



EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: East Cheshire NHS Trust

HELD AT: Manchester

ON: 9-10 December 2019

BEFORE: Employment Judge Slater
Ms L Atkinson
Mr S Stott

REPRESENTATION:

Claimant: Miss S George, counsel

Respondent: Mr B Williams, counsel

JUDGMENT ON REMEDY

The unanimous judgment of the Tribunal is that:

1. The respondent is ordered to pay to the claimant the sum of £5634.50 compensation for unfair dismissal. The Recoupment Regulations do not apply to this award.
2. The respondent is ordered to pay to the claimant the sum of £207,975.90 compensation for the acts of disability discrimination in respect of which the complaints were found to be well founded in the Tribunal's judgment on liability sent to the parties on 22 February 2019.

REASONS

Issues

1. This was a remedy hearing following a decision on liability sent to the parties on 22 February 2019. We had found, in that judgment, the following complaints to be well founded:

1.1. The complaint of unfair dismissal.

1.2. Two complaints of discrimination arising from disability in relation to requiring the claimant to take involuntary paid authorised leave in the periods between 26 October 2015 and February 2016 and between 4 July 2016 to 26 October 2017.

1.3. A complaint of discrimination arising from disability in relation to the claimant's dismissal.

1.4. A complaint of failure to make reasonable adjustments in relation to the provision, criterion or practice that, from 4 January 2016, the claimant was required, as a condition of avoiding dismissal, to agree to be bound by the behaviour impact and action agreement.

2. This hearing was to determine the remedy for all these complaints.

3. The claimant did not seek reinstatement or re-engagement with the respondent. She sought only compensation by way of remedy.

4. The parties agreed on the calculation of the basic award for unfair dismissal and that £500 should be awarded as compensation for loss of statutory rights, as the compensatory award for unfair dismissal. Any financial loss was to be compensated for as part of the award of compensation for unlawful discrimination.

5. The parties agreed on the figures to be used in the calculation of financial loss and on the approach put forward by the claimant to pension loss in the Schedule of Loss.

6. The issues which the Tribunal needed to decide were:

6.1. What compensation should be awarded for injury to feelings for the acts of discrimination found to have occurred. The claimant sought an award in the higher *Vento* band. The respondent argued that this should be in the middle *Vento* band, albeit in the middle to top of that band.

6.2. What financial loss was caused by the imposition of the Behaviour Impact and Action Agreement? The claimant argued that she would have successfully completed the retraining programme no later than 1 November 2016 so claimed the difference in salary between a band 5 post and a band 7 post for the period 1 November 2016 until dismissal on 26 October 2017. The

respondent argued that there was only a 20% chance that the claimant would have successfully completed the retraining programme by 1 November 2016.

6.3. What compensation, if any, should be awarded to the claimant for financial loss after dismissal? The claimant argued that, had reasonable adjustments been made, she would have remained in employment and she should be compensated at the level of a Band 7 from 26 October 2017 to date and then for a further 3 years, the period she anticipated would be needed to get back to the level of earnings she would have been on as a Band 7 pharmacist. The respondent argued that either the claimant would have been lawfully dismissed in any event by 26 October 2017 or, alternatively, there was only a 20% chance of the claimant remaining in employment after 26 October 2017 and this percentage chance should be applied cumulatively with the percentage chance that the claimant would have successfully completed the retraining programme and reverted to Band 7 from 1 November 2016, so there was only a 1 in 25 chance the claimant would have remained in employment after 26 October 2017.

6.4. What, if any, impact did the GPHC suspension order have on remedy?

7. The respondent accepted that the claimant had mitigated her loss as best she could in the circumstances.

Evidence

8. We heard evidence from the claimant and Mark Pitt, Assistant General Secretary of the PDA Union and the Director of Defence Services of the Pharmacists Defence Association, for the claimant, and from Kashif Haque, Chief Pharmacist for the respondent Trust, for the respondent. The parties had agreed a bundle of documents for use at the remedy hearing.

Facts

9. We refer back to our judgment on liability and rely on relevant findings of fact in that judgment.

10. We make the following additional findings of fact.

11. The claimant's witness statement addressed the way that matters, not limited to the complaints we upheld, had made her feel. We have, therefore, sought to pick out from the witness statement evidence which relates to the particular acts of discrimination we upheld. We are mindful, also, of the fact that the claimant is someone who finds it difficult to talk through her feelings, a point which Mr Williams fairly acknowledged in his submissions. We consider it likely that the claimant has, if anything, underplayed the effect on her of the unlawful discrimination because of this difficulty. The claimant's evidence as to how events made her feel was unchallenged by the respondent and is accepted by us.

12. The claimant suffered serious anxiety during the periods of involuntary leave. She was particularly concerned about "deskilling". The claimant loved her job as a

pharmacist and was worried that she would become de-skilled and prevented from working at that job.

13. The claimant was also suffering anxiety around the same time, including worries about her finances, as she was afraid of losing her job. The claimant had visited her GP because of stress prior to the first period of involuntary leave but visited again on 26 November 2015, during the first period of involuntary paid leave.

14. Throughout the periods of involuntary leave, the claimant read her Bible and watched Trinity broadcasting network for several hours each morning to enable her to regain some calm.

15. When the behavioural impact agreement was imposed on the claimant, this caused her further anxiety. She felt she was being constantly picked on for behaviour which she regarded to be small things, causing her anxiety as there was nothing she could do to change herself. She was particularly worried about potentially losing her job if she could not comply with the agreement, and this caused her considerable worry about her financial situation.

16. The claimant's dismissal caused her further stress and anxiety. She was constantly worried about her ageing mother, who is now 83. Her mother lives in Cape Town and, after her dismissal, the claimant could not afford holidays so could not afford to visit her mother until, with family assistance, she went to Cape Town because her brother was seriously ill. The claimant became tired and exhausted, not having had any holidays since a week in October 2016. The claimant has a more limited social life due to working weekends and evenings and due to reduced finances. The claimant had to rearrange her mortgage for a lower monthly mortgage payment over a longer time period. She also took in lodgers to help her finances.

17. Following the claimant's dismissal in October 2017, the claimant has worked as a carer. She had not been able to work from beginning of August 2019 until this hearing because she had gone to South Africa to care for her brother who was in hospital and her mother who was ill. Her family subsidised her financially to be able to do this. The claimant's brother died on 3 December 2019 and the claimant returned to the UK for this hearing. She has arranged some shifts for December and intends to work as many shifts as possible from January onwards. The claimant is on a zero hours contract and took unpaid leave whilst in South Africa.

18. The claimant was humiliated and upset by her dismissal. The claimant has suffered considerable loss of self-esteem with the loss of her position. As previously noted, she loved being a pharmacist. Her whole life has been built around her pharmacy career. Her mother was very proud that she was a pharmacist. The claimant became more introverted and insular after her dismissal. She kept away from Saturday walks and weekends away as she felt embarrassed, upset, unaccepted and distressed. She avoided Facebook for the same reasons.

19. When she went to South Africa because her brother was ill, she did not see many friends there or discuss work circumstances because she found it humiliating.

20. At the supermarket where she regularly takes a client, the pharmacists know her from previously attending professional meetings with her. The claimant is concerned that she is likely to be stigmatised regarding any future jobs in the small world of pharmacy. The claimant felt humiliated when, waiting with a client at the hospital in her care-worker uniform, the HCAs commented that she was familiar and asked where they knew her from. An HCA, who was on a ward at the hospital when the claimant worked there, and was at a much lower level to the claimant in the hospital staffing structure, is now the claimant's boss at the care agency. The claimant feels very humiliated by the change in her status.

21. The claimant's reduced financial circumstances have caused her further anxiety and humiliation. The claimant takes a client each day to a local supermarket café where her client has a latte and they do some shopping. The claimant cannot afford a latte for herself every day so has a £1 carers' tea or takes her own teabag and the café provides hot water.

22. The General Pharmaceutical Council (GPHC) Fitness to Practice Committee (the Committee) imposed on the claimant on 8 September 2017, an interim suspension order for a period of 12 months on the basis that it was necessary for protection of members of the public. Concerns about the claimant's fitness to practice had been raised with the Committee by Mr Haque of the respondent. By the date of the first interim suspension order, the claimant had been given notice of termination. The claimant consented to extensions of the order. At a hearing on 22 August 2019, the committee revoked the interim suspension order.

23. The Committee had witness statements from Elizabeth Street and Mr Haque from the respondent. They also had medical evidence, including, at the hearing in August 2019, a medical report from Dr Suleman dated June 2019 and from Dr Barrett dated 13 July 2019. They were also advised by Dr Alam, the Committee's clinical advisor.

24. The Committee accepted the opinion of Dr Suleman. Dr Suleman's report included the following.

"7.3.2 It is difficult for me to make a judgement on her fitness to practice as a pharmacist can be required to work in a vast variety of roles/settings with varied degree of supervision, team working, and time pressures and it appears that [the claimant's] performance can vary according to situations and settings she is working in. I feel that it may be helpful for me to list difficulties and situations which may affect her performance and I'm sure tribunal will be able to make a judgement on her fitness. It appears that she had difficulties whilst working as a pharmacist at [name of hospital] and most of these difficulties can be attributed to her ASD. However, there were no reported concerns in the places she worked previously as a pharmacist for a number of years. In summary majority of concerns during her work at [name of hospital] were related to communication difficulties, finishing tasks in time, rigidity of thinking, difficulty adopting to new environments and roles, and theory of mind deficits. I am also mindful that majority of these concerns were reported before she was diagnosed with ASD and she and her colleagues were unaware of her ASD. [The claimant] is now more aware of her ASD

difficulties and has attended autism inclusive meetings. It is well known that having an insight into ASD difficulties usually have a positive impact especially for those with normal or above normal IQ. [The claimant] herself feels that getting a diagnosis has been an eye-opener for her and she is now making efforts to improve her communication, her team working skills and time management and an example of that is that she has not had any communication difficulties in her current job as a support worker.

