Case Number: 3400502/2016

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr B Plaistow	v	Secretary of State for Justice

Heard at: Cambridge

On: 7 and 8 May 2019 (no parties in attendance)
13 and 14 May 2019
15 May 2019 (no parties in attendance)

Before: Employment Judge Ord

Members: Mrs M Prettyman and Mr B Smith

Appearances
For the Claimant: Ms N Braganza, Solicitor
For the Respondent: Mr J Allsop, Counsel

PRELIMINARY JUDGMENT ON REMEDY

Background

1. The merits judgment in this case was promulgated on 5 February 2019. The claimant succeeded in claims of direct discrimination on the protected characteristic of sexual orientation, harassment on the protected characteristic of sexual orientation, victimisation contrary to Section 27 and 39 of the Equality Act 2010 and unfair dismissal.

2. The remainder of the claimant's claims were not successful, but the claimant had made protected disclosures. The Tribunal found that the matters about which he complained did not relate to those protected disclosures but rather were acts of victimisation, as was his dismissal.

3. The remedy hearing was originally listed to take place in March 2019, but was adjourned by consent and case management orders were made on

25 March 2019, including the listing of the remedy hearing for 13 and 14 May 2019 (preliminary reading to take place by the Tribunal on 7 and 8 May 2019). The Tribunal was able to utilise 15 May 2019 for deliberations on remedy.

4. The Tribunal is grateful to Counsel on both sides for their clear and helpful submissions on remedy, for their ability to narrow the issues between the parties to a defined list and for their conduct of this case generally.

Findings and Orders

5. The parties had helpfully agreed a list of outstanding issues for determination at the remedy hearing. It was agreed that the parties would use these findings as the basis for calculations in relation to the claimant's claims for loss of earnings, future loss of earnings and pension loss. In this Judgment we set out our unanimous findings in relation to the specific issues put before us by the parties.

<u>The base salary for use in calculating losses</u>

6. Figures for the claimant's actual earnings during the tax year 2013/14 and 2015/16 were before the Tribunal. The claimant said that the figures from 2013/14 were the appropriate ones to use, whereas the respondent contended for the year 2015/16 which was the last year of the claimant's employment (he was dismissed on 9 August 2016).

7. During year 2013/14 the claimant was working at HMP Bullingdon (he transferred to HMP Woodhill where he suffered the acts of discrimination and victimisation which were the foundation of his claims and from where he was unfairly dismissed), on 7 September 2014.

8. Whilst at Bullingdon, the claimant was working a significant amount of "payment plus" which is effectively overtime. He was able to work these extra hours due to staffing issues at the Prison, so that in the claimant's own words officers (including the claimant) could "write their own cheque" in terms of the amount of additional work they could do.

9. The claimant says that that the year 2015/16 on which the respondent seeks to rely, is inappropriate for two reasons. First because for a part of that year, he was either absent injured as a result of the incident with Prisoner A which led ultimately to his dismissal, or was suspended from work. During those periods he was unable to work any additional payment plus hours and therefore we agree that that renders the period inappropriate of itself.

10. The second reason relied on by the claimant is that he says he was denied overtime whilst at HMP Woodhill and thus during that period the amount of payment plus work he could carry out was not indicative of what he would have earned had he not been treated unfairly.
11. It is right to say, as the respondent points out, that that was not pursued as a separate head of loss in these proceedings.

12. The respondent also states that opportunities for payment plus have diminished. Whilst no figures have been produced to show such diminution, the evidence from Mr Heavens who was called by the respondent was that additional recruitment had meant that opportunities for payment plus were reducing and would continue to reduce in the future. There are no figures produced by the respondent to show what levels of payment plus were worked over what years by others, either individually or collectively, at HMP Woodhill or at HMP Bullingdon.

13. It is clear, however, that prior to the claimant's transfer at his request to HMP Woodhill and for a period thereafter (when he primarily worked additional payment plus at HMP Bullingdon), he worked a significant amount of payment plus. There is no reason to doubt that he would have continued to work payment plus hours available.

14. Notwithstanding the fact that for the tax year of 2015/16, the claimant was suspended or absent for four months, he did, according to the information he has provided from the respondent's Shared Services unit, earn the gross sum of £37,127.96. This was in fact more than he had earned in the previous tax year about which he has raised no specific complaint.

15. Taking into account all of that evidence and reflecting upon the amount of payment plus which was available to him in 2015/16 notwithstanding matters about which he complains, we consider and determine that the most appropriate way to fix the base salary for calculations of the claimant's losses to date and future loss, is to take an average of the two years contended for by the parties. This balances the competing argument as best we are able on the information provided to us, takes into account the availability of payment plus as best we are able and the likelihood that the claimant would have worked such payment plus as was available to him. The relevant figures are as follows:

15.1	Total gross earnings 2013/14	£44,015.75;	
15.2	Total gross earnings 2015/16	£37,217.98;	
15.3	Average of the above	£40,616.87	(£781.10 per week).

16. We have taken the figures for gross salary from the Shared Services letter of 24 May 2016 as these include an amount of non-taxable pay which is

not shown on other documents provided by the respondent, in particular the annual P60 which records only taxable pay.

17. The total tax paid in the two years amounted to £11,519.80 and National Insurance contributions for the two years totalled £6,393.36. Averaging those total deductions over the two years and deducting it from the average gross salary gives an average net salary of £31,660.29 per annum (£608.85 per week).
18. Accordingly, the base salary for calculation of the claimant's loss of earnings, future loss of earnings and pension loss are those figures as set out above.

Loss of long notice / loss of statutory rights

19. The claimant seeks an award for the loss of long notice to which he was entitled whilst employed by the respondent as a Prison Officer. The respondent considered that the conventional award for loss of statutory rights was appropriate and the claimant conceded that the longer the period of future loss for which the claimant was to be compensated, the less appropriate an award for loss of long notice was.

20. In view of the award made for future loss of earnings (see below), an award for loss of long notice is not appropriate in this case and the claimant is awarded the sum of £500 for loss of statutory rights.

The appropriate period of which to assess future loss of earnings

21. The claimant's evidence was that he intended to remain in employment up to retirement age (now 68 years of age for the purposes of his employment and pension) had he not been subject to the acts of discrimination about which he complains.

22. The claimant had shown, throughout his employment, not only resilience by returning to work from previous incidents where he had been injured in the course of his duties (including the most recent incident Prisoner A, when he sought to return to work as soon as possible including on reduced duties whilst he was still injured), but he also enjoyed his work and demonstrated his desire to remain in work even in the face of the discriminatory conduct we have found he was subjected to. At that time, he sought nothing more than a transfer back to HMP Bullingdon from where he had transferred to HMP Woodhill.

23. All of the evidence we have heard indicated that the claimant was liked and respected by the prisoners with whom he worked (their evidence to the investigation into the claimant's alleged misconduct demonstrated this)

and he was clearly well regarded by the Prison Service as his previous annual assessments indicate.

24. There is no evidence to suggest that the claimant would have chosen anything other than to continue in employment and would have continued to enjoy his work. We are satisfied that but for the matters which have led to these proceedings, he would have continued to provide a good service to the prisoners in his care and to the system more widely.

25. We have carefully considered the medical reports and the evidence given by Dr Oyebode and Dr Sahota as part of this hearing. They are in broad agreement as to the claimant's symptoms and their origins.

26. The essential difference between the medical experts (such as it is), is confined to the issues of whether the claimant's condition will improve with further and perhaps different treatment, and whether the claimant will ever, (and if so, when) be fit to return to some work.

27. Dr Sahota said that the claimant "may" be fit for work in the future provided that "reasonable adjustments" (which were not defined in any way), were in place. Dr Oyebode said the prospect could not be ruled out, but in his view the claimant's condition was now permanent and unlikely to improve. In that regard, he "did not hold out much hope". Whilst he agreed that the possibility of a return to work could not be ruled out, Dr Oyebode considered the possibility as "highly unlikely" and said that even if the claimant was fit for work he would remain unreliable due to his on-going and in, Dr Oyebode's view, permanent mental condition.

28. The high point of Dr Sahota's position was that the claimant "may" be fit for work at some indeterminate date in the future, but that would require additional treatment over a period which he could not define and in relation to which there was no guarantee of success. Dr Oyebode commented that further treatment was unlikely to bring about any improvement given, what he considered, the claimant's chronic condition and his lack of progress having had previous treatment including cognitive behaviour therapy in relation to his current condition.

29. We find that the prospects of the claimant being able to return to any work in the future to be extremely remote. We have further considered that by that stage, if ever reached, the claimant would need to undergo a lengthy period of retraining and / or rehabilitation into any workplace and he would be very substantially disadvantaged in the labour market when seeking employment after what would be a very lengthy absence from work with significant mental health issues.

30. We have further considered the fact that on the respondent's own evidence, those employees who work for more than five years in the Prison

Service, had a resignation rate of less than 5%. The claimant had already worked for 13 years at the time of dismissal and the possibility of his early resignation is therefore, we find, equally remote.

31. We have therefore concluded that this is one of those rare cases where it is appropriate to consider the claimant's future losses on the basis of a career long basis. The claimant would have remained in work up to retirement age. He wanted to remain at work even in the face of the discriminatory treatment he was receiving at HMP Woodhill and it is a matter of considerable regret, in the minds of the Tribunal, that the claimant was not allowed to transfer to HMP Bullingdon when he sought to do so, when the Governor had agreed to "let him go" and when HMP Bullingdon were ready to accept him. Had that happened, we believe the claimant would have been able to continue to provide good service in a career which he manifestly enjoyed. The appropriate period over which to assess his future loss of earnings is a career long loss up to retirement age and that applies to both the future loss of earnings and the pension loss claim.

32. It is accepted between the parties that the claimant would have been promoted to the next grade in the Service in 2026 and that he had a 50% prospect of one further promotion in 2041. That we consider to be a fair and reasonable assessment of the claimant's future prospects within the Prison Service had he been allowed to continue with his career.

33. It is on those bases that the claimant's future loss of earnings and pension loss should be calculated.

<u>The appropriate deduction for the likelihood of early resignation or withdrawal</u>

34. As we have said, based on the evidence we have heard, it is very unlikely that the claimant will be able to return to work at any stage between now and his retirement age. In addition, we find the likelihood of his early withdrawal from the pension scheme / early resignation from the Prison Service to be highly unlikely. He enjoyed the work, he had shown resilience to return to work after previous incidents and still wished to return to work until he was, unfairly and as an act of victimisation, dismissed from the Prison Service.

35. In those circumstances we make no more than a minimal discount to reflect the very slight prospect of the claimant retiring from the Service before his pension age and the equally remote prospect of recovery and a return to work. Both possibilities are above zero but are very small indeed. Having considered the matter at length, our unanimous view is that the appropriate reduction to take account of those possibilities in relation to both future loss of earnings and the calculation of pension loss is 5%.

Injury to feelings

36. The parties agree, this case merits an award in the top band as described in Vento v Chief Constable of West Yorkshire Police (2) [2003] IRLR 102 CA, as increased following the decision in Da'Bell v National Society for the Prevention of Cruelty to Children [2010] IRLR 19. The claimant contends that the appropriate award of damages for injury to feelings in this case should exceed the high point of that band which, at the relevant time given the presentation of the claimant's complaints on 18 May 2016 (after commencing early conciliation on 19 March 2016 and 15 December 2016 having commenced early conciliation on 4 November 2016), the appropriate extent of the top band in Vento begins at £24,670 and ends at £41,150.

37. The claimant was the victim of multiple acts of discrimination and victimisation over a lengthy period. We have found that he suffered a campaign of direct discrimination and harassment on the basis of his sexuality, or perceived sexuality, throughout his period of employment at HMP Woodhill and was victimised for his having made protected acts. He was unfairly dismissed and his dismissal was an act of victimisation.

38. The impact on the claimant as a result of this conduct is stark. Even today, (over three years and 4 months since he was suspended and more than two years and nine months since his dismissal), he finds the recounting of the matters found by this Tribunal to be distressing. We have observed this several times in the course of the hearing before us including during this remedy hearing.

39. Given the lengthy and sustained campaign of discrimination and victimisation which the claimant suffered, which included the conduct of his line managers and their superiors – individuals who could and should have ensured that such conduct ceased and was appropriately punished, but which instead they condoned and participated in, as set out in the Tribunal's Judgment, we unanimously conclude that this is a case which warrants an award at the very highest end of the Vento guidelines. The appropriate figure for an award for injury to feelings is £41,000. In reaching that figure we have reflected on the overall award of damages as set out in the remainder of this Judgment, and the fact that an award for injury to feelings is to be compensatory and not punitive. Notwithstanding those matters, we are satisfied that the appropriate award is at the very highest end of the guidelines.

Aggravated damages

40. The respondent has, properly, conceded that, in principal, aggravated damages are recoverable in this case given the findings of the Employment Tribunal.

41. We have been referred to the guidance in Commissioner of the Police of the Metropolis v Shaw [2012] IRLR 291, recognising that aggravated damages are an aspect of an award of damages for injury to feelings and are compensatory in nature.

42. In that case, Mr Justice Underhill, by then President of the EAT, expressed the view that aggravated damages are an aspect of injury to feelings and should be dealt with as a sub-heading under the same head of loss to avoid over compensation and that the question is whether the overall award is proportionate to the totality of the claimant's suffering.

43. The claimant points to the findings of the Tribunal, including as to the conduct of the respondent during the Tribunal hearing, matters which have aggravated the claimant's condition. We reflect upon that but note again that the award is compensatory and not punitive.

44. The respondent, on the other hand, seeks to pray in aid that it has commissioned an investigation with what it describes as detailed and full terms of reference into the matters that were the subject of the claim and

> has arranged for significant training to take place in the high security estate.

45. It is a characteristic of this case that the claimant maintains that the respondent has not taken his complaints, or indeed the matter generally, as seriously as it ought. It is therefore with some sadness that we have considered the true extent of what the respondent has done in this regard.

46. The training to which we have been pointed deals with how to cope with absences from work. Mr Heavens on behalf of the respondent, sought to indicate that this was designed to deal with the processes and form of dealing with difficult issues rather than the substance of the training itself. But the training ("How Line Managers Input into the Decision Process", when dealing with "managing unsatisfactory attendance") is, other than tangentially, wholly unconnected to the matters which form the substance of our Judgment in this case and the claimant's complaints. There is no evidence of any training having been undertaken in relation to the conduct towards people based on their sexual orientation (actual or perceived), and no steps have been identified as having been taken at Management level as to the identification and eradication of such conduct amongst staff.

47. Further, the investigation into what are described as the "allegations" that the claimant was bullied and subjected to discrimination, the "allegation" that his grievances were incorrectly managed, that the incident involving Prisoner A was

"allegedly" not investigated correctly, that the claimant was subjected to a flawed disciplinary hearing and a flawed disciplinary appeal hearing as well as allegations that the prisoner involved was subject to excessive force or otherwise assaulted by staff (not by the claimant), was commissioned on 20 March 2019. Earlier that day, the claimant's solicitors asked the respondent's solicitors what steps had been taken to deal with the issues set out in the Judgment which had been with the parties since 5 February 2019. That request was made at 11.30am that day and twelve minutes later, the respondent's solicitors replied, stating that they "should be in a position to provide… a letter from my client confirming the steps that it proposes to take in relation to the matters highlighted in the Judgment shortly" (our emphasis). There then followed a letter dated 20 March 2019, identifying that the Acting Director General for Prisons commissioned an investigation into those matters to be undertaken by a Senior Civil Servant (formerly an experienced Prison Governor), and inviting the claimant to participate in the investigation. The Terms of Reference are dated 20 March 2019.

48. Under the Terms of Reference, ordinarily the report should be provided not later than 28 days from the date commissioned, but on this occasion the Investigating Officer was given until 20 May 2019 in recognition of the complexity of the matters under investigation. We were told during the course of the remedy hearing (although the claimant had not been made aware previously), that that date was deferred to 30 May 2019.

49. No reference is made in the Terms of Reference to the Tribunal's Judgment, the members of staff to be investigated are not identified other than by being described as "all staff involved in the above" and a number of facts as found by the Tribunal are referred to only as "allegations". On the face of the Terms of Reference, the reader would not be aware that these matters had been the subject of a Tribunal Judgment. Reference is made to investigating the Government Legal Department's preparation for the Tribunal, but the Tribunal's findings have not been disclosed to the Investigating Officer as far as the Terms of Reference disclose.

50. Based on the information presented to us, we have concluded that this investigation was only commenced after the enquiry from the claimant's solicitors and not before. No document indicating that any steps preparatory to an investigation had been taken before 20 March 2019 and no oral evidence of any steps being taken before that date has been produced to us. The delay in the presentation of the report is because the individual at the Government Legal Department charged with the production of a report into the conduct of the matter from the lawyer's side (who was also involved in the matter throughout as the relevant contact with the Tribunal), needed additional time to prepare her report because she was also preparing for the remedy hearing.

51. As a result of the above, we give very little credit indeed to the respondent for the investigation it is apparently conducting. We say apparently because we have seen no evidence of any steps being taken whatsoever in relation to the

investigation. Mr Heavens could not tell us whether any of the individuals whose conduct was found to be unacceptable, discriminatory, harassing and / or victimising by the Tribunal, had been suspended pending an investigation; he could not even tell us whether steps had been taken to ensure that they did not collude during the investigation and no information from the Investigating Officer to explain what steps he had taken to date, was before us. We have unanimously concluded based on the information (and lack of it) presented to us that the Respondent had taken no steps whatsoever to investigate the serious findings and the matters of concern which had been found by the Tribunal until prompted to do so by the claimant's solicitors enquiry on 20th March 2019.

52. None of this therefore serves to alleviate the aggravating features of this case in any meaningful way.

53. Taking matters in the round and on the basis that the principal of aggravated damages (classically to be awarded as set out in Alexander v Home Office [1988] ICR 685, when the Court of Appeal said that they could be awarded in a discrimination case where respondents had behaved in a "high handed, malicious insulting or oppressive manner in committing the act of discrimination", or as Mr Justice Underhill said in Shaw, "where the manner in which the wrong is committed was particularly upsetting, where there was a discriminatory motive i.e. it was evidently based on prejudice or animosity, or spiteful, vindictive, or intended to

    wound and / or where subsequent conduct adds to the injury, i.e. where the Tribunal proceedings had been conducted in an unnecessary and offensive manner or where a respondent rubbed salt into the wound by showing it does not take the claimant's complaint of discrimination seriously"), we have concluded that – reflecting on the overall award and the fact that an award has been made at the very highest end of the Vento guidelines, an appropriate figure for aggravated damages, to be added to and forming part of the injury to feelings award, is £15,000.

54. The respondent engaged in a campaign of victimisation leading to the claimant's dismissal. During the course of the hearing they could, or would not, concede even the most obvious failings of process notwithstanding the gross lacunae in the investigation, the dismissal process and the conduct of their investigations into the claimant's grievances. The manner in which the wrongs were committed will be particularly upsetting (taking place as some of them did in front of line managers and / or senior officers who should have immediately intervened to prevent and punish such conduct) and we are satisfied that the failure, as we have found it, to investigate the claimant's grievances and the failure, until prompted, to consider taking any steps in the light of the Judgment of the Tribunal, served to rub salt in the claimant's wounds by showing that the respondent has failed to take the claimant's complaints of discrimination seriously.

Exemplary damages

55. Exemplary damages are rare and only recoverable in a case where compensation is insufficient to punish the wrong doer and where the respondents conduct amounts to oppressive, arbitrary or unconstitutional actions by agents of the Government (or, not relevant here, where the conduct has been calculated to make a profit which might exceed the compensation payable to the claimant).

56. In Ministry of Defence v Fletcher [2010] IRLR 25, exemplary damages were stated to be reserved for the very worst cases of oppressive use of power by public authorities and indeed in that case, even though as the respondent's Counsel has pointed out, there was disregard for the respondent's own procedures for redressing Ms Fletcher's complaints which was described as deplorable. That did not cross the high threshold warranting an award of exemplary damages.

57. We do note, however, that elsewhere immediately thereafter, Mr Justice Slade, in that Judgment, said this, "our view may have been otherwise if the Employment Tribunal had based the award of exemplary damages on the use by the Army of disciplinary procedures and sanctions to victimise Ms Fletcher for pursuing complaints and to deter her from seeking redress".

58. That is exactly what has happened in this case. Amongst the other actions of the respondent upon which the claimant relies in seeking an award of exemplary damages, the respondent used its disciplinary procedures, wrongly, as a vehicle for the victimisation of the claimant because he had raised complaint regarding the acts of discrimination which he was suffering on a regular and ongoing basis whilst at HMP Woodhill.

59. The respondent's conduct, as an arm of the state, in relation to this case has been unacceptable as set out in the Merits Judgment. It has withheld documents, redacted documents incorrectly, corrupted documents to include information irrelevant to the claimant, all to the claimant's detriment, failed to properly transcribe an interview with Prisoner A (the "missing" sections which were perfectly audible and transcribable, assisting the claimant to a degree), produced documents which had been created far later than their stated date and admitted on oath that this was done to "plug the gaps", conducted oppressively and as an act of victimisation, investigatory dismissal and appeal proceedings, claimed CCTV footage had been deleted and then (although the claimant says only in part) disclosed it. In addition, the demeanour, lack of preparation and veracity of a series of witnesses who gave evidence on behalf of the respondent, was seriously called into question by the Tribunal.

60. For those reasons we do consider it appropriate to make an award of exemplary damages. When assessing the appropriate figure, we reflect

upon the awards already made for injury to feelings including aggravated damages, reflect on whether or not that is sufficient to punish the wrongdoer and / or to compensate the claimant.

61. On behalf of the respondent, Mr Allsop says that the findings of the Tribunal stopped short of describing the respondent's conduct as conscious and contumelious as required for an award for exemplary damages. For the avoidance of doubt, we are satisfied that the respondent's conduct in withholding of evidence including the hopelessly late disclosure of a number of obviously relevant documents; the tampering with, corruption of and the misleading after-the-event creation of documents and generally their conduct, including the conduct of a number of witnesses, which we have set out in this Judgment and the merits Judgment, was both conscious and contumelious. The appropriate figure for an award of exemplary damages is £15,000. We have had careful regard to the comments in Fletcher (a case decided in 2010), stating that exemplary damages are unlikely to be less than £6,000 (as of December 2006). We have reflected, as said, on the overall award of damages to the claimant considering a further award of exemplary damages to be warranted in this case and accordingly make that Order which reflects as best we are able the wilful disregard which the respondent has shown for the Tribunal rules of procedure, and what we unanimously find to have been nothing more nor less than an attempt to prevent a fair trial by the concealment, corruption and late creation of documents.

General damages for pain, suffering and loss of amenity / personal injury

62. The reports of Dr Oyebode and Dr Sahota are substantially in agreement. The claimant has suffered moderate psychological damage and Post Traumatic Stress Disorder.

63. The Judicial College guidelines place the appropriate level of awards for moderate psychological damage in the bracket of £4,670 - £15,200 and for Post Traumatic Stress Disorder £6,520 - £18, 450.

64. The respondent has referred us to Hodgson v Co-op Group Limited, WCVTG Limited and Barber v Somerset CC with awards in the range of £14,181.81 - £16,585.37 as adjusted for inflation.

65. We are conscious not to make any award which could be seen as double recovery; injury to feelings and personal injury awards are distinct (HM Prison Service v Salmon [2001] IRLR 425), but we reflect on the fact that the claimant now has, we have found, a chronic and permanent condition, the significantly debilitating impact which it has on the his day to day activities as set out in his witness statement, exacerbated by the development of paranoia as detailed in his remedy statement. Taking all

matters into account we find an appropriate award for personal injury to be in the sum of £18,000.

