EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr O Iwuchukwu	**AND**	**South Tyneside and Sunderland NHS Foundation Trust**

Heard at: Newcastle upon Tyne **On: 16 November 2020**

Deliberations in Chambers: 17 November 2020

Before: Employment Judge A M Buchanan

Non-Legal members: Mrs A Tarn and Mrs S Mee (by cloud video platform)

Representation:

Claimant: Mr S Rahman of Counsel

Respondent: Ms C Millns of Counsel

JUDGMENT ON REMEDY - STAGE II

It is the unanimous judgment of the Tribunal that:

1. The respondent is ordered to pay to the claimant £29986.35 compensation for unfair dismissal.

2. The respondent is ordered to pay to the claimant £37736.00 compensation for race discrimination and victimisation.

3.The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply to the award of compensation for unfair dismissal.

4. The total amount due from the respondent to the claimant pursuant to this Judgment is £67722.35.

5. When making payment the respondent is entitled to set-off the sum of £4218.00 making the amount now due to the claimant £63504.35 which sum is payable forthwith.

REASONS

Preliminary matters

1. At this hearing we had before us an agreed bundle of documents contained in three lever arch files of documents. Any page number in this Judgment applies to that agreed bundle. We were greatly assisted by the method used to divide and paginate the bundle. The Employment Judge and the parties were present at the Tribunal, but the non-legal members attended by cloud video platform.

2. This matter came before the Tribunal on 16 November 2020 following our Judgment on Remedy - Stage I promulgated on 22 December 2019 ("the First Remedy Judgment": pages A93-A116). That Judgment followed our Judgment on Liability ("the Liability Judgment": pages A1-A92) promulgated on 2 November 2016. The subsequent history of this litigation is summarised at paragraphs 1-10 of the First Remedy Judgment and is not rehearsed in this Judgment.

3. The hearing with the parties finished late in the day on 16 November 2020 and the parties were released and Judgment was reserved. The Tribunal deliberated on 17 November 2020. This judgment is issued in writing with full reasons in order to comply with the provisions of Rule 62(2) of Schedule I of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

4. The preparation for this hearing was protracted and difficult and required judicial intervention on numerous occasions. Telephone private preliminary hearings took place on 12 February 2020 (pages A117-A122), 15 April 2020 (pages A123-A131) and 3 June 2020 (pages A133-A.144). The resulting orders required (amongst many other matters) full disclosure of all documents relevant to the calculation of remedy and in particular pension information (Pages A120-A121 and A128- A129). The Orders also made provision for the appointment of one joint expert to opine on the matters set out in the joint letter of instruction contained in the Appendix to the Orders of 3 June 2020 (pages A139-A143). Several other referrals were made which required judicial intervention by letter dated 1 July 2020 (pages A145-A146), 5 October 2020 (pages A200-A201), 5 October 2020 (page A202-A203) and a further Order to Disclose directed to the claimant dated 3 October 2020 (page A204-A205). That last mentioned order noted that the Tribunal would need to see (amongst other matters) information on *"any increases in salary and/or benefits which the claimant would have received had he not been dismissed by the respondent and the parties must ensure that information about such increases is available".* The respondent made further applications including an application for an "unless order" on 21 October 2020 which was refused by letter dated 27 October 2020 (pages A228-A229). In the event, that above-mentioned information was not before the Tribunal. That level of judicial intervention was necessary because the parties were unable to agree between themselves matters which can usually be agreed without difficulty.

5. The hearing was listed on the basis that the claimant would give evidence but that no witness evidence was likely to be called by the respondent. Orders for the

preparation and exchange of witness statements were made. It came as a considerable surprise to the Tribunal to be advised at the outset of this hearing that the claimant would not be giving evidence and that there was no witness statement from the claimant.

6. The Tribunal was advised that the claimant had attended the Tribunal building but could not cope with the trauma of entering the Tribunal room or of giving evidence and was not in a fit state so to do. We received no medical evidence to support that position. The Tribunal was concerned and raised the question of an adjournment of the hearing. We were advised that the claimant did not wish to make any application for an adjournment and specifically did not want one. The respondent also did not wish to make application for any adjournment.

7. The respondent had made application shortly before the hearing for an unless order in respect of an alleged failure by the claimant to make full disclosure. That application was refused on the basis that the matter could be raised again at the outset of this hearing. The claimant had denied that there had been any failure to disclose. In the event the respondent chose not to raise this issue and did not continue the application for a strike out.

8. The Tribunal considered whether it was right to continue with the hearing in the absence of the claimant. We noted again the history of this matter and that two days had been set aside for this hearing and that, if the matter was adjourned, it would be many months before it could be re-listed. We noted that neither party wished to see the matter adjourned and wished to proceed. In those circumstances, we decided to press ahead with the hearing. We made it clear that it was for the claimant to prove his losses which this hearing was convened to calculate. We indicated that we would do the best we could with the information before us if there were any gaps in disclosure or in the information generally. That approach was approved of by both counsel before us.

9. We had before us a joint expert report ("the Report") from Professor Michael Trimble (Professor of Behavioural Neurology and Consultant Physician) dated 4 August 2020 (pages H2-H24) to which detailed reference is made below.

10. There are no other civil proceedings ongoing in the courts between these parties relevant to the issues we had to deal with.

11. We were made aware of proceedings in respect of the claimant ongoing in the General Medical Council ("GMC") and we refer below in particular to a case review decision issued by the GMC on 16 April 2020 (pages D69-D79).

12. We were made aware that there is an appeal against the First Remedy Judgment lodged by the claimant ongoing between the parties in the Employment Appeal Tribunal ("EAT"). We enquired whether there had been any direction issued by the EAT relevant to this hearing and we were advised that there had not. We indicated that we would direct that a copy of this decision be sent to the EAT in case it is of assistance in the hearing of the appeal which we were advised is set for early February 2021.

Issues

13. The issues for the Tribunal were encapsulated in the schedule of loss provided by the claimant and responded to by the respondent. There had been many iterations of those documents but the latest iteration and the one we considered at the hearing and in our deliberations was that contained at pages A148-A152 (claimant) and pages A233-A250 (respondent). In point of fact, the documents at A233-A250 contained both the claimant's most recent schedule of loss and the respondent's comments on it and it was that document to which the Tribunal made particular reference. The issues for the Tribunal were briefly:

Compensation for unfair dismissal pursuant to the Employment Rights Act 1996 ("the 1996 Act")

13.1 How should the basic award for unfair dismissal be calculated: section 119 of the 1996 Act.
13.2 Should there be an award for loss of statutory rights as part of the compensatory award for unfair dismissal and if so, in what amount? Section 123 of the 1996 Act.
13.3 What is the amount the claimant has suffered in respect of loss of earnings to 16 November 2020?
13.4 How much has the claimant received from other employment since his dismissal?
13.5 How much should be awarded for past loss of earnings?
13.6 Should there be an award for future loss of earnings? If so, how should any such award be calculated?
13.7 Should any award be made to compensate the claimant for his loss of income from private practice since his dismissal?
13.8 Should there be any award for the costs incurred by the claimant in travel from Newcastle to Cornwall and in renting property in Cornwall when working in Cornwall after his dismissal?
13.9 Has the claimant suffered a loss of pension by reason of his dismissal?
13.10 If so, how should such loss be calculated?
13.11 Should the claimant be compensated for the loss of an excellence award to which he might have been entitled had he remained in the employment of the respondent?

Compensation for discrimination/victimisation: Equality Act 2010 ("the 2010 Act")

13.12 Should the claimant be awarded a sum for injury to feelings? If so, in what amount|?
13.13 Should the claimant be awarded damages for personal injury by reason of injury to his mental health? If so, in what amount.
13.14 Should there be an award for aggravated damages? If so, in what amount?

Issue added in submissions on behalf of the claimant

13.15 Should there be an award for loss of earnings and/or handicap in the labour market under the 2010 Act?

General

13.16 Should any award be increased/decreased by reason of the provisions of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") for failure to comply with the ACAS Code of Practice on Discipline and Grievance Procedures 2009/2015? If so, which elements of any award should be adjusted and to what extent?

13.17 Is grossing up of any award appropriate?

Submissions

Claimant

14. For the claimant Mr Rahman made written and oral submissions which are briefly summarised:

14.1 The opportunity should be taken in light of the Report to review the findings of the Tribunal at the first stage remedy hearing that no loss of earnings flows from the discrimination the claimant has suffered.

14.2 In light of the GMC investigations which has confirmed that the capability investigation of the respondent and his dismissal was deliberate and substantially unfair, the claimant asks the Tribunal to make an award for loss of earnings as set out in his schedule of loss in the amount of £161220 (page A151) or alternatively £78335 if the statutory cap is applied.

14.3 The claimant has not had any permanent employment since he was dismissed in 2015 and the respondent's counter schedule does not reflect the loss of a career. The current employment of the claimant is heading to a conclusion. The Tribunal has sufficient information in respect of the claimant's pension in order to make an assessment of loss. The claimant's earnings now are about one third of what they were. The complex calculation method is just about feasible but if not, the Tribunal should resort to the contribution method of calculation. It would be a crying shame if the claimant loses out. There is a chance that the claimant would have acquired an excellence award if his employment with the respondent had continued. The loss of the private practice income is because the claimant was made unattractive to private patients because of his dismissal. It is a stigma type approach. It is ridiculous that the claimant should be criticised for a failure to mitigate. He is unlikely to acquire another consultant post. The GMC has still restricted his practice.

14.4 In respect of an award for injury to feelings, the Tribunal was referred to its findings at paragraphs 7.110-7.119 and 11.48 - 11.49 of the Liability judgment. It has now been found by the GMC that information provided to it by the respondent did not represent the claimant's practice. Those matters were not investigated in the grievance process as they should have been and as a result the claimant has suffered significant psychiatric harm. Each individual complaint which was not dealt with appropriately which made up the grievances has to be considered as an individual act of discrimination or detriment and it is no answer to say the respondent in another review considered the complaints. The appropriate band for injury to

feelings is the upper band and the claimant contends he should receive an award of at least £42,000. The award should be calculated by reference to the present guidelines. The litigation has been run by the respondent in a confrontational and aggressive manner and the detriment is ongoing. It was all about demeaning the claimant. The award for injury to feelings should be considered in band 3 as the starting point.

14.5 The claimant suffers from epilepsy, anxiety, stress and depression as a result of the acts of race discrimination and victimisation and as a matter of law the claimant should be compensated for each of the injuries established. The Report should be considered together with all other medical evidence produced.

14.6 The Report confirms that the specific acts of race discrimination and victimisation found by the Tribunal caused the claimant's injuries. The respondent must take the claimant as he finds him and the so called "egg-shell skull rule" applies. In the law of tort, where an injury could be said to have more than one cause, a victim has to prove that the defendant materially contributed to the injury and once that is established it becomes immaterial even if there are some other causes. The respondent's concern as to whether the Report needs to set out the percentage rate of causation attributed to the acts of discrimination and victimisation is not correct and difficult to sustain looking at the relevant facts and the applicable law. The question put by the claimant to Professor Trimble was unambiguous as was his reply. The claimant is entitled to be fully compensated for his injuries. If the Tribunal adopts an approach to apportion the cause of the injury, then reasons must be given. Any compensation awarded must be just and equitable and that could be another approach adopted by the tribunal.

14.7 The Report indicates that even a single seizure happening every few months would be enough not only to prevent the claimant driving but also have limitations on his career as a surgeon. The claimant is presently on a zero-hours contract with Queen Elizabeth Hospital London and has been notified recently of an advertisement to recruit a permanent surgeon. Suffering from epilepsy, anxiety and depression, it is difficult to see how the claimant can return to permanent surgical work and he has suffered a permanent reduction in his earning capacity as well as an injury on the labour market. The schedule of loss does not reflect the loss of earnings and pension which will flow from the claimant's injury and so although the 52- week cap will apply to the loss of earnings in the unfair dismissal claim, it does not apply to the losses arising from the substantial injuries. There is no basis to reduce this aspect of the award for personal injury nor the injury to feelings award.

14.8 The claimant is not going to be able to give evidence at the hearing and will rely on the Report and the medical evidence produced. Before the restrictions to his practice imposed by the GMC, the claimant was an internationally renowned surgeon whose career has been damaged as a result of the personal injury sustained and he is entitled to damages that reflect this loss as part of the discrimination claim. As a result of the contents of the Report and his impending loss of employment, the claimant will seek an award for handicap in the labour market. Professor Trimble goes so far as to suggest that, at some point, the claimant may not be able to work at all. The cumulative award for pain suffering and loss of amenity should be in the region of £170,000.

14.9 There was a clear deliberate intention to disregard and ignore the contents of the respondent's grievance policy and there should be a 25% uplift for failure to comply with the Code.

14.10 The actions of the respondent have demonstrated clear high handedness and oppression in the way the respondent carried out acts of discrimination and victimisation against the claimant. The detriments flowing from the failure to investigate the grievances have put the claimant's professional life into complete ruin and it is appropriate to make an aggravated damages award. The respondent is a public body and should have known better than to act as it did.

14.11There is a substantial real risk that the claimant will lose his present job and will give evidence to that effect at the Tribunal *(this was said in written submission but altered orally).* The Tribunal must therefore assess and quantify on the basis of the factors that may affect his chances of getting another job at all or an equally paid job. The loss of earnings is very substantial. In addition, there is also the handicap in the labour market on future occasions when the claimant may be unemployed to consider. Even if the claimant's current rate of earnings is the same as his pre-accident rate, he may still have a claim for loss of future earning capacity. He is entitled to a lump sum as compensation for the losses likely to be suffered in the future by reason of increased difficulty in obtaining or retaining employment.

14.12 This was as bad a breach of the Code as it is possible to imagine. There should be a 25% uplift.

14.13 In addition to the authorities referred to at the end of the written submissions, the following authorities were submitted:
Prison Service -v- Johnson 1997 ICR 275
Reaney -v- University Hospital of North Staffordshire NHS Trust 2015 EWCA 1119
Leigh -v- London Ambulance NHS Trust 2014 EWHC 286
Smith -v- Leech Brain & Co Ltd 1962 2QB 405
Essa -v- Laing 2004 ICR 746

Respondent

15.1 Detailed written submissions were made in respect of the alleged failure of the claimant to make full disclosure of all relevant mitigation documentation. The initial submission made was that it was not just and equitable for the claimant to be given a compensatory award for unfair dismissal in respect of his alleged loss of earnings including alleged pension loss because of that failure. The fall-back submission was that, if the Tribunal went ahead to make a compensatory award on the basis of incomplete evidence of earnings, any doubt should be resolved in favour of the respondent.

15.2 The correct calculation of the basic award was £5195.50 taking account of the 25% reduction decided previously. Loss of statutory rights was denied or in the alternative should be no more than £300. Credit must be allowed for £2850 paid by the respondent pursuant to the now revoked Judgment of Employment Judge Garnon.

15.3 Consideration should be given as to whether the claimant could have found employment as a general surgeon if not a breast surgeon. The claimant found a position as a general surgeon in Cornwall (page A53). There is no shortage of roles available to the claimant (pages E1 -E283).

15.4 If the concerns of the respondent in respect of the claimant's performance were invalid (as the claimant has maintained throughout these proceedings) then he ought to have been able to address those apparent deficiencies and find work within six months of dismissal. Alternatively, if the concerns of the respondent were valid then the claimant acting reasonably would have taken steps to resolve those concerns with at the most 12 months from dismissal. Further, if the failure of the claimant to gain income at pre-dismissal level was caused by the restrictions placed on him by the GMC, then the losses are not attributable to the actions of the respondent but rather matters outside the control of the respondent.

15.5 The claimant should not be entitled to any future loss of earnings because he has clearly mitigated his losses as his current net weekly earnings are in the region of £1400-£1650. No evidence has been provided to substantiate the loss of earnings from private practice. In any event, such losses arise due to genuine concerns about the claimant's capability, which predated his dismissal, and the award should be nil.

15.6 The claimant has failed to comply with straight forward directions in respect of the information required to substantiate his claim of pension loss. It is blatantly not true that the claimant has not received pension contributions in his NHS roles since dismissal as he asserted on 2 February 2020 (page A119). The award should be nil or alternatively as set out at page A241.

15.7 The Tribunal has accepted that the respondent had established a potentially fair reason for dismissal relating to the capability of the claimant. It is inconceivable that the claimant would have received an Excellence Award and there should be no recovery.

15.8 Reference was made to **Prison Service v--Johnson 1997 ICR 275** in respect of any award for injury to feelings. Injured feelings must be proved, and the matter will turn on the evidence of the claimant. As the claimant presented his claim in August 2015 the applicable Vento bands for that time should be considered. An alternative method would be to apply the current rates but award no interest. There must be no double recovery in respect of the injury to feelings award and any award for personal injury for depression /stress/anxiety. The respondent places any award in the lower bracket of the Vento guidelines because the discrimination and victimisation findings arise from the same facts and the claimant was merely denied a procedural step: if the formal grievance procedure had been used, the claimant cannot say the outcome would have been different. There is no evidence of the claimant's depression or anxiety in his GP or other medical records. The calculation of any award for injury to feelings is hampered by the lack of any direct evidence from the claimant. He has been obsessed throughout with allegations that the respondent sent to the GMC incorrect data. The Tribunal should not get carried away by looking at the series of events leading up to the claimant's dismissal. The injury to feelings award is to compensate the proven acts of discrimination only and in that regard, whilst the grievance procedure was not followed, the door was not closed on the

claimant and there was the Fenwick review which considered all the relevant matters. It is far from the position that the matters were swept under the carpet.

15.9 The claimant makes a claim for personal injury totalling £240,000. The figures are not supported by the Judicial College Guidelines ("JCG") 15th edition. The claimant must prove that he was injured as a result of the proven acts of discrimination in that the discrete acts caused or materially contributed to his injuries. The Tribunal may make a percentage reduction to compensation in cases where there are several causes all operating on the claimant's health: **Thaine -v- London School of Economics 2010 ICR 1422.** The evidence does not sufficiently support the causation issue and it follows that the award for personal injury should be nil. Alternatively, the respondent contends for a reduction of at least 90% to any assessment of general damages to take account of the other significant life events which led the claimant to suffer the injuries about which Professor Trimble opines in the Report. The respondent contends that the appropriate JCG's are "other epileptic conditions" and "less severe psychiatric damage" which on a 90% discount would result in an award of no more than £1500. A further decision in respect of apportionment relied on it was **HM Prison Service -v- Salmon 2001 WL 535727.** The amount claimed as damages for personal injury is too high by far. The claimant has to prove causation and has failed to do so. It would be right to consider what has caused the personal injury. There were a great many events which occurred in the claimant's life other than the proven acts of discrimination and it is submitted that an award of no more than 10% of the appropriate level of general damages should be made. The claimant's sense of personal injustice, which is unfounded, and the dismissal were far more significant events than the proven acts of discrimination.

15.10 There is no evidence of conduct which will justify the making of an award for aggravated damages.

15.11 An appendix was submitted setting out the various periods of employment of the claimant subsequent to dismissal and indicating whether or not the information the claimant had been ordered to produce had been produced in respect of each of the three periods.

15.12 In light of the findings of the Tribunal at the remedy stage I, the claimant does not get anywhere near the statutory cap in respect of compensation for unfair dismissal. There is no evidence before the Tribunal of multiple unsuccessful applications for employment. The matter not referred to by the claimant's counsel and of significant relevance is the findings of the GMC which are not conceivably placed at the door of the respondent. The findings of the GMC have had an impact on the claimant's ability to earn particularly in respect of his private income. The Tribunal was referred in particular to the decision of the GMC beginning at page D69. The claimant had been obstructive with the GMC. The claimant could have applied himself to the recommendations of the GMC much earlier and more assiduously than he did and that has to have had an impact on his claim for recovery of private income and in respect of the Excellence Award. There is no chance that the claimant would have obtained an Excellence Award had he not been dismissed because of the GMC restrictions. Even if there was such a chance, the Tribunal has no basis on which it could sensibly and reasonably assess of that amount.

15.13 Detailed submissions were made in respect of the calculation of mitigated earnings from October 2015 onwards and the many missing pay slips. It was submitted that the claimant had been working at Guy's hospital at a time when he had claimed to have been unemployed - page F24. It would not be appropriate for there to be any award for loss of earnings from 20 May 2019 onwards because by then the claimant had more than mitigated his losses. There is no claim before the Tribunal for pay rise related compensation and the Tribunal should not do the best it can in respect of pay increases the claimant may have obtained had he not been dismissed. The claimant has not set out his claim in that way.

15.14 The claimant's present employment position is not clear, and the Tribunal has simply no evidence, in the absence of the claimant, of what his position will be in the future. Submissions from counsel are not evidence and there is simply nothing to substantiate the submission that the claimant is not well enough to work at this time. In any event, once the GMC conditions are removed the claimant will be in a position to earn privately. The claimant will have no difficulty in finding alternative work even if his present position were to come to an end. He is presently earning over £100,000 per annum and there is no basis whatever to consider a handicap in the labour market award which in any event does not feature at all on the schedule of loss. The Tribunal simply does not have the figures available to it to make any sensible assessment of pension loss. The Tribunal should not be asked to carry out the calculation when the claimant has not done it and has not produced any evidence upon which the calculation could be made.

15.15 Any award for breach of the ACAS Code should not exceed 10%. A claim for handicap in the labour market has not been raised before today and it is unusual to raise it now. Even if there is a handicap in the labour market, it is not caused by the acts of discrimination alone but by many other matters. In any event the Report does not make it plain that the claimant will have difficulty working again. There is a very positive prognosis and there is no basis on which a handicap in the labour market award can be made. This is not a case in which stigma damages should be awarded. The respondent should be allowed credit for the amount paid under the now revoked Judgment of Employment Judge Garnon and the claimant owes the respondent £1368 in respect of the fees for the Report and provision for recovery of that amount should be made it in the judgment.

The Law

16.1 We have reminded ourselves of the provisions of sections 119-122 of the 1996 in respect of the calculation of a basic award of compensation for unfair dismissal and of the provisions of sections 123-126 of the 1996 Act in respect of the calculation of a compensatory award.

16.2 We have reminded ourselves of the provisions of section 124 of the 2010 Act in respect of the calculation of compensation for unlawful discrimination/victimisation and the provisions of section 119 of the 2010 Act.

16.3 We have reminded ourselves of the provisions of the Employment Tribunals (Recoupment of Benefits) Regulations 1994 ("the Recoupment Regulations").

16.4 We have reminded ourselves of the Employment Tribunals Principles for Compensating Pension Loss Fourth Edition (Second Revision) of December 2019 ("the Pension Guidance"). We have reminded ourselves of Presidential Guidance: Vento Bands 2017 and the three addenda thereto ("the Guidance"). We have reminded ourselves of the Judicial College Guidelines for the Assessment of General Damages for Personal Injury 15th Edition published on 26 November 2019. We have reminded ourselves of the provisions of the 2009 and the 2015 ACAS Codes of Practice on Discipline and Grievance Procedures ("the ACAS Code"). We have reminded ourselves of the provisions of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992"). We have reminded ourselves of the provisions of the Employment Tribunals (Interest of Awards in Discrimination Cases) Regulations 1996 ("the Interest Regulations*").*

16.5 We have reminded ourselves of the authorities to which we were referred by counsel. We have reminded ourselves of the decision in **Thaine -v- The London School of Economics 2010 ICR 1422** to which further reference is made below. We have also considered the authorities of **Ging -v- Ellward Lancs Limited1991 ICR 222** and **Whelan -v- Richardson 1998 ICR 318**.

16.6 We have reminded ourselves of the provisions of section 401 of the Income Tax (Earnings and Pensions) Act 2003 ("the 2003 Act").

Discussion and Conclusions

Unfair Dismissal

Causation

17. We have first considered the arguments advanced by the respondent that the losses incurred by the claimant were not caused by the dismissal in August 2015 but rather by the performance issues which arose before dismissal and which are still ongoing in the GMC as evidenced by the most recent report from the GMC set out at pages D69-DD79. We have considered that document in detail.

18. We have reminded ourselves of the terms of the Liability Judgment and paragraphs 81-95 (pages A110-A114) of the First Remedy Judgment.

19. This is a difficult case in terms of causation. We have decided that there were legitimate concerns in relation to the performance of the claimant and eventually those concerns led to the capability hearing and the dismissal. However, we decided that the process which led to the capability hearing was unreasonable in that the respondent had failed to follow the terms of MHPS and if that procedure had been properly followed then there may have been no necessity for a capability panel at all. By way of example only, at the end of paragraph 87 of the Liability judgment we find: *"If the respondent had acted in accordance with MHPS and either not imposed a blanket exclusion from clinical work at all or had reviewed it and imposed a lesser exclusion once the outcome of the enquiry into the serious incident was known, then it is possible that the claimant could have been retained in the workplace carrying out*

some clinical work. If that was so, then the claimant who presented himself to the capability panel some 16 months later would have been less "de-skilled" and potentially much easier to remediate".

20. The failure to review the long suspension of the claimant is also a matter which greatly concerned this Tribunal and the consequent difficulties encountered in respect of remediation. We also found that there was a chance that if the appeal process had been organised more quickly, then an appeal would have taken place and the dismissal might have been overturned. We assessed all these matters in the First Remedy judgment in the context of the Polkey deduction and reached a conclusion that there was an 80% chance that a fair dismissal would and could have taken place. We refer in particular to our conclusion at paragraph 95 of the First Remedy Judgment. In a nutshell, if the respondent had not acted unreasonably in the way we have identified, a capability hearing might have been completely avoided or if not, it might have had a different result. The likelihood of that being so is reflected in the finding that there was an 80% chance of a fair dismissal but that dismissal was not inevitable.

21. We conclude that the losses arising to the claimant in this case do arise from the unfair dismissal and the necessary causal link is established. The other factors which feed into this assessment were addressed in the First Remedy Judgment and our conclusion that only 20% of the losses arising are recoverable renders the compensation just and equitable as it is required to be pursuant to section 123 of the 1996 Act and fully address the questions which the respondent now raises in respect of issues of causation.

Mitigation of Loss

22. The respondent criticises the claimant for a failure to mitigate. We remind ourselves that it is for the respondent to prove a failure to mitigate on the balance of probabilities.

23. The claimant was a high earner and was dismissed in August 2015 with concerns in relation to his capability. By June 2019, the claimant had found employment which more than matched his earnings level at the date of his dismissal. Even though (as we decide below) that employment was temporary, we conclude that that is a relatively short period in which to achieve income parity in light of the circumstances prevailing at the date of dismissal.

24.The claimant acted promptly to find himself a position where remediation of his skills was able to occur and that was at the Royal Cornwall Hospital. After a period of months, the claimant found further employment at Guy's and St Thomas' Hospital and then began his present position with Queen Elizabeth Hospital in June 2019. There have been some periods of unemployment, but they have been relatively short ones.

25. We have noted the respondent's submission that we do not have evidence before us of failed applications for employment in the period since dismissal and we take account of that situation. We have also perused the information before us at section

E of the bundle which gives details of the numerous vacancies with the NHS to which we were not specifically referred.

26.1 We have perused the decision of the GMC at pages D69-D79. We note that in July 2017 the claimant agreed undertakings with the GMC arising from the referral made to the GMC by the respondent subsequent to his dismissal in May 2015. During 2018 the claimant engaged with the GMC and in particular in April, May and October 2018 sent copies of his operative logs to the GMC for review. It is clear that the claimant made a complaint about the original referral to the GMC by the respondent, but that complaint was subsequently closed by the GMC. In March 2019, the claimant wrote to the GMC again making clear his position that the data which had been submitted by the respondent was false. At the same time the claimant sent a copy of his then current appraisal to the GMC and that appraisal included a form of development plan in which the GMC had said it was particularly interested. Further information was sent by the claimant's workplace supervisor on 8 February 2019 which concluded with the words *"..he has performed his duties as a senior breast surgeon satisfactorily and we believe that it is time for the restrictions on his practice to be lifted".* On 5 March 2019 the Clinical Director of Surgical Oncology (which Breast Surgery lay within at Guy's and St Thomas') wrote to the GMC with the same recommendation.

26.2 In spite of these reports, the GMC decided on 1 May 2019 to maintain the undertakings which the claimant had agreed. It was noted that a request from the claimant at that time to at least relax the undertakings was based on the premise that the claimant considered the undertakings never to have been justified. The GMC continue: "*The case examiners noted that Mr Iwuchukwu had provided only piecemeal evidence of his remediation, rarely in a timely manner and despite clear advice on the rules and guidance governing his undertakings…".* It was felt that an assurance assessment was required and thus the undertakings were not relaxed or revoked in May 2019.The claimant agreed to undergo such an assessment but in March 2020 such assessments were suspended because of the Covid -19 pandemic. The decision of May 2019 was reviewed by the GMC at the request of the claimant but maintained on 16 April 2020. There the matter rests until the claimant can arrange and undergo an assurance assessment.

27. The respondent submits that that is evidence of a failure to mitigate on the part of the clamant. We do not agree. Whilst the claimant clearly does not agree with what the GMC required, he has engaged with the GMC and broadly co-operated with them. We do not agree with the criticisms levelled against the claimant by the respondent about his engagement with the GMC. Our calculations of the loss of income which follow show that by the date of the hearing before us the claimant's total loss of income (as pleaded) amounts only to some £85,000 which is a relatively modest amount in the terms of the income level of the claimant. We do not agree that the respondent has established that the claimant has failed to mitigate his loss and there will be no reduction from the compensatory award on that basis.

General

28. We propose to assess the compensation due to the claimant by reference to the most recent schedule of loss ("SOL") with the respondent's comments attached at

pages A233-A248. We have taken account of the detailed submissions made to us for which we were grateful. We propose to look at each relevant head of claim by reference to the list of issues above and, if findings of fact are necessary, we will make those findings in relation to each such head of claim before setting out our conclusions on each head of claim. We will then bring together our conclusions in a final table of compensation which will also embody the conclusions we reached in the First Remedy Judgment.

29. It was astonishing to the Tribunal that the claimant did not give evidence to us at the hearing in November 2020. The matter had been prepared on the basis that the claimant would give evidence and it came as a considerable surprise both to the Tribunal and to the respondent that he did not do so. Submissions from counsel are no substitute for evidence from a witness – in this case the claimant. These proceedings were instituted by the claimant over 5 years ago with a view to achieving a remedy for the claims advanced. It must have been clear that any remedy would have involved the calculation of loss both of earnings and pension. The claimant has been represented throughout. It behoves any claimant to keep detailed records of his losses and to be prepared to produce documents in support of the losses and of the steps taken to mitigate those losses. It is a simple enough matter to retain monthly pay statements, forms P45 and P60 and employment contract papers. We conclude that the claimant has failed to take those basic steps for it is apparent in looking through the bundle that there are very significant gaps indeed in relation to disclosure of mitigation documents from the claimant. In the absence of the claimant, we have no explanation for that state of affairs which can only work to the claimant's disadvantage. If the claimant was not advised to keep detailed records, then he was very badly advised. If he was advised to do so and has failed, then he is the author of his own misfortune.

30. The preparation for this hearing received close case management because of the inability of the representatives for the parties to agree matters between themselves. We know not where responsibility for that situation lies. However, detailed orders were made for disclosure of all relevant mitigation documents which were repeated as late as 3 October 2020. It is clear those orders have been only partially complied with. Detailed orders were made to enable the calculation of loss of pension which the claimant claims total £181446.68 (page A241) but those orders were plainly not complied with. The documents produced in relation to the claimed loss of pension go nowhere near enabling this Tribunal to carry out a complex calculation of pension loss as would seem to be required in the circumstances of this case – leaving aside the question of whether the Tribunal should undertake those steps when the claimant has patently failed to do so. Again, this highly unsatisfactory situation can only work against the claimant. In our Orders of 3 October 2020, we drew the attention of the parties to the necessity for us to consider any increases in earnings and benefits to which the claimant may have become entitled if not unfairly dismissed. Despite that indication, we have no evidence before us of what the claimant's position with the respondent would have been if he had remained in the employ of the respondent and all the information before us, and thus all our conclusions, are based on the income position at dismissal. Over 5 years have passed since the dismissal and much may have changed in that time, but we have no evidence on those changes.

31. We have considered the situation in respect of disclosure and compliance with our orders. We have concluded that we should proceed and resolve this matter and that we should do the best we can with the information before us. We indicated that view to counsel at the hearing and received no objection to our doing so.

Unfair Dismissal Compensation

The Basic Award.

32. On the balance of probabilities we conclude that the claimant was born on 13 January 1964. He began employment with the respondent on 12 February 2007 and he was dismissed with 12 weeks' notice on 7 May 2015 and his last day of employment with the respondent was 6 August 2015. He had completed 8 years' service and was aged 51 years at dismissal.

33.The only evidence of income received by the claimant from the respondent before dismissal is at pages F8-F10 and comprises three barely legible payslips. Page F8 is dated August 2013 and is of no assistance to us. Page F10 is the final payslip to 6 August 2015 which would have been of assistance if the year-to-date figures had been legible, but they are not. Accordingly, we have used page F9 as the best guide to income at dismissal. This is dated 31 March 2015 and gives income figures in tax period 12 and for the tax year then ending. The gross annual income is shown on page F9 as £101600 which is £1953.84 per week. That exceeds the statutory maximum for calculation of the basic award which at time of dismissal amounted to £475 and that is the applicable figure. The claimant is entitled to 1.5 weeks for each complete year of service. The multiplier is therefore 12. The calculation by the claimant on page A233 is wrong.

34. The basic award if £475 x 12 which equals **£5700.00.** In the First Remedy Judgment we decided it was appropriate to deduct 25% from that sum which is £1425. Therefore, the basic award now payable is **£4275.00**

Compensatory Award

Loss of Statutory Rights

35. The claimant had been employed by the respondent for over 8 years in a senior position. We do not agree with the respondent's submission that an award for loss of statutory rights is not appropriate – it clearly is appropriate. We award the sum of **£500.00**

Loss of Earnings to date

36. The period from 6 August 2015 until 19 November 2020 is 5 years 15 weeks: 275 weeks in total. We calculate the loss to 19 November 2020. Any loss thereafter will be dealt with as future loss. The statutory cap on unfair dismissal compensation at the date of the claimant's dismissal was £78335. The alternative maximum amount set by section 1ZA(b) of the 1996 Act is more than that given the annual pay of the claimant at dismissal and thus £78335 is the applicable amount.

37. The payslip at page F9 indicates that the claimant had received £101600.40 gross earnings in the tax year 2014/2015. He had suffered income tax totalling £25599 and national insurance contributions of £4784.61. That gives an annual net income of £71216.79 and equates to £1369.55 per week or £5934.73 per calendar month. The claimant pleads in the schedule of loss that his net monthly income from the respondent was £4470.00. The claimant did not give evidence and we were not able to clarify this discrepancy which appears to result from the claimant taking account of his own pension contributions and other voluntary deductions. If we adopt the claimant's lower figure of £4470.00 per month that equates to £1031.53 per week. 275 weeks at £1031.53 per week totals £283670.75. However, in the figures for income actually earned since dismissal we take no account of the claimant's contribution to his pension and we consider it just and equitable to write back into the loss of earnings figure the claimant's contribution to his pension in order to ensure we are comparing like with like. From the information before us F9 and F10 the claimant's contribution rate to pension was 13.5% and thus we increase £283670.75 by 13.5 % namely £38295.55 to give a loss of earnings figure before mitigation to 19 November 2020 of **£321966.30.**

38. The claimant first found work with **Royal Cornwall Hospital ("RCH")** and we see the relevant documents at F11-F13, F48 and F57 -F59. Doing the best we can from the documents supplied and from the statements in the SOL and from what the claimant told Professor Trimble (page H12), we conclude that the claimant was appointed on **7 October 2015** at Registrar level. We accept that he worked in that role as he says in his SOL until **30 September 2016** and then did a maternity cover until **17 April 2017**. We disregard the letter at F48 from the RCH as the dates mentioned there are clearly wrong. We accept he stayed at the RCH on an unpaid basis from 17 April 2017 until **October 2017**.

39. Whilst working as a Registrar we note that the claimant states on his SOL that he earned £3602 net per month (£831.23 per week) and whist covering maternity leave £2668.78 net per month (£615.87 per week). Thus, over the 51 weeks as Registrar he earned £42392.73 and over the 28 weeks' maternity cover he earned £17244.36. The total net earnings to offset from RCH would therefore total £59637.09. The SOL placed the amount earned erroneously at £55634.74.

40. We check these figures by reference to the payslips at F11 and F12 in respect of the Registrar earnings and F57 in respect of the maternity leave earnings which also usefully gives year to date figures to the end of the tax year 2016/17. The annual earnings from the payslip at F57 are £60476.34 gross less tax £12034.40 and national insurance of £4541.45 giving £43900.49 net. There are two weeks net pay to add to 17 April 2017 at £844.24 per week namely £1688.48 net. The period from 7 October 2015 until 6 April 2016 is 25 weeks which needs to be added at £831.23 per week which totals £20780.75 net. That gives a net income of £66369.72 from RCH.

41. In the absence of evidence from the claimant and in the light of incomplete disclosure and in light of the fact that the claimant's figure on the SOL is clearly incorrect, we conclude that it is right to adopt the higher figure for the net earnings from RCH and will therefore deduct **£66369.72**

42. The claimant next found work at **Guys and St Thomas' NHS Foundation Trust ("GST")**. The contract of employment in respect of this appointment at page F24 onwards shows it to be dated 12 December 2017 and it is expressed to continue for a fixed period until 4 December 2018. The claimant was employed as a Clinical Fellow in Breast Surgery. The date of continuous employment for the purposes of the 1996 Act is shown as 7 October 2015 being the date the claimant began work at RCH. In the SOL the claimant claims this contract ran from 1 February 2018 until 31 January 2019. The contract provides at clause 10.2 for a salary of £46208 per annum gross and at clause 12 for the claimant to be automatically enrolled as a member of the NHS Pension Scheme. The contract is subject to the relevant sections of the National Terms and Conditions of Service for Doctors and Dentists in Training 2016. Those provisions are not before us.

43. We have payslips before us at pages F60-F65 for April, June, July and August 2018 and February 2019. We take the figures from the February 2019 payslip. In tax period 11 of tax year 2018/2019, the claimant had earned £50067.02 gross and had paid £6783.40 tax and £4320.93 national insurance. That equates to net income of **£38962.69** over 11 months being £811.72 per week or £3542.06 per calendar month. In the SOL the claimant states the net monthly income from this source was £2455. That figure takes account of the claimant's contribution to his NHS pension and is therefore wrong.

44. We have considered when this employment began and ended. We conclude that the contract was for a fixed term of 12 months from **4 December 2017** but that it was extended until the end of **28 February 2019**. We make these findings from considering the contract, the payslips and the SOL. If the claimant had given evidence, he could have clarified the situation. That being so we must calculate the net income from 4 December 2017 until 6 April 2018 being the date when the figure we reach at the last above paragraph begins. That is a period of 17 weeks. We use the figure of £811.72 as above and conclude the net income in the first period of this employment was **£13799.24.**

45. We conclude the total net income earned by the claimant from GST was **£52761.93** and we will deduct that sum from the loss of earnings figure.

46. The claimant next found work at **Queen Elizabeth Hospital Lewisham ("QEH").** We have no contract of employment before us in relation to this position. The payslips show that the claimant is employed as a "Bank Consultant". Mr Rahman told us during his submissions that the claimant is employed on a zero-hours contract, but we have no evidence that that is so. We have a letter from QEH which says the claimant's employment began on **7 June 2019** and the claimant confirmed that in what he said to Professor Trimble at page H13. We accept that date. We note the claimant told Professor Trimble (page H13) that he was working as a locum consultant.

47. We have reminded ourselves of the authorities of **Ging** and **Whelan** to which we refer above. We have noted that where an employee has found alternative permanent employment which pays at least as much as the job from which he was dismissed, then the Tribunal should only assess the employee's loss from dismissal to the date on which he started the new job. The dismissing employer cannot rely on

the employee's increased earnings to reduce loss sustained prior to taking up the new employment. If we decide that the claimant's present employment is temporary, then his earnings to date fall to be deducted from his losses to date but may open an award for future loss. If we decide that the position at QEH is permanent, then the loss of earnings claim will cease on 7 June 2019 being the date the claimant began at QEH. Doing the best we can with the information before us, we conclude that the employment of the claimant at QEH is not permanent. He is paid on a weekly basis and is described as a "bank consultant" both of which factors lead us to conclude his position at QEH cannot be considered as permanent. Accordingly, we will calculate the claimant's income to 19 November 2020 and deduct the amount from the loss to that date and award that sum as loss of earnings. We will then give consideration to the question of future loss. In support of that argument, the claimant produced the additional documents H43-H60 being a job description for a consultant breast surgeon at QEH. In submissions we were told that the claimant's contract is a zero-hours contract and that he has been told he cannot apply for the consultant breast surgeon position and that once an appointment is made, the claimant's position on the bank will cease. The difficulty with all that is that we had no evidence from the claimant or anyone else which could be tested in cross examination. Who is to say that the bank position will cease at that time? Where are the papers to evidence that the claimant is working on a zero-hours contract? We accept that bank work is not equivalent to a permanent position, but bank contracts can and do last for years.

48. In this employment the claimant is paid on a weekly basis. Since his employment began the claimant had been paid by the time of the hearing in November 2020 on some 75 occasions. We had only 10 of 75 payslips before us – the first in time being dated 27 October 2019 on page F67. That document shows the claimant's pay to date in that employment to be £55569.53 gross with tax paid of £20163.20 and national insurance paid of £2482.91 giving a net income total to that point of £32292.42. There are 20 weeks between 7 June 2020 and 27 October 2020 which give a weekly net figure of £1646.17 which equates to £7133.40 per calendar month.

49. We have next examined the payslip at F53 which is as close to the end of the tax year 2019/20 as is available being dated 1 March 2020. At that point the claimant had earned since 7 June 2019 £108789.53 gross with tax deducted of £39471.60 and national insurance of £4767.78. This gives net income of **£64550.15** over a period of 38 weeks which equates to £1698.68 per week or £7360.98 per calendar month. We adopt these figures in preference to those in paragraph 48.

50. The period from 1 March 2020 until 5 April 2020 is 5 weeks which at £1698.68 per week totals **£8493.40**. We assume the weekly rate in this short period to be the same as the average in the immediately preceding paragraph.

51. We have considered the latest payslip available from this employment being that dated 27 September 2020 at page F78. In week 26 of tax year 2020/21 the claimant had earned £74058.69 with tax deducted of £18911.20 and national insurance of £3411.37 giving a net income position of **£51736.12.** In week 26 this equates to £1989.85 per week or £8622.68 per calendar month.

52. The period from 27 September 2020 until 19 November 2020 is 9 weeks at £1989.85 which totals **£17908.65**. We assume the weekly rate in this short period to be the same as the average in the immediately preceding paragraph.

53. The income from QEH to 19 November 2020 is £64550.15 plus £8493.40 plus £51736.12 plus £17908.65 which totals **£142688.32**.

54. The claimant's SOL contains a glaring error at item 9 on page A238 for it treats the figure for weekly income as if it were the figure for monthly income and claims a loss of £56000. We conclude that far from there being an ongoing loss from 7 June 2019 onwards, the claimant had in fact by that point more than matched his pleaded income from the respondent and thus the claim for loss of earnings reduces as each week passes from 7 June 2019.

55. With that conclusion in place, we are able to conclude the loss of earnings calculation. The loss of earnings to date is £321966.30 (paragraph 37). From that we deduct the net income figures from RCH of £66369.72 (paragraph 41) and from GST of £52761.93 (paragraph 45) and from QEH of £142688.32 (paragraph 53) which leaves a net loss of income to the claimant to 19 November 2020 of £60146.33. Subject to the deductions required by the First Remedy Judgment, we will award to the claimant **£60146** for loss of earnings for unfair dismissal.

56. We were told that the claimant had not claimed state benefits at any time during any period of unemployment. In those circumstances, we conclude that the Recoupment Regulations do not apply to any award in this Judgment.

Future loss of earnings

57. We have decided that the employment of the claimant with QEH is not permanent employment. At some point in the future that employment will end and the claimant will have to seek further employment.

58. This is a matter which requires us to apply our industrial knowledge and consider for how long the claimant will be unemployed. We have already concluded that the claimant has properly mitigated his loss to date. We consider that his ability to find work in the future will improve as the restrictions imposed by the GMC will be removed at some stage in the near future. That said and leaving aside the question of his health, the claimant will have a dismissal by the respondent on his curriculum vitae and even though that was an unfair dismissal, we conclude there will be gaps in his employment in the future. We have considered the claimant's work-record. We note he is an eminent surgeon and from the documents produced to us is well known in his field of activity. There have been issues with his work, but we conclude that the time is fast approaching when those matters will be behind him. In the period since his dismissal was effective in August 2015, the claimant has only been without employment of some kind for a period of some eight months.

59. Applying our detailed knowledge of the background of this case and our industrial knowledge, we conclude that it would be appropriate to make an award to the claimant of six months net pay to cover the periods in the future when he will be without work because of the fact of his unfair dismissal. That is our best evaluation of

the evidence before us and we conclude that that award would be just and equitable compensation which is what we are required to achieve pursuant to section 123 of the 1996 Act.

60. We take the net monthly earnings figure from paragraph 37 above namely £4470 which over 6 months totals £26820. For the same reasons as set out in paragraph 37 above, we increase this sum by 13.5%. Accordingly, we award **£30440** for future loss of earnings. Given the amount, we conclude discount for early receipt is not appropriate.

Private income

61. The claimant's SOL includes a claim of £200,000 for loss of private income. We are told that the claimant had a contract with Bridgewater Hospitals to work on 4 Saturdays each year, to carry out 4 sessions each Saturday and earn £2500 each session namely £10000 on 4 Saturdays in the year namely £40000 per annum. The claim is for loss over 5 years.

62. We remind ourselves of the decision of the EAT in **Schlesinger -v- Swindon and Marlborough NHS Trust 2004 EAT 72**. We must consider in relation to a claim for loss of private income whether the loss can be said to be attributable to the actions of the respondent and whether the amount claimed was just and equitable in all the circumstances.

63. It is far from clear on what basis the claimant says these losses arise from his dismissal from his NHS post by the respondent. Who is to say the claimant could not have continued with his private work? How and in what circumstances was the private work brought to an end? Where is the evidence that the claimant could earn £10000 for working on a Saturday?

64. We have no documentary evidence of any kind to support that claim and we had no oral evidence from the claimant. In those circumstances we conclude that there can be no award for the loss of private income which is not evidenced in any way other than by unsupported statements in the SOL.

65. There will be **no award** for loss of private income.

Excellence award

66. The claimant's SOL claims £160,000 for the "*loss of excellent award".* It is stated that the claimant could have secured an award of this type but for his dismissal. The basis is said to be the work carried out by the claimant within the respondent Trust.

67. We had no evidence before us of how such awards are applied for or gained. If gained, we do not know how long they last or the amount which would be awarded on an annual basis. Is the award permanent? Does a recipient have to apply again after a period of time? Can a recipient apply again? We have no evidence at all to justify how the claimed figure of £160,000 is arrived at.

68. We have reminded ourselves of paragraphs 7.35 and 7.36 of the Liability Judgment (page A23). That is all we know of the system of excellence awards. We note that in the competition for these awards in 2012 the claimant was placed 31 out of 49 applicants and only the top 21 applicants were granted an award. We agree with the submission of the respondent that, at best, the claimant has suffered the loss of a chance to apply for such an award. We have no information before us on which we could even begin to assess that loss of chance.

69. There will be **no award** for loss of the excellence award.

Travel and Rental costs

70. We remind ourselves that section 123(2) (a) of the 1996 Act expressly states that assessment of an employee's loss shall be taken to include any expenses reasonably incurred by the claimant in consequence of dismissal.

71. In this case the claimant seeks the cost of travel for 10 weeks to Cornwall from Newcastle upon Tyne for interview and performance assessment before the employment with RCH began on 1 November 2015. The claimant also seeks the cost of renting a property in Cornwall for 3 months from 1 November 2015 until 31 January 2016 whilst working on voluntary remediation at RCH. The distance claimed at 460 miles each way is accurate and the rate of 22p (rounded) per mile reasonable. The monthly rental figure of £400 per month is reasonable.

72. We have noted the respondent's position as set out in the SOL that these expenses do not arise from the dismissal but rather from the requirement for remediation and that the claimant would have been responsible for such expenditure even if not dismissed. We do not agree with that submission for the reasons stated above.

73. We conclude that it is appropriate to compensate the claimant for this expenditure as claimed on the SOL which we are satisfied arises in consequence of the unfair dismissal and we award **£3200**.

Pension Loss.

74. Various case management orders were made requiring detailed calculation of pension loss (pages A120, A128, A138). It is quite apparent from the bundle before us that those orders have not been complied with. The information before us in relation to pension is sparse.

75. Information in respect of the claimant's pension is contained at A153-A157 and C73-C76. We have no calculation of pension loss save for two figures contained in the SOL at A241 which total £181446.68 without any meaningful explanation. There is no apparent reference to the Pension Guidance in anything we have seen.

76. It has been said on behalf of the claimant that the posts he has held since dismissal did not have the benefit of any NHS pension scheme. We do not accept that that is the case. All the payslips which are before us show that the claimant

made his own contributions to the NHS pension scheme in the three posts he has held since dismissal at RCH, GST and QEH.

77. We have considered whether we should attempt any calculation of pension loss and, if so, on what basis. We have taken account of the submissions made to us. We conclude that even if the so-called complex calculation method referred to in the Pension Guidance was appropriate that we could not conceivably embark on any such calculation.

78. Given that the claimant had by June 2019, albeit in temporary employment, matched his pre-dismissal earnings then we are far from satisfied that the complex method of calculation of pension loss would have been appropriate even if we could have embarked on it.

79. We are told by the respondent, and we accept, that the notional contribution which it would have made to the claimant's pension scheme at point of dismissal was 14.3% and that broadly agrees with the information contained in the Pension Guidance at section 5.5 onwards. We accept that that figure is a proper figure to calculate pension loss on the basis of contributions and we conclude that it would be appropriate for us to undertake that exercise in this case.

80. The gross income which would have been earned by the claimant (without taking any account of any increases for the reasons stated above) from dismissal until 19 November 2020 would have been £101600.40 per annum namely £8466.70 per month. The period in question is 63 months namely £533402.10 gross income. 14.3 % of that sum is **£76276.50.**

81. In the same period the claimant earned gross income from RCH. In the period to March 2016 the gross pay was £31957 (page F12) and to March 2017 was £60476 (F57) and to October 2017 £7382 which totals **£99815**. The gross income from GST to March 2018 was £16400 (estimated) and to February 2019 was £50067. That totals **£66467**. The income from QEH to 1 March 2020 was £108789, from 1 March 2020 to 5 April 2020 was £14285 (estimated), to 27 September 2020 was £74058 (page F58) and to 19 November 2020 was £23936. That totals **£221068** from QEH. The gross income from those three places of employment totals £387350. 14.3% of that sum is **£55391.05**

82. We deduct £55391.05 from £76276.50 and reach the sum of £20885.45. We award the sum of **£20885** for pension loss to November 2020.

83. We have considered the question of future loss. We have awarded future loss based on 6 months loss of earnings which amounts to £50800.20 gross (paragraph 33) on which the pension contribution from the respondent would have amounted to **£7264.42.** We award that sum for future loss in relation to pension. Given the amount which will be payable of this sum after the Polkey deduction already decided, we conclude it would not be appropriate to make any deduction for accelerated receipt,

84. We carry forward to the table of compensation the total sum for pension loss of **£28149.**

ACAS Code

85. We were asked to consider an uplift to any award pursuant to section 207A of the 1992 Act. We consider it appropriate to consider this matter separately in the context of the award under the 1996 Act and the award under the 2010 Act.

86. We have reminded ourselves of the provisions of the relevant ACAS Code. We note that a new version of the ACAS Code came into force on 1 March 2015 and that before then the relevant code was that which came into force in 2009. We have looked at both versions for the purposes of our deliberations in this matter given that the relevant events straddle those periods.

87. We have reminded ourselves of the provisions of the Liability Judgment and in particular paragraphs 11.81-11.90 (pages A88-A91). We criticise the respondent by reference to the provisions of MHPS but those provisions are considerably more onerous than the provisions of the ACAS Code. We can see no arguable breach of the ACAS Code in terms of the procedure followed save in relation to the appeal. The Code requires that an appeal should be offered and, if taken up, *"heard without unreasonable delay".* In this case, there was a delay in organising the appeal which led the claimant ultimately to abandon the appeal. The reason for the delay was the stated difficulty in finding suitably qualified individuals in terms of MHPS to sit on the panel.

88. We conclude that there should be an uplift to the award of compensation for unfair dismissal but that it should be a modest uplift. There can be no criticism of the procedure followed by the respondent in terms of the convening and management of the capability hearing. Any criticism is limited to the appeal and so our starting point for an uplift would have been in our judgment no more than 10%. The respondent did not deny an appeal to the claimant, but it failed to organise the appeal with sufficient urgency (notwithstanding the difficulties) and that led to the claimant deciding not to proceed with an appeal at all and that is highly regrettable in the terms of this case. We conclude that there was an unreasonable delay in organising the appeal and that it is appropriate to uplift the award of compensation for unfair dismissal by **5%** to reflect that delay. We remind ourselves that in terms of the order of applying this uplift the "Polkey" deduction decided in the First Remedy Judgment should be applied before this uplift and the following table will reflect that position.

89. We do not consider there should be any deduction from the compensatory ward by reason of the claimant's failure to exercise his right of appeal.

Grossing Up

89. We conclude that the sums awarded to the claimant under the 1996 Act will be subject to the income tax regime and in particular the provisions of section 401 of the 2003 Act.

90. The payments awarded relate to the termination of the claimant's employment and therefore the first £30000 of the award will be exempt from tax. Given the amount we award for unfair dismissal is less than £30000, grossing up is not applicable.

Compensation for Discrimination: the 2010 Act

91. We have reminded ourselves that we are now assessing compensation for the acts of discrimination which we found established in the Liability Judgment ("the Proven Acts"). The claimant was subjected to two refusals by the respondent to investigate grievances ("the Grievances") raised by him on 3 June 2014 (but actually dated 31 May 2014) and 7 October 2014. Those refusals were both acts of direct race discrimination and victimisation. We have reminded ourselves again of the contents of those grievances. We have also reminded ourselves that the contents of the October grievance were investigated by the Fenwick review.

Injury to Feelings

92. Given the diametrically opposite views of the parties as to the value of this claim, we are not surprised to note that the claimant considers the award for injury to feelings should lie at the top of the upper Vento band whilst the respondent places any injury in the bottom half of the lower Vento band. Those polarised positions have been a feature of this case throughout and remain so. We note our Judgment at the First Remedy hearing was to the effect that there would be such an award in this case but the amount remained to be quantified.

93. We have considered whether we can make any award for injury to feelings at all given that the claimant did not appear before us to give evidence. We conclude that we can make such an award. It would be a rare case indeed when acts of discrimination did not result in injury to the feelings of the victim and in any event, we heard from the claimant at the liability hearing and at the first stage of the remedy hearing and have reminded ourselves of the evidence given by him. We have referred in particular to the claimant's witness statement for the first remedy hearing dated 19 September 2019. At paragraph 61 the claimant records the contents of the May grievance remaining un-investigated even to the point of his dismissal and in paragraph 64 the claimant records that he felt to be an outcast in the organisation. At paragraph 69, the claimant speaks of raising the May 2014 grievance with the Chief Executive of the respondent, a non-executive member of the board and the Director of HR but that none of them took it seriously. The claimant entertains feelings that if the May grievance had been properly investigated, then the whole situation may have had a very different outcome and the damage done to his health and his family life avoided. At paragraph 98 the claimant records that the worst aspect of his losses hinges on the refusal to investigate the Grievances *"because if they had then the false information sent to the GMC would have been remedied and correct information passed to the GMC officially by the Trust."*

94.The difficulty we face is removing from our assessment the feelings which the claimant entertained, and doubtless still entertains, that the data furnished by the respondent to the Royal College of Surgeons and then the Capability Panel was false and was manipulated by officers of the respondent to achieve the dismissal of the claimant. Whilst we do not doubt that those sentiments are genuinely held by the claimant, and probably always will be, we have decided that that situation is not established in fact let alone as acts of discrimination. We remind ourselves at this stage we are not considering damage to the claimant's health and we are careful to avoid any element of double recovery.

95. We have considered the level of the Vento bands at the time that these acts of discrimination took place in May and October 2014. The Guidance applies to cases presented on or after 11 September 2017. Paragraph 11 gives the formula for updating the Vento bands in respect of a claim presented on 15 August 2015 as this is. Given the claim falls to be assessed after 1 April 2013 we need to increase the resulting figures by 10% to deal with the **Simmons-v- Castle** uplift. We are grateful to Ms Millns for carrying out the required calculation which found no objection from Mr Rahman. The resulting figures for the lower band with the 10% uplift are £799.95 - £8005.04.

96. We do not accept the submissions of Mr Rahman that the Proven Acts attract an award in excess of the upper Vento band as adjusted. We do not accept that there was a campaign of discrimination against the claimant in this case. We conclude that the failure to investigate the May grievance was a serious matter but one which can be compensated in terms of the injury to the feelings of the claimant by an award in the lower adjusted Vento band and we conclude that the appropriate level of compensation is **£6000**. We take a similar view in relation to the October 2014 grievance but note in that instance that there was investigation through the Fenwick enquiry but not under the auspices of the grievance policy as there should have been. The evidence we have from the claimant as to the injury to his feelings resulting from that more technical failure is sparse and much less compelling – no doubt because there was some investigation. We conclude the appropriate level of award for that failure is **£4000.** That makes a total award for injury to feelings of **£10000** which collectively falls within the middle Vento band as adjusted but individually falls within the lower band and we conclude that that is the correct level of award.

Aggravated Damages

97. We have considered whether an award of aggravated damages is appropriate in this case. Such awards of damages are reserved for cases which are outside the ordinary - the respondent must have acted in a high-handed, malicious, insulting or oppressive manner in committing the discrimination or in the manner in which the matter was handled including the conduct of the hearing itself.

98. In considering this matter we remind ourselves again that the Proven Acts relate solely to the Grievances. If all that the claimant asserted as acts of discrimination had been established, then an award of aggravated damages would have been very likely, but the Proven Acts are over a short time and relate solely to the Grievances. The fact that the claimant continues to believe in the veracity of his allegations is no reason for us to look beyond what our findings were at the liability stage of these proceedings.

99. We have reminded ourselves of the relevant contents of the Liability Judgment and in particular paragraphs 11.36- 11.41 and 11.46-11.52. (pages A79-82). Neither grievance was wholly ignored. The grievance of 31 May 2014 was discussed at a meeting with the claimant and his representative on 8 July 2014, but questions of remediation took centre stage at that meeting and it was only later, when those discussions came to nothing, that the claimant sought to resurrect the grievance and was told that he could not. We are highly critical of that approach by the respondent

and concluded it amounted to an act of discrimination. We note that we have decided the failure to investigate the May 2014 grievance was also an act of victimisation.

100. We have reminded ourselves of the actions taken by the respondent in relation to the October 2014 grievance. That matter was not investigated under the terms of the respondent's grievance policy, but it was investigated as part of the Fenwick review. Those actions by the respondent were acts of discrimination and victimisation.

101. We have noted the submissions made to us. We note Mr Rahman asserts that acts of victimisation almost always attract an award of aggravated damages and we have noted Ms Millns' submission that there was no campaign of discrimination in this case and that the respondent did not in any way sweep the matters complained of by the claimant under the carpet.

102. We have considered all relevant matters and, whilst we criticise the respondent for the way it acted and find what it did was both an act of discrimination and victimisation, we do not consider that the actions of the respondent reached the level of being high-handed, insulting, oppressive or malicious. In those circumstances there will be **no award** of aggravated damages.

Interest

103. We consider it is appropriate to award interest on the awards made above for injury to feelings. We have considered the Interest Regulations. We note by reference to Regulation 6 that interest begins on the date of the act of discrimination and ends on the day of the calculation. We will calculate the interest from the date of the two grievances separately.

104. The May 2014 grievance was lodged on 3 June 2014. From that date until 19 November 2020 is 6 years 188 days. The rate of interest is 8%. The annual interest on £6000 is £480. 6 years at that rate is £2880 and 188 days is £247 which gives a total of £3127.

105. The October 2014 grievance was lodged on 7 October 2014. From that date until 20 November 2020 is 6 years 44 days. The rate of interest is 8%. The annual interest on £4000 is £320. 6 years at that rate is £1920 and 44 days is £38 which gives a total of £1958.

106. The total amount of interest awarded on the injury to feelings award is **£5085**.

Damages for Personal Injury

The Report

107. As the Report is an important document in terms of the matters we need to consider in relation to this head if claim, we set out matters from the Report which we consider of significance.

108. There is nothing prior to 2014 in the claimant's medical records of neuropsychiatric relevance. On 29 January 2016, the claimant suffered a seizure or fit of some kind whilst at work at RCH and lost consciousness. This occurred again at the end of 2016 and in January 2017. Epilepsy was first diagnosed in January 2017 and repeated in March 2017. The claimant's marriage broke down in 2015 at around the time the claimant relocated to Cornwall. Dr Johanna Harrod a consultant psychiatrist reported on 12 January 2017 and diagnosed that the claimant suffered from an Adjustment Diagnosis subsequent to his dismissal in May 2015. On the other hand, Professor Reuber reported on 25 January 2017 that the symptoms were highly suggestive of epilepsy. The claimant re-counted a further episode in 2018 and one in 2020. At the time he was seen by Professor Trimble, the claimant was taking levetiracetam 750mg twice daily for the epilepsy but was no longer on anti-depressant medication.

109. In his conclusions, Professor Trimble notes that the claimant has had five episodes and concludes that the diagnosis of epilepsy is most likely. On balance the claimant suffers from adult-onset epilepsy. It is likely that some of the five episodes were non-epileptic in nature. At the present time, the claimant does not have a recognisable psychiatric disorder: he previously suffered with an Adjustment Dis-order but that is now asymptomatic. The claimant should be under the care of an epileptologist to monitor his condition because *"even a single seizure happening every few months would be enough not only to prevent him driving but also would have limitations on his career as a surgeon".*

110. In view of the equivocal nature of the conclusion as to the cause of the conditions from which the claimant suffers, questions were asked of Professor Trimble by both the respondent and the claimant. In his reply to the respondent, the expert opined that stress provided an adequate explanation for the onset of both the epileptic and non-epileptic seizures from which the claimant suffers. When asked to say which of several factors identified caused the stress, Professor Trimble stated that that was like "*asking which card is responsible for the collapse of a house of cards"* and that it was not possible to speculate whether the failure to deal with the Grievances was the beginning of the stress which led to the epileptic attacks.

111. In answer to questions from the claimant, Professor Trimble confirmed that stress and stressful events in life were related to both types of epilepsy. In answer to a convoluted question from the claimant as to whether the Proven Acts had caused or materially contributed to the conditions from which the claimant suffers, Professor Trimble replied "*yes".*

Award

112. We are satisfied on balance of probabilities from our perusal of the Report and such of the claimant's medical records as have been produced that the claimant suffers from adult-onset epilepsy with resulting fits – some of which are non-epileptic in nature. We are also satisfied that the claimant suffered after his dismissal in 2015 with an Adjustment Disorder which is now asymptomatic. We have considered what was the cause of those impairments and to what extent the respondent can be said to bear responsibility for those impairments. Only if the Proven Acts are the cause of

the impairments or materially contribute to the impairments can we compensate the claimant for those impairments in these proceedings.

113. We have considered how we should approach that exercise. We did not hear evidence from the claimant, but we have noted the Report and all that the claimant told Professor Trimble at the consultation in July 2020. The process of deciding if and to what extent the Proven Acts caused or materially contributed to the impairments from which the claimant suffers is not an easy one and indeed it is one Professor Trimble was not prepared to embark on. However, the fact that the process may be a difficult one is no reason not to do it.

114. We had diametrically different submissions as to how we should approach this exercise. For the claimant Mr Rahman submitted that if we were satisfied that the Proven Acts were a material cause of the impairments then the claimant was entitled to full compensation. On the other hand, Ms Millns for the respondent submitted that the approach approved by the EAT in the decision in **Thaine** (above) was the appropriate method to adopt. We have considered those submissions in detail and conclude that the submissions of Ms Millns are to be preferred.

115. We have noted the Judgment of Keith J in **Thaine** in detail and in particular paragraphs 17 and where it is stated:
"This passage neatly illustrates the critical distinction which the law makes. The test for causation when more than one event causes the harm is to ask whether the conduct for which the defendant is liable materially contributed to the harm. In this case, the Tribunal found that it did, and therefore the LSE was liable to Miss Thaine. But the extent of I notts liability is another matter entirely. It is liable only to the extent of that contribution. It may be difficult to quantify the extent of the contribution, but that is the task which the Tribunal is required to undertake. It did that in this case by saying that the unlawful discrimination to which Miss Thaine was subjected at work was 40% responsible for her ill-health, and by therefore discounting her award by 60%. ……

116. In this case the stress under which the claimant laboured was ongoing for several years and is neatly encapsulated by the respondent in a document headed "Appendix 1" (page H33) to a list of questions it put to Professor Trimble. The claimant had been encountering difficulties in the workplace since 2010. We have reminded ourselves of the Liability Judgment and the matters about which the claimant complained. There was the issue with Klaus Overbeck in 2010 which led to a period of suspension from work for the claimant. This was followed by issues relating to the claimant's conduct at MDT meetings and the subsequent investigation by Ian Martin into the claimant's conduct which, even though it found no case for the claimant to answer, was clearly a stressful process. There were issues with the claimant's relationship with Peter Surtees which he had raised himself and which resulted in an investigation. The claimant was working as a sole breast surgeon at this time. The claimant applied unsuccessfully for an excellence award. There were issues arising in respect of a proposal to transfer the breast service from the respondent to a neighbouring Trust. There were then issues raised about the claimant's complication rates which led to close scrutiny of the claimant's work and ultimately to the Royal College of Surgeon's ("RCS") independent review. There followed the serious incident in the theatre on 13 August 2013 and the claimant's full suspension from work for a period until he was allowed to return to partial duties.

There was the so-called Holtham investigation and the audit carried out by the RCS and their resulting unfavourable report in terms of the claimant. There followed the capability proceedings and the eventual dismissal of the claimant. There followed the proceedings before this Tribunal in 2016 and an outcome which the claimant considered unfavourable. In 2015 the claimant relocated for remediation to Cornwall which coincided sadly with the breakdown of his marriage.

117. As those events unfolded from 2010 onwards, the claimant entertained suspicions and then convictions that he was being discriminated against because of his race and in 2014 on two occasions he sought to raise the matters of his concern in the Grievances. That was the appropriate way for the claimant to raise his concerns, but he found himself denied full and proper access to the grievance process – not once but twice and at a time when he was clearly facing the prospect of dismissal. In his evidence at the First Remedy hearing, he described himself as being excluded by the respondent and that at a time when he was suspended from clinical duties by the respondent – an exclusion which was to last some 2 years. The claimant asserted many acts of race discrimination but after thorough review this Tribunal only found acts of discrimination in respect of the Grievances – the Proven Acts.

118. We are satisfied that the Proven Acts did make a material contribution to the stress from which the claimant clearly suffered and did make a consequent material contribution to the impairments from which the claimant now suffers. We have considered the extent of the contribution. We conclude that the capability proceedings and the dismissal and the subsequent relocation to Cornwall and Tribunal proceedings must have played a very significant part in the cause of the impairments as must the breakdown of the claimant's marriage. We place that level of contribution in all at 67%. We conclude the other factors in all amount to 33% contribution but that the Proven Acts must have played a significant part of that remaining contribution. We concluded that the Proven Acts contributed to the extent of 15% to the impairments suffered by the claimant and we will therefore award 15% of the appropriate compensation which arises from those impairments.

119. We have turned to consider the appropriate level of compensation and have considered the Judicial College Guidelines referred to above. Unsurprisingly the parties placed the appropriate level of compensation at opposite ends of the spectrum.

120. We have first considered the appropriate bracket of compensation in terms of the epilepsy from which the claimant suffers. It is noted that there have been at least five episodes associated with alterations of consciousness, amnesia, at least some associated with tongue biting and urinary incontinence and some episodes that have been witnessed in a hospital setting. That description leads us to conclude that an award for the bracket entitled "grand mal epilepsy" is appropriate given the loss of consciousness which has accompanied the seizures. That bracket with the Simmons-v- Castle uplift is £95710-£140870.

121. We have considered where in that bracket this case lies. We are hampered again by the lack of evidence from the claimant. Looking at the factors mentioned in the Judicial College guidelines, we conclude that the symptoms of the claimant are

successfully controlled by medication, we have no evidence from the claimant that his appreciation of life is blunted by the medication, there appears to be no effect on his working life as he is presently employed full-time as a bank consultant and earning at least what he was earning when dismissed by the respondent, there appears to be no associated behavioural problems and, from what we take from the Report, the prognosis is good. Taking all those factors into account, we conclude the case lies at the bottom of this bracket and we would award £96000 for general damages arising from the epilepsy from which the claimant now suffers. We are satisfied that sum would adequately compensate the claimant in relation to both the epileptic and nonepileptic seizures from which he suffers.

122. We have next considered the Adjustment Disorder. We note that this condition is now asymptomatic and presents the claimant with no present difficulty. It appears to have been symptomatic for only a relatively short time in 2016/2017. Again, without evidence from the claimant, we have no details of how, if at all, this condition affected the claimant's daily activities or his sleep or about any of the other factors which the Judicial College guidelines say we should take account of. We conclude the appropriate bracket of compensation for this impairment is "L*ess severe psychiatric damage*" for which the range with the uplift is £1440-£5500. Doing the best we can, we place the appropriate award at £5000

123. We therefore would award £101000 damages for personal injury in relation to the impairments from which the claimant suffers. Taking account of our conclusion above, we reduce that amount by 85% and award **£15150** damages for personal injury and psychiatric damage attributable to the Proven Acts.

Interest

124. We consider it appropriate to award interest. The Judicial College guidelines were published on 29 November 2019 and so we conclude it appropriate to award interest pursuant to the Interest Regulations but only from that date - pursuant to our discretion so to do contained in Regulation 6(3). We award interest for 12 months at 8% on the sum of £15150 which totals **£1212.**

Handicap in the Labour Market Award

125. We were asked to consider making an award to reflect handicap in the labour market. We received no evidence from the claimant at all in relation to this matter. The head of claim was not included in the claimant's SOL and was raised for the first time at the hearing.

126. The Report does not address this issue directly because Professor Trimble was not asked to consider that matter.

127. We do not agree that we should make any such award as we are not satisfied that the claimant will be handicapped in the labour market by reason of the Proven Acts. The evidence we have seen does not at present point to any such handicap as the claimant is now being remunerated at a level at least equivalent to that which he enjoyed at the time of his dismissal and that at a time when the restrictions on his practice, which have nothing to do with the impairments from which he suffers, are

still in place. We take account of the matter in the Report which we highlight at paragraph 109 above, but we have no evidence before us as to likelihood of another such attack. For example, it may be that with this litigation at an end, the health of the claimant may improve dramatically. We have no evidence before us on this point and we cannot speculate without some basis on which to do so.

128.There will be **no award** under this belated head of claim.

Stigma damages

129. There was some suggestion that this is a case where stigma damages should be considered. That matter was not pursued with any vigour. To be clear, our view is that such a head of claim is entirely misplaced.

ACAS Code Uplift.

130. We were asked to consider uplifting the compensation awarded under the 2010 Act pursuant to section 207A of the 1992 Act. We note that at the time the Proven Acts took place that the appropriate ACAS Code of Practice on Disciplinary and Grievance Procedures was that issued in 2009. The claimant sought on two occasions to utilise the respondent's grievance procedure in 2014 and on two occasions he was denied that opportunity. In terms of dealing with grievances, the ACAS code required that an employee raise his grievance and then the employer has a duty to hold a meeting without unreasonable delay to discuss the grievance. If dissatisfied with the outcome the employee is to be allowed recourse to an appeal process. We have reminded ourselves again of the contents of the Liability Judgment. The respondent did not seek to sweep the matters raised under the carpet but neither did it follow its own grievance procedure and in the case of the October grievance it sought to close down the grievance as quickly as possible by use of the Fenwick Review. The stance taken by the respondent in terms of the May Grievance to the effect that it could not be pursued because it was out of time was baseless and a flagrant breach of the claimant's right to have his many and complex issues aired before an independent panel with a subsequent right of appeal. Whilst this was not the most flagrant of breaches as Mr Rahman submitted, it certainly was not the minor breach as Ms Millns would have us say. The breach by the respondent which leads to the awards we make under the 2010 Act was serious. We consider it appropriate to uplift the award under the 2010 Act by 20% to reflect the gravity of what occurred. The uplift to the award is **£6289.**

Grossing Up

131. The award we have made under the terms of the 2010 Act relates to the Proven Acts which occurred many months before the claimant was dismissed. The compensation awarded relates to matters which occurred during the course of the claimant's employment or which result from such events. It seems to us that the sums awarded are not subject to tax and therefore that grossing up of this element of the award is not appropriate.

132. **Table of Compensation - Summary.**

Unfair Dismissal

Basic Award

Calculation at paragraph	£5700		
Less 25%	£1425	£4275.00	

Compensatory Award

Loss of Earnings to 20.11.20	£ 60146.00		
Loss of Statutory Rights	£ 500.00		
Future Loss	£ 30440.00		
Expenses	£ 3200.00		
Pension Loss	£ 28149.00		
	£ 122435.00		
Less Polkey deduction 80%	£ 97948.00		
Balance	£ 24487.00		
Add 5% uplift ACAS Code	£ 1224.35	£25711.35	
Total before grossing up		£ 29986.35	
Add Grossing up element		£ NIL	
Total award for unfair dismissal			£29986.35

Race Discrimination

Injury to feelings	£10000.00		
Interest	£ 5085.00		
Personal Injury	£ 15150.00		
Interest	£ 1212.00		
Total	£ 31447.00		
Add 20% uplift ACAS Code	£ 6289.00		
Total award for discrimination			£ 37736.00

Grand Total of Awards **£67722.35**

Final comments

133. During the course of these protracted proceedings, the unfair dismissal claim brought by the claimant was re-heard by Employment Judge Garnon and the resulting judgment awarded £2850 to the claimant. It is common ground that the respondent paid that sum to the claimant. That judgment was subsequently revoked when the Judgment of this Tribunal was restored by the Court of Appeal. Clearly it must be right that the respondent is entitled to set off from the amount now ordered the sum of £2850.

134. In case management orders for the stage II remedy hearing, it was said on behalf of the claimant that he could not afford to discharge 50% of the estimated fees of Professor Trimble and, as a result, the contribution of the claimant to those fees

was limited to £1800 and it was noted the matter would be addressed at the conclusion of these proceedings. The letter of instruction at page A143 refers. Having received the Report, the parties both asked questions of Professor Trimble and the respondent discharged the fees for that exercise in full. The fees for the report totalled £4752 and the fees for the questions totalled £1584. The total fees were therefore £6336. 50% of that sum is £3168 due from the claimant of which he has apparently discharged £1800. There is the sum of £1368 due from the claimant to the respondent and the respondent may offset this amount when discharging this judgment. The total amount of set-off is therefore **£4218**.

Employment Judge A M Buchanan.

Date: 18 January 2021.

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