



THE EMPLOYMENT TRIBUNALS

Claimant: Mrs S Clifford

Respondent: Durham County Council

Heard at: Teesside Hearing Centre **On:** 17th & 18th February 2020

Before: Employment Judge Johnson

Members: Mrs S Don
Mr P Curtis

Representation:

Claimant: Mr P Crammond of Counsel

Respondent: Mr R Stubbs of Counsel

JUDGMENT ON REMEDY

1. The employment tribunal finds that the claimant would have been unable to work and would have retired on ill-health grounds by not later than 31st July 2018, had the proven acts of unlawful disability discrimination not taken place. The respondent is ordered to pay compensation to the claimant for lost earnings from 18th June 2017 to 31st July 2018 in the sum of £3,542.95.
2. The respondent is ordered to pay further compensation to the claimant in respect of the costs incurred by her in acquiring an electric wheelchair in the agreed sum of £1,700.
3. The respondent is ordered to pay compensation to the claimant for injury to feelings in the sum of £15,000.
4. The respondent is ordered to pay compensation to the claimant by way of damages for personal injury in the sum of £15,000.
5. The total sum ordered to be paid by the respondent to the claimant is therefore £35,242.95.

REASONS

1. By judgment promulgated on 2nd January 2020 the employment tribunal found that the claimant's complaints of unlawful disability discrimination (unfavourable treatment because of something in consequence of disability, harassment and victimisation) were well-founded. Of the 14 allegations of discriminatory conduct, the employment tribunal upheld 8, as follows:-
 - (i) the headmaster saying to the claimant "I can do whatever I like" in or about December 2016;
 - (ii) the headmaster telling the claimant "we are all under pressure working hard" in February 2017;
 - (iii) the headmaster telling the claimant that she was causing stress and extra work for her colleagues as well as financial stress for the school by taking sickness absence, again in February 2017;
 - (iv) the headmaster telling the claimant he did not ever want her to return to work on 15th February 2017;
 - (v) the headmaster telling the claimant she was no longer permitted to attend hospital appointments during working hours, on 16th February 2017;
 - (vi) the headmaster berating the claimant for raising her voice to school children, again in February 2017;
 - (vii) the headmaster saying to the claimant "there is the door" on 6th March 2017;
 - (viii) the headmaster divulging to colleagues that the claimant had raised a grievance about him, on 3rd May 2017.
2. The claimant now seeks a remedy by way of compensation in respect of the employment tribunal's findings on liability. Unfortunately there has been considerable delay in progressing the claimant's claim for a remedy. The liability judgement was promulgated on 26th March 2018. Thereafter, permission was granted by the tribunal for the parties to jointly instruct medical experts to provide expert evidence to assist the tribunal in considering the claimant's claim for damages for personal injury. Attempts to negotiate terms of settlement proved unsuccessful. The matter was finally listed for a 2-day hearing on 17th and 18th February 2020. The tribunal was unable to conclude its deliberations by the end of the second day and shortly thereafter the Covid 19 pandemic prevented a deliberations meeting taking place until 17th September 2020.
3. The claimant went on long-term sick leave on 7th March 2017 and did not return to work thereafter. Her employment was terminated on capability grounds following a meeting on 11th December 2017, at which the claimant accepted she would be unable to return to work. The claimant did not appeal against her dismissal on

capability grounds. The claimant was dismissed with notice and the effective date of termination of her employment was 9th March 2018.

4. The claimant claims compensation under the following heads of damage:-
 - (i) loss of earnings up to the date when she would ordinarily have retired;
 - (ii) compensation for injury to feelings;
 - (iii) damages for personal injury relating to psychiatric/psychological injury;
 - (iv) damages for personal injury relating to the deterioration in her physical condition;
 - (v) special damages relating to the cost of acquiring a wheelchair.
5. The respondent acknowledges that the claimant is entitled to compensation for losses incurred as a result of its discriminatory conduct. However, the respondent does not accept that the claimant has incurred “career-long” losses, submitting that the claimant would have had to cease work on ill-health grounds long before her ordinary retirement date. The respondent acknowledges that the claimant is entitled to compensation for injury to feelings. The respondent acknowledges that the tribunal may award compensation/damages for personal injury, but submits that the respondent did not cause the claimant’s physical medical condition, nor her mental medical condition. The respondent submits that those conditions were present long before the proven acts of discrimination and that the respondent is only liable to compensate the claimant for any aggravation or exacerbation of those pre-existing conditions and any acceleration of the date when the claimant would have to retire.
6. Over the 2-day remedy hearing, the claimant gave evidence and was cross-examined by Mr Stubbs for the respondent. The claimant was taken by Mr Stubbs to a number of the documents in the substantial remedy bundle, including her own voluminous medical records. The claimant was questioned about the contents of the medical reports from Doctor Michael Lough (Consultant Psychiatrist) and Doctor Colin Pease (Consultant Physician and Rheumatologist). Neither Doctor Lough nor Doctor Pease were called to give evidence to the tribunal, but both had been asked questions by the respondent, following delivery of their respective reports.
7. The tribunal had the benefit of well-constructed schedules and counter schedules of loss from the claimant and respondent, together with most helpful written skeleton arguments from both counsel, which were supplemented by their oral submissions at the end of the claimant’s evidence.
8. The documentation placed before the tribunal included 4 x A4 ring binders containing copies of the claimant’s medical records. Those records were reviewed by the two experts, Doctor Lough and Doctor Pease. There was no challenge to the accuracy of the records, nor was there any challenge to the respective experts’ assessment of those records, save for the respondent’s

challenge to the claimant relating to the accuracy of the information she had given to those experts in her discussions with them.

9. The claimant was first diagnosed with Fibromyalgia in 1999, 6 or 7 years before she became employed by the respondent. At page 4 of his report, Doctor Lough refers to the following:

“The claimant has suffered multiple physical problems. She has had Fibromyalgia since 1999 and alongside this has a diagnosis fatigue syndrome. She has suffered with migraines since childhood. She is chronically iron deficient. The claimant suffers with restless limbs (an uncomfortable sensation of movement within her legs and arms). She has Raynaud’s Disease (a painful reaction in her limbs when it is cold). She has had diverticular disease of her lower bowel since 2017. She has raised blood pressure and raised cholesterol. She had a hysterectomy for fibroids and also previously a Cholecystectomy”.

10. At page 6 of his report, Doctor Lough reports that there was a diagnosis of Fibromyalgia on 23rd September 2009 and records, “she has a nine-year history of widespread chronic pain....she says she is never pain free.”
11. At page 7 in his report, Doctor Lough reports as follows:-

“In March 2014 the claimant was seen by Doctor Thimappa who is a consultant in pains management. He describes the claimant’s chronic pain and comments – “she now describes pain and tiredness which affects her work as a teaching assistant....along with her Fibromyalgia she has got raised cholesterol, high blood pressure, gastric irritation, migraine and Raynaud’s Syndrome. She describes her sleep as very poor but does not let it affect her mood.”

12. The GP notes show on 30th March 2015 an entry which states, “Joints all over are painful. She is a teaching assistant for the primary school. All joints painful.”
13. On 27th July 2015 the GP entries show, “MRI head satisfactory. Vision Express was concerned about BP rise in her retina photo. Tiredness and pain. Fibromyalgia worse. Ankles pain and everywhere worse.”
14. The 23rd November 2015 entry states, “Fibromyalgia – Chronic Fatigue Syndrome – multiple ongoing pains, has been under the care of the pain clinic but complains they are unable to help her. Nothing which has ever been tried on her works. Pain is affecting daily activities, including work.”
15. On 31st March 2016 the GP notes state, “hip pain, back pain, pelvis, knees, under her feet, shoulders – like Fibromyalgia. Struggles to sleep. Taking too many Tramadol but the pain is still there. Big joints are very painful. She will let DVLA know.” The last reference to DVLA refers to the claimant’s ability to drive. At page 101 on the bundle is a handwritten note by the claimant dated 9th November 2016, which states, “I now do not drive. A couple of weeks ago I had a slight

accident whilst driving. I now don't feel safe behind the wheel. Depression is linked to this as is stress. It makes my ability to ignore the pain lessen."