66. In reaching this figure, we have considered the fact that the claimant suffers not only from psychological damage, but also Post Traumatic Stress Disorder and has now developed a paranoia as a result of those two conditions and the treatment he has received at the hands of the respondent. Collectively, those conditions would warrant a higher award if it were not for the fact that the claimant has already received a substantial award for injury to feelings, including an award for aggravated damages and that we have already made an award for exemplary damages.

Uplift for failure to follow Acas Code of Practice Number 1

67. The respondent does not dispute that an uplift should be given.

68. The claimant points to the lengthy failings as set out in the merits Judgment, in particular the failure to follow the correct grievance procedure, failures during the investigation and the disciplinary hearing including the hiding and controlling of information, not following the correct procedure during the investigation process, an admission by the Investigating Officer that his investigation was flawed, a failure by the Commissioning Manager to review and consider the report, a failure to adhere to timescales for an investigation, the fact that the dismissal was clearly unfair, lack of impartiality of the decision makers, predetermination of the outcome and oppressive questioning of the claimant during the disciplinary process.

69. It is correct that the respondent did follow a process, that it conducted an investigation, held a disciplinary hearing and allowed an appeal. It was, however, essentially a case of "going through the motions" as the failures as set out at length in the Merits Judgment indicate. It lacked fairness and impartiality, was predetermined and was, as we have found, an act of victimisation.

70. In the circumstances it is only to a minimal degree that the respondent has complied with the Acas Code and has done so in form rather than in substance.

71. We therefore consider that an uplift should be at the higher end of the scale as set out in Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and award the claimant a 20% uplift on the relevant awards of damages.

Interest on injury to feelings

72. The parties were unable to agree a date from which any interest on the awards for injury to feelings should run.

73. The first date of any act of discrimination as found by our Judgment was the 7 September 2014 and the final date was the date of the rejection of the claimant's appeal (17 November 2016). We have determined that the appropriate date from which interest should run is the mid-point between those dates, 12 October 2015.

Mitigation

74. Although this was a matter which the parties identified as being for determination by the Tribunal, it is clear that the claimant has, since the date of the termination of his employment, been unfit for work, and remains so. There is no evidence to the contrary. Prior to his dismissal the claimant was making an application for alternative posts. He did so, as he said, because he was satisfied that the respondent had determined to dismiss him (he was correct) and because he was facing a future without income where he had bills to pay. In those circumstances he acted appropriately. He has been unable to take any meaningful steps to mitigate his loss since his dismissal, remains and as we have found is near certain to remain incapable of any work. There is therefore no issue on mitigation which requires our further determination.

Summary

75. The claimant is therefore awarded the following sums:

    75.1 Loss of earnings and future loss of earnings, together with pension loss, based on an annual salary of £40,616.87 gross (£781.10 per week) which equates to a net salary of £31,660.29 per annum (£608.85 per week).

    75.2 The claimant is awarded £500 for loss of statutory rights.

    75.3 The period of future loss is career long.

    75.4 The reduction in the calculations of loss of earnings and pension loss to take account of withdrawal / early resignation or retirement, is 5%.

    75.5 The claimant is awarded £41,000 for injury to feelings and aggravated damages of £15,000.

    75.6 An award for exemplary damages is made in the sum of £8,000.

75.7 On the appropriate awards there shall be an uplift of 20% for failure to follow the Acas Code of Practice No. 1.

76. The parties are to agree the calculations of loss of earnings to date, future loss of earnings and pension loss, including grossing up of awards to reflect the incidence of tax. The respondent has credit for the sum of £75,000 paid on account to the claimant.

77. The protected period runs from the date of dismissal (9 August 2016) to today (15 May 2019). The claimant's loss of earnings to date will be the protected amount. Once the parties have agreed their calculations and submitted to the Tribunal figures to be inserted into a Supplementary Judgment, the appropriate notifications will be sent to the Department for Work and Pensions.

78. The parties are to agree the relevant sums for the Supplementary Judgment and advise the Tribunal by not later than 31 May 2019.

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Employment Judge Ord

Date: 11 June 2019

Sent to the parties on: 12 June 2019

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For the Tribunal Office