aggravated damages are available in cases of detriment suffered by whistleblowers, which is identified as a serious form of discrimination.
- 5.42. There must be some causal link between the conduct and the damage suffered: high-handed conduct on its own is not enough to lead to an award of aggravated damages. The ultimate question according to the then President of the EAT, Mr Justice Underhill, in *Commissioner of Police of the Metropolis v Shaw [2012] ICR 464 EAT* is whether the overall award is proportionate to the totality of the claimant’s suffering. It is an aspect of injury to feelings reflecting the making more serious the injury to feelings by some additional element which would fall into one of three categories:
- (a) the manner in which the wrong was committed, that is, where it is done in an exceptionally upsetting way – high-handed, malicious, insulting or oppressive way
  - (b) a discriminatory motive, provided that the claimant was aware of it , for example conduct based on, prejudice, animosity spite or vindictiveness is likely to cause more distress
  - (c) Subsequent conduct, such as the employer ‘rubs salt in the wound’ by showing that it does not take the claimant’s complaint of discrimination seriously. That can include the manner of conducting the tribunal proceedings. In *Zaiwalla and Co and anor v Walia 2002 IRLR 697 EAT*, the award reflected the inappropriate and monumental effort put into the defence of the proceedings in a manner deliberately designed to be intimidatory and cause the maximum unease and distress to the claimant.
- 5.43. Tribunals must be wary of focusing on the quality of the respondent’s conduct – that is, assuming that the more heinous the conduct, the more devastating its impact on the claimant. Tribunals must not lose sight of the ultimate purpose of aggravated damages, which is to compensate for the additional distress caused to the claimant by the aggravating features in question. The award overall in respect of non-pecuniary loss must be fair and proportionate (*Shaw, above*).

### *ACAS Code of Practice*

- 5.44. Section 207A TULRCA can apply to unfair dismissal awards and to discrimination awards, if there is a breach of a relevant ACAS Code of Practice as part of an act of discrimination. The relevant Code of Practice is that on Disciplinary and Grievance procedures.
- 5.45. The power to make such an uplift raises different issues and needs to be considered separately to questions of injury to feelings and aggravated damages (*Mr Q QU v Landis & Gyr Limited UKEAT/0016/19/RN*)
- 5.46. In *Allma Construction Ltd v Laing UKEATs/0041/11 25/01/12*, Lady Smith suggested a tribunal should approach an uplift under this section in this way:
- Does a relevant Code of Practice apply?
  - Has the employer failed to comply and how?
  - Was the failure unreasonable and why?
  - Is it then just and equitable in all the circumstances to increase the award and why?
  - If so by how much and why?
- 5.47. In *Mr Q Qu* (above), it was argued but not accepted that the ACAS Code prescribes minimum procedural standards in a disciplinary and grievance context, rather than considering the quality of the Respondent's decision making. However, in that case it was held that the findings made by the Tribunal were not about the quality of decision making but failings in the process that was adopted, and an implicit finding that the grievances were not considered in good faith. There was a breach of the Code, even though the formally correct steps had been taken.
- 5.48. In considering what is just and equitable to order under section 207A, the Tribunal must have regard to the overall size of the award and what is proportionate. The breach of the Code of Practice must be identified. The award is the just and equitable amount up to 25%.

### *Grossing up*

- 5.49. The effect of income tax must be taken into account in the assessment of damages.
- 5.50. Grossing up provides an estimate of the tax payable on this award, in this financial year, so that Dr Mann receives what the tribunal has found to be due, in full, having had to pay the tax required. The aim is to get to a figure that will leave Dr Mann with the sums intended by the Tribunal.

- 5.51. Grossing up will apply to sums based on net weekly pay and taxable in the recipient's hands, so to the unfair dismissal compensatory award and financial losses as a result of unlawful discrimination.
- 5.52. The injury to feelings element in an award based on termination of employment is taxable, except where the compensation is for a psychiatric injury. Where compensation for injury to feelings is included in a termination payment, it is taxable under s406 ITEPA to the extent that the £30,000 allowance has been exceeded.
- 5.53. The relevant tax year is the year in which the award is received by the claimant

### *Wrongful dismissal*

- 5.1. The basis for a claim of wrongful dismissal is that where the contract of employment is wrongfully terminated by the employer, the employee may sue for damages for the breach. The employee cannot simply claim as a liquidated sum the amount of wages he would have earned because he has not been allowed to perform his side of the contract and so has not earned the wages.
- 5.2. The prima facie measure of damages is a sum equivalent to the wages which would have been earned between the effective date of termination and the date when the contract might lawfully have been terminated on due notice being given.
- 5.3. Usually, and in the absence of gross misconduct by the employee, the "Norton Tool principle" applies, such that where an employee is dismissed without notice and without pay in lieu, he or she is entitled to compensation in net pay for the notice period (*Norton Tool Co Ltd v Tewson [1972] ICR 501*, an unfair dismissal case). That is a principle derived from good industrial practice. Any earnings during that period are not taken into account to reduce the level of damages.
- 5.4. That principle does not apply in a constructive dismissal case. In such a case, the claimant has to mitigate losses during the contractual notice period (*Stuart Peters Ltd v Bell [2009] IRLR 941, CA*). That is because this is a claim in damages. The Tribunal must take full account of sums earned during the notice period and set them off against the sum in respect of notice pay to which the employee is entitled.
- 5.5. We are referred to *Lavarack v Woods of Colchester Ltd [1967] 1 QBD 278*. Damages for wrongful dismissal cannot confer on an employee extra benefits which the contract did not oblige the employer to confer even though the employee might reasonably have expected his employer to confer them on him in due course.

### **Submissions**

- 5.1. The Tribunal had the benefit of the Respondent's skeleton argument and Dr Mann's schedule of loss version 4 (plus earlier versions).

- 5.2. We had the benefit of detailed calculations from both counsel including after the close of the oral hearing, for which we are grateful, together with their oral submissions. Given the detail provided, it would be over-ambitious to summarise here. We are grateful to both counsel for their helpful and carefully presented calculations and arguments.

## Discussion and Reasons

### *Evidence*

- 5.3. No difficulties over preparation for the remedy hearing had been apparent at the preliminary hearing on 10 December 2021.

