EMPLOYMENT TRIBUNALS

Claimant: Mrs N A Ball

Respondent: Southport & Ormskirk NHS Trust

Heard at: Liverpool **On:** 29 January 2024

Before: Employment Judge Horne
With members: Mr S Hussain
Mr A Murphy

REPRESENTATION:

Claimant: Miss L Halsall, counsel
Respondent: Mr J Boyd, counsel

JUDGMENT having been sent to the parties on 7 February 2024 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 FOR REMEDY DECISIONS

Introduction

1. In a judgment sent to the parties on 9 June 2023, the tribunal found that the respondent had subjected the claimant to three unlawful detriments, infringing her rights under section 47B of the Employment Rights Act 1996 ("ERA"). We will refer to them collectively as "the unlawful detriments". They were:

   D3.1.3.1(d) – the respondent's Deputy Human Resources Director sent the claimant an e-mail accusing her of behaving unpleasantly and aggressively towards managers.

   D3.1.3.2(a) – the claimant's line manager deliberately failed to support the claimant and in particular deliberately failed to ask the claimant if she wanted a referral to occupational health.

   D3.1.3.4 – the respondent's Deputy Human Resources Director accepted the account of Human Resources Business Partners uncritically and unquestioningly.

2. In the same judgment, we found that the claimant had been unfairly dismissed, but that the claimant's compensation should be limited to reflect an important finding about what would have happened if the respondent had acted fairly.

3. Written reasons for the Judgment were sent to the parties on 20 November 2023. As paragraph 2 of those Reasons records, the well-founded complaints were only a small fraction of the overall claim. The tribunal had been required to adjudicate on three alleged protected disclosures, 28 alleged detriments, a complaint of unfair dismissal and two complaints of discrimination arising from disability. All had failed, with the exception of the three unlawful detriments and (to a limited extent) the complaint of unfair dismissal.

4. We must now determine the claimant's remedy for those parts of the claim that did succeed.

Remedy issues

5. The parties cooperated well to narrow the issues.

6. The parties agreed that the basic award for unfair dismissal should be £2,967.30. It was also agreed that the claimant's compensatory award for should be made up of an award of £825.10 as compensation for loss of earnings, and an award of compensation for loss of statutory protection. The claimant additionally claimed the sum of £203.76 in respect of pension losses as an element of the compensatory award. The respondent did not consent to that element of the award,but did not make any submission in opposition to it either. The only actively disputed point was whether the award of compensation for lost statutory protection should be £350 or £500.

7. The claimant's remedy for the unlawful detriments involved determining two disputed issues. The first related to a claim for damages for loss of earnings. The claimant's case was that the detriments had caused the claimant's health to deteriorate to the point where she was unable to work. In consequence, she said, her earnings were considerably less than they would have been had there been no unlawful detriment. Her inability to work meant that after a period of contractual full pay, her pay reduced to sick pay. Her case was that, had the unlawful detriments not occurred, she would have remained at work or, at least, come back to work soon enough that she would not have exhausted her entitlement to full sick pay.

8. The second issue relating to the claimant's remedy for unlawful detriments was the amount of compensation we should award her for injury to her feelings.

The Hearing

9. This remedy hearing took place with the parties in the hearing room and the three members of the tribunal appearing remotely on the Cloud Video Platform. It would have been preferable for the tribunal to have been physically present in the room with the parties, but this arrangement would not have been practicable. For unavoidable reasons, our Employment Judge was required to participate in the hearing remotely.

10. The claimant gave oral evidence. She confirmed the truth of her written remedy statement and answered questions. We additionally considered documents in an agreed remedy bundle.

Facts

11. The claimant felt strongly about all 28 of the detriments that believed she had been subjected to on the ground that she had made protected disclosures. These included the three detriments which we concluded were well-founded.

12. Of the 25 detriment allegations that failed, three concerned events that happened in quick succession in July 2020. They were:

    12.1. the reprimand email from Mrs Leadbetter,

    12.2. the one-to-one summary document and

    12.3. the response of Mrs Heaton and Mrs Grice to the claimant's email of 14 July 2020 in relation to the matron.

13. The claimant was also very upset and anxious about numerous things that happened after she went on sick leave. None of these things were found to be unlawful detriments. They would inevitably have happened even if the three unlawful detrimental actions had not occurred. In particular, Mrs Royds would in any event have referred the wider problems identified in the Grice report to an external investigator to conduct a cultural review. Mrs Green would have been chosen as the investigator. She would have reported in the same way that she actually did report. The claimant's requests for information would not have been dealt with any differently. The claimant would have been invited to a meeting to discuss the future of her employment. The outcome of that meeting would have been the same.

