Case Number: 2201874/2018 V

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

S **v** **A**

Heard at: London Central (by video (CVP)) **On**: 12 and 13 (in Chambers) October and 8 December 2020

Before: Employment Judge E Burns
Mrs J Cameron
Mr M Reuby

Representation

For the Claimant: Mr Sangha (counsel)
For the Respondent: Mr Anderson (counsel)

RESERVED JUDGMENT ON REMEDY

The tribunal makes the following award of compensation:

	£
Basic award	**2,445.00**
Financial loss	
Loss of Earnings (16 May 2018 – 13 October 2021)	161,055.90
Bonus payments (2019, 2020 and 2021)	13,630.66
Pension loss (2% of loss of earnings plus bonus)	3,571.73
Private medical cover (16 December 2018 to 13 October 2021)	3,947.16
Loss of statutory rights	500.00
Less mitigation of £21,196.58 (past and future)	-21,196.58
Subtotal	161,508.87
Applying a 25% reduction	40,377.22
Bonus 2017 (not subject to the 75% reduction)	3,900
Total Financial loss	**44,277.22**
Personal Injury General Damages	**5,000.00**
Personal Injury Special Damages	**2,478.00**

Injury to feelings	**17,000.00**
Interest on injury to feelings	**3,658.96**
Interest on financial loss and PI General Damages	**5,303.04**
Total	**80,162.22**

REASONS

The Remedy Hearing

1. The first part of the hearing was conducted using the cloud video platform (CVP) under rule 46 on 12 October 2020. The parties agreed to the hearing being conducted in this way because the claimant was in Canada. The hearing started at 4 pm and continued until 7.30 pm (BST) to accommodate the claimant.

2. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was undertaken via a notice published on Courtserve.net. As a result, two members of the public attended the hearing on 12 October 2020.

3. The parties and members of the public were able to hear what the tribunal heard and see the witnesses as viewed by the tribunal. From a technical perspective, there were no difficulties. No requests were made by any members of the public to inspect any witness statements or for any other written materials before the tribunal.

4. The participants were told that it was an offence to record the proceedings.

5. The tribunal heard evidence from the claimant. We were also provided with a witness statement from a member of the respondent's HR team whose evidence was accepted by the claimant.

6. The tribunal ensured that the claimant had access to the relevant written materials which were unmarked when giving evidence. The panel was satisfied that he was not being coached or assisted by any unseen third party while giving his evidence.

7. The evidence before us included the expert report of Dr Nunez, a qualified medical practitioner with a specialty in Psychiatry in the province of British Columbia, Canada. Dr Nunez had been instructed jointly by the parties. A copy of the letter of instruction was provided to us together with the written responses of Dr Nunez to some additional questions. The report of Dr Nunez was accepted by both parties with neither side wishing to call him as a witness.

8. There was a hearing bundle of 391 pages. We read the evidence in the bundle to which we were referred. Page numbers referred to below are references to the page numbers in the bundle, save for the expert medical report which was contained in the bundle prepared for a preliminary case management hearing.

9. The panel deliberated in chambers on 13 October 2020 and provided a preliminary judgment to the parties without formal promulgation on a number of matters of principle. The hearing reconvened on 8 December 2020 (by video) where there were some final areas of dispute that needed to be determined.

Findings of Fact

10. Our findings of fact, where required, were made on the balance of probabilities, having considered all the evidence.

11. The claimant was dismissed from his employment with the respondent on 15 March 2018. We have found that dismissal to be both unfair and discriminatory. At the time of his dismissal, the claimant had been absent from work due to illness for just over 13 months. His ill health was the reason for his dismissal.

12. The claimant has not worked since his dismissal. He has continued to be unwell and unable to work for this reason.

13. The claimant's medical history is complex. He was diagnosed with a serious life-long medical condition in March 2016. He began taking medication to support him with this condition shortly afterwards which he continues to take today. Initially he suffered quite severe side effects as a result of the medication, but these settled down by the time of his dismissal and were not a barrier to preventing him from being well enough to return to work.

14. The claimant subsequently developed depression and anxiety. According to the report of Dr Nunez, he now has four different, but related psychiatric conditions namely Major Depressive Disorder, Generalised Anxiety Disorder, Social Anxiety Disorder and PTSD.

15. For the purposes of the remedy hearing, we are required to determine when and how these conditions arose (i.e. what was their cause) and how long they will continue to last. We are also required to speculate whether the position would have been different had the respondent not dismissed the claimant when it did. Our findings are based on the contemporaneous medical evidence, the report of Dr Nunez which was based on an examination of the claimant in February 2020, his responses to the additional questions put to him and the claimant's evidence during the liability and the remedy hearing.

