EMPLOYMENT TRIBUNALS

Claimant: **Mr Nikoloz Papashvili**

Respondents: **(1) Governing Body of Belvue School &**
(2) Ms Allison Blair &
(3) Ms Maria Stock &
(4) London Borough of Ealing

Heard: **Watford Hearing Centre**

On: **19 and 28 December 2023**

Before: **Employment Judge G Tobin**
Members: **Mr D Sutton**
Mr D Walton

Representation
Claimant: **In person**
Respondent: **Ms A Dannreuther (counsel)**

RESERVED JUDGMENT ON REMEDY

It is the unanimous decision of the Employment Tribunal that the claimant is awarded compensation of £9,309.15.

Recoupment information

Prescribed element	**£658.55**
Prescribed period	**04.12.2020 to 14.03.2024**
Total award	**£9,309.15**
Balance	**£8,650.60**

REASONS

The proceedings

1. The claimant made complains of: unfair dismissal; direct disability discrimination; discrimination arising in consequence of disability; breach of a duty to make reasonable adjustments; detriment on grounds of a protected disclosure; automatically unfair dismissal on grounds of a protected disclosure; sexual harassment and victimisation.

2. Following a hearing of 13 to 21 October 2022 the claimant succeeded with his claim of unfair dismissal, pursuant to s94 Employment Rights Act 1996 ("ERA") subject to a 70% deduction in his compensatory award for his contributory or blameworthy conduct. The claimant succeeded in 7 of his 18 allegations of sexual harassment, under s26 Equality Act 2010 ("EqA"), which were all out of time, although the Employment Tribunal determined that it was just and equitable for those complaints to proceed to remedy, pursuant to s123 EqA.

3. The Tribunal determined that the claimant made 2 protected disclosures, but rejected the claimant's claim that that he was subjected to any of the 11 detriments contended and that he was automatically unfairly dismissed because of either or both protected disclosures. All the claimant's allegations of disability discrimination, specifically direct discrimination, discrimination arising from disability and failures to make reasonable adjustments, were rejected by the Tribunal. The claimant was not victimised by the respondent, so those allegations were also rejected.

The relevant law in respect of remedy

Unfair dismissal

4. In most successful unfair dismissal claims the remedy will be an award of monetary compensation which is usually made up of a basic award and a compensatory award: see s118(1)(a) and (b) ERA. The basic award is designed to compensate the employee for the loss of his employment caused by the unfair dismissal by awarding him a sum almost exactly equivalent to a statutory redundancy payment. The compensatory award is intended to reflect the actual losses that the employee suffered as a consequence of being unfairly dismissed.

5. According to s123(1) ERA:

> …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.

6. S123(4) ERA provides a duty to mitigate losses for the claimant by taking reasonable steps to obtain alternative employment. The burden is on the respondent to establish that the claimant has not mitigated his losses: *Fyfe v Scientific Furnishings Ltd 1989 ICR 648, EAT*. Compensation will not be awarded for any loss that should have been mitigated but was not: *Kyndall Spirits v Burns EAT/29/2002*.

7. In this case there is a substantial issue as to failure to mitigate, so in accordance with *Gardiner-Hill v Roland Berger Technics Ltd 1982 IRLR 498, EAT* the respondent poised the following questions:
    i. what steps were reasonable for the claimant to have to take in order to mitigate his loss;
    ii. did the claimant take reasonable steps to mitigate his loss; and

iii. to what extent, if any, the claimant would have actually mitigated his loss if he had taken those steps.

Sexual harassment

8. S119(4) EqA specifically provides that Tribunals may award compensation for injury to feeling. Notwithstanding, the Tribunal has a broad discretion as to the amount to award for injury to feeling, we should have regard to the principles set out in *Prison Service & Others v Johnson 1997 ICR 275 EAT:*
   a. awards for injury to feeling are designed to compensate the injured party fully but not to punish the guilty party;
   b. an award should not be inflated by feelings of indignation at the guilty party's conduct;
   c. awards should not be so low as to diminish respect for the policy of the discrimination legislation nor should they be so excessive as they might be regarded as "untaxed riches";
   d. awards should be broadly similar to the range of awards in personal injury cases;
   e. Tribunals should bear in mind the value in everyday life of the sums they are contemplating;
   f. Tribunals should bear in mind the need for public respect for the level of awards made.

