EMPLOYMENT TRIBUNALS

Claimant **Ms S J Kent**

Respondents **W M Morrisons plc ("Morrisons") Mr Kelly Heads (" Mr Heads")**

REMEDY JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS ON 18 April 2019

EMPLOYMENT JUDGE GARNON
Members: Mr EA Euers and Mr M Brain
Appearances
For Claimant Mr D Robinson-Young of Counsel
For Respondent: Mr V Phipps of Counsel

JUDGMENT

1. The claim of unlawful deduction of wages is well founded . We order Morrisons to repay £649.93.

2. On the claim of wrongful dismissal, we make no award of damages because the losses are covered in the award which follows.

3. On the claim of unfair dismissal, we award compensation of £11264.20 being a basic award of £5656.50 and a compensatory award of £5607.70. The Recoupment Regulations do not apply.

4. On the claims of disability discrimination as defined in sections 15, 19 and 20/21 of the Equality Act 2010 (EqA) we make no recommendations. We award compensation to be paid by Morrisons only for injury to feelings of £25000 , for psychiatric injury arising during the employment not from dismissal of £6000, aggravated damages of £5000 and future loss of earnings of £10074.60.

5. We make no award under the Employment Act 2002 (the 2002 Act) and no uplift for failure to follow any ACAS Code

6. We award interest on the Injury to feelings award of £2666.67

REASONS (Bold print is our emphasis and italics are quotations)

1. Introduction and Issues

1.1. Today we heard evidence from the claimant only and had an agreed bundle of documents. At the liability hearing both sides prepared and presented their cases well

(apart from the aspect for which we award aggravated damages). In sharp contrast, preparation for this hearing was poor on both sides. The liability judgment had been sent to the parties on 12 November 2018 which afforded them plenty of time prepare for this hearing which was originally listed for 22 February 2019 but had to be postponed. Basic information was still missing. Matters which should have been capable of quantification were simply estimated.

1.2. In preparation for the earlier remedy hearing the claimant's solicitors had sent a schedule of loss on 30 January to the tribunal and to the respondent's solicitors but that schedule was not passed to Mr Phipps . Mr Robinson-Young had prepared a schedule the night before this hearing which he gave to Mr Phipps this morning.

1.3. We convened today at 10 am but because there was no agreement on the issues we needed to decide we rose at 10:40 until midday for Counsel to try and agree those issues. Some basic points were agreed but by the time we concluded evidence and submissions it was already 4:15 pm. We were able to reach a decision in principle and perform some calculations. For everybody's sake we wished to give the claimant a result but it was to be subject to checking for errors of calculation. We have identified some minor errors and corrected them, so the figures in the judgment may differ slightly from the provisional figures we announced.

1.4. The first aspect upon which agreement was reached related to a sum deducted from her final wages in respect of holiday overtaken. £ 649.93 too much was deducted.

1.5. The claimant was born on 17 September 1975. She worked for Morrisons from 1992 to 1999 and started work for it again on 4 May 2004. Her employment ended on 26 February 2018. Her statutory minimum notice period was 12 weeks. A basic award would be based on continuous employment of 13 years during the last of which she was entirely over the age of 41. The multiplier would be 13.5. A schedule filed on 4 July 2018 showed annual gross salary of £21000. The schedule sent on 30 January shows annual salary of £21,600 but gave her weekly pay gross at £403.83 which multiplied by 52 gives an annual salary of £21000. figure. The agreed basic award we were given today was £5656.50 equates to a weekly gross on £419. We were given no explanation as to how that figure had been reached.

1.6. The only other area of agreement was on a figure for loss of statutory rights at £500.

1.7. In outline the issues we have to determine are

1.7.1. What awards to make for financial loss and under which statute to award them.

1.7.2. What awards to make for injury to feelings. psychiatric injury and aggravated damages.

1.7.3. Whether to make any increases for failure to comply with an ACAS code of practice and/or under the powers in section 38 of the Employment Act 2002.

1.7.4. Whether at this stage there is any reason to gross up awards calculated net of tax.

1.7.5. What interest if any should be awarded in the Equality Act 2010 (EqA) claims.

2. Relevant Law

2.1. Under the Employment Rights Act 1996 (ERA) we have to consider an order for re-employment. Neither party wanted such an order and on the facts of this case it would have been inappropriate to make one, so we move to assessment of compensation which comprises the basic award at an agreed sum and a compensatory award.

