EMPLOYMENT TRIBUNALS

Claimant: Mr E Osifo

Respondent: British Gas Trading Limited

Heard at: Manchester **On:** 18 October 2018
In Chambers 4 July 2019
In Chambers 28 February 2020

Before: Employment Judge Holmes
Mr J Ostrowski
Mr T A Henry

REPRESENTATION:

Claimant: Ms A Niaz-Dickinson of Counsel
Respondent: Mr B Gray of Counsel

RESERVED JUDGMENT ON REMEDY

It is the unanimous judgment of the Tribunal that the claimant is entitled to the following awards by way of remedy:

1. In respect of unfair dismissal the Tribunal makes awards, by consent, as follows:

Basic Award	**£2,634.80**
Compensatory Award	
Loss of statutory rights	**£500.00**

The recoupment regulations do not apply.

2. In relation to disability discrimination the Tribunal makes the following awards:

   (a) Injury to feelings – the Tribunal awards the claimant the sum of **£20,823.53** by way of award for injury to feelings.

(b) Interest on the said award, from 5 August 2016 to the date that the same was paid, 23 November 2018, in the sum of **£3,833.81**.

(c) Loss of earnings – the Tribunal awards the claimant loss of earnings from the date of his dismissal on 5 August 2016 to 13 May 2019, calculated as follows:

First period :		
Total:	£30,576.99	
less benefits received	£6,871.40	
less notice pay received	£2,218.02	
Net sum	**£21,487.97**	
Period 2:		
Total:	**£ 7,446.21**	
Sub – Total:	**£28,933.78**	
Less excess earned in mitigation	£ 1,556.97.	
Total sum		**£27,376.81**

(d) Interest:

Period : 5 August 2016 to 13 May 2019 - 1011 days, mid – point 505 days.

£27,376.81 x 8% x 505 days @ £6.00 per day **£3,030.20**

3. The claimant's application to amend his claims to add a claim for compensation for the period during which he was in receipt of sick pay prior to his dismissal is dismissed.

REASONS

1. By a Judgment sent to the parties on 24 October 2017, the Tribunal found that the claimant had been unfairly dismissed and that his claims of disability discrimination were well-founded, entitling him to remedies. Following the promulgation of the liability Judgment the parties were afforded a period of time in which to seek to agree remedy, but they have been unable to do so, and consequently a remedy hearing was convened to determine those matters that remain in issue. The claimant was again represented by Ms Niaz-Dickinson of counsel, and the respondent on this occasion was represented by Mr Gray of counsel. The claimant made a further witness statement in support of his claims, and the parties agreed a bundle for use in the remedy hearing which was before the Tribunal.

2. At the outset counsel were able to inform the Tribunal that a number of matters had been agreed, namely that the claimant's entitlement to a basic award was agreed in the sum of £2,634.80, his gross weekly pay pre - dismissal being £376.40. This equates to a gross annual salary of £19,572.80. The parties also agreed that as part of the compensatory award the claimant was entitled to an award in respect of loss of statutory rights in the sum of £500. In terms of the issues between the parties, they were:

a)The period in respect of which the Tribunal should award the claimant compensation for loss of earnings, the claimant seeking an award to date (i.e the date of the remedy hearing on 18 October 2018) , and thereafter through to May 2019 following the anticipated termination of his temporary employment , which was due to end on 1 February 2019.

b)There was also an issue as to whether the claimant had unreasonably failed to mitigate his loss , so as to require the Tribunal to limit any award for loss of earnings to a shorter period following the termination of his employment by the respondent, and subsequently after the loss of the claimant's employment in November 2018 .

c)Further, the appropriate award for injury to feelings was in dispute, it being common ground between counsel that the claimant's claims lay within the middle band of the Vento guidelines, but the claimant contending for an award towards to the upper part of that band, and the respondent contending for the lower end of that band.

3. Those were, broadly, the issues for the Tribunal to determine. The Tribunal reserved its judgment. The Tribunal reached a decision, and was about to promulgate its judgment when the claimant, on 22 October 2018 , notified the Tribunal that his current employment, which he had secured in May 2018, and was not due to end until February 2019 , was in fact being prematurely terminated on 30 November 2018. He confirmed this by a further email on 24 October 2018, attaching a letter dated 23 October 2018 from Pearson VUE ending his employment on 30 November 2018. As this was a major issue in the remedy hearing, and the Tribunal had taken this employment into account in determining what award to make in respect of loss of earnings, this clearly could affect the Tribunal's judgment.

4. Accordingly, by letter of 8 November 2018 , the parties were invited to make further submissions, or seek a further hearing for the Tribunal to consider how this information may affect the Tribunal's award. The respondent replied on 10 December 2018 to the effect that it did not seek a further hearing, but would make further written submissions upon further disclosure from the claimant as to his attempts to find alternative employment after the loss of this current job at the end of November. In the meantime , payment to the claimant of the injury to feelings award, loss of statutory rights, and basic award was confirmed, for which the Tribunal thanks and commends the respondent.

5. Whilst the claimant did correspond with the Tribunal , he did not expressly say whether he wanted a further hearing, but the implication of his communications was that he did not.

6. By letter of 9 January 2019 the Employment Judge proposed to the parties that the remedy hearing be re-listed after 1 February 2019, the date upon which the claimant's employment was originally due to have terminated. He sought further information from the claimant as to his job search, and afforded the parties an opportunity to make further written representations by 18 February 2019.

7. On 4 February 2019 the claimant wrote to the Tribunal, copying the respondent, informing it and the respondent that he had not been able to obtain further employment since 30 November 2018, but had been able to obtain accommodation. He had not made any job applications between 24 December 2018 and 1 January 2019 as his phone was broken. He got a new phone on 8 January 2019, and internet access from 16 January 2019. He attached details of his job search, running to 227 pages. This too was copied to the respondent.

8. The respondent apparently (for it was not copied to the Tribunal) made a request of the claimant for further information about his search for employment following the loss of his job on 30 November 2018, and following his disclosure on 4 February 2019. The claimant replied to that by email of 8 February 2019, which was copied to the Tribunal, from which the Tribunal can discern what the respondent had requested.

9. The claimant provided further information to the respondent, and copied it to the Tribunal , by email of 14 February 2019. The respondent made further written submissions on remedy on 18 February 2019. To those submissions were attached three annexes, one of which "C" was an email from the claimant dated 6 December 2018 in which he gave a detailed explanation of his attempt to attend an interview for a job on 29 November 2018, which he did not attend, and did not try to re-arrange. The claimant did ask by email of 18 February 2019 whether he could make further representations. That email, however, was not replied to by the Tribunal, and appears not to have been specifically referred to the Employment Judge. In the respondent's further submissions it argued that the claimant had further failed to mitigate his loss in respect of the period post 30 November 2018.

10. On 9 May 2019 the claimant notified the Tribunal, and the respondent that he had accepted an offer of permanent employment with Pearson VUE from 13 May 2019 at a salary of £24,000 per annum. No further communication from the respondent had been received since that communication.

11. Neither party sought a further oral hearing. The Tribunal, unfortunately could not reconvene in chambers until 4 July 2019, when the Tribunal deliberated further. Unfortunately, the Tribunal did not have any response from the claimant to the respondent's further submissions of 18 February 2019 that he had unreasonably failed to mitigate his loss in the period from November 2018 to May 2019.

12. The Tribunal accordingly considered it could not conclude its deliberations on remedy without having the claimant's response to these further submissions. It accordingly wrote to the parties on 9 July 2019 in these terms:

"The Tribunal convened in chambers to resume its deliberations on remedy. The Tribunal noted the correspondence since the hearing on 18 October 2018. In particular it was noted that the claimant sent an email to the Tribunal (copied to the

respondent) informing it that he had secured permanent employment from 13 May 2019.

It was also noted that the respondent had filed its submission on 18 February 2019, copied to the claimant. He had sent an email to the Tribunal on 18 February 2019, asking if he could respond to the respondent's submissions, as he considered there were incorrect assertions being made. The Tribunal did not respond to that email, which may be the fault of the Employment Judge, though it is unclear if it was specifically referred to him. The claimant, in any event, did not follow it up, and hence has not filed any further submissions or evidence.

The Tribunal notes that there is now a new, and separate, argument as to whether the claimant has unreasonably failed to mitigate his loss during the period from 30 November 2018 to 13 May 2019. He has disclosed some 227 pages of documents detailing his job search, but the respondent has suggested that he has not "cast his net" widely enough, and has failed to apply for jobs more readily in his range of skills and experience. The Tribunal considers that the claimant must be given an opportunity to comment upon this, as he has asked to, either in written submissions, or in a witness statement. Indeed, a further oral hearing may be necessary, if either party considers one is necessary.

In the course of the Tribunal's discussions, and an examination of the evidence before it in the bundle and subsequent documents, it was noted that whilst the claimant's schedule of loss includes a global figure for "recoupment" of benefits, there appears to be no supporting documentation in the bundle. When the Tribunal makes an award for loss of earnings under the discrimination jurisdiction, recoupment does not apply, but any sums received by way of benefits are deducted from the loss of earnings calculation. The Tribunal needs the details of these payments and the periods to which they relate, in respect of the initial period of loss, i.e that up to 11 June 2018.

Further, whilst the claimant has not said so, it is presumed that, following the termination of his employment with Pearson VUE on 30 November 2018, he will once again have been eligible to claim benefits. Again the Tribunal will need details of all benefits received in the period from 30 November 2018 to 13 May 2019.

As it is likely that the claimant will have had to satisfy the Benefits Agency that he was actively looking for work, and would have had to record his attempts to find work, there may well be documents (he may need to obtain copies from the Benefits Agency) which record what steps he took to find work in this period.

The Tribunal has therefore reluctantly decided that , before it can finalise its judgment in this matter, the claimant must be given an opportunity to respond to the respondent's further contentions that he unreasonably failed to mitigate his loss in the period 30 November 2018 to 13 May 2019. It is not his fault that his email raising this query was not responded to. The Tribunal in any event needs more information on benefits received in both periods before it can make a final judgment.

By way of further preparation for the next stage, the Tribunal also seeks comment upon matters of calculation.

At present, subject to deduction of benefits, the Tribunal is minded to award loss of earnings at the agreed weekly net rate of £316.86 for the period from 5 August 2016 to 11 June 2018 , a period of 96.5 weeks, a total of £30,576.99 , less benefits received (probably a total of £6,871.40) a net sum of £23,705.59. It would assist if the parties could agree, or otherwise, this as a calculation.

In relation to any excess by way of earnings in the post with Pearson VUE between 11 June 2018 and 30 November 2018 over the claimant's earnings had he stayed employed by the respondent, the Tribunal noted that the weekly net amount of this excess was said to be £63.55 . If that is correct, as the employment lasted 24.5 weeks, the total excess the Tribunal calculates is 24.5 x £63.55 = £1,556.97. Again, it would assist if , as a matter of calculation, the parties could indicate their agreement or otherwise.

In terms of what may be regarded as the period most at issue now, i.e that from 30 November 2018 to 13 May 2019, that is a period of 23.5 weeks. The Tribunal calculates the loss of earnings over that period will accordingly be 23.5 x £316.86 = £7,446.21. Again, that will be subject to deduction for any relevant benefits received in that period. Agreement, or comment upon, this figure would be of assistance.

13. The claimant replied by email of 2 August 2019 . In that email he specifically responded to the respondent's contentions in relation to the period from November 2018 to May 2019. The respondent replied by email of 8 August 2019.

14. By email of 7 September 2019 the claimant , whilst seeking an extension of time for responding to the Tribunal, also made an application, in effect to amend, as this had not previously formed any part of his schedules of loss , his claims to seek compensation for the period of 18 weeks during which he was on sick pay , at half pay.

15. The respondent responded by letter of 7 October 2019 , in which it largely addressed the claimant's application to amend his claims to include a claim for loss of earnings when in receipt of sick pay.

16. The parties were able to agree the calculations that the Tribunal invited them to do in its letter of 9 July 2019.

17. The respondent responded to the amendment application by email of 7 October 2017. It objected to this attempt to add this head of claim. Its arguments are really addressed to the merits of such a claim, which is resisted on the findings of the Tribunal.

Final Determination of Remedy

18. The Tribunal was finally able to reconvene in Chambers on 28 February 2020 to conclude its deliberations. The Tribunal apologises for the delay in finalising remedy, occasioned by a combination of the change in the claimant's circumstances, the need for further submissions , and a further hearing in Chambers, and the difficulty in re-convening the Panel, one of whom has since retired. Thereafter the limitations of access to judicial premises and resources, by reason of the Covid – 19

pandemic, have further delayed the promulgation of this judgment. The Employment Judge apologises for this delay , and thanks the parties for the considerable patience they have shown in this matter.

19. The position therefore, as at the final deliberations meeting on 28 February 2020 was as follows. The parties had agreed certain figures, which they did as follows:

Weekly rate of net loss of earnings: £316.86

The period from 5 August 2016 to 11 June 2018 : 96.5 weeks

Excess by way of earnings in the post with Pearson VUE between 11 June 2018 and 30 November 2018 over the claimant's earnings had he stayed employed by the respondent, weekly amount : £63.55 . 24.5 weeks of employment the total excess is 24.5 x £63.55 = £1,556.97.

30 November 2018 to 13 May 2019, period of 23.5 weeks x £316.86 = £7,446.21.

20. The issues that remained to be determined therefore were in relation to the claimant's claims for loss of earnings, which, whilst previously were potentially to be cut off at November 2018, when he obtained employment at a higher rate of pay, but have now increased so that he seeks loss of earnings continuing past that date, up to May 2019, at which point he regained employment with Pearson VUE, in what is expected to be permanent role. Having heard the evidence of the claimant, considered the documents in the bundle, the submissions of counsel, the further documents and submissions received, the Tribunal unanimously finds the following facts (references to page numbers are, unless otherwise stated, to the remedy bundle).

20.1 The claimant commenced his employment with the respondent in April 2009. He was initially recruited as a Customer Service Adviser, a role that involved considerable telephony activity, and also a familiarity with and use of a computer system. During his employment with the respondent the claimant increased his IT skills, and he took a software testing qualification with the respondent in order to progress his career.

20.2 The claimant's physical disabilities were hyperacusis and tinnitus, additionally he suffered from depression. The former conditions impacted severely upon the claimant's hearing, with the effect being that he would often hear loud sounds in a manner that presented as very painful for him, and the tinnitus would cause pain and noise in his ears. He would wear earplugs, or headphones in his ears to reduce the effects of his conditions. For his hearing conditions, part of his treatment was the use of headphones to play an app which alleviated his symptoms. Earplugs would be used to block out noise that may potentially aggravate the claimant's conditions. Consequently on occasion the claimant may have appeared to have been listening to music or to be unable to hear because of how he presented to members of the public or potential employers.

20.3 The claimant was paid notice pay upon his dismissal, and after his dismissal he began to make enquiries in relation to finding alternative employment. At this

time, however, unfortunately he was homeless having previously resided with his mother at the address in Hazelhurst Walk, Manchester, M23, but from which he was effectively ejected by his mother shortly before his employment came to an end. This was, he explained, because he had by that time, by reason of his sickness absence, been receiving only half pay, and as he was not able to contribute to the household income, he was required to leave that address. Consequently at the time of his dismissal and for some time thereafter the claimant has been effectively homeless, and has been, as it was termed "sofa-surfing" with no permanent residence of his own.

20.4 He has continued to use the Hazelhurst Walk address as his correspondence address, and has been able to visit that property, as he still sees members of his family there, but he no longer can reside there.