9. The Court of Appeal set down 3 bands of injury to feelings awards in the case of *Vento v Chief Constable of West Yorkshire Police (No 2) 2003 ICR 318*. The original *Vento* figures have been uplifted to keep pace with inflation and the cost of living as set out in the latest Presidential Guidance. The current figures are*:*
   a. A lower band of £1,100 to £11,200. This band is appropriate for less serious cases, particularly where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £1,100 should be avoided as they risk being regarded as so low as not to be a proper recognition of injury to feelings.
   b. The middle band of £11,200 to £33,700. This band should apply to serious cases that do not merit an award in the highest band.
   c. A top band of between £33,700 to £56,200. This band should apply only to the most serious cases, for example where there has been a lengthy campaign of discriminatory harassment or where the claimant has suffered a severe stress reaction. Only in very exceptional circumstances should an award of compensation for injury to feeling exceed the top of this band.

Witness evidence

10. We (i.e. the Tribunal) considered a remedy hearing bundle of 600 pages produced by the respondents, which included both the claimant's documents and those of the respondents. The claimant produced an additional remedy bundle of 445 pages.

11. We heard evidence from the claimant, the claimant's partner Ms Danielle Parkinson and Mrs Shelagh O'Shea (the Heads Teacher at the respondent school). The claimant provided a statement from Ronnie Byrne, but this witness was not available to confirm his statement or answer questions, so we gave this evidence no weight.

12. We were not impressed with Ms Parkinson as a witness. She attempted to pass off the claimant's shoulder injury as being related to his purported stress and this undermined her credibility in our eyes.

13. We did not place too much emphasis on Mrs O'Shea's evidence because the key witness was the claimant. We comment upon the claimant's evidence below.

Our original findings

14. Our judgment on liability made findings of fact for this unedifying sequence of events. The claimant skived off work. He was caught out and he lied about it. The respondent called him to a disciplinary investigation and the claimant failed to attend because, he said, he had covid. We do not believe him on this point as we have seen no corroborative medical evidence to support this. On balance he probably lied about this because it was in his interest to avoid a disciplinary process for as long as possible. We previously assessed the claimant as both unreliable and dishonest. Having heard further evidence from him at this hearing, we are in no doubt that this was a correct assessment. We formed the unusual view that we were unlikely to believe the claimant on any controversial point unless this was independently and authoritively corroborated. As the claimant behaved so badly in the index events, as is often the case, the respondent behaved badly also. However, the respondent was the employer and we expected more professional behaviour from them.

Our further findings of fact

15. The evidence addressing the claimant's stress-related illness was surprisingly limited.

16. The claimant attended an occupational health referral on 16 September 2020 [page 332-333 of claimant's remedy bundle]. This was almost 3 months prior to his dismissal. He said that he had symptoms of poor sleep for 1 month. He was not given any medication. The claimant was assessed as able to engage with the disciplinary process. Indeed, from September 2020 and throughout the duration of his claim the claimant was able to write detailed and articulate correspondence with his employers and write detailed complaints to OFSTEAD and fully engage with the Employment Tribunal. This was at variance with his purported-related incapacity.

17. The claimant provided various sickness note which referred to work-related stress. These were contained within the hearing bundle at pages 583 to 589. The sicknotes were as follows:
    - 2 September 2020 to 13 September 2020 (12 days) work related stress
    - 14 September 2020 to 27 September 2020 (2 weeks) work related stress
    - 25 September 2020 to 4 January 2021[1] (over 3 months) work related stress
    - 15 January 2021 to 31 March 2021 (less than 3 months) stress at work[2]
    - 29 March 2021 to 29 June 2021 (3 months) stress at work
    - 28 June 2021 to 29 September 2021 (3 months) stress
    - 29 September 2021 to 29 December 2021(3 months)

18. The claimant provided a letter from his GP, Dr Strastha from Trowbridge Surgery dated 12 October 2021, page 408 to 409 of the claimant's bundle. Ms Danreuther said that

[1] The claimant was dismissed on 4 December 2020 with immediate effect.
[2] Although the claimant said in evidence he did not have work at this time.

the claimant's remedy bundle was only provided the day before the hearing, in breach of case management orders and thereby giving the respondents little time to investigate his witness evidence. The GP's report confirmed that the claimant became a patient of the practice on 17 September 2020, which was after his first 2 sickness certificates. The report is not expansive. It provides scant details and largely reports what the claimant appears to have told his medical practitioner. There is no analyses, nor is there anything to say what caused the claimant's illness other than reporting what he told them. The report is not impressive, we do not view this as particularly supportive of the claimant's position that the respondent caused his illness.

19. In his evidence to the Tribunal the claimant confirmed that he did not look for any work from the date of his dismissal, i.e. 4 December 2020, until after his liability hearing.

Our determination

Unfair dismissal: basic award

20. The claimant had miscalculated the age factor for his basic award, so on an agreed net weekly wage of £410.04, the correct amount for this loss should be **£6,150.60** and we increase this accordingly.

Unfair dismissal: compensatory award

21. The claimant is entitled to an award in respect of loss of statutory rights. This reflects the fact that he will need to be employed for 2 years to qualify again for the right not to be unfairly dismissed. The amount is nominal, and we award the fairly standard amount of **£350.00**.

22. The claimant claims a substantial loss of earnings of 98-weeks' pay (i.e. just short of 2-years). There is no claim in respect of loss of pension. He did not look for any work throughout this period. The claimant said that he was too ill to work.

23. We do not believe his account in respect of remedy. We note the claimant had previously fabricated evidence which he tried to pass off at the last hearing. So, he is dishonest and, we assess, he will say anything that might increase his compensation.

24. There is a dearth of evidence which should have been submitted to confirm this claim; the absence of which leads us to a negative conclusion. The claimant has not provided GP records, which is common to provide, and which was referred to at the previous hearing.

25. In his occupational health assessment of September 2020, the claimant referred to private counselling, which we heard evidence of and considered correspondence at the last hearing from a psychotherapist in Georgia. The report from the Georgian psychotherapist was unsatisfactory. The report did not state the psychotherapist's area of practice, his expertise or qualifications. There was no detailed assessment nor any proper prognosis. In the circumstances we are not going to take that into account. There was no evidence from any NHS or UK based counsellor and, despite the fact that the claimant originally came from Georgia, we were not at all persuaded why he sought treatment from Georgia via the internet and not in the UK.

26. The claimant's sicknotes suggest several questions. First, we note that the claimant did not provide any sick note for the summer of 2020. He told his employers he was off ill through coronavirus and just before term started in September 2020 he provided, for the first time a stress related medical certificate. There was no certified sick leave during the summer of 2020 and for a period of around 3-months during which time the respondent indicated that they wanted to proceed with their investigation. This undermines the claimant's credibility further as his certified sickness absence (for stress) starts some considerable time after he first went off sick (for a different condition) and after his summer holidays.

27. Second, the sick notes seem to identify ongoing "stress at work" for a period of 6 months after his employment ceased.

28. Third, it is truly astonishing (unbelievable) that the claimant's GP appears to have signed off the claimant for 1 year and 3 months, yet we have no independent evidence of any prescribed or recommended medication, no reference to exploring therapies, and no reference to any medical reviews or referrals for counselling or treatment or alternative assessment. So, the picture we are presented in these sicknotes is hugely incomplete and just does not make sense. It undermines the veracity of these medical certificates.

29. Fourth, and most important, the claimant did not provide any General Practitioner notes, which might clarify the above, it would at least provide a contemporaneous record that might inform us what he told his doctor. The GP records would be relatively easy to produce, particularly as he sought a GP's report, and its absence was contrary to our very clear indication.

30. The respondents say that the claimant is a liar and probably made up his illness. Ms Dannreuther said that if the claimant was ill from September 2020 onwards (which she disputed) then he was stressed because he was caught out lying and wanted to do everything possible to avoid the consequences of his bad behaviour. This contrary narrative is consistent with the claimant's GP letter.

31. The claimant provided a letter from his GP, Dr Strastha from Trowbridge Surgery dated 12 October 2021, page 408 to 409 of the claimant's bundle. Ms Danreuther said that the claimant's remedy bundle was only provided the day before the hearing, in breach of case management orders and thereby giving the respondents little time to investigate his witness evidence. The GP's report confirmed that the claimant became a patient of the practice on 17 September 2020, which was after his first 2 sickness certificates. The report is not expansive. It provides scant details and largely reports what the claimant appears to have told his medical practitioner. There are no analyses, nor is there anything to say what caused the claimant's illness other than reporting what he told them. The report is not impressive, nor do we view this as particularly supportive of the claimant's position That the respondent caused his purported illness.

