EMPLOYMENT TRIBUNALS

Claimant:	**Mrs C Jackson**
Respondent:	**The Governing Body of Longcroft School and Sixth Form College**
Heard at:	**CVP On: 2 March 2021**
Before:	**Employment Judge Davies** **Dr D Bright** **Mrs C Sanders**

Representation
Claimant: Mr J Small (counsel) (written submissions only)
Respondent: Mr B Frew (counsel) (written submissions only)

JUDGMENT

1. The Respondent shall pay the Claimant the following sums:
   1.1 **£16,180.08** compensation for loss of earnings;
   1.2 **£1,618.89** interest on that sum;
   1.3 **£9,720** compensation for pension loss;
   1.4 **£26,000** compensation for injury to feelings;
   1.5 **£5,202.85** interest on that sum;
   1.6 **£14,320** compensation for psychiatric injury;
   1.7 **£716.39** interest on that sum.

2. The total sum payable is **£73,768.21**.

REASONS

Introduction

1. In a judgment made on 2 July 2019, the Tribunal upheld complaints of failure to make reasonable adjustments for disability brought by the Claimant, Mrs C Jackson, against her former employer, the Governing Body of Longcroft College and Sixth Form. Reasons were given orally for the judgment and a note was subsequently prepared by counsel and approved by the Tribunal. We do not repeat the content of that judgment.

2. There has been extensive delay in determining the appropriate remedy payable to the Claimant. In part that was attributable to her ill health. There were also extensive delays while the parties tried to agree on the identity of a suitable expert and joint instructions for that expert. Some of those delays were attributable to the Claimant's approach. It was then necessary for the expert to produce a report and supplementary report. The Claimant did not wish to attend a remedy hearing. The parties agreed that the Tribunal should determine remedy on the papers, with the assistance of an agreed file of documents and written submissions and replies from counsel. The Tribunal thanks both counsel for their careful and detailed written documents. The Claimant also produced a further witness statement and impact statement. As explained at the most recent case management hearing, the fact that she was not cross-examined about those statements affects the weight that can be attached to them. The Claimant also produced a supplementary file of documents, and a further additional document. The Respondent did not object and the Tribunal took those documents into account.

3. The Claimant has since July 2019 presented further Tribunal complaints relating to her dismissal, which she says was unfair and discriminatory. At the most recent case management hearing in this claim, counsel agreed that it was open to the Claimant to argue that the discriminatory treatment that the Tribunal found took place in this claim caused the termination of her employment, such that her compensation should include compensation for lost income and injured feelings caused by the termination of her employment. In those circumstances, the more recent claims did not appear to add anything to the first claim and the expectation was that the Claimant would withdraw those claims once the remedy in this claim has been determined. There was no discussion of a basic award for unfair dismissal at the case management hearing. For the reasons explained below, the Tribunal does not consider that it can award a basic award in these proceedings. The Claimant will need to reflect on whether she wishes to pursue her unfair dismissal claim in order to try to recover a basic award, or whether to withdraw her other claims in any event, so as to achieve closure in respect of these matters. She should note that it does *not* follow from the fact that the Respondent's failure to make reasonable adjustments led to the absence from work that gave rise to her dismissal, that that dismissal was unfair.

The Issues

4. The issues to be determined in respect of remedy are:
    4.1 What compensation should be awarded for injury to feelings and/or psychiatric damage?
    4.2 Did the found acts of discrimination cause the Claimant's employment to end?
    4.3 What was the chance of the Claimant's employment coming to an end in any event?
    4.4 When was or is the Claimant likely to return to work or secure alternative work?
    4.5 How much was or is she likely to earn?
    4.6 What are the Claimant's financial losses?
    4.7 What interest is payable?

Findings of Fact

Events prior to September 2018

5. As recorded in the liability judgment, the Claimant started working for the Respondent in 2008. She worked full-time until 2015, when she went down to four days per week. In 2017 she went down to three days per week, and it was agreed in May 2018 that she would go down to two days per week from September 2018.

