EMPLOYMENT TRIBUNALS

REMEDY JUDGMENT

BETWEEN

CLAIMANT		RESPONDENT
MS H NANUCK	**V**	**BRITISH TOURIST AUTHORITY**

HELD AT: LONDON CENTRAL **ON: 26 OCTOBER 2022**

EMPLOYMENT JUDGE: MR M EMERY
MEMBERS: MS C IHNATOWICZ
MR M REUBY

REPRESENTATION:
For the claimant: In person
For the respondent: Ms M Polimac (counsel)

REMEDY JUDGMENT

The claimant is awarded the sum of **£39,538.58**

Comprising of:

Damages for unfair dismissal

1. Basic Award: £1,088.00
2. Compensatory award x 12 weeks' pay £9,461.04

Damages for breaches of the Equality Act

3. Injury to feelings
    a. prior to dismissal: £10,000
    b. after dismissal: £10,000 £20,000

4. Aggravated damages £1,000

Loss of statutory rights

5. Award: £500

ACAS uplift

6. s.207A TULRCA 1992 10% uplift £3,204.09

Interest

7. Interest £4,285.45

REASONS

Witnesses and Tribunal procedure

1. We heard from the claimant. For the respondent we heard from Ms Trudi Wellbelove, Head of People and Talent, who also gave evidence at the liability hearing.

2. The hearing was conducted remotely on the CVP platform. We arranged regular breaks. The evidence and questions were presented effectively and without difficulties for all participants. A bundle and witness statements were made available for the press.

3. The Tribunal spent the first morning of the hearing reading the witness statements and the documents referred to in the statements.

4. This judgment does not recite all of the evidence we heard, instead it confines its findings to the facts relevant to the issues in this case. This judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

Case law

5. We had regard to the following general principles:

Injury to feelings

a. Ministry of Defence v Cannock [1994] IRLR 509, EAT: Where compensation is awarded, it is on the basis that 'as best as money can do

it, the claimant must be put into the position she would have been in but for the unlawful conduct of [her employer]'. …. 'Tribunals [should] … not simply make calculations under different heads, and then add them up. A sense of due proportion and look at the individual components of any award and then looking at the total to make sure that the total award seems a sensible and just reflection of the chances which have been assessed.'

b. Olayemi v Athena Medical Centre [2016] ICR 1074, EAT: The 'eggshell skull' principle of the law of tort also applies in cases of unlawful discrimination: a discriminator must take their victim as they are. That means that the wrong doer takes the risk that the wronged may be very much affected by an act of sexual harassment, say, by reason of their own character and psychological temperament. Provided the losses claimed can be shown to be causally linked with the unlawful act, the respondent must meet them, even if the claimant is predisposed to the disorder. If the employer's acts were a material cause of the claimant's psychiatric condition, it was no defence for the respondent to show that she would not have suffered as she did but for a vulnerability to that condition. The Tribunal can discount the compensation to take account of the risk that she might have suffered from the condition in any event. If there is a material cause, which goes beyond mere vulnerability, and the resultant harm was truly divisible, the tribunal should estimate the degree of the respondent's responsibility and make an award for that.

c. Ministry of Defence v Hunt [1996] ICR 554: It is for the respondent to adduce evidence to demonstrate that the loss could have been mitigated. The employer must provide the evidence to support the argument that the complainant could have mitigated their loss; vague assertions of a failure to mitigate, unsupported by any evidence is unlikely to succeed. If there is such evidence then the question for the employment tribunal is not simply whether the complainant acted reasonably but whether by taking the course they did, they took all reasonable steps to mitigate their losses.

d. BAE Systems (Operations) Ltd v Konczak [2017] EWCA Civ 1188. The case confirmed the following propositions:

1. Where the harm has more than one cause, a respondent should only pay for the proportion attributable to their wrongdoing unless the harm is truly indivisible.

2. The burden is on the employer to raise the issue of apportionment. Tribunals should try to 'identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong, and a part which is not so caused.' The Tribunal should see if it 'can identify, however broadly, a particular part of the suffering which is due to the wrong'.

3. Where such a 'rational basis' can be found, the Tribunal should apportion accordingly, even if the basis for doing so is 'rough and ready'.

4. Any such assessment must consider any pre-existing disorder or vulnerability, and account for the chance that the claimant would have succumbed to the harm in any event, either at that point or in the future.

5. In cases of psychiatric injury, careful evidence should be obtained from experts, particularly in relation to the likelihood of suffering the harm in any event.

e. Sadler v Filipiak [2011] EWCA Civ 1728: The tribunal must consider totality of the pain, suffering and loss of amenity experienced.

f. De Souza v Vinci Construction UK Ltd [2017] EWCA Civ 879: The Simmons v Castle 10% uplift should apply to employment tribunal awards in respect of non-pecuniary losses.

g. Essa v Laing Ltd [2004] EWCA Civ 02: There is no need to show that the personal injury in respect of which the claim is made was reasonably foreseeable, provided a direct causal link between the act of discrimination and the loss can be made out.

h. Scott v Comrs of Inland Revenue [2004] IRLR 713: When looking at non-pecuniary loss, whilst the total sum awarded must be borne in mind, it remains important not to conflate different types of awards for the purposes of the Vento guidelines.

i. 'Vento' Presidential Guidance for awards after 6 April 2021:

- a lower band of £990 to £9,900, for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence;

- a middle band of £9,900 to £29,600, for cases that do not merit an award in the upper band; and

- an upper band of £29,600 to £49,300, for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race;

- the most exceptional cases might be capable of exceeding £49,300.

j. Alexander v Home Office [1988] IRLR 190: "Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be

excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards. Further, injury to feelings, which is likely to be of a relatively short duration, is less serious than physical injury to the body or mind which may persist for months, in many cases for life."

Aggravated damages

k. Commissioner of Police of the Metropolis v Shaw [2012] IRLR 291, EAT Aggravated damages are an aspect of injury to feelings and tribunals should have regard to the total award made (i.e. for injury to feelings and for the aggravation of that injury) to ensure that the overall sum is properly compensatory and not excessive.

l. HM Land Registry v McGlue UKEAT/0435/11, [2013] EqLR 701: tribunals should 'be aware and be cautious not to award under the heading “injury to feelings” damages for the self-same conduct as it then compensates under the heading of “aggravated damages”'. Aggravated damages may be awarded in circumstances where the employer has acted 'In a high-handed, malicious, insulting or oppressive way'’; by subsequent conduct: e.g. where there has been a failure to apologise. A tribunal considering making such an award should look first as to whether, objectively viewed, the conduct is capable of having aggravated the sense of injustice and having injured the complainant's feelings yet further.

m. Tameside Hospital NHS Foundation Trust v Mylott UKEAT/0352/09: An award of aggravated damages should not be made merely because an employer acts in a brusque and insensitive manner towards an employee and/or is evasive and dismissive in giving evidence.

Section 3 Employment Act 2008 – Trade Union and Labour Relations (Consolidation) Act 1992

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) (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%.

(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(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.

(5) Where an award falls to be adjusted under this section and under section 38 of the Employment Act 2002, the adjustment under this section shall be made before the adjustment under that section.

n. Kuehne and Nagel Ltd v Cosgrove UKEAT 0165/13: The tribunal must make an express finding that a failure to follow the Code was unreasonable before making an adjustment. Merely not following the Code is not sufficient in and of itself.

o. Lawless v Print Plus (Debarred) UKEAT/0333/09: The focus when deciding upon whether to make an adjustment needs to be upon the failures to comply with the Code (as opposed to unfairness or conduct generally). The circumstances to be considered should always include: whether the procedures were applied to some extent or were ignored altogether; whether the failure to comply with the procedures was deliberate or inadvertent; and whether there were circumstances which mitigated the blameworthiness or the failure to comply.

p. Rentplus UK Ltd v Coulson [2022] EAT 81, [2022] IRLR 66: should an uplift be ordered? A 4-stage test:

    i. Is the claim one which raises a matter to which the ACAS Code applies?
    ii. Has there been a failure to comply with the ACAS Code in relation to that matter? This can apply to cases of non-existent or poorly conducted internal procedures; where there is an issue about conduct which is tainted by a discriminatory assumption; where it is held that an apparently competent procedure was actually a sham, not carried out in good faith.
    iii. Was the failure to comply with the ACAS Code unreasonable? This is an integral part of the section's scheme and must always be considered.
    iv. Is it just and equitable to award an uplift because of the failure to comply with the ACAS Code and, if so, by what percentage, up to 25%? See Slade v Briggs below.

q. Slade v Biggs and Stewart [2022] IRLR 216 – A 4 stage test on quantifying the uplift:

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. The EAT must be reluctant to second guess the ET's decision either to adjust or not adjust the percentage in this respect, or the amount of any adjustment, because it is quintessentially an exercise of judgment on facts which can never be as fully apparent on appeal as they were to the fact-finding tribunal. The EAT will certainly not substitute its own view for the judgment of the ET in the absence of an obvious error
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?

