EMPLOYMENT TRIBUNALS

Heard at: Southampton (by video) **On:** 21 to 22 November 2022

Claimant: Dr Jasna Macanovic

Respondent: Portsmouth Hospitals NHS Trust

Before: Employment Judge E Fowell

Ms S Maidment

Mr P Bompas

Representation:

Claimant Mr J Allsop, instructed by Paris Smith Solicitors

Respondent Mr M Sutton KC, and Mr R Hignett of counsel, instructed by Mills & Reeve Solicitors

JUDGMENT ON REMEDY

1. The claimant is awarded compensation for unfair dismissal in the sum of £186,697

2. The claimant is awarded compensation for injury to feelings following unlawful detriments for raising protected disclosures in the sum of £33,000.

3. Hence, the overall total due is £219,697

REASONS

Introduction

1. This hearing is to decide on the compensation to be awarded to Dr Macanovic. It follows several years of litigation which began in January 2018, shortly before her dismissal on 5 March 2018. At the liability hearing in November 2021 we found that she had been unfairly dismissed from her post in Hampshire as a consultant nephrologist. The principal reason for her dismissal was that she had made a series

of disclosures about a clinical technique known as buttonholing, and in particular had reported two of her senior colleagues to the GMC. We also found that she had been subjected to a series of detriments at work over a period of a year or more before her dismissal.

2. At the start of this hearing, Mr Sutton KC, for the respondent, apologised to Dr Macanovic for the approach which the Trust had taken in relation to her case and for the harm caused. The Trust say that their Board has since commissioned a review from leading counsel to understand the lessons learned and that the findings made in that review were being percolated throughout the Trust.

Procedure and evidence

3. Another point raised at the outset concerned contributory fault. Throughout these proceedings the main argument on behalf of the Trust has been that Dr Macanovic was not dismissed for making protected disclosures but because of the way she went about it. In our decision on liability we rejected that argument very firmly, and we also rejected the argument that her compensation should be reduced to any extent because her behaviour caused or contributed to her dismissal.

4. Mr Sutton KC referred us to section 49(5) Employment Rights Act 1996 which provides that when considering compensation for any *detriment*:

> "Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding."

5. The terms of that section, he submitted, are mandatory and so ought now to be considered. As he noted, there was no detailed consideration of contributory fault at the last hearing; it was dealt with briefly at paragraph 150, in the context of the claim of unfair dismissal, and rejected on the basis that the Trust had not shown its reason for the dismissal.

6. Mr Allsop objected that contributory fault is a liability issue, and that the claimant was entitled to regard it as concluded. Further, the Trust had not pleaded any reliance on section 49(5), and for that reason only it did not appear in the list of issues for the liability hearing.

7. He also referred us to the Presidential Guidance on Case Management, under the heading Submissions on Pokey and Contributory Fault, which states at paragraph 19:

> "Generally the tribunal will decide these issues at the same time as it reaches its decision on the merits of the claim. Sometimes this will be done at a separate remedy hearing. The tribunal will usually explain at the start of the hearing which of those options it will

follow. If it does not then the parties should ask for clarification on when they are expected to give evidence and to make submissions on these matters."

8. We agree that this ought to have been raised and resolved at the liability hearing if it was felt that different considerations applied to the detriment claim. The wording of section 49(5), quoted above, is very similar to the wording at s.123(6) in relation to dismissal. It would in our view be wrong for the question of contributory fault to be dealt with as a liability issue for the complaint of unfair dismissal and for it to be raised as an issue of remedy in connection with the complaint of unlawful detriments.

9. The agreed list of issues for the liability hearing was detailed, and followed two case management hearings prior to the three day preliminary hearing to decide whether the alleged disclosures were protected. The importance of adhering to lists of issues was reinforced by the Employment Appeal Tribunal in **London Luton Airport Operations Limited v Levick** UKEAT/0270/18/LA, which held that

   "Parties are entitled to expect that employment litigation will be conducted in accordance with issues which have been defined at a preliminary hearing. The list of issues can of course can be amended or augmented; but whether to do so is a matter of case management which should not be ignored."

10. Since the main liability hearing there have been two further case management hearings. This issue was not raised on either occasion. It was only raised in correspondence this month, after arrangements for this hearing were well advanced. In those circumstances we felt that there was a serious risk of unfairness to the claimant in allowing this issue to be reopened. The question of why working relationships at the Trust broke down so comprehensively was the broad underlying question we had to resolve at the last hearing. That involved hearing from ten witnesses for the Trust. It would not, we concluded, be right for us to start to unpick those findings on the basis of some further questions to Dr Macanovic alone. In any event, we saw no reason to revise or alter our previous conclusions.

11. At this hearing we heard some further evidence from Dr Macanovic and from:

    (a) Mr Nigel Heilpern, her partner, who supported her through the discliplinary process and subsequent litigation; and

    (b) Ms Rebecca Kopecek (Deputy Director of Workforce and Organisational Development), who advised the Trust during the disciplinary process.