2.2. Section 123 of the ERA , as far as relevant, says:

(1) Subject to the provisions of this section and sections 124 and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
(2)The loss referred to in subsection (1) shall be taken to include—
(a)any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b)subject to subsection (3), ***loss of any benefit which he might reasonably be expected to have had but for the dismissal.***
(4)In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales ..

2.3. No expenses were claimed. Subsection 4 is subject to the important qualification first made in Norton Tool Co Ltd -v- Tewson and affirmed in Burlo-v-Langley that sums earned in mitigation during the notice period do not fall to be deducted from loss. Calculations are based on net pay.

2.4. Section 126 includes
(1) This section applies where compensation falls to be awarded in respect of any act both under—
(a) the provisions of this Act relating to unfair dismissal, and
(b) the Equality Act 2010.
(2)An employment tribunal shall not award compensation under either of those Acts in respect of any loss or other matter which is or has been taken into account under the other by the tribunal (or another employment tribunal) in awarding compensation on the same or another complaint in respect of that act.

2.5. Section 124 (1ZA) imposes a limit on the amount of a compensatory award of 52 week's pay of the person concerned. In cases where this limit is likely to come into effect we believe the safest course is to award part or all of the compensation under the EqA. In this instance we will award loss to the date of hearing under the ERA and future loss under the EqA.

2.6. The net weekly loss is calculated in the same way under both acts. It is a fundamental principle any claimant will be expected to mitigate the losses they suffer and the tribunal will not make an award to cover losses that could reasonably have been avoided. An employee is expected to search for other work, and will not recover losses beyond a date by which the tribunal concludes she ought **reasonably** to have been able to find new employment at a similar rate of pay. The burden of proving a failure to mitigate is on the respondent (Fyfe v Scientific Furnishing Ltd [1989] IRLR 331).

2.7. In assessing future loss, the tribunal may take into account the chance of events occurring, and award on the basis of the loss of that chance. Where the chance of a future event is very high, or very low, the tribunal may well treat the chance as 100% or 0% as appropriate (see Timothy James Consulting Ltd v Wilton UKEAT/0082/14).

2.8. The statutory provisions of the EqA as far as relevant are:
Section 124
(2)The tribunal may—
(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
(b) order the respondent to pay compensation to the complainant;
(c) make an appropriate recommendation.
(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate
(6)The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by a county court or the sheriff under section 119.
We made the declaration in the liability judgment. Rightly we think, we were not asked to make any appropriate recommendation.

Section 119 includes
(2) The county court has power to grant any remedy which could be granted by the High Court—
(a) in proceedings in tort;
(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

2.9. Compensation on tortious principles means the Tribunal should assess what the position would have been but for the unlawful discrimination and should compensate the claimant by attempting as best it can to restore the claimant to that position Abbey National plc v Chagger [2010] ICR 397. For loss to be compensable, it must flow 'directly and naturally' from the unlawful discrimination, but there is no requirement of foreseeability (Essa v Laing Ltd [2004] ICR 746). We need to compare the financial benefits had she not been treated unlawfully with those she will be able to obtain in the future. Future loss calculation involves first determining weekly, monthly or annual loss, which includes not only basic pay but other contractual benefits. It is on this aspect we encountered the greatest difficulty due to lack of information.

2.10. The next step is to convert that figure into an amount to represent a value which, paid now as a lump sum, will compensate the claimant for future periodic loss. The factors to be considered include inflation, mortality and discount for accelerated payment. As HHJ Hand QC said in Stroud Rugby Football Club v Monkman EAT/0143/13, the assessment of future loss is a '*rough and ready matter. It always has been and it always will be*'. In Wardle v Credit Agricole Corporate and Investment Bank [2011] IRLR 604), Elias LJ said: *" it is incumbent on the tribunal to do its best to calculate the loss, albeit that there is a considerable degree of speculation ... ".* The claimant could have used the Ogden Tables which would have produced a multiplier of about 25 but Mr Robinson-Young used a simpler approach . It would be wrong of us to use the Ogden Tables of our own initiative .

