# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Lasseter

**Respondent:** Department for Work & Pensions

**Heard at:** Manchester **On:** 9 & 10 February 2017
**In Chambers**: 3 April 2017

**Before:** Employment Judge Porter
Mr PE Bell
Mr W Haydock

**Representation**
Claimant: Mr O Isaacs of counsel
Respondent: Miss C Knowles of counsel

# RESERVED JUDGMENT ON REMEDY

A further remedy hearing shall take place on 10 May 2017 commencing at 10.00am.

## REASONS

1 This is a further remedy hearing following:

1.1 the reserved decision on the substantive merits of the claim. Written reasons for the reserved decision were sent to the parties on 17 December 2015

1.2 a remedy hearing on 24 and 25 May 2016 when the Tribunal, having heard considered the evidence, determined that it would

order the claimant to be reinstated and invited submissions on the terms of that Order. The parties indicated that agreement for settlement had been reached in principle and were hopeful that the terms could be finalised by no later than 22 June 2016. As a result, with the consent of the parties, the Order of Reinstatement was not made and the hearing was stayed to allow time for agreement to be reached;

1.3 By email dated 21 June 2016 the claimant's solicitors indicated that terms had not been agreed and requested that the case be restored to the list for hearing

1.4 At a preliminary hearing on 20 September 2016 before EJ Franey, counsel for the respondent stated that the respondent did not consider reinstatement to be practicable and sought a single listing for remedy on the assumption that the respondent would not be complying with any order for reinstatement. EJ Franey expressed his view that this was inappropriate and the case was listed for two remedy hearings, the first to consider reinstatement and the appropriate order, and the second to be listed some weeks after that in case the respondent did not comply with the Tribunal's order.

1.5 An Order of Reinstatement was made at that first remedy hearing on 15 November 2016. Written reasons for the reinstatement order were sent to the parties on 20 December 2016.

2 The respondent has failed to comply with the Order for Reinstatement.

3 The claimant claims compensation as set out in the Updated Schedule of Loss (pages 61-64), as amended during the hearing.

4 The respondent has provided a Counter Schedule (pages 65A – 65H) and an updated Counter Schedule (pages 65I – 65P) as amended during the hearing.

5 Those documents set out, in part, the parties' assertions in the claim for compensation, which we have considered with care.

**Issues to be determined**

6 At the outset it was confirmed that the parties had agreed a List of Issues which appears at pages 59 and 60.

**Agreed issues**

7 It was confirmed that agreement had been reached on the following:

7.1 Basic Award in the sum of £9,145.67;

7.2 Loss of earnings from the date of termination to the date of the hearing were in the sum of £40,898.59;

7.3 Actual Income from the date of termination to the date of hearing, which should be deducted from the loss of earnings figure:

7.3.1 notice pay in the sum of £3,535.87 net;

7.3.2 Civil Service Compensation Scheme Payment in the sum of £23,761.38;

7.3.3 Income from employment in the sum of £27,934.08;

7.4 An award of compensation for injury to feelings fell within the middle band of the Vento scale.

**Submissions**

8 Counsel for the claimant made a number of oral and written submissions which the tribunal has considered with care but does not rehearse in full here. Submissions included the following:

8.1 Mrs Knight did not give reinstatement of the claimant appropriate consideration. She did not speak to the claimant, IT services or the line manager;

8.2 the respondent set its face against the idea of reinstatement. At the last hearing the respondent clearly indicated that it would not reinstate;

8.3 There has been wilful non-compliance with the reinstatement order. An Additional award should be made at the top end of the scale;

8.4 the claimant has attempted to mitigate his loss. The question is whether the claimant acted unreasonably in refusing the offer of re-engagement. The answer is no. The claimant gave a coherent explanation for his reason for declining the offer;

8.5 It is incumbent on the respondent to show that the claimant has acted unreasonably in failing to apply for available job vacancies. The respondent has merely disclosed a telephone directory of jobs. There is no analysis of whether any of those jobs were jobs

that the claimant could do. There is no way of understanding whether the jobs were appropriate to the claimant's skills set;

8.6 it is most likely that the claimant would have continued in employment with the respondent until his retirement. The claimant's evidence is that he would not have left voluntarily. His dissatisfaction stemmed from the respondent's failure to make reasonable adjustments. The claimant was able to provide effective and absence free service when adjustments were made. There is no evidence that when adjustments were made the claimant's absence record would continue. In the absence of any evidence of external stressors, the tribunal should reject any argument that a fair dismissal because of capability was any possibility, or anything other than a remote one;

8.7 in the calculation of loss of earnings to the date of hearing, the claimant accepts the respondent's figures as to the income that the claimant would have earned, that is, £40,898.59. However, credit should be given for the claimant's entitlement to a non-consolidated bonus. Mrs Knight accepts that this would have been awarded in each year. There is no satisfactory evidence as to the amount of any such bonus. In the absence of any evidence the tribunal should accept the best evidence that the claimant's likely bonus would be £500 thus raising the claimant's lost income to £42,398.59

8.8 in calculating pension loss this case should be treated as a complex case under the new guidelines and the Ogden tables applied. The claimant agrees that the sum of £1,714.09 should be netted down but is unable to provide a figure for that. There should be no further deduction for accelerated receipt as the Ogden tables provided for that. However it is agreed that there should be a deduction based on the likelihood and/or chance that the claimant would nevertheless exit the pension scheme before the age of 60. The claimant accepts that a deduction of 25% should be applied;

8.9 in calculating compensation for injury to feelings the award depends on the reaction to the discrimination. The discrimination had a very significant impact on the claimant, who describes the events as the worst nightmare of his life, describing himself as an embarrassment to his wife, family and friends. An award should fall at the top end of the middle bracket;

8.10 the compensation should be grossed up to reflect the incidence of tax after taking account of the £30,000 tax-free element. The injury to feelings award will now also need to be grossed up

having regard to the decision of the Upper tribunal in **Moorthy v Commissioners for HMRC 2010 UKUT**

8.11 interest should be added at the rate of 8%.

