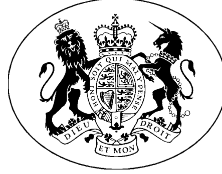
Case Numbers: 2201378/2019 &
2201817/2019



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mrs E Aylott		BPP University Limited

REMEDY HEARING

Heard at: London Central Employment Tribunal by CVP

On: 7 & 8 December 2020
15 December 2020, 16 February 2021 (in Chambers)

Before: Employment Judge Adkin
Members: Ms C I Ihnatowicz
Mr R Baber

Representations

For the Claimant: Ms H. Platt, of Counsel
For the Respondent: Mr R. Jones, of Counsel

JUDGMENT

The judgment of the Tribunal is that the Respondent should pay the Claimant the following sums pursuant to the Tribunal's findings that the Respondent unfairly dismissed the Claimant pursuant to section 98 of the Employment Rights Act 1996 and unfavourably treated her because of something arising from disability pursuant to section 15 of the Equality Act 2010:

(i) Basic award of **£3,937.50**.

(ii) Notice pay of **£13,930.95**.

(iii) An award for injury to feeling in the sum of **£20,000**.

(iv) An award for personal injury in the sum of **£17,340**.

(v) Medical expenses caused by personal injury assessed at **£1,505**.

(vi) There will be no award for aggravated damages.

(vii) Loss of statutory rights assessed as **£500**.

(viii) Compensation for past financial losses up to the date of the remedy hearing of **£32,247.07** comprised of:

a. 72 Weeks at a net weekly wage of £688.48 = £49,570.56;

b. *Less* credit for £17,761.08 income received;

c. 20 months pension contributions based on an annual pension contribution of £1,902.36, making £3,170.60;

d. Aqa training costs for apprenticeship of £850.

e. A 10% reduction following *Chagger* (*Abbey National plc and Hopkins v Chagger* [2009] ICR 624) reflecting the possibility of the Claimant leaving for non-discriminatory reasons.

(ix) Compensation for future financial losses from the date of the remedy hearing of **£71,200.15**, comprised of:

a. For the 56 weeks from the remedy hearing to 31 December 2021 net earnings from employment with the Respondent of £38,554.88 (56 x £688.48)

b. *Less* assumed net earnings of £16,145.58 = £22,409.30.

c. 4 years' from 1 January 2022 net loss of earnings £11,760.96 per annum = £47,043.84.

d. Pension contributions of (4 x £1,902.36 =) £7,609.44.

e. A 10% reduction following *Chagger* reflecting the possibility of the Claimant leaving for non-discriminatory reasons.

(x) Interest

a. Interest on the award for injury to feeling of £3,651.51.

b. Interest on personal injury award of £791.46.

c. Interest on past financial losses of £2,943.76.

(xi) The total of sums above is <u>£168,047.40</u>.

(xii) As regards "grossing up", further directions are given below.

REASONS FOR REMEDY

<u>Evidence</u>

1. The Tribunal was presented with an agreed remedy bundle of some 1,035 pages provided in electronic format.

2. The Claimant provided a witness statement of 75 pages. The Tribunal refused, for reasons given orally, Mr Jones' application that we should not admit substantial parts of the Claimant's witness statement. Nevertheless, we did accept the thrust of his submission that much of the witness statement was not strictly relevant to the matters that we had to decide. We also had a witness statement from the Claimant's sister Mrs Sarah Bolton which was not challenged by the Respondent and evidence on behalf of the Respondent by Mr Mizan Ur-Rahman who is now Head of HR Business Partners but was at the material time a Senior HR Business Partner whose role was referred to in our findings on liability.

3. We received written submissions and oral submissions from both Counsel.

Damages for the claim

4. We are assessing damages for discrimination under s.15 of the Equality Act 2010 and constructive unfair dismissal. This was a discriminatory dismissal by virtue of the fact that one element of the serious breach was discriminatory .

5. Two allegations of the Claimant's s.15 succeeded, the first was described by issue **9d/11d**: that because of the Claimant's need for adjustments namely the adjustment that she only work her contractual hours and be given the ability to say no to work which we found was something arising from the Claimant's disability. The Respondent through Mr Stephen Shaw did not obtain an Occupational Health report and instead was focussed on terminating the Claimant's employment by means of a settlement agreement (liability reasons paragraph 279).

6. The second allegation that succeeded was issue **9f/11f** namely the Claimant was not offered alternatives to a settlement agreement i.e. a referral to Occupational Health in a review meeting on 6 November 2018. We found that the something arising was the Claimant's absence due to her sickness which was as a result of her disability and again that Mr Shaw was focussed on terminating the Claimant's employment by means of a settlement agreement because of her sick absence rather than referring her for Occupational Health that the Claimant requested (see paragraphs 287-291 of the liability reasons).

7. This has been characterised by Mr Jones as merely a delay of approximately three months in the Occupational Health referral being made. It is correct that an Occupational Health referral was made in February 2019. This however misses two elements of our finding. First, that Mr Shaw was intent on pursuing the settlement agreement route which necessarily meant a termination of the Claimant's employment and second that these actions together with the other actions set out at paragraph 375 of our liability reasons cumulatively amounted to a repudiatory breach of contract. It is for these reasons that we consider that this was a discriminatory dismissal.

8. The effect of the successful s.15 claim is more significant than simply a delay in a referral to Occupational Health. It was an integral aspect of the actions of the Respondent amounting to the Claimant's constructive dismissal.

FINDINGS OF FACT

Subsequent employment

9. Following her resignation in April 2019, the Claimant commenced working for a new employer Weir Training Limited ("Weir Training") on 2 August 2019 and worked for them until 14 November 2019 on a salary of £23,000 gross per annum.

