Case No: 3401301/2016

EMPLOYMENT TRIBUNALS

Claimant: Ms C

Respondent: (1) The Governing Body of Warren School
(2) Suffolk County Council

HEARD AT: BURY ST EDMUNDS ET **ON**: 7 August 2017 in Chambers
1 September 2017.

BEFORE: **Employment Judge M Warren**

MEMBERS: Ms P Breslin
Mrs L Gaywood

REPRESENTATION

For the Claimant: Ms J Phillips, Solicitor.

For the Respondent: Mr A Hodge, Counsel.

JUDGMENT ON REMEDY

1. The Claimant having succeeded in her claims of indirect sex discrimination and unfair dismissal we make this declaration that the Claimant's right not to be indirectly discriminated has been contravened by the requirement that she work in an environment in which a sexual assault could take place.

2. The Respondent shall pay the Claimant compensation in respect of her claim of unfair dismissal in the sum of £18,851. The recoupment provisions do not apply.

3. The Respondent shall pay the Claimant compensation in respect of her claim of sex discrimination in the sum of £33,642.

4. For the avoidance of doubt, the total payable by the Respondent to the Claimant under the terms of this Judgment is **£52,493**.

REASONS

Background

1. By a Judgement dated 5 April 2017, the Claimant succeeded in her claims of unfair dismissal and discrimination by reason of sex. The issue of remedy came before us at a hearing on 7 August 2017.

The Issues

2. For the Remedy Hearing we had before us a Schedule of Loss prepared by the Claimant. We also had a Counter Schedule of Loss from the Respondent. We set out below the points of agreement and the issues before us on the question of remedy, as identified by Mr Hodge:

    2.1 The Claimant's Basic Award was agreed at £1,916.

    2.2 Subject to what is said below, the Claimant's calculation of her past loss of earnings to date was agreed at £12,917. That is subject to an argument on whether the Claimant should be able to claim for loss of earnings when she was too unwell to work in any event.

    2.3 In respect of the Claimant's future loss of earnings, she claims 52 weeks loss from 7 August 2017, (the date of the Hearing) whereas, the Respondents say that period of loss should be 26 weeks only.

    2.4 The Claimant seeks interest on her loss of earnings. The Respondent says that she is not entitled to interest as she should only receive compensation for loss of earnings under the unfair dismissal jurisdiction, not the discrimination jurisdiction. Interest is not payable in respect of compensation for loss of earnings in the unfair dismissal jurisdiction.

    2.5 The Claimant's calculation of her pension loss to the date of hearing is agreed in the sum of £3,621 subject to the Respondents' argument on whether she should receive compensation at all for the period during which she was ill.

    2.6 In respect of the Claimant's calculation of her future pension loss, she calculates that loss for a period of 52 weeks and the Respondents say that the appropriate period of calculation should be 26 weeks only.

    2.7 The Claimant's claim for loss of statutory rights in the sum of £500 is agreed.

    2.8 The Claimant seeks damages for injury to feelings in the sum of £16,500. The Respondents say that the Claimant should receive no compensation for injury to feelings because her discrimination claim succeeded in respect of a claim of indirect discrimination only.

2.9 There is a heading in the Claimant's schedule of loss for Aggravated Damages, but no figure is given. No argument was put forward as to why this is a case in which an award of Aggravated Damages is appropriate. In any event, the Respondents contend that no award for Aggravated Damages should be made.

2.10 The Claimant seeks interest on any award for injury to feelings, the Respondents agree that interest is payable if such an award is made.

2.11 The Claimant seeks reimbursement of the tribunal issue fee and hearing fee which she has paid in the sum of £1200. The Respondents say this should be recovered from the Tribunal Service, in light of the Supreme court decision on fees in the UNISON case.

2.12 The Respondents argue that any calculation of loss of earnings should take into account the Claimant's illness and what would have been a period of absence from work and apply the standard sick pay provisions for teachers set out in the Burgundy Book. That is, six months on full pay and thereafter, six months on half pay.

2.13 The Respondents also say that the Claimant has failed to mitigate her loss.

2.14 The Respondents argue that the compensation awarded to the Claimant should be subject to a 25% reduction because of her failure to pursue a grievance contrary to the ACAS code.

3. In summary, the areas of contention may be summarised as follows:

3.1 Should there be an injury to feelings award at all?

3.2 If there should be an injury to feelings award, of what amount?

3.3 How should Ms C's ill health be treated in our calculations?

3.4 Did Ms C take reasonable steps to mitigate her loss?

3.5 Should there be a reduction in compensation because of Ms C's failure to follow the ACAS code?

3.6 Should the respondent be ordered to reimburse the tribunal fees Ms C has paid?

Evidence

4. We had before us a witness statement from Ms C on the issue of remedy, which she signed and dated at the beginning of giving oral evidence.

5. We had a short bundle of documents prepared by Ms C's solicitors, running to page number 21. Within that bundle was Ms C's schedule of loss referred to above. The Respondent's counter schedule was separately provided.

6. No evidence was offered by the Respondent.

The Law

7. Where a claim has succeeded before an Employment Tribunal under the Equality Act 2010, section 124 provides as follows:

> *(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).*
>
> *(2) The tribunal may—*
>
> *(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;*
>
> *(b) order the respondent to pay compensation to the complainant;*
>
> *(c) make an appropriate recommendation.*
>
> *(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect [on the complainant] of any matter to which the proceedings relate—*
>
> *(a) . . .*
>
> *(b) . . ..*
>
> *(4) Subsection (5) applies if the tribunal—*
>
> *(a) finds that a contravention is established by virtue of section 19, but*
>
> *(b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.*
>
> *(5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).*
>
> *(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by [the county court] or the sheriff under section 119.*
>
> *…"*

8. What amounts to a declaration really requires no further explanation beyond the wording of section 124(1) itself: it is simply a statement that the Respondent has contravened the Claimant's rights under the Equality Act in some way.

9. With regard to recommendations, they may only relate to obviating an adverse effect on the Claimant.

10. In this case, the only finding of discrimination is one of indirect discrimination, the provisions of Section 124 (4) and (5) are therefore

relevant. They set out that in a case where there has been indirect discrimination, the tribunal is required to consider whether in applying the provision, criterion or practice, there was an intention on the part of the Respondent to discriminate against the Claimant. If there was not, the tribunal should not award compensation until it has first considered whether to make a declaration or a recommendation. It does not say that if the tribunal makes a declaration or a recommendation, it should not make an award of compensation; it just says that the tribunal should consider those remedies first.

