RM

EMPLOYMENT TRIBUNALS

Claimant: **Miss R Harkness**

Respondent: **Holland & Barrett Retail Limited**

Heard at: **East London Hearing Centre (via Cloud Video Platform)**

On: **13 and 14 October 2020, 2 November 2020 (in chambers)**

Before: **Employment Judge Moor**
Members: **Mr P Pendle**
Mr P Quinn

Representation:

Claimant: Ms L Harkness, Claimant's mother
Respondent: Mr C Ludlow, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the Respondent is ordered to pay to the Claimant the sum of £29,138.57.

The calculation of this sum is set out in Appendix 1.

Recoupment does not apply.

REASONS

1. The judgment on liability was sent to the parties on 19 December 2019. In summary, the Tribunal found the Respondent had failed, contrary to the Equality Act 2010, to make two reasonable adjustments. First, failing to continue to provide her with support (after her initial mentor/confidante had been promoted); and second, failing to remove the prospect of lone working. We decided that failing to remove the prospect of lone working also amounted to a breach of the

implied term as to trust and confidence and therefore also that the Claimant had been unfairly dismissed.

2. We did not uphold the Claimant's other disability discrimination complaint in relation failing to transfer her to Head Office; and we did not uphold the majority of her complaints that were alleged to have either been PCPs or contributed to her breach of contract in relation to: deliveries; how a sewage leak had been managed and its consequences as to stock; the use of the lift; her manager, Mr Gold's, attitude towards her; broken cages.

3. The remedy hearing originally listed in March 2020 was postponed because of the restrictions imposed by the Coronavirus. For the same reasons this hearing was conducted remotely via cloud video platform. We thank all concerned for the efforts they made to ensure that the hearing was effective including providing us with a PDF version of the remedy bundle. We had some difficulties on the first day with internet connections, which meant we lost about 90 minutes hearing time in total. We ensured sufficient breaks to compensate for the greater intensity that video hearings demand. On the second day, we checked with the parties that they had not been disadvantaged by the interruptions on the first day, by giving them an opportunity to bring up any matter they felt they had missed on the first day. Neither party needed to take that opportunity. The delays meant that we have also needed the morning of 2 November 2020 in order to conclude our deliberations on remedy.

4. We thank both representatives for their hard work: Ms Harkness approached what probably felt a daunting task as a lay person with skill and good sense; and Mr Ludlow adopted a scrupulously fair approach, asking questions in a structured and sensitive way, and assisting both us and Ms Harkness in his description of the legal principles.

Issues

5. The List of Issues was set out in the Case Management Summary sent after the liability decision.

6. Unfair dismissal:

1.1 The calculation of the basic award [now agreed]*;*

1.2 For the compensatory award, what loss is attributable to the dismissal:

(a) If the Claimant has not found another job, then whether the Claimant has taken reasonable steps to look for work;

(b) If the Claimant argues that she has not been well enough to look for work, then she must provide adequate medical evidence, including GP records for the relevant period.

(c) If the Claimant is not in work, the likely further period the Claimant will be out of work.

(d) How pension loss, if any, should be calculated. [now agreed]

(e) *What amount, if any, should be awarded for loss of statutory rights.* [now agreed]

1.3 Should any reductions to the awards be made:

(a) *What is the percentage chance that the Claimant would have resigned in any event because of the reasons for her resignation that have not found to be in breach of contract? And/or on what date, if any, is the Claimant likely to have resigned in any event?*

(b) *What is the percentage chance that the Claimant would have been dismissed in any event ('the Polkey question')? And/or on what date, if any, is the Claimant likely to have been dismissed in any event?*

7. Disability discrimination:

1.4 What would have happened if the discrimination had not occurred? The answer to this question is not necessarily 'all or nothing': the Tribunal can assess the percentage chances, for example, of the Claimant remaining in work.

1.5 What injury to feelings award should be made? Injury to feelings awards are compensatory and are based on the injury suffered. They are not for the purpose of punishing the Respondent.

1.6 Whether an aggravated damages award should be made and, if so, at what amount.

1.7 Whether interest should be awarded and, if so, for what period/s at what rate in respect of financial loss and injury to feelings.

8. To these were added the issue whether there should be a percentage decrease in any award if the Claimant had failed unreasonably to follow the ACAS Code on Discipline and Grievance.

Findings of Fact

9. Having heard evidence from the Claimant, Miss M Ellwood and Mr Gold and having read the documents to which we were referred in the Remedy Bundle, we make the following findings of fact. We refer to page numbers in the Remedy Bundle as R# and the Liability Bundle as L#. We refer to the findings of fact made in the liability judgment by J(paragraph number).

10. While the Claimant's resignation email was 28 June 2018, she gave 4 weeks' notice (L269a), therefore the effective date of termination of employment was 25 July 2019.

11. The parties have agreed figures for weekly net and gross pay and the value per week of lost pension contributions, see Appendix 1.

Attempts to Mitigate

12. The Claimant was encouraged by her former manager Mr Bristow to apply for a job as a store locality manager at Lloyds Pharmacy, on 26 June 2018 (R316). She was unsuccessful. Other than this, she has not applied for work since her resignation.