10. The Respondent contends that the circumstances of the loss of the Claimant's employment with Weir Training are such as to break the causation. It has been necessary therefore to analyse the Claimant's employment with Weir Training in some detail.

11. On 11 October 2019 Iren Kalm, an HR Administrator at the Respondent provided a "standard" reference to Weir Training, confirming that the Claimant worked as a Student Learning Manager from 1 September 2013 to 24 April 2019.

12. Ms Sarah Caines, a Director at Weir Training was evidently concerned that this reference contained no mention of the Head of Functional Skills role which appeared in the Claimant's CV. This had been a secondment that the Claimant commenced in April 2018. Accordingly she wrote to Ms Kalm on 23 October 2019, querying whether the details provided were accurate and asking whether there any other job titles within BPP, or whether her position of Student Learning Manager was the last one which she held ending on 24 April 2019. By a reply on the same day Ms Kalm confirmed that this was the last role held, although she clarified that the Claimant had been a lecturer in the period 2013 – 2015.

13. On 12 November 2019 Ms Caines wrote again, quoting the Claimant's CV which referred to the Head of Functional Skills role for the period March 2018 – April 2019. Ms Kalm replied the same day suggesting that Ms Caines would need to obtain a reference from the Claimant's former line manager. She declined however to provide contact details for the line manager and said that the Claimant would have to provide this.

14. On 12 November 2019 Ms Krystel Rajewski, Head of Curriculum at Weir Training wrote to the Claimant extending her probation period for a further six weeks because of an extended absence from the business due to unavoidable personal reasons. A meeting on 14 November 2019 was arranged.

15. It seems from internal communications at Weir Training (e.g. an email sent by Krystel Rajewski, Head of Curriculum to Ms Caines, that the management team became concerned about a number of matters. First that the Claimant's CV did not match the references provided by the Respondent and the Claimant was not able to fully evidence the fact of her having the Head of Functional Skills role and her responsibilities in this role. Second, there was confusion as to whether David Donnarumma was a colleague or the Claimant's manager. Third, that the Claimant had retained a laptop belonging to the Respondent, which was the property of the Respondent and contained their data. This gave rise to a concern about a potential breach of data protection regulations. Fourthly, the

Claimant began to take personal telephone calls relating to these matters in the office which they did not consider to be appropriate.

16. On 13 November 2019 Ms Caines had a discussion with the Claimant, which she documented in a one-page note. She explained that the references from the Respondent did not match her CV. The Claimant explained that she was never actually given the title "Head of Functional Skills" as this had been a secondment from her substantive role. Ms Caines noted that this was not something that was declared in the interview back in August 2019. Ms Caines raised a concern that Weir Training's external standards verifier Pearson, and/or Ofsted would be very likely to request this information. Ms Caines requested that the Claimant provide contact details of her line manager at the Respondent. The Claimant told her that this was not possible because her line manager David was a person involved in her upcoming case in the Employment Tribunal.

17. On 14 November 2019, having apparently consulted ACAS and the ICO (Information Commissioners Office), Ms Caines retracted the Claimant's offer of employment with Weir Training with immediate effect on the grounds of failure to provide acceptable references. She was not prepared to accept email evidence supplied by the Claimant of the work that she had been doing at the Respondent on the basis that this was a breach of data protection regulations. When Sarah Caines at Weir Training tried to talk to the Claimant about this with her she became very upset.

18. The stated reason in Weir Training's letter of dismissal dated 14 November 2019 (746 of the remedy bundle) was failure to provide acceptable references.

19. On 27 November 2019 Ms Caines at Weir Training sent an email to the Respondent informing them that Weir Training had become aware that the Claimant was still using her BPP laptop and accessing BPP data including personal data.

20. On 27 November 2019 after the Claimant had been dismissed by Weir Training, the Respondent provided confirmation to Weir Training that the Claimant had indeed held the role of Head of Functional Skills. It was explained that "this would not have been known to the member of HR staff providing the reference due to the fact that Elizabeth was on secondment and as this was a temporary position her job title was not formally changed". Unfortunately, however it was too late to salvage the Claimant's relationship with Weir Training.

21. The Claimant's Schedule of Loss sets out sums in mitigation which show that she was paid for work for Pearson in July 2019 and April 2020. After the work for Weir Training, she carried out class cover/supply teaching for which she received payments in January, February, March, May, June 2020 and work for UEL for which she received payments in February, March, April, June, July, September, October 2020. She also did some work for the Cambridge International examiners for which she received payment in June 2020.

MEDICAL EVIDENCE

Past Loss of Earnings

22. In the decision on liability, we summarised multiple causes of the Claimant's sickness, in particular at paragraph 179 and 324-329.

23. The Tribunal has the benefit of the following evidence:

    23.1. The Claimant's Impact Statement dated 10 September 2019.

    23.2. The Claimant's GP record.

    23.3. Employment Judge Gordon's judgment dated 10 December 2019.

    23.4. A report of Dr Emma Cosham dated 26 November 2018.

    23.5. A report dated 30 July 2019 of Dr Chris Cull.

    23.6. Evidence of Dr Kathryn Newns:

    23.7. First report (based on joint instruction 5 December 2019).

    23.8. Second report dated 23 June 2020 (Claimant's sole instruction).

    23.9. Oral evidence at the hearing.

    23.10. Occupational health report of Gillian Gladwell dated 12 February 2019.

    23.11. A letter to the Claimant's GP dated 18 June 2019 from Dr Pearson, a doctor in Surrey Heath CMHRS.

    23.12. Details of the employment/work carried out by the Claimant since she left the Respondent's employment, contained within the Schedule of Loss.

24. In an Occupational Health report dated 12 February 2019, Gillian Gladwell concluded that the Claimant was unfit to continue in her current role at that time. She concluded that the Claimant appeared to have a severe depressive illness with anxiety and panic attacks. She was under the care of her GP and a clinical psychiatrist and was on appropriate medication. She was highly anxious and experiencing significant symptoms due to her poor mental-health.

Expert report for these proceedings

25. In her report dated 23 June 2020 Dr Kathryn Newns concluded:

    25.1. There was a deterioration in mood from late 2017, with an increase in anxiety and drinking from February 2018 onward, feeling too unwell to work from October 2018 [3.4.3].

    25.2. Since February 2018 the Claimant has experienced a clinically significant mental-health disorder.

25.3. That a range of opinion would include that at the material time the Claimant suffered from a Depressive Order with anxious distress (recurrent, mild to moderate), and Adjustment Disorder with mixed anxiety and depression (reactive to stress at work) and a Generalised Anxiety Disorder. Dr Newns herself would identify that the Claimant was suffering from Adjustment Disorder with mixed anxiety and depression (reactive to stress at work).

25.4. The Claimant's "mental health problems were poor from February 2018 but worsened by September 2018 [paragraph 1.3].

25.5. She identifies a "date of deterioration" just before September 2018 (i.e. in August 2018)

25.6. GP records from 9 October noted that deterioration was caused by a colleague leaving and her having an increased workload.

25.7. By 24 October 2018 according to GP records "anxiety and physical symptoms of this currently the major issue".

25.8. By "October or November 2018" the Claimant recalls suffering the following symptoms: exhaustion, agitation, depression, grinding of teeth at night, thumping at night (possibly an irregular heartbeat), lack of memory to the point where she could not "self-care", vulnerable to any small change, lacking the ability to concentrate, irritability, muddled and irrational thinking, high level of fear with regard to contact from the Respondent, a sense of "unreality", constantly tearful, shaking throughout the day, in the state of shock – going over and over everything, and "very bad drinking".

25.9. Approximately 12 November 2018 [sic] there was a return to work interview and following this the Claimant wanted to have no more to do with her workplace. It was at this stage she instructed a solicitor and asked all correspondence go through the solicitor.

26. Regarding *causation* Dr Newns was instructed to deal with events in September/November 2018, which makes our task more difficult, since based on our findings we are only dealing with the effect of the actions of Stephen Shaw on 6 November 2018. At page 12 of her second report [295 of the remedy bundle] she gave the following answer:

> "6. Did the failure to refer the Client to Occupational Health in September / November 2018 to identify adjustments required for the Client cause or contribute to any deterioration in the Client's mental-health/ASD symptoms?
>
> It is not possible to predict with complete certainty how her mental-health would have been different if Occupational Health had been involved from September/November 2018. However I would have hoped that she would have been able to have time off work, with no contact from her workplace, and would have been able to engage in therapy at that time. If this had been the case, she may

> not have developed anxiety and low mood to the degree that she did.
>
> I acknowledge, however, that the tribunal and related issues have been a source of considerable distress to her, and this would have been likely to have been the case regardless of whether Occupational health were to have been involved if the tribunal were to have gone ahead in any event.
>
> The trajectory of her mental-health if Occupational Health have been involved from September/November 2018 would obviously have depended very much on what their recommendations would have been at that time."

27. Regarding *prognosis*, Dr Newns writes:

    27.1. She recommends 24 sessions of psychological therapy with a Clinical or Counselling Psychologist (ASD specialist), once a week at first, with less frequent sessions towards the end of therapy, with a phased return to work towards the last 2 months of treatment. She would expect within 9 months of commencing therapy that the Claimant would be able to return to work full-time, if all of these conditions are met (psychological therapy and a workplace which had themselves undergone ASD training and have a clear individuals with ASD.)

    27.2. There is a lifelong vulnerability to psychological difficulties. Anxiety and ASD symptoms are likely to fluctuate with stress, work pressures and other life events throughout the Claimant's lifetime.

<u>Other evidence relevant to health</u>

28. The Claimant resigned on 25 April 2019, but was sufficiently well to commence working for Weir Training Limited three months later on 2 August 2019. We have not received detailed evidence of the Claimant's attempts to find work, but based on a start date at Weir, it is a reasonable inference that she must have been well enough on some level to look for work in July 2019, if not earlier.

29. We note that in her oral evidence the Claimant said that she was not really well enough to work but felt that she had to secure an income. Despite working the Claimant appears to have remained unwell up to the time of the remedy hearing. We find that she continued to experience symptoms of anxiety and depression throughout 2020.

LAW

Apportionment

30. A victim of unlawful discrimination may suffer stress and anxiety to the extent that psychiatric and/or physical injury can be attributed to the unlawful act. In that situation it has been confirmed that the employment tribunal has jurisdiction to award compensation, subject to the requirements of causation being satisfied, see *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481, [1999] ICR 1170, CA.

31. When a tribunal finds that an employee's personal injury has been caused by a number of factors including discrimination for which the employer is liable, it should reduce compensation so that it reflects only the extent to which the unlawful discrimination contributed to the employee's ill health: *Thaine v London School Of Economics* UKEAT/0144/10, *HM Prison v Salmon* [2001] IRLR 425, *BAE Systems (Operations) Ltd v Konczak* 2018 ICR 1, CA, [2018] IRLR 893.

32. In *Thaine*, Keith J cited the decision of the Court of Appeal in *Allen and Others v British Rail Engineering Ltd and Another* [2001] ICR 942 at paragraph 20 per Schiemann LJ:

> (iv) The court must do the best it can on the evidence to make the apportionment and should not be astute to deny the claimant relief on the basis that he cannot establish with demonstrable accuracy precisely what proportion of his injury is attributable to the defendant's tortious conduct.

33. In *Konczak*, Underhill LJ dealt with the question of divisibility and indivisibility, following a summary of the case law (in which he approved the decision in *Thaine*):

> 71. What is therefore required in any case of this character is that the tribunal should try to identify a rational basis on **which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused**. I would emphasise, because the distinction is easily overlooked, that the exercise is concerned **not with the divisibility of the causative contribution but with the divisibility of the harm**. In other words, the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong; not whether it can assess the degree to which the wrong caused the harm.
>
> 72. That distinction is easy enough to apply in the case of a straightforward physical injury. A broken leg is "indivisible": if it was

suffered as a result of two torts, each tortfeasor is liable for the whole, and any question of the relative degree of “causative potency” (or culpability) is relevant only to contribution under the 1978 Act. It is less easy in the case of psychiatric harm. The message of Hatton is that such harm may well be divisible. In Rahman the exercise was made easier by the fact (see para 57 above) that the medical evidence distinguished between different elements in the claimant’s overall condition, and their causes, though even there it must be recognised that the attributions were both partial and approximate. **In many, I suspect most, cases the tribunal will not have that degree of assistance. But it does not follow that no apportionment will be possible. It may, for example, be possible to conclude that a pre-existing illness, for which the employer is not responsible, has been materially aggravated by the wrong (in terms of severity of symptoms and/or duration), and to award compensation reflecting the extent of the aggravation**. The most difficult type of case is that posited by Smith LJ in her article, and which she indeed treats, rightly or wrongly, as the most typical: that is where “the claimant will have cracked up quite suddenly; tipped over from being under stress into being ill.” On my understanding of Rahman and Hatton , even in that case the tribunal should seek to find a rational basis for distinguishing between a part of the illness which is due to the employer’s wrong and a part which is due to other causes; but whether that is possible will depend on the facts and the evidence. If there is no such basis, then the injury will indeed be, in Hale LJ’s words, “truly indivisible”, and principle requires that the claimant is compensated for the whole of the injury—though, importantly, if (as Smith LJ says will be typically the case) the claimant has a vulnerable personality, a discount may be required in accordance with proposition 16.

[**emphasis added**]

34. As is referred to in *Konczak*, Hale LJ’s identified propositions relevant to stress at work cases in the case of Hatton (*Sutherland v Hatton* [2002] IRLR 263 CA) which may be of assistance in discrimination cases. Of particular relevance are:

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

(16) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress-related disorder in any event.”

Likelihood of non-discriminatory dismissal

35. Where it is satisfied that there is some prospect that a non-discriminatory course would have led to the same outcome an ET must reduce damages accordingly: *Abbey National plc and Hopkins v Chagger* [2009] ICR 624. A Tribunal must avoid incorporating another guise of unlawful and/or discriminatory conduct in the Chagger exercise. On the other hand any hypothetical exercise relating to future employment in the absence of discrimination must relate to the actual respondent employer not a "reasonable employer" (*Abbey National Plc v Formoso* [1999] IRLR 222).

ASSESSMENT OF COMPENSATION

Basic Award

36. The basic award in this case is **£3,937.50**.

Notice Pay

37. The parties are agreed that the figure for three-month's notice pay is **£13,930.95**.

Injury to Feeling award

38. An award of injury to feelings is intended to compensate a claimant for the anger, distress and upset caused by the unlawful treatment they have received. It is compensatory, not punitive.

39. The Tribunal has taken account of the fact that essentially only one discriminatory act was proven and that this would not be described as a campaign of harassment or anything of that nature, for that reason we do not consider it is appropriate to make an award in the upper band.

40. On the other hand however, the discriminatory conduct was an integral part of the serious breach which led to the termination of the Claimant's employment, as such it was serious. Mr Shaw's attempt to steer the Claimant towards a settlement agreement rather than making the requested referral to Occupational Health in the circumstances of the Claimant being vulnerable and unwell as she was at the time we consider has had a serious and substantial effect on the Claimant.

41. We consider that an award should be made at the upper end of the middle band. The middle band is £8,800 – £26,300. In our assessment the correct figure is **£20,000**. In so awarding we have taken account of our award for injury to health

and adjusted to ensure that the Claimant is not over-compensated due to the degree of overlap.

Injury to Health

42. Ms Platt characterised the Claimant's claim for injury to health caused by the discrimination as an exacerbation of a pre-existing condition.

43. The Claimant's witness statement for the remedy hearing says regarding a lack of referral to occupational health at paragraph 132:

> "I think it is reasonable to conclude that I was crying out for help, possibly throughout 2018, but certainly from 19 or 20 September 2018. It led to a much more severe breakdown, and a vulnerability that I do not think I can fully recover from. By the time I was finally referred to OH I had severe depressive illness with anxiety and panic attacks, with thoughts of self-harm and suicidal ideation and drinking heavily. If I had received OH support earlier, I could have recovered quietly, as I wished to do, and returned to BPP, so there is a direct correlation between the lack of OH support and my financial and career status now."

44. The discriminatory act we are considering is that of Stephen Shaw on 6 November 2018. The Claimant's significant anxiety, depression and other mental-health difficulties prior to this date cannot have been caused by this discriminatory act.

45. Was there an injury to health caused or exacerbated by the discrimination?

46. It is clear from contemporaneous documents that the Claimant was already suffering from significant mental health difficulties at the point when the act of discrimination occurred on 6 November 2018. Her state of health up to that point cannot be attributed to the statutory tort of discrimination. There was a deterioration in mood from late 2017. She began to become unwell in February 2018, a clinically significant mental health disorder. There was a significant deterioration from August 2018 onward. She was no longer at work from October 2018 onward. All of this occurred before the discriminatory actions of Mr Shaw on 6 November 2018.

47. There continued to be other stressors after this point. Some of the causes of stress are circumstances relating to the Claimant's employment with the Respondent in respect of which there is no legal liability. Some of the causes are unrelated factors, whether personal or domestic. The litigation itself has plainly been a cause of stress.

48. The report of Dr Newns does not deal in precise terms solely with the effect of the discrimination on 6 November 2018, given that the instructions given to her also referred to September 2018. Her opinion regarding the effect of the non-referral to OH is expressed in slightly tentative terms. She acknowledged in

cross examination that in preparing her report she had assumed that the Claimant had not had time off whereas in fact the Claimant had gone off sick on 24 October 2018.

49. Dr Newn has not attempted to provide any percentage apportionment relating to the events on 6 November 2018.

50. One imponderable point from Dr Newn's perspective dealing with causation is what the Occupational Health recommendations would have been at the time, i.e. had there been a referral in November 2018. Her degree of caution is entirely appropriate given that she is simply offering a medical opinion.

51. It is clear from appellate authority that a Tribunal should not avoid what is often a somewhat speculative process. It is incumbent upon us to consider what would have happened and to make findings as to what would have happened but for the discrimination and what will now happen.

52. This is a situation, as envisaged by Underhill LJ in *Konczak* where we do not have medical evidence to support a precise apportionment. However following this and other appellate guidance we find that it is in the interests of justice to make such an apportionment as we are able. We accept the Claimant's evidence to the extent that, her ill health was significantly aggravated by the decision of Mr Shaw not to make the occupational health referral requested at a crucial time. The consequence, we find, was not simply a delay of three months in the making of the occupational health referral, but a missed opportunity to make a referral at a stage when the Claimant actively wanted such a referral, such that it was realistic to anticipate that a return to work would be successfully achieved.

53. Our finding is that an Occupational Health referral in 6 November 2018 would have had a very good chance of allowing the Claimant the opportunity to recover and providing a structure for her return into the workplace. We find on the balance of probabilities that this would have successfully led to her return to work. (We deal with the possibility that it would not have worked out below under "Chagger").

54. We find that the injury is best described as an aggravation of the Claimant's ill-health at the time of 6 November 2018. Although this discriminatory omission is one of a number of stressors in the Claimant's life, its particular significance was in the effect. The opportunity to obtain occupational health advice at a time when the Claimant was receptive to it and the likelihood of a successful return to work was lost. It is the experience of the Tribunal that lengthy absences from the workplace make a return to work harder to achieve. We find that this was the situation in this case.

55. The Claimant understood from Mr Shaw that the employment relationship was coming to an end. The GP record of 16 November 2018 recorded "Work have said she needs to settle with them so will be looking for other work but doesn't feel able to do this at present".

56. The failure to refer to occupational health led to the submission of the grievance in January 2019 and ultimately to the breakdown in the employment relationship. We accept that the Claimant's symptoms depression and anxiety have been aggravated from the continuing effects of the discrimination of 6 November 2018. We find that that persisted even up to the date of the remedy hearing.

57. *Konczak* makes clear that it is the divisibility of harm that should be the focus of the Tribunal. Given the multiple causes and the fact that the Claimant was ill already by 6 November 2018, we consider that, on a rough and ready basis the appropriate apportionment is that **50%** of the Claimant's injury can be apportioned to the discriminatory conduct and its consequences.

Assessment of quantum for injury to health

58. We have considered the Judicial College Guidelines specifically the 15th Edition which was published in November 2019. We have taken account of the guidance for psychiatric injuries and

    (a) the injured person's ability to cope with life and work

    (b) the effect of the injured persons relationships with family friends and those with whom she comes in to contact

    (c) the extent to which treatment would be successful

    (d) future vulnerability

    (e) prognosis

    (f) whether medical help has been sought

59. We find that, prior to apportionment, the extent of the Claimant's injury falls into the Moderately Severe award suggesting an amount between £17,900 and £51,460.

60. Moderately Severe cases include those where there is a work related stress resulting in a permanent or long standing disability preventing a return to comparable employment. These are cases where the problems with factors (a) – (d) above but there is a more optimistic prognosis than severe, we do not consider that this is a severe case given that the prognosis is reasonably good albeit that the Claimant in our assessment is unlikely to return to work at the same level of compensation that she enjoyed while working for the Respondent.

61. We have also taken account of the decision of Mr Justice Henriques in a quantum award reported by Lawtell in the case of Garrod v North Devon NHS Primary Care Trust a decision in 2006 in which the Claimant received an award which would be updated for inflation of £20,967 in that case the Claimant who was female and 49 and a Health Visitor suffered a Moderately Severe depressive illness, her employment was terminated on grounds of ill health following two depressive episodes which were on the facts of that case the fault

of the employer, her depression continued at trial which appears to have been four years after the material injury but was expected largely to resolve within six to twelve months allowing a return to work within two years of the end of litigation but not in a stressful occupation or a managerial position.

62. We find that case is useful as a point of comparison but in fact that Mrs Aylott's situation was somewhat less severe given that the prognosis supported by medical evidence in her case is that she should be able to return to full time work in less than a year with treatment. Accordingly, we consider that any award should be lower than that awarded in the case of Garrod.

63. If the Respondent's discrimination was the sole cause of the Moderately Severe episode we consider that it would be in the circumstances of this case appropriate to award a figure somewhere in the middle of the Moderately Severe band i.e. between £17,900 and £51,460. The mid-point of the band is £34,680.

64. Based on an apportionment of 50% the injury to health award we find is (50% x £34,680=) **£17,340**.

Expenses caused by injury

65. The next item in the schedule are a series of payments to Doctor Cosham totalling **£1,110** we have seen evidence of Doctor Cosham's input in this case, we find that this was of therapeutic benefit and arose from the Claimant's injury caused by discrimination, dealt with below. For reasons given above on apportionment we allow 50% of this making **£555**.

66. A figure of **£1,900** is claimed for what is described as "Lorna Wing" in July 2019. This is an autism report, which although has been of some benefit in this litigation we consider was obtained principally for therapeutic reasons and accordingly we allow 50% of this making **£950**.

Aggravated Damages

67. Aggravated damages may be awarded where the act of discrimination has been done in an exceptionally upsetting way, for example "in a high handed malicious, insulting or oppressive way" or alternatively where a case is conducted at trial in an unnecessary offensive manner.

68. It was put forward on behalf of the Claimant that she had been put through an unnecessary preliminary hearing to determine the matter of disability. It seems however that the question of disability was conceded at the outset of that hearing.

69. We find that hearing and the decision of Employment Judge Gordon made some useful findings about the extent, nature and timing of the Claimant's disability. While we acknowledge that a concession might have been at an earlier stage, we do not consider that it crosses the threshold for aggravated damages.

Past Loss of Earnings

70. The Respondent argues that the circumstances regarding the Claimant's employment at Weir Training are supervening events and that it would not "just and equitable" for losses to continue beyond that this point. Further, it is argued, that to hold the Respondent accountable for the reference would amount to a claim for negligent misstatement, which falls outside of the jurisdiction of the tribunal.

71. The circumstances leading to this dismissal are unfortunate. It is easy to see how the somewhat bureaucratic approach of the Respondent's administrator led to suspicions in the minds of the Claimant's new employer, compounded with the circumstances of the laptop.

72. We have seen nothing in the evidence of the way that the Claimant described her old role to her new employer to suggest that she was anything other than entirely honest. It seems that the lack of a reference by Respondent in the precise terms she used to describe the secondment from the Respondent precipitated events which led to the termination of the Claimant's employment with Weir Training. As to the laptop, Mr Shaw or the Respondent could have arranged for the laptop to be returned. Equally we accept that the Claimant should have taken some action to return this laptop, which was not her property. The concerns regarding the Respondent's data on the laptop was precipitated by the absence of an adequate reference to corroborate the title and nature of the Claimant's secondment.

73. We do not consider that we need to attribute blame for the circumstances that arose involving the Claimant, Respondent and Weir Training. In our view none of the actions of any of the three actors broke the chain of causation. Looking at the matter broadly, at this time the Claimant was receiving a salary at Weir Training Limited which was £32,000 less than the salary she had been receiving at the Respondent. She was on any view still experiencing a significant loss as a result of the discriminatory dismissal. We find that the Claimant reasonably accepted this employment in an attempt to mitigate her loss. The fact that this subsequent employment came to an end because of a lack of prompt and full communication over her former role, on the part of the Respondent we do not find amounts to a supervening event.

74. In summary we do not find that this was a supervening event. The Claimant was still during and after the period of employment with Weir Training suffering an ongoing loss following the discriminatory dismissal. These events did not break the chain of causation.

Calculations

75. The period from the end of the three month notice period on the 16 July 2019 until the remedy hearing on 7 December 2020 is 72 weeks.

76. We have taken the weekly net earnings figure of **£688.48** set out in the counterschedule. We find that this figure is evidenced by the most up to date payslip contained within the remedy bundle set out pages 442-443. This is the

latest payslip before the period of sick absence and we find that this is the best approximation to the Claimant's ongoing net pay.

77. Multiplying these figures gives a figure for loss of earnings up to the date of the remedy hearing of **£49,570.56**. (72 weeks x £688.48/week)

78. From that figure we *deduct* the sum of **£17,761.08** which is the amount that the Claimant earned from other employment in the period May 2019 to October 2020 as set out in her amended schedule of loss provided on the first day of the hearing.

Pension Contributions (past)

79. We have taken the agreed annual pension contribution figure set out in the up dated counter schedule namely an annual figure of £1,902.36. This is equivalent to a monthly loss of £158.53 or a weekly loss of £36.58.

80. We find that for the twenty months from dismissal to the first day of the remedy hearing the Claimant lost out on pension contributions in the sum of **£3,170.60**.

Loss of Statutory Rights

81. We have assessed this figure in the round figure of **£500**.

Job Seeking Expenses

82. The Claimant has claimed **£100** for this figure. We do not consider that the Claimant has proved this loss and accordingly make no award.

Other Expenses

83. The footnote for expenses at the bottom of page of the schedule of loss does not seem to be fully reflected in the body of the schedule. We have considered that the appropriate approach is to consider this footnote as if it was part of the body of the schedule, we note that the Respondent had seen these figures in an earlier iteration of the schedule and consider it appropriate to assess this accordingly.

84. The first item is **£850** described as an AQA course from Brooks and Kurt. This is dealt with in the Claimant's witness statement, she says it is to help her carry out apprenticeship work, this point was not challenged by the Respondent and we accept this is a loss accordingly we award **£850**.

Interest

85. Interest is awarded on injury to feelings awards from the date of the act of discrimination complained of until the date on which the tribunal calculates the compensation (see Reg 6(1)(a) IT(IADC) Regs 1996). In this case the act of discrimination occurred on 6 November 2018. The date of assessment is 17 February 2021. The elapsed number of days is 833. Interest on injury to feelings is therefore 833/365 x 8% x £20,000 = **£3,651.51**.

86. The Claimant has claimed interest on the award for personal injury at 2%. The elapsed number of days is 833. Interest on the award for personal injury is therefore 833/365 x 2% x £17,340 = **£791.46**.

87. Interest is awarded on all sums other than injury to feelings awards from the mid-point of the date of the act of discrimination complained of and the date the tribunal calculates the award (Reg 6(1)(b) IT(IADC) Regs 1996). The mid-point date is the date half way through the period between the date of the discrimination complained of and the date the tribunal calculates the award (Reg 4 IT(IADC) Regs 1996). The elapsed number of days is 833. Interest on the award for personal injury is therefore 833/365 x 0.5 (only from mid-point) x 8% x £32,247.07 (total past compensation) = **£2,943.76**.

FUTURE LOSSES

Future recovery

88. The opinion of clinical psychologist Doctor Kathryn Newns in her report dated 23 June 2020 (based on a sole instruction from the Claimant having previously been jointly instructed) is that the litigation itself has been a significant source of stress for the Claimant and that herself confidence has deteriorated to a significant extent.

89. Happily, however she is of the opinion that the current situation which she characterises as a cycle of anxiety and avoidance using alcohol to cope is not likely to be permanent, she considers that with the intervention of a clinical or counselling psychologist who specialises in working with individuals with ASD should would be able to recover her self-confidence, re learn ways to interact at work and manage conflict at work and carry out work tasks without risks to her mental health.

90. She recommends twenty four sessions of psychological therapy which would be weekly at first but with less frequent sessions towards the end of therapy. She suggests that towards the last two months of treatment the Claimant would be able to start a phased return to the work place.

91. In her opinion the Claimant should within nine months of commencing therapy be able to return to full time work if all of these conditions are met. She does however, register an opinion that the Claimant has a lifelong vulnerability to psychological difficulties and her anxiety and her ASD symptoms are likely to

fluctuate with stress, work pressures and other life events throughout her lifetime.

92. The Tribunal heard oral evidence from Doctor Newns who was asked questions by Mr Jones and the Tribunal panel. We asked for information about the lead time in entering this type of therapy. Unfortunately it seems that such therapists do not have a waiting list due to risks that might attach to such a waiting list. Taking account of a likely delay in the Claimant obtaining therapy and Doctor Newn's opinion that it would take her nine months to get to the stage of being in full time employment and also the exceptional circumstances of the present Covid-19 pandemic taking a realistic view of this we consider that it would be January 2022 before the Claimant is likely to be in position of carrying out full time employment. We do however consider that she would be likely to continue picking up *ad hoc* or contracting work during the course of 2021 as she has been doing.

Residual Earning Capacity

93. The Claimant has put forward her claim on the basis of a residual earning capacity of £20,000 a year. We note that in an earlier version of the schedule of loss it was suggested that the Claimant would eventually get to the ability to earn £30,000 per year.

94. The Claimant is an intelligent, hardworking and resourceful woman. She has demonstrated since her dismissal the ability to find work.

95. We find that by January 2022 the Claimant will be able to earn £30,000 per year, we take account of the fact she may have to do more than one work stream simultaneously to achieve this figure and that it may be hard work to earn this much in the education sector working as a contractor or on a self-employed basis. Nevertheless, doing the best that we can we find that she will earn £30,000 a year from this point onwards. This is approximately equivalent to £24,040 net earnings.

December 2020 – December 2021

96. We find that during this fifty six week period from the date of the remedy hearing to the end of 2021 the Claimant will continue to earn money on an *ad hoc* basis as she has done between her dismissal and the remedy hearing.

97. We have considered the Claimant's income for the first nine months of 2020 and consider that this is probably our best guide as to her earning capacity at present. We have excluded the income from the Weir Training period, on the basis that this is less likely to be reflective of the future pattern of her earnings.

98. Excluding the Weir income, the Claimant's earnings for a 43 week period in 2020 were £12,397.50. This represents weekly net earnings of £288.31.

99. For 56 weeks from early December 2020 to the end of December 2021 if the Claimant continued to earn at the same rate she would earn £16,145.58 and we

have given credit for that set against a loss calculated by reference to the Claimant's weekly earnings of £688.48 for the fifty six week period.

100. We calculate this as a net loss of (£38,554.88-£16,145.58) = **£22,409.30**.

Pension

101. For this fifty six week period we have awarded pension loss of **£2,048.70** on the same basis as the pension loss before (i.e. £36.58 x 56).

2022 and onward

102. The Claimant has put forward her claim on the basis on a career long loss. Her claim is that she would have remained working for the Respondent until a retirement age of 68. This claim is supported by a number of submissions, including that the Claimant had a "stable and secure employment … .. before April 2018 it was enjoyable and rewarding and it enabled her to support her family". The Claimant's case is therefore that there is no reason to doubt that she would have continued working until the age of 68 in full time-employment.

103. The Tribunal does not accept this characterisation. As we found in our written reasons on liability, the Claimant had been struggling with the workplace and in her role in it. We dealt with a variety of such problems in our written reasons, in particular at paragraphs 46, 49, 55-72, 86, 90-120. This history goes back to Summer 2016. For example she was unhappy with her allocation of responsibilities following Mr Kolhathkar joining the team in Summer 2016, she was struggling with the long hours culture and she suffered with anxiety with rumours about a restructure. As to the politics of the organisation, she had experienced friction with the Dean of the Business School, she attended the meeting with the CEO described by the Vice-Chancellor as not being "appropriate or sensible" and friction with the Head of the Programme Design team. In February 2018, following discussions with her mentor, the Claimant was already contemplating whether she had been constructively dismissed. This was before the discriminatory event.

104. Absent the discrimination, we do not accept that the Claimant would have continued working for the Respondent until she was 68.

105. We have considered the guidance of the Court of Appeal in the leading case on career long loss *Wardle v Credit Agricole Corporate and Investment Bank* [2011] EWCA Civ 545 [2011] IRLR 604. While we accept that Mrs Aylott's case is one in which she may not recover the same level of remuneration in her subsequent employment, we do not consider that her case should be seen as a career long loss approach given that we do not find what she would only voluntarily have left her employment for an equivalent or better job. We find that she would have left this job long before the end of her career. She was not particularly happy in the organisation and her employment there was taking a toll on her health. Against this, we recognise that she had a strong work ethic

and had she recovered from her illness in 2018 as we find most likely, we find she would have worked another few years.

106. The Tribunal is required to do the best it can based on the evidence. This exercise is necessarily speculative. Doing the best we can, our finding is that but for the discriminatory dismissal, the Claimant would have worked for a little over five years from the date of the remedy hearing, to 31 December 2025.

107. For this period on the basis we find that the Claimant will have a residual earning capacity of £30,000 (gross annual)**.** When compared to her actual gross annual salary of £55,000 the gross loss is £25,000. Comparing net equivalents, the net annual salary in the Respondent's employment was £688.48 x 52 = £35,800.96. The net equivalent of £30,000 is £24,040. The loss of annual earnings is £11,760.96.

108. Accordingly the Claimant's future net loss for this period is (4 x £11,760.96 =) **£47,043.84**.

109. Future pension contributions which we have calculated at **£7,609.44** (4 years x £1,902.36 p.a.).

110. The Claimant has put forward her claim for future loss of on a multiplier basis for a career long loss to the age of 68. Given that we are not assessing this claim on the basis of a career long loss and we have heeded the guidance of the EAT on the use of the Ogden table approach in *Kingston Upon Hull City Council v Dunnachie (No.3) and another* [2004] ICR 227, EAT and *Birmingham City Council v Jaddoo* (EAT0448/04). We do not find that such an approach is appropriate in the circumstances of this case.

Apportionment of compensatory award

111. We have considered whether we should apportion the compensatory award for financial losses arising from dismissal in line with the 50% apportionment of the award for psychiatric injury and financial losses caused by the injury.

112. Focusing on the divisibility of harm, we find that we cannot divide the harm suffered to the Claimant's career with the Respondent in the same way that we could divide the psychiatric injury.

113. Our finding is that but for the discrimination of 6 November 2018, the Claimant would have benefited from a timely referral to occupational health, would not have submitted a grievance and would have returned to the workplace. The whole sequence of events following the discrimination was caused by it. We do not find that we can divide out multiple causes or apportion harm.

114. To the extent to which it might be said that there was a chance that the employment relationship would come to an end in any event, we have dealt with this under ‘Chagger’ below.

Chagger deduction

115. Following *Chagger v Abbey National* [2009] EWCA 1202 it is necessary to consider what would have happened had there been no unlawful discrimination on 6 November 2018. Mr Jones submits on behalf of the Respondent that, if there was a chance of a non-discriminatory constructive unfair dismissal taking place in any event, a reduction should be made on this basis.

116. While we have derived some assistance from *Chagger* and *Formoso* regarding the broad principles to be applied, Mrs Aylott’s factual circumstances are significantly different to both cases. *Chagger* was a redundancy situation. *Formoso* was a dismissal for a disciplinary matter. In both of those cases the employee involved was subject to a process that was quite likely to result in a dismissal absent the discrimination. In both cases the employee was approaching the conclusion of a process where they would or would not be dismissed.

117. By contrast Mrs Aylott was not involved in a disciplinary or redundancy process. There was nothing inevitable about a dismissal situation arising, even a constructive dismissal situation. On 6 November 2018 she was on sick leave, and requesting a referral to occupational health. Mr Shaw, who was part of the HR department was signalling by his actions that a settlement agreement with termination was the Respondent’s preferred outcome rather than rehabilitation and return to work. The referral to occupational health was made 3 months later, by which point her health had deteriorated and she was by that stage reluctant to engage with occupational health. By the time of her resignation on 25 April 2019 she was in a situation that had been caused by the discrimination which she would not otherwise have been in. This is quite different to a disciplinary or redundancy process which might be thought quite likely to lead to dismissal within a particular timeframe whether or not there had been discrimination.

118. Our finding is that, on the balance of probabilities, a referral to occupational health made within a few days of her requesting it in November 2018 would have led to her returning to the workplace. Mr Donnarumma, her line manager in her seconded role, seems to have been reasonably sympathetic to her. She had been absent with health difficulties before but managed to recover and return to work. On balance we find that with occupational health assistance she would have rested and returned to work with some support in place.

119. Nevertheless we accept that there was some possibility that the Claimant’s employment would have come to an end absent discrimination.

There are two reasons. First, that the Claimant had struggled with her relationships in the workplace in the months preceding her sick absence in October 2018, as is dealt with at some length in the written reasons for our decision on liability. Secondly, she was unwell and her employment was exacerbating her ill health.

120. For the reasons given above, in particular that she was not in a process that would be naturally likely to lead to the termination of her employment, we find that the likelihood of the Claimant resigning for a non-discriminatory reason was low but possible.

121. Our finding is that but for the discrimination there was a 10% chance of her resigning on 25 April 2019, the date of her actual resignation.

122. It follows that the deduction should be **10%**.

Grossing up

123. Ms Platt's written submissions contend for "grossing up" i.e. an increase in award to reflect the fact that the compensation over £30,000 will be taxed in the hands of the Claimant. The Tribunal did not hear detailed argument on this point, nor does it have a basis to calculate the tax that the Claimant will have to pay, not knowing the likely date of payment of the award and nor her other income in the relevant tax year or years.

124. The Tribunal considers in principle that grossing up should apply, but invites the parties to agree if possible the amount.

ORDER

1. By **12 March 2021**, the Claimant will provide to the Respondent a draft calculation of the sum claimed for grossing up.

2. By **26 March 2021** the parties will notify the Tribunal (marked in the subject line for the urgent attention of Employment Judge Adkin) whether the matter has settled, or alternatively of the agreed figure for a grossing up element if an order is required or in the event that any point remains in dispute, the basis for dispute, setting out each side's position in brief and an indication of whether the parties are content for this point to be resolved on the papers.

____

Employment Judge Adkin

Date 22.2.21

SENT TO THE PARTIES ON

23 Feb. 21

FOR THE TRIBUNAL OFFICE