Case No: 1801339/2017

EMPLOYMENT TRIBUNALS

Claimant: **Miss S J Austin**

Respondent: **The Leeds Teaching Hospitals NHS Trust**

Heard at: **Leeds** **On:** **16 to 20 September 2019**

Before: Employment Judge Bright
Mrs LJ Anderson-Coe
Mr M Brewer

Representation
Claimant: Mr R Kohanzad (counsel)
Respondent: Ms A Smith (counsel)

RESERVED JUDGMENT ON REMEDY

1. The respondent shall pay to the claimant £265,719.23 as compensation for disability discrimination, including interest of £6,962.30.

2. The respondent shall pay £3,394.68 to the claimant as damages for breach of contract in respect of notice.

REASONS

Procedural history

1. The claimant submitted her claim on 3 August 2017. A full hearing on liability was held from 26 January to 11 February 2018 and there was a day in chambers on 2 March 2018. A reserved judgment was sent to the parties on 9 May 2018 in which the Tribunal, consisting of Employment Judge Bright, Mrs Anderson-Coe and Mr Appleyard, held that the claimant had been unfairly dismissed and subjected to disability discrimination.

2. The Tribunal found on that occasion that the claimant suffered from a variety of medical conditions, including depression and anxiety and fibromyalgia. Her medical conditions, in particular her anxiety and fibromyalgia, had caused her to check her medical records repeatedly in the manner evidenced and to check those of her mother on three occasions. As a result the respondent commenced an investigation, which caused the claimant further anxiety. Because of her anxiety she pestered her line manager for information about the investigation, as a result of which the respondent suspended her. The claimant was summarily dismissed by letter dated 23 May 2017, some 18 months after the date of her last alleged offence. The Tribunal found that the claimant's conduct was not culpable or blameworthy, that her dismissal was unfair and, being summary, was in breach of the claimant's contractual right to notice. The Tribunal also held that the dismissal and suspension were, prima facia, both acts of discrimination arising from disability, in that the claimant's behaviours (accessing the medical records and pestering her manager) arose from her disability and those behaviours were the cause of her dismissal and suspension. The Tribunal found that the respondent had not shown that dismissal or suspension were a proportionate means of achieving a legitimate aim in the circumstances.

3. Following the hearing on liability, case management orders were agreed with the Tribunal on 21 September 2018. However, the remedy hearing listed for 8 – 11 April 2019 was postponed for the reasons given in the Tribunal's order dated 2 April 2019. Instead a preliminary hearing for case management was held on 8 April 2019 resulting in further orders sent to the parties on 10 April 2019.

4. Unfortunately, the Tribunal's panel member Mr Appleyard died before the remedy hearing could be re-listed and, as the claimant preferred to proceed with a panel of three, Mr M Brewer was appointed to the panel for the remedy hearing.

5. The panel spent the morning of 16 September 2019, prior to the start of the remedy hearing, reading the judgment and reasons on liability and the relevant documents on the Tribunal's file.

6. Adjustments were made for the claimant at the remedy hearing, as they had been during the liability hearing, so that the hearing commenced at noon each day (except on the final day when it commenced around 11am) and breaks were taken every 20 minutes or so.

7. Despite the hearing concluding on 20 September 2019, it has unfortunately not been possible to issue the reserved judgment and reasons until now, owing to the sickness absence of the Employment Judge.

Evidence

8. The claimant gave evidence at the remedy hearing from a witness statement and a supplemental witness statement. The respondent called Mr Tracey, who gave evidence from a witness statement and a supplemental statement.

9. The parties presented an agreed bundle of remedy documents of 926 pages, to which additional documents were added by consent during the remedy hearing at pages 926a to 932 and page 944. Following a disputed application to adduce a document relating to mortgage losses, the Tribunal determined that that document be added to the bundle at pages 933 to 943. Reasons for

that decision having been given to the parties at the hearing, reasons are not detailed here. A further document was added to the bundle at pages 945 to 957 by consent on the final day of the remedy hearing. The parties also helpfully produced a joint schedule/counter schedule of loss document, setting out both parties' calculations in table format.

Issues

10. It was agreed at the remedy hearing that the issues for the Tribunal to determine were:

    10.1. What damages were owed for breach of contract?

Pecuniary loss

    10.2. Has the claimant mitigated her loss of earnings and pension loss?

    10.3. Should the claimant's losses be calculated to reflect the increased rate of NHS Band 2 pay that she would have received had she remained in employment with the respondent?

    10.4. What is the period of future loss of earnings, if any?

    10.5. What figure should be awarded for loss of statutory rights?

    10.6. What is the claimant's pension loss? In particular, will the claimant become or could the claimant have become a member of a public sector CARE pension scheme and, if so, when? If not, has the claimant behaved or will she have behaved reasonably in not doing so?

    10.7. If she acted reasonably in not getting a job with a CARE pension, when would she have retired had she continued to work for the respondent? Is the appropriate increase to the claimant's salary in the pension calculation by CPI or CPI +1?

    10.8. Should any pension loss be calculated with reference to lost employer contributions or by reference to the Ogden tables and the Employment Tribunal Guidance on Pensions' complex calculation?

    10.9. Has the claimant reasonably incurred the expenses claimed in her schedule of loss said to arise from dismissal?

    10.10. Has the claimant suffered a loss of healthcare benefits and, if so, what is the value of any compensation?

    10.11. Should the respondent be liable to pay for 20 sessions of cognitive behavioural therapy at £150 per session?

Non-pecuniary loss

    10.12. What injury to feelings has the claimant suffered?

    10.13. Has the claimant suffered a personal injury or an exacerbation of an existing injury as a result of the respondent's discrimination?

11. In addition, any award will be subject to interest and the parties agree that the total figure should be grossed up to take account of tax.

Submissions

12. Both Counsel gave oral submissions, and presented their own notes on the relevant case law. We have considered their submissions and notes/extracts of the case law with care but do not rehearse them in full here. We deal with the pertinent parts of the submissions and case law in our analysis set out below.

13. These are the unanimous findings of the Tribunal panel, made on the balance of probabilities on the evidence before us. These reasons set out, under a heading relating to each issue, our findings of fact, the relevant law, submissions and our determination of that issue.

Damages for breach of contract

14. It was not disputed that the claimant's contract entitled her to one week's notice of dismissal for each year of continuous service, subject to a maximum of twelve weeks' notice after twelve years' service. The claimant, having twenty five years' service, was therefore entitled to 12 weeks' notice. In light of our finding at the previous hearing that the respondent was not entitled to summarily dismiss her on 4 May 2017 without notice or payment in lieu of notice, she is therefore entitled to damages for breach of contract of 12 weeks' pay. She was not able to find any work until mid-November 2017 and therefore was unable to mitigate any of her loss during her notice period.

15. The claimant's net weekly wage at the time of her dismissal was £282.89, according to the schedule of loss provided to the Tribunal by the parties. Her loss of 12 weeks' notice pay was therefore (12 x £282.89) **£3,394.68 net.**

Pecuniary loss

16. It is agreed that the claimant was aged 50 at her effective date of termination. She had twenty five years' complete continuous service. It was agreed that her gross annual salary was £18,157.00 at the time of her dismissal, her gross weekly basic pay was £345.73 and her net weekly basic pay at the time of her dismissal was £282.89. The number of weeks from the date of dismissal to the date of the remedy hearing was 123.57, less the twelve weeks' notice period calculated above, giving 111.57 weeks. It was agreed that the claimant was an agency worker for a government department (understood to be HMRC) for a short period following her dismissal.

Basic award for unfair dismissal

17. The parties agreed that the basic award for the claimant's unfair dismissal is 9 years x 1.5 x £345.73 = £4,667.35 plus 11 years x 1 x £345.73 = £3,803.25 = **£8,470.38 gross**.

Loss of statutory rights

18. The claimant claims a sum of £1,000 for loss of her statutory rights. The respondent submits that £300 would be a more appropriate and regularly awarded figure than that sought by the claimant.

19. We take the view, applying a similar logic to the statutory redundancy payment scheme and statutory notice pay scheme, that as it would take the claimant two years to accrue the statutory right not to be unfairly dismissed, it would be appropriate to award the claimant two weeks' pay for the loss of that right. The calculation is therefore 2 weeks x £282.89 = **£565.78 net**.

Past loss of earnings

20. Our aim, in awarding compensation, must be to, *'as best as money can do it, ... put [the applicant] into the position she would have been in but for the unlawful conduct'* (**Ministry of Defence v Cannock and ors** 1994 ICR 918 EAT).