Benefit Income Since Resignation

13. The Claimant applied for Universal Credit ('UC') in July 2018. Her first payment was 30 September 2018. She continues to receive it. After the necessary three-month waiting period, she was assessed as having a Limited Capability for a Work-Related Activity (this DWP phrase incorporates having a limited capability for work): as a result she received an additional element within her UC payment. The figures for receipt of UC, set out in our calculation of remedy at Appendix 1, are taken from the UC statements (R104-137). The parties had not ensured that these statements were up-to-date. We find, having checked with the Claimant at the hearing, that she continued to receive the standard, housing and LCWRA elements, but that these were all increased from the beginning of April 2020. We find she has received UC of £979 per calendar month and will continue to do so until she is well enough to work.

Fitness for Work Since Resignation

14. On 18 July 2018 the Claimant went to her GP who considered her to be in mental health crisis. She was referred to the Crisis team and stayed in a 'crisis house', a place where a person can receive therapy and respite for a week or so, until 8 August 2018.

15. The Claimant was referred to the Francis Dixon Lodge ('FDL') in August 2018. This is a specialist unit for personality disorders. Her evidence at the liability hearing was that, since this referral, she had been having good counselling and therapy. This is supported by her medical notes for the period: in May 2019 she told her GP she had had her FDL assessment and that treatment would begin in July 2019 (R324). The FDL documents show they invite her to an assessment in January 2019 (352) and then a follow up appointment in July 2019. The Claimant's evidence to the remedy hearing of the current position was that she had been seeing a mental health nurse for therapy at FDL at approximately monthly intervals, but that she was still waiting an assessment for an 18-week course at FDL, which would do deeper work in relation to her personality disorder, and, until then, she had been advised not to work. This is supported by the letter from FDL in January 2020 (R409) that says she is under assessment and '*until completed and undergone treatment*' she is not fit for work. This in-depth course of treatment has been delayed by coronavirus restrictions.

16. The Claimant's evidence, which we accept, is that she has more insight into her condition now and has been provided with some coping mechanisms. Her condition is also managed generally well by medication (as we found in our liability judgment) except when she experiences extra stress.

17. The Claimant had the extra stress of not finding a place to live until January 2019 (see below). After this, according to the GP notes, her mental

health appears to have settled: in February she was described as doing fairly well and likewise in July 2019.

18. After the understandable stress of the liability hearing the Claimant went into a period of mental health crisis and had one further week at the crisis house (R330).

19. The GP notes also reflect that a relationship issue was a continuing stressor in the Claimant's life. From time to time this has also exacerbated problems with her mental health.

20. From about April 2017 the Claimant developed symptoms of physical pain initially in her hands, then elbows, then all over her body (e.g. R347). The Claimant asserted in her evidence that this is generally managed by medication but is made worse by stress. We do not have any medical evidence, but this assertion was not challenged by the Respondent and we accept it to be the case.

21. In her evidence to the remedy hearing, one reason the Claimant said she had wished to apply for a head office job was to avoid the physical strain of the store manager job.

22. For the purposes of her benefit claims, the Claimant has been certified as being unfit for work by her GP and those providing her with specialist mental health input since her resignation. The GP's assessment is based on both her fibromyalgia and personality disorder (R356: December 2018).

23. The Claimant agreed in her evidence that, in October 2019 that she had discussed with her GP having a long-term goal of retraining in the field of mental health (R319); and, in February 2019, talking about the idea of some limited volunteering to help socialisation (R323). We find it is the Claimant's future goal to re-train in mental health, but not one she has yet been able to take steps towards.

Caravan and Housing

24. While working at Colchester the Claimant had been living in a static caravan. This had been purchased by her mother on finance. The Claimant paid rent to her mother who used it to pay the finance company.

25. The Claimant began her last period of sickness with the Respondent on 9 April 2019 (J72). She went to stay with her mother in Loughborough for support and to allow her mother to rent out the caravan (J74). We accept that this is because, after 6 weeks of full pay, the Claimant would only then receive statutory sick pay of around £90 per week (SSP) and could therefore not afford the rent but her mother still needed an income from the caravan to pay the finance. We find that this was initially a temporary move to obtain much-needed support. Only after the resignation, without an income, the Claimant then decided to continue to stay with her mother and the move became permanent. This was a difficult decision for the Claimant: her friendship circle was in Essex, as had been her job: she only decided it was to be a permanent move after her constructive dismissal.

26. The documents show that her mother had a complaint about the state of the caravan when it was delivered to Colchester. This did not stop it being lived-in but did ultimately lead to Ms Harkness obtaining an Ombudsman's decision

recommending that the company she purchased it from accept a return of the caravan and compensation. We find that this dispute did not impact upon the Claimant's decision to move to Loughborough and was an entirely separate issue.

27. The Claimant spent about 5 months applying for ('bidding on') social housing properties until she was successful and moved into her own flat in January 2019. She was understandably anxious about her housing situation before then.

Other Findings of Fact about Employment

28. The Claimant had been progressing well until she came to Culver. Mr Bristow, the Claimant's earlier manager, had marked her out as Area Manager material (R277). The Claimant had enjoyed working for the Respondent. It seemed to us she clearly gained confidence from her progress through the ranks. She was delighted to have been given the larger store, Culver, and was keen to continue to develop. Again understandably, she saw her work at the Respondent as a career.

29. The Culver store was a step-up for the Claimant. She had more staff to manage and a bigger, 'concept' store with a wider range of products (J32-33).