14. We take the claimant to have been genuinely aggrieved about all of the events giving rise to the complaints that failed. Those events had an adverse effect on the claimant's feelings. To conclude otherwise would be to find that the claimant had included these allegations for the sake of it. Had the respondent not subjected the claimant to the unlawful detriments, these events would still have happened. The claimant would have been upset by them.

15. We have revisited the point in time at which Mrs Grice sent the now-notorious "ping pong" email of 20 July 2020. We have imagined what would have happened had Mrs Grice not made the hurtful comment that the claimant had a tendency to be aggressive and unpleasant towards managers. In this imaginary scenario, we find that it is inevitable that Mrs Grice would have sent the claimant an email which she would have found very difficult to read. On 20 July 2020, or soon afterwards, Mrs Grice or another senior manager would have had to tell the claimant that it was not appropriate for her to continue emailing the Deputy Director of Human Resources as frequently and as pointedly as she was doing. Mrs Grice, or that other senior manager, would inevitably have written such an email even if the fact that the claimant was a whistle-blower had no effect on their thinking. The claimant needed to be told. There was no easy way of delivering that message to her. It would have had a marked effect on her feelings and her health.

16. At paragraph 97 of our earlier written Reasons, we found that the claimant emailed Mrs Grice on 10 July 2020, copying her email to Mrs Armstrong-Child. In that email she informed Mrs Grice that her stress and anxiety levels had been particularly high. She sent this email before any of the unlawful detriments occurred.

17. We know how heavily the issue of her husband's job application was occupying the claimant's thoughts at this time, because of the volume of correspondence that she wrote about it. See, for example, the claimant's detailed rebuttal of the notion of interference in the job application in the claimant's email of 14 July 2020. At that time, the claimant thought that this was the caus' of Mrs Leadbetter's change in behaviour towards her.

18. Had the three unlawful detriments not occurred, the claimant would inevitably have continued to be very anxious about the concerns that Mrs Leadbetter had raised about the claimant's involvement in her husband's job application.

19. In our earlier Reasons, we found that Ms Jones emailed Mrs Morris on 14 July 2020 to express concern about the claimant's wellbeing. At a similar time, Mr Ezechukwu spoke to one of the Human Resources Business Partners and requested an Occupational Health referral for the claimant. This was before the claimant discovered the contends of the Grice report. It was also before the ping pong email. It was also before the respondent had subjected the claimant to Detriment 3.1.3.2(a). Our finding that Mrs Leadbetter failed to take supportive steps to protect the claimant's wellbeing was based on the very fact that the claimant was already showing signs by 14 July 2020 that she was unwell. The claimant's oral evidence at the previous hearing, which we accepted, was that she knew that she was unwell at this time.

20. We have imagined what would have happened had Mrs Leadbetter taken steps to support the claimant between 8 and 22 July 2020. In particular, we have considered what would have happened had Mrs Leadbetter offered to update the claimant's stress risk assessment or suggested to the claimant that she could be referred to Occupational Health. Our finding is that the claimant would not have been as upset. She would have benefitted from the opportunity to speak, in particular, to an Occupational Health professional about the causes of her anxiety. We find, however, that such a referral would not have prevented the claimant from going on sick leave.

21. The claimant started her long-term sick leave six days after Mrs Armstrong-Child told her the outcome of the freedom to speak up investigation and shared a summary of Mrs Grice's conclusions. Her sick leave began two days after the "ping pong" email.

22. Looking back now at her experience as a whole of the events of July 2020 to May 2021, the claimant told us, "The whole thing was devastating, unbelievable". We accept that this was how the claimant felt about the last 10 months of her employment as a whole. We did not find it a reliable guide to the particular effect of the three unlawful detriments.

23. Independently of the unlawful detriments, the claimant was deeply upset at what she believed was the complicity of Mrs Royds in the unfair process that led to her dismissal.

24. In August 2020, the claimant's gross basic pay was £2,143.05 per month. That is £1,585.47 net monthly pay. Her net weekly pay was £365.81. In addition to basic pay, the respondent paid employer pension contributions of £497.09 per month, which equates to £114.71 per week. When the basic pay and pension contributions were added, the total net weekly remuneration was £480.52.

25. Whilst the claimant was on sick leave, her pay initially remained at full pay, but over a period of months gradually decreased until it reached a floor of £1,071.52 gross per month. After deductions for tax and national insurance, the net monthly sick pay was £922.56. Expressed as a weekly sum, the net sick pay was £212.90. When sick pay was paid at that rate, the employer pension contribution was £278.60 per month, or £64.29 per week. When the sick pay and the respondent's contributions on that pay were added together, the resulting weekly net figure was £277.19.

26. We accept that the claimant was genuinely too unwell to work from 22 July 2020 onwards.

27. One of the questions that arises for decision is whether the three unlawful detriments made a material contribution to an indivisible psychiatric injury, which in turn caused the claimant's inability to work. In the absence of medical evidence, we were unable to conclude that the claimant's mental ill health in August 2022 was indivisible. The claimant herself in her emails at the time appeared to us to be capable of differentiating between different causes of stress and anxiety.

28. Another finding that we must make is whether the claimant would have remained at work, had the three unlawful detriments not occurred. Our finding is that the claimant would inevitably have begun long-term sick leave soon after 22 July 2020, even if the "ping pong" e-mail had been differently worded, Mrs Leadbetter had supported the claimant with her mental health, and the Grice Report had critically evaluated the views of Mrs Heaton and Mrs Hilton.

29. That said, the claimant has satisfied us that the "ping pong" email was the immediate cause of the claimant going on sick leave at that particular point in time. We are able to make this finding based on the very short period of time between the "ping pong" email and the claimant first going on sick leave.

30. Having found that the claimant would inevitably have started long-term sick leave at some point, and also having found that the "ping pong" e-mail was the immediate cause of the start of the claimant's sick leave, what we must now do is estimate the date on which the claimant would have gone on sick leave had it not been for the three unlawful detriments.

31. When estimating the date, we have borne in mind the claimant's oral evidence to us that a particular cause of her anxiety in late July 2020 was her knowledge that the culture of the organisation was about the investigated by an external appointee. This was notified to the HR Operations Team in Mrs Armstrong-Child's letter of 30 July 2020. Doing the best we can, our finding is that the effect of the three unlawful detriments was to bring forward the date on which the claimant went on long-term sick leave by a period of three weeks. Had there been no infringement of section 47B, the claimant would inevitably have started long-term sick leave on or about 12 August 2020.

32. The acceleration of her ill-health caused the claimant to lose earnings. But for the unlawful detriments, she would have received three weeks of full pay between 22 July and 12 August 2020. The date of her dismissal would not have changed. Mrs Green's investigation would have started and concluded at the same time. The claimant would not have returned to work before her dismissal. She would, in this counterfactual scenario, have had her pay gradually reduced to sick pay three weeks later than it actually reduced. The period of residual sick pay would have been three weeks shorter. That is to say, her sick pay would have begun three weeks later, but ended on the same day that it actually ended, namely 25 May 2021.

33. The claimant has therefore been deprived of the difference between three weeks' full pay and three weeks' residual sick pay.

34. That equates to 3 x £203.33 = £609.99.

Relevant Law

Remedies for unfair dismissal

35. Where a tribunal makes a compensatory award for unfair dismissal, "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": section 123(1) ERA.

36. A compensatory award may include compensation for loss of pension rights. It is open to a tribunal to assess the loss by reference to the pension contributions that the employer would have made had the employee not been unfairly dismissed.

37. As part of a compensatory award, the tribunal may permissibly seek to compensate the employee for loss of statutory protection. Some employment rights (such as minimum notice pay and the right not to be unfairly dismissed) are acquired through periods of continuous employment. An unfairly-dismissed employee will have to build up continuous employment from scratch if they find a new job.

Remedies for unlawful detriment

38. Section 49 of ERA provides, relevantly:

> "
>
> (1) Where an employment tribunal finds a complaint under section 48…(1A)… well-founded, the tribunal-
>
> … (b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.
>
> …
>
> (2) … the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to-
>
> (a) the infringement to which the complaint relates, and

(b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right.

…"

39. Compensation for unlawful detriment will normally include compensation for injury to feelings, as a whistleblowing detriment is a serious infringement of an employment right, to be regarded as equivalent to discrimination: *Virgo Fidelis Senior School v Boyle* [2004] ICR 1210.

40. Section 49(2) requires "pithily encapsulates the common law principles governing causation in the context of damages": *Wilsons Solicitors LLP v Roberts* [2018] ICR 1092 at para 58 per Singh LJ.

41. In the context of discrimination, he following provisions can be derived from *Prison Service v. Johnson* [1997] IRLR 162:

(1) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.

(2) Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use Lord Bingham's phrase, be seen as the way to untaxed riches.

(3) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award; rather to the whole range of such awards.

(4) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.

(5) Finally, tribunals should bear in mind Lord Bingham's reference to the need for public respect for the level of awards made.

42. In *Vento v Chief Constable of West Yorkshire Police (No. 2)* [2002] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318 the Court of Appeal identified three broad

bands of compensation for injury to feelings awards, as distinct from compensation awards for psychiatric or similar personal injury. The lower band of £500 to £5,000 applied in less serious cases. The middle band of £5,000 to £15,000 applied in serious cases that did not merit an award in the upper band. The upper band of between £15,000 and £25,000 applied in the most serious cases (with the most exceptional cases capable of exceeding £25,000).

43. The *Presidential Guidance on Vento Bands – Fourth Addendum* reads, at paragraph 2:

> "In respect of claims presented on or after 6 April 2021, the Vento bands shall be as follows: a lower band of £900 to £9,100 (less serious cases); a middle band of £9,100 to £27,400 (cases that do not merit an award in the upper band); and an upper band of £27,400 to £45,600 (the most serious cases), with the most exceptional cases capable of exceeding £45,600."

44. In *Vento* itself*,* the Court of Appeal gave examples of particular kinds of discrimination tending to fall into particular bands. A "one-off" act of discrimination was apt for the lower band. But the type of discrimination is not determinative: what matters is the effect of the discrimination on the individual: *Base Childrenswear Ltd v. Otshudi* UKEAT 0267/18 per HHJ Eady QC at paragraph 36.

45. Compensation under section 49 may, in appropriate cases, include compensation for loss of earnings consequent on injury to the claimant's health.

46. Sometimes an employee is injured by two causes, one of which is the employer's legal responsibility, and the other of which is not. In such cases, the tribunal should follow the following principles, derived from *BAE Systems (Operations) Ltd v Konczak* [2017] IRLR 893:

    a. Psychiatric harm may be divisible, even if it takes the "classic" path of stress turning into injury

    b. In all cases, the tribunal 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.

    c. In such an exercise, focus must be on the division of the injury or harm (and not the causative potency or culpability of the tortfeasor for it

    d. Whether there is a rational basis for divisibility depends on the facts and the evidence including medical evidence and the questions asked of any medical experts.

47. Where a claimant complains of two alleged discriminatory acts, only one of which is found to have contravened EqA, it is open to a tribunal to find that the employee's injury was caused by the lawful act, and not by the unlawful one, provided that there is a clear evidential basis: *Wisbey v. Commissioner of City of London Police* [2021] IRLR 691.

48. In our view, the principles in *Konczak* and *Wisbey* apply with equal force to infringements of section 47B.

49. During the parties' oral submissions, our Employment Judge asked counsel whether they agreed or disagreed with the following propositions:

    49.1. The Tribunal has no power to award interest on an award of compensation made under section 49 of ERA.

    49.2. Awards of damages for injury to feelings for unlawful discrimination under the Equality Act 2010 are different. The Tribunal has a statutory power to award interest on such damages.

    49.3. The *Presidential Guidance on Vento Bands* is specifically aimed at claims under the Equality Act 2010. The sums of money at the lower and upper end of each band are fixed by reference to the date on which the claim was presented. This makes sense in a jurisdiction where the Tribunal has the power to award interest. A fall in the value of money between the date of presentation of the claim and the date of the award will, in most cases, be adequately compensated by the interest on that award.

    49.4. Where, as here, the Tribunal has no power to award interest, delays between presentation of the claim and the making of the award can cause the award to lose its value in real terms because of the rise in prices in the meantime.

    49.5. It is therefore appropriate to up-rate the award modestly to ensure that it has the same spending power as the equivalent award that would have been made in a discrimination case.

50. Both counsel agreed with these propositions.

51. The respondent relied on summaries of three decided cases. All three summaries referred to awards of compensation for injury to feelings. Each summary had been taken from an online law database. There was no evidence of any editorial input, or curation of cases within the database to remove outliers. None of them described in any meaningful detail how the infringements of the worker's rights in those cases had affected the claimant. We were not able to draw any useful comparison between the three cases and the facts of this case.

Conclusions

Injury to Feelings

52. We have assessed the impact on the claimant's feelings of the three detriments in the round, but having regard to the particular individual effects.

53. Our award must reflect the immediate hurt that the claimant felt on reading the the "ping pong" email. The claimant would inevitably have been stung when (as would surely have happened) she received an email from a senior manager reminding her of the expected standards when communicating with senior managers. The effect of such an e-mail would not, however, have been as distressing for the claimant as the "ping pong" e-mail actually was. Mrs Grice used the e-mail to make a personal criticism, using language that went considerably beyond what was necessary to make the point. It is not our function to punish the respondent when assessing compensation, but the strength of the e-mail reinforces our view about the effect that it must have had on the claimant.

54. Our award must also reflect the fact that the unlawful detriments had the effect of making the claimant too unwell to work three weeks earlier than would otherwise would have been the case.

55. The effects of those three unlawful detriments was not, however, confined to that three-week period. The claimant's sense of hurt and anger lasted considerably longer. Much of the period from August 2020 until 25 May 2021 was taken up with the claimant's attempts to obtain unredacted copies of the Grice report. It was also taken up with the claimant's attempts to find a procedure by which she could challenge the conclusions that Mrs Grice had reached. She would not have gone to such lengths if she did not feel strongly about the views expressed by Mrs Grice in that report, as summarised to her in July 2020. That was a lasting effect of the detrimental action of accepting views uncritically in the report.

56. Our award must also reflect that, even if the three detriments had not happened, the claimant would certainly have been anxious and upset and unable to work for the whole of the period from mid August 2020 until 25 May 2021.

