



EMPLOYMENT TRIBUNALS

Claimant: Mr B Fox

Respondent: Jaguar Land Rover Limited

Heard at: Birmingham Employment Tribunal (by CVP)

On: 11 February 2021 with a further day for deliberations on 08 March 2021

Before: Employment Judge Mark Butler
Ms S Campbell
Mrs N Chavda

Representation

Claimant: Ms Grossman (Counsel)

Respondent: Mr Feeny (Counsel)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V. A face to face hearing was not held because of the ongoing pandemic and all issues could be determined in a remote hearing. The documents that I were referred to are across two very short bundles.

JUDGMENT ON REMEDY

1. The tribunal awards the claimant the following:

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| Basic award for unfair dismissal | £14,732 |
| Loss of statutory rights | £300 |
| Loss of bonus (6 years) | £2,520 |
| Loss of RHA (6 years) | £6,240 |
| Injury to feelings (including interest of £1,551.78) | £11,551.78 |
| Past and Future loss of wages | £72,823.94 |
| Accelerated receipt reduction | -£2,797.44 |
| Pension loss | £68,881.87 |

| | |
|------------------------------------|--------------------|
| Amount to be added for grossing up | £78,084.42 |
| Total | £252,336.57 |

2. The respondent is therefore ordered to pay the claimant the total sum of **£252,336.57**.
3. The necessary sums have been awarded following grossing up, and therefore may be subject to statutory deductions for tax and National Insurance.

REASONS

Procedural History

1. The claimant presented his claim on 14 June 2019. A full hearing on liability was held on 21 September to 28 September 2020. Oral judgment was handed down on 28 September 2020. There are no written reasons in this case, as no request was made for them. The decision of the tribunal was that the claimant succeeded in his claim for a failure by the respondent in their duty to make reasonable adjustments, discrimination arising from disability, indirect disability discrimination and unfair dismissal. Claims for direct disability discrimination and victimisation failed and were dismissed.
2. Initially the tribunal was due to consider remedy at the conclusion of determining liability. However, it became clear from the evidence bundle that if the claimant wanted to be properly compensated for pension losses, given he had been in the respondent's direct benefit scheme, then a complex pension calculation would be required. In these circumstances, the claimant was given the option to either consent to remedy being dealt with today, with pension losses being calculated on a simple basis but at the risk of being undervalued, or to have a separate remedy hearing where such losses could be properly calculated. Having considered what the claimant had to say, the tribunal decided that a separate remedy hearing would be listed.
3. Following the hearing on liability, case management orders were agreed with the tribunal. This included on how best to proceed on calculating pension losses. This was eventually done using the seven-step method.
4. The tribunal spent the morning of the hearing reading the remedy bundle, the witness statement from the claimant, a separate witness statement produced for Mr Brown of the respondent, and its notes of the liability judgment.
5. The hearing commenced with evidence from the claimant at 11.40am.
6. Having heard the claimant's evidence, and oral submissions for both the respondent and the claimant, it was around 4pm. Unfortunately, this meant that the tribunal was not able to fully deliberate in the remaining time, in order to hand down judgment. No decision had been reached by the time the tribunal concluded deliberations on that day.
7. The tribunal panel reconvened to reach a decision on remedy on 08 March 2021. Unfortunately, it was not possible to reconvene any earlier than this.

Issues

8. The parties agreed a number of matters in advance of the tribunal hearing evidence, which was helpful in narrowing down the issues for the tribunal to determine. Namely that:
- If the claimant was to continue working up to and retire at 65, then his net pension losses from the respondent's scheme would be £77,841.87
 - If the claimant was to continue working up to and retire at 66, then his net pension losses from the respondent's scheme would be £86,670.28
 - The claimant's gross pay per week was agreed at £661.56, and net pay per week was agreed at £465.00 per week.
 - The basic award is agreed at £14,732
 - The RHA is agreed at the figure of £1,040 per year.
 - The loss of bonus was agreed at the annual sum of £420
 - It was alter confirmed, by email from the claimant's representative, that the claimant had received a payment of 3 months net pay in lieu of notice.
9. The issues that remained for the Tribunal to determine were:

Pecuniary losses:

- Has the claimant mitigated his loss of earnings?
- What is the period of future loss of earnings, if any?
- Would the claimant have continued to work with the respondent and retire at the age of 65 or 66?
- Should there be a withdrawal factor applied to the pension losses?
- Was the claimant entitled to a financial benefit for 50 years' service?
- What award should be made for loss of statutory rights?
- Should there be a Polkey reduction made to reflect that the claimant may not have reached retirement age under the employ of the respondent?