9 Counsel for the respondent made a number of oral and written submissions which the Tribunal has considered with care but does not rehearse in full here. Submissions included the following:-

9.1 in deciding whether it was practicable to comply with the reinstatement order the tribunal should give due weight to the commercial judgment of the management. Alison Knight is the witness best placed to speak to the practicability of reinstatement. The tribunal is invited to accept Mrs Knight's evidence that it was not practicable for the respondent to reinstate the claimant on 29 November 2016. There is no reason to disbelieve Mrs Knight when she sets out her genuine concerns;

9.2 if an additional award is made, in calculating the amount of the award the tribunal should take into account the employer's conduct, This is not a case where there was a deliberate refusal to comply with the Order. Mrs Knight did give careful and genuine consideration to whether it was practicable to comply with the Order and genuinely believed that it was not. Having reached that view the claimant was offered the opportunity of re-engagement into another EO role but refused that offer. The tribunal is entitled to take into account the extent to which the claimant has failed to mitigate his loss - **Mabrizi v National Hospital for Nervous Diseases [1990] IRLR 133** ;

9.3 in assessing any loss flowing from the discrimination the tribunal should consider the risk that the claimant's employment would have been fairly terminated in any event. It is highly likely that the claimant would not have continued in employment with the respondent up to the date of his retirement and indeed would have been dismissed, or resigned, much sooner than that;

9.4 it is clear that the claimant had been liking his job less and less because of changes in work and increased pressure. The claimant's wife used to tell him to look for other work if he wanted to;

9.5 the claimant had carried out some alternative employment when the claimant was still employed. The claimant's explanation as to the reason why he sought this alternative employment is not credible. The claimant did not have a meeting with Miss Chyba in

June 2014 and he was not referred to a decision maker until October 2014. Therefore he could not have been taking this action in anticipation of dismissal;

9.6 in any event, bearing in mind the extent of the further changes that have been made, and are to be made, relating to the duties of the Work Coach, then even with adjustments there was a likelihood or significant risk that the claimant's condition would deteriorate, that he would become absent and this would lead to the application of the attendance management policy and ultimately dismissal;

9.7 The claimant now agrees that he has received income from employment since his dismissal in the total sum of £27,934.08. The claimant has received income from self-employment in the years to 5 April 2015 and 5 April 2016 totalling £7,129.20. The claimant's evidence that he has received no further income from self-employment from 6 April 2016 to date is not credible. The claimant's evidence of the income earned by him since dismissal has been inconsistent and unsatisfactory throughout. He has consistently under reported his income;

9.8 the claimant has failed to mitigate his loss. The claimant spends considerable time in Italy. Acting reasonably, he should base himself in the UK, save during a period equivalent to the usual statutory holidays;

9.9 had the claimant accepted the offer of alternative employment at EO level, this would have removed any ongoing loss;

9.10 the suggestion that the claimant will not receive any future income until the age of 60 is wholly unrealistic bearing in mind what the claimant has earned since his dismissal. The claimant has received income to date almost at the same level that he would have received had he remained in employment. It is likely that he will therefore be able to earn in the future the same amount as he would have earned with the respondent up to the date of his retirement;

9.11 the claimant failed to mitigate his loss by applying for any vacant Civil Service roles as set out in bundle;

9.12 pensions are part of the overall remuneration package. A higher income since dismissal means that no award should be made for pension loss;

9.13 in calculating any pension loss this should be treated as a simple case under the new guidelines and compensation based on the contributions. The Ogden calculation should not be applied;

9.14 if the tribunal applies the Ogden calculation then:

9.14.1 the figure should be reduced by 40% to reflect the likelihood and/or chance that the claimant would nevertheless have left the pension scheme before the age of 60;

9.14.2 The annual loss figure, the multiplicand, has not yet been confirmed and it should be netted down

9.15 in assessing the award for injury to feelings the amount claimed by the claimant is unrealistic. The respondent notes that this was not a claim of harassment or direct discrimination. The claimant was able to obtain gainful employment. The sum of £11,000 is an appropriate figure;

9.16 any sum awarded in excess of £6,238.60 should be grossed up as it will be taxed.

9.17 The decision in **Moorthe** is going to the Court of Appeal. Decisions of the EAT indicate that the award for injury to feelings is not taxable and therefore should not be grossed up. **Orthet Limited v Vince Cain 2005 ICR 324; Timothy James Consulting Ltd v Wilton [2015] IRLR 368.**

**Evidence**

10 The claimant gave evidence. In addition he called Mrs Dorothy Kerr, former work colleague, to give evidence.

11 The respondent called Mrs Alison Knight, Senior Operations Manager, to give evidence.

12 The witnesses provided their evidence from written witness statements. They were subject to cross-examination, questioning from by the tribunal and, where appropriate, re-examination.

13 The claimant had provided the respondent with a witness statement from his wife, but did not call his wife to give evidence, did not seek to rely on her witness statement as written evidence.

14 Agreed bundles of documents were presented. Additional documents were presented during the course of the Hearing, with consent. References to page numbers in these Reasons are references to the page numbers in the agreed main Bundle.

**Agreed Facts**

15 On the termination of his employment the claimant's gross weekly pay was £446.13. His net weekly pay was £347.84.

**Additional Findings of Fact**

16 We have considered our findings of fact as set out in the written reasons referred to at paragraph 1 above. Having considered all the evidence the tribunal has made the following additional findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

17 By letter dated 25 November 2016 the respondent informed the claimant that it was not possible to reinstate him for the following reasons:

- The only EO grade available in Work Service Directorate (WSD) in Blackpool North is the Work Coach role which has changed significantly since 2014;
- The site…. will be moving sites over the coming months
- Works services are currently introducing a new operating model and benefit, changing the way it delivers the service to its customers;
- WSD are adopting an agile way of working where change is impacting the business on a fortnightly basis, making it difficult to provide the level 121 support requested by the claimant in the past;
- my client is concerned that the level of change will impact negatively on the claimant's health and well being
- my client considers that the employee/manager relationship has broken down and would not be able to operate effectively in Blackpool North job centre.

18 By letter dated 19 December 2016 the claimant asked for details of any alternative role.

19 By e-mail dated 4 January 2017 (page 263) the respondent notified the claimant's solicitor that there were two team leader positions currently available in the Attendance Allowance unit. The vacancy details were provided. The e-mail continued:

> " The unit leader is looking to fill these vacancies quickly and is willing to consider the claimant on re-engagement. They have asked that the claimant confirm whether or not he is interested by Friday 6 January (apologies for the short notice). If he is interested than the unit leader would like to meet with the Claimant to discuss the roles further."

20 By letter dated 5 January 2017 the claimant's solicitor replied as follows:

> I can confirm that our client Mr Lasseter has considered ...the two team leader positions… however he has decided to decline. The reasons for this are as follows:
>
> Mr Lasseter is grateful for the offer of re-engagement from DWP however he has previously shadowed a team leader in the Attendance Allowance Unit and found that most of its operational staff were on regular sick absence due to the stressful nature of the job. He has previously declined a previous offer for this reason after shadowing the team leader and so also declines now
>
> Mr Lasseter believes that as he has 10 years experience in the JobCentre plus business and this is a job which would be easier to resume rather than starting an entirely new job from scratch.
>
> In addition to the above are also remain trust issues in light of the stance that has been taken on reinstatement. He still fails to understand why reinstatement is not feasible and this has not been adequately explained. Until this has been explained, he has real concerns about whether he could go back to work for the DWP."

21 The claimant's date of birth is 10 October 1960. At the effective date of termination (28 October 2014) he was aged 54 years. The claimant, as part of his employment benefits with the respondent, was a member of the Civil Service pension scheme, a defined benefit pension scheme.

22 It was the claimant's intention to remain in the employment of the respondent until his intended retirement at the age of 60.

*[On this we accept, in the main, the evidence of the claimant. We note that he was a little confused as to the reason for his decision to look for alternative work in or around June 2014. We note that the meeting with Miss Chyba and the referral to the decision maker had not yet taken place. However, on balance we find that the fact that the claimant looked for and obtained alternative work at this time does not show an intention to voluntarily leave the respondent's employ before he reached retirement age. It was hardly surprising, in the circumstances, when the claimant had been dismissed twice before, when the claimant had warned the respondent of the possible effect on his health if they implemented change without giving him adequate notice, when the respondent had proceeded with the changes without giving adequate notice, that the claimant should start looking for alternative work to provide him with an income in the*

*event that he would be dismissed again. The claimant was proved right; he was dismissed again. He can hardly be criticised, or accredited with a different motive, simply because he was planning in advance. The claimant was dissatisfied with the way in which he was treated at work. Again that is hardly surprising, bearing in mind the discriminatory treatment he received. However, the claimant was approaching retirement age, he had the benefit of a valuable Civil Service pension. The evidence of the claimant is credible, that he wished to continue in employment with the respondent until he reached his retirement age]*

23 The claimant has obtained other employment since his dismissal. He has had no pension benefits in that employment. It is highly unlikely, there is very little, if any chance, that the claimant will either:

23.1 obtain employment with another employer which attracts the same or similar pension rights as he enjoyed with the respondent;

23.2 obtain employment again with the respondent. The respondent has not identified any job for which the claimant could apply and have a reasonable prospect of success of obtaining a job offer.

24 The claimant made a genuine request for reinstatement. He was happy to return to his job in spite of the ill health and injury to feelings which had been caused to him by the respondent's discriminatory treatment. He was disappointed when the respondent refused to reinstate him and did call into question his ability to work for the respondent after that indication had been given. However, he was offered only two posts and he reasonably rejected those, bearing in mind that he had shadowed those posts previously, and had rejected an offer of the posts prior to these proceedings on the grounds that the claimant genuinely believed that the position of team leader in a stressful environment would not suit his needs. That was a reasonable stance for this claimant, with his disability, to take.

25 Three newly appointed Work coaches commenced employment at Blackpool North job centre in the period February to April 2016. They were promoted from outside agencies and did not have experience of legacy benefits, did not have any experience in the job centre environment. All new work coaches recruited to Blackpool North since April 2016 have had to learn all three legacy benefits. All training has been in-house desk training.

*[On this we accept the evidence of Mrs Kerr who, although retired from the respondent, remains in regular contact with staff at Blackpool North and the trade union secretary. Mrs Kerr reports the evidence given to her by the trade union secretary and another unnamed work coach. The*

*respondent has not produced any satisfactory evidence to contradict the hearsay evidence of Mrs Kerr.]*

26 During 2016 the Cumbria and Lancashire District dismissed 10 people due to work-related stress, 8 of whom have been dismissed since October 2016, when the new way of working was introduced.

27 Before reaching her decision that reinstatement of the claimant was not practicable Mrs Knight did not:

27.1 Make any reasonable enquiries as to the nature of any reasonable adjustment required by the claimant for a reason related to his disability;

27.2 seek consultation with the claimant as to any adjustments he would need;

27.3 seek advice from Occupational Health services as to the need for any reasonable adjustments;

27.4 did not consider the decisions of this tribunal in relation to the failure of the respondent to make reasonable adjustments;

27.5 did not discuss the need for, or practicality of, any such adjustments with the IT department or appropriate line manager;

27.6 did not make any enquiries about any adjustments that could be made to the management of the claimant's diary. In her witness statement Mrs Knight bases her concerns over one requested adjustment noted in the claimant's grievance dated 17 June 2014. Mrs Knight made no enquiries as to whether that remained a requested adjustment, did not give any consideration to the findings of this tribunal in relation to this adjustment

28 Mrs Knight did not give any consideration to the practicability of the reinstatement of the claimant. Her evidence on this has been unsatisfactory. The respondent had made its decision not to reinstate the claimant before the Order was confirmed by this tribunal in February 2017. It has simply ignored the Order of the tribunal. It was not the genuine belief of the employer that there was a good reason for refusing to comply with the Order of reinstatement.

29 The respondent has included in the bundle lengthy lists of internal vacancies containing simply a job title, the relevant departments and district. Insufficient detail has been provided to establish whether any of these posts would have been suitable alternative employment for the claimant, whether he failed in his duty to mitigate his loss by failing to

apply for such vacancies. The only two vacancies identified by the respondent as possible posts for engagement were the two posts referred to in paragraph 27 above.

30 In the tax years to April 2015 and 5 April 2016 the claimant received income from self-employment in the sum of £7,129.20.

31 The claimant has continued to receive income from self-employment in the tax year from 6 April 2016 to date. The tribunal finds that it is likely that the claimant would have earned income from such self-employment at the same level as his self employed earnings in the previous tax years. We note that in the period 28 October 2014 – 5 April 2016 the claimant earned the sum of £7129.20 net from self-employed working. That is a total of 75 weeks giving a net income of £95 05 per week. Therefore income from self-employment from 5 April 2016 to 10 February 2017 is a total of 44 weeks at £95 05 pence per annum per week: a total of £4182.20.

*[We reject the evidence of the claimant that he has made no earnings from self-employment since 6 April 2016. This is not credible. We agree with counsel for the respondent that the claimant's evidence as to the level of income he has enjoyed since his dismissal has been inconsistent.]*

32 Had the claimant continued in employment he would have continued to receive a non-consolidated bonus each year. It is likely to be in or around the same level as the bonus declared in 2016. We calculate the claimant would have received in each year of continued employment a non-consolidated bonus in the sum of £500.00.

33 There is no evidence of any external stressors which affect the claimant's health or ability to perform his duties at work.

34 During the claimant's final period of absence the claimant was upset by the thought that he was going to be dismissed again, that history would repeat itself. He could not eat or sleep. He became withdrawn, avoiding socialising and lost all interest in riding his much loved road cycling bikes. This was a hobby which he enjoyed and participated on a regular basis, entering competitions. It is a hobby he no longer pursues. He felt that he was no longer in control of his future and suffered a Cognitive behavioural relapse. He contacted his GP and was referred to Cognitive Behavioural Therapy for a period of 3 months.

35 The claimant was upset by the dismissal, he felt let down by his managers and employer. He describes being made jobless "on the back of his disability" as the worst nightmare of his life. He feels like an embarrassment to himself and his wife and family whenever the question of his employment status is raised. The claimant found the discriminatory

treatment of him intimidating, demoralising and offensive, degrading, humiliating. His feelings of anxiety have continued – he often expresses his feelings of anxiety when giving evidence to the tribunal

36 Since his dismissal the claimant has taken reasonable steps to mitigate his loss by working in PAYE employment and in self-employment. He has spent only a few weeks in Italy. His visits to Italy have not hampered his ability to find and engage in alternative employment

**The Law**

37 We have considered and applied Sections 112-124 Employment Rights Act 1996.

38 Where an employer fails to comply with a reinstatement order the onus is on the employer to show on the balance of probabilities that it was not practicable for it to comply with the Order.

39 In **Port of London Authority v Payne 1994 IRLR 9** it was held:

> " The… tribunal.. should carefully scrutinise the reasons advanced by an employer, should give due weight to the commercial judgment of the management unless of course the managers are disbelieved. The standard must not be set too high… the employer does not have to show that reinstatement or re-engagement was impossible. It is a matter of what is practicable in the circumstances of the employer's business at the relevant time."

40 The tribunal must make an additional award unless the employer satisfies the tribunal that it was not practicable to comply with the order. The tribunal has a discretion as to how much to grant but the award must be of an amount not less than 26 weeks pay and not more than 52 week's pay.

41 In exercising its discretion the tribunal should take into account the true purpose of an additional award. A relevant factor is the employer's conduct. A wilful refusal to reinstate an employee may attract an award towards the top end of the scale. However the tribunal is entitled when deciding the appropriate level of the additional award to take into account the employer's genuinely felt objection to reinstatement. Another relevant factor is the extent to which the claimant mitigated his loss. **Mabirizi v National Hospital for Nervous Diseases [1990] IRLR 133**

42 We have considered section 124 Equality Act 2010.

43 We note that, in assessing compensation under the Equality Act 2010 the tribunal must consider what loss flows from the discrimination. The tribunal

must consider whether the claimant's employment would have been fairly terminated, without discrimination, in any event.

44 In **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274** the EAT held:

> "A *Polkey* deduction has the following particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. The tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand. *Polkey*, properly approached, requires an assessment of chance, which depends upon all the facts -- the weight of those facts is best assessed by the primary fact finder."

45 The Polkey principle is to be applied in determining compensation for discriminatory acts. Employment tribunals may need to consider whether, were it not for the discriminatory dismissal, there could have been a non-discriminatory dismissal at the same time, or whether there would have been a non-discriminatory dismissal at some definable point in the future. In **Abbey National plc v Chagger 2010 ICR 397** the Court of Appeal stated that if there was a chance that, apart from the discrimination, the claimant would have been dismissed in any event, that possibility had to be factored into the measure of loss

.

46 In deciding the level of compensation account must be taken of the employee's duty to mitigate his or her loss. The burden of proof lies on the employer as the party who is alleging that the employee has failed to mitigate his or her losses **Fyfe v Scientific Furnishings Ltd 1989 ICR 648**.

47 The amount of compensation in cases of discrimination should be calculated in the same way as damages in tort. **Ministry of Defence -v- Cannock & Others [1994] ICR 918**. A Tribunal should determine what loss, financial and non-financial, has been caused by the discrimination in question. The EAT stated 'as best as money can do it, the applicant must be put into the position she [or he] would have been in *but for* the unlawful conduct'. The tribunal must ascertain the position that the claimant would have been in had the discrimination not occurred. Tribunals can award full compensation for the loss suffered. See **Ministry of Defence -v- Hunt & Others [1996] ICR 554**: there is no upper limit on awards.

48 In relation to an award of compensation for injury to feelings, the onus is on the claimant to establish the nature and extent of the injury to feelings. The amount of the award under this head should be made taking into account the degree of hurt, distress and humiliation caused to the complainant by the discrimination. We have considered the case of **Armitage Marsden & HM Prison Service -v- Johnson** (**1997) ICR 275** and in calculating the award for injury to feelings in this case have applied the principles as set out therein which we summarise as follows:-

48.1 Awards for injury to feelings are compensatory not punitive.

48.2 Awards should not be too low, as that would diminish respect for the policy of anti-discrimination legislation. Nor should they be so excessive as to be viewed as "untaxed riches".

48.3 Awards should be broadly similar to the whole range of awards in personal injury cases.

48.4 Tribunals should remind themselves of the value in every day life of the sum they have in mind.

48.5 Tribunals should bear in mind the need for public respect for the level of awards made.

49 We have also considered the case of **Alexander -v- The Home Office [1998] IRLR 190 CA** wherein the Court of Appeal said that the level of injury to feelings awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the (Race Relations) Act gives the effect. On the other hand awards should not be excessive because this does almost as much harm to the same policy.

50 We have considered the decision and guidance given by the Court of Appeal in **Vento v Chief Constable of West Yorkshire Police (No.2)** [**2003] IRLR 102** in which the Court of Appeal confirmed that in carrying out an assessment of compensation tribunals should have in mind the summary of the general principles on compensation for non-pecuniary loss by Smith J in **Armitage v Johnson** (above). The Court of Appeal observed: Three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury, can be identified:

50.1 The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the grounds of sex or race. Only in the most exceptional cases should an award of compensation for injury to feelings exceed £25,000.

50.2 The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

50.3 Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

51 There is within each band considerable flexibility allowing Tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case. Regard should also be had to the overall magnitude of the sum total of the awards of compensation for non-pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage. In particular double recovery should be avoided by taking appropriate account of the overlap between the individual heads of damage. The extent of overlap will depend on the facts of each particular case.

52 We note the formal revision of these bands in the case of **Da'Bell v NSPCC 2010 IRLR 19** , giving £6000 as the top of the lower band, £18,000 as the top of the middle band, and £30,000 as the top of the upper band.

53 In **Olayemi v Athena Medical Centre and anor** the EAT followed the decision in **Beckford v London Borough of Southwark 2016 IRLR 178, EAT** and confirmed that the general uplift in general damages in all civil claims for pain and suffering, loss of amenity, physical inconvenience and discomfort, social discredit, mental distress (as determined in **Simmons v Castle *[2013] 1 WLR 1239***) – apply to claims in the Employment Tribunal for personal injury or injury to feelings.

54 Pension loss. New guidelines are expected on the calculation of pension loss. We have considered the Consultation Paper on Compensation for loss of pension rights. It is noted that the proposal is for two new categories of cases:

54.1 simple cases, which will apply to both defined contribution and defined benefit schemes, in such cases the tribunal will exclusively use the contributions method to assess compensation;

54.2 complex cases, which it is anticipated will be rare. In such cases the tribunal will either apply the Ogden tables or use expert actuarial evidence.

55 The Consultation Paper makes reference to the 2003 guidance on pension loss, noting that the 2003 guidance made clear that the choice between the simplified and substantial loss approach was an important one, and that the same could be said for the choice between a simple and complex approach as proposed for the new guidelines. The Consultation paper notes that many of the same factors will be relevant, such as the stability of employment and its isolation from the economic cycle, and that it cannot be overlooked that many individuals who have been unlawfully dismissed from employment that carried the benefit of membership of a defined benefit scheme will find it harder to replicate those benefits today than would have been the case in 2003. If the tribunal is persuaded that such individual will not be able to replicate those benefits it may be appropriate to adopt the complex approach.

56 We note that in this the Consultation Paper reflects the 2003 guidance which states:

> 4.12 There maybe cases where the tribunal decides that a person will return to a job at a comparable salary, but will never get a comparable pension…. In such cases the substantial loss approach may be needed even where the future loss of earnings is for a short period ...

57 We have considered the authorities referred to in submissions.

**Determination of the Issues**

(This includes, where appropriate, any additional findings of fact not expressly contained within our findings above or in the previous written reasons but made in the same manner after considering all the evidence)

58 We have in reaching this decision considered our previous decisions and findings of fact, as set out in the written reasons referred to in paragraph 1 above.

**Likelihood of the claimant remaining in employment to retirement age**

59 We accept the evidence of the claimant that it was his intention to continue in employment with the respondent until his retirement age.

60 The question is what was the likelihood that the claimant would not have achieved that aim because either:

60.1 he would have changed his mind and left voluntarily;

60.2 he would have been unable to perform the new duties as a Work Coach to a satisfactory standard and his contract of employment would have been terminated because of incapability;

60.3 he would have been unable to cope with the stress and anxiety of the changes to the duties of a work coach and/or place of work and his contract of employment would have been terminated because of incapability on medical grounds.

61 The fact that the claimant was suffering from stress because of recent changes at work, and expressed his dissatisfaction with what was happening at work, and the way the respondent was treating him, is not sufficient to show that the claimant would have voluntarily left the employ of the respondent before he reached the age of 60. The fact that the claimant had looked for alternative employment, prior to the termination of his employment, is not enough to suggest that the claimant would have left voluntarily anyway, had he not been dismissed. We refer in particular to our finding at paragraph 18 above. There is little, if any, possibility that the claimant would have left the respondent's employ voluntarily before his retirement date.

62 There is no satisfactory evidence to support the suggestion that the claimant would have been unable to cope with the changes in the work of a Work Coach, would have been unable to perform the new duties required of him in that role. The claimant has demonstrated an ability to perform his duties to a satisfactory standard, provided that the respondent complies with its duty to make reasonable adjustments. As indicated in earlier written reasons, the skills required for the new duties remain the same. There is no suggestion that any of the claimant's formal work colleagues, the work coaches, have not had the necessary skills to perform the new tasks. There is no satisfactory evidence to support the assertion that the changes to the duties and/or place of work will take place with such regularity, at such a pace, that the respondent will be unable to give the claimant time to consider any changes before the changes are required to be put into effect. All employees must be given notice of a change before they can be expected to put it into practice. The amount of notice required varies from employee to employee, depending on their skills and aptitude. The claimant requires more notice than others for a reason relating to his disability. There is no satisfactory evidence to support the assertion that the respondent will be unable to provide that notice, that such a requirement for advance notice would be unreasonable. We are satisfied and find that, had the claimant remained in the employ of the respondent and reasonable adjustments made to give the claimant advance notice of any changes, the claimant would have been able to perform the new role to a satisfactory level.

63 We accept that the claimant has in the past suffered stress and anxiety following changes to his workplace and working conditions. However, there is no satisfactory evidence to support an assertion that the claimant, with reasonable adjustments in place, would suffer stress and anxiety leading to absence for ill-health and dismissal. The claimant has displayed in the past an ability to deal with change given reasonable adjustments. The fact that other employees have gone off work with and/or dismissed for, work-related stress does not mean, by itself, that the same would have happened to the claimant. The circumstances in which those other employees became ill and/or were dismissed, and the steps taken by the respondent in relation to such dismissals, have not been provided. We are satisfied and find that, had the respondent complied with its duty to make reasonable adjustments, it is most likely that the claimant would have remained in the employ of the respondent up until the date of his retirement.

64 On the balance of probabilities, had the claimant not been dismissed, it is most likely that he would have continued working for the respondent, in the same post, up to his intended retirement date. There is little, if any, possibility that the claimant would leave before his retirement date, either voluntarily or because he was unable to carry out the new duties of a work coach.

**Duty to mitigate loss**

65 There is no satisfactory evidence to support the assertion that the claimant has failed to mitigate his loss. We note in particular that:

65.1 the claimant has taken active steps to secure alternative employment and has obtained employment since his dismissal, both PAYE and self-employed;

65.2 the suggestion that the claimant spends a disproportionate amount of time in Italy on holiday is not supported by any satisfactory evidence;

65.3 the claimant was reasonable in rejecting the offer of reengagement. He was seeking an Order of reinstatement. That was rejected by the respondent who, giving the claimant very little information and time to reflect, chose to offer the claimant two team leader posts which the claimant had shadowed and rejected previously;

65.4 the respondent has not identified any other job which was suitable for the claimant to consider. In relation to the lists of internal vacancies contained within the bundle, we note that no job

descriptions have been provided for these lists of vacancies. The respondent has failed to adduce any satisfactory evidence to support an assertion that any of these vacancies were suitable for the claimant and/or that he would have been successful if he had applied for those posts.

In all the circumstances we find that the claimant did comply with the duty to mitigate his loss.

**Additional Award**

66 We have considered whether the respondent has shown that it was not practicable to comply with the Order for reinstatement.

67 We do not accept the evidence of Mrs Knight that she carefully considered whether it would be practicable to reinstate the claimant. Mrs Knight states her reasons including:

67.1 the substantial change in the work of a Work Coach;

67.2 concerns about the department's ability to make reasonable adjustments for the claimant and in particular any adjustments needed for the management of his diary;

67.3 the fact that the change to the work has proven to be challenging to some staff and this has led to an increase in stress-related absences. Mrs Knight relied on her unchallenged evidence that in 2016 the district dismissed 10 people due to work-related stress, eight of these have been since October 2016 when the new way of working was introduced;

67.4 Universal Credits for service will roll out in Blackpool from September 2018;

67.5 the job centres in Blackpool will be relocated to a new site within 0.2 miles of Blackpool North job centre later this year. She has concerns about how the claimant would deal with the upheaval caused by an office move

68 We have carefully considered these concerns in turn.

69 Substantial change in the work of a Work Coach. Whereas there have been changes to the duties carried out by work coaches, the respondent has led to no satisfactory evidence to support its assertion that such changes make the reinstatement of the claimant not practicable. We refer

to our written reasons sent to the parties on 20 December 2016 and in particular to paragraphs 30, 31 and 51.11. The respondent has provided no satisfactory evidence to support any assertion that the claimant would be unable to perform the new duties, with appropriate training, in the same way as his former work colleagues. We agree with counsel for the claimant that there can be no barrier regarding the provision of any necessary training when new employees have been recruited in Blackpool North and have received all necessary training at their desks in house;

70 Reasonable adjustments. Mrs Knight has led no satisfactory evidence to support her assertion that the respondent would be unable to make reasonable adjustments for the claimant should he be reinstated. Before reaching this conclusion. Mrs Knight did not seek confirmation from the claimant as to any adjustments he would need, did not discuss the need for and/or practicability and/or reasonableness of any adjustments with anyone from IT services or the appropriate line manager, did not make any enquiries about any adjustments that could be made to the management of the claimant's diary. In her witness statement Mrs Knight bases her concerns over one requested adjustment noted in the claimant's grievance dated 17 June 2014. Mrs Knight made no enquiries as to whether that remained a requested adjustment, did not give any consideration to the findings of this tribunal in relation to this adjustment. We refer to our written reasons sent to the parties on 17 December 2015 and in particular to paragraphs 138 – 139. Again at this remedy hearing the respondent has adduced no satisfactory evidence to challenge the practicability of the suggested adjustment for the diary system, no satisfactory evidence to indicate that this step would be very costly or would cause disruption to the operation of the LMS diary system generally or in the workplace. The respondent merely repeats its concern about any adjustments to the LMS diary system, a concern that was considered in depth at the initial substantive merits hearing and determined in our previous judgment. No new evidence has been led to support this assertion that no reasonable adjustment can be made to the LMS diary system.

71 Mrs Knight, in asserting that the respondent would be unable to make reasonable adjustments for the claimant, has not taken the time to consider the nature of the reasonable adjustments required by the claimant and the reason for them. Mrs Knight in her witness statement asserts that the reason for the claimant's absence which led to his dismissal in 2014 was his desk being moved to a different floor. Mrs Knight made no investigation of the types of adjustments required by the claimant or the need for any such adjustments. There is no satisfactory evidence that she considered the medical evidence or the OH reports. There is no satisfactory evidence that she considered this tribunal's judgment in reaching her decision that the respondent could not make

reasonable adjustments. We refer to the written reasons sent to the parties on 20 December 2016 and in particular to paragraphs 134 – 137. It is clear from the judgement that the relevant PCP applied by the respondent was making changes to working practices of individual employees without any adequate notice. Paragraphs 36 of the written reasons indicates that changes had been put in place without adequate notice, the claimant had advised the respondent then that he needed notice of any change, he had not been provided with notice and as a result he had become ill and this had started his latest (and final) period of absence. A reasonable investigation would have led Mrs Knight to understand that the moving of the desk was not the reason for the claimant's ill-health and subsequent dismissal, it was the failure of the respondent to give adequate notice of changes to working practices, including the removal of his desk to a different location.