30. In mid-2017, after about 6 months of being the store manage at Culver, and when there was no lone working and the Claimant was receiving the mentoring support of Mrs Cepparulo (i.e. there were no adjustments to be made), she had a period of depression/anxiety combined with a sprained ankle for which she needed about 5 weeks off and a graded return (J37 and R300). The medical notes record her keenness to get back to work at this time (R300).

31. The Culver store did not meet the sales targets set for the first year of trading but, by December 2018, sales targets were met in every month except one until the Claimant's last sick leave in April 2018. The store was still not meeting other Key Performance Indicators (like items in a basket). At the remedy hearing, we heard evidence from the Claimant, which we accept, describing difficulties with staffing at Culver. Some of these difficulties stemmed from her having to demote the Assistant Manager, Ms Faircloth, to supervisor and to the staff hours reductions we referred to in our liability judgment.

Subsequent Allegations of Gross Misconduct

32. In his witness statement at the liability hearing (para 42), Mr Gold stated that, before her resignation, he had begun an investigation into allegations of misconduct against the Claimant. We left that evidence to any future remedy hearing as the Claimant was not aware of the allegations at the time and they were not relevant to liability.

33. On 10 April 2018, the day after the Claimant had signed off sick, Mr Gold went to the store to ensure it was adequately covered. He did a full safe check and found it was £10 down. Ms Faircloth informed him that the Claimant had borrowed £10 from the till to buy cigarettes. As the Claimant had then begun sick leave it had not been paid back. In a later fact-finding interview, the other supervisor, Ms Tiganila, informed him that the Claimant had taken a few reduced lines without purchasing them on the basis that she would return to pay for them

later. On 23 May 2018 Mr Gold was informed that the Claimant had returned to the store to pay for those lines. He says he saw the CCTV where the Claimant did a transaction at the till without scanning items. He also says he saw the Claimant picking items from the reduced lines bin. Mr Gold did not retain the CCTV. He accepted in cross-examination that the receipt he relies on for the transaction he referred to is not for 'reduced lines' (R420). We find this receipt also shows that the transaction was not for 'a few' items, but a significant shop of 14 items totalling about £81. Mr Gold accepted he did not know whether the receipt related to the products or not. He also accepted that there had been staffing difficulties at the branch, including because of the demotion of Ms Faircloth.

34. Mr Gold checked with Miss Ellwood of HR who remembers advising him to do an investigation, a 'fact find', with the two supervisors. In his interview with Ms Faircloth she says that Ms Tiganila had only been told of the issue on the Friday, but Ms Tiganila suggests they both knew on the same day. Ms Tiganila alleged the Claimant had told her to replace the £10 from the till with money from the change float to make sure the tills were balanced.

35. At the end of each fact-find Mr Gold decided not to take any form of disciplinary action against the supervisors.

36. Mr Gold decided to await the Claimant's return before investigating the matter with her: he knew she was on sick leave for stress and did not therefore think it appropriate to raise it with her while she was absent.

37. The security policy of the Respondent informed staff they must not borrow company money for any purpose (R141), nor must they take goods intending to pay at a later date (R142). In its disciplinary policy '*taking stock without making payment for it*' is an example of gross misconduct as is '*any serious breach*' of the security policy.

38. In his evidence Mr Gold explained that, although the supervisors were also at fault for not reporting the matter, he thought they had a close relationship with the Claimant and that was why he did not take action against them. We find, however, that his decision also suggests he did not consider the matter as serious as he now claims otherwise he is likely to have taken some action in order to lay down the message that each supervisor was responsible for upholding the security policy.

39. Mr Gold accepted that his investigation was not complete and could have been more detailed, but he maintained his view that, if the Claimant had returned to work she is very likely to have been dismissed because of these allegations.

40. The Claimant denies borrowing money from the till and suspects her staff of using her as a convenient excuse, given she was absent. She denies taking items without paying for them and refers to the receipt that shows what she later paid for were not 'reduced items' or a 'few'. The Claimant was extremely upset by these allegations.

Decision Whether to Bring Grievance

41. The Claimant had tried to contact Mrs Cepparulo by email in January 2018 for support, but Mrs Cepparulo had not replied. We accept the Claimant's

explanation that she had not complained about this at the time because she hoped that Mrs Cepparulo would reply. The Claimant also bore in mind Mr Bristow's warning to her that she should not bring grievances if she wanted to progress. Before her resignation, the Claimant did complain about the prospect of lone working to Miss Ellwood in a welfare meeting.

Injury to Feelings

42. The Claimant had viewed her employment with the Respondent as a career: she had been promoted and done well in most of the 6 years she was employed. The job bolstered her self-esteem and gave her confidence and status. We find she suffered significant disappointment, upset and, initially intense anger, as well as a loss in confidence when this career ended. These responses were so severe that the mental health crisis she experienced at the end of July/August 2018 was very much down to the loss of work. We take the Claimant as we find her: a person with a vulnerable mental health because of her personality disorder. We therefore take into account this more magnified response to the loss of her job, even though it may not have been how those of a more resilient disposition would have responded.

