EMPLOYMENT TRIBUNALS

Claimant: Mr A Arif

Respondent: Manpower UK Ltd (1)
Jaguar Land Rover Ltd (2)

Heard at: Birmingham (by CVP)

On: 17 & 18 November & 9 December 2020 in chambers

Before: Employment Judge Miller
Mr G Bagnall
Mr J Wagstaffe

Representation
Claimant: Mr Wilson (counsel)
Respondent: Mr Sutherland (solicitor) R1
Ms Barney (counsel) R2

RESERVED JUDGMENT ON REMEDY

The respondents are ordered to pay the total sum of **£25035.30** to the claimant comprised of the following sums:

Compensation for loss of earnings	£5409.87
Compensation for pension losses	£260.62
Compensation for loss of termination payment	£1267.92
Compensation for injury to feelings	£14000
Interest on losses	£813.60
Interest on injury to feelings	£3283.29

REASONS

Introduction

1. The claimant was employed by the first respondent which was an employment agency and he was assigned to do work for the second respondent.

2. On 28 May 2018 the claimant brought claims against the first and second respondent of discrimination arising from disability under section 15 of the Equality Act 2010 and failure to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010.

3. Those claims were heard by a full tribunal over five days from 16 to 20 September 2019. The decision of the tribunal was that the claimant's claims under section 15 of the Equality Act 2010 relating to the ending of his assignment with second respondent succeeded against the first respondent; the claimant's claims of unfavourable treatment under section 15 of the Equality Act 2010 relating to the requirement to undertake allocated tasks and the instruction to the first respondent to terminate his assignment were successful against the second respondent; and the claimant's claim of failure to make reasonable adjustments succeeded against the second respondent. There was a reserved judgement and written reasons were provided.

4. The case was listed for a remedy hearing which, because of the ongoing coronavirus pandemic, was unfortunately delayed. It was decided at a subsequent Case Management hearing that the remedy hearing would be listed for two days. The reason for this was that since the claimant's employment at the second respondent ended, it was alleged that there had been a significant reduction in the need for agency workers to work at the second respondent. It would therefore be necessary to hear evidence about this in order to determine, amongst other things, whether the claimant's work at the second respondent would have ended in any event at some point after the date on which his employment was terminated.

The hearing

5. At the remedy hearing we were provided with a further bundle of documents including a number of schedules of loss, a witness statement from the claimant, a witness statement from Judy Bardell, a Senior Contract Manager employed by the first respondent and Sarah Phillips an HR Manager employed by the second respondent.

6. All of the parties attended remotely by CVP.

Findings

Employment history

7. The claimant's assignment with the second respondent ended on 4 January 2018 by notice effective from 11 January 2018. This means that he was paid until 11 January 2018 but he did no actual work for the second respondent after 4 January 2018.

8. While working for the first respondent at the second respondent the claimant says he was earning £19.81 per hour. We have considered the claimant's schedule of loss at page 330 of the bundle which was agreed by the parties as including accurate figures, and that records his earnings up to the end of his employment as £17.16 per hour giving a gross weekly pay of £613.12 and a net weekly pay of £449.47. The first respondent operated a scheme whereby salary increased year-on-year so that from 3 February 2018 to 2 February 2019 the claimant's earnings would increase to £17.61 per hour (£475.47 net per week), from 3 February 2019 to 2 February 2020 it would be increased to £20.37 per hour (549.99 net per week) and then from 3 February 2020 to 17 November 2020 there would increase to £20.92 per hour (564.84 net per week).

9. The claimant continued to be employed by first respondent and he says that he asked the first respondent to find him other employment opportunities following the termination of his assignment at the second respondent. That was unsuccessful.

10. The claimant says that he registered with another agency, Brook Street, the day after his dismissal and got a job with the Office of the Public Guardian with them. This started on 1 February 2018 and continued until 8 November 2018. The claimant's salary working for the Office of the Public Guardian was £11.47 per hour. He worked for 30 hours per week giving a gross weekly figure of £344.10 and a net weekly figure of £293.58.

11. The claimant then was reassigned by Brook Street from 20 November 2018 to 28 February 2019 at the Birmingham Magistrates Court. His wages at this point were £9.97 per hour for a 37 hour week equating to £368.89 per week gross or £308.79 per week net.

12. During his employment through Brook Street, the claimant says that he made numerous unsuccessful job applications averaging two or three a week.

13. We were taken to those job applications and they are all applications to the Ministry of Justice specifically or the civil service generally.

14. All of the claimant's job applications were unsuccessful until 1 March 2019 when the claimant started working as a permanent caseworker at the Office of the Public Guardian earning £10.51 per hour.

Pension

15. While the claimant was employed by the first respondent at the second respondent he was a member of a pension scheme to which the first respondent contributed 3% of the claimant's gross wages. This is agreed in the schedule of loss is amounting to £20.84 per week.

16. Once the claimant started full-time work at the Office of the Public Guardian he was entitled to a defined benefit pension with an employer contribution rate in the region of 26.4%. While the claimant was working for the Office of the Public Guardian through Brook Street the claimant was entitled to a pension to his employer with employer contributions at the same 3% as when he worked for the first respondent (albeit that the wages on which the 3% was calculated was different).

The claimant's career aspirations

17. It was put to the claimant that these job applications reflected his aspirations to work in the legal or financial sector and, specifically, he wanted a job in the civil service. The respondents' suggestion was that the claimant had not taken adequate steps to mitigate his losses. It was specifically put to the claimant that he had not applied for any manufacturing or manual jobs which might have produced an income more similar to that he had received while employed at the second respondent. The claimant's response was that there are no other similar employers in the West Midlands providing employment like the second respondent. We were shown no evidence of any available manufacturing jobs paying the same level of remuneration in the West Midlands that the claimant might have reasonably applied for.

18. We find, therefore, that in the absence of any evidence to the contrary there were no manufacturing jobs reasonably available paid at a commensurate level with the claimant's previous role at the second respondent for which he could reasonably have applied after 11 January 2018.

19. We were taken to a list of roles that the claimant had applied for at the second respondent from about a year into his employment. The claimant said that the reason he applied at that point was because he was of the belief that he could not apply for internal jobs until he had been there for a year.

20. In his evidence the claimant said that he has a law degree and relevant experience for administrative or other non-manual roles. Having regard to the direction the claimant's career has since taken, his applications to the legal and finance departments of the second respondent and his own assessment of his abilities, we find that that the claimant did have an aspiration to work in a non-manual role at the second respondent and/or to develop a professional career based on his qualifications and experience. The claimant agreed that he also continued to apply for jobs outside the second respondent at that time.

21. Each of those applications to the second respondent had been unsuccessful. The claimant produced evidence of his skills and experience

and it seemed to be an implicit part of the claimant's case that the second respondent's failure to appoint him was unreasonable in light of those skills and experiences. We do not consider it would be appropriate to assess the claimant's suitability for those jobs and the reasons for his lack of success in his applications. Firstly, it is not relevant to the question before us, secondly we have not heard sufficient evidence about it and thirdly, in so far as the rejection of his applications after he raised issues about his disability might be considered victimisation, this was not a claim before the main tribunal and certainly not one we are considering at this stage. However, it is clear, and we find, that the claimant was unsuccessful in his applications for non-manual roles throughout his employment at the second respondent

22. The claimant said that the reason he made these applications was that he wanted to develop and improve himself and we do not criticise the claimant for that.

23. It was also part of the claimant's claim for damages that he had a particular loyalty to the second respondent based on his family history and including the fact that his grandfather had worked for Jaguar Land Rover for over 20 years. We do not accept that the claimant did have any particular loyalty to the second respondent. We think it more likely that the role the claimant undertook at the second respondent offered the claimant a well remunerated position and, in the claimant's perception, potential way into a professional career at the second respondent. In the absence of that, the claimant wanted to look elsewhere.

24. Finally, in respect of the claimant's employment with the second respondent, the claimant said that he thought there was a good chance that, had his employment not ended when it did, not only would he have been retained, but that he would have secured professional employment in the legal or finance fields with the second respondent.

25. While we acknowledge that that is always a possibility, the claimant's history of seeking employment with the second respondent in a professional role was that he was consistently unsuccessful. In our view, the chance of the claimant securing a permanent professional role with the second respondent was an outside possibility at best. The claimant had made numerous applications and, despite his stated qualifications and experience, had been unsuccessful on every occasion, often not making it past the first paper review. Clearly the claimant does have useful skills and experience in the legal sector as he has secured employment in that field but in respect of the particular professional roles at the second respondent, we find that there was a negligible chance of the claimant securing such employment in a reasonable period with the second respondent.

Would the claimant's employment have ended anyway?

26. It is both respondents' cases that regardless of the termination of the claimant's assignment, his employment would have ended at some point in any event.

27. The first respondent identified what they described as stopping points at which the claimant's assignment would have come to an end in any event.

28. The first was January 2018 when the claimant's assignment was in fact terminated or within a few weeks of that.

29. The second was in June or July 2018 when the first respondent's agency workers were all released from assignment in FA2 at the second respondent for economic reasons.

30. The third was in late 2018 or early 2019 when agency workers were released from FA1.

31. The final backstop is 31 July 2020 when all of the first respondent's workers were released from their assignment at the second respondent. Related to this final backstop is the furloughing of the first respondent's employees from 24 March 2020 until 31 July 2020.

32. The second respondent broadly agreed with these backstops except that they conceded that the earliest point at which the claimant's losses would stop was June or July 2018.

33. We deal with each of those potential stopping points.

January to March 2018

34. The first backstop is identified on the basis that even had the respondents properly considered reasonable adjustments and/or a return to work process the claimant would have been released from his assignment in any event. This was put by the first respondent on the basis that there was a consultant's report prepared for the purposes of a criminal injuries compensation claim which said that the claimant is unsuitable for manual work following his injuries from an alleged assault. The date of that report was unclear but it was after the end of the claimant's employment at the second respondent.

35. The claimant's response to this was that regardless of the consultant's opinion he had actually been undertaking manual work for 18 months while he worked in FA1at the second respondent.

36. The implication in questioning of the claimant about this report was clearly that he had exaggerated his symptoms to the consultant. The claimant made the point that he could not exaggerate his performance on the tests that the consultant undertook.

37. We do not need to make any findings about that but we note that the report was prepared for a specific purpose, namely a criminal injuries compensation claim, and was not considering the Equality Act or the obligations of an employer to make reasonable adjustments. We do not see anything inconsistent with a consultant concluding that a person is *unsuitable* for manual work and that person being able to undertake manual work with adjustments in accordance with the Equality Act.

38. Our finding on liability in respect of the second respondent's failure to make reasonable adjustments was that the claimant was not assessed against

potentially suitable roles, he was merely slotted into roles as alternatives without any proper consideration of whether he would be able to perform them or not.

39. We were referred to the agency restricted worker process, which was in draft at the time of the claimant's termination but has subsequently been adopted, as evidence of what process would have been applied to the claimant had his employment not ended. Particularly it refers to consultation with the worker and a self-assessment addressing their problems, then the identification of up to two trials in the production line area and a further two trials in the manufacturing area (FA2 in the claimant's case at the relevant time).

40. It was suggested that as the claimant had in fact had more job trials prior to termination than the policy provided for, it therefore followed that the application of that policy would have been unsuccessful. This was on the basis that the policy provided for fewer trials than the claimant had *actually* had.

41. At the remedy hearing, the claimant gave examples of a number of roles in FA2 that he could have undertaken even with his disability. It was clear from the liability hearing that permanent employees of the second respondent were given preference for what were referred to as "restricted worker" roles over agency workers so that the claimant had not been given the opportunity to trial these roles which he might have been able to do.

42. We observe that the second respondent was under a duty to take such steps as would be reasonable to remove the disadvantage that the claimant suffered as a result of being required to do the jobs to which he was assigned. That was the duty that the second respondent breached. It is not clear to us that the agency restricted worker process is necessarily compliant with the requirements of the Equality Act 2010. We do not make any findings about that one way or the other, and if proper consideration is given to the agency workers restrictions and the full availability of all roles it may well be that that policy does facilitate compliance with the Equality Act 2010. However, it would be wrong for us to make finding that the claimant's employment would have terminated on the basis of compliance with a policy if there is a possibility that that policy does not accord with the requirements of the Equality Act 2010. Our findings must, therefore, be based on an assumption that the respondents would have complied with their obligations under the Equality Act 2010.

43. Considering this and the claimant's evidence at the remedy hearing about the potential roles available in FA2, we find that had the second respondent properly considered what steps could reasonably have been taken to overcome the substantial disadvantage that applied to the claimant there was a very good chance that he would have been able to secure a suitable role in FA2 that he would have been able to complete without experiencing a substantial disadvantage. Such jobs may have included non-manual roles at the side of the track that the claimant suggested or in quality assurance.

44. Consequently, we find that the claimant's assignment at the second respondent would not have ended as result of the difficulties he was

experiencing in FA2 had the second respondent complied with its duty to make reasonable adjustments. To be clear, the first respondent suggested that this would have been a date sometime between January and March 2018 once the policy had been applied. We find that the claimant's employment would not have ended by March 2018, but that on the balance of probabilities he would have continued to work in FA2.

45. The workers placed by the first respondent were assigned by the second respondent according to business need. We cannot predict whether the need for the claimant to move between FA2 and back to FA1 would have arisen at any point. In light of the policy, and the second respondent's apparent business needs in moving the claimant from FA1 in the first place we think it more likely than not that the claimant would have remained in FA2.

June/July 2018

46. The next potential backstop is around June or July 2018. The evidence of Ms Bardell for the first respondent was that in June 2018 there was a release plan to release 763 of the 1818 manpower employers engaged at the second respondent. Ms Phillips, the second respondent's witness, says that in fact around 511 of the first respondent's workers were released from assignment with the second respondent between May and July 2018. Ms Phillips says that the larger number includes those people who would have left in any event, whether by resignation or termination for conduct or capability reasons. Ms Phillips relied on the document at page 174C of the bundle which broke down the circumstances in which the first respondent's workers stopped working at the second respondent. That included 511 people who were released for headcount reduction and also included 79 people who were redeployed within the second respondent.

47. Ms Bardell explained the criteria for selecting the individuals to be released in each tranche. She said that the FA two releases were divided between four days being first of June, 15th June, 29th of June 13 July 2018. Ms Bardell says that she could not say on which of those dates the claimant would have been released but he would have been released on one of them.

48. We were referred to the selection criteria applied by the first respondent for determining the order in which the workers were released. There was no suggestion that this was not the policy that was applied. It lists a number of steps they are as follows:

    a. individuals from areas where there are no vacancies
    b. individuals offered short-term temporary roles which cease to exist
    c. individuals with below expectations or unsatisfactory ratings in most recent manpower appraisal and an active disciplinary sanction
    d. individuals with below expectations or unsatisfactory ratings in most recent manpower appraisal
    e. individuals with active disciplinary sanctions
    f. individuals with the highest percentage of days absence assessed over the previous 12 months. In the event of a tie the individual with more occasions of absence leaves

g. individuals with two instances of lateness, misconduct or failing to meet quality standards
h. individuals with below expectations or unsatisfactory ratings in any manpower appraisal
i. length of service (shortest length first) by the shift requiring a reduction
j. individuals with lowest average recruitment assessment scores

49. These selection criteria were notionally applied to the claimant. Ms Bardell's evidence was that the application of the criteria to the claimant would have put him at position number 225 overall out of the 1818 manpower employees. Given that she says 247 people were released on the first day (1 June 2018) this would tend to suggest that had the claimant remained at work in FA2 at this time he would have been released in the first tranche.

50. Ms Bardell was, however, unable to confirm the accuracy of the calculations that had led to this assessment as the calculation was undertaken by a data analyst who did not provide any further explanation and did not give evidence to the tribunal.

51. There was also a dispute as to the appropriate application of the criteria. This related specifically to the amount of sickness absence that the claimant had. Ms Bardell said that the calculation was based on the claimant having three days sickness absence; the claimant disputed this and said that he had had only two days sickness absence.

52. We were taken to the return to work form which is the only contemporaneous evidence of or about the claimant's absence. This related to an absence from 13 October 2017 to 18 October 2017, the 13th being Friday and the 18th being his first day back at work so that in total there were three days during which the claimant was not at work. The claimant said in evidence that he had originally booked three days holiday but because he felt ill on the Friday and went to the walk-in health centre on the Monday he agreed with the first respondent to take the Tuesday as unpaid holiday. The return to work form records that the claimant

"wasn't aware until Monday disciplinary action until called in sick, didn't attend holiday you can check. Spent weekend in bed-walk in centre on Monday".

53. Ms Bardell said that the reference to disciplinary relates to the fact that if a worker is sick on a day adjacent to a day's leave they are subject to disciplinary proceedings.

54. The claimant said that he had not been paid for any of the days and the pay records weren't available. The only other contemporaneous evidence was the absence tracker which also recorded the claimant as having three days sickness absence.

55. On the balance of probabilities, we think that it's more likely that the claimant was absent for three days sickness. This is the most realistic interpretation of the return to work form and is consistent with the claimant withdrawing his holiday to avoid disciplinary proceedings. We also note that

no disciplinary proceedings are recorded which would have put the claimant further up the list of people to be released.

56. In any event, however, had the claimant been dissatisfied with his assessment at the time he would have had the right to appeal. In the absence of any direct evidence as to how the claimant's place on the release list was calculated, and in light of the right of the claimant to challenge his position, we cannot say with any certainty that the claimant would have been released in the first tranche. We note also that Ms Bardell says that she could not say when the claimant would be released.

57. However, it is clear and we accept that by 13 July 2018 the claimant would have been released from assignment. This is because all of the FA two workers were released by that date and we have found that on the balance of probabilities the claimant would have remained working in FA2.

58. We were also referred to the first respondent's policy on Lay Off and Short Time Working and Alternative Options. The claimant said in his witness statement, and it was not disputed, that he would have been entitled to a payment equivalent to a redundancy payment under the first respondent's policy.

59. This says,

"If When your assignment ends you have been employed by us for two or more years continuously, you are entitled to a payment (similar to a redundancy payment to) if, after your assignment with JLR ends you are not provided with an alternative assignment after four continuous weeks from when you were last paid. This payment is in line with the lay off and short time working regulations - sometimes referred to as LOST. this payment is calculated as follows using the average pay over the previous 12 weeks worked:

- 1 ½ weeks' pay for each complete year of service, counting backwards from the date employment ends, in which you are aged 41 or over; plus
- 1 week's pay for each complete year of service, counting backwards from the date employment ends in which you were aged 22 to 40 inclusive;
- half a week's pay for each completed year of service, counting backwards from the date employment ends, in which you are aged 18 to 21 inclusive".

60. We find that had the claimant remained employed until 13 July 2018 this policy would have applied to him. We also find that the relevant pay on which the payment would be calculated is an employee's actual pay.

61. We also mention briefly the reference to the redeployed workers. It was put to Ms Phillips that there was a possibility that the claimant may have been redeployed. Ms Phillips said that the potential departments to which the claimant could in theory have ben redeployed were "preferred departments" which were reserved for long term employees and she was not aware of agency worker vacancies at other factories.

62. In our view, the possibility of redeployment is only relevant in respect of the moves within FA2 as discussed above. There is nothing to suggest that, aside from being moved to jobs he was capable of doing (which we have found was likely to be in FA2) the claimant would be subject to or benefit from special treatment resulting in redeployment to avoid being released form his assignment.

2019 and 2020 backstops

63. Although not strictly necessary in light of our findings, we deal briefly with the remaining two backstops. Had the claimant been reassigned to FA1 Ms Bardell's evidence was that he would not have been released in January or February 2019. That's because the release was based on start date only, and the claimant's employment at the second respondent started on 2 February 2016. Only those workers who started on or after 9 February 2016 would have been released. The exception to this was that workers who started before 9 February 2016 would also be released if they had had absences in the year before the release date.

64. We were invited to find that on the balance of probabilities the claimant would have had such absences in the 12 months prior to the release date. We cannot possibly make such finding. The claimant had a reasonably good sick record with only one period of sickness absence in his employment and there is absolutely no reason at all to assume that he would have subsequent sickness absences.

65. We therefore find that had the claimant been reassigned to FA1 he would not have been released in January or February 2019.

66. The final backstop point, being 31 July 2020, was when all of the first respondent's workers were released from assignment at the second respondent. This was undisputed. Had the claimant, therefore, been reassigned to FA1 his employment at the second respondent would have terminated on 31 July 2020. We further find that in the period from 24 March 2020 to 31 July 2020 his wages would have reduced to 80% of full wages under the furlough scheme.

Other findings

Injury to feelings

67. In respect of his claim for injury to feelings the claimant in his witness statement said that the loss of his employment had impacted on the planning of his marriage and he had been forced to continue living with his parents. The claimant referred to the respondent's witness at the liability hearing, Mr Gardner, saying that he didn't see any willingness in the claimant to undertake work and saying that the claimant simply wouldn't work with them and that the respondent didn't take any real steps to consider or accommodate the claimant's disabilities

68. The claimant says that the experience of his dismissal and financial struggle has "destroyed me emotionally, significantly impacting my mental health and the quality of my life". He also says "My life now is not good. I am

anxious and preoccupied constantly with financial worries. My appetite has decreased, and I noticed that I am smoking more cigarettes. Since being dismissed I felt depressed, drained, and mentally quite blank, emotions I still feel to date".

69. The claimant says that he also experiences guilt at not being able to provide for his wife as he would like and is no longer able to spend as much time caring for his mother. The claimant also says that his grandfather worked for 28 years on the track at Jaguar Land Rover and that it was the proudest day of the claimant's life when he started working there.

70. We accept that the, effective, dismissal has had an adverse impact on the claimant. However, we have seen no medical evidence from the claimant to support a finding that he has experienced mental ill health as a result of his treatment. We are also not convinced by the claimant's assertions that he was particularly proud to be working at Jaguar Land Rover. It is clear from the evidence we have seen that the claimant had aspirations to work in a professional role and while we do not underestimate the impact on the claimant of being removed from a well remunerated job in discriminatory circumstances, we cannot help but observe that the claimant is now on the path to a legal career which appeared to be his preferred career originally.

71. We find, therefore, that there has been an impact on the well-being of the claimant as a result of the actions of the respondents as the claimant describes except that the claimant is not experiencing any diagnosed mental illness as a result of the actions of the respondents and the claimant did not, on the balance of probabilities, have a particular loyalty or affiliation to the second respondent.

Law and principles of compensation calculation

72. Section 124 Equality Act 2010 says

> (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
> (2) The tribunal may—
> (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
> (b) order the respondent to pay compensation to the complainant;
> (c) make an appropriate recommendation.
> (3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect [on the complainant] of any matter to which the proceedings relate—
> (a) . . .
> (b) . . ..
> (4) Subsection (5) applies if the tribunal—
> (a) finds that a contravention is established by virtue of section 19, but
> (b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.

(5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).
(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by [the county court] or the sheriff under section 119.
(7) If a respondent fails, without reasonable excuse, to comply with an appropriate recommendation . . ., the tribunal may—
(a) if an order was made under subsection (2)(b), increase the amount of compensation to be paid;
(b) if no such order was made, make one.

73. Section 119 of the Equality Act 2010 provides that the County Court may grant any remedy which could be granted by the High Court in proceedings in tort or on a claim for judicial review.

74. In *Chagger v Abbey National PLC and another* [2010] IRLR 47, the court of appeal confirmed, citing *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 that the amount of damages a successful claimant should be awarded "*that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation*". They went on to confirm, citing the same case, that the losses must flow from the wrong but "*there is no need to add a further requirement of reasonable foreseeability and that the robust good sense of employment tribunals can be relied upon to ensure that compensation is awarded only where there really is a causal link between the act of discrimination and the injury alleged. No such compensation will of course be payable where there has been a break in the chain of causation or where the claimant has failed to take reasonable steps to mitigate his loss*".

75. The task for the tribunal is, therefore, to determine what position the claimant would have been in had he not been subject to the discriminatory treatment by the respondents, taking into account whether and for how long the claimant would have remained in that employment and the steps he has taken, if any, to mitigate his losses. If there is a chance that the claimant would have been dismissed or promoted and that chance is neither zero, or almost zero nor 100% or almost 100%, the tribunal should assess that chance and may apply the appropriate percentage to the level of damages.

76. A successful claimant is also entitled to recover compensation for non-pecuniary losses including injury to feelings. In *Prison Service v Johnson* [1997] IRLR 162 the EAT provided guidance on the assessment of such awards at paragraph 27:

(1) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.

(2) Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the

other hand, awards should be restrained, as excessive awards could, to use Lord Bingham's phrase, be seen as the way to untaxed riches.

(3) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award; rather to the whole range of such awards.

(4) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.

(5) Finally, tribunals should bear in mind Lord Bingham's reference to the need for public respect for the level of awards made.

77. In *Vento v Chief Constable of West Yorkshire Police* (No2) [2003] IRLR 102 the Court of Appeal provided guidance to tribunals about the award of compensation for injury to feelings:

(i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.

(ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

(iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

78. These figures have subsequently been uplifted so that the figures now set out in 'Presidential Guidance: Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury Following De Souza v Vinci Construction (UK) Ltd' as amended by the first addendum which applied on the date the claimant brought his claim (which takes account of the relevant uplifts) are as follows:

    a. a lower band of £900 to £8,600 (less serious cases);
    b. a middle band of £8,600 to £25,700 (cases that do not merit an award in the upper band); and
    c. an upper band of £25,700 to £42,900 (the most serious cases), with the most exceptional cases capable of exceeding £42,900

79. In respect of pension losses, we have considered the "Employment Tribunals – Principles for calculating pension loss".

80. In a "simple case", where the claimant has lost entitlement to a defined contribution scheme for a fixed period, the claimant's losses are those

employer contributions that would have been made by the former employer less any pension contributions payable under any new employment or notional new employment where a claimant has failed to mitigate their loses.

81. Finally, interest is payable on awards for discrimination under The Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 2013 at 8% per annum.

82. Interest on injury to feelings awards is calculated from the date of the discrimination to the calculation date, and interest on compensation for financial losses is calculated from the mid-point between the date of the act of discrimination complained of and the date the tribunal calculates the award.

Conclusions and calculations

83. This is the unanimous decision of the tribunal.

84. We have not apportioned liability between the parties. The first respondent is only liable for the breach of section 15 in respect of the decision to terminate the claimant's assignment on the instructions of the second respondent. The decision to terminate flowed from and was inherently related to the failure by the second respondent to make reasonable adjustments. It is not, therefore, possible to separate the financial losses arising from the three decisions, namely the decision not to make reasonable adjustments, the decision of the second respondent to request that the first respondent release the claimant form his assignment and the decision of the first respondent to comply with that request. Consequently, the following financial losses are awarded against both respondents jointly and severally.

85. In respect of non-financial losses (injury to feelings) it is correct that there are two distinct incidents – the failure to make reasonable adjustments and the decision (of each respondent) to end the claimant's assignment. However, in our view and in light of the claimant's evidence the consequences of those two decision together resulted in the claimant losing his job. The injury to feelings described by the claimant relates exclusively to the making of the decision to end his assignment and the consequences of that decision. We have therefore only made one award of injury to feelings arising from the consequences of both respondents' actions and that award is made jointly and severally against both respondents.

86. It is a matter for the respondents as to how they apportion liability between themselves.

Loss of earnings

87. We have found that the claimant's employment at the second respondent would have ended by 13 July 2018. For that reason, his loss of earnings is limited to the period from 11 January 2018 to 13 July 2018. This is thirty weeks and one day.

88. During that period, the claimant worked for Brook Street at the Office of Public Guardian earning £293.58 per week net. This amounts to £8866.12.

89. The expected net weekly earnings had the claimant's employment continued over the same period are:

    a. From 11 January 2018 – 2 February 2018: £449.47 per week
    b. From 3 February 2018 – 13 July 2018 : £475.47 per week.

90. This is 3 weeks and one day at £449.47 per week and 27 weeks at £475.47 per week. This is a total of £1438.30 for the first period and £12837.69 for the second period, totaling £14275.99. The net losses are therefore £14275.99 less £8866.12 which comes to **£5409.87**.

91. The respondents have not shown that the claimant unreasonably failed to mitigate his losses. There was no evidence of similar higher paying jobs for which the claimant could have applied and applying the tests in *Cooper Contracting Ltd v Lindsey* UKEAT/0184/15/JOJ we do not consider that the claimant's decision to pursue his preferred career was unreasonable. It is correct that the claimant did limit his applications to non-manual jobs generally and civil service jobs particularly but it is also correct that he was able to secure alternative employment in a relatively short space of time. We are also mindful that the claimant was concerned to secure an income for his family quickly and it is likely that he would have to have taken a lower paid job in any event. We also consider that, although the claimant could have done a manual job or worked in a production environment with adjustments, it was reasonable for him, and particularly in light of the consultant's report, to seek non-manual work having been put in the position that he was, and discriminated against by the respondents.

92. It might be that, had the award not been limited to July 2018 the Tribunal would have been required to put a time limit on the award to reflect the fact that the claimant could have been expected to find a way to increase his income in the longer term but, in the circumstances of this particular case, the claimant acted quickly and reasonably in securing alternative employment.

Loss of chance of promotion

93. We did not hear submissions on the claimant's apparent case that there was a good chance that he would secure permanent professional employment with the second respondent. However, it is clear from our findings that we do not consider that this was a realistic possibility, and certainly not within the period from January to July 2018 for the reasons we have set out above. We do not, therefore, make any award in respect of this and in our judgement the prospects of a promotion or being taken in-house were not realistic enough to impact on the chance of the claimant being released from assignment in July 2018.

Pension losses

94. We have calculated pension losses on the basis of 3% of the difference between the gross actual earnings of the claimant and the gross pay the claimant would have received in the relevant period.

95. The claimant's gross earnings were 30 weeks and one day at £344.10 totaling £10,391.82. 3% of this is £311.75.

96. The claimant's gross earnings in the relevant period had his assignment not ended would have been 3 weeks and one day at £613.12 which is £1961.98 and 27 weeks at £633.96 which is £17,116.92, giving a total of £19078.90. 3% of this is £572.37. The claimant's pension losses are therefore £572.37 less £311.75 which is **£260.62**

Loss of summer bonus

97. There is a reference to a summer bonus of £400 on the claimant's schedule of loss. There was no reference to this in any of the witness evidence and we have heard or seen nothing to show when or in what circumstance it would or might be paid. We have therefore not an award in respect of this.

Quasi redundancy payment

98. Had the claimant remained employed until 13 July 2018, he would have been entitled to a payment equivalent to a statutory redundancy payment on release in accordance with the first respondent's Lay Off and Short Time Working Arrangements. This provides that the claimant would have been entitled to one week's pay for each complete year of employment between the ages of 22 and 41. The claimant was aged 27 at the end of his employment and his employment started on 2 February 2016 so he would have been entitled to two weeks' pay. The policy does not refer to the statutory cap. As at 13 July 2018, the claimant's gross wages were £633.96 so that the claimant would have been entitled to **£1267.92** and this amount is therefore awarded to the claimant.

Injury to feelings

99. In our judgment, the ending of the claimant's assignment with the respondent was analogous to a dismissal. We accept that the claimant remained employed by the first respondent following the termination of his assignment, but in reality, it was the end of his work.

100. We were referred to section L of Harvey on Employment Law and have had regard to the tribunal cases reported in there and our own experience.

101. In our view, this was a relatively serious breach by the respondents. They had no regard to the claimant's disability and made somewhat hurtful and dismissive comments about the claimant and whether his problems were genuine. This was after the claimant had worked for 18 months without apparent problem before the change in work location and line management.

102. We do not accept that the claimant had any particular loyalty to or affection for the second respondent. The claimant was an agency worker and, despite his assertions about his family associations with the second respondent, he could have had no reasonable expectations of a long term career with them. The claimant was also subsequently able to obtain employment in his preferred career, albeit with a reduced income. We have not relied on the insecure nature of the claimant's employment to reduce the injury to feelings award, but these two factors support our conclusions that the claimant did not, in fact, have any feelings of affection or loyalty to the second respondent because of his grandfather's employment with them. This is not, however, intended to diminish the impact of the respondents' actions on the claimant. We emphasise that the claimant was entitled to be treated with respect and consideration by the respondents. He was not and this did have an impact on the claimant.

103. In our view, this case falls in the lower to middle part of the middle Vento band and we award **£14000** for injury to feelings.

Total

104. The claimant is therefore awarded **£20,938.41** before interest.

105. This is lower than the £30,000 tax limit in section 401 Income Tax (Earnings and Pensions) Act 2003 so no grossing up is required. Interest is payable as follows:

106. Interest on injury to feelings is calculated at 8% per annum from the date of the discriminatory act (4 December 2018) to the date of this calculation. The number of days from 4 January 2018 to 9 December 2020 is 1070.

107. The calculation is therefore the number of days x 8% / 365 x injury to feelings award which is 1070 x 0.08 / 365 x £14000 which is **£3283.29**

108. Interest on other losses is calculated from the midpoint between the date of discrimination and the date of calculation to the date of calculation. That requires the following calculation: 535 x 0.08 /365 x 6938.41 which gives **£813.60**

109. Therefore, the total compensation awarded to the claimant is **£25,035.30**

1302834/2018

Employment Judge **Miller**

15 December 2020 (Date signed)