32. We regarded the claimant as a profoundly dishonest person; therefore, we were unlikely to accept anything he said unless this was independently corroborated by a credible source. This was also illustrated when the claimant produced some evidence of a shoulder injury in December 2020. He argued that his traumatic left shoulder dislocation was somehow a manifestation of his stress reaction. There was no medical evidence to support this view on causation and the claimant's contention, and that of Ms Parkinson, did not make sense. Upon close scrutiny of the claimant's bundle, the

Ambulance Patient's Report Form at page 340 indicated this was a physical injury arising from an assault on 2 December 2020.

33. So, we do not believe the claimant suffered any substantial ongoing serious medical illness in consequence of his dismissal on the scant information available.

34. He was off sick for 13 weeks prior to the 98 weeks off after his dismissal, which is a substantial sick period before the actual dismissal on 4 December 2020. As the respondents' representative succinctly put it: he lied repeatedly, he was caught out and he would not return to work to face the music.

35. So, the claimant's sick leave was well established prior to his dismissal. There is not a single shred of corroborative evidence that this illness was caused by or made worse by the actual dismissal on 4 December 2020. Furthermore, there is nothing to suggest that the condition improved, or got worse, or fluctuated following his dismissal over the next 2 years.

36. In our judgment on liability, we sought to give guidance to the parties to assist them in their discussions on remedy. We stated that in our professional knowledge of the employment market we would expect the claimant to obtain another job within 3 to 4 months.

37. The respondents contended that there was always a shortage of teaching assistants; that job market was buoyant. The respondent proffered voluminous documents of job vacancies from November 2022 to November 2023 (remedy bundle p11-340]. We note the claimant travelled across London from Hackney to Ealing to work for the respondent, so he was quite mobile.

38. We considered that it was reasonable for the claimant to have applied for work as a teaching assistant, or even doing something quite different, within weeks of his dismissal. His employment was not so well paid and opportunities so infrequent that it would be justified delaying looking for alternative work. We note the claimant was mobile.

39. We considered not awarding any compensation for loss of earning for the claimant. However, we regarded this as disproportionate. If the claimant had applied himself then we assess he would have found a suitable replacement job such to extinguish his loss of earning after, say, 15 weeks. So, we award him **£1,845.18** net for loss of earnings.

Breach of ACAS Code of Practice

40. The first respondent breached the ACAS Code of Practice. However, the employer did undertake an investigation, for which the claimant did not participate. The employer then held a disciplinary hearing which considered the investigatory report and again the claimant did not attend (for no good reason). The respondent provided an appeal for which the claimant participated. So, there was not a wholesale breach of the ACAS recommended procedure. The investigation was biased and unfair. It was important to keep an open mind and look for the evidence which supported the employee's case as well as evidence against this and the investigation should have confined itself to establish the facts of the case.

41. The claimant claimed an uplift of 25% for the respondent's failure to comply with the ACAS Code. This is a wildly exaggerated figure.

42. At his appeal hearing the claimant produced a bank statement to purportedly corroborate that he was in the UK rather than going on holiday. This document was not really considered by the appeal hearing. The claimant was cross-examined on this document by Ms Dannreuther at the previous Tribunal hearing. At first, he sought to justify some discrepancies but then he admitted that he created a fraudulent document. This document was manufactured with the intent to deceive – at the appeal dismissal hearing, during the Employment Tribunal preparation and at the liability hearing.

43. The Tribunal has a just and equitable discretion as to both whether to increase the compensatory award and, if so, by how much. The purpose of the award is to show the employer respondent our displeasure in its failure to adhere to proper professional standards in conducting disciplinary and dismissal procedures. However, we remind ourselves that the claimant created a fraudulent document and sought to pass this off, both in the disciplinary process (at appeal) and he again tried to pass off that fake document at the liability hearing. That behaviour was outrageous. It would bring any ACAS uplift into disrepute with honest thinking members of the public if we were to make such an award in such circumstances. It would not be justified to penalise the respondent for its failures in following proper standards in an internal process and yet compensate the claimant financially while ignoring his fraud and deceit in that same process. Such an award could never be justified so we make no award in this regard.