When did the medical conditions develop and what caused them?

16. Dealing with the Major Depressive Disorder first, there was no dispute between the parties as to the initial cause of this. It originated as a result of the diagnosis of the claimant's underlying condition. Dr Nunez comments in his report, however, that the claimant's depressive disorder condition was aggravated by "*the course of interaction and mediation with [the respondent]*" (PH Bundle page 27). He states that the claimant's depression was exacerbated by his interactions with the respondent through the course of the absence management process. (PH Bundle page 33)

17. According to Dr Nunez, the General Anxiety Disorder stemmed from a general sense of worry arising from the claimant's decrease in function and capability (PH bundle page 27). We understand Dr Nunez to be saying that this was a reaction to the decrease in function and capability the claimant had from the combination of his underlying condition, the initially prolonged side effects of his treatment and the debilitating effects of his depressive disorder.

18. Dr Nunez's opinion is that the claimant's Social Anxiety Disorder, "appears to have [been] initiated following a confrontation with his previous employer about being able to remain in contact with colleagues and friends from work" (PH bundle 27 - 28). We interpret this as being a reference to the dinner that did not take place in June 2018 (described in paragraphs 47 - 54 of our written reasons for the liability judgment).

19. The opinion expressed by Dr Nunez about the nature and origins of the claimant's depressive disorder and general anxiety is consistent with medical certificates submitted by the claimant to the respondent and the occupational health reports prepared contemporaneously. We note that these did not refer to social anxiety as a separate condition. We find this is unsurprising as the reports are brief and not prepared by a psychiatrist. We do not consider this omission to be significant.

20. We find the report of Dr Nunez to be a little unclear on the origins of the claimant's PTSD. In one place he suggests the cause of the PTSD to be the same as the depressive disorder, i.e. it started with the diagnosis of the underlying condition, but was aggravated by interactions with the respondent (PH Bundle page 26). However, in two other places he expressly describes the PTSD as a "*later condition"* that developed, like the social anxiety disorder, because of the interactions with the respondent (PH Bundle page 27). We consider these latter comments more accurately reflect the opinion of Dr Nunez.

21. Unfortunately, Dr Nunez does not specify which interactions with the respondent caused the aggravation of the claimant's depression and the development of the PTSD. There were, of course, a great many interactions between the claimant and the respondent during the absence management process, not all of which we have found to be unlawful.

22. According to the claimant, one of the most damaging aspects of his interactions with the respondent was when the respondent wanted him to name his underlying condition and tried to get him to provide consent for a

GP's medical report. He felt he had provided a lot of information, including being explicit about the fact that his condition was named as a disability under the Equality Act 2010, but the respondent appeared not to believe that he was genuinely unwell. Related to this, he also found the fact that the respondent viewed him as difficult particularly distressing.

23. Finally, we note that a further exacerbating factor in this case was the delay in the claimant accessing the right treatments. In Dr Nunez's view, the delay in treatment of approximately one year before the claimant was able to access CBT counselling *"gravely exacerbated the impact on ability to work.*" (29)

What if the claimant had not been dismissed unfairly or discriminatorily?

24. In order to speculate what might have happened had the claimant not been dismissed unfairly or discriminatorily, we have found it helpful to go back to the third occupational health report, commissioned by the respondent which was produced on 27 November 2017 (232 - 235).

25. At that time, the claimant had been waiting on an NHS waiting list to have counselling for nearly a year. He had had some counselling through his employer's medical expenses insurance scheme in 2016, but nothing in 2017. He became entitled to have further counselling under his employer's medical expenses scheme in 2018.

26. The report stated that the main barrier to the claimant's return to work at that time was the claimant's mental health condition which would not improve until he received specialist counselling in the form of CBT. The report specifically stated that the claimant would need a minimum of three months of counselling before he was well enough to return to work. It went on to state that it was envisaged that, in total, the claimant would need 12-18 sessions of CBT, but that it would not be necessary for this all to take place before he could commence a phased return to work (234).

27. The claimant's evidence was that, in the period prior to his dismissal, he had been receiving counselling from Dr Straffer-Kruse which was of benefit to him and put him on the road to recovery. He told us that his dismissal disrupted that path and meant that he was not able to take that step of commencing a phased return to work.

28. We have looked at the evidence available to us as to whether this is correct or not.

29. The claimant was able to begin counselling in January 2018. