Case Number: 3401590/2015

EMPLOYMENT TRIBUNALS

Ms J Allard — **Claimant**

Central and North West London NHS Foundation Trust — **Respondent**

v

Heard at: Cambridge (via Cloud Video Platform) **On: 23 and 24 July 2020**

Before: Employment Judge Brown, sitting alone (with the parties' consent)

Appearances

For the Claimant: Ms V von Wachter, counsel
For the Respondent: Mr S Sudra, counsel

JUDGMENT

The respondent is hereby ordered to pay to the claimant, pursuant to section 124(2)(b) Equality Act 2010, the sum of £168,373.35 in compensation.

REASONS

1. Introduction

1.1. By a reserved judgment and reasons dated 24 August 2017, an Employment Tribunal which I chaired decided that the respondent Trust had unlawfully discriminated against the claimant, contrary to sections 15 and 39(2)(c), Equality Act 2010 by dismissing her. The Tribunal listed a remedy hearing for 9 October 2017.

1.2. Employment Judge Ord postponed that hearing as a result of an appeal by the respondent to the Employment Appeal Tribunal, which was ultimately dismissed on 1 November 2018 at a preliminary hearing before His Honour Judge Shanks. A preliminary hearing (for case management) was thereafter listed before Employment Judge Henry on 25 February 2019, re-listing the remedy hearing for 25 November 2019, and making case management directions. That hearing was postponed, on the application of the parties, to 23 and 24 July 2020. It is

deeply regrettable that such a long time has passed between the final hearing on liability and the final hearing on remedy, and also that it has taken over 5 years in total for the claim to be resolved.

1.3. At the time of the re-listing of the remedy hearing, the covid-19 pandemic could not have been anticipated. Shortly before the remedy hearing, it became apparent that the Tribunal would not be able to resume for those dates in its original constitution because the members could not assemble in person as a result of vulnerabilities, and could not conduct the hearing by video because not all members of the Tribunal were able to access and use Cloud Video Platform or an equivalent. I therefore caused the parties to be contacted to enquire whether they would be minded to consent to me conducting the remedy hearing sitting alone, by CVP. Each party consented to this in writing (as provided by the Employment Tribunals Act 1996 s 4(2) and 4(3)(e)). I held a short telephone preliminary hearing with the parties' representatives on 22 July 2020 to case manage a remote hearing, and the hearing proceeded on 23 and 24 July 2020 by CVP. I was satisfied, before, during and after the hearing, that the use of CVP was appropriate: both parties were professionally represented and they were able to call the evidence they wished to call and adduce the documentary evidence they wished to adduce. I was able to see and hear the witnesses and representatives well at all times.

1.4. The claimant provided an (undated) 'updated schedule of loss'. I had an agreed bundle of 395 pages, and received written submissions for the claimant and the respondent (whose submissions included an updated counter-schedule of loss). I heard oral evidence from the claimant. Ms Annabel Butcher gave evidence for the Trust. Each had a written witness statement. Dr Stephen Davies, a psychiatrist, who had produced an expert report on the joint instruction of the parties, was questioned on his report.

1.5. Dr Davies was not available to give evidence until the morning of 24 July 2020, and by the time that closing submissions were concluded at about 3.30pm, there was not sufficient time for me to deliberate, reach my conclusions, and formulate and deliver an oral decision, and so I reserved my judgment.

1.6. I asked during the claimant's closing submissions about the evidential basis for her claim for 5 years' future loss of earnings, on top of over 5 years' past loss of earnings. Counsel for the claimant frankly acknowledged that a claim for five years' future loss was 'a guess' and accepted that it was more than the claimant expected to recover. In reaching my decision, I regret that I have found myself disadvantaged by the weakness in the relationship between the evidence and the parties' cases (on both sides). It has left me deciding the case with less help than I would have had from cases more closely based on the evidence.

2. The claimant's evidence

2.1. The claimant worked for the respondent from 18 October 2004 to 12 December 2014, a little over ten years.

2.2. The claimant's evidence, which I accept, was that she had loved her job as an ambulance person, but the effect of the Tribunal's findings was that the claimant

was not likely to be able to continue in that role, but would have been able to take on new clerical work. Therefore, the respondent had not acted unlawfully in the loss of the claimant of a job that she particularly enjoyed.

2.3. I accept the claimant's evidence that her dismissal hit her very hard. She had already experienced a stressful time. Her chronic back pain was debilitating, and the treatments were not particularly effective. Her dismissal added to her distress. I accept that she was distraught that her job had ended in the way that it did. She was prepared to keep working for the respondent and did not want to be dismissed.

2.4. I accept that something which especially upset the claimant was that the respondent made no serious attempt to try to help her find alternative employment, while there was work available. I accept that this left the claimant feeling that the respondent did not want her, after ten years of employment. I accept that the claimant felt upset, let down, and rejected, and that the experience was hurtful, and greatly affected the claimant's confidence. I accept that the claimant lost confidence in her abilities to do anything else and felt that she was being looked down on because of her disability.

2.5. I accept that the claimant genuinely and reasonably felt that the respondent was denigrating her skills, both on appeal and during the tribunal process, and it downplayed or disregarded her IT skills and qualifications. I accept that the respondent's rejection of the claimant's appeal against dismissal was a further blow to the claimant's wellbeing. The claimant felt dejected and defeated, and that she had lost all purpose.