- 5.4. Following complaints of non-disclosure by the respondent, including of an expert report commissioned on behalf of Dr Mann and of the letter of instruction, a direction was issued by Employment Judge Street on 11 March 2022, the last working day before the remedy hearing, to the effect that,

*‘if Dr Mann is seeking to rely on documents that have not been disclosed in accordance with the Orders given, it is for Dr Mann to make an application. That particularly applies to an expert report which has not been obtained on the basis of an Order or joint instructions, nor disclosed, nor agreed. In the absence of such an application, the hearing will proceed on the basis of documents properly disclosed by the due dates.’*

- 5.5. An application was made at the hearing for the admission of additional documents. The non-disclosure was primarily attributed to staff sickness and the hand-over of a substantial file with the inadvertent error over recording deadlines. That does not explain the failures, which could only reflect a failure to consult the order of Employment Judge Bax and a failure to carry out routine trial preparation notwithstanding reminders and proposals from the respondent.
- 5.6. Orders were made admitting and excluding evidence. Reasons were given at the time and briefly set out here.
- 5.7. The failure to disclose the expert report on pension loss together with the instructions on which it was based in time for it to be considered by the respondent was wholly unreasonable and the Tribunal refused to admit it in evidence.
- 5.8. Remaining documents were admitted, either by consent, with regard to the GP report and tax return for year 2020/21, and otherwise in the interests of justice. The locum receipts and remittance advices provided a factual platform for the Tribunal’s findings, the benefit of even late disclosure outweighing the undoubted difficulty for the respondent.



## Notice pay

- 5.9. The measure of damages in respect of notice pay is the sum due under the contract. We do not however accept that the authorities cited mean that an earlier overpayment can be offset against the notice pay due. The issue with regard to a wrongful dismissal claim is what is due to Dr Mann by way of notice pay. Any contractual claim requires to be pursued by way of counterclaim. The overpayments arising before the effective date of termination are not recoverable by the respondent in these proceedings in the absence of a counterclaim. Nor had the respondent taken the steps required under the contract to demand repayment.
- 5.10. Dr Mann has conceded that she has fully mitigated her loss with regard to notice pay. Her locum earnings exceeded her entitlement to notice pay.
- 5.11. No award is made.

## Injury to feelings

- 5.12. We accept that the injury to feelings award relates only to the pleaded detriments, which importantly include the failure to address the grievance, but does not include the unfair dismissal.
- 5.13. The pleaded and upheld detriments are,
- 3 July 2019 – alleged unilateral cancellation of Dr Mann’s locum sessions by Dr Mulder (without consultation or explanation)
  - 3 July 2019 – alleged unprofessional and disrespectful conduct towards / treatment by Ms Friis when the issue of the unilateral cancellation of the locum shifts was raised by Dr Mann
  - 12 – 19 July 2019 – failure to deal promptly or at all with Dr Mann’s grievance (Dr Mulder and / or Mr Laver)
- 5.14. These are all closely related incidents and the most significant is the last one, which led to the situation becoming irretrievable.
- 5.15. The detriments are specific, based on events in July. There is no prolonged campaign complained of, and the period at issue is short.
- 5.16. The first two pleaded detriments contributed to the impact that the third made, establishing a context in which Dr Mann felt treated without respect and humiliated. We do not underestimate them.
- 5.17. The cancellation of the locum sessions was without precedent. There had been neither consultation nor warning. The sessions had been accepted by Dr Mann to support the practice. She was replaced by a different locum: this was not cancellation because there was no need for the sessions (205 liability bundle). That was a breach of long-standing working arrangements, disrespectful and insulting in the way it was carried out.
- 5.18. On 3 July, Ms Friis refused any explanation for the cancellation of locum sessions and addressed Dr Mann as “love”. Dr Mann had expected Dr Mulder to attend, and in his absence, had asked for a witness to be present, rather than seeing Ms Friis alone. Dr Mann was brought to tears by the

conduct of Ms Friis. It is no light thing for a professional to be so distressed by a manager's conduct towards her that she cannot conceal her emotions. The incident still echoes with her – as she puts it in her witness statement for the remedy hearing,

“As I fled in tears, she followed me across the car park and shouted at me. Other people in the car park who I recognised were staring at me, I felt humiliated.” (para 5)

and, in oral evidence,

“The flashbacks, I can see them now, they haven't left me, I was sitting, her face, looking at me, opening the door, I was saying you cancelled the locum shifts, give me an explanation, and one of the worse parts was I was leaving and I heard her heels behind me, and she shouted. There was a dementia meeting and there were team members from that meeting staring at me while she was shouting at me, and I was hanging my head in shame and I can remember, just hanging on....”

5.19. After that meeting, Dr Mann sent a message to Mr Laver, (Reasons 3.170),

“Hello, I am unable to work today or the rest of the week due to acute stress, palpitations and headaches. This was precipitated by an incident with Dagma this morning. The attitude she displayed towards me is unacceptable. I have to question what is going on here and why.”

5.20. The central concern is the failure to address the grievance. Dr Mann raised concerns for patient and staff safety, and they were dismissed. Dr Mulder saw her as the problem, and chose not to see that she was raising genuine concerns about patient safety.

5.21. The grievance was raised on 12 June 2019. It was short, but followed on a series of incidents when serious concerns had been raised by Dr Mann and others over issues affecting staff wellbeing and patient safety (3.81, 3.95, 3.104, reasons). There had been repeated protests about extreme pressures of work, the inadequate GP cover and arrangements for triage, failure to make provision for paperwork to be done, all with risks for patient safety.

5.22. Dr Mann had, earlier on the same day, written in detail to Dr Mulder and Mr Laver about the absolute inadequacy of the arrangements. The circumstances were that Dr Mulder was on holiday, a regular locum was in hospital, there was no triage GP and the staff were failing to arrange cover leaving Dr Mann solely responsible for the whole patient population. She was looking for solutions, rather than alerting the CQC at that stage that they were unable to provide a service.

5.23. Her short grievance,

- *Lack of support by the Partnership in my role as a Salaried GP*
- *Unsafe working within the practice which has been highlighted on several occasions with ineffectual resolution ie lack of adequate action about concerns raised. Risk to patient safety*
- *Poor communication amongst staff members*
- *No response to last email regarding pay appraisal. (182)*

has to be read with that immediate context.