20.5 As a result the claimant has sought assistance from a number of organisations including Shelter, The Shaw Trust, Motiv8, Work Choice Self-Employment, Pathways CIC, and has regularly visited the Jobcentre. He has been in receipt of Jobseeker's Allowance ("JSA") since about October 2016. He has been able to maintain his entitlement to receive JSA, and in the process of claiming JSA has had to satisfy the Benefits Agency that he has been actively looking for work, and has had to complete the usual documentation setting out what efforts he had made to obtain work.

20.6 The Jobcentre did provide Job Coaches for the claimant, but he has subsequently sought the assistance of a further Job Coach through Shelter. Initially the claimant attended the Jobcentre weekly, but with the agreement of the Benefits Agency this was increased to fortnightly visits.

20.7 The claimant had a mobile phone, which was the only form of technology and communication device that he had at the time. He was highly dependent upon his mobile phone onto which he loaded apps, including an app from Reed Employment, by which he was notified of, and could search for, suitable job vacancies. He put into the search application job criteria which he considered best matched his skills and experience, which were IT based. He did not select potential employment opportunities based on salary, but on the type of job that he considered he was suitable and qualified for. Examples of such applications are contained in the bundle from page 97 onwards, and whilst some of these positions have starting salaries of £17,000 or £18,000, some start at £25,000 or above, but the claimant did not limit his job search to posts with a salary commensurate with his pre dismissal earnings and did, he accepts, look at posts which in fact paid better. His focus, however, was not upon the salary but upon the job role.

20.8 In relation to other non IT related jobs, the claimant did make some applications, but was told that he was over qualified. He therefore continued to make applications and to seek jobs within the IT field.

20.9 Further, the claimant did consider , and made efforts to set up, his own business and operate on a self-employed basis. He prepared a document offering his services as an IT Consultant (see page 93 of the bundle). He took advice on becoming self-employed from a Work Choice self-employment

adviser. He was told, however, that he could not work from home if he did not have a home to work from, and this was an obstacle to the claimant becoming self-employed at that time. Consequently he continued to seek full time employment.

20.10 The claimant experienced some difficulties because of his homelessness, and lack of income, in maintaining his mobile phone charge. His phone was also needed for other applications such as his treatment for his ear conditions, and consequently he was concerned to use battery life for that purpose predominantly , and to then use his phone for job searches after that application had been prioritised.

20.11 His health during this period was not good, and on 23 August 2016 he was seen in the Mental Health Clinic (see page 531 of the bundle). He saw his GP again on 8 September 2016, 23 September 2016, 6 October 2016, 9 November 2016, and 15 November 2016 . He was referred to the Manchester Mental Health Clinic.

20.12 The claimant had previously undergone CBT counselling, which he had been able to pay for privately whilst still employed. He had to forego this upon losing his employment, and consequently was dependent again on the National Health Service for counselling. He subsequently did manage to resume counselling, which assisted with his condition of depression.

20.13 The claimant continued to make applications for IT sector jobs, but was unsuccessful. The claimant accepts that there were occasions upon which his job search activity may have reduced, but this would be due to his homelessness, lack of battery charge, lack of funds, and his medical conditions. The claimant continued to receive treatment for his ear conditions, and in or about late 2017, noticed an improvement in them. At this time the claimant felt able to widen the scope of his job search, as his hearing was now less impaired and he felt able to cope with using the telephone, which had been a major issue for him both whilst still employed by the respondent and in the aftermath of his dismissal. The ability to use a telephone directly to his ear enabled the claimant to widen his job search, which he did in or about March 2018. Following that job search the claimant successfully obtained employment with Pearson VUE, a post that the claimant was offered on 23 May 2018 and which he took up on 11 June 2018. The offer letter is at pages 94-95 of the bundle.

20.14 The claimant was also at this time offered an interview for a post with Haven Systems Limited , as a Junior IT EPOS Field Engineer (page 339 of the bundle). That interview was to be on 23 May 2018, the same day the claimant received his offer of employment from VUE. He cancelled that interview.

20.15 The VUE position was a temporary maternity cover position, and the claimant's gross salary was £24,100 per annum. This was a fixed term contract which would end on 1 February 2019. The claimant discussed with his employers what the position would be in February 2019, when it was anticipated that the postholder whose maternity leave the claimant was covering would indeed return. The claimant explored with HR the possibility of remaining in employment, but it was indicated that this is most unlikely. He explained how the

company had a relatively low turnover of staff and that the other members of his department had been there for a number of years. The postholder was one of the best performing employees and was likely to return, and would be most welcome to return. The staffing levels in this company are generous, and the claimant did not therefore anticipate that if the postholder returned as expected there would be any prospect of his being retained in that, or any other similar position.

20.16 The claimant anticipated at that time that it would thereafter take a further three months for him to obtain further employment after February 2019, which he would continue to seek in the IT or similar fields , or in a similar role to that where he was then currently employed as a VSS Level 1 Consultant.

20.17 The claimant did not apply for other posts whilst employed with VUE. He did not think it was fair to do so, would need time off for any interview, and considered it may jeopardise his employment with VUE if they were aware he was looking for another job whilst still employed by them.

20.18 Because of his lack of financial means, the claimant was the subject of legal proceedings and a County Court judgment was entered against him. The claimant has received some financial support from his sister , and some £11,000 or so has indeed passed through his bank accounts. Not all of that, however, has been utilised by the claimant, but the claimant's sister has used the facility of the claimant’s credit cards, which have thereby been maintained, to purchase goods and then pay for them by paying the credit card , using funds paid into and then out of the claimant’s bank account. The claimant therefore does not accept that he has received support from his sister to the tune of some £11,000 since his unemployment began, but does accept that he has received some assistance from her , and that not all of the payments in his bank accounts can be accounted for in this way. He has, as he set out in his witness statement, borrowed money thus from his sister , and indeed from others.

20.19 Being unemployed, having a CCJ against him, and being homeless impacted upon the claimant's ability to find alternative employment. His ability to find alternative accommodation was also compromised by this unfortunate combination of events, which clearly exacerbated the consequences of his dismissal.

20.20 During the period from 10 August 2016 to 30 May 2018 the claimant received Jobseekers Allowance at the rate of £73.10 per week, a total of £6,871.40.

20.21 Since the hearing on 18 October 2018, however, on 30 November 2018, the claimant’s employment with Pearson VUE ended prematurely, which he communicated to the Tribunal by an email of 22 October 2018. This is confirmed by a letter dated 23 October 2018 from Pearson VUE , which the claimant sent to the Tribunal, and has been copied to the respondent.

20.22 On 28 November 2018 the respondent paid the claimant the sum of £23,958.33, representing the Tribunal’s indicated awards for the basic award, loss of statutory rights, and injury to feelings.

20.23 In terms of the claimant's attempts to secure further employment since he became aware of the loss of his employment with Pearson VUE on 30 November 2018, he has submitted to the Tribunal and the respondent documentation demonstrating his job applications. These run to some 227 pages.

20.24 The claimant applied for 144 posts in this period. He was offered interviews or assessments in the case of five of them:

Trainee Quality Assurance Tester

Trainee Software Programmer

A post in Sale, Manchester

IT Support Trainee

Support Desk Analyst

20.25 In relation to the Trainee Quality Assurance Tester role, the claimant had a telephone interview on 21 November 2018. As a result he was then invited to a second stage face to face interview and exam, scheduled to take place in Knutsford at 14.15 on 29 November 2018.

20.26 The claimant had not driven for two years. He had hired a car, and set off, to be in good time for the interview. He arrived at a McDonalds at Lymm Poplar Services at around 12.43. He stayed there, preparing, and having lunch, then set off for the interview. At that point he had a problem with the satnav in the car, got lost, and could not find the interview venue. He had an anxiety attack. He therefore informed the interviewer by email at 15.17 that he would not be attending.