43. The Claimant went as far as describing her hurt feelings in her Schedule of Loss as arising from a '*campaign'* of discrimination '*almost as soon as'* she told the Respondent about her mental health. But we have found that the Respondent gave her mental health support through the mentorship of Mrs Cepparulo but failed to *continue* it. And we have found the Respondent ought to have adjusted for the *future* prospect of lone working. This, by no stretch of the imagination, could be described as a 'campaign' of discrimination or one beginning from as soon as the Respondent became aware of her disability. Thus we find that **part** of the Claimant's injured feelings relate to those complaints we have found **not** to be discrimination: in particular the failure to look for or offer her a head office position about which she was still complaining at the remedy hearing; the relationship with Mr Gold; her feelings of a lack of support over the sewage leak and the cage injury; and her feelings about being unable to use the lift. That is not to say, however, that we do not weigh most heavily in the cause of her injured feelings the loss of her job, which was partly the result of the discrimination we found.

44. We find that by late 2018 the Claimant's emotional response had lessened. In February 2019 she told her Doctor she had *not felt 'intense anger for months'* (323). The other GP notes in early 2019 record that she was doing altogether better in mental health terms. But we find that, although the loss of her career did not manifest itself in a significant mental health response any longer, as a real feeling of loss it still persists. We consider that once the litigation is over this feeling is likely to improve as she moves on in her life with the help FDL.

Dates for the Calculation of Interest

45. There was an ongoing failure to provide alternative support to Mrs Cepparulo from January 2018. In relation to the failure to adjust the prospect of lone working, the Claimant raised her concerns about its impact on her interstitial cystitis in a meeting in March 2018. It would have taken a further period for the Respondent to figure out an alternative approach: by Mr Gold discussing the

matter with his managers and the Claimant. It would have reasonably taken no more than the end of May 2018 to do this. For interest purposes, we therefore calculate the date of discrimination from then.

Submissions

46. Both parties provided Schedules of Loss. The parties agreed some figures (as set out in Appendix one).

Respondent

47. We refer to Mr Ludlow's helpful skeleton argument, which he supplemented orally.

48. In essence he argued that the Tribunal could find that there was no loss of earnings from the resignation onwards (or that loss of earnings should be discounted to allow for the chance of various other outcomes):

49. The Claimant would have resigned in any event because of the other reasons for her resignation and because of the other stressors at work.

50. The Claimant would have resigned in any event because she had relocated to Loughborough.

51. The Respondent is very likely to have dismissed the Claimant for gross misconduct.

52. The Claimant would have resigned/or been dismissed in any event due to ill health: her mental health has prevented her from working and she had developed fibromyalgia, which has played a large part in her inability to work since.

53. Mr Ludlow also submitted that the Claimant failed to mitigate her loss: she applied for one job very shortly before dismissal which showed she thought herself capable of work. And there is evidence that she was intending to retrain in a different field, which he argued broke the chain of causation. He argued the GP notes showed that she was considering volunteering and was faring better in 2019, so that some work was possible. The Claimant could not have it both ways: either she was well enough for some work or she was so unwell that this inability to work would eventually have led to her dismissal for incapability.

54. He argued that Injury to Feelings fell within the bottom of the middle band of Vento. These were short-lived failures to adjust. This was not a continuing campaign of malicious discrimination. The Tribunal must not compensate for the mental health that the Claimant already experienced nor for the other complaints that the Tribunal rejected (the sewage leak; the lift; the management of Mr Gold; the finger injury; and the failure to transfer her to head office). We should compensate her only for the injury to feelings in consequence of the failure to make adjustments. Plainly there was an exacerbation at first, as illustrated by the crisis soon after resignation, but the GP notes show that the Claimant was getting along emotionally far better by early 2019.

55. He submitted that the Tribunal should also compare any injury to feelings award it makes to the Judicial College Guidelines in personal injury awards: Mr

Ludlow suggested the band for 'moderate' psychiatric damage was the best reference point (£5,500-£17,900).

56. Mr Ludlow argued that the threshold for aggravated damages was simply not met in this case. There had been no malicious, insulting, oppressive or high-handed behaviour here, rather a failure to continue support that had been in place and a failure to remove the prospect of something happening in the future (a limited amount of lone working).

57. He submitted that, although the Claimant had complained to Miss Ellwood about the prospect of lone working, she had not complained about the loss of support; that this failure to complain was unreasonable; and that we should exercise our discretion to decrease any award made by 25%.

58. Upon my query, he did not submit that we should take a different approach to interest than the usual one set out in the relevant Regulations.

59. Mr Ludlow agreed that in relation to compensation for loss of earnings, if there was any, that we should calculate this under the discrimination head of damages and that the Universal Credit sums received should be deducted.

Claimant

60. In her impressive submissions for the Claimant, Ms Harkness in essence submitted that the Claimant loved her job at the Respondent. She saw it as a career and before the events complained about was doing well. Her injury to feelings award should be judged against the impact of such a loss. Mrs Harkness acknowledged (contrary to the original Schedule) that the award should be within the middle band of Vento but at the higher end. She referred to the Claimant's loss of confidence, self-esteem, and her going into crisis very soon after the end of her employment.

61. She submitted there was a loss of earnings here because: (1) the Claimant would not have resigned in any event had she had the support she needed: this was a career she was giving up and she had wanted to progress; (2) the move to Loughborough was initially a temporary measure for support and only became permanent after the resignation. The caravan issue had not prevented the caravan from being lived in: it was because the Claimant would only receive SSP that she moved temporarily so that rent could be obtained on the caravan to pay for its finance. (3) FDL were clear the Claimant should not work until her therapy was over. It was not the Claimant's fault that there had been delays in obtaining it. It was reasonable for her not to look for work while an 18-week course of therapy was in the pipeline. (4) Her fibromyalgia was controlled by medication and would not have prevented the Claimant from working for the Respondent.

