EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4118429/2018

Hearing Held by CVP on 23 May 2024 and 23 August 2024

Employment Judge Hendry
Tribunal Member A Sillars
Tribunal Member F Parr

Mrs L McNicholas	**Claimant** **Represented by:** **Mr H Menon, Counsel**
Care And Learning Alliance	**1st Respondent** **Represented by:** **Mr L G Cunningham, Advocate**
Cala Staffbank	**2nd Respondent** **Represented by:** **Mr L G Cunningham, Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is as follows:

1. The First Respondent shall pay to the claimant a monetary award of Three Thousand and Fifty One Pounds and Sixty Eight Pence (£3051.68) for past loss of earnings made up as follows:

   a) the sum Two Thousand One Hundred and Sixty-One Pounds and Ninety-Five Pence (£2,161.95) (being made up of £2059 for past loss of earnings which sum being subject to an ACAS uplift of 5% (£102.95)) together with £889.73 interest.

2. The Second Respondent shall pay to the claimant, a monetary award of Fifteen Thousand, Nine Hundred and Twenty Seven Pounds and Seventy Six Pence (£15,927.76) made up as follows:

   a) the sum of £10,776 for past loss of earnings which shall be subject to an ACAS uplift of 5% totalling £11,314.80 (£10,776 + £538.80) together with the sum of £4612.96 interest.

3. The First and Second Respondents shall pay to the claimant monetary awards, made up as below noted, and shall be liable jointly and severally therefore:

   a) the sum of Seventy-Five Thousand, One Hundred and Twenty Four Pounds and Ninety Six Pence (£75,124.96) as past loss of earnings to which interest was added of £9551.30

   b) the sum of Thirty Thousand, Five Hundred and Eight Four Pounds and Sixty Two Pence (£30,584.62) in respect to injury to feelings with interest to the date of the Judgment of £10,584.62 and then at 8 per cent until payment;

   c) the sum of Twenty-Four Thousand Four Hundred and Sixty Seven Pounds and Sixty Nine Pence (£24,467.69) in respect to solatium for psychiatric injury including interest to the date of the Judgment of £8,467.69. and with interest at 8 per cent per annum until payment;

   d) the sum of Three Thousand, Seven Hundred and Thirty-Six Pounds and Fifteen Pence (£3,736.15) in respect of the shortfall in National Insurance contributions;

   e) the sum of Twenty-Eight Thousand and Five Hundred and Fifty Three Pounds and Eight Five Pence (£28,553.85) as legal expenses for the

Employment Tribunal liability hearing of £20,000 with interest of £8,553.85 to the date of the Judgment;

f) the sum of Fifteen Thousand, Four Hundred and Eight Two Pounds and Forty One Pence (£15,482.41**)** made up of £11,902.50 in respect to her legal expenses for the GTCS referral and interest (£3579.91);

g) the sum of Five Thousand, Four Hundred and Thirty One Pounds and Fifteen Pence (£5431.15) in respect of legal expenses incurred in relation to Judicial Review including interest of £931.15.

h) the sum of One Thousand Eight Hundred and Sixty Pounds (£1860) being the fees for Dr Moosa's attendance at the remedy hearing on 24 May 2024 together with interest to date;

i) the sum of Eleven Thousand, Nine Hundred and Two Pounds and Fifty Pence (£11,902.50) in relation to her legal expenses defending the GTCS proceedings which included interest of £3,310.73;

j) the sum of Eleven Thousand Nine Hundred and Two Pounds and Fifty Pence (£11,902.50) in reimbursement of her legal fees for defending the proceedings before the GTCS.

REASONS

1. The Employment Appeal Tribunal remitted this case back to the Employment Tribunal to reconsider the issue of remedy. On 26 September 2003 it made the following Order:

> "*ii. remitting the case to the same Tribunal for it to (a) reassess future loss, injury to feeling and psychiatric injury: (b) reconsider the claims for pension loss and legal costs incurred in defending the GTCS proceedings: (c) reconsider the claim for expenses in respect of liability hearing: (d) consider the issue of an ACAS uplift: and (e) consider the issue of grossing up for tax.*"

2. Prior to the remedy hearing a supplementary bundle was lodged by parties. The claimant had lodged an updated detailed annotated Schedule of Loss. This was revised by the claimant's Counsel in the course of the hearing. The respondents' Counsel, Mr Cunningham, also helpfully provided the

Tribunal prior to the hearing with a document headed "Summary Principal Areas of Dispute for the Respondents" which set out their position essentially in response to the Schedule.

3. Included in the bundle were three Witness Statements provided by the claimant in support of the Schedule and supporting documentation. The claimant's representatives had also obtained an up-to-date medical report from her Consultant Psychiatrist Dr H Moosa. The report was dated 7 April 2024.

4. Both Mr Menon, Counsel for the claimant and the respondent's Counsel took the Tribunal through the issues that the Tribunal had to consider setting out their respective positions. Accordingly, we do not see the need to set out their submissions separately but will refer to appropriate submissions when coming to address particular heads of claim.

Agreed Matters

5. It was accepted that the claimant did not appeal against awards 1 and 2 of the original remedy judgment. These remain in force. The claimant did not appeal against the decision not to make an award for loss for Occupational Pension rights. In addition, there was no appeal against the Tribunal Judgment in relation to it not awarding a basic award. These matters were not issues for reconsideration by the Tribunal.

6. Mr Cunningham indicated that the charging rates for an agents and Counsel in respect of the expenses claimed were not challenged and overall no objection was taken to the figure of £20,000 as expenses in the original Tribunal hearing which took place over a number of days at the Tribunal venue in Inverness. However, it was not conceded that an award should be made. He also indicated that the calculations in relation to State Pension shortfall were accepted. More generally apart from the matters we mention

the calculations and in general the underlying assumptions in the Schedule of Loss were not matters of dispute.

7. It was also agreed that if the Tribunal awarded future loss of earnings the appropriate withdrawal figure for accelerated payment would be .75.