20.27 Whilst he tried driving again in the next few days, with someone else in the car, he did not seek to re-organise that interview, as after that experience he decided to apply for jobs which were commutable and accessible by public transport. He found driving was still likely to lead to panic attacks, so avoided it until his confidence was built up again.

20.28 The claimant did not claim any state benefits during this period of his unemployment because, he had received the payment from the respondent referred to, was living off that, and no longer qualified for state benefits.

20.29 On 9 May 2019 the claimant informed the Tribunal and the respondent that he had again secured employment with Pearson VUE, this time on a permanent basis, again at a salary of £24,100 per annum.

21. Those then were the relevant facts as found by the Tribunal. The respondent called no evidence on remedy. The claimant, as the Tribunal has previously found, is a credible witness who gave measured and thoughtful responses to the proper but probing questions put to him by Mr Gray for the respondent. The Tribunal was generally impressed with the efforts that he had made in very difficult circumstances to obtain alternative employment, and indeed to avoid the more serious consequences of

homelessness. As neither party requested a further hearing following the premature loss of the claimant's temporary employment in November 2018, the Tribunal considered only the further written submissions of the parties, and the further documents submitted by the claimant . He has not, therefore been cross – examined as to mitigation of his losses post November 2018, whereas he was in respect of the first period. Where the claimant has made factual assertions in written documents, such as emails, e.g. about his failure to attend the job interview on 29 November 2018 , the Tribunal has accepted these as matters of fact. This is partly because the Tribunal has previously accepted the claimant as a credible witness, but also because , if the respondent wished to challenge any factual assertions made by the claimant in his further submissions, it should have sought a further oral hearing in which the claimant could have been cross – examined.

The Submissions: (i) In the hearing, and subsequently, - Period 1, prior to the claimant's loss of his post with VUE.

22. Mr Gray for the respondent made his submissions first. They were , firstly, directed to the question of mitigation of loss, in the period up until the claimant obtained his temporary post with Pearson VUE (which the Tribunal will term "Period 1") . He submitted that the claimant, whilst entitled to take an initial period following his dismissal to seek alternative employment of the nature that he had previously enjoyed with the respondent, and to that extent to be rather limited in the width of his job search, nonetheless thereafter a time came when the claimant, being unsuccessful in this regard, should have "set his sights lower". He contended that the claimant had waited too long for the right type of job to come along, and he should have accepted earlier than he did that his search was not going to yield any results of this nature. There were other jobs that the claimant could , and should have applied for, either in the same field , or indeed of an unskilled nature (examples of which are contained in the bundle, but were not expressly put to the claimant). He therefore submitted that after the initial period of , say , some three months or so , the claimant should have started looking for other jobs which he was likely to be able to obtain, and on that basis the Tribunal should not award loss of earnings for more than , say, a further three months from the date of his dismissal.

23. In the alternative, the Tribunal should not make any award in respect of loss of earnings for any period beyond June 2018, when the claimant obtained his alternative employment. That , at the very latest , should be the cut-off period for any loss of earnings award. Further, Mr Gray submitted that the claimant earning , as he did , more than he did in his pre - dismissal employment with the respondent, should give credit for the excess thereby received which should be set off against any future earnings claim that is made by him.

24. Further, a point made in the respondent's further submissions of February 2019, it was submitted (para. 9) that the claimant acted unreasonably in not attending the interview with Haven scheduled for 23 May 2018, just because he had secured the alternative employment with Vue. He was not due to start until 11 June 2018, so could still have attended the interview, for what might have been a permanent job. He thereby, the respondent contends, denied himself the opportunity of future, possibly long – term, employment.

25. The claimant has responded to this contention in an email to the Tribunal of 2 August 2019. He points out that the Haven role was a field based role, that would require him to

drive to client sites on a daily basis. This would be in addition to his daily commute. His anxiety state was such that he preferred to avoid driving for work. The salary would have been £16,000 per annum, but 20% of that would be spent on travel. He had harboured hopes of other posts in VUE, which is a multinational organisation. Having been homeless, and in debt, it would have been illogical to take the Haven post in the circumstances.

26. Turning to injury to feelings, whilst the parties were agreed that the claims merited an award in the middle band, Mr Gray's submissions were that the claimant would not merit an award at the high end of the band, but towards the lower band thereof. He sought to distinguish the cases referred to by Ms Niaz-Dickinson extracted from Harvey section L7B(3)(b), and submitted that those which were awards in the region of £14,000-£15,000 contained rather more aggravating features than were present in the facts of this case. His proposed figure for injury to feelings at today's range of awards was £14,000.

26. For the claimant, Ms Niaz-Dickinson submitted that the claimant should receive loss of earnings for the whole of the period to the date when he obtained his alternative employment , and indeed beyond that but limited to the 12 weeks set out in his updated Schedule of Loss, i.e up to May 2019. She submitted that the claimant had acted reasonably in his attempts to find alternative employment , and was entitled to confine himself to the roles that he applied for , given his health, finance and housing issues at the time. The claimant had applied for several jobs unsuccessfully, and whilst his activity in job searching was not always consistent, there was adequate explanation for this in the claimant's evidence as to his circumstances at the time. She urged therefore that the Tribunal make an award for loss of earnings to the date when the claimant obtained his new employment, and indeed beyond on the basis that it having taken him three months to obtain that employment from when he first began to look for it in March 2018 it would be reasonable to infer that it may take him as long again to replace it when he loses that job as, on the balance of probabilities, he was likely to do on 1 February 2019.

26. Ms Niaz-Dickinson argued against the crediting of any excess in the new post against any loss of earnings award in the future, contending that it would be unfair for the respondent to get the benefit of the claimant's good fortune in obtaining a better paid job.

27. Turning to the injury to feelings award, Ms Niaz-Dickinson referred to the specific cases she had extracted from *Harvey*, and sought to draw comparisons from them. In terms of the appropriate band and the way in which the awards have evolved since the original ***Vento*** case, in the course of discussion with the Employment Judge she contended, and it was agreed, that at the time of the presentation of this claim, January 2017, the appropriate ***Vento*** bands had been updated by ***Da'Bell v National Society for Prevention of Cruelty to Children*** so that at the relevant time the mid band of **Vento** was £6,000 to £18,000. Applying paragraph 11 of the 2017 Presidential Guidance as she had done in the Schedule of Loss at page 91(a) and (b) produced a figure based on £14,000 award under the ***Da'Bell*** guidelines of £20,823.53 which is what she contended for. She made reference to various findings in the Tribunal's judgment, and to the build up to the claimant's dismissal, which was itself a stressful time for him when he was experiencing considerable difficulty with the AWB computer system as the Tribunal found. She referred to a number of findings in the Tribunal's liability Judgment to support

her contention that the claimant's claim should be valued, in relation to injury to feelings, at the higher end of the middle band of ***Vento***.

The Submissions (ii): Period 2 - post the claimant's loss of his post with VUE in November 2018.

28. In the light of the loss of the claimant's employment with VUE in November 2018, three months earlier than anticipated, both sides have made further submissions, in correspondence. The claimant no longer has the benefit of representation by counsel, so has made his submissions as a litigant in person. The respondent has continued to be legally represented, and its submissions have been made by its solicitors.

29. The parties' respective further written submissions are to be found in the following emails to the Tribunal:

From the respondent:	18 February 2019
From the claimant :	9 May 2019
From the claimant:	2 August 2019
From the respondent :	8 August 2019
From the claimant :	15 August 2019
From the claimant :	7 September 2019
From the respondent:	7 October 2019

30. The claimant initially, of course, was notifying the Tribunal of his sudden change of circumstances. This lead him to re-cast his claim for loss of earnings. He was not, of course, to know in November 2018, when he would obtain a further job, and to that extent , understandably sought continuing loss of earnings.

31. In the event, and fortunately, the claimant has found another post, in fact back with VUE, the company which had to terminate his previous employment prematurely. This employment started on 13 May 2019, and is at a level of earnings which matches, or exceeds the claimant's earnings with the respondent, even allowing for any increases. He therefore limits his claim for loss of earnings to May 2019.

32. The respondent contends that the claimant has failed to mitigate his loss too during this further period from November 2018 to May 2019. Similar arguments are raised in relation to this period as were advanced in relation to the previous period. The respondent's submissions made in February 2019 were, of course, made at a time when he had not successfully obtained further employment with VUE.

33. The claimant, in his reply contends that he has not failed in this period either to mitigate his loss. He has set out his actions, and attempts to find work during this period, and has explained his actions. He submits that he has acted reasonably.

Discussion and Findings

34. Given that certain elements had been agreed, the Tribunal's first task was to consider how it should approach the assessment of compensation in these circumstances. The claimant has succeeded in both unfair dismissal and disability discrimination, so the first question that arises is as to the proper approach to be taken in relation to those two jurisdictions , and what the Tribunal should award under which head of compensation. Where there is a finding of unfair dismissal and discrimination, the guidance from an EAT case ***D'Souza v London Borough of Lambeth [1997] IRLR 677*** is that a Tribunal should make an award under the discrimination legislation so as to give the employee full compensation in circumstances where, of course, the statutory cap upon the compensatory award in these circumstances may well apply so as to limit the award in respect of, for example, loss of earnings. Consequently the Tribunal, with the agreement of the parties, has approached the assessment of remedy on that basis.

The awards for Unfair Dismissal.

35. Dealing first, however, with the unfair dismissal, the parties agreed the basic award and the loss of statutory rights award , which is part of the compensatory award. There will therefore be awards in respect of the basic award , and the compensatory award, but only in respect of that element , and not in respect of loss of earnings.

The claimant's application of 7 September 2019.

36. Before proceeding any further, however, the Tribunal must address the claimant's request to add to the compensation awarded a sum in respect of the period of half pay in the period from 21 March 2016 to his dismissal. He cites the Tribunal's judgment , and argues that it has found that the respondent's actions prevented him from returning to work, and hence led to his receipt of sick pay.

37. Whilst not so termed, this is, the Tribunal considers, an application to amend the claims. It may only be in respect of remedy, but the Tribunal considers that is still an amendment. As such , it falls to be considered on the basis of the principles in ***Selkent Bus Co Ltd v Moore [1996] IRLR 661, [1996] ICR 836***, in which the court set out well established principles now that should be applied in relation to applications to amend, it being the case, (as it has been for many years under all of the Tribunal's rules however much may have changed but this has not changed), that basically the matter of amendment is a matter for discretion for the Tribunal . ***Selkent*** set out the test that should be applied, in the judgment of Mummery, J, where he gives guidance as to how it the Tribunal should exercise its discretion , and what it should take into account, which is all the relevant circumstances of an application to amend. It should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. In terms of the relevant circumstances, what are "the relevant circumstances?". It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant. First , is the nature of the amendment, the second is the applicability of time limits and the third is the timing and manner of application, but they have no particular priority .

38.The applicability of time limits has always been a significant factor in amendments, and in terms of how they are factored in, if the claim is to be amended but the amendment would have been in time if included in the claim originally, then that is

obviously a persuasive but not definitive argument for allowing the amendment. Conversely the mere fact that an amendment would be out of time , so Mummery, J makes clear, and countless other authorities have done since , is not a reason in itself for not granting an amendment. It has been said that , in terms of weighing up the justice or injustice of allowing a refusal and amendment, if a claim had been presented with the original claim and would itself have been out of time a claimant, who loses the benefit of an amendment in those circumstances , loses nothing that they would not otherwise have had. This is because if the claim had been originally included, but was out of time , and was subject then to the Tribunal finding it had no jurisdiction , then an amendment can put a claimant , or should put a claimant in no better position than they would have been if they included that claim in the first place. Certainly the applicability of time limits is thus a highly relevant consideration in terms of whether or not to grant the application.

39.In terms of the timing and manner of the application, of course, in this case the timing is the 7 September 2019 , is when the application was formally made to the Tribunal. There is no explanation from the claimant why that claim was only first made at that time. There have been three iterations of his Schedule of Loss, and this head of claim was not advanced in any of them. Further, the claimant has been advised by, and was represented at the liability , and the original remedy hearing, by counsel.

40.The application is made very late, almost a year after the start of the remedy hearing. It does not relate to any new development, as it relates to the period before the claimant's dismissal. It was thus a claim , if it was to be pursued, which could and should have been made at the very outset. There is no explanation why it was not, nor for why the application to amend was being made at such a late stage. That in itself is enough for the Tribunal to reject the application. Going on, however, to consider the balance of hardship, this is but a small facet of the claimant's claims. Further, the Tribunal doubts that the claimant can maintain such a claim in any event. It has to be remembered that the disability claims were put as a s.15 claim – the dismissal being the unfavourable treatment - and one of failure to make reasonable adjustments, relating to the PCP of not allowing another person to test a system profile.

41.The claimant cannot seek this head of loss as compensation under the s.15 claim, as the unfavourable treatment was the dismissal, not anything that preceded it (in the same way that he cannot pursue this head of compensation under the unfair dismissal claim, as it pre-dates the dismissal). That leaves only the failure to make reasonable adjustments claim under which this head of loss could be claimed. It is far from clear what the link between this particular failure to make a reasonable adjustment and the claimant's reduction in pay was. The reduction was because of the length of time that the claimant had been off work sick. He was not, however, off work sick solely because the respondent would not allow the AWB system to be tested by another employee. He was off work sick because of a whole range of issues that he had with the AWB system. He did not go off sick at a point when, or because, the respondent refused to have the AWB system tested by someone else. He had been off sick because of the AWB system, off and on since August 2015. His reduction in sick pay in March 2016 was therefore a consequence of his previous absences, not just any further issues that arose then. It may have been possible to argue a specific claim that it would have a reasonable adjustment at that stage to maintain the claimant's pay at full pay, or to argue a further s.15 claim, on the basis that the claimant was unfavourably treated , by the loss of pay, as a result of something arising from his disability, i.e his absences. No such claims, (without, of course, saying whether they would or would not have

succeeded) however, were made. The new head of loss that the claimant seeks to claim may have been relevant to such claims, but it is hard to see how it could be maintained in relation to the two disability claims that have been brought and which have succeeded. The application is therefore refused.

42.The Tribunal now turns to the awards that need to be considered in respect of the claims that are, and always have been, before the Tribunal.

Loss of earnings – Period 1 : 5 August 2016 to 11 June 2018.

43.The respondent's prime position is that the claimant unreasonably failed to mitigate his loss in this period by not "casting his net" wider, and sooner, by applying for jobs which he was more likely to obtain. The criticism is made that the claimant applied for jobs with a salary range that was rather higher than that which he had enjoyed whilst still employed by the respondent, and which therefore were probably not going to be suitable for him. The claimant, however, explained that salary range was not one of his search criteria, his skills, abilities and experience were, and that, when putting these into the app on his mobile phone , the sorts of jobs which are contained in the bundle (and that he did apply for) were the ones that came up. He pointed out, as the Tribunal indeed notes, that in many of these instances there is a salary range as opposed to a set salary, and whilst there are indeed some posts that the claimant applied for where the salary started at say £25,000, there are equally others where the salary range started at £17,000. The claimant's pre-termination gross salary was £19,300.

44. The claimant was also, the Tribunal considers, somewhat restricted in terms of his health as to what posts he felt he could safely apply for. Telephony had been an issue whilst he was with the respondent, and also the claimant was battling with depression, for which he was undergoing counselling. His confidence was understandably shaken and his witness statement eloquently sets out the effects of the dismissal upon him in terms of his self confidence , and ability to look for other jobs. It is to be noted, as it was noted in his GP notes, that he had never previously been unemployed, and he had been employed with the respondent for some seven years.