57. Pulling those features together, we are satisfied that the lower Vento band can adequately compensate the claimant.

58. Had we the power to award interest we would have awarded the sum of £7,000. This is considerably nearer to the £9,100 ceiling of the lower band than it is to the £900 floor. To reflect the diminution of the value of money since the claim was presented, we have increased that award slightly to £7,500.

Loss of Earnings

59. We have already recorded our finding that, as a result of the unlawful detriments, the claimant lost earnings of £609.99. That loss is, in the language of section 49(2)(b) ERA, attributable to the three unlawful detriments. It is just and equitable to award the claimant compensation in that sum.

Loss of Statutory Protection

60. As a rough and ready guide, we would usually find it just and equitable to award one gross week's pay as compensation for loss of statutory protection. This is inevitably a somewhat arbitrary figure as it is difficult to put a precise value on the statutory rights to such things as minimum notice and protection against unfair dismissal. A week's pay seems, however, to be a fairer measure of compensation than 70% of a week's pay. As a benchmark, it is worth remembering that, after one month's continuous employment, an employee has a right to one week's minimum notice of termination. That week can fairly be valued at the gross pay that the employee would earn in that week.

61. The claimant's monthly gross pay was £2,143.05. That figure, when converted into a week's pay, is much closer to the £500 sought by the claimant than it is to the £350 sought by the respondent.

62. We therefore order the respondent to pay £500 compensation for loss of statutory protection as part of the claimant's compensatory award for unfair dismissal.

Compensatory Award – Pension Losses

63. This is a claim for compensation, as part of the compensatory award for unfair dismissal, for loss of the employer pension contributions that the respondent would have paid had the claimant not been unfairly dismissed.

64. It is agreed that the claimant's compensation for loss of earnings should be £825.10. That figure, we presume, is net.

65. Our calculations of loss of earnings caused by the detriments led us to identify employer pension contributions on full pay and on sick pay. Both amounted to approximately 30% of net pay.

66. The sum of £203.76 pension loss claimed by the claimant is approximately 25% of the net loss of earnings that has been agreed. Bearing that in mind, and the fact that it has not been positively challenged by the respondent, we award the sum in full as part of the compensatory award.

REASONS FOR REFUSING A COSTS ORDER

The costs application

67. Once we had announced our judgment on the claimant's remedy, the claimant made an application for a costs order.

68. The application was made on the basis that the respondent had allegedly acted unreasonably in its conduct of the proceedings. The point was a relatively narrow one. It related to the negotiations that took place between the liability judgment being announced on 26 May 2023 and today's remedy hearing.

69. Evidence about the negotiations would normally be inadmissible on the ground that it was protected by "without prejudice" privilege. That ground of admissibility, however, vanished once the remedy judgment had been announced and the costs application had commenced. The claimant helpfully provided a pdf file of the relevant correspondence. The respondent did not object to us reading it.

70. In short summary, the claimant alleged that the respondent had acted unreasonably by making an unrealistically low offer and failing to increase that offer as the remedy hearing approached. Particularly unreasonable, said the claimant, was the stance taken by the respondent once it had prepared its revised counter-schedule. That document gave the impression that the respondent subjectively believed that it could not realistically argue for the award to be any less than the amount stated in the counter-schedule. Despite apparently holding that belief, the respondent failed to increase its offer to the amount in the counter-schedule.

71. The claimant contended that, had the respondent offered her the amount stated in the counter-schedule, she would have accepted it. There would therefore have been no need for her to have incurred a brief fee in instructing counsel for the remedy hearing. That fee was £1,000.

72. The respondent did not dispute that the £1,000 brief fee had been genuinely incurred, or suggest that the amount of the fee was excessive.

Relevant Law

73. Rule 76 of the Employment Tribunal Rules of Procedure 2013 provides, relevantly:

> **"76.**—(1) A Tribunal may make a costs order…, and shall consider whether to do so, where it considers that—
>
> (a) a party… has acted … unreasonably in either the bringing of the proceedings (or part) or in the way that the proceedings (or part) have been conducted…"

74. A tribunal faced with an application for costs must decide, first, whether the power to award costs under rule 76 has been triggered and, second, whether in its discretion it should make a costs order. If so, the tribunal must move to the third stage, which is to decide what amount of costs to award.

75. In deciding whether unreasonable conduct should result in an award of costs, the tribunal should have regard to the "nature", "gravity" and "effect" of the conduct. There is no need for rigid analysis under the separate heading of each of those three words. 'The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects if had': *Barnsley Metropolitan Borough Council v Yerrakalva* [2011] EWCA Civ 1255, [2012] IRLR 78.

