



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT
MS ANNE GIWA-AMU

V RESPONDENT
DEPARTMENT FOR WORK AND
PENSIONS

HELD AT: CARDIFF

ON: 19TH NOVEMBER 2019
(CHAMBERS DISCUSSION
ON 2ND DECEMBER 2019)

BEFORE: EMPLOYMENT JUDGE HOWDEN-EVANS
MR P CHARLES
MS K GEORGE

REPRESENTATION:

FOR THE CLAIMANT: MR DAVIES (SOLICITOR)

FOR THE RESPONDENT: MR FEENY (COUNSEL)

JUDGMENT ON REMEDY

The unanimous decision of the Employment Tribunal is as follows:

1. The Claimant is awarded **£42,809.32** compensation for injury to feelings and interest thereon.
2. The Claimant is awarded **£31,102.57** in respect of her past losses and interest thereon.
3. The Claimant is awarded **£169,723.95** in respect of her future losses.
4. As the Respondent has made an interim payment of £10,000, the total amount outstanding that the Respondent is liable to pay the Claimant is **£376,059.73.**

REASONS

Background

1. In the Reserved Judgment on Liability, the tribunal has made declarations that the Respondent had:
 - 1.1.directly discriminated against the Claimant because of her race;
 - 1.2.harassed the Claimant by unwanted conduct related to her race;
 - 1.3.directly discriminated against the Claimant because of her age;
 - 1.4.harassed the Claimant by unwanted conduct relevant to her age; and
 - 1.5.victimised the Claimant because she had carried out protected acts.
2. At the remedy hearing on 18th November 2019, the tribunal heard evidence on oath from the Claimant and from Mrs Adele Packer, who in January 2019 became the Respondent's new manager of the Caerphilly Service Centre. The Claimant was represented by Mr Davies, solicitor; Mr Feeny, counsel, represented the Department of Work and Pensions.
3. The Claimant had prepared a witness statement and supplementary witness statement and Mrs Packer had prepared a witness statement. The tribunal read the witness statements and accepted them as evidence in chief. With each witness, we allowed supplemental questions, before cross examination, tribunal questions and finally any re-examination. The tribunal also had the benefit of a bundle of documents of 6 lever arch files, a Schedule of Loss, a Counter Schedule of Loss and the respondent's Note on the Law. Whilst the Tribunal were able to finish hearing evidence on the day, there was insufficient time for closing submissions. The tribunal gave directions for representatives to exchange written submissions and subsequently any response to written submissions. Ahead of the chambers discussion, the tribunal received written submissions and a reply to written submissions/ updated written submission from both parties.
4. As the Respondent had valued the Injury to Feelings claim at £10,000 and the Claimant was experiencing extreme financial hardship, at the hearing on 19th November 2019, the tribunal made a recommendation that the Respondent pay the Claimant £10,000 on or before 22nd November 2019. The Respondent has complied with this recommendation.

The Issues

5. By closing submissions, the issues to be determined by the tribunal were:

Appropriate recommendations:

6. The claimant was seeking the following recommendations:

6.1. Within 28 days, Peter Schofield (Permanent Secretary) and Debbie Alder (Director General of HR) or equivalent provide the Claimant with a written apology for the distress caused to her by the unlawful treatment found by the Tribunal.

6.2. Within 28 days, the DWP staff who have been found to have breached the Equality Act 2010 being subject to a disciplinary investigation in that regard.

6.3. Within 56 days, the DWP staff who have been found to have breached the Equality Act 2010 being required to undertake formal equality and diversity training provided by a recognised external provider, such training to include communications to include unconscious bias.

6.4. Within 28 days, the Respondent to invite the Equality and Human Rights Commission to intervene into the Respondent and investigate and recommend in particular what (if any) action should be taken in the light of the ET judgment to ensure that BAME and older employees are not subject to such unlawful abuse and dismissal during their training stage and that its Public Sector Equality Duty has been complied with and will be in the future.

6.5. Within 28 days the Claimant to be reinstated to her employment with full back pay to be paid. The Claimant will then agree to resigning on the date of reinstatement and future bare references will reflect the fact that she was employed until the date of reinstatement and resigned on that date.

6.6. The Claimant's personnel file to be amended to reflect the reinstatement and resignation, the reason for leaving to be stated to be resignation and the Respondent to confirm that the Claimant performed her role to a good standard.

6.7. The reinstatement to be announced to all staff internally due to the unlawful dismissal within 14 days of the reinstatement.

6.8. Within 28 days, the Respondent to provide the Claimant with a detailed written breakdown of the debt that they now admit is the total debt she owes them (£738.27) and to instruct the bailiffs not to pursue her for the same for a further 28 days.

- 6.9.If reinstatement is not ordered, the Respondent to be required to provide a bare reference for the Claimant to any prospective employer and to confirm if asked by a prospective employer that the Claimant was found by a unanimous decision of the ET to have been unlawfully dismissed.
- 6.10.Within 28 days, the Respondent to provide the Claimant with a signed original bare reference on headed paper on a “to whom it may concern basis”.
- 6.11.Within 180 days, the Directors of the Respondent to receive 3 hours of training on equality from the Claimant and/or her agent, based on the judgment.
7. The Respondent agreed to implement the following:
- 7.1.Change the reason for leaving on its internal system to resignation. This reason will be given if any external requests are made.
- 7.2.Provide a standard reference with dates of employment upon request from any prospective employer.
- 7.3.Provide a letter of apology to the Claimant which the Claimant can show to any prospective employer if they query the circumstances of her departure.
8. In relation to the Recommendations suggested by the Claimant, the Respondent objects that many of these do not obviate or reduce the adverse effect on the Claimant. In particular,
- 8.1.In relation to the suggestion that the Claimant is reinstated, the Respondent submits the length of service stated in any reference would be untrue and this would leave the Respondent susceptible to legal proceedings from prospective employers and the Claimant vulnerable to retracted offers, if the truth was discovered.
- 8.2.In relation to the debt owed to the Respondent, the Respondent suggests the entire November 2017 payment is set off against the Claimant’s loss of earnings and the Respondent will abandon all action for repayment of overpaid wages.

The appropriate award for Injury to Feelings (including any aggravated damages).

9. The Claimant claims £37,500 for Injury to Feelings (of which £7,500 is for aggravated damages), an award in the Vento top-band (as adjusted by the Presidential Guidance dated 5th September 2017) for “the most serious cases, such as where there has been a lengthy campaign of harassment”.
- 10.The Respondent’s Counter Schedule of Loss contends the Injury to Feelings award should be £10,000 and in closing submissions, the

Respondent contends the award should be “within the middle band of Vento, between £8,400 and £25,200”. The Respondent submits there should be no aggravated damages award.

