EMPLOYMENT TRIBUNALS

Claimant: Mr A Thompson

Respondent: Wheeldon Brothers Limited

Heard at: Manchester (by CVP) **On:** 6 November 2020 and 20 and 30 November 2020 (in chambers)

Before: Employment Judge McDonald
Ms S Khan
Mr J Ostrowski

REPRESENTATION:

Claimant: Mrs Thompson (Claimant's wife)
Respondent: Mr F Jaffier (Employment Law Consultant and Advocate)

JUDGMENT ON REMEDY

1. The judgment of the Tribunal is that the respondent shall pay to the claimant the sum of £105,904.75 without any deduction.

2. The recoupment regulations do not apply.

REASONS

1. We decided in a Judgment dated 23 January 2020 ("the Liability Judgment") that the respondent had unfairly dismissed the claimant and had subjected him to race related harassment. This judgment records our decision about the compensation the respondent should pay the claimant and the reasons for that decision.

The remedies hearing

2. This was a remote hearing by CVP video link (Code V). The parties and Tribunal members all attended remotely. All parties consented to this and we are satisfied that all parties were able to fully participate in the hearing.

3. The claimant was represented by his wife. The respondent was represented by Mr Jaffier.

4. After initial discussions with the parties we took time to read the papers in the case then heard evidence and submissions from the parties from the early afternoon onwards.

5. At the end of the hearing there was insufficient time for us to deliberate and reach a decision. We therefore re-convened in chambers on the 20th and 30 November 2020.

6. At the end of the hearing Mrs Thompson told us that she had applied for a preparation time order in relation to the case. There was no time left to consider that application at the hearing and, in any event, it seemed to us more appropriate to consider it after our reserved decision on remedy had been given. We indicated that once the remedy decision was given we would order that Mrs Thompson write to the Tribunal and respondent within 28 days of that decision being sent to the parties if the claimant did still want to pursue that application.

Witness evidence

7. We heard evidence from the claimant who had provided a written remedy witness statement consisting of 14 paragraphs. At the start of cross examination evidence Mr Jaffier raised a concern that Mrs Thompson was assisting the claimant with his answers. To alleviate that concern Mrs Thompson then left the room while her husband was being cross examined. We are satisfied that the evidence the claimant provided was his own evidence uninfluenced by Mrs Thompson.

8. With Mr Jaffier's consent, Mrs Thompson also gave oral evidence. She had not provided a written statement. However, there were a number of issues relevant to our decision on which the claimant had not been able to give clear evidence. As we noted in our Liability Judgment, the claimant has been identified as being on the autistic spectrum and it was clear that he struggled in particular to remember date orders. During his evidence he was also visibly distressed when being asked questions about the events which led to the remedy hearing, specifically the incidents of race-related harassment he suffered at work.

9. With Mr Jaffier's consent the Employment Judge and the tribunal panel members asked Mrs Thompson two or three open questions to elicit her evidence in chief. Mr Jaffier then cross examined her and the Tribunal also asked some follow up questions.

The bundle of documents for the hearing

10. There was a remedy bundle in pdf format consisting of 226 pages ("the Bundle"). Page references in this judgment are to pages in the Bundle. The Bundle included the Liability Judgment, medical evidence and evidence related to the social security benefits claimed and paid to the claimant and Mrs Thompson. The Bundle

did not include the Judicial College Guidelines on General Damages ("the JC Guidance") relevant to our decision on personal injury so we arranged for the relevant section on Psychiatric Damage to be emailed to the parties. We also had before us a Schedule of Loss for the claimant, a Counter-Schedule of loss from the respondent and written submissions from both parties.

Post-hearing documentation

11. During his oral evidence the claimant said that he had further medical evidence which he had not had an opportunity to send to the Tribunal. With Mr Jaffier's consent, we ordered that the claimant send those further documents in electronic format to Mr Jaffier and the Tribunal as soon as possible. We then gave Mr Jaffier until 16 November 2020 to provide any additional written submissions the respondent wished to make on those documents. The document sent through included further fit notes but also an extract from the claimant's medical records.

12. The respondent submitted that one of the documents forwarded by the claimant was inadmissible. What appears to have happened is that the claimant sent an initial email with four documents to the respondent on 12 November 2020. The respondent then made its written submissions to the Tribunal at 11:02 on 13 November 2020. The claimant then sent the respondent a further document on 13 November at 18:03, which was a Friday evening. Although the respondent had until the end of 16 November to make further submissions it did not do so. Those 3 emails were forwarded to the Tribunal at the start of the chambers day on 20 November 2020.

13. Because we were concerned that the respondent might have made further submissions which we had not seen, we emailed the parties to check whether that was the case. The respondent responded by submitting that the document sent on 13 November at 18:03 should be disregarded by the Tribunal because it was submitted late. The respondent submitted there would be prejudice to it of not having had the opportunity to cross examine the claimant upon its contents. We agree and have not taken into account the contents of that document in making our decision. We have where relevant taken into account the four documents sent by the claimant to the respondent on 12 November, on which the respondent had had an opportunity to make submissions.

Preliminary Matters

14. In his written submissions and at the start of the hearing Mr Jaffier submitted that the claimant should not be entitled to seek compensation for personal injury because he had not expressly claimed such compensation in the proceedings. He relied on **Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] ICR 1170**. That case makes clear that a claimant who does not expressly claim for personal injury in discrimination proceedings risks being estopped from litigating the issue in another court in the form of a claim for damages based on tort and/or breach of contract. **Sherrif** does not seems to us to require a claimant to specifically include a claim for personal injury compensation in their Tribunal claim form.

15. In this case, the claimant had included a claim for personal injury in his schedule of loss dated 15 July 2020 and the respondent had responded to it in its

counter-schedule. We are satisfied there was nothing in principle to prevent us awarding compensation for personal injury in this case.

Issues for Remedy Hearing

16. The issue for the remedy hearing was the amount of compensation due to the claimant for financial loss and injury to feelings and/or personal injury arising from the acts of harassment on which his case succeeded and for his unfair dismissal.

17. We used a draft list of issues prepared by the Employment Judge as the basis for clarifying with the parties the detailed issues we needed to decide. Those issues were as follows:

a. What basic award should be awarded to the claimant under s.118(1)(a) of the Employment Rights Act 1996 ("the ERA").

b. What financial loss (excluding pension loss) has the race related harassment and/or unfair dismissal caused the claimant to date?

c. What pension contribution loss has the race related harassment and/or unfair dismissal caused the claimant to date?

d. What future financial loss (excluding pension loss) has the race related harassment and/or unfair dismissal caused the claimant?

e. What future pension contribution loss has the race related harassment and/or unfair dismissal caused the claimant?

f. What injury to feelings has the race-related harassment caused the claimant and how much (if any) compensation should be awarded for that injury?

g. What personal injury has the race-related harassment caused the claimant and how much compensation (if any) should be awarded for that injury?

h. Should any of the compensation be reduced for any of the following reasons:

    i. that the claimant failed to mitigate his loss

    ii. that the claimant contributed to his own dismissal (s.123(6) ERA).

    iii. that the respondent could have fairly dismissed the claimant had a proper procedure been followed ("a Polkey reduction")

i. Should any compensation awarded be increased by up to 25% because the respondent unreasonable failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992)?

j. What is the total award of compensation after issues a-i have been decided?

k. What interest, if any, is payable on that compensation?

l. Should any part of the award be "grossed up" to take into account the impact of taxation?

m. Do the recoupment provision apply?

Facts previously found

18. In our Liability Judgment we found a number of acts by the respondent's employees to be acts of race-related harassment. We quote our summary findings about those incidents below:

> "Incidents 3, 6, 8, 10, 11 and 12: These were all incidents involving Marcin and Dariusz which we have found were aimed at the claimant. They began in February 2018 (Incident 3 – banging wood) with most of them happening in July 2018 (incidents 6,8,10 and 11) culminating in the incident on the stairs on 7 August 2018 (incident 12) which we found was instigated by Marcin and led to his and the claimant's suspensions. We found that these were all incidents of unwanted conduct. We agree with the claimant's characterisation of them as an ongoing campaign against him. We did not hear evidence from Dariusz or Marcin. However, the acts consisted of acts both of verbal hostility ("no one likes you", "we don't want black people" – incidents 10, 11) and physical hostility (banging wood, throwing wood at the radio, Marcin's middle finger gesture and the incident on the stairs – incidents 3, 6, 8, and 12). We find that they were made with the purpose of creating a hostile and intimidating environment for the claimant. found that the following were acts of race related harassment in breach of section 26 of the Equality Act 2010." (Para 238 of our Liability Judgment)
>
> "Incident(s) 5: We found that Mr Savery did on more than one occasion make the remark about black men alleged by the claimant and did grab his private parts. We found that conduct was unwanted conduct and had the effect of humiliating the claimant. Having heard Mr Savery give evidence we do not believe he made the remarks with the purpose of violating the claimant's dignity. He displayed no hostility towards the claimant nor was there evidence that he otherwise treated any of the respondent's employees less favourably because of race.
>
> We do find that this was an ill-judged attempt at humour but one which had the effect of violating the claimant's dignity and creating a humiliating environment for him, especially as we have found it happened on at least one occasion in front of the claimant's manager and supervisors at his workplace. Given the explicit nature of the remark we find it was related to the claimant's race and, even though not meant as harassment by Mr Savery was serious enough in its effect to amount to harassment under s.26 of the 2010 Act." (Paras 246-247 of our Liability Judgment).

19. In addition, we found that the claimant's dismissal was an unfair dismissal. We concluded that the respondent's investigation was not within the range of reasonable investigations and that the belief in the claimant's guilt on the part of Mrs Wheeldon-Gorst (the dismissing officer) or James Wheeldon (who heard the appeal against dismissal) was not a reasonable one (para 232 of our Liability Judgment).

20. The parties were agreed that the claimant's employment had been employed for 12 years at the date of dismissal. That meant that he was entitled to 12 weeks' notice. He was dismissed without notice.

Findings of Fact related to Remedy

21. We first set out our findings of fact relating to the claimant's financial losses to the date of this judgment. We then set out our findings of fact relevant to injury to feelings and personal injury. Finally, we set out our findings relevant to future employment prospects.

Financial losses to 30 November 2020

22. The claimant worked for the respondent as a labourer. At the time of the effective date of dismissal (17 August 2018) he was 37 years' old. He has not worked since leaving the respondent's employment.

Wages and other income

23. The claimant received a basic weekly wage which at the time of his dismissal was calculated using an hourly rate of £7.93. He also received a fixed weekly attendance allowance of £12.00 and a variable monthly bonus. Based on the payslips at pages 34-47 of the Bundle, we find his average gross pay in the 12 weeks prior to dismissal was £328.73 and his average net pay after all deductions was £279.73 per week. However, that figure includes deduction of his employee pension contributions. We must add those back to fully reflect his loss. Based on his payslips we find his pension contributions averaged £8.90 a week. Adding those back to his net pay gives a net weekly pay amount of £288.63.

24. There are 119 weeks and 3 days from the date of dismissal to 30 November 2020. Using the net weekly pay figure of £288.63 that gives a figure for the wages the claimant would have earned to 30 November 2020 of £34,462.42 (£288.63 x 119.4 weeks).

25. The claimant's evidence was that because of his dismissal he had lost Child Tax Credits (CTC) to which he had been entitled while employed. His Schedule of Loss to 6 November 2020 gave the figure for loss of CTC as £12,700.81. Using the weekly figure of £104.45 in that Schedule of Loss, the total additional amount of CTC lost from 6 November 2020 to 30 November 2020 would be £355.13 (£104.45 x 3.4 weeks). That gives a total loss of CTC from dismissal to 30 November 2020 of £13,055.94.

26. From October 2018, however, the claimant received Universal Credit. The first payment made on 11 October 2018 covered from 5 September 2018 (pp.70-71). The payment notification in the Bundle (pp.60-90) and the list of payments in the claimant's Schedule of Loss showed a total of £22,986.89 of Universal Credit

received covering the period up to 4 July 2020. Those documents did not provide a complete picture to date. However, the post hearing documents supplied by the claimant confirmed that the payment on 11 August 2020 (covering the period to 4 August 2020) was £1208. The notification dated 11 October 2020 (also in the post-hearing documents) covering the period to 4 October 2020 showed an increase in Universal Credit to £1346. Although supplied post-hearing, it does not seem to us there is prejudice to the respondent in our basing our findings on those documents given they confirm an increase in the amount of Universal Credit for which the claimant has to give credit. Adding £1208 for each of the payments in August and September 2020 and £1346 for the payments in October and November 2020 gives a total for the Universal Credit period to 4 November 2020 of £28094.89. For the period 5 November to 30 November 2020 which represents 0.5 of a month we have used the monthly figure of £1346 divided by 2 which gives £673. That gives a total figure for the Universal Credit received to 30 November 2020 of £28,767.89.

Pension loss

27. The claimant was enrolled into a stakeholder pension scheme. We categorise this as a "simple" case under the Employment Tribunal's Principles for Compensating Loss Fourth Edition (Second Revision 2019). The basis for calculation used is to calculate the employer's contributions for the period of loss we have identified. This is known as the "contributions method" (paragraph 4.17 in the Principles).

28. The respondent said that the employer's pension contribution was 2% of basic wages. Mrs Thompson said the claimant did not disagree with that but was not in a position to agree with it, because the only information he had regarding pension gave the total contribution made by the employer to date (p.55). Based on the claimant's payslips (pp.34-47) we are satisfied that the employer's weekly contribution at the time of dismissal was £5.90 per week.

29. That seems to us to equate to 2% of the claimant's basic income, including the attendance allowance but disregarding the monthly bonus. From 6 April 2019 the employer's minimum required contribution for a workplace stakeholder pension increased to 3%. Doing our best with the information available we find that means that from April 2019 the respondent would have contributed £8.85 to the claimant's pension (£5.90 x 1.5).

30. From 18 August 2018 to 5 April 2019 is 33 weeks. We find that the respondent's pension contributions for that period would be £194.70 (£5.90 x 33 weeks). From 6 April 2019 to 30 November 2020 is 86 weeks and 3 days. We find that the respondent's pension contributions for that period would be £764.64 (£8.85 x 86.4 weeks).

31. We find that from the date of dismissal to 30 November 2020 the respondent would have contributed a further £959.34 to the claimant's pension.

Other expenses

32. The claimant also claimed for various expenses. These included £91.20 for bus journeys to the Healthy Minds counselling sessions x 9 at £4.80 per bus ticket, and to the Jobcentre in Oldham for his Work Club visits. The total amount of those

journeys is £91.20. At the hearing Mrs Thompson confirmed that there were no receipts for those journeys. However, we are satisfied from the corroborating evidence in the form of the letter from Healthy Minds (pp.123-125) that these visits did take place and from the documentation relating to Universal Credit, that the visits to the Jobcentre took place.

Findings of fact relevant to injury to feelings and personal injury

33. In the Liability Judgment we found that the respondent's employees had racially harassed the claimant. Although there were seven acts which we found to be acts of harassment, they fell broadly into two groups. The first was the conduct of Mr Savery (incident 5). We found that Mr Savery on more than one occasion made a remark to the claimant about black men and grabbed the claimant's private parts. We found that this humiliated the claimant, particularly given that on at least one occasion this behaviour was witnessed by his manager, Mr Jonathan Wheeldon, who did not intervene.

34. In relation to incidents 3, 6, 8, 10, 11 and 12, at paragraph 238 of our Liability Judgment we agreed with the claimant's characterisation of these as an ongoing campaign against him by two fellow employees. Those incidents involved behaviour which we would characterise as "menacing", such as banging wood and, ultimately, a physical assault on the claimant. The incidents included acts of verbal hostility with specific reference to the claimant's race and physical hostility (banging wood, throwing wood at the radio) and Marcin's middle finger gesture to the claimant. We accepted that these were made with the purpose of creating a hostile and intimidating environment for the claimant.

35. The claimant gave evidence at the hearing about the impact of the harassment on him. We accept his unchallenged evidence that there has been an impact on his family life affecting his relationships with his wife and child. We accept his evidence that he has become fearful of leaving the house and for example, if he hears a noise outside or a car door slam he will get up and down to look out of the window to see who it is. That includes during the night when he will regularly get up to check at windows. He finds it difficult sleeping at night.

36. We also accept the claimants unchallenged evidence that he is no longer taking part in activities he was previously involved in. Prior to the harassment he played football for a non-league team, volunteered as a Sunday school teacher for children between 5 and 10 years old and (as a qualified Street Pastor) spent Saturday evening on duty on the streets of Oldham, Failsworth and Limeside helping vulnerable people. He no longer does any of these things.

37. The claimant's evidence was that the harassment left him feeling depressed and struggling with suicidal thoughts, stress and anxiety. We accept the claimant's evidence that the depression got worse when he was discussing reliving what had happened to him at work. We observed that that was the case when being cross examined at the remedy hearing.

38. For the respondent, Mr Jaffier submitted that there was no significant medical evidence to support the claimant's evidence. It is certainly the case that there is no expert medical report in the Bundle. There was, however, medical evidence in the Bundle.

39. On 6 September 2018 the claimant saw his GP because of his anxiety, low mood and inability to sleep. The GP notes record that the claimant "denies any thoughts of self-harm or suicidal ideation" (p.27). At that point the claimant did not want medication but agreed to see a counsellor. The claimant was issued with a fit note on 19 September 2018. It certified him as unfit for work because of "depression" (p.93).

40. On 1 October 2018 the claimant attended a telephone screening with Healthy Minds Oldham. Healthy Minds reported to the claimant's GP by letter after that screening (p.94). That letter reports that the claimant at the screening "identifies as having post trauma symptoms of anxiety, experiencing flashbacks and nightmares and these are preventing the client from being able to pursue a new job due to feat of another attack occurring". The claimant also reported he "lay awake at night thinking of how he will support the family". Under the heading "risk review" the report noted that the claimant "does not have plans, intentions or thoughts of taking own life, but struggles with things going on at the minute and wonders if there is another way out". The Treatment Plan agreed as a result of that screening was that he should be added to the waiting list for "High Intensity Cognitive Behaviour Therapy (CBT) for help with anxiety and/or depression" and that the claimant would also benefit from "a Mental Health Practitioner (MHP) while waiting appointment for High Intensity Therapy."

41. As a result, the claimant was offered an appointment with a High Intensity Therapist on 24 October 2018 (p.96) and an appointment with Cassie Lewtas, a Mental Health Practitioner at Healthy Minds, initially on 23 October 2018 (p.97).

42. Ms Lewtas first saw the claimant on 30 November 2018. On 6 December 2018 she helped him complete a Universal Credit Capability for Work Questionnaire. In that questionnaire the claimant says "the depression started on 7 August 2018 after being assaulted at work. This was intensified when I was unfairly dismissed form work on 7 August 2018. The shock and trauma of losing my job after 12 years has left me feeling stressed and unable to cope mentally" (p.119).

43. On 23 January 2019 Ms Lewtas wrote to the claimant's GP to confirm that the claimant had been discharged from the service (pp.123-125). That letter provides a summary of the treatment provided to date, the claimant's progress and the reason for discharging him in January 2019.

44. In terms of treatment, Ms Lewtas confirms that after discussion at the Healthy Minds multi-disciplinary team meeting in October 2018 it was agreed that the claimant was "not ready to engage in therapy at that time but would benefit from six sessions 1:1 with a Mental Health Practitioner to focus on stabilisation in preparation or therapy" (p.123). Due to little progress in the sessions Ms Lewtas increased the number of sessions from six to nine. They covered "Coping with suicidal thoughts and grounding techniques; vicious cogs; coping with flashbacks and grounding techniques; two types of worry and acceptance; Social inclusion; Sleep hygiene; and Safety planning" (p.124). At the last session, the claimant confirmed he would contact his GP about medication, having declined to consider that option at previous sessions.

45. In terms of the claimant's progress, Ms Lewtas (at p.123) records that when she first saw the claimant on 30 November 2018 he presented "anxious, low in mood

with suicidal thoughts, rumination and feelings of hopelessness". She also notes that "there is also possible trauma symptoms due to childhood abuse" which being physically assaulted had triggered. She reports that he "continues to struggle to adjust to the changes of not being in work and is distressed on a daily basis due to what he feels was an unfair dismissal involving racism and intimidation". She also notes that he "presents with symptoms of depression as a result of losing his job and being bullied". The section on "risk" records that the claimants "continues to experience suicidal thoughts" (p.123).

46. The decision by Healthy Minds to discharge the claimant was because he was not making progress. Ms Lewtas reports that at a multi-disciplinary team meeting it was agreed that it was "not the right time for the claimant to be engaging in therapy". The reason for that was that the claimant was very stressed about these Tribunal proceedings. The recommendation was that the claimant be re-referred once the Tribunal proceedings were over (p.124). We find that the decision to discharge the claimant by Healthy Minds in January 2019 was not because his mental state had improved but because it had not.

47. Also in the Bundle (pp.126-148) was a Medical Report Form from an assessment carried out by a Registered Nurse on 29 January 2019 for the purposes of Universal Credit (pp.126-148). This records that the claimant had started taking medication a week earlier. It also confirms he had no history of mental health admissions. It records the claimant saying he "can feel paranoid and often looks out of the window" (p.127) which is consistent with the oral evidence he gave at the Tribunal hearing.

48. Under "Description of Functional Ability" (p.129) the report records that the claimant walked to the local library alone each day and went to the local corner shop alone. He "sometimes goes alone to the supermarket or sometimes he goes with his wife" but "the first few times he goes somewhere new he goes with his wife due to anxiety, then he is able to go alone" and does not like crowded places.

49. The assessment summary (p.143) records that "he has had a recent onset of mental health problems since harassment, bullying and an assault at work". It also notes that the Tribunal proceedings "exacerbated his stress and anxiety". He appeared "distracted and low in mood". The assessor decided that the claimant was not capable of work but would have limited capability for work-related activity as he was able to manage appointments and can make phone calls and denied any history of "self-harm, suicide attempts or suicidal ideation" (p.142).

50. The section headed "prognosis" advised that the claimant should be re-referred in 6 months and that "with completion of the Tribunal, continuation of his medication, ongoing GP input and therapy some improvement is likely" (p.144)

51. On 9 February 2019 the claimant was sent a Work Capability Assessment Decision which confirmed he had "limited capability to work" which meant he would not have to look for work but would need to meet with a work coach to take steps to prepare for work in the future (p.149).

52. We find the claimant was prescribed Setraline as an anti-depressant from January 2019 (p.127). At the hearing the claimant confirmed that he is still being prescribed Setraline and will contact his GP on roughly a monthly basis to obtain a

repeat prescription. The prescription for July 2019 (p.150) is for 28 days and seems to us consistent with that evidence. We accept his evidence on that point.

53. Other than the evidence that the claimant has continued to be prescribed anti-depressants there is no medical evidence about the claimant's mental health after January 2019. The post-hearing documents supplied by the claimant included fit notes for February and March 2019 citing "depression" as the reason the claimant remained unfit for work. Mr Jaffier submitted that we should not take into account those fit notes since he had not had an opportunity to cross-examine the claimant about them. We accept that submission. In any event, we do not find that they take matters further than the documents we had in the Bundle.

54. The position, we find, is that as submitted by Mr Jaffier, the latest direct medical evidence about the claimant's condition was that at the end of January 2019, i.e. Ms Lewtas's letter (pp.123-125) and the Universal Credit medical report (pp.126-148). There is only what might be called "indirect" evidence after that date, namely the claimant's prescription for Setraline from July 2019 (p.150) and the evidence that Universal Credit continues to be paid to him on the same basis from February 2019 onwards (though with adjustments to the actual amounts paid). It does seem to us that a GP would not continue issuing repeat prescriptions for antidepressants were there no good reason for that to happen.

55. Other than that we are reliant for the current position on the claimant's evidence. When it comes to the claimant's evidence, we found him a credible witness and his evidence about his current condition reliable. We noted the obvious distress the claimant experienced at times in giving evidence about what had happened to him. We accept the claimant's evidence that his medical condition has not improved since the medical evidence in January 2019. That also seems to us consistent with the continued prescribing of Setraline and payment of Universal Credit.

56. Mr Jaffier also submitted that the position appeared to be that as at January 2019 those assessing the claimant's health for the purposes of Universal Credit told him they no longer to see him again. He suggested that might point to the claimant's mental health issues no longer persisting. As we read that documentation, the decision was that they no longer need to see the claimant because they had decided that there was sufficient evidence that he was indeed not well enough to work until they were alerted that the position had changed. We assume that there would have been a review of that position after a certain period of time had COVID-19 not intervened.

<u>Findings relevant to future employment prospects</u>

57. In terms of the claimant's "CV", his personal profile at pages 20-21 of the bundle make it clear that he has no formally recognised qualification. He worked for the respondent and its predecessor for 12 years. He clearly had some skills acquired through doing that because we found in our Liability Judgment that he would occasionally fix the machines he worked on. However, his work as described on the personal profile was "labourer" and we accept he had no recognised qualifications which might help him to find a job.

58. We accept the claimant's evidence that he had been attending meetings with the "Work Coach" as required for Universal Credit purposes but was told around April 2019 he no longer needed to attend those session.

The Law

Compensation for unfair dismissal

56. S.118(1) ERA says that:

> "Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—
>
> (a) a basic award (calculated in accordance with sections 119 to 122 and 126, and
>
> (b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126)."

57. The basic award is calculated based on a week's pay, length of service and the age of the claimant.

58. The compensatory award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).

59. A just and equitable reduction can be made to the compensatory award where the unfairly dismissed employee could have been fairly dismissed at a later date or if a proper procedure had been followed (the so-called **Polkey** reduction named after the House of Lords decision in **Polkey v AE Dayton Services Ltd [1988] ICR 142** .

60. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).

61. Where the tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly (s122(2) ERA).

Compensation for breach of the Equality Act 2010

59. Section 124 of the Equality Act 2010 provides that where a Tribunal finds there has been a contravention of a relevant provision the Tribunal may make a declaration as to the rights of the parties; an order requiring the payment of compensation and an appropriate recommendation.

60. In assessing financial loss, the aim is to put the claimant in the position that he would have been in but for the discriminatory act. Loss caused by anything other than the discrimination is not recoverable.

Pension Loss

61. On pension loss we have had regard to the Employment Tribunal's Principles for Compensating Loss (Fourth Edition – Second Revision) issued in 2019 ("the Principles").

Compensation for Unfair Dismissal where there is a breach of the Equality Act 2010

62. Section 126 of the Employment Rights Act 1996 applies where compensation falls to be awarded in respect of any act both under the Equality Act 2010 and under the Employment Rights Act relating to unfair dismissal. Section 126(2) states that a Tribunal shall not award compensation under either of those Acts in respect of any loss or other matter which is or has been taken into account under the other by the Tribunal in awarding compensation on the same or another complaint in respect of that Act.

63. In **Prison Service v Beart (No 2) [2005] ICR 1206** the Court of Appeal decided that an employer cannot rely on a subsequent unfair dismissal to break the chain of causation and terminate its liability for earlier discrimination.

Injury to feelings

64. Awards for injury to feelings are compensatory. They should be just to both parties, fully compensating the claimant (without punishing the respondent) only for proven, unlawful discrimination for which the respondent is liable. Tribunal's must remind themselves of the value in everyday life of the award by reference to purchasing power or earnings.

65. There are three bands of award for injury to feelings following **Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102 CA** and uprated in **Da'Bell v NSPCC [2010] IRLR 19 EAT:**

i) The top band: sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment

ii) The middle band: this should be used for serious cases, which do not merit an award in the highest band.

iii) the lower band: where the act of discrimination is an isolated or one-off occurrence.

66.. There is within each band considerable flexibility, allowing a Tribunal to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.

66. Presidential Guidance was issued on the **Vento** bands on 5 September 2017. A First Addendum was issued on 23 March 2018 which applies to Tribunal claims issued between 6 April 2018 to 5 April 2019. It applies to the claimant's claim. In that First Addendum the lower band is £900 to £8,600; the middle band £8,600 to £25,700 and the top band £25,700 to £42,900; with the most exceptional cases capable of exceeding £42,900.

Personal Injury

67. General Damages for Personal Injury are covered in the Judicial College Guidelines ("the Guidelines"), currently in its fourteenth edition. Psychiatric and psychological damage is at chapter 4 of the guidelines and it includes the uplift for **Simmons v Castle**.

68. A claimant does not need to have expert medical evidence to support his or her claim for personal injury in order to be awarded compensation under this head. (**Hampshire County Council v Wyatt EAT0013/16**).

Apportionment of damages

69. When it comes to the question of apportionment of damages for multiple causes, there has been conflicting authority which has been resolved by the Court of Appeal in **BAE Systems (Operations) Limited v Konczak [2017] IRLR 893**. The background case law sets out some relevant propositions or principles which include:

> "Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment."

70. The difficult task is establishing whether a harm is "truly indivisible". The Tribunal has the task of avoiding over compensation in what can be difficult cases. A sensible approach should be made to apportion harm between what is and what is not attributable to the respondent's wrong (**Konczak** paragraph 67).

71. Underhill LJ said in **Konczak** at paragraph 71:

> "What is therefore required in any case of this character is that the Tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused. I would emphasise, because the distinction is easily overlooked, that the 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."

72. We must 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; but whether that is possible will depend on the facts and the evidence. If there is no such basis, then the injury will be "truly indivisible" and the claimant will need to be compensated for the whole of the injury.

Mitigation

72. Employees are under a duty to mitigate loss. The burden of proving a failure to mitigate lies with the respondent. They must show any failure was unreasonable. We must consider what steps the claimant should have taken to mitigate his loss,

whether it was unreasonable for him to have failed to take any such steps and if so, the date from which alternative income would have been received.

Interest

73. The Tribunal are obliged to consider whether to award interest on awards for discrimination. The basis of calculation is set out in the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations [1996] SI 2803 (as amended). For injury to feelings awards interest is awarded for the period beginning on the date of the act of discrimination and ending on the day the amount of interest is calculated. For other awards interest commences at a midpoint.

Taxation

74. In relation to taxation, the Court of Appeal in **Moorthy v HMRC [2018] EWCA Civ 847** held that awards for injury to feelings were to be treated as tax free whether or not related to the termination of employment. This position changed from 6 April 2018 by an amendment to section 406 of the Income Tax (Earnings and Pensions) Act 2003 so that although "injury" in subsection (1) includes psychiatric injury it does not include injured feelings. This amendment has effect for the tax year 2018-19 and subsequent tax years. Section 406 which deals with the tax exemption provides:

"(1) This chapter does not apply to a payment or other benefit provided –

(a) in connection with the termination of employment by the death of an employee, or

(b) on account of injury to, or disability of, an employee.

(2) Although 'injury' in subsection (1) includes psychiatric injury, it does not include injured feelings."

75. This means that an award of compensation for psychiatric injury falls within the tax exemption but an award compensating for injury to feelings does not if it is "in connection with termination of employment". Therefore, an award for injury to feelings is taxable to the extent that it exceeds £30,000 if made in connection with termination of employment.

76. To avoid any disadvantage to the claimant we should gross up any award to him over £30,000. It requires us to estimate the tax he will have to pay on receipt of the compensatory award and add that sum back into the award to cancel out the tax burden on him. The purpose is to place in the claimant's hand the amount he would have received had he not been discriminated against.

Discussion and Conclusions

77. Applying the law to the facts as we have found them, we now set out our conclusions on the issues we need to decide.

What basic award should be awarded to the claimant under s.118(1)(a) of the Employment Rights Act 1996 ("the ERA")

78. The claimant was 37 when he was dismissed. We have found that his gross weekly pay was £328.73. He had completed 12 years' service when he was dismissed. His basic award as calculated in accordance with s.119 ERA is therefore 12 x £328.73 giving a total basic award of £3944.76.

What financial loss (excluding pension loss) has the race related harassment and/or unfair dismissal caused the claimant to date?

79. In this case, we decided that the claimant's dismissal was unfair but not discriminatory. Before deciding what compensation we should award for financial loss we decided whether that compensation should be awarded as a compensatory award for unfair dismissal under the ERA or as compensation for the breach of the Equality Act 2010. S.126 of the 2010 Act means we cannot take into account under either of those Acts any loss or other matter which is or has been taken into account under the other by the Tribunal.

80. **Beart** makes it clear that an employer cannot rely on its own unfair dismissal to break the chain of causation when it comes to compensation for pre-dismissal harassment or discrimination. That principle seems to us to clearly apply in this case where the only reason the dismissal occurred was because of an act of harassment. In para 95 of the Liability Judgment we said "we find that the claimant did not punch Marcin but Marcin did punch him at the bottom of the steps. We find that Marcin was the aggressor in this incident and that the claimant was seeking to hold him off and defend himself". In other words, had it not been for an act of harassment (incident 12) by Marcin, there would have been no suspension, no disciplinary action and no dismissal.

81. In those circumstances our approach has been to award compensation for the claimant's financial loss under the Equality Act 2010 and on the basis that the unfair dismissal did not bring those losses to an end.

82. Mr Jaffier submitted that any financial loss based on the claimant's lost earnings should be calculated on the basis that he would only have been paid statutory sick pay. That was becasue the claimant's own evidence was that he was still not well enough to work. We reject that submission. It seems to us it would mean the respondent benefitting from its own wrongdoing. As we record elsewhere, we are satisfied that the claimant's inability to work was caused by the race-related harassment he experienced. We must aim to put the claimant in the position we would have been in had the harassment not occurred. We are satisfied that means calculating his financial loss based on his having continued to work for the respondent without suffering the mental health issues arising from the harassment.

83. Had he done so we find that the net wages the claimant would have earned to 30 November 2020 would be £34,462.42. We find he would also have continued to receive Child Tax Credit which from his dismissal to 30 November 2020 would have been £13,055.94. His total income during the period to 30 November 2020 would therefore have been £47,518.36.

84. Because we are awarding compensation for lost earnings under the Equality Act 2010, rather than making a compensatory award for unfair dismissal, the recoupment provisions do not apply to this part of our award. We therefore need to offset the Universal Credit the claimant actually received during the period up to the

30 November 2020 against the income which we have found the claimant would have received. We found the claimant received £28,767.89 Universal Credit in that period. We deduct that amount from £47,518.36 to ensure that the claimant does not double recover by being awarded all the income he would have received but not having to give credit for the Universal Credit received. That gives a figure for lost income (including social security benefits) from dismissal to 30 November 2020 of £18,750.47.

85. In addition, we award the claimant £91.20 for the expenses incurred in travelling to the Job Centre and to his Mental Health Practitioner. We find those expenses would not have been incurred were it not for the respondent's unlawful acts. However, we do not consider that it is appropriate to make an award for expenses associated with taking legal advice about the case from Bury and Moss Side Law Centres nor for the other expenses claimed, e.g. for stationery. Those seem to us to be matters properly to be recoverable if at all as part of a Preparation Time Order.

86. That gives a total for the financial loss to the 30 November 2020 of £18,841.67. We award that under the Equality Act 2010.

87. The claimant also claimed £500 for loss of statutory rights which we think is appropriate in this case. We make a compensatory award for unfair dismissal in that amount.

<u>What pension contribution loss has the race related harassment and/or unfair dismissal caused the claimant to 30 November 2020?</u>

88. We find that from the date of dismissal to 30 November 2020 the respondent would have contributed a further £959.34 to the claimant's pension and award compensation for past pension loss in that amount.

<u>What future financial loss (excluding pension loss) has the race related harassment and/or unfair dismissal caused the claimant?</u>

89. When it comes future financial loss, this inevitably involves a degree of speculation. We have taken into account the evidence about the claimant's depression and anxiety. We have found that his mental health has not improved since January 2019 when he was assessed for Universal Credit as not being capable of work. We have also taken into account the evidence that the conclusion of this Tribunal will assist the claimant to move on and enable him to undergo Therapy to try and address those mental health issues.

90. When it comes to the prospects of the claimant finding work, we have taken into account Mrs Thompson's submission that the current economic climate is not a good one to be looking for work in given the impact of Covid-19 related restrictions. It is difficult to speculate with any degree of certainty, but it seems to us that the sort of industry in which the claimant had previously worked (waste sorting/recycling) is likely to be one which is not as badly affected by lockdown as other industries, e.g. hospitality. We do accept, however, that the impact on other industries will inevitably have a knock-on effect on anybody looking for work because there may be more people seeking employment and so more competition which the claimant might be seeking once he is well enough to do so. The claimant does not have formally

recognised qualifications but his work with the Work Coach will have provided some assistance when he is looking for work (e.g. in preparing a CV (pp.20-22).

91. Taking all those matters in the round we decided that the appropriate period for which to award future financial loss was 52 weeks.

92. Based on the figures as at 30 November 2020 the claimant's total weekly income would have been £393.08 (£288.63 net pay and £104.45 tax credits).

93. We have considered whether we should increase that weekly figure to take into account the fact that the claimant's pay would have to increase at least from 6 April 2021 when the National Living Wage increases to £8.91 per hour. Based on the claimant's usual working week for the respondent of 37.5 hours that would mean his gross pay from 6 April 2021 would have to be at least £334.12. That would make his net pay £297 from April 2021, an increase of £8.37 over the net weekly figure we have used for financial loss to 30 November 2020. Taking into account the likelihood that the tax credit received would also increase we find it reasonable to use an average weekly figure for future financial net loss of £400 per week. For 52 weeks that comes to £20,800.

94. We have not deducted Universal Credit form that figure. That is because our understanding is that the claimant will not be eligible for Universal Credit if he and his wife have savings in excess of £16,000. Since we are awarding them more than that in compensation, we work on the basis they will lose their entitlement to Universal Credit during that 52-week period.

95. Our award for future financial loss is therefore £20,800.

What future pension contribution loss has the race related harassment and/or unfair dismissal caused the claimant?

96. We also award compensation for the employer's pension contributions for a 52-week period. As at 30 November 2020 we calculated the employer's contribution to be £8.85 per week (para 30 above). From April 2021 the minimum contribution an employer could make would be 3% of £334.12. to reflect the National Living Wage. That would equate to an employer's contribution of £10.02 per week. For the period from 1 December 2020 to 5 April 2021 we calculate the future pension contribution loss to be £159.30 (18 weeks x £8.85). For the remainder of the 52 weeks we calculate the future pension contribution loss to be £340.68 (34 weeks x £10.02).

97. Our award for future pension contribution loss is therefore £499.98.

What injury to feelings has the race-related harassment caused the claimant and how much (if any) compensation should be awarded for that injury?

98. Mrs Thompson for the claimant submitted this case was at the top of the middle **Vento** band which would mean we should award £25,700 for injury to feelings. Mr Jaffier for the respondent submitted this was a case in the lower band and that we should award £4,500 for injury to feelings.

99. Mr Jaffier in his submissions provided examples of cases in the three bands. The examples of cases in the top band included **Miles v Gilbank [2006] ICR 1297**

where there was a "an inhumane and sustained campaign of bullying and discrimination" which was "targeted, deliberate, repeated and consciously inflicted". That case involved discrimination against a pregnant worker and "demonstrated not only a total lack of concern for the welfare of the claimant herself, but a callous disregard…for the life of her unborn child". The tribunal awarded £25000 for injury to feelings which at that time was at the top of the top **Vento** band. An award of £25000 was also made in **Driscoll v MGN Ltd [2007]** when the claimant was subject to many acts of discrimination "which caused him a considerable amount of hurt and anguish; damaged his self-confidence and self-esteem,…caused a depressive illness to someone without any previous history of depression"

100. Of the two examples given by Mr Jaffier for middle band cases the most relevant seemed to us to be **Wade-Jones v CJ Upton & Sons Ltd [2009]**, a sexual harassment case involving overt comments about the claimant's legs as well as suggestions of sexual liaisons with a client. When the claimant gave in her notice she was threatened with a disciplinary in an attempt to get her to drop the complaint of discrimination. The tribunal in that case held that the campaign was not sustained enough to attract an award in the highest band. The award made was £15,000 which at that time would be at the top of the middle **Vento** band. We did not find the examples provided by Mr Jaffier of cases in the lower **Vento** band to be at all comparable to the claimant's case.

101. Mr Jaffier also reminded us that an award for injury to feelings is compensatory. He suggested that the impact of the harassment could not have been that great because the claimant never complained to his employer. At paras 24, 56 and 97 of the Liability Judgment we found that the claimant had been inhibited from raising complaints about the harassment he experienced. We do not find his failure to do so indicates the impact of the harassment on him was not that great.

102. Mr Jaffier also submitted that and any hurt experienced was over a short period of time with the incidents starting in February 2018 but the majority happening in July and August 2018. He also submitted that the claimant's own statement in December 2018 was that the depression started with the assault in August 2018, i.e. the last incident of harassment (p.119). In the Liability Judgment, however, we found that the previous incidents also had a harassing effect on the claimant.

103. We consider this is to be a case which falls towards the lower part of the top **Vento** band. According to **Vento** itself, that top bands should be reserved for the most serious cases. As we noted in para 18 above, we found there was an ongoing campaign targeted at the claimant, involving hostile gestures and comments, some explicitly about his race. It culminated in a physical assault. We found that the respondent did not take reasonable steps to prevent it. In relation to incident 5 we found that the respondent's management witnessed and did not prevent that incident. We have found that the harassment triggered depression in the claimant when he had no history of depression. We have found the incidents had a serious impact on the claimant, making him fearful of going to new places alone and resulting in him constantly checking at windows when he hears noises outside the house at night.

104. This was not a case involving a one-off incident. Although the incidents began in February 2018 and lasted until August 2018 we accept that the majority were in July and August 2018 so it would not be correct to characterise it as a "lengthy"

campaign. Despite that, the nature of the incidents and their impact on the claimant mean that we find that an award in the top band is appropriate.

105. We make an award in the lower part of that top band because although we acknowledge that the acts of harassment were serious, including physical assaults, none of the acts were perpetrated by the claimant's managers (other than, arguably, incident 5). We accept that the respondent is clearly and should be legally liable for those acts, but this was not a case where someone in a position of managerial power was harassing an employee. We also take into account the fact that by the claimant's own evidence it was the final assault which triggered his depression rather than the whole campaign from February 2018. That is not to minimise the impact of the previous incidents on him nor the inhibitions he would have in raising the issue at work.

106. We have decided that the appropriate level of compensation for injury to feelings in this case is £30,000. That represents an award towards the lower end of the top **Vento** band and seems to us, taking all factors into account, to be the correct level to award in this case.

What personal injury has the race-related harassment caused the claimant and how much compensation (if any) should be awarded for that injury?

107. As we recorded in our findings of fact, we find that the claimant's condition has not improved since January 2019 when he was diagnosed as suffering from depression. The Guidelines set out the factors to be taken into account in assessing damages for claims for psychiatric and psychological damage as:

(i) The injured person's ability to cope with life, education and work;

(ii) The effect on the injured person's relationships with family, friends and those with whom he or she comes into contact;

(iii) The extent to which treatment would be successful;

(iv) Future vulnerability.

108. The definition of "moderately severe" psychiatric injury in the Guidelines states that there will be significant problems associated with factors (i)-(iv) above but the prognosis will be much more optimistic than in severe cases. The guidance suggests that cases of work related stress resulting in a permanent or longstanding disability preventing a return to comparable employment would appear to come within this category. The definition of "moderate" is that there have been the sorts of problems associated with factors (i)-(iv) but there will "have been a marked improved by trial and the prognosis will be good". The suggestion is that cases of work related stress may fall within this category if symptoms are not prolonged.

109. The respondent did not make submission about apportionment, for example, by suggesting that we should apportion the harm suffered by the claimant between the harassment and the non-discriminatory dismissal.

110. We have found that the harassment he experienced has had a serious effect on the claimant's ability to cope with life and work. We also accepted the claimant's

evidence that the incidents have had an impact on his relationships with his wife and child, particularly because it has made him paranoid and prone to getting up in the night to check if there is a noise outside their home. He is not able to visit new places by himself. However, treatment by way of medication has been successful in at least moderating the effect of depression on the claimant. He is able, for example, walk to the local library or corner shop.by himself. He has been assessed as not capable to work

111. It does not seem to us that there has been a "marked improvement" by the Tribunal hearing. On the other hand, our findings do not suggest that this is a case where there would be a permanent or longstanding disability preventing a return to comparable employment. Although there is no medical expert prognosis as such, we found that the evidence suggested that the claimant will be able to undertake Therapy and may be able to move on once there is a resolution to this Tribunal claim.

112. Our conclusion is that the depression and anxiety from which the claimant suffers comes at the top end of the "moderate" category in the Guidelines. On that basis we make an award of £17,900 for personal injury.

113. In doing so, we take into account that we have made an award of £30,000 for injury to feelings. In making the award for personal injury at the level we did, we have erred on the side of caution. There were features of the claimant's condition which suggested an award in the moderately severe category was appropriate, in particular the lack of improvement over the 2-year period since the incidents. It does not therefore seem to us appropriate to reduce the award for personal injury to avoid the risk of double counting. We are satisfied that together the two awards for injury to feelings and for personal injury accurately reflect the impact of the harassment on the claimant.

Should any of the compensation be reduced for any of the following reasons:

i. that the claimant failed to mitigate his loss

114. For the respondent, Mr Jaffier submitted that it was not enough simply for the claimant to accept what he was told by Universal Credit in terms of not being fit to work and doing no more. It does not seem to us that the respondent has satisfied the burden on it to show that the claimant acted unreasonably in not seeking work. He did what was required of him by Universal Credit after they assessed him as not being fit for work. More generally we have accepted the claimant's evidence that he remains too unwell to work.

ii. that the claimant contributed to his own dismissal (s.123(6) ERA).

iii. that the respondent could have fairly dismissed the claimant had a proper procedure been followed ("a Polkey reduction")

115. We have awarded the compensation for financial loss in this case under the Equality Act 2010 rather than as a compensatory award for unfair dismissal. In those circumstances, it seems to us these reductions contended for by Mr Jaffier cannot apply.

116. For the sake of completeness we briefly record that our conclusion on these issues. Put at their simplest, Mr Jaffier's argument was that the claimant had been fighting with a colleague and so the respondent could have fairly dismissed him or the compensatory award reduced under s.123(6). On s.123(6) we find that the claimant's conduct did not cause or contribute to his dismissal. If we are wrong and it did we not have found it just and equitable to make a reduction in compensation - he was simply attempting to fend off a colleague who had physically assaulted him.

117. On **Polkey**, our finding was that the respondent had unfairly dismissed the claimant by failing to take steps to fully investigate what had led up to the incident which triggered his suspension and ultimate dismissal. Had it done so, and carried out a reasonable investigation, we found it would have discovered that he had been subjected to racial harassment and that he was the victim rather than the perpetrator and not even an equal participant in the incident on the stairs. On that basis, we find that it would not have been appropriate to make a **Polkey** deduction had we been deciding compensation on the unfair dismissal basis.

Should any compensation awarded be increased by up to 25% because the respondent unreasonable failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992?

118. We considered whether it was appropriate to increase the compensation on the basis that the respondent had unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. If it had we are allowed to increase compensation if we find it just and equitable to do so. In this case, although as recorded in the Liability Judgment we found that the investigation was flawed, the respondent did in broad terms comply with the Code. It did conduct an investigation (although not an adequate one) and did hold a disciplinary hearing and a subsequent appeal. Given the Code does not set out in granular detail exactly what should be done at each stage of the process, we do not think that in this case it can be said that there was an unreasonable failure by the respondent to comply with it. This was not a case where an employer completely disregarded the need to have some kind of disciplinary process before dismissing. We therefore decided it was not appropriate to increase compensation in this case for an unreasonable failure to comply with the ACAS Code.

What is the total award of compensation after issues a-g have been decided?

119. The total award is therefore as follows:

For unfair dismissal under the ERA:

a. A basic award: £3944.76

b. A compensatory award (loss of statutory rights): £500.00

120. For unlawful harassment under the Equality Act 2010:

a. Financial loss to 30 November 2020: £18,841.67

b. Pension contribution loss to 30 November 2020: £959.34

c. Future financial loss: £20,800.00

d. Future pension contribution loss: £499.98

e. Injury to feelings: £30,000.00

f. Personal Injury: £17,900.00

121. That gives a total award (before interest and adjustments for taxation) of £93,445.75.

What interest, if any, is payable on that compensation?

122. When it comes to interest, we decided that it was appropriate to apply interest in this case on those awards made under the Equality Act 2010 to 30 November 2020. As required by the Employment Tribunals (Interest on Discrimination Awards) Regulations we have calculated interest on the injury to feelings for the whole of the relevant period and for other past loss on the mid point basis. As to the date when it should start, the earliest incident in this case was February 2018. There is no date specified for that and in fairness to the respondent we find that the equitable approach is to calculate interest from 28 February.

123. Interest is not payable on future financial loss and as pension loss is a form of future loss which arises only upon retirement, interest is not payable on compensation for this (Principles paragraph 2.12).

124. For the parts of our award other than injury to feelings, interested is awarded on the financial loss to 30 November 2020 (£18,841.67) and on the award for personal injury (£17,900) so on a total of £36,741.67.

125. The period of calculation from 28 February 2018 to 30 November 2020 is 1007 days.

126. For the injury to feelings award, the sum upon which we calculate interest is £30,000. The rate is 8% per annum. The daily rate is £6.58. The interest on the injury to feelings award is therefore £6.58 x 1007 days = £6626.06.

127. Interest on past financial losses and personal injury is on the midpoint therefore for 504 days. At a rate of 8% per annum on £36,741.67 that equates to a daily rate of £8.05. The interest on these awards is therefore £8.05 x 504 days = £4057.20.

128. The total interest on the award is therefore £10,638.26.

Should any part of the award be “grossed up” to take into account the impact of taxation?

129. In this case, the compensation for injury to feelings is awarded for pre-termination acts of harassment. We therefore decided it (and the interest awarded on it) is not taxable and so do not gross it up.

130. Compensation for personal injury is not taxable so we do not gross that award up.

131. The parts of our award which are taxable are:

a. A basic award: £3944.76

b. A compensatory award (loss of statutory rights): £500.00

c. Financial loss to 30 November 2020: £18,841.67

d. Pension contribution loss to 30 Nov 2020: £959.34

e. Future financial loss: £20,800.00

f. Future pension contribution loss: £499.98

g. Interest on the non-injury to feeling awards £4057.20

132. The total potentially taxable amount is therefore £49,602.95.

133. However, the first £30,000 is tax exempt as a payment in connection with termination of employment.

134. That means £19,602.95 is taxable. The claimant has a personal allowance of £12,5000 for the tax year 2020-2021. He will pay tax on £7102.95 at 20%. Grossing up that figure so he receives £7102.95 after tax means awarding £21,378.69 (£12500 plus £8878.69 for the grossed-up element) in addition to the £30,000.00 tax exempt amount.

Do the recoupment provision apply?

135. The recoupment provisions do not apply because we have not made a compensatory award for unfair dismissal consisting of immediate loss of income.

Conclusions

136. The total award to the claimant is the sum of £105,904.75 consisting of the following elements:

a. Injury to feelings plus interest: £36,626,06

b. Personal Injury £17,900.00

c. Grossed up part of the award £51,378.69.

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Employment Judge McDonald

Date: 2 December 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
8 December 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: 2416768/2018
Mr A Thompson v Wheeldon Brothers Limited

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

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

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

"the relevant decision day" is: 8 December 2020

"the calculation day" is: 9 December 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.