76. Legal representation is relevant when considering whether a party should have known that their claim (or response) had no reasonable prospects of success. A legally-represented party may not be afforded the same degree of latitude as an unrepresented party: see for example *Brooks v. Nottingham University Hospitals NHS Trust* UKEAT/0246/18/JOJ, at paragraph 36. In our view, this proposition is also true of alleged unreasonable conduct. A party with legal representation can more readily be expected to have known better.

Facts

77. Judgment ("the Liability Judgment") was announced to the parties on 26 May 2023. The Tribunal listed a remedy hearing to take place on 29 September 2023.

78. On 27 June 2023 Ms Shute of the respondent's solicitors emailed the claimant and copied in Ms Halsall. Her email was headed "Without Prejudice and Subject to Agreement". Attached to the email was the respondent's counter-schedule of loss. We have not seen this document. It is common ground, however, that the aggregate compensation acknowledged in that schedule was £8,048.26. The email itself indicated that the respondent was making an offer to settle the claimant's remedy, "details of which are set out in the attached schedule of loss". A reasonable person reading this email and attachment would understand that the respondent was making an offer of £8,048.26. That is how the claimant in fact understood it.

79. Attached to the counter-schedule were summaries of the three decided cases referred to in our remedy decision reasons.

80. A further hearing took place on 29 September 2023, but it was not the remedy hearing that the Tribunal had originally listed. This was because the claimant was unavailable for the hearing, having informed the Tribunal that she would be caring for her father. We identified the issues and relisted the remedy hearing to take place on 29 January 2024. Our Employment Judge made Case Management Orders for a witness statement and updated Schedule of Loss.

81. On 3 December 2023, the claimant sent Ms Shute a copy of her Schedule of Loss and witness statement for the remedy hearing. Her covering email was headed "Without Prejudice". It stated, "If the respondent is prepared to consider making a fair and reasonable offer I would be open to discuss settlement". Ms Shute acknowledged the email and took instructions. She provided an update on 12 December 2023 and indicated that she would revert to the claimant as soon as the respondent's instructions were known.

82. On 21 December 2023, Ms Shute emailed the claimant again. By this time the Tribunal had provided the parties with our written reasons for the Liability Judgment. Ms Shute's email attached the same counter-schedule as had been attached to the email of 27 June 2023. The email itself stated, "I am instructed to restate the previous WP offer dated 27 June 2023". It contained a brief explanation of why the respondent had taken that stance.

83. On 2 January 2024, the claimant rejected the respondent's offer and made a counter-offer to settle the claim in return for £23,700. Her email provided a detailed breakdown of how that sum had been calculated. The components of the offer included £13,670 for injury to feelings and £5,573.16 for "losses due to detriment". She pointed out that the respondent's offer of £8,048.26 had not included any loss of employer pension contributions or any consequential loss of earnings due to whistleblowing detriment.

84. On 9 January 2024, Ms Shute replied to the claimant and Ms Halsall, stating that the claimant's offer was not accepted and that the respondent had no further offer to make.

85. The claimant emailed the respondent the same day. The email contained a reduced offer to settle at £18,000. Her offer was expressed to be, "in the hope that both parties can avoid the additional time and cost of a remedy hearing".

86. The next day, 10 January 2024, Ms Shute replied, having taken further instructions. She reopened the original offer, understood by all to be £8,048.26. Her email continued to the effect that if the claimant did not accept their offer, the respondent would await the judgment at the remedy hearing.

87. On 11 January 2024, the claimant sent Ms Shute a further email, headed "Without Prejudice Costs Warning". She rejected the respondent's offer and made a "final offer of £16,000". Her email continued:

> "In my view, the original WP offer is unreasonable given the liability findings and further it is unreasonable of the Trust not to negotiate so as to try and devoid the expense of a remedy hearing for both parties. As such, I will be making an application for costs in respect of the remedy hearing if I successfully obtain the figure I have offered and a remedy hearing could have been avoided."

88. Ms Shute replied on 15 January 2024. Impliedly, her email rejected the claimant's £16,000 offer. Part of her explanation for doing so was that the respondent was "limited as to what ex gratia offer/payment it can make without approval from HM Treasury (which it does not have nor is likely to get) or a court order".

89. The correspondence continued, not with a view to settling the claim or agreeing the claimant's remedy, but simply to ensure that the parties were ready for the remedy hearing.

90. On 23 January 2024, Ms Shute informed the claimant that she was updating the respondent's counter-schedule and would share a copy in due course.

91. Later that day, Ms Kelsey Ryan, solicitor, emailed the claimant on behalf of the respondent. She attached the respondent's proposed bundle of documents for the remedy hearing. Included within the bundle was the respondent's updated Schedule of Loss.

92. The "updated Schedule of Loss" attached to that email was the same counter-schedule that we had before us at today's hearing. This was not a "without prejudice" document setting out the details of an offer. This was an open document intended for the Tribunal to read. The purpose of the document was evidently an aid to the Tribunal to understand where the respondent disagreed with the claimant on the calculation of her remedy. Another obvious purpose of the counter-schedule was to keep the respondent's financial liability to a minimum. The counter-schedule served to put into the Tribunal's mind the lowest award of compensation that the respondent could realistically argue that it should have to pay.

93. Inclusive of basic and compensatory awards, the total compensation for unfair dismissal acknowledged in the counter-schedule was £4,306.24. The calculation did not include any element of pension losses.

94. The counter-schedule addressed the claim for compensation for injury to feelings caused by the unlawful detriments. It stated:

> "If the Employment Tribunal considers an award of injury to feelings appropriate, the respondent considers £4,500 a fair figure given the circumstances of the case. The respondent contends that any award for injury to feelings should be within the lower Vento band. The respondent relies on the cases in Schedule 1 as justification for the figure proposed. The respondent contends that no other financial losses were caused and can be attributed to the three proven detriments."

95. The three cases referred to in schedule 1 to the respondent's counter-schedule were made available to the claimant at the same time as the original schedule was provided to her on 27 June 2023.

96. The counter-schedule also included an acknowledgement that it would have to pay interest on the award of compensation for injury to feelings. The amount of interest conceded by the respondent was £1,150.02. As is clear from the previous set of reasons, that concession was mistakenly made: the Tribunal has no power to award interest, although it does have the power to increase the amount of compensation to reflect a diminution in the value of money.

97. When the constituent elements of the counter-schedule were added together, the total amount of compensation was £9,956.26. For the sake of simplicity, we proceed on the basis that it was a tiny amount short of £10,000.

98. The respondent is entitled to keep secret any communications between its managers and the respondent's solicitors for the purposes of calculating the figures in the counter-schedule. It has not waived that privilege. The respondent is also entitled to withhold from the Tribunal any information about attempts that it made, or did not make, to obtain approval from His Majesty's Treasury to make offers of settlement to the claimant. The respondent has not waived that privilege either. We do not criticise the respondent for keeping any of these communications secret. The effect, however, is that we have less information than we otherwise would have to enable us to understand how the respondent made its decisions about what offers to make.

99. Doing the best we can on the evidence available, we find that the respondent knew from 23 January 2024 that the Tribunal would almost inevitably award the claimant compensation exceeding £10,000. That subjective assessment was based in part on the mistaken premise that the Tribunal would order interest on compensation for unlawful detriments. In our view, that mistake does not matter. The people at the respondent who were in a position to give instructions to the respondent's solicitors subjectively believed that they could not realistically argue that the aggregate award from the Tribunal could be less than £10,000.

100. In the absence of any evidence, our conclusion is that the respondent did not try to seek Treasury approval within the time remaining between 23 January 2024 and the date of the remedy hearing.

101. The claimant has not told us what her agreement was with Ms Halsall about her brief fee for the remedy hearing. Ms Halsall told us, and we have every reason to accept, that the amount of the fee was £1,000. What we do not know, however, is whether the claimant agreed with Ms Halsall that the fee should be cancelled or reduced in the event that the claim was settled shortly before the remedy hearing. The claimant does not have to tell us about any such agreement, and we do not criticise her for not providing us with this information. Doing the best we could with the information that we had, we concluded that there would have been a cut-off time by which the brief fee became payable regardless of whether the remedy hearing went ahead. Realistically, that cut-off date would be unlikely to be any later than Friday 26 January 2024, the last working day before the remedy hearing.

102. On the evidence available to us, we were unable to conclude that the respondent knew at any time prior to 24 January 2024 that the Tribunal's award would inevitably exceed £10,000.

103. The total amount payable under the Tribunal's remedy judgment at today's hearing was £12,606.15.

Conclusions

104. It was not unreasonable for the respondent to limit its offer on 27 June 2023 to £8,048.26.

105. In coming to this view, we took account of the three case summaries on which the respondent included in the two iterations of its counter-schedule. It is

common for parties to research legal databases in an attempt to place a value on an award of compensation for injury to feelings. Although we did not find them of much assistance, it was reasonable for the respondent to use them as a guide to predicting our award, and tailoring its without prejudice offer accordingly.

106. It is arguable that from 2 January 2024, the respondent acted unreasonably by refusing to increase their offer *at all*. This is because the claimant had pointed out an obvious defect in the respondent's original calculation. The defect was that the calculation made no allowance for pension losses. We did not, however, make any finding about whether this omission amounted to unreasonable conduct by itself. This is because a prompt concession of pension losses would not have been enough, by itself, to make any real difference to the negotiations. The amount of pension losses ultimately claimed by the claimant at today's hearing was £203.76.

107. Subject to the possibility of unreasonableness with respect to pension losses, the respondent did not act unreasonably in standing by its previous offer between 2 January and 24 January 2024. The respondent had articulated a reasonable basis for contending that compensation for injury to feelings should be no more than the amount in the original counter-schedule, by reference to the three cases it had cited. The respondent cannot be criticised for refusing to offer anything in respect of compensation for loss of earnings allegedly caused by the unlawful detriments. It was always open to the respondent to argue that the claimant would have suffered that loss in any event. As it was, we found that only three weeks' loss of earnings (at a differential rate) were attributable to the detriments which had succeeded.

108. Where we disagree with the respondent is in relation to the period from 24 January 2024 until the date of the remedy hearing. That was a period of three working days. During that time, as we have found, the respondent knew that its offer of £8,048.26 was unrealistically low. The moment the respondent's counter-schedule went into the bundle, it was almost a foregone conclusion that the claimant's remedy would exceed £10,000. Yet the respondent did not make any improved offer and did not seek Treasury approval to make one. In our view this was unreasonable.

109. We therefore have the power to make a costs order under rule 76(1).

110. What we must now decide is whether or not we should exercise that power. Here, we must examine the case in the round, including the conduct of the claimant as well as that of the respondent. Without losing sight of that overview, or taking too rigid an approach, we must also have regard to the nature, gravity and effect of the unreasonable conduct of the respondent.

111. Putting that self-direction into some context, we need to make an assessment of how the unreasonable conduct impacted on the settlement negotiations. Was there some prospect that the claimant could have avoided incurring Ms Halsall's brief fee had the respondent conducted itself reasonably?

112. In our view there is no such prospect. The claimant would not have settled for £10,000. Had the respondent taken steps (as it should have done) to improve its offer on or after 24 January 2024, the remedy hearing would inevitably have proceeded, and the claimant would have had to pay Ms Halsall to attend it.

113. This is a controversial finding. Here are our reasons:

113.1. There were clear issues of principle between the parties when it came to the determination of the claimant's remedy. These issues had been identified on 29 September 2023. One was the amount of compensation for injury to feelings. The parties had radically different valuations of that compensation. The other issue was how much (if any) compensation should be paid to reflect the claimant's loss of earnings as a consequence of the unlawful detriments. Each party had a reasonable position in relation to these two issues. Depending on which way they went, the claimant's compensation could have been below £10,000 or in excess of £20,000.

113.2. The claimant had already made what she described as a "final offer". The amount of the final offer was £16,000. It is not a good starting point for a claimant to tell the Tribunal that they made a final offer in the knowledge that they would actually be prepared to settle for less.

113.3. On the claimant's behalf, Ms Halsall asks us not to hold the wording against the claimant. The words "final offer" were, it is said, simply an echo of the respondent's entrenched bargaining position expressed on 9 January 2024 that it had "no further offer to make". This argument was attractively presented to us, but we reject it. The claimant's email was carefully worded. We can take the claimant not to have sent it out of pure petulance. If the claimant believed that the final offer of £16,000 would serve no purpose at all, she would not have made it. Our conclusion about the claimant's email is that it was intended to serve two purposes. One purpose was to make a final attempt to avoid the cost of a remedy hearing. What was new about this attempt was that it placed additional pressure on the respondent to make an improved offer. The pressure came in the form of the costs warning. The other purpose was to improve the claimant's prospects of successfully applying for costs in the event that the negotiation failed and the case proceeded to a remedy hearing.

114. Viewed in the light of those purposes, this e-mail is a reliable guide to the claimant's minimum figure that she would have been prepared to accept. That figure was £16,000. An offer of £10,000 would, in the claimant's opinion, have fallen well short of her red line figure.

115. We have also borne in mind that there was only a very limited period of time available in which to negotiate before the claimant would have incurred Ms Halsall's brief fee in any event. For these purposes we ignore the time it would take to obtain Treasury approval. If it really is the case that NHS employers have to wait weeks rather than days to obtain approval for a settlement, it would be unreasonable of them to wait until a few days before the hearing before updating their counter-schedules. Choosing such a timescale would be tantamount to denying themselves deliberately the opportunity to make an improved offer that may be necessitated by their revised assessment of the likely award.

116. Even discounting the time it would have taken to obtain Treasury approval, however, the period of three working days was only a very short time in which to obtain instructions and reach an agreement. Bearing in mind how far the parties were apart, even if the claimant had been prepared to accept an offer

substantially below £16,000 it is unlikely that an agreement would have been reached in that time.

117. Having concluded that the unreasonable conduct of the respondent had no ultimate bearing on the progress of the negotiations and did not cause the claimant to incur any further legal costs, we do not think it is appropriate in this case to make any order for costs.

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Employment Judge Horne

16 February 2024

REASONS SENT TO THE PARTIES ON
28 February 2024

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FOR THE TRIBUNAL OFFICE