EMPLOYMENT TRIBUNALS

Claimant: Ms B McInerney

Respondent: Nottinghamshire Healthcare NHS Foundation Trust

Heard at: Midlands (East) Region as a Hybrid Hearing
Claimant gave evidence by Cloud Video Platform

On: 9 November 2022 (in chambers)
14, 15, 16 November 2022
17 November 2022 (in chambers)

Before: Employment Judge M Butler
Members: Mrs K Srivastava
Mr J Purkis

Representation
Claimant: Mr A Allen, KC and Ms E Grace, Counsel
Respondent: Ms B Criddle, KC and Mr J Boyd, Counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that the Respondent is ordered to pay to the Claimant the following sums:

1. £20,000.00 for injury to feelings;

2. £10,000.00 in aggravated damages;

3. Interest on the above awards of £2,470.01;

4. Compensation for past financial losses in the Forensic Gender Clinic role in the sum of £12,245.90 gross including interest; and

5. Compensation for future loss of earnings in the Forensic Gender Clinic in the sum of £11,198.40 gross taking into account the discount for accelerated receipt.

The total award is £55,914.31.

6. The claims for compensation in relation to the Claimant's loss of medico-legal fees and future loss of First-tier Mental Health Tribunal sitting fees are not well founded and no awards are made.

RESERVED REASONS

Background

1. The Claimant submitted two claims against the Respondent. The first was a claim of constructive unfair dismissal under claim number: 2601862/2019 and this claim for victimisation. She succeeded in both claims and the Remedy Judgment in the first claim has already been given. This Remedy Judgment relates to the second claim of victimisation.

2. The appearances on behalf of the parties are noted above. We are grateful to Mr Allen and Ms Criddle for their helpful and sensible approach throughout the hearing and also to Ms Brace and Mr Boyd for their help during the liability hearing.

3. It was, of course, inevitable that the Tribunal would be making a financial award by way of remedy given the findings of the liability Judgment. However, there is a very significant difference in the figures in the Claimant's schedule of loss compared to that set out in the Respondent's counter-schedule. By way of illustration, the Claimant's schedule of loss is some £2,114,140.90 gross, and £1,512,320.38 net. The Respondent's counter-schedule of loss puts the total award at its highest at around £29,545 taking into account their assessment of aggravated damages as being £5,000.

4. It is fair to say that there has been some considerable acrimony between the parties between the liability hearing and this remedy hearing with the Claimant being accused by the Respondent of changing her position on a number of occasions and the Respondent being accused by the Claimant of an unduly aggressive approach to the litigation. The Employment Judge has been obliged to deal with many applications late in the day in relation to a variety of matters, objections to those applications, responses to the various additional statements presented to the Tribunal and applications to give responses to the responses.

The claims

5. The Claimant's heads of claim in her final schedule of loss are for:

(i) past and future losses associated with the Forensic Gender Clinic ("FGC") role she says she would have been appointed to by the Respondent after her retirement;

(ii) loss of past and future income from medico-legal work;

(iii) loss of First-tier Mental Health Tribunal ("FTT") work,

(iv) injury to feelings; and

(v) aggravated damages.

The Claimant claims she would have continued working until the age of 75.

6. The Respondent accepts there will be an award for injury to feelings, aggravated damages and for the loss of income the Claimant would have earned in the FGC. It denies that the Claimant has incurred or will incur any losses in relation to the FTT work or medico-legal work. It further suggests that, based on the Respondent's own statistics, the Claimant would only have worked until the age of 67.

The issues

7. A list of issues has helpfully been agreed between the parties. They are appended to this Judgment.

The evidence

8. The Claimant provided three witness statements and was cross-examined. She gave her evidence by video. We also heard evidence on behalf of the Respondent from Dr James Barrett, Consultant Psychiatrist at the Tavistock and Portman NHS Foundation Trust and Director of the Gender Identity Clinic at Charring Cross; Dr Sarah Murjan, Consultant General Adult Psychiatrist and Gender Specialist at the Respondent and Mrs Jennifer Guiver, Executive Director of People and Culture at the Respondent. We were provided with expert reports by Dr Matthew Appleyard, Consultant Forensic Psychiatrist, and Professor Keith Rix, Consultant Forensic Psychiatrist, who both gave evidence. There was a statement of agreement/disagreement from Dr Appleyard and Professor Rix. The Respondent's witnesses and the experts provided written statements/reports and were cross-examined.