Non-pecuniary losses:

- What injury to feelings has the claimant suffered?
- Has the claimant suffered an exacerbation of an existing injury as a result of the respondent's discrimination?

10. In addition, any award will be subject to interest, and the total figures will need to be grossed up tot take account of tax.

Evidence

11. The parties had agreed the 2 net figures as they related to pension losses. As a result, Mr Feeny stood down Mr Brown as a witness. As his evidence related only to this matter.
12. The tribunal only heard evidence from the claimant.
13. The tribunal was assisted by an agreed bundle that ran to 228 pages. There were additional documents submitted for consideration by the tribunal on the morning of the hearing. These were allowed into the hearing given their relevance, and having considered the views of the respective parties.

Submissions

14. Mr Feeny presented the tribunal with a note on the law in advance of oral submissions.

15. Both Counsel made oral submissions, and provided the tribunal with relevant case law. We have considered their submissions, but do not rehearse them in full here. However, the pertinent parts of the submissions and case law analysis are set out below.

16. In brief, Mr Feeny made the following submissions:

- That there should be a percentage reduction in the compensatory award. This was put forward on 4 grounds. First, was whether there was a chance that the respondent would not be able to offer the role permanently without nightwork. Secondly, was as to how fellow workers would have reacted, and whether, if this caused disquiet amongst others, would this ultimately would have resulted in the claimant going back into the restricted worker pool, with likely dismissal after 3 months. Thirdly, whether the claimant would have been able to see out his full term up to his anticipated retirement age due to his health, given he has suffered two relatively serious health conditions. And, fourthly, whether general matters relating to the economy, namely the impact of BREXIT and with the economy having entered recession, would mean that the claimant was unlikely to continue working for the respondent up to his anticipated retirement age. Mr Feeny submitted that guidance in both Chagger and D'Bell meant that, although speculative, the tribunal cannot simply decline to engage with this matter on the basis of a lack of evidence. Mr Feeny submitted that on the basis of these grounds, there should either be a 100% reduction after 3 months, or a blended reduction after 3 months.
- That the claimant's evidence that he would retire at 66 was on the mistaken basis that at 50 years' service he would receive a gift. And that once he realised that this was not the case, he would retire before that point.
- On whether the claimant failed to mitigate his losses, Mr Feeny submitted that the claimant had not applied for other roles regularly. And that he should have been considering supermarket roles earlier on in the process. Mr Feeny submitted that the claimant would have needed some time to get over the shock and disappointment of his dismissal, but that this time should have come much earlier than October 2020, and realistically this should have been Summer 2019. In support of this he submitted that although health was clearly raised in the claimant's witness statement, there was no evidence that supported that the claimant's health had worsened post-dismissal, nor that his medical treatment had changed.
- Mr Feeny submitted that there was no evidence to support that the claimant was incapable of looking for work. That being disheartened was not a reasonable position to take. It was submitted that had the claimant persevered with looking, he would likely have secured a job in the retail sector.
- It was accepted that the claimant is limited to the types of roles that he had been looking at, which is likely to give rise to an ongoing financial loss for the claimant for the remainder of his working years. Based on guesstimate, using salaries available for roles with Lidl and Aldi, Mr Feeny suggested that the claimant was likely to earn £18,622.50 gross per year, which is £16,325.46 net per year. This is based on a weekly gross figure of £358.13, and net weekly figure of £313.95. Mr Feeny suggested that this figure should apply from early Summer 2019; however, if the tribunal concludes that the claimant had acted reasonably to date, then this

should be applied to future losses within a month or so.

- Mr Feeny submitted that any injury to feelings award should be at a figure of around £7,500. As this was essentially a one off act of discrimination, that being the dismissal. And that the schedule of loss figure was based on all claims succeeding. Further, the claimant's evidence on injury to feelings refers to matters not subject to this claim, namely, alleged bullying from Ivan Cheeseman. Long period of service should not be taken into account in this award, as this is compensated for through the basic award.
- Mr Feeny concluded by submitted that the loss of statutory rights ought to be restricted to £300, given that the claimant only has 6 years left to work, at most, so the loss is not as great to him as somebody with more years in front of them. And that the award for 50 years' service is not recoverable as a loss.

17. In brief, Ms Grossman made the following submissions:

- The claimant worked for the respondent for nearly his entire life.
- That he is a man of advanced years and with health conditions.
- In relation to *Polkey* reduction, that the substantive decision to dismiss the claimant was tainted by discrimination and therefore such a reduction is inappropriate (Biggs)
- That applying *Cooper Casings*, the burden rest on the wrongdoer
- The eggskull shell principle is relevant.
- That this is a case that is wholly speculative in respect of *Polkey* consideration. And that none of the matters now raised had been put forward before.
- Claimant was reasonable, or at least not unreasonable in the approach that he took to mitigation.
- The claimant found the process extremely difficult, which caused him to feel ashamed and embarrassed.
- That the claimant would need to explain to employers that he had been dismissed. This along with being aged 59 at the time, having two disabilities, are difficult hurdles to overcome.
- The claimant wanted to clear his name before considering other work.
- The claimant made reasonable attempts to find job after his name was cleared, and showed a willingness and appetite to look for work on an ongoing basis, although the dismissal continues to affect him.
- Beyond it being a matter of medical conditions, in the claimant's own words, he was disheartened. There are also points where he is not doing well. Taking these factors into account, and the job market as it currently stands, the fact the claimant is unskilled, he will never work again.
- If the claimant did find work, he would have an ongoing loss up until retirement.

- The claimant would not be able to work full time.
- Mr Fox wanted to remain in work until he reached 50 years' service.
- The dismissal has had a significant impact on the claimant.
- Claimant was an honest witness
- This is a serious incident of discrimination, against a vulnerable individual. At the point of dismissal, there were a series of missteps by the respondent.
- The claimant's depression was induced by bullying, justifiable that he receives a high award.
- Entitled to full amount of pension loss.

Law

18. We were referred to the following by Mr Feeny (as set out in his note on the law):

- Section 123 of the Employment Rights Act 1996
- Morgans v Alpha Plus Security Ltd [2005] ICR 525, EAT
- *Abbey National v Chagger* [2010] I.C.R. 397 and *Eversheds Legal Services Ltd v De Belin* [2011] ICR 1137
- *Software 2000 Ltd v Andrews* [2007] ICR
- *Al Jumard v Clwyd Leisure Ltd* [2008] IRLR 345
- *Turton v McGregor Wallcoverings Ltd* [1977] IRLR 249
- *Lane v London Metropolitan University* [2005] All ER (D) 220 (Jan), EAT
- *Vento v Chief Constable of West Yorkshire* [2002] EWCA Civ 1871
- *Chapman v Simon* [1994] IRLR 124, CA
- *Thaine v LSE* [2010] ICR 1422
- *Cooper Contracting Limited v Lindsey* UKEAT/0184/15/JOJ

19. Ms Grossman referred us to the following case law:

- *Alidair Ltd v Taylor* 1978 ICR 445, CA
- *Taylor v OCS Group Ltd* 2006 ICR 1602, CA
- *Polkey v AE Dayton Services Ltd* 1988 ICR 142, HL
- *Sinclair v Wandsworth Council* EAT 0145/07
- *Lynock v Cereal Packaging* [1988] I.C.R. 670
- *City of York Council v Grosset* [2018] EWCA Civ 110
- *Dyer v London Ambulance NHS Trust* EAT 0500/13

- Newcastle City Council v Spires UKEAT/0334/10/ZT
 - Hibiscus Housing Association Ltd v McIntosh UKEAT/0534/08/CEA
 - Vento v Constable of West Yorkshire Police, CA, {2002} EWCA Civ 1871.
20. The tribunal has considered each of these decisions when determining this case.

Findings of fact

We make the following findings of fact based on the balance of probability from the evidence we have read, seen, and heard. We do not repeat all of the evidence here. And we do not make findings in relation to all matters in dispute but only on matters that we consider relevant to deciding on the issues currently before us.