21. The claimant's complaint relates to a dismissal which we found to be both unfair and discriminatory, so the heads of compensation largely overlap and we must guard against awarding the same compensation twice (section 126 Employment Rights Act 1996). Following **D'Souza v London Borough of Lambeth** 1997 IRLR 677 EAT, we therefore award compensation for past and future loss of earnings under the discrimination legislation alone.

Mitigation of loss

22. The first issue for us to determine is what loss of earnings the claimant has suffered up to the date of the hearing, if any. The respondent says that she has failed to mitigate her loss. For convenience, when discussing mitigation, we have divided the period of time from the date of dismissal to the date of the hearing into two separate episodes. The first episode is from dismissal to the end of February 2019. The second is from the end of February 2019 to the date of the hearing.

23. The burden of proving a failure to mitigate loss rests on the person alleging it, i.e. the respondent. Ms Smith referred us to the cases of **Archbold Freightage Ltd v Wilson** [1974] IRLR 10, **Simrad Ltd v Scott** [1997] IRLR 147 and **Cannock**, regarding the question of whether a claimant has taken reasonable steps to find alternative employment. Ms Smith emphasized that the cases establish that, while a claimant's decision might be reasonable, it may not amount to the taking of all reasonable steps to mitigate loss. Ms Smith directed us to the guidance given in **Wardle v Credit Agricole Corporate and Investment Bank** [2011] IRLR 604.

24. Mr Kohanzad referred us to the case of **Singh v Glass Express Midlands Limited** UKEAT/0071/18, in which the Employment Appeal Tribunal ("EAT") emphasized that it is for the wrongdoer to show that the claimant acted

unreasonably. He directed us to HHJ Eady QC's summary in that decision of the guidance, given by Langstaff P in **Cooper Contracting Ltd v Lindsey** UKEAT/0184/15, on the correct approach to the question of mitigation:

(1) The burden of proof is on the wrongdoer; a claimant does not have to prove they have mitigated their loss.
(2) It is not some broad assessment on which the burden of proof is neutral; if evidence as to mitigation is not put before the ET by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works; providing information is the task of the employer.
(3) What has to be proved is that the claimant acted unreasonably; the claimant does not have to show that what they did was reasonable.
(4) There is a difference between acting reasonably and not acting unreasonably.
(5) What is reasonable or unreasonable is a matter of fact.
(6) That question is to be determined taking into account the views and wishes of the Claimant as one of the circumstances but it is the ET's assessment of reasonableness - and not the Claimant's - that counts.
(7) The ET is not to apply too demanding a standard to the victim; after all, they are the victim of a wrong and are not to be put on trial as if the losses were their fault; the central cause is the act of the wrongdoer.
(8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.
(9) In cases in which it might be perfectly reasonable for a Claimant to have taken on a better paid job, that fact does not necessarily satisfy the test; it would be important evidence that may assist the ET to conclude that the employee has acted unreasonably, but is not, in itself, sufficient.

Temporary job

25. It was not disputed that the claimant worked for a short period (mid-November 2017 to around 22 January 2018) through an employment agency for the HMRC. We accepted the claimant's evidence as to the reasons that agency employment came to an end. She told us, and we accepted, that when she informed the agency of her Employment Tribunal claim against the respondent, it suggested to her that it was not appropriate to place her with its NHS clients for the time being and told her to come back once everything was sorted, because she was taking so much time out to concentrate on the legal proceedings. We find from the claimant's evidence that she earned a total of £2,458.70 net from her agency work. Otherwise, she had not, by the date of the remedy hearing, obtained any replacement employment.

Health issues

26. The claimant has fibromyalgia and anxiety and depression, which caused her to be disabled at the time of her dismissal. The medical experts instructed by the parties, in their joint report for these proceedings (pages 923 - 926), agreed that she has a "*long history of a complex interaction of medical difficulties and psycho-social difficulty*". They relate a series of episodes of fibromyalgia, pain, depression and difficulties at work and in her private life which led to further physical and psychological symptoms. The experts agree that:

…after each of these occasions of adversity she has been able to return to work, work which she told both of us she has generally enjoyed.

27. The report concluded:

    We agree…that Miss Austin suffers mixed anxiety and depression. The condition, in which there are insufficient symptoms to make a diagnosis of a depressive illness or of an anxiety disorder per se, is one with which Miss Austin has suffered intermittently for a number of years, and which at times has interfered with her ability to work, but to which she had always returned full time.

    The causes of her current episode of mixed anxiety and depression which began in about June 2016 include her social circumstances and a number of longstanding physical complaints but prominently her current unemployment and her ruminations about her past employment and the process of the Employment Tribunal, and her belief that her attempts to regain employment particularly in the public sector including the NHS are hampered by shared prejudice about her. However her ability to work full time at the end of 2017 and early 2018 together with her attendance at college indicates the mildness of her disorder and bodes well for her future employment.

28. The joint medical experts identified that the claimant required cognitive behavioural therapy ("CBT") to assist her with her "*automatic negative and paranoid beliefs about correspondence between old and prospective employers, and with negative beliefs about her capacity for work".* They concluded that 20 sessions of CBT would be required, but would only be effective after the conclusion of all Employment Tribunal proceedings. They considered that within six months of that conclusion, with the treatment recommended she would be able to return to work, which would itself consolidate her recovery from this episode of mixed anxiety and depression. They agreed that her vulnerability to psychological disorder had not been increased by this episode.

29. Based on the joint report (to which we return below in discussing non-pecuniary loss), Ms Smith estimated that, based on one CBT session per week, this would mean the claimant would have been out of work for a period of 46 weeks (20 + 26 weeks) following her dismissal, but would then have been fit to fully mitigate her losses. The respondent therefore accepted that the claimant should be entitled to financial loss of earnings of £13,012.94 (46 weeks x £282.89), but submitted that she had failed to mitigate her loss thereafter. Ms Smith also noted that the claimant had previously attended CBT but stopped before the end of the course.

30. However, the joint report clearly identified that the claimant would only be fit to return following 20 sessions of CBT (plus six months), which "*will only be effective after a conclusion of all Employment Tribunal proceedings"* (page 925). We found, from the report and from the claimant's evidence, that the Employment Tribunal proceedings have had an impact on her mood and her ability to focus on job applications, in particular when she discovered the respondent had appealed against the judgment after the previous hearing (the 'liability judgment'). We find that the experts' report does not support the submission that the claimant was fit to return to work 46 weeks after her dismissal.

Eggshell skull

31. We agreed with Mr Kohanzad's submission that the so-called 'eggshell skull' principle ('take your victim as you find them') is relevant to the issue of mitigation in this case. The question is not what we would think or do or what it would be objectively reasonable to think or do in the circumstances. Mr Kohanzad submitted, and we agreed, that the test is objective, but with a strong subjective element: Was it unreasonable for the claimant to make the choices she did in her particular circumstances? Those circumstances are someone who suffers from her physical and psychological disability, who has suffered the discrimination she suffered at the respondent as found in the liability judgment, and who had the psychological barriers described by the joint experts.

32. The psychological barriers are: "*her ruminations about her past employment and the process of the Employment Tribunal"; "her belief that her attempts to regain employment particularly in the public sector including the NHS are hampered by shared prejudice about her"; "her automatic negative and paranoid beliefs about correspondence between old and prospective employers"*; and "*negative beliefs about her capacity for work."* We accepted the claimant's evidence, supported by the experts' report, that she became paranoid that the respondent was talking with recruiters internally, in other NHS departments and Trusts, and with other public sector employers about her and her record. Mr Tracey agreed that he had made inquiries of other public sector employers about available Band 2 jobs for the purposes of these proceedings, and it seems this may have been the source of, or compounded, the claimant's paranoia in June 2018.

33. We agreed with Mr Kohanzad that the claimant's decisions must therefore be viewed through the lens of what is unreasonable for someone with a pre-existing mental health condition and paranoid and negative thinking, particularly around the respondent and other public sector employers talking about her.

34. We noted that Mr Kohanzad made reference in his submissions to the individual report of Dr Latcham (pages 790 – 803), which was commissioned by the claimant's solicitors prior to the joint report. Ms Smith objected in her submissions to reference being made to Dr Latcham's previous report, on the basis that it undermined the joint report and Dr Latcham was not present to be cross examined. We agreed with Ms Smith that it was not appropriate in the circumstances for any reference to be made to Dr Latcham's individual report, nor to that prepared by Dr Alexander, the respondent's expert (pages 843 – 922). We noted that the parties and experts had been ordered to provide the tribunal with a list of any areas of dispute between the two experts prior to the final hearing, so that arrangements could be made for the experts to attend to give evidence if necessary. No areas of dispute having been identified, the experts were not called to give evidence and were not available for cross examination. It should not therefore have been necessary to make reference to the individual reports and we concluded that it was not appropriate for us to take account of their contents in the circumstances.