62. Ms Harkness argued that there was no likelihood of a gross misconduct dismissal here: the matter had not been investigated properly and, without hearing from the staff themselves, it was impossible to make that finding. She argued that one staff member had heard about the allegation from the other. She argued that the 'taking items' allegation could not be sustained bearing in mind that the receipt relied upon did not relate to 'reduced items' and the evidence had been lost.

63. Mrs Harkness acknowledged that aggravated damages were not usual. She argued it was appropriate to take into account that the gross misconduct allegation the Claimant now faced had not been raised with her and this was to rub salt into the wound. She suggested that the Respondent's treatment had been 'cruel'.

64. As to the grievance issue she pointed to our liability findings that Mr Bristow had advised the Claimant not to grieve so much; and it was reasonable for the Claimant to hope that Mrs Cepparulo, her confidante, would eventually get back to her.

Legal Principles

65. We are grateful to Mr Ludlow for setting the key principles out in advance for the assistance of Ms Harkness.

66. Section 124(2) of the Equality Act 2010 provides that, if there has been contravention of Part 5 (as there has here), the Tribunal may make a declaration as to the rights of the complainant and order the Respondent to pay compensation to the complainant. Our judgment made appropriate declarations. The Claimant now seeks compensation.

67. The amount of compensation under the EA corresponds to that which could be awarded by the County Court. Section 119 EA provides that it may grant any remedy which could be granted by the High Court in proceedings in tort. This includes compensation for financial loss. Section 119(4) EA provides that an award of damages can include compensation for injury to feelings.

68. Discrimination is a statutory tort. The compensation awarded should put the Claimant, so far as is possible, in the position she would have been in had the discrimination not occurred.

69. This is not necessarily an all or nothing assessment. The Tribunal may need to make an assessment of the Claimant's prospects absent the discrimination, O'Donoghue v Redcar Borough Council [2001] IRLR 615. This may involve the identification, on the balance of probabilities, of a percentage chance of, for example, of not resigning. Where loss of earnings is concerned, income received since the dismissal must be deducted.

70. In summary, our job is to construct the hypothetical world that the Claimant is likely have lived and worked in if there had been no discrimination.

71. Compensation for unfair dismissal under the Employment Rights Act comprises two main awards: the basic award, which has been agreed by the parties; and the compensatory award - that financial loss 'attributable' to the dismissal. We can and should adopt the same approach to that award as we have set out above. (Technically speaking, the Polkey question does the same work as O'Donoghue.) We assess the chances of the Claimant staying or leaving absent the unfair dismissal. Similarly, income received since the dismissal must be deducted, except in relation to some welfare benefits. In the unfair dismissal regime, UC is deducted by the DWP in a recoupment process. The other differences in unfair dismissal compensation are that there is a cap on the compensatory award of 52 weeks' pay and no interest can be awarded on the loss.

72. In this case, the financial loss we would calculate in the financial loss award under the discrimination and unfair dismissal claims overlaps because one of the acts of discrimination was dismissal. In order to do justice, we have therefore calculated compensation under the discrimination claim only because there is no cap on this award and interest on it can be awarded. There is therefore no unfair dismissal 'compensatory' award here and the DWP recoupment process does not apply.

73. A Claimant is under a duty to mitigate her losses: in other words, if it is reasonable, to look for work.

74. The award for injury to feelings must compensate the Claimant and not punish the Respondent. It must relate only to injury to feelings for the unlawful discrimination we have found, not in respect of the other matters complained of. We must beware not to make an award that is too low, which would diminish respect for the policy underlying anti-discrimination legislation; however, excessive awards can have the same effect.

75. The bandings set out in Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102 CA are a useful starting point in assessing the level of injured feelings. We remind ourselves that Vento referred to the *acts* of discrimination in setting the bands and that our concern is to compensate for the *impact* of those acts/omissions upon the Claimant. We have regard to the severity of the unlawful treatment or omissions and their duration, but only insofar as this helps us to judge their impact upon the Claimant's feelings. We consider the period of time over which the Claimant has suffered or is likely to continue to suffer injured feelings.

76. The Vento bands refer to injury to feelings for less serious cases (the lower band), more serious cases (the middle band) and the most serious of cases (the upper band). We have applied the Presidential Guidance (updated 23 March 2018) to uplift the original Vento figures to account both for inflation and the decision in Simmons v Castle [2012] EWCA Civ 879. The relevant middle band is £8,800- £25,700.

77. Where there are multiple acts of discrimination or detriment then it is usual to make a global award of injury to feelings in order to avoid double-counting.

78. An aggravated damages award is to compensate for injury to feelings where, there has been malicious, insulting, oppressive or high-handed behaviour by the Respondent in committing the act of discrimination, see Alexander v Home Office [1988] ICR 685 CA. Some cases suggest subsequent conduct can be taken into account, for example, where a Respondent plainly does not take a complaint seriously.

79. Under section 207 of the Trade Union and Labour Relations (Consolidation) Act we can consider whether to decrease any relevant award by up to 25% where there has been an unreasonable failure to follow the ACAS Code of Practice on Discipline and Grievance. So far as relevant, the Code provides, under the title 'Let the employer know the nature of the grievance' at paragraph 32: *If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager*

who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance.