Exemplary Damages

11. The Claimant is seeking an award of £50,000 for Exemplary Damages. The Respondent submits there should be no Exemplary Damages award.

Financial Loss – Loss of Earnings

12. Parties agree the tribunal should assess the Claimant’s financial loss by determining what position she would have been in had the discrimination not occurred.
13. The Claimant contends she would have continued to work for the Respondent until her retirement aged 66 years and 9 months. She asserts she would have been promoted to the position of Executive Officer by 1st July 2018 and to the position of Senior Executive Officer by 1st July 2020.
14. By closing submissions, the Respondent accepted that the Claimant’s fixed term appointment as an Administrative Officer would have been converted to a permanent position on 14th August 2018 but asserted the Claimant would have remained as an Administrative Officer and would not have been promoted. The Respondent submits the tribunal should apply a 25% reduction to losses from August 2018 onwards to reflect the chances of the Claimant choosing to leave employment with the Respondent before her anticipated date of retirement (18th September 2027).
15. The Claimant contends she is unlikely to be able to find work before her retirement as she has been dismissed having complained of discrimination, has been out of work for a long period of time, is almost 60 years of age and is a BAME woman. In the Reply to the Respondent’s closing submissions, the Claimant accepted that if the Respondent provides the reference suggested, future loss of earnings could be reduced by 25% to reflect the chance of the Claimant finding equivalent employment.
16. The Respondent asserts that, given the Claimant’s legal qualifications, had the claimant taken reasonable efforts to mitigate her loss, she would have secured a position on a similar salary by no later than 12 August 2018.

Financial Loss – Pension Losses

17. By closing submissions, both parties accepted that in the event of the tribunal awarding career loss of pension (ie until retirement) this should be calculated by adopting the Civil Service Pensions annual projected figure of £4,265.76 [page 188A]. It was agreed this gives a 15-year loss of £63,986.40, which if reduced by 25% (for contingencies in the loss of earnings claim), would amount to £47,989.80. Both parties agree that if the tribunal accept the Claimant would have been promoted with the

Respondent, this can be factored into the pension calculation by adopting a 10% increase in the projected pension payment.

Expenses

18. The Claimant sought the cost of travelling to and from the tribunal hearings and expenses for paper, printer ink and telephone calls. The Respondent asserts these are litigation costs rather than being mitigation costs.

Failure to Follow the ACAS Code

19. The Claimant is seeking a 25% uplift for failure to follow the ACAS Code of Practice. The Respondent asserts there should be no uplift as the reason for dismissal was that it was not envisaged the claimant would return to work within a reasonable timeframe and this was not something that could be resolved through a disciplinary process.

Financial Penalty

20. The Claimant invites the tribunal to impose a financial penalty under section 12A Employment Tribunals Act 1996. This is resisted by the Respondent.

Findings of fact

21. Prior to joining the Respondent, the Claimant has previously worked as a Designated Case Worker in the CPS (Grade B2) for 5 years, a trainee solicitor (being admitted to the roll of solicitors in 2008) and as a Company Secretary and Executive Director with a US oil company up until 2013. In 2013, when her employment with the US oil company came to an end, she moved from London to Caerphilly, Wales. She purchased and renovated a small property and tried, without success, to start a small business whilst looking for new employment.
22. After three years of looking for employment, on 13th February 2017, the Claimant commenced work for DWP in the Caerphilly Service Centre as a full-time Administrative Officer, appointed on an 18-month fixed term contract. She was one of a number of newly appointed Administrative Officers that completed an induction week and then a number of weeks of training. The new trainees started their induction week on 13th February 2017 and were due to finish training on 17th March 2017, before going on to work in different parts of DWP.
23. The Claimant describes herself as being of Nigerian-Welsh origin. She was the only non-white trainee that was completing training in Nicola Foley's group of 9 trainees.
24. The Claimant was 55 years old at the time of the training. She was the only trainee over the age of 50; the tribunal understand Nicola Foley, the trainer, was in the same age group as the Claimant.

25. On 13th March 2017, which was the start of her fifth week of employment, the Claimant submitted a grievance headed "Formal complaint of bullying and racial harassment" and started her sick leave on the same day.
26. At some point between 14th and 16th March 2017, Karen Williams was appointed to investigate the Claimant's grievances.
27. On 16th March 2017 the Claimant contacted ACAS. ACAS early conciliation procedures continued until 11th April 2017.
28. On 22nd March 2017, Ms Williams interviewed the claimant before interviewing the Claimant's colleagues on 24th March 2017. On 5th April 2017, Ms Williams notified the Claimant that she had decided not to uphold the grievance.
29. On 9th April 2017, the Claimant appealed the grievance decision to Alison Thomas. On 19th May 2017 the Claimant attended a grievance appeal meeting with Ms Thomas. On 25th May 2017, Ms Thomas wrote to the Claimant explaining she was not upholding the Claimant's grievance appeal. The Claimant did not receive this letter until 15th June 2017 as the original letter had been sent by recorded mail and was not collected from the Post Office.
30. The Claimant presented her ET1 claim on 28th June 2017. This alleged harassment, direct discrimination and victimisation (by reference to the protected characteristics of race, age and sex).
31. On 13th July 2017, Ceri Morris conducted a formal attendance management meeting by telephone with the Claimant.
32. By letter of 18th September 2017, the Claimant was invited to attend an attendance management meeting. The Claimant did not receive this letter. The Claimant did not attend the attendance management meeting on 29th September 2017.
33. On 4th October 2017, Ms Clarke made enquiries of the Post Office and learnt that the Claimant had not picked up Ms Clarke's letter of 18th September 2017 from the Post Office; this letter had been sent by recorded delivery. Ms Clarke knew (from Ms Morris) that the Claimant had not collected other letters from the Post Office that had been sent via recorded delivery. Ms Clarke did not seek to rearrange the meeting, but instead concluded the Claimant was not going to engage with the Respondent.
34. By letter of 4th October 2017 Linda Clarke informed the Claimant she was dismissed as she had failed to maintain an acceptable level of attendance / had been unable to return to work within a reasonable timescale. The Claimant did not appeal the decision to dismiss her.

35. The Claimant did not receive her employment contract until 12th October 2017, 6 days after her dismissal. The Claimant has never received her October and November 2017 payslips.
36. By email of 31st October 2017, the Claimant wrote to Ms Morris explaining she had not received her final payslip and needed it to be able to claim Jobseekers Allowance. Later that day the Claimant sent a further email to Ms Morris confirming she had not been paid her final pay and had no money for food.
37. Ms Morris replied by email that same day explaining she could not access the Claimant's payslips or any of the Claimant's personnel details. She provided the Claimant with a contact number for Shared Services HR. Calls to this telephone number are charged at 2p per minute plus network provider connection charges. The Claimant responded by requesting an email address for Shared Services HR. Ms Morris confirmed there was no email address but the Claimant would be able to send a text.
38. The Claimant responded by asking Ms Morris to contact Shared Services HR and ask them to contact the Claimant on her home phone number. Ms Morris contacted Shared Services and was advised they were "unable to call employees or ex-employees".
39. On 1st November 2017, the Claimant emailed Ms Morris again confirming she was still waiting for her payslip and salary and pleading for someone from DWP to chase this up urgently. Ms Morris contacted Shared Services HR again and was told they could not disclose information to Ms Morris and told the Claimant had to contact them directly.
40. In December 2017, the Claimant received £2,418.83 into her bank account, from the Respondent. As she still has not received a payslip for October or November 2017, she is unsure how this has been calculated. None of the Respondent's witnesses have been able to assist in this regard.
41. Ms Clarke and Ms Morris were able to explain that payroll were not aware of the Claimant's dismissal until 17th October 2017, which was after the 13th October 2017 cut off for the October payroll. They both confirmed that due to the length of the Claimant's sick leave, she would not have been in receipt of sick pay at the end of her employment.
42. It may be the case that itemised pay statements have been prepared and are available on the DWP internal intranet, but this is inaccessible to an employee that is on sick leave and unable to attend DWP premises. Further this is inaccessible for a former employee.
43. Ms Morris believed the Claimant had been overpaid in the final amount paid to her, but could not explain how. DWP subsequently demanded repayment of this final payment and threatened the Claimant with legal action in relation to the alleged overpayment. DWP passed the Claimant's details to debt collectors in relation to this alleged overpayment.

44. Turning to the amount of the alleged overpayment, in February 2018 the Claimant received a letter from the Respondent stating she had been overpaid by £2,418.83; in June 2018 the Claimant received a letter from the Respondent stating she had been overpaid by £2,371.44 net. In September 2018 the Claimant received a letter from the Respondent confirming the total amount of the overpayment was £738.27 net. In Ms Packer's witness statement provided for the remedy hearing, she asserted the claimant had been overpaid by £1,061.38. During cross examination, she confirmed the September 2018 letter was likely to be correct and that the actual total amount of the overpayment was £738.27 net.
45. In the meantime, on 29th September 2017, DWP had submitted their ET3 Response. A preliminary hearing by telephone was conducted by Regional Employment Judge Clarke on 20th October 2017. As the claimant had been dismissed and wished to bring new proceedings in respect of the dismissal, it was agreed that it was appropriate for any claims arising from dismissal to be added to the existing proceedings. A Scott Schedule was prepared, which listed 25 different items/alleged incidents of discrimination. Employment Judge Whitcombe urged the parties to try to reduce the number of items on the Scott Schedule. By the time of the final hearing, the Claimant had agreed to remove 6 of the items / alleged incidents, to narrow the issues the tribunal had to determine. This left 19 items / alleged incidents to be considered by the tribunal.
46. Following a tribunal hearing of 6 days, which ended in September 2018, the tribunal upheld 12 of the Claimant's 19 complaints.

The Discriminatory Acts

47. The Judgment of 20th December 2018 identified the following specific acts of discrimination:
- 47.1. During their first week of employment, the week commencing 13th February 2017, during a one-to-one conversation, Ms Cartwright told the Claimant (who was the only non-white trainee) that Ms Cartwright had been called "Paki Lover" in her previous employment. The tribunal found this to be an act of racial harassment and of age-related harassment, in that whilst Ms Cartwright did not deliberately intend to violate the Claimant's dignity, it was a highly insensitive comment and had the effect of violating the Claimant's dignity.
- 47.2. In mid to late February 2017, Ms Cartwright told the Claimant it was racist for the Claimant to comment it always rains in Wales and, on a number of occasions, said to the group "It's [the Claimant]'s weather report again". Against the backdrop of the Claimant being more and more marginalised by the group and the Claimant reasonably perceiving Ms Cartwright to be trivialising discrimination and routinely criticising her when the Claimant was trying to find a topic of conversation to share with the group, the tribunal found these to be

acts of racial and age-related harassment which had the effect of violating the Claimant's dignity.

47.3. In early March 2017, Ms Cartwright repeatedly accused the Claimant of stealing ice-cream, whilst publicly addressing the group of trainees. Whilst this might have started as a joke, the Tribunal note that the Claimant was the first person to be "blamed" and that Ms Cartwright carried on with this conduct, even after the Claimant had asked her to stop. It was obvious to others that the Claimant was upset by this conduct and they intervened to stop Ms Cartwright. By this point in time, Ms Cartwright's behaviour was creating an environment in which the Claimant, a quiet individual, was regularly humiliated in front of the other trainees. We concluded that this was an act of racial and age-related harassment; Ms Cartwright's actions had the purpose of creating a humiliating environment for the Claimant, the only non-white person in the group and the only trainee that was clearly much older than the other trainees.

47.4. In early March 2017, Ms Cartwright sprayed body spray on herself, whilst sat next to the Claimant, just after the Claimant had made it clear how much she disliked this practice. We found that this act was deliberately intended to offend the Claimant and had the purpose of creating a hostile environment for the Claimant; we concluded this was an act of racial and age-related harassment.

47.5. In early March 2017, Ms Cartwright purposefully spun on her chair next to the Claimant after the Claimant had said it was making her feel sick. The Claimant had to move away from her work area as she was worried the chair might hit her. We concluded this was a further act of racial and age-related harassment as it had the purpose of creating a hostile environment for the Claimant.

47.6. On 9th March 2017, when the Claimant arrived for training, Ms Cartwright made gestures to Ms Blue, which the Claimant reasonably perceived were about her and which caused the Claimant to become so upset that she left the training room in an obvious state of distress. We concluded this was a further act of racial and age-related harassment; it had the effect of creating a hostile and humiliating environment for the Claimant.

47.7. When the Claimant tearfully explained to Ms Foley, the trainer, she was being bullied by Ms Cartwright and she felt the reason for the bullying was her (the Claimant's) appearance, within a couple of hours, Ms Foley, spoke to Ms Cartwright about her behaviour towards the Claimant, breaching the Claimant's confidence, despite the Claimant having clearly told Ms Foley that she did not want her to speak to Ms Cartwright about this. The tribunal found this to be an act of victimisation as Ms Foley was significantly influenced by the Claimant having made allegations of racial harassment.

- 47.8. Subsequently, the next morning, on Friday 10th March 2017, Ms Foley further breached the Claimant's confidence by speaking to all the other trainees, during the Claimant's absence, in circumstances in which the tribunal found it must have been obvious to the other trainees that the Claimant had made a complaint. We found that this decision to further breach the Claimant's confidence was significantly influenced by the Claimant having made allegations of racial harassment and this was a further act of victimisation.
- 47.9. On Friday 10th March 2017, Mr Lewis humiliated the Claimant by loudly telling the group "I touched [the Claimant]'s bum. I touched [the Claimant]'s bum" We found this to be an act of direct race and direct age discrimination. We also found this to be an act of racial and age-related harassment as Mr Lewis was intentionally violating the Claimant's dignity. The Claimant felt humiliated by Mr Lewis's words and found it difficult to talk about this incident even at the time of the tribunal hearing.
- 47.10. On Friday 10th March 2017, when the Claimant was leaving the training room and said "Goodbye" to a small group of trainees, to which one of them responded "See you Monday", Mr Lewis said to the group "if she comes back". In the context in which this comment was made – the previous day the Claimant had left the training room distressed on two occasions and had told the trainer she felt she was being bullied. The whole group realised the Claimant was distressed. Mr Lewis was aware of the Claimant's distress - the tribunal found this to be a nasty dig which underlined the message "we don't like you". It proved to be the final straw for the Claimant and the tribunal found this comment to be an act of direct race and age discrimination. The tribunal also found this to be an act of racial and age-related harassment; it was unwanted conduct with the purpose of creating an intimidating and hostile environment for the Claimant.
- 47.11. In taking the decision to dismiss the Claimant - it was noted "*[the Claimant] is now taking the matter forward with an external Employment Tribunal*" in Ms Morris's report that concluded "*I recommend [the Claimant] is dismissed*". Ms Clarke considered this report and when the Claimant failed to attend their attendance management meeting, she decided to dismiss the Claimant despite being aware the Claimant had not received the invitation to attend the meeting. The Tribunal found that both Ms Morris and Ms Clarke's decision making was significantly influenced by the Claimant's protected act of issuing tribunal proceedings. The Claimant's dismissal was an act of victimisation.
- 47.12. The delays in processing and paying the Claimant her final pay – the Tribunal found that either Ms Clarke or Ms Morris did not action the instruction to payroll for the Claimant's final pay as quickly as they should have done and the deadline for the October payroll had passed. The decision to dismiss the Claimant had been made on 4th October and payroll were not notified until 17th October 2017. Whilst Ms Clarke

did attempt to assist the Claimant at the end of November 2017, nobody has been able to explain the 13-day delay which meant payroll didn't process the Claimant's pay in October. The Claimant was not paid in October or November and did not receive this pay until December 2017. Not paying the Claimant on time amounted to a further act of victimisation.

The impact the acts of discrimination have had on the Claimant

48. Initially, the Claimant was shocked by Ms Cartwright's use of racist language and chose to distance herself from Ms Cartwright by moving seats. However, later in the week, when the trainees moved to a new work area, she found Ms Cartwright to be sitting next to her again.
49. When Ms Cartwright told the Claimant she was being racist for saying it always rained in Wales, the Claimant was upset that Ms Cartwright was trivialising discrimination. The Claimant was finding it difficult to make conversation with the group, so when Ms Cartwright repeatedly mocked the Claimant (to the rest of the group) for talking about the weather, the Claimant started to feel like an outsider.
50. When Ms Cartwright repeatedly accused the Claimant of stealing ice-cream, the Claimant was very upset, particularly when Ms Cartwright continued with these accusations even after the Claimant had asked her to stop. Other trainees recognised how upset the Claimant was and intervened to stop Ms Cartwright. The Claimant explained she felt sick and humiliated; she was offended that Ms Cartwright was confirming a negative racist stereotype and felt Ms Cartwright was evaluating the Claimant's honesty according to her race. She felt self-conscious as to how the others in the office would view her.
51. In relation to Ms Cartwright's actions in spraying body spray and spinning next to the Claimant, the Claimant felt Ms Cartwright was using anything the Claimant felt uncomfortable about, to deliberately upset her. She felt she was being humiliated, having to sit next to someone that was so hostile towards her.
52. When Ms Cartwright made gestures to Ms Blue, the Claimant was so distressed she had to leave the training room. The whole class noted how distressed she was. She could not stop crying. She tried returning and had to leave again after a further five minutes. She had a drink in the kitchen – it was the first time she had made a drink in the kitchen as she was worried someone would accuse her of stealing. She confided in Ms Foley that she felt she was being bullied and talked about her daughter having previously experienced discrimination. She specifically asked Ms Foley not to talk to Ms Cartwright about this. The Claimant appreciated she had nearly completed the training and she desperately wanted this job, as she had been unemployed for a long period of time immediately prior to this.

53. By lunchtime on the same day, Ms Foley had broken her confidence and spoken to Ms Cartwright. The Claimant realised this as she walked into the room during the final part of their conversation. The Claimant felt Ms Foley had betrayed and undermined her. That night the Claimant was so stressed she was unable to sleep.
54. Ms Foley made matters worse the next day, by having a discussion with all the trainees, bar the Claimant, in circumstances in which the other trainees must have realised the Claimant had made a complaint. The Claimant had arrived to discover the training room empty and went to find the rest of the class. She walked in on the end of the discussion and was immediately embarrassed that everyone appeared to have been discussing her personal situation.
55. Ms Foley went on to prepare a self-serving note, which did not truthfully report the incident. The Claimant learnt of this note during the tribunal proceedings and was upset that if Ms Foley had been truthful in her account of events, the Respondent might have handled the Claimant's situation differently and the Claimant may have been able to complete her training and continue with her career with the Respondent.
56. The same day as Ms Foley's discussion with the Claimant's peers, Mr Lewis accidentally touched the Claimant's bottom, but then loudly told the group about this twice, deliberately humiliating the Claimant. The Claimant described the experience as being "horrible"; she was so affected by this incident that she found it difficult to talk about over a year later during the tribunal hearing. The Claimant felt Mr Lewis was laughing at how unpleasant it was to have touched her.
57. The final straw, Mr Lewis's nasty comment "*if she comes back*" made the Claimant feel entirely rejected, ridiculed and isolated from the rest of the group. In her conversation with Miss O'Connor on 13th March 2017, ie 3 days later, the Claimant said she could not return to work alongside these colleagues or be in the same room as them. The Claimant only had 5 days of training left to complete and following that she would have been able to move into different areas and offices of DWP. She had completed 4 weeks of training and was so close to finishing the course, yet could not attend as a result of the impact of Mr Lewis and Ms Cartwright's behaviour. She described crying and being unable to sleep before writing her letter of formal complaint. Over the weekend she felt overwhelmed and was regularly in tears. The Claimant was heartbroken that she was not able to return to a job she desperately needed and wanted.
58. The Claimant was signed unfit for work due to work related stress on 13th March 2017 and her GP has continuously signed her off work since that date; initially with work related stress and since 15th May 2019 with depression or symptoms of depression. By the time of the Remedy Hearing in November 2019, the Claimant reported that she feels she is starting to recover from the symptoms of depression, however, the Tribunal notes her current sick note is not due to expire until 21st December 2019.

59. As part of her ill health, the Claimant lost her confidence and was initially too embarrassed to tell family and friends that she had lost her job. The Claimant found it difficult to go to the Post Office to collect post and was also anxious about people coming to her house.
60. This anxiety was compounded when the Respondent delayed processing and paying the Claimant her final pay. When the Claimant wasn't paid at the end of October 2017, she experienced severe financial hardship such that she didn't have money for food. The Claimant was subsequently paid in December 2017, but shortly after this the Respondent asserted she had been overpaid and in later months referred the overpayment to a debt collection agency, which significantly added to the Claimant's anxiety. Even at the remedy hearing (in November 2019), the Claimant was still afraid of the bailiffs pursuing the Respondent's debt.
61. Through the employment tribunal proceedings, the Claimant has come to learn that:
- 61.1. All the trainees were kept on after the expiry of the fixed term contract;
 - 61.2. Ms Cartwright applied for promotion to a post at Executive Officer level in a different part of the civil service and was undertaking this role by May 2018;
 - 61.3. Ms Blue was promoted to a post at Executive Officer level in the Prison Service; and
 - 61.4. Mr Lewis continues to be employed as an Administrative Officer working for the DWP at the Caerphilly Office.
62. The Claimant continues to feel upset that her former colleagues have been allowed to progress with their careers without any apparent reprimand, disciplinary action or equality training. She is frustrated that the Respondent has not acted upon the Liability judgment (which was with the parties in December 2018). Ms Packer, admitted that she had not even read the Judgment until a few weeks prior to the Remedy Hearing (in November 2019).

The Claimant's attempts to mitigate her losses

63. The Claimant, who was approaching her 59th birthday at the time of the Remedy Hearing is a very capable lady and has a great deal of skills and experience that she can offer future employers. She represented herself during the liability hearing, preparing complex paperwork including a detailed Scott Schedule and presented as an excellent advocate. A good example of her ability and work ethic is that during her time at the CPS she started as an Administrative Assistant and within 6 months had become an Administrative Officer and within a further 2 years was promoted to the post of Senior Executive Officer.
64. Her strength of character is evident in the efforts she has made to regain control of her life since the discriminatory acts. Despite being continuously

signed unfit for work by her GP, the Claimant has actively sought alternative employment and remained on Job Seekers Allowance until more recently being on Universal Credit (since developing symptoms of depression). The tribunal were referred to the Claimant's "Actions for Getting Work" diary, which recorded job searches and which the Claimant was required to keep and discuss regularly with her Work Coach as a condition of receiving JSA. The tribunal note that the Claimant has made regular employment searches using a number of recruitment agencies and has submitted a number of applications for a variety of roles.

65. The Claimant considered other means of supporting herself and started an application for Enterprise Allowance, to edit a novel that she had written to be in a position to publish it. She started editing this text in November 2017 but has not yet been able to finish this. The Claimant did not finish the application for Enterprise Allowance, but remained on JSA instead.
66. Unfortunately the Claimant has not, to date, had much success in being invited to interview. The tribunal accept that, in part, it is likely that employers consider her, a qualified solicitor, to be overqualified for non-solicitor roles and it has been some time since she was last in practice, placing her at a disadvantage in applying for solicitor roles. In February 2019, at short notice, the Claimant was invited to interview with a solicitors' practice in Cardiff. She explained to the Tribunal she was not able to attend the interview as she did not have £7.50 to pay for the train ticket. The Claimant's income was £55 per week. She asked the jobcentre (ie the DWP) if it was possible to have a loan to afford transport costs to attend an interview, but was advised she would have to pay for the ticket and would be reimbursed within 30 days. The tribunal accept the Claimant was experiencing severe financial difficulties at the time and was not able to attend this interview.

The Law - Remedies under the Equality Act 2010

67. s124 and s119 Equality Act 2010, enable an employment tribunal to order the Respondent to pay the Claimant compensation (ie any remedy that a High Court could grant in tort, including compensation for injured feelings); and enable an employment tribunal to make appropriate recommendations.
68. It is well established that compensation is based on tortious principles. The aim is to put the Claimant in the position she would have been in if the discrimination had not occurred. (*see for instance, Abbey National v Chagger* [2010] ICR 397). The award should compensate the claimant for her loss caused by the discrimination; it is not to punish the respondent.
69. In *Software 2000 Ltd v Andrews* [2007] ICR 825, Elias J, President explained "(1) *In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal (2) if the employer seeks to contend that the employee would or*

might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment including any evidence from the employee himself. (3) However there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. (4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation even if there are limits to the extent to which it can confidently predict what might have been and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence...

70. An Injury to Feelings award attempts to provide compensation for “*subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on*” caused by the discriminatory acts (per Lord Justice Mummery in *Vento v Chief Constable of West Yorkshire Police (No.2)* [2003] IRLR 102, CA)

71. In *Armitage, Marsden and H M Prison Service v Johnson* [1997] IRLR 162, EAT, Mrs Justice Smith gave the following oft-cited guidance:

“(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.

(2) 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 Lord Bingham’s phrase, be seen as the way to untaxed riches.

(3) 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.

(4) 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.

(5) *Finally, tribunals should bear in mind Lord Bingham’s reference to the need for public respect for the level of awards made.*”

72. The starting point, when considering the amount to award for injury to feelings is the guidance given by Lord Justice Mummery in *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] IRLR 102. In *Da’Bell v NSPCC* [2010] IRLR 19, EAT, Judge McMullen QC confirmed the figures adopted in *Vento* should be adjusted to reflect inflation. The Presidential Guidance dated 5th September 2017, further adjusted the *Vento* figures to reflect the Court of Appeal decisions in *Simmons v Castle* [2012] EWCA Civ 1039 and *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879.

73. The Tribunal is aware of awards made in comparable injury to feelings cases and is also aware of amounts recommended in the Judicial Studies Board Guidelines for personal injury awards. However, the tribunal are also mindful of EAT guidance that *“a comparative exercise has to be treated with some caution”*, as the amount of injury to feelings will depend on the particular facts of each case.

74. Turning to aggravated damages, these can be awarded where an employment tribunal is satisfied the respondent has *“behaved in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination.”* (see *Alexander v Home Office* [1988] IRLR 190, 193, May LJ)

75. The Law Commission Report 247, on Aggravated, Exemplary and Restitutionary Damages, attempted to define aggravated damages:

“the best view, in accordance with Lord Devlin’s authoritative analysis in Rookes v Barnard [1964] AC 1129, appears to be that they are damages awarded for a tort as compensation for the plaintiff’s mental distress, where the manner in which the defendant has committed the tort, or his motives in so doing, or his conduct subsequent to the tort, has upset or outraged the plaintiff. Such conduct or motive aggravates the injury done to the plaintiff, and therefore warrants a greater or additional compensatory sum.”

76. In *Commissioner of Police of the Metropolis v Mr H Shaw* UKEAT 0125 /11/ZT, EAT, Mr Justice Underhill, emphasised that aggravated damages are compensatory; they should not be used to punish conduct. Mr Justice Underhill explained the features that can attract an award of aggravated damages can be classified under 3 heads:

76.1. the manner in which the defendant has committed the tort;

76.2. the motive for it; and

76.3. the defendant’s conduct subsequent to the tort, but in relation to it.

77. The features identified affect the award of compensation because they aggravate the distress caused by the actual wrongful act. Employment tribunals should ask *“what additional distress was caused to this particular*

claimant, in the particular circumstances of this case, by the aggravating feature(s) in question?"

78. Aggravated damages are an aspect of injury to feelings and may be expressed as a separate award or as an element of the injury to feelings award.

"The ultimate question must be not so much whether the respective awards [injury to feelings and aggravated damages] considered in isolation are acceptable but whether the overall award is proportionate to the totality of the suffering caused to the claimant." Commissioner of Police of the Metropolis v Mr H Shaw UKEAT 0125 /11/ZT, EAT, Mr Justice Underhill.

79. Exemplary damages are discussed by the Court of Appeal in *Ministry of Defence v Fletcher* [2010] IRLR 25. *"The first category of cases in which such damages may be awarded is...oppressive, arbitrary or unconstitutional action by the servants of the government...The authorities establish that exemplary damages are to be reserved for the most serious abuses of governmental power. The examples of cases in which such damages have been awarded illustrate the high degree of gravity of conduct required to warrant such an award. Although the ET characterised the Army's failure to provide or operate procedures for redress of Ms Fletcher's complaints as oppressive arbitrary and unconstitutional, in our judgement their conduct in this regard, deplorable though it was found to be, did not cross the high threshold warranting an award of exemplary damages."*

80. The applicability of the ACAS Code of Practice to ill health dismissals was considered in *Holmes v Quinetiq Ltd* [2016] IRLR 664, where the EAT stated *"...the employment tribunal properly construed the code of practice does not apply to internal procedures operated by an employer concerning an employee's alleged incapability to do the job arising from ill health or sickness absence and nothing more. It is limited to internal procedures relating to disciplinary situations that include misconduct or poor performance but may extend beyond that, and are likely to be concerned with the correction or punishment of culpable behaviour of some form or another."*

Conclusions

Recommendations

81. The tribunal finds that the following recommendations would obviate or reduce the adverse effects of the discrimination on the Claimant:

81.1. On or before 9th March 2020, the Respondent should write to any department / debt agency / external party it has ever instructed to pursue debts against the Claimant, confirming that any outstanding debt has been satisfied and that no further action is to be taken. Copies of this correspondence should be sent to the Claimant by 9th March 2020.

- 81.2. On or before 23rd March 2020, the Respondent should change the Claimant's reason for leaving on its internal system to resignation. This reason will be given if any external requests are made. The Respondent will provide a standard reference, with dates of employment, upon request from any prospective employer.
- 81.3. On or before 23rd March 2020, the Respondent will provide the Claimant with a letter of apology in the terms set out in the Annex to the Respondent's Closing Submissions, which the Claimant can show to any prospective employer if they query the circumstances of her departure.
- 81.4. On or before 25th May 2020, Peter Schofield (Permanent Secretary) and Debbie Alder (Director General of HR) or equivalent, should read the Liability and Remedy Judgments in this case and arrange a meeting with the Claimant (if she wishes to attend such a meeting) to:
- 81.4.1. identify the failings in policies and procedures;
 - 81.4.2. discuss the lessons that can be learnt from the Claimant's experience as recorded in these Judgments; and
 - 81.4.3. provide the Claimant with a written apology having reflected upon the judgments.
- 81.5. On or before 25th May 2020, the Respondent should approach the Equality and Human Rights Commission and seek their assistance in reviewing the Respondent's Equality Act 2010 and diversity awareness training, with a view to implementing effective training throughout the Respondent's organisation on or before 25th May 2021.
- 81.6. On or before 25th May 2021, the Respondent should write to the Employment Tribunal confirming that each of these recommendations has been complied with, within the specified time scale.
82. The tribunal considers it will reduce the Claimant's hurt feelings if those at the very top of the DWP consider the judgment and look at lessons to be learnt and involve the Claimant in this process. The Claimant is clearly upset that the very limited online equality training that was undertaken by the trainees was not fit for purpose, as demonstrated by Ms Cartwright's actions following this training. Even Ms Thomas, who considered the Claimant's grievance appeal, appeared to imply that discrimination related to age was part of human nature and should just be tolerated. The tribunal considers it will reduce the Claimant's hurt feelings to know that the Respondent is seeking advice from EHRC, to ensure the Respondent's employees receive effective training, to better understand diversity and discrimination and to reconsider their views.
83. The tribunal has declined to make a recommendation requiring the respondent to commence disciplinary investigations; this is a matter that ought to be left for the Respondent to consider.

84. The tribunal has declined to make a recommendation requiring the respondent to reinstate the Claimant, to enable her to resign. This would put both the Claimant and Respondent in an impossible position, if a future employer discovered the Claimant's true length of service.

Injury to Feelings (including an award for aggravated damages)

85. The tribunal are tasked with fully compensating the Claimant for her loss that has been caused by the unlawfully discriminatory acts.

86. In considering whether to make an award for aggravated damages, the Tribunal considered the 3 heads identified by Mr Justice Underhill in *Commissioner of Police of the Metropolis v Mr H Shaw* (the manner, the motive and the defendant's conduct subsequent to the tort, but in relation to it) and identified the following aggravating features:

86.1. We considered that a number of Ms Cartwright's and both of Mr Lewis's acts were undertaken in an insulting way (the manner), deliberately intended to humiliate the Claimant and create a hostile environment for her (the motive); this caused the Claimant additional distress as demonstrated by the fact that she was unable to be in the same room as them, to complete the last 5 days of training.

86.2. We considered that Ms Foley's actions, in creating a self-serving document, and distorting the Claimant's honest and open disclosure that she was being bullied was exceptionally upsetting for the Claimant (conduct subsequent to the tort, but in relation to it). The Claimant was in tears, discussing a very personal situation and Ms Foley subsequently betrayed the Claimant's confidence and distorted the Claimant's account. When the Claimant learnt of the self-serving document, she felt aggrieved that, if Ms Foley had followed procedure and honestly reported the Claimant's disclosure, the Claimant may have been able to complete the training and may still be working for the Respondent.

86.3. We considered that the Respondent's actions following the discriminatory dismissal and delay in providing the claimant's final wages to have really "rubbed salt into her wounds". The Claimant had no access to itemised pay statements for October (and November) and desperately needed these to be able to claim JSA. She begged the Respondent to help as she had no money for food; the Respondent was unable to offer any proactive support, instead the Claimant was expected to use a phone line that carried additional telephone charges, which exacerbated her distress. This was subsequently further compounded by the Respondent referring the overpayment to debt collectors. The Claimant, who was already ill with work-related anxiety, was placed under extreme pressure by demands for her to repay in excess of £2,000 at a time when her income was £55 per week and the actual debt was £738.27.

87. The Tribunal reminded itself that aggravated damages must be compensatory in nature; in relation to these aggravating features the Tribunal must ask "what additional distress did they cause to this particular

claimant?" The tribunal accepts the Claimant's evidence that these aggravating features caused her additional distress and hurt and considerable additional anxiety. The award for aggravated damages of £7,500 is compensating her for this additional distress and anguish.

88. Turning to consider the overall Injury to Feelings award, the Tribunal considered whether it was possible to separate the Injury to Feelings caused by each of the acts of discrimination and concluded it would be artificial to do so. Instead, the tribunal has had in mind all of the acts of discrimination and the impact that they collectively had upon the Claimant throughout the period. In particular, the Tribunal notes that the Claimant was distressed not by a single individual's actions, but by a number of people's discriminatory actions – this caused her far greater harm and injury to feelings, as she felt ostracised from the group and betrayed by the person she had turned to for help. We had regard for the negative impact these actions had and continue to have on the Claimant (as set out in paragraphs 48 to 62 above) and the extent to which the recommendations are able to reduce her ongoing distress. We are satisfied that to fully compensate the Claimant's injury to feelings it is necessary to make an award in the Vento top-band. We are awarding an overall Injury to Feelings award of £35,000 (of which £7,500 is for aggravated damages, as previously explained). We are satisfied that this overall award is proportionate to the totality of the suffering caused to the claimant.

Interest on the Injury to Feelings award

89. The tribunal has a discretion to award interest on the injury to feelings award at up to 8% per annum from the act of discrimination. As there are a number of acts of discrimination, the Tribunal has decided to award interest from, 17th February 2017, as the Claimant had experienced the first act of discrimination by this date. Reg 6 Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 explains this should be calculated up to the day of calculation. The Tribunal has calculated interest up to 2nd December 2019. This amounts to 1,018 days (inclusive).

Exemplary Damages

90. Whilst the Tribunal were satisfied that the Respondent's employee's actions caused the Claimant significant distress, the Tribunal did not find these to be "*oppressive, arbitrary or unconstitutional action by the servants of government*"; we found the actions did not cross the high threshold required for an award of exemplary damages. The Tribunal accepts the Respondent's submissions that exemplary damages are usually awarded in cases involving false imprisonment, malicious prosecution and misfeasance in public office and declined to make an award for exemplary damages in this case.

Financial Loss – Loss of Earnings

91. Parties agree that, but for the discriminatory acts, the Claimant would have had her fixed term appointment as an Administrative Officer converted to a permanent position on 14th August 2018 and would have remained in employment with the Respondent well beyond that date. As each of the other trainees remained in employment or was promoted into new posts, the Tribunal accepts this would have been the case.
92. The Claimant is a very capable lady and particularly wanted this job. Within 2 ½ years of her employment with the CPS she had been promoted twice and was a Senior Executive Officer. As trainees that did not have the Claimant's extensive experience were able to apply for and become Executive Officers within a short period of time, the tribunal has no doubt that, but for the discriminatory acts, the Claimant would have been promoted to the position of Executive Officer by 1st July 2018. We considered for a considerable time whether the Claimant would have gone for further promotion and actually been promoted to the position of Senior Executive Officer. Whilst the Claimant has a track record of sound career progression, we found it was too speculative for us to say that she would have been promoted twice before her retirement.
93. The Tribunal accepts the Claimant's assertion that she would have continued to work for the Respondent until her retirement aged 66 years and 9 months. The Respondent accepts that this was likely, but has suggested a 25% reduction to career earnings to reflect a chance that the Claimant may have left this employment. The Tribunal does not accept that there was any evidence that, in the absence of discrimination, the Claimant would have left employment with the Respondent. This job was ideally located for the Claimant, as it was close to her home address. Given the Claimant's age and that she had experienced 3 years of unemployment, the Tribunal accept that working for the civil service until her retirement, would have been very attractive for the Claimant. The Tribunal note the Respondent witnesses' evidence that many staff enjoy long careers and opportunities for promotion with the Respondent; we are satisfied that the Claimant would have done so too.
94. Turning to mitigation, the Respondent asserts that, given the Claimant's legal qualifications, had the claimant taken reasonable efforts to mitigate her loss, she would have secured a position on a similar salary by no later than 12 August 2018. The Tribunal note that, despite her GP having continuously signed her unfit for work since March 2017, up to and beyond the Remedy hearing in November 2019, the Claimant has made considerable efforts to mitigate her loss. She has satisfied the Work Coach (that was assigned to her by DWP for the purposes of being eligible to receive Job Seekers Allowance) that she is continuously making reasonable efforts to find alternative employment. She has explored the possibility of becoming self employed by publishing a novel and has make a number of applications for work.