9. There was also an agreed bundle of documents which was added to during the course of the hearing of 436 pages. References to page numbers in this Judgment are to page numbers in the bundle.

The medical evidence

10. This is a very high value claim which primarily rests with the Claimant's financial losses she says arise as a result of her mental health issues caused by her victimisation by the Respondent. As a consequence, the Tribunal consider medical evidence to be essential to enable proper consideration of the effect of the victimisation on the Claimant's mental health. It is very unfortunate, therefore, that no independent evidence was produced giving a diagnosis and prognosis.

Mr Allen submitted that we did not need medical evidence because we could rely on the letter from Dr Patricia Hughes (to which we refer more fully below) and the Claimant's own evidence. Mr Allen suggested that the Claimant, as a Consultant Psychiatrist, was well placed to give evidence on her mental health. We cannot agree with that submission. Relying on a self-diagnosis in such a high value claim would in itself raise potential issues, not the least being the cynical view that she would know what to say to support her claim.

11. The only written medical evidence in this hearing is a letter dated 28 October 2022 from Dr Patricia Hughes, Consultant Psychiatrist in Psychotherapy (page 364.31/32). Dr Hughes no longer practises as a doctor but as a psychotherapist. As a consequence, she does not make a diagnosis or give a prognosis in

relation to the Claimant's alleged mental health issues of anxiety, low mood, social isolation and loss of confidence. Further, she says she first saw the Claimant only six months before this hearing in May 2022 and regularly thereafter. She records what the Claimant told her about suffering from, inter alia, anxiety and low mood and social isolation **"…. since she was involved in a Serious Untoward Incident enquiry following the death by suicide of one of her patients in Rampton Hospital".** This does not help the Claimant as she must show that the act of victimisation in not appointing her to the FGC role caused the mental health issues which prevent her from working. No doubt in order to cross this particular bridge, Mr Allen submitted that the Respondent must take the Claimant as they find her following the tortious principle of the egg shell skull rule. The problem with that argument is that, without proper medical evidence, how are we to find the Claimant?

12. At the very least, we would expect the Claimant's GP records to be produced but there are none. This was not addressed in the hearing so we have no idea whether the Claimant consulted her GP. Further, and importantly, there is no evidence before us as to what, if any, medication the Claimant was prescribed for her mental health issues.

13. The Claimant also complains of ongoing social isolation, a particular example of which is said to be her inability to attend the reception of a relative's wedding after the ceremony itself. No corroboration of this was provided. We noted that not even the Claimant's husband was called to give evidence on her behalf as to this social isolation or any of her other mental health issues.

14. The Claimant further claims that, but for her mental health issues caused by the victimisation, she would have worked until she was seventy-five. Again, medical evidence would have been helpful by clarifying there were no other underlying medical issues which would have prevented this aspiration. In the absence of an independently supported diagnosis and prognosis, we find difficulty in supporting the Claimant's arguments and submissions. In our view, the absence of an expert medical report is a surprising and fundamental omission.

The Claimant's evidence

15. The Claimant gave her evidence in much the same manner as in the liability hearing in which the Tribunal accepted her evidence even though she often drifted "off point". The essential distinction in this remedy hearing, however, is that the Claimant was effectively on her own and, except for the issues we refer to below, there were no witnesses for the Respondent who gave unreliable evidence which gave credibility to the Claimant's evidence. There were, however, a number of occasions in this hearing when the Tribunal completely lost track of the Claimant's evidence, such was her desire to get her point across. This is understandable but when drilling down to consider the issues it was unhelpful.

16. We were also concerned as to the Claimant's understanding of some parts of her claim and the fact that some of her evidence on issues which were important to her, the Respondent and the Tribunal, amounted to little more than conjecture.

17. One of the main threads of her argument was that her reputation had been demolished. The Employment Judge asked her whether there was any evidence of this which prompted a long, rambling answer which did not answer the question. The Judge then asked whether it would be accurate to say that the demolition of her reputation was her perception and she agreed it was. This was an important concession by the Claimant as she relies on her allegedly tarnished reputation for not pursuing medico-legal assignments for fear of being aggressively cross-examined by those with knowledge of that reputation. Again, she was unable to provide any corroborating evidence, even from her former friends/colleagues or her husband.

18. Indeed, when referred to the press article at page 297, the Claimant rather unconvincingly said that this was "only good for me in relation to people who knew me" and "was not good for my reputation among people who did not know me". She then, somewhat paradoxically, said this was not good for her in a social context, having just said it was.

19. The Tribunal was also concerned with the evidence of the Claimant in relation to her schedule of loss and the figures therein. In particular, when questioned about the figures at pages 370-371, she said she did not understand them. Further, she said she had not understood she would recover compensation at the level of the statutory cap for her unfair dismissal claim. Similarly, when questioned about figures in her schedule of loss at page 366, she was unable to explain the calculation for the loss of category 2 medico-legal work, said she had no memory of it and did not know what the figures related to. The Tribunal was of the impression that the Claimant had little input into the drafting of her schedule of loss and probably did not understand it or how it was calculated.

20. The Claimant produced three witness statements. The first can be almost entirely discounted as it merely repeats the findings in the Tribunal's liability judgment. The second statement at paragraph 27.d. suggests a definition of medico-legal work as, **"this is the preparation of reports for use in the courts, tribunals, or, for example, for risk assessments of individuals. This is done outside of other employment and is charged for separately**". At paragraph 29, she adds, **"In the normal course of my work I assessed individuals' fitness to plead to specific offences and assessed their legal responsibility …."** The Claimant does not specifically refer to this aspect of her duties as medico-legal work, presumably as it does not satisfy her own definition of such work because she received no separate fee for it. In her third witness statement, the Claimant states that preparing reports for her patients for use in the courts etc is medico-legal work. The Tribunal have doubts about this. She refers to a network of referrers for this work but it seems to us this was merely preparing brief reports for solicitors and others who contacted her, not because she was an expert, but because she was the supervising physician of the patient and was best placed to provide such report. We were given no information as to how long these reports were but our sense was they were not as detailed as a separately commissioned report for which she could have charged up to £3500.

21. The Claimant was accused by the Respondent of shifting her position during the course of this litigation and there is certainly an element of truth in this accusation as evidenced by the very late reference to reports prepared by her

in the course of her normal duties at Rampton. Further, the various schedules of loss provided differed by almost £2m from first to last having regard to the two schedules in the bundle from pages 365-375.

22. However, we did consider the Claimant's account of her expected role in the FGC to be entirely credible in relation to her involvement in its planning and her expectation of being appointed. This conclusion was supported by the evidence of Dr Murjan, whose evidence seemed to differ from that given in the liability hearing where she did not entirely support the proposition that the Claimant was expected to fulfil this role. Before us she said the Claimant was a "shoe in" for the role and left us in no doubt that this had been expected and the Claimant had been involved in designing the service to be offered.

23. The Tribunal has no doubt that the Claimant has suffered injury to feelings, but we are concerned at the lack of any medical evidence to support her contention that her financial losses can be placed at the door of the victimisation. Indeed, the only medical evidence we have from Dr Hughes suggests that the Claimant's mental health issues were caused principally by her treatment whilst still employed by the Respondent. We consider the lack of independent medical evidence giving a diagnosis and prognosis to be a major issue in this hearing. The Tribunal members are not medically qualified and cannot rely on a party's self-diagnosis when there is so much at stake but it was noted that the Claimant seemed to have no problem in "fighting her corner" when being cross-examined which in itself does not support her argument that she has lost confidence and cannot face people.

The Respondent's position

24. The Respondent does not dispute that the Claimant is entitled to an award for injury to feelings, aggravated damages and loss of earnings through not being appointed to the FGC role. The amounts of these heads of claims are, however, in dispute. The Respondent also disputes any entitlement in respect of the other heads of claim because the Claimant has failed to establish that those losses were caused by the victimisation of the Claimant. The Respondent's view is also that, even if the Tribunal agrees that awards under those heads of claim are justified, they are not justified as being calculated up to the Claimant's 75th birthday.

Determination of the heads of claim

Injury to feelings and aggravated damages

25. The Claimant considers that £10,000 is a realistic figure for aggravated damages and the Respondent counters with £5,000. For injury to feelings, the Claimant suggests £30,000 and the Respondent £15-20,000. In relation to aggravated damages, we have had regard to the decisions in **Commissioner of Police of the Metropolis v Shaw 2021 ICR 464, EAT** and **Alexander v Home Office 1988 ICR 685, CA.** We note that aggravated damages are compensatory only and should not be awarded to punish the Respondent but may be awarded where the Respondent has behaved in a high-handed, malicious, insulting or oppressive manner. The failure to appoint the Claimant to the FGC role was particularly upsetting for her. Referring to the liability

judgment, we recall the evidence of Dr Hankin which, after some astute questioning by Ms Grace, culminated in a withdrawal of some of the evidence in her witness statement which was identified as an attempt to mislead the Tribunal.

26. We may, of course, take into consideration the efforts of the Respondent to take steps to avoid the treatment given to the Claimant from happening again. The Respondent attempted to do this through the evidence of Mrs Guiver who presented a report commissioned by the Respondent detailing how such issues could be avoided in the future (pages 400-431). We did not consider the report to be at all helpful or afford any insight as to what the Respondent has done or is doing to prevent what happened to the Claimant from happening again. At paragraph 4.4.1 (page 422) the report says, "**Some key, and quick, improvements have not as yet been put in place"-** this some 3 years after the event. We also note that only now, in Mrs Guiver's statement at paragraph 8 is an apology offered to the Claimant.

27. It is clear to us that Dr Hankin had a heavy hand in preventing the Claimant from being appointed to the Forensic Gender Clinic role. She gave false evidence to the Tribunal and then withdrew it. Her actions were high-handed, malicious and insulting. Taking all of these matters into consideration, we award the sum of £10,000 in aggravated damages.

28. Given the date on which the victimisation claim was presented, the applicable Vento bands for consideration are the lower band of £900 to £8,800; the middle band of £8,800 to £26,300; and the higher band of £26,300 to £44,000. Section 119(4) Equality Act 2010 provides:

An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

In **Corus Hotels plc v Woodward and anor EAT 0536/05,** the EAT said that Tribunals are required to focus on compensating the claimant rather than on punishing the wrongdoer. In **Murray v Powertech (Scotland) Ltd [1992] IRLR 257, EAT,** the EAT provided that the onus is on the claimant to establish the nature and extent of such injury. In **Vento v Chief Constable of West Yorkshire Police (No.2) [2003] ICR 318, CA,** Mummery LJ identified that the higher band was to be applied only in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment and the middle band should apply to serious cases that do not merit an award in the higher band.

29. The amount to be awarded by the Tribunal prompted lengthy discussion among the panel members. We reminded ourselves that the conduct of the Respondent and its employees which led up to the Claimant's enforced retirement presented a problem in that, as undesirable and vindictive as it was, the only act of victimisation to be considered was the failure to appoint the Claimant to the FGC role. Ms Criddle referred us to **Macken v BNP Paribas London Branch [2021] ET 2208142/17** and **Plaut v University of Exeter [2021] ET 14000362/20** for guidance in determining the award. In the first of these cases, the Claimant suffered years of bad treatment and was awarded £35,000 and, in the second, the Claimant was subjected to a severe and long term suspension as a pretext

to dismiss her, suffered diagnosed anxiety and depression and was awarded £20,000 for injury to feelings.

30. We have also considered the Court of Appeal Judgment in **Miles v Gilbank and anor [2006] ICR 1297, CA** in which the Employment Tribunal described the Respondent's employees as engaging in a catalogue of behaviour towards the Claimant **"which goes beyond malicious and amounts to downright vicious. It was an inhumane and sustained campaign of bullying and discrimination (which was) targeted, deliberate, repeated and consciously inflicted."**

31. Mr Andrews referenced the egg shell skull principle and encouraged us to accept we must take the Claimant as we find her so as to take into account her mental health at the time of the act of victimisation as it existed as a result of the treatment she received from the Respondent up to her retirement. We cannot accept that argument and the reason once more points to the lack of medical evidence. In the absence of such evidence, however, we do not know how to find her. We cannot, therefore, take into account the Respondent's previous conduct towards her and must focus on the victimisation in this case alone.

32. Even discounting Dr Hankin's conduct towards the Claimant before her retirement and her disrespect to the Tribunal in attempting to mislead us, it is clear that there was a considerable element of malice in the way she obviously determined the Claimant would not be offered the role in the FGC for which she was eminently well qualified and which it had been anticipated would be hers. We do also have regard to the Claimant's professional expertise and the injury to her feelings would have been significant. Bearing in mind the judgment in **Komeng v Creative Support Ltd UKEAT/0275/18/**JOJ, we must focus on the injury to the Claimant and not the gravity of the acts of the Respondent. The injury to feelings in this case does not, in our view, reach the level in **Komeng.** In all the circumstances, we consider an award the middle Vento band is appropriate and award the sum of £20,000.

The Forensic Gender Clinic earnings

33. In relation to the FGC role, the issues between the parties were not that there was no loss, but when the Claimant would have started in that role, how many sessions she would have undertaken and how much she would have been paid for those sessions. There is also the issue as to how long the Claimant would have chosen to remain at the Clinic where she says until she was 75 and the Respondent says 67. The Tribunal noted that the Claimant said she would have obtained further funding for the FGC in Nottingham which would have meant her role would have expanded to two sessions, equivalent to one day, per month. The Tribunal do not recollect any discussion or explanation as to how the Claimant would have secured this funding. We had the evidence of Dr Murjan. We thought her evidence before us in this hearing was honestly given and she answered those questions put to her which she could answer in a straightforward manner. She explained that the Nottingham Centre for Transgender Health had a current caseload of approximately 2,000 patients and a waiting list of over 2,500, of which less than 2% on the waiting list were awaiting assessment as forensic patients and this is the work the Claimant would have been undertaking.

34. Dr Murjan contradicted the Claimant's description in her schedule of loss as being the only clinic of its kind in the UK (page 372). It is perfectly clear that there are in fact seven national specialist gender identity clinics in England. The Claimant also suggests in her schedule of loss that there would have been sufficient demand due to the substantial increase for forensic gender clinic work but produces no statistics to support this contention.

35. The Respondent suggests that the Claimant's work in that role would have begun sometime in 2020 and it is clear from Dr Murjan's evidence that NHS England carried out a national procurement exercise regarding the provision of transgender services between August 2019 and February 2020. Thus we consider the Claimant's role would likely have commenced on 1 March 2020. The Claimant's submission of a start date in 2019 cannot be accepted when her claim form states clearly that the formal advertisement for the role did not appear until September 2019 at a time when funding was still being sought. This date would also have seen the conclusion of the GMC's investigation following the report to it by Dr Hankin.

36. Before moving on to detailed calculations, we must consider the age at which the Claimant says she will have worked until. As before, we were hampered in determining this point by the lack of medical evidence. At the time of the victimisation, was the Claimant fit and well with no underlying health conditions? She quotes a life expectancy of 87.3 years (page 368) but does not explain the source of this statistic. The Respondent, in arguing the relevant age should be taken to be 67, produces statistics from its own Consultant Retirement Data (pages 224-225) taken from over 40 consultants who had retired over a period of 10 years. Of course, every one of them will be different and have different priorities, but an unchallenged statistical source must carry more weight and, for that reason, we accept 67 as being the likely age at which the Claimant would wish to cease work.

37. We must also consider how many sessions the Claimant would have worked in the FGC. Dr Murjan's evidence is essentially that there would have been no funding for the Claimant to work two sessions per month. However, we note from paragraphs 23 and 24 of her witness statement that, after the Claimant's retirement, the FGC work was split between her and Professor Richards and when she left, but remained on secondment, the work was split between Dr Murjan, Professor Richards and the newly appointed Clinical Lead of the FGC, Dr Glidden. Dr Murjan says, **"Whilst the three of us are all consultants with significant experience in transgender healthcare, none of us are forensically trained, unlike Dr McInerney. Notwithstanding this, we are suitably qualified and experienced to assess forensic patients with transgender healthcare needs. Since Professor Richards' secondment has ended, the work has been done by Dr Glidden and me as she was not replaced".**

38. The Tribunal reached a conclusion in relation to the sessions the Claimant would have worked by applying a certain amount of logic. We note that at all times the work which it was anticipated would be carried out by the Claimant was carried out by at least two people. Notwithstanding the statistics set out by Dr Murjan, this indicates to us that there was sufficient work for the Claimant to have been engaged for two sessions, or one day, each month for the ten months

of the year the Claimant says she would have worked. As concluded above, we consider the Claimant would have undertaken this work until she was 67 years old.

39. The Claimant's gross annual salary was at the relevant time £110,340 which for one day per month is, we calculate, £423.22 per day. Up to the estimated calculation date of 24 January 2023 (see later), she would have earned £11,003.72 gross (£423.22 x 26).

40. In terms of future losses for the FGC role, the Claimant was 64 years old at the date of this hearing and would have reached the age of 67 on 25 September 2025. Thus, her future earnings would have been 27 months (assuming she would have not worked for 2 months each year as she asserts) at £423.22 making a total of £11,426.94.

First-Tier Mental Health Tribunal appointment

41. The Claimant relies on her loss of confidence caused by her victimisation to explain why she will be unable to continue with face-to-face hearings in the FTT. She gave evidence that since the pandemic lockdown, which forced many courts and tribunals to engage with remote hearings, she has been content to continue her sittings remotely as she does not have to engage with people on a face-to-face basis. However, she also gave evidence that, following her retirement, she did attend some in person hearings in the FTT. There was no explanation as to why this stopped other than to refer to her loss of confidence for which there is no medical diagnosis or prognosis.

42. The Claimant has produced an email chain (page 437) wherein she writes to Dr Joan Rutherford, Chief Medical Member of the FTT saying,

"As we discussed, due to my mental health I would prefer to do my work by video hearing and for this to be reviewed in 2023".

Dr Rutherford replies to that request saying,

"granted that you have video only hearings".

There is no indication in this exchange that the situation will be reviewed in 2023 or, if it is, at what point in 2023. No evidence has been produced to the Tribunal that video hearings in the FTT will cease, reduce in number or continue from 2023 onwards. We would assume that, as with other tribunals (including the Employment Tribunals) that some direction has been made by the FTT about the future of remote hearings in its jurisdiction. Consequently, even if the Tribunal accepts that the Claimant cannot attend in person hearings, which she has done on occasion since her retirement, we have no information as to whether remote hearings will continue in the FTT and, if so, at what level the Claimant could continue to sit.

43. In fact, the Claimant's evidence is that she has made herself available for 4 days each week in the FTT which is more than her pre-retirement offering of 2 days per week. It would seem that her earnings from that source of income have now increased from pre-retirement levels with no evidence from which we can assess any future losses.

Medico-legal work

44. By far the most significant in terms of value of the Claimant's heads of claim is the alleged losses arising from her inability to undertake medico-legal work which she puts at £1,744,080 gross, £1,071,540.32 net (page 371). Once more, however, there is no medical report giving a diagnosis or prognosis. The Claimant says her mental health issues result in her not making herself available for such reports because she was unable and, therefore, unwilling, to appear in court to be cross-examined on the content of her reports. She maintains that her loss of reputation amongst others, which we have already considered above, her loss of confidence and the fact that she was no longer working in the NHS are factors which conspire against securing medico-legal work.

45. At paragraph 7 of the joint report of Professor Rix and Dr Appleyard they say:

"We are of the opinion that if the Claimant has the confidence and if there has been no reputational damage, she would be able to obtain instructions in criminal, family, civil (personal injury), mental health law, prison law, asylum and immigration and employment law cases".

Further, at paragraph 12 of the joint report, they say:

"We agree within a matter of two or three months it is probable that the Claimant could have started receiving instructions in criminal cases, personal injury and, specifically, medical negligence cases where psychiatric injury is alleged to have occurred, family court cases, cases of alleged clinical negligence related to medium and high secure care and cases that required expertise in gender identity issues".

At paragraph 16 of the joint report they say:

"Not being any longer employed should not have an impact on the Claimant's ability to secure medic-legal work given that she has ongoing clinical experience as a mental health tribunal doctor and on the assumption that she would be able to obtain instructions through a medicolegal company".

They also agree that that the closure of the GMC investigation and favourable liability judgment by this Tribunal would have meant the Claimant could have resumed medico-legal work if mentally fit to do so.

46. The Claimant seems to have adopted the stance that she could not undertake any medico-legal work for fear of being cross-examined in court. Dr Appleyard in his evidence said that his own expert witness company had one psychiatrist on its register of experts who also did not wish to engage in preparing reports which might involve having to appear in court and that psychiatrist received as many instructions as others registered with the company. Specifically, Dr Appleyard said there was plenty of work available in the housing sector which never resulted in the expert having to attend court.

47. It was not until September 2022 that the Claimant registered with Expert Witness, a company which receives and gives to those registered with it, instructions to prepare medico-legal reports in exchange for a commission

(page 223). Very quickly after registering, the Claimant received 3 lots of instructions to prepare medico-legal reports and declined all of them. We were troubled by this apparent inconsistency. It is not clear to us why the Claimant did not register with such a company before or why she did so very recently whilst claiming not to be able to cope with the work due to her mental health issues. Did she now feel able to cope with such work or did she believe she could be instructed on matters which did not involve court attendance? More cynically, did she register with Expert Witness to support an argument that she had attempted to mitigate her loss?

48. As with the other heads of claim where the Claimant relies on her mental health issues, we do not have produced to us a diagnosis or prognosis as to the Claimant's health. There is no other witness to corroborate these undiagnosed mental health issues or at least give information of any prescribed medication. There is no witness evidence to corroborate the alleged reputational damage to the Claimant arising from the victimisation. There is no witness evidence to testify as to the Claimant's social anxiety. The experts, reporting jointly, say the Claimant could have obtained medico-legal work but she did nothing about this until a few months before this hearing. All we have in relation to her mental health issues is her own self-diagnosis and an inconclusive letter from Dr Hughes. Accordingly, the Tribunal makes no award for this head of claim.

Interest calculations, accelerated receipt and grossing up

49. For the purposes of these calculations, we asses the date of the discriminatory act as being 16 October 2019 which is the date Dr Hankin first notified the Claimant's husband that the FGC role was no longer open to her to apply. We have made our calculations based on a calculation date of 24 January 2023 which is our estimate as to when this remedy judgment will be sent to the parties. The calculations may have to be amended by the parties if this estimate is inaccurate.

50. In relation to the FGC role, we calculate the Claimant's past losses to be £11,003.72. The number of days between the discriminatory date and calculation date is 1030 (divided by 2 under the mid-point rule). The interest rate applied is 8%. The total interest payable is £1,242.18 making the total award £12,245.90.

51. There is a discount to be applied for accelerated payment of the future losses in the FGC role. The amount calculated to be paid in respect of future loss is £11,426.94. A straight-line discount is not advised by the appeal courts especially where such losses accrue over a lengthy period. In this case, however, the period of future loss is comparatively short at a little over 3 years. The reality in this case is that average interest rates have been very low between the discriminatory and calculation dates and we consider a figure of 1.5% over the period of future loss to be appropriate. The discount applied, therefore, is £228.54 making the total award £11,198.40.

52. Interest on the injury to feelings and aggravated damages awards is calculated at 8% over a period of 1030 days and is simple rather than compound interest. In this case, the interest awarded is £2,470.01.

53. As for grossing up, we consider two issues. Firstly, regarding the losses emanating from the FGC role, Mr Allen suggests the Claimant's earnings fall below the basic rate tax band so no grossing up is necessary. The Employment Judge also suggested at the hearing, but did not make an order as this is a matter for the Claimant, that it would be useful for the Claimant to submit the necessary tax information in the event grossing up became an issue. She has not done this so we make no order for grossing up.

General concluding comments

54. It is appropriate, for the sake of clarity, to discuss some of the submissions made to the Tribunal by Mr Allen and Ms Criddle and how they have been considered. Whilst we do not rehearse the submissions here, we did consider them in detail in reaching our decision.

55. We consider first the principle of causation. Mr Allen submits that to be recoverable, a loss suffered by the Claimant must be directly attributable to the act of discrimination. We doubt Ms Criddle contests this statement and we certainly agree with it. He goes on to submit that the discriminator must take the victim as it finds her and,

"The award should only reflect the degree to which the discrimination has caused or contributed to the loss. Losses with multiple causes can be subject to apportionment".

The difficulty we have with these submissions is in attributing any of the Claimant's losses to the act of victimisation by the Respondent. Indeed, as Ms Criddle points out in her submissions, the Claimant repeatedly attributes her alleged loss of reputation to the events leading up to her dismissal. If we were to attempt to apportion the cause of the Claimant's mental health issues between her treatment pre-dismissal and post dismissal, any conclusions would be pure speculation predicated on a complete lack of independent medical evidence to either support the claim to be suffering from mental health issues or to what extent they can be said to be caused by the victimisation. Following the judgment in **Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] EWCA Civ 1663,** it is for the Claimant to establish that the act of victimisation resulted in her claimed mental health issues and, on the balance of probabilities, she has not done this.

56. Mr Allen supports the argument around the loss of reputation point with references to paragraphs in the liability judgment. We do not accept that anything can rest on these comments. In the main, they are comments about the fact that the Respondent's management had no regard to the impact their conduct would have on the Claimant's reputation. Further, in one example given (paragraph 143 at page 97), the reference to the Claimant's reputation was not a finding by the Tribunal but a submission made by Ms Grace. We would also comment that recording that a party had no regard for the other's professional reputation does not automatically lead to the conclusion that the reputation has actually been tarnished. It was open to the Claimant to produce evidence of this but she did not. Ms Criddle also makes the valid point that the Coroner's comments of having no concerns with the Claimant's care of the patient who died, this Tribunal's liability judgment and press coverage illustrate a lack of damage to the Claimant's reputation.

57. As we have said more than once in our comments above, the absence of medical evidence and relying on the Claimant's self-diagnosis and a letter from a psychotherapist who gives no diagnosis or prognosis, would leave the Tribunal in a position of speculating on the extent of the Claimant's mental health issues and the effect of those issues on her ability to engage in remunerative work. It also has to be noted that the Claimant has seemingly made little or no effort at all to obtain medico-legal instructions or otherwise mitigate her losses. The claim in relation to the FTT work and the fact that it will cease during 2023 is not supported by any independent evidence at all and neither is her loss of confidence or social anxiety.

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Employment Judge M Butler

Date: 26 January 2023

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Appendix

The Issues

3. The parties helpfully agreed a List of Issues which are as follows:

Constructive unfair dismissal

3.1 It is accepted that there is an implied term in the Claimant's contract of employment that the Respondent shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and Respondent.

3.2 Between 7 January 2017 and 1 February 2019, did the Respondent, by the actions of Dr Silva, Mr Wright, Dr Packham and/or Dr Hankin in relation to the Claimant as set out below, breach the implied term of trust and confidence, either individually or collectively, or did the Respondent act with reasonable and proper cause at all material times?

(a) On or around 7 January 2017, the manner in which the serious untoward incident inquiry (SU I) was investigated, specifically, failing to take into account the Claimant's, and other members of staff's, concerns and viewpoint;

(b) Not one of the Claimant's factual corrections being made to the final version of the SUI report which was sent to the Coroner on 21 March 2017 and circulated within the trust on 15 August 2017; (n.b. the Claimant clarified at the hearing that it was Mr Wright's statement that was circulated and not the SUI report);

(c) On 21 March 2017, Mr Wright providing a statement to the Coroner effectively endorsing the unchanged SUI report;

(d) The trust not initially providing the Coroner with documents relevant to the inquest and only doing so once pressed to do so;

(e) Continuing with the Maintaining High Professional Standards investigation, and subsequently amending the terms of reference, in the light of the Coroner's findings;

(f) The investigating officer not being provided with the Claimant's list of factual inaccuracies to the SUI report, not being informed that the contents of the SUI report were disputed and not being provided with any evidence or related documents from the inquest, or the Coroner's findings;

(g) Mr Wright circulating the SUI report within the Trust on 15 August 2017 but without including the Claimant's corrections and accompanying it with ambiguous wording regarding the Claimant's evidence and the Coroner's findings at the inquest;

(h) Mr Wright circulating his statement from the inquest to the trust's medical staff committee on 15 August 2017 which contained numerous

factual inaccuracies which he was aware of at the time of circulation but did not amend or qualify;

(i) Following the conclusion of the investigation, and without the Claimant knowing the outcome of the investigation, Dr Packham telling the Claimant on 5 April 2018 that she had three choices - to resign, retire or face a conduct hearing arranged and overseen by Mr Wright;

(j) On 6 July 2018, Mr Wright circulating a document to the Claimant's consultant colleagues informing them that the Claimant was to be subject to a conduct hearing.

3.3 If there was a breach of the implied term of trust and confidence on the basis of the above, was it sufficiently serious to have justified the Claimant's resignation? Alternatively, was it the last in a series of acts which justify the Claimant's resignation?

3.4 Did the Claimant wave or affirm any of the alleged breaches of the implied term of trust and confidence?

3.5 Did the Claimant resign in response to the alleged breaches of the implied term of trust and confidence?

3.6 Insofar as the Tribunal finds that there has been a dismissal, was this an unfair dismissal?

Victimisation

3.7 Did the Respondent subject the Claimant to a detriment by not allowing the Claimant to apply for the role of forensic psychiatrist in the forensic gender clinic in September 2019?

3.8 Did the Respondent subject the Claimant to a detriment by not considering and/or acknowledging and/or responding to the Claimant's application for the role of forensic psychiatrist in the forensic gender clinic in October 2019?

3.9 Did the Respondent subject the Claimant to a detriment by not offering the Claimant the role of forensic psychiatrist in the forensic gender clinic in October 2019?

3.10 If so, was this because the Claimant did a protected act by issuing a claim in the employment Tribunal against the Respondent in June 2019?

Remedy

3.11 If successful, what compensation should the employment Tribunal award to the Claimant?

3.12 Insofar as the Tribunal finds that there has been an unfair dismissal, should any compensation awarded to the Claimant be reduced to:

(i) reflect the Claimant's contributory conduct and/or

(ii) pursuant to Polkey v AE Dayton Services Ltd [1987]ICR 142 to reflect the fact that the Claimant would have been dismissed in any event following the disciplinary process.

3.13 What compensation, if any, should be awarded for injury to feelings?