2.11. We deal next with injury to feelings. Compensation is not meant to punish. The summary in Armitage Marsden and H M Prison Service v Johnson is invaluable:
a "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.
b Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination 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, to use the phrase of Sir Thomas Bingham M.R., be seen as the way to "untaxed riches."
c Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards.
d In exercising their 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.
e Finally, tribunals should bear in mind Sir Thomas Bingham's reference to the need for public respect for the level of awards made"

2.12. In the textbook most used in personal injury cases , Kemp and Kemp, one reads in cases of physical injury the medical facts such as the interpretation of X rays and findings of a clinical examination, not a description of the accident which caused the injury . One cannot X ray or clinically examine feelings. The facts of the incidents which cause such injury enable a Tribunal to assess how such facts would affect normal people, including themselves. When one watches a boxing match and sees the punches delivered one can imagine how much they would hurt. The severity of the "blows" , their number and duration over which they are delivered is a starting point . However, what matters is the effect **on the claimant not on ourselves or some hypothetical person.** So her characteristics and vulnerabilities must also be considered. That is why we caution ourselves against comparing awards made in other cases.

2.13. For injury to feelings in respect of claims presented on or after 6 April 2018, taking account of Simmons v Castle ,the Vento bands are shown in Presidential Guidance to include a **middle band of £8,600 to £25,700** for cases that do not merit an award in the upper band. Loss of congenial employment can be viewed as part of injury to feelings.

2.14. Psychiatric injury is different. There one looks to evidence to grade the injury on a scale of severity. The Judicial College publish guidelines for the sums to be awarded. Factors to be taken into account include the injured person's relationships with family, friends and those with whom she comes into contact and prognosis. Where there has been been marked improvement by trial and the prognosis is good, the injury is classed as " moderate" and the band of compensation is **£5130 - £16720.**

2.15. Aggravated damages are to be awarded only where conduct is high handed, malicious, **insulting or oppressive** (Scott-v-Inland Revenue) but such conduct may occur after the discrimination proved, including during the litigation (Zaiwalla-v-Walia).

2.16. It is important at the end when assessing non pecuniary loss to take an overview to avoid " double counting" . If a factor causes us to move the award higher up a Vento band, it must not also form the basis of an aggravated damages award.

2.17. Interest runs from the acts of discrimination in respect of injury to feelings, see Reg 6 of the Employment Tribunals (Interest on Awards in Discrimination Cases)Regulations 1996. When the acts causing injury to feelings themselves span a period injustice may be caused to the respondent by taking the earliest date and to the claimant by taking the latest. Reg 6(3) gives us discretion as to **from when** to calculate interest. Reg 3 says Interest **"shall be calculated as simple interest"** at a rate presently prescribed at 8%.

2.18. Employers are liable for the acts of their employees done in the course of their employment, whether or not done with the employer's knowledge or approval. In this case neither party wanted us to make an award against Mr Heads personally.

2.19. Financial loss is calculated net of tax but some kinds of award, including future loss of earnings consequent on dismissal, are taxable in themselves under S.401 of the Income Tax (Earnings and Pensions) Act 2003 (IT(EP)A in so far as they exceed £30,000. When this happens, tribunals 'gross up' the award, by working out what tax would be likely to be paid on the net amount and adding it to the award. Whether awards in respect of injury to feelings require grossing up has proven difficult to answer. Orthet-v-Vince-Cain held all injury to feelings awards are exempt from taxation. In a later decision, Yorkshire Housing Ltd v Cuerden the EAT did not think it quite so clear-cut. The particular appeal related to compensation for disability discrimination in respect of the employer's failure to make reasonable adjustments during the currency of the employment relationship. The EAT held awards for pre-termination discrimination, at least, were not subject to tax, and so decided the case on this basis. The Court of Appeal in Moorthy v Revenue and Customs Commissioners 2018 ICR 1326, agreed with the reasoning in Vince-Cain . In its view s406 IT(EP)A was to be construed as exempting payments on account of any injury recognised by Parliament as providing a basis for the payment of compensation. However, s 406 was amended with effect from 6 April 2018 to say '**injury**' includes psychiatric injury but not injury to feelings so, from the 2018/19 tax year onwards, HMRC will treat awards for injury caused by discriminatory **dismissal** as taxable and we should gross up such awards. Neither Counsel made any submissions on this point. We believe injury to feelings awards in respect of pre-termination discrimination are still not subject to tax and should therefore not be grossed up. As the elements which should do not exceed £30000, there should be no need to gross up. If HMRC take a different view the parties may ask for a reconsideration.