21. The claimant's date of birth is 28 November 1959.
22. The claimant started his employment with the respondent on 21 June 1976. He continued to work for them until he was dismissed on 29 March 2019.
23. At the time of his dismissal the claimant was 59 years old. At the time of this hearing, the claimant was 61 years old.
24. A significant number of the claimant's family either worked, or had worked, for the respondent. Including the claimant's late father.
25. After 25 years' service with the respondent, the claimant had his length of service recognised by receiving a clock.
26. After reaching 40 years' service with the respondent, the claimant's service was recognised through a gift of a watch and an award (see p.45 of the remedy bundle)
27. The claimant held a genuine belief that he would have had 50 years' service recognised by the respondent had he reached that milestone. He expected that as part of this he would have been invited to a 50-year service dinner and dance, receive an award and be able to choose a gift up to the value of £1,000.
28. The respondent did not recognise 50 years' service with a formal service and a gift. It only recognised 25 and 40 years' service in this way.
29. The claimant has been prescribed, and taking, various medications as part of treatment for both physical and mental impairments.
30. Following his heart surgery, the claimant has been taking spironolactone, warfarin and candesartan.
31. The claimant was described by Dr Sagoo on 24 January 2017 as having a history of severe depressed episode without psychotic symptoms. To treat this mental impairment the claimant has been taking various medication (see pp 165-168). He has been taking this medication since around 28 July 2016. The claimant in his oral evidence explained that he had been taking these medicines since he went into Bruce Burns at Solihull Hospital, and thought that this was around July 2019. However, the letter at pp.65-66 states that the claimant was admitted into Bruce Burns in July 2016. Given the claimant was clear that it was following his admittance into Bruce Burns that he started on this medication, on balance, we find that this was in 2016 rather than 2019. There is no suggestion in the claimant's witness statement that he has ever come off this medication, with

paragraph 40 indicating that he still takes the 'depression tablets', and therefore must have been since July 2016.

32. The claimant would have retired at the age of 65. Although the claimant's witness evidence was that he would remain working until the age of 66 to complete 50 years' service, this was tied in with his misbelief that he would be recognised through a formal process, similar to that which he had received for completion of 25 and 50 years' service. On balance, once the claimant became aware that this was not the case with respect to 50 years' service, which he would have become aware of as he got closer to that age, the likelihood is that the claimant would have retired at what is often considered as retirement age (although we accept that that is no longer the case), that being 65. Once the claimant was aware that the incentive to continue until 66 did not exist, it is unlikely, considering the claimant's health, that he would have continued until that age.
33. The claimant was offered the possibility of ill-health retirement. However, he was unfamiliar with the scheme and the figures he would receive were uncertain. The respondent would not provide the figures that he would likely receive without the claimant completing some forms. The claimant was reluctant to sign any documents as he considered himself still fit to work.
34. The claimant has been fit to work since January 2019. However, due to his psychiatric medication work that involves night shifts would not be suitable.
35. Following dismissal by the respondent, the claimant did not apply for any roles before 19 October 2020.
36. During October and November 2020 the claimant applied for roles with Tesco's and Morrison's, and registered with totaljobs.com. The claimant did not consider any roles outside of the retail sector. And only made around half a dozen applications.
37. The claimant tried to make contact with some suppliers he had through having worked for the respondent. This was limited to attempting to contact two such suppliers. This was by phone at the end of October/beginning of November 2020. No other attempts were made down this route.

Conclusions

Pecuniary Losses: mitigation

38. Given our findings above, we conclude that it was not an unreasonable failure to mitigate by the claimant through rejecting the offer of ill-health retirement. Given that the claimant was uncertain as to what this meant in terms of a financial package, and that such information was not readily available, it would not be unreasonable for the claimant to refuse such an offer in those circumstances.
39. We agree with Ms Grossman's submission that the so-called 'eggshell skull' principle (the principle that you take your victim as you find them') is relevant to the issue of mitigation in this case. The question is not what this tribunal would think or do, or what it would be objectively reasonable to do in the circumstances. Rather, the test is mix of objectivity and subjectivity: was it unreasonable for the claimant to make the choices that he did in his particular circumstances? Those circumstances are someone who suffers from physical and mental impairments, somebody who is nearing retirement age, somebody who has suffered from discrimination at the respondent, as found in the liability judgment, and who believed that having a dismissal on his record would hamper their future job prospects.

40. We must view the claimant's decisions through the lens of what is unreasonable for somebody in his particular circumstances.
41. Bearing this in mind, we have considered the issue of the compensatory award in two separate periods. The first is the period from the effective date of dismissal up to the date that judgment was handed down on liability. The second period covers the period following the date of liability judgment onwards. This is because there is a change in the claimant's circumstances from the date of the liability hearing which is a material change when considering mitigation and expectation of future employment, and thus relevant to the compensation that the claimant is awarded.

First period: Effective date of dismissal (29 March 2019) to date of conclusion of liability hearing (28 September 2020)

42. The respondent alleges that the claimant failed to take reasonable steps to mitigate his loss during this period. It is for the respondent to show that the claimant has acted unreasonably in failing to take steps to mitigate his loss.
43. The respondent produced no documentary evidence in terms of roles that the claimant could have applied for. At its height, the respondent's evidence in this respect was adduced from cross-examination of the claimant. The claimant explained that due to the way he was dismissed, and the impact this had on him, especially given his ongoing mental impairment, that he felt unable to apply for work during this period.
44. We concluded that, whilst the claimant has not put in any evidence of job-seeking during this period, there was a reasonable explanation by the claimant as to the approach he adopted. The burden rested with the respondent to show that there had been an unreasonable failure to mitigate and we do not consider that this was established by the evidence.
45. We awarded the claimant full compensation for this period, which is from 29 March 2019 to 28 September 2020 amounting to **£36,270** net pay (78 weeks x 465).

Second period: From conclusion of liability hearing (28 September 2020) onwards

46. The claimant produced documents relating to a limited number of roles that he had applied for after the liability hearing was concluded in September 2020. These applications were made across October and November 2020. And are for roles primarily in the supermarket sector. The claimant also gave evidence that he had tried to contact suppliers that he had built relationships with during his time with the respondent. He tried to contact at least two such suppliers. These are the only efforts the claimant has made to secure further work.
47. The respondent did produce some documents relating to mitigation during this period, producing details of a number of supermarket roles which the claimant could have applied for. These are all dated February 2021. The claimant's position was that he had not applied for any of those particular roles, but would do so on the conclusion of this hearing.
48. Under cross-examination the claimant explained that the reason why he stopped applying for supermarket jobs was that he was 'not getting any luck there' and that he had become disheartened. Similarly, with respect contacting previous contacts, he says he 'gave up on that route' probably around Christmas 2020.

49. It is that, to a large degree the circumstances that prevented the claimant from applying during the period March 2019-September 2020 no longer applied to the claimant. First, he felt able and had been applying for roles, and indicated that he would continue do so on the conclusion of this remedy hearing; secondly, he had liability ruled in his favour, and; thirdly, the impact of the dismissal was some way behind him. In these circumstances, the limited applications the claimant made during this period, and his giving up without much perseverance, we conclude is an unreasonably failure in the duty placed on the claimant to mitigate his losses. In these circumstances we conclude that the claimant, had he applied himself to seeking work adequately following the liability hearing then he would likely have secured employment within 3 months of that hearing. However, given that this was a change of career direction and given the impact of the claimant's impairments and medication we would have expected him to initially commence employment at part time rate (50%) for the first 6 months, before moving to full time employment.
50. We would have expected the claimant to have been employed in a sector similar to the retail sector. Considering the wages on offer in the adverts we have seen, we accept the figures put forward by Mr Feeny. That being a full time role (37.5 hours) at the gross annual figure of £18,622.50 and net at £16,325.46.
51. What this all means is that we award the claimant full compensation for the three month period 29 September 2020-28 December 2020, that being **£6,045** net pay. A further 6 months, that being from 29 December 2020- 28 June 2021, of the difference between his net salary at the respondent and 50% of the net salary for supermarket work of £16,325.46. This is the net figure of **£8,008.64**. And, the difference between his net salary at the respondent and the expected net salary at a supermarket, up until the date of the claimant's expected retirement at 65, which is the net figure of **£28,095.30** $((465-313.95) \times 186 \text{ weeks until aged 65})$.
52. For the avoidance of doubt, the net figure of £8,008.64 above is a period of circa 26 weeks. Of which circa 20 week is from 11 February 2021 and is thus future financial losses, and equates to the net figure of £6,160.49.
53. The total net future losses in this period is thus £34,255.79.