95. The Respondent has presented many folders full of job opportunities that they suggest would have been suitable for the Claimant. For instance it has been suggested the Claimant should have been applying for jobs as far away as Bristol, commuting from Caerphilly for a salary of circa £17,000. Given the costs involved in commuting this distance, the Tribunal accepts this was not a suitable job for the Claimant and she should not be criticised for not considering it.
96. The Respondent suggests the Claimant failed to mitigate her loss in not attending the interview in Cardiff. The Tribunal accepts that practically the Claimant could not afford the train fare and had no ability to borrow this money to be able to attend. The Tribunal is satisfied that the Claimant has made reasonable attempts and continues to make reasonable attempts to mitigate her loss.
97. The Claimant contends she is unlikely to be able to find work before her retirement as she has been dismissed having complained of discrimination, has been out of work for a long period of time, is almost 60 years of age and is a BAME woman. Sadly, despite the Claimant's obvious ability and skills, the Tribunal finds this is likely to be the case. It took the Claimant three years of searching to be able to find employment (with the Respondent) and, to date, despite making good efforts to find alternative employment, she has only received one invitation to interview. The Claimant is likely to be regarded as being overqualified for some jobs and other employers are likely to be deterred by the long periods during which she has been unable to find work. The Tribunal accepts it is likely to be harder for a person to find employment at the age of 59 and it is likely to be harder for a BAME woman to find employment.
98. The Tribunal notes that the Respondent's proposed reference and written apology will give some comfort to future employers concerned about the circumstances in which the Claimant left her last employer; unfortunately there are likely to be other employers who are deterred from employing someone that has presented an Employment Tribunal claim (the Employment Tribunal is referred to in the Respondent's proposed reference and written apology). The Tribunal concludes it is highly likely the Claimant will be unable to find alternative work on an equivalent salary prior to her retirement age; however we accept that, with the Respondent's reference and written apology her chances of finding employment are improved and so we consider there is a 25% chance of her being able to do so. The Respondent has suggested there is a chance the Claimant could earn an income from her novel. Whilst it has no doubts about the Claimant's skills as a writer, the Tribunal considers it to be highly unlikely that the Claimant will earn any or any sustained income from her novel, as it notoriously difficult to get a novel published and to make a living from writing.

Financial Loss – Pension Losses

99. As agreed by the parties the Tribunal has calculated the pension loss by adopting the Civil Service Pensions annual projected figure of £4,265.76.

It was agreed this gives a 15-year loss of £63,986.40, which when reduced by 25% (to reflect the chance of the Claimant finding alternative employment and pension) amounts to £47,989.80. As agreed by the parties the tribunal has increased this by 10% to factor in the likelihood that the Claimant would have been promoted whilst working for the Respondent; this gives a total award for pension losses of £52,788.78

Expenses

100. The Tribunal accepts the Claimant's travelling costs and expenses for paper, printer ink and telephone calls are litigation costs rather than being mitigation costs. The Tribunal has not made an award for these expenses.

Failure to Follow the ACAS Code

101. Having had regard to the EAT's decision in *Holmes v Quinetiq Ltd* [2016]IRLR 664, the Tribunal accepts that the Respondent was not required to follow the ACAS Code of Practice, as the main reason for the Claimant's dismissal was on the grounds that the Claimant was unable to do the job as a result of her ill health, rather than because she had committed any act of misconduct or poor performance. The Tribunal accepts there should not be an uplift for failure to follow the ACAS Code.

Financial Penalty

102. The tribunal has considered imposing a financial penalty under section 12A Employment Tribunals Act 1996. This provision is designed to encourage employers to take steps to ensure they meet their obligations to their employees and to reduce deliberate and repeated breaches of employment law. The Tribunal considers that the Recommendations it has made will be more effective in ensuring the Respondent avoids repeated breaches of employment law and so has declined to make a Financial Penalty order.

Calculations

Claimant's salary as Administrative Officer:

Gross pay: £17,598 per annum; £1,466.50 per month; £338.42 per week.

Net pay: £1,058.78 per month; £244.33 per week.

Salary as Executive Officer (from 1 July 2018):

Gross pay: £24,476 per annum.

Net pay: £1,660 per month; £383.08 per week.

The Claimant's Effective Date of Termination: 6th October 2017

Claimant's anticipated date of retirement: 18th September 2027

Compensatory Award (immediate loss)**Loss of Earnings prior to EDT (1st May 2017 to 6th October 2017)**

23 weeks x net pay £244.33		£5,619.59
<i>Less sick pay received:</i>		
May	722.43	
June	393.14	
July	393.14	
Aug	393.14	
Sept	<u>393.14</u>	
		<u>(2,294.99)</u>
		£3,324.60

Loss of Earnings EDT to Date of Calculation (6th October 2017 to 2nd December 2019)

to 1 st July 2018: 38 weeks x £244.33 net pay		£9,284.54
1 st July 2018 to 2 nd Dec 2019: 74 weeks x £383.08 net pay		<u>£28,347.92</u>
		£37,632.46
<i>Less</i>		
<i>Payment received in December 2017</i>	£2,418.83	
<i>Pension contributions refunded</i>	£4,770.22	
<i>JSA / Universal Credit received</i>		
<i>112 weeks at £51.67 per week</i>	<u>£5,787.04</u>	
		<u>(12,976.09)</u>
		£24,656.37

plus Interest

(calculated at 8% per annum from the midpoint between the date of the first act of discrimination and the calculation date)

£27,980.97 [£3,324.60 + £24,656.37] x 8% per annum x 509 days	<u>£3,121.60</u>
Total Compensatory Award (immediate loss)	<u>£31,102.57</u>

Compensatory Award (future loss)

Loss of Earnings

(between Date of Calculation and Anticipated Date of Retirement:
2nd December 2019 to 18th September 2027)

407 weeks x £383.08 net pay	£155,913.56
<i>Less 25% reduction to reflect chance of finding new employment</i>	<i><u>(£38,978.39)</u></i>
	£116,935.17

Loss of Pension

(as set out in paragraph 99)

Total Compensatory Award (future loss)	<u>£52,788.78</u>
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Total Compensatory Award (immediate and future losses)	<u>£169,723.95</u>
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Total Compensatory Award (immediate and future losses)	<u>£200,826.52</u>
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**Injury to Feelings Award
(including aggravated damages)**

Injury to Feelings Award	£35,000
plus interest	
£35,000 x 8% per annum x 1,018 days	£7,809.32
	<u>£42,809.32</u>

Total Award	<u>£243,635.84</u>
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Total Award after Grossing up at 40%	£386,059.73
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<i>Less Interim Payment paid in November 2019</i>	<i><u>(£10,000.00)</u></i>
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Total Amount of Compensation outstanding	£376,059.73
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(Grossing up adjusts the award to reflect the tax the Claimant will have to pay on this award (beyond the £30,000 tax free threshold). As tax is now payable on injury to feelings awards, this has been included in the calculation)

If the full amount of this award is paid before 9th March 2020, no additional interest will be payable. If the award is not paid before 9th March 2020, additional interest at a rate of £82.42 per day will be payable from 9th March 2020 until payment. (see the Employment Tribunal (Interest) Order 1990).

EMPLOYMENT JUDGE HOWDEN-EVANS

Dated: 22nd February 2020

Judgment posted to the parties on

.....23 February 2020.....

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For Secretary of the Tribunals