Case No: 2409100/2021

EMPLOYMENT TRIBUNALS

Claimant:	Professor Fahmy Fahmy
Respondent:	Countess of Chester NHS Foundation Trust
Heard at:	Liverpool
On:	14 & 15 March 2024; deliberations 22 March 2024.
Before:	Employment Judge Liz Ord Tribunal Member Michelle Plimley Tribunal Member Rob Alldritt
Representation:	
Claimant:	Mr J Mitchell (Counsel)
Respondent:	Ms L Quigley (Counsel)

RESERVED REMEDY JUDGMENT

The unanimous decision of the panel is:

1. The Respondent is ordered to pay the Claimant compensation in the sum of £73,943.26.

1. The Tribunal recommends that:

   1.1. The Respondent remove concerns from the Claimant's appraisal so that it is re-categorized as having no concerns.

   1.2. The Chief Executive of the Respondent apologises to the Claimant.

REASONS

Background

2. Liability judgment was given orally on 26 January 2024, followed by written reasons on 9 March 2024. The Tribunal unanimously adjudged that the Claimant succeeded in substantive complaints under various heads of claim (disability discrimination and detriment from protected disclosures) as follows:

    2.1. A failure in May 2020 to implement changes to the Claimant's work in a timely manner;

    2.2. A unfair allocation of work to the Claimant without further remuneration;

    2.3. Communication of the Claimant's duties to colleagues in an undermining manner;

    2.4. Recording concerns on the Claimant's appraisal form for the first time in 20 years;

    2.5. Exclusion from ACA work so that the Claimant was unable to earn additional monies from ACAs;

    2.6. Failure between June and September 2021 to action a phased return to work in a timely manner;

    2.7. Placing the Claimant at undue risk for not prioritizing him for risk assessment;

    2.8. Delaying the grievance process.

Issues

3. The issues for the tribunal are set out in the Annex to this judgment.

Evidence

4. The tribunal had before it the following documentary evidence:

    4.1. Liability documents bundle, remedy documents bundle (added to liability bundle with sequential numbering), bundle of authorities, bundle of witness statements, updated schedule of loss, counter schedule of loss, four Excel spreadsheets (K241-K244), Claimant's skeleton argument, Respondent's skeleton argument.

5. It heard evidence on oath/affirmation from:

    5.1. The Claimant; and

    5.2. On behalf of the Respondent: Tina Slater (Divisional Director of Planned

Care); Gary Watson (Head of Medical Staffing); and Kevin Smith (Directorate Manager – Planned Care).

The Law

General

6. With respect to detriment arising from a protected disclosure, section 49 of the Employment Rights Acts 1996 provides:

(1) Where an employment tribunal finds a complaint under section 48(1) …well founded, the tribunal –

(a) Shall make a declaration to that effect, and

(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.

7. With respect to discrimination, section 124 of the Equality Act 2010 provides:

(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2) The tribunal may –

(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b) order the respondent to pay compensation to the complainant;

(c) make an appropriate recommendation.

(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.

(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or sheriff under section 119.

(7) If a respondent fails, without reasonable excuse, to comply with an appropriate recommendation …….the tribunal may-

(a) if an order was made under subsection (2)(b), increase the amount of compensation to be paid:

(b) if no such order was made, make one.

8. Section 119(4): An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

9. In accordance with the Employment Tribunals (Interest on Awards etc) Regulations 1996, interest is awarded on injury to feelings awards from the date of the act of discrimination complained of until the date on which the tribunal calculates the compensation (reg 6(1)(a)); for all other sums it is from the mid-point of the date of the act of discrimination complained of and the date the tribunal calculates the award (reg 6(1)(b)).

10. Where a tribunal considers that serious injustice would be caused if interest were to be calculated according to the aforementioned approaches, it may calculate it on such different periods as it considers appropriate (reg 6(3)).

11. Where discrimination extends over a period of time, the tribunal is afforded some discretion in deciding when the discrimination starts for the purposes of calculating interest.

12. Interest is calculated after the final adjustments have been made to the award.

13. Any grossing up will apply after interest has been calculated.

14. Section 12A of the Employment Tribunals Act 1996 sets out provisions for financial penalties as follows:

(1) Where an employment tribunal determining a claim involving an employer and a worker –

(a) concludes that the employer has breached any of the worker's rights to which the claim relates, and

(b) is of the opinion that the breach has one or more aggravating features,

the tribunal may order the employer to pay a penalty to the Secretary of State (whether or not it also makes a financial award against the employer on the claim).

15. The "eggshell skull" principle applies to loss arising from discrimination/detriment and so the discriminator must take the victim as s/he finds him/her.

16. In order to award compensation, the Tribunal must be satisfied, on the basis of its evidence and its findings of fact, that the harm suffered by the Claimant was caused by the act of discrimination (**Essa v Laing Ltd** [2004] ICR 746, CA).

Injury to feelings/Personal injury

17. In **Vento v Chief Constable of West Yorkshire Police (No.2)** 2003 ICR 318, CA, the Court of Appeal gave specific guidance on how employment tribunals should approach the issue of injury to feelings. Three bands of compensation were identified, namely:

    - A lower band for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence;

    - A middle band for serious cases that do not merit an award in the highest band; and

    - A top band for the most serious of cases, such as where there has been a lengthy campaign of discriminatory harassment.

18. The Court described some of the elements that can be compensated under the head of injury to feelings which, according to Lord Justice Mummery, include: "subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on".

19. The Court also emphasised that, after making an award for injury to feelings, the tribunal must stand back and have regard to the overall compensation figure to ensure that it is proportionate and not subject to double counting.

20. Since then, the figures have been revised to take account of inflation (**Da'Bell v National Society for Prevention of Cruelty to Children** [2010] IRLR 19 EAT).

21. For the year 6 April 2021 to 5 April 2022 (the year in which the claimant presented his claim which was on 12 August 2021), the Vento bands were:

    - Lower band - £900 to £9,100;
    - Middle band - £9,100 to £27,400;
    - Top band - £27,400 to £45,600.

22. In **HM Prison Service and ors v Johnson** [1997] ICR 275, EAT, the EAT summarised the general principles that underlie awards for injury to feelings:

    a) Awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party;

    b) An award should not be inflated by the Tribunal's feelings of indignation at the guilty party's conduct;

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

    d) Awards should be broadly similar to awards in personal injury cases;

    e) Tribunals should bear in mind the value in everyday life of the sum they are contemplating;

f) The Tribunal should bear in mind the need for public respect for the level of awards made.

23. The focus must be on the effect of the unlawful discriminatory treatment on the Claimant, not on the gravity of the discriminatory acts of the respondent (**Komeng v Creative Support Ltd** EAT 0275/18).

24. In **Al Jumard v Clywd Leisure Ltd and ors** [2008] IRLR 345, EAT, the EAT ruled that where unlawful discrimination occurred in respect of two or more different grounds, the compensatory award for injury to feelings should be assessed in respect of each discriminatory act. However, where more than one form of discrimination arises out of the same facts, it will not be an error of law to take a composite approach.

25. In **Ahsan v The Labour Party** EAT/0211/10, Mr Justice Underhill, the then President of the EAT, stated that liability extends only to those consequences which "directly and naturally" flow from the acts complained of.

26. Employment Tribunals may, but need not, make separate awards for injury to feelings and personal injury. The Tribunal must be alert to the danger of double counting.

27. In **HM Prison Service v Salmon** [2001] IRLR 425, EAT, the EAT noted that, although the two awards are distinct in principle, they are not easily separable in practice because it is not always possible to identify when the distress and humiliation suffered as a result of unlawful discrimination becomes recognised psychiatric illness. The Tribunal may treat the personal injury as having been compensated for under the heading of injury to feelings, as long as the Tribunal identifies those aspects of the victim's medical condition that the injury to feelings award is also intended to cover.

28. The principle that Employment Tribunals have jurisdiction to award compensation for personal injury caused by unlawful discrimination, whether physical or psychiatric, was confirmed by the Court of Appeal in **Sheriff v Klyne Tugs (Lowerstoft) Ltd** [1999] IRLR 481.

29. **In Hampshire County Council v Wyatt** EAT 0013/16, the EAT held that, when claiming damages for personal injury, it is advisable for claimants to obtain medical evidence, especially in cases involving psychiatric injury, which can give rise to difficult questions of causation and quantification, as a failure to produce such evidence risks a lower award than might otherwise be made, or even no award being made at all.