Evidence

8. Neither the claimant nor Dr Moosa were cross examined following their evidence. We found them both credible and reliable witnesses. In particular we accepted the claimant's evidence set out in her three witness statements.

9. We take account of our views reflected in both the original liability and remedy Judgment and have supplemented the findings in fact there on the basis of the up-to-date evidence we have now heard.

Additional Findings in Fact

10. The claimant intended remaining in employment until at least the age of 67. Prior to her resignation the claimant had been spoken to by Kelly Sutherland a manager with the First Respondent and encouraged to apply for a role as Childhood Practice Manager. This was a senior role.

11. Following the receipt by the claimant of a Notice of Investigation from the GTCS on the 9 July 2018 (p264-265) the claimant realised that an adverse finding by the GTCS would mean the end of her career in teaching. During the currency of the referral the Investigators from the GTCS recommended that the claimant should be referred to the Scottish Ministers under the Protection of Vulnerable Groups (Scotland) Act 2007 because of alleged emotional harm to children. The claimant was devasted by these events.

12. On receipt of the Notice the claimant sought legal advice and representation in relation to the GTCS referral. This included instructing Counsel. The claimant tried to bring the application to a close by bringing a Case Cancellation application to the GTCS in November 2021 but was unsuccessful.

13. In the course of the proceedings the Presenting Officer, the legal adviser to the GTCS, refused to admit the Employment Tribunal's Judgment in evidence. Evidence recorded in the Tribunal Judgment was from either those initiating the complaint against the claimant or potential witnesses. The claimant argued that their evidence had changed in their submission to the GTCS from the position taken at the Tribunal. The claimant raised Judicial Review proceedings in the Court of Session against the decision not to allow the panel access to the Employment Tribunal Judgment. These proceedings were successful and an Interlocutor was pronounced on the 8 April 2022 in the claimant's favour (p729). The Interlocutor also decerned against the GTCS in taxed expenses. The claimant recovered expenses of £900 plus VAT.

14. The GTCS proceedings were finally cancelled on the 18 April 2023. The claimant was represented by Counsel at the initial Panel Meeting, (26/8/2020), a discharged Procedural Hearing (21/6/2021), a reconvened and Procedural Hearing (12/10/2021). The claimant has incurred legal expenses defending the GTCS referral in the sum of £11,902.50 (p483-485 and 634-637).

15. The claimant has been treated for depression and anxiety arising from these events and from the events leading to termination of her employment by the First and Second Respondent and the referral to the GTCS. She has experienced symptoms of inability to sleep and panic attacks. It has affected her concentration and self-esteem. The condition has been persistent. Her mental health has deteriorated since May 2021. The condition, diagnosed initially as an Adjustment Disorder and now referred to as Mixed Anxiety and Depressive Disorder, which has not improved. She continues to require medical intervention and it is envisaged that she will require intense

psychological therapy. She remains unwell and unable to work as at the date of the remedy hearing. Her medical adviser's prognosis is that the condition will not improve until the end of legal proceedings.

16. The claimant is unable to immediately return to teaching, if she was well enough to do so because of her long absence from class teaching. She requires to undertake a professional learning plan or undergo an accredited course (p608). To return to teaching in England it is recommended by her professional body that she volunteers to work at a school for a period or works as a teaching assistant for a period of time. The teaching assistant role is unqualified. The claimant is disadvantaged in obtaining a full time post both because of the referral to the GTCS, the circumstances around the termination of her employment by both Respondents and because she is close to retirement age. It may take some time after she has recovered sufficiently to work to identify a school that would allow her to train or volunteer to become eligible to work. She will then have to identify a suitable vacancy.

17. The claimant remains unemployed as at the date of the hearing.

18. The claimant remains unwell and unable to work as at the date of the hearing.

Areas of Dispute

19. The principal area for dispute between the parties was whether or not the Tribunal should make a whole life award in relation to future loss of earnings. Mr Cunningham pointed out that such cases are rare and such an approach is only appropriate where there is no real prospect of the employee ever obtaining employment (***Wardle v Credit Agricole*** [2011] ICR 1290 para 50). His position was that the period of future loss should be identified on the basis of the Tribunal's assessment of when it considers the claimant would be fit for work and likely to obtain employment. He argued that 12 months would be an appropriate period starting with the date of

today's hearing. He submitted that this was consistent with Dr Moosa's updated report and his expressed view that the ending of legal proceedings should lead to the claimant recovering.

20. In response Mr Menon accepted that a whole career award might not be appropriate. However, he pointed both to the seriousness of the claimant's condition, its persistence and the practical difficulties she was going to encounter in obtaining work. He reminded us of her current age and the difficulties set out in her witness statement that she will encounter obtaining employment. This would potentially require her to requalify in some way.

21. Mr Cunningham pointed out that the claimant did not appeal the failure to award a sum for loss of Occupational Pension.

Future Loss

22. Mr Menon referred the Tribunal to the claimant's Witness Statement and to the supporting documentation in the Bundles. The claimant could readily have returned to teaching and earned a salary in the high forty thousands. The basis of calculation was clear. Mr Cunningham while not doubting the claimant's sincerity asked us to be cautious about accepting this. It would in his submission be open to us to look at the claimant's more modest earnings at the time of her dismissal and use this as guide for loss of earnings.

Expenses for GTCS/Judicial Review

23. Mr Menon explained that the claimant sought recovery of her legal expenses involved in the GTCS proceedings that had occurred as a consequence of her being reported to the organisation by her employers. He submitted that it had been accepted that these losses flowed from their illegal conduct.

24. Mr Cunningham's position was that the appropriate forum for the claimant to have sought recovery of those expenses was the GTCS itself. In his submission this was a situation where the claimant had failed to mitigate her loss. He made reference to Rule 1.10 of the GTCS Rules which provided for such an award. Turning to those rules he explained that an award could be made when a party has acted unreasonably. The parties are defined as the GTC Scotland or the Presenting Officer and the Teacher and accordingly an award from the GTCS to a Teacher was within the scope of the Rules.