<u>The basic award</u>

Employment Rights Act1996 s122 Basic award: reductions.

(1) Where the tribunal finds that the complainant has unreasonably refused an offer by the employer which (if accepted) would have the effect of reinstating the complainant in his employment in all respects as if he had not been dismissed, the tribunal shall reduce or further reduce the amount of the basic award to such extent as it considers just and equitable having regard to that finding.

(2) 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 that amount accordingly.

(3) …

r. Sanha v Facilicom Cleaning Services Ltd 2020UKEAT/0250/18 - it is a prerequisite of a reduction of a basic award under s 122(2) (as it is with a compensatory award under s 123(6)) that the tribunal finds the conduct in

question to be culpable or blameworthy in some way and that it is just and equitable to make the reduction.

s. Britool Ltd v Roberts[1993] IRLR 481 - where the dismissal is for a reason unconnected with the employee's conduct, e.g. sickness, there is no power to reduce the basic award at all.

t. Langston v Department for Business Enterprise and Regulatory Reform UKEAT/0534/09 – a Tribunal must consider whether, and if so to what extent, the claimant was guilty of blameworthy or culpable conduct or had control over those events which gave rise to or contributed to the dismissal.

u. Steen v ASP Packaging LtdUKEAT/0023/13, - guidance to tribunals on the approach to be taken:

i. The tribunal must identify the conduct in question
ii. decide if it is culpable or blameworthy and
iii. whether it is just and equitable to make the reduction.

v. Fulton v RMC Russell plc UKEATS/0055/03 - an employee's refusal to accept the new terms on offer may lead to a reduction upon conduct grounds under s 122(2).

The Evidence

6. We address the evidence by way of the main issues raised in the case which are:

a. The respondent asserts that the claimant failed to mitigate her loss by failing to take a role offered to her on her return from maternity leave, the SC&SRM role. The claimant asserts that it was not reasonable for her to take this role.

b. The claimant's loss of salary claim is for the period she contends a proper consultation process would have taken approximately 12 weeks. The respondent says the claimant has suffered no loss as either this process would have taken place during her maternity leave and she would have been dismissed by 31 March 2021; or a process did take place on her return from maternity leave ending in her dismissal.

c. The claimant argues her entitlement to an injury to feelings award is at the upper end of the mid-band Vento; the respondent argues an award at the lower-end of the mid-band Vento.

Mitigation

7. The respondent's case is that the claimant unreasonably refused a suitable alternative role, the SC&SRM role which was offered to her following her return to work from maternity leave; that by failing to take this role she has failed to mitigate her loss. This is the focus of Ms Wellbelove's remedy witness evidence.

8. The claimant argues that she should have been consulted with about changes to her substantive role –TXGB Contract Manager – prior to or on her return to work. Instead, she argues, on her return to work she was told to resign or accept the SC&SRM role, she was given no time to consider the changes to her role. Her evidence is she was bullied during this process. She says her team were told not to contact her during the process – a fact we accepted at liability stage. Her evidence:

> *"Time and time again I was put on the spot to either resign or accept a post, which was unsuitable for me without any consultation. I was ambushed and not given any time to make important decisions that would have affected my on-going career with the respondent and my responsibilities as a new mother…".*

9. We have already found at the liability stage, following extensive evidence, that the respondent failed to undertake an appropriate consultation process. The Tribunal accepts that the claimant was 'put on the spot' during the process in which the claimant was being told the SC&SRM role was a suitable role, she was told (to summarise) take it or leave it. As the liability judgment records, we concluded that the claimant should have been consulted with about the TCXGB role being potentially redundant, because there was in the respondent's mind a redundancy situation (paragraphs 141-2).

10. We accept that following her return from maternity leave, the claimant felt vulnerable and bullied because of the position taken by the respondent towards her and her role. The claimant was being told that her role no longer existed and she did not have the right to return to the role – this was wrong in fact and in law. She was being told to take the SC&SRM role or be dismissed.

11. We did not accept that in a process where the claimant felt vulnerable and bullied, where she had significant concerns about the SC&SRM role, and when she – accurately – believed her duties existed as they had been distributed amongst other staff members, it was reasonable for her to take this role. She had already rejected this role as unsuitable prior to her maternity leave. It was now being offered to her again, but with a lower salary. The respondent was failing to follow a proper consultation process, it was a discriminatory process because it was failing to comply with the claimant's maternity-related rights.

12. We concluded: the respondent was failing to undertake a proper process, was putting her under pressure, was wrongly asserting that her substantive role no longer existed, it isolated her from colleagues, its process was discriminatory, its process was making her ill. We concluded that in this situation it cannot show that the claimant acted unreasonably and failed to mitigate her loss by failing to take the SC&SRM role.

Loss of income claim

13. The claimant claims a loss of income for what she considers the length of a consultation process would have been. The respondent's position is that this

process would have occurred when she was on maternity leave, that she has therefore suffered no loss because she would have been dismissed on the expiry of her fixed-term contract, 31 March 2021.

14. We rejected the respondent's argument. The claimant should have been consulted with during her maternity leave. It was then that it became clear to that the claimant's role was changing because a decision had been taken to reallocate most of her duties to other members of staff and a decision made that this was going to be a permanent change.

15. But the respondent chose not to do so, in part of because of the confusions and misconception we set out in the liability judgment. It cannot say that a failure to conduct this process when it should have done means she would have been dismissed fairly prior to her actual dismissal date.

16. Given it had failed to consult with the claimant while on maternity leave; the respondent should have consulted with the claimant on her return to work when it was clear that her TXGB Contract role had been reallocated to other staff members (including new staff) and in the respondent's mind this role had disappeared. We did not accept that it did so. In her evidence Ms Wellbelove did not take the invitation to say consultation had occurred, instead saying *"we were discussing the suitability of the SC&SRM role … and to reconfirm out stance that it was a suitable role…"*; the question in response *"So no consultation took place"* was, we concluded, an accurate one.

17. Instead, the respondent chose to decide that the claimant's role had come to an end, her contract had come to an end, and the role she was being offered was suitable, take it or leave it. This was not a consultation on whether or not the TXGB role was redundant.

18. Ms Wellbelove gave evidence of a redundancy process affecting some of the respondent's employees which occurred during the claimant's maternity leave. She said that the consultation period was *"just over 4 weeks",* that the process from 'at risk' notice to individual employees to notice of dismissal was *"3 months, some longer".* She gave various reasons for this – interviews for alternative roles, other roles were being ringfenced *"it was the volume and time to go through processes and responses".*

19. The respondent's redundancy policy says that a redundancy process will take 12 weeks, it can be shortened by agreement. We concluded that a reasonable consultation process would have been 12 weeks, starting on the date the claimant was given her notice of dismissal. This date, because by then it was clear the claimant was not accepting the SM&SCR role, she had come back of sick leave and was clearly in dispute with her employer via her grievance dated 11 May 2021. The respondent should have taken a step back and considered the actual legal position, instead it decided to give her written notice of dismissal on 21 May 2021.

20. At this date, 21 May 2021, a consultation process should have started. We accept that this process would have taken approximately 12 weeks, and could

have included consideration for other roles, also proper consideration whether in fact her TXGB Contract Manager role continued to exist albeit reorganised, and the reason for this. A proper process should have considered whether her maternity leave was a factor in the reorganisation of this role.

21. We also accepted that this was a one-person process, without the added complexity of coordinating several potential redundancies simultaneously. But it was complex, and Ms Wellbelove's evidence is that a grievance would have taken approximately 8 weeks to conclude, another factor in a complex situation, supporting a 12-week process in total.

22. We therefore award the claimant the sum of 12 weeks net loss of pay, the length of time it would have taken to undertake a consultation process on what had happened to her TXGB role, was her role redundant or had it been reallocated to others during her maternity leave.