- 5.24. She had followed up with a further report the following day and went off sick on 14 June having been repeatedly expected to work as a duty GP/ triage and do a booked clinic. Later in June there continued to be failure to make adequate arrangements for GP cover, with Dr Mann repeating that the arrangements were unsafe and unacceptable, with real risks that a patient could come to harm.
- 5.25. The context for her grievance had been made very clear.
- 5.26. Dr Mulder's first discussion with Dr Mann about her grievance dated 12 June was on 3 July. She had had no effective response from Dr Mulder to any emails sent since the beginning of June – a text message from him of 11 June had said, 'All you can do is your best within reason'. She had replied raising patient safety, but without response.
- 5.27. Dr Mulder called her on 3 July. He was not offering to address the grievance, which had had no previous response. He asked her if she was going to resign, in which case, they would not need to address the grievance (3.176, reasons).
- 5.28. He attached no weight to the concerns that Dr Mann raised. He did not even arrange to discuss them with her. The only meeting arranged was to discuss locum shifts and invoices.
- 5.29. Dr Mann was signed off sick after the events of 3 July and did not in fact return to work before her resignation on 19 July.
- 5.30. The next reference to the grievance by Dr Mulder was in his email to Dr Mann of 19 July. The proposal is that a new person who would be helping with the management of Helios discuss matters with Dr Mann. His wording is, (3.192, reasons)

"One proposal is that you and Catherine meet to talk through your grievances. This conversation would be protected in that anything discussed or said would be completely off the record and not be repeated or used by either of you to anyone including myself. The aim would be to find a acceptable solution to the current situation for all concerned. This would be without prejudice. .... I hope this will help to move things forward."

- 5.31. There is a world of difference between a discussion with a third party to discuss "your grievances" and steps to investigate a grievance that raises patient safety concerns. The proposal itself is dismissive of the concerns

raised. Calling them “grievances” carries with it a suggestion that they were perhaps petty or personal. The proposal to address them in this way is consistent with that.

- 5.32. The proposed third party is not introduced. She is to assist in Helios management, so is not an independent third party. She is not a clinician. It is not clear how she could have addressed the concerns. The discussion would be confidential, such that nothing said could be repeated, even to Dr Mulder. That precluded serious consideration of Dr Mann’s concerns or effective steps being taken to address them. There could be no learning points from such a discussion for the practice.
- 5.33. There was no other response to the grievance.
- 5.34. No effective steps were taken.
- 5.35. In spite of all that had been written over recent weeks, including by other GPs, Dr Mulder did not see the management of Helios as the problem. He saw Dr Mann as the problem.
- 5.36. A grievance is something that has to be discussed with the employer, and it was a diversion and a failure to suggest that a third party should be involved, someone who could not address Dr Mann’s concerns.
- 5.37. It was being seen as the problem that so significantly undermined Dr Mann’s confidence. She felt unsupported, belittled and intimidated. Staff felt free to be rude to her, to ignore her clinical concerns and to seek to override her clinical judgment. The partners did not respond to her reports. Mr Laver confirmed to her that Ms Friis had the authority to run the practice which therefore included for staff to undertake clinical triage without medical training or oversight. The difficulties the practice faced had been very fully documented and the risks to patients and staff highlighted. The serious concerns Dr Mann raised had not been acknowledged but sidelined.
- 5.38. That had a profound effect on her. She describes it as a toxic environment and that arises out of the management failures including allowing or condoning disrespectful conduct towards Dr Mann while refusing to investigate the concerns she raised. She was anxious and fearful, her sleep badly affected.
- 5.39. She suffered a severe loss of confidence and that has had lasting consequences for her in that her resilience in working within the NHS, a quality essential to her work, has diminished. She continues to suffer anxiety and loss of sleep.
- 5.40. It is a very short period that is pleaded, but it has had long term implications for her. She was already emotionally strained and fragile as a result of the earlier series of incidents, as she describes in her witness statement – distressed and shaking on 12 June, to the point where her own patient asked if she was all right.
- 5.41. We are not compensating for events before July, only for the pleaded detriments, but the mental and emotional fragility meant there was a vulnerability there by July, and that intensified the distress caused – we are not considering the impact on the earlier energetic and resilient Dr Mann.

- 5.42. It has been suggested that the severity of her symptoms and distress and their later resumption is attributable to events in June, in particular to 12 June, not to the events of July, the pleaded detriments.
- 5.43. The difference between June and July is that in June, Dr Mann felt, with confidence, that she was a member of a team, reporting a genuine concern and looking to others to find solutions with her. In July, instead, she felt isolated, bullied and intimidated and her concerns discounted. While in June she suffered the trauma of an unsafe working environment, in July, she had the same concerns but was seen as the problem. That is why the pleaded detriment relates to the conduct of the respondents in July. As she explained in her oral evidence,

“The unsafe working environment at Helios certainly has left an indelible trauma but it was at the time that I raised those concerns, I raised them with confidence, ..... I was saying with confidence at that moment still, Hey, look what is going on here, I can’t do this on my own, this is really unsafe, this is falling apart, and I was expecting help to come and although there was an intense feeling of not being safe, .... I was part of the solution, I was on the ground but I could not do it alone.

No help came, I was not listened to. Bullied and intimidated by Dagma Friis, unqualified and seemed to have gone rogue and decided to do clinical triage as well, and I remember saying to Laver is this true, is she going to do this and apparently she had the authority to do it, so it was feeling unsafe in the work place, asking for help and then it was what happened, where is the cavalry, and there isn’t any but actually you are the problem, the loss of confidence, feeling misunderstood, all those flashbacks, I cannot unexperience them, they haven’t left me.”

“The worst trauma was the way I was treated, totally ignored.” (oral evidence)

- 5.44. The detriments in July and in particular the failure to investigate and address the grievance, discounting her concerns, treating her as the problem, is what caused the acute distress, anxiety, loss of sleep and loss of confidence and resilience at the time and since.
- 5.45. Her family life suffered, with a period of intense pre-occupation over the summer of 2019, recurring since given the difficulty of these proceedings, in particular after receiving the response in December 2019. She has had anxiety and stress symptoms on a continuing basis since her resignation. Medication for anxiety started in June 2021. There have been impacts on her ability to cope in the work environment more fully described below.
- 5.46. In respect of injury to feelings, we propose an award of £21,000. This is not upper band Vento, although the impact has been long-lasting. There was no sustained and prolonged campaign against Dr Mann or equivalently

serious circumstances. It was however serious in the conduct towards her and serious in its impact on her. Taking into account all that she says, including that there was a period when she felt unable to return to work, the anxiety, the distress, the all-consuming preoccupation and self-questioning, we find that the right range is in the upper middle band.