25. In the claimant's case for Judicial Review in the Court of Session it had found the GTCS had acted unlawfully by failing to follow the rules and refusing and ruling that certain documents were inadmissible. He submitted that such conduct was unreasonable in terms of Rule 1.10 and the claimant would have been more likely than not to have recovered expenses. The claimant had failed to mitigate her loss in that respect. In relation to the actual expenses claimed he pointed out that certain items were disputed namely items 2 and 3 (p633) (these relate to work in relation to the Judicial Review). He referred to the Judicial Review and suggested that as the application had been successful there should have been no bar to recovering expenses in that action.

Expenses of the Tribunal Proceedings

26. Mr Menon referred us to the Schedule. He also sought payment of the expenses of the ET claim. He submitted that the Respondents had both acted unreasonably. They had been aware that their complaints were unfounded and frivolous. Mr Cunningham's position regarding the expenses were that these were still the exception rather than the rule in ET proceedings. He adhered to the Tribunal's reasoning contained in the Judgment. His submission in brief was that expenses are the exception rather than the rule. In most cases the unsuccessful party will not be ordered to pay expenses (***MacPherson v BNP Paribas (London Branch)***

[2004] IRLR 558 paras 2 and 5). Something special or exceptional is required before an award can be made (***Salinas v Bear Sterns International Holdings (Inc) UK*** (EAT/0596/04 DM). In considering whether a party's conduct was unreasonable in terms of Rule 76(1)(a) the Tribunal should adopt a reasonable responses approach to the respondent's conduct of the proceedings (***Solomon v University of Hertfordshire*** UKEAT/0258/18). Where something special exists the Tribunal still has the discretion whether or not to make an award (***Benyon and others v Scadden*** [1999] IRLR 700).

Injury to Feelings/Psychiatric Injury

27. Counsel for the claimant began by pointing out that the claimant had set out in the Schedule the basis on which such an award of expenses was being claimed. This was an exceptional case with profound impacts on the claimant. An award of £35,000 for injury to feelings was justified. He addressed the issue of double counting and turned to the issue of psychiatric injury. He referred us to passages from Kemp and Kemp (p567-570) in relation to qualifying psychiatric injury specifically to depressive and anxiety conditions. The claimant should be placed in the moderately severe category. She will have suffered a psychiatric condition in total for 7 years before anticipated recovery. The sum of £35,000 was in his submission easily justifiable and an award of £25,000 which was sought would be appropriate in the round. He referred to the case of ***Marsh*** and ***Zeromska-Smith*** cited by the authors. Both of which he suggested had some similarities with the situation we were dealing with. The awards there need to be uprated for inflation before being considered.

28. The Respondents' position was that the award should be in the middle of the three *Vento* bands and the detriments should be considered as a whole. Counsel observed that they covered a relatively short period of time and are not apt to be categorised as a campaign of wrongdoing against the claimant. The Tribunal should be aware of double counting as between the

award for injury to feelings and the award for psychiatric injury. In Mr Cunningham's submission the case was within the moderate category on the general scale (SB569). Dr Moosa's opinion was that the claimant's condition has continued due to the ongoing litigations. These are now at an end. The prognosis is therefore positive and these factors required to be reflected in any award.

29. The Tribunal, Mr Cunningham continued, should consider the absolute value of the award as that absolute value is likely to be significantly large bearing in mind that in fixing on the amount which it considers just and equitable the Tribunal must have regard to justice and equity for both parties (***Acetrip v Dogra*** UKEAT/0238/1B/BA) at paragraphs 103.

ACAS Uplift

30. The claimant sought an uplift. This was a case where the Respondent's witnesses lied. Mr Cunningham interjected that there were findings in the Judgment critical of the Respondent's witnesses but the Tribunal had not gone this far. Mr Menon's response was that it was accepted that the referral to the GTCS was malicious and as one could not be malicious by accident this demonstrated that they had lied at an earlier point during the events leading up to the dismissal.

31. Mr Cunningham pointed out that this was an ''automatic'' unfair dismissal claim. It was not clear that the Code was engaged. In relation to the grievances these were post termination events. The sums here were large and if a high percentage increase was awarded this would not be just and equitable. There was guidance for the Tribunal in the cases of ***Acetrip Ltd v Dogra, Jhuti*** and ***Slade v Briggs***.

Discussion and Decision

32. It was agreed that once the Tribunal had fixed the amount for the award for future loss and the other awards a draft of the Judgment would be sent to parties to allow consideration of grossing up for tax purposes which could then be reflected in the final issued Judgment.

Pension Loss

33. The first issue raised was whether we were to reassess pension loss. Mr Menon referred us to the wording both in the Appeal Judgment and in the Order. He referred to page 7 and paragraph 5 of the updated Schedule of Loss. Mr Cunningham's position was that the failure to award Occupational Pension Loss had not been appealed. Mr Menon's secondary position was that if it was not to be reassessed the Respondents should not get credit for the lump sum the claimant actually obtained by commuting her Teacher's Pension.

34. The EAT do not seem to have been addressed on pension loss specifically and the Judgment there can only rule on matters that have been appealed. The Grounds for Appeal (p720) are silent on that matter. In addition, the Judgment set aside paragraph 3 of our Judgment which contains no reference to Pension Loss. In these circumstances we concluded that we cannot reopen this matter. Separately, however, when calculating future loss of earnings credit had been given in the Schedule of Loss for receipt of pension which Mr Menon argued must now come out if we did not make an award for loss of Occupational Pension. (This is at Calculation 5 of the Schedule of Loss). Mr Cunningham conceded that it must be left out of account.

Expenses GTCS/Judicial Review

35. We considered the claim for the expenses of the claimant having representation at the various GTCS disciplinary hearings. There was no issue that these were not important hearings and that the claimant was well

advised to have representation at them. Her career was at risk. These proceedings followed on the actions of the respondents in reporting the claimant to the GTCS which we held to be a detriment (p644). We can also accept that given the career ending implications of any disciplinary finding and the fact that Mr Menon was well placed as the Counsel that had dealt with initial Tribunal proceedings to represent her there, given the genesis of the complaint and the Tribunal findings which surprisingly the GTSC was unwilling to consider, it does appear to us that following the guidance provided by the Employment Appeal Tribunal that these are losses that flowed from the actions of the employers.

36. We considered carefully Mr Cunningham's submission that these expenses could have properly been recovered through the GTCS proceedings themselves which provide for expenses against a party with the GTCS itself being regarded as a party for those purposes. This was on the face of it an attractive submission but one that we ultimately rejected. The Rules refer to a party whose conduct has been ''vexatious, non-compliant…or otherwise unreasonable – and has resulted in increased expenses being incurred''. We are not wholly convinced that this Rule completely mirrors the Tribunal's own Rules. For example, it seems to suggest that there has to have been a situation that has resulted in ''increased'' expenses'' before an award is made and does not clearly say that where proceedings have been wrongly initiated there should be an award. But even if we are wrong in this from the view point of the GTCS we are unsure where the unreasonable behaviour occurred except perhaps in relation to the matter that led to Judicial Review. We were given no guidance as to whether such an award, in favour of a party, is common or in what circumstances it is made other than the reference to the terms of the Rule. Mr Menon was somewhat disparaging about the suggestion that the GTCS would pay expenses saying that his understanding from his instructing agents was that expenses would be opposed ''tooth and nail''.

37. We concluded that the GTCS would no doubt say that a complaint was made, assessed as not being on the face of it frivolous or minor and that

they proceeded to initiate proceedings and that in itself was not unreasonable. We would observe that in realty given their clear reluctance to look at the *bona fides* of the initiating complaint and the evidence given to the Tribunal by those still pursuing the complaints, requiring the claimant to raise Judicial Review proceedings to allow the Panel to see the ET Judgment, we are not at all confident that any application by the claimant for expenses would have been treated sympathetically or ultimately have been successful. We can imagine that their legal advisers who no doubt gave the panel advice about the admissibility of Judgment would be unlikely to accept that their advice led to panel acting unreasonably. Standing back and looking at the process overall they were entitled to accept a complaint that appeared on the face of it valid to initiate proceeding that they believed to be in the public interest and in accordance with the functions of the GTCS. The issue of the refusal to allow the panel to see the Judgment, although wrong, should not detract from the overall process and we think is separable.

38. It is clear from the claimant's witness statement that attempts were made to recover expenses in the Court of Session proceedings. Traditionally expenses recovered on a party/party basis are lower than those of solicitor/ client. This appears to be the case here somewhat undercutting Mr Cunningham's argument. The claimant's evidence on this matter was unchallenged. The claimant in her Statement indicates that £900 plus VAT was recovered in the Court of Session proceedings leaving a balance of £4500.

39. Accordingly, our view is that we are prepared to award expenses relating to the GTCS proceedings and the Judicial Review. The legal expenses involved in preparation and for Counsel's attendance at the actual GTCS hearing were not individually examined. As we noted above they are in our estimation properly recoverable by the claimant as being losses flowing from the respondents' actions. The claimant sets these out in her witness statement (page 32).

40. The fees sought are Counsel's fees and helpfully Mr Cunningham indicated that the level of fees was not an issue. The fees are detailed in the Joint Bundle at pages 481 onwards. The claimant cannot recover VAT. The fees that are appropriate are shown in the Statements dated 7/1/2020 at (p481), and the highlighted fees in the statement dated 13/4/2021 (p483-485). The solicitor's fees are set out in the Joint Bundle at page 633. These sums total £11,902.50.

Expense of Tribunal Proceedings

41. The Tribunal had considered the question of expenses in the original proceedings (p689-713) at paragraphs 47 onwards. We refreshed our memory both in regards to what we said there and in relation to the original liability Judgment (p642 onwards). The cost of the proceedings was clearly considerable and the claimant ''capped'' these at £20,000 (p480).

42. That part of our Judgment was, however, subject to a successful appeal. The Judgment of the EAT whilst remitting back the issue of compensation and expenses makes no specific reference to this issue in its' own Judgement. We accordingly had regard to the Numbered Grounds of Appeal and to ground 3 which touched on the matter (p726). This mostly addresses the issue of the GTCS expenses. The paragraph also refers more generally to the grounds of appeal in paragraph 1.2. In essence the claimant's Counsel argued there and before us that we did not have sufficient regard to our own findings, that there was ''no genuine cause for concern'' about the claimant's practice and that the referral was retaliation for the claimant's whistleblowing. He suggested defending the proceedings on the merits was unreasonable as was the conduct of both respondents.

43. We noted that there had been no costs warning. We noted that we had concluded that the actions in reporting the claimant to the GTCS was unjustified and described as being ''malicious''. We considered carefully what we had said about the witnesses in the liability Judgment (p672 paras 102-104). We found that two of the witnesses were ''unimpressive'' and

appeared to be bent on ‘‘appeasing’’ the Council and that one witness was ‘‘evasive and truculent’’. We also recalled that the claimant had accepted that she had got some things wrong (p712). We noted that there was no issue taken about the manner in which the proceedings themselves were conducted.

44. Expenses or costs can be awarded if a party is held to have acted unreasonably. This rule if often invoked when a party acts unreasonably causing delay and cost to another party. However, unreasonable conduct encompasses a wide range of possible behaviour. We considered the proceedings as a whole. Whether it is unreasonable conduct when a party has been truthful or not in proceedings was considered in the case of ***Daleside Nursing Home Ltd v Mathew*** EAT 0519/08. A costs award was upheld in a situation where a claimant made untrue assertions, described as wholly unsubstantiated, of sex discrimination. However, in the case of ***Kapoor v Governing Body of Barnhill Community Hight School*** EAT 0352/13 the EAT stated that expenses should not be automatically awarded simply because of false evidence. On the other hand in the case of ***Topic v Hollyland Pitta Bakery*** EAT 0523/11 it was held that lying was not a minimum threshold.

45. We did not specifically say in the liability Judgment that some of the witnesses lied as Mr Cunningham correctly pointed out although we were highly critical of their evidence and motives. Mr Menon was correct that on a close reading of what we said in relation to alleged wrongdoing by the claimant implied that the witnesses were deliberately not telling the truth. He pointed to the use of language and the deliberate nature of the illegal wrongdoing that constituted the detriments here.

46. On reconsidering this matter we concluded that there were exceptional features to the case and that in the claimant’s Counsel’s words the respondent’s staff had ‘‘stitched her up’’ to protect their organisations relationship with Highland Council and to give evidence that they knew was untrue and exaggerated. Accordingly, we concluded that the threshold had

been reached to engage the Rule that defending the proceedings on liability was unreasonable in all the circumstances. We accordingly award the claimant the restricted expenses she has sought in the sum of £20,000.

Dr Moosa's fees

47. An additional issue arose during the course of the hearing. The claimant's Counsel Mr Menon sought the expenses of Dr Moosa attending the hearing. The exact correspondence between the solicitors was not available on the day but was later passed to the Tribunal. This matter arose from the fact that neither the claimant nor Dr Moosa were cross examined. Dr Moosa had prepared an updated report which had been disclosed to the respondent's agents some time before the hearing. We do not believe the chronology of events is disputed. Orders were promulgated for the preparation of an updated medical report for the remedy hearing set down for the 23 May. The claimant's solicitors wrote to the respondent's agents enclosing the report on the 19 April and reminding them that they had 7 days to put additional questions to him. There did not seem to be a response to this. On the 9 May the claimant's lawyers wrote again noting that no questions had been put and asking as a matter of urgency whether Dr Moosa had to attend to give evidence.

48. The Tribunal received an email from Mr Menon effectively on the morning of the hearing asking for certain preliminary matters to be canvassed and indicating that they had been told at 1.28 pm that day by the respondent's solicitors that they did not require Dr Moosa's attendance. They had not indicated that the report could be agreed. By this point Dr Moosa had no doubt cleared his schedule for the day in anticipation of giving evidence.

49. Mr Cunningham although unaware of the precise correspondence indicated that the papers had been sent to him for consideration and it had only been following his review of those papers that a decision was taken not to cross examine Dr Moosa. He opposed the application for expenses. The

respondents were in his view entitled to instruct Counsel and it was through no fault of either that the decision was made when it was.

50. While we have no criticism towards Counsel who appears here today. He no doubt dealt with the matter as speedily as he could in the circumstances in which he was instructed but that was not in our view a complete answer to the charge of acting unreasonably. He did not say he had been asked to urgently consider Dr Moosa's attendance as an urgent preliminary. The Respondents instructed competent solicitors, they profess expertise in employment matters and the case was being dealt with by a senior member of staff. When the medical report was disclosed and the issue of putting questions to Dr Moosa arose that was the opportunity to consider if his evidence was to be accepted or not. The starting point was perhaps the Tribunal's comments on his earlier report (p689) where we accepted the basis of his report observing that we found him ''a careful thoughtful witness'' who was credible and reliable. The respondents did not lead any alternative medical evidence. The basis on which the updated report could be challenged was perhaps narrow. In any event our view is that the respondents' agents should have considered whether he required to give evidence at that stage and if they felt that matter was something they could not do then Counsel should have been pressed to address this issue urgently given the proximity of the hearing and the knowledge that if his report was not accepted then he would have to attend to give evidence and that this would undoubtedly be costly. Where skilled professional witnesses are to give evidence, particularly Doctors who have other pressing responsibilities, it is important for professional advisers to consider whether they need to give evidence or if there are no matters of dispute for that evidence to be agreed and their attendance excused.

51. The appropriate rules that apply here are Rules 75 and 76. Rule 76 is in these terms:

*''**When a costs order or a preparation time order may or shall be made***
76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that— (a) a

party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted…''

52. Applications for expenses as noted earlier are still not common in Employment Tribunal cases and awards are the exception rather than the rule. The number of applications which are through the fault of agents handling cases is even more rare. However, the Tribunal considered the circumstances that had occurred in the case of ***Jones v Standard Life Employee Services Ltd*** UKEATS/0034/13 where agents were held to be at fault in not seeking an earlier adjournment of a hearing causing the other party to prepare for the hearing which was then adjourned. We acknowledge that each situation turns on it's own merits but Tribunals expect a high degree of cooperation between parties, especially when represented by solicitors in furthering the overriding objective. The Rule specifically makes reference to saving expense and it must have been apparent that having Dr Moosa attend would, be costly and would entail him setting aside his normal practice to be available to give evidence to the Tribunal. The Rule ends in these terms ''….*The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal''*.

53. In these circumstances the claimant was left with the not inconsiderable fee of £1800 to pay for his attendance. There was no application for us to consider ability to pay. This could and should have been avoided and the failure to indicate that the evidence was unchallenged, necessitating his attendance, was unreasonable in our view.

ACAS Uplift

54. The power of the Tribunal to adjust awards, the so-called ACAS uplift is contained in the Trade Union and Labour Relations (Consolidation) Act 1992:

"***207A Effect of failure to comply with Code: adjustment of awards***

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

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

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

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

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

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

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

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

(c) that failure was unreasonable."

55. The factual position was that the Tribunal found that the First Respondent had forced the claimant to resign and the Second Respondent had dismissed the claimant for whistleblowing. We also found that the claimant had submitted grievances which had been ignored (P671 paragraph 99). Mr Cunningham submitted that the Code had limited applicability here and did not appear to have been engaged in relation to the actions of the First Respondent in dismissing.

56. The EAT in the case of ***Rentplus UK Ltd v Coulson*** [2022] EAT 81 in which the EAT held that an uplift of 25% made by a Tribunal should be upheld where a redundancy process was a sham. In that case the EAT suggested that the Tribunal ask itself the following questions: ‘‘1) Is the claim one which raises a matter to which the ACAS Code applies, 2) Has there been a failure to comply with the ACAS Code in relation to that matter, 3) Was the failure to comply with the ACAS Code unreasonable, 4) Is it just

and equitable to award an uplift because of the failure to comply with the ACAS Code and, if so, by what percentage, up to 25%''.

57. This was a case where the operation of the Code was perhaps not particularly obvious and the Respondents argued that the case was a redundancy case and not a misconduct case which would trigger the application of the Code. This was rejected.

58. It would be fair to observe that the Code sets out the requirements for a fair process and can be viewed as being more often applicable where there has been some departure from procedural fairness. However, as this case makes clear the Code can have wide application. In the present case the claimant was summarily dismissed by the Second Respondent. We deal with this and her subsequent grievances which were not concluded on the basis that she had left the organisation at paragraphs 98 and 99. Mr Menon urged us to accept that if the dismissal was to appease the Council and therefore a 'sham' then the Code was engaged.

59. We considered our findings. In particular paragraph 140 of the original liability Judgment (p685). There was no formal disciplinary hearing and the claimant did not get to consider the evidence being used by the employers. We were mindful that the Code provides that a disciplinary hearing should have these basic elements: ''• Establish the facts of each case • Inform the employee of the problem • Allow the employee to be accompanied at the meeting • Decide on appropriate action • Provide employees with an opportunity to appeal".

60. It seems to us that there are three basis on which the Code was engaged. The first is that the dismissal was a sham. We held that the dismissal was because of the earlier protected disclosures. Secondly the actual disciplinary hearing was not approached with an open mind. We did not describe the meeting as a 'formal disciplinary hearing'. The claimant was not given the evidence to consider and was not accompanied. Thirdly, the grievances were ignored.

61. We considered the guidance given in the case of ***Acretrip*** to which we had been referred. That case in turn drew on earlier decisions in ***Chagger v Abbey National Plc & Anor*** [2010] ICR 397 (CA) and ***Wardle v Credit Agricole Corporate & Investment Bank*** [2011] ICR 1290. At paragraph 100 we noted the following:

> "*100. Under the 2002 regime, the starting point, in a case where the uplift provisions were engaged, was an uplift of 10%, but a Tribunal might award less if there were exceptional circumstances. In Chagger the Court considered that the absolute value of a large award might constitute such circumstances. The Court in that case (at paragraph 102) observed that Parliament could not have intended the sums awarded to be wholly disproportionate to the nature of the breach. In Wardle, the Court was concerned with the power, under that same regime, to make an award of up to 50%, if thought just and equitable. At paragraph 15 Elias LJ (Smith LJ and the Master of the Rolls concurring) said: "The principle of proportionality is equally applicable in those circumstances. The size of the award sought in an appropriate case to be a factor informing the tribunal's determination of what is just and equitable under that provision. No doubt in most cases where the compensation is modest it will not affect the tribunal's analysis. But in other cases, it can be a highly material consideration."*

62. We take account of the submissions made. This does appear to be an unusual case and we paused to consider whether any uplift should be made. However, the power to make such an award was given by Parliament to mark, as it were, an employer's failure to adhere to the principles in the Code which should inform employer/employee relationships. The employers acted badly and there was no fair disciplinary process. We accepted that employers were not acting in good faith. While we accept that this should not lead to a disproportionately large award or a windfall but we accept that in principle an award should be made and that 5% is appropriate given these serious failings. This must then be applied to the award for unfair dismissal payable by the Second Respondent. This is £2161.95 (£2,059 +£102.95).

Future Loss of Earnings

63. The claimant was diagnosed with having an Adjustment Disorder triggered by the events in May 2018. We reconsidered this matter both in the light of our original findings and in the light of the most up to date evidence before us. Sadly, there has been a deterioration in the claimant's mental health. We noted that Dr Moosa in his updated report said as follows:

> *"6.5 It is difficult to give an exact prognosis at this moment in time. However, I am of the firm opinion that the symptoms will not improve until the end of the legal proceedings. Thereafter, I believe that she will require intense psychological therapy with CBT and/or EMDR therapy. She probably will require treatment for between 18-24 months. She will need to continue to take her current medication for the foreseeable future.*
>
> *6.6 The prognosis will be very much determined by the outcome of these processes. If the outcome is negative, then it is my opinion that her mental health may potentially deteriorate significantly and she may never fully recover from her psychological symptoms. Even if the outcome is positive, she will require some time to fully come to terms with what has happened to her and to repair some of the damage. As I mentioned earlier, she will require extensive psychological therapy to allow this to happen. The therapy may require trauma focused CBT and EMDR therapy. This is because there are significant traumatic memories which continue to haunt her in relation to the index event. It is entirely possible that Miss McNicholas may never get to a stage to go back to the sort of employment she was previously doing. At this moment in time she fears that she may make further mistakes and she may be subjected to extra scrutiny. This will undermine her confidence and her ability to do her work properly. She may be too apprehensive and may be too avoidant of putting herself in that situation. If she is able to fully recover from her psychological symptoms, and if the outcome of the tribunal is in her favour, then it is possible that she may be able to consider alternative forms of employment which do not remind her of the previous trauma once her therapy sessions have come to an end."* (Our emphasis)

64. The persistence of the claimant's condition seems tied to the stresses she has been subjected to and the cautious air of optimism about her recovery which we detected in our original Judgment and the estimate of a recovery between 12 and 24 months has proven unfounded. The claimant has now been unwell for some years and the Report recognises this. These difficulties were to some extent foreseen in the earlier report. Mr Cunningham suggested that 12 months would be appropriate as the

proceedings were now at an end. We take the view that the proceedings will not come to an end until we release our Judgment. Even then Dr Moosa's report is not, understandably given the lack of progress in the claimant's recovery to date, particularly optimistic. In addition, the claimant's best option of obtaining reasonably well-paid employment (given her age and utilising her professional skills) will be a return to education and this may well present difficulties as the passage in Dr Moosa's report we have highlighted suggests.

65. In addition, we noted from the claimant's evidence that any job in education would probably involve retraining and work experience (p30) as she is no longer immediately eligible to return to class teaching. There is always an element of speculation and in this case the picture we have shows that the claimant has difficult hurdles to overcome both with regards to her health, retraining/requalifying and whether she will be robust enough to return to teaching. There are a number of uncertainties such as whether she can obtain a job immediately in teaching and this may be hampered because any retraining will probably occur in the course of the academic year while recruitment for a post will usually be at the beginning.

66. We do not accept that a full life award is appropriate. This was the basis on which the Schedule of Loss was prepared. It seems to us that the circumstances here all militate towards a period of three years' future loss of earnings as being appropriate. Account has been taken that the claimant might recover more quickly during this period by the application of a withdrawal factor of .75 reflecting a 25% chance of early recovery/employment.

67. The basis on which the calculations were made and the underlying assumptions were only challenged to an limited extent. Mr Cunningham argued that it was not clear that the claimant would lose salary at the rate claimed which was based on her returning to a similar role before these events occurred. She had, he observed, given up the relatively stressful role

as a principal teacher to change direction and that involved accepting lower paid work. In short, his position was that there was little evidence to support either her speedy return to teaching or the salary claimed.

68. We ultimately rejected these submissions. It seems clear to us that the claimant wanted to make a career in special needs education and hoped to quickly reach a level of salary approximating to her old teaching role. Her decision was not irrevocable. She had ensured that she could apply for work as a Secondary School teacher in Scotland. It was understandable that she would give this new ambition a period to materialise but in the background she had financial commitments that would have meant her return to Secondary Education if her new ambitions were not fairly quickly realised. She was on her way to realise this by keeping both posts with the respondents and obtaining better paid work with the Second Respondent.

69. The claimant was also conscious of the impact of lower paid employment on her pension and we recorded in the original Remedy Judgment (p693) that she needs to return within 5 years of the break. The claimant's skills and experience coupled with the demand for such skills and experience lead us to the conclusion that she would have been able to obtain a senior position commanding a substantial salary. For these reasons we accepted the basis on which the loss of salary both past and future was calculated in the Schedule of Loss (at Table 2 (e)(ii)).

70. In all probability considering both her personal and professional needs we considered that she would have returned to Secondary Education in April 2021 on at least a salary of £45,000. This was four years after her initial break from teaching in 2016. This would have been likely to increase to £46,702 between 1/9/2022 and 31/8/2023. This would in turn have increased to £49,739 from 1/9/2023. It is reasonable that the continuing loss should be calculated on this basis. The loss to the date of the remedy hearing is therefore £108,242 net. From this figure should be deducted pension received early from 7 May 2021 to the date of the hearing on 23 May. These total £42668.32. The final net loss of earning to 7 May 2021 up

to the remedy hearing is £65,573.68. The withdrawal factor does not apply to these sums.

71. In relation to future loss of earnings the gross annual salary was £49,739. The net annual loss is £37,853 as set out in the revised Schedule of Loss. A withdrawal factor of 0.75 is applied leaving £85,175.15.

Injury to Feelings/Solatium

72. The Tribunal had originally awarded the claimant £10,000 for injury to feelings and £12,000 for psychiatric injury. The matter is now at large for us to reconsider these awards based on the most up-to-date information we have and taking full account of the impact of the GTC referral which we had previously subtracted. It is, of course, clear that public interest ("protected") disclosure claims are a form of discrimination and fall to be compensated in the same way (***Virgo Fidelis Senior School v Boyle*** [2004] IRLR 268). In ***Virgo Fidelis*** the EAT said that detriment suffered by whistle-blowers should normally be regarded by Tribunals as a very serious breach of discrimination legislation. Both Counsel referred the Tribunal; to the ''***Vento***'' bands.

73. Mr Cunningham's position was that the award should still fall into the middle band while Mr Menon suggested that the higher award was appropriate given the campaign as he put it against the claimant which had resulted in the referral to the GTCS and all the distress resulting from that prolonged process.

74. An award for injury to feelings is intended to compensate a claimant for the anger, distress and upset caused by the unlawful treatment and is not meant to be punitive. Although as Mr Cunningham pointed out there were only five detriments these were particularly serious and although committed over a short period having a long-term effect.

75. The Tribunal had regard to what are known as the ***Vento*** bands called after the case of ***Vento v Chief Constable of West Yorkshire Police*** (2003) IRLR 102. The financial boundaries of these bands have periodically been increased. The claims were made in 2018 and accordingly it is the bands in operation at that point that are in play. We reminded ourselves about the guidance given in relation to appropriate bands. The top band should only be for the most serious cases. While the consequences of the employers' actions have had long term and serious effects the employers' actions although bad were not in this higher category in our estimation. The second band ends at £25,700.

76. The claimant sets out in her updated statements the difficulties she has faced and the impact of the long drawn out GTCS proceedings. This is also reflected in Dr Moosa's report. The first material change he records (p550) in his up dated report is that the GTCS investigation continued for a further 23 months. It had lasted five years. The claimant's mental health had deteriorated since the previous report in October 2020. The evidence discloses the claimant's anguish and the impact these matters had on her both personally and on her family life. One aspect of this was that she would suffer panic attacks when having to deal with correspondence about this process. In layman's terms most of the 'news' for some 5 years was bad with no sign of a resolution until the proceedings were dropped.

77. We take the view that now that it has been clarified that the proceedings before the GTCS flowing from illegal conduct (detriment) are part of the background to which we can have regard, we concluded that because of the serious nature of these matters and the impact they have had on the claimant that this would mean that we would have to consider an award in the higher level of the middle band. We accept that the illegal wrongdoing perpetrated by the Respondents took place was over a relatively short period of time as Mr Cunningham suggested but the impact of the GTCS referral has been longstanding.

78. We were, however, aware that guard against double recovery in effect compensating the claimant twice. The medical evidence is clear that the claimant suffered severe anxiety and depression (Dr Moosa's report paragraph 6.2 p562). This was not a situation of some relatively transient condition following the experiencing of upsetting events. The condition has resulted in the claimant experiencing chronic symptoms. These have been longstanding. The claimant experienced significant personal and emotional problems. She has been unable to concentrate to work, had had relationship and family problems and she will need intensive interventions to recover and these may take some time. These matters are documented and described both in the two medical reports and in the claimant's evidence at both remedy hearings.

79. We found the cases submitted by Mr Menon to be of some assistance in our consideration of this matter. (***Marsh v Ministry of Justice*** and ***Zeromska - Smith v United Lincolnshire Hospitals***). If we had been looking solely at psychiatric injury the award in ***Marsh*** of £23,000 seems to have been made in broadly similar circumstances. That award would now be £32,640. Our conclusion is that an overall award of £36,000 is appropriate with £20,000 allocated to the claim for injury to feelings and £16,000 in respect to the psychiatric injury.

80. The claimant is also entitled to compensation for National Insurance Contributions as set out in the Schedule of Loss amounting to £3,736.15.

Interest

81. We were asked to consider interest on the awards. We understood there appeared to be no challenge to the calculations provided to us in the up dated Schedule of Loss. Issuing the Judgment took much longer than we anticipated and as a consequence we have added 15 additional weeks to take this into account in recalculating interest.

82. The application of interest was not in dispute in principle. The claimant will be entitled to interest on the awards made for detriment as if they are

awards for discrimination. Again, we did not understand that this was disputed in principle and must also apply to the awards of expenses/costs before the GTCS (£11,902), ET Liability hearing (£20,000) and Dr Moosa's Report from the dates of payment set out in the Schedule of Loss. Interest will be simple interest applied at 8%. Interest will accrue for the date of the act of discrimination and ends on the date the Tribunal calculates loss at the remedy hearing. In relation to the expenses incurred by the claimant it will accrue from the date the expenses were paid.

83. We issued a draft Judgment on the 23 August to allow parties to calculate interest and address the issue of grossing up. The claimant's solicitors produced a revised Schedule of Loss and calculations based on a date of the 23 August. These were not ultimately challenged.

First Respondent

84. In relation to past loss of earnings amounting to £2059 there is an ACAS uplift to be applied of 5% (£2,059 + 102.95). Interest is then applied as follows:

Interest @ 4% p.a. 5.5.181 - 31.3.212 – (151 weeks) 0.04 x £2,161.95 x 151/52 = **£251.12**

Interest @ 8% p.a. 1.4.213 – 6.12.2024 – (192 weeks)

0.08 x 2,161.95 x 192/52 = **£638.61** Making a total award of **£3051.68** (£2059 +£102.95 + £251.12 + £638.61).

Second Respondent

85. The sum of £11,314.80 was awarded for past loss of earnings. The ACAS uplift is 5% ACAS uplift (£10,776 + £538.80).

Interest is then applied @ 4% p.a. 13.6.184 - 31.3.21 - 146 weeks

0.04 x £11,314.80 x 146/52 = £1,270.74.

Interest @ 8% p.a. 1.4.21 – 6.12.24. - 193 weeks

0.08 x £11,314.80 x 192/52 = **£3,342.22**. The total interest to be added amounts to **£4612.96** (£1,270.74 + £3342.22).

First and Second Respondents

86. As discussed, the claimant will be entitled to reimbursement of her legal expenses involved in the GTCS proceedings amounting to **£11,902.50.** To which interest falls to be added (@ 8% p.a. from 8.3.21 – 6.12.24 (195.5 weeks) (0.08 x £11,902.50 x 195.5/52 = **£3,579.91** totalling **£15,482.41** (£11,902.50 + £3,579.91).

87. We also awarded the claimant the balance of her expenses amounting to £4,500 to which interest is added **£931.15.** (8% from 09.5.22 to 6.12.24 = 134.5 weeks @ 8% p.a. 0.08 x 4,500 x 134.5/52 = 931.14).

88. The fees for Dr Moosa's unnecessary attendance at the remedy hearing amounted to £1800. Interest falls to be added **£60** making a total of **£1860** (8% p.a. from 28.6.24 to 6.12.24 = 5 months @ 8% p.a. = £60.00).

89. The legal expenses for the Employment Tribunal liability hearing amounted to £20,000. Interest falls to be added as follows. (7.8.19 – 6.12.24 = 278 weeks @ 8% p.a. 0.08 x 20,000 x 278/52 = **£8,553.85.** The total is accordingly £28,553.85).

90. We assessed past loss of earnings at £65,573.66. Interest requires to be added from 7.5.21 to 23.5.24 (date of the Remedies Hearing) 159 weeks @ ½ rate 4% (continuing loss) 0.04 x 65,573.66 x 159/52 = **£6,726.59.** Then from 24.5.24 to 6.12.2024 (date of judgment) 28 weeks @ full rate 8% (0.08 x 65,573.66 x 28/52) = **£2824.71.** This totals **£75,124.96** including interest**.**

91. We turned to consider the application of interest to the figure for injury to feelings. Again, using the date of the 23 August from the forced resignation on the 4 May 2018 this amounts to £10,123.08 from (344 weeks @ 8% 0.08 x 20,000 x 344/52 = **£10,584.62.**

92. In relation to solatium (£16,000) from the date of the forced resignation 4.5.18 (1st detriment) to 6.12.24 is 344 weeks @ 8% 0.08 x £16,000 x 344/52 = **£8467.69..**

93. No interest is awarded on the future loss of earnings or the National Insurance shortfall of £3,736.15.

Employment Judge: Hendry

Date of Judgment: 6 December 2024

Date Sent to Parties: 6 December 2024