Job search

35. It was not disputed that the claimant's clerical Band 2 role was not specialized and vacancies for that type of role are regularly advertised in the public and private sectors. Mr Tracey gave evidence, which we accepted, that a total of 292 clerical Band 2 roles became vacant at the respondent between 4 May 2017 and 15 January 2019. However, we accepted the claimant's evidence that she did not feel that many of the jobs listed by the respondent were in fact appropriate for her. We accepted that she did not feel confident applying for some of the roles because of certain criteria or ruled them out because of travel or geographical constraints.

36. The claimant presented evidence of over 50 applications, of which there were up to 7 applications each month from May 2017 through to February 2019. We accepted the claimant's evidence that she was actively looking for work, making applications and going to interviews until around February 2019. We accepted her evidence about the applications and interviews she underwent, about her poor performance, her feelings about the interviews and applications and how she found herself in front of the same person on a number of occasions, such that she became on first name terms with them, but that she was rejected repeatedly. We accepted that the job application process must have felt progressively hopeless to her.

37. We agree that the question is not 'could she have done more?' but 'has the respondent shown that, in her circumstances, she behaved unreasonably?'. It was clear to us that she could have done more to find a job, had she been motivated to do so, unaffected by the emotional effects of the discrimination, mentally and physically healthy, not preoccupied with the Employment Tribunal proceedings, confident about her abilities and/or not paranoid about prospective employers gossiping about her with the respondent. The respondent's list of Band 2 roles proved as much. However, given the circumstances, we find that she was seeking work perhaps as actively as she was able. She may have underestimated her ability to travel, her courage, her confidence and/or her ability to perform at interview and it is likely she performed badly on application forms, on the telephone and at interview. Her paranoid and negative thoughts about interviewers communicating with the respondent about her undoubtedly interfered with her ability to apply for jobs and perform in recruitment processes. But, despite those constraints, we find that she was making efforts to find work until at least February 2019. Taking account of the guidance in the case law to which we were directed by the parties, in particular in **Cooper**, we find that the respondent has not shown, in our view, that the claimant acted unreasonably in the steps she took to seek to mitigate her losses up to February 2019 in all the circumstances.

38. The respondent submitted that the claimant's ability to obtain work with HMRC demonstrated that she was capable of getting work in the public sector and was evidence that she had failed to mitigate thereafter. However, this work was agency work which, we accepted was short lived, and was discontinued for the reasons set out above (paragraph 25). We preferred Mr Kohanzad's submission rather that this was evidence that the claimant was seeking to mitigate her losses, but struggling to do so.

Reference

39. A further factor which the claimant believed was an obstacle to her re-employment was a reference from the respondent. The claimant gave

evidence that her solicitor had requested a reference from the respondent, but no reference was provided. In cross examination we were taken to page 161 of the bundle, which was a response from the respondent's solicitor to that request. The email informed the claimant's solicitor that the respondent's policy was to provide a standard form reference and attached a copy of such a reference (page 163). That document is entitled 'Confirmation of Employment (with sickness absence) request', contains details of the claimant's name, date of birth, employment dates, job title and grade, number of days sickness over the past two years and number of episodes of sickness and whether there are any current warnings on the claimant's record and if so, details.

40. The form states under 'details', "*Breach of confidentiality – dismissed for Gross Misconduct*". Mr Tracey gave evidence that this would not necessarily disadvantage the claimant when applying for a new role. He told us that managers shortlisting or interviewing candidates would ask questions of a candidate and not reject them outright. Mr Kohanzad, on the other hand, submitted that such a reference would clearly impact on the claimant's appeal to prospective future employers. It is our combined industrial experience that, in a competitive job market, notice on a reference that someone had been dismissed for gross misconduct from their previous job for breach of confidentiality would be a warning sign to recruiters, particularly in the public sector. We accepted the claimant's submission that a reference in those terms would obviously negatively impact on her ability to find replacement work.

41. We were surprised to be told by Mr Tracey that the reference still contained that wording and had, at least by the date of the remedy hearing, not been amended to make any reference to the finding of this Tribunal in 2018 that the dismissal for gross misconduct had been unfair. Any efforts by the claimant to find work up to the date of the remedy hearing may well have been impeded by the respondent's misleading reference, in our view.

42. Ms Smith submitted that any argument about the reference amounted to a claim for stigma damages and referred us to the case of **Ur-Rehman v Ahmad** 2013 ICR 28, in which the EAT held that a Tribunal considering stigma damages should ask whether such stigma had a real or substantial effect and, if it had, how great the effect was. She urged us to consider the need for a sound evidential basis, rather than a mere suggestion or suspicion, for a finding that stigma had been the cause of a failure to gain employment. However, **Ahmad** was a case in which the employee claimed that there was a risk of stigma because he had brought legal proceedings against his former employer. This is an issue about a post-employment reference. In our view, the difference in context distinguishes **Ahmad** from the claimant's claim. A prospective future employer might or might not ask or be interested in proceedings brought by an applicant against a previous employer, but they will inevitably be interested in the applicant's reference, particularly from their only significant employer, who employed them for over 25 years. While employers are used to receiving and providing factual references and do not therefore necessarily expect to glean much more from a reference than sickness absence and reason for leaving, the very purpose of a reference is to provide a factual check to help the recruiter determine whether the applicant is the right person for the job. A warning flag such as dismissal for gross misconduct for something as serious as breach of confidentiality will inevitably make a

significant impression on recruiters at all stages of a recruitment process. To suggest otherwise is unrealistic, in our experience.

43. Separately, **Ahmad** was a claim for stigma damages, while the question before us is whether the claimant had done sufficient to mitigate her losses to the date of the hearing and beyond. She is not seeking stigma-type damages. Rather, the respondent is seeking to prove that she has failed to mitigate her losses. The burden of proof is not on the claimant. The reference provided by the respondent was merely part of the environment within which she was seeking to mitigate her losses. It was one of the obstacles to her successfully obtaining replacement employment. For these reasons, we find that the evidence available to us in relation to the reference is sufficient for us to make the findings above, and **Ahmad** does not assist the respondent as submitted.

Decision to retrain

44. It is agreed that, in around February 2019 the claimant stopped looking for jobs in the public sector because she decided to retrain as a hairdresser. The question for us is whether the respondent has shown that, in so doing, the claimant has failed to mitigate her loss. In the case of **ICTS (UK) Ltd v Tchoula** [2000] IRLR 643 the EAT held that it may, exceptionally, be reasonable for a claimant to undertake re-training instead of continuing to seek work.

45. Ms Smith asked us to find that the claimant's reason for ceasing to look for public sector work was unreasonable. Ms Smith submitted that, having applied for so many jobs in the public sector her evidence that, all of a sudden, she decided that she did not want to work in the public sector was not convincing.

46. Mr Kohanzad submitted, and we were persuaded by the narrative in the claimant's evidence, that she initially had hopes of returning to her familiar workplace following the Tribunal's finding of unfair and discriminatory dismissal. She was disappointed by the respondent's appeal and progressively demoralized by her fruitless job search. Her psychological difficulties were compounded by her developing paranoia about the respondent gossiping to prospective employers about her. The effect of the reference on her prospects, the increasing length of time she was out of work and the growing number of rejections eventually wore her down and it was in this context that, almost two years after her dismissal, she made the decision to give up and change direction altogether. While more resilient individuals might reasonably be expected to have continued to apply for Band 2 roles and bear more rejections, we consider that in this claimant's circumstances, her decision to change direction was not unreasonable. We return to this issue in relation to pension, below.

Respondent's job offers

47. It was agreed that the respondent offered the claimant a number of jobs (pages 164 and 165), some of which were at St James' Hospital in Leeds, in March 2019. It was not disputed that the claimant did not respond to these offers. Ms Smith submitted that the claimant's evidence that these jobs were not suitable was not believable and her actions were unreasonable.

48. We accepted the claimant's evidence that she was not able to work at St James' Hospital because it would require her to take a number of busses and was a significantly longer commute for her. Some employees could be expected to take several buses to get to work and it might be reasonable for some claimants to respond to job offers put in these circumstances. However, we remind ourselves that there is a distinction between what is reasonable and what is not unreasonable. This claimant suffered from fibromyalgia, depression and anxiety, with paranoid and negative thoughts about the respondent. Moreover, the job offers were made via solicitors in the context of ongoing litigation, at a time when she had already made the decision that she could not go on looking for work in the public sector and would be retraining as a hairdresser. It is not unreasonable, in our view, in these circumstances, for her to fail to respond to the respondent's offers and/or fail to accept one of the roles.

Conclusion

49. We find that the respondent is liable for the claimant's pecuniary loss up to the date of the hearing.

Pay rises

50. The question for us is whether the claimant's losses should be calculated to reflect the increased rate of NHS Band 2 pay that she would have received had she remained in employment with the respondent.

