EMPLOYMENT TRIBUNALS

Claimant: Mrs J Wolloms

First Respondent : CI Accountancy Limited
Second Respondent: Mr G Killmister
Third Respondent: Mr L Hare

HELD AT: at Newcastle by CVP
ON: 22 November 2022 (and 7 February 2023)

BEFORE: Employment Judge Aspden
Members: Ms J Maughan
Mr J Weatherston

REPRESENTATION:

Claimant: Ms McBride, Solicitor
Respondents: Mr Gilbert, Consultant

JUDGMENT having been sent to the parties on 24 November 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In our judgment of 31 May 2022 we upheld the following of the claimant's complaints:

   1.1. the complaint that the first, second and third respondents subjected the claimant to disability-related harassment by commencing disciplinary proceedings against her, contrary to the Equality Act 2010;

1.2. the complaint that the first respondent subjected the claimant to detriment contrary to Section 47C of the Employment Rights Act 1996 by commencing disciplinary proceedings against her;

1.3. the complaint that the first, second and third respondents subjected the claimant to disability-related harassment and direct disability discrimination by dismissing her, contrary to the Equality Act 2010;

1.4. the complaint that the first respondent unfairly dismissed the claimant (the dismissal being unfair by virtue of Section 99 of the Employment Rights Act 1996); and

1.5. the complaint that the first respondent breached the claimant's contract of employment by terminating her employment without notice (ie the complaint of wrongful dismissal).

2. The parties were unable to agree on the appropriate remedy. Accordingly, a remedy hearing was arranged and took place on 22 November 2022.

3. There was one issue we were unable to determine at the November hearing due to lack of time, namely whether any part of the award should be grossed-up in accordance with the Gourley principle (referred to below). We proposed, and the parties agreed, that before that matter was determined, the parties should have an opportunity to make further submissions, and try to reach agreement, on the amount of any additional compensation that should be awarded under the Equality Act 2010 (which would be dependent on the claimant's taxable income from other sources in this tax year) and, in the meantime we should give a judgment in respect of all other matters relating to remedy. Accordingly, after giving judgment we adjourned the hearing until 7 February 2023. It was agreed that the Gourley matter would be determined on that date (along with the claimant's outstanding application for costs), unless the parties could reach agreement before then.

4. By 7 February, the parties had not managed to reach agreement on the Gourley issue but they had narrowed the issues in dispute considerably (and the claimant had decided not to pursue her costs application). Therefore, the remedy hearing continued on 7 February 2023 and we gave a further judgment on that date.

5. The respondents have asked for written reasons for the judgment we gave on 22 November. They have not asked for written reasons for the further judgment made on 7 February.

Remedy for unlawful acts under the Equality Act 2010

6. As noted above, we upheld the claimant's complaints that the first, second and third respondents contravened the Equality Act 2010 by:
   6.1. commencing disciplinary proceedings against her; and
   6.2. dismissing her.

7. Mrs Wolloms sought an award under the Equality Act 2010 made up of the following elements:
   7.1. Compensation for lost earnings consequent on dismissal.
   7.2. Compensation for loss of health insurance consequent on dismissal.
   7.3. Compensation for loss of statutory rights to the value of £300.
   7.4. Compensation for injury to feelings, including aggravated damages.
   7.5. An uplift for failing to follow the ACAS Code on discipline and grievances (applying section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.
8. Mr Gilbert agreed that it was appropriate to award the claimant £300 in respect of loss of statutory rights.
9. The areas of dispute concerned:
   9.1. The extent of any financial loss caused by the discriminatory dismissal.
   9.2. Compensation for injured feelings (including whether there should be any award for aggravated damages).
   9.3. Whether there should be an additional award under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.
10. With regard to financial loss, the claimant's case was that, if the respondents had not discriminated against her by dismissing her, she would have remained in the first respondent's employment for a further 107 weeks, at which point she would have retired as planned.
11. The parties agreed the claimant's net weekly earnings with the respondent were £463.55 and they also agreed that the value of the claimant's lost health insurance benefit over the 107 weeks claimed would be £3744.19, roughly £35 per week. During the hearing the claimant confirmed that she had received benefits following the termination of her employment totalling £5323.71 that she would not have received if she had not been dismissed.
12. The respondents did not agree that the financial loss claimed was attributable to the claimant's dismissal. The respondent's position on financial loss was as follows:
    12.1. Absent discrimination, there was a chance that the claimant would have left her employment voluntarily much sooner than the claimed retirement date and any compensation should reflect that possibility. Mr Gilbert submitted that, if the respondents had not dismissed the claimant (or if they had reinstated her following her appeal), Mrs Wolloms would have resigned anyway, either to care for Mr Wolloms or in response to the actions of the respondents (or for a combination of those reasons).
    12.2. In any event, the claimant had failed to mitigate her loss.

13. It was not the respondent's case that there was a chance that they might have dismissed the claimant lawfully if they had not done so on discriminatory grounds.

Legal framework

14. Where an employment tribunal finds that there has been a contravention of part 5 of the Equality Act 2010 (as we have in this case), the tribunal may order the respondent to pay compensation to the complainant: Equality Act 2010 s124(2)(b).

Joint and several liability

15. Where the discrimination damage done by employees or agents of the employer is the same indivisible damage as that for which the employer is vicariously liable, the normal compensation order against all respondents will be one of joint and several liability for 100% of the award: Bungay v Saini UKEAT/0331/10, [2011] EqLR 1130; LB Hackney v Sivanandan [2011] IRLR 740, [2011] ICR 1374.

General approach to compensation

16. The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court under section 119: Equality Act 2010 s124(6). This means that, where compensation is ordered, it is to be assessed in the same way as damages for a statutory tort: see Hurley v Mustoe (No 2) [1983] ICR 422, EAT and Equality Act s 119(2)(a). The measure of tortious damages is such amount as will put the claimant in the position he or she would have been in but for the employer's unlawful conduct, as best as money can do so.

Duty to mitigate

17. A claimant is under a duty to mitigate her loss. In Cooper Contracting Ltd v Lindsey UKEAT/0184/15 (22 October 2015, unreported), the President of the EAT summarised the law on mitigation as follows:

> *'(1) The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss.*
>
> *(2) It is not some broad assessment on which the burden of proof is neutral.... If evidence as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer.*
>
> *(3) What has to be proved is that the claimant acted unreasonably; he does not have to show that what he did was reasonable....*
>
> *(4) There is a difference between acting reasonably and not acting unreasonably.....*
>
> *(5) What is reasonable or unreasonable is a matter of fact.*
>
> *(6) It is to be determined, taking into account the views and wishes of the claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the claimant's that counts.*

(7) The Tribunal is not to apply too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer....

(8) The test may be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate.

(9) In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient.'

18. Even if the Tribunal is satisfied that there were steps that it was unreasonable for the claimant not to have taken to find an alternative income, it does not follow that any compensation will be reduced. The Tribunal must consider whether the claimant would have mitigated her loss (ie obtained an alternative income) if she had taken those steps. That generally involves identifying a 'date' (ie a suitable point in time) when such steps would (on the balance of probabilities) have borne fruit in terms of an alternative income (and the amount of such income): Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498, applied in Savage v Saxena [1998] IRLR 182, [1998] ICR 357.

Injury to feelings

19. In Vento v Chief Constable of West Yorkshire Police (No2) [2003] IRLR 102, the Court of Appeal set out the following guidance:

'Employment tribunals and those who practise in them might find it helpful if this court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.

(i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.

(ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

(iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.'

20. We bore in mind, however, that notwithstanding references in Vento to the 'nature of the prohibited conduct', awards are to be compensatory in nature, not punitive. It is the impact of the discriminatory act upon the claimant that determines the appropriate level of compensation.

21. The Vento bands now need to be uplifted to take account of inflation and the case of Simmons v Castle [2013] 1 All ER 334. The Presidents of Employment Tribunals for England and Wales and Scotland have published guidance on Employment Tribunal awards for injury to feelings and psychiatric injury in light of those developments. For claims made between 6 April 2019 and 5 April 2020 the Presidential guidance says that the Vento bands shall be as follows: a lower band of £900 to £8,000 (less serious cases); a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band); and an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000.

Aggravated damages

22. A Tribunal may also award aggravated damages, in appropriate circumstances, for an act of discrimination. Such an award is compensatory and not punitive in nature. It is an aspect of injury to feelings compensation and tribunals should have regard to the total award made (ie for injury to feelings and for the aggravation of that injury) to ensure that the overall sum is properly compensatory and not excessive: Commissioner of Police of the Metropolis v Shaw [2012] IRLR 291, EAT.

23. In HM Land Registry v McGlue UKEAT/0435/11, [2013] EqLR 701, the EAT said such awards might be appropriate where the sense of injustice and injured feelings have been aggravated (a) by being done in an exceptionally upsetting way, eg 'In a high-handed, malicious, insulting or oppressive way'; (b) by motive: conduct based on prejudice, animosity, spite or vindictiveness where the claimant is aware of the motive; (c) by subsequent conduct: eg where a case is conducted at a trial in an unnecessarily offensive manner, or a serious complaint is not taken seriously, or there has been a failure to apologise. An award of aggravated damages will not be appropriate, however, merely because an employer acts in a brusque and insensitive manner towards an employee or is evasive and dismissive in giving evidence: Tameside Hospital NHS Foundation Trust v Mylott UKEAT/0359/09 (11 March 2011, unreported).

Tax considerations

24. The loss sustained by the claimant is generally calculated on the basis of the net loss to the claimant, after deduction of the income tax which he or she would have

been required to pay in the absence of the relevant wrong. Where an award of compensation is taxable, however, then to avoid under-compensating the claimant, the award should be 'grossed-up' in order to place the claimant in the position in which the Tribunal's award seeks to place them, after they have discharged their tax liability: British Transport Commission v Gourley [1956] AC 185, HL.

Acas Code

25. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that in some circumstances an employment tribunal may increase an award if it appears to the tribunal that the employer has unreasonably failed to comply with the ACAS Code of Practice on Discipline and Grievances.

26. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) provides:

> *"207A Effect of failure to comply with Code: adjustment of awards*
>
> *(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.*
>
> *(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*
>
> *(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*
>
> *(b) the employer has failed to comply with that Code in relation to that matter, and*
>
> *(c) that failure was unreasonable,*
>
> *the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%. …*
>
> *(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes."*

27. Section 207A TULR(C)A applies to section 120 of the Equality Act 2010, pursuant to which claims of discrimination are brought.

28. The relevant Acas Code of Practice is the Code of Practice on Disciplinary and Grievance Procedures published on 11 March 2015.

29. The Foreword to the Acas Code provides:

"The Acas statutory Code of Practice on discipline and grievance procedures is set out in paragraphs 1 to 47 below. It provides basic practical guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace. …

…

Many potential disciplinary or grievance issues can be resolved informally. A quiet word is often all that is required to resolve an issue. However, where an issue cannot be resolved informally then it may be pursued formally. This Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most instances."

30. In Rentplus UK Ltd v Coulson [2022] IRLR 664, [2022] ICR 1, the EAT considered the position of an employer that 'goes through the motions of applying a fair procedure, but it is a subterfuge and nothing the employee says could possibly make any difference, because dismissal is predetermined, so that the process is truly a sham.' The EAT held that if a disciplinary, capability or grievance procedure is purportedly applied by an employer acting in bad faith, who takes no account of what the employee says, there is a breach of the Acas Code. As Judge Tayler said: 'If dismissal is predetermined and the employer will not take any account of anything said by the employee, at a hearing or appeal, it is hard to see how the employee is in a better position than would have been the case if the procedure had not been applied at all, and the meetings had not taken place.'

31. The assessment of any uplift was considered by Griffiths J in Sir Benjamin Slade v Biggs [2022] IRLR 216:

'… when considering what should be the effect of an employer's failure to comply with a relevant Code under section 207A of TULRCA , tribunals might choose to apply a four-stage test, in order to navigate the various points which I have been considering in this appeal:

i) Is the case such as to make it just and equitable to award any ACAS uplift?

ii) If so, what does the ET consider a just and equitable percentage, not exceeding although possibly equalling, 25%?
Any uplift must reflect "all the circumstances", including the seriousness and/or motivation for the breach, which the ET will be able to assess against the usual range of cases using its expertise and experience as a specialist tribunal. It is not necessary to apply, in addition to the question of seriousness, a test of exceptionality.

iii) Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the ET's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?
This question must and no doubt will be answered using the ET's common sense and good judgment having regard to the final outcome. It cannot, in the nature of things, be a mathematical exercise.

iv) Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the ET disproportionate in absolute terms and, if so, what further adjustment needs to be made?

Whilst wholly disproportionate sums must be scaled down, the statutory question is the percentage uplift which is "just and equitable in all the circumstances", and those who pay large sums should not inevitably be given the benefit of a non-statutory ceiling which has no application to smaller claims. Nor should there be reference to past cases in order to identify some numerical threshold beyond which the percentage has to be further modified. That would cramp the broad discretion given to the ET, undesirably complicate assessment of what is "just and equitable" by reference to caselaw, and introduce a new element of capping into the statute which Parliament has not suggested. Indeed, the reduction by Parliament in the range from 50% to 25%, after the decision in Wardle may be taken to be a reconsideration of what is proportionate in the most serious cases, and, therefore, a strong indication on that aspect.'

Interest

32. When making an award under s124 of the Equality Act 2010, a tribunal may include interest on the sums awarded. Awards of interest are governed by the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996, which provide as follows:

32.1. A Tribunal is required to consider whether to award interest even if the claimant does not apply for it: reg 2.

32.2. Interest is to be calculated as simple interest, which accrues daily: reg 3(1).

32.3. For claims presented after 28 July 2013, the rate of interest to be applied shall be, in England and Wales, the rate fixed by section 17 of the Judgments Act 1838 (which is, and has been throughout these proceedings, 8%): reg 3(2).

32.4. No interest shall be included in respect of any sum awarded for a loss or matter which will occur after the on the day on which the amount of interest is

calculated by the tribunal (or in respect of any time before the contravention or act of discrimination complained of): reg 5.

32.5. Subject to regs 6(2) and (3), in the case of any sum for injury to feelings, interest shall be for the period beginning on the date of the contravention or act of discrimination complained of and ending on the day on which the amount of interest is calculated by the tribunal: reg 6(1)(a).

32.6. Subject to regs 6(2) and (3), in the case of all other sums of damages or compensation (other than any sum referred to in regulation 5) and all arrears of remuneration, interest shall be for the period beginning halfway through the period that starts with the act of discrimination and ends with the day on which the amount of interest is calculated by the tribunal: reg 6(1)(b).

32.7. Where the tribunal considers that in the circumstances, whether relating to the case as a whole or to a particular sum in an award, serious injustice would be caused if interest were to be awarded in respect of the period or periods in paragraphs (1) or (2), it may— (a) calculate interest, or as the case may be interest on the particular sum, for such different period, or (b) calculate interest for such different periods in respect of various sums in the award, as it considers appropriate in the circumstances: reg 6(3).

Evidence

33. We heard some evidence relevant to remedy at the original hearing and some of the findings set out in our earlier judgment are relevant to remedy. We heard further evidence from Mrs Wolloms at this hearing and made additional findings of fact as set out in our conclusions below.

Conclusions

Financial loss

34. Mr Gilbert submitted that it was likely, or at least possible, that the claimant would have left her job with the respondent voluntarily if there had been no discrimination. Mr Gilbert pointed to a number of matters in support of that position including the following:

34.1. Mr Wolloms was unwell. He had health problems and the claimant had recently taken a considerable period of time off work to look after him.

34.2. The claimant did not say in her claim form that she wanted to be reinstated.

34.3. The claimant applied for and obtained Carer's Allowance.

34.4. Since her dismissal by the respondents the claimant has not had any paid employment and only applied for two jobs.

35. The respondents' position was that those matters indicated that the claimant would (or at least may) have left her job to care for Mr Wolloms.

36. Mr Gilbert also referred us to the claimant's evidence that she registered with online recruiters a week after the meeting on 7 January 2019 when the claimant was due to return to work. The suggestion, as we understood it, was that this indicated the claimant was contemplating leaving the employment of the first respondent to work elsewhere.

37. Mr Gilbert also submitted that, whether or not the claimant may have left her job voluntarily, she failed to take reasonable steps to mitigate her financial loss.

38. We made the following findings that are particularly pertinent to these issues.

39. Before her dismissal, the claimant was in stable employment with the first respondent, having worked there for over 13 years. She had had a good relationship with Mr Killmister and Mr Hare and was settled in her job.

40. We rejected the respondents' submission that Mrs Wolloms went into the 7 January 2019 meeting hoping to come out of it with a redundancy payment or somehow engineer a redundancy situation (see liability judgment paragraph 110).

41. We accepted Mrs Wolloms' evidence that Mr Wolloms was not in need of full time care at any time after the date Mrs Wolloms attempted to return to work (7 January 2019). Mrs Wolloms had wanted to return to work full time with the first respondent. She felt that she could cope with whatever needs Mr Wolloms had alongside her full time job after he had a sudden deterioration in his health some months earlier. She was carrying out some elements of care but could work. She needed and wanted a job for financial reasons. She was the main earner in the family. We accepted her evidence that she and her husband had saved up for their care needs should they ever need them. It had not been part of those plans that she would leave her job to care for Mr Wolloms or take a part time job. Had she wanted to spend more time caring it seemed likely to us that she would have taken the opportunity to raise that at the 7 January 2019 meeting when the conversation was about those issues, but she did not say at that time that she thought she would need time off.

42. After the meeting on 7 January 2019 the claimant signed up to or registered with some online recruitment sites with a view to looking for alternative work. She did so because she perceived, correctly, that the respondents did not want her to return to her job. She believed, again correctly, that this was for discriminatory reasons. We found that he reason the claimant registered with these sites was not because she wished to leave the first respondent's employment to care for her husband.

43. The claimant had planned to retire at the age of 66: that had been her intention for some time before her dismissal. At the time of her dismissal she was approaching her 64th birthday. She had 107 weeks to go before her planned retirement date.

44. We accepted the claimant's evidence that she did actively look for other work after her dismissal. There was some ambiguity in her evidence, however, as to when it

was that she started actively looking for work. She said in her witness statement that she was too unwell at first although we accepted her evidence that she signed up for job sites in January 2019, when she first suspected that the respondents would not allow her to return to work. We found it more likely than not there was a time during which the claimant was not actively looking for work. That was partly because she did not feel well enough as a result of the conduct of the respondents. It was also because the claimant was hoping the appeal process would yield favourable results: the fact that the claimant had asked for someone independent to conduct the appeal indicates that she was genuinely hoping for a positive outcome from the appeal process.

45. In her claim form the claimant did not say that she wanted to be reinstated. At that point, however, she was pursuing an appeal. That was her route to reinstatement. The fact that the claimant was not asking to be reinstated if the Employment Tribunal found her to have been unfairly dismissed did not, in our judgement, say anything about what the claimant's intentions would have been if she had not been treated unlawfully by the respondents. Nor did the fact that the claimant had, before her dismissal, started looking at what jobs might be available.

46. By the time the claimant learned that the respondents would not reinstate her following her appeal, she was already registered with a number of job websites. She signed up with the job centre immediately after learning that the decision on appeal was not going to be accepted by the respondents.

47. The claimant's efforts to find work included: signing up with several online job websites and checking for vacancies with these online recruiters daily, checking for vacancies at the job centre, checking the local paper once a week.

48. The claimant applied for two jobs in January 2020. She did not receive a response.

49. After her dismissal, Mrs Wolloms applied for and obtained Carer's Allowance. In doing that she mitigated her loss. It was a benefit that was available to her when her entitlement to Job Seekers Allowance ran out. We did not consider that that showed the claimant would or might have given up her full-time job to become a carer for her husband had she not been dismissed.

50. The claimant's evidence to us was that she did not come across any other suitable jobs that she could have applied for. The respondents' position was that we should infer that there were likely to have been more than two such jobs and that the reason that the claimant did not apply for them was that she was unaware of them because she was not making a genuine and reasonable efforts to search for jobs, or she was aware of them but unreasonably decided not to apply. In this regard we made the following findings and observations.

    50.1. The claimant was geographically limited in where she could reasonably look for alternative work because she cannot drive and there was limited scope for the claimant to access other locations by bus. For that reason the claimant only looked for alternative jobs in Hexham. This, we found, was not unreasonable.

50.2. Mrs Wolloms has health conditions that mean she cannot stand for long periods. She also has an inner ear condition that affects her balance. For those reasons she did not apply for certain types of jobs that would have involved standing for significant periods, including jobs in retail and cleaning jobs. That, too, was not unreasonable.

50.3. By March 2020, businesses generally were affected by Covid. That resulted in fewer jobs being available in general. The uncertainty created by Covid19 meant very many businesses stopped recruiting. That state of affairs continued for some time.

50.4. We inferred from the evidence given by Mrs Wolloms that she did come across some jobs that would have been suitable for her but for the fact that the employer was looking for somebody with an NVQ qualification. The claimant did not have that qualification. She looked into the possibility of obtaining a relevant NVQ but decided against it. That was not an unreasonable decision, given the claimant's proximity to retirement.

50.5. If the need for the qualification was said by the employer or recruiter to be a necessary qualification or requirement for the job then we were satisfied that it was not unreasonable for the claimant not to apply for the job. In such circumstances the claimant would not have been able to fulfil the minimum qualifications for the job. Mr Gilbert suggested that the claimant could have applied anyway because employers sometimes fund individuals through NVQs. We found that the idea that an employer would fund the claimant through such a qualification when she was planning to retire in May 2021 to be fanciful. The employer simply would not receive a sufficient return on their investment. It was reasonable for the claimant to assume that an employer would not sponsor her to get an NVQ qualification and employ her on that basis and for her not to apply for such jobs.

50.6. If the claimant had come across a vacancy for a bookkeeping or similar job in Hexham with an employer who was suggesting that an NVQ qualification was desirable rather than necessary then arguably it would have been unreasonable for the claimant not to apply for such a job. The claimant's evidence as to whether she came across any such jobs was somewhat contradictory. At one point she appeared to suggest she may have done but then she said that in all of the relevant vacancies she came across an NVQ was a requirement of the job. Mr Gilbert also seemed to suggest that the claimant's evidence of employers insisting on NVQs contradicted the evidence given by the claimant at the liability hearing that no formal qualifications were required for bookkeeping jobs. We did not find the claimant's evidence in that respect at all contradictory: she was simply making the point that, in principle, one does not need qualifications to work as a bookkeeper but, in practice, employers often insist on NVQs these days.

50.7. Mr Gilbert suggested that the claimant had failed to mitigate her loss by failing to sign up with local recruitment consultants and look for temporary jobs.

However, the respondents did not adduce any evidence that tended to show that there were in fact any local recruitment consultants based in in Hexham or who covered the Hexham area. Nor was there any evidence before us to indicate that, if any such local recruitment consultants existed, they may have had access to vacancies that would not have been advertised in the job centre or on any of the websites the claimant looked at.