72 Stress related absences and dismissal of staff. Any employer has a duty of care towards its employees and must be concerned about the stress of the job and its effect on the employees. However, the respondent has led no satisfactory evidence as to the circumstances in which 10 employees have been dismissed “due to work related stress” and what, if any, steps have been taken by the respondent to alleviate any work related stress, if this is causing them concern and this led to the dismissal of staff. No satisfactory explanation has been provided as to why the respondent would be unable to make reasonable adjustments to avoid the stress of the job leading to the claimant, and indeed other employees, being absent from work by reason of ill-health.

73 Requirement to work on Universal Credits The respondent has failed to provide any satisfactory evidence as to why the claimant could not, with appropriate adjustments and training, successfully work with Universal Credits at some date in the future, after the date for reinstatement. We refer to the written reasons sent to the parties on 20 December 2016 and in particular our findings at paragraphs 29-33, 51.10 and 51.11. We further note the intention of the respondent to introduce further significant changes to work patterns with the move over to Universal Credits, the introduction of a so-called “agile” working system whereby system and process changes can be introduced either fortnightly or overnight. The evidence as to the extent of the effect of any such changes is not satisfactory. It is accepted that in Blackpool North the Work Coaches will not be required to work on Universal Credits until September 2018. The introduction of the new system will have had the opportunity to be “bedded down” and established , and therefore it is likely that fewer changes to the system will be implemented at the time the work coaches in Blackpool North commence this work. In any event the respondent has given insufficient consideration to the possibility of making appropriate adjustments for the claimant to enable him to process any changes.

74 Relocation of the Blackpool North Job Centre. The respondent has failed to provide any satisfactory evidence as to why any such move of office could not work for the claimant, provided that the respondent complied with its duty to make reasonable adjustments. The nature of the adjustments required by the claimant has been made clear to the respondent throughout: the claimant requires notice of change, more notice than an employee without his disability. The respondent has provided no satisfactory explanation of its stated concern that the claimant could not cope with any such move, with the appropriate adjustments, why for example, the respondent could not give the claimant adequate notice of any change in location before the proposed move of Blackpool North Job centre. The respondent has not provided any satisfactory explanation as to why the future relocation of the Job Centre makes it impracticable to reinstate the claimant.

75 In its letter dated 25 November 2016 (see paragraph 17 above) the respondent indicated an additional reason, namely that it considered that employee/manager relationship had broken down and would not be able to operate effectively in Blackpool North job centre. We refer to the written reasons sent to the parties on 20 December 2016 and in particular paragraphs 25, 26 and 51.2-51.6. The respondent has not led any satisfactory evidence to support the assertion that trust has broken down and/or that the reinstatement of the claimant would cause difficulties in the workplace by reason of any animosity or breach of trust and confidence.

76 The respondent did not carefully consider whether it would be practicable to reinstate the claimant.

77 Having considered all the circumstances we find that the respondent has failed to discharge the burden. It was reasonably practicable to reinstate the claimant.

78 In deciding the level of the additional award we have considered all the circumstances and note in particular as follows:

78.1 Mrs Knight did not give any reasonable consideration to the practicability of the reinstatement of the claimant. Her evidence on this has been unsatisfactory;

78.2 The respondent had made its decision not to reinstate the claimant before the Order was confirmed by this tribunal in February 2017. That is clear from the stance taken at the preliminary hearing before EJ Franey and the unsatisfactory evidence of Mrs Knight as to the steps she took to consider the practicability of reinstatement after that hearing.

78.3 The respondent, a government body, has simply ignored the Order of the tribunal, failed to give due consideration to its duty to make reasonable adjustments and the findings of this tribunal;

78.4 It was not the genuine belief of the employer that there was a good reason for refusing to comply with the Order of reinstatement;

78.5 The claimant genuinely pursued his application for reinstatement. He wished to return to the job. He had returned to work on two previous occasions after long absences and having been reinstated following an appeal against dismissal. He had demonstrated that he could return in these circumstances and work at an acceptable standard;

78.6 The claimant was reasonable in rejecting the offer of re-engagement;

78.7 On the balance of probabilities, had the claimant returned to work, it is most likely that he would have continued working for the respondent, in the same post, up to his intended retirement date;

78.8 The claimant has mitigated his loss.

79 In these circumstances it is appropriate to make the maximum Additional Award which we calculate in the sum of 52 weeks x £446.13 = £23,198.76.

**Basic Award**

80 The claimant is entitled to a basic award in the agreed sum of £9,145.67

**Compensatory Award**

81 We have considered the claimants loss of earnings and pension rights under the Equality Act. The claimant is entitled to compensation for loss of statutory rights, which we assess in the sum of £500.00.

**Loss of earnings from the effective date of termination to the date of the remedy hearing**

82 The claimant is entitled to compensation for loss arising from the discriminatory acts.

83 We accept the evidence of the claimant and find that it was his intention to continue in employment with the respondent until his retirement age. As stated above, it is most likely that the claimant would have remained in the employ of the respondent up until the date of his retirement. Had the

claimant not been dismissed he would have remained in employment throughout his period. He is therefore entitled to compensation for loss of earnings throughout the period from the date of termination to the date of the remedy hearing.

84 Loss of earnings for this period are agreed in the sum of £40,898.59, plus any applicable non-consolidated bonus. We refer to our written reasons sent to the parties on 20 December 2016 and in particular paragraphs 40, 41, and 42. Had the claimant remained in the employ of the respondent he would have received a non-consolidated payment of £500.00 in the three years 2014 - 2016. His loss of income therefore totals £ 42,398.59 for that period.

85 We deduct from the sum of £42,398.59 the following sums:

| | | |
|---|---|---|
| 85.1 | Notice pay | £ 3,535.87 |
| 85.2 | Civil Service payment | £23,761.38 |
| 85.3 | Income from PAYE employment £27,934.08 | |
| 85.4 | Income from self employment to 5 April 2016 | £ 7,129.20 |
| 85.5 | Income from self employment from 5 April 2016 to 10 February 2017 | £ 4,182.20 |
| | Total to be deducted | £66,542.73 |

86 There are no loss of earnings to the date of the remedy hearing. No award of compensation is made under this head.

**Future Loss of earnings**

87 We calculate future loss of earnings ( from date of remedy hearing to date of retirement ) as follows.

88 The claimant at the effective date of termination was earning a weekly net sum of £355.05 calculated as follows:

| | |
|---|---|
| Agreed net weekly wage: | £347.84 |
| Annual non consolidated bonus of £500.00 as a weekly benefit | £ 7.21 |
| | £355.05 |

89 Since the termination of employment the claimant has mitigated his loss and has earned at the weekly rate of £467.50 calculated as follows:

Income from PAYE employment

| | |
|---|---|
| £27,934.08 over 75 weeks | £372.45 per week |
| Income from self employment | £ 95.05 per week |

90 We find that it is more likely than not that the claimant will continue to earn at that same rate. The claimant has therefore suffered no loss of earnings and no award is made under this head.

**Injury to feelings**

91 We note that it is agreed that the level of compensation falls in the middle band of the Vento range. We have considered our findings from our previous judgments and all the circumstances. We note in particular that:

91.1 the period of the discriminatory acts commenced in September 2014, when Miss Chyba stated that she would not talk about reasonable adjustments until after the claimant had returned to work;

91.2 Miss Chyba's actions and in particular her referral to a decision maker, aggravated the stress the claimant was suffering at the time, it caused him stress and anxiety, aggravated his medical condition (see paragraph 58 of the written reasons sent to the parties on 17 December 2015);

91.3 the claimant was absent from work until the termination of his employment, the reason for his incapacity being stress. The stress was caused by the discriminatory acts. During this period the claimant's personal life was severely affected by the aggravation of his medical condition. We refer to our findings at paragraph 34 above;

91.4 The claimant was upset by the dismissal, he felt let down by his managers and employer. We refer to our finding at paragraph 35 above. The claimant found the discriminatory treatment of him intimidating, demoralising and offensive, degrading, humiliating. His feelings of anxiety have continued – he often expresses his feelings of anxiety when giving evidence to the tribunal;

91.5 The claimant suffered considerable stress and anxiety when faced with the respondent's refusal to provide reasonable adjustments. We have referred to the written reasons sent to the parties on 20 December 2015 and in particular paragraphs 60, 65, The claimant made it clear to the respondent what adjustments he needed to enable him to consider a return to work;

91.6 The claimant felt well enough to seek full – time employment in September 2015;

In all the circumstances, we agree that this falls within the middle band of the Vento range. The affect of the discriminatory treatment on the claimant has been long-lasting, quite severe, has adversely affected his health and quality of life. We award the sum of £16,000.00.

**Pension Loss**

92 We have considered the Consultation Paper on Compensation for loss of pension rights and all the circumstances of this case including the following:

92.1 At the effective date of termination (28 October 2014) the claimant was aged 54 years;

92.2 The claimant, as part of his employment benefits with the respondent, was a member of the Civil Service pension scheme, a defined benefit pension scheme;

92.3 The claimant has obtained other employment since his dismissal. He has had no pension benefits in that employment.

92.4 It is highly unlikely that the claimant will either:

92.4.1 obtain employment with another employer which attracts the same or similar pension rights as he enjoyed with the respondent; or

92.4.2 obtain employment again with the respondent. We make this determination bearing in mind all the circumstances and, in particular, that the respondent:

92.4.2.1 has simply ignored the Order for reinstatement;

92.4.2.2 has displayed a marked reluctance to consider its duty to make reasonable adjustments to enable the claimant to continue in its employ;

92.4.2.3 made only two offers of re-engagement, giving the claimant very little time to consider, two posts which the claimant had previously shadowed and rejected;

92.4.2.4 has failed to identify any vacant post which would provide suitable employment for the claimant

92.5 It was the claimant's intention to remain in the employment of the respondent until his intended retirement at the age of 60;

92.6 It is highly likely that the claimant would have achieved that aim. The claimant would not have left voluntarily. We refer to our findings at paragraphs 59-64 above.

93 In all the circumstances we find that it is just and equitable to award compensation for pension loss by treating it as a complex case under the new guidelines.

94 In these circumstances the parties agree that compensation should be calculated with use of the Ogden tables.

95 We note that in calculating the compensation the parties agree that a deduction should be made for the likelihood and/or chance that the claimant would nevertheless have exited the pension scheme before the age of 60. On balance, bearing in mind our comments above as to the likelihood of the claimant continuing in employment with the respondent, we agree with the claimant that a deduction of 25% should be applied.

96 However we are unable to fully complete the calculation at this time because:

96.1 the parties have not been able to agree the net annual pension loss to use as the multiplicand. The claimant asserts that the figure is £1,714.09, but agrees that this should be "netted down" but is unable to provide the netted down figure. The respondent asserts that they have not yet received from the Pension service confirmation of the amount the claimant would have received;

96.2 the claimant asserts a discount factor of 2.5%. The tribunal is not clear if that figure is agreed by the respondent. Further, the parties are invited to comment on the possible application of the new discount factor of minus 0.75% for personal injury claims, announced by the government in February 2017.

97 Until the pension loss is quantified the tribunal is unable to calculate the amount of interest and the correct figure for grossing up.

98 In relation to the grossing up of any award for injury to feelings, the tribunal notes that the difference between the parties on their view of the law is significant. The tribunal is minded to follow **Moorthe** but invites further submissions as to the nature and relevance of the appeal to the Court of Appeal and the likely date that decision will be made.

99 The tribunal invites further submissions on the outstanding points before reaching a final decision.

100 A further remedy hearing has been set but the parties may wish to seek agreement on the outstanding matters, or agree to provide written submissions, to avoid the need for attendance on the next hearing date.

Employment Judge Porter
Date: 27 April 2017

JUDGMENT SENT TO THE PARTIES ON
27 April 2017

FOR THE TRIBUNAL OFFICE