80. Under the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996, SI 1996/2803 as amended, the Tribunal must consider whether to award interest on past loss of earnings and injury to feelings. Under the Regulations: for past financial loss the interest period begins on the mid-point date (from the act of discrimination to the date of calculation) and ends on the day of calculation. For injury to feelings the interest period begins on the date of the act of discrimination and ends on the day the amount of interest is calculated, reg 6(1). The calculation date is 14 October 2020.

Application of Legal Principles and Facts to Issues

81. We set out our calculation of the award we make in Appendix 1.

82. In order to adopt the approach we set out above we have taken the discrimination issues first.

Issue 1.4 What would have happened if the discrimination had not occurred?

83. We have to consider what were the chances, absent the discrimination, of the Claimant staying in work. In other words, with the support in the form that Mrs Cepparulo originally gave (a mentor/confidante) and, without the prospect of lone working, what are the chances the Claimant would have stayed in employment.

Alleged Misconduct

84. First, we have considered what the chances are, if any, of the Claimant being dismissed for gross misconduct.

85. We consider that, had the Claimant returned to work, then, as advised by Miss Ellwood, Mr Gold would have undertaken a ‘fact-find’ investigation with her. She would have denied borrowing £10 and denied taking reduced items without paying for them. She would have referred to the staffing difficulties and suggested her absence meant she was a convenient person to point to. She would have relied on the absence of CCTV. She would have used the receipt to show the goods were not reduced and were not ‘a few’.

86. We also find that the Claimant would have found this fact-find extremely upsetting and stressful.

87. After we doubt, given that the receipt plainly does not relate to reduced items, that Mr Gold would have pursued the issue of taking items without paying for them. That left the borrowed £10. In relation to that, he may well have concluded that the staffing difficulties cast doubt on who to believe. We take the view that, in order to ease relationships at work, he may well have decided to deal with the matter informally just as he had done with the two supervisors who were at some fault for not following the security policy. For these reasons we consider that there is only a 50% chance of the matter going to a disciplinary hearing.

88. If a disciplinary hearing had taken place, we are unanimously clear that there was no chance of dismissal here. We rely on the following facts: the evidence for the 'taking items' allegation was very very slim: the receipt relied upon just does not support the allegation at all; how Mr Gold dealt with the supervisors, who he accepts were also at fault, sets a low baseline as to the seriousness of the matter; the disciplinary procedure suggests only serious breaches of the security policy amount to gross misconduct; this is not an allegation of stealing; the Claimant had a clean disciplinary record; and, finally, the comparable cases relied upon by Mr Gold in his evidence and set out in the bundle where dismissal has followed all include an element of fraud, which is missing here.

89. What we are equally clear about however, is that this matter would have been a further stressful event at work, and we weigh that extra stress in the balance in considering the chances of a future resignation and/or ill health.

Mitigation

90. We do not agree that, because the Claimant applied for a job the day before her resignation, she has been fit for work since. A few weeks later the loss of her job sank in and the Claimant went into crisis. Since then, according to her doctors' fit notes, the January 2020 letter from FDL, all accepted by the DWP, the Claimant is unfit for any kind of work or work-related activity. But there have plainly been ups and downs in the Claimant's condition: her mental health improved in 2019, but her fibromyalgia declined. We have therefore discussed between ourselves whether, at some point, it would have been possible for her to do a non-stressful job part-time. The Claimant was not cross-examined about this and certainly the medical evidence would not suggest the Claimant could sustain even a limited role. The only evidence we have is that she was, in around February 2019 thinking about volunteering. This is insufficient, in our view, to consider that the Claimant acted unreasonably in not searching for work.

91. The Claimant's plan for retraining was very much for the future and she has not taken steps towards this plan because she has not been well enough to do so. This plan certainly does not break the chain of causation until steps are taken towards it.

Chances of Continuing in Work

92. We have then considered the other factors relevant to whether the Claimant could have continued in work.

93. We found that Claimant's mental health disability and fibromyalgia was adequately managed unless she was subject to extra stress.

94. The factors that support the prospect of the Claimant staying in work are:

95. The Claimant loved her role and saw it as a career. She had had 6 years with the Respondent during which she had had the satisfaction of promotion and progressing to a 'concept' store.

96. She had, prior to Culver, been a successful store manager, and had been earmarked by one manager as Area Manager material.

97. Her job gave her self-esteem and confidence.

98. Although the role was stressful and physical, to some degree, she had undertaken it for some years without resigning when support was in place.

99. There were other outside stressors in the Claimant's life, but she had been able to retain her job and return to it after her initial breakdown, and the 5-week sickness absence in 2017, while manager of Culver.

100. The housing stress, the loss of her job and this litigation all contributed to the Claimant's ill health and contributed to her lack of fitness for work after termination. None of these stressors would have existed absent discrimination. We conclude that absent these stressors there was a chance that her mental and physical health would have been manageable as far as work was concerned.

101. Although Culver was a 'step-up' as a larger store and this brought inherent stresses, she had done the job for 18 months, for 12 months of that she had had the support of Mrs Cepparulo. In that time Culver's sales had improved: it exceeded targets in all months except one since December 2017 before her sickness absence. As regards sales her store was going in the right direction and this would have given her some improved confidence.

a. We have found there was a real prospect that with support and no lone working that the Claimant could have remained in work (J184).

102. The factors that suggest there was a chance the Claimant might have resigned, even with support/no prospect of lone working are:

103. Culver's KPIs apart from sales were 'in the red' and this would have put her under pressure.

104. Even with the adjustment to lone working, there were going to be some staff reductions and there were already some staffing problems. These would have been stressful.