6. Dr Friedman, the jointly instructed expert, recorded that the Claimant had an episode of low mood for which she saw her GP in around 2000. She was then generally well until 2009, when her daughter became unwell and the Claimant became increasingly anxious and fearful. She had some time off work and has never been completely well since. Dr Friedman was not provided with a complete copy of the Claimant's medical records. Nonetheless, in what was disclosed there were numerous entries over the years relating to her psychological problems. For example, in March 2016 there was reference to long standing low mood and depression and suicidal thoughts. The Claimant had been absent from work and at risk of dismissal and felt that she could not take more time off. In addition, she was in debt and her daughter was unwell. She felt she had too much to cope with. She saw the GP throughout 2016, and was up and down. She returned to work in January 2017 but reported further panic attacks and work-related stress. She went down to three days per week in October 2017 and had found CBT helpful at that stage. In May 2018 she had some issues with her heart, and by mid-June 2018 she was extremely anxious and stressed and having problems with her medication.

7. The Claimant herself wrote on 8 May 2018 that she had had a bout of severe and disabling anxiety the previous week, and that her physical health had declined in relation to her diabetes and a hormone imbalance. She requested a reduction in her working hours. She was signed as partially fit for work from 24 May 2018 to 23 July 2018 because of "mixed anxiety depression" and because she was under hospital investigation. She was subsequently signed as unfit for work from 14 June 2018 to 25 July 2018 for the same reason.

8. Dr Friedman recorded that, in relation to "more recent matters", the Claimant described increasing concern about her "application to reduce her working hours" and how this was managed by the school. That reference is not entirely clear – the Claimant's application to reduce her working hours was not an issue. The issue was about her timetable, in particular the balance of classes and the number of PPA sessions. However, whatever the precise reason, Dr Friedman records that the Claimant was becoming increasingly anxious over time, sleeping poorly, shaking and experiencing panic attacks. She was somewhat less anxious during the holidays and on weekends, but never completely settled. Given the reference to weekends and holidays and the fact that the Claimant did not open the timetable until August 2018, all of this must pre-date the found acts of discrimination.

9. It is therefore clear that the Claimant has had poor mental health for some years. Dr Friedman's diagnosis is that over recent years she has presented with

symptoms best described as a severe generalised anxiety disorder. She also has symptoms of depressive disorder, but secondary to her anxiety. The Tribunal accepted that expert view.

10. The Claimant has other health issues too. She has type 2 diabetes, which was uncontrolled for a period because of insulin resistance. She has longstanding problems with IBS. She had some hormonal issues and also concerns about her heart in 2018.

11. A combination of the Claimant's health issues led to her having a significant level of absences from work. In 2016 she had 113 days' absence. In 2017 she had 35 days' absence and in 2018 she had 27 days' absence up to 23 July. Although the number of absences reduced from 2016, so too did the number of working days, so the reduction in the *proportion* of working days on which the Claimant was absent was less marked. The Respondent took steps to manage the Claimant's absence through its absence management processes. It is clear that at some points the Claimant was warned of the possibility of dismissal.

Events of August/September 2018 and effect on Claimant

12. As noted in the liability judgment, Mr Pearson failed to reflect the Claimant's agreement with the headteacher in the timetable he produced for her in July 2018. The Claimant opened the email at the end of August and the Tribunal accepted in its liability judgment that it had a catastrophic effect on her. She had been planning to return to work at that start of the academic year, but was now unable to do so. While she might have been able to return to work if the Respondent had been willing to discuss and amend her timetable to reflect the prior agreement, it was not willing to do so. The Claimant remained signed off work after that, and was dismissed for long term absence with effect from 31 December 2019.

13. The evidence produced for the remedy hearing (some of which was in the original hearing file) provides more information about those events, their effect on the Claimant and her ill health.

14. As noted above, the Claimant had been signed off with mixed anxiety and depression and because she was under hospital investigation for some time before she read the email at the end of August. She sent an email to the Respondent on 24 August 2018 saying that she was fit after the expiry of her previous fit note, but was still being seen by a specialist endocrinologist at the hospital, who was currently implementing a major change to her treatment and medication. She had more blood tests and medical appointment due over the next two weeks. She then sent a fit note on 31 August 2018 signing her off for mixed anxiety and depression and because she was under hospital investigation until 13 September 2018. In her email to Mr Lloyd on 3 September 2018, she explained that since being taken ill at work in May, she had been diagnosed with a heart problem related to her medication and had been referred to an endocrinologist because of her cortisol levels. She was currently undergoing a major change in medication which was causing side effects and she had been signed off to 13 September 2018. She went on to refer to the email from Mr Pearson, and said that on top of managing ongoing ill health she was tired of battling over the same issues. She asked for Mr Lloyd's help and advice. It

seemed to the Tribunal that, at that stage, the underlying reason for absence related to the issues that had been ongoing since May, and the change in medication advised by the endocrinologist.