12. Mr Heilpern's evidence supported that of Dr Macanovic about the emotional impact of her dismissal and about the way in which she had been treated by the Trust during the litigation process. Ms Kopecek's evidence was mainly concerned with how a consultant's salary can be increased with additional awards for Clinical Excellence and by extra sessions each week, or Programmed Activities. This was relevant to Dr Macanovic's claim that she had lost out on some elements of her pay

following her move to a consultant's role at Oxford University Hospitals NHS Foundation Trust. Her new employer has now agreed to match her terms with the Trust, and the only remaining difference is that she is doing slightly less in the way of Programmed Activities.

13. During this hearing Dr Macanovic and the Trust were able to agree some figures for her loss of earnings covering the transition to her working at Oxford, and there is a remaining gap in connection with her slightly lower earnings over the last three and a half years. That gap has closed further more recently, and on that basis Dr Macanovic has withdrawn any claim for future loss beyond the end of this month, and with it her claim for pension loss; she remains in the same NHS pension scheme as before.

14. The main remaining issues we have to decide comprise her claims for:

    (a) the costs incurred in relocating, some of which are also agreed,

    (b) legal and other fees incurred prior to her dismissal (as losses attributable to her detriment claim),

    (c) damages for injury to feelings,

    (d) aggravated damages,

    (e) an uplift for breaches of the ACAS Code,

    (f) interest, and

    (g) an uplift for tax payable over £30,000

15. There was also a bundle of about 500 pages. Having considered this evidence and the submissions on each side, we made the following further findings, limited to those we need to make in relation to remedy.

Findings of Fact

16. At the time of her dismissal Dr Macanovic was 49. She had been working at the Trust in Hampshire for 17 years, the last 13 of them as a consultant. We have already described her impressive career and the range of responsibilities she had taken on.

17. On a personal level she was and is a mother to two children. Her partner, Mr Heilpern, has a residence in London, where he works during the week. They had between them bought a substantial property in the Meon Valley; a large, period home in a gated community, which meant that they could enjoy the grounds without any need of maintenance. (Having a full-time job as well as being the main carer for her children, Dr Macanovic had no spare time for such extra work). She

described it as her dream home, and it was bought with a view to her retirement. She intended to work at the Trust until she was 67, a further 18 years.

18. That intention is clear to us from the determination she showed to remain in post despite the series of detriments she experienced in her last year of employment. During that period she was excluded from consultants' meetings and carried on with her clinics as best she could. As we have already noted, she was invited to resign with a favourable reference at the disciplinary hearing and even then refused. From a practical point of view, dismissal was little short of disastrous. The Trust was the sole employer of consultant nephrologists in the area and it was almost inevitable that she would need to move house to get a similar post. There must have been the real risk that she could not find an alternative somewhere else, having been dismissed for serious misconduct. And moving house also meant uprooting her daughter, who had grown up in the area, and who had to move schools and leave all their friends behind her. (Her son at least was able to complete his education without moving.)

19. But she did manage to find alternative work, and with impressive speed. The Trust accept that she took all reasonable steps to mitigate her loss of earnings, and indeed her loss could well have been very must greater. In June 2018 she began locum work in Acute Medicine at the Great Western Hospital in Swindon. It meant a long daily commute from her home in Hampshire, but she was earning again, and back in the NHS.

20. By August she had secured a locum role in her own discipline, nephrology. This was with Oxford University Hospitals, working three days a week. On the other two days she carried on at Swindon. Then in June 2019, to her great relief, she was offered a permanent post at Oxford University Hospitals as a consultant nephrologist.

21. Working at Oxford, even as a locum, meant that a daily commute was no longer viable. She put her house on the market in October 2018 and moved into rented accommodation near work. That cut down on the commuting and meant that her daughter could start a new school in Oxford at the start of the school year. Like her previous school, it was fee-paying, and the need to give a term's notice at her old school meant the loss of a term's fees. She rented that property for eight months, together with an adjoining parking space.

22. By the following summer her purchase of a new house had gone through and they moved again. The new house was less expensive. It was also considerably smaller – a newly built terraced house with less than half the previous floor space. It needed new curtains. The old ones were far too long and had been made or ordered for much longer windows in a period home. Consequently they had been left in place for the new owner. She also needed some new furniture. Her old furniture was not a good match for the new house, and some of it was too big to get in, so it had been

sold off or given away. So, she bought a new dining table and chairs and a sideboard.

23. In common with most Trusts, Oxford University Hospitals has a relocation policy and in appropriate cases will pay up to £8,000 for new joiners. It did not occur to Dr Macanovic that she might be eligible for such a grant, but recent correspondence from them suggests that she would have been eligible to apply within 12 months of taking up her consultant's post, and might have been successful. It seems to us understandable that she was not aware of this, and did not enquire into it, given that she was transferring to them from a locum role at the same Trust. Accordingly we find no failure to mitigate her loss in that respect.

24. The only difference between her current role and her previous one concerns the number of Programmed Activities (PAs). Without going into too much detail, a PA is generally a period of four hours, or three hours at nights and on weekends. A consultant working less than ten PAs a week is considered to be part-time. If they want to work more than ten, they can ask for extra PAs. While in Hampshire, Dr Macanovic had 11, and while at Oxford she had until recently 10.41 PAs a week. Recently, this has increased to 10.752 PAs per week in recognition of her on-call work, and this has been backdated to 1 April 2021.

25. It follows that we are in the unusual position, nearly five years after this case began, of knowing how it all ended before assessing compensation. There is no need for any speculation about whether Dr Macanovic is going to get another job or what she will be earning. The financial impact of her dismissal can be assessed with some certainty, together with the emotional impact of the various detriments, and it should only remain to assess the extent to which the Trust is liable.

26. However, the Trust also contended at this hearing that her compensation ought to be reduced on the basis that she would not have been able to continue working in Hampshire for very much longer, given the degree of animosity with her colleagues and her insistence on fighting over buttonholing. They point to the fact that about two years after she left them she was in contact with the wife of a patient who died, having undergone this procedure, as evidence that she would not leave things alone.

27. We will deal with that broad, general point at the outset. As already noted, we previously concluded that no deduction should be made for contributory fault, on the basis that the real reason for her dismissal was not misconduct at all, and so there was no place for a deduction to reflect any misconduct on her part. Mr Sutton KC reminded us however there are various points in our judgement we made reflections upon the approach adopted by Dr Macanovic. He has set them out at paragraph 40 of his skeleton argument, and there are 23 in total. Without mentioning each, they include:

(a) a reference to the poisoned state of departmental relationships,

(b) the distress felt by her colleagues at the failed mediation meeting,

(c) the allegations of dishonesty she made against colleagues in reporting complications and clinical outcomes,

(d) the accusation she made at a consultant's meeting that Dr Sangala had lied about whether this practise was being conducted in Reading,

(e) a subsequent remark to him that she wished she could have intimidated him more,

(f) the extent of the accusations she made during the Hunter investigation about Mr Gibbs,

(g) her refusal to accept the CQC findings, and

(h) the referral letters to the GMC which alleged a cover up and that colleagues were guilty of lying and dishonesty.

28. All of these points have been dealt with in our judgement on liability. Each has to be considered in context, which we have already explained, that a certain group of consultants in a senior position within the renal unit were intent on pursuing this technique, about which Dr Macanovic had serious concerns, on reasonable grounds, and where she felt that the risks were being ignored. Hence, she also raised concerns about the way the results were presented at conferences, the lack of investigation into at least one death of a patient undergoing this treatment and the lack of explanation of the risks to patients. Once again, she was not alone in her concerns. The consultant body were fairly evenly divided. She, however, went further than others, and where she believed that risks were being downplayed she did not hesitate to describe this as a cover up or an act of dishonesty. Most people would not use that language, and it did cause very serious offence, but it had a specific meaning. It was not a general slur.

29. Mr Gibbs in particular was the subject of criticism. The GMC (at page 1593 of the original bundle) summarise the allegations against him as including

(a) misleading the CQC (mainly for stating that "after about two years, no significant harm has been observed");

(b) leading a campaign of bullying and vilification against her; and

(c) misrepresenting outcomes at national and international meetings.

30. Those were the personal criticisms, and they are all in the context of the button holding controversy. The GMC found that:

(a) His comments about button holding did not appear to be unreasonable given the explanatory text and the other information available at the time

(b) There was no evidence about bullying and vilification in the e-mail correspondence provided by Dr Macanovic;

(c) The information they had about information presented at conferences was limited and it could not be said on the balance of probability that Mr Gibbs had misrepresented outcomes.

31. That ought not in our view to have led to an irretrievable breakdown in working relations. However upsetting it was for Mr Gibbs to be put through this process, Dr Macanovic had a professional duty to raise her concerns. It does not follow that these allegations were the result of personal hostility rather than that proper clinical concern. It is true that she was unwilling to accept these conclusions of the GMC, but it is the responsibility of the Trust to manage their staff. As we have already described, the Trust waited for the GMC report and then used it as the basis for disciplinary proceedings against Dr Macanovic. There was no attempt then at mediation. The only attempted mediation had been earlier, to prevent this being raised with the GMC at all.

32. Another feature we have to draw out in laying this issue to rest is the dismissive approach taken by the Trust towards Dr Macanovic throughout. It appears to have been assumed by the most senior consultants in the team that she could not possibly be correct in what she was saying, and their view was adopted by more senior management without any real exploration. It was the view of Dr Lewis which formed the basis of the management case against her at the disciplinary hearing.