50.8. There were signs, in the claimant's evidence, that she may have harboured a somewhat defeatist attitude towards finding alternative employment. She referred to not having references and her age. That led us to consider whether the claimant had ruled out applying for jobs she could have applied for as she just assumed she would not succeed or because she was not genuinely interested in finding alternative employment. However, it seemed unlikely to us that the claimant would not make real and genuine efforts to find an alternative source of income following her unplanned-for termination of employment. Looking at the evidence in the round we concluded that the claimant had not ruled out applying for jobs she could have applied for because of an assumption she would not succeed.

51. We bore in mind that the claimant's search was reasonably confined to a small geographical area, she had reasonably ruled out certain types of job because of her physical conditions, and from March 2020 there were likely to be fewer jobs available due to Covid. In the circumstances it was not surprising that the claimant had been unable to find more than two suitable vacancies before her planned retirement date in May 2021. For their part, the respondents did not adduce any evidence that there were in fact any vacancies for a bookkeeper or similar in Hexham in the relevant time period in respect of which an NVQ qualification was not required. Nor did the respondent adduce evidence of any other potentially suitable vacancies that the claimant could have applied for at the material time other than the two that the claimant did apply for. Looking at the evidence in the round we were not prepared to infer that it was more likely than not that there were any such vacancies. We accepted the claimant's evidence and found that, although she made reasonable efforts to search for jobs in Hexham that might be suitable, she did not come across any that she considered she was able to do other than the two that she applied for.

52. In light of all of the above, the respondents did not persuade us that the claimant acted unreasonably in failing to mitigate her loss.

53. As for what might have happened if the respondents not acted unlawfully, looking at the evidence in the round we found that the claimant had no intention of leaving her employment voluntarily in order to care for Mr Wolloms and that would have remained the case up until retirement if the respondents had not treated her unlawfully. Had the respondents not discriminated against the claimant, there was no chance the claimant might have left her employment voluntarily because she needed to or wanted to spend more time caring for Mr Wolloms.

54. Nor, we found, was there any chance that the claimant might have left the respondents employment voluntarily for any other reason had the respondents not discriminated against the claimant. Absent the respondents' unlawful behaviour, there would have been no reason for the claimant to wish to leave her job given her age and proximity to retirement, the fact that her job was stable and she had been doing it for 13 years and the fact that she and her husband relied on her income.

55. We found that, had the respondents not discriminated against the claimant, her employment with the first respondent would have continued for a further 107 weeks, whereupon she would have retired.

56. The claimant's financial loss, therefore, amounted to £48,020.33 ie £53,344.04 (as calculated in the schedule of loss) less the benefits received of £5,323.71.

57. In addition, Mr Gilbert agreed that the claimant should be awarded compensation for loss of statutory rights of £300.

Injury to feelings

58. We found the behaviour of the respondent had a significant impact on the confidence of the claimant and her mental health.

59. When the claimant realised that she was not going to be permitted to return to work she spent a week barely getting out of bed and in tears a lot of the time. As a result of the respondents' actions her mood became low. She sometimes struggled to get out of bed. Her confidence was also affected and she felt her physical conditions had worsened as a result of the stress she experienced consequent on the respondents' treatment of her. She was also concerned that her husband's recovery was being adversely affected because he was worried about her and saw her so upset.

60. Her feelings were further badly affected by the fact that the quality of her work, her professionalism and her integrity were attacked by the respondents. She found the tone of the dismissal letter extremely offensive. The claimant's subsequent attempts to salvage her reputation through an appeal were thwarted when the respondents refused to accept the decision of the independent professional.

61. We accepted that the claimant felt, as she put it, powerless, helpless, 'destroyed' and devastated. Those were the words she used to describe how she felt and we accepted they accurately represented how she felt as a consequence of the discrimination.

62. In addition, the financial worries of losing her job took a toll. Her husband was not well enough to work and they depended on her salary. She had lost her stable employment, which she had intended to remain in until her retirement in two years' time. She knew that her age was against her in the job market, as was the fact that she had been dismissed for alleged gross misconduct and would be unable to get a favourable reference from the respondents.

63. The discrimination against the claimant began with the commencement of disciplinary action and continued with the claimant's dismissal. The effects of those discriminatory acts lasted a long time. The impact on the claimant's feelings and mental health began when the discrimination started and they continued at least until the case was determined on liability in May 2022 ie for more than three years. Throughout the process the respondents maintained their position that the claimant had been guilty of serious misconduct. She had to endure the very considerable stress and anxiety of these Tribunal proceedings to clear her name.

64. Both parties' representatives agreed this was a case in the Vento middle band. The mid-band for claims made between April 2019 and March 2020 begins at £8,800 and ends at £26,300.

65. We reached the view that an appropriate amount to compensate the claimant for injury to feelings was £20,000 in total, made up of:

    65.1. £18,000 ie a sum just above the mid-point of the middle Vento band; and

    65.2. a further £2,000 by way of aggravated damages.

66. We awarded aggravated damages because, aside from engineering the claimant's dismissal and seeking to disguise the true reason for the claimant's dismissal, when the claimant appealed, Mr Killmister tried to influence the outcome of the appeal and then the respondents refused to accept the findings of the appeal. That was high-handed behaviour that aggravated the claimant's injury.

67. We invited submissions as to how compensation should be apportioned, between damages attributable to the dismissal and damages attributable to pre-dismissal discrimination. Mr Gilbert and Ms McBride agreed a 50/50 split would be appropriate. Left to our own devices we might have been more inclined to weight the greater proportion of the award towards the dismissal compensation but the parties' suggestion of a 50/50 allocation was not inappropriate and so we agreed that is how the compensation should be attributed.

68. Therefore, we awarded:

    68.1. £10,000 for injury to feelings occasioned by the pre-dismissal discrimination (ie taking disciplinary action); and

    68.2. £10,000 compensation for injury to feelings occasioned by the dismissal.

ACAS Code: Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

69. We found there was an unreasonable failure to follow the ACAS code on discipline and grievances:

    69.1. The respondents provided the claimant with a large amount of evidence they relied on to support the dismissal only after they had dismissed her, depriving her of the opportunity to comment on that evidence before she was dismissed. This contravened that part of the ACAS Code of Practice on

discipline and grievances that says employees should normally be provided with written evidence when they are notified that there is to be a disciplinary hearing.

69.2. The claimant was dismissed for a reason that the respondents didn't reveal to her, there was no proper discussion of the true reasons for dismissal giving the opportunity for the claimant to state her case. In that sense there was a wholesale disregard of the ACAS code.

69.3. The decision to dismiss was made before the disciplinary hearing.

69.4. Mr Killmister and Mr Hare then refused to accept the conclusion of the appeal ie that Mrs Wolloms should be reinstated. The claimant was thereby deprived of an effective right of appeal.

70. These were very serious breaches of the ACAS code and were unreasonable.

71. However, Mr Gilbert was right to submit that any award or uplift for failing to follow the ACAS code needed to be considered in the context of the overall award being made. In this regard, we took into account the following:

71.1. The respondent's failings in respect of the ACAS Code were already reflected to some extent in the award of compensation for injured feelings and the basic award for unfair dismissal set out below (£10,237.50).

71.2. The overall amount of the award which was to be uplifted.

71.3. The fact that the award was also increased due to the award of interest at a relatively high rate (8%).

72. Taking all of the above into account, we decided that an uplift of 5% (£3,416.02) appropriately reflected the additional amount the first respondent should pay for their failure to comply with the ACAS code. The uplift only applied to the award against the first respondent.

Interest

73. We were obliged by the 1996 Regulations to consider whether to award interest. There was no submission on behalf of the respondent that interest should not be awarded. In any event, we considered that it should be.

74. The interest rate of 8% per annum is prescribed by law. It is not a matter in respect of which we had any discretion.

75. Mr Gilbert did not contend that serious injustice would be caused if interest were to be awarded in respect of the periods referred to in the 1996 Regulations.

76. In the circumstances, we awarded interest calculated in the manner set out in the regulations. The interest amounted to £12,764.42, calculated as follows:

76.1. Interest on £10,000 injury to feelings award not attributable to the dismissal, calculated at the prescribed rate of 8% per annum ie £2.19 per day, from 6 March 2019 (the date disciplinary action began) to 22 November 2022 (the calculation date) (1357 days) = £2,971.83.

76.2. Interest on £10,000 injury to feelings award attributable to the dismissal, calculated at the prescribed rate of 8% per annum ie £2.19 per day, from 18 April 2019 (the date of dismissal) to 22 November 2022 (the calculation date) (1314 days) = £2,877.66.

76.3. Interest on £48,020.33 compensation for financial loss, calculated at the prescribed rate of 8% per annum ie £10.525 per day, from the midpoint between 18 April 2019 (the date of dismissal, when financial loss began) to 22 November 2022 (the calculation date) (657 days) = £6,914.93.

Remedies for other claims

77. Ms McBride accepted that Mrs Wolloms was fully compensated for her dismissal by the award under the Equality Act 2010 and that therefore we should not make a separate awards of compensation against the first respondent for:

77.1. its contravention of Section 47C of the Employment Rights Act 1996 by commencing disciplinary proceedings against her;

77.2. its breach of the claimant's contract of employment by terminating her employment without notice (ie the complaint of wrongful dismissal).

78. For the same reason, Ms McBride accepted that compensation for unfair dismissal should be confined to a basic award.

Unfair dismissal basic award

79. The basic award is calculated in accordance with section 119 of the 1996 Act. The parties agreed that, subject to section 122(2), the basic award calculated under ERA section 119 amounted to £10,237.50.

80. Section 122(2) of the 1996 Act provides that, where the Tribunal considers that any conduct of the claimant prior to dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, it must reduce the amount accordingly. The conduct in question must be in some way 'culpable or blameworthy': Nelson v BBC (No 2) [1979] IRLR 346, CA. It need not, however, cause the dismissal.

81. In Nelson the Court of Appeal gave some guidance as to what constitutes culpable or blameworthy conduct. It held

'The concept does not, …, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody- minded. It may also include action which, though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the circumstances. I

should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."

82. In Sanha v Facilicom Cleaning Services Ltd, UKEAT/0250/18/VP, the EAT held that the concept of culpable or blameworthy conduct may also include conduct which is negligent and that the words 'culpable' and 'blameworthy' are synonyms meaning 'deserving of blame.'

83. In our earlier judgment we made the following findings:

> *'240. In his appeal conclusions, Mr Purvis found that there were no errors in the accounts but that it was not immediately obvious where some of the figures in the accounts had come from. ..*
>
> *…*
>
> *241. We find that some of the claimant's workings in the accounts she was responsible for were not clear because she annotated computer summaries with hand-written notes and calculations. That was not good practice. It had not led to errors but meant it was not as easy for someone to pick up her work in her absence as it could have been. The respondent has not, however, proved that Mrs Wolloms' work fell below a competent standard as alleged.*
>
> *…*
>
> *250. We find that the deadline for completion of Client W's accounts was at the end of February 2019. That was some way off at the time Mrs Wolloms took leave to look after Mr Wolloms. When she went on leave, Mrs Wolloms had not reflected certain information received from the client in the accounts. Ms Little described these as 'minor issues' when she drew Mr Hare's attention to them.*
>
> *251. In his appeal conclusions, Mr Purvis found that the claimants' work on this matter was work in progress; that Mrs Wolloms was preparing the working papers and accounts when she went on holiday leave and subsequently had time off to look after Mr Wolloms; that that was a satisfactory explanation for the file being incomplete; and a competent senior should have been able to pick up the file and complete the accounts as necessary.*
>
> *252. We agree with Mr Purvis' conclusion that there was no misconduct by Mrs Wolloms. Mrs Wolloms' working methods were not a model of perfection but they cannot reasonably be considered to constitute misconduct.*
>
> *…*
>
> *253. In light of the evidence of Ms Little and Mr Nixon, we find it is more likely than not that Mrs Wolloms accounted for VAT on an invoice and cash basis in*

the first respondent's accounts. We accept that was erroneous: Mr Purvis acknowledged in his appeal findings that doing this would be incorrect and that was the evidence of Mr Nixon and Ms Little. The evidence of Mr Nixon was that Mrs Wolloms did not appear to have been making this mistake consistently throughout the time she was dealing with VAT returns. We accept that was the case. This was a relatively recent mistake rather than a long-standing failing. It coincided with an increase in Mrs Wolloms' workload.

…

254. The only matters relied on by the respondent for which Mrs Wolloms could be criticised are as follows.

254.1 Mrs Wolloms made mistakes accounting for VAT at a time that coincided with an increase in workload.

245.2 Mrs Wolloms' working methods made it somewhat difficult for others to take over her work should she be absent or should someone else take over responsibility for the work she was doing for some other reason.

84. Mr Gilbert submitted that the basic award should be reduced by 50% to reflect those findings.

85. Although Mrs Wolloms made some mistakes accounting for VAT and her working methods were imperfect, we did not find any negligence on her part. We bore in mind the findings of Mr Purvis on appeal, including that there had been no misconduct by the claimant. As we said in our previous judgment, 'Mr Purvis was an independent person and a qualified accountant. The evidence before us suggests he considered the evidence before him with great care. Although he did not give evidence at this hearing, his conclusions carry significant weight.' Bearing that in mind, we did not consider the claimant's conduct was deserving of blame. Even if some culpability could be attached to the claimant, it would be very much at the least blameworthy end of the scale. What is more, in deciding whether it would be just and equitable to reduce the award, and the extent of any reduction, an important consideration was the fact that the respondents opportunistically seized upon mistakes and imperfections in the claimant's work to disguise the true reasons for dismissing the claimant.

86. In all the circumstances we decided it was not just and equitable to reduce the basic award on account of the fact that Mrs Wolloms had made some mistakes accounting for VAT and her working methods were imperfect.

Employment Judge Aspden

Date: 27 March 2023