### **Aggravated damages**

- 5.47. The respondent accepts that an award of aggravated damages is in principle recoverable in the light of the Tribunal's earlier findings, but the amount of the award is at issue.
- 5.48. The Reasons earlier issued address in detail the wholesale falsity of the content of the response to the claim. The allegations made were unsupported by evidence and untrue. There were serious allegations going to Dr Mann's professional competence which stand in direct contrast to the confidence both Dr Mulder and Mr Laver had in her. Dr Mulder did not, either at the date of these events or at the time of the liability hearing, rule out her return to the practice and to the previous good working relationship they had enjoyed. Mr Laver offered her a good reference when she resigned in July 2019. Her good standing in the practice and the partners' view of Dr Mann is inconsistent with the serious allegations of neglect and incompetence made in the ET3, which we held to be without foundation. There were serious allegations going to her conduct, including bullying, intimidation, threatening behaviour, which we found on very clear evidence to be fabricated. This was calculated to intimidate her.
- 5.49. Dr Mann reports that she was moving on from the circumstances of her resignation/dismissal by late 2019, until she saw the content of the ET3. The allegations made were not only damaging to her reputation but potentially career-ending. She was deeply shocked.

“In December 2019, I received the ET3. I was devastated to read what had been written about me and developed palpitations and anxiety symptoms. My sleep was again disturbed with flashbacks of the traumatic events at Helios. The baseless accusations and allegations, such as being a bully, caused me significant harm as it called into question my professional integrity and my character. There were charts which tried to make it look as if I was not working in line with other GPs, which I knew to be false, there were different versions of what I had worked on on 12 June 2019 and evidence of clear fabrication, for example, the allegations regarding Mohima Hussein and Holly King. I felt betrayed, vulnerable and unprotected by my ex-colleagues being prepared to lie.” (witness statement para 9)

- 5.50. Receipt of the ET3 had an immediate effect on her mood and well-being, with heightened anxiety, flashbacks, renewed loss of confidence and resilience. The conduct of the response to the claim continued on the same basis, in spite of the absence of evidence to support the serious allegations

made, the contradictions in the evidence relied on and that the documentary evidence itself supported a very different history. In the conduct of the defence, the respondent acted in a way that was wholly inappropriate and intimidatory. The impact on Dr Mann significantly aggravated the original harm done.

- 5.51. Dr Mann describes how disabling the effects were. She was at the time working as a locum at a local practice, with a view to joining as a salaried GP.
- 5.52. She describes feeling betrayed, vulnerable and unprotected by her ex-colleagues being prepared to lie.
- 5.53. Issues began to arise that she needed to address at work but she found herself struggling to raise concerns or challenge,

“I felt I could not raise it, I was deliberating, I was in anguish, and I began to get flashbacks to what was happening in June and July 2019, and I realised I could not speak up about seemingly quite simple matters. ... by January, I had severe anxiety again, and flashbacks to Helios and the way Dagma Friis had treated me when I raised concerns. It was not that I was not feeling safe, it was that I felt I had lost my voice, I had been gagged, it was physical as well as mental.”  
(oral evidence)

- 5.54. She realised that she had not really processed or dealt with what had happened to her. She was worried about being vilified again if she complained. There was then a point that she was faced with handling a patient with Covid with inadequate guidance or equipment and withdrew from the role.
- 5.55. It was put to her that the way in which the respondent conducted the litigation had no effect on the way that she suffered. She did not accept that and we do not either. It is inevitable that a response put together with malice and deceit will have an impact and the impact here was profound. This response contained very serious allegations of misconduct and incompetence and even with our findings that they are unfounded, there remains always the risk that people will say, “No smoke without fire”, without exploring any further. She was very aware of the immediate and future damage to her reputation.
- 5.56. The respondent had the opportunity to address the misrepresentations in the response through the process of disclosure, where the falsity of the statements made would have become plain. They did not do so. Dr Mulder was still musing about Dr Mann hitting Mohima during his oral evidence, when that allegation had been rejected well before these events, and Mohima had left under a cloud and facing disciplinary procedures.
- 5.57. There was no point when the respondents acknowledged the dishonesty of the case they brought.
- 5.58. That made the litigation the more traumatic for Dr Mann,

“All roads, all threads lead back to June and July 2019, and everything else that comes on top is aggravation, viciousness, the hurt, all the way, this past three years, the way it has all been litigated, the survival mode I have been in just to get through this.”

5.59. She has lost the satisfactions of working in a team. She had good working relationships at Helios and took an active role in addressing mutual concerns, confident in working with others in the team. Given the terms of the respondent’s response and approach to this litigation, she has withdrawn from social and even professional contact with her peers, fearing to be asked about Helios, fearing gossip about what had happened, avoiding colleagues at work and leaving promptly after her locum sessions. That is a major change and a serious loss.

“I know what I was before all this all happened, I was confident, GP I had my future ahead of me, I had security in the NHS, I had been committed to for 17 years, you work hard, you get job security, decent pension, all scuppered, all taken away from me, what I am doing now, working as locum, keeping my head down, doing my clinical work, all I can do to function, all the other options are taken away, as soon as I think about salaried work I wonder what will happen if I need to raise concerns, fundamentally you have to feel respected and have trust and be protected when you raise concerns, so I am disadvantaged and I am scrambling day to day, I used to plan year on year, I could see myself as a partner, but now I am scrambling week by week.”

5.60. We award £10,500 in respect of aggravated damages in respect of the respondent’s conduct of the proceedings.

### **Financial losses: the principles**

5.61. The claimant is entitled to future losses arising from the automatically unfair dismissal. The reason for the dismissal was the protected disclosures she had made. We must also consider whether future losses arise from the proven detriments arising from the protected disclosures, which include the grievance itself, but without double counting. There is a clear element of stigma loss.

### *Salary*

5.62. We accept the contention that Dr Mann’s salary, had she not been dismissed, would have been raised to £9,000 per session as a salaried GP



from the date of dismissal. That was the lower end of the roles advertised and included in the bundle, the advertised posts being between £9,300 and £10,500 (300 – 323). It is below the level of the lowest rate offered to her in June 2021. She had been promised annual salary review in 2015, but no increase had been awarded. Her salary had fallen below the market rate at a time when the practice urgently needed to retain her services and to recruit. A change at that time would not have cost the surgery the full amount, if anything, because of a national change in the arrangements for the indemnity fee. An immediate rise to £9,000 per session, £36,000 per annum for four sessions a week, was probable.

5.63. We accept the need to add back employee pension contributions in finding the true net loss of earnings.

5.64. We do not accept that the sum paid in respect of accrued holiday entitlement is deductible from the award in respect of loss of earnings. It reflects her accrued entitlement.