33. We are now invited to consider what would have happened if Dr Macanovic had not been dismissed, and to conclude that her employment would not have lasted for very much longer in any event. Firstly, if that had been our view we would have considered it as part of our findings on liability, at the same time as dealing with contributory fault and Polkey. Secondly, in trying to reconstruct what would have happened if she had not been dismissed – the counter-factual position – it seems to us that we must consider things on the basis that none of the detriments occurred. That detrimental treatment, it seems to us, was predominantly responsible for the poisoned atmosphere within the department. Had there been an internal investigation which was open to the possibility that her concerns were valid, rather than merely inquiring as to the more senior people made of them, there would have been a good deal less frustration on her part and perhaps less of a polarising effect within the team.

34. Fundamentally however, it is for the Trust to ensure that such disputes do not get out of hand. These points were raised with the GMC, who made their findings. At that point it ought to have been perfectly viable, whether through mediation or

otherwise, to ensure that working relationships continued to operate satisfactorily. We bear in mind that Dr Macanovic had put up with being excluded from consultants meetings for a lengthy period before the disciplinary process began, so on a day-to-day basis she was not making any difficulty for the management. We also bear in mind the points made earlier about her intention to remain in post in Hampshire until her retirement and to avoid at all costs the need to relocate at that stage in her career. In those circumstances we see no basis to reduce her compensation on the basis that she would have left through resignation by today's date or by way of dismissal because of the breakdown of working relations.

35. Turning to the detail, and before considering the applicable law, it may be helpful to set out in more detail those sums which have been agreed and which have not. There is a schedule of loss from the claimant and a counter schedule recording these points.

Unfair dismissal

36. We will start with the claim of unfair dismissal. As already noted, the calculation of the basic award is agreed at £11,736.

37. There is no claim for breach of contract, but losses of £2,652.29 have been agreed to the end of her notice period. There is then a further shortfall for the period from 2 June 2018 to 1 June 2019, agreed in the sum of £5,916.28. This covers the period in which Dr Macanovic was working as a locum.

38. The last period runs from the start of her permanent appointment at Oxford University Hospitals to the end of this month, a period of nearly three and a half years. It relates solely to the difference in PAs during that period. On the basis of the latest increase from Oxford University Hospitals, the figure for Dr Macanovic is put at £10,172.53. Of this, £2,025.64 is for the resulting loss of pension. The Trust say that extra PAs do not attract extra pension, so the correct figure is at most £8,146.89. That is the only dispute over loss of earnings.

39. Then there are the relocation expenses. The Trust say that that liability ended at the point when the claimant decided to move out of a rental accommodation into the new home in Oxford. They say they should not be liable to pay for those extra costs.

40. Some items have been agreed, as follows:

    (a) Travel expenses during her commute from Hampshire, of £2,931.30

    (b) Rental payments of £17,000

    (c) Parking space rental of £1,000

    (d) Royal Mail re-direction of £133.98

(e) Additional school fees of £5,206.57

(f) Van hire of £71.38

41. The items which remain in dispute are as follows:

(a) The estate agents costs from the sale of the home in Hampshire, in the sum of £28,350

(b) Additional marketing costs of £834.78

(c) Legal costs of the sale of £2,409.60

(d) Storage costs of £2,437.60 – for which £1,040 is offered

(e) Removal expenses out of Hampshire into rented accommodation of £1,730 – for which £272.98 is offered

(f) Removal expenses out of rented accommodation into the new home in Oxford of £1,920

(g) Van hire of £604.80

(h) Furniture costs of £11.992.50

(i) Curtains of £11,313.50

42. There is a further element to the claim, which concerns expenses said to have been incurred as a result of the detrimental treatment. They comprise:

(a) Legal costs incurred prior to the issue of proceedings in the sum of £15,324

(b) Three days of medico-legal training prior to attendance at the GMC hearing in the sum of £1,147.20

(c) A medical legal report from a Professor Moist on the subject of buttonholing, which was presented as part of her response to the management case at the disciplinary hearing, in the sum of £2,720, and

(d) Travel and associated costs of £244.50 – presumably in connection with attending the training.

43. Other outstanding issues relate to the ACAS Code of practice, injury to feelings, aggravated damages, interest and the effect of tax on the total. It will be more convenient if we deal with each of these aspects in turn, setting out the relevant law and our conclusions in sequence.

Loss of earnings

44. The claim for the £8,146.89 for the pay gap to date is a claim for compensation resulting from the dismissal. By section 123 Employment Rights Act 1996,

> " the amount of compensation awarded shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that losses attributable to action taken by the employer."

45. Normally this is a straightforward calculation. If the new job pays less than the old job then the difference is recoverable. We accept however that she could have sought additional duties to match those at Hampshire so as to close the gap over time. Dr Macanovic's position is that she is not seeking any increase due to being worn down by the litigation and her dismissal. She is happy as she is. In those circumstances the difference is more attributable to the mental and emotional toll of the process, which are not recoverable in a claim of unfair dismissal, rather than the availability of hours. That view is reinforced by the fact that her claim for ongoing losses is not pursued beyond the end of this month, and on that basis this head of claim is not allowed.

Removal Costs

46. Turning to the disputed costs of moving house, Dr Macanovic had a duty to mitigate her loss. Section 123(4) provides that in calculating the employee's loss, tribunals shall apply 'the same rule concerning the duty of a person to mitigate his loss as to damages recoverable under the common law'.

47. In the employment context this normally involves no more than making reasonable efforts to find alternative employment. But here, Dr Macanovic had to go to considerable expense in finding that employment. The normal rule is that the burden is on the employer to show that an employee has failed to mitigate her loss. Although we were not addressed specifically on this point, it seems to us that the burden remains on the employer to show that any such expense was unreasonably incurred.

48. On any view however, we accept that she needed to move house in order to find an alternative post over the longer term and so the reasonable costs of doing so are recoverable. Mitigating her loss also involved finding suitable long term accommodation, i.e. buying another house. It is not clear to us why the Trust have taken the view that her losses ended once she has found suitable alternative *rental* accommodation, particularly as they have agreed to pay eight months of those rental costs. If she had not moved out of that rental accommodation then, it is difficult to understand where they would propose drawing the line. Anyone who has owned their own home will want to avoid a return to renting, and had Dr Macanovic been in a position to move directly to a comparable house in Oxford these extra

rental costs would have been avoided. No doubt that cost was very unwelcome at the time. But she needed to take up her new post without delay and so that was not possible. In those circumstances the reasonable costs of the next stage, of moving from her rental accommodation into her new home, also seemed to us recoverable in principle.

49. We note too that not everything claimed is receipted but that is not a bar to recovery. We have already found that Dr Macanovic is a credible witness. By way of example, she has provided quotes for removal services but no evidence of payment although we are happy to accept that she went ahead with those quotes.

50. Taking each element in turn, the estate agents costs are allowed. This represents 2.5% of the sale price of the former home, which was the price agreed for a joint instruction, i.e. she went with more than one agency in order to ensure a good price and a quick sale. We heard no evidence about typical rates but that matches our expectations. It is quite possible that Dr Macanovic could have spent less on estate agents but then perhaps more on rent. Applying the principle that it is for the respondent to show that any particular cost is unreasonable, we see no reason to discount this element, however large it may be.

51. The same considerations apply to the additional marketing costs, the legal costs of the sale, the storage costs, removal costs and van hire. All seem reasonable in amount and reasonably incurred, or at least the contrary has not been shown.

52. The main item of challenge concerned furniture and curtains. These are each substantial sums. There is a risk here of a degree of betterment in replacing older items with new ones.

53. For the curtains, we accept Dr Macanovic's evidence that the previous curtains were adapted for the former home and we're much too long. Consequently they were left in the home in Hampshire and new ones bought from John Lewis. Although the total cost amounted to £11,313.50, individual items are typically for a few hundred pounds. The only misgiving we have is that the old curtains would have added to the purchase price of the former home and that credit should be given for this. The value of old curtains may be modest and on that basis we discount the sum claimed by £2000, in what is inevitably a broad brush approach.

54. We take the same approach in respect of the furniture. Again, we accept Dr Macanovic's evidence that some of her old furniture had to be discarded because it was too big for the new property or simply unsuitable for a new build home, and she got no money for it; in fact she had to pay Oxfam to take it away. Nevertheless this is a considerable outlay of £11,992.50 for a sideboard, dining table and six chairs. Making every allowance for the high standard of furnishing previously enjoyed, there seems likely to be some degree of betterment here, and we deduct a further £2000 on that basis.

Legal and other expenses

55. Section 49 (2) provides that the tribunal may make an award of compensation for such loss as is attributable to the infringement, and 49 (3) provides that this loss shall be taken to include

> “ any expenses reasonably incurred by the complainant *in consequence of* the act, or failure to act, to which the complaint relates.”

56. It follows that there needs to be a close connection between the expense and the complaint. A more typical example would be an employee who suffers the detriment of being moved to another place of work and incurs additional travel expenses. Here the expenses relate to legal costs, a professional report and additional training.

57. The first objection to a claim for legal costs is that separate rules apply to costs and they are not generally recoverable. There is no exception for pre-action legal costs. Indeed in **Health Development Agency v Parish** [2004] IRLR 550 Lord Justice Mummery concluded that pre-action costs could be recovered, once costs protection was lost. They are therefore part and parcel of the costs regime. An expert report prepared for the purposes of litigation would also normally fall within the scope of such costs.