51. Mr Kohanzad submitted that the award for compensation must take account of the increases in the Band 2 pay and that the pay deal should also feed into the pension calculation. He also invited us to find that the pay deal increase should be predicted to be above the consumer prices index ("CPI").

52. Ms Smith accepted that there would have been pay increases, but submitted that the claimant's compensation should be calculated on her salary at the time of dismissal, because her losses should be for a limited period only.

53. The claimant's original schedules of loss contained evidence that the NHS pay deal provided for pay increases for employees in Band 2 from 2018/19 to 2021/22. Neither the Band 2 pay awards nor the figures given were disputed by the respondent, though the respondent did dispute that the claimant was entitled to compensation calculated at those rates. The figures set out in the schedules of loss were:

Year	2018/19	2019/20	2020/21	2021/22
Annual	£18,702	£19,020	£19,337	£19,820
Net week	£312.56	£316.72	£320.87	£327.18

54. The respondent has not disputed that the claimant would have been included in the Band 2 pay award had she continued to be employed and we therefore find that past and future financial loss (discussed below) should be calculated to include the pay award figures at the appropriate rates.

55. In respect of past financial loss, the claimant's loss is calculated:

    2017/18 36.14 weeks x £282.89 = £10,223.64

    2018/19 52.14 weeks x £312.56 = £16,296.88

2019/20 23.43 weeks x 316.72 = £7,420.75

Subtotal 111.57 weeks. **£33,941.27**

Deductions

56. The Recoupment Regulations do not apply.

57. In **Chan v Hackney London Borough Council** [1997] ICR 1014 the EAT held that, as the Recoupment Regulations do not apply to pecuniary loss in discrimination claims, the Tribunal must deduct income support allowance in full and also any invalidity benefit (or their latest incarnations). We must therefore deduct the claimant's job seekers' allowance ('JSA') as well as the £2,458.70 she earned in her temporary work at the HMRC.

58. The claimant told us in cross examination that she first commenced JSA in May 2017 following her dismissal. From page 56 of the bundle, the claimant's evidence is that she received her first agency wage on 1 December 2017. Her evidence was that she re-started JSA on 23 January 2018, when her agency work finished. Given that her final wage is shown as 2 February 2018, it is logical to assume that she was paid around 2 weeks in arrears, which suggests that she commenced work with the agency in mid-November 2017. We therefore calculate that she claimed JSA for a period of 195 days in 2017 (which is the period between the effective date of termination and the start of the agency work in mid-November). From the claimant's evidence it appears that JSA was paid at a rate of £24.01429 per day in the tax year 2017/2018, and her total JSA in 2017 was therefore 195 days x £24.01429 = £4,682.79. The claimant's evidence was that she received JSA of £10,762.11 during 2018. The total to be deducted in relation to benefits is therefore (£4,682.79 +£10,762.11) = £15,444.90.

59. The total deductions for benefits and earnings are therefore benefits £15,444.90 + income £2,458.70 = **£17,903.60**.

Withdrawal factor

60. There was no suggestion that the claimant, who had worked for the respondent for the previous 25 years, would have left the respondent or been dismissed for any other reason from 2017 to 2019. We do not therefore make any reduction in that regard.

Total

61. The claimant's total past financial loss, less deductions, is therefore:

£33,941.27

(£17,903.60)

£16,037.67

Expenses

62. The issue is whether the claimant reasonably incurred the expenses claimed in her schedule of loss.

63. The burden of proof is on the claimant to show that any expenses sought were reasonably incurred and that they flowed from the discrimination.

64. The claimant claims the following expenses:

    64.1. Healthcare benefits

    64.2. Dental treatment

    64.3. Chiropody appointments

    64.4. Mileage

    64.5. Mortgage interest

    64.6. Bank Charges

Healthcare benefits

65. The claimant's schedule of loss, though not her witness statements, makes reference to the loss of a healthcare benefit, at an estimated open market price of £6 per week. In cross examination it was established that she paid premiums which were deducted from her salary by the respondent into a corporate plan with Simply Health. The plan covered basic healthcare costs, such as dental treatment, physiotherapy and chiropody, and was cancelled when the claimant was dismissed. The respondent submitted that there was insufficient evidence to show that the healthcare benefit she claimed was incurred or that any loss was because of the dismissal.

66. We were also troubled by the lack of evidence for the basis of the estimated open market price figure presented to us. We were unable to ascertain where that figure came from or whether it was a net or gross figure. We concluded that there was insufficient evidence of the claimant's loss for us to include this benefit in the award. We make no award in respect of healthcare benefit expenses.

Dental treatment

67. The claimant claims £355.40 for dental treatment which, she says, had she continued to be employed by the respondent, would have been covered under its healthcare plan with Simply Health. There were two invoices for dental treatment in the bundle amounting to £120, but no other evidence of what dental treatment was provided or what it cost. The claimant explained in cross examination that she had tried to join an NHS dentist but failed. However, having not seen the terms of the Simply Health plan, there was insufficient evidence that this treatment would have fallen within the plan's cover or that any loss was caused by the discrimination. We find that the claimant has not proved that this loss arose from her dismissal, on the balance of probabilities. We make no award in respect of dental treatment expenses.

Chiropody appointments

68. The claimant claims £224.00 for chiropody appointments which, had she continued to be employed by the respondent, she says would have been covered under the Simply Health plan. The only evidence presented by the claimant other than the figure in the schedule of loss was at page 322 of the

bundle and consisted of a book receipt for £28 dated February 2019 and an invoice for £28 dated March 2019. There was no evidence relating to the remainder of the sum claimed, the treatment provided nor the necessity for the treatment. Nor was it clear that the Simply Health plan would have covered this treatment. We find that there was insufficient evidence and that the claimant has not proved that this loss arose from her dismissal, on the balance of probabilities. We make no award in respect of chiropody expenses.

Mileage

69. The claimant claims a figure of £776.80 for mileage, attributed to her petrol expenditure attending interviews. There was nothing in the bundle or in the claimant's witness statements explaining the basis for that figure. In cross examination the claimant was only able to tell us that it was for petrol, although she was unsure at what rate and added that some of it was for taxis. Ms Smith submitted that this was insufficient evidence to show that these expenses had been reasonably incurred or that they were attributable to the discrimination and the Tribunal should not be prepared to make any award for mileage. Mr Kohanzad submitted that the Tribunal could take a rough-and-ready approach on the basis that the claimant had obviously attended a number of interviews and award an amount accordingly.

70. We accepted the claimant's evidence that she had applied for at least 50 roles and attended a number of interviews, to which she must have travelled, whether by public transport, taxi or car. There is clearly insufficient evidence for us to award a figure as significant as that she is seeking, but we feel confident that she must have spent a sum of money travelling to interviews which she would not have had to spend, but for her discriminatory dismissal. In the absence of any clear indication of what that sum is in reality, we therefore adopt a broad-brush approach and award a figure of **£100** (which represents 10 taxi fares at £10 each).

Bank charges

71. The claimant claims for the charges made by her bank in relation to her overdraft. Pages 49 - 56 of the bundle contained a list of dates and amounts compiled by the claimant's solicitor. The claimant explained that, while she had regularly become overdrawn while working for the respondent, she always paid the overdraft off at the end of each month, so did not incur charges. Once she had been dismissed, she was unable to pay off the overdraft and began to incur charges, particularly when the bank switched to daily accrual. In cross examination the claimant gave evidence that she could have obtained a loan from the bank, which she suggested might have been interest free, to prevent her incurring charges on her overdraft. She explained that she did not do so because it would have been short term and would have required her to provide significant documentation. We found her evidence somewhat vague and concluded that there was insufficient evidence that the bank charges were caused by the discrimination. We make no award in respect of bank charges.

Mortgage interest

72. The claimant claims additional mortgage interest of £1,626.07, which she says she was required to pay as a result of having to change her mortgage to an interest-only mortgage because she was unable to meet her normal mortgage repayments following her dismissal.

73. The document at pages 934 – 938 of the bundle shows the claimant's mortgage repayments, and a switch to an interest-only mortgage on 1 August 2017. We accepted the claimant's evidence that this was because, having lost her job, she was struggling to pay her mortgage each month and an interest-only mortgage enabled her to make lower monthly repayments. We accepted her evidence that she discussed her options with her mortgage provider and they agreed to change to an interest-only mortgage for a term of three months, on a renewable basis. We accepted her evidence that on 1 June 2019 she reverted to a repayment mortgage because the bank refused to renew the interest-only arrangement.