“7.3.3 Overall, on balance, I feel that her ASD difficulties do have an impact on her performance, but the impact can be minimised with adjustments and the right working environment for her. I feel that it is very important to make her team and supervisors aware of her ASD diagnosis as this will enable her colleagues to understand her better for example why she can come across as abrupt and rude and why instructions need to be direct and precise.

“7.3.4 It is likely that she will struggle with rapidly changing environment and working under time pressure. In my view, it is important that [the claimant] should make any future employer aware of her diagnosis of ASD and ask for adjustments. These adjustments will depend on the role but generally, she may require: (i) a clear written job plan and explanation of her role and a prior notice of any changes well in advance; (ii) she may require secretarial support for time management and she has a tendency to hyperfocus on some aspects of her job; (iii) she will require team to make allowances for her communication difficulties as she is likely to come across as too direct and over-inclusive. She would struggle with small talk and pleasantries. She may take things literally and therefore will require precise, clear and simple instructions; (iv) she would require changes to working systems well in advance and will require training to adopt; (v) in my view, the most significant concerns in relation to her working as a pharmacist are due to her theory of mind deficits. Theory of mind deficits are a limited ability to attribute mental states (including beliefs, intents, desires, emotions and knowledge) to others and to themselves and that others mental states (beliefs, intentions, desires, emotions and knowledge) can be different than their own. I feel that this issue can be best tackled by providing her with a mentor and supervision by her line manager. Supervision will enable a supervisor to pick up on these issues and mentor will enable her to ask for advice without fear of adverse consequences.”

25. Dr Suleman wrote at paragraph 7.4.1: “On balance, I feel that the recommended adjustments will make her capable of providing safe and effective practice.”

26. Dr Barrett, in a report dated 13 July 2019, commented, having read Dr Suleman’s report, that he was broadly in agreement with that report. He added:

“I do think that [the claimant’s] difficulties are made all the worse by her coming from a quite different (albeit anglophone) country and culture and note that Dr Suleman does not address this aspect.”

27. The Committee took account of information provided that the claimant had been attending monthly Axia Postdiagnostic Asperger meetings and had read several

books on the subject of Asperger, including a book specifically dealing with Asperger syndrome and employment, reflecting specifically on communication. They also noted that, in her work as a carer, she had gained “useful and helpful insights into her disorder over the last 2 years.”

28. The committee also accepted the advice of Dr Alam, the clinical advisor. They wrote:

“In summary his advice was that Asperger (F.84.5 in the ICD 10), is a neuro developmental disorder and is therefore lifelong. There is no reason why a person with it should have any significant difficulty in the workplace. The important factor is that the employer is made aware of the diagnosis and the particular needs of the person, and is able to make the necessary adjustments. There had been no concerns about her practice raised prior to those at the Trust. In the past she had worked in a series of locum posts. There was positive reference within the bundle regarding the standard of her practice. He confirmed that it does appear that consultants who had met her since her diagnosis considered that she had a good insight into her condition, and the evidence suggested that she was engaging with the support available to her.”

29. Taking account of medical evidence before it, at paragraph 58 of the decision, the Committee wrote:

“In summary, given that the opinions of all medical advisers are now to the effect that [the claimant] should be safe to practice if reasonable adjustments are put in place, the Committee determines that it is no longer necessary for the protection of members of the public for an interim order to remain in place. The Committee also considered whether it was otherwise in the public interest, or in [the claimant’s] interest, for an order to remain in place, and decided that it was not.”

30. The claimant gave an undertaking to the registrar of the GPHC for an initial period of 12 months, which could be extended if necessary, which included that she would let any future employer and the GPHC know about her medical condition and any changes to it and would ensure that she was seeking appropriate support and adjustments from any current or future employer.

31. The claimant has been in touch with several locum agencies. There are band 6 post placements available, but the claimant needs to retrain. The claimant considers that she will need to work as a carer to fund retraining or shadowing in the pharmacy profession until she is able to return to work as a pharmacist. A possibility is transferring to a GP pharmacy but this is likely to take a long time. She would have a better chance of obtaining such work if she obtained an independent prescriber qualification. She has kept up with pharmacy CPD as much she can since her dismissal.

32. The claimant wants to remain in the same area because she likes it and does not want to sell her house.

33. Since her diagnosis, the claimant has worked hard at her communication skills and engages in chat and small talk with staff and clients, although she states that she is not good at repartee. The claimant has gained many illuminating insights into her situation since her diagnosis. She listens to people more and explains her thinking more.

34. From the claimant's CV, we note that the claimant, after training in South Africa, and a few years as a pharmacy technician at a hospital in London, had completed her pre-registration training at Barts and the Royal London Hospitals NHS Trust. She had then worked in a succession of locum and other posts as a pharmacist in hospitals in the UK before joining the respondent in August 2010. As Dr Alam noted in his advice to the Committee, there had been no concerns about her practice raised prior to those at the Trust.

35. We accept the evidence of Mark Pitt about the significant difficulties the claimant is likely to face in securing pharmacist employment within a reasonable timescale. One reason is deskilling. The claimant has been unable to work as a pharmacist for over 4 years and during that time her professional skills have become degraded and out of date. She will require workplace experience to start to rebuild her professional competence. To comply with her professional obligations, she would not be able to operate alone or in an unsupervised capacity as a pharmacist for a considerable period of time (possibly up to 12 months). Retraining for hospital work would need to be undertaken with a sympathetic employer and reasonable adjustments put in place to facilitate assimilation of the training. Financial constraints within the NHS would make finding such supportive opportunities more difficult. Other pharmacists in this situation have found extremely limited opportunities for work shadowing even on an unpaid basis, let alone any properly supervised and supported training programme. In another case supported by the PDA, the PDA considers that regulatory conditions imposed by the GPHC for support and supervision were a major barrier to the individual obtaining employment and employers balked at the additional burden this would impose.

36. We accept that, for reasons given by Mr Pitt, the community pharmacy sector is unlikely to be suitable for the claimant. This is a sector where members report the biggest problems in the pharmacy profession with lack of support, a pressurised and target driven culture and chronic understaffing.

37. The government's migration advisory committee has recently noted that there was a "below-average vacancy rate over the past 5 years" for pharmacists and, therefore, did not recommend adding pharmacists to the shortage occupation list.

38. Mr Pitt comments that the claimant would be competing in a limited job market against other candidates who are not disabled, have no regulatory restrictions on their practice and who do not need adjustments being put into place to accommodate their disability. His view is that, in such a job market, and in conjunction with other factors mentioned previously, it is likely that the claimant will take at least 2 years and more likely 3 years to secure suitable employment with a disability friendly hospital employer. He considers that, based on his knowledge of other pharmacists in similar circumstances, the claimant will be fortunate to find any pharmacy employment above grade 5 whilst she undertakes retraining and reskilling

in her field of work. It is more likely that she will have to resort to accepting ad hoc opportunities shadowing pharmacists unpaid or on minimum wage for up to 6 months, possibly without the benefit of reasonable adjustments being put in place to accommodate the effects of her disability. Once she has started to reskill herself and regain confidence, she will be on the first rung of a very tall ladder to get back to the position she was in before her demotion to band 5 from a band 7 position. Mr Pitt's view is that it is likely to take the claimant up to 3 years to return to her previous earning levels as a band 7 pharmacist.

39. In relation to the GPHC action, Mr Pitt's evidence, which we accept, is that the GPHC operate on a risk assessment basis. Generally, if someone is in an employed position, that is a positive. The regulator can close the case down if employment continues. If an individual is dismissed or leaves the employer, that changes the risk assessment so they may take measures to protect individuals and others.

40. Mr Haque gave evidence, giving his opinion as to whether the claimant could have successfully completed the training programme had the behavioural impact and action agreement not been imposed and then as to whether she could have worked safely with the adjustments recommended by Dr Suleman. Mr Haque has not sought the assistance of the National Autistic Society, as was previously recommended by the respondent's own occupational health advisor, in considering the reasonable adjustments which might have been made to enable the claimant to continue working.

Submissions

41. Mr Williams submitted, on behalf of the respondent, in summary, that there was a 20% chance of the claimant successfully completing the retraining by 1 November 2016. If she did successfully retrain, he submitted that, in all likelihood, because of an inability to put in place all the adjustments the claimant needed, she would have been dismissed no later than she was so all losses end at the date of dismissal. Alternatively, at the very least, the percentage chance should significantly reflect the chances that the claimant would not have continued in employment. If the respondent's primary case was not accepted, then the GPHC findings have an impact. The reference to the GPHC was before any discriminatory treatment. The respondent says that there was, at least, a prospect the claimant would have been suspended anyway. The respondent says this impacts on the percentage chance of continued employment and continued loss.

42. In relation to injury to feelings, Mr Williams submitted that an appropriate award would be in the middle to higher section of the middle band of *Vento*. This was not the most serious of cases which would justify the upper band.

43. Miss George submitted, on behalf of the claimant, in summary that this was a case of unlawful acts covering a long period of time. The claimant suffered injury to feelings over two years ending with dismissal and continuing after dismissal. The claimant, in her schedule of loss, sought compensation for injury to feelings of £42,000, in the top band of *Vento*.

44. In relation to financial loss, Miss George submitted that the claimant would have successfully completed the training programme by 1 November 2016, had the Behavioural Agreement not been in place. The claimant's primary argument was that she would have been back at a B7 and remained in employment as a B7 pharmacist had the respondent done what they were required to do. Alternatively, Miss George submitted that, at worst, the claimant would have been employed as a B5. Miss George submitted that Mr Haque was raising similar objections now to the prospects of the claimant remaining as a B7 pharmacist to those raised by him and Karen Adams to Dr Reiser and Dr Gidlow's advice, which leads to an inference that the respondent has not taken on board the need to show justification.

45. In relation to the GPHC, Miss George submitted that the respondent was asking the tribunal to conclude that, despite the GPHC's conclusion, even if the claimant had been back at work, the GPHC would have suspended the claimant. This was not how the GPHC operates.