3. Findings of Fact

3.1. In 2015 the claimant became Café Manager at Tynemouth. This was not her first managerial role as she had held such in other departments since about 2006. She reported to Mr Heads the General Manager directly or through Denise Burke, Duty Manager. The claims we found proved were of conduct by Mr Heads which, taken together with Morrisons handling of her complaints and its failure to ensure reasonable adjustments were made, amounted to disability discrimination and a fundamental breach of contract entitling her to resign which she did on 26 February 2018.

3.2. We wholly rejected Morrison's case the claimant left to work with her husband. They needed two incomes and she would not give up a job she had held , albeit with a break in employment , since she had left school to take up a zero hours contract with the brewery (Marstons) which owned the pub her husband was to take over as manager. In her new job she lives on the premises and works slightly more hours per week than at Morrisons . If she had been supported in her efforts to control the symptoms of her disability with the help of medication, she could have put in the same hours at Morrisons, and would have.

3.3. She started new employment about three weeks after her employment at Morrisons ended. She is now a carvery chef. She has recently looked at going back into retailing exploring job opportunities at Iceland supermarket and Costa Coffee but has not been successful . She would not get better pay but would like to get back to the daily interaction with members of the public which she does not have as a chef .Her REM sleep disorder has been relatively well controlled by medication and it is anticipated by her and her doctor her mental health also will improve when the stress of this case is over. From the end of her notice period, during which we will compensate without making deductions for earnings from other sources, to the date of this hearing is 47 weeks.

3.4. The first question was what she is actually earning at Marston's. Payslips in the bundle had not been analysed by either representative. Working on her year's cumulative totals we can see her basic pay is not significantly different from the £330.75 she normally earned at Morrisons. The hourly rate is approximately £1 per hour less but by working a few extra hours she has made up the difference. In short, we have nothing but praise for the effectiveness with which she has mitigated her loss, and see no realistic prospect of her doing better in the foreseeable future.

3.5. However at Morrisons she had benefits additional to basic pay which she does not have at Marston's nor is she likely to obtain at any time in the future. Of these elements the paucity of relevant information provided to us was regrettable. In a 156 page document bundle hardly any pages were of any assistance to us. In the schedule of loss submitted in January the following heads of claim are clear (a) loss of a death in service benefit (b) loss of a private health benefit (c) pension loss (d) loss of employee discount Mr Phipps protestations he had been taken by surprise by the schedule Mr Robinson-Young handed to him on the morning of the hearing were genuine but had his instructing solicitors sent him what they had been sent on 30 January 2019 there would have been no surprise at all. When we pointed out he could if necessary request a postponement he said to do so would be disproportionate and we agree with that.

3.6. As regards element (a) the claimant has obtained one estimate of what it would cost to replace on a term assurance basis the death in service benefit which is the equivalent to one year's salary. The estimate is £4.74 per month. The schedule claims this loss for a 48 weeks, a figure for which there is no logic whatsoever. That element of loss will be with the claimant for many years. Allowing that any other quote may be cheaper, we estimate a continuing loss of **£1 per week.**

3.7. As regards (b) the schedule of loss simply says" *£500 est*". We asked what type of health insurance was provided because they range from comprehensive cover to "top up" to services provided by the NHS. The claimant knew it was with " Sovereign Healthcare". The staff handbook says it applies to her partner and children, she can join for "*a small weekly contribution*" and it was a "*bespoke plan offering enhanced cover for pre-optical*

and dental treatments" . We were provided with no other information nor any quote for the cost of its replacement. We cannot make any award on the basis of guesswork.

3.8. As regards (c), the claimant believed both she and Morrisons made payments into a pension fund of 7% of her gross salary . The handbook does not provide a rate of contribution but the payslips show the claimant's contribution was 5%. We asked if she could be wrong about the percentage and she freely accepted she could. At Marston's she is also in a pension scheme but the employer contributions are only 3%. She therefore has a net loss of 2% of gross salary of £21,600 employer pension contribution= £432 ÷52 comes to **£8.30**. The schedule of loss claims this for seven months, another figure to which there is no logical explanation. Mr Robinson Young said this was an error and said he would argue loss should be awarded for 10 years.

