Case Number: 1406149/2019

EMPLOYMENT TRIBUNALS

Claimant: **Dr N Bhatt**

Respondent: **University Hospitals Bristol and Weston NHS Foundation Trust**

Heard at: **Bristol** **On:** **27 January 2023 (hearing)**
20 & 28 April 2023 (deliberation and writing)

Before: Employment Judge Midgley

Representation
Claimant: In person
Respondent: Miss E Misra (Counsel)

RESERVED
REMEDY JUDGMENT

1. There is a 100% likelihood that that the claimant would fairly have been dismissed within a month of his dismissal.

2. The claimant committed culpable and blameworthy conduct and it is just and equitable to make a reduction to the compensatory award of 33%.

3. It is not just and equitable either to make a reduction to the basic award or to reduce the award to injury to feelings because of the claimant's misconduct.

4. The respondent is Ordered to pay the claimant the following sums as compensation:

    a. Unfair dismissal
        i. Basic Award £3,937.50
        ii. Compensatory award £1,605.25

    b. Injury to feelings (s.47B ERA and s.27 EQA) £10,000.00
    c. Interest at 8% £2,945.75

REASONS

Introduction

1. This Reserved Judgment follows the hearing on liability and Reserved Judgment on Liability and the resulting remedy hearing.

Procedure, Hearing and Evidence

2. The remedy hearing was conducted in public and in person.

3. In addition to the bundle and witness statements which were provided for the liability hearing, I was provided with a bundle of 189 pages which had been prepared by the respondent, the witness statement of Miss Stephanie Curtin for the respondent, and a skeleton argument prepared by Miss Misra for the respondent.

4. Despite having made an Order permitting the claimant to prepare and exchange a witness statement addressing his claims for damages for injury to feelings and loss of earnings and a written argument addressing the issues to be considered at the remedy hearing; bizarrely he chose not to do so. There was therefore no statement addressing the claimant's efforts to mitigate or the impact of the proven discrimination upon him. Similarly, the claimant had not requested that his documents should be included in the bundle for the remedy hearing. The respondent had included what he had disclosed.

5. As detailed below, I permitted the claimant to submit additional documents during the course of the hearing and the claimant sought to adduce documents into evidence after the hearing.

6. Prior to the hearing I re-read the Liability Reserved Judgment, the relevant documents referred to in it, and read the respondent's skeleton argument for this hearing.

7. At the outset of the hearing, the claimant stated that he had been unable to open the electronic version of the remedy bundle and had not therefore seen the documents within it prior to the start of the hearing. Having clarified that Miss Misra proposed to cross examine the claimant in relation to mitigation and intended to refer to documents relevant to that issue from the remedy bundle, I adjourned for 30 minutes to permit the claimant to review the limited documents which are relevant to mitigation.

8. When we reconvened, the claimant confirmed that he had had sufficient opportunity to read through the relevant documents, but observed that the pension scheme contained in the remedy hearing bundle was not the scheme used for his pension.

9. The claimant was then cross examined by Miss Misra, during the course of which he confirmed that he had undertaken work for Poole Hospital NHS Foundation Trust, Gloucestershire NHS Trust, and the Dudley Group NHS Trust. The claimant had not disclosed pay slips in respect of that work. The

claimant suggested that he had requested copies of the pay slips from those Trusts, but only Poole Hospital NHS Foundation Trust had responded and provided him with copies, which he had disclosed to the respondent.

10. Additionally, the claimant confirmed in evidence that he had received a formal offer of employment from Betsi Cadwaladr University Health Board ("Betsi") but said that the offer had been withdrawn following contact from the respondent and he had been notified of that by email. In consequence the respondent made an application for an Order for specific disclosure of the pay slips which the claimant had not disclosed and for any correspondence he had received from Betsi which referred to the withdrawal of the offer of employment.

11. The claimant consented to such an Order but stated that in order to access his emails he would need to return to his home address in Western to use his personal computer, as could not access the relevant emails from his phone.

12. I therefore heard submissions from the parties as to whether the best course was to adjourn the case to another day, or to adjourn for a short period to permit the claimant to return home to retrieve and disclose the emails. The respondent argued for the latter and having heard arguments from the claimant, it seemed to me that such a course was in accordance with the interest of justice.

13. I therefore directed that the claimant should return to his home address and conduct a search for any electronic document from Betsi detailing the reason for his dismissal, and furthermore should prepare a short witness statement describing the nature of the search that he had made (for example identifying the search terms used) and the outcome.

14. The tribunal adjourned between 12:30 and 2:30 p.m. for that purpose.

15. After that adjournment, the respondent conceded in respect of the relevant pension scheme, that the claimant was right to suggest that all doctors were required to move to the 2015 pension scheme by April 2022. As a result of that concession, the claimant was content to accept the contents of Miss Curtains witness statement and did not seek to cross-examine her to challenge its contents.

16. Having reviewed the correspondence disclosed to the respondent by the claimant, Miss Misra set out what appeared to be an accepted sequence of events in relation to the application to Betsy and its withdrawal. The claimant accepted that he had not in fact received an email from Betsi advising him the offer of employment it had made was withdrawn, following communication with the respondent. He sought to argue that must have been communicated to him in a telephone call.

17. As a consequence of the conclusions that I have reached in relation to *Polkey* and contributory conduct, it is unnecessary for me to rehearse the full history of that job application here; it is sufficient to record that the offer in fact was withdrawn because the claimant had not disclosed in his application that he had been subject to a restriction on his practice by the GMC in 2014-201 or that he had been dismissed because his relationship with his colleagues had irretrievably broken down.

18. I then heard submissions from each of the parties. I raised with them whether,

in the absence of any evidence from the claimant in relation to injury to feelings the law permitted a tribunal to make an award of injury to feelings. Following further discussion, it was agreed that the parties would be permitted until 2 February 2023 to investigate the matter and file and exchange any additional written submissions on the point.

19. In the event, neither party submitted any further written argument

The Relevant Law

Unfair dismissal

20. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides:

> "Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly."

21. The compensatory award is dealt with in section 123. Under section 123(1)

> "the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

22. Potential reductions to the compensatory award are addressed in section 123(6) which provides:

> "where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

23. A similar power is contained in relation to the basic award in s.122(2) ERA (as quoted above) in relation to any conduct which occurred before the dismissal, however, that provision does not contain the same causative requirement which exists in s.123(6); the Tribunal therefore has a broader discretion to reduce the basic award where it considers that it would be just and equitable (see ***Optikinetics Ltd v Whooley*** [1999] ICR 984, EAT).

Polkey

24. S.123(6) ERA 1996 permits a Tribunal to make a reduction to the compensatory award to reflect the likelihood that a claimant would have been fairly dismissal as a consequence of contributory conduct had a fair process been followed (see ***Polkey v A.E Dayton Services Ltd*** [1988] ICR 142, HL). It is not an “all or nothing” question but permits degrees: percentage chances (see para 96 of the Judgment).

25. The ***Polkey*** approach requires a predictive exercise, asking what the chances were that the employer would have dismissed fairly in the circumstances, focusing on the employer's likely thought processes: ***Attrill v Granchester Construction (Eastern) Ltd*** (2013) UKEAT/0327/12/LA, [2013] All ER (D) 364 (Feb).

26. The burden is on the employer, not to prove any fact on the balance of probabilities, but to satisfy the tribunal that a future chance would have happened: ***Grayson v Paycare (a company limited by guarantee)*** (2016)UKEAT/0248/15, [2016] All ER (D) 31 (Jul), [2016] ICR D13 per Kerr J at [17], [32], [46][48], [51].

27. Furthermore, the Tribunal may alternatively consider whether the claimant's employment would have ended for some other reason at a certain point, and so limit compensation to a period during which the claimant's employment would have continued but for the unfair dismissal (***O'Donoghue v Redcar & Cleveland BC*** [2001] EWCA Civ 701 at paras 44 and 53).

28. However, if it adopts that approach, the Tribunal must be 100% certain that a dismissal would have occurred within that period (***Zebrowski v Concentric Birmingham Ltd*** [2017] UKEAT/0245/16/DA per Mrs Justive Laing at para [34).

29. Where there is uncertainty as to whether employment would have continued, the percentage approach is the appropriate one to adopt in making any Polkey reduction (see Laing J in ***Zebrowski*** at paragraph 54:

> "In other words, in my judgment, the approach of the Court of Appeal in *O'Donoghue*, properly understood, is that it is only open to an ET to limit compensation to a period as opposed to making a percentage deduction where the ET is 100 per cent confident that dismissal would have occurred within that period…."

30. The approach to be taken in respect of both of those issues was set out in ***Software 2000 Ltd v Andrews and ors*** [2007] ICR 825. In essence,

    30.1. A tribunal must assess the loss flowing from a dismissal, using common sense, experience and a sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

    30.2. If an employer asserts that the claimant might or would have been fairly dismissed had a fair process been followed, or would not have been employed indefinitely it must adduce relevant evidence to establish that such a dismissal would have occurred on the balance of probabilities. The Tribunal must assess that evidence against all the evidence available on the point, including the claimant's own evidence

    30.3. The Tribunal may conclude that the evidence is insufficient to determine when a fair dismissal would have occurred had a fair process been followed, however, it must still make an assessment of whether there was a realistic chance that a fair dismissal would have occurred. It must do so on a percentage basis, and cannot elect to avoid the issue because

it is difficult - “the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.”

30.4. The Tribunal must assess the question of whether a fair dismissal would have occurred had a fair process been followed separately from the assessment on a percentage basis of whether the employment would have ended for some other reason. It cannot conflate the two processes.

30.5. Having considered the evidence, the Tribunal may determine:

30.5.1. That there was a chance of dismissal in which case compensation should be reduced accordingly;

30.5.2. That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the ***O'Donoghue*** case.

30.5.3. The employment would have continued indefinitely.

30.5.4. However, this last finding should be reached ‘only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored.'

31. An Employment Tribunal may take different approaches to a Polkey reduction under s.123(6) ERA. It can apply a percentage reduction to the compensatory award or it can limit compensation to a particular point in time; it cannot do both. ***Zebrowski*****.**

32. The loss of a chance approach is traditionally adopted in the assessment of loss of earnings in an unfair dismissal case as per the classic, oft-repeated words in ***Mallett v McMonagle*** [1969] NI 91 (at 111,112), [1970] AC 166 (at 176) of Lord Diplock:

'The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.'

Repeated with approval by Stacey J in ***Shittu v South London and Maudsley NHS Foundation Trust*** [2022] IRLR 382

<u>Contributory conduct</u>

33. Three factors must be satisfied if the Tribunal is to find contributory conduct (see ***Nelson v BBC (No.2)*** [1980] ICR 110, CA):

33.1. the conduct must be culpable or blameworthy

33.2. the conduct must have caused or contributed to the dismissal, and

33.3. it must be just and equitable to reduce the award by the proportion specified

34. Provided these three factors are satisfied, the fact that the dismissal was automatically, as opposed to ordinarily, unfair is of no relevance (***Audere Medical Services Ltd v Sanderson*** EAT 0409/12).

35. In determining whether conduct is culpable or blameworthy, the Tribunal must focus on what the employee did or failed to do, not on the employer's assessment of how wrongful the employee's conduct was ***(Steen v ASP Packaging Ltd*** [2014] ICR56, EAT).

Discrimination and whistleblowing injury to feelings awards

36. Section 124 EQA 2010 records the remedies which are available to the Tribunal. By s.124(2) that includes an order for a respondent to pay compensation. S.24(56) provides: "The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119."

37. By section 119(2)(a) EQA 2010 the remedies available for torts are made available to County Court (as so) by operation of s.124 EQA 2010 to the Tribunal. By s.119(4) such compensation can include damages and compensation for injury to feelings.

Assessment of losses caused by discrimination

38. In assessing loss flowing from discrimination, the correct approach is not to speculate as to what would have happened as if it involved questions of fact, to be decided on the balance of probabilities, but rather to assess matters of chance in a broad and sensible manner (***Ministry of Defence v Cannock*** [1994] IRLR 509 per Morison J at 515, 518).

Injury to feelings

39. In ***Prison Service and ors v Johnson*** [1997] ICR 275, EAT (a race discrimination case), the EAT summarised the general principles that underlie awards for injury to feelings:

39.1. awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party (approving ***Corus Hotels plc v Woodward and anor*** EAT 0536/05)

39.2. an award should not be inflated by feelings of indignation at the guilty party's conduct

39.3. awards should not be so low as to diminish respect for the policy of the discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches

39.4. awards should be broadly similar to the range of awards in personal injury cases

39.5. tribunals should bear in mind the value in everyday life of the sum they are contemplating, and

39.6. tribunals should bear in mind the need for public respect for the level of the awards made.

40. Guidance as to the application of those factors was provided in ***Vento v Chief Constable of West Yorkshire Police (No.2)*** [2003] ICR 318, where Lord Justice Mummery held that injury to feelings encompasses 'subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on'.

41. The Tribunal's focus must therefore be on the effect of the discrimination upon the claimant, rather than upon the gravity of the act of discrimination itself (see in ***Cadogan Hotel Partners Ltd v Ozog*** EAT 0001/14 per Eady J: 'The question is all about the impact on the employee: what injury they have suffered as a result of the unlawful act,' approved in ***Komeng v Creative Support Ltd EAT*** 0275/18)

42. However, the Tribunal must be satisfied that the injury was caused by the proven acts of discrimination, rather than other factors or allegations of discrimination which were not established at the hearing (see ***Essa v Laing Ltd*** [2004] ICR 746). That principle is one of Tort which is preserved in s.124(2)(b) and (6) combined with s.119(2) and (3) EQA 2010.

43. Awards for injury to feelings should not be discounted or reduced to reflect the fact that a claimant would or could fairly have been dismissed absence an act of victimization or discrimination (see ***O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615.***

44. Where unlawful discrimination has occurred in respect of two or more different grounds (i.e. protected characteristics), the compensatory award for injury to feelings should be assessed in respect of each discriminatory act (***Al Jumard v Clywd Leisure Ltd and ors*** 2008 IRLR 345, EAT).

The Vento Bands of awards

45. In Vento three broad bands of awards were identified:

45.1. a top band of between £15,000-25,000: to be applied only in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in very exceptional cases should an award of compensation for injury to feelings exceed £25,000

45.2. a middle band of between £5,000-15,000: for serious cases that do not merit an award in the highest band, and

45.3. a lower band of between £500-5,000: 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 should be avoided, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

46. The bands must be periodically uprated to reflect inflation and the decision

reached in the personal injury case of ***Simmons v Castle*** [2012] EWCA Civ 1288, CA (see ***De Souza v Vinci Construction UK Ltd*** [2018] ICR 433, CA, and ***Da'Bell v National Society for Prevention of Cruelty to Children*** [2010] IRLR 19, EAT).

47. The uprated bands at the time of the claimant's presentation of his claim (it is the presentation of the claim which is the reference point for the Vento band in force), the appropriate bands were as follows:

    47.1. Lower band: £900 to £8,800

    47.2. Middle band: £8,800 to £26,300

    47.3. Upper band: £26,300 to £44,000

The Arguments

The Respondent's arguments

48. Miss Misra argues for the respondent as follows:

Unfair dismissal

    48.1. The Tribunal found that the reason or principal reason for the claimant's dismissal was that his conduct had caused his relationship with his peers irretrievably to have broken down and in consequence the respondent not longer had trust and confidence in him;

    48.2. That conduct included the treatment of Miss Taylor, and his use of the Datix;

    48.3. The dismissal was procedurally unfair because the respondent did not put the allegation that his conduct had caused the relationship with his colleague irretrievably to break down had broken down to the claimant [251-252].

    48.4. Mediation was a potentially reasonable alternative to dismissal (or at least trailing it to see whether it enabled the relationship to be recovered) but Mr Warmsley had considered mediation, and had a reasonable basis for concluding that it was not appropriate in light of the stance the claimant had taken to it during the disciplinary and his prevailing attitude towards his colleagues [250]

    48.5. The claimant's conduct towards Miss Taylor and his response to the disciplinary allegations during which the claimant had lied and said that she had made up the allegations [247], amounted to gross misconduct.

    48.6. Consequently, there is a 100% likelihood that had the allegation about the claimant's conduct and its effect been put to the claimant during the disciplinary, he would have been dismissed on the date he was. Therefore (a) it would not be just an equitable to make any award of compensatory loss and/or (b) there should a 100% Polkey reduction to any sum awarded as compensatory loss so as to result in a nil award.

48.7. The same matters should cause the Tribunal to determine that the claimant committed culpable or blameworthy conduct which was the sole cause of the claimant's dismissal, and so his basic award should be reduced by 100% pursuant to s.122(2) ERA 1996.

Injury to feelings (detriment and victimisation)

48.8. Any award of damages as compensatory loss should be reduced to zero for the same reasons as set out in paragraphs 46.1-46.5 above. The claimant's position in relation to damages for compensatory loss should not be improved because he succeeded in the s.47B ERA 1996 claim.

48.9. Section 47B ERA 1996: Any award of injury to feelings should be at the lower end of the Vento bands because the claimant's feelings could not be said to be injured by the de minimis extent to which the raising of the Datix featured in Mr Warmsley's reasons for dismissal. Further, for the purposes of the assessment under s.27 EQA 2010, the Tribunal did not find that the dismissal itself was an act of victimisation, but rather that that disciplinary panel's view that the claimant had raised allegations of racism because he had leaped to conclusion played more than a trivial part in the decision to dismiss.

48.10. In any event, the claimant had failed to prove any injury to feelings, because he had not produced a witness statement detailing any injury and did not refer to it in his first statement.

48.11. It would not be just and equitable to make any award at all in the circumstances of the claimant's conduct detailed above.

<u>The claimant's arguments</u>

49. The claimant argued (in so far as is relevant given my conclusions below) as follows:

49.1. The Trust should have explored mediation; even if that failed, he should have been permitted to work from home as an alternative to dismissal

49.2. He denied that he had bullied Miss Taylor; he alleged there was collusion in relation to that incident.

49.3. The breakdown in his relationship with his colleagues related to his conduct, but he had only acted when there was a patient safety incident or issue and had raised genuine concerns about those matters through Datix.

49.4. The evidence of the injury to his feelings was contained within his appeal letter.

Discussion and Conclusions

50. I have reviewed the letter entitled 'Grounds of Appeal' [1122-1130] to identify any evidence it contains detailing the claimant's injury to feelings or which is relevant to that issue. The claimant describes a number of the matters which he complained about as unlawful detriments (s.47B), victimisation and/or

discrimination as "bullying and harassment;" it is clear that all of those matters had an impact upon his feelings, particularly decision in relation to study leave and the allocation of work.

51. In relation to victimisation, the claimant wrote:

> *"Under section 27 of the Equality Act 2010, any person can raise concerns based on their protected characteristic as their statutory right. The concerns should be properly addressed and, crucially, the person raising the concerns should not be victimised. The Trust has not only categorically failed me in exercising my statutory right, their decision of dismissal could also be construed as victimisation.*
>
> *Any reasonable person would find it very strange that, despite a legal firm to advice [sic], my efforts to make people aware of my perceived harassment were judged as "accusation of racism" and I have been deemed guilty.*
>
> *This investigation is about victimising whistle-blowers and BAME staff for adhering to national guidance and protocols on patient safety."*

52. An OH report dated 12 September 2019 (which was prepared by a Consultant Occupational Physician) was considered at the appeal hearing and offers a little further insight in relation to the impact of the events which the claimant pursued as allegations in these proceedings (both those in respect of which he was successful and those which failed). It records that the Consultant's opinion was as follows,

