Case No: 1601036/2017 [H]

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MR SHUNMUGARAJA	**V**	**ROYAL MAIL GROUP LIMITED**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 23RD 24TH & 25TH NOVEMBER 2020 (CHAMBERS DISCUSSION ON 8TH DECEMBER 2020)

BEFORE: EMPLOYMENT JUDGE HOWDEN-EVANS
MRS J KIELY
MS K GEORGE

REPRESENTATION:
FOR THE CLAIMANT: IN PERSON, ASSISTED BY MR ADDISON AND MR KHAN

FOR THE RESPONDENT: MR PEACOCK (SOLICITOR)

JUDGMENT ON REMEDY

The unanimous decision of the Employment Tribunal is as follows:

1. The Claimant is awarded **£34,574.80** compensation for injury to feelings and interest thereon.

2. The Claimant is awarded **£70,164.26** in respect of his past losses and interest thereon.

3. The Claimant is awarded **£129,178.25** in respect of his future losses.

4. The Respondent is liable to pay the Claimant the net sum of **£229,161.86**; the Respondent will account to HMRC for the tax and National Insurance due on this sum.

5. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply to this award.

Reasons

1. In the Reserved Judgment on Liability, the Tribunal made declarations that the Respondent had:

    1.1. harassed the Claimant by unwanted conduct related to his race;

    1.2. directly discriminated against the Claimant because of his perceived religion; and

    1.3. victimised the Claimant because he had carried out protected acts.

2. At the remedy hearing on 23rd, 24th and 25th November 2019, the Tribunal heard evidence on oath from Mr Gary Trunks (the Respondent's Independent Casework Manager), the Claimant and Mr Omar Khan who continues to work as an OPG at the Royal Mail's Cardiff Mail Centre.

3. The Claimant attended the hearing in person and was represented by his friends Mr Addison and Mr Khan (who also attended in person). The Respondent was represented by Mr Peacock, solicitor. As a result of coronavirus restrictions, Mr Peacock, Mr Trunks and all three members of the Tribunal attended the hearing via video link.

4. All three witnesses had prepared written witness statements. In addition, the Claimant had prepared a written remedy impact statement. The Tribunal read the witness statements and accepted these as evidence in chief. With each witness, we allowed supplemental questions, before cross examination, Tribunal questions and finally any re-examination. The Tribunal also had the benefit of 3 bundles of documents (bundle A, B & C). During the course of the hearing, the Claimant was permitted to admit a further bundle of documents Bundle D (comprising of pages 141 to 186 from the original draft remedy bundle). The employment judge used Bundle D to create a table of job applications for parties to work with during the hearing. The Tribunal also had the benefit of having a Schedule of Loss, a Counter Schedule of Loss, a Chronology and the Respondent's Written Submissions. Whilst we were able to finish hearing evidence and both parties' oral closing submissions, there was insufficient time for the Tribunal to consider its decision. The Tribunal spent a full day carefully considering the documents, evidence and submissions. This chambers discussion was conducted via video link on 8th December 2020.

5. At the preliminary hearing on 7th April 2020, the employment judge suggested the Respondent consider making an interim payment in an effort to reduce the adverse effect that acts of discrimination were having upon the Claimant; the Respondent had accepted an Injury to Feelings award was owed to the Claimant, and the Claimant was experiencing extreme financial hardship as a result of his employment having been terminated, which the Tribunal had found was an act of victimisation. The

Respondent made a voluntary interim payment of £4,500 shortly after that preliminary hearing.

The Issues

6. By closing submissions, the issues to be determined by the Tribunal were:

Appropriate recommendations:

7. The Claimant was seeking the following recommendations:

7.1. The Respondent rewrite their grievance policy to make it clear that all employees, whatever their grade and position, can be victims of bullying and harassment.

7.2. The Respondent changes its procedure to ensure victims of bullying and harassment are properly supported.

7.3. The Respondent refer itself to the Equality and Human Rights Commission for a wide-ranging review.

7.4. The Respondent ensures that lessons are learnt from the Claimant's experience so other employees are protected from discriminatory acts – the Claimant is very concerned about friends of his that continue to work in Royal Mail Cardiff.

7.5. The Respondent ensures that training on diversity awareness and discrimination law filters down to the employees working on "the shop floor".

8. The Respondent suggested:

8.1. When the Respondent receives requests for references from employers that are considering employing the Claimant, the Respondent should not make any reference to the reason for the Claimant leaving employment with the Respondent – ie there should be no reference to the Claimant having been dismissed.

8.2. There was no need for the Respondent to be referred to the Equality and Human Rights Commission as they already have discussions to identify learning points from each judgment. In relation to the liability judgment in this case, the Respondent had already noted the Tribunal's comments in paragraph 84 of the liability judgment and would revisit the wording in template letters that are used. The Respondent had also instigated some additional training around the use of the phrase "sly dog".

8.3. Mr Trunks had already provided an apology to the Claimant in his witness statement.

The appropriate award for Injury to Feelings (including any aggravated damages).

9. The Claimant seeks £26,000 for Injury to Feelings and an additional £18,000 for Aggravated Injury to Feelings – this would be an award at the top of the Vento top-band (as adjusted by the Presidential Guidance dated 5th September 2017) for "the most serious cases, such as where there has been a lengthy campaign of harassment".

10. The Respondent's Counter Schedule of Loss contends a Lower Vento band award (£900 to £8,800) is appropriate for Injury to Feelings for each of the discriminatory acts. The Respondent submits there should be no aggravated damages award. The Respondent reminds the Tribunal to distinguish between the feelings of upset caused by the acts of discrimination (which should be compensated) and the feelings of upset caused by other events, such as the disabled toilets situation (which should not be compensated).

Financial Loss – sick pay and yearly bonus

11. The Respondent accepts the Claimant is owed a shortfall in sick pay of £1,145.81. The Claimant asserts this should be £1,900.

12. The Claimant asserts he should have received a bonus of £3,000 for the year 2017/18 and for each year thereafter. The Respondent accepts the annual gross value of the Claimant's managerial bonus is £3,509.

Financial Loss – Loss of Earnings and pension losses

13. Parties agree the Tribunal should assess the Claimant's financial loss by determining what position he would have been in had the discrimination not occurred.

14. The Claimant contends he would have continued to work for the Respondent until his retirement. The Claimant was 38 years old at the date of his dismissal and had worked for the Respondent for 10 years at that point. He contends it will take him 5 years to find comparable employment.

15. The Respondent asserts the Claimant's employment would not have continued beyond 23rd January 2018, submitting:

    15.1. by November 2017 there was a complete breakdown of trust between the Claimant and his employer, such that the Claimant was covertly recording meetings with managers;

    15.2. when the employer became aware of the covert recordings (during Mr Addison's Tribunal claim) they would have taken steps to discipline the Claimant, which was likely to have resulted in his dismissal as the covert recording had destroyed the Claimant's managers' trust in the Claimant.

15.3. by November 2017 the Claimant was taking an entrenched stance over the lack of ground floor disabled toilets with Mr Addison (who subsequently brought his own Tribunal claim) – this culminated with the Claimant's letter of 28th December 2017 stating he was exercising his right to stay absent from work per s100 and s44 Employment Rights Act 1996;

15.4. by January 2018 the Claimant had withdrawn from contact with the employer;

15.5. the Claimant chose not to exercise his right to appeal the decision to dismiss the Claimant; and

16. Whether the Claimant has mitigated his loss – the Respondent asserts the Claimant has not taken reasonable steps to mitigate his loss.

17. The Claimant asserts he has mitigated his losses – he asserts he was homeless by April 2018, had no fixed address and was sleeping on friends' sofas. He refers to job applications that were made in 2018 and asserts he was unable to attend an interview as the person he was staying with was anxious about the consequences of the Claimant using the address (difficulties with landlord, benefits etc). He asserts when he could not borrow anything further from friends he had no choice other than to move home to his mother in a remote part of India.

Loss of statutory rights.

18. The Claimant sought £600 compensation for the loss of statutory rights.

Costs associated with being blacklisted / bad credit history having county court judgments.

19. The Claimant sought £50,000 compensation for the impact of being blacklisted and interest on defaulted sums.

Lack of duty of care

20. The Claimant sought £20,000 compensation for lack of duty of care in relation to Mr Day and Mr Brown.

Cost preparation

21. The Claimant sought the cost of preparing for the Tribunal hearing. The Respondent asserts these are litigation costs rather than being mitigation costs.

Failure to Follow the ACAS Code

22. The Claimant is seeking a 25% uplift for failure to follow the ACAS Code of Practice.

Interest

23. The Claimant invites the Tribunal to award interest at 8%.

Findings of fact

Situation prior to discriminatory acts

24. The Respondent is a privately-owned company that provides a service to the public. It has 139,000 employees in the UK. Approximately 450 people work out of the Respondent's Cardiff Mail Centre; this would increase by 120 to 150 people during the busy Christmas period. The Tribunal notes the Cardiff Mail Centre has a very diverse workforce.

25. The Claimant describes himself as being of British Indian origin and a Hindu. He has actively supported the British South Indian Chamber of Commerce and has worked to enhance UK-India ties, such that he was selected to attend a national UK-India Young Leaders Forum in 2018.

26. The Claimant moved to the UK at the age of 28. Prior to this he had worked for a number of fruit agencies, working in operations in distribution centres. The Claimant completed his Maths degree in 2016 – some of this had been undertaken at a university in India and some had been completed via distance learning whilst working for the Respondent.

27. The Claimant commenced employment with the Respondent, at the Cardiff Mail Centre, on 1st August 2007 as an OPG. Since 13th May 2013 the Claimant had been a Work Area Manager working the late shift. (Employees at Cardiff Mail Centre are assigned to one of three shifts – the early, late or night shift.).

28. For a period of time, the Claimant worked in "the bookroom" (the local HR department) at Cardiff Mail Centre, which meant he has experience of dealing with HR administration such as sickness absence, emergency leave and managing overtime. The Claimant also has some experience of health and safety work. The Tribunal notes in 2010 the Claimant had taken part in the Safety Management Audit meeting (with 67 colleagues) and was one of 4 colleagues delivering a short presentation on risk assessment.

29. In 2014, the Claimant had made a bullying and harassment complaint to the Respondent. The Claimant was told that a manager can't complain that a subordinate is bullying them and the complaint went no further. The Claimant worked in a different area from the person he had made the complaint about.

30. As a Work Area Manager, the Claimant was on the first tier of management within the Cardiff Mail Centre. During evidence for the remedy hearing, the Claimant confirmed he had on occasions in 2017 been "acting up" as Work Area Manager for the weekend shift. The Claimant was responsible for managing a number of OPGs including Mr Day and Mr Brown. The Claimant was also the Stamp Cancellation Project lead for the Cardiff Mail Centre; in September 2017, Mr Mason, the

national lead on the Stamp Cancellation Project attended Cardiff and praised the Claimant for the Cardiff Mail Centre's excellent performance in the project.

31. In the Claimant's "Half Year Indicative Appraisal 2017/18", which Mr Colclough stated was completed on 27th November 2017, the Claimant was assessed (by his line manager) as overall having "high" achievements in customer goals and financial goals, and overall having "good" achievements in people goals and efficiency goals. His manager comments "I have never had any behavioural issues with [the Claimant] who always acts professionally and with the up most respect for himself and our team." He also comments "Overall a strong 6 months for [the Claimant] – working within his own role and that of the WSM (Covering Long Term Leave)…In the next 6 months [the Claimant] will be in a position to really push again for the marking he deserves. I believe that [the Claimant] will not sit back on this challenge and will strive for even further success. Looking forward to the next 6 months".

32. Prior to Summer 2017, the Claimant's marriage had broken down; his former wife has remarried. The Claimant has no relatives or family living in the UK. In evidence at the remedy hearing, the Claimant described his colleagues at Royal Mail as being "his family".

Discriminatory Act 1 – Mr Brown's comment at the 21st June 2017 meeting

33. Historically the Claimant has found it difficult to manage Mr Brown, one of the OPG's in his team, and has raised this regularly with various managers. Other witnesses agree that Mr Brown can be a challenging team member to line manage.

34. By June 2017, the Claimant's relationship with Mr Brown was not a good one. Mr Brown was absent due to illness for 6 weeks and the Claimant's evidence was that he didn't know this. Mr John had dealt with Mr Brown's absence rather than the Claimant.

35. On the day Mr Brown returned to work there was an incident between the Claimant and Mr Brown. Mr Brown refused to undertake the tasks the Claimant had instructed him to do; Mr Brown subsequently reported this was because he had returned after 6 weeks' absence and the Claimant had given him orders without first welcoming him back.

36. On 21st June 2017 a meeting was called to "clear the air" between the Claimant and Mr Brown. The meeting was chaired by Mr John. Mr De-Castro-Pugh, OPG accompanied Mr Brown. It is accepted that during this meeting Mr Brown called the Claimant a "sly dog". The Claimant was clearly offended by this comment. Mr John tried to calm the Claimant but the Claimant was so upset he left the meeting. Mr John said to Mr Brown "looks like you've really offended him" and Mr Brown agreed to find the Claimant to apologise.

37. Mr Brown's account was that he had called the Claimant a "sly dog" because the Claimant had raised a private issue and Mr Brown felt the Claimant was trying to make Mr Brown look bad in front of Mr John. The Claimant explained he finds the phrase deeply offensive. Shortly after the meeting, Mr Brown realised his comment had upset the Claimant and found him to apologise. The Claimant was so upset he refused to accept Mr Brown's apology.

38. The Tribunal accepted this was unwanted conduct and that the term "dog" and the phrase "sly dog" would be perceived as an insult in many cultures and could have connotations of race.

39. The Tribunal note that Mr Brown was a team member at a lower grade than the Claimant.

40. The Tribunal accepted that it is unlikely that Mr Brown had intended to cause the significant offence that he did cause and that it was not said with the purpose of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

41. However, we found that Mr Brown's "sly dog" comment had the effect of violating the Claimant's dignity and creating a humiliating and offensive environment for the Claimant, such that the Claimant left the meeting. The Claimant was clearly very upset by the remark as witnessed by Mr John and Mr Brown. Mr John noticed the Claimant was "really offended" and Mr Brown went after the Claimant to apologise. The Claimant was so offended he refused to accept the apology. The Tribunal find it was reasonable for the Claimant to be so offended, given that the term is regarded as being highly offensive in many cultures.

42. In his evidence the Claimant explained that what particularly upset him about this incident was that the comment had been made in front of Mr John, the Claimant's line manager and the employer had not taken further action.

43. The Claimant referred to this incident again in his meeting with Mr Colclough in December 2017, in Costa Coffee:

    "We all there and [Mr John] was chairing that meeting and one of the colleagues is calling me a dog. I can't take it and nobody took any action for that and [Mr John] he said that [a colleague] said something to you and he got two years of serious warning, what is the difference between you and me [Mr Colclough]…I am just saying that, it affects me" to which Mr Colclough responded *"when that…when [that colleague] did that yeah, I took him personally down on the conduct code, yeah, when you got a subordinate"* at which point the Claimant said *"[Mr Colclough] you are my line manager, [Mr John] is my line manager as well, right, what can I expect, what can I expect".*

44. In December 2017, the Claimant was still clearly upset that when an employee was disrespectful to Mr Colclough, that employee had been

disciplined and yet when someone had been disrespectful to the Claimant, nothing had happened, despite the Claimant's immediate line manager being a witness to this incident.

Discriminatory Act 2 – The incident with Mr Day on 3rd August 2017

45. As a Work Area Manager, the Claimant was required to deliver a 30-minute Work Time Listening and Learning session ("WTLL") to his team of employees each week. During WTLL time the Claimant would deliver training, identify forthcoming events, share good practice and plan the team's week.

46. To assist his team member, the Claimant decided to hold WTLL sessions in the Respondent's Quiet Room and Book Exchange. The Tribunal found that the "Quiet Room" was in fact a multi-use room, used by some staff as a place to relax during a rest break. It obviously had been used as a training room, on occasions, as suggested by the classroom style layout. Mr Day (and possibly others) used it as a quiet room to pray.

47. The Claimant agrees that up until 2016 he had a good relationship with Mr Day, one of the OPG's in his team, and had nominated him for two thank you cards as a sign of appreciation for what Mr Day did in their team. However, by August 2017 this relationship had deteriorated, and Mr Day was deliberately not attending the Claimant's WTLL sessions.

48. The Claimant arranged a WTLL session in the Quiet Room for 3rd August 2017. Mr Day knew the meeting was scheduled to take place in this room and spoke to Mr John shortly before the meeting, to complain. Mr John agreed with Mr Day, that the Claimant should not be conducting WTLL in the Quiet Room and said he would speak to the Claimant.

49. Mr John did speak to the Claimant immediately before the WTLL session on 3rd August 2017. As the WTLL session was just about to begin, (the Claimant's team were already in the Quiet Room), Mr John told him "please don't use the Quiet Room for WTLL in future" but allowed this particular WTLL session to continue in the Quiet Room.

50. Unfortunately, Mr John didn't have chance to speak to Mr Day ahead of that WTLL session. Mr Day was furious the WTLL session was going ahead in the Quiet Room. Having chosen not to attend some WTLL sessions previously, he chose to attend this one, to confront the Claimant. His conversation with Mr John, earlier that day, had led him to believe the Claimant was acting unreasonably in continuing to hold the WTLL session in the Quiet Room.

51. Mr Day was aggressive towards the Claimant in the WTLL session and asked the Claimant to come outside to discuss things. The Tribunal note that we did not find this part of the discussion to be an act of discrimination – we have been careful to focus <u>only</u> on the incident that continued outside the room when considering the injury caused to the Claimant's feelings.

52. Mr Day and the Claimant continued their discussion outside the Quiet Room. The Claimant's friend, who is a Muslim, was with them as the Claimant had asked her to be a witness. The Tribunal found that Mr Day continued to speak in an aggressive tone and was being caustic when he said "*Let's go use the [Muslim] Prayer Room"* to the Claimant.

53. The context in which this was said is important – Mr Day was wound up and upset that the Claimant was using the Quiet Room, which Mr Day personally used for prayers. There had been a breakdown in communication as Mr John had not told Mr Day that he was allowing this session to go ahead in the Quiet Room. In the heat of the moment Mr Day made this comment without thinking. It was a retort that came out that he wouldn't have said to someone of the same religion as himself. The Tribunal was satisfied that in the heat of the moment and in those words he was blurring together the Claimant's religion and the Claimant's friend (who is a Muslim)'s religion and was trying to say "you respect the Muslim religion – why not respect mine". However, Mr Day did not express it like this or in this manner – instead he said caustically and aggressively *"Let's go use the [Muslim] Prayer Room*". We accepted that being spoken to aggressively was less favourable treatment and the reason for this less favourable treatment was the Claimant's perceived religion, as in that instant Mr Day had confused the Claimant's religion with the Claimant's friend's religion.

54. Mr Day then went to see Mr John rather than attend the WTLL session. (The Claimant returned to deliver the WTLL session in the Quiet Room). At some point in their conversation, Mr John told Mr Day *"I'll back you 100%".* Mr John explained he meant he supported Mr Day in his objection to the Claimant using the Quiet Room for WTLL sessions, as Mr John believed it was not appropriate to use this room for WTLL sessions.

55. Whilst Mr Day was with Mr John, they phoned Ms Rich to seek clarification as to what the Quiet Room was to be used for. Ms Rich didn't know so they spoke to Ms Jones who confirmed it was used as a Christian prayer room. Ms Rich stated the Prayer Room on the other floor was a multifaith prayer room, not a dedicated Muslim prayer room, as Mr Day had believed until that point. The Tribunal note that Mr Day and Mr John had to check whether the Quiet Room was, in fact, a prayer room, as it wasn't clearly designated as a prayer room.

56. The Claimant was so upset by the incident with Mr Day that he phoned Mr Colclough, the Late Shift Manager, that evening (3rd August 2017) and Mr Colclough had spoken to Mr John about the incident that same evening and reported the Claimant as being *"really upset".*

57. On 7th August 2017, the Claimant made a written complaint to Mr John Press, acting Plant Manager, about the *"very frightening experience"* with Mr Day.

58. Whilst he continued to attend work without any sickness absence, in August 2017 the Claimant started taking anti-depressant medication.

59. As the Claimant had not received a response to his letter of 7th August 2017, he wrote to Royal Mail HR in Sheffield on 14th September 2017. This letter alleged the Claimant was being harassed and bullied on account of his race and referred to the incidents on 21st June 2017 and 3rd August 2017 among other allegations. The letter explained the Claimant had felt *"frightened for my health and safety"* during the incident on 3rd August 2017 and requested an external investigation, as the Claimant was concerned that a Cardiff Mail Centre based investigator would not be impartial.

60. By letters of 15th September and 18th September 2017, the Respondent's Employee Relations Case Management Team and the Respondent's Chief Executive acknowledged receipt of the Claimant's grievance and asked the Claimant to contact them to discuss an appropriate route. They did not receive a response to these letters.

61. After the Claimant contacted ACAS, on 25th October 2017, the Respondent's Employee Relations Case Management Team wrote to the Claimant explaining that the Respondent did not normally accept bullying and harassment complaints from managers against OPGs, rather the issues alleged by the Claimant should be dealt with formally by a manager under the conduct code.

62. On 26th October 2017, a different customer services adviser in the Respondent's Employee Relations Case Management Team wrote to the Claimant acknowledging receipt of the ACAS notification and explaining that the Claimant's bullying and harassment complaint had been returned to him as the complaint should have been dealt with under the Respondent's conduct processes as the complaint was about an OPG.

63. The Claimant presented an ET1 claim on 9th November 2017.

64. Mr Newton (who was on exactly the same level of management as the Claimant and who was based in the Cardiff Mail Centre) was asked to investigate the Claimant's bullying and harassment complaint under the Respondent's conduct code.

65. Unfortunately, the Claimant's invitation to attend a fact finding meeting was from a template letter that is used to invite someone <u>facing</u> conduct allegations to interview. The letter includes phrases like *"I recognise that being faced with conduct action can be a stressful time"* and *"The purpose of this meeting is to establish the facts and to determine if any formal action under the conduct policy is required."* The "Fact finding meeting guide for employees" that was enclosed with the invitation letter included the statement *"Your manager may also consider whether precautionary suspension is appropriate or if you are already suspended they should review whether you are able to return to work".*

66. On 21st November 2017, the Claimant attended the fact-finding meeting with Mr Newton; he was accompanied by Mr Addison, an OPG.

67. The Claimant objected to Mr Newton conducting the investigation, as he considered any manager within Cardiff Mail Centre would not be impartial. The Claimant was very concerned that the Respondent was in breach of equality duties at the Cardiff Mail Centre. This stemmed from the Respondent's decision to remove a ground floor disabled toilet facility. The Respondent had consulted the trade union about this change and was satisfied that it was safe and appropriate to have a disabled toilet facility available on the fourth floor. The Claimant disagreed with the Respondent (and the Trade Union)'s assessment of the situation and had spoken out about his concerns previously. This is why he did not have confidence that an internal investigation would be impartial.

68. In the fact-finding meeting, Mr Newton was genuinely trying to find out about and understand the Claimant's complaint about the OPGs that the Claimant perceived were bullying him. Both the Claimant and Mr Addison were more concerned with the disabled toilet situation and the Claimant said there was no point continuing the meeting as it was "contaminated", implying that Mr Newton was not able to consider the investigation impartially.

69. On 22nd November 2017, Mr Newton wrote to the Claimant, providing him with a copy of the minutes of the investigation meeting on 21st November 2017. By letter of 26th November 2017, the Claimant explained to Mr Newton his concern that his grievance should not be considered internally. This letter again discussed the situation with the disabled toilets.

Discriminatory Acts 3, 4 and 5 – threatening to stop and stopping sick pay and dismissing the Claimant

70. On 27th November 2017, whilst he was in work, the Claimant became unwell with sharp pains in his shoulder and neck, such that Mr Colclough had to arrange transport for the Claimant to his local hospital. This was the start of the Claimant's sick leave; he did not return to work prior to his dismissal.

71. The Claimant attributes this neck and shoulder pain to anxiety caused by harassment and bullying at work. On Friday 1st December 2017, the Claimant was examined by his GP and was advised he was not fit for work due to *"stress at work"*. His fit note signed him off work for *"1 month"* and was dated 1st December 2017. The Claimant sent this fit note to his employer in accordance with the sick absence procedures. The Claimant's GP prescribed antidepressant medication Sertraline (50mg) This medication had an adverse impact on the Claimant's stomach, so subsequently the Claimant ceased taking anti-depressants.

72. On Monday 4th December 2017, Mr Colclough wrote to the Claimant inviting him to attend a meeting on Thursday 7th December 2017, to discuss his absence.

73. By letter of 5th December 2017 [p210], the Claimant responded to Mr Colclough and explained *"due to the nature of my illness (depression, causation work related stress)"* he would prefer to meet at his home address. He commented *"I am under the care of my physician who is presently doing all that is necessary ie tablets and counselling to aid my speedy recovery".* The final comment in his letter (*"Please find enclosed documents for your sighting"*) referred to two newspaper articles that the Claimant had enclosed with his letter. These newspaper articles [p211 to 218] had been printed on 9th March 2017 and referred to a Royal Mail employee who had committed suicide following racial abuse at work (at the Birmingham sorting office).

74. Upon receipt of this letter and attachments, Mr Colclough was extremely concerned about the Claimant's health. He tried to phone the Claimant and left a voicemail message. He sent a text message to the Claimant and explained (in oral evidence) that he was on the verge of contacting the police, he was so concerned about the Claimant's welfare.

75. By letter of 7th December 2017, Mr Colclough wrote to the Claimant inviting him to attend a meeting on Wednesday 13th December 2017, at either Costa Coffee (Leckwith Retail Park) or the Cardiff West delivery office. In his letter he stated *"Due to the content of your letter and the attachments provided I am really concerned about your health and wellbeing. I have tried to contact you by phone and left a voice mail and text message to understand your current situation, to which you have not responded…..If you have not already done so, I would strongly recommend you contact the Feeling First Class Helpline…..if you feel that you require support*."

76. On 13th December 2017, Mr Colclough and Mr John met the Claimant and his friend Mr Khan at Costa Coffee. During the meeting, the Claimant explained *"I have been going through this for years and I am on medication for long time…for my depression and anxiety".* The Claimant goes on to refer to *"its just gone over because I couldn't sleep it's gone beyond my control…..Even though I was in treatment I came to my work…you know….I am that kind of person like…but just as a human you can take certain limits not more than that….and my neck is just an affect of what's going on inside myself…might be it's part of stress…part of something…I am not medically qualified that's what my doctor says."*

77. Mr Colclough explained how worried he had been when he had received the newspaper articles; *"…So are you saying at the moment you have got suicidal tendencies?"* The Claimant tried to explain why he sent Mr Colclough the newspaper articles *"the reason I sent this documents to you is… I don't want to go into my grievance case….but that is the form of root cause for you know as a normal person I couldn't have day to day normal life and you know that's all affects me this one is telling Royal Mail already previous experience…So that's what I think I have highlighted in somewhere you know I just want to know I am the only one suffering or…."*

78. Mr Khan tried to explain "*I think the point is and the rational is that if you can see where the part of where [the Claimant]'s stress and depression emanates from is similar to this case here…its mentioned there with the bullying and harassment thing…I believe its highlighted in this article that how the senior management were kept away from certain things. As you are aware [the Claimant] has asked for his grievance to be heard by certain people at certain level, not within….the rational is…look this is what the possibility is of people when they manipulate grievance procedures and all that when people are crying out saying look it's my grievance, my complaint, my harassment and bullying, my concerns that needs to be addressed I don't feel that it can be addressed at this level it needs to be addressed outside of here and that's why he is trying to bring it to you, the seriousness of it."*

79. The Claimant goes on to explain *"…I have been seeking help for a long time I have been asking right where as you been telling me the buck stops with me…I can't see certain things it affects my own health, my line manager is telling me that buck stops with me, I am just human, I am just human…to avoid prejudice and bias please handle this case, you know, with an external manager and when I seek for help instead of helping me…you know…you know, exasperating my anxiety and depression is happening*."

80. The Claimant went on to refer to the incident on 21st June 2017.

81. The Tribunal found that at this meeting, the Claimant was explaining part of the reason he was ill with work related stress, was he felt his employer had not responded appropriately to his allegations of bullying. He was clearly upset that when an employee was disrespectful to Mr Colclough, that employee had been disciplined and yet when someone had been disrespectful to the Claimant, nothing had happened, despite the Claimant's immediate line manager being a witness to this incident; the Claimant's managers had expected him to deal with the matter himself. The Claimant was trying to explain that he had not been able to resolve the matter by himself and the situation was affecting his mental health and making him ill. He had lost confidence in internal managers and was asking for an external investigation. He felt this request for an external investigation had been ignored and he could no longer cope with the situation in his workplace.

82. During the course of his evidence, the Claimant alleged that at the end of this meeting, Mr Colclough said he would phone the Claimant each Friday, as a means of keeping in touch during his absence. During cross examination, Mr Colclough confirmed that he had said this to the Claimant at the end of their meeting on 13th December 2017.

83. On 15th December 2017, Mr Colclough's letter to the Claimant included:

"If you do not attend or fail to provide a reasonable explanation for your continued work related stress sick absence, I will not give authorisation for ongoing Royal Mail Sick Pay to be paid to you, and I expect you to discuss

this situation with me further. If you do not do so, your Royal Mail Sick pay will be stopped with effect from Wednesday 20th December 2017.

Therefore I need you to attend a meeting with myself on Tuesday 19th December 2017…in the Shift Manager's Office at Cardiff Mail Centre."

84. The Tribunal found this letter to be an act of victimisation and unlawful discrimination. It was totally inappropriate, given that it was written to an employee that was off work with work-related stress, particularly as,
    - 84.1. the Claimant had not been referred to Occupational Health;
    - 84.2. the Claimant's GP had certified he would not be fit for work for the month of December;
    - 84.3. the Claimant had attended an absence review meeting with Mr Colclough two days earlier;
    - 84.4. two days earlier, Mr Colclough had said he would phone each Friday as a means of keeping in touch;
    - 84.5. one week before this, Mr Colclough had been concerned the Claimant may be suicidal;
    - 84.6. the threat of stopping sick pay was being made immediately before Christmas; and
    - 84.7. the Claimant (signed off with work related stress) was being told he had to attend a meeting in the workplace.

85. This letter was a considerable change in tone and placed the Claimant under immense pressure at a time when he was already mentally unwell. The Claimant had been taken ill in the workplace, had provided a GP fit note and had attended the absence meeting on 13th December – we found receiving this letter would have had a huge negative impact on the Claimant as he had worked with Mr Colclough for many years, had a good attendance record and was regarded as "high" achieving, yet Mr Colclough felt it was appropriate to send the 15th December letter without further investigation.

86. By letter of 16th December 2017, the Claimant replied to Mr Colclough (and copied in the Respondent's Chief Executive Officer, the Respondent's solicitor, the Respondent's HR department and Ms Rich, also providing them with a copy of Mr Colclough's letter of 15th December 2017). In this letter, the Claimant repeated his request for his grievance to be considered externally and again repeated his concerns about the disabled toilet provision, pointing out that one colleague with a disability could not use the stairs and explaining his concern about the fire risk assessment. He ends his letter *"My doctor has prescribed medication and recommendations for my wellbeing. Please be cooperative in the spirit and interests of natural justice, fairness and equality. I am only human."*

87. By letter of 20th December 2017, Mr Colclough responded *"Further to our meeting on 13th December, I invited you in to attend a meeting…on 19th December 2017 to discuss further your work place related stress, as it is not clear as to why you are unable to attend work as all of the issues raised have been correctly dealt with under our policies and procedures. Therefore I am now giving you a further and final opportunity to meet with*

me to discuss your current absence and agree a return to work date. I would like you to meet with me on Wednesday 27th December 2017 …in the Shift Manager's Office. If you do not attend or fail to provide a reasonable explanation for your continued work related stress sick absence I will not give authorisation for ongoing Royal Mail Sick Pay to be paid to you therefore your Royal Mail sick pay will be stopped with effect from Thursday 28th December 2017.

88. On 22nd December 2017, the Claimant saw his GP and was certified not fit for work with "stress at work" for a further 28 days. The Claimant's evidence was that he had enclosed the original Fit Note (of 22nd December 2017) with his letter of 28th December 2017 addressed to Ms Rich. Copies of this letter were also sent to the CEO of Royal Mail, Ms Higgins at the Respondent's solicitors and Mr Colclough.

89. The Claimant's letter of 28th December 2017 [p243] made further allegations of discrimination including a complaint about Mr Colclough's letter of 15th December 2017 and conduct of the meeting on 13th December 2017, a separate complaint about Ms Rich, as well as referring to the disabled toilet issue and ended "*You have left me with no option but to exercise my legal right to protect myself and others ….I am exercising my legal right in pursuant of the Employment Rights Act 1996 section 100 and section 44 respectively".*

90. Mrs Rich's evidence was that whilst she accepted she had received the letter of 28th December 2017, she had not received the sick note dated 22nd December 2017. None of the Respondent's witnesses could recall having seen the original sick note of 22nd December 2017.

91. On 4th January 2018, Mr Colclough wrote to the Claimant listing the contact during the Claimant's sick leave and stating that the Claimant's Royal Mail sick pay had been stopped on 28th December and inviting the Claimant to attend an interview on 8th January 2017 in the Shift Manager' Office; *"The present position is untenable and in the circumstances we are not confident that you will return to work to your contractual role. Therefore I am giving consideration to your continued employment on the basis that the business is not satisfied that you intend to return to your employment in the foreseeable future."*

92. The Claimant didn't respond to Mr Colclough's letter of 4th January as he believed Ms Rich had received the 22nd December 2016 sick note. Mr Colclough wrote a further letter of 15th January explaining that SSP had been stopped from 9th January 2017 and he was considering terminating the Claimant's employment *"on the grounds 1. The business has no reasonable prospect of knowing when you will be fit to return to work and in what capacity; and 2. The business is not satisfied that you intend to return to your employment..in the foreseeable future*". Mr Colclough invited the Claimant to attend at interview on 22nd January at which he would consider terminating the Claimant's employment.

93. By letter of 23rd January 2018 [p257], Mr Colclough confirmed his decision to dismiss the Claimant. He noted the Claimant had not attended meetings (on 19th and 27th December and 8th and 22nd January) [which the Tribunal notes were all at the Claimant's workplace] and stated *"You have provided no explanation for your non-attendance at all meetings."*

94. Mr Colclough's letter of 23rd January 2018 explained the Claimant had a right to appeal this decision. The Claimant did not take steps to appeal this decision.

Victimisation

95. The Respondent accepted and the Tribunal found that the Claimant's grievance – the letter of 14th September 2017 was a protected act, as it included allegations that a person had contravened the Equality Act.

96. The Tribunal found that the Respondent did, through Mr Colclough's letters, threaten to and subsequently on 28th December 2017 actually stop the Claimant's contractual sick pay. We also found that the threat of having contractual sick pay stopped was an act of detriment, (particularly in the run up to Christmas) and the act of stopping the Claimant's sick pay was a further act of detriment. We found that the fact the Claimant had presented the grievance had a significant influence on Mr Colclough's decision making.

97. The Tribunal found that Mr Colclough's opening paragraph to his letter of 15th December 2017 heralded a change of tone and manner towards the Claimant that ultimately led to an employee of 10 years, who had recently been praised for excellent performance, being dismissed after 56 days sick leave, in circumstances in which his employer had a GP fit note diagnosing work-related stress for at least half of that time. The first paragraph in Mr Colclough's letter of 15th December referred to the grievance and the grievance was on Mr Colclough's mind from that point onwards. We found that the grievance did have a significant influence on Mr Colclough's decision to dismiss the Claimant - the threat and the stopping of contractual sick pay and ultimately the decision to dismiss him, were significantly influenced by the protected act and were all acts of victimisation.

The impact of the 15th December 2017 letter (the threat to stop sick pay) upon the Claimant

98. In his impact statement, the Claimant described Mr Colclough's letter of 15th December as being a drastic and sudden change from what had been agreed, *"a 90 degree change in attitude"*. He described his stomach churning when he realised he had *"no support, no duty of care"* from Mr Colclough. He described being *"at my lowest ebb in the prospects of having no money for my weekly commitments and Christmas. I felt at this time to run and hide, to disappear and other bad thoughts that I never had under any stressful situation before, along with sleepless nights."*

99. The Claimant described responding by letter of 16th December 2017 *"in a deperate bid to prevent myself being subjected to further discrimination".* This letter was addressed to the CEO of Royal Mail amongst others. In evidence, the Claimant explained he was asking those at the very top of Royal Mail to help him.

100. The Claimant was hurt that Mr Colclough had personal knowledge of how upset the Claimant had been following the incident with Mr Day on 3rd August 2017 (as the Claimant had phoned Mr Colclough that evening). He felt that from 15th December 2017, Mr Colclough had "*embarked on a course of conduct which ultimately destroyed me in many ways rather than support and protect".*

101. In evidence, the Claimant explained he was also upset that Mr Brown had been on sick leave for 6 weeks without any action being taken against him. At the point of receiving the letter of 15th December 2017, the claimant had only been absent from work for 2 ½ weeks; the Claimant was hurt that he was being treated differently from Mr Brown.

The impact upon the Claimant, of the decision to stop sick pay and the decision to dismiss him

102. The Claimant has described his colleagues at Royal Mail as being "his family" – he has no family in the UK, hence losing his employment at Royal Mail was even more distressing as it was such a central part of his life. The Claimant loved his job, was clearly performing at a very good level and had every expectation that he would continue to progress his career at Royal Mail until his retirement. For instance, 4 months before his dismissal, he took great pleasure, in September 2017, in being commended for his work by the national lead on the Stamp Cancellation Project.

103. The Claimant described Mr Colclough's letters between 15th December 2017 and 15th January 2018 as "*demoralising and push me faster on a downwards spiral heading for the social scrap heap"*

104. The Claimant was unfit for work during December 2017 and on 22nd January 2018 was signed off for a further month with work related stress.

105. He described feeling *"helpless and hopeless"* and having *"no more control of my financial destiny".* Christmas 2017 he avoided phone calls from friends as he could not afford to meet people or celebrate Christmas in any way.

106. The Claimant describes the experience of being dismissed from his managerial job and finding himself homeless and credit blacklisted as *"falling from grace"* and having his reputation adversely affected.

107. The Claimant has remained homeless and without a fixed home address since Spring 2018. He has had a number of county court judgments that he is unable to settle. He has not been able to register for

social security benefits (as he has no fixed address). He has relied on friends for a sofa to sleep on and for money. He has spent periods living with his mother in India. He clearly described the distress he experiences, sleeping on friends' sofas, feeling awkward about using the toilet in the night, not wanting to get them in trouble with their landlord. He has also described the shame he feels, returning to India relying upon his mother to support him.

108. In addition to the pain he experienced in his neck and shoulders in November 2017, the Claimant has subsequently experienced stomach cramps and IBS, which he says stems from the stress he experiences as a result of the discriminatory acts – these conditions still, to this day, have an impact on his travelling, socialising and everyday activities.

109. The acts of discrimination have left the Claimant with difficulty sleeping, difficulty concentrating, intermittent headaches and has affected his persona. He describes ruminating about the way he has been treated by Royal Mail and admits he *"badly needs counselling*". He explained he was once regarded as a man of substance and high influence in his religious community – he now feels ostracised from the local, national and international Tamil community. Previously he had led and organised events such as Diwali celebrations in the Millennium Centre – his financial situation has meant he cannot put down deposits to arrange events and he is too embarrassed to participate in events that used to give him great pleasure and pride.

The Claimant's efforts to mitigate his loss

110. Between March 2018 and July 2018 the Claimant applied for 25 different positions. These were mainly in the South Wales / Bristol region and ranged from graduate posts and operations management type posts to security baggage handler and support worker. The Claimant was invited to attend an interview in April 2018 but felt unable to do so as the friend that he was living with was anxious about the Claimant using his address – the friend asked the Claimant not to use his address as the friend was worried it would create trouble with their landlord.

111. By April 2020 the Claimant was living with his mother in a rural part of India. The Claimant explained there are no big cities or reasonably sized employers near his mother's home so the Claimant had been unable to find employment in India. During the preliminary hearing in April 2020 it was apparent that the Claimant was having difficulty remaining in contact with others – the Claimant did not have a mobile phone and was dependent on receiving messages via Mr Khan.

112. Unfortunately at the date of the remedy hearing, the Claimant remained homeless and without a fixed address. He had not been able to find any other source of income.

Findings of fact in relation to covert recordings and the Claimant's relationship with Mr Addison

113. The Claimant covertly recorded five conversations with managers between 25th October 2017 and 13th December 2017.

114. During the remedy hearing, at the request of the Respondent, the Tribunal considered the 2018 Judgment of an Employment Tribunal (chaired by Acting Regional Employment Judge Davies) in Mr Addison and Mr Khan's claim against the Respondent. The Claimant, Mr Addison and Mr Khan had all appeared as witnesses in that case.

115. In Autumn 2017, Mr Addison was employed as an OPG at Royal Mail's Cardiff Mail Centre and was also covertly recording meetings with managers.

116. In Autumn 2017, Mr Khan was also employed as an OPG at Royal Mail's Cardiff Mail Centre; he continues to be employed by the Respondent at the Cardiff Mail Centre. Mr Khan presented claims of indirect religious discrimination, disability discrimination by association, harassment and victimisation.

117. Mr Addison had raised concerns about the disabled toilet situation (amongst other complaints including various allegations of failure to make adjustments for Mr Addison's disabilities). In November 2017, Mr Addison telephoned his employer and asserted he was exercising his right to remain away from the workplace on grounds of health and safety, referring to the disabled toilet situation.

118. On 28th December 2017, Mr Colclough took the decision to dismiss Mr Addison.

The Law - Remedies under the Equality Act 2010

119. s124 and s119 Equality Act 2010, enable an employment Tribunal to order the Respondent to pay the Claimant compensation (ie any remedy that a High Court could grant in tort, including compensation for injured feelings); and enable an employment Tribunal to make appropriate recommendations.

120. It is well established that compensation is based on tortious principles. The aim is to put the Claimant in the position he would have been in if the discrimination had not occurred. (*see for instance, Abbey National v Chagger* [2010] *ICR 397).* The award should compensate the Claimant for his loss caused by the discrimination; it is not to punish the Respondent.

121. In *Software 2000 Ltd v Andrews* [2007] ICR 825, Elias J, President explained *"(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the*

dismissal (2) if the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment including any evidence from the employee himself. (3) However there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely is so unreliable that the Tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. (4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation even if there are limits to the extent to which it can confidently predict what might have been and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence…"

122. An Injury to Feelings award attempts to provide compensation for *"subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on"* caused by the discriminatory acts (per Lord Justice Mummery in *Vento v Chief Constable of West Yorkshire Police* (No.2) [2003] IRLR 102, CA)

123. In *Armitage, Marsden and H M Prison Service v Johnson* [1997] IRLR 162, EAT, Mrs Justice Smith gave the following oft-cited guidance:

"(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."

124. The starting point, when considering the amount to award for injury to feelings is the guidance given by Lord Justice Mummery in Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102. In Da'Bell v NSPCC [2010] IRLR 19, EAT, Judge McMullen QC confirmed the figures adopted in Vento should be adjusted to reflect inflation. The Presidential Guidance dated 5th September 2017, further adjusted the Vento figures to reflect the Court of Appeal decisions in Simmons v Castle [2012] EWCA Civ 1039 and De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879.

125. The Tribunal is aware of awards made in comparable injury to feelings cases and is also aware of amounts recommended in the Judicial Studies Board Guidelines for personal injury awards. However, the Tribunal are also mindful of EAT guidance that *"a comparative exercise has to be treated with some caution",* as the amount of injury to feelings will depend on the particular facts of each case.

126. Turning to aggravated damages, these can be awarded where an employment Tribunal is satisfied the Respondent has *"behaved in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination.'* (see Alexander v Home Office [1988] IRLR 190, 193, May LJ)

127. The Law Commission Report 247, on Aggravated, Exemplary and Restitutionary Damages, attempted to define aggravated damages:

"*the best view, in accordance with Lord Devlin's authoritative analysis in Rookes v Barnard [1964] AC 1129 , appears to be that they are damages awarded for a tort as compensation for the plaintiff's mental distress, where the manner in which the defendant has committed the tort, or his motives in so doing, or his conduct subsequent to the tort, has upset or outraged the plaintiff. Such conduct or motive aggravates the injury done to the plaintiff, and therefore warrants a greater or additional compensatory sum."*

128. In *Commissioner of Police of the Metropolis v Mr H Shaw* UKEAT 0125 /11/ZT, EAT, Mr Justice Underhill, emphasised that aggravated damages are compensatory; they should not be used to punish conduct. Mr Justice Underhill explained the features that can attract an award of aggravated damages can be classified under 3 heads:

128.1.the manner in which the defendant has committed the tort;
128.2.the motive for it; and
128.3.the defendant's conduct subsequent to the tort, but in relation to it.

129. The features identified affect the award of compensation because they aggravate the distress caused by the actual wrongful act. Employment

Tribunals should ask *"what additional distress was caused to this particular Claimant, in the particular circumstances of this case, by the aggravating feature(s) in question?"*

130. Aggravated damages are an aspect of injury to feelings and may be expressed as a separate award or as an element of the injury to feelings award.

"*The ultimate question must be not so much whether the respective awards [injury to feelings and aggravated damages] considered in isolation are acceptable but whether the overall award is proportionate to the totality of the suffering caused to the Claimant." Commissioner of Police of the Metropolis v Mr H Shaw* UKEAT 0125 /11/ZT, EAT, Mr Justice Underhill.

<u>Conclusions</u>

Recommendations

131. The Tribunal decline to recommend the Respondent refer themselves to the Equality and Human Rights Commission. The Tribunal is confident that by working with the Communication Workers Union the Respondent can make changes to its existing policies and roll out refresher training to ensure policies are robust, effective and applied appropriately.

132. The Tribunal were concerned that the Respondent's "triage system" for grievances and complaints does not seem to work effectively in practice. The Claimant, a victim of discrimination has "slipped through the net" and not received the welfare support he needed - the Claimant's August 2017 complaint was not discussed with the Claimant in August 2017. In September and October 2017, the Claimant was repeatedly advised that, as he was a manager this was a conduct matter rather than a bullying and harassment situation and he was inadvertently sent documents that suggested he was the subject of a conduct investigation rather than being the victim of discriminatory incidents– If the Claimant had received appropriate support in August 2017, he would still be working for the Respondent and the Respondent would still have a loyal, dedicated and high achieving manager.

133. At the remedy hearing, the Claimant was concerned about friends that continue to work at Royal Mail. The Tribunal is satisfied that making recommendations that improve the effectiveness of the Respondent's policies will reduce the anxiety that the Claimant feels about his friends continuing to work at Royal Mail; it will reduce the ongoing anxiety the Claimant experiences as a result of the acts of discrimination.

134. The Tribunal were also concerned that, whilst in his statement Mr Trunks apologises for Mr Day and Mr Brown's conduct, there has, to date, been no apology for any of Mr Colclough's conduct including the unlawful decision to dismiss the Claimant. As there has been no written apology for the decision to dismiss the Claimant, the Claimant is at a disadvantage in applying for new employment.

135. The Tribunal finds that the following recommendations would obviate or reduce the adverse effects of the discrimination on the Claimant:

136. On or before **28th January 2021**, the Respondent's Chief Executive Officer or Chairman, or equivalent, should read the Liability and Remedy Judgments in this case to:

136.1. identify the failings in policies and procedures;
136.2. consider the lessons that can be learnt from the Claimant's experience as recorded in these judgments; and
136.3. provide the Claimant with a written apology, which the Claimant can show to any prospective employer if they query the circumstances of his departure. This apology should include an acknowledgment that having read the judgments, the Respondent accepts the decision to dismiss the Claimant was an act of victimisation and unlawful discrimination.

136.4. On or before **28th January 2021**, the Respondent should ensure that systems are in place to make sure that all future references provided on behalf of the Claimant, make no reference to dismissal. Mr Peacock has explained the Respondent can simply omit the reason for employment ceasing in all future references.

136.5. On or before **31st March 2021**, the Respondent should introduce an "**Independent first point of contact ("IFPC")"** into their bullying and harassment, conduct, grievance and equality procedures. Whilst in reality a number of staff may perform the function of IFPC, the IFPC assigned to each complaint / concern / grievance should be based at head office or outside the employee's place of work. Policies should provide a phone number and email address for the IFPC. The intention behind the IFPC is that they support an employee that is going through a difficult situation to choose how to take a complaint / concern / grievance forward. They take a proactive approach in supporting that individual. The IFPC will endeavour to resolve problems as quickly as possible and as informally as possible, albeit sometimes there will be circumstances that require a more formal approach. In the Claimant's case, an IFPC would have been able to discuss with the Claimant whether his complaint should be

a) handled informally eg the IFPC could speak to a line manager on behalf of the Claimant to explain the Claimant's situation – if this had happened in August 2017, the Claimant would have felt supported;
b) progressed as a bullying and harassment complaint;
c) progressed as a conduct matter; or
d) simply noted eg the IFPC is acting as a sounding board, to support an employee in a difficult situation.

136.6. On or before **31st March 2021**, the Respondent should create a single page guidance document (this could be a flow chart) that makes

it clear to all staff, that a complaint / concern / grievance can be progressed in a number of ways (eg it could be progressed as a bullying and harassment complaint or as a conduct matter or informally). It is crucial that there is no assumption that if the victim is a manager, the complaint should be progressed via the conduct policy. In each case, the appropriate route for a complaint should be discussed by the IFPC and complainant before progressing along any particular route.

136.7. The Respondent should approach the Communications Workers Union and seek their assistance in reviewing the Respondent's training programme covering the Equality Act 2010, diversity awareness and bullying and harassment procedures, with a view to implementing effective training throughout the Respondent's organisation, and in particular ensuring this filters down to individual postal workers. The Respondent should write to the Tribunal on or before **31st December 2021,** explaining what further training has been provided, to which level of employees and the Respondent's proposals for refreshing this training going forward.

136.8. On or before **31st December 2021**, the Respondent should write to the Employment Tribunal confirming that each of these recommendations has been complied with, within the specified time scale.

Injury to Feelings (including an award for aggravated damages)

137. The Tribunal are tasked with fully compensating the Claimant for the loss that has been caused by the unlawfully discriminatory acts.

138. In considering whether to make an award for aggravated damages, the Tribunal considered the 3 heads identified by Mr Justice Underhill in *Commissioner of Police of the Metropolis v Mr H Shaw* (the manner, the motive and the defendant's conduct subsequent to the tort, but in relation to it) and identified the following aggravating features and additional upset / distress experienced by the Claimant as a result of these aggravating features:

138.1. The Respondent's response following the discriminatory act by Mr Brown (conduct subsequent to the tort). The Claimant was particularly upset that his manager had witnessed the claimant being called a "sly dog" and had seen how offended he was and yet had not taken further action to support the claimant or further action to reprimand Mr Brown. He was so upset about this that he raised this in his meeting with Mr Colclough in December 2017. He felt aggrieved that when Mr Brown was disrespectful to Mr Colclough action had been taken and yet when Mr Brown was disrespectful to the Claimant, Mr John had not taken further action.

138.2. The Respondent's response following the discriminatory act by Mr Day (conduct subsequent to the tort). In August 2017, after the

incident with Mr Day, the Claimant was so distressed he had spoken to Mr Colclough that evening and had sent a letter to the Acting Site Manager, Mr Press. The Respondent failed to support the Claimant – he did not receive any response in August 2017 which added to his anxiety about the situation. He started taking antidepressants in August 2017.

138.3.Mr Colclough's letter of 15th December 2017 with it's sudden change of tone; pressurising an employee that was already mentally unwell and off work with work-related stress to attend a meeting in the workplace (the manner); this caused the Claimant additional distress as demonstrated by the fact that he felt at his lowest ebb, experienced "bad thoughts" and sleepless nights;

138.4.In response to Mr Colclough's letter of 15th December 2017, the Claimant had replied making a further request for help *"…..My doctor has prescribed medication and recommendations for my wellbeing. Please be cooperative in the spirit and interests of natural justice, fairness and equality. I am only human."* deliberately copying in the Respondent's Chief Executive Officer, the Respondent's solicitor, the Respondent's HR department and Ms Rich, also providing them with a copy of Mr Colclough's letter of 15th December 2017. The only response the Claimant received to this correspondence was again from Mr Colclough, repeating the threat to stop sick pay (conduct subsequent to the tort). This caused further distress for the Claimant as he felt he had asked for help from those at the very top of the Royal Mail and this had fallen on deaf ears.

138.5.Threatening to stop the Claimant's sick pay in the run up to Christmas and stopping the Claimant's sick pay shortly after Christmas (the manner); whilst an employee is likely to experience a degree of anxiety at having their sick pay stopped and concern about how to pay bills, taking these actions in the run up to and shortly after Christmas caused the Claimant a greater level of anxiety and distress. He was unable to afford the usual Christmas expenses and avoided contact with friends as he was financially embarrassed.

138.6.The culminative effect of the series of discriminatory acts by Mr Colclough – the threat to stop sick pay, stopping sick pay and the decision to dismiss (conduct subsequent to the discriminatory act). The Claimant described feeling that Mr Colclough had embarked on a course of conduct *"which ultimately destroyed me rather than support and protect"*. He felt Mr Colclough was pushing him faster *"on a downward spiral heading for the social scrap heap."*

139. The Tribunal reminded itself that aggravated damages must be compensatory in nature; in relation to these aggravating features the Tribunal must ask "what additional distress did they cause to this particular Claimant?" The Tribunal accepts the Claimant's evidence that these aggravating features caused him additional distress and hurt and

considerable additional anxiety. The award for aggravated damages of £7,000 is compensating him for this additional distress and anguish.

140. Turning to consider the overall Injury to Feelings award, the Tribunal considered whether it was possible to separate the Injury to Feelings caused by each of the acts of discrimination and concluded it would be artificial to do so. Instead, the Tribunal has had in mind all of the acts of discrimination and the impact that they collectively had upon the Claimant throughout the period. In particular, the Tribunal notes that the Claimant was distressed not by a single individual's actions, but by three people's discriminatory actions. Whilst we note that two of these were employees at a lower grade than the Claimant, this meant the Claimant kept being told that his complaint needed to proceed as a conduct matter rather than the Claimant immediately being offered support via the Bullying and Harassment procedure.

141. We note that the Claimant had taken great pleasure in his friendships at work and was proud to be performing well as a manager. He had worked for the Respondent for over 10 years and was doing a job that he loved and intended to do until his retirement. From the first act of discrimination, this happiness was gradually eroded and replaced by feelings of anxiety and distress. The Claimant has experienced anguish, anxiety and depression which have impacted on his ability to sleep, eat and socialise. At times the Claimant's anxiety has manifested itself physically, affecting his neck and shoulders and his stomach, giving the Claimant symptoms of IBS. The Claimant was honoured to serve his community and describes himself as "having fallen from grace". He experiences ongoing distress and shame (both in the UK and in India) at now being homeless, unemployed, credit blacklisted and unable to participate in community activities. Having regard to the negative impact these actions had and continue to have on the Claimant (as set out in paragraphs 24 to 112 above) and the extent to which the interim payment and recommendations are able to reduce his ongoing distress, we are satisfied that to fully compensate the Claimant's injury to feelings it is necessary to make an award in the Vento top-band. We are awarding an overall Injury to Feelings award of £27,000 (of which £7,000 is for aggravated damages, as previously explained). We are satisfied that this overall award is proportionate to the totality of the suffering caused to the Claimant.

Interest on the Injury to Feelings award

142. The Tribunal has a discretion to award interest on the injury to feelings award at up to 8% per annum from the act of discrimination. As there are a number of acts of discrimination, the Tribunal has decided to award interest from, 21st June 2017, as the Claimant had experienced the first act of discrimination on this date. Reg 6 Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 explains this should be calculated up to the day of calculation. The Tribunal has calculated interest up to 22nd December 2020. This amounts to 1,280 days.

Financial Loss – Loss of Earnings

143. The Tribunal has carefully considered the Respondent's submissions that the Claimant would have ceased employment by 23rd January 2018 in any event by November 2017.

144. The difficulty that the Tribunal has had is that we have to look at what would have been the position without the acts of discrimination and the first act of discrimination was in June 2017 and predates each of the situations that the Respondent relies upon.

145. The tribunal accept that by October / November 2017, the Claimant's trust in his managers had been damaged, hence he was covertly recording meetings and asking for his grievance to be investigated outside the Cardiff Mail Centre. However, this was largely as a result of (1) his manager not taking action having witnessed the Claimant being subjected to verbal discriminatory abuse by Mr Brown and (2) his employer not taking action despite his obvious distress after the incident with Mr Day in August 2017, even though the Claimant had made two complaints about this in August 2017 (a verbal complaint to Mr Colclough) and a written complaint to Mr Press.

146. If the Respondent had responded to the Claimant's "cries for help" in August 2017, following those two acts of discrimination, we consider it is highly unlikely that the Claimant would have felt the need to record managers in Autumn 2017; his trust in his employer would have remained high. The Claimant had worked for the Respondent for over 10 years, he had been promoted with the Respondent, he received praise from a manager outside the Cardiff site in September 2017 and had a good appraisal even in November 2017; we are confident without the acts of discrimination and mishandling of the August "cries for help" the Claimant (1) would not have undertaken covert recordings and (2) he would have continued to want to work for the Respondent until retirement.

147. Whilst the Claimant and Mr Addison had shared concerns about the lack of ground floor disabled toilets, the Claimant was not acting in unison with Mr Addison as has been suggested by the Respondent. Mr Addison refused to return to work in November 2017 verbally stating he was exercising his right to stay absent on health and safety grounds. The Claimant was taken ill in the workplace and transported to hospital on 27th November 2017 and subsequently signed unfit for work due to work related stress for two months. This was his reason for being away from work; he was mentally unwell. On 13th December 2017 he had met Mr Colclough, as requested, and discussed correspondence which suggested the Claimant may be having suicidal thoughts. That meeting was left with an arrangement that Mr Colclough would phone the Claimant each Friday to check on his wellbeing. If Mr Colclough had stuck to that arrangement, instead of writing his letter of 15th December 2017, which the tribunal found to be an act of victimisation and unlawful discrimination, the tribunal have no doubt that the Claimant would have continued to speak to Mr Colclough on Fridays as arranged. The Claimant described the letter of

15th December 2017 as being *"a 90 degree change in attitude" which caused his* stomach to churn as he realised he had *"no support, no duty of care"* from Mr Colclough. The Claimant reached out to those more senior in Royal Mail by copying them in to his 16th December 2017 letter asking for support. When he received a further theat to stop his sick pay the Claimant lost all confidence in his employer and wrote his letter of 28th December 2017 stating he was exercising his right to stay absent from work per s100 and s44 Employment Rights Act 1996. We are satisfied that if Mr Colclough had not committed the act of victimisation, the Claimant would not have written his letter of 28th December 2017; he would have stayed off work whilst medically unfit and at some point returned to work.

148. The tribunal accepts that by January 2018 the Claimant had withdrawn from contact with the employer and he chose not to exercise his right to appeal the decision to dismiss him. As explained in paragraph 54, this was prompted by the act of victimisation in December 2017 and subsequent conduct of the Respondent. We are satisfied that without the discriminatory act, the Claimant would have continued to engage with his employer and continued in employment. On 27th November 2017, in his "Half Year Indicative Appraisal", the Claimant had been assessed as overall having "high" achievements in customer goals and financial goals, and overall having "good" achievements in people goals and efficiency goals. His manager commented "I have never had any behavioural issues with [the Claimant] who always acts professionally and with the up most respect for himself and our team." He also comments "Overall a strong 6 months for [the Claimant] – working within his own role and that of the WSM (Covering Long Term Leave)…In the next 6 months [the Claimant] will be in a position to really push again for the marking he deserves. I believe that [the Claimant] will not sit back on this challenge and will strive for even further success. Looking forward to the next 6 months". The Claimant regarded his colleagues at Royal Mail as his family; he was a dedicated and enthusiastic team leader embracing new initiatives at Royal Mail. Without the acts of victimisation, we are satisfied the Claimant would have returned to work at the end of his sick leave and continued in employment with the Respondent until his retirement.

148. In awarding compensation for loss of earnings, we have assumed the Claimant would have continued in his role as Work Area Manager.

Financial Loss – sick pay and yearly bonus

149. The Respondent accepts the Claimant is owed a shortfall in sick pay of £1,145.81 (gross) £1,082.64 (net); the Tribunal accept this is the correct calculation of the Claimant's sick pay shortfall.

150. The Tribunal accepts the Claimant would have received a bonus of £3,509 (gross) £2,680.77 (net) for the year 2017/18 and for each year thereafter, as the bonus is awarded if a manager is assessed as attaining a "good" overall.

Mitigation

151. The Respondent asserts that, the Claimant failed to mitigate his loss as evidence of job applications only covers the period Spring and Summer 2018. The Tribunal accepts that practically the Claimant's efforts to find employment have been hindered by him not having a permanent address, having to rely on various friends for a couch to sleep on and money and at times having to live with his mother in a remote part of India and not having a stable means of communicating with potential employers. The Claimant was placed in an impossible situation as he does not have family in the UK and his friends were unable to offer him a fixed address for any length of time. We could see that the Claimant did apply for a variety of suitable jobs in 2018 but as his financial situation worsened and when he realised he was not able to attend an interview as it would put his friend's accommodation at risk, he appears to have been trapped in a difficult situation, in circumstances in which, practically, it was not possible for him to find suitable alternative employment. In these very challenging circumstances, the Tribunal is satisfied that the Claimant has made reasonable attempts to mitigate his loss.

152. The Claimant contends he is unlikely to be able to find comparable work for 5 years as, with his county court judgments, it will take him a period of time to get a fixed address in the UK, and then it is likely to take some time to be successful in a job application.

153. Given the global pandemic and the impact that has had on many employment sectors and the current uncertainties surrounding Brexit (which may have an impact on industries that might have been recruiting candidates like the Claimant, with experience in operations) the Tribunal are less confident that the Claimant will be able to find comparable employment quickly.

154. The Tribunal notes that the Respondent's proposed written apology will give some comfort to future employers concerned about the circumstances in which the Claimant left his last employer.

155. A further glimmer of hope for the Claimant is that the UK government will be making lots of retraining schemes available, so the Claimant may be able to retrain in the months ahead. The Claimant is highly intelligent; he is already a Maths graduate and has a good propensity to learn new operations. As he did with Royal Mail, we are confident that when he is able to get employment with a new employer, he has the ability to progress well. We note it took 6 years (from starting employment) for the Claimant to progress to a management position within Royal Mail.

156. We predict the most likely outcome is that the Claimant will succeed in finding employment within the next 2 years on a salary of circa £20,000 and then it will take him a further 6 years to progress with his new employer to be on a salary of £32,000 (as he was with Royal Mail).

Financial Loss – Pension Losses

157. The Tribunal has calculated the pension loss by calculating the value of the employer contributions that would have been made. The employer was paying contributions of 13.6% on the Claimant's pensionable pay of £32,182.60 ie it was paying £4,376.83 into the Claimant's pension each year.

Loss of statutory rights.

158. The Tribunal has awarded £600 compensation for the loss of statutory rights.

Costs associated with being blacklisted / bad credit history having county court judgments and lack of duty of care

159. The Tribunal does not consider it has jurisdiction to make any award in this regard.

Cost preparation

160. The Tribunal accepts that these are litigation costs rather than being mitigation costs. The usual rule in the Tribunal is that each party bears their own costs / costs of preparing for the case. There has not been any finding that the Respondent has acted unreasonably such that a preparation time order should be made. The Tribunal declines to make any award in this regard.

Failure to Follow the ACAS Code

161. The Claimant sought a 25% uplift for failure to follow the ACAS Code of Practice. The Tribunal accepts that the Respondent was required to follow the ACAS Code of Practice for this dismissal, however, Mr Colclough did attempt to comply with the ACAS Code of Practice, in that he invited the Claimant to meetings and advised the Claimant of his right to appeal the decision to dismiss him. The Tribunal declines to make an uplift for failure to follow the ACAS Code.

Calculations

Claimant's salary as Work Area Manager:
Gross pay: £32,802 per annum; £2,733.50 per month; £630.81 per week.
Net pay: £1,869.02 per month; £431.31 per week.

The Claimant's Effective Date of Termination: 23rd January 2018
Claimant's age at EDT: 38 years old

Future Employment with gross salary of £20,000 per annum (from 22nd December 2022):
Net pay: £1,436.83 per month; £331.58 per week.

Compensatory Award (immediate loss)

Sick Pay (net of tax and national insurance)

£1,082.64

Loss of Earnings EDT to Date of Calculation (23rd January 2018 to 22nd December 2020)

1st July 2018 to 2nd Dec 2019: 152 weeks x £431.31 net pay	£65,559.12
Less *Payment received in lieu of notice*	*(£7,589.76)*

Managerial Bonuses for years ending April 2018, April 2019 and April 2020

£1,082.64 (net bonus) x 3	3,247.92
	£62,299.92

plus Interest

(calculated at 8% per annum from the midpoint between
the date of the EDT (the final act of discrimination) and the calculation date)

£62,299.92 x 8% per annum x 532 days	£7,264.34
plus Loss of Statutory Rights	600.00
Total Compensatory Award (immediate loss)	**£70,164.26**

Compensatory Award (future loss)

Loss of Earnings

(between Date of Calculation and 22nd December 2028 when the Claimant is likely to be on an equivalent salary)

22nd December 2020 to 22nd December 2022

104 weeks x £431.31 net pay £44,856.24

Managerial Bonus for year ending April 21 and April 22

£1,082.64 (net bonus) x 2 £2,165.28

22nd December 2022 to 22nd December 2028

312 weeks x £99.73
(the difference between £431.31 and £331.58 weekly net pay) £31,115.76

Managerial Bonus for years ending April 23, 24, 25, 26, 27 and 28

£1,082.64 (net bonus) x 6 6,495.84

Loss of Pension contributions

The Claimant will have 5 years without any employer making contributions (2018 to 2022 inclusive) and 6 years with reduced employer contributions (3% employer contributions are most likely scenario)

5 x £4,376.83 £21,884.15

6 x £3,776.83 £22,660.98

(£4,376.83 - £600 (3% contribution on £20,000 salary))

Total Compensatory Award (future loss) **£129,178.25**

Total Compensatory Award (immediate and future losses) **£199,342.51**

Injury to Feelings Award
(including aggravated damages)

Injury to Feelings Award	£27,000
plus Interest on Injury to Feelings Award	
£27,000 x 8% per annum x 1,280 days	£7,574.80
Less Interim Payment (and interest on that amount)	
£4,500 plus interest of £255.45 (250 days at 8% per annum)	*(£4,755.45)*
Total Award **(Compensatory Award and Injury to Feelings Award)**	**£229,161.86**

The Respondent will account for any tax and National Insurance due on that net Total Award

EMPLOYMENT JUDGE HOWDEN-EVANS

Dated: 22nd December 2020

Judgment posted to the parties on

23 December 2020

....

For Secretary of the Tribunals