15. On 6 September 2018, the Claimant was signed off for four months, with mixed anxiety and depression and work-related anxiety. On 31 December 2018, she was signed off for a further six months for the same reasons.

16. The Claimant has given written evidence about the impact of the discrimination on her. She said that the timetable triggered a major setback with her mental health, which she described as devastating. She said the timetable hit her "like a sledgehammer", she felt "completely shattered" and like she was "returning to square one all over again." She said the timetable was "like a punch between the eyes by an iron fist." She said that she was stunned and in a state of shock, and was then signed unfit for work. Over the next week she began to realise the full impact of what was involved and began to break down as a result.

17. The claimant said that she had taken increased doses of a range of anti-depressant medication as a result of the discrimination upheld by the Tribunal, including lorazepam administered under hospital conditions for "extreme distress." The Claimant also said that being dismissed from the job she loved caused her extreme distress and severely affected her anxiety. She said she had been left incapacitated for work and with a lack of trust. Her confidence was undermined and she felt that she would never be able to face going into a school to teach again. She had disposed of her teaching resources, which she described as "heart wrenching". She had now withdrawn from many things she used to enjoy doing. She dreaded the post arriving, answering the door or telephone, or checking emails. She avoided social situations and preferred to be quietly at home than out and about. She avoided anything to do with schools or education, which she found very painful. Her daughter was a teacher and the Claimant was unable to talk to her about her work.

18. The Tribunal approached the Claimant's evidence with a degree of caution. She was not cross-examined about it and, to an extent, it was not reflected in the contemporaneous notes kept by her GP during 2018/2019 and referred to by Dr Friedman. It seemed to the Tribunal that, understandably, looking back the Claimant was focussing on the worst parts and not always giving a balanced account. For example, when she saw the GP on 4 October 2018 the Claimant reported some improvement after an increase in her medication and on 22 October 2018 she was feeling anxious but wanted to be able to return to a job she enjoyed. By 3 December 2018 her anxiety had improved. On 31 December 2018 she appeared less anxious, despite stress for a reason that was apparently redacted, and her ongoing union work with her employers, which was dragging on. Her anxiety got worse at the end of January 2019 when she started these Tribunal proceedings. She was feeling better, much calmer and brighter, by the end of February 2019 and coping well on 2 April 2019. She had an anxiety attack in May 2019 and spent a night in A&E. She was very upset by correspondence warning her that she might be dismissed for long term absence. Later in May 2019 she had been doing well until the exchange of witness statements for these proceedings. There were evidently better periods. Nonetheless, the Tribunal accepted that at other times the impacts were as

described by the Claimant and were severe and extreme. That was reflected in her presentation at the liability hearing.

19. As already noted, Dr Friedman's diagnosis was that the Claimant had presented over recent years with symptoms of a severe generalised anxiety disorder, with some symptoms of depressive disorder. The trigger was concern over her daughter's health. A significant issue in precipitating feelings of stress or anxiety over the years was problems with work or workload. The Tribunal did not make findings about the Claimant's work or workload during previous periods, apart from noting that there was a long history of adjustments being made. It would be wrong to assume that the Claimant's stress or anxiety at that time was caused by any failure or shortcoming on the Respondent's part. It might simply have been the Claimant's own response to the work and workload associated with her teaching role, given her anxiety disorder.

20. Dr Friedman had concerns about how the Claimant had been treated over the years. He felt that it would have been more purposeful for her to receive skilled intervention many years ago, rather than dealing with the matter by reducing workload on a regular basis over a number of years. The difficulty with that approach was that it developed into a vicious cycle, where the major response to feeling stressed was to reduce workload and avoid those situations.

21. Dr Friedman went on to express the view that there was good evidence that the "major trigger" for the Claimant's serious psychiatric disorder was related to issues at work. He noted the Tribunal's judgment in relation to the way her request for a reduced workload was handled and considered that this was a major factor in her becoming increasingly unwell. He considered that if her return to work in September 2018 had been managed reasonably and with reasonable adjustments she would have been able to return to work and he considered that employment issues had been the major causative factor in her recent psychiatric disorder. In his second report, Dr Friedman declined to comment on whether other life factors and stressors might have caused or contributed to this episode. Dr Friedman said that he had understood that the claim related to employment as opposed to other life events and "did not understand the purpose of trying to dissect the multitude of other events" in the Claimant's life. He did note that the Claimant has generalised anxiety disorder and so responds with greater anxiety to life's worries. She may generally be more vulnerable to stresses in life and will always have an increased concern, worry and anxiety about stressful events compared to most people.

22. The Claimant's disorder remained unresolved at the time of Dr Friedman's report but there had clearly been significant improvement. Dr Friedman reported very significant improvement in the Claimant's PHQ-9 and GAD scores in September 2019 after 6 sessions of treatment. Dr Friedman's prognosis for the future was much more optimistic than the Claimant's. He had concerns about the intensity and quality of the intervention she had received in the past. More recently, the Claimant had found the Tribunal process distressing and anxiety provoking, and she was likely to be significantly helped by a resolution of this process. Dr Friedman advised a specialist review of the Claimant's medication, but more importantly she needed to see a skilled therapist for a plan of rehabilitation. When she saw him, the Claimant did not dismiss the idea that she could work in

a school at some point in the future. She would need to find somewhere that she had confidence in the management. Dr Friedman expected to see a significant improvement over 12 months with the ending of the Tribunal process. At the end of such a period, he considered that the claimant would be generally fit to return to work and would be able to work in some form of teaching role. There would be a wide range of opinions about whether she would be able to work as a secondary school teacher. He noted that the Claimant had developed some specific anxieties associated with the school environment, so this might be difficult to achieve. On balance, he considered that the Claimant would be fit to work two to three days per week in some education related role.

23. In his supplementary report, Dr Friedman recommended treatment by a skilled CBT therapist for 12 to 14 sessions over three to six months, costing between £1800 to £2000.

24. In her statement, the Claimant explains that she has had limited treatment during the pandemic. She has stopped one long-standing medication, which has led to withdrawal symptoms including depression, but has not yet started with skilled therapeutic intervention.

25. Bringing that evidence together, the Tribunal concluded:
    25.1 The Claimant had a long standing generalised anxiety disorder before September 2018. This had led to absence from work in the summer term and ill health during the summer holiday.
    25.2 At the very start of September 2018 issues associated with her long-standing disorder, including issues relating to her medication, heart and cortisol levels, were the cause of her being signed off work.
    25.3 However, the email from Mr Pearson caused the Claimant extreme distress when she opened it and over the course of about a week that developed into a serious, psychiatric response. It was notable that the Claimant's next fit note, issued on 6 September 2018, was for a very lengthy period, of four months. There was one further fit note, for six months, before the Claimant was dismissed because of long term absence. The Tribunal accepted Dr Friedman's expert view that the issues relating to the timetable were a major cause of this particular episode. That was also consistent with our previous finding that the effect of these events was catastrophic for the Claimant, which was based on her own account and presentation, but also on the evidence from Mr Lloyd. He had a long involvement with the Claimant and described his observation of what happened to her at the time.
    25.4 However, the episode did not start from a position of good mental health, but against a background that the Claimant had already been experiencing anxiety attacks, and problems with her medication, heart and cortisol, since May 2018, and was in the midst of a medication change when the discrimination took place.
    25.5 The Claimant's condition was clearly up and down during the months that followed, and the discrimination itself was not always the *direct* cause when she experienced stress and anxiety. One cause was redacted from the notes, the Tribunal proceedings themselves were obviously a cause of anxiety, and so too was the management of her long-term absence.

25.6 Nonetheless, as Mr Small submitted, the Tribunal found that there was a "straight line" between the discrimination in August/September 2018 and the Claimant's dismissal. The discrimination was a major trigger of this particular psychiatric episode; that episode spanned ten months, covered by only two fit notes, until the Claimant's dismissal; although there was a range of factors in the continuing anxiety, they were primarily linked directly or indirectly with the discrimination; and it was this absence that led to the Claimant's dismissal.

25.7 The Claimant's psychiatric disorder has not yet fully resolved, but there had been a marked improvement by September 2019. More recent symptoms of depression have been caused by withdrawal of medication. The disorder is likely to improve significantly when these proceedings are resolved and when the Claimant undertakes skilled CBT.

25.8 The discrimination caused the Claimant extreme distress over a prolonged period. She has had ups and downs, but the Tribunal had no hesitation in accepting that there were significant times when she experienced such extreme distress. That was clear when she gave evidence at the liability hearing and from Mr Lloyd's evidence. The Tribunal accepted, based not only on the Claimant's account, but on the medical records and expert report, that the discrimination has had a lasting impact. The Claimant perceives, rightly or wrongly, that she has lost her teaching career forever, and attributes this to the discrimination. We accept her account of disposing of her teaching materials and that she avoids anything to do with schools or education. This affects her relationship with her daughter, who is a teacher. The discrimination continues to have a lasting impact on the Claimant's ability to trust others, her confidence and her enjoyment of day to day activities and life.

What would have happened if the discrimination had not occurred?

26. We begin with some observations about the reports of Dr Friedman. The Tribunal found those reports of limited assistance in some respects. The doctor did not answer a number of the agreed, specific questions, and declined to provide clarification when that was sought by the Respondent. He took a view about what was relevant, obviously without having a clear understanding of the issues the Tribunal had to decide. It seemed to the Tribunal that in some respects his views were based on the account of her employment history given by the Claimant. That was not necessarily an accurate or objective account. For these reasons, while the Tribunal placed significant weight on Dr Friedman's expert account of the Claimant's illness, treatment and prognosis, we placed less weight on his views where they depended on the Claimant's account of what had happened in the workplace.

27. In particular, Dr Friedman expressed the view in his first report that if the Claimant's return to work in September 2018 had been managed reasonably and with reasonable adjustments, she would have been able to return to work. Further, he considered that if she was in a reasonably supportive environment, on the balance of probabilities she would have remained in work. He found her convincing in saying that she generally found her work very rewarding. The Respondent asked Dr Friedman to provide further explanation of this view. It referred to his statement that a significant issue over the years in precipitating

feelings of stress and anxiety was problems at work and workload and drew his attention to the Tribunal's finding that there was a long history of the Respondent making adjustments for the Claimant. The Respondent also referred to the history recounted in Dr Friedman's report of the Claimant reducing her working days from 2015 onwards, and his concern that simply reducing working days to address feelings of stress and anxiety was a vicious cycle in which the major response to feeling stressed was to reduce workload and avoid those situations. The Respondent asked Dr Friedman to clarify and explain his initial finding in view of those matters. He said that he believed he had answered the question and did not provide any further clarification or explanation.

28. The Tribunal placed limited weight on this part of the report. It was difficult to reconcile the view that the Claimant would have successfully sustained her attendance in September 2018 with the other matters identified by the Respondent and referred to in the report, and Dr Friedman did not explain how he had reconciled those matters. The Respondent had a history of making adjustments but the Claimant had a history of finding work and workload stressful and anxiety producing. The Claimant's approach was to reduce working hours. That had been done three times in three years. This was a vicious cycle. The Claimant had not received skilled intervention to date. There was nothing to suggest that the Claimant's stress and anxiety would change, that she would start to receive skilled intervention, or that the vicious cycle would be broken. To the extent that Dr Friedman's view was based on his finding the Claimant "convincing" in saying that she found her work rewarding, the Tribunal considered that this strayed into the assessment of the evidence that was for the Tribunal, and needed to be weighed alongside the other evidence about the workplace history. For these reasons, the Tribunal placed little weight on Dr Friedman's view about whether the Claimant would have sustained a successful return to work in September 2018.

Legal principles

29. An award of compensation in a discrimination case is designed to put the individual so far as possible in the position he or she would have been in but for the discrimination. The award is based on the statutory tort of discrimination and the Respondent is liable for injury caused directly by the discrimination. There is no "reasonable foreseeability" test: see *Essa v Laing* [2003] ICR 1110 EAT. An employer will be liable for lost earnings if discrimination was a significant factor in causing them. However, when determining the appropriate amount of compensation for loss of earnings, the Tribunal must assess the chances that the loss would have occurred in any event, i.e. the chance that dismissal would have occurred if there had been no unlawful discrimination. The compensation that would otherwise have been awarded will be reduced proportionately to reflect that change: see *Abbey National plc v Chagger* [2010] ICR 397.

30. Awards for injury to feelings are compensatory, not punitive. The aim is to compensate the Claimant fully for the proven, unlawful discrimination for which the Respondent is liable. The crucial consideration is the effect of the unlawful discrimination on the Claimant. The Tribunal will have regard to the well-established bands of compensation for injury to feelings: see *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] IRLR 102, and to the regularly

updated Presidential Guidance on Employment Tribunal Awards for Injury to Feelings. The applicable bands of relevance in this case are: middle band £8,600 to £25,700 and upper band £25,700 to £42,900.