105. The Claimant would have continued to experience stressors outside of work: the caravan dispute and relationship stressors.

106. The Claimant emphasised again in her evidence to the remedy hearing that she really wanted a head office role. Failure to offer her one was not discrimination but may have created a sense of grievance for her leading her to leave.

107. Similarly the Claimant's dislike of Mr Gold could have caused her to leave even though we have found his management of her generally was not discrimination.

108. The Claimant is likely to have viewed the disciplinary investigation and possible disciplinary hearing as extremely upsetting and stressful; however this would have been reduced once she was not dismissed.

109. The development of fibromyalgia in 2018/9 was an additional physical problem for the Claimant. The job was physical to some extent. This, too, is one of the conditions that her GP and the DWP have taken into account in deciding that she is not currently fit for work. However, this was a developing complaint. It

was not fully blown at the time of the resignation. It worsened in 2019. There is the chance that the Claimant would have been able to manage with sick leave and medication.

110. The Claimant has been certified as unfit for work since her resignation. We are of the view that this would not necessarily have been the case if she had remained in work and been supported in it. Over time, however, the chances of her staying in work decreased, because her mental health therapy was delayed and her fibromyalgia developed from being initially in her hands to all parts of her body.

111. Such is the mix of factors that this is not a case, in our judgment, where it is certain that the Claimant would have left or would have stayed. We have weighed each of these factors in the balance. We give considerable weight to the Claimant's resilience in the job while she had appropriate support and to the fact that she viewed her job as a career. We take into account that she could have continued to take some sick leave where necessary without losing her job. We note that the therapy that she has already received has helped her with insight and coping mechanisms that are likely to have assisted her in staying at work. We note the stresses of the job, but they were not all in one direction with sales targets improving. The support we have suggested would have helped to some extent to soak up these stressors. But we also weigh in the other direction that the Claimant had significant complaints about work that we have not found in her favour and her perception of these problems at work may well have increased with the continued 'keen' management of Mr Gold and the inevitable disciplinary investigation. Doing the best that we can, with this hypothetical question, we put the percentage chance of the Claimant leaving work in the first year at 25%.

112. From the first anniversary of the termination, we put the percentage chance of the Claimant leaving the Respondent at 50%. We do so to recognise that the outside and work stressors time are likely to have accumulated to make it more difficult for the Claimant to stay in work: in particular: her having to improve the store's KPIs, in addition to sales; the day to day stressors of managing a bigger store with the staffing stressors that this brought on top of the staffing difficulties that already existed; the development of worsening fibromyalgia, which is likely to have necessitate more time off at times of stress; the likelihood that even with support her mental health difficulties would have required more time off, especially in the light of delays in obtaining specialist treatment; those longer periods of sick leave increasing the chance of a fair capability dismissal.

113. We consider that this 50/50 chance would continue into the future but that at 6 months after our calculation date of 14 October 2020 the chance that that the Claimant would have continued in work will have reduced to nil. Ultimately, all of those stress factors would have damaged her mental health and physical health in combination, so as to militate against the Claimant managing to stay in the role.

114. We have calculated loss of earnings in accordance with these percentage chances. We have deducted income received in the form of Universal Credit. We refer to Appendix 1 for the calculation. We calculate loss of earnings to be £5,295.53.

115. We calculate pension loss separately because it is a future loss, albeit here calculated for ease by reference to lost pension contributions. Deductions of income and interest therefore do not apply.

Issue 1.5 What injury to feelings award should be made?

116. We agree with the parties that the starting point for level of injury to feelings should be in the middle Vento band. This is because the Claimant lost her job as a result of the discrimination and this had a significant impact on her: this is a serious case.

117. We have taken into account the range of psychiatric awards for moderate injury. We have taken into account the Claimant's need to spend time in a crisis house. The fact that early on, she experienced intense anger and continues to feel the loss of a job she saw as a career. The award compensates not just disappointment but loss of real confidence that came with the role for the Claimant: she was excited to be managing such a large store. She really felt the loss of Mrs Cepparulo's support. And she was also really worried by the prospect of lone working: a matter that she consistently complained about. All of these factors point towards the higher end of the middle band. While the degree of the Claimant's response might be enhanced by her personality disorder: we must take the Claimant as we find her.

118. Before finally settling on a figure, we discounted for the injured feelings that arose because of matters of complaint that were not discrimination (the leak, the lift, the cages, Mr Gold, not being transferred to head office). The Claimant experienced hurt feelings in the form of resentment and upset about all of those matters, too. We have also recognised that the Claimant would have had ongoing mental health difficulties in the absence of discrimination and would have had experiences in her life that would have caused her upset absent the discrimination: we have discounted for this.

119. Finally we have stood back and considered the award by reference to those other comparable cases referred to by Mr Ludlow; to the value of money generally; and in order to ensure that the respect for awards under the Equality Act is maintained.

120. Taking all of this into account we award £16,500 to compensate the Claimant's injury to feelings arising from discrimination.

Issue 1.6 Whether an aggravated damages award should be made and, if so, at what amount.

121. We agree with Mr Ludlow that the conduct of the Respondent has not reached the threshold whereby we could award separately aggravated damages. This is not a case where the acts of discrimination were malicious, high handed, oppressive or insulting. Though that is not to reduce the seriousness of them. Furthermore, our Injury to Feelings award has compensated for all the injured feelings the Claimant has experienced because of the discrimination. We have taken the impact of the seriousness of constructive dismissal into account in assessing this award.