74. The respondent submitted that the claimant could have moved house or downsized but we accepted the claimant's evidence that she already lived in one-bedroom accommodation and could not afford the cost of moving. We considered that her choice to remain in her own home and with her existing mortgage provider was not unreasonable in the circumstances. We agreed with Mr Kohanzad's submissions that, while there may have been cheaper interest-only mortgages available, it was a logical step for the claimant to approach her existing mortgage provider to help when she found was struggling with her mortgage repayments. We accepted that the extra mortgage interest incurred was attributable to the discriminatory dismissal by the respondent because, had the claimant not been dismissed, she would have continued with her repayment mortgage and not had to incur the additional interest by switching to an interest-only mortgage.

75. The financial impact of the change to an interest-only mortgage is shown in the difference between the total projected amount actually to be paid on the mortgage and the projection based on no change to interest-only set out at pages 939 to 943. We accepted those and that the ultimate cost (in additional interest payment) of the temporary switch to an interest-only mortgage to the claimant overall will be **£1,626.07**.

76. Total past pecuniary loss

Earnings:	£16,037.67
Mileage:	£ 100.00
Mortgage:	£ 1,626.07
Total:	**£17,763.74**

Future financial loss

77. Our findings regarding the claimant's decision to change career are relevant to the question of future financial loss. In the schedule of loss handed to the Tribunal at the outset of the remedy hearing, showing both parties positions, the claimant sought future loss of earnings of twelve months, on the basis that it would take her around that time to retrain and find replacement income as a hairdresser. Having found that her decision to retrain was not unreasonable

in her circumstances, we accept her evidence that his is a realistic time frame for finding a new role, given that she has already commenced her retraining.

78. Even were the claimant to continue looking for roles in the public sector, the joint report identifies the need for a course of 20 sessions of CBT to first overcome her negative thinking. On the basis of weekly sessions of CBT followed by some time to search, apply and obtain a new position, it seems likely that her losses would continue for up to a year.

79. Mr Kohanzad submitted that, if the claimant now pursues a hairdressing career we are more likely to find tapering loss rather than an immediate cessation of loss. However, we consider that predicting the future is so imprecise that to choose a cut off date 12 months hence is no better or worse than trying to taper loss over the course of a 12 month period beginning in 6 months' time and ending in 18 months' time. The claimant has already commenced her training as a hairdresser and, given the projections in the joint experts' report, will have "*no psychiatric impediment to a return to any employment (of which she is physically capable) full time*" (page 925), so even if the hairdressing does not work out for her, we would expect her to be able to find replacement income from work of some kind by that date in any event.

80. We therefore award compensation for loss of wages for a further period of one year from the date of the remedy hearing, at the rate of pay applicable to Band 2 in 2019/20 and 2020/21:

    From 16 September 2019 to 5 April 2020 (29 weeks) x £316.72 = £9,184.88

    From 5 April 2020 to 16 September 2020 (23.43 weeks) x £320.87 = 7,517.98.

    Total: **£16,702.86**

Withdrawal factor

81. We find, as above, that given her past history of employment and evidence that she wished to stay at the respondent there was no likelihood that the claimant would have left or been dismissed for any other reason during the period of her future loss and we therefore do not make any deduction in that regard. As her future loss does not exceed a year, there is no necessity to make any percentage reduction for accelerated receipt.

Cognitive Behavioural Therapy

82. The joint report clearly identifies that the claimant requires a course of CBT once these proceedings have concluded to enable her to recover and move forward. The need for and cost of that treatment (20 sessions at £150 per session) were not disputed and we find that the respondent is liable for the cost of that treatment. We make an award of **£3000 gross**.

Pension loss

83. Prior to the original remedy hearing, and also prior to any case management orders being made in respect of remedy, the parties jointly instructed an

actuary, Mr David Lockett, to prepare an expert report regarding the claimant's loss of pension rights. The parties provided the Tribunal with Mr Lockett's original report ("the pension report") dated 12 February 2019 (pages 757 – 786) and also an addendum report ("the addendum report") dated 13 September 2019 (which was added to the bundle at pages 926 – 932).

84. The pension report having been commissioned without any involvement of the Tribunal, Mr Lockett was operating somewhat in the dark as to the facts we would find which might impact on the claimant's future pension loss. He acknowledged this in the report and prepared a series of calculations based on alternative scenarios, depending on different dates of leaving the respondent's scheme, and different pay rises (CPI, CPI plus 1%). We noted that his calculations take account of the fact that the claimant was in a Career Average Scheme at the time of her dismissal, but had also accrued benefits in the previous final salary NHS Pension Scheme 1995 section. Mr Lockett's assumption regarding the claimant's health was that she currently enjoys and will continue to enjoy in retirement normal good health for a woman of her age. He identified that the issue of mitigation of loss was one which was in dispute between the parties and would be for the Tribunal to decide. At the time of the original report there were ongoing consultations about the discount rate. However, by the date of the remedy hearing, the discount rate was increased to -0.25%, with effect from 5 August 2019. The addendum report took account of that increase and those are the tables we therefore adopt.

Mitigation/length of loss

85. The claimant claims career long pension loss, on the basis that she would never be able to replace the benefits of the NHS defined benefit pension scheme she lost as a result of her dismissal. On the schedule of loss prepared by the parties the claimant identified her pension loss as £158,910.00.

86. The respondent submitted that the claimant, having accepted that the loss of future earnings was limited, ought to accept that her pension losses were limited also. However, we agreed with the claimant's submissions that, while it is exceptional to award career long loss of earnings, it is not exceptional to award career long loss of pension when dealing with public sector employees. It is not uncommon, in our experience, for an employee moving from the public to the private sector to experience limited loss of earnings but significant pension loss.

87. It is appropriate, therefore, to consider whether the claimant has mitigated her pension loss, specifically. In relation to the period up to the date of the hearing, the question is mainly answered by our findings in relation to past financial loss above. However, the question of the reasonableness of the claimant's decision to change careers takes on a new significance when pension loss is included in the picture. While it might not be unreasonable to decide to change career when it comes to mitigating one's lost earnings, what is the situation when it comes to virtually irreplaceable pension loss? Will or could the claimant have become a member of a public sector CARE pension scheme? If so, when? If not, has the claimant behaved or will she behave reasonably in not doing so? While the standard of proof is no lower for the respondent to show a failure to mitigate (remaining the balance of probabilities) the loss of significant public sector pension benefits is inevitably a weighty factor in the

factual context in which the claimant's decision to change career is to be judged reasonable or unreasonable.

88. In addition to our consideration of mitigation relating to loss of earnings set out below, we have considered pension mitigation carefully and separately, in view of the not inconsiderable financial consequences for the parties that flow from our conclusions. This is a claimant who has long-standing pre-existing physical and psychological conditions, including anxiety and depression. After 25 years' service she was suspended by the respondent around 4 years ago, an act which we found to be discriminatory. Then, around 2 years ago, after a significant delay, she was dismissed for gross misconduct, an act which we found to be unfair dismissal and discrimination. She hoped to return to the working environment where, we accepted, she had a familiar structure and social support. The claimant applied for around 50 jobs over the course of almost 2 years and attended a number of interviews but was repeatedly unsuccessful. She was aware that her performance at interview was poor and her success was no doubt impeded by the inaccurate and misleading reference which the respondent continued to provide to prospective employers. The joint psychological report identified that she developed paranoid and negative thinking around the respondent and we accepted that she believed, having seen some evidence of it, that they were gossiping to other public sector employers about her. Her pre-existing vulnerability caused by her physical and mental health conditions meant that the respondent's treatment of her, after 25 years' service, caused her to lose faith in the respondent and the public sector in general. The respondent's actions since the claimant's dismissal compounded her difficulties. It was clear from Mr Tracey's evidence that the respondent had not made any efforts to correct the inaccurate impression created by the reference despite the claimant's solicitor raising the matter. The medical report identified that she had psychological impediments to work. We accepted her evidence that she saw the chance to have a fresh start and go in a completely new direction to retrain as a hairdresser.

89. In these circumstances, taking account of the eggshell skull principles and the other points made relating to mitigation above, we conclude that the claimant's decision to retrain cannot be said to be unreasonable, even if it means being unable to replace the public sector pension rights she could have continued to accrue if she found work in the public sector.

Likely retirement age/withdrawal factor

90. The claimant says that, had she remained employed by the respondent she would have continued working until she was 70. She told us there was a tradition in her family of working to 70 and that that was her intention. We accepted the claimant's evidence that she intended to work to age 70 at the respondent and that there was a tradition in her family of doing so. We also accepted that her previous employment history, the actuarial report and the medical report all suggested that her health concerns were unlikely to prevent her working to retirement if not beyond.