#### *The overpayment of salary*

5.65. We have not accepted that any overpayment of salary before the effective date of termination is recoverable in these proceedings, in the absence of a contract claim from the respondent.

5.66. We accept the Respondent's approach to the calculation of loss of salary in July 2019, after the effective date of termination. The salary is annual, accrues day to day, paid in regular and equal monthly instalments. Although calculated on the basis of the number of sessions worked, pay does not vary according to the number of sessions worked per month. Pay for the month of July was made on the basis of a five session salary, £3,437.50 instead of the four session salary due at £2,750, a rate higher by £687.50, and she was paid for the full month and not for the period to the 19 July. After the date of termination, she was overpaid during that period by 12 days. The total overpayment then was £1331.

5.67. Dr Mann accepts the principle that that overpayment should be offset against the compensatory award.

#### *Locum Earnings*

5.68. We are satisfied that the locum earnings, while not paid pursuant to the employment contract, are nonetheless recoverable in damages for unfair dismissal. Dr Mann was able to do locum work for the Respondent in addition to her salaried role. That work was intrinsic to the running of the practice and her contribution was heavily relied on. She was a preferred choice of locum, given her knowledge of the practice and the patients. It was good practice to use locums who had that knowledge, and who were also known to be reliable and competent, as she was.

5.69. When she left, that source of work ceased immediately to be available to her. The effect of her protected disclosure was that the locum work was

cancelled. The effect of the unfair dismissal was that she also lost those earnings for the future. There was no other reason for the locum work to stop. If she had not been dismissed, that work would have continued at the level she chose. It stopped because of the protected disclosures and the constructive dismissal.

5.70. Those losses are well within the scope of the compensatory award for financial losses within section 123(1) of the Employment Rights Act 1996.

5.71. There is substantial disagreement as to the projected level of future locum work and the rate charged for it.

5.72. We do not accept the contention that Dr Mann's locum work would have been charged at £85 per hour, with £100 triage. While she did charge Helios the agreed triage premium of £100 in her July invoice, as agreed with Mrs Friis, she does not seem to have charged it since, in working elsewhere. The later history shows that the figure was challenged by the respondent, albeit properly agreed. It is probable that there would have been some renegotiation at the same time as agreeing the increase in salary.

5.73. The terms on which Dr Mann offered her locum services after dismissal were £80 per hour, with the same rate for additional administrative or patient-based duties. She did not charge a triage premium, but she has withdrawn from offering triage on a locum basis. On the limited evidence available, others charged £80 per hour. We find the proper rate to calculate locum services would be £80 per hour. There was some debate in the correspondence about the duration of the session time, but while Helios paid for 3 hour sessions, we find that the normal session time would be four hours. That equates with the actual working practices at Helios and elsewhere. Mr Laver considered that the overrun would be covered by the triage premium. There is strong evidence that the session times were consistently longer than 3 hours, with doctors unable to take planned breaks. Helios had to pay the going rate to meet their needs. The difference between the figure Dr Mann contends for in locum earnings, £8169 and the figure we identify, £8320, for 26 sessions per year is minimal, and in fact, given that variability of locum work, neither can be wholly accurate projections.

#### *Approach to the calculation of net earnings from self-employment*

5.74. In relation to the earnings from self-employment, expenses in year 2018/19 had been a significant percentage of fees at 38.30% (269). In the following three years, they were 11.45% (2019/20) 7.93% (2020/21) and 9.69% for the period 6/04/21 to 14/03/22. The expenses for year 2018/19 seems exceptionally high, perhaps reflect the start of Dr Mann's locum work and are not a proper basis for assessing later rates. We see no reason not to use the actual rates from the three tax years between 2019 and 2022. The average of those three years (9.71%) is very close to the level in the third year, so we continue to use the rate that operated in the third year for future

losses.

### *Mitigation*

- 5.75. We are satisfied on the evidence that Dr Mann has done all she could to mitigate her losses, as evidenced by the substantial locum earnings she achieved from the point at the end of August 2019 when she felt able to get back to work after the shock of the events in June and July 2019.

### **Future losses**

- 5.76. In assessing what would have happened to Dr Mann if she had not been constructively dismissed, we remind ourselves that we are looking at a GP in mid-career, with an excellent record. She was ambitious, looking to achieve partnership within a reasonable period, in particular thinking about when her younger daughter would reach the age for secondary school. She was highly valued within the practice by both partners, (“You are the good news”; “Nobody underestimates how good you have been for Helios during the last 4 years”) and had already been offered a partnership. A concern in not accepting it was that both partners were due to retire and Dr Mann did not want to find herself a sole practitioner. In spite of what had been said about her by the Respondent, Dr Mulder still thought highly of her and said so at the liability hearing.
- 5.77. She has been and still is a good candidate for partnership, with only the uncertainties of life a factor against it, together with the loss of confidence and resilience suffered as a result of the respondents’ actions.
- 5.78. She continued to look for salaried roles after the dismissal, originally with some confidence and then with increasing dismay as it became clear the extent to which she was at a disadvantage both in relation to salaried roles and locum roles, because of her whistleblowing. The firm offer that she had was withdrawn within a week of the projected start date.
- 5.79. We are wholly satisfied that that was because the Respondent refused to give a reference – there may also have been adverse comments about her made by telephone, but the refusal to give even a bare reference was enough to cause the withdrawal of the offer. Mr Laver had, in his kindly and regretful acknowledgement of her resignation letter, commented that she had been one of the mainstays of the practice during her four years with them, and that he would give her a good reference if she required one. However, he was not a clinician, and a reference from a medical practitioner was important. Dr Mulder refused any reference.
- 5.80. Silence about a GP who has been a member of the practice for four years is damning.
- 5.81. She has had locum positions refused, and then readvertised.
- 5.82. Her reputation has been damaged within the local community and perhaps more widely. The respondent’s conduct, their misrepresentations and dishonesty have impacted severely on her prospects for work as a GP in Bristol, including in relation to locum work.