58. More fundamentally however, none of these expenses appear to us to have been incurred *in consequence of* the detriments in question. The expert report and training costs were incurred in the course of Dr Macanovic’s efforts to challenge the practise of buttonholing at the Trust and to bolster her case, not in response to the verbal abuse she received, for example, or the email urging staff to take sides against her, or in consequence of her exclusion from meetings. It might be argued that the legal costs were an attempt to respond to those measures, since her solicitors raised the fact that she was a whistleblower, but that response still seems to us too general to fall within this definition. Accordingly, these elements are not recoverable.

Injury to feelings

59. The general guidelines that apply to compensation in discrimination claims were set out by the Court of Appeal in **Vento v Chief Constable of West Yorkshire Police** 2003 ICR 318, CA. These guidelines provide for three broad bands:

    (a) a top band applicable to the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment;

    (b) a middle band applicable to serious cases that do not merit an award in the higher band; and

(c) a lower band applicable to less serious cases, such as where the act of discrimination is an isolated incident or one-off occurrence.

60. The President of the Employment Tribunals issues periodic guidance on the appropriate award in each Vento band, and the most recent applies to for claims submitted after 6 April 2018. This provides that:

(a) awards in the lower band should fall between £800 to £8,400;

(b) awards in the middle band should fall between £8,400 to £25,200; and

(c) awards in the upper band should fall between £25,200 to £42,000, with the most exceptional cases capable of exceeding that upper limit.

61. In **Virgo Fidelis Senior School v Boyle** 2004 ICR 1210, EAT, the Employment Appeal Tribunal held that it was appropriate to adopt the same approach to compensation in whistleblowing detriment claims as has been taken in discrimination cases.

62. Unlike in discrimination cases however, compensation can be awarded for detrimental treatment up to the point of dismissal, but not for the dismissal itself. That may seem illogical, but workers are entitled to bring a complaint of such detrimental treatment without being dismissed or resigning, and in those circumstances the only remedy generally available to a tribunal is to make an award for injury to feelings. The law on unfair dismissal however, which is of older origin, has always excluded any such award in dismissal cases. These two different approaches therefore have to be reconciled and the main question here is where to draw the line, particularly as many of the detriments relate to the dismissal procedure.

63. Section 47B(2) provides that the right not to be subjected to a detriment does not apply where the detriment in question amounts to a dismissal. Dismissal is given the same definition under Part X of the Act, and so includes constructive dismissals. We were referred to the case of **Melia v Magna Kansei Ltd** 2006 ICR 410, CA on this issue, a case involving a constructive dismissal complaint. Chadwick LJ observed:

> "The tribunal could not award within compensation for unfair dismissal a sum of money to reflect the injury to feelings or even psychiatric damage caused by the manner, still less the fact, of that dismissal".

64. In **Edwards v Chesterfield Royal Hospital NHS Foundation Trust** [2012] 2 A.C. 22 per Lord Dyson JSC at para.40, it was held by the Supreme Court that:

> "The manner may be unfair because it was done in a humiliating manner or because the procedure adopted was unfair, inter alia, because the agreed disciplinary procedure which led to the dismissal was not followed.

65. Hence, the "manner" includes the procedure followed. That case involved a consultant surgeon disciplined for an inappropriate examination of a female patient. Mr Edwards complained about the failure of the trust in that case to adhere to its disciplinary policies and also about the composition of the panel which dismissed him. None of that was held to give rise to any entitlement to damages for injury to feelings; it all came within the scope of the manner of his dismissal. That reflected the clear statutory intention to limit the scope of claims for unfair dismissal. Those limits also included strict time limits and financial limits on the amount of compensation which can be awarded. It was held that claiming damages for the manner of the dismissal as a separate breach of contract would be an impermissible attempt to circumvent these limits. That decision is of the highest authority and it relates to a similar case, i.e. one of actual dismissal. In those circumstances we conclude that some of the detriments do not sound in damages. These are mainly those which were criticised at the last hearing as being essentially fairness points.

66. It may assist to summarised the detriments which were upheld at this stage. They were as follows:

    (a) Detriment 1 involved the e-mail from Mr Gibbs to the consultant body urging them to take sides against Dr Macanovic,

    (b) Detriment 2 involved the verbal abuse from Mr Graetz,

    (c) Detriment 3 involved the assembling of complaints from Mr Gibbs, Dr Sangala and Doctor Nevolls which furnished the basis for the disciplinary allegations,

    (d) Detriment 4 was the decision to initiate the disciplinary investigation,

    (e) Detriment 5 involved D Lewis reading out loud to the consultant body the terms of Dr Macanovic's referral to the GMC,

    (f) Detriment 7 involve her exclusion from consultants meetings,

    (g) Detriment 8 involved the refusal to lift those restrictions in September 2017,

    (h) Detriment 9 involved the decision to initiate the disciplinary proceedings at the review meeting,

    (i) Detriment 10 involved the failure to include the conduct of others in the investigation,

    (j) Detriment 13 concerned the response from the solicitors for the Trust to complaints about the process,

    (k) Detriment 14 involved the Trust's failure to follow its own disciplinary and whistleblowing policies,

(l) Detriment 16 involved refusing to consider ADR before the hearing,

(m) Detriment 18 involved the prejudgment of the disciplinary decision,

(n) Detriment 21 involved the offer made at the disciplinary hearing for her to resign.