91. The respondent submitted that the claimant was more likely to retire at the more normal retirement age of 67 and we were directed to the case of **Newsome v Sunderland City Council** EAT/36/02 concerning the correct

approach when considering the prospective date of retirement. The correct approach is not to consider it on the balance of probabilities, but to make an assessment of the chance of the claimant remaining in employment until a particular age. In that case, a finding that the claimant had a 100% chance of remaining in employment until 65 was held to be irrational and perverse.

92. We are also required to consider the likelihood of the claimant leaving the respondent to work elsewhere and/or her employment terminating before retirement for any other reason. We note that she had stayed with the respondent for 25 years and had only ever worked for them. Neither her health nor any of the other difficulties in her life had previously prevented her working and, the employer being a large NHS Trust, we consider it almost inevitable that she would have continued working for the respondent until retirement. However, as in **Newsome** there simply cannot be any guarantee that a person aged 54 will work for the same employer until they are aged 70. There must be some recognition of the possibility, however small, that circumstances may cause the claimant to no longer be working for the respondent at age 70, despite her intention to continue to that age.

93. We conclude that there must be some chance that she will not be able to work to the age of 70 and/or would not have continued to work for the respondent until retirement. While taking account of the guidance in **Newsome,** we consider that an appropriate reduction can be achieved by allowing for retirement at age 67, rather than 70. That equates to a 15% reduction (20 years' remaining employment x 15% = 3 years) and we consider that it takes account of the likelihood both that she would not have continued working for the respondent and/or that she would not have worked to age 70.

Method of calculation

94. In light of our finding that the claimant has career long pension loss, we reject the respondent's submission that a 'simplified loss' method of calculation should be adopted. Ms Smith submitted that calculating what withdrawal factor/deduction to apply to the claimant's pension up to retirement and other future contingencies (sickness, dismissal, early retirement, time off, etc) would be too speculative, so a contribution-based approach to calculation would be more appropriate, and that a simplified approach remains appropriate in certain cases. Ms Smith drew our attention to paragraph 5.53(j) of the Employment Tribunals - Principles for Compensating Pension Loss (4th Edition, Second Revision, 2019) ("**the Principles**") which confirms that "*a huge discount for withdrawal would suggest that DB pension loss could be better assessed by the contributions method"*. She also referred us to several cases decided using the old pension guidance to the effect that where losses are to be calculated over a short period, a contributions-based approach is generally more appropriate (**Griffin v Plymouth Hospital NHS Trust** [2015] ICR 347; **Network Rail Infrastructure Ltd v Booth** EAT/0071/06). Mr Kohanzad submitted that the Principles have done away with the old simplified approach and substantial loss approach to pension loss and provides for a single seven step approach based on the Ogden tables.

95. In fact, the Principles provide for a contributions-based approach in 'simple' cases and the seven-step approach in 'complex' cases. Simple cases are appropriate where there is limited loss or defined contribution schemes. Where dealing with defined benefit schemes, where there is career long loss of pension or significant accrued benefits, the simple case approach is not appropriate. The parties have provided us Mr Lockett's actuarial report, setting out the pension loss calculated as both a simple case and a complex case. The Principles allow for a departure from the seven-step approach in complex cases only through the use of expert evidence. We therefore depart from the Principles to the extent that we are assisted by Mr Lockett's report.

96. Although the claimant may obtain another pension even if not employed in the public sector (see below), we consider that the claimant's pension loss will be significantly underestimated if a simple contributions-based loss approach is taken. She is in her mid-fifties, has significant accrued pension rights, is unlikely to be able to replace her public sector pension given everything we have said above and her period of loss is likely to be over 10 years and for the remainder of her working life. We therefore consider that this is a complex approach case.

CPI

97. Mr Kohanzad invited us to find that future pay rises within the NHS for Band 2 would be above CPI. However, given recent economic trends, which can be our only possible guide to the future, we feel less optimistic and are inclined to believe that public sector pay rises are more likely to merely keep pace with CPI. We therefore consider that Table 6.2.1 of the Addendum Report (page 928) shows the correct figure for the claimant's pension loss, being £**108,860**.

Replacement pension

98. Mr Lockett's report does not take account of any possible replacement pension from future employment. This was an area on which both the evidence and submissions from the parties were unhelpfully vague. We have referred to paragraph 5.56 (f) of the Principles and concluded that the best estimate we can make is that, if she is successful as a hairdresser, she may become an employee (although self-employment is also a possibility). As an employee, our best estimate of salary is national minimum wage rates, and there would be a right to automatic enrolment in a NEST pension.

99. As suggested by the Principles, we have used the NEST calculator (https://www.nestpensions.org.uk/schemeweb/NestPublicWeb/faces/public/BE/pages/pensionCalculationPublicAreaResult.xhtml). Using the claimant's date of birth, the rate of national minimum wage at the date of the remedy hearing, working hours of 30 hours per week, over 52 weeks' per year, we calculated an annual gross salary of £12,807.60. Estimating a minimum employer contribution following auto enrolment of 8%, the calculator gives a gross pension estimate of £15,200 on retirement at age 67. While we acknowledge that this figure does not take account of increases in the national minimum wage, likelihood of earnings above national minimum wage, employer contributions above the minimum 8% or various other contingencies

which might increase that figure, it also does not take account of the possibility of periods of self-employment, unemployment or part time employment. We therefore consider that, on the information available to us, it is an adequate estimate of future pension accrual in the circumstances. Assuming that the claimant's accrued pension benefits to date are such that she is likely to pay income tax at basic rate on any NEST pension income after retirement, we have deducted income tax at 20% from the NEST pension figure, giving an estimated deduction from overall pension loss to take account of NEST benefits gained of £12,160 net.

100. We find that the claimant's total pension loss is therefore: £108,860.00 - £12,160 = **£96,700 net.** We consider taxation below.

Non-pecuniary loss

Injury to feelings

101. We are to determine what award should be made to compensate the claimant for the injury to her feelings caused by the proven, unlawful discrimination for which the respondent is liable.

102. The evidence available to us at the hearing was the claimant's witness evidence and a copy of a joint psychiatric statement ("the joint report", discussed at paragraphs 26 to 28 above) dated 4 September 2019 of the parties' expert witnesses, M S Alexander and R W Latcham, which was provided to the tribunal on 11 September 2019.

103. Mr Kohanzad submitted that the joint report was more relevant to the issue of personal injury than injury to feelings. He was careful to emphasize, and we agree, that the purpose of the report is to assess her objectively observable psychiatric condition, rather than her subjectively held injured feelings. Nevertheless, the report is of evidential value when examining the claimant's account of her emotional responses and the extent of the injury to her feelings. We have therefore made reference to the joint report in so far as it assists us in making findings of fact about the injury to the claimant's feelings. We acknowledge that the fact that the joint report describes her psychiatric condition as 'mild' does not mean the injury to her feelings cannot be extensive.

104. As discussed above, the joint report contained agreement by the experts that the claimant had "*a long history of a complex interaction of medical difficulties and psycho-social difficulty*". The report related a series of episodes of fibromyalgia, pain, depression and difficulties at work and difficulties in relationships which led to further anxiety and depression. The experts agreed in the joint report that:

> *…after each of these occasions of adversity she has been able to return to work, work which she told both of us she has generally enjoyed.*

105. The experts agreed:

Miss Austin suffers mixed anxiety and depression. The condition, in which there are insufficient symptoms to make a diagnosis of a depressive illness or of any anxiety disorder per se, is one with which Miss Austin has suffered intermittently for a number of years, and which at times has interfered with her ability to work, but to which she had always returned full time.

106. It is therefore clear that the claimant suffered the mixed anxiety and depression for many years before the events which led to her Tribunal claim. She evidently had a pre-existing tendency or vulnerability to anxiety and depression and, indeed, we found that it was her anxiety which led to her actions which were at the root of her dismissal. Mr Kohanzad reminded us of the 'egg-shell' skull principle, that a discriminator must 'take their victim as they find them'. Thus, if the claimant's reaction to her dismissal was exaggerated by her existing vulnerability, then the respondent will still be liable for the extent of that injury to her feelings. However, if the injury to her feelings was caused, in part, by other factors, the respondent should only be liable for that part caused by its unlawful actions.

107. It was agreed that the claimant had worked for the respondent for over 25 years, which represented virtually all of her working life. Her evidence in her witness statement that her work represented a key part of her life and that the security and familiarity of her work routine was central to her life was also not disputed. We accepted that her suspension and dismissal disrupted her life in a profound way. We accepted her evidence about her fear of the unknown and the impact of the respondent's treatment of her on her confidence.

108. We accepted her evidence that, as a single person in her 50s, she had benefited from the social side of work and made friendships there. We accepted that the suspension and dismissal lead her to feel isolated and unable to stay in touch with her old friends and that, once her employment had terminated, she felt uncomfortable re-kindling those friendships.