- 5.83. It is known that she brought a Tribunal case. There will always be those who think “no smoke without fire” and “there are always two sides to a story”, without knowing the history. There will be few, if any, who find their way to the full judgment and understand the true background.
- 5.84. She faces real stigma affecting her search for suitable alternative work within reach of her home. She has a working partner and children at school, so even if she might not face the same difficulties elsewhere – and the refusal to give a reference would probably have the same impact anywhere – she is not free to move.
- 5.85. She has had to work on the basis of self-employed locum or private work, work that is essentially insecure, unreliable and variable. Those give her no prospects of advancement and none of the benefits of good working relationships with colleagues or long-standing responsibility for patients. Her career prospects have changed radically. Levels of earnings per month vary from £500, or even nothing, to £4,000 or 5,000. There is a delay and uncertainty over payment, evidenced in the documents, and even of non-payment. Some of the work, the private work, is not pensionable.
- 5.86. Her confidence and health have suffered.
- 5.87. She has no employment rights. She has no entitlement to sick pay or holiday pay or the other statutory or contractual rights of employment. Her credit status is very different, as between someone in secure salaried employment and someone with insecure and variable self-employment.
- 5.88. Looking ahead to what might have happened in future had there been no constructive dismissal, she enjoyed secure, pensionable employment. She might have stayed where she was and accepted a partnership at around her planned time, or moved elsewhere and after some years as a salaried GP, then been offered a partnership, again at around the time that she had originally intended. We are satisfied that but for the dismissal, she would have progressed to a partnership on her proposed time scale, save for the unforeseen contingencies of life
- 5.89. If she had not been dismissed, she would have continued with Helios working for £9,000 per session, for four sessions annually, £36,000 per annum, with some locum work. (It is not contended that the employment of a salaried GP such as Dr Mann would have terminated on the transfer of the practice to Mendip Vale in April 2021).
- 5.90. We do not accept the respondent’s projections based on the very low level of locum work in 2018/19, as standing in stark contrast to the work undertaken in the following year. That does not afford an accurate basis for projection.
- 5.1. We put the income from self-employed locum work at broadly the level contended for by Dr Mann, undertaking one additional locum shift every other week, two sessions per month, with perhaps some extra sessions at difficult times. She actually did nine sessions in June 2019, but that was when Helios were really struggling and that level of demand would not be expected to continue. We have worked with our figure of £80 for four hours,

which is our best estimate. The figure we propose is £8320 per annum, before expenses and tax/national insurance.

- 5.2. She would in due course either have secured higher earnings at Helios, given that she was still earning at the lower end of the market rate and her rate had not increased over the previous four years, or she would have moved to get better terms and prospects. Either way, she still had partnership prospects at her preferred date of beginning 2025.
- 5.3. We calculate on the basis for £9,000 per salaried session per year from the date of dismissal until February 2022.
- 5.4. She had a firm offer from another practice to start in August 2021 but that involved her in a significantly lower salary, £9300 per session for three sessions. She would not have left Helios, earning £9000 for four sessions per week on a salaried basis to take such a salary cut. But it is easier to step from one job to another than to find work from a position of self-employment or locum work and she would not have faced stigma in the employment market, as she has done in fact.
- 5.5. When offered £9,400, she would have accepted that and undertaken five sessions per year, reducing substantially her involvement in locum work. But she would have continued with it, because she had done some locum work in 2018/19 before all these recent difficulties and the increasingly chaotic management. She was doing a little under one locum session a month at that time while doing five salaried sessions per week and we find it likely that even with five sessions committed to salaried work, she would have continued with one locum per month, that is, half the level she had been doing more recently.
- 5.6. £9,400 is an entirely realistic rate, judged by the advertised positions we have seen. By 1 February 2022, she would have secured at Helios or elsewhere an offer of 5 sessions per month at £9,400 per session. She would have earned an additional £4160 in locum fees, before deduction of expenses and statutory payments.
- 5.7. While some of the work now done is not pensionable, there would have been no reason for her to do non-pensionable work had there not been the discriminatory dismissal and subsequent misconduct in this litigation. Her locum work would have been pensionable.
- 5.8. We project that that level of loss will continue until 1 January 2025. At that point, either there or elsewhere, she had a 75% chance of securing a GP partnership. That 75% simply reflects the scope for unforeseen incidents of life which may interfere with career plans – illness or disability within the family, caring obligations, the demands of a partner's career – all sorts of contingencies arise and alter career plans.
- 5.9. There is a 25% chance that she would have continued as a salaried GP for a further five years, to 2030. As a salaried GP, she would have enjoyed salary increases and she would have continued with a modest level of locum work.
- 5.10. If she secured the partnership, her losses would include the uplift in income that goes with being a GP partner that she has lost.

- 5.11. While we accept how despondent she is now over her future, we do not consider that she has lost all future prospects of advancement in her career. She has been very badly shaken by recent events and the serious damage to her reputation. She is however, as a locum, in a good position to rebuilt trust in her skills, abilities and professionalism. She has shown confidence and resilience in the past and those qualities will return. As her therapist writes, she has gone through an extremely stressful and distressing chapter. She has strength and insight and has tackled her distress and symptoms with courage. She has a lot to offer.
- 5.12. We accept her profound reluctance to go back into a salaried position at present. Given time, that may change, or she may find new opportunities for advancement. We project that after a further five years, by 2030, she will have been able to either find an alternative medical career outside NHS GP practices or to have secured again a salaried position leading by then to a partnership and that her status will be restored to where it should have been in February 2025. That may not end her losses, in that she will have ongoing losses in particular pension losses, reflecting that her career progress has had a marked setback.
- 5.13. The statutory cap on the compensatory award for unfair dismissal does not apply, pursuant to section 124(1A)
- 5.14. We have quantified the award in respect of injury to feelings. We have quantified past losses.
- 5.15. The quantification of future losses is difficult. We have not had evidence on the level of prospective partnership earnings as a GP. It is now clear that that is relevant to the calculation of future loss. The findings made clearly demonstrate an impact on Dr Mann's pension entitlement which requires expert assessment.
- 5.16. We invite the parties to consider a joint report in respect of pension. We have also specifically found that Dr Mann had a 75% chance of obtaining her GP partnership by 1 January 2025. On her terms at that point, evidence and submissions are invited. In addition, it is unrealistic to consider that her salary if the 25% chance applies, would have remained static over the remaining period, and we again invite evidence and submissions.

*Uplift in respect of ACAS Code – s 207A*

- 5.17. Dr Mann contends for an uplift of 25%. The respondent accepts in principle that an uplift may apply but says that it should at maximum be 10%.
- 5.18. It was the failure to address the grievance that was fundamental to both the detrimental treatment and the dismissal.
- 5.19. The ACAS Code sets out minimum requirements for the fair handling of grievances. At paragraph 4, the essential elements of a fair process are set out, including prompt action, consistency, the conduct of necessary investigations, due information to the employee and an opportunity for them to put their case, the right to be accompanied at any meeting, and the right

of appeal. At paragraphs 33 to 41, more specific guidance is given, including for a formal meeting to be held without unreasonable delay after the grievance has been received.

- 5.20. None of that was done. The grievance was ignored, there was no recognition of the serious nature of the issues arising and no attempt to arrange a meeting or to discuss them. That was a wholesale and unreasonable failure to comply with the requirements of the Code.
- 5.21. Section 207A applies both in respect of the detrimental treatment under section 47B and the automatically unfair constructive dismissal case.
- 5.22. The case merits a high uplift in principle. However, the tribunal must consider what it is just and equitable to do in all the circumstances. It is not possible at present to quantify the future losses; it is therefore not possible to establish the consequences of applying the uplift to the overall award. The question of the ACAS uplift must be deferred until the level of that award is established.

### **Calculation of the elements of the award**

#### *Basic award for unfair dismissal*

- 5.23. a\

#### *Compensatory award – statutory rights*

- 5.24. We put the loss of statutory rights at £1300.

#### *Past losses*

- 5.25. The calculation method is that proposed in the respondent's counter-schedule of loss, as agreed by Dr Mann in the updated calculation. That method reflects net earnings/profit inclusive of employee pension contribution, both as an employed GP under the 2015 NHS Pension Scheme and making contributions to the same scheme as a self-employed locum GP. It is a calculation of net earnings, but inclusive of the value of the employee pension contributions.
- 5.26. The calculations to support the findings below are set out in the annex and in summary below.

### **Conclusion and Summary of Findings so far**

- 5.27. On the Claimant's application for the hearing to be adjourned for further evidence, it is appropriate to invite further evidence and/or submissions on the calculation of future loss to include pension loss, on the basis of the panel's findings so far.

### **Detriment**

Injury to feelings	£21,000
Aggravated damages	£10,500

Interest is to be calculated from the date of discrimination at the statutory rate of 8% from 3 July 2019

The ACAS uplift has not yet been applied.

### **Unfair Dismissal**

Basic award for unfair dismissal	£3,150
Loss of statutory rights	£1,300

### **Financial Losses**

Past losses

2019/20		4,144
2020/21		8,424
2021/22	344	
	545	
		889

Total past losses to 11 March 2022	£13,457
Offset for July overpayment	£ 1,331
Net Past losses to 11 March 2022	£12,126

A further calculation will be required for the final hearing.

The ACAS uplift has not been applied.

### *Summary in respect of past losses to 11 March 2022*

#### ***2019/20 37 weeks***

<i>Weekly actual income</i>	£552
<i>Projected income</i>	£664
<i>Weekly losses</i>	£112
<i>Overall loss</i>	£4,144



**2020/2021 one year**

<i>Weekly actual income</i>	£510
<i>Projected income</i>	£672
<i>Weekly losses</i>	£162
<i>Overall loss</i>	£8,424

**2021/2022**

*To 31/01/22 43 weeks*

<i>Weekly actual income</i>	£661
<i>Projected income</i>	£669
<i>Weekly losses</i>	£8
<i>Overall loss</i>	<b>£344</b>

*To 11/03/22 – 5.5 weeks*

<i>Weekly actual income</i>	£661
<i>Projected income</i>	£760
<i>Weekly losses</i>	£99
<i>Overall loss</i>	<b>£545</b>

*(99 x 5.5)*

5.28. A case management hearing has been listed to address the outstanding issues.

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Employment Judge Street  
3 May 2022

Sent to the parties on:  
11 May 2022 By Mr J McCormick

For the Tribunal Office:

**ANNEX**

Rounding is to the nearest pound.

**Period 1 2019/20**

The EDT was 19 July 2019.

Actual salary at the EDT £2750

**Actual earnings prior to the EDT**

Total locum earnings in 2019/20	£35,474
Locum Earnings to EDT	4,001
Actual expenses at 11.45%	458
<b>Locum earnings net of expenses to EDT</b>	<b>3,543</b>

Salary entitlement per month	2,750
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Salary entitlement from 6 April to 19 July 2019:	9,935
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(April, May, June, @ £2750

$2750 \times 3 = 8250,$

July 1 – 19,

$2750 \times 19/31 = \text{£}1685$

$8250 + 1685 = 9935)$

Earned income prior to dismissal on 19 July	13,478
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(That is, at the rate of salary then applicable so £9935 salary, and locum fees of £3543:  $9935 + 3543 = 13,478$ )

The overpayment of salary at the higher rate for five sessions is not recoverable insofar as it relates to the period prior to the EDT.

The overpayment following the EDT has been agreed to be recoverable, that is, offset against losses.

12 days of July's salary to be offset, including

the overpayment arising from the higher rate of salary paid: £3437

$3438 \times 12/31 = 1331$

**Offset required**

**£1331**

For comparison purposes: pre- EDT

Weekly earnings: £635 gross salary

Weekly locum earnings net of expenses: 15 weeks at £3543 = £236 per week

Total gross earnings for the purposes of comparison: pre EDT

£635 plus 236 = £871 gross per week.

**Actual earnings Post EDT 2019/20: 37 weeks**

Locum earnings in the period post EDT                    £ 31,473

Expenses at 11.45% on £31,473,                                £ 3,604

Profit after expenses gross,                                    £27,869

inclusive of employee pension contributions.

Annual equivalent:

Per annum, 27,869 x 52/ 37 =                                    £39,167

Per week, £753 gross per week

Expenses    £4,486

Net of expenses     £34,681 per annum

Pension deductions at 9.3%                                    £ 3,225

Using self-employed and employed salary calculator online;

Tax    3,791

NI    Class 1    156

NI    Class 2    2,054

Take home     25,455

Add back pension contributions,                             3,225

Net annual income post EDT                                    28,680

**Weekly net income    £552**

*Projected earnings had she remained at Helios on the findings above*

Dr Mann should have been earning £9,000 per session for four sessions, and earning locum fees of £8320 per annum.

**Gross salary**  $9,000 \times 4 = 36000$

**Gross locum earnings** 8,320

Expenses were 11.45% using the tax return figure.

$£8320 \times 11.45\% = £953.$

Net of expenses, the profit is £7,367.