> *"I infer from this description that the issue here is overwhelmingly one of work-related stress and a reaction to the circumstances of his employment."*

53. The report references the claimant's reaction to many matters which I concluded were not well-founded allegations and which I dismissed. In relation to the prospect of the claimant's return to work it noted,

> *"Even if his appeal does indeed move forward in this direction, I would still see no prospect of a sustained return to his current work situation. I suspect that a return to unchanged circumstances would rapidly lead to the emergence of further pressures. I suggest that the only way a sustained return could be considered would be against a background of modified working conditions."*

54. The consultant proposed remote working and concluded "*There is no fundamentally medical issue in this case*."

55. The only additional contemporaneous evidence I could locate was contained in the minutes of the disciplinary hearing of 9 August 2019, which I re-read in their entirety following the remedy hearing. In them the claimant's wife discussed how the events had affected the claimant to the extent that it was necessary for her to represent the claimant at the disciplinary hearing because of the upset the process and allegations had caused him. During the meeting the claimant stated that he had been on anti-depressants and had therapy sessions twice in the previous two years.

56. In the claimant's witness statement, he repeated the allegation that he had been victimized for raising concerns of race discrimination (see paragraph 98); the only comment he made in his statement in relation to the injury or hurt caused by that act is in the final paragraph of the statement (112) where he states:

> *"I am disappointed that I have been dismissed in this manner… and fear that the longer I am out of a substantive post I am becoming deskilled."*

Unfair dismissal

Polkey

57. The procedural failing was the respondent's failure to notify the claimant that it was considering, as an additional disciplinary allegation, an allegation that the claimant's conduct had caused his relationship with his colleagues to break down with the result that he no longer enjoyed the trust and confidence of his employer.

58. The allegation began forming in Mr Warmsley's mind as he was reading the investigation report and had crystalised by the time he adjourned the disciplinary hearing on 6 August 2019.

59. A fair process required that the claimant was made aware of that allegation and offered an opportunity to respond prior to a decision being taken in respect of it. In my judgement, it would have taken a month for the disciplinary allegation letter to be formulated, and for the claimant to be given a reasonable opportunity to respond to the new allegation in writing before the disciplinary hearing could be reconvened. In reaching that conclusion I have had regard to the claimant's ill health in the period in question, which may have necessitated a longer period than might have been usual.

60. However, I am satisfied that had that step been taken the claimant would inevitably have been summarily dismissed at the reconvened meeting. Even had the claimant fallen on his sword and accepted his fault in causing the situation, which I concluded simply would not have happened given the claimant's stance even at the time of the hearing as to whether he was guilty of any wrongdoing and his denial of events relating to Miss Taylor, Mr Warmsley had reasonably concluded that mediation was not a viable option because of the numbers of individuals involved and the claimant's failure to accept that he had done anything wrong (see paragraph 150 of the Judgment).

61. That conclusion is corroborated and supported by the claimant's witness statement; see the statements in paragraph 75 and 79 detailing his appraisal of his relationships with his colleagues, and his rejection of the investigation's conclusion that he had breached the standards of behaviour required by Good Medical Practice and the respondent's policy on bullying in his treatment of Miss Taylor at paragraph 110. The conclusion is further corroborated by the OH Consultant's advice that there was no prospect of a sustained return to his current work even at the time of the appeal because of his perception of his colleagues, and that the only basis on which the claimant would agree to return to work was remote working, and that was not a viable option at all.

62. Therefore, the respondent would fairly have dismissed the claimant for

misconduct and a consequent breakdown of his working relationships within 4 weeks of his dismissal.