3.9. As for (d) all staff are provided with a discount card The handbook confirms they get 10% discount on their weekly shop and the list of purchases includes wine, spirits grocery, dry-cleaning, electrical goods, DVDs CDs books and magazines. There is a cap of £10,000 per annum on the amount of discounted spend i.e. a cap on this benefit of £1000 per annum. But had she remained at Morrisons and her employment ended by retirement (her plan being to retire at about 65) the discount card would be kept for use by her until her death. Had the claimant been told to keep a record from 1 December to 31 March of what she spent on such items we would have had a firm basis upon which to calculate her loss . We asked her what she usually spent and her best estimate was £100 per week to feed a family of five. That is certainly not a high estimate. The schedule of loss asks for an average weekly **£10,** which is very reasonable, a multiplier of 59.5 weeks another figure for which there is no logical explanation.

3.10. In short, the total of the emboldened sums in the last four paragraphs mean that although she has replaced her basic pay, the claimant is **£19.30 per week** worse off by the loss of these benefits. Proper use of the Ogden tables could easily have persuaded us to use a multiplier of at least 20. The more conservative 10 year multiplier requested, allowing for 3 leap years, equates to 522 weeks = **£10074.60.** .

Injury to Feelings

3.11. On this topic Mr Phipps submitted our findings of fact were not of a very serious nature in that we had dismissed the claim of harassment and direct discrimination .We do not agree with his reading of liability findings. The first paragraph of our conclusions read:

4.1. At this hearing, the claimant presented her case first. When Mr Phipps had cross-examined her and her witnesses the picture he was trying to paint of an employee who unjustifiably acted with petulance when she was fairly criticised for underperformance looked a distinct possibility. His written submissions also read very well but are predicated on our finding his witnesses were credible. We hope our findings of fact, which we appreciate are robust, show we did not find them credible. This was not simply due to their answers to Mr Robinson-Young's questions but more importantly repeated inconsistencies between their written statements, their oral evidence and vital documents, most of which they themselves created, roughly contemporaneously.

3.12. The direct discrimination claim failed because the treatment afforded to the claimant was not less favourable than would have been afforded to a person with a different disability whose abilities to perform her job were impaired whilst a medication

regime to control its symptoms was still being explored. We gave reasons of law for rejecting the harassment claim at 3.35-3.37. However, to remove any doubt, we found a relentless campaign waged by Mr Heads who subjected the claimant to unfavourable treatment because of matters arising in consequence of her disability from February until 31 December 2017. We need not repeat our findings of fact or conclusions. We found Mr Heads had a single-minded determination to make the store 100% efficient, if he possibly could, and would not let anything divert him from that . What we can fairly describe as his" bullying" included (a) the meeting on 31 March 2017(b) deciding the claimant was not eligible for company sick pay (c) a series of so called "welfare" meetings, which were Mr Heads way of putting pressure on the claimant whom he believed should be at work (d) treating any OH report which did not spell out not only what needed to be done but that it was essential to do it, as absolving him of the need to act ,only doing as little as he was forced by OH recommendations to do , and always grudgingly.

3.13. Mr Heads has been employed by Morrisons for 31 years. He was the deputy store manager at Tynemouth for 4 years some time ago when the claimant worked there. He had a good relationship with her then. The change to being a man who was treating her so badly made her injury to feelings worse.

3.14. The Christmas rota which the claimant would have found perfectly manageable before she became ill, she actually worked, without complaint , but was utterly exhausted by the end of it . Because OH did not say explicitly to Mr Heads or Ms Weaver excessive working hours, such as in the week before Christmas 52 hours, could in itself be a problem, they allowed her to be given it . It was self-evident that would cause harm.

3.15. On 30 December 2017, Ms Burke issued the claimant with a Record of Improvement ("ROI") the timing of which was calculated to maintain pressure on the claimant and we believed was done at the instigation of Mr Heads . The claimant wanted New Year's Eve off for her child's birthday. Mr Heads made her work it , as well as Christmas Eve . The claimant's statement and diary describe 31 December 2017 graphically. Mr Heads left her so upset she was physically sick and left work. On 2 January 2018 she was signed off work for eight weeks as a result of anxiety brought on by the treatment of her and disregard of her disability.