45. In considering whether the claimant has unreasonably failed to mitigate his loss in these circumstances the Tribunal reminds itself that the burden of proving unreasonable failure to mitigate lies upon the respondent. (See ***Bessenden Properties Limited v Corness [1974] IRLR 338***) In a leading case on mitigation of loss, ***Wilding v British Telecommunications PLC [2002] 1 ICR 079***, Potter LJ observed that the test of unreasonableness was an objective one , based on the totality of the evidence, that all the surrounding circumstances should be taken into account, and that a court or Tribunal should not be too stringent in its expectations of the injured party. The obligation therefore upon the claimant in this case was simply to act reasonably, and the question of fact for this Tribunal is whether it finds that he did so, the burden being upon the respondent to establish that he did not.

46. That principle was endorsed by Langstaff P. in ***Cooper Contracting Limited v Lindsey UKEAT/0184/15*** . More recently In ***Singh v Glass Express Midlands Limited UKEAT/0071/18*** HHJ Eady QC (sitting alone) set out a concise summary of the guidance given by Langstaff P in ***Cooper*** 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.

47. We also remind ourselves , as held in ***Savage v Saxena [1998] IRLR 182*** , that , in accordance with ***Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498*** the Tribunal ought , in considering alleged failure to mitigate, to carry out the following analysis:

(1) Identify what steps should have been taken by the appellant to mitigate his loss

(2) Find the date upon which such steps would have produced an alternative income

(3) Thereafter reduce the amount of compensation by the amount of income which would have been earned.

To quote from the judgment in ***Gardiner-Hill v Roland Berger Technics Ltd*** :

"In order to show a failure to mitigate, it has to be shown that if a particular step had been taken, Mr Gardiner-Hill would, after a particular time, on balance of probabilities have gained employment; from then onwards the loss flowing from the unfair dismissal would have been extinguished or reduced by his income from that other source. In fixing the amount to be deducted for failure to mitigate, it is necessary for the tribunal to identify what steps should have been taken; the date on which that step would have

produced an alternative income and, thereafter, to reduce the amount of compensation by the amount of the alternative income which had been earned."

48. The Tribunal unanimously considers that the claimant did indeed act reasonably in all the circumstances in not obtaining alternative employment until June 2018, (in fact his offer was May 2018). The Tribunal is quite satisfied that the attempts that he made to obtain alternative employment were indeed reasonable, and indeed given his personal circumstances at the time were commendable.

49. The Tribunal notes from his witness statement the efforts that the claimant made from an early stage to obtain alternative employment, and to seek assistance in doing so. Paragraph 3 of his witness statement sets out the organisations from whom he sought and obtained help. In July 2017 he considered and sought advice upon going self-employed, something which , had he done so, the respondent could not have complained about if it then took him a substantial period of time to build up some replacement income , as can be seen in the case of ***Gardiner-Hill v Rowland Burger Technics Ltd [1982] IRLR 498*** referred to above in another context.

50. The Tribunal considers that whilst the claimant's efforts to find alternative employment in the aftermath of his dismissal may have been somewhat intermittent, there were good reasons for that , as explained by the claimant's personal circumstances. He was highly dependent upon his mobile phone and the app. installed thereon , through which he was actively seeking work. In all this further, however, it must not be forgotten that the claimant was throughout this period satisfying the Benefits Agency that he was making adequate attempts to find any alternative employment by dint of the fact that he continued to receive JSA. In many instances that would be sufficient to dispose of any argument as to unreasonable failure to mitigate loss, but this Tribunal does not base its decision solely upon this factor, but upon the facts as the claimant has established them , in terms of the efforts that he made to find alternative employment. As for the contention that he may have limited his search to posts which the respondent contends were unrealistic because of their salary level, the Tribunal does not accept this argument , having accepted the claimant's argument that his search criteria were predominantly based upon his skills, experience and abilities rather than any particular level of salary. Indeed, this can be seen from a perusal of the applications that he did make which are contained in the bundle. He was not seeking jobs on the basis of their salary, he was seeking jobs on the basis of the content of the job in question , and his own skill and experience set. Given his lack of experience outside the respondent for some seven years since he started working for it, his increasing focus upon IT and his increasing abilities in that field (particularly the achievement of a software qualification whilst still employed by the respondent and indeed a Masters qualification in the same field), the Tribunal considers that it was entirely reasonable of him to continue to seek to develop his skills and seek employment in that field, which his dismissal unfortunately cut short. The Tribunal therefore does not consider that in failing to "lower his sights" as he did , until late 2017/early 2018 , the claimant thereby unreasonably failed to mitigate his loss.

51. A further consideration, of course, is that the claimant was limited by reason of his hearing difficulties in applying for roles where direct telephonic contact would be necessary. The claimant's medical records show ongoing issues with his health throughout 2017, and he continued to have difficulties with both his hearing and his mental health. It is, we find, significant that it was the improvement in his hearing

condition that enabled him to widen his net to include the temporary job that he then obtained.

52. We will also address the specific issue of failure to mitigate raised by the respondent, that of the claimant not proceeding with the interview with Haven, which he had arranged for 23 May 2018, which he cancelled upon learning that his application to VUE had been successful.

53. The Tribunal does not consider that this was unreasonable failure to mitigate his loss on the part of the claimant . He has explained, in his email of 2 August 2018, why he made that decision, primarily because he did not want to be field based, and do a lot of driving in the role. As set out above, the obligation is to act reasonably. Further, in any event, it is one thing to turn down an offer of employment, it is another not to attend an interview. There is nothing to say the claimant would have been successful, nor, whilst the post with Haven is said to have been permanent, whereas the post with VUE was fixed term, no job is actually permanent, and the claimant could have found himself out of work again after a few weeks or months in post, or could have found that he could not in fat cope with a field based role at that time.

54. In short, the respondent's argument in this regard is too speculative, and the Tribunal considers that by cancelling an interview for a post that he might or might not have got, and which he reasonably considered less suitable that the one he had actually been offered, the claimant did not act unreasonably.

55. In general terms, in relation to mitigation of loss, the Tribunal would again also observe that during this first period, the claimant was claiming and receiving Jobseekers Allowance. It is, of course, a feature of that benefit that claimants have to satisfy the DWP that they are actively seeking work, and keep records demonstrating that. The claimant was clearly able to do that. Whilst this is in no way conclusive that he was making reasonable efforts to mitigate his losses, it is another factor to which we feel some weight can be attached in determining whether for the purposes of an award of compensation the claimant has been shown to have unreasonably failed to mitigate his losses.

56. We consider that the respondent has failed to demonstrate in all these aspects that the claimant did unreasonably fail to mitigate his losses in this period, and we propose to award the whole of the loss of earning figure claimed, less the appropriate deductions. Consequently , the Tribunal is minded to award the claimant's loss of earnings up until the date that he obtained his alternative employment in June 2018. Accordingly, in respect of this period, the Tribunal proposes to award:

Loss of earnings at the agreed weekly net rate of £316.86 for the period from 5 August 2016 to 11 June 2018 , a period of 96.5 weeks

Total	£30,576.99	
less benefits received	£6,871.40	
less notice pay received	£2,218.02	
Net sum		**£21,487.97**

Period 2 - after 30 November 2018

57. That brought the Tribunal originally to consider the next period, namely that beyond 1 February 2019, when the claimant's temporary employment was to end. Clearly the claimant, we have found , mitigated his losses from June 2018 onwards, but that mitigation was expected to cease on 1 February 2019. The respondent invited the Tribunal to find that even if losses should be awarded in respect of the period up until June 2018, no further losses should be awarded thereafter, because thereafter the claimant should be able to obtain alternative employment, and , indeed , should have been seeking such alternative employment before that employment ended.

58. This was a difficult argument, and one that potentially involved the Tribunal having to assess the likelihood or otherwise of the claimant immediately obtaining alternative employment when that period of temporary employment with VUE ended. The speculation as to whether, and when , that employment was likely to end on 1 February 2019 has now been rendered unnecessary , as it actually ended on 30 November 2018. That said, it did seem to the Tribunal likely, or more likely than not, that the claimant's employment would have ended on 1 February 2019.

59. That issue, however, was overtaken by events, when the claimant informed the Tribunal on 22 October 2018 that his employment was to end prematurely on 30 November 2018. The claimant did start to look for alternative employment before his employment ended on 30 November 2018. He continued to do so, until he successfully obtained further employment again with Pearson VUE with effect from 13 May 2019.

60. The respondent, however, contends that the claimant has unreasonably failed to mitigate his loss again in this period of just under 6 month , as argued in its submissions of 18 February 2019. In particular, the respondent argues the following acts of the claimant were unreasonable failures to mitigate his losses in this second period by, firstly:

a) not , when aware his employment with VUE was to end prematurely, searching for other jobs within his experience and qualifications, but applying for mostly roles which were out of his reach;

61. In support of this contention , the respondent argues that , although the claimant has disclosed applications for 144 roles in this period , it is the nature of these roles which was unreasonable, and many of them were outside his experience or qualifications. He had not , save for the VUE role, worked in an IT – oriented role since 2009, and his self – employed IT business had not generated any income. The fact that only five of these applications resulted in invitations to interview or assessment demonstrates how his job search was not sufficiently focussed , and he had applied for roles which were, on the whole, out of his reach.

62. The claimant's response (his email of 2 August 2019) to these points is as follows. In relation to the first, he had continuously worked in IT oriented roles from 2001 to 2015, and returned to an IT oriented role in 2018. He cites evidence from the respondent's own IT manager in an interview on 4 May 2016 in which the claimant was noted as being skilled in using the IT system. His work experience, progressing education, and qualifications were all in IT based subjects. Amongst the various jobs he applied for, some were below his experience and qualifications, and he was actually turned down for

one (the Cinema Support Role with Unique Digital) because he was over – qualified. Some roles were training roles, other post – graduate posts, for which , as he holds a Postgraduate Diploma and a Masters degree , he was qualified to apply.

63. The Tribunal's view is that the claimant has not been shown to have unreasonably failed to mitigate his loss on this basis. Accepting, for these purposes, initially , the respondent's argument that the claimant was being too ambitious, that does not establish failure to mitigate. The essence of failure to mitigate is not doing enough. Overreaching is not failure to mitigate, unless thereby the claimant has also failed to apply for posts that were within his reach. The respondent has failed to show that the claimant was failing to apply for jobs that he could have done, and that he would have been likely to succeed in such applications.

64. The claimant , of course, does not agree that he was indeed overreaching himself, and we consider he has some basis for that view. Quite apart from what his experience and work done with the respondent actually was, the fact is, as the respondent acknowledges, the most recent job he had with VUE, from which he was applying for these roles, was an IT – oriented role. We see nothing unreasonable in the claimant , having most recently been employed in such a role, then seeking to find alternative employment in a similar role.

65. We also see nothing significant in the fact that only five applications led on to interviews or assessments. We take the point that it was easy, by use of the technology available, to make multiple applications, and we should not be blinded by mere weight of numbers. That the claimant in this period, however, secured five interviews or assessments is the more telling figure. It is far more relevant than the per centage figure based on the total number of applications that the claimant made.

66. Further, we consider that there is very little that can be read into how many applications proceeded any further. Whilst the fact that at least five potential employers or recruiters considered the claimant was a potentially suitable candidate supports his contentions that he was applying for the right type of role, the converse, lack of success, does not undermine his case. There could be many reasons why the claimant did not get more interviews or assessments. He had, of course, an employment history with a large hole in it, and his most recent employment had been short – lived and was coming to a premature end. Whilst that was for perfectly proper reasons, that may not have been accepted at face value by some potential employers. In any short – listing exercise, the claimant's employment history at that time was always going to put him at a disadvantage. All this means is that it is very hard to infer from the lack of success the claimant experienced that he was applying for unsuitable roles.

67. In short, as we have said above, the bar for mitigation is not set very high, and we are quite satisfied that the respondent has not demonstrated on this basis that the claimant has fallen below it.

68. The next alleged unreasonable failure to mitigate loss in this period is contended to be:

b) not attending a second interview for a post of Trainee Quality Assurance Tester, on 29 November 2018;

69. This is a very specific contention. The claimant accepts that he applied for this post, and was offered an interview. He failed to attend the interview, citing satnav problems for missing the interview. The claimant , however, failed to rearrange that interview. This was a further alleged instance of failure to mitigate his loss.

70. The claimant has explained (in his email dated 6 December 2018) both what occurred on the day of the interview, and the reasons why he did not seek to rearrange the interview. In short, he made an attempt to attend the interview, got close to the venue, had lunch at a nearby McDonalds, but then , having set off for interview, got lost because of satnav issues, and suffered an anxiety attack. Thereafter, having had that experience , his confidence as a driver (he had not driven for two years) was dented, and he did not then apply for jobs he could not get to on public transport.

71. The Tribunal's view is that this too is not unreasonable failure to mitigate. As the respondent rightly recognises , the claimant might not have been successful. This highlights the difficulty that respondents seeking to argue unreasonable failure to mitigate often face. As the cited passages from ***Gardiner-Hill v Roland Berger Technics Ltd*** demonstrate , the respondent has to show not only that the claimant failed to take reasonable steps to mitigate his loss, but also that , if he had done so , he would have been successful. If, of course, a claimant is not even trying, or is paying lip service to mitigate to create a false impression of trying to mitigate, a Tribunal would be entitled to find that the respondent has done enough to establish unreasonable failure to mitigate.

72. Here, however, this is again, even if taken at its highest, one instance of the claimant not going through with an interview that he had clearly set off for, and for which purpose (either specifically or as part of his general jobsearch) gone to the trouble and expense of hiring a car. Those do not seem to the Tribunal to be the actions of someone who was not seriously trying to find new employment, and , however unfortunate the claimant's actions were, the Tribunal does not find this is enough to justify a finding that he thereby unreasonably failed to mitigate his losses. The respondent has to take the claimant as it finds him, and if the claimant's limitations by reason of his health and personal circumstances restricted his ability to explore every available opportunity for alternative employment, the respondent has to accept that.

73. In overall terms, given that it took him three months to find the temporary employment with VUE , after he began to look for it seriously after his ear condition improved, the Tribunal accepts that a further period of just over five months to find the next employment, fortunately back with VUE, is reasonable. That is particularly so given the sudden and unexpected loss of the VUE post, the claimant's long period of unemployment which preceded the obtaining of the first VUE post, the short period for which that employment in fact then lasted, and the claimant's medical and personal circumstances at the time.

74. On that basis the Tribunal will indeed award loss of earnings from the date of the end of his employment with VUE up until the date of his new employment with that company.

The period of this further loss is 30 November 2018 to 13 May 2019, period of 23.5 weeks x £316.86

£7,446.21

Credit for earnings in excess of losses.

75. That brings the Tribunal to a further factor which the respondent invites it to take into account in assessing what sums should be deducted from any award for loss of earnings. It is agreed that the notice pay received by the claimant in respect of the first seven weeks of his loss of earnings should be credited, and that will be done. A more contentious issue, however, is the issue of whether the Tribunal should also deduct from the loss of earnings award the excess received by the claimant in his next employment over the earnings he would have received if he had remained in the employment of the respondent. That excess in net terms is some £63.35 per week. The respondent has argued that this sum should be credited against any award the Tribunal may make, and indeed now will make, in respect of the further 12 weeks' loss of earnings that the claimant will suffer at the end of his contract of employment. This is resisted by the claimant.

76. The Employment Judge did enquire of the parties as to whether they were aware of any guidance upon this topic in terms of any decided cases. Counsel was unable to assist the Tribunal in this regard, Mr Gray contending that it must be axiomatic , and this would explain the absence of authority as the principle for compensation must be that the claimant is put in the same but no better position than he would be if his employment had not been ended prematurely. The Tribunal, however, in its research for its deliberations in relation to this matter has encountered a line of cases ending in ***Whelan v Richardson [1998] IRLR 114***, in which the previous authorities particularly of ***Ging v Ellward (Lancs) Ltd (1978) [1991] ICR 222n*** and ***Fentiman v Fluid Engineering Projects [1991] IRLR 150*** were discussed and considered. This very issue, albeit in an unfair dismissal context, was considered by the Employment Appeal Tribunal and in its judgment, at paragraph 42 onwards, sought to give guidance to Tribunals in connection with this issue. The EAT set out some five circumstances which may arise, but in relation to the possibilities and in relation to the present situation the EAT said this at paragraph 45(4):

"Where the applicant takes alternative employment on the basis that it will be for a limited duration, he will not then be precluded from claiming a loss down to the assessment date, or the date on which he secures further permanent employment whichever is the sooner, giving credit for earnings received from the temporary employment."

77. Thus the view of the EAT is that in circumstances such as pertain here where the claimant has only obtained temporary employment, and indeed is seeking and will be awarded compensation beyond its termination, he must give credit for the earnings, i.e all the earnings, received from that temporary employment. Thus , particularly in these circumstances, where the claimant is being compensated beyond the date of the original remedy hearing, the Tribunal is satisfied that , in order that he is not overcompensated, he must give credit for the whole of the excess of the earnings earned i.e. the whole of his earnings in the temporary employment must be credited against the totality of the

loss of earnings that the Tribunal is going to make up until the period of his further employment on 13 May 2019.

Credit for state benefits not claimed.

78. In its email of 8 August 2019 the respondent further contends that the claimant's losses during Period 2 could and should have been mitigated by state benefits , which he has confirmed he did not claim.

79. The Tribunal makes no such deduction. Whilst for unfair dismissal compensation any benefits would fall to be recoupable , for discrimination awards they are not, but , if received, fall to be deducted as they are sums (assuming they are not benefits to which a claimant would have been entitled in any event) which usually do mitigate the loss of earnings sustained.

80. That is the position in respect of cases where benefits are actually received. Here the respondent's case is that the claimant acted unreasonably in not mitigating his losses by applying for state benefits. The respondent overlooks one matter. In November 2018 the respondent , quite properly, paid the claimant just under £24,000 on account of the awards the Tribunal was to make. This would, the Tribunal understands , and the claimant states in his email of 15 August 2019, have rendered the claimant ineligible, at least until the amount of his capital dipped below the relevant limit, to claim state benefits. Further, in any event, the Tribunal sees no reason why the burden of supporting the claimant during periods of unemployment caused by the tortious act of the respondent should be borne by the state. In any event, having been provided with an interim payment of this nature upon which the claimant could, and did, live, it seems to us quite reasonable, even if eligible, for the claimant not to seek state benefits. We make no deduction on this basis.

The loss of earnings awards

81. The calculation of the award for loss of earnings, therefore is as follows:

Period 1:		
Total:	£30,576.99	
less benefits received	£6,871.40	
less notice pay received	£2,218.02	
Net sum	**£21,487.97**	
Period 2:		
Total:	**£ 7,446.21**	
Sub – Total:	**£28,933.78**	
Less excess earned in mitigation	£ 1,556.97.	
Total sum		**£27,376.81**

Injury to Feelings.

82. That leaves the injury to feelings award. Mr Gray's submissions were primarily to seek to distinguish the cases referred to by Ms Niaz-Dickinson in her submissions, and the Tribunal can see in some cases some grounds for distinction. The Tribunal, however, does accept the claimant's submissions , and notes the references made in the judgment to the claimant's reaction , not only to his dismissal, but to the failure to make reasonable adjustments which preceded it , which also had an impact upon him even before his dismissal. That is a point perhaps rather overlooked by the respondent in its submissions. Further, whilst the respondent did not cause the claimant's homelessness, his dismissal certainly contributed to it continuing. The respondent must take the claimant as it finds him, and it finds him as at the date of the dismissal a person with not one , but two , disabilities, which were conceded only late in the day, and in respect of which the claimant continued to have considerable difficulties in resolving the loss of his employment, employment which he had had for some seven years , and which, absent the IT issues that he suffered , he enjoyed. He expected , and indeed was seeking, to progress further by gaining further qualifications which he hoped would have led to a long and increasingly successful career with the respondent. Those in themselves are significant factors. Add to them the difficult circumstances which the claimant then found himself in as a result of his dismissal, of lacking not only an income, but also a home, the Tribunal indeed considers that this is a case which merits an award towards the upper and not the lower end of the middle band of ***Vento***. For those reasons, therefore, the Tribunal does accede to Ms Niaz-Dickinson's submissions that the appropriate award is indeed one taken from the higher end of the band which, on the ***Da'Bell*** range of £6,000 - £18,000, would merit an award at that time of some £14,000 as suggested by counsel for the claimant which, by the application of the formula provided at paragraph 11 of the 2017 Presidential Guidance produces the figure of £20,823.53 by way of an award for injury to feelings as set out in the updated Schedule of Loss.

Further matters – Interest and grossing up.

83. There remain further matters which require the Tribunal to make determinations.

Interest (i) Injury to Feelings

84. The first is interest on the injury to feelings award. Whilst the Tribunal assessed the award in the sum of £20,823.53 , that was before interest. Interest on injury to feelings awards runs from the date of the discrimination, to the calculation date. Where, however, payment is made before the calculation date , by the provisions of Reg. 6(2) of the Interest on Awards Regulations, the payment date is the relevant date.

85. This in this case the date of the discrimination is 5 August 2016, when the claimant was dismissed, and the award was paid on 23 November 2018. That is a period of 840 days. The rate of interest is 8%.

The amount of interest is therefore:

£20,823.53 x 8% ~ 365 x 840 = **£3,833.81**

Interest (ii) Loss of Earnings

86. Reg.6 of the provisions of the Regulations in relation to any other sums of compensation provides that interest shall be payable for the period beginning on the mid – point date, and ending on the day of calculation. The day of calculation, by Reg. 4, is the day on which the Tribunal calculates the interest. That would potentially be the date below, i.e in June 2020, or the date of the Chambers determination on 28 February 2020.

87. Reg. 6(3), however, provides that , in circumstances where serious injustice would be caused if interest were to be awarded in respect of the period specified in Reg.6, the Tribunal may calculate the period of interest for a different period.

88. In this case the starting date is the date of contravention, 5 August 2016. The mid point to 28 February 2020 would be one half of 1302 days , 651 days.

89. The claimant's loss of earnings, however, ceased on 13 May 2019, over a year ago now. The Tribunal does indeed consider that serious injustice would be caused if the respondent were to be liable to pay interest over the whole of the normal period. The delay in calculation of the interest payable is not attributable to the respondent, nor, of course, the claimant.

90. The Tribunal considers the just thing to do is to take the period from 5 August 2016 to 13 May 2019, when the loss actually ceased, and apply the mid - point between those two dates in calculating the interest payable. That period is 1011 days, so the mid point is 505 days.

91. That produces the following calculation:

£27,376.81 x 8% x 505 days @ £6.00 per day **£3,030.20**

93. Finally, in relation to grossing up, as the total amount awarded for loss of earnings is below the £30,000 tax free limit, no grossing up is required.

Employment Judge Holmes

Date: 12 June 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
23 June 2020

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: **2400140/2017**

Name of case: **Mr E Osifo** v **British Gas Trading Limited**

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: 23 June 2020

"the calculation day" is: 24 June 2020

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

MR S ARTINGSTALL
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.