67. Having reviewed the guidance in **Edwards**, we conclude that all those detriments from and including detriment 9 - the decision to proceed to a disciplinary hearing - come within the manner of the dismissal and so no award of injury to feelings can be made. (Parliament has however provided a remedy for defective procedures at section 207A of the Trade Union & Labour Relations Consolidation Act 1992, where there has been a breach of the ACAS Code of Practice, considered below.)

68. How much then to award for detriments 1 to 8? These are significant and damaging events. We heard that Dr Macanovic had to seek medical help after the verbal assault by Mr Graetz. After the consultant's meeting that day she was signed off sick for two weeks. After Dr Lewis chose to read out the terms of her referral to the GMC, she was left shaken. The exclusion from subsequent consultants meetings' was itself a significant personal and professional slight but it also made it obvious to her colleagues that she was *persona non grata* within the department. That degree of exclusion must have taken a significant toll on her. It undermined the whole basis of her role as a respected and trusted clinician, working as part of the team.

69. We remind ourselves that the purpose of such an award is compensation rather than to punish the employer. No specific cases were cited to us on similar facts, and these are very unusual facts. Most employees might have resigned long before matters reached this degree of isolation and exclusion. Mr Allsop urged us to place this in the upper band, whereas Mr Sutton KC submitted that the middle of the middle band was the maximum applicable.

70. The main question is how much effect it had on Dr Macanovic. There is relatively little medical evidence to show a significant or lasting effects, reflecting her resilience, and so we did not feel it appropriate to place this in the upper band. Her own evidence included details of the demoralising effect of all this, but it was all in the context of her dismissal. Trying to strip out that aspect from the whole is no easy task, even for the victim.

71. We take the view that this is a serious case involving a lengthy series of detriments which might fairly be described as a campaign of harassment. The top of the middle band is £25,200. We concluded that a figure towards the top of that band would be appropriate.

72. We took into account the totality of the award and the potential application of uplifts for breach of the ACAS Code and aggravated damages. Anticipating our conclusions on those points, we made no award of aggravated damages and a 10% uplift in

respect of the ACAS Code, so there is no reason to revise our view that an award towards the top of the middle band is appropriate.

73. We also have to take into account interest. In **Virgo** the Employment Appeal Tribunal held that as far as possible compensation for injury to feelings in cases like this should be the same as those for discrimination cases (paragraphs 45 and 48). The upshot was that in assessing the amount of the compensatory award, and by extension any award for injury to feelings, account should be taken of the loss of value of the award over the passage of time. Had this been an award for discrimination, interest would have been awarded at 8%. Over the period in question, which is now nearly five years, an award of interest on an award of £24,000 would be slightly over £9,000. On that basis we assess this overall head of loss at £33,000, making that notional allowance for interest.

Aggravated damages

74. This award can be further bolstered by an award of aggravated damages in certain circumstances. Such damages are not intended to be punitive but to set out under a separate heading the effect of injury to feelings caused by aggravating features of the case attributable to the employer. Consequently only those detriments for which an award of injury to feelings can be made are capable of being aggravated.

75. The main points raised by the claimant under this heading are:

    (a) the way in which the Trust operated its internal procedures,

    (b) the letter from its solicitors at detriment 13 disputing that she had a reasonable belief in her disclosures,

    (c) the lack of reflection shown by the Trust following the liability judgement.

76. The first two are not covered by applicable detriments and we accept that the Trust has now made an apology, and has sought to learn lessons from this episode. Accordingly, we find no basis for an award any aggravated damages.

The ACAS Code

77. The next issue concerns the application of the ACAS code. Tribunals are required to have regard to this in considering fairness. It sets out principles for handling disciplinary procedures in the workplace including the need to:

    (a) establish the facts of each case

    (b) inform the employee of the problem

    (c) hold a meeting with the employee to discuss the problem

(d) allow the employee to be accompanied at the meeting

(e) decide on appropriate action, and

(f) provide the employee with an opportunity to appeal.

78. Mr Sutton submitted that the Code was of no application because the real reason for the disciplinary process was (as found) the making of the disclosures rather than any actual misconduct. Thus, although he did not describe in those terms, the Trust should be entitled to take advantage of its own default.

