EMPLOYMENT TRIBUNALS

Claimant: **Ms P. Thomas**

Respondents: **(1) Legacy Care Ltd (in Creditors' Voluntary Liquidation)**
(2) Angelic Care Resources Ltd

Heard at: **East London Hearing Centre (by CVP)**

On: **3 May 2022**

Before: **Employment Judge Massarella**
Members: **Mrs S. Jeary**
Ms J. Clark

Representation
Claimant: Did not attend and was not represented
First Respondent: Did not attend and was not represented

RESERVED JUDGMENT ON REMEDY

The judgment of the Tribunal is as follows:

1. **the Claimant is entitled to an award of £5,000 net as compensation for injury to feelings in respect of the detriment found by the Tribunal to have occurred;**

2. **after grossing-up, the total sum which the First Respondent is ordered to pay to the Claimant is £6,250;**

3. **the Claimant shall account to HMRC for any tax liability due on this sum.**

REASONS

This has been a remote hearing by video (CVP), which has not been objected to by the parties. A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Procedural history

1. By a judgment sent to the parties on 21 December 2021, the Tribunal held as follows:

> '1. the Claimant's employment terminated with immediate effect by reason of her resignation on 11 June 2019;
>
> 2. the Claimant's employment did not transfer by operation of the TUPE Regs 2006 to the Second Respondent; all claims against it are dismissed;
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> 3. the Claimant made qualifying, protected public interest disclosures, as identified at Issues 3(C)(a) and (b), but not in respect of the other alleged disclosures;
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> 4. the First Respondent subjected the Claimant to a single detriment, as identified at Issue 8(B), but only in respect of the meeting of 7 May 2019; all other allegations of PIDA detriment are not well-founded and are dismissed;
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> 5. the Claimant's claim of automatically unfair constructive dismissal under s.103A ERA 1996 is not well-founded, and is dismissed;
>
> 6. the First Respondent made unauthorised deductions from the Claimant's wages in respect of salary in the amount of £6,912;
>
> 7. the First Respondent made unauthorised deductions from the Claimant's wages in respect of holiday pay in the amount of £2,400;
>
> 8. the Claimant is entitled to an award for injury to feelings in respect of the single act of PIDA detriment which we have upheld; the amount of that award will be determined at a remedy hearing, unless the parties invite us to determine it by way of written submissions.'

2. At paragraphs 130-131 of the Judgement, the Tribunal stated:

> 'Injury to feelings
>
> 130. The Claimant is also entitled to an award for injury to feelings in respect of the single PIDA detriment which we have upheld. For the avoidance of doubt, we have concluded that no loss of earnings can flow from that single detriment because we are satisfied that, had it not occurred, the Respondent would have instigated a disciplinary investigation in any event, and the Claimant would have resigned at precisely the same point.
>
> 131. The parties may invite us to deal with the question of how much the award for injury to feelings should be on the papers, if they wish to avoid a further hearing. However, if a hearing is requested, it will be listed for three hours. The parties must notify the Tribunal of their preference within 14 days of the date on which this judgment is sent out.'

3. No correspondence had been received from either party by 15 February 2022. The Tribunal wrote to them again on that date, ordering them to notify the

Tribunal by no later than 22 February 2022 whether they were content for the amount of the injury to feelings award to be dealt with by way of written submissions or whether they requested a hearing.

4. On 17 February 2022 at 12:42, the Claimant wrote to the Tribunal, asking for a hearing. At 13:59 the same day, she wrote again, attaching some written submissions, explaining that she could not cope with another hearing and asking for the matter to be dealt with on the papers. The attached submissions was effectively a document in support of an application for permission to appeal to EAT. It was broad in nature, setting out the reasons why she was dissatisfied with the Tribunal's judgement on liability. Unfortunately, they did not address the specific issue of injury to feelings.

5. On 21 February 2022, the Tribunal received a letter from Mr Athur Qureshi stating that the matter could not be decided without the involvement of the First Respondent's administrators and asking for a hearing. Under cover of the same email, he forwarded an email from the administrators, in which they wrote that they would not be making any comment, submitting any written submissions or requesting a hearing; if Mr Qureshi wished to submit any written submissions, he was asked to forward them to the administrators by 21 February 2022, so that they could submit them by the deadline the next day. He did not do so. Mr Qureshi objected to the administrators' decision not to participate in the hearing, writing: 'abstaining is not an option' and asking for the Tribunal's guidance.

6. On 24 February 2022, a notice of a hearing by CVP on 3 May 2022 was sent to the parties, copying in the administrators.

7. On 18 March 2022, the Judge wrote to the parties (copying in the administrators) in the following terms:

> 'The parties' recent correspondence is acknowledged.
>
> Point 8 of the judgment on liability was as follows:
>
> > 'the Claimant is entitled to an award for injury to feelings in respect of the single act of PIDA detriment which we have upheld; the amount of that award will be determined at a remedy hearing, unless the parties invite us to determine it by way of written submissions'.
>
> Because Mr Qureshi requested a hearing, it has been listed for 3 hours on 3 May 2022, to be conducted remotely by CVP as per the notice of hearing dated 24 February 2022.
>
> I note that the Claimant originally asked for a hearing, but then wrote to say she did not feel able to attend a further hearing.
>
> It is open for either party to notify the Tribunal that it does not propose to attend the hearing, but to invite the Tribunal to have regard to written representations instead (Rule 42). Any such representations must be received no less than 7 days before the hearing.

> The Claimant has provided some written representations, but they do not appear to me to address the single issues we have to decide: how much should the award for injury to feelings be?
>
> The amount of an award for injury to feelings for a PIDA detriment is approached on the same principles as an award for injury to feelings in a discrimination claim. The law which the Tribunal will be applying may be summarised as follows […]

8. The Judge then set out the relevant law in terms similar to those contained later in this judgment. The order then concluded as follows:

> 'If either party wishes to make written representations as to how much the award for injury to feelings should be, they may do so, provided they send them to the Tribunal and each other no later than 7 days before the hearing.
>
> As for Ms Norcutt's email of 16 February 2022, and Mr Qureshi's of 21 February 2022, the Tribunal cannot order the administrators to participate. They have indicated that they do not intend to do so. The hearing will go ahead on the date listed. It is a matter for Mr Qureshi whether he wishes to make written submissions via Ms Norcutt, as she proposed.'

9. Nothing further was received from the Respondent/administrators before the day of the hearing. The Claimant sent in a number of written submissions in emails/attachments, dated and timed as follows:

   9.1. two emails on 27 April 2022 at 17:55 and 17:57;

   9.2. one on 30 April 2022 at 14:48

   9.3. three on 1 May 2022 at 15:10, 15:12 and 15:14.

The remedy hearing

10. The CVP hearing on 3 May 2022 began slightly late because of technical difficulties. When the Tribunal entered the hearing room, at around 10.20, the Claimant was not in the virtual waiting room. This did not come as a surprise; she had said she did not wish to attend and had provided written submissions. We noted that an observer was present, but they declined to switch their camera on, or speak to the Tribunal.

11. Mr Athur Qureshi was present. We spent some time explaining that he was not permitted to participate because he no longer had standing to represent the First Respondent and he had elected not to provide written submissions to the administrators, which they could submit on behalf of the First Respondent. We also explained that we would reserve our judgment because the Claimant was not present to hear the reasons for our decision.

12. The hearing finished at 10:39, after which the Tribunal deliberated in private. We reminded ourselves of the evidence we heard at the liability hearing and went through the Claimant's written submissions. We reached our conclusion. However, there was not sufficient time for the judgment and reasons to be

written up that day; there was then a delay in doing so because the Judge was engaged on other cases.

After the hearing

13. On 20 May 2022, the Claimant called the Tribunal and spoke to a member of the administration in some distress, explaining that she had been unable to access the hearing on 3 May 2022 and had made a complaint about this which had not been dealt with. The member of staff interrogated the system and discovered that there were a number of emails from the Claimant which had not been put on file or drawn to the attention of the Judge, including emails from the Claimant at 10:11, 10:15, 11:02 and 11:07 on the day of the hearing, saying that she was meant to be at the hearing 'but no one else is there. Please ring me.'

14. This correspondence was shown to the Judge, who wrote to the parties on 23 May 2022, explaining (and apologising for) the fact that the Claimant's correspondence had not been dealt with and setting out what had happened at the hearing. The letter ended as follows:

> 'Of course, the Claimant was entitled to attend the hearing and it is most unfortunate that she was not able to access it and was not provided with appropriate assistance. Again, the Tribunal apologises for this.
>
> If the Claimant is satisfied that she has made the points she wishes to make about remedy in her written submissions, she may feel that it is not necessary for a further hearing to take place. If she has further points she wishes to make, she may do so in writing if she prefers. However, if she feels that she would like to make some further points orally to the Tribunal, we will list a two-hour hearing, to be conducted by video. We will then finalise our judgment after that hearing. The Claimant will appreciate that it may take several weeks to arrange that hearing at a time when everybody (including the lay members) is available.
>
> The Claimant shall write to the Tribunal by 31 May 2022, for the attention of EJ Massarella, stating whether:
>
> 1. she is content for the Tribunal to finalise its judgment on the basis of her existing written submissions;
>
> 2. she wishes the Tribunal to have regard to additional written submissions (but does not ask for a further hearing), in which case she shall include those submissions;
>
> 3. she asks to the Tribunal to list a further two-hour hearing at which she will make some oral submissions, in which case she must provide her dates to avoid for the next three months.'

15. Later the same day, the Claimant wrote to the Tribunal as follows:

> 'Thank you for acknowledging my distress about not being able to be present at the hearing on 3 May 2022 – even though I had got through to Tribunal staff and ask for assistance in logging on to attend. I appreciate

> the offer of a further hearing. However, please accept all the written submissions and make your judgement. I appreciate that this case has already taken a lot of time, energy and resources. For this reason, I am happy for the Tribunal to make their judgement about any award that can be made. Then hopefully a line can be drawn under the whole affair and we can all move on.'

16. On 25 May 2022, the Tribunal wrote to the parties, acknowledging the Claimant's email and indicating that Judge anticipated that the judgement on remedy would be sent out within two weeks.

17. The Claimant emailed again the same day:

> 'Please can you inform Judge Massarella that the Claimant in the above case is happy for a judgement for the above case to be made. No further hearings are necessary. I have been asked to provide this information by 31st May.'

The law

Injury to feelings

18. In *Virgo Fidelis Senior School v Boyle* [2004] ICR 210, the EAT held that it was appropriate to adopt the same approach to compensation in whistleblowing detriment claims as has been taken in discrimination cases.

19. The matters compensated for by an injury to feelings award include 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 (No2)* [2003] IRLR 102).

20. In *Vento* the Court of Appeal gave the following guidance as to the level of awards for injury to feelings:

> **'Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.**
>
> **i. The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. … Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.**
>
> **ii. The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.**
>
> **iii. Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.**
>
> **There is, of course, within each band considerable flexibility, allowing Tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.'**

21. The bands have since been increased to reflect inflation, recently by way of Presidential Guidance. The Claimant's case having been presented on 26 July 2019, the relevant Guidance[1] provides:

    21.1. lower band: £900 to £8,800;

    21.2. middle band: £8,800 to 26,300;

    21.3. top band: £26,300 to £44,000.

22. Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the perpetrator. Feelings of indignation at the perpetrator's conduct should not be allowed to inflate the award. Awards should not be too low, as that would diminish respect for the policy of the legislation. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches (*Prison Service v Johnson* [1997] IRLR 162, EAT at [27]).

23. The focus of the Tribunal's assessment must be on the impact of the unlawful conduct on the individual concerned; different individuals may be affected differently (*Essa v Lang* [2004] IRLR 313).

24. A *Polkey*-type deduction should not be applied to an award for injury to feelings (*O'Donoghue v Redcar and Cleveland Borough Council* [2001] IRLR 615).

25. Unlike in discrimination cases, there is no power to award interest on awards for injury to feelings in whistleblowing detriment cases.

26. An award for compensation can be increased by up to 25%, if the employer has unreasonably failed to comply with a relevant code of practice relating to the resolution of disputes (see s.207(A) TULRC(A) 1992). At present, the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015) is the only relevant code of practice. The full list of Tribunal jurisdictions to which s.207A applies is detailed in Schedule A2 of TULR(C)A; it includes s.127 EA 2010 (discrimination in work cases). When making an adjustment under these provisions, a Tribunal must take account of the absolute value of a given uplift, rather than just the percentage value. (*Acetrip Ltd v Dogra* UKEAT/0238/18/BA).

Findings and conclusions

27. We reminded ourselves that our focus must be on the specific, single whistleblowing detriment which we have found occurred, and the injury to the Claimant's feelings caused by that. That detriment was 'subjecting the Claimant to [an] oppressive investigatory meeting [on 7 May 2021] which [was] a sham, causing the Claimant distress and upset'. Our findings in our judgment on liability were as follows:

> '102. We reject the allegation that the meeting of 7 May 2021 was a 'sham': there were genuine concerns which had been allowed to lay dormant, but which the Claimant herself accepted in cross-examination ought properly to be investigated. Crucially, there was also a new

[1] 2019 Second Addendum to Joint Presidential Guidance

> concern which had arisen the day before, on 6 May 2019, which we conclude was one of the triggers for the decision to move to a formal investigation. Nor was the meeting 'oppressive' in terms of the manner in which it was conducted. It was somewhat chaotic, but we are satisfied that Mrs Clifford was genuinely seeking to address the issues which needed to be addressed.
>
> 103. However, we are not satisfied that the timing of the decision to move to a disciplinary investigation, which could be described as oppressive given its haste, was unconnected with the fact that the Claimant made protected disclosures at 10.30 in the morning. An invitation to a disciplinary investigation meeting was on her desk by lunchtime. We have concluded that the fact that she had made protected disclosures irritated the Qureshis and materially influenced the timing of the meeting, i.e. their decision to instruct Mrs Clifford to move so quickly to a disciplinary procedure. We have concluded that it was a subsidiary reason, not the sole or main reason for the decision. The principal reason was the new matter which had arisen on 6 May 2019; it was decided that this matter required formal investigation, and that it would be appropriate to look at the other matters formally at the same time, as there may be underlying concerns about the Claimant's conduct. Nonetheless, the fact that the disclosures played a subsidiary, but not immaterial, part in the decision, is sufficient for this claim to succeed.'

28. The Tribunal carefully considered the various written submissions which the Claimant had lodged. We noted that the majority of them effectively invited us to compensate her for matters other than this single detriment, in relation to claims which we have not upheld, such as past and future loss of earnings and a basic award, consequent on the claims of ordinary and automatically unfair dismissal which the Tribunal had rejected. The award for injury to feelings proposed in the schedule of loss (£19,800) was also predicated on the Claimant having been dismissed for making protected disclosures, which we found did not occur. We assume that this document was drafted much earlier in the proceedings, before we gave judgment on liability. To be clear: it is not permissible for us to reopen matters of liability at this stage of proceedings.

29. We focused our attention on those parts of the documents which related specifically to the meeting of 7 May 2021 and its impact on the Claimant.

30. Our starting point in assessing that impact was the fact that the Claimant was already in a vulnerable frame of mind before she learnt that the meeting was to take place. She was finding the responsibilities of the new role she had taken on stressful and the hours too long. There was a lack of support for her, which was particularly troubling given that she had only just started as Acting Clinical Lead. She had been left very much to fend for herself. She was worried about the behaviour of her colleague, who she believed was putting patients at risk, and about whom she made protected disclosures at the beginning of the day. She was not expecting be summoned to a meeting to discuss her own conduct and we accept that she was shocked to receive the invitation.

31. The Claimant accepted, in retrospect at the Tribunal, that the concerns that had been raised about her own conduct needed to be investigated at some point. Insofar as the Claimant takes issue (in the last of the written submissions, sent to the Tribunal on 30 April 2022) with the substance of the specific conduct issues raised with her, we do not have regard to that in assessing the level of the award for injury to feelings. However, we do have regard to the manner in which the meeting was convened and handled, which we find was thoughtless and often inappropriate.

32. Firstly, there was the haste with which the meeting was arranged. The very fact that it was convened so quickly after the Claimant made what we have found were protected disclosures aggravated her sense of vulnerability. She felt she was being targeted because she had blown the whistle, which we have found was, in part at least, the case; she found that distressing.

33. We do not accept the written submissions the Claimant made that the meeting was 'like the old Witch Hunt Star Chamber meetings'. Based on our scrutiny of the notes, that was an exaggerated description. The Respondent had genuine concerns about some of the Claimant's conduct. Nor do we accept her submission that the answers she gave at the meeting ought to have stopped the process in its tracks. Apart from anything else, the poor quality of the meeting failed to achieve the necessary degree of clarity; it was almost inevitable that further meetings would be required.

34. On the other hand, we have already found that the meeting was chaotic (or, to use the language of the Claimant in her written submissions, 'haphazard and unprofessional'). We are satisfied that this was a direct consequence of the haste with which it was arranged. The letter inviting her to the meeting did not set out the matters which were to be investigated and Mrs Clifford did not explain them clearly at the meeting itself. She was also very unclear in terms of what the precise purpose of the meeting was, and what its possible consequences might be, which in turn created further anxiety for the Claimant.

35. It is clear from the contemporaneous notes of the meeting and the evidence which the Claimant gave at the liability hearing, that she became very agitated and upset at the meeting. At points she was tearful. We find that this was in part because the meeting had been sprung on her and was so poorly structured. Had it been conducted in a more orderly fashion, she might have been able to approach it in a calmer frame of mind.

36. The timing of the meeting was also unfortunate in another respect: it occurred in the middle of the Claimant's shift. The Claimant explained in her written submission that, after the meeting she had to go back to complete her shift; there was no other nurse in the building and so, even though she had just emerged from a stressful meeting, she had to continue to look after the residents in her care and administer their medication. We also accept that going back on the shift caused her embarrassment because staff and residents asked why she was upset. This would not have happened had meeting been arranged in an orderly fashion, for example to take place at the end of a shift, or on a day when the Claimant was not rostered to work.

37. On the other hand, we took into account that Mrs Clifford spent part of the meeting asking about the Claimant's welfare and discussing with her whether she felt that work was becoming too much for her. Her approach, once the meeting started, was not without care for the Claimant.

38. With those findings in mind, we then turn to the question of which of the *Vento* bands the award should fall.

39. The Claimant invited us to find that the award should come into the middle, or perhaps even the top, *Vento* band. She appears to have arrived at that conclusion in part by taking into account events other than the meeting itself, including a submission that it caused her to resign. We have already rejected the Claimant's claim of constructive dismissal and so cannot proceed on that basis.

40. In our judgement, the award properly falls into the lower *Vento* band: it was a one-off occurrence; there was an appropriate underlying reasons for holding the meeting, although the planning and conduct of the meeting was inappropriate; and, although Mrs Clifford's handling of it was poor, she was in some respects compassionate towards the claimant.

41. Having placed the award into the lower band, we are satisfied that it should be in the upper half of that band: the Claimant was vulnerable at the material time and we must take her as we find her; we think that the timing and manner of the meeting will have affected her more than it might have affected another employee in a more robust frame of mind. However, we think that an award at the top of the band would be excessive in all the circumstances.

42. Balancing all these factors, we have concluded that the appropriate award is £5,000.

ACAS uplift

43. In her final submission, attached to the email of 30 April 2022, the Claimant invited the Tribunal to award an ACAS uplift of 25% on our award for injury to feelings, on the basis that the Respondent breached the ACAS code in its conduct of the meeting of 7 May 2021 (in fact she put her submission more broadly than that, but again, in doing so, strayed beyond the single detriment we are considering).

44. We are not satisfied that the Claimant has identified a specific breach of the ACAS code in relation to the meeting of 7 May 2021, such as to justify an increase to the award. Our criticisms of that meeting relate to the existence of an improper motivation for holding it at that point. Although the meeting was not well-conducted, we are not satisfied that there was a relevant breach of the Code: rights such as the right to be accompanied, and to have sufficient time to prepare, arise only in relation to disciplinary meetings, not investigatory meetings.

Grossing up

45. Awards for injury to feelings in respect of pre-termination discrimination are now taxable. Accordingly, we must gross up the amount awarded to reflect the tax payable on it. Absent more detailed information, we have proceeded on the

assumption that the basic rate of 20% will apply. This produces an additional sum of £1,250. The total awarded (gross) is, therefore, £6,250.

Employment Judge Massarella

Date: 1 June 2022