Pension contributions on net self employed earnings 685

Total projected gross earnings before pension contributions but net of self-employed expenses £43,367

$(36,000 + 7,367 = 43,367)$

*Earned income calculation*

Using salary calculator online

Salary	36,000
Pension deductions	3,348
Tax	4,030
NI	3,284

Take home 25338

Add back pension deductions  $25338 + 3348 = £28,686$

**Projected earnings –**

**Net weekly figure for comparison £28,686 per annum, £551 per week**

*Self employed income calculation*

Turnover	8,320
Expenses	953
Pension	685
Tax	1,336
NI Class 2	156
NI Class 4	000

Her self-employed earnings post the EDT would have been £5,190 net per annum

Add back pension contributions at 685,  $5190 + 685 = 5,875$

Figure for comparison is £5875 per annum, £113 per week

**Her projected earnings had Dr Mann remained at Helios**

salary	£551
self-employed earnings	£113
net per week -	<b>£664</b>

**Actual earnings post EDT net per week £552**

Net loss per week (664 – 552) **£112**

Over the 37 week period, Dr Mann's net losses were **£4,144**

***Period 2 2020/21***

**Actual earnings**

Total receipts from locum work	£34,766
Expenses at 7.93%	
(claimant's figure based on tax return)	£2,757
Net of expenses, locum earnings	£32,009
Employee pension contributions at 9.3%	£2,863
(claimant's figure)	
Tax and national insurance	£5,514
(claimant's figure)	
Net locum fees	£23,632
Adding back employee pension contributions,	
$£23,362 + £2,863$	£26,495
<b>Per week, net weekly earnings</b>	<b>£510</b>

**Projected earnings**

Dr Mann should have been earning £9,000 per session for four sessions, and earning locum fees of £8320 per annum.

Locum fees	£8,320
Her declared rate of expenses in this year was 7.93%	
Expenses at 7.93%: $8320 \times 7.93\% =$	£660
Self-employed earnings net of expenses	£7,660
Pension on self-employed earnings 9.3%	£712

*Earned income calculation*

Using salary calculator online

Salary	36,000	
Pension deductions	3,348	
Tax	4,030	
NI	3,180	
Take home	25,441	
Add back pension contributions		
(25,441 + 3,348)		£28789

Projected net salary for comparison: £28,789 per annum or £554 per week

*Self-employed earnings*

Turnover	8,320
Expenses	660
Pension	712
Tax	1,390
NI Class 2	159
NI Class 4	00

Her self-employed earnings post the EDT would have been £ £5,400 net per annum

Add back pension contributions at £712, net income is £6,112 per annum, £118 per week

Her projected earnings had she remained at Helios £554 salary plus £118 self-employed earnings net per week - **£672 per week**

*Summary for period 2*

Actual earnings per week	£510
Projected earnings at Helios per week	£672
Net loss per week 672 – 510 =	£162
<b>Loss for the year 2020/21</b>	<b>£8,424</b>

***Period 3 2021/2022***

This falls into two parts. From 6 April 2021 to 31 January 2022, Dr Mann would have earned £36,000 per annum salaried and £8,320 per annum locum fees.

From 1 February 2022 and ongoing, she would have earned on the basis of 5 sessions per week, at £9,400 per annum per session, total annual salary £47,000 plus reduced levels of locum work at £4160 per annum.

6 April 2021 to 31 January 2022 – (42 weeks and six days) – 300 days

1 February 2022 to 11 March 2022 - 5 weeks four days, 39 days

**Actual earnings 6 April 2021 to 11 March 2022**

Earnings over 43 weeks.

Locum earnings £39,248

Annual equivalent £47,462

Non-pensionable element - work from Nuffield: £12,268 (agreed figure)

Pensionable element £26,979 (claimant's figure)

pension contributions	£2,509
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Business expenses 9.69% = £3,803

Annual equivalent 4,599

*Using self-employed calculator*

Turnover	47,462
Expenses	4,599
pension contributions	2,509
Income tax	5,557
NIC class 2	159

NIC Class 4	2,771
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Net income from self-employment, on an annual basis, £31,867

Add back pension contributions (31867 + 2509)	£34,376
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Weekly net pay for the period to 11 March 2022	£661
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### **Projected earnings 2021/22 to 31 January**

Salaried income per annum £36,000

Locum fees per annum £8320

The rate of expenses actually claimed was 9.69% - £806 per annum

Pension deductions on locum fees £699

*Using the online calculator*

#### *Salary*

Salary	36,000
Pension on salary	3,348
Tax	4,016
NI	3,172

Take home pay	£25,464
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Add back pension contributions on salary

25,464 + 3,348	£28,812
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Weekly	£554
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Projected earnings £554 per week, inclusive of employee pension contributions

#### *Self-employment*

Turnover	8320
Expenses	806
pension contributions	699
Income tax	1363
NIC class 2	159



NIC Class 4 00

Net income from self-employment,	£5,293 per annum
Add back pension contributions £699	£5,992
(5293 + 699= 5992)	
Weekly net pay for period	£115

*Summary for period 3 part 1 6/04/21 to 31/01/22*

Actual earnings per week	£661
Projected earnings	
Salary	£554
Self employment	£115
Total	£669

Loss during period per week £8

**Loss this period 43 weeks at £8 per week £344**

**Projected income 1/02/22 to 11/03/22**

*Salary*

Salaries income £47,000

Locum income £4,120

Expenses 9.69% on £4120 £399

Pension on self employed earnings £346

*Using the online calculator*

Salary	£47,000
Pension on salary	4,371
Tax	6,012
NI	4,492

Take home pay	£32,125
Add back pension contributions on salary	
32,215 + 4371 =	£36,586
Projected earnings per week	£704
inclusive of employee pension contributions	

*Self-employed income*

Turnover	4120
Expenses	399
pension contributions	346
Income tax	675
NIC class 2	159
NIC Class 4	00

Net income from self-employment, on an annual basis, £2,541

Add back pension contributions £2,887

(2,541 + 346)

Weekly net pay inclusive of pension contributions £56

*Summary for period 3 part 2 1/02/22 to 11/03/22*

Projected take home pay inclusive of pension contributions 1/02/22 to 11/03/22 per week

Salary	£704
Self employment	£56
Total	£760

Actual earnings	£661
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losses per week 760 – 661 £99

**Five and a half weeks at 99 per week: loss £545**

***Totals for period 3***

<i>To 31/01/22</i>	<b>£344</b>
<i>To 11/02/22</i>	<b>£545</b>
<b><i>Total</i></b>	<b>£899</b>

Total past losses	£13,457 to March 11 2022
Offset	£1331
<b>Past losses to 11 March 2022</b>	<b>£12,126</b>