3.16. As for Morrison's acts and omissions as an organisation, people who deal with HR are called " People Managers" who can seek advice from the Employment Relations Team (ERT) at head office . The claimant had sent Ms Grey a text on 14 March giving details of medical advice and future planned treatment . She had told Ms Grey of things she had done when "sleepwalking ". Ms Grey replied "*I hope you get sorted.* ***Must be awful***" . . Ms Grey may not have shared all the details with Mr Heads but would surely have told him the claimant had a major problem.

3.17. On 14 March the claimant saw a consultant. A letter from her GP dated 7 April includes: *Due to her poor sleep pattern this has resulted in Mrs Kent being* ***extremely exhausted on a daily basis to the point that it is affecting her daily functioning. It will also have an impact on her ability to work hence the provided fit note****",* The letter itself was probably detached and placed on file by Ms Grey. However, Morrisons as an organisation cannot credibly say it did not receive any information from the claimant's treating clinicians. A OH letter dated 17 April went into considerable detail about her symptoms, but confirms the medication appears to be helping It then states

Mrs Kent reports due to this sleep disorder and significant lack of sleep it is it has affected her mood, she feels very low, she is emotional, she has no energy, she is fatigued, she cannot concentrate, she has stopped driving as she does not feel confident and safe to drive, she feels depressed but only due to this sleep disorder"

3.18. In June 2017 Claire Grey left and was eventually replaced by Ms Weaver . A "General Manager" is supposed to work in liaison with the people manager on anything to do with HR . Mr Heads said he would defer to a people manager on HR matters but we did not accept the opinion of any people manager would ever persuade him to take a course which was not in his view the best one to take operationally.

3.19. On 6 June 2017 Mr Adrian Farrage, an Appeal Manager, wrote to the claimant confirming the decision to withhold company sick pay was unfounded. It was agreed her other concerns would be addressed on her return to work.

3.20. Jayne Hunter, Store Manager at another store met the claimant on 6 September 2017 **with Ms Weaver** as note taker. She found there had been a "misunderstanding" regarding the PIP process, Ms Hunter arranged to speak to Mr Heads and Ms Weaver on 18 September 2017 to arrange a mediation. The one which occurred changed nothing

3.21. In November Colin Pearce, a **Regional** Manager met the claimant with Ms Mags Gardner, **Regional** People Manager, as note taker. Mr Pearce told Mr Heads, and confirmed in writing, the excessive frequency of welfare meetings was unacceptable, as was his practice of changing the rotas and the way he addressed her in front of others. He continued just as before.

3.22. Against this background and her contact with the claimant over Christmas , on 3 January 2018 Ms Weaver sent an email to Ms Gardner saying the claimant showed a **"*pattern*"** of **" *challenge , outburst, off sick* ".** On the one occasion in March 2017 when she went sick, Ms Weaver was not there**.** After 20 years good attendance, what happened, even on Ms Weaver's account , could not be described as a "pattern".

3.23. Throughout January and February 2018 Ms Weaver's abject failure to prevent Mr Heads intimidating the claimant was made worse by steps she took. Having checked with ERT she could meet the claimant without Mr Heads present, which was unnecessary if what Mr Pearce had written and what Mr Heads said about the role of a people manager was true, she made matters worse. The claimant still wanted to transfer stores. Morrisons was going through a structural change. Ms Weaver announced all transfers had been put on hold. The claimant asked on 1 February whether her arrangement not to work past 7 pm would continue and Ms Weaver replied she could not give an answer. The claimant was told she had a week to make up her mind and, not until 8February was she told the 7pm arrangement would continue.

3.24. The claimant had worked only for Morrisons since she left school and did not want to leave . However, she had given Morrisons every chance for about a year to curb Mr Heads behaviour towards her, and there was no sign Mr Heads would change his ways and no prospect of a transfer. The acts of Mr Heads during the currency of the claimant's employment, combined with the acts and omissions of Ms Weaver, is sufficiently serious to take injury to feelings **arising during the employment** towards the top of the middle band at **£25000**. Mr Phipps submissions it should be lower ignore the findings of fact we made at the liability stage.

3.25. As for psychiatric injury, the claimant accepted on being cross-examined by Mr Phipps she had had minor episodes of depressive illness in the past, one in particular following the birth of one of the children. The sleep disorder itself caused her to be depressed and she was being prescribed fluoxetine at a low dose to combat low mood. However, by January 2018 her GP prescribed Sertraline and the dose increased from 50 mg to the maximum 200 mg at which she has been maintained ever since . Her oral evidence is clear the type of depressive illness she is now experiencing is like nothing she has ever experienced in the past. It has adversely affected her relationships with others and she hates to see a Morrisons van or television advert. Her mental health is likely to improve once these proceedings are behind her so the prognosis is good

3.26. The difficulty was the absence of any medical evidence. Mrs Justice Simler when she was President of the EAT in Hampshire County Council -v-Wyatt at paragraph 27 said if the issue of divisibility is raised, as it was, particular care has to be taken without medical evidence and at paragraph 28 concluded with the observation that although a failure to provide medical evidence could result in a lower award, it is not an absolute requirement. The injury is plainly in the moderate category and **£6000** is the least figure we can safely award. Had medical evidence shown such a high dose of Sertraline for so long a period was uncommon, it could have pushed this award much further up the band.

Aggravated Damage

3.27. We have taken some elements of aggravation into account in raising the injury to feelings award to the top of the middle band but not those in respect of the way in which the respondents conducted these proceedings. At the first preliminary hearing Employment Judge Johnson challenged Mr Phipps as to why disability was not admitted in the light of the medical evidence which he had then seen . The claimant was plainly a disabled person by, at latest, April 2017. Morrisons took months to admit the claimant had a disability. Even at the hearing it did not accept it knew of her disability and its effects. We found the respondents knew by April 2017 she was disabled and throughout the rest of the year their protestations they did not know the effects of the disability or the steps were needed to alleviate it , became increasingly unbelievable, as more and more information was drawn to their attention .

3.28. Mr Phipps is right says it is wrong to make an award of aggravated damages based purely us finding a line of defence has been run which is unfounded. However, this went beyond that. Putting the claimant to proof in the light of the evidence the respondent already had was simply a means of increasing the pressure upon her during the proceedings. It caused unnecessary anxiety, insult to her integrity and embarrassment. The email of 3 January 2018 from Ms Weaver to Ms Gardner showed that HR whilst purporting to understand the need to support the claimant thought her behaviour was petulant . An award of aggravated damages of **£5000** is merited.

3.29. There are two other aspects to the claim advanced by Mr Robinson-Young. He asks for an uplift under section 38 of the 2002 Act. The claimant's evidence was Morrisons provided her with a statement of terms and conditions of employment and, every time something changed, for example her job title, with an updated statement. At the date these proceedings were issued she had not been not been given two updates to

sign. If there was an omission to even give her a copy it was an accidental administrative slip. In our judgment that is not the situation at which section 38 is aimed.

3.30. The final aspect was an uplift for failure to follow the ACAS grievance procedures. We cannot identify any such failure. The Code is all about taking the right steps and they **were** taken even though nothing happened to change Mr Heads behaviour despite the decisions of Mr Farage and Mr Pearce.

4 Calculations Of Past and Future Financial Loss

4.1. On the claim of unfair dismissal, the basic award is **£5656.50** The compensatory award is loss of statutory rights £500 loss during the notice period to which no duty to mitigate applies of (£330.75+ £19.30 x 12) £4200.60 and loss to the date of hearing £19.30 x 47 weeks £907.10 . A total of **£11264.20**

4.2. On the claims under the EqA) we award compensation for loss of £19.30 for 522 weeks £10074.60 . Taken with the awards for injury to feelings during employment of £25000, psychiatric injury of £6000 and aggravated damages of £5000 the total under the EqA is **£46074.60.**

4.3. The potential elements to gross up are £11264.20+ £10074.60 + £5000 = £26338.80 which is below the £30000 exemption so no added sum is needed

4.4.We have considered and decided to award interest on the Injury to feelings award We agree Mr Phipps' submission that 8% is much higher than any commercially obtainable rate of interest but cannot accept we have discretion to use any other rate, We decide it should be from mid December 2017 to date (16 months) on £25000 = **£2666.67.**

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TM GARNON EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 24 APRIL 2019

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2500744/2018**

Name of case(s):	**Mrs SJ Kent**	v	**WM Morrisons Plc & Others**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **25 April 2019**

"the calculation day" is: **26 April 2019**

"the stipulated rate of interest" is: **8%**

MISS K FEATHERSTONE
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at **www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426**

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.