63. The claimant's loss is therefore limited to 4 weeks' net wages and pension contributions.

Contributory conduct

64. The claimant was guilty of culpable and blameworthy conduct for the reasons given in the Reserved Judgment on liability; Mr Warmsley's conclusion that the claimant's relationship with his colleagues had irretrievably broken down was a reasonable one on the evidence, as I found. As detailed in that Judgment at paragraph 223, that conduct was the predominant reason for the claimant's dismissal. However, the conduct for which the claimant was dismissed was not limited to conduct which I have found to be culpable (such as his treatment of Miss Taylor), the other key allegations included 'deliberate use of Datix for inappropriate purposes' and the making on 'unjustified accusations of race discrimination.' Both were also key factors in the decision to dismiss. Whilst the claimant's conduct towards Miss Taylor was reasonably concluded of itself to amount to gross misconduct, the respondent unreasonably concluded that the complaints of race discrimination were 'unjustified' because the panel had concluded that they were not established on the evidence and the claimant had therefore 'leapt to the conclusion of racism', and further unreasonably concluded that the claimant had committed misconduct through his use of Datix where the panel also accepted that the claimant had not submitted Datix dishonestly or maliciously and had used them to raise genuine concerns of patient safety.

65. The assessment of causation is not an exact science: it seems to me that there were three predominant reasons for the conclusion which led to the claimant's dismissal on the grounds that his relationship with his colleagues had irretrievably broken down (as I have detailed above). One of those was properly regarded as gross misconduct, the others were improperly regarded as misconduct; all were weighed in the balance in reaching the conclusion that the working relationship was irretrievable. It is therefore appropriate to reduce the compensatory award by 33% to reflect the extent to which the culpable conduct caused the claimant's dismissal.

66. I decline to make a reduction to the basic award. The claimant had worked to a very high standard clinically for the respondent for five years. There was some justification in his complaints about his treatment by his colleagues (in the sense that he was right to regard it in certain respects as unreasonable, but not right to suggest that that it all constituted a detriment for making protected disclosures, direct race discrimination or victimisation) and which was a cause of his jaundiced view of them. It would not be just an equitable to reduce the basic award to nil because of his treatment of Miss Taylor; that wrongdoing is reflected in the reductions to the compensatory award.

<u>Injury to feelings</u>

67. In the present case, the claimant pursued claims of direct discrimination and claims of detriment against his colleagues which were not well-founded. Each of those matters were clearly matters which affected the claimant as is manifest

from his accounts during the internal process and his evidence at the liability hearing.

68. Nevertheless, the events about which the claimant's complaints were repeated in the witness statement and at the disciplinary hearing were the fact that he had been dismissed because he had made complaints of race discrimination and because he had submitted Datix which were protected disclosures. In so far as his complaint was that they had influenced the decision to dismiss him, his complaint was justified. Conversely, I concluded that whilst influenced by those matters, the disciplinary panel did not dismiss the claimant to punish him for doing so.

69. I remind myself that I must focus on the injury caused to the claimant, rather than the wrongdoing itself. The injury to feeling arises because the claimant was dismissed, and that dismissal was part caused by his complaints of discrimination and part caused by raising Datix to identify matters that respondent accepted were genuine patient safety concerns.

70. I must consider each head of claim separately, both s.47B ERA 1996 and s.27 EQA 2010 applying ***Al Junard****,* but make a single award reflecting the injury to feelings as a whole.

71. As the case involves a dismissal of a consultant who had been employed for five years, which was partly caused by the respondent's confused and erroneous approach to the claimant's use of two of its fundamental mechanism for raising concerns (one clinical with a focus on protecting patients and the other personal intended to protect the individual employee within the workplace and to prevent breaches of rights enshrined in the Charter of Fundamental Rights of the European Union), in my judgement, it is not appropriate to consider an award in the lower band of the *Vento* guidelines. All of those factors suggest this is not a 'less serious' case and that the award must fall within the middle band.

72. However, because the principal reason for the dismissal was not the protected disclosures or the protected acts, but the claimant's gross misconduct and its effect, and, crucially, because of the claimant's failure to address the injury to his feelings in his evidence and his witness statement, in my judgement, those factors move the award to the lower end of the middle band.

73. Weighing all those matters in the balance, the appropriate figure is £10,000 (ten thousand) for injury to feelings.

74. Next, I consider Miss Misra's arguments that it would not be just and equitable to make an award for that sum because the claimant (a) should not be entitled to better his position for compensation under the ERA through making a claim under the EQA and/or (b) the claimant was properly dismissed for gross misconduct.

75. Whilst initially attractive, I largely reject those arguments. First, I have concluded that the claimant's award under the ERA should be limited to the basic award, and 33% of the compensatory award, which itself was limited to 4 weeks nets' wages as loss of earnings. I am making no separate award for damages in tort for loss of earnings caused by an act of discrimination; to that extent I accept Miss Misra's argument that the claimant cannot do better in tort

than he does under the statutory regime in the ERA.

76. Secondly, the award of damages for injury to feelings is inherently distinct from the award of tortious damages for loss of earnings. One is not constrained by the other, as Miss Misra accepts.

77. Thirdly, the nature of the award for injury to feelings focusses upon the hurt caused by a respondent's tortious act of discrimination, rather than on the claimant's wrongdoing. Whilst it is superficially attractive to consider a nil award where a claimant has committed gross misconduct on the grounds that it would not be just and equitable to permit the claimant to profit from his own wrongdoing (which is what I understand the essential thrust of Miss Misra's argument to be), there are a number of fundamental problems with that approach:

    77.1. First, the wrongdoing which is the trigger for the award is the respondent's, not the claimant's.

    77.2. Secondly, to reduce awards for injury to feelings to nil in such circumstances would defeat the purpose of the Equality Act and the Charter of Fundamental Human Rights. Each would lose their teeth if the sole remedy in such circumstances were a declaration of compensation; arguably in would be in breach of the Charter obligation to provide an effective remedy for acts of discrimination.

    77.3. Lastly, it would have the result that even if a claimant were genuinely hurt by deliberate acts of discrimination of the basest nature, there could be no award of compensation. That cannot be right; it is often helpful in such situations to extend matters to their extreme logical conclusion to test the principle. Thus, if an employer were to dismiss a black employee on baseless and entirely fabricated charges of fraud solely because of the colour of that employee's skin, but it subsequently emerged that the employee had behaved in a manner which amount to harassment and gross misconduct, if Miss Misra's argument were right, the employee could not be compensated for the serious, deliberate and contrived act of the discriminatory dismissal, because the claimant had committed an act of gross misconduct. That cannot be right, and certainly is not just and equitable.

78. Here, the effect of the claimant's wrongdoing has been reflected in the reduction to the period of loss for which he is to be compensated and a further reduction to the percentage of that loss that he can recover. That is the appropriate censure for the misconduct concerned. It would not be just and equitable to reduce the award for injury to feelings for the same conduct.

79. Accordingly, I make no reduction to the award on the grounds that it would be just and equitable to do so because of the claimant's wrongdoing.

80. For the avoidance of doubt, I am not persuaded that the acts of discrimination caused the claimant's anxiety or depression, there was no evidence to establish that they rather than the other matters about the claimant complained which were not acts of discrimination or the ill-health of the claimant's wife were the cause. I therefore make no award for personal injury.

81. The appropriate award of compensation is thus

Unfair dismissal

81.1.	Basic award:	£3,937.50
81.2.	Compensatory award:	
81.2.1.	Loss of statutory rights:	£600.00
81.2.2.	Loss of earnings 1 month	£3407.20
81.2.3.	Loss of pension contributions	£714.11
81.2.4.	Subtotal:	£4,721.31
81.2.5.	Less 66% deduction contributory fault	(3,116.06)
81.2.6.	Total award ERA	£1,605.25

Detriment and discrimination

81.3.	Injury to feelings	£10,000.00
81.4.	Interest	
	16.8.2019 to 28.4.2023	
	(1344 days @ 8% = £800 a year/ £2.19 a day)	
	= 1344 x £2.91	£2,945.75
81.5.	Total	£12,945.75

Employment Judge Midgley
Date: 28 April 2023

Judgment & Reasons sent to the Parties: 2 May 2023

FOR THE TRIBUNAL OFFICE