16. In August 2016 the GP notes refer to "worsening right anterior knee pain". On 11th October 2016 the entry states, "extreme pain – not fit for work."
17. On 19th October 2018 the consultant rheumatologist (Doctor Bridges) states, "I did see her as a private patient a couple of months ago when she had a sixteen-year history of widespread constant, unremitting pain in the muscles and joints, exhaustion, tiredness and brain fog and I diagnosed Fibromyalgia. The claimant has a raised CCP antibody which may indicate rheumatoid arthritis. Undoubtedly Mrs Clifford has Fibromyalgia. The question is does she have superimposed rheumatoid arthritis – there is no clinical evidence of this diagnosis."
18. On 7th November 2016 the GP notes state, "she was walking slowly down the hallway, bending difficult – extremely painful joints – generalised arthritis. Not fit for work. Diagnosis Fibromyalgia/acute joint pain/extreme painful movements."
19. On 21st December 2016, Doctor Roscoe the consultant in pain management records:- "she presents with a very long-standing history of a body that is painful everywhere. She describes pain within her heart and also her brain, significant superficial sensitivity especially to sound, temperature fluctuation, burning and whooshing sensations under her skin. She feels the pain is within her bones. She's been off work for the last 2 months. She complains significantly of fatigue and states she could sleep 20 hours per day if able. Has significant headaches and migraines, although these maybe somewhat separate issues as she has suffered from them since the age of 5."
20. The GP notes for 7th March 2017 record, "she says she works in a primary school, was at work yesterday says mood low, thought of self-harm and plans....pain worse and this is the trigger for mood, says can't take any more pain." That entry continues on 15th March when the GP records, "She says she has put in a formal complaint about harassment from her boss, feels stress is not helping her condition....diagnosis – stress at work."
21. On 7th April 2017 the GP records, "she says pain has gotten worse from Fibromyalgia – struggling to sleep during the day and night – feels hands swollen – says needs sick note extension. OT advise refer to wheelchair services for electric wheelchair."
22. On 8th May 2017 the GP notes record, "multiple joint pain – multiple stiff joints – movement aggravate symptoms – pain in lower limbs – headache – splitting pain – depressed mood – insomnia – diagnosis; multiple joint pain."
23. On 31st May 2017 Doctor Roscoe records, "she has struggled and has a significant escalation of her pain. This has coincided with the significant stress at work and also a current rise in her inflammatory markers and an increase of swelling in her joints."

24. On 14th June 2017 the claimant “reports symptomatic bullying from her manager over a 7-year period. She also reports poor physical health and now uses a wheelchair to get around. This has impacted upon her mental health and she has experienced suicidal ideation which she has found distressing”.
25. In December 2017 Doctor Roscoe records:-
- “6.12.2017 She continued with her job as a teaching assistant until approximately 18 months ago therefore mid 2016 when she started to suffer what she describes as bullying at work with significant deterioration in her mental health and has had suicidal ideations requiring admissions to Westpark Psychiatric Hospital since and a significant exacerbation and deterioration of her Fibromyalgia. Her mobility has gone from using a stick 20% of the time to being virtually wheelchair bound. She has a mixture as stated of Fibromyalgia and Chronic Fatigue Syndrome and has more recently been diagnosed with Rheumatoid Arthritis by Doctor Bridges. More recent hospital admission with significant chest pain now put down to Fibromyalgia flare-up. She has background mechanical lower back pain and Fibromyalgia pain. She has had a significant flare-up of hip pain. She says she is managing from a general Fibromyalgia point of view, but her hip pain is the most severe.”
26. The claimant’s GP records on 7th December 2017, “unable to continue working due to disabling arthritis. She has constant pain in multiple joints and is receiving intensive treatment from the rheumatologist.”
27. In January 2018 there is a letter by Doctor Roscoe, the consultant in pain management. He states:-
- “4.1.2018 – unfortunately things significantly deteriorated approximately 18 months ago and she suffered a significant deterioration of her mental and physical health and I understand this coincides with work related stress. This is one of the predominant triggers to destabilise Fibromyalgia and Chronic Fatigue Syndrome and negates the benefit of self-management. I envisage that her condition will not improve and has certainly more recently been exacerbated by significant stress.”
28. In summary, the claimant was diagnosed with Fibromyalgia and Chronic Fatigue Syndrome at the of 37, although she had been experiencing pain for some years before that formal diagnosis. Those physical conditions were treated with powerful medication, including Tramadol and Fentanyl. Whilst those drugs may have alleviated the claimant’s pain, they did not prevent a gradual deterioration in the claimant’s physical condition. The claimant accepts that she began to have to use a walking stick and subsequently a wheelchair. The claimant voluntarily gave up driving, as she felt she was unable to safely do so. The claimant herself described to the various medical practitioners a worsening in her condition and an increase in her levels of pain.

29. The claimant was first diagnosed with depression in April 1998, with entries that year in April and August referring to “recurrent depression”. In June 2011 her GP notes record, “depressive disorder – Citalopram. The claimant was also prescribed the anti-depressant Sertraline from 2011 until 2016, when it was changed to a different anti-depressant. In December 2016 the claimant was prescribed Duloxetine. Although this is an anti-depressant, it is also used for its pain modulating properties.
30. In June 2017, the claimant was assessed by the South Durham and Darlington Crisis Team to whom she reported “systematic bullying from her manager over a y year period.” The claimant was seen by MIND in October 2017, which she attributed to “on-going stress from workplace”. In October 2018 there is a lengthy assessment by the community psychiatric nurse, which includes the following:-
- “Main issues – Fibromyalgia which she reports is becoming much worse. Chronic Fatigue Syndrome. Depression – her mood has deteriorated since she was bullied at work and she had to leave. The stress she was under has impacted on her physical health and her mood. She is in bed most of the time due to physical pain. This became much worse over the past 6 weeks when she found the person whom bullied her is now working at a school along the street. She is very angry and irritable. Often isolates herself away from her grandchildren. Can spend 2 – 3 days a week in bed. Can’t remember the last time she felt happy. The headteacher who was bullying her has made her feel worthless. Lost her motivation. Struggles to mobilise around the home due to Fibromyalgia. Uses a wheelchair to enable her to get out of the home. Had to surrender her driving licence. Unable to do much around the home due to pain. Unable to stand and cook. Lost weight. Struggling to motivate herself to manage her personal care. Feeling very anxious about leaving the home as the person whom bullied her has moved to a school near to her. She feels the stress she has been under due to the bullying has led to her physical health deteriorating. Struggles to mobilise. Feelings of being worthless and a burden to her family. Presents as very low in mood. Feels life is pointless and she is worthless. Has been bullied at work for 7 years. Is housebound and uses a wheelchair.”
31. On 10th December 2018 a treating psychiatrist records, “diagnosis severe depressive episodes. The presentation indicates a diagnosis of PTSD and severe depressive episodes. The clinical expression is that a lot of Sandra’s depressive symptoms stem from the trauma that she experienced whilst she was working as a teaching assistant – reported an extensive period of abuse including verbal and psychological abuse. At one point he made her physically sit on a pupil in the hallway. She was extremely tearful when she was talking about this. Reports flashbacks from the abuse and struggles to sleep at night. When out and passing the school she gets the impression he is watching her from the school window or from the school courtyard.”
32. At the original liability hearing, the claimant sought to persuade the employment tribunal that she had been subjected to a course of discriminatory conduct going

back to late 2015. The claimant sought to persuade the tribunal that the respondent had failed in its duty to make reasonable adjustments to accommodate her disability and that the respondent's failure to make those adjustments had contributed to her inability to continue working. The employment tribunal rejected those allegations, finding (as is set out above) that the cause of discriminatory conduct began in or about December 2016, and continued throughout February 2017, with one incident in early March 2017 and the last one (the headmaster divulging that the claimant had raised a grievance) on 3rd May 2017. There was no failure to make reasonable adjustments.

33. The claimant had received a copy of the employment tribunal's judgment before the two medical experts were instructed. Nevertheless, the claimant continued to maintain that she had been subjected to bullying and discriminatory conduct going back "several years". Following robust cross examination by Mr Stubbs for the respondent, the claimant eventually conceded that many of the allegations contained in her witness statement and impact statement for the remedy hearing had taken place before the first proven active disability discrimination in December 2016. The claimant also accepted that she had referred to those earlier matters when discussing her medical condition with both experts.
34. The claimant was "registered as disabled" on 27th January 2017, before which there had only been 1 proven act of disability discrimination, when the headmaster said to her "I can do whatever I like" in December 2016. The claimant had already stopped driving as she no longer considered herself safe to do so, before the first act of proven discrimination. By June 2016, the claimant had already told Doctor Bridges that she was "getting to the stage where she was struggling to cope functionally". At paragraph 13.6 of his report, Doctor Pease states:-

"On the balance of probabilities, I do believe that the abuse Mrs Clifford suffered has resulted in the exacerbation of her fibromyalgic symptoms. This exacerbation does seem to have started towards the end of 2016. It seems to me that the collapse of the relationship between the headmaster and Mrs Clifford in late 2016 was the "straw on the camel's back". By this I mean that the previous episodes of bullying were not significant enough to cause exacerbation but were still enough to upset Mrs Clifford. This did result in Mrs Clifford going "on sick" and ultimately her retirement on the grounds of ill-health. I do suspect there will be some improvement once the legal process is finished and Mrs Clifford has had closure for this problem. However on the balance of probability I believe that Mrs Clifford is always going to be severely limited in her functional ability. I also do not believe that she will not be able to sustain any regular form of employment."

35. At paragraph 10.10 on page 21 of his report, Doctor Lough states:-

It is important for me to state that I am not an expert in Fibromyalgia. If the tribunal considers the issue needs to be further clarified, then the opinion of a Fibromyalgia expert should be sought. From my reading of the medical records, the deterioration in the claimant's physical health

appears to commence in October 2016 and to be caused on the balance of probability by non-discriminatory conduct of the respondent.”

36. At paragraph 10.30 on page 22, Doctor Lough says:-

“It appears that the claimant’s psychiatric disorder has been triggered by three factors, all of which were in operation at that time:-

- (i) an increase in severity of her long-standing pain disorder
- (ii) the discriminatory behaviour of the respondent
- (iii) the formal complaint which I assume ultimately triggered the employment tribunal process.

I do not have a mathematical formula to separate these three causes except to suggest pragmatically that each contributed equally to the onset of the claimant’s psychiatric disorder.”

37. At paragraph 10.60 at page 22, Doctor Lough states:-

“A significant aggravating factor for the claimant’s psychiatric disorder is her former headmaster taking up a post as a teacher in a school close to the claimant’s home. The claimant has to pass this school to leave her close and to travel anywhere. This had aggravated the claimant’s preoccupation with her former headmaster and aggravated the cause of her psychiatric disorder. This issue is not caused by the actions of the respondent, but is a constant reminder to the claimant of the discriminatory and non-discriminatory behaviour of the respondent.”

38. At paragraph 10.80 Doctor Lough states:-

“The onset is March 2017. The psychiatric disorder is still present. In general terms depressive disorder is completely resolved with the passage of time. The claimant’s psychiatric disorder was initially moderate but has been severe and the cause is being aggravated by both her continued physical illness and her former headmaster working nearby. On the balance of probability I expect the claimant’s psychiatric disorder to fully resolve though it may take a further two years and significant additional psychiatric treatment. I currently do not believe the claimant will be left with permanent psychiatric symptoms or disability.”

39. Having prepared their respective reports, the two medical experts were asked a series of questions on behalf of the respondent, answers to which appear in the bundle. Doctor Pease notes that Mrs Clifford had described to him that she felt he had a reasonable working relationship with the headmaster “until the end of 2016”. Doctor Pease understood this to mean that the breakdown in communications between the claimant and the headmaster really happened after that date, although episodes prior to 2016 had existed. The claimant had previously mentioned that the bullying behaviour had begun “5 years previously”.

When asked to describe the extent to which the claimant's medical condition was caused, contributed to or exacerbated by the discriminatory conduct of the respondent, Doctor Pease replied as follows:-

"Mrs Clifford's Fibromyalgia was present prior to her employment at the school. On the balance of possibility I do believe that Mrs Clifford's symptoms were exacerbated by the headmaster's actions. By this I mean that Mrs Clifford had symptoms of Fibromyalgia, consisting of widespread pain and fatigue, which were made worse following 2016. However, an assessment of this deterioration is difficult in the absence of any viable reproduceable method of assessing functional disability in Fibromyalgia. Any assessment of Mrs Clifford's health at this point in time has to take into account her psychological status and the effect that this case has had on her psychological wellbeing."

Doctor Pease goes on to say that he recognises that some of the allegations made by the claimant were not upheld by the tribunal. However, his view was that "the situation has to be looked at in the whole, in that the issues raised represent a breakdown in communication between the headmaster and a member of his staff.

Doctor Pease goes on to accept that the claimant's medical condition has been contributed to and exacerbated by the employment tribunal process, which Mrs Clifford has found to be "very upsetting."

Finally, Doctor Pease states that he does not believe that the headmaster taking up a role in a school close to the claimant's home has upset the claimant's Fibromyalgia. He says it may have an impact on her psychological status, but this would be for the psychologist or psychiatrist to decide.

Finally, Doctor Pease did not believe that the claimant's medical condition had been exacerbated by her stopping the Fentanyl medication in 2016.

40. Doctor Lough's answers to the respondent's questions were to reject the claimant's diagnosis of Post-Traumatic Stress Disorder, as he considered it "clear from the text of the discharge letter (in 2019) that the claimant had suffered a severe depressive episode with psychotic features."

Doctor Lough concluded that there are 3 likely factors which have aggravated the claimant's psychiatric disorder:-

- (i) her former headteacher taking a post close to home;
- (ii) continued Fibromyalgia, with her consequent pain and disability;
- (iii) the tribunal process.

41. In her witness statement and evidence to the tribunal, the claimant stated that she both intended and would have expected to continue working until she was aged 67. The medical evidence was that, had the claimant continued working beyond

the age of 60, she would have had to reduce her hours. In his closing submissions, Mr Crammond for the claimant accepted that the claimant would in any event have been unable to continue working beyond the age of 60. That means that the claimant would have retired on 16th August 2022, instead of in March 2018. Mr Crammond submitted that the respondent should compensate the claimant for any financial losses sustained from the date of her ill-health retirement in March 2018 until the date when she would otherwise have retired in August 2022.

42. Both Mr Crammond and Mr Stubbs agreed that the correct measure of damages is not what is just and equitable, nor should it have to be reasonably foreseeable, but what arises naturally and directly from the acts of discrimination. When faced with the task of deciding whether an unlawful act of discrimination had taken place, the tribunal must only consider the act of which complaint is made by the claimant. Where loss has been caused by a combination of factors, including some which are not the unlawful discrimination complained of, the compensation awarded may be discounted by such percentage as reflects the apportionment of that responsibility. (**Thaine v LSE 2010 ICR 1422**)
43. Mr Crammond for the claimant submitted that, in assessing that apportionment, the employment tribunal should focus not on the divisibility of the causative contribution, but on the divisibility of the harm caused. (**BAE v Konczak 2017 IRLR 893**). The question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong. In order to divide harm suffered between differing causes, the tribunal should identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and any part which is not so caused. Mr Crammond submitted that, where there is no such a rational basis for doing so and/or the harm is indivisible, the claimant should be compensated by the respondent for the entirety of the harm suffered. Mr Crammond also submitted that the claimant ought to be treated as an "egg-shell skull" case. This meant that the respondent should be made liable for the impact of its discriminatory conduct on the claimant, taking into account her existing physical and mental conditions. Whilst the respondent may not have caused her Fibromyalgia and may not have caused her depression, Mr Crammond submitted that the respondent should be liable for the impact of its conduct on a person who suffered from those pre-existing conditions. In other words, the impact of the respondent's conduct on the claimant was far greater than it would have been on a fit and healthy person, who did not already suffer from those conditions. Mr Crammond further submitted that this was particularly relevant in assessing the impact upon the claimant of Mr Gargen working at the local school, as had she not suffered from the acts of discrimination by Mr Gargen, then she would not have been in the position of suffering such harm.
44. Mr Crammond submitted that the respondent should be responsible for special damages (ie financial losses) from March 2018 until August 2022, that being the date when the claimant would otherwise have retired had it not been for the respondent's acts of discrimination. Mr Crammond insisted that there was no medical or any other evidence to support a contention that the claimant would have left her employment before the age of 60, had she not suffered discrimination. Mr Crammond referred to the expert evidence from Dr Pease, to

the effect that the claimant would ordinarily have been able to continue working until she reached the age of 60 years. Mr Crammond submitted that the claimant “ultimately became incapacitated at work, due to the psychological effects suffered and/or the exacerbation of her physical condition, both of which were caused by the discrimination.” Mr Crammond submitted that the respondent should also be liable for the cost of acquiring the electric wheelchair at a cost of £1700, as the necessity to acquire that wheelchair at that time, was caused by the respondent’s discriminatory conduct.

45. Mr Crammond argued that the respondent should also compensate the claimant by way of damages for personal injury, both for physical injury and psychiatric/psychological injury. Finally, Mr Crammond argued that the respondent should further compensate the claimant for injury to feelings and that the award of such compensation should be at the upper end of the middle band in the Vento guidelines, taking into account the following matters;
- a) the numerous acts of discrimination
 - b) the different types of discrimination including harassment and victimisation
 - c) that they occurred over a period of 6 months
 - d) that they include an act of victimisation after the claimant was absent from work
 - e) those acts were by one person, namely the headmaster in a senior position who had a coordinated approach
 - f) they became increasingly more severe, including the pointed comment towards the end which indicated a suggestion that the claimant to leave her employment
 - g) the psychological hurt and suffering on the part of the claimant which is serious prolonged and obvious
 - h) the claimant ultimately lost her employment as a result
 - i) the acts of discrimination have had a very severe effect on the claimant and her life in general.
46. Mr Crammond submitted that damages for physical injury should take into account the level of the claimant’s pain and discomfort and that in the claimant’s case, this falls within the “severe” bracket in the JC Guidelines for “other pain disorders”, which means a figure between £39,530 and £59,110. In terms of the claimant’s psychiatric injury, Mr Crammond submitted that this fell within the “moderate” bracket of between £5,500 and £17,900. Mr Crammond submitted that any award should fall towards the top end of that bracket.
47. Mr Crammond submitted that the proven acts of discrimination were “plainly the operative and immediate cause of the losses suffered”, in that there was a series of acts of discriminatory conduct in the important period between December 2016 and March 2017, when the claimant went off sick, never to return. Mr Crammond submitted that both experts support the position of the claimant as to the loss of her employment, her inability or incapacity to work and its causation. Mr Crammond said that the claimant “became ultimately incapacitated at work due to the psychological effects suffered and/or the exacerbation of her physical condition, both of which were caused by the discrimination. Mr Crammond submitted that “there is no rational or appreciable basis for separating out the

harm caused to the claimant by factors other than the acts of discrimination, as those factors had no significant or substantial effect on the harm suffered by the claimant as a result of that discrimination.”

48. Mr Stubbs for the respondent submitted that most of the claimant’s physical and mental injuries were sustained prior to the first act of discriminatory conduct and that the claimant’s physical and mental health had already deteriorated to such an extent that she would have been unable to continue working beyond the date when she accepted ill-health retirement in any event. Mr Stubbs referred the tribunal to the decision of the Employment Appeal Tribunal in **Thaine v LSE (2010-ICR 1422)**, which set out the principles which should be observed when the tribunal attempts to examine what would have been the position of the claimant if the discriminatory behaviour found by the tribunal had not occurred.

“The test for causation when more than one event causes the harm, is to ask whether the conduct for which the defendant is liable materially contributed to the harm. In this case, the tribunal found that it did, and therefore the LSE was liable to the claimant. But the extent of its liability is another matter entirely. It is liable only to the extent of that contribution. It may be difficult to quantify the extent of the contribution, but that is a task which the tribunal is required to undertake.”

In **BAE Systems Ltd v Konczac** the Court of Appeal stated that the tribunal should in cases such as these;

“Try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer’s wrong and any part which is not so caused. That exercise is concerned not with the divisibility of the causative contribution, but with the divisibility of the harm. In other words, the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong; not whether it can assess the degree to which the wrong caused the harm. The tribunal should seek to find a rational basis for distinguishing between a part of the illness which is due to the employer’s wrong and a part which is due to other causes.”

49. Mr Stubbs submitted that the respondent was not responsible for the claimant’s Fibromyalgia, nor was it responsible for the deterioration in that condition caused by matters for which the respondent is not liable. At best, the tribunal must only compensate the claimant for the extent to which, if any, the respondent’s proven discriminatory conduct caused or contributed to any physical or psychological injury. In particular, Mr Stubbs submitted that the respondent should not be made liable for the effect of the claimant’s Fibromyalgia on her psychiatric disorder, unless that could be shown to have been caused by the respondent’s conduct. Nor could the respondent be liable for any effect of the former headmaster now working at a school near to the claimant’s home, as the respondent was not responsible for, and played no part in, that appointment. Mr Stubbs referred the tribunal to the finding of Dr Pease, namely that he did not believe that the headmaster taking up a role close to the claimant’s house had upset the claimant’s fibromyalgia.

Mr Stubbs also referred to Dr Lough`s opinion, that the claimant`s psychiatric disorder had been triggered by 3 factors, all of which were in operation at that time;

- i) an increase in the severity of her long-standing pain disorder
- ii) the discriminatory behaviour of the respondent
- iii) the formal complaint which I assume ultimately triggered the employment tribunal process.

Dr Lough went on to say that he did not have a mathematical formula to separate those 3 causes, except to suggest pragmatically that each contributed equally to the onset of the claimant`s psychiatric disorder.

- 50 Mr Stubbs conceded that the respondent would be liable to compensate the claimant for injury to feelings and submitted that any such award be in the middle band of the Vento guidelines. Mr Stubbs submitted that any award for psychiatric injury should be in the “moderate” bracket of between £5,500 to £17,900. Mr Stubbs submitted that the respondent should not be made liable for any compensation for physical injury, but that, if there were to be such an award, then it also should be in the “moderate” bracket as this case should be categorised as an “acceleration” case, i.e. that the discriminatory conduct brought forward the date by which the claimant would otherwise have been unable to continue working.
51. The tribunal was satisfied that the claimant suffered from, and had been diagnosed with, Fibromyalgia for many years prior to the first proven act of discrimination. The tribunal was satisfied that the claimant had suffered from, and had been diagnosed with, depression for many years prior to the first act of proven discrimination. The tribunal found that the respondent did not cause the claimant`s Fibromyalgia, nor did it cause the claimant`s depressive condition. However, following the “egg-shell skull” principle, the Tribunal was satisfied that the respondent must take the claimant as they found her, namely as someone with pre-existing conditions, which were likely to be exacerbated by their discriminatory conduct.
52. The tribunal found that there had been a gradual deterioration in both the claimant`s physical and mental conditions, prior to the first act of proven discrimination. In discussions with her medical advisors before the first act of discrimination, the claimant had confirmed that her symptoms were worsening over the years to the extent that they had impacted upon her ability to perform her role as a teaching assistant. The claimant had begun to use a walking stick, had given up driving a motor car and had asked for a number of “reasonable adjustments” to be made to enable her to continue in that role. The tribunal found that the respondent had not failed in any duty to make such reasonable adjustments and that, at the meeting where she was eventually dismissed, the claimant accepted that there were no adjustments which could have been made which would enable her to continue in her role. The tribunal found it likely that the claimant`s physical condition would have continued to deteriorate, regardless of the respondent`s discriminatory conduct. That continued physical deterioration would in turn have led to a deterioration in her mental health. The claimant herself accepted that she was sadly caught in a downward spiral, whereby her physical

condition adversely affected her mental health, which then, in turn, adversely affected her physical condition.

53. Dr Pease refers to an “exacerbation” of the claimant’s fibromyalgia. “Exacerbation” refers to a temporary flare-up of a pre-existing medical condition. It is not suggested that there has been any “aggravation” of that condition, in the sense that it has been made worse by the respondent’s discriminatory conduct. There has been no “acceleration” of the claimant’s physical symptoms, other than that which has led to the claimant giving up work in March 2018 rather than in July 2018.
54. The tribunal found that the claimant had given inaccurate and misleading information to both experts and to the tribunal, in that she insisted that the alleged discriminatory conduct had begun long before the first incident of proven misconduct found by the tribunal. The claimant seemed to have convinced herself that any deterioration in her physical and/or mental well-being was entirely due to the actions of the respondent. The tribunal found that not to have been the case. Having taken into account the claimant’s evidence, her answers in cross examination and the extent of the medical evidence, the tribunal found it highly unlikely that the claimant would ever have been able to continue working beyond the end of the summer term at the end of July 2018. The tribunal was satisfied that the deterioration in the claimant’s physical condition was such that she would not have been able to continue beyond that date, regardless of any discriminatory conduct by the respondent.
55. The tribunal found that the harm caused by the respondent’s discriminatory conduct was the exacerbation of her physical and mental conditions, which led to the acceleration of the date by which she would have to retire due to ill-health. The Tribunal found that the respondent was not liable for any impact upon the claimant of the former headmaster working in a school near to the claimant’s home.
56. The claimant went on long-term sick in March 2017 and accepted ill-health retirement with effect from March 2018. The tribunal found that the respondent is liable to compensate the claimant for any losses incurred during that period. Utilising the claimant’s schedule of loss, the tribunal finds that the claimant has lost earnings from 19th June 2017 to 16th October 2017 in the sum of £662.28. The loss from 17th October 2017 to 26th December 2017 is £354.88. The loss from 26th December 2017 to 9th March 2018 is £1,676.39. The loss from 10th March 2018 to 31st July 2018 (20 weeks at £42.47) is £849.40. The total loss of earnings is therefore £3,542.95.
57. The tribunal is satisfied that the claimant’s requirement to acquire an electric wheelchair occurred at a date earlier than would otherwise have been the case, but for the respondent’s discriminatory conduct. The claimant was entitled to pay for an electric wheelchair due to the delay she would have incurred in waiting for one from the NHS. The respondent is ordered to pay to the claimant the sum of £1,700 being the cost of the electric wheelchair.

58. The tribunal is satisfied that the respondent should pay compensation to the claimant for injury to feelings and that the appropriate award in this case falls within the middle of the 3 bands within the Vento guidelines. The tribunal takes into account that there were several acts of discriminatory conduct over a period of approximately 6 months and that those acts were carried out by the headmaster, who was in the position of authority over a relatively vulnerable claimant. The tribunal orders the respondent to pay to the claimant compensation for injury to feelings in the sum of £15,000.
59. The tribunal found that the respondent's discriminatory conduct exacerbated the claimant's pre-existing depressive condition. The tribunal found that the appropriate award is within the moderate bracket of the JC Guidelines, as referred to above, and that in this case the appropriate award should be £10,000. The tribunal acknowledges that there is to some extent an overlap between the award for injury to feelings and the award for psychological harm and therefore reduces the award for psychological harm to £5,000, to reflect that overlap.
60. The tribunal was satisfied that the respondent's discriminatory conduct exacerbated the claimant's Fibromyalgia, in that the levels of stress experienced by the claimant as a result of that conduct, made it far more difficult for her to manage the levels of pain caused by the Fibromyalgia. It was the deterioration in the claimant's Fibromyalgia which accelerated the date by which she would no longer have been able to continue working in any event. The tribunal found the appropriate award for the claimant is in the moderate bracket for pain disorders based upon that acceleration. The tribunal found the appropriate award to be £20,000, which is towards the very bottom end of that bracket. Again, the tribunal finds that there is an element of overlap between the award of compensation for physical injury and the award for injury to feelings. The tribunal therefore reduces the award for physical injury to £10,000.
61. The total award of compensation for personal injury is therefore £15,000, to which should be added the award for injury to feelings in the sum of £15,000. When added to the award for lost earnings and the wheelchair, the total compensation ordered to be paid is £35,242.95.

Authorised by **EMPLOYMENT JUDGE JOHNSON**

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 12 November 2020**

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