79. That proposition is based on two cases. In **Holmes v QinetiQ Ltd**, [2016] I.C.R. 1016 Simler P. held that:

> "In other words, the Code applies to all cases where an employee's alleged actions or omissions involve culpable conduct or performance on his part that requires correction or punishment. Where there is no conduct or performance on the part of an employee that requires correction or punishment giving rise to a disciplinary."

80. In **Ikejiaku v British Institute of Technology Ltd**, the Employment Appeal Tribunal held that the disciplinary procedure aspects of the Code did not apply to a dismissal on the ground of a protected disclosure, as such a disclosure cannot properly be a ground for disciplinary action.

81. However, that case concerned someone who was dismissed on purported grounds of redundancy the day after making a protected disclosure. There was no attempt to invoke the disciplinary process. The key point, it seems to us, is whether or not disciplinary allegations were made and a disciplinary process followed. If so, the failure to conduct it in accordance with the Code may result in an uplift. We note too that Dr Macanovic succeeded in her claim of unfair dismissal on ordinary principles, independently of her claim to be a whistleblower, and it would be wrong for her to receive less compensation as a result. Accordingly, we conclude that the Code does apply in this case.

82. Given that view, the Trust also submitted that a deduction should be made on account of Dr Macanovic's failure to appeal. We have already concluded on the last occasion that it was perfectly understandable for her not to do so given the predetermined nature of the outcome, as revealed by the offer to resign and the close involvement of the handful of more senior personnel in arranging the disciplinary hearing. We make no such deduction.

83. Mr Allsop on the other hand submitted that the Trust were in breach in two particular respects:

(a) Dr Macanovic was not given sufficient information about the alleged misconduct to answer the case against her at the disciplinary hearing, contrary to paragraph 9, and

(b) Paragraph 18 provides that *after the meeting* the employer should decide whether or not disciplinary action is justified, whereas in this case the decision was made beforehand.

84. Again, we have already noted the vagueness of the allegations and the difficulty that gave rise to in providing evidence in response. The need to make a decision *after* hearing from the employee is arguably a description of the sequence of events, but the terms of the Code seemed sufficiently clear to cover a predetermined outcome, and this is perhaps the key aspect of fairness in the process. On that basis, and having regard to the totality of the award, we apply an uplift of 10%. This augments the losses for unfair dismissal only. It would be illogical to increase the award of damages on this basis for the detriments, since those detriments all took place before the disciplinary process began and were unconnected with it.

Interest

85. A final point concerned the availability of interest on damages for unfair dismissal. In a discrimination case interest is awarded on financial and non-financial losses alike. Mr Allsop submitted that the same approach should apply here, adopting the principle in **Virgo**, that the same treatment should be applied in whistle blowing as in discrimination cases. The point was considered in detail in **Melia** at paragraphs 38 to 42, which supported that view.

86. However, that decision rested on the fact that the tribunal discounted future losses for early receipt. It was therefore only fair to increase the award for interest on past losses:

> "43. It may be necessary, in a future case, to consider whether that approach should be adopted in circumstances in which the tribunal is not also awarding compensation for future loss. But in the present case the unfairness of the employment tribunal's approach is very striking; and it seems to me, that was an unfairness which the appeal tribunal were entitled to redress."

87. This is not a case involving future loss, let alone one where those losses were discounted for accelerated receipt, and given the lack of any statutory basis to award interest in unfair dismissal cases, we must decline to do so. The just and equitable test does not provide a gateway generally for the award of interest in such cases.

Calculations

88. The relevant figures for compensation are as follows:

Unfair dismissal

89. The basic award is **£11,736.00**

90. The compensatory award comprises:

    (a) Loss of earnings **£8,568.57**

    (b) Agreed relocation costs **£28,649.23**

    (c) Additional relocation costs **£57,592.78**

    (d) Loss of Statutory Rights **£500.00**

91. The total is therefore **£95,310.58**

92. Hence, the total award for unfair dismissal is **£107,046.58**

93. To this has to be added a 10% uplift: **£10,704.66**

94. Amended total **£117,751.24**

Detriment claim

95. The award for injury to feelings is **£33,000.00**

96. Hence, the total award for unfair dismissal and detriments, pre-tax, is **£150,751.24**

Grossing up

97. The final stage is to increase this sum to ensure that, after tax, the same net amount is received. After giving these reasons verbally on the day of the hearing, the parties asked for time to carry out the necessary calculations in detail and have agreed that the total amount due, after grossing-up for tax, is £219,697, i.e. an additional £68,945.76

98. The award for the detriments is unaffected by tax and so the two elements can be broken down as follows:

    (a) compensation for unfair dismissal in the sum of £186,697

    (b) compensation for unlawful detriments in the sum of £33,000

    (c) Overall total **£219,697**

Employment Judge Fowell
Date: 3 January 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON
9th January 2023 by Miss J Hopes

FOR THE TRIBUNAL OFFICE