11. The Equality and Human Rights Commission's Code of Practice on Employment (2011) provides the following guidance on compensation for indirect discrimination:

> *15.44*
>
> ***[s 124(4) & (5)]*** *Where an Employment Tribunal makes a finding of indirect discrimination but is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the claimant, it must not make an award for compensation unless it first considers whether it would be more appropriate to dispose of the case by providing another remedy, such as a declaration or a recommendation. If the tribunal considers that another remedy is not appropriate in the circumstances, it may make an award of damages.*
>
> *15.45*
>
> *Indirect discrimination will be intentional where the respondent knew that certain consequences would follow from their actions and they wanted those consequences to follow. A motive, for example, of promoting business efficiency, does not mean that the act of indirect discrimination is unintentional.*

12. The final sentence of the guidance at paragraph 15.44 does not appear to be an accurate representation of the provisions of sections 124 (4) and (5), which do not appear to make the award of compensation in such circumstances, contingent on a finding that a declaration or recommendation is not appropriate.

13. The guidance at 15.45 as to the meaning of, "intention" does appear to accord with the case law on the earlier, superseded, similar statutory provision in the Race Relations Act 1976, section 57(3) which provided that in a case of indirect discrimination, a tribunal could award no compensation if the PCP was, "not applied with the intention of treating the claimant unfavourably on racial grounds". In JH Walker Ltd v Hussain 1996 ICR 291, the EAT explained what was meant by, "intention" in this context. The employer had a policy of not allowing holiday to be taken at Eid, which indirectly discriminated against Asian employees. The employer could not rely on s57(3) because it knew about the adverse effect of its policy on its Muslim employees. "Intention" refers to the employer's state of mind as to the consequences of its actions. There would be an, "intention" if (a) the employer wanted to bring about a state of affairs that was the prohibited

outcome and (b) knew that the prohibited outcome would follow. In other words, if the employer introduced the policy for genuine business reasons, (not out of ill will toward the employee or category of employee) it still had an "intention" if it knew the detriment its decision would cause.

14. If the Tribunal decides to award compensation, section 119(1) sets out what a County Court may order, which is to grant any remedy which could be granted in the High Court in proceedings for tort or judicial review, which includes compensation for financial loss and personal injury. Such compensation can include damages for injury to feelings, (s119 (4)). Those damages would be payable by reason of a statutory tort on the part of the Respondent, the measure of damages in respect of which is to place the Claimant, so far as is possible, in the position that she would have been in but for the discrimination, (see Ministry of Defence v Channock [1994] IRLR 509 EAT).

15. Placing a Claimant in the position she would have been in but for the discrimination will entail an assessment of what might have happened, but for the discrimination, (see for example Chagger v Abbey National Plc [2009] EWCA Civ 1202 CA, [2010] IRLR 47).

16. The "eggshell principle" in the law of tort applies, in other words, the Respondent has to take the Claimant as it finds her; if she is particularly vulnerable and so the effect of the discrimination that much greater, the Respondent is nevertheless liable for the full extent of the loss, (see Olayemi v Athena Medical Practice [2016] ICR 1074, EAT).However, as this is a statutory tort, the principle of reasonable foreseeability does not apply, all that needs to be established is a causal link between the discrimination and the injury or loss, (see Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] ICR 1170 and Essa v Laing Ltd [2004] ICR 746 paragraphs 17 and 29 of the latter).

17. Damages are assessed under two headings; General Damages for pain, suffering, loss of amenity or injury to feelings and Special Damages in respect of the financial losses flowing directly from the discrimination.

18. We have had regard, in broad terms, to the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases, so as to have in mind the levels of awards made in personal injury cases.

19. We have not in this case, been asked to make an award for personal injury.

20. In the case of (1) Armitage, (2) Marsden and (3) HM Prison Service v Johnson [1997] IRLR 162 the EAT set out five principles to consider when assessing awards for injury to feelings in cases of discrimination:

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

    20.2 Awards should not be too low as that would diminish respect for the policy of the legislation. Society has condemned discrimination and

awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches.

20.3 Awards should bear some broad general similarity to the range of awards in personal injury cases. This should be done by reference to the whole range of such awards, rather than to any particular type of award.

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

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

21. Further guidance was given on the range of awards by setting out three bands of compensation for injury to feelings by the Court of Appeal in the case of Vento v Chief Constable of West Yorkshire Police (2) [2003] IRLR 102. Those bands as follows:

21.1 The top band should normally be from £15,000 to £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 ground of sex or race.

21.2 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.

21.3 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.

22. Those bands were subsequently amended to take into account inflation, see the case of Da'Bell v NSPCC [2010] IRLR 19. In the case of AA Solicitors v Majid UKEAT/0217/15/JOJ (paragraph 22) Mr Justice Kerr said that it was not necessary for Employment Tribunals to await guidance from the appellate courts before further raising the thresholds of those bands to take into account inflation.

23. In a personal injury case known as Simons v Castle [2012] All E R 90 the Court of Appeal held that General Damages awards for personal injury should be increased by 10% in all cases where Judgment is given after 1 April 2013. After a period of uncertainty, with conflicting decisions from the EAT, the Court of Appeal has now in De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879 confirmed that injury to feelings awards should similarly be uplifted.

24. In De Souza the Court of Appeal invited the Presidents of the Employment Tribunals in England & Wales to issue fresh guidance, adjusting the Vento figures for inflation and the Simmons 10% uplift. On 5 September 2017 the Presidents of the employment tribunal's for England & Wales and Scotland

issued such guidance in respect of cases on which proceedings were issued on or after 11 September 2017. That comes too late for this case, however the methodology recommended for cases issued before that date seems to have unimpeachable logic and we therefore adopt the approach set out at paragraph 11 of the Presidents' guidance in recalculating where the Vento boundaries should be as at November 2016, when these proceedings were issued. We divided each of the figures by 178.5 being the RPI figure as at the date of Vento and then multiplied by 265.5 being the RPI figure for November 2016. We then multiplied the results of those calculations by 10% to add the Simmons v Castle uplift, rounding up or down to the nearest £10.

25. On that basis, the Vento bands should be for the purposes of this case:

    Top: £24,540 to £40,900

    Mid: £8,180 to £24,540

    Bottom: £810 to £8,180

26. An award of compensation can include an element of what is known as Aggravated Damages. In Alexander v The Home Office [1988] IRLR 190 CA the Court of Appeal said that this may be appropriate where the respondent has behaved in a high handed, malicious, insulting or oppressive manner in committing the act of discrimination.

27. The sort of behaviour that can warrant an award of aggravated damages can include the manner in which the defendant has conducted the proceedings, as the EAT made clear in Zaiwalla & Co v Walia [2002] IRLR 697. In that case, the Respondent's solicitors had put in a, "monumental amount of effort" to an, "inappropriate" extent and had conducted the proceedings in a manner, "deliberately designed …to be intimidatory and cause the maximum unease and distress to the Claimant".

28. In Metropolitan Police v Shaw [2012] IRLR 291 the EAT reiterated that Aggravated Damages should be compensatory, not punitive and are an aspect of injury to feelings, not a separate head of claim. The President of the EAT, Underhill J as he then was, recommended that tribunal's use the words: "*injury to feelings in the sum of £x incorporating aggravated damages in the sum of £y"*

29. In Shaw the EAT identified 3 broad examples of circumstances in which aggravated damages might be appropriate:

    29.1 Where the manner in which the discrimination was done was particularly upsetting, referred to in Alexander as, "high handed, malicious, insulting or oppressive";

    29.2 Where there was a discriminatory motive, known to the claimant;

    29.3 Where subsequent conduct adds to the injury, for example in the conduct of tribunal proceedings.

30. Special Damages is the name given to the award that is to compensate for financial losses that flow from the discrimination. They fall into 2 elements; losses to the date of the hearing, (which can usually be calculated with some precision) and future financial losses, (which invariably involve speculation as to what the future may hold for the Claimant).

31. In respect of financial losses, the Claimant is under a duty to *mitigate* her loss. The burden of proof though lies with the Respondent if it wishes to assert that the Claimant has failed in that duty. The question is not whether the Claimant has behaved reasonably, but whether she has taken reasonable steps to mitigate. She is expected to behave as she would have behaved had she had no prospect of receiving compensation. However, Sedley LJ commented in Wilding v British Telecommunications plc:

> *"… a restatement of the principle set out by Lord Macmillan in* Banco de Portugal v Waterlow and Sons Ltd *[1932] AC 452, 506:*
>
> > *'The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.'*
>
> *In other words, it is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed: he must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed."*

32. More recently and in the employment law context, Langstaff J reviewed the law on mitigation in Cooper Contracting Limited v Lindsey UKEAT/0184/15 which might be summarised as follows:

32.1 The burden proof of is on the wrongdoer.

32.2 The burden of proof is not neutral – if no evidence is offered, the employment tribunal does not have to find a failure to mitigate.

32.3 What has to be proved is that the Claimant acted unreasonably.

32.4 There is a difference between acting reasonably and not acting unreasonably

32.5 What is reasonable and unreasonable is a question of fact

32.6 The views and wishes of the claimant is one factor to be taken into account, but it is the tribunal's assessment of reasonableness that

counts, not the Claimant's.

32.7 The tribunal should not apply too exacting a standard on the Claimant, he or she is the victim.

32.8 In summary, it is for the Respondent to show that the Claimant acted unreasonably.

32.9 It may have been perfectly reasonable for the Claimant to have taken a better paid job, that is important evidence, but not itself sufficient.

33. Where a Claimant has succeeded on grounds of discrimination and unfair dismissal and the discrimination has led to loss of employment, the elements of compensation for financial losses inevitably overlap, although unfair dismissal compensation is subject to a statutory cap on the level of award. In such cases, the Tribunal should award compensation under the discrimination legislation, (see D'Souza v London Borough of Lambeth [1997] IRLR 677).

34. If a Claimant had the benefit of a pension provided by, or contributed to by, her employer, then she will be entitled to compensation for loss of pension benefits. How these losses are to be calculated is not prescribed by law. A guide written by 2 Employment Judges, (then Chairmen) and 2 Government actuaries was published by the Stationary Office in 2003 had been commonly used for this purpose, however it became inappropriate to continue to do so following the case of Griffin v Plymouth Hospital NHS Trust [2014] EWCA Civ 1240. A working party of Employment Judges has now produced a fourth edition of this booklet, now entitled, "Employment Tribunals: Principles for Compensating Pension Loss". It is permissible to follow that guide if, on the facts of the case, it will provide a reasonable assessment of the Claimant's losses. Equally, it is permissible to follow some other approach to assessing pension loss if that alternative approach were, on the facts, to provide a more accurate means of calculation.

35. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 provide that interest is payable on awards of compensation in cases of discrimination. The rate of interest payable stands at 8% for proceedings issued after 28 July 2013. Interest should be calculated from the 'day of calculation' which in a case of injury to feelings, is the period beginning on the date of the contravention or act of discrimination complained of, through to the date of calculation. In respect of other damages, interest is calculated from the mid-point, half way through the period in question, to the date of calculation. A Tribunal has a discretion where it considers a serious injustice would be caused if interest would be awarded, in respect to the periods specified, to calculate interest for such different period as it considers appropriate.

36. When a Claimant has succeeded in a claim for unfair dismissal, the award of compensation falls into two categories. The first is in respect of a Basic Award pursuant to sections 119 to 122 of the Employment Rights Act 1996 (ERA) which provide that in the case of an ex-employee aged more than 21 and less than 41, the Basic Award shall be a multiple of the number of years' complete service and the individual's gross pay, subject to a statutory

maximum which stood at £479 as at the date of termination of employment in this case.

37. The second element of the award is to compensate the Claimant for losses sustained as a result of the dismissal, known as the Compensatory Award. Such losses in the context of the unfair dismissal jurisdiction do not attract interest and are subject to a statutory cap which stood at the time of dismissal at £78,962 or one year's pay, if lower.

38. The amount of such an award is governed by sections 123 to 126 of the ERA. Section 123 (1) states:

> "*The amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to any action taken by the employer.*"

39. The loss, it should be noted, must be a consequence of the dismissal. This can produce a counterintuitive outcome in cases of constructive dismissal, where the Claimant says that the Respondent's conduct that led to her resignation, has caused her ill health such that she is unfit to work. During any period post dismissal that the Claimant is unfit to work due to that illness, she is not entitled to compensation for loss of earnings if it is the case that had she remained in employment, she would not have received sick pay. This is because: (1) she is not suffering a loss of earnings as had she still been in work, she would not have received an income and (2), the loss is as a consequence of the ill health caused, (if upheld) by the employer's pre-dismissal conduct, not by the dismissal itself. Unjust though this may seem, the Claimant is not without remedy; in such circumstances the Claimant's redress is a civil action for damages for personal injury. Equally, it might be said, if the illness, the personal injury, were caused by the discrimination, the loss may be compensated as a consequence flowing from the discrimination. The authority for this is the Court of Appeal case of GAB Robins (UK) Ltd v Triggs [2008] ICR 529.

40. Section 123 (4) provides that a Claimant has the same duty to mitigate his or her loss as would a Claimant under the common law. The burden of proof lies with the employer to show that the Claimant has failed to mitigate loss, (see above).

41. By an amendment to the Trade Union and Labour Relations (Consolidation) Act 1992 at section 207A, where in a case of discrimination or unfair dismissal, it appears that a relevant code of practice applies, the employee has failed to comply with that code and that failure was unreasonable, then the Tribunal may, if it considers it just and equitable in all the circumstances to do so, decrease the award by up to 25%. The only ACAS code of practice to which that provision relates is the ACAS Code of Practice 1 Disciplinary and Grievance Procedures (2009) which sets out recommendations as to how an employer and employee should handle a grievance.

Findings of Fact

Basic Agreed Facts

42. The following are agreed facts for the purposes of deciding and calculating the issue of remedy:

    42.1 The Claimant's date of birth is 8 March 1986.

    42.2 The date employment commenced was 1 September 2014.

    42.3 The date of termination of employment was 31 December 2016.

    42.4 Gross monthly pay was £3072.

    42.5 Net weekly pay was £455.08.

    42.6 Employer's monthly pension contribution was 16.48% of gross pay.

    42.7 Employee's monthly pension contributions were 9.6% of gross pay.

Overview

43. Ms C was a teacher at the Respondent school, which is a school for pupils with learning difficulties.

44. In September 2015, Ms C began a period of absence from work with an illness that was in due course diagnosed as epilepsy. There was a short period of an unsuccessful attempt to return to work in November 2015, subject to that, Ms C was away from work with this illness until April 2016.

45. On 16 June 2016, there was an incident in which Ms C was sexually assaulted by a 17-year-old male pupil who put his hand up her dress and flapped it against her vagina. When told to stop, he slapped Ms C on the arm several times and then when she walked away, ran after her and pushed into her back.

46. Ms C was naturally, very upset by this incident. She began a period of absence from work on 17 June 2016, from which she did not return. Ms C resigned her employment on 13 December 2016, giving notice which expired on 31 December 2016.

47. We found that requiring Ms C to continue working with the pupil that ultimately assaulted her, given his known sexualised behaviour, amounted to the provision criterion or practice of requiring her to work in an environment where a sexual assault could take place. We found that amounted to indirect sex discrimination. We further found that other events which took place between the assault and the resignation amounted to a breach of the implied term that an employer must maintain mutual trust and confidence, so that Ms C was entitled to claim that she had been constructively dismissed.

Medical Evidence

48. We review the medical evidence with which we have been provided.

49. Within the trial bundle were 6 Fit Note's covering the relevant period of absence. Each of them, perhaps a little unhelpfully, gives as the condition causing the absence, "assault".

50. The trial bundle contained an occupational health report dated 24 June 2016. This referred to a physical injury from the assault, described as whiplash. It also referred to, "reduced concentration, disturbed sleep, low mood, and tearfulness.". In her conclusions, the Occupational Health Adviser described Ms C as clearly distressed and the sleeping pattern being disturbed, which may exacerbate her epilepsy. She is said to be seeking specialist counselling.

51. A further occupational health report in the trial bundle dated 13 July 2016 adds nothing of assistance.

52. The final occupational health report from a Consultant Occupational Health Physician dated 13 September 2016 is at page 343 of the trial bundle. Here, reference is made to Ms C being referred on by her GP for further support. The consultant refers to Ms C suffering from emotional distress and he recommended a referral of Ms C, by the Respondent, to cognitive behavioural therapy, (CBT). He confirmed that Ms C was suffering significant emotional distress and she remained unfit to go back to her role.

53. Ms C was referred for CBT and a report from her therapist appears in the trial bundle at page 367 and in the remedy bundle at page 14. This is worthy of quotation:

> *The return to work interview however highlighted issues which included the incident not being recognised by management at the school as an assault as well as a comment from another member of staff that Ms C had brought it on herself. Despite ACAS involvement to assist to resolve issues between management and Ms C, the advice given by ACAS has not been followed through. The result of these circumstances has left Ms C to have conflicting thoughts around the incident e.g. I should accept it, but she also feels vulnerable to return to this workplace due to management not recognising the incident and also not passing on information of this incident to the pupil's new education placement.*
>
> *This therefore leads her to feel unsafe in working within the Suffolk County Council when relevant information has not been shared.*
>
> *Ms C is currently experiencing high anxiety with symptoms of worrying too much, trouble relaxing, feeling restless and becoming easily annoyed or irritable. This is also effecting her sleep and she is feeling down in her mood.*
>
> *She has noticed that she feels out of control due to the anxiety and is finding it anxiety provoking to be far from home. She particularly is*

> *finding it difficult to travel as a passenger in a car and is only going on short trips. It appears that Ms C is experiencing symptoms of panic and is implementing safety behaviours to avert a feared consequence."*

54. Psychometric measures were recorded with the following scores:

    GAD-7 score 17 indicating symptoms within the severe range of anxiety symptoms.

    PHQ-9 score 10 indicating symptoms within the moderate range of depression.

55. Reference is made to Ms C wishing to discuss further issues surrounding her anxiety with CBT, in particular to have an understanding of anxiety and symptoms, to reduce anxiety, to be able to travel in a car for longer distances and to improve sleep.

56. A proposed treatment plan is set out, including to formulate the cycle of panic, to address behaviours that are unhelpful and assist in helpful techniques to manage anxiety, to give helpful information on good sleep hygiene and to assist understanding the cycle of worry and techniques to manage it.

57. The report recommends that Ms C undergo further counselling with an organisation called the Sue Lambert Trust.

58. In the remedy bundle at page 17 is a report from Ms C's GP, Dr Wiggins, dated 24 March 2017. Dr Wiggins begins by explaining that in 2015 Ms C had been diagnosed with profound déjà vu and other semiology localised towards her temporal lobe in origin and she was prescribed Lamotrigine. At that point, she was told to stop driving and was permitted to return to work. Dr Wiggins referred to that period as stressful, but said that Ms C had been returning to normal life and enjoying her role as a teacher. The rest of the report warrants extensive quotation:

> *"I saw [Ms C] on the 20 June 2016 when she had been assaulted by one of the pupils at school…. She was obviously very shocked and upset by the episode and I suggested that she undergo some counselling and gave her a sicknote to recover from the problems resulting from the injuries… She was referred on to the well-being service from which she underwent a period of cognitive behaviour therapy finishing in March 2017… It appears that the stress around this episode has caused considerable upset and I have been keen to try and help Ms C deal with this as it may potentiate the chances of further fits…. She has clearly been under a lot of stress and has lost a lot of weight over the last nine months as it has been a very difficult time with her finally leaving her post and now the resulting tribunal".*

59. Lastly, we have a further report from the CBT therapist dated 4 August 2017. That passage of the report which sets out what it calls, "Presenting Problems" largely repeats what we have set out above from the first report, although it adds that part of Ms C's anxiety is that if she is too far from

home, she fears that she will not get to the toilet in time and may wet herself. It also refers to her having taken her dresses to charity shops.

60. The latest psychometric testing scores were as follows:

PHQ-9 score 10 at assessment score 12 at discharge, (symptoms of depression are worse).

GAD-7 score 17 at assessment score 12 at discharge, (symptoms of anxiety are improved).

61. The therapist concludes by reporting as follows:

> *"Ms C found therapy useful to look at anxiety and panic cycles and strategies to manage anxiety feelings and anxious thoughts. However, the ongoing legal process has been understandably stressful and limiting in terms of reduction in symptoms.*
>
> *Ms C remains to have significant anger, and moderate symptoms of anxiety and low mood as a result of the ongoing legal process.*
>
> *This is understandable within this situation and I would suggest further therapy is likely to be required when the legal case is finalised…"*

Ms C's Evidence

62. We accept Ms C's evidence and we set out below the relevant facts and information which she has provided that assist us in deciding the issues before us.

63. Part of Ms C's upset at the time of the incident was caused by reflecting on what might have happened had she been on her own with the child at the time of the assualt.

64. She was also upset by the Head Teacher's remark to the effect that it is part of the job to deal with challenging behaviour.

65. Ms C returned to work the day after the incident, but had to go home in the afternoon. That was a Friday. The following Monday, she attended a course, but broke down in tears and had to go home.

66. She had been given a lift to the course and her male colleague driving her made an inappropriate comment. She was upset by that.

67. Ms C was upset on being told that the parent of the child did not think that the assault was a sexual assault and implied that Ms C ought not to have given the child the deep tissue pressure therapy we referred to at paragraph 73 of our liability Judgement.

68. Ms C describes herself as having been, "extremely upset" on being shown a document entitled, "Advice for Working with Pupil A" upon her attending a return to work interview, because she saw it as implying that she had acted inappropriately.

69. Ms C said that she found it demoralising to learn that the Respondent had not shared information about pupil A with the new educational institution he was to attend.

70. She described herself as, “utterly devastated” after the return to work meeting.

71. Ms C described how she cried, taking her dresses to a charity shop, after she had read an Incident Report by the Head teacher which she saw as criticising her for wearing a dress.

72. Ms C referred to the correspondence passing between her Trade Union representative, Ms Roe and the Respondents’ Human Resources advisor, Ms Platten as, “particularly upsetting”.

73. Ms C explained that she found herself questioning everything that she had done on 16 June 2016. She refers to support from the Sue Lambert Trust and she also turned for support to Suffolk Wellbeing, Waveney Wellbeing and Victim Support. She was at the time of the remedy hearing on a waiting list for further support from the Sue Lambert Trust.

74. In cross-examination, Ms C seemed to place much greater emphasis on the Return To Work meeting on 7 July 2017, than on the incident on 16 June, as a cause of her emotional difficulties.

75. Ms C spoke of being horrified when she learned that in the referral to occupational health in September 2016, the Respondent had said merely that she had been assaulted by a child.

76. Ms C explained that her problems have led to significant difficulties with her partner, she wrote of pushing him away and telling him that he does not understand her emotions. She wrote of blaming him for not supporting her, whilst acknowledging that she had excluded him. She wrote of feeling enormous guilt about changing their lives and that over a year later, she remains unhappy. She describes how she had secretly felt suicidal. She says that she has pushed family and friends away in an effort to shield them from her turmoil, and she wrote, “I feel like I’m living day-to-day waiting for the next part of what Jan will do to me, the next piece of heartache I will have to bear.”.

77. Ms C explained how she no longer uses the supermarket that she used to use because it is frequented by the child who had assaulted her, with his family. She resorted to shopping online for several months.

78. Ms C says that she would now like to leave Suffolk to return to where she came from because she does not feel able to work for Suffolk County Council. She speaks of grieving for the loss of her job and her career and that she does not feel able to trust people in charge to keep her safe whilst she is in a classroom. She said that she is consumed by grief in this respect and that she finds it difficult to motivate herself to get up and get dressed every day. She feels terrified of being asked why she is no longer teaching. She says that she switches between emotions of anger and devastation at

losing her vocation.

79. Ms C's employment ended on 31 December 2016. At that point she had been unfit to work since 17 June 2016. She has not since in fact, been certified as fit to work.

80. Ms C tells us that she had secured some employment over the summer with a company called M & H Plastics. This was a temporary job on a zero hours contract. She felt this gave her more time to build her confidence to see if she could do some supply teaching. It was a job where she could choose not to go into work if she did not feel like it. It is also at a location that is close to her home which is easier for her because she is suffering from stress incontinence. She explains how because of this condition, she had stopped doing things that involved travelling by car and this was a major factor when she started looking for work. The work at M & H Plastics was also attractive because it allowed flexibility in terms of attending appointments for therapy. She had earnt a total of £845 from the beginning of June to the date of hearing. The opportunity to do this work will cease at the beginning of October. There may be an opportunity to do more over the Christmas holidays.

81. Finally, Ms C told us that in early May 2017, she registered with a small local supply teacher agency run by the husband of a friend she knows quite well. She has confidence in his ensuring that she is only offered supply teaching placements in which she will feel comfortable. At the time of writing her witness statement she had completed 4 days teaching in 2 different schools. She accepted that before this, she had not made any other attempt to find work. She said in her witness statement that it is clear she is not yet ready to go back to that environment. However, in oral evidence she told us that as of the new academic year starting at the beginning of September 2017, she will continue with this arrangement, visiting a school before she accepts a vacancy, going only to schools recommended to her by her friend's husband.

CONCLUSIONS

82. We consider each of the seven areas of contention in turn.

Should there be an injury to feelings award at all?

83. The question here is whether or not an award for injury to feelings should be made, having regard to the provisions of s124 (5) & (6) the Equality Act 2010?

84. The Respondent required the Claimant to continue working in an environment in which a sexual assault might take place. It knew of the potential danger, evidenced by the health and safety assessments, yet continued with retaining child A in the school and requiring men and women, rather than men alone, to work with him. We find that the PCP was imposed with the intention contemplated by s124(4), as explained above. We do not say of course, that the Respondent, or Mrs Bird, intended that Ms C should be assaulted. Subsection (5) is not therefore engaged.

85. That said, we have in any event considered first whether a declaration or a recommendation is appropriate. The Respondent does not suggest a recommendation, the Respondents' submissions seem to be that all that is required is a declaration. We agree that we should make a declaration.

86. As Ms C is no longer employed by the Respondents, it is not appropriate to make a recommendation in any event. (Section 124 (3)).

87. Having considered a declaration and a recommendation and having made a declaration but having concluded that a recommendation would not be permissible, we go on to consider whether we should exercise our discretion and make an award of compensation.

88. Ms C has suffered loss and upset as a consequence of the requirement to comply with the PCP. There is a causal link between the act of discrimination and the loss; Ms C was knowingly placed at risk, that risk came to pass and Ms C was injured as a result. It is therefore appropriate for us to exercise our discretion and award compensation, as a declaration alone is insufficient.

What amount of damages for injury to feelings should be awarded?

89. We are compensating injury to feelings and not personal injury, although the authorities are clear that an award for injury to feelings contains an element personal injury. See for example, Vento referred to above.

90. In awarding compensation, we are trying to place the Claimant in the position that she would have been in, but for the discrimination. However, that is tempered by the requirement that there must be a causal link between the discrimination and the injury or loss. This creates a difficult issue in this case, because we are looking to compensate the Claimant for the loss arising as a consequence of her being required to work in an environment where she was at risk of sexual assault, but many of the matters complained of and which caused upset to the Claimant are as a result of actions taken by individuals in the employment of the Respondents which were not acts of discrimination. These subsequent actions are perhaps better described as acts of insensitivity, of incompetent management or as a consequence of a lack of awareness or insight. Whilst on the one hand, "but for" the original act of discrimination, these events might not have taken place and Ms C might not therefore have been upset by them, one cannot say that these events were, "caused by" the act of discrimination, that is, the act of requiring Ms C to continue working in the environment in which she was at risk.

91. The events we are referring to are:

    91.1 Ms Bird not recognising the assault as a, "sexual assault".

    91.2 Ms Bird's lack of support.

    91.3 The Respondent's not passing on information to child A's new school.

    91.4 The comment by Ms Bird to the effect that such things are part of the

job.

91.5 The comment by Ms C's colleague whilst driving her to the course.

91.6 Ms Bird's remark that the male colleague was entitled to his opinion.

91.7 The events at the return to work meeting.

91.8 Ms C's perception that she was criticised for wearing a dress.

91.9 The effect of the correspondence passing between Ms Roe Ms Platten.

91.10 The failure to properly describe to occupational health what had happened.

92. These are all matters that contributed toward our finding that the Respondents had undermined mutual trust and confidence such that Ms C was entitled to resign and successfully claim that she was unfairly dismissed. However, we found that these were not acts of discrimination.

93. We focus then, on the injury to feelings caused by Ms C being required to work in the dangerous environment where she was at risk of suffering a sexual assault. There is a causal link between being required to work in that environment, her being sexually assaulted and the upset and distress suffered by Ms C because of that assault. Beyond that, we draw the line.

94. The GP report of 24 March 2017 refers to Ms C as being very upset and shocked by the episode of the assault. That resulted in her being referred for counselling and CBT. The therapist's report of 4 August 2017 refers both to the assault and to the events which occurred thereafter. What we do not have is the benefit of expert medical evidence on what degree of upset has been caused by what. All that we can do on the basis of the evidence available to us and by exercising our common sense and judgement, is to make our best assessment on to what degree the upset, distress and ongoing repercussions may be attributed to either the consequences of the assault, (as a consequence of the indirect discrimination) as opposed to the subsequent intervening events in the form of actions by others.

95. We have had regard to the general range of awards in personal injury cases, we have looked at and considered the range of such awards as set out in the The Judicial College Guidelines 13th Edition and the range for set out in the section entitled, "Psychiatric Damage Generally".

96. We have also considered the cases referred to in the excerpt from Harvey provided to us on quantum of awards in sex discrimination cases. These excerpts are often offered up in submissions on quantifying injury to feelings in discrimination cases, but they have to be approached with caution. Many of the cases are first instance decisions, they represent nothing more than a colleagues opinion on a set of facts which are very, very briefly, summarised. We keep in mind that damages for injury to feelings is to compensate the hurt and upset, the injured feelings, not what it is that has happened to the Claimant. Some of these reports seem to focus on the

events rather than the injury to feelings. They are doubtless very useful to practitioners as a guide on what to expect, but they are not authorities upon which we should rely. However, amongst the first instance decisions are some appellate decisions which are useful, (and often referred to). We refer to some of them below. Where we give the current day equivalent value, we have taken the November 2016 RPI at 265.5, (see paragraph 24 above) and divided that by the RPI for the month of July in the year of the appeal decision under discussion:

96.1 Keohane v Commissioner of Police of the Metropolis UKEAT/0463/12/RN: the claimant was a police constable and a dog handler. She was pregnant and her police dog was taken away from her and allocated to another handler. These two decisions were made over the period of a year and the award of injury to feelings was £9000, described as the lower part of the middle Vento band. There is no information as to the degree of upset to the Claimant and quantum was not at issue in the appeal. Ms C's degree of upset seems likely to have been far worse.

96.2 Lipton Group Limited v Cudd UKEAT/0360/14: the Claimant was pregnant and fell out with the person due to take over from her, who happened to be the sister of the Managing Director and daughter of the Chairman. The discrimination included preventing her from raising a grievance informally, holding three meetings on one day, the MD adopting an aggressive stance in those meetings and the MD seeking to implement a grievance procedure disproportionately. The Claimant was described as initially devastated, she had difficulty in sleeping and cried frequently. She has lost interest in her hobbies, felt tired and lethargic. The experience was said to have tainted her pregnancy. An Employment Tribunal award of £11,000 in 2015 was reduced to £9000 by the EAT. What Ms C had been through and her degree of upset, was far worse.

96.3 Wilton v Timothy James Consulting Ltd [2015] IRLR 368: the Claimant's relationship with a Mr O'Connell, the person who ran the company, came to an end by mutual agreement. Mr O'Connell then began a relationship with another employee, who reported to the Claimant. That person made complaints about the Claimant's management of her, as a result of which the Claimant was subjected to a 30 minute tirade of criticism from Mr O'Connell, including calling her a "green eyed monster" and saying that he believed her to be jealous of the other person. The Claimant was excluded from an investigation into claims against her and an account by that other person was accepted without question. An award of £10,000 in 2015 was upheld by EAT. The experience and upset of Ms C was worse than this.

96.4 St Andrews Catholic School v Blundell UKEAT/0330/09: in this case the Claimant teacher was victimised by the Head teacher for having brought a sex discrimination claim. Demands were made of the Claimant as to the details of her complaint to the governors, the Claimant was assessed very negatively in a classroom observation after which she was told that she was inadequate, that there were

grave concerns about her, that her future was under review and then, she was dismissed. This occurred over a period of four months and the Claimant was said to suffer from a stress related illness and panic attacks. An award of £22,000 was reduced to £14,000 in 2010. The current day value of that award is approximately £16,500. There is little information in the Judgement of the EAT itself, the Claimant was said to have described the impact of the schools actions upon her in graphic terms, the most mundane things were said to have been a huge effort to her, the tribunal had the benefit of a joint expert's report from a consultant psychiatrist and a report from the Claimants Doctor. This is a case closer to approaching the degree of hurt suffered by Ms C but still not of the same degree and one has to bear in mind that it was seven years ago. It was a case described by the EAT as one falling in the middle of the Vento band.

96.5 All of the above cases were in the middle Vento band. There are a couple of cases in the higher Vento band referred to in the Harvey exert, the first of which is HM Prison Service v Salmon [2001] IRLR 425. This is a case of sex discrimination; a woman prison officer worked in an environment where male colleagues openly read pornographic magazines and engaged in unacceptable banter, including one individual using an extremely unpleasant and vile expression to describe women. The Claimant was belittled in front of inmates and was subjected to offensive and sexually degrading comments about her of an appalling nature in the court dock book. She had been deeply upset and shocked. She did not return to work the next day and was subsequently absent from work until finally taking medical retirement having been diagnosed as suffering moderate to severe depressive illness. This Claimant was awarded £21,000 for injury to feelings in 2001, 16 years ago. The current day equivalent value of that award is approximately £32,000. It is a case that is worse than that of Ms C. Not in terms of what happened to her, but in terms of the effect on her. Ms C's case does begin to approach this though, in terms of severity.

96.6 The second higher Vento band case is Miles v Gillbank [2006] EWCA Civ 543: this is another pregnancy discrimination case, the Claimant was a head designer and when she became pregnant there was no risk assessment or adjustment to working practices, there was no help in arranging breaks for meals or for rest, she was not allowed to keep antenatal appointments and was told that she was, "not ill". She was underpaid her maternity pay and suffered unsympathetic remarks and detrimental treatment by managers; when she suffered bleeding, she was told to deal with the client and see if the bleeding occurred later. The behaviour of the manager was said to go beyond malicious and was downright vicious. It was said to have been deliberate, repeated and consciously inflicted. The impact on the Claimant was that she was very shocked, she felt degraded, demoralised and severely distressed. It affected her very substantially. She was awarded £25,000 for injury to feelings in 2006, 11 years ago. The current day equivalent value of that award is approximately £32,000. This is a case that is worse than that of Ms C, in terms of the impact on her.

97. Our assessment of the impact on Ms C of her feelings overall as described in her evidence and as summarised above is that this would be a case that comes into the top end of the middle Vento band or the lower end of the upper band. In other words, it is borderline middle and upper, circa £25,000.

98. What we must do is discount in our assessment the impact on Ms C in terms of her injured feelings and the symptoms thereof, those events which occurred after the sexual assault as itemised above. It is clear to us on reading the medical reports that the most significant impact on the Claimant was the sexual assault. She was undoubtedly upset by the events thereafter which she has complained about and which led to her resignation, but the greater impact on her had been that of the assault which was a consequence of the PCP.

99. Our assessment is that the appropriate award for injury to feelings is £16,000. We have reflected on the significance of this sum in everyday life and consider it appropriate.

100. The claim for Aggravated Damages has not been pursued in submissions and no figure appeared in the schedule of loss. This is not a case where it seemed to us appropriate that an award for Aggravated Damages is appropriate. The injury to the Claimant in her hurt feelings is compensated in the injury to feelings award. There is nothing high handed, malicious, insulting or oppressive in the way that the Respondents implemented their PCP. It has not been suggested that anything in the way the proceedings have been conducted attracts those adjectives.

How should the Claimant's Ill Health be Treated in our Calculations?

101. The Respondents' occupational health reports focuses on the incident as causing the ill health. The GP Dr Wiggins in his or her report of 24 March 2017 referred to Ms C as being very shocked and upset by the episode, that being the assault sustained at the hands of pupil A. Ms C was referred to cognitive behaviour therapy as a consequence of that. The report refers to, "this episode" as having caused considerable upset. The therapist is slightly more ambiguous as to whether the cause is the assault or the treatment of Ms C after that event. It does seem to us however tolerable clear, particularly from the GPs report, that the primary cause of the ill-health which caused Ms C to be absent from work was the discrimination, in that it flowed from the assault, which flowed from the imposition of the PCP.

102. In compensating for unfair dismissal, we may only compensate for losses arising from the dismissal itself and not for losses which arise from something that happened before the dismissal. (See Gab Robins referred to above). However, that Ms C is too unwell to work or to work full-time, was caused primarily by the effect of the assault on her, caused by the imposition of the PCP. Therefore, to compensate her for the discrimination, to place her in the position that she would have been in had the discrimination not taken place, must entail ensuring that she is reimbursed what she would have received had she not been ill.

103. In our view therefore, whilst calculating the compensation payable for loss of earnings as a consequence of unfair dismissal, we must take into

account that Ms C would not have been able to earn her full pay had she not been dismissed, when calculating her financial losses flowing from the discrimination, we should ignore the sick pay and compensate her in full for her loss of earnings because she would not have been sick, had it not been for the discrimination.

104. We assess that C would have been fit to return to work only part-time as at 21 May 2017, which is the date of the first Orange Genie payslip. We have no evidence in the form of a medical prognosis as to when Ms C will be fit to work full-time again. We accept her evidence that she is not up to it at the moment. We have to make some sort of assessment of when we think she will be fit enough to work full-time. She is not fit to work now, she will be sometime in the future. All we can do in this situation in this case, is draw on our collective experience and form a view. In doing so, we assess that from 21 May 2017 until 6 April 2018, she would have been/will only be fit to work part-time. By 6 April 2018, we estimate that she will be fit to work full-time.

What is the Appropriate Period of Loss?

105. The Respondent argues that Ms C's period of loss should come to an end 26 weeks after the date of the remedy hearing, by which time she should have found employment paying the equivalent of what she was receiving in the Respondents' employment. Ms C says that it will take her 52 weeks to reach that point.

106. We have explained above that we do not think that Ms C will be well enough to work full-time until 6 April 2018. Thereafter, she will be fit to work full-time but she will not necessarily have a full-time job straightaway. She will most likely be in a position to take a full-time post at the beginning of the new academic year in 2018. In the meantime, she will, through Orange Genie, find temporary placements in nearby schools. Some of those will be very short term, some of them might be long term. We can only guess. She will not be paid during the holidays. She might or might not find longer temporary placements after April 2018.