Pecuniary Losses: figures already received.

54. The claimant was paid payment in lieu of notice, which was equivalent to 3 months' pay. Therefore, £6,045 will need to be deducted from the award (net figure).

Withdrawal factor

55. We consider that the claimant, who had worked for the respondent since he was aged 16, would have continued to work for the respondent up until his retirement at age 65. There is no evidence to support that there was any likelihood of the claimant being dismissed before he reached retirement age. The submissions made on behalf of the respondent were generalisations with respect the economic recession and Brexit, without any further evidence as to how these are or are likely to impact upon the respondent in the short and medium term future. We make no deduction in these circumstances.

Pecuniary Losses: pension losses

56. Given our findings above, the net pension loss at the claimant's retirement age of 65, is at the agreed figure of **£77,841.87**. This was calculated using the seven-step method. However, this has not taken account of any replacement pension benefit that the claimant would receive on starting new employment. This is

further considered below.

Pecuniary Losses: replacement Pension

57. In the submissions that we have received, no account of any possible replacement pension from future employment has been made. However, this is something that we must take account of when ensuring that compensation is awarded at the just level. The evidence on this, is quite vague, in that there is little provided. In these circumstances, we refer to para 5.56(f) of the Principles for Compensating Pension Loss, which will help us in making the best estimate that we can make. This will be based on the claimant becoming an employee of a supermarket, in line with that above, with the employee having a right to automatic enrolment in a NEST pension.
58. As suggested by the Principles, we have used the NEST calculator ([Enter your estimates \(nestpensions.org.uk\)](https://www.nestpensions.org.uk)). Using the claimant's date of birth, the average 35.45 hours (calculated using the claimant working a 0.5 part time role for 6 months, and full time role of 37.5 hours per week for the remaining 4.08 years before retirement at 65), on a gross salary of £17,604.47 (this is similarly based on the claimant working a 0.5 role for 6 months, with the remaining 4.08 years of work at full time, based on a full time gross salary of £18,622.50). Estimating a minimum employee and employer contribution following auto enrolment of 8%, the calculator gives a gross pension benefit of £11,200 on retirement at age 65. We acknowledge that this figure does not take into account increases to wage, or to contributions or various other contingencies. However, we consider, that on the information that we do have, it is an adequate estimate of future pension accrual in the circumstances. Assuming that the claimant's accrued pension benefits to date, are such that he is likely to pay income tax at basic rate on any NEST pension income after retirement, we have deducted income tax at 20% from the NEST pension figure, giving an estimated deduction from overall pension loss to take account of NEST benefits gained of £8,960.
59. We find that the claimant's total pension loss is therefore: **£68,881.87** net (£77,841.87 – £8,960).

Bonus and RHA

60. The parties agreed an annual figure of £420 for loss of bonus. The claimant would have completed 6 full years before retiring. This award is therefore £2,520.
61. The parties agreed an annual figure of £1,040 for RHA. The claimant would have completed 6 full years before retiring. This award is therefore £6,240.

Accelerated receipt

62. The total amount of future losses awarded to the claimant is: £111,897.66.
63. This is made up of: future loss of wages of £34,255.79, future pension losses of £68,881.87, future loss of bonus of £2,520 and future loss of RHA of £6,240.
64. The claimant has 4 years remaining until retirement.
65. Applying a broad brush approach, and applying 5% reduction for accelerated receipt to half of this award, to represent 2.5% multiplied by half the number of years covered by the compensation, and to account for it being the second half of the award in respect of which early receipt will be most accelerated.
66. A reduction of **£2,797.44** will be made for accelerated receipt.

Loss of statutory rights

67. We have awarded a sum of **£300** for loss of statutory rights on the basis that the £600 claimed seemed to us excessive, and was not warranted by the period of employment that the claimant had left before retirement.

Non-pecuniary loss: injury to feelings award

68. The claimant did not succeed on all of the matters which he brought before the tribunal. With those matters he did succeed having a clear link between them.
69. The claimant's evidence on this is that he was very proud working for the respondent, and that many of his family also worked there. The claimant describes the whole process as having caused him a lot of stress and anxiety, which appears to have flowed from the decision that was made in relation to adjusting a role for him so as to remove the need to work nights. However, much of the claimant's evidence focusses on the impact that alleged treatment by his line manager had on him, which was not the subject of this tribunal. This appears to be the cause of many of the impacts referred to by the claimant.
70. In these circumstances, we conclude that an award at the lower end of the middle band of Vento would be appropriate. In these circumstances we consider that the award should be a little bit higher than that submitted by Mr Feeny, and so award a figure of **£10,000**.

Pecuniary Losses: interest on injury to feelings.

71. The Employment Tribunals (Interest on awards in discrimination cases) Regulations 1996 set out, at Regulation 1, the awards to which the Regulations apply. Interest on this award is calculated at an interest rate of 8%. Taking the date of the prohibited act, there has been 708 days that have passed up until the date of the remedy hearing.
72. Interest is awarded at **£1,551.78** ($708/365 \times 0.08 \times £10,000$)

Polkey reduction

73. The tribunal makes no *Polkey* reduction in these circumstances. Put simply, there is no evidence adduced by the respondent that would support making any such reduction, other than general and unsupported speculation.

Grossing up

74. Following the **Gourelly** principle, the tribunal must take care to ensure that its approach to tax does not put the claimant in a better or worse financial position if the dismissal had not occurred. Where the award will be taxed under s.401 ITEPA 2003, the tribunal must gross up that part of the award which will fall to be taxed.
75. Following the decision in **Moorthy v Revenue & Customs [2016] UKUT 13 (TC)** and the amendment to section 406 ITEPA 2003 with effect from 6 April 2018, compensation for injury to feelings related to termination of employment is also taxable to the extent that the £30,000 tax free allowance is exceeded. In this case, the injury to the claimant's feelings resulted from the claimant's discriminatory dismissal. Therefore the sum of £11,551.78 (which includes interest) is also to be included in the amount to be taxed under section 401 ITEPA.

76. The amounts to be included in the calculation for section 401 purposes are:

- a. Loss of pay in period from effective date of dismissal (29 March 2019) to date of conclusion of liability hearing (28 September 2020): (£36,270-£6,045, received for PILON) of £30,225
- b. Loss of pay in period from conclusion of liability hearing (28 September 2020) onwards (£6,045 + £8,008.64 + £28,095- £2,797.44) of £42,148.64
- c. Pension losses of £68,881.87
- d. Loss of bonus of £2,520
- e. Loss of RHA of £6,240
- f. Injury to feeling award, including interest, of £11,551.78
- g. A deduction of £2,797.44 has been made for accelerated receipt.

77. The total compensation taxable under section 401 ITEPA is therefore £158,769.85, of which £30,000 is the tax free sum.

78. The remaining £128,769.85 must therefore be grossed up. Using a Finlay table, we calculate the tax bands on the compensation (assuming that the claimant continues to have no income and using the 2019/20 bands) as follows:

79.

| | GROSS | TAX | NET |
|------------------------------------|------------|------------------|------------|
| PA (0%) to £12,500 | 12,500 | 0 | 12,500 |
| BR (20%) the next £37,500 | 37,500 | 7,500 | 30,000 |
| HR (40%) up to £100,000 | 50,000 | 20,000 | 30,000 |
| NR (60%) from £100,001 to £125,000 | 25,000 | 15,000 | 10,000 |
| HR (40%) £125,001 to 150,000 | 25,000 | 10,000 | 15,000 |
| AR (45%) £150,001 upwards | 56,854.27 | 25,584.42 | 31,269.85 |
| Totals | 206,854.27 | 78,084.42 | 128,769.85 |

80. An amount of **£78,084.42** must therefore be added to reflect the tax payable on the compensation awarded.

Summary

81. Total compensation payable is therefore:

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|--|------------|
| Basic award for unfair dismissal | £14,732 |
| Loss of statutory rights | £300 |
| Loss of bonus (6 years) | £2,520 |
| Loss of RHA (6 years) | £6,240 |
| Injury to feelings (including interest of £1,551.78) | £11,551.78 |
| Past and Future loss of wages | £72,823.94 |
| Accelerated receipt reduction | -£2,797.44 |

| | |
|------------------------------------|--------------------|
| Pension loss | £68,881.87 |
| Amount to be added for grossing up | £78,084.42 |
| Total | £252,336.57 |

Employment Judge **Mark Butler**

Date 12 March 2021