The Law

46. Section 124(6) of the Equality Act 2010 provides that the amount of compensation which may be awarded for a breach of the Equality Act in relation to work is "the amount which could be awarded by a county court...under section 119". Section 119 provides that the county court has power to grant any remedy which could be granted by the High Court in proceedings in tort and section 119(4) provides: "an award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis)". The aim of damages in tort is to put the claimant in the position they would have been in, had the act of discrimination not occurred. Compensation (with the possible exception of exemplary damages which may be relevant in rare cases and is not in issue in this case) is to compensate for loss caused by the act of discrimination. There is no limit on compensation for discrimination.

47. In relation to compensation for injury to feeling, we have regard to the guidelines in *Vento v Chief Constable of West Yorkshire Police (no.2)* [2003] IRLR 102. We note, in particular, the guidance that awards are compensatory and not punitive. *Vento* sets out the bands that we must consider.

48. Presidential Guidance, issued by the President of the Employment Tribunals in England and Wales and the President of the Employment Tribunals in Scotland, on 5 September 2017, set out bands for compensation for injury to feelings, revised to take account of subsequent developments, in respect of claims presented on or after 11 September 2017. The Presidents have issued an addendum to that guidance for claims presented on or after 6 April 2018, but that does not apply in this case since the claim was presented before that date.

49. In accordance with the Presidential Guidance, the top band is normally £25,200 to £42,000. This is to be said for the most serious cases, such as where there is a lengthy campaign of discriminatory harassment. The middle band is £8,400 to £25,200, described as used for serious cases which do not merit an award in the highest band. The lower band is between £800 and £8,400. This is for less serious cases such as where the act of discrimination is an isolated or one-off occurrence.

50. Interest may be awarded on awards made in discrimination cases in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The interest rate for claims presented on or after 29 July 2013 is 8%.

Conclusions

51. We set out our conclusions in relation to the different heads of loss. The figures included in each section are the net figures. Because of the total amount to be awarded, the taxable element requires grossing up to arrive at the amount to be paid by the respondent. We deal with the grossing up calculation after setting out the constituent elements of the net award.

Unfair dismissal

52. The calculation of the basic award was agreed to be £5,134.50. The only amount claimed under the heading of the compensatory award was £500 for loss of statutory rights, which was agreed.

Disability discrimination

Injury to feelings

53. The claimant sought one global figure for injury to feelings for all the acts of discrimination which had been found. Mr Williams, for the respondent, submitted that it was open to the tribunal to adopt this approach, or to consider compensation for the acts individually, then taking a view as to whether the total amount arrived at was appropriate.

54. We decided to adopt the approach of awarding one sum for all the acts of discrimination found in our judgment on liability. In doing this, we are careful to avoid compensating the claimant for hurt suffered by other matters which were not found to be acts of unlawful discrimination.

55. In relation to the complaints of being required to take involuntary paid leave, we have found that the claimant suffered serious anxiety during the periods of involuntary leave. She was particularly concerned about “deskilling”. The claimant loved her job as a pharmacist and was worried that she would become de-skilled and prevented from working at that job. The claimant visited her GP because of stress on 26 November 2015, during the first period of involuntary paid leave, although we note that she had visited her GP on several occasions because of stress before this, for reasons not due to any of the acts found to be unlawful discrimination. Throughout the periods of involuntary leave, the claimant read her Bible and watched Trinity broadcasting network for several hours each morning to enable her to regain some calm.

56. In relation to the imposition of the behaviour impact and action agreement, we found that this caused the claimant further stress and anxiety. She felt she was being constantly picked on for behaviour which she regarded to be small things, causing

her anxiety as there was nothing she could do to change herself. She was particularly worried about potentially losing her job if she could not comply with this, and this caused her considerable worry about her financial situation.

57. The claimant's dismissal caused her further stress and anxiety. She was constantly worried about her ageing mother, who is now 83. Her mother lives in Cape Town and, after her dismissal, the claimant could not afford to visit her mother on holiday or take other holidays. The claimant became tired and exhausted, not having had any holidays since a week in October 2016. The claimant has a more limited social life during due to working weekends and evenings and due to reduced finances. The claimant had to rearrange her mortgage for a lower monthly mortgage payment over a longer time period. She also took in lodgers to help her finances.

58. The claimant has felt embarrassed and humiliated about her change in status and financial circumstances. This has been exacerbated by contact, when carrying out her current job as a carer, with people she previously met in a professional capacity as a pharmacist. As noted above, she has been managed by someone who was formerly in a lower grade job to her own at the hospital.

59. We must consider the hurt to the claimant because of the acts of discrimination. We are not concerned with punishing the respondent. We conclude that the claimant has suffered serious injury to her feelings over a lengthy period of time due to the acts of discrimination which we upheld. We do not consider this to be amongst the most serious of cases which would merit an award in the upper *Vento* band, but consider it merits an award at the top of the middle *Vento* band.

60. Since the claim was presented on 6 February 2018, the applicable bands of compensation are those identified in the Presidents' Guidance issued in September 2017. The top of the middle band is £25,200 and we award compensation for injury to feelings of this amount.

61. We consider it appropriate to award interest on this sum in the usual way, at 8% per annum. Interest on awards for injury to feelings is normally calculated from the date of the act of discrimination. Here, we are compensating for a number of acts of discrimination which took place over a range of dates. The first act began on 26 October 2015 and the last act was the dismissal which took effect on 27 October 2017. We consider it appropriate to take a point roughly half way between these dates, and use the date of 10 December 2016, so 3 years' interest is awarded on the compensation for injury to feelings. The calculation, as shown in the Schedule, arrives at a sum of £6048 for interest.

Financial loss relating to the failure to make reasonable adjustments in relation to the behaviour impact and action agreement

62. The claimant began the retraining period on 12 October 2015. The behaviour agreement was not imposed at this time, but she was being spoken to about her behaviour within a few days of her return (including about what she was wearing) and she was alleged to have made dispensing errors and errors on logs (see paragraphs 81-82 of the reasons for our liability judgment). The claimant was then placed on the first period of involuntary paid leave beginning 26 October 2015.

Elizabeth Street made a reference to Occupational Health, expressing concern to the claimant that she was feeling stressed and anxious about the “back to work” training plan and that this stress and anxiety may precipitate her making further errors. We consider that being criticised for behavioural matters almost as soon as she had returned to work is likely to have exacerbated any anxiety the claimant would have had about the retraining programme and made her more liable to make mistakes. The behaviour agreement was not in place at this time so this period is not one to which our finding of a failure to make reasonable adjustments applies. However, what happened at this time is evidence which supports a conclusion that, if the reasonable adjustments identified at paragraphs 271 and 272 of our reasons on liability had been made during the relevant period, and the claimant not subjected to requirements of the behaviour agreement and criticism for issues arising, in particular, from a misunderstanding of behavioural norms, the claimant was more likely to have been able to successfully complete the retraining programme.

63. The claimant returned to work on the retraining programme on 15 February 2016, the behaviour agreement having been initiated in January 2016 by Elizabeth Street. The claimant was on annual leave between 2 March and 11 April 2016.

64. As early as 22 February 2016, the claimant was being criticised for reading a book in reception during quiet times and standing too close/leaning over members of staff when shadowing them (see paragraph 116 of the reasons on liability).

65. Mr Haque provided the disciplinary panel with a report about errors on logs on 22 June 2016, also writing that there had been numerous examples of the claimant not sticking to her behaviour agreement. (See paragraph 129 of the reasons on liability). The disciplinary panel was reconvened because the panel understood, from reports from Mr Haque, that the claimant was not progressing as expected and because of alleged breaches of the behavioural agreement (see paragraph 136 of the reasons on liability).

66. The claimant was placed on the second period of involuntary paid leave beginning on 4 July 2016.

67. The claimant had only been at work, subject to the behaviour agreement, for the period 14 February to 1 March and 12 April to 3 July 2016, before being placed on involuntary paid leave. During this time, she had been criticised for various behavioural issues.

68. We have to calculate damages to try to put the claimant back in the position she would have been in, had the act of discrimination not occurred; in this part of our decision, the failure to make reasonable adjustments in relation to the PCP of requiring the claimant to be bound by the behaviour impact and action agreement. We have to decide what would have happened if the claimant had not been subjected to this agreement and not criticised for minor errors and for issues arising from her disability and, in particular, from a misunderstanding of behavioural norms, where her behaviour did not impact on the quality of her work and patient safety.

69. The claimant argues that, if these adjustments had been made, she would have successfully completed the retraining programme by 1 November 2016 and gone

back to a Band 7 pharmacist role (having been demoted to Band 5). The respondent argued that there was only a 20% chance that she would have done so.

70. Matters we take into account in assessing the % chance that the claimant would have successfully completed the retraining programme by 1 November 2016 include the following.

70.1. The claimant had previously successfully completed the pre-registration programme, on which this was based, at Barts. Although there may have been some changes since she did that programme, we consider this demonstrates that the claimant was capable of successfully passing the retraining programme.

70.2. The claimant had worked as a pharmacist in other hospitals for years, without any problems we are aware of and certainly without any problems significant enough to be drawn to the attention of the GPHC.

70.3. During her employment with the respondent, there had been a period of more than 2 years without incident.

70.4. The claimant had worked hard on her CPD during her absences, so retained her level of technical knowledge.

70.5. A number of doctors testified to her skills in the course of the respondent's internal proceedings.

70.6. Having to comply with behavioural standards, particularly at a time before the claimant had received the diagnosis of Asperger's Syndrome and started to gain better insight into potential issues due to this condition, was difficult for the claimant and caused her stress, making her more likely to commit other errors which could cause her to fail the retraining programme.

71. We consider there is a chance that the claimant would not have successfully completed the retraining programme but for the unlawful discrimination. However, we conclude that it is much more likely than not that, without the unlawful discrimination, she would have been successful in the retraining. Doing the best we can, in what is, inevitably, a highly speculative process, we conclude that there was an 80% chance that the claimant would have successfully completed the retraining programme and returned to a Band 7 pharmacist role by 1 November 2016 if reasonable adjustments had been made.

72. We conclude that the claimant should, therefore, be compensated for 80% of the difference in pay between Band 5 and Band 7 in the period 1 November 2016 to her dismissal on 26 October 2017. The parties agreed that the difference in pay between the two bands for this period was £6,658. 80% of this is £5326.40. We award interest on this at 8% for the period from the midpoint of 30 April 2017 to the calculation date of 10 December 2019, giving a figure of £11111.39 interest.

Financial loss relating to discriminatory dismissal

73. The claimant seeks compensation for past loss of wages and a further three years' future loss from the date of calculation.

74. We have to assess what would have happened if the claimant had not been unlawfully dismissed. The claimant argues that she would have remained in employment with the respondent. The respondent argues that, if the claimant did successfully retrain, in all likelihood, because of an inability to put in place all the adjustments the claimant needed, she would have been dismissed no later than she was and all losses end at the date of dismissal.

75. It is agreed that the claimant has taken reasonable steps to mitigate her loss.

76. In assessing the chances that the claimant would have remained in employment with the respondent beyond the discriminatory dismissal to at least the point of three years from the calculation date for which the claimant claims financial loss, we take into account all the factors to which we referred when assessing the chances that the claimant would have successfully completed the retraining programme. Additional factors we take into account include the following:

76.1. The medical evidence is that the claimant is fit to practice as a pharmacist if reasonable adjustments are made.

76.2. The GPHC have decided that the claimant is fit to practice as a pharmacist if reasonable adjustments are made. Their decision relates to working as a pharmacist generally. There are no restrictions on the environments in which the claimant may practice as a pharmacist.

76.3. The claimant had, prior to joining the respondent, worked for years in hospitals as a pharmacist without any difficulties of which we are aware and certainly without any difficulties serious enough to have been brought to the attention of the GPHC. We do not consider there is any reason to believe that the role with the respondent or the working environment at the respondent's hospital are so different to the claimant's previous roles and work environments that the claimant is less likely to be able to work successfully as a Band 7 pharmacist with the respondent, than at other hospitals where she has worked.

76.4. The difficulties which arose during her employment with the respondent were at a time when the claimant's disability had not been identified. Identification of the disability has, as Dr Suleman noted, been an eye-opener for the claimant. She has gained much more insight into her behaviour and possible issues which may arise related to her disability. Dr Suleman noted that the claimant is now making efforts to improve her communication, her team working skills and time management and an example of that is that she has not had any communication difficulties in her current job as a support worker. The claimant, following her diagnosis, is in a much better position to avoid the behavioural issues which arose when working for the respondent and to communicate more effectively with other staff.

76.5. The respondent would be making reasonable adjustments. We note Mr Haque's opinion as to whether reasonable adjustments referred to in medical reports would have been possible in relation to the claimant's particular post. However, we note that Mr Haque had not sought assistance from the National Autistic Society in considering what adjustments might be made in the particular workplace, which had been a recommendation of the respondent's own Occupational Health advisor (see paragraph 166 of the reasons on liability). As noted in our decision on liability (paragraph 166), the respondent's Occupational Health Advisor, who can be expected to have knowledge of the particular work environment and job of the claimant, had expressed the view that the claimant was fit to undertake the role of Clinical Pharmacist with reasonable adjustments.

77. We conclude that Mr Haque's pessimistic view of the prospects of the claimant being able to continue in her role successfully with reasonable adjustments is outweighed by the other evidence. We conclude that, with reasonable adjustments and the insight into her disability, the claimant would have remained in employment with the respondent for at least the period for which financial loss is sought. This is dependent on the claimant having successfully completed the retraining period, the chances of which we assessed at 80%. Had the claimant not successfully completed the retraining programme, we conclude she would have been dismissed by no later than the date she was dismissed. Financial loss relating to the discriminatory dismissal should, therefore, be calculated on the basis of 80% of loss suffered but there is no additional factor to be applied.

78. We conclude that, had the respondent not committed the acts of discrimination found to have occurred, the claimant would have remained in employment with the respondent and the GPHC would not have suspended her from practice. We accept the evidence of Mr Pitt about the GPHC working on a risk assessment basis. The claimant was not suspended from practice, under an interim order, until 8 September 2017, by which time she was under notice of termination from the respondent and the respondent had notified the GPHC of their decision to dismiss. Had the claimant remained in employment, we conclude that the GPHC would have felt no need to subject her to an interim suspension order. We do not, therefore, need to reduce compensation because of any chance that the claimant would not have been able to practice because of suspension by the GPHC, if the respondent had not unlawfully discriminated against her.

79. We conclude that the claimant would not have left her job with the respondent of her own accord during the period for which loss is claimed. The claimant likes routine. She liked her job and the area. She had bought a house to which she hoped to move her mother from South Africa.

80. We accepted the evidence of Mr Pitt as to the difficulties facing the claimant in getting back to work as a Band 7 pharmacist. We conclude that it is likely to take the claimant 3 years from the time the GPHC lifted the suspension, on 30 August 2019, to get back to the same level of earnings. We calculate financial loss on the basis of loss of earnings from dismissal until 30 August 2022, taking account of income from alternative employment as a carer to date, and estimating future earnings in

mitigation at the same level. This is, by necessity, a rough and ready estimate of loss. There will be times when the claimant may have to take unpaid work experience. There may be times when she will be able to earn at a level higher than the National Minimum Wage e.g. in a Band 5 role. We consider that an assessment on this basis gives a fair estimate of the claimant's loss.