31. The Tribunal also has the power to award compensation for psychiatric injury: see *Sherrif v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481. As with compensation for lost earnings, the Respondent is liable for injury caused directly by the discrimination and there is no “reasonable foreseeability” test. If the injury is caused by multiple factors, the Respondent is only liable if its contribution has been material, and to the extent of its contribution: see *e.g. Thaine v LSE* [2010] EAT 0144. The Tribunal must take care not to double count, e.g. where there is psychiatric injury and injury to feelings.

32. The Judicial College Guidelines (15th Edition) provide guidance on compensation for psychiatric injury. The factors to be taken into account include (1) the person’s ability to cope with life, education and work; (2) the effect on the person’s relationships with family, friends and those they come into contact with; (3) the extent to which treatment would be successful; (4) future vulnerability; and (5) prognosis. The Guidelines characterise injuries as severe, moderately severe, moderate and less severe. It is important to note that these categories do not correspond to the diagnostic categories used by physicians. The “severe” category covers cases where the person has marked problems with respect to factors (1) to (4) and the prognosis is very poor. The range of awards is £51,460 to £108,620. The “moderately severe” category covers cases where there are significant problems with factors (1) to (4) but the prognosis is much more optimistic. Cases of work-related stress resulting in permanent or long-standing disability preventing a return to comparable employment fall within that category. The range of awards is £17,900 to £51,460. The moderate category covers cases where there have been problems associated with factors (1) to (4) but a marked improvement by trial and a good prognosis. Cases of work related stress where the symptoms are not prolonged fall within this category.

Application of the law to the facts

33. The Tribunal starts with the question of injury to feelings and psychiatric damage. For the reasons explained in detail in the findings of fact above, the Tribunal found that the discrimination was a major cause of the psychiatric episode that was triggered in September 2018, continued until the date of the examination by Dr Friedman and still persists to an extent.

34. However, the Tribunal found that the discrimination was not the only cause of the episode. The Claimant had a long-standing history of generalised anxiety disorder. She had been experiencing symptoms including anxiety since May 2018 and “mixed anxiety depression” was one of the two reasons given in each fit note from May 2018 onwards. The Claimant was not fit for work as of 1 September 2018 and the reason for that was the long-standing issues and associated medication change, not the discrimination. The Tribunal considered that these factors were part of the cause of the episode of psychiatric ill health from September 2018 onwards. The major cause was the discrimination, but the Claimant’s underlying condition; ongoing work-related anxiety unconnected with the discrimination; and problems with medication, her heart and her cortisol

levels were also not insignificant causes. The Tribunal considered that the appropriate apportionment was 80% caused by the discrimination and 20% caused by the other factors.

35. Having regard to the findings set out above and the Judicial College Guidelines, the Tribunal found that the Claimant's injury fell on the borderline between moderate and moderately severe. The fact that Dr Friedman diagnosed severe generalised anxiety disorder is not the decisive factor. The Tribunal has to assess the criteria in the Guidelines. There were elements of the "moderately severe" category: the episode that started in September 2018 did affect the Claimant's ability to cope with life and work and her relationships with people. However, treatment was likely to be successful, such that the Claimant should be fit for work after 12 months (provided the Tribunal proceedings were resolved). This was a case of work-related stress that had caused a lengthy period during which the Claimant was not able to return to comparable employment but the expert view was that this was not likely to be permanent. Far from it. Further, the evidence suggested that the episode might well have resolved sooner if these proceedings had been resolved sooner and if the pandemic had not affected the availability of treatment. The delay in resolving these proceedings was, in part, caused by the Claimant's approach. There were also elements of the "moderate" category in the Claimant's situation. There have been problems with the Claimant's ability to cope with life and work and her relationships with people, but there had been a marked improvement by the time she saw Dr Friedman and the prognosis is good. On the other hand, the symptoms were certainly prolonged. Given that there were elements of both categories, the Tribunal concluded that the Claimant's injury fell at the borderline between the two. The improvement over time and the positive prognosis, with the prospect of a return to comparable employment within a relatively short time scale, put this at the very bottom of the "moderately severe" category. The appropriate figure for compensation is the borderline figure: £17,900. However, the discrimination contributed only 80% to the development and continuation of the episode, so the appropriate award is £14,320.

36. The Tribunal considered that it was appropriate to make a separate award for injury to feelings, dealing with all of the discrimination from August 2018 onwards, but taking care not to compensate twice for the matters already covered by the award for psychiatric damage.

37. The elements of injury to feelings were to a significant extent distinct from the elements of psychiatric damage. The latter was more about anxiety and symptoms of that: persistent feelings of anxiousness, persistent nervousness, physical symptoms and concern about coping. The former was more about feelings of distress and loss and impact on the Claimant's enjoyment of and participation in life. Although the *Vento* categories include reference to what the employer did, the focus here is on the effect on the Claimant, not on the nature of the Respondent's conduct. As explained above, the Tribunal found that this was one of those cases where the effect of the discrimination was extreme. We described it as "catastrophic". The Claimant has experienced extreme distress regularly since the discrimination occurred, as described above. While recognising that she has had better times as well, that is still a high level of distress and impact over a lengthy period. The Tribunal considered that this fell

comfortably within the upper band of *Vento.* The Claimant identified a figure of £30,000 in her schedule of loss. That is in the lower half of the bottom bracket and the Tribunal considered that, leaving aside the award for psychiatric injury, that would have been the appropriate figure. However, while the injury to feelings and psychiatric injury are in many ways separate, as described above, there is plainly some overlap between the Claimant's feelings of distress and the impact on her enjoyment of life, and her feelings of anxiety and the effect her anxiety disorder has on her enjoyment of life. The Tribunal considered that the injury to feelings award should be reduced by £4000 to reflect that overlap. That leads to a combined figure for compensation for injury to feelings and the part of the psychiatric injury that was caused by discrimination of £40,320. That combined figure for the two elements seemed to the Tribunal to be appropriate. If the whole injury – the lengthy episode of anxiety disorder and the injury to feelings – were compensated within the *Vento* guidelines, that figure would still fall within the upper band in total. The Tribunal found that that was correct. Taking into account the whole of the injury, this would be at the upper end of the upper band, but it would not be the exceptional kind of case that justified a higher award.

38. We turn next to compensation for financial losses. As explained in the findings of fact above, the Tribunal had no hesitation in finding that the discrimination caused the Claimant's employment to end, in the sense of being a significant factor in that. The discrimination was the major factor causing this episode of psychiatric ill health, and the Claimant was dismissed because of the absence from work that resulted. The Respondent is therefore liable, in principle, for lost earnings caused by the Claimant's dismissal.

39. The question for the Tribunal is to identify the chance that the Claimant would have been dismissed or that her employment would have come to an end in any event.

40. We have explained above why we attached little weight to Dr Friedman's view that she would have successfully sustained a return to work in September 2018 if the discrimination had not taken place. The Tribunal did not consider that this was supported by the evidence, and it was to some extent inconsistent with his own expert view about the illness and the appropriate treatment for it. The Tribunal also rejected the Claimant's submission that her condition was improving, her attendance was improving and with reduced hours and her love of her job there was no chance of her leaving it. To the extent that the Claimant "loved" her job, that had always been the case yet it had not prevented her from experiencing long-standing work-related anxiety and stress, and from addressing that by reducing her working hours repeatedly over the preceding three years. It is clear that reductions in her working hours only had a short-term impact. She had reduced them from full-time to four days in 2015, but still experienced issues during 2016. She reduced them to three days from 2017, but again continued to experience issues. The Claimant's increasing anxiety, poor sleep, shaking and panic attacks described by Dr Friedman were happening before the discrimination and at a time when she was working three days a week to a timetable that incorporated the adjustments she had asked for. She asked for a further reduction to two days in that context, which was agreed. There was nothing in the evidence to suggest that this pattern of only short-term

improvement as a result of reduced working hours would have changed. On the contrary, Dr Friedman's expert view was that this was a vicious cycle that would likely continue, unless the Claimant received skilled intervention. There is nothing to suggest that there would have been any change in the approach to her condition. That has been brought about only as a result of her referral to Dr Friedman in these proceedings.

41. Further, the evidence did not suggest an improvement in the Claimant's condition prior to the discrimination. It suggested ongoing difficulties with it. Mixed anxiety and depression were identified in fit notes for four months before the discrimination. The Claimant's absence levels had decreased, but as indicated, the decrease as a proportion of her working days was less marked and she still felt it was necessary to seek a further reduction in her working days.

42. The Tribunal therefore considered that it was inevitable that the trajectory of the Claimant's employment would have continued in the same way as had happened since 2015. It was inevitable that she would have continued to experience work-related stress and anxiety and it was inevitable that she would have continued to have relatively high rates of absence from work. There would have come a point within a similar time frame (about a year) when the reduction to two days' work was no longer sufficient to address these issues and she was not able to sustain her attendance and performance at work.

43. For those reasons, the Tribunal concluded that the chance of the Claimant's employment coming to an end in any event within a relatively short time period was 100%. She would have been unable to sustain her employment at two days per week and would either have been dismissed as a result of an absence management process or would have resigned. The Respondent had been managing her absence for some years and she had previously had warnings that her employment might be terminated. It is very unlikely that there would have been a willingness to allow her to work one day per week given the background and the Tribunal did not accept that there was a plausible scenario in which the Claimant would have remained at work beyond the relatively short term. Doing our best to put that assessment in percentage terms, the Tribunal's view was that there was broadly a 50% chance that the Claimant's employment would have ended within one year, a 75% chance that it would have ended within two years and a 100% chance that it would have ended within three years. These are not scientific assessments, but judgments based on the evidence. Given that these assessments are not scientific, the Tribunal considered that the appropriate approach to compensating the Claimant for her losses was not to award 100% for one year, 50% for a further year and 25% for a further year, but to simply award her two years' loss in total. That is because the agreed calculations of pension loss are based on whole years. The calculations are much more straightforward on that basis, and the relatively small difference between the amount awarded on this basis, and the amount that would be awarded based on diminishing percentages over three years would be within the margin of error of the Tribunal's non-scientific assessment in any event.

44. The Claimant's financial losses are therefore calculated for the two-year period from September 2018 as follows:
44.1 Losses to 31 December 2019: £10,666,72 net (agreed schedule of loss).

44.2 Earnings to 31 December 2019: £3,264.08 net (agreed schedule of loss).
44.3 Losses to 31 August 2020: £8,777.44 (agreed schedule of loss).
44.4 Net losses to 31 August 2020: **£16,180.08**.
44.5 Pension loss scenario D calculation compensates for 116 days' pension loss during 2019 when the Claimant remained employed and allows for one year's loss thereafter. Total loss: **£9,720**.

45. Given our finding that the Claimant's employment would inevitably have ended in any event, it is not necessary to consider when she is likely to secure work and what she will earn in that work.

46. The Claimant also sought £2,000 compensation to pay for CBT, based on Dr Friedman's rough assessment of the likely cost of such treatment. The Tribunal was not satisfied that this was a loss caused by the discrimination. As Dr Friedman's report makes clear, the Claimant's generalised anxiety disorder is longstanding and, in Dr Friedman's expert view, should have been treated with skilled intervention from a qualified CBT therapist in the past. The need for this therapy does not arise from the discrimination, it arises from the condition itself and had arisen before the discrimination took place.

47. The Claimant also seeks compensation in the form of a basic award and compensation for loss of statutory employment rights arising from her dismissal. Those items would only be payable if the Claimant was unfairly dismissed. The Tribunal has not heard or determined the complaint of unfair dismissal. It cannot be assumed that the Claimant's dismissal was unfair, even though the absence that led to it was substantially caused by discrimination. The case law makes clear that a disabled employee can still be fairly dismissed, even if their long-term absence is caused by their disability and even if there has been a failure to make reasonable adjustments for that disability. It would not be appropriate to award the Claimant compensation equivalent to a basic award or compensation for loss of statutory rights by way of compensation for discrimination in this claim.

48. Interest on the injury to feelings award has been calculated in accordance with the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803, based on a period of 913 days between the act of discrimination and the remedy hearing, as calculated by the Claimant. Interest on the lost earnings has been calculated in accordance with those Regulations and based on the mid-point of those 913 days. No interest is payable on the pension losses, because this is a current assessment of a loss that has not yet been incurred. The Claimant sought interest at 2% on the award for psychiatric damage and the Respondent did not dispute that rate. Interest on that sum has therefore been calculated at 2%.

49. No grossing up calculation has been performed because the Tribunal calculated that the Claimant's losses linked to dismissal do not exceed £30,000 in total. She was dismissed with effect from 31 December 2019, so only £8,777.44 for loss of earnings flows from her dismissal. Of the £9,720 for loss of pension, part relates to the period in 2019 when she was still employed but most flows from her dismissal. The Tribunal considered that 20% of the Claimant's injury to feelings flowed from her dismissal. It is clear that most of her distress and other

impacts referred to above were attributable to the discrimination directly, rather than to the consequential dismissal, which took place 10 months later, but a relatively small proportion was attributable to her dismissal. The Tribunal decided that the proportion was 20%. That means £5,200 of the compensation for injury to feelings compensates for losses flowing from dismissal.

Employment Judge Davies
4 March 2021