107. The appropriate period of loss is 52 weeks to 6 August 2018. If the academic year is 39 weeks, that is 195 working days. Over the course of that period, we estimate that Ms C will be able to work for 60 of those days, taking into account the likely availability of work and her health. We will therefore deduct from our calculation of Ms C's loss of earnings for the 52 week period through to 6 August 2018, 60 days of earnings as a temp teacher at the rate shown in the Orange Genie payslips in the remedy bundle. That is 119.40 x 60 + £7,164.

108. As Ms C was able to work at M & H Plastics over this summer, there is no reason to suppose that she would not be able to again during the summer holiday of 2018. We assume then that she will be able to earn £914 just as she did this year.

109. We also assumed that Ms C will be able to work for two weeks at M & H plastics over the Christmas period, as she acknowledged in her evidence, which would be an additional £270.

110. The total of those three above-mentioned figures is £8,348 and we will deduct that from our calculation of the loss of earnings to 6 August 2018.

Mitigation

111. In our view, the steps which Ms C has taken to mitigate her loss are reasonable. The Respondent has not offered any evidence that suggests to the contrary.

Should there be a Reduction for the Claimant's failure to follow ACAS Procedure?

112. The Respondents say that the compensation we award should be reduced by 25% because Ms C did not raise a grievance.

113. Ms C through her Trade Union representative Ms Roe, wrote a long letter of complaint on 11 July 2016, setting out all of the issues with which she was unhappy. That was a lengthy and detailed grievance in all but name. Ms Platten wrote a detailed reply, which we described in our liability judgement as defensive.

114. In his oral submissions, Mr Hodge referred us to the paragraph in this correspondence in which Ms Roe refers to the Claimant not having raised a formal grievance. Ms Phillips is right to point out, that statement is plainly in the context of Ms Roe writing about the comment by the male colleague, who had driven Ms C to the course, to the effect that she had brought it on herself by using the deep pressure technique with child A. It was not an acknowledgement that Ms C had not raised a grievance at all. That incident was not relied on in this case as an act of discrimination or as a factor leading to Ms C's resignation.

115. Mr Hodge also made reference to Ms C having agreed in cross-examination that neither she nor Ms Roe had raised a formal grievance. Actually, my notes of the Claimant's evidence on this are that she acknowledged that she had not raised a grievance following the July email and nor had Ms Roe.

116. One would have thought that a human resources practitioner would have recognised and treated Ms Roe's email of 11 July 2016 as a grievance. In fact, the Respondents appears to have done so, again, in all but name; it is evident from the documents in the liability hearing bundle that the Respondent investigated the various matters Ms Roe had raised and some effort and collaboration went into drafting a detailed reply.

117. Mr Hodge submits that if Ms C had raised a formal grievance, the Respondents would have had a chance to investigate and seek to resolve matters. In our view, Ms Roe's email of 11 July 2016 gave them that opportunity.

118. It was suggested that if Ms C had raised a formal grievance, this would have given the Respondents an opportunity to persuade Ms Bird to amend her attitude toward Ms C and what she refused to describe as a "sexual

assault". From Mrs Bird's demeanour in tribunal, we doubt that.

119. The ACAS code at paragraph 32 sets out its recommendations relating to the raising of a grievance as follows:

> *"If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance."*

120. The code does not stipulate that an employee has to write a document entitled, "Grievance". It seems to us that the Claimant has complied with the code in that she has set out in writing the nature of her grievance. Indeed arguably, it is the Respondents who might be said to be in breach of the code, for not having set up a meeting upon having received the email of 11 July 2016, in breach of paragraph 33 of the ACAS code.

121. In any event, the circumstances are such that we do not consider that it would be just and equitable to make a reduction from the compensation.

Reimbursement of Tribunal Fees

122. In light of the Supreme Court's decision in R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51 and the arrangements the Ministry of Justice is putting in place to reimburse all issue and hearing fees, the Claimant should look to the MOJ for reimbursement and it is not appropriate to order the Respondent to reimburse her.

Other Matters

123. Our understanding is that Ms C did not claim benefits and that therefore, the recoupement provisions do not apply and there are no benefits that ought to have been deducted in our calculations.

124. We were not provided with any evidence about what the arrangements are for pension contributions on sick pay and we have therefore proceeded on the assumption that employer pension contributions are made at the same percentage rate during periods of sick pay.

125. It was not suggested to us that the compensation should be grossed-up.

CALCULATIONS

	£	£	£
Unfair Dismissal			
Basic Award			
Agreed at			**1,916**
Compensatory Award			

Loss to date of hearing		
1/1/17 to 7/8/17		
Claimant's loss is what she would have received in sick pay had she remained in employment		
2 weeks to 17/1/17 at full pay 2 x 455.08	910	
18/1/17 to 20/5/17 at half pay 18 x 455.08 x ½	4,095	
Thereafter Claimant only able to work part time at say 50% 21/5/17 to 7/8/17 11 x 455.08 x ½	2,503	
Sub total	7,508	
Less income received:		
Orange Genie	344	
M&H	845	
Loss to hearing	6,319	**6,319**
Future Loss		
Period 8/8/17 to 6/8/18 , 52 weeks		
For period to 5/4/18 Claimant would only be working part time, say 50%		
39 x 455.08 x ½	8,874	
From 6/4/8 to 6/8/18 Claimant would be working full time		
13 x 455.08	5,916	
Sub total (anticipated loss for period)	14,790	
Less, (as above) anticipated will earn	8,348	
Net loss therefore	6,442	
Add for loss of statutory rights Agreed at	500	
Total future loss	6,942	**6,942**

Pension Loss:			
To date of hearing 7,508 x 6.48%	1,237		
From date of hearing 14,790 x 16.48	2,437		
Total pension loss	3,674	**3,674**	
Total compensatory award		**16,935**	**16,935**
Total unfair dismissal compensation			**18,851**
Discrimination			
Injury to Feelings		**16,000**	
Interest thereon at 8% from 16/6/16 16,000 x 8% ÷ 365 x 417		**1,462**	
Loss of pay as a result of ill health caused by the discrimination			
From 17/1/17 would have been on ½ pay From 20/5/17 would have only been earning 50% as only able to work part time 18/1/17 to 7/8/17 31 x 455.08	14,107		
Less: Orange Genie M&H Unfair dismissal compensation	344 845 6,319		
Sub total	6,599	6,599	
From 8/8/17 to 7/8/18 52 x 455.08	23,664		
Less, (as above) anticipated will earn Less unfair dismissal compensation	8,348 6,442		
Sub total	8,874	8,874	
Total loss of income re discrimination		**15,473**	
Interest thereon to the mid-point 15,473 x 8% ÷ 365 x 417 ÷ 2		**707**	
Total compensation for discrimination		**33,642**	**33,642**

Total award **52,493**

Employment Judge M Warren, Bury St Edmunds.
6 September 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS