EMPLOYMENT TRIBUNALS

Claimant: Mrs J Marsden

Respondent: Department for Work and Pensions

HELD AT: Manchester **ON:** 8-10 September 2020 and 16 September 2020 (in chambers)

BEFORE: Employment Judge Slater
Ms L Atkinson
Mr A J Gill

REPRESENTATION:

Claimant: Ms M Stanley, counsel
Respondent: Mr S Redpath, counsel

JUDGMENT ON REMEDY

The unanimous judgment of the Tribunal is that the respondent must pay to the claimant the net total of £62,381 as compensation for the acts of discrimination arising from disability and failure to make reasonable adjustments set out in the judgment on liability sent to the parties on 17 October 2019, made up as follows:

1. £31,500 for injury to feelings, personal injury and aggravated damages, including a 25% uplift for unreasonable failure to follow a relevant ACAS Code of Practice plus interest of £6833 on this award.

2. £21,897 for financial loss, including a 25% uplift for unreasonable failure to follow a relevant ACAS Code of Practice plus interest of £2151 on this award.

REASONS

The hearing and background to the remedy hearing

1. The code in the heading indicates that Ms Atkinson attended the hearing by video link. All others attended the hearing on 8-10 September 2020 in person. The in chambers' meeting on 16 September 2020 was conducted by video conferencing.

2. The remedy hearing was originally listed for 10 March 2020. The claimant, who had been unrepresented at the liability hearing, was, by this time, represented. The claimant's representatives sent a revised schedule of loss, which included a claim for financial loss as well as compensation for injury to feelings, and witness statement shortly before the hearing. Employment Judge Slater conducted a case management preliminary hearing. The respondent made an application that the claimant's claim for remedy be restricted to a claim for compensation for injury to feelings or, if that application was not granted, for a postponement of the hearing. The claimant opposed both applications. The judge refused the application to restrict the remedy in this way and granted a postponement of the remedy hearing.

Preliminary Issues

3. There were three preliminary issues the Tribunal was asked to decide on at the outset of the hearing:

3.1. Whether the claimant should be allowed to rely on the medical report of Dr Marsden;

3.2. Whether the claimant should be allowed to rely on a supplemental report of Dr Marsden; and

3.3. Whether the respondent should be allowed to rely on the witness statements of Mr Harrison and Ms Angus served on 28 August 2020.

4. After a preliminary discussion about the issues, we had an adjournment during which Mr Redpath took further instructions. His instructions were that the respondent was prepared to have the medical report admitted in evidence but the respondent continued to object to the supplemental report being admitted in evidence. Mr Redpath said he had not had an opportunity to take instructions on the supplemental report and it would be unfair for the Tribunal to consider it without giving the respondent a proper opportunity to put questions to Dr Marsden. Both parties were determined to have the case heard within this window, so he was not seeking a postponement. Mr Redpath objected to the Tribunal reading the supplemental report before deciding whether to admit it in evidence, on the basis that it would potentially prejudice the way the Tribunal assessed the evidence.

5. Ms Stanley submitted that the witness statements had been sent more than 2 months late with no good reason given. However, she accepted that she could deal

with the statements. She invited the Tribunal to read the supplemental report to assess its relevance before deciding whether to admit it. She noted that the respondent had not wanted to put questions about the original medical report and suggested it was unlikely they would have put questions about the supplemental report, had it been served earlier. She said that, if the Tribunal admitted the medical report and supplemental report, she would deal with the witness statements.

6. We decided that the medical report, supplemental report and witness statements should all be admitted in evidence.

7. We concluded that we did not need to read the supplemental report to be able to decide whether to admit it in evidence. We concluded that the report was potentially relevant. We were not satisfied that the respondent would have asked questions of Dr Marsden, had the supplemental report been provided earlier. The respondent had declined an opportunity to have a joint report and had not objected at that stage to the late obtaining of a medical report or said they would like an opportunity to ask questions of the expert. The respondent had the main report on 27 August 2020. Although this was a fairly short time before the hearing, we considered there was sufficient time to ask questions of the expert, if they wished to do so. Their failure to do so suggested to us that they were unlikely to have wanted to put questions to the expert had the supplemental report been obtained earlier. From what we were told, the supplemental report was a very short report clarifying certain points. We considered that Mr Redpath would have sufficient time to read this and consider it before cross examining the claimant. If Mr Redpath was unable to get instructions on the afternoon of the first day of the hearing to assist him cross examining the claimant on this aspect, he would have an opportunity to do so overnight. In the event, the Tribunal took the rest of the first day, after deciding on the preliminary issues and having a discussion with the parties, for its reading, before beginning to hear evidence on the second day.

8. We concluded it was in the interests of justice to admit the medical report, supplemental medical report and witness statements and to give them such weight as we considered appropriate.

Evidence

9. We heard evidence from the claimant and from David Harrison, Senior Executive Officer, who manages the Newcastle HR Casework Team, and Joanne Angus, HR Consultant, for the respondent. We were referred to documents in an agreed remedy bundle consisting of two lever arch files. References to B[number] are to pages in this bundle of documents. We had the report and supplementary report of Dr Marshall.

10. References in these reasons to J[number] are to paragraphs of the Tribunal's judgment and reasons on liability, sent to the parties on 17 October 2019.

Issues

11. This hearing was to determine remedy following a decision on liability sent to the parties on 17 October 2019. The Tribunal found in that decision that complaints of discrimination arising from disability and failure to make reasonable adjustments were well founded.

12. The complaint of discrimination arising from disability which the Tribunal concluded was well founded was that, in the period 30 October 2017 until 21 March 2018, the respondent had treated the claimant unfavourably by the respondent treating the document issue as concluded and refusing to engage in any further substantial discussion about it, including a face to face meeting because of something arising in consequence of the claimant's disability (J140). The document issue was that the historical background document should be corrected (J132).

13. The complaint of failure to make reasonable adjustments which the Tribunal concluded was well founded was that, in the period 30 October 2017 to 21 March 2018, the respondent failed to make a reasonable adjustment by not holding a face to face meeting between the claimant and HR (J152).

14. The claimant sought compensation for injury to feelings, injury to health and aggravated damages. She also sought compensation for loss of earnings during a period of sickness absence from 12 June 2018 until July 2019, compensation for the cost of treatment by a consultant clinical psychologist which had been recommended to aid her recovery and compensation for the loss of a chance that she would have been made a compensatory payment by the respondent, had the discriminatory acts not occurred. The claimant sought an uplift on compensation due to failure to comply with the ACAS Code of Practice on Discipline and Grievance and interest on the award.

15. The claimant initially also sought a recommendation that the respondent provide her with a formal, written and public apology, but, in closing submissions, withdrew the request that such a recommendation be made.

16. The respondent accepted that some payment should be made for injury to feelings, which should include injury to health, interest and some uplift for failure to comply with the ACAS Code, but did not accept that any of the other heads of compensation sought were payable.

17. The tribunal had to decide whether compensation should be awarded for all the heads of loss sought and, if so, in what amount.

18. We had some discussion with the representatives about whether any award would be subject to tax. It was the Tribunal's provisional understanding that compensation for the heads of loss sought would not be taxable. However, the representatives were not in a position, without further research, to make submissions on that point. We agreed that the Tribunal would make its award on a net basis and, if the parties considered that part or all of the award would, in fact, be taxable, they could make further submissions on that basis. The Tribunal could then reconsider

the judgment and, if we considered that part or all of the award was likely to be subject to tax, vary the judgment to gross up the amount of compensation to arrive at the award, as appropriate.

The finding of fact that Mr Harvey sent the historical background document to the respondent's solicitors in 2014

19. An issue arose as to whether the Tribunal should rely, in this remedy hearing, on a finding of fact made in its liability judgment that Mr Harvey sent the historical background document to the respondent's solicitors in 2014 when requesting legal advice on the claimant's claim for compensation (J28). Mr Harrison gave evidence in his witness statement that he had reviewed the legal submission and could find no evidence to suggest that the historical background document had been sent with the agreed chronology to obtain legal advice. He expressed the belief, in his statement, that the evidence of Sheila Dove, who had given evidence for the respondent at the liability hearing, was inaccurate on this matter. Mr Redpath clarified, in answer to questions from the judge during cross examination of the claimant, that he intended to ask the Tribunal to make a finding of fact that Mr Harvey had not sent the historical background document to the respondent's solicitors in 2014 as part of the legal submission. The respondent had not applied for a reconsideration of this part of the Tribunal's findings or informed the claimant and the Tribunal, prior to this discussion, that the respondent was intending to ask the Tribunal to make a finding of fact contrary to that made at the liability hearing.

20. We heard submissions from the representatives, as part of their closing submissions, as to whether the Tribunal could and should reopen this finding and, if we did, what finding of fact we should make.

21. Ms Stanley argued that the Tribunal could not made a finding of fact that Mr Harvey did not send the historical background document to the respondent's solicitors: the liability judgment stands. She submitted that it would also be disproportionate, and not in line with the overriding objective, for the Tribunal to essentially reconsider facts already found at the liability hearing. It was, or should have been, obvious to the respondent that the Tribunal would need to make findings of fact as to which document Mr Harvey sent to the respondent's solicitors in 2014. The use, consequences and relevance of the historical background document is highly relevant to the question of whether or not it is an act of discrimination to fail to re-open the dispute about the contents of the historical background document (a legal claim upheld at the liability hearing). The respondent had a chance to call evidence concerning which documents Mr Harvey sent to the solicitors in 2014. It proffered the evidence of Sheila Dove. Ms Dove said that the historical background document was sent to the respondent's solicitors in 2014. Ms Stanley submitted that the Tribunal's finding was on the basis of documentary evidence as well as Ms Dove's evidence, referring to the Ash email. Ms Stanley also submitted that it would be grossly unfair to the claimant to essentially reconsider the findings of the liability judgment in the course of the Tribunal's remedy decision.

22. Mr Redpath submitted that the finding made by the Tribunal in relation to Sheila Dove's evidence was not intrinsically essential to our discrimination ruling; this was

background. He submitted that the finding in the liability judgment relating to Sheila Dove's evidence does not have the effect of fettering Mr Harrison's "good faith" consideration of matters raised by the claimant. Mr Redpath submitted that, given the unusual loss of chance points raised by the claimant, the Tribunal cannot, as a matter of law, disregard the reality of Mr Harrison's discovery that Mr Harvey had only supplied the agreed chronology and not the historical background document when seeking legal advice. The matter has proceeded as a split liability/remedy hearing and Mr Harrison could not have been called at the liability hearing.

23. We agree with Ms Stanley's submission that it is not open to us to reopen the finding of fact we made that the historical background document was included in the documents sent by Mr Harvey to the respondent's legal advisers in 2014. The finding was not simply a background finding; it was a finding which was integral to our conclusions on the complaint of discrimination arising from disability (see J135 and J137 in particular). The respondent should have appreciated the significance of what use was made of the historical background document for the decisions to be made at the liability hearing and called the appropriate evidence. They chose to call Sheila Dove who gave evidence on this point which they now ask the Tribunal to disregard in favour of evidence given by Mr Harrison at this remedy hearing. The respondent could have sought a reconsideration of the Tribunal's finding of fact on this point or, at the very least, raised this with the claimant and the Tribunal prior to this hearing in a clear way, rather than just by the witness statement of Mr Harrison, but they did not do so. Remedy hearings proceed on the basis of the facts found at the liability hearing, together with any additional findings of fact made at the remedy hearing. It appears to us to be contrary to the overriding objective of dealing with cases fairly and justly to allow the respondent to reopen this finding of fact in this way, having a second bite of the cherry, to "correct" evidence given by their own witness which the respondent finds unhelpful to the arguments they seek to put at this remedy hearing.

24. Even if we had decided that it was open to us to revisit the evidence about whether the historical background document was sent to the legal advisers in 2014, we would not have been persuaded by the evidence of Mr Harrison to make a different finding of fact to that recorded in our liability judgment. Sheila Dove gave evidence that she had read the legal submission and confirmed that both the agreed chronology and historical background document formed a part of the documents sent with the request for legal advice (J28). This evidence was consistent with the email sent by LA of the respondent's data protection team on 1 October 2014, that the historical background document was part of the legal submission so exempt under the Data Protection Act from the requirement to provide it to the claimant (J31). We do not consider the evidence of Mr Harrison (paragraphs 12-13 of his statement) proves that Sheila Dove and LA were mistaken. Document B139A-B139O, show that the chronological summary was provided to the legal advisers, which is not in dispute, but does not prove that the historical background document was not sent as well. Mr Harrison's belief that LA was referring to the agreed chronology appears to be speculation only; he gives no evidence of making any enquiries of LA to see if this was the case. There is no basis on which we would prefer the evidence of Mr Harrison to that of Sheila Dove and the LA email.

Further facts relevant to remedy

25. We rely on the facts found and set out in our judgment on liability, including our finding of fact that the historical background document was sent to the legal advisers in 2014.

26. We make the following additional findings of fact based on evidence presented at the remedy hearing.

Promotion

27. As noted in our judgment on liability, the claimant raised grievances in 2002 relating to a promotion report and investigators upheld her grievances in part, including that her line manager had blocked applications for promotion for a Band C role. Incorrectly, the claimant was not told that that part of her grievance had been upheld (J11).

28. The claimant had been marked in the top 10% in the civil service in 2001/2002 and 2002/2003.

29. The claimant did not apply for promotion after 2002 and has remained an administrative officer at all relevant times. She has, however, acted up to Executive Officer level, for example in February 2020, which we find indicates that the respondent considers her capable of work at a promoted level. Carrie Cowsill also asked the claimant to undertake training in a Band C role, with a view to taking on that role.

Other evidence relating to the possibility of a special payment for maladministration

30. On or around 9 January 2004, Liz Wilson, Regional HRBP, advised the claimant to take legal advice if she wished to pursue a compensation claim (B130). Tony Adams, HRBP, in a briefing note dated 16 January 2004, wrote that he felt they had to pursue the compensation route "subject to Joyce Marsden being legally represented." (B80).

31. The claimant took legal advice as advised, incurring the cost of solicitors' fees.

32. The claimant was unable to provide evidence as to the total amount of fees incurred. She was able to produce one document showing "expense categories" for Rose Partnership (B710F) with entries from dates 1 June 2004 to 26 August 2005 and a grand total of £1888.13. According to the agreed 2014 chronological document, the respondent received a letter from The Rose Partnership, the claimant's solicitors, on 7 May 2004, indicating her intention to claim damages for personal injury (B130). The chronology records that it appears the claim was put on hold whilst a formal investigation was conducted and that, following the conclusion of the investigation in October 2005, no further correspondence on the matter was received from the Rose Partnership. The entries on the "expense categories" document all post-date 7 May 2004. We consider it likely that The Rose Partnership did most of the work for the claimant prior to 7 May 2004 so the "expense categories"

document does not reflect all the work done and charged for by the claimant's solicitors.

33. We have little information as to the basis for and the potential value of the personal injury claim. We accept the claimant's evidence that she was told by her solicitors that the personal injury claim could be worth £50,000 but we have no documents which assist us in understanding the nature and likely value of the claim.

34. The claimant was on sick leave from 12 August 2004 until she began maternity leave on 1 July 2005 (J13). The last 6 months of this sick leave was on half pay.

35. JS, when completing the SPEC1 form, to refer the case to a Special Payment Decision Maker for consideration of a special payment, in January 2011 (J17), listed solicitors' fees as actual financial loss incurred (B104). She also wrote that she considered a consolatory payment was appropriate. The form indicates that a consolatory payment can be awarded in very exceptional circumstances where maladministration has had a direct adverse effect on the person's life. JS described the effects of the maladministration on the claimant as "substantial breakdown of trust with the Department as her Employer and continues to affect her mental state and stability".

36. The claimant, in a complaint considered by Mike Harvey in 2014 (J23, 28-30), asked for a special payment in respect of the following matters: payment for personal injury claim; solicitors' fees with interest; payment equal to the loss of wages to Band C grade from 2002; payment equal to 6 months' half pay with interest (for sick leave when she received half pay); payment to reflect detriment suffered as a result of the respondent's handling of her data (B140-144).

<u>The claimant's sickness absence</u>

37. Apart from a period of sickness absence in 2005, there is no evidence that the claimant had any significant period of sickness absence prior to her absence beginning on 12 June 2018.

38. The claimant was absent from work due to depression and anxiety from 12 June 2018 until July 2019.

<u>The claimant's mental health and hurt feelings</u>

39. We heard evidence from the claimant. We had the report and supplemental report of Dr David Marshall, a consultant psychiatrist, who interviewed the claimant by Zoom on 6 August 2020. We also had a number of occupational health reports.

40. The claimant had a pre-existing vulnerability to mental health difficulties, prior to the events with which we are concerned. The claimant suffered various bouts of depression and anxiety from 25 March 2002 onwards. In 2004, she was diagnosed as having clinical depression. In 2005, she was diagnosed as having PTSD.

41. We accept the evidence of the claimant, which was not challenged on this aspect, about the effects the discrimination we found in our liability judgment as having occurred had on her.

42. The claimant has suffered sleep disturbances, sleeping about 4 hours and then waking up and not always being able to get back to sleep. The claimant failed to notice when her family needed her, leading to lasting guilt. The claimant lost confidence in herself as a mother and as a provider. She could not concentrate enough to keep up hobbies that she used to do. She felt less assertive than she had ever felt and was not there for her daughter as much as she felt she should have been, as her time, mind and energy was focused on this issue with the respondent. The claimant withdrew from family and friends, as she did not feel "normal". She was unable to engage fully or enjoy family holidays.

43. She was tearful most of the time when on her own and sometimes at work, which she found difficult and embarrassing. The claimant had difficulty making decisions. The claimant felt guilt at colleagues she considered had been harmed by encountering her and her situation.

44. The claimant felt incredulous, angry, depressed and anxious when Alison Nelson dismissed her grievance regarding reasonable adjustments in February 2018, telling the claimant there was no grievance (J96).

45. The claimant felt embarrassed, humiliated and ashamed when it was alleged that she was breaching standards of behaviour in March 2018 when she continued to try to raise a grievance. The claimant felt frightened that Carrie Cowsill and Stephen Louis were prepared to contemplate dismissing her by using the Standards of Behaviour, for trying to use the grievance procedure.

46. The claimant overthinks and ruminates a lot about the past actions of her employer.

47. The claimant feels that her reputation and career have been destroyed and she feels ashamed because of this.

48. The Occupational Health Report dated 14 December 2017 recorded that the claimant was, at that time, reporting symptoms of low mood, feeling tearful, disturbed sleep pattern, reduced concentration and reduced motivation. She was assessed as being fit for work and fit for her full duties at that time. The report expressed the view that the claimant's symptoms were directly linked to the unresolved issues regarding the claimant's personal records.

49. The claimant attended her GP on 31 May 2018. This appointment was arranged after the claimant, during a routine appointment with a practice nurse, became very distressed. The GP placed the claimant on anti-depressant tablets.

50. The claimant was absent from work due to depression and anxiety from 12 June 2018 until July 2019. She went onto half pay in January 2019 and nil pay in June

2019. To mitigate the effects of loss of income, the claimant, at the suggestion of her new manager, took annual leave.

51. The claimant attended four sessions of counselling through her GP from July 2018 to September 2018 and was then referred to longer term counselling which started in June 2019 and finished in February 2020.

52. An Occupational Health Report dated 10 September 2018 referred to the claimant experiencing symptoms of increased heart rate, feeling panicky, difficulty breathing, being tearful, having poor concentration and not wanting to interact with other people. The report expressed the view that she was unfit for work and likely to remain unfit for work whilst the perceived work-related issues persisted.

53. The claimant returned to work in July 2019, fearing dismissal, although she was not fully fit to return. The claimant had been given a two month fit note from 21 June 2019, but returned during the course of certified absence. The claimant had received an email from the respondent dated 11 June 2019 informing her that the respondent's management had decided to refer the claimant to a Decision Maker for unsatisfactory attendance and for a decision as to whether her absence could "continue to be supported or whether dismissal or downgrading is an option." This was at a time when the claimant was awaiting her hearing in the employment tribunal.

54. An Occupational Health Report dated 5 August 2019 recorded that the claimant had returned to work but experienced neck pain and anxiety on a daily frequency which was aggravated by stress. The claimant reported feeling OK with customers but anxious with formal meetings. The OH adviser advised that the claimant was fit for amended duties at work. They noted that the claimant had unresolved work issues and diagnoses of spondylosis and hypertension and that both the claimant's mental and physical health conditions could be exacerbated by stress.

55. An Occupational Health Report dated 3 December 2019 recorded that the claimant reported that she was coping with her usual contractual hours and tasks required, although it was not easy to attend work. The OH opinion was that the claimant continued to experience symptoms of moderate depression and severe anxiety and the claimant's reporting suggested that mental ill health was exacerbated by outstanding work-related issues by ruminating on the past. It noted that the claimant was aware that there needed to be an outcome and closure from work related issues for her to be able to move forward. The claimant was considered fit to work, although likely to require ongoing support because of ongoing mental ill health symptoms.

56. An Occupational Health Report dated 23 January 2020 recorded that the claimant still had periods where her anxiety increases but she was self-managing any symptoms. She was assessed as being fit to work and carry out her full range of duties.

57. The claimant stopped taking antidepressants in January 2020. She kept missing taking them because she could not remember to do so. She also suffered an

unpleasant side effect of acid reflux. She tried to cut down gradually because she hoped, by taking less, the side effect would lessen, but it did not.

58. Dr Marsden interviewed the claimant on 6 August 2020. Dr Marsden identified the "index incident" as being in 2002. Dr Marshall recorded that the claimant had reported that her mood level had fluctuated over the period from 2002 but there had been two lengthy periods where she had experienced extreme lowering of mood: 2004-5 and 2018. Dr Marsden recorded biological (somatic) features of depressive disorder in 2018-2019 including loss of motivation, low self-esteem, poor concentration and feelings of hopelessness and despair. He also recorded adverse effect on sleep and lack of care relating to diet, leading to comfort eating and putting on weight.

59. Dr Marsden diagnosed that the claimant had suffered from recurrent episodes of moderately severe depressive disorder in 2004-5 and 2018. From July 2019, he diagnosed that she had been left with a chronic adjustment disorder with mixed anxiety and depressive reaction.

60. Dr Marsden wrote:

> "On balance I believe Mrs Marsden has experienced trauma from her work situation; this appears to have overwhelmed her psychological defences at varying times and to varying levels."

61. He acknowledged that the claimant had experienced other, unrelated adverse life events, including her daughter's emotional struggles, her mother-in-law's illness and death, her mother's current illness with dementia; and her husband losing his job due to the effects of Covid-19.

62. Dr Marsden wrote:

> "On balance I consider that absent the index incident she would have coped with these psychosocial stressors without developing a psychiatric reaction. Because of her increased psychological vulnerability caused by the index incident, it is likely that the above mentioned stressors had exacerbated her level of anxiety and depressive symptoms."

63. Dr Marsden recommended that the claimant undergo a course of psychological therapy from a Consultant Clinical Psychologist and that this be obtained privately in order to expedite treatment. He recommended one or two assessment sessions, followed by approximately 12 further sessions at approximately £185 per session. He expressed the view that the claimant should expect an improvement by 12 months from the start of therapy provided she did not experience major, unrelated adverse stressors.

64. Dr Marsden expressed the view that the claimant's absence from work from 12 June 2018 to July 2019 was wholly attributable to her psychiatric reaction which had been caused solely by the discrimination arising from disability and the failure to make reasonable adjustments as per the judgment of the Employment Tribunal. He

expressed the view that the further refusal of the respondent to disclose the relevant information has led to a prolongation of her psychiatric reaction to the present.

65. Dr Marsden produced a supplemental report dated 6 September 2020, in answer to questions from the claimant's solicitors. He clarified that the conduct found to be discriminatory by the employment tribunal (the refusal to engage in a further substantive discussion about the historical background document, including a face to face meeting, during the period 30 October 2017 to 21 March 2018) caused or contributed to the injuries identified in his report and also to sickness absence from June 2018 to July 2019. He wrote that there was documentary evidence that the claimant suffered with a clinically significant level of biological symptoms of anxiety and depression as derived from GP records from 31 May 2018; records from a psychology practitioner in 17 August 2018; the Occupational Health Report of 10 September 2018 and sick notes in the period 6 July 2018 to 17 May 2019.

The annual review

66. In May 2018, the claimant's line manager, Alison Nelson, told the claimant that she would receive a "must improve" mark for her annual review. The appraisal scheme at the time used the following performance markings: "exceptional", "good", "developing" and "poor". A "developing" marking was entered on the claimant's record. The claimant had been given an indicative marking of "good" during the mid-point of that performance year. Alison Nelson did not discuss with the claimant the self-assessment that the claimant had completed, as she should have done, in accordance with the respondent's procedures. We find there is no difference, in practice, between a marking described as "must improve" and "developing"; they are both markings below the standard expected.

The meeting with David Harrison in February 2020

67. After the Tribunal had given its judgment on liability, David Harrison, Senior Executive Officer and manager of the Newcastle HR Casework Team, wrote to the claimant on 13 November 2019, offering to meet her face to face to discuss her concerns and requesting some further information. In advance of the meeting, the claimant sent to Mr Harrison on 21 February 2020, a proposed agenda for the meeting and points which the claimant thought should be included in the draft historical background document. The claimant attended a meeting with David Harrison on 26 February 2020.

68. There is a dispute between the claimant and Mr Harrison as to whether Mr Harrison said, at the outset of the meeting, that the respondent could see no reason to correct the historical background document but that he would take advice, as alleged in the claimant's witness statement, or that the respondent was not "minded to correct" that document, as alleged by the claimant in oral evidence. Mr Harrison denied that he said this.

69. Based on the oral evidence of Mr Harrison, we find that he told the claimant that, because the historical background document was on a bit of paper, rather than being an electronic copy, he could not just change it.

70. Notes of that meeting were taken by a notetaker and a typed summary of points discussed at the meeting sent to the claimant on 28 February 2020. The notes do not record Mr Harrison making the alleged comment. However, they do record the claimant expressing her concern at the respondent's unwillingness to take actions that day and take on board what the judgment said.

71. The respondent did not disclose, in preparation for this remedy hearing, the original notes taken during the meeting.

72. On 27 February 2020, the claimant sent Mr Harrison an email which included the following:

> "I am concerned that I was informed at the meeting of 26.2.2020, that a decision was taken by the DWP to not follow the judgement of the Employment Tribunal and correct the draft briefing Historical Background Document and then implement any actions that flowed from this, particularly as a copy of the incorrect draft briefing Historical Background Document will be kept in the bundle used at the Employment Tribunal, by the DWP Legal Team."

73. Mr Harrison replied the next day, enclosing a summary of the discussion. He did not take issue with what the claimant had written.

74. The claimant did not write back disputing the accuracy of the notes. However, on 1 March 2020, she wrote confirming that the draft briefing Historical Background Document needed to be corrected as a separate document and to corroborate with the chronological summary Final Version 14.1.14 where the two documents both detail the same incidents. She wrote that the historical background document would not go beyond where it ends currently. She wrote that, following on from the correction of the historical background document, there would need to be legal advice given on the corrected information and a maladministration complaint considered.

75. We prefer the evidence of the claimant to that of Mr Harrison in finding that he said words to the effect that the respondent was not minded to correct the historical background document. The notes of the meeting are a summary, rather than a verbatim record of what was said so the absence of a record of this comment in the notes does not prove it was not said. The claimant wrote to Mr Harrison the day after the meeting, in the terms set out above, recording that this was her understanding of what had been said. We consider that Mr Harrison saying words to this effect is consistent with what he told us in oral evidence about saying that the historical background document could not be changed, because it was on a piece of paper, rather than being an electronic copy. It is also consistent with there being a subsequent discussion, which is recorded in the summary of the meeting, about creating a new 2020 document to supersede both the historical background document and the 2014 chronological summary document.

76. Mr Harrison's evidence was that he concluded (contrary to our finding of fact) that Mike Harvey had not sent the historical background document to the respondent's solicitors and considered this conclusion determinative of the discretionary payment issue. Mr Harrison accepted in oral evidence that he did not come to his own conclusion about the merits or otherwise of the claimant's request for a discretionary payment because he had concluded it did not form part of the legal submission. Mr Harrison did not consider the issue of what corrections, if any, needed to be made to the historical background document and did not consider whether the making of a special payment was a step flowing from the re-opening of the issues concerning that document.

77. No corrections have yet been made to the historical background document.

78. The claimant, in her witness statement, did not give any specific evidence about the injury to her feelings being aggravated by what was said at the meeting with Mr Harrison. However, Dr Marsden records, under the heading "Present Condition" that the claimant said, in the interview with him:

79. "Although I have been vindicated by the Tribunal, none the less my employer still wants to deny me the possibility of correcting any mis-information. I have therefore not been able to inspect the records; the judgment that I should be given access has not been enforced. Instead I have been told that the employer is waiting until September 2020 for the remedial hearing, thereby not allowing me to put a close to this situation.

80. "I am now left in a state of uncertainty; my future employment hangs on whether the company will behave with me in a reasonable manner in the future, sufficient for me to feel a return of some level of trust. I don't know whether I will have the stamina to cope with the work situation were I to be exposed to future intimidation. I don't want to leave my employ and I obviously have a pressing need to provide for my family. I ask myself whether I will have enough self confidence to face a move to a new employer and take the risk of being exposed to stress from a different source."

Submissions

81. Both representatives provided submissions in writing and made additional oral submissions. Ms Stanley provided the Tribunal with written opening and closing submissions and Mr Redpath provided the Tribunal with written closing submissions.

82. The representatives were agreed on the relevant law to be applied.

83. We do not seek to summarise the representatives' submissions. However, we deal with their principal arguments in our conclusions.

The Law

84. Section 124(6) of the Equality Act 2010 provides that the amount of compensation which may be awarded for a breach of the Equality Act in relation to work is "the amount which could be awarded by a county court…under section 119".

Section 119 provides that the county court has power to grant any remedy which could be granted by the High Court in proceedings in tort and section 119(4) provides: "an award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis)".

85. The aim of damages in tort is to put the claimant in the position they would have been in, had the act of discrimination not occurred. Compensation (with the possible exception of exemplary damages which may be relevant in rare cases) is to compensate for loss caused by the act of discrimination. The discriminator must take the employee as it finds her.

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

87. We also note the guidance in *Prison Service v Johnson* [1997] ICR 275, that awards for injury to feelings should bear similarity to the range of awards made in personal injury cases, keeping awards in perspective and not making them unduly low or high, and that, in assessing the correct sum, tribunals should remind themselves of the value of the award in everyday life.

88. *Vento* sets out the bands that we must consider. These were amended by the case of *Da'Bell v NSPCC [2010] IRLR 19*. The Court of Appeal in *Da Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879,* held that the 10% uplift provided for in *Simmons v Castle [2012] EWCA Civ 1039,* should also apply to employment tribunal awards of compensation for injury to feelings and psychiatric injury in England and Wales. The Presidents of the Employment Tribunals in England and Wales and Scotland have issued joint guidance about the applicable bands of compensation, taking into account these authorities and changes in the value of money since the *Vento* decision. The guidance provides that, in relation to cases presented after 11 September 2017 and before 6 April 2018, the *Vento* bands are as follows: lower band £800- £8,400 (less serious cases); middle band £8400 - £25,200 (cases that do not merit an award in the upper band); and upper band £25,200 - £42,000 (the most serious cases). In the most exceptional cases, the award can exceed £42,000.

89. The Tribunal has jurisdiction to award compensation for personal injury arising out of unlawful discrimination: *Sheriff v Klyne Tugs (Lowestoft) Limited* [1999] ICR 1170. The Judicial Studies Board issues Guidelines for Assessment of Damages in Personal Injury Litigation which includes a chapter on Psychiatric and Psychological Damage.

90. Where there are a number of causes of psychiatric injury, the Tribunal should make a sensible attempt to identify the extent to which the discrimination caused the injury. The EAT, in *Thaine v London School of Economics [2010] ICR 1422* held that an employer should not have to compensate a claimant for his or her injury in its entirety when the harm for which it was responsible was just one of many causes of the ill health. In so holding, the EAT had regard to obiter guidance on the issue of apportionment in psychiatric ill-health cases given in *Hatton v Sutherland and other cases 2002 ICR 613, CA*. There, Lady Justice Hale suggested (obiter) that where

there are multiple causes of psychiatric illness, the court should make a sensible attempt at apportionment between them.

91. This apportionment of injury due to multiple causes is distinct from the principle that the wrongdoer must take the victim as they find them, or the "eggshell skull principle". It is no defence to say that a claimant would not have suffered as she did but for her susceptibility or vulnerability to a psychiatric condition. The respondent will be liable for the whole of the injury if it was caused by the discrimination but the injury was worse than would have been suffered by someone else, because the claimant was vulnerable or pre-disposed to psychiatric injury.

92. Tribunals may make an award of aggravated damages in certain circumstances. The case law permits aggravated damages to be awarded as a separate and additional award to an award of compensation for injury to feelings. However, a single award for injury to feelings can also be made, taking into account aggravating features. Underhill P expressed a preference for the latter approach, in *Commissioner of the Metropolitan Police v Shaw* [2012] ICR 464, EAT, whilst recognising that the former approach was permissible. If a separate award is made, care must be taken to avoid double counting i.e. compensating for the same injury twice over.

93. Underhill P, in *Commissioner of the Metropolitan Police v Shaw* [2012] ICR 464, set out, in paragraph 21, three broad categories of case where aggravated damages could be awarded. We set out paragraph 22 from that judgment, with the same abridgements for brevity as used by Ms Stanley in her written opening note.

> (a) ***The manner in which the wrong was committed****. The basic concept here is of course that the distress caused by an act of discrimination may be made worse by it being done in an exceptionally upsetting way […]*
>
> *[…] As the Law Commission makes clear , an award can be made in the case of any exceptional (or contumelious) conduct which has the effect of seriously increasing the claimant's distress.*
>
> (b) ***Motive.*** *It is unnecessary to say much about this. Discriminatory conduct which is evidently based on prejudice or animosity or which is spiteful or vindictive or intended to wound is, as a matter of common sense and common experience, likely to cause more distress than the same acts would cause if evidently done without such a motive – say, as a result of ignorance or insensitivity […]*
>
> *[…]*
>
> (c) ***Subsequent conduct.*** *The practice of awarding aggravated damages for conduct subsequent to the actual act complained of originated, again, in the law of defamation, to cover cases where the defendant conducted his case at trial in an unnecessarily offensive manner. […]*

> *But there can be other kinds of aggravating subsequent conduct, such as where the employer rubs salt in the wound by plainly showing that he does not take the claimant's complaint of discrimination seriously: examples of this kind can be found in Armitage, Salmon and British Telecommunications v Reid. A failure to apologise may also come into this category; but whether it is in fact a significantly aggravating feature will depend on the circumstances of the particular case. […]*

94. Putting the claimant in the position she would have been in, had the act of discrimination not occurred, may require the assessment of the loss of a chance to obtain something. The representatives referred us to a number of authorities about loss of chance, including the EAT decision *Timothy James Consulting Ltd v Wilton* [2015], ICR 764, in which the EAT (Singh J) considered the relevant authorities on loss of chance in the context of an employment appeal.

95. Interest may be awarded on awards made in discrimination cases in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The interest rate for claims presented on or after 29 July 2013 is 8%. For awards for injury to feelings, interest normally runs for a period beginning on the date of the act of discrimination and ending on the day of calculation. For other compensation, interest normally runs from a period beginning with the mid point date between the act of discrimination and the day of calculation.

96. Section 207A Trade Union and Labour Relations (Consolidation) Act 1992 provides that, where the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies and the employer has unreasonably failed to comply with that Code in relation to that matter, the Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

Conclusions

Injury to feelings, personal injury and aggravated damages

97. Mr Redpath submitted that we should make only an award for injury to feelings; any separate awards were likely to result in double counting. He submitted that the award should be the middle of the middle *Vento* band. Mr Redpath submitted that there were multiple causes for the injury suffered by the claimant and account should be taken of these in assessing the injury caused by the discrimination as distinct from other causes.

98. Ms Stanley submitted that this was an appropriate case for a free standing personal injury award and an award of aggravated damages, as well as an award for injury to feelings. She submitted that the expert medical evidence was that the injury was because of the discrimination. She submitted that the injury to feelings award should be at the top of the middle band. She submitted that the personal injury award should be in the moderate bracket of psychiatric damage in the Judicial College Guidelines.

99. For the reasons which follow, we concluded that the claimant suffered injury to feelings and personal injury as a result of the acts of discrimination we found and that there were some aggravating features such that an award of aggravated damages would have been possible. However, in this case, we concluded that we could not separate out the personal injury suffered from the injury to feelings or the additional injury suffered by reason of aggravated features. The injuries are so intertwined that we concluded there would be a real risk of double counting if we were to make separate awards under these three heads. We have, therefore, decided to make one award for injury to feelings which is inclusive of personal injury suffered and additional injury due to aggravating factors.

Personal injury

100. As noted in paragraph 59, Dr Marsden diagnosed that the claimant suffered from an episode of moderately severe depressive disorder in 2018 (and an earlier episode in 2004-5). From July 2019, he diagnosed that she had been left with a chronic adjustment disorder with mixed anxiety and depressive reaction. His opinion was that the conduct found to be discriminatory by the employment tribunal caused or contributed to the injuries identified in his report and also to sickness absence from June 2018 to July 2019 (see paragraph 65). Dr Marsden attributed the claimant's lengthy absence from work 12 June 2018 to July 2019 wholly to the discrimination arising from disability and failure to make reasonable adjustments as per the Tribunal's judgment. (See paragraph 64).

101. With the treatment recommended, Dr Marsden's view was that the claimant should expect an improvement by 12 months from the start of therapy provided she did not experience major, unrelated adverse stressors (see paragraph 63).

102. We conclude, on the basis of Dr Marsden's evidence, that the claimant suffered moderate psychiatric damage as set out in the Judicial College Guidelines as a result of the discrimination we found. Although the claimant had suffered from lowering of mood to varying degrees since 2002, there was a notable worsening of her condition as a result of the discrimination in the period 2017 to 2018. We are satisfied, on the basis of the expert evidence of Dr Marsden, that, although the claimant was subjected to other stressors, the extent of her injury was due to the discrimination and no attempt at apportionment is required. There had been significant problems with factors (i) to (iv) set out in the Guidelines, in particular, the claimant's ability to cope with life and work; and the effect on her relationships with family, friends and those with whom she came into contact. However, her condition had improved by trial and the prognosis, with treatment, was good.

Injury to feelings

103. We accepted the claimant's evidence as to the impact on her of the discrimination (see paragraphs 41 to 47). This is supported by the evidence of the Occupational Health reports (see paragraphs 48, 52, 54, 55 and 56). These show that the effects of discrimination carried on over a lengthy period. The claimant was off work from June 2018 until July 2019 but, even after her return to work, the August 2019 report recorded that she was suffering daily anxiety and the December 2019

report recorded that she continued to experience symptoms of moderate depression and severe anxiety. The claimant's state of mind was somewhat improved by the report in January 2020, but the report recorded that the claimant still had periods where anxiety increased.

104. We take account of the fact that the claimant had other stressors in her life which caused her anxiety in considering the extent of injury to feelings attributable to the discrimination.

105. The parties agree that the injury falls into the middle band in *Vento* and we agree that this is correct. The respondent contends that an appropriate award would be towards the middle of that band; the claimant contends that it should be towards the upper end. We conclude that the injury suffered was more serious than the middle of the middle *Vento* band. Since we have decided that the correct approach in this case is to make one award including personal injury, injury to feelings and aggravating factors increasing the injury to feelings, due to the difficulty of separating out these injuries from each other, we will deal with the total figure to be awarded after having dealt with our conclusions in relation to all three elements.

Aggravating factors increasing the injury to feelings

106. The claimant relied on a number of matters as the basis for making an award of aggravated damages. She relied on the manner in which the conduct was carried out, including the fact that the claimant was threatened with disciplinary action for, in effect, asking the respondent to act lawfully. She also relied on subsequent conduct which Ms Stanley submitted "rubbed salts in the wounds" including Ms Nelson's approach to the performance management process and Mr Harrison's approach to the meeting he conducted on 26 February 2020, in particular his opening statement that the respondent was "not minded" to correct the historical background document.

107. We agree that threatening the claimant with disciplinary action if she continued to try to pursue a grievance (see J100, 103 and 104) falls within the type of conduct identified in *Commissioner of the Metropolitan Police v Shaw* as being a case where aggravated damages could be awarded: the discrimination was done in an exceptionally upsetting way.

108. In relation to subsequent conduct, we consider first the performance review conducted by Alison Nelson. We have found that Ms Nelson did not follow the respondent's procedure in that she failed to discuss with the claimant the claimant's self-assessment (see paragraph 66). She gave the claimant a low marking, which was unexpected, given the claimant's mid-year mark. The claimant suspects a connection between the discrimination and the conduct of this review. Whilst the performance review followed the discriminatory acts and the presentation of the claim, we do not consider this timing of events to be sufficient evidence to link the way the review was done with the discriminatory acts. We conclude, therefore, that we cannot take this into account as an aggravating factor in determining the level of injury to feelings award.

109. In relation to Mr Harrison's conduct of the meeting on 26 February 2020, we have found that he said words to the effect that the respondent was not minded to correct the historical background document (see paragraph 75). We conclude that this was subsequent conduct which had the effect of rubbing salt into the wounds and is within the type of conduct identified in *Commissioner of the Metropolitan Police v Shaw* which can justify an award of aggravated damages.

The total award for injury to feelings

110. Taking into account the personal injury, injury to feelings and aggravating factors, we consider that the injury suffered was so severe and prolonged that it merits an award at the top of the middle band in *Vento.* At the time the claim was presented, this was £25,200, and we make an award of compensation for injury to feelings of this amount.

111. Mr Redpath submitted that interest should run for a period from the date the claimant presented her claim until 10 March 2020, when what was to have been the remedy hearing was adjourned following the claimant's representatives sending a revised schedule of loss and witness statement shortly before the hearing date. He submitted that the delay occasioned by that postponement should not result in additional interest to be awarded to the claimant. In response to the judge questioning whether the reason for interest being paid was to compensate the claimant for the period the claimant was out of the money, Mr Redpath replied that he could understand that argument if the Tribunal applied bank interest rates of 0.5% but not when interest was at the punitive rate of 8%.

112. Ms Stanley submitted there was no basis for delaying the start of the period for calculation of interest. The respondent had not sought to mitigate the effect of interest accruing by, for example, making a part payment. She submitted that interest on the injury to feelings award should start to run from 30 October 2017.

113. We consider that interest should be awarded on the compensation for injury to feelings at the applicable rate of 8%. The acts of discrimination were committed over a period from 30 October 2017 to 21 March 2018. We consider it would be appropriate to take the period for interest as starting around the mid point of the period of discrimination (which we take as 1 January 2018) and running until the date of calculation, which is 16 September 2020. We are not persuaded there is any good reason to delay the start of the period for which interest is to run until the date the claimant presented the claim or to end it in March 2020.

114. The calculation of interest is on the award after any adjustments because of unreasonable failure to follow a relevant ACAS Code of Practice. For the reasons given below, we conclude that an uplift of 25% on compensation should be made because of the respondent's failure to follow the ACAS Code of Practice on Discipline and Grievance. We, therefore, increase the injury to feelings award by 25% before the calculation of interest. The adjusted award is £31,500.

115. We calculate interest on £31,500 at 8% p.a. from 1 January 2018 until 16 September 2020. The period is 141 weeks. The amount of interest on the injury to feelings award is, therefore:

141/52 x 8/100 x £31,500 = £6833 (omitting pence).

Loss of earnings during sickness absence from 12 June 2018 until July 2019

116. Mr Redpath submitted that this loss should not all be attributed to the acts of discrimination; other stressors in the claimant's life were contributory factors and needed to be taken into account. Mr Redpath submitted that the period of sickness was overwhelmingly to do with her historical claims, the Alison Nelson performance marking (about which he submitted there was no evidence that the marking was malicious) and the claimant's domestic situation.

117. Ms Stanley submitted that the medical report showed the necessary link between the discrimination and the absence.

118. Based on the report of Dr Marsden and the evidence of the claimant, we conclude that this period of sickness absence was wholly caused by the acts of discrimination. Although the claimant had suffered from lowered mood, to varying degrees, from 2002, she had not had any significant period of sickness absence prior to this period since 2004-2005. The claimant was absent from work due to depression and anxiety from 12 June 2018 until July 2019. Dr Marsden attributed this absence wholly to the acts of discrimination found by the Tribunal (see paragraph 64). The claimant suffered loss of earnings as she was placed on half pay in January 2019 and nil pay in June 2019.

119. We adopt the calculation of loss of earnings during this period set out in the claimant's schedule of loss. This is as follows:

(6 x £1087.92) – £2906.68 (pay received from 1/19 to 6/19) = £3,620.84.

120. We make an award of compensation for this head of loss in this amount. We will calculate interest on this head of loss as part of the calculation of interest for the total financial loss.

Payment for private medical treatment recommended by Dr Marsden

121. Mr Redpath submitted that therapy is available on the NHS. He also submitted that any treatment the claimant may require is too remote from any injury she says may have been occasioned by the discrimination; there were many other contributory factors.

122. Ms Stanley submitted that it was enough if the discrimination contributed to the loss, it did not have to be the only cause, and was not too remote. In personal injury claims in the civil courts, treatment recommended by a medical expert can be loss flowing from the act complained of. It is well established in the civil courts that the fact that treatment is available on the NHS does not mean a claimant cannot recover

the cost of private treatment. It this is awarded, no interest should be awarded on this head of loss, since the cost has not yet been incurred.

123. We concluded that the level of psychiatric injury diagnosed by Dr Marsden was wholly attributable to the discrimination, based on the evidence of Dr Marsden and the claimant. The treatment has been proposed to alleviate this injury. We, therefore, conclude that the cost of the treatment is a loss attributable to the discrimination and not too remote.

124. The claimant was not challenged that, if awarded compensation for the cost of treatment, she would pay for the treatment recommended. The claimant has co-operated with other medical treatment plans, which included counselling. We have no reason to believe she would not undertake this treatment recommended by Dr Marsden (see paragraph 56). Dr Marsden recommended one or two assessment sessions, followed by approximately 12 further sessions at approximately £185 per session. We do not consider the fact that the claimant may be able to obtain some therapy on the NHS, after a significantly greater delay, prevents the claimant from recovering the cost of having this treatment privately.

125. We conclude that an award should be made for the cost of this treatment, as part of the aim of putting claimant in the position she would have been in, had the discrimination not occurred.

126. We award the cost of 14 sessions at £185 per session (two assessment sessions, followed by 12 further sessions). The total is £2,590.

127. We make an award of compensation for this head of loss in this amount. We will calculate interest on this head of loss as part of the calculation of interest for the total financial loss.

Loss of chance to obtain a special payment

128. The claimant argues that the respondent's unlawful discrimination deprived her of the chance to receive the discretionary payments she seeks.

129. Mr Redpath submitted there was no real connection between the losses which flow from not having a face to face meeting and the claim that the claimant was passed over for promotion in 2002. Mr Harrison had a meeting and discovered Ms Dove had been mistaken in her evidence that the historical background document had been included in the documents submitted when Mr Harvey took legal advice. Mr Redpath submitted there was no chance that the respondent would have made a consolatory payment.

130. Ms Stanley submitted that we had two decisions to make in relation to each element claimed:

130.1. What sort of sum might the claimant have got?

130.2. What was the percentage chance the decision would have gone in her favour?

131. Ms Stanley submitted that the evidence suggested that, if Alison Nelson or Sheila Dove had engaged with the issue, they would have had to refer the decision as to whether a special payment would be made to someone else. The claimant was deprived of the opportunity of having a third party look at her claim. Mr Harrison's evidence could only be relevant to what would have happened in the past. However, this was not useful evidence as he was not acting as the Tribunal said the respondent should have acted.

132. We refer to parts of our judgment on liability which are particularly relevant to this claim and to further findings of fact made at this remedy hearing.

133. In July 2003, the claimant was incorrectly not told that part of her grievance, relating to the refusal by her line manager to delegate and blocking applications for promotion, had been upheld. Subsequently, an HR Business Partner identified a weakness in the handling of the grievances and recommended compensation subject to the claimant being legally represented (J11).

134. In 2010, JS, a newly appointed HR Business Partner, did some considerable investigation and came to the view that a couple of issues had not been correctly or timely handled and she told the claimant she would look to seek some form of apology or recompense. JS submitted an application for a Special Payment Decision Maker to consider a special payment (J17).

135. In paragraphs 35 above, we further found that JS, when completing the SPEC1 form, to refer the case to a Special Payment Decision Maker for consideration of a special payment, in January 2011 (J17), listed solicitors' fees as actual financial loss incurred (B104). She also wrote that she considered a consolatory payment was appropriate. The form indicates that a consolatory payment can be awarded in very exceptional circumstances where maladministration has had a direct adverse effect on the person's life. JS described the effects of the maladministration on the claimant as "substantial breakdown of trust with the Department as her Employer and continues to affect her mental state and stability".

136. The Special Payments Decision Maker issued an interim decision asking JS to have the solicitors' branch confirm that it was acceptable to make a special payment decision and, if the case was re-referred to them, said they would need more evidence (J17). JB took over from JS and did not refer the matter back to solicitors or go back to the Special Payments Decision Maker.

137. The draft briefing historical background document was created in 2011 (J20) and contained inaccuracies, including that none of the claimant's 2002 grievances were upheld (J20). The claimant obtained this in response to an SAR in 2013 and asked how it was to be corrected. Mike Harvey was appointed to deal with the claimant's maladministration claim and to oversee any other outstanding action. (J22-23).

138. We found, in paragraph 36 above that the claimant, in the complaint considered by Mike Harvey in 2014 (J23, 28-30), asked for a special payment in respect of the following matters: payment for personal injury claim; solicitors' fees with interest; payment equal to the loss of wages to Band C grade from 2002; payment equal to 6 months' half pay with interest (for sick leave when she received half pay); payment to reflect detriment suffered as a result of the respondent's handling of her data (B140-144).

139. Mike Harvey took legal advice in relation to the matters he was investigating. We found that the incorrect historical background document formed part of the documents sent with the request for legal advice (see J28 and J31 and paragraphs 19 to 24 above). Mike Harvey concluded, after taking advice, that there should be no financial redress (J29).

140. The background to the discrimination we found to have occurred in the period 30 October 207 to 21 March 2018 was that the claimant raised with various people over some period that she believed that legal advice had been sought using incorrect information (J36).

141. The complaint of discrimination arising from disability which the Tribunal concluded was well founded was that, in the period 30 October 2017 until 21 March 2018, the respondent had treated the claimant unfavourably by the respondent treating the document issue as concluded and refusing to engage in any further substantial discussion about it, including a face to face meeting because of something arising in consequence of the claimant's disability (J140). The document issue was that the historical background document should be corrected (J132).

142. The complaint of failure to make reasonable adjustments which the Tribunal concluded was well founded was that, in the period 30 October 2017 to 21 March 2018, the respondent failed to make a reasonable adjustment by not holding a face to face meeting between the claimant and HR (J152).

143. In relation to this head of loss, we need to assess the chance, if any, that, if the respondent had not discriminated unlawfully against the claimant in these ways, but, in the period 30 October 2017 to 21 March 2018, engaged in further substantial discussion about corrections needed to the historical background document, including have a face to face meeting between the claimant and HR, the respondent would, as a result of that engagement, decided to make a special payment to the claimant. If we conclude that there was some chance that they would have made a special payment, we need to decide how much that would have been.

144. As recorded in J152, we considered that we had to approach the matter of whether having a face to face meeting was a reasonable adjustment on the basis that whoever from HR would have conducted the meeting would have done so in good faith, listening carefully to the claimant and what she had to say. We concluded that, if this had been done, there was a chance that the respondent would have gone on to correct the historical background document and take whatever steps flowed from this.

145. Mr Harrison's evidence about what he did after the Tribunal's judgment on liability does not persuade us that there was no chance that, if the respondent had held a face to face meeting with the claimant in 2017/2018 and engaged with her in good faith, listening carefully to what she had to say, the respondent would have made a special payment to the claimant. Mr Harrison did not consider the issue of what corrections, if any, needed to be made to the historical background document and did not consider whether the making of a special payment was a step flowing from the re-opening of the issues concerning that document. His evidence was that he concluded (contrary to our finding of fact) that Mike Harvey had not sent the historical background document to the respondent's solicitors and considered this conclusion determinative of the discretionary payment issue. Mr Harrison accepted in oral evidence that he did not come to his own conclusion about the merits or otherwise of the claimant's request for a discretionary payment because he had concluded it did not form part of the legal submission.

146. We conclude that, had there been good faith engagement with the claimant about the issues she was raising, in 2017/2018, it is likely inaccuracies in the historical background document would have been corrected, legal advice taken and the matter of whether a payment should be made referred to the special payments team.

147. We deal separately with the loss of chance in relation to each element in respect of which the claimant was seeking a payment, since we consider that the percentage chance of a payment being made in respect of each element is not the same in each case. We will deal with interest on any awards when we have reached a total of financial loss.

Loss of promotion and pension rights since 2002

148. The claimant was blocked by her line manager for promotion in 2002 but the claimant was incorrectly not told that her grievance about this was upheld. There was an inaccuracy in the historical background document where it suggested that none of the claimant's 2002 grievances had been upheld, whereas parts of the grievance, including that her line manager had blocked her promotion, had been upheld.

149. Mr Harvey's letter to the claimant of 7 March 2014, refusing any payment, incorrectly stated that her equal opportunities complaint of 2002 was not upheld, not acknowledging that parts of the complaint, including about being blocked for promotion, were upheld (B141). He also wrote that, that aside, he also considered that a successful outcome of a promotion application is never a given, so it could not be assumed that any promotion application that the claimant had made would have led to a promotion to the EO grade.

150. The claimant demonstrated the capability for promotion. She was marked in the top 10% in the civil service in 2001/2002 and 2002/2003. She has acted up to a Band C role. However, since being blocked for promotion in 2002, the claimant has not made another application for promotion.

151. We conclude that the way this matter was dealt with was so poor, from the blocking of promotion in 2002, to the failure to tell the claimant her grievance was successful in this respect, continuing to the errors in Mr Harvey's letter in 2014 and continuing failures to acknowledge errors had been made, that we conclude there was a very good chance that the respondent, acting in good faith, would have made a special payment to the claimant for this element of her claim. We assess this chance at 75%. However, we do not consider that the amount the respondent would have awarded would have been anywhere near the amount sought by the claimant in her schedule of loss, which is £150,000, based on an annual difference in pay between the two grades of £6,393 from March 2002 up to and beyond the date of this remedy hearing.

152. We conclude that the level of payment likely to have been made would have been more in the region of a year's difference in pay and pension, on the basis that the claimant could have applied again for promotion and there was no guarantee of success in 2002, if the claimant had not had her opportunity at that time blocked. One year's difference in pay is £6,393. We were not given figures as to the value of pension rights, but estimate this as in the region of 10% of salary. We, therefore, use an estimated figure of £7000 for one year's difference in pay and pension benefits.

153. We conclude that an appropriate award of compensation for the loss of chance of receiving a special payment relating to loss of promotion and pension rights since 2002 is 75% of £7000, which is £5,250.

Personal injury claim and solicitors' fees

154. As noted in paragraph 33 above, we have little information to assist us in understanding the nature and likely value of the personal injury claim. Ms Stanley gave us some information in submissions, after taking instructions. However, we have not taken account of this limited information since Mr Redpath had not had the opportunity to take instructions on the information provided.

155. We accept the claimant's evidence that she was told by solicitors it could be worth £50,000. However, we consider it likely that this was the top end of what the claim could be worth. We note that £50,000 would be at the top end of compensation for moderately severe psychiatric damage according to the current (15th) edition of the Judicial College Guidelines. The lower end of compensation for this level of injury is £17,900.

156. The personal injury claim was never reactivated after the period when it was put on hold for an investigation. We conclude that Mike Harvey's reasoning as to why there should be no payment for a personal injury claim (B141) would not have been any different had the historical background document been corrected in the way the claimant sought (B315).

157. We conclude that there was a low chance that the claimant would have received a special payment for personal injury. We assess this as 10% chance. If a payment had been made, we conclude it would have been at the lower end of the moderately severe category of psychiatric damage i.e. around £18,000. We,

therefore, conclude that there was a 10% chance of a special payment of £18,000 being made, had the respondent not discriminated against the claimant in the way found i.e. £1800.

158. In relation to the solicitors' fees the claimant incurred, we conclude there is a considerably higher chance that the respondent would have made a special payment. The respondent had advised the claimant to get legal advice and made it a condition or recommendation that she do so if she wanted to pursue a claim for compensation (see paragraph 30). The claimant incurred solicitors' fees as a result of this advice or requirement. We assess the chance that a special payment would have been made in respect of solicitors' fees as being 75%.

159. As noted in paragraph 32, the claimant was unable to provide us with evidence as to the total amount of fees incurred. We consider the fees were likely to be rather higher than the amount shown on B710F since the majority of the work was probably done on dates earlier than shown on this document. Doing the best we can, on the basis of this limited evidence, we conclude that the claimant incurred total fees in the region of £3500.

160. We, therefore, conclude that there was a 75% chance that the respondent would have made a special payment in respect of £3500 of solicitors' fees i.e. a total of £2625.

6 months' half pay for the period Jan/Feb 2005 to June/July 2005

161. The claimant began a period of long term sick leave in August 2004 which changed into maternity leave beginning 1 July 2005 (J13). The last six months of this period of sick leave was on half pay (see paragraph 34 above).

162. In the information sent to Mr Harrison before the meeting in February 2020, the claimant referred, in explanation of this element of the claim, to the 2014 chronology which confirmed that a reasonable adjustment of a transfer to another government department was not pursued but the claimant pursued a transfer through a non DDA route, as advised by her manager. The failure to make a reasonable adjustment was clear in the 2014 chronological summary, but the equal opportunities complaint having been partially upheld, but not notified to the claimant, was not. We conclude that there was a 50% chance that, if the discrimination had not occurred, the respondent would have considered that there should be a special payment of the loss of pay. We, therefore, conclude that an award should be made of 50% of the difference in pay, which is £3,263.76 i.e. £1631.88.

The Total Award for Financial Loss

163. The total award for financial loss, before uplift for failure to comply with a relevant ACAS Code of Practice, is as follows:

Loss of earnings 12 June 2018 to July 2019	3,620.84
Cost of private medical treatment	2,590.00
Loss of chance:	

Promotion and pension rights	5,250.00
Personal injury	1,800.00
Solicitors' fees	2,625.00
Half pay Jan/Feb 05 to June/July 05	1,631.88
Total financial loss before adjustment	£17,517.72

Uplift for failure to comply with a relevant ACAS Code of Practice

164. Mr Redpath conceded that there should be some adjustment for failure to comply with the ACAS Code of Practice in relation to the handling of the claimant's grievance but submitted this should be at the lower end of the discretionary scale. Mr Redpath submitted that, if the grievance procedure had been conducted properly, the claimant would have been disappointed because she would have been told that they could not go into the matters again.

165. Ms Stanley submitted that this was not a case where the respondent simply got the procedure wrong; the respondent refused to engage with the claimant's grievances.

166. We conclude that there was a complete failure on the respondent's part to comply with the ACAS Code of Practice on Discipline and Grievance, when the claimant was attempting to raise a grievance. The claimant was met with responses that the matter was closed, without any attempt to look into the grievance or hold a grievance meeting (see J96-97 and 100-104 in particular). We conclude that this failure was unreasonable, particularly as it accompanied by a threat of disciplinary action if the claimant continued to attempt to pursue her grievances (see J103).

167. We conclude that there should be an uplift on compensation of 25% due to the unreasonable failure of the respondent to comply with the ACAS Code of Practice in relation to the claimant's attempt to pursue a grievance.

168. The adjusted award for financial loss is £21,897 (disregarding pence).

Interest on the financial loss

169. We refer to Mr Redpath's submissions on interest referred to at paragraph 111 above.

170. Ms Stanley submitted that interest should run from the mid point between the start of the discriminatory treatment and the calculation date.

171. We conclude that interest should be awarded at 8% on the total financial loss other than the cost of medical treatment (since this has not yet been incurred) for a period beginning with the mid point between the start of the discrimination i.e. 30 October 2017, and the calculation date, 16 September 2020, until the calculation date. This mid point date is 9 April 2019. The period for calculation of interest is 526 days.

172. The adjusted financial loss on which interest is to be calculated is (17,517.72 – 2,590) + 25/100 x (17,517.72 – 2,590) = 14,927.72 + 3,731.93 = £18,660 (rounding up the pence).

173. Interest is calculated as follows:

526/365 x 8/100 x 18,660 = £2,151 (rounding down the pence).

Total award of compensation

174. The total award of compensation is, therefore, as follows:

Injury to feelings/personal injury/aggravated damages (adjusted)	31,500
Interest on non-pecuniary loss	6,833
Financial loss (adjusted)	21,897
Interest on financial loss	2,151
Total	£62,381

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Employment Judge Slater

Date: 13 October 2020

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON
5 November 2020

FOR THE TRIBUNAL OFFICE

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

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2405365/18**

Name of case: **Mrs J Marsden** v **Department for Work and Pensions**

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

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

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

"the relevant decision day" is: 5 November 2020

"the calculation day" is: 6 November 2020

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

MR S ARTINGSTALL
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

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

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

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

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

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

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

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