109. The joint report concludes that:

We agree, after discussion, that Miss Austin requires CBT to assist her with her automatic negative and paranoid beliefs about correspondence between old and prospective employers, and with negative beliefs about her capacity for work. With such treatment there will be no psychiatric impediment to a return to any employment (of which she is physically capable) full time.

110. This supports what the claimant says about the respondent's actions causing her to feel paranoid about what people were being told about her and how it had changed the way she felt about who she could trust. Her evidence as to her feelings given in her witness statements and in cross examination was also consistent with the paranoid impressions she reported regarding the HR departments of prospective employers speaking to the respondent, her job application history and lack of success at interview, and her decision to re-qualify as a hairdresser. We also accepted the claimant's evidence that her dismissal affected her ability to socialize and engage in hobbies in the same way as previously, because she was afraid of encountering Mr Warren and lacked the motivation and confidence, getting stressed and nervous and suffering panic attacks.

111. We found her evidence entirely credible that:

I have lost my job, my career, everything that 25 years' service has built up. I've lost my confidence, my daily routine and my structure. I have lost relationships and friends. I have lost the ability to make or maintain either. I've lost the person I used to be.

Separate acts of discrimination

112. The parties were agreed that any separation of the injury attributable to the suspension and that attributable to the dismissal would be artificial. In the case of **ICTS(UK)Ltd v Tchoula** [2000] IRLR 509, the EAT held that where there are a number of allegations of discrimination, a global award covering all the acts of discrimination as found can usually be made, particularly where considering the injury caused by each of a number of different acts of discrimination. We agree that, in this case, the injury from the suspension and dismissal should be treated as one and the same, as attempting to determine which part of the claimant's hurt arose from one or the other would be entirely artificial. We consider that, while the respondent's discriminatory actions began at the time of the suspension, the injury to the claimant's feelings can be treated as beginning, or crystallising, at the time of her dismissal. The period of the injury to her feelings has therefore been from the date of her dismissal to the present day.

Reasonable foreseeability

113. Ms Smith reminded us that, in the general law of tort, on which injury to feelings awards are based, losses that are unforeseeable will not be recoverable. She submitted that, while the Court of Appeal held in **Essa v Laing Ltd** [2004] ICR 746 that this principle does not apply to all statutory torts, including direct discrimination or discriminatory harassment, that authority did not consider other forms of discrimination. She suggested that it would be appropriate for us to take into account whether the claimant's injury was reasonably foreseeable in assessing the award for injury to feelings in this case.

114. We acknowledge that, in **Essa,** Lord Justice Pill observed that, *"in …circumstances of direct discrimination by racial abuse in the face of the victim [reasonable foreseeability] considerations do not apply*", but, "*It is possible that, where the discrimination takes other forms, different considerations will apply".*

115. However, in that case, he also set out his reasoning as to why it was not necessary to apply a test of reasonable foreseeability to injury to feelings or psychiatric injury in discrimination cases*:*

I see no need to superimpose the requirement or prerequisite of reasonable foreseeability upon the statutory tort in order to achieve the balance of interests which the law of tort requires. It is sufficient if the damage flows directly and naturally from the wrong. While there is force in the submission that, to prevent multiplicity of claims and frivolous claims, a control mechanism beyond that of causation is needed, reliance upon the good sense of employment tribunals in finding the facts and reaching conclusions on them is a sufficient control mechanism, in my view. As a mechanism for protecting a defendant against damages which, on policy grounds, may

> *appear too remote, a further control by way of a reasonable foreseeability test is neither appropriate nor necessary in present circumstances*.

116. Ms Smith has not explained to us why we should depart from **Essa**, other than because this complaint is one of discrimination arising from disability rather than direct discrimination. In fact, Lord Pill's reasoning set out above appears to us to apply equally in this case.

117. Separately, as was noted in **Essa**, the test of reasonable foreseeability in tort is whether the kind of damage is reasonably foreseeable, not its extent. In a discrimination arising from disability claim, both injury to feelings and psychiatric injury are likely, in our view, to be the kind of damage which is reasonably foreseeable. Ms Smith is merely proposing that the extent of the injury was not foreseeable, and the submission does not therefore assist the respondent.

Other causes

118. The joint report found:

> *The causes of her current episode of mixed anxiety and depression which began in about June 2016 include her social circumstances and a number of longstanding physical complaints but prominently her current unemployment and her ruminations about her past employment and the process of the Employment Tribunal, and her belief that her attempts to regain employment particularly in the public sector including the NHS are hampered by shared prejudice about her. However her ability to work full time at the end of 2017 and early 2018 together with her attendance at college indicates the mildness of her disorder and bodes well for her future employment.*

119. We note that, where injury to feelings are partly attributable to factors other than the discrimination which has been upheld, compensation must be awarded only for the upheld discrimination. This can be done either by a specific focused finding of compensation for the upheld discrimination or by applying a percentage approach. The respondent submitted that the causes of the claimant's injured feelings were multiple and not solely attributable to the respondent's actions. We agree that it appears from the account of her life contained in the joint medical report that her injured feelings and loss of confidence and low mood were not solely caused by the respondent, given that there were a number of other negative life events cited. In these circumstances, any assessment we make of the split between one cause and another will necessarily be arbitrary. However, we find from the joint experts' use of the word "*prominently*" that the cause of her current episode of anxiety and depression was the unlawful discrimination. While, we agreed with Mr Kohanzad that the medical report related more directly to the question of personal injury we considered that the claimant's injured feelings were no doubt not helped by other negative life experiences and consider that a 10% reduction is appropriate to reflect those alternative causes.

Quantum of injury to feelings

120. Section 124 EQA states that the amount of compensation which may be awarded for discrimination corresponds to the amount which could be awarded

by a County Court in England & Wales or a Sheriff in Scotland. Section 119 Equality Act 2010 provides that an award of damages may include compensation for injured feelings.

121. In **Prison Service & Ors v Johnson** [1997] ICR 275, the EAT summarized the general principles that underlie awards for injury to feelings and, although we do not repeat those principles in full here, we have taken them into account.

122. Three bands of injury to feelings awards were set out by the Court of Appeal in **Vento v Chief Constable of West Yorkshire Police (No 2)** [2003] ICR 318. Mr Kohanzad reminded us that the injury to a claimant's feelings are subjectively, rather than objectively measurable, echoing the words of Lord Justice Mummery in that case: injury to feelings encompasses "*subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise…Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms".*

123. Mr Kohanzad submitted that the caselaw on injury to feelings is clear that the effects of the wrong are the measure, not the wrong itself, moving away from **Vento**. Mr Kohanzad also referred us to the case of **Komeng v Creative Support Limited** UKEAT/0275/18 in which the EAT emphasized the importance of focusing on the actual injury suffered by the claimant and not the gravity of the acts of the respondent. Ms Smith referred us to the findings in **Cannock** that an award for injury to feelings is not about punishing the respondent, but about compensating the claimant.

124. The **Vento** bands were subsequently uprated to reflect inflation (**Da'Bell v NSPCC** [2010] IRLR 19 EAT and **AA Solicitors Ltd t/a AA Solicitors and anor v Majid** EAT 0217/15) and the decisions reached in **Simmons v Castle** 2012 EWCA Civ 1288 and **De Souza v Vinci Construction (UK) Ltd** [2018] ICR 433.

125. The Presidential Guidance for Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury (and subsequent annual updates) provides guidance on further uprated bands, taking into account inflation and the **Simmons** uplift. The Guidance also provides a formula for uprating the bands to take account of inflation in claims presented before 11 September 2017.

126. In this case, the claimant's statement of loss sought injury to feelings of £44,000 (being the top of the upper band for claims presented on or after 9 April 2019).

127. The respondent's figure was £8,000, which Ms Smith identified as being the top of the lower band or bottom of the middle band (somewhere between **Da'Bell** and the Presidential Guidance). Ms Smith submitted that, as the experts concluded the claimant's vulnerability has not been increased by this episode and with treatment there is no impediment to her returning to work, the injury to feelings award should be in the lower band of **Vento** or at the lower end of the middle band.