2.6. The claimant said that she had been prescribed Nortriptyline in 2014 for depression. I was not satisfied that this was more likely than not because the medical records from the time include no reference to depression and the medical records referred to Nortriptyline in the context of the management of the claimant's back pain. I find that if Nortriptyline was being prescribed for depression, the medical notes would at least have recorded the claimant complaining of or presenting with depression, Furthermore, the claimant was prescribed Nortriptyline on 8 December 2014, which pre-dated her dismissal.

2.7. After her dismissal the claimant received Employment and Support Allowance. The claimant did not seek work. Her evidence was that her physical and mental health did not enable her even to contemplate her seeking work; her confidence had taken a huge knock. The claimant felt worthless and useless and thought that, if she could not get alternative employment with the respondent, she would not be able to get a job anywhere. The claimant said that her job was very important to her wellbeing and mental health; it kept her on an even keel, giving her focus and direction. Without it, she felt lost and with nothing more to aim for in life.

2.8. From May 2015, the claimant started receiving Jobseeker's Allowance and met job search requirements. She applied for the following roles:

2.8.1. 13 May 2015, In-house Health Adviser, in response to an advert on Gumtree;

2.8.2. 29 May 2015, Customer Service Adviser, via Berry Recruitment;
2.8.3. 4 June 2015, Part-Time Receptionist at GP's surgery;
2.8.4. 7 June 2015, Mystery Shopper via Berry Recruitment;
2.8.5. 18 June 2015, In Health Customer Adviser and Inbound Call Centre Adviser;
2.8.6. 12 July 2015, position with St John's Ambulance;
2.8.7. 15 August 2015, Mystery Shopper via Reed Recruitment; and
2.8.8. 22 August 2015, Driver in Milton Keynes area.

2.9. The claimant did not find new employment. Her poor physical health continued. The claimant resumed Employment and Support Allowance with effect from 16 September 2015. Employment and Support allowance is payable to people with disabilities which affect how much they can work. The claimant was placed in the work-related activity group, which meant that she was considered to have the potential for work related activity.

2.10. The claimant's evidence was that she continued to lack confidence, and had continuing anxiety and depression which left her mentally unable to contemplate searching for further work. She found it difficult to carry out normal day to day tasks. She had no motivation and found it difficult to leave the house.

2.11. The claimant says that by the end of 2016 she was suffering from severe clinical depression. I am not satisfied that this is supported by a clinical diagnosis. She was assessed at the Nuffield Orthopaedic Centre on 8 December 2016 and spoke to a physiotherapist about her mental health (bundle pages 346—347); she was having suicidal thoughts. On 23 January 2017 she went to see her GP, was diagnosed with a mood disorder, and was prescribed Fluoxetine. On 3 March 2017 she went to see her GP again about depression and was prescribed Mirtazapine. The claimant's GP notes record that she had been taking an 'SSRI" (selective serotonin reuptake inhibitor) since January 2017 but had only used them for 4 weeks. The notes record that the claimant could not take an SSRI because of a risk of serotonin syndrome. In a depression questionnaire from 3 March 2017, the claimant said that over the preceding two weeks, she had not had thoughts about suicide or self-harm, but nearly every day had little interest or pleasure in doing things and had sleep troubles, and over half of the time felt down, depressed or hopeless, felt tired or had little energy, had appetite problems, felt bad about herself and had difficulty concentrating.

2.12. The claimant said that the hearing of her Employment Tribunal claim took its toll on her health; she had found it a very stressful experience (she had represented herself). The respondent's appeal against the Tribunal's decision worsened the situation for her. The ongoing Tribunal case affected her deeply; the claimant felt unable to put the events of her dismissal behind her and move on with her life.

2.13. In September 2017 the claimant had been asked to attend a mandatory work programme, but was unable to attend because she was too unwell. She was signed as unfit to work by her GP on 26 September 2017. The reasons

given were the claimant's back pain and not her mental health. Between 20 September 2017 and 6 October 2017 she attended a Balanced Life Programme, a pain management course for three days per week at the Nuffield Orthopaedic Hospital in Oxford. She was assessed for ongoing anxiety which had not improved. The claimant still felt physically and mentally unable to work.

2.14. On 12 October 2017 the claimant received a report following the pain management course which suggested that she be referred for an Improving Access to Psychological Therapies programme due to clinical depression and anxiety. She was referred to MIND and assessed on 29 March 2018. Counselling was recommended and she was referred to Milton Keynes Counselling Service. The claimant had her first counselling session on 17 July 2018 and attended weekly sessions for eight weeks. On 15 August 2018 the claimant's counselling ended and her counsellor asked her GP to refer her to a mental health team.

2.15. The claimant said that her mental health continued to worsen. She said that she had suffered periods of psychosis since the age of 20 (although I did not have older medical records, and nor had Dr Davies seen these). In November 2018 the claimant was referred to an early intervention mental health team because she reported that symptoms of psychosis (such as hearing voices and others) had returned. She was assessed by Dr Simon Edgar, a consultant psychiatrist, on 14 December 2018, who diagnosed unspecified non-organic psychosis, and prescribed Aripiprazole (an anti-psychotic medication) and given a care plan and anti-psychotic medication. Dr Edgar noted long-standing psychotic symptoms and secondary depression caused by a number of adverse life events, largely (he said) the claimant's long-standing back pain.

2.16. As at the date of the hearing, the claimant remained under the care of her GP and was still taking medication. She described feeling worried to leave the house, and a fear of public spaces. She could only go out with the support of a friend or family member. She described anxiety on public transport. She described periodic thoughts of self-harm and suicide, although her relationship with her daughter and grandchildren mean she would never carry these out. The claimant found it difficult to talk to people because she had no self-confidence. She had tried a variety of approaches to improve her mental health, such as mindfulness, reflexology, acupuncture and according to Dr Edgar spiritual healing, but the claimant said that she was still suffering and felt that she would not really be able to get better until the Employment Tribunal case was over. She said that all of her symptoms and their consequences stemmed from her dismissal. Her job had been the one thing that had kept her going and helped her to keep focused and happy. When it was taken away, she felt that she was left without any purpose or meaning.

2.17. Dr Davies said that the claimant had attempted to retrain in 2016 by taking floristry lessons from a friend of hers. He said that the claimant had enjoyed this, and occasionally helped her friend, but had not been able to find any other work. A letter from Ms Tracy English said that the claimant had learned floristry over 18 months before March 2019 (therefore starting late in 2017). The claimant had referred to the *prospect* of doing floristry at the hearing in 2017, but did not suggest that she had already done it. I find that it is more likely that the claimant started some floristry training in late 2017 than in early 2016. Ms English said

that the claimant had had to stop and start her training because of anxiety and bad days with pain. The claimant had made and sold some wreaths during Christmas (probably 2018), but had not made any profit doing so.

2.18. The claimant had lost her home three times because of her financial circumstances, and her gas supply had been cut off once.

3. The respondent's evidence

3.1. Much of Ms Butcher's evidence covered the history of the litigation and summarised the Tribunal's liability decision and commented on the expert evidence, I considered that this was not independent evidence, but commentary on evidence. Ms Butcher's witness statement included three paragraphs about mitigation which were in substance submissions alleging a failure by the claimant to mitigate her loss. Ms Butcher said that the claimant had asked to be reinstated or re-engaged (which was not strictly accurate, and I was told that this had been the subject of without prejudice communications between the parties—but in effect the respondent was waiving the privilege in those communications and the claimant agreed to the waiver of that privilege). In addressing this, Ms Butcher alleged damage in the trust and confidence between the parties. When asked about this in cross-examination, the only matters that Ms Butcher referred to as the reasons for a breakdown in trust and confidence were the fact that the claimant had brought these proceedings and the conduct of the proceedings. No facts were brought to my attention suggesting the unreasonable conduct of the proceedings by the claimant. I found it difficult to see how refusing to consider employing a person who has (successfully) brought proceedings under the Equality Act 2010 would not amount to victimisation, and I considered the respondent's position, though frank, very unfortunate. Those who are dismissed by an employer are able to complain that their dismissal was unlawfully discriminatory and if they succeed in such a claim, it does not sit well in the mouth of an employer who has broken the law to say that there has been a breakdown of trust and confidence between the parties because an employee has successfully asserted their statutory right. The respondent's position also made clear that, had the claimant applied for a job with the respondent, she would have almost certainly not been appointed: until the Tribunal's decision on liability (and probably until the dismissal of the respondent's appeal), the respondent evidently considered that it had acted appropriately in dismissing the claimant and thereafter, the respondent seems to have considered that there was a breakdown in trust, so that it would not re-employ the claimant. The respondent could not logically point to its own vacancies as ones which the claimant should have applied for to mitigate her loss while saying that it would not have re-employed her.

4. Expert evidence

4.1. Mr Dyson, a consultant orthopaedic surgeon, saw the claimant on 12 June 2019 and, on the joint instructions of the parties, reported on her back condition. His opinion (paragraph 8.3) was that the biological aspects of her condition in isolation would not have prevented her working at any time during the period between her dismissal and the date of his examination. In his opinion, in the absence of the various psychological issues which had affected her life, the

biological issues would have caused relatively short and temporary periods of absence from work, and that these relatively short and temporary absences would not have been particularly greater had she remained in her original job or been employed in an alternative modified occupation. The claimant was not unfit to undertake any work from a purely orthopaedic point of view. In Mr Dyson's opinion, the claimant presented with a severe disability with a high dependency on medication, considerable immobility and sitting intolerance. He attributed this disability predominately to psycho-social issues which, in his opinion, were likely to threaten her ability to engage in any form of useful employment.

4.2. Neither party sought to challenge or probe Mr Dyson's conclusions, but on the basis of his concluding observations, Dr Davies was instructed.

4.3. The instructions to Dr Davies were perhaps not as a helpful as they might have been, given the very different issues that arise when dealing with remedy. I am not interested so much in whether the claimant met the statutory definition of a disabled person at any time (since that issue was conceded so far as liability issues were concerned, and plays a subsidiary role in relation to remedy), or about pre-dismissal matters, except to the extent that they help me decide the questions whether the respondent's unlawful act caused or materially contributed to an injury to the claimant (and if so, to what extent), and about the claimant's condition and prognosis from time to time and in particular so far as it affected her ability to look for work and do work. Dr Davies' report (no doubt as a result of his instructions) does not always easily enable focus on these questions, and I did not always find it easy to follow his conclusions. Several passages in his report set out speculation, which again did not readily help me to decide the issues for me.

4.4. Dr Davies corrected his report before he gave evidence: his report said that he had not seen GP records after September 2016, and that there were not entries about depression or anti-depressants, but Dr Davies wrote this before seeing a second set of later records, which did include references to low mood and anti-depressants.

4.5. Dr Davies' conclusions, in summary, were that:

4.5.1. It was generally accepted that patients experiencing depression generally experienced pain as more severe, or found it more difficult to deal with pain. However, the claimant did not give an account of experiencing depressive symptoms until after her dismissal or shortly before, when she had a return to work meeting.

4.5.2. It was more often the case that, rather than depressive symptoms leading to back pain, back pain led to depressed mood. Depressive symptoms were common among people experiencing chronic pain.

4.5.3. The Claimant had experienced reactive low mood at times relating to life events (including loss of her job, and the withdrawal of her benefits), but these did not amount to a depressive disorder but at times amounted to an adjustment disorder in the short term.

4.5.4. On one view, the claimant had experienced an adjustment disorder for between 6 and 12 months or possibly more (preceding her dismissal).

4.5.5. Dr Davies' alternative suggestion (paragraph 15.2 of his report) was that on the basis of the claimant's account, she had experienced a depressive episode of moderate severity lasting around six months (though this was not recorded in the claimant's GP records, suggesting that the claimant's symptoms were no more than mild).

4.5.6. Dr Davies considered that the claimant's psychotic symptoms were genuine, but their cause was unclear.

4.5.7. The claimant had managed to remain in work despite reporting symptoms of a long-standing psychotic disorder (reporting that work had assisted her to manage her symptoms).

4.5.8. The claimant was restricted by medication side effects. It was likely that the combined effects of several sedative medications were contributing to the claimant's feelings of lethargy and reduced motivation and this was separate from any depressive symptomatology. Overall there had not been a long-term, substantial impairment as a result of a psychiatric disorder.

4.5.9. From a psychiatric perspective it had been reasonable for the claimant to have had short-term time off around the time of her grandmother's death (three days after her dismissal), in relation to the difficult end of a relationship in 2014, and short-term at other times.

4.5.10. While the claimant's psychiatric symptoms would disadvantage her in terms of applying for and holding down a job, work was not prevented. The claimant's overall psychiatric symptoms would impair her in terms of applying for and holding down a job but did not prevent her carrying out work for which she was suitably skilled and qualified. Dr Davies saw no reason why the claimant should not be able to do work running a small shop for example, if her medication effects were addressed.

4.5.11. But for the distressing effects of her dismissal, 'the regulations regarding driving', and the effects of medication, there was no reason why the claimant should not have been able to continue working and why she could not work now.

4.5.12. The claimant's presentation on examination was not suggestive of a then-current depressive episode.

4.5.13. The specific issues of the claimant's immobility and sitting intolerance were not direct consequences of psychiatric symptoms but Dr Davies suspected that psychiatric medication had contributed to psychiatric symptoms through sedation and weight gain.

5. Submissions

5.1. The parties' submissions were set out in writing, and therefore I will not rehearse them here. I set out the key differences in position below.

Conclusions

6. Injury to feelings

6.1. The claimant claimed damages for injury to feelings at the top of the highest *Vento* band as well as aggravated damages of £20,000. The respondent's counter schedule contended that an award for injury to feelings should be £7,000.

6.2. I must have regard to Presidential guidance, though it is not a source of law and I am not bound by it. The original Presidential guidance on injury to feelings applied to claims started from 11 September 2017 (and therefore after this claim). Paragraph 11 of that guidance provides that in respect of claims presented before 11 September 2017, an Employment Tribunal may uprate the bands for inflation by applying the formula x divided by y (178.5) multiplied by z and where x is the relevant boundary of the relevant band in the original *Vento* decision and z is the appropriate value from the RPI All Items Index for the month and year closest to the date of presentation of the claim (and, where the claim falls for consideration after 1 April 2013, then applying the *Simmons v Castle* 10% uplift) (unless I conclude that a *Simmons v Castle* uplift should not apply).

6.3. The original middle *Vento* band was £5,000 to £15,000.

6.4. The claimant's claim was presented on 13 July 2015.

6.5. The RPI for July 2015 was 258.6.

(5,000/178.5) x 258.6 = £7,243.70 x 110% = £7,968.07.

(15,000/178.5) x 258.6 = £21,731.09 x 110% = £23,904.20

6.6. I conclude that I should allow for a *Simmons v Castle* uplift; I see no grounds which would justify the disapplication of one. I conclude that I should follow the Presidential guidance; there are no reasons which justify departing from it. The applicable middle band is therefore £7,968.07 to £23,904.20.

6.7. The respondent argues for an award in effect towards the top of the lowest *Vento* band (as uprated). I conclude that this would be unjustly low. The claimant argues for an award in effect well into the top *Vento* band. I conclude that this would be too high. Although it is right that there was single unlawful act, that act was the dismissal of the claimant from her employment of 10 years. There are few, if any, single acts more economically and socially disadvantageous to an employee than dismissal. Dismissal removes income, causes stress, disadvantages an employee in finding alternative work and, I have been satisfied in the claimant's case, led to a downward spiral that has had profound consequences on the claimant's health, personal life, and future prospects. It has caused her very real suffering, and I am satisfied that the claimant tried to remain in work in 2014, cooperated with consideration of alternative work, and made very clear her desire to do other work. I am satisfied that her attempts to remain in work were undermined by the respondent's failure to take seriously its duties towards her as a disabled employee. The respondent compounded the claimant's sense of injury by denigrating the skills that the claimant had, and (as described in the liability decision), it failed to comply with its policy, the intention of which is to avoid unnecessary dismissal. The claimant has satisfied me that her work was a very important part of her self-identity and a means of maintaining a sense of wellbeing. Had the respondent acted lawfully, the claimant would not have remained as an ambulance driver and so she is not entitled to be compensated for the loss of *that* particular employment.

6.8. I conclude that there is a degree of aggravation to the claimant's damage as a result of the respondent's continued denigration of the claimant's skills and abilities in these proceedings (prior to the Tribunal's liability decision). However, I must be careful to avoid over-compensating the claimant by taking aggravating factors into account in assessing damages for injury to feelings and then making a separate award of aggravated damages. I must pay particular attention to the totality of the amount I award for non-pecuniary loss.

6.9. Having regard to these principles, I conclude that I should award the claimant a total of £25,000 by way of damages for injury to feelings, which also reflects (and includes) the degree of aggravation to the injury to her feelings. I do not make a separate award of aggravated damages. I have considered whether, given the unusually long passage of time since the claim was started I should adopt a different approach to allow for inflationary effects on the value of money, but I have concluded that this will be addressed by an award of interest and that therefore I should not also make a change to the underlying figures on which interest will be payable.

7. General damages for pain suffering and loss of amenity

7.1. I am satisfied in light of the claimant's evidence and Dr Davies' opinion that the claimant's dismissal materially contributed to the development of a clinically well-recognised mental injury in the form of depression or an adjustment disorder which lasted for between 6 and 12 months. There were probably other contributory factors, in the form of the death of the claimant's grandmother, relationship difficulties, and the claimant's long-term back pain, but I am satisfied that but for the claimant's dismissal, it is unlikely that she would have experienced the same degree of impairment. In 2015, the claimant's mental health was not so disabling as to cause her to report it to her GP. I have not been satisfied that it is more likely than not that the respondent's actions caused or materially contributed to any more serious mental injury, such as psychosis or schizophrenia. So far as any psychosis is concerned, the claimant's evidence is that this was of long standing, and so far as the claimant's current state of mental health is concerned, I am satisfied that the principal causes of this are the claimant's ongoing experience of back pain and her medication, and I have not been satisfied, in light of Dr Davies's evidence that the claimant's unlawful dismissal has operated in more recent times as a materially contributing factor to her state of mental health.

7.2. The claimant's claim for general damages (of over £50,000) is essentially based on the entirety of her current symptomatology being entirely caused by her unlawful dismissal. I do not accept that as established on the evidence before me.

7.3. The *Judicial College Guidelines for the assessment of general damages in personal injury cases* (15th edition) require consideration of:

7.3.1. the injured person's ability to cope with life, education and work;
7.3.2. the effect on the injured person's relationships with family, friends and those with whom he or she comes into contact;
7.3.3. the extent to which treatment would be successful;

7.3.4. future vulnerability;
7.3.5. prognosis;
7.3.6. whether medical help has been sought.

7.4. In my judgment, the relatively mild adjustment disorder described by Dr Davies falls within the 'less severe' bracket of the guidelines for psychiatric damage, for which the guideline range is £1,440 to £5,500. I bear in mind the minor injuries guidelines, for which, for injuries involving complete recovery within three months, the guideline range is £1,290 to £2,300.

7.5. In my judgment, the claimant's injury was more serious than one seeing complete recovery within three months. Therefore, within the less severe range for psychiatric damage and having regard to the fact that the claimant's injury was a recognised psychiatric injury and lasted for between 6 and 12 months, in my judgment, the claimant's overall injury would merit an award of £5,000.

7.6. However, non-tortious contributory factors to the claimant's injury were the death of the claimant's grandmother, relationship difficulties, and the claimant's ongoing back pain. The burden is on the claimant to prove how damage is to be apportioned between tortious and non-tortious factors, unless it is truly indivisible, but I must be astute not to deny justice because of complex issues of causation. Doing the best I can, I conclude that the claimant's injury can be apportioned, and that I should reduce an award for general damages to £4,000. I am satisfied that the claimant's dismissal (and notably the rejection of her appeal against her dismissal) was the single most significant factor in the likely development of an adjustment disorder at this time.

8. Loss of earnings

8.1. On the Tribunal's 2017 findings and conclusions, the claimant had alternative employment with the respondent which she could have been enabled to take up instead of being dismissed. There was no evidence that that post no longer existed. The starting point therefore was that had the claimant not been dismissed, she would have remained in the Trust's paid employment. The parties agreed that the claimant's net weekly loss after dismissal was £270.45, and the claimant would therefore continue to experience this loss until she found alternative employment.

8.2. On the basis of Dr Davies's opinion, I find that it is more likely than not that the claimant developed a disorder in her mood following (and as a result of) her dismissal, but this was not as much of a concern to the claimant as her ongoing back pain, and not of enough significance for her to report it to her doctor at that time or until 2017 (having reported it to her physiotherapist in late 2016). I have not been satisfied that the prescription of Nortriptyline was because of depression—the claimant's medical notes do not record any complaint about depression. I am satisfied that it is likely there was some interplay between the claimant's back pain, her dismissal, and her mood: the claimant's back pain was pre-existing at the time of her dismissal, and substantial, and the fact of her dismissal and its circumstances adversely affected the claimant's mood. I accept in light of the expert evidence that the claimant's pre-existing chronic back pain left her vulnerable to low mood and depression. I accept that it is likely that the

claimant found work an important part of her life, and that her dismissal and the circumstances of it was a very serious blow to her: it affected her overall ability to manage her wellbeing as well as damaging her self-confidence and creating financial problems which led to a downward spiral. The claimant felt (and was) able to apply for work from May 2015 and applied for jobs between May and August 2015, but I find that her failure to find alternative work then left her dejected and defeated. The claimant was disadvantaged on the job market by May 2015, and increasingly disadvantaged as time went by, because she had been dismissed from her last employment for her attendance and health, and she was applying for work from a position of unemployment. She was not able to do the same kind of work from which she was dismissed and although able to do administrative work, she could identify less evidence of skills and aptitude for this work to prospective employers, and new employers were not under the same duties towards her to make reasonable adjustments as the respondent had been. These factors significantly disadvantaged the claimant on the labour market; they were not matters for which blame can be attributed to the claimant and they flow as a matter of causation from her dismissal. From September 2015, the claimant's state of health meant that she was moved from jobseekers' allowance to employment and support allowance, and this indicates that, so far as provision of state benefits is concerned, she was considered not fully able to apply for jobs or work.

8.3. The expert medical evidence is difficult for me to synthesise, but both Mr Dyson and Dr Davies identified the claimant's dependence on medication as a factor inhibiting her ability to work, and neither suggested that the claimant was malingering or that she would be able to start working at the time that they saw her. I am satisfied that, at the moment, as a result of her circumstances, the claimant is unable to work principally as a result of the effects of medication. Dr Davies' opinion was that the claimant's overall psychiatric symptoms would impair her ability to apply for and hold down a job. Dr Davies did not indicate a likely prognosis for the claimant on the basis of alternative treatment plans. Significantly, Dr Davies was of the view that but for the claimant's dismissal, regulations about driving, and the effects of the claimant's medication, there was no reason that the claimant would not have remained employed. The delay and uncertainty surrounding these proceedings appears also to have been a significant contributory factor to the claimant's circumstances, and it must be a cause of the greatest regret that they have taken as long as they have to be resolved.

8.4. While the claimant's circumstances since her dismissal in 2014 (in not finding alternative work and in the deterioration in her health and wellbeing) could not reasonably have been foreseen, I am satisfied that, as a matter of causation, they flow from her unlawful dismissal. But for the claimant's dismissal, I find, she would not have been out of work for the past 5 ½ years and the fact that she has been out of work for the past 5 ½ years is because of her unlawful dismissal. However, the claimant's ongoing unemployment is not entirely because she has not been fit to do any work since her dismissal, and in particular it is not entirely because of ill health caused by her dismissal. The claimant was able to look for work, and did look for work in the summer of 2015, during a period when in Dr Davies' view she was probably experiencing an adjustment disorder. The combination of the claimant's inability to find work then, and her mood, and her

back pain have led, in my judgment, to a downward spiral in which the prospects of the claimant securing paid work and remaining in paid work have grown ever more difficult for her (as both Mr Dyson and Dr Davies observe).

8.5. The respondent (which bears the burden of proof on the issue of mitigation) has not satisfied me by reference to its evidence on mitigation that there were particular jobs that the claimant could and should have applied for during the period since her dismissal, and which, had she applied for, she would have been appointed to. For most of the period since her dismissal, the claimant has not been required by the Department for Work and Pensions to look for work, and I am satisfied that she has not been well enough to look for work and that even had she looked for work, it is on balance unlikely that she would have found a job.

8.6. However, I consider that two less concrete considerations are material in determining appropriate compensation.

8.7. First, in light of her complex health situation and the fact that the claimant was already experiencing significant back pain before her dismissal (of course, that was the reason for her dismissal), there must, in my judgment, have be some prospect that the claimant, had she not been dismissed in December 2014, and had she moved to the administrative role which the Tribunal found should have been offered to her, would nonetheless not have successfully remained in that post for the 5 ½ years since.

8.8. Second, in light of the claimant's ability to work as a florist with her friend—albeit that this was work with breaks and with a sympathetic friend—there must have been some prospect, albeit not great, that the claimant might have found work if she had committed to finding alternative employment. The test which I apply when considering whether there has been reasonable mitigation of loss (and bearing in mind that the burden of proof is on the respondent to prove a failure to mitigate loss, and not on the claimant to prove that she has mitigated her loss) is whether the claimant could and would have done any more if she had no prospect of compensation from the respondent. Although I am satisfied that the claimant's circumstances have been very difficult ones, that her circumstances were caused by her unlawful dismissal, and they have significantly impacted on her ability to find alternative work, I have been satisfied that there was some more that the claimant could reasonably have been expected to do, and would have done, certainly in mid-2015, if she had never had any prospect of recovering compensation from the respondent, by way of seeking alternative employment. The claimant could and would in my judgment have looked more carefully at informal networks back to work, through friends and family connections, people who could vouch for her (as she has done to some extent through her floristry training), and would, in my judgment, had she done so, have had some prospect of finding work which would have increased her self-esteem and her mood and broken the downward spiral that she has experienced since her dismissal.

8.9. Doing the best that I can to reflect these two considerations which reduce compensation, I conclude that the claimant's past loss should be reduced by 50% to reflect the prospect that the claimant would have been unable to continue

working for the respondent and that the claimant could have found alternative work if she had broken the downward spiral that she experienced in 2015.

8.10. The claimant was dismissed on 12 December 2014 with 10 weeks' pay in lieu of notice. Her past loss therefore started from 20 February 2015. The period from then to the date of this judgment is 289.5 weeks. At £270.45 per week produces a net loss of £78,314.59. 50% of that amount is £39,157.30.

8.11. The claimant has received state benefits since her dismissal. The 2014 rate was £72.40 weekly. Thereafter until 2020, the rate was £73.10, and from 2020, the rate has been £74.35. Recoupment does not apply in this claim, and therefore, the claimant must give credit against her loss of earnings for benefits received.

8.12. The following table sets out the applicable deductions for benefits received:

Start	End	Weeks	Benefit
20/02/2015	05/04/2015	6.285714286	£ 455.09
06/04/2015	05/04/2020	260.8571429	£ 19,068.66
06/04/2020	08/09/2020	22.14285714	£ 1,646.32
			£ 21,170.06

8.13. Accordingly, after deduction of £21,170.06 from £39,157.30, the claimant's net loss of earnings is £17,987.24.

9. Future loss of earnings

9.1. I am satisfied that the resolution of these proceedings will help the claimant to recover. The claimant also has, as a result of the expert advice in this case advice on how she can get better, with identification of the things, in particular medication, which are affecting her ability to recover and with expert reassurance that her back itself does not seem to be the cause of her difficulties. But, as a result of the length of time for which the claimant has been out of work, in my judgment, it is likely still to take the claimant some time to get better and back into employment. I have been satisfied on balance that as a matter of causation, this ongoing loss flows from the claimant's dismissal. The claimant's friends and family will be important sources of support and encouragement in helping and challenging the claimant to get better and return to work, and the claimant can be expected to try to use informal networks to find some work.

9.2. I have carefully considered how to approach the question of future loss. In light of the claimant's recent expressed wish to be re-employed by the respondent, and since I have not been satisfied that the relationship of trust and confidence has broken down, I considered whether I should make a recommendation under s 124(2)(b) Equality Act 2010 for the respondent to offer suitable employment to the claimant within a specified period, in default of which I would have the power to revisit the question of compensation. However, I have concluded that I should not do this because it risks prolonging these proceedings (which have not allowed the claimant to recover and move on), and which I conclude is not in the

interests of either party, and in my judgment it risks over-complicating the proceedings.

9.3. In my judgment, it is likely to take the claimant a further six months to recover so that she can return to work. Although this period is short in the overall picture of the claimant's health and absence from work, I am satisfied that the resolution of the proceedings will be an important factor influencing the claimant's recovery, and this decision will redress the claimant's financial concerns. I have therefore concluded that the period in respect of which I should award future loss of earnings is six months. For the same reasons as those in relation to past loss, I reduce the amount awarded by 50%. 26 weeks at £270.45 produces £7,031.70. 50% of this is £3,515.85. £3,515.85 is therefore the amount I award for future loss of earnings.

10. Pension loss

Past pension loss

10.1. The parties agree that the claimant was a member of a defined benefit pension scheme. The claimant says that she has lost 17 years of pensionable service, having been dismissed 17 years before her intended retirement, aged 60. The respondent says that the claimant should have been able to secure alternative employment within the NHS within 6 months of her dismissal, so compensation should be limited to notional employer's pension contributions.

10.2. Since the claimant's loss of a defined benefit pension is a fact, and this loss would only be avoided by the claimant securing new employment with a defined benefit pension, the burden is arguably on the respondent to prove a failure by the claimant to mitigate her loss. But even if the burden were on the claimant, she has satisfied that she could not have obtained alternative employment within the NHS within 6 months of her dismissal. The claimant has lost 5.74 years' of her pension to date. However, I have concluded that there is a prospect that she would not have remained in the respondent's employment had she not been dismissed. And there is a future prospect that the claimant can obtain employment in the NHS. There was no evidence before me that, were she to obtain new employment in the NHS, she would not be entitled to resume membership of the NHS Pension Scheme.

10.3. The period between the claimant's dismissal and her sixtieth birthday is a total of 17.94 years. Of these 5.74 years are past loss. I reduced the claimant's past loss of earnings by a factor of 50% to allow for both some failure to mitigate and for the prospect that the claimant could and would have been lawfully dismissed some time later. I do not consider that the claimant has failed to mitigate her loss to date by finding work with an NHS employer, and in particular the respondent, as her former employer, has expressed resistance to re-employing her. Therefore, I conclude that I should not reduce the claimant's past pension loss by the same factor if 50% that applied to her past loss of earnings. Doing the best I can, I consider that it is appropriate to reduce past pension loss by ⅓ to reflect the prospect that the claimant would have been lawfully dismissed in due course. The agreed basis pay is gross pay of £335 a week or £17,420 a year.

5.74 X £17,420/80 = £1,250.16.

10.4. The applicable discount rate is now -0.25% not -0.75% as claimed. The claimant is 47. Table 20 of the Ogden Tables gives a multiplier for loss of pension from age 60 for a person of the claimant's age at a discount rate of -0.25% of 31.30.

£1,250.16 x 31.30 = £ 39,130.08.

⅔ of £ 39,130.08 = £ 26,086.72.

Future pension loss

10.5. As to future pension loss, in my judgment, there is a prospect that the claimant will be able to secure alternative employment in the NHS when she recovers, and there is the additional prospect that the claimant would not have remained in the employment of the NHS until the age of 60. Allowing for the combination of these factors, and seeking to do the best I can on the basis of limited evidence, in my judgment an award of 25% of the value of the claimant's future loss of a defined benefit pension compensates the claimant for the loss resulting from her unlawful dismissal.

10.6. The remaining period of pension loss (17.94 years less 5.74 years) is 12.2 years.

12.2 x £17,420/80 = £2,657.71

£2,657.71 x 31.30 = £ 83,186.40

£ 83,186.40 x 25% = £ 20,796.60

11. Loss of statutory rights

11.1. I award £500 for loss of statutory rights: the claimant had the rights not to be unfairly dismissed and to a redundancy payment which she lost with her dismissal.

12. Summary of compensation

12.1. Injury to feelings: £25,000
12.2. General damages for pain, suffering and loss of amenity: £4,000
12.3. Loss of statutory rights: £500
12.4. Past loss of earnings: £17,987.24
12.5. Future loss of earnings: £3,515.85
12.6. Past pension loss: £ 26,086.72
12.7. Future pension loss: £ 20,796.60
12.8. The total award (before interest) is therefore: **£97,886.41**.

13. Interest

13.1. The applicable rate of interest is 8%.

13.2. The period between the claimant's dismissal and the date of this judgment is 2097 days and the midpoint is therefore 1048.5 days.

13.3. Interest is payable on past loss, but not on future loss: regulation 5, Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.

13.4. The interest payable is as follows:

Amount	Period	Daily rate	Total
£ 25,000.00	2097	£ 5.48	£ 11,482.55
£ 4,000.00	1048.5	£ 0.88	£ 918.60
£ 500.00	1048.5	£ 0.11	£ 114.83
£ 17,987.24	1048.5	£ 3.94	£ 4,130.79
£ 26,086.72	1048.5	£ 5.71	£ 5,990.84
			£ 22,637.60

13.5. This means that the total after interest but before grossing up is £120,524.01.

14. Grossing up

14.1. The claimant has had no taxable income in the current tax year.

14.2. £30,000 is payable without tax as a payment in connection with the termination of the claimant's employment.

14.3. This leaves £90,524.01 on which tax is payable.

14.4. The claimant's personal allowance is extinguished by the overall sum that is payable, because it exceeds £125,000.

14.5. Tax is payable on £37,500 at 20%.

14.6. Tax is payable on £112,500 at 40%.

14.7. In order thereafter to achieve a total net income of £90,524.01, the gross amount payable is £138,373.35.

14.8. To this must be added the £30,000 tax-free amount, producing a total payable of £168,373,35.

15. Judgment

15.1. I give judgment for the claimant accordingly.

16. Corrections

16.1. At the conclusion of the remedy hearing, I indicated to the parties that I would send a copy of my reserved judgment and reasons in the usual way and that if either side thereafter wished to make representations as to it, by way of an application for reconsideration on matters of calculation (including grossing up or interest or any other matters), they should feel free to do so. The parties have my email address, and I would invite them for this purpose only, if they wish to make an application for reconsideration of the judgment, to copy me into any application made to the Tribunal by email at the usual email address for the regional office, so that I can take immediate steps to consider and resolve such an application (especially if it concerns only matters of calculation on which the parties are agreed).

17. Concluding remarks

17.1. I hope that the claimant will now be able to move forward after the regrettably long time that it has taken for her claim to be determined. It is disappointing that the respondent has felt unable to offer to re-employ the claimant, at least since the Tribunal's liability judgment became conclusively binding, and especially since the respondent put in evidence at the remedy hearing its own vacancies for jobs which it says the claimant was able to do. The respondent's recent claim that the re-employment of the claimant would be unsuitable because the claimant has brought a claim against the respondent is especially disappointing. While I stop short of making a formal recommendation to that effect, I would encourage the respondent to consider with care what steps it should take to train its staff (including human resources staff) in equality and diversity matters, including making reasonable adjustments for people with disabilities (which might have avoided the claimant's dismissal), and in the prohibition of victimisation of people who bring proceedings under the Equality Act 2010.

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Employment Judge Brown
8 September 2020

Sent to the parties on:

24 September 2020

For the Tribunal:

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