Basic Award

23. The respondent argues that the claimant's basic award should be reduced by 100% under s.122(2) ERA 1996; that it is just and equitable to reduce the award because of the conduct of the claimant prior to dismissal, her failure to accept the SC&SRM role which included parts of her previous role. This was a suitable role and it was unreasonable of her not to take it, had she does so she would not have suffered losses.

24. We did not accept this argument. The process under which she was offered this role was, we have found, a discriminatory process which failed to consider her maternity-leave related employment rights. The respondent had reallocated her role during her maternity leave, and its senior managers knew that they had done so. We did not consider that this amounted to blameworthy or culpable conduct, or that she had any control over the events following her maternity leave and leading to her dismissal.

Injury to feelings

25. The claimant argues that the respondent acted in a "high-handed manner", that it ignored and disregarded what she had to say about her role on her return to work

> *"... my feelings of being ambushed, their incessant attempts to get me to resign or accept the new post and constantly refusing to consult with me and/or allowing me any time to consider any changes before accepting a completely new role, made me feel bullied and extremely anxious…."*

26. The claimant's statement talks about the significant effect this treatment had on her mental health, that she went to her GP but was advised not to take medication because she was breastfeeding, she was advised to attend counselling, which she did. We accept this evidence. We also accept her evidence of the physical and mental toll the treatment had on her, including loss of appetite, sleeplessness, waking up in tears, constantly fatigued, having

migraines. We accept that this in turn reduced her milk supply which caused her baby distress, which added to her own. Given she was unable to take medication, she suffered the full force of her symptoms. We accept that her *"mood sunk a lot, making me depressed all the time…".* We also accept that the effects lasted some time, up to and beyond the liability hearing.

27. The claimant argues that she should receive an award for "injury to feelings" at the upper end of the middle-band Vento guidelines; the effect of the stress and depression on her, the impact on the baby, the length of time she suffered from the symptoms *"it was a slow and painful process".*

28. The respondent argues that any award should be towards the bottom of the middle-band Vento. There was an innocent one-off failure to consult over the expiry of a fixed-term contract and *a "misunderstanding"* about redundancy. The claimant's only objective evidence is that she was signed-off work for 2.5 weeks for work-related stress, there is *"no evidence"* beyond the claimant's statement about the ongoing effect on her. Ms Polimac accepted that the respondent is not challenging *"how she says she feels"* but there is *"no impartial evidence"* for example from her GP or counsellor. Ms Polimac accepts that she did not challenge this evidence, that the respondent's case is it *"accepts she feels the way she says in her statement, but this is not backed up by evidence"*.

29. For example, Ms Polimac argued that there is no evidence on causation, that the claimant's symptoms are not backed up by evidence that this was caused by *work "it could be because she's a new mother."*

30. We noted that the respondent did not challenge any of the claimant's evidence, including that prior to her return to work she says she was looking forward to returning to work. We accepted that there was no evidence or suggestion – and it was not put to the claimant – that there may be any other cause for her ill-health. We attributed all the symptoms the claimant describes to the events at work from the day before her return from maternity leave, when she was informed her role did not exist, to the date of her dismissal.

31. The respondent did not challenge the claimant's witness evidence of her symptoms. We accepted the claimant's evidence as truthful, that the discrimination she experienced at work led to her symptoms as she describes.

32. The claimant became aware of the issue about her role on the day before her return to work, and this is when her anxiety, stress and depressive symptoms started, we accepted the claimant view that until this date she was looking forward to returning to work. The process continued during meetings and calls with her from her return to work when she was being told that she must take the SC&SMR role, it persisted in the failure to adequately address her concerns in the grievance process, in the decision to dismiss and the decision to place the claimant on garden leave. These are all decisions taken during the continuing process to her dismissal.

33. We reject the respondent's contention that this was a one-off act. The concept of continuing acts are well known, and we found the process of insisting over a

period of time that the claimant take the SC&SRM role or face dismissal amounted to a continuing act. This act started from the day before the claimant's return to work to the effective date of termination.

34. We concluded that the length of the discriminatory process, the fact that the grievance allegations were dismissed as without merit, the nature of the claimant's symptom and the effect they had on her relationship with her baby, the fact that her systems persisted for a long time after her dismissal, merits an award just over the middle of the middle-band (£18,250), of £20,000.

Aggravated damages

35. The claimant argues she is entitled to an award of aggravated damages, a *"continuous failure"* to address the issue and *"their high-handed manner".* There has been a failure to apologise, the respondent still argues that she should have taken the SC&SMR role, it says she was at fault for her dismissal.