81. The figures for earnings with the respondent and earnings in alternative employment were agreed by the parties. The approach to pension loss put forward by the claimant was also agreed, doing this in accordance with the contributions method.

82. The calculation of loss, using the agreed figures and applying the decisions we have made, is set out in the Schedule to these reasons.

83. Interest at 8% is calculated on past loss of earnings.

84. Compensation for pension contributions is regarded as future loss, so no interest is awarded on compensation for pension contributions relating to the period prior to the date of calculation as well as to the future.

Grossing up

85. The grand total of unfair dismissal and disability discrimination awards is a net sum of £140,113.40.

86. The award, save for £30,000, is taxable. The taxable element of the award must, therefore, be grossed up to enable us to arrive at a figure which, after deduction of tax, will give the claimant the compensation we have calculated on a net basis. The claimant has other taxable income for the tax year 2019/2020 in which the award should be paid. We have estimated that the claimant will continue to earn at the same rate for the rest of the tax year as she has been so far. Because the claimant has other taxable income, we have done the grossing up using a *Finlay* table. The method for this type of calculation is set out in Appendix 3 to the Employment Tribunals Principles for Calculating Pension Loss. The calculation is as follows.

	Other Income			Taxable Tribunal Award		
	Gross	Tax	Net	Gross	Tax	Net
PA (0%) to 12,500	12500	0	12500	0	0	0
BR (20%) the next 37,500	990	198	792	36510	7302	29208
HR (40%) up to 100,000	0	0	0	50000	20000	30000
NR (60%) from 100,001 to 125,000	0	0	0	25000	15000	10000

HR (40%) 125,001 to 150,000	0	0	0	25000	10000	15000
AR (45%) 150,001 upwards	0	0	0	47100	21195	25905
TOTALS	13490.15	198.03	13292.12	183610	73497*	110113
*Amount to be added to taxable and non-taxable awards is £73497						

Grand total of award before grossing up - £140,113 of which £30,000 is tax free, so £110,113 is taxable.

Add £73497 to award for discrimination.

Unfair dismissal award:

Basic award - £5134.50

Compensatory award - £500

Total for unfair dismissal - £5634.50

Discrimination award:

Total before grossing up: 134478.90

Add £73497

Total after grossing up: £207,975.90

Employment Judge Slater

Date: 18 December 2019

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

20 December 2019

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2404031/2018**

Name of case: **X** v **East Cheshire NHS Trust**

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

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

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

"the relevant decision day" is: **20 December 2019**

"the calculation day" is: **21 December 2019**

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

For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

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

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

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

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

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

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

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

Schedule – Calculation of loss**Unfair dismissal**

BA	5134.5	
Compensatory award		
Loss of statutory rights	500	
Total unfair dismissal award		5634.5

Disability discrimination

Injury to feelings		25200
Interest 8% for 3 years		6048

Financial loss**Loss of earnings relating to failure to make reasonable adjustments - BIA**

1.11.16-26.10.17		
80% of 6658		5326.4
Interest 8% from 30 April 2017 to 10 Dec 2019 - 952 days (952/365 x 8/100 x 5326.40)		1111.39

Loss of earnings from the date of dismissal to 10.12.19

27.10-5.4.18	13524	
6.5.18-7.8.18	10540	

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8.8.18-5.4.19		21449	
6.4.19 - 31.7.19	119 days @£90 per day	10710	
Total before mitigation		56223	
Less earnings and JSA in that period		22562.16	
Total after mitigation		33660.84	
80% of total			26928.67
Expenses			19
Total past financial loss from dismissal after mitigation			26947.67
Interest at 8% on 26947.67 from 18.11.18 - 388 days			2291.66
Future loss of wages			
10.12.19 - 10.8.22 - 32 months			
4 months @ 2766	11064		
28 months @ 2807	78596		
	89660		
Less estimated income			
32 months @ 1074	34368		
	55292		
80% of total			44233.6
Pension loss			
Pension loss in period 1.11.16 - 26.10.17			

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1.11.16-5.4.17	628.27		
6.4.17-7.8.17	504.15		
8.8.17-26.10.17	368.22		
Total		1500.64	
Pension loss from date of dismissal to 10.12.19			
27.10.17-5.4.18	2564.73		
6.4.18-7.8.18	2103.04		
8.8.18-5.4.19	4087.36		
6.4.19-31.7.19 (115 days @£17.24 p.d.)	1982.6		
Total		10737.73	
Pension loss from 10.12.19 - 10.8.22			
10.12.19 - 10.8.22 - 32 months			
11.12.19-5.4.20	1999.84		
6.4.20 - 10.8.22 (2.33 years x 6400 p.a.)	14912		
Total		16911.84	
Total pension loss		29150.21	
80% of total pension loss			23320.17
Total discrimination award			134478.9
Grand total			
Unfair dismissal			5634.5

RESERVED JUDGMENT

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Discrimination

134478.9

Total

140113.4