30. **In BAE Systems (Operations) Ltd v Konczak** [2018] ICR 1, CA, Lord Justice Irwin specifically endorsed the view that expert medical evidence would be of great assistance to courts and tribunals deciding such matters.

    The Court also said that, in cases where there were multiple extrinsic causes of psychiatric injury, a sensible attempt should be made to apportion the harm, but there might be cases where the harm was indivisible and apportionment would be wrong.

31. In considering quantum, the Tribunal has had regard to the **Judicial College Guidelines – Seventeenth Edition**, with respect to psychiatric and psychological damage.

Aggravated damages

32. Aggravated damages may be awarded where the behaviour of the respondent increased the impact of the discriminatory act on the claimant and therefore, the injury to his feelings. They are an aspect of injury to feelings and are awarded for the additional distress caused by the aggravating features. They are compensatory and not punitive.

33. In **Alexander v Home Office** 1988 ICR 685, CA, the Court of Appeal held that aggravated damages can be awarded where the discriminatory behaviour was carried out in a ”high-handed, malicious, insulting or oppressive manner”.

34. In **Commissioner of Police of the Metropolis v Shaw** UKEAT/0125/11/ZT, Mr Justice Underhill, the then President of the EAT, identified three broad categories of case for awarding aggravated damages:

- Where the manner in which the wrong was committed was particularly upsetting;
- Where the motive for the conduct was evidently based on prejudice or animosity, or was spiteful, vindicative or intended to wound;
- Where subsequent conduct added to the injury, for example, where the employer conducted tribunal proceedings in an unnecessarily offensive manner, or “rubbed salt in the wound” by plainly showing that it did not take the claimant’s complaint of discrimination seriously.

35. The tribunal must consider whether the overall award of injury to feelings and aggravated damages is proportionate to the totality of the suffering caused to the claimant. In **Wilson Barca LLP and other v Shirin** [2020] UKEAT/0276/19, the EAT said that, if the tribunal makes an aggravated damages award it should explain why the amount of the injury to feelings award is insufficient to compensate the claimant, and the extent to which the conduct giving rise to the award of aggravated damages has increased the impact of the discriminatory act on the claimant.

36. In **HM Land Registry v McGlue** [2013] EqLR 701, the EAT warned that a Tribunal 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”.

ACAS Code of Practice

37. Section 207A of the Trade Union and Labour Relations Act 1992 provides:

> (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.
>
> (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that-

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

38. In this case, the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015) is relevant. The Code warns employers against unreasonable delay and talks of fairness and transparency.

39. In **Slade v Biggs** [2022] IRLR 216 the court set out the approach to take when considering an uplift by applying a four staged test:

(i) Is it just and equitable to award an ACAS uplift?
(ii) If so, what is the just and equitable percentage, not exceeding 25%?
(iii) Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what is the appropriate adjustment, if any, to avoid double-counting?
(iv) Applying a final sense check, is the sum of money represented by the percentage uplift disproportionate in absolute terms and, if so, what further adjustment needs to be made?

Caselaw provided by the parties

40. We are grateful to the parties for providing extensive caselaw to assist us with our deliberations. Apart from the cases cited above, we have taken account of all other cases referenced in the authorities bundle and the skeleton arguments of both parties.

Findings of Fact

(Numbers in brackets refer to the liability and remedy bundles).

Injury to feelings/personal injury

41. The Claimant was scared of catching Covid and the delay in assessing his vulnerability and risk added to his anguish. The undermining manner in which the Respondent communicated about the Claimant's duties to colleagues increased his distress. This was exacerbated by excluding him from ACAs, allocating him additional work without pay, delaying his grievance and not actioning his return to work in a timely manner.

42. The Claimant felt this was the worst period in his whole career. He lost inner peace and experienced severe pain and hurt regarding his standing and status within the hospital. Such was the impact that he was eventually referred for mental health treatment.

43. No expert medical evidence has been provided to the Tribunal, although there is an Occupational Health (OH) report and other medical records.

44. The OH report of 25 August 2020 (1156) says:

    "Mr Fahmy reports that he has been put under substantial work related pressure and as a consequence is experiencing stress related symptoms, impacting on him on a day-to-day basis, both at work and at home…….this is impacting on his health and wellbeing, and may impact on work performance in the longer term."

45. The Claimant's GP records show the first entry relating to stress at work on 21 August 2020 (p1244 & 1298). It states:

    "Covid situation has created new pressure on him as management is putting pressure on doing more work… feeling he might not be able to cope if this continues. Mood is ok but can be anxious. Using prn diazepam for this…"

46. On 27 November 2020 there is a record of diazepam being given for severe anxiety (1243), and on 25 May 2021 there is an entry (1241):

    "Still feeling stressed due to work situation, anxiety, disturbed sleep, less motivated, normal concentration, low mood, worry all the time….. Happy to start on citalopram".

47. On 25 May 2021 the Claimant was referred to mental health services (1255). The referral letter (1263) notes anxiety since August 2020 and stress at work. It states that since October last year his anxiety has become worse and he has developed low mood. ……..He has no suicidal thoughts and his concentration is normal…"

48. On 17 August 2021 there is an entry noting several teeth are exhibiting signs of stress fracture (1258), and throughout the notes there are several entries of high blood pressure (eg1238).

49. The Claimant's mental health records from the date of this referral to 10 January 2022 (1274-1297) show that he was devastated about the way he was treated at work and had been "..waking up, scared of what he'd wake up to, fear of what's going to happen…."(1276). His mood was subjectively and objectively recorded as anxious (1277) and his thoughts as "catastrophic in nature" (1281). He was waking up with palpitations (1282).

50. He had not been referred to mental health services previously (1278).

51. In June 2022, the Claimant was referred for Eye Movement Desensitisation and Reprocessing (EMDR) for PTSD with a Psychotherapist and underwent 10 sessions (1236-1237 & 1737). In August 2022 he was referred for counselling and undertook nine sessions (1737).

52. There is no formal mental health diagnosis or prognosis in the medical notes.

Aggravated damages

53. There was never any apology forthcoming from the Respondent for its infringements.

54. The Respondent purposefully withheld relevant information about the allocation of ACAs at the grievance hearings.

ACAs

55. We refer to our findings of fact in our written reasons on liability at paragraphs 84 to 99. Most relevantly, from March 2020 to September 2021 there were in the order of 21 virtual ACAs available, which the Claimant could have competed for. From 14 June 2021 (when the Claimant was cleared to do F2F work) to September 2021, there were about 30 F2F clinics, which the Claimant could have competed for.

56. As there were four consultants eligible for this work, the Claimant had a one in four chance of obtaining any particular ACA.

57. The pay for a four hour ACA session was £600. However, some ACA sessions were longer than four hours and attracted greater numeration. From the Excel spreadsheet K243, we make the following findings:

58. During the period Aug 2020 to Sept 2021 the following consultants did the following ACAs:

- Breahna worked 36 ACA sessions with an average payment of £706.00 per session
- Sharma worked 37 ACA sessions with an average payment of £1,104.00 per session
- Siddiqui worked 9 sessions with an average payment of £933.00 per session
- Fahmy worked 1 session and was paid £675.00

59. The total number of sessions overall as per the spreadsheet were 83. The total amount paid as per the spreadsheet was £75,336. Therefore, the average payment per ACA session for the period was £907.66.

60. Whilst this sum does not readily represent multiples or divisions of £600, for the purposes of ascertaining loss, we find the average paid out for an ACA session over the period was £907.66.

Additional unpaid work

61. There are no records showing definitively what additional work the Claimant performed during the relevant time period, which is from 27 May 2020, the date he stopped doing F2F work, to 20 August 2021, the date there was a change of decision maker (p1229).

62. Kevin Smith's witness statement (page 21, paragraph 14) provides a table, which sets out the number of patients the Claimant triaged on a month by month basis, taking data from the Respondent's e-RS records, which are

linked to the Plastic Surgery referral service. Mr Smith explained that, since providing the table, he was able to obtain more accurate data from the user ID card system now in place.

63. The table shows that from the beginning of May 2020 to the end of August 2020, the Claimant triaged 184 patients, and in addition to this, Mr Smith explained, a further 63 triages have been identified. Therefore, the total number of triages is 247 over this 15 month time period. We accept his evidence.

64. The Claimant was doing all the triaging for the four consultants. He would normally be on a rota, doing one in four triaging sessions, and so we have taken his contracted triaging during the period to be 247 ÷ 4 = 61.75, meaning that the additional triaging amounted to 185.25 triages (247 – 61.75). We have rounded this up to 186 additional triages.

65. We have limited information on how long a triage might take. However, the e-Referral Service data for 23 July 2021 (pp1228-1229) shows that the Claimant triaged 31 patients in 90 minutes, having logged on at 16.37 and logged off at 18.07. The average time taken for each patient amounts to 2.9 minutes or 2 minutes 54 seconds (90 ÷ 31). 186 additional patients would take 539.4 minutes (186 x 2.9) or 8.99 hours (539.4 ÷ 60), which we have rounded up to 9 hours.

66. The Claimant in his witness statement (p5, paragraph 18) explained that besides triaging, he also did additional GP referrals and associated administration. We accept there was further work over and above the triaging.

67. The Claimant puts the total amount of additional work, including triaging, at 12 hours per week. It is for him to prove this, yet there is no documentary evidence before us to substantiate such quantification and the Claimant has not given any specific details of the additional work said to have been done. Therefore, we do not accept that the Claimant worked an additional 12 hours per week.

68. The Respondent suggested that a reasonable approach would be an additional session per month, which amounts to 3.5 hours. Given the dearth of evidence, we accept that this broadbrush approach is fair and we find that the Claimant did 3.5 hours per month additional unpaid work during the times he was working.

69. The Claimant worked 42 weeks per year (see The Consultant Handbook p199- Annualization). This takes account of annual leave and study leave, which made up the rest of the time during the year. Therefore, over the roughly 15 month period (May 2020 to August 2021), he worked 52.5 weeks (42 + 10.5). This broadly equates to 13.125 months working (52.5 ÷ 4). At 3.5 additional hours per month, this amounts to a rounded up total of 46 hours over the 15 month period (13.125 x 3.5 = 45.94).

70. Splitting this 46 hour total over 15 months gives an average rate of 3.07 hours per month additional unpaid work, having accounted for a reduction for holidays and study time. This is the number of additional hours per month we find the Claimant worked without pay.

71. Turning next to the rate of pay, the Claimant says it was £150 per hour. He points to the rates paid to Consultants for cover during the junior doctors' strike (p1719) but these rates were only valid during strike periods from December 2022 to March 2023, and were not valid for administrative type duties. Neither were the ACA rates of £150 per hour payable, as these were high rates used only exceptionally for clinics and surgery, not for routine administrative tasks. Triaging and administrative work was not offered as ACAs.

72. We accept Kevin Smith's evidence that the Claimant would have been paid at his basic rate. We have considered the Claimant's payslips from May 2020 to August 2021, to ascertain his basic rate.

73. In May 2020, he was paid at the rate of £149.8525 for a 3.5 hour session (p1758) and this continued throughout June, July and August 2020 (pp1759-1761). This was a gross hourly rate of £42.815.

74. From September 2020 he was paid at the rate of £154.0490 per 3.5 hour session (p1762) and this rate continued through to August 2021 (1763-1773) This was a gross hourly rate of £44.014.

75. Therefore, for the four months of May, June, July and August 2020, the Claimant worked an average additional 3.07 hours per month at the gross rate of £42.815 per hour. This equates to £131.44 per month.

76. For the 11 months from September 2020 to August 2021, he worked an average additional 3.07 hours per month at the gross rate of £44.014 per hour. This equates to £135.12 per month.

Loss of private practice income

77. The Claimant in his witness statement (p6 paragraph 30) said that he was unable to undertake private work between 14 June and 30 September 2021 due to the Respondent's deliberate delay and obstructive approach in implementing a phased return to NHS work.

78. The Claimant was cleared to restart F2F clinics on 14 June 2021 and surgery 4-6 weeks later, which would be somewhere between 12-26 July 2021 (see OH report p834). He actually returned to F2F clinics with the Respondent on 6 August 2021 and to surgery on 16 September 2021. Therefore, his claim must be restricted to between 14 June 2021 to 6 August 2021 for clinics, and from 12 July 2021 (at the earliest) to 16 September 2021 for surgery. From 19 August to 1 September 2021 the Claimant was on annual leave.

79. In an email from his private clinic, Spire Health Care, dated 23 April 2021 (p1717), they informed the Claimant that they were looking to restart cosmetic surgery lists in June, and that they had reserved a number of sessions for him which spanned from June to December 2021. The Claimant emailed back on 17 May 2021 regarding the June list (p1718) saying: "I am not entirely certain that I will be utilizing the above list or have patients ready for it. So please feel free to release it and let's aim for the July list."

80. The 17 May was before the Claimant was cleared to restart F2F clinics. There is no subsequent correspondence disclosed with the Spire for 2021, and no

evidence of the Claimant telling the clinic he could not do the lists because he was not back doing F2F work with the NHS. There is a letter from the Spire dated 26 April 2022 (p1128) simply confirming that, following the Covid lockdown, the Claimant re-instigated his first private clinics and surgeries in October 2021.

ACAS uplift

81. There was an unreasonable delay in the grievance process. ACA information was deliberately withheld (see paragraph 99 of liability judgment written reasons) and the Respondent gave instructions not to admit or apologise for anything (685). These were the main problems with the process.

Claimant's submissions.

Injury to feelings

82. On the facts of the case, all the Claimant's losses claimed flow from the discrimination and detriments found. There is no other cause of the losses claimed.

83. The discrimination was serious and amounted to a campaign pushed forward by various individuals and was long term. An award of £40,000 is claimed.

Aggravated damages

84. The Claimant contends that the Respondent acted in a high-handed manner and refers to 1) there being no apology; 2) the identity of the individual responsible for excluding the Claimant from ACAs being hidden; 3) failures with disclosure obligations; 4) allegations that the Claimant was "very aggressive"; 5) attempts to impugn the Claimant's entitlement to losses from private practice work.

85. The Claimant claims £5,000.

Personal injury

86. The Claimant asserts that he has suffered moderate psychiatric damage, and pursuant to the Judicial College Guidelines, claims £15,000.

ACAs

87. The Claimant says he missed out on £43,379.40 worth of ACAs, as per his calculation in closing submissions.

Additional unpaid work

88. The Claimant claims £34,571.25.

Loss of private practice income

89. The Claimant claims £52,917.95.

ACAS uplift

90. The Claimant relies on delay, inadequate process, interference with process and lack of impartiality. He claims a 25% uplift.

Respondent's submissions.

Injury to feelings

91. The Respondent submitted that the Claimant in his witness statement relied on factors which have not been found to be acts of discrimination. Neither have they been found to be detriment. In this regard he says:

- Being accused of being "very aggressive" is one of the most hurtful things… not to mention her dismissive approach to all concerns raised (paragraph 36).
- Michelle Greene's lack of engagement with emails being very painful (paragraph 40).
- The Hostile meeting with David Coyle and Emma Taylor giving him daily flashbacks (paragraph 67).

92. Therefore, the Respondent suggests that the Tribunal should identify a rational basis to apportion the harm suffered.

93. Nonetheless, the Respondent accepts that the Claimant is due an award in the lower end of the upper Vento band, in the region of £30,000, which takes into account the nature of the allegations, duration and severity of impact.

Aggravated damages

94. The Respondent submits that the discrimination found proved does not fall into any of the categories for aggravated damages and should not be awarded.

Personal injury

95. The Respondent contends that the Claimant has produced no evidence of psychiatric injury beyond stress and injury to feelings. The Tribunal does not have: complete medical records, records from the Consultant Psychiatrist that treated the Claimant, any diagnosis, any prognosis, any expert evidence on causation, evidence of severity of symptoms.

96. In any event, there is a clear and obvious overlap between his injury to feelings and any personal injury, so that a separate award is not justified.

ACAs

97. The Respondent submits that the Claimant's loss was £7,950 as per the calculations in its closing submissions.

Additional unpaid work

98. The Respondent submits that a reasonable amount would be £2,424.76.

Loss of private practice income

99. The Respondent submits that there is no reliable evidence to support this claim.

ACAS uplift

100. The Respondent accepts that the Tribunal's findings of delay may amount to a breach of the ACAS Code, but that otherwise the Code was followed. It asserts that an uplift of 5-10% would be proportionate to the Tribunal's findings.