36. The respondent argues that there is no basis for making an award of aggravated damages.

37. In determining that an award should be made we noted the respondent's arguments at remedy – that the claimant had wholly contributed to her dismissal by her conduct -s.122(2) ERA. We considered that this argument ignored the tribunal's conclusions at liability, that the claimant was entitled to conclude her TXGB role existed, the process it adopted and its rationale was discriminatory.

38. The respondent's position is, we concluded, that it was unreasonable for the claimant to fail to submit to an act of discrimination and unfairness. We felt that this is a high-handed approach to take, that this amounted to a lack of remorse or reflection by the respondent for its actions. This was compounded we concluded by the respondent's failure to apologise.

39. We noted the need to ensure there is no double-award of compensation. We concluded that the claimant had some continuing injury at the remedy hearing, that this was compensated for by the award for injury to feelings.

40. We concluded that the claimant had suffered an aggravation of this injury because of the respondent's stance at the remedy stage. Its position upset her, in her evidence she had to justify again why she had not accepted the SC&SCR role.

41. Given this, we concluded that an award of £1,000 for aggravated damages was appropriate, for the additional harm done to the claimant by the respondent's stance at the remedy stage.

42. We also concluded that overall an award for injury to feelings including aggravated damages of 21,000 was appropriate compensation for the harm done to the claimant by the treatment she suffered at work, and the additional harm done at the remedy stage.

ACAS Uplift

43. The claimant argues that the respondent disregarded its own policies in its grievance process asked for an uplift of 25% on the award.

44. We accepted that there was a failure to consider the claimant's grievance properly. Her grievance was called vexatious and hostile, yet the points she was making had legal and factual merit. But we also accepted that this was not a deliberate failure, that there as ignorance as to the legal position and how it affected the claimant and her right to return to a role which had been reorganised in her absence.

45. But we considered that the failure was a significant failure to comply with the ACAS Code of Practice on disciplinary and grievance procedures. We note that the process requires an employer to decide on *"appropriate action"* to resolve the issue. We concluded that acting in ignorance of the basic legal and factual situation – for example what had happened to her role and the impact her maternity leave had on the lawfulness of decisions taken – amounted to a poorly conducted process lacking the appropriate skills to reach an appropriate decision.

46. In the circumstances we concluded that this was an unreasonable failure to follow the Code. Mistakes can be reasonable, and an error of the law does not necessarily mean a decision is unreasonable. But here there was a failure to grasp the basic facts, that the claimant had a role which was allocated to others during her maternity leave, that she had two years' service, that she had maternity-related rights. These basic failures amounted to an unreasonable failure to follow the ACAS Code.

47. In saying this, we accepted that there was not a deliberate or malicious breach of the Code, that the decision makers were not acting in bad faith. Bearing in mind the Slade v Briggs guidance we also considered the potential overlap with the award for injury to feelings, also that the grievance decision did distress the claimant. But we also concluded that this was a serious breach, and one which was made after the decision to dismiss had been made, that this materially contributed to the injury suffered by the claimant.

48. We concluded that a 10% uplift would be just, that this would add the sum of just over £3,200 to the total award. We considered that this sum did not make the non-pecuniary loss award disproportionate, that the total award was one which adequately compensated the claimant for the totality of her injury.

<u>Loss of statutory rights</u>

49. The claimant seeks an award of £500. The respondent argues the award should be reduced to zero – see the argument on basic award above. Alternatively it should be no more than £300 as the claimant had just over 2 years' service. As above we did not accept that the claimant had contributed to

her loss. Bearing in mind the usual awards made, we concluded an award of £500 was appropriate for loss of statutory rights.

Interest

50. The parties agreed the following interest calculation:
    a. Injury to feelings: 736 days: £21,000 x 8% /365 x 736 days = £3,887
    b. Compensation: £898.45.

51. The award was calculated and reasons provided at the hearing. Written reasons were requested within the applicable timeframe by the respondent. I apologise for the delay in providing these – I was not aware reasons had been requested until sometime after.

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EMPLOYMENT JUDGE EMERY

Dated: 7 July 2023

Judgment sent to the parties
On: 10/07/2023

For the staff of the Tribunal office