44. The compensatory award is therefore **£350** plus **£1,845.18**. This equates to **£2,195.18**. We have made a deduction from the compensatory award of 70% for the claimant's contributory or blameworthy conduct. This means that the compensatory award is now **£658.55.**

45. This figure is subject to the Employment Protection (Recoupment of Benefits) Regulations 1996.

Sexual harassment: injury to feelings

46. Of the 18 allegations of sexual harassment, 7 were proven.

47. We found that Mrs O'Shea had sexually harassed the claimant by making inappropriate comments. The consistent theme in these allegations was Mrs O'Shea remarking upon the claimant's supposedly fit body and his speedos. These 7 events occurred over a 2-year period, so they were not particularly frequent and stopped some time before proceedings were commenced. The incidents occurred on: 5 July 2017 (issue 12.1.1), 5 February 2018 (issue 12.1.4), 4 July 2018 (issue 12.1.6), 20 March 2019 (issue 12.1.9), 12 June 2019 (issue 12.1.12), 3 July 2019 (12.1.11) and 7 July 2019. We rejected the claim's other 11 allegations of sexual harassment as either an exaggeration of what, in fact, occurred or that he made them up to bolster his claims. We rejected the claimant's claims that Mrs O'Shea inappropriately touched him.

48. We believe that Mrs O'Shea thought that she was paying the claimant a compliment and/or that her comments were jokey or risqué. The allegations were made in public.

She was not challenged over these comments. No by-stander or witness appears to have been outraged and there seemed to be no immediate comment or complaint made by anyone supposed to have witnessed the incidents, so the remarks continued.

49. We accepted Mr Byrne's previous evidence that he and some other staff teased the claimant about the Head Teacher's remarks and innuendos. This also appears to be consistent with WP (Class Teacher) referring to "banter" in the partial notes available for the grievance investigation. We do not accept any contention that such comments were no big deal, but they do fall on the less serious scale. Both language and attitudes to colleagues change over time and comments that might have been prevalent and acceptable in a workplace 30 or 40 years ago are no longer justifiable or tolerated. Similar comments made by a senior man, particularly if older, are generally regarded as unacceptable if directed towards a junior or younger female and perhaps, belatedly, such comments made by a female Head Teacher towards a younger Teaching Assistant should now similarly be regarded as unacceptable. Such comments are not teasing or risqué when the recipient objects and the claimant did object – although sometime after the even. We do not think the comments were made directly to the claimant; they were made about him in a juvenile manner that increasingly has no place in the modern workplace. The harassment amounted to juvenile insinuations from an older woman in a professional environment and this reflected badly upon her.

50. There is no medical evidence to support the claimant's claim of person injury, so we reject this.

51. The claimant made no contemporaneous complaint about these in the intervening years and that these matters were not raised until his grievance. This indicates to us that that he was not significantly troubled by such occurrences. The claimant did not regard the Head Teachers behaviour as either particularly serious or worrying. It also indicates that he raised this issue as retaliation towards the Head Teacher because of his perceived negative treatment. We assess the claimant's motivation was to deflect attention from his conduct in absenting himself from work and to cover his ongoing lies about this. We say this because had the claimant not been caught out then we do not believe that he would have raised these matters.

52. *Komeng v Creative Support Ltd EAT/0275/2018* among other cases established that, depending upon severity, repeated acts of discrimination can fall into the lower *Vento* band. The comments were not harmless, but they were less serious such to correctly place them in the lower band. Although the claimant ignored these comments at first, when it suited him, he chose to take offence. We award the claimant compensation of **£2,500.00**.

<u>Sex discrimination: interest</u>

53. We should consider masking an award of interest, but we are not obliged to do so. As said above in respect of the ACAS uplift. The claimant's behaviour was disgraceful in passing off a falsified bank statement at the last hearing. We are resolved that it would not be appropriate for him to benefit for the Tribunal's relatively high interest rate when he sought to abuse the Tribunal's process. Consequently, we are resolved to refuse to make an award of interest in this instance.

Employment Judge Tobin

Date: 14 March 2024

RESERVED JUDGMENT, REASONS & BOOKLET SENT TO THE PARTIES ON 15 March 2024

FOR THE TRIBUNAL OFFICE

Notes

Public access to Employment Tribunal decisions

All judgments and Written Reasons for the Judgments (if given) are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.