Discussion and Conclusions

Injury to feelings

101. Taking account of the eggshell skull rule, we accept from the medical records and Claimant's evidence that the Respondent's infringements caused the Claimant substantial injury to feelings. Both parties agree that the injury falls within the upper Vento band and the panel concurs.

102. Part of the injury was caused by acts and omissions that did not sound in discrimination or detriment. However, as the various acts and omissions were closely linked, the harm was indivisible. In any event, in broad terms, the Claimant would most likely have suffered a similar level of injury through the discrimination and detriment alone. Therefore, we take the view that there is no rational basis upon which to apportion damages.

103. Furthermore, in terms of causes of action, whilst there were various types of discrimination and detriment, they broadly arose out of similar acts and omissions, giving rise to conduct extending over a period. In those circumstances we are of the opinion that a composite approach to damages should be taken, as opposed to assessing each ground separately.

104. Having considered the extensive caselaw provided to us on quantum, we conclude that an award at the lower end of the upper Vento band is appropriate to cover stress, anxiety, depression, PTSD, and the symptoms which flowed from these conditions. Consequently, we award £30,000 for injury to feelings.

Aggravated damages

105. The fact that the Respondent has failed to apologise for its failures and the fact that it withheld evidence about the allocation of ACAs, caused the Claimant increased distress over and above the injury to feelings already compensated. The other matters raised by the Claimant, in general, were either not sufficiently linked to the discrimination/detriment found, or were simply a reasonable part of the Respondent's defence.

106. For the reasons given, we take the view that an additional award is merited and that an appropriate sum is £1,000, which is proportionate. This is the sum we award.

Personal injury

107. In this case it is not easy to separate the injury to feelings from any personal injury that might have occurred. In the absence of expert medical evidence, it is not possible to identify when the anxiety, depression and PTSD, crystalised into a recognised psychiatric illness, if at all.

108. Taking a step back and considering the level of damages awarded for injury to feelings, we conclude that the amount is appropriate without any additions for personal injury. Consequently, we make no award.

ACAs

109. The Claimant missed out on a one in four chance of undertaking 51 ACAs. This equates to a loss of 51 ÷ 4 = 12.75 ACAs. At an average payment of £907.66, the loss to the Claimant was 12.75 x £907.66 = £11,572.67.

110. We award £11,572.67 for this head of damages.

Unpaid additional work

111. The Claimant worked an additional 3.07 hours per month. For four months, this was at the rate of £42.815 per hour, amounting to £131.44 per month. For 11 months it was at the rate of £44.014 per hour, amounting to £135.12 per month.

112. 4 x £131.44 = £525.76

113. 11 x £135.12 = £1,486.32

114. This totals £2,012.08

115. We award £2,012.08 for this head of damages.

Loss of private practice income

116. There is no evidence to suggest that the reason the Claimant did not undertake private work was because of the delay in his return to NHS F2F work.

117. Consequently, we make no award for this.

Interest

118. There is no good reason not to award interest. Accordingly, for the financial losses, interest is awarded at 8% from the mid-point of the date of the discrimination/detriment to the date the tribunal calculated the award. For the injury to feelings and aggravated damages award, interest at the rate of 8% is awarded from the date of the discrimination/detriment to the date the tribunal calculated the award.

119. There have been several instances of discrimination/detriment from May 2020 to September 2021. Using our discretion, we have taken the date of the 7 May 2020 as the starting point, which was the date the Claimant's risk

assessment was signed off and should have been actioned. The end point is 22 March 2024, which was the date of the calculations.

ACAS uplift

120. There were problems with the grievance process in that it was significantly delayed, ACA information was withheld and there was an attitude of not admitting anything or apologising. However, in general, the Code was otherwise largely complied with.

121. We take the view that it would be just and equitable to award an uplift and that 10% would be proportionate and would avoid any overlap with the already substantial injury to feelings award. We therefore award a 10% uplift.

Recommendations

122. The Claimant has requested a number of recommendations, as set out in his closing submissions.

123. We recommend the following:

- The Respondent remove concerns from the Claimant's appraisal so that it is re-categorized as having no concerns.