122. Nor is this a case where the Respondent's behaviour in defending the claim warrants an aggravated damages award. Justice requires that employers are allowed to put their case. Just because the Tribunal has not agreed with it, does not mean that it was a case put in bad faith. The allegations of gross misconduct were not fabricated by Mr Gold: the contemporaneous documents shows they were made to him and he was bound to investigate them. We understand that feelings run high in these cases but that is not what aggravated damages are about.

123. It is worth us recording Miss Ellwood's evidence of the efforts the Respondent has made after our liability decision to improve its approach in particular to employees with mental health difficulties. These include the recruitment of a certified counsellor as a Colleague Welfare Manager; the training of 24 colleagues as mental health first aiders; the intention to roll out mental health training across the Respondent; the provision to senior leadership and HR of copies of A Guide to Mental Health at Work; the training of managers in the Respect For You policy; the plan to show a mental health awareness video for all colleagues; the new contract with an occupational health provider; the plan to minimise lone working; and the giving of mandatory training to line managers in HR practice. These efforts show an employer keen to do better, keen to take a Tribunal decision seriously and act on it.

124. We would also urge the Respondent to put in place a system that ensures that the 'ball is not dropped' between HR and managers so that adjustments for disabled employees are continued when they or their managers move on.

Issue 1.7 Interest

125. We have decided to award interest in accordance with the usual principles, set out in Mr Ludlow's skeleton argument paragraphs 61-66. We have considered whether a serious injustice would be done to the Respondent by our calculation of interest for the period of delay caused by coronavirus and/or because the Judgment Act rate of 8% no longer reflects financial reality. Upon our asking him directly, Mr Ludlow did not submit we should alter our approach from the normal calculation of interest in this case. We have also concluded that this delay has been one of the uncertainties of litigation and cannot be taken into account. We have also noted that the weekly loss of earnings figure agreed by the parties does not take into account any annual increase in earnings that may have occurred since 2018 and therefore the very generous interest rate, as a matter of justice, is likely to incorporate that. And of course some interest could have been avoided if the Respondent had paid what it admits it owed earlier. For these reasons we award interest at the Judgment Act rate of 8% for the periods set out in the Regulations.

126. We refer to Appendix 1 for the interest figures.

Additional Issue: Grievance

127. We consider that there was no unreasonable failure to bring grievance here. The Respondent has accepted that the Claimant had complained to Miss Ellwood, about the prospect of lone working, as well as originally to her line manager, Mr Gold. In relation to Ms Cepparulo's lack of response to her email of January 2018 and subsequent lack of support and failure to hand that support

role to another appropriate person, we find it reasonable not to bring a grievance in the light of the discouragement the Claimant had previously received.

Issues 1.2 and 1.3 Compensatory Award

128. We do not make any award for compensatory loss in the unfair dismissal because to do so would be to double-count.

Employment Judge Moor

3 November 2020

APPENDIX ONE
CALCULATION OF LOSS

Agreed Figures:

Gross weekly pay £429.03
Net weekly pay £349.27
Weekly pension loss £7.51
Effective date of termination 25 July 2018

A. Injury to Feelings **16,500**

Interest on Injury to Feelings

at 8% per annum from 31 May 2018 – 14.10.2020 (867 days)

867/365 x 8% = 19% x 16500 = **3,135**

B. Past Loss of Earnings and Pension

In order to avoid double-counting under unfair dismissal/discrimination losses we have calculated loss of earnings under discrimination provisions the higher of the two because they do not have a statutory maximum and attract interest.

From 26 July 2018 – 25 July 2019

In the first year, 25% chance of resignation in any event i.e. 75% of earnings lost.

349.27x 52 x 75% = 13,621.53

Minus income received:
UC paid 30th of month in respect of the period up to 24th of the month.

213+272+601+601+601+881+854+852+860+860 + 860 +871 (8326)
5295.53

From 26 July 2019 to calculation date 14 October 2020

50% chance of leaving work
63 weeks and 5 days duration i.e. 64 working weeks.

349.27x 64 x 50% = 11,176.64

Minus income received
UC increased in April to £979 per month.
Allocate all of October 2020's UC to future loss as paid at end Oct 2020

885+885+(856 x 6) +(979 x 6) = (12,780.00)
0

i.e. as soon as chance of loss falls to 50% loss of earnings stops

Total Past Loss of Earnings **5295.53**

C. Interest on Past Loss

from midpoint between date of discrimination and date of calculation

867/2=433.5 days/365x 8%= 9.5% x 5295.53 = **503.08**

No future loss of earnings because receipt of UC
more than outweighs 50% of lost earnings 0

D. Pension Loss

We use a simple calculation as to pension agreed by the parties by awarding the equivalent of the proportion of lost weekly pension contributions as adjusted by our decision.
Pension loss represents a future loss: there is therefore no interest payable on these amounts.

The parties have agreed pension loss at £7.51pw.

75% x 52 x 7.51 292.89
50% x [64 + 26] x 7.51 337.95
630.84

E. Basic Award
429.02 6 weeks (and agreed)
2,574.12

F. Loss of Statutory Rights (agreed) **500.00**

Total Award (A+B+C+D+E+F) **£29,138.57**