128. Taking into account our findings of fact above and all of the factors cited, we conclude that the claimant's injury to feelings is to be assessed towards the bottom end of the top band of **Vento.** The claimant had 25 years' service. We

found, at paragraph 111 above, that the impact on her life, confidence and trust in people was profound and she lost the person she had been. The injury was suffered over a prolonged period, was sustained and compounded by the respondent's actions in failing to correct her reference. Although the respondent's actions were not malicious and the fact that the treatment was not intentional might normally play a part in evidencing the seriousness of any injury to feelings, this claimant had a pre-existing vulnerability ('egg-shell skull') which led her to become paranoid about the respondent's behaviour. The injury to her feelings was significant but her psychiatric injury is described in terms of 'mildness' by the joint experts and she did not suffer a nervous breakdown or other devastating mental injury, such as might justify the top of the top band of compensation or higher. She is likely to make a recovery and the prognosis for a return to work appears to be good according to the joint medical report. We therefore consider that an award at the bottom end of the top **Vento** band is the appropriate compensation for injury to feelings. This recognizes the severity of the injury to her feelings and her subjective sense of having lost the person she used to be while also taking account of the medical report's evidence of the lack of any severe psychiatric injury.

129. Since the date of presentation of the claim was 3 August 2017 we are required to use the formula for uprating the bands provided in the Guidance for pre-11 September 2017 claims. Under the **Vento** bands as they stood following **Da'Bell**, we would award the bottom of the top band (£18,000). As per the guidance in the Presidential Guidance for pre-11 September 2017 claims, we divide that figure by 178.5 and then multiply the answer by the RPI all prices index figure at the date the claimant presented her claim (274.7, according to the Office for National Statistics: https:// www.ons.gov.uk/economy/inflation and price indices/ timeseries/ chaw/ mm 23).

130. That calculation renders a figure of £27,700.84 We are then required to add the 10% uplift under **Simmons**, giving a total of £30,470.92. However, we then make a 10% deduction, according to our conclusion at paragraph 119 above, that there were other contributory factors. That results in a figure of £27,423.83 for injury to feelings. In real terms, that sum equates to approximately 1.5 years' gross annual salary for the claimant or the cost of a new medium sized car.

131. Although the claimant's schedule of loss initially included a claim for aggravated damages, the claimant later withdrew any claim under that head of damages.

Personal injury

132. The claimant says she suffered a personal injury or an exacerbation of an existing injury as a result of the respondent's discrimination. The respondent submitted that there should be no award for personal injury because of the degree of overlap with injury to feelings.

133. Mr Kohanzad submitted that the claimant's injury to feelings and the psychiatric damage recorded in the medical report were two separate distinguishable elements of injury. Mr Kohanzad directed us to the case of **Base Childrenswear v Otshudi** UKEAT/0267/18 in which an award of £16,000 was made for injury to feelings and a separate award of personal injury of £3000 because the claimant had suffered medical depression for three months. Ms

Smith asked us to be cautious when comparing the claimant's case with **Otshudi**, as the facts are quite different.

134. We were mindful, in this case, of the dangers of double recovery because the point at which injury to feelings becomes a recognised psychiatric illness is not necessarily clearly defined, since injury to feelings can encompass anxiety and depression.

135. We find from the joint medical report that the claimant had a recognizable psychiatric condition: an episode of mixed anxiety and depression. She had a pre-existing vulnerability and had had episodes in the past. The respondent was not responsible for causing her condition per se. However, the claimant's current episode of anxiety and depression was mainly caused by the unlawful discrimination. Although the report describes the 'mildness' of the claimant's condition, there was evidently exacerbation of the underlying condition by the discrimination to the extent that an episode of anxiety and depression was triggered. We consider that the triggering of such an episode by the respondent's discrimination warrants some personal injury award, over and above the award for injury to feelings award set out above. Separately and in addition, the claimant's paranoia and negative thinking around her return to work are a new symptom and the fact that the experts recommend CBT to treat it suggests that this is something psychiatric, which is directly attributable to the respondent's discrimination.

136. The parties referred us to Chapter 4 of the Judicial College's Guidelines for the Assessment of General Damages in Personal Injury Cases, 15th Edition ("the JC Guidelines"). Mr Kohanzad submitted that the appropriate bracket for an award was the moderately severe category because the injury is long term, but not permanent, and should be assessed at around £25,000, as set out in the schedule of loss. We disagreed. Had the respondent been solely responsible for the claimant's mixed anxiety and depression condition and there was no overlap with injury to feelings then that might be the appropriate band. But the joint report makes it clear that the respondent was merely responsible for this episode of anxiety and depression.

137. The respondent asked us to refer to the claimant's engagement with work and education as demonstrating her ability to cope with life. The fact she is still in contact with friends and family and that treatment will be successful, she has a good prognosis suggest that any award should be assessed as in the lower categories (somewhere between £1,350 and £5,130). We agreed that the claimant's prognosis is good, according to the experts, once the Tribunal proceedings are concluded and her CBT has been completed. Any future vulnerability is likely as a result of her underlying mixed anxiety and depression rather than the present episode.

138. We conclude that the lower categories are the more appropriate and that, in view of the considerable overlap with the injury to feelings award, a personal injury award of £3,000 is appropriate. We note that this award is less than would be appropriate if personal injury only were in consideration. We are mindful that the overall award for injury to feelings and personal injury will therefore be £30,423.83 which, we consider, is the appropriate level of overall non-pecuniary award in the present case.

Interest

Interest on past financial loss

139. 866 days / 2 = 433 days x 0.08 (8% interest rate) x 1/365 x £17,763.74 = **£1,685.85**
£17,763.74 + £1,685.85 = £19,449.59

Interest on injury to feelings

140. The interest rate for interest on an award for injury to feelings is 8%.

141. 866 days x 0.08 x 1/365 x £27,423.83 = **£5,205.27**
£27,423.83 + £5,205.27 = 32,629.10

Interest on personal injury

142. The interest rate for an award for personal injury is 2%.

143. 866 days/ 2 = 433 days x 0.02 (2% interest rate) x 1/365 x £3,000 = **£71.18**
£3,000 + £71.18 = £3,071.18.

Taxation

144. Following the **Gourley** principle, the Tribunal must take care that its approach to tax does not put the claimant in either a better or worse financial position that if the dismissal had not occurred. Where the award will be taxed under section 401 ITEPA 2003, the Tribunal must gross up that part of the award which will fall to be taxed.

145. Section 401 applies to payments in connection with the termination of a person's employment. The first £30,000 are tax free in any tax year, and tax will be paid on sums in excess of that amount. Neither is subject to employee national insurance.

146. The relevant year for consideration of the tax burden is the year in which the claimant will receive the payment. In this case we make the assumption that will be the tax year 2019/20.

147. The amounts to be included in the calculation for section 401 purposes are:
Damages for wrongful dismissal: £3,394.68
Loss of statutory rights: £565.78
Past financial loss, including expenses and interest: £19,449.59
Future financial loss, excluding CBT: £16,702.86
Pension loss: £96,700.00

148. Following the decision in **Moorthy v Revenue & Customs** [2016] UKUT 13 (TC) and the amendment to section 406 ITEPA 2003 with effect from 6 April 2018, compensation for injury to feelings related to termination of employment is also taxable to the extent that the £30,000 tax free allowance is exceeded. In this case, the injury to the claimant's feelings resulted from her discriminatory dismissal. We have made a separate personal injury award of £3,000 for the psychiatric injury to the claimant, which is not taxable. Therefore

the sum of £32,629.10 (which includes interest) is also to be included in the amount to be taxed under section 401 ITEPA.

149. The cost of CBT appears to fall within the tax exemption in sections 310 and s311 ITEPA 2003 and is therefore awarded net.

150. The total compensation taxable under section 401 ITEPA is therefore £169,442.01, of which £30,000 is the tax free sum.

151. The remaining £139,442.01 must therefore be grossed up. Using a **Finlay** table, we calculate the tax bands on the compensation (assuming that the claimant continues to have no income and using the 2019/20 bands) as follows:

	Gross	Tax	Net
PA (0%) to £12,500	12,500	0	12,500
BR (20%) the next £37,500	37,500	7,500	30,000
HR (40%) up to £100,000	50,000	20,000	30,000
NR (60%) from £100,001 to £125,000	25,000	15,000	10,000
HR (40%) £125,001 to 150,000	25,000	10,000	15,000
AR (45%) £150,001 upwards	76,258.20	34,316.19	41,942.01
Totals	226,258.20	**86,816.19**	139,442.01

152. An amount of £86,816.19 must therefore be added to reflect the tax payable on the compensation awarded.

Conclusions

153. Total compensation payable is therefore:

Damages for breach of contract	£ 3,394.68
Basic award for unfair dismissal	£ 8,470.38
Loss of statutory rights	£ 565.78
Loss of wages to date of hearing (including expenses and interest of £1,685.85)	£17,763.74
Future loss of wages	£16,702.86
CBT	£ 3,000.00
Pension loss	£96,700.00

Injury to feelings (including interest of £5,205.27)	£32,629.10
Personal injury (including interest of £71.18)	£ 3,071.18
Amount to be added for grossing up	£86,816.19
Total:	**£269,113.91**

Employment Judge Bright

Date 28.02.2020