- The Chief Executive of the Respondent apologises to the Claimant.

124. We do not recommend the following:

- The Respondent name the person responsible for removing the ACAs from the Claimant.

  This is because we have not found that any one person in isolation was responsible for removing the ACAs. The identities of those responsible may be disputed and could lead to difficulties enforcing.

- The Respondent identify all persons at Board level who are responsible for the conduct of this case and or who have approved the course of conduct against the Claimant.

  This is because we have made no findings identifying all those who were responsible at Board level, and responsibility may be disputed. This would lead to difficulties enforcing.

- The Respondent should train its staff, but in particular those specific individuals identified by the Tribunal as being responsible for the proscribed treatment endured by the Claimant.

  This is too broad a request in terms of the personnel it would cover. It is also too vague, as it does not specify what type of training is requested. Consequently, it is disproportionate and would be difficult to enforce.

Section 12A Employment Tribunals Act 1996

125. This was raised by the Claimant in closing submissions for the first time and the Claimant's Counsel conceded that it was an ambush and prejudiced the Respondent.

126. Putting issues of natural justice to one side, we take the view that the aggravating features in this case were not so serious as to justify ordering the Respondent to pay a penalty. Therefore, we make no order.

Total award and calculations

Injury to feelings including aggravated damages

127. Unadjusted award = £31,000

128. ACAS uplift at 10%

129. £31,000 x 10% = £3,100

130. Injury to feelings award with uplift = £34,100

131. Add interest

132. Number of days from 7/5/2020 to 22/3/2024 = 1,415 days

133. 1,415 x 0.08 x 1/365 x 34,100 = £10,575.67

134. Injury to feelings award including uplift and interest = £44,675.67

135. The first £30,000 is non-taxable.

136. This leaves £14,675.67 which is taxable and must be grossed up.

137. The Claimant is subject to a tax rate of 45%

138. The grossed up amount is calculated as follows:

139. 0.55 = 14,675.67

140. 1.00 = 14,675.67/0.55

141. Grossed up amount = £26,683.04

142. The total injury to feelings award is £30,000 + £26,683.04

143. = £56,683.04

Financial award

144. £11,572.67 (ACAs) + £2,012.08 (additional work)

145. Unadjusted award = £13,584.75

146. ACAS uplift at 10%

147. £13,584.75 x 10% = £1,358.48

148. Financial award with ACAS uplift = £14,943.23

149. Add interest

150. Number of days from 7/5/2020 to 22/3/2024 = 1,415 days

151. 1,415/2 x 0.08 x 1/365 x £14,943.23 = £2,317.22

152. Financial award including uplift and interest = £14,943 + £2,317.22

153. = £17,260.22

154. The financial figures have been based on the Claimant's gross rate of pay. Consequently, there is no need to gross up.

155. Accordingly, the total award is £56,683.04 + £17,260.22

156. = £73,943.26

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Employment Judge Liz Ord

Date: 28 March 2024

JUDGMENT SENT TO THE PARTIES ON

Date: 18 April 2024

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FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions
Judgements and reasons for the judgments 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.

ANNEX

Agreed List of Issues – Remedy

4. Remedy for Detriment

4.1. What financial losses has the detrimental treatment caused the claimant?
4.2. Has the claimant taken reasonable steps to replace any lost earnings?
4.3. If not, for what period of loss should the claimant be compensated?
4.4. What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?
4.5. Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?
4.6. Is it just and equitable to award the claimant other compensation?
4.7. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
4.8. Did the respondent or the claimant unreasonably fail to comply with it?
4.9. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

8. Remedy for discrimination or victimisation

8.1. Should the Tribunal make a recommendation? What should it recommend?
8.2. What financial losses has the discrimination caused the claimant?
8.3. Has the claimant taken reasonable steps to replace lost earnings?
8.4. If not, for what period of loss should the claimant be compensated?
8.5. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
8.6. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
8.7. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
8.8. Did the respondent or the claimant unreasonably fail to comply with it?
8.9. If so is it just and equitable to increase or decrease any award payable to the claimant?
8.10. By what proportion, up to 25%?
8.11. Should interest be awarded? How much?
8.12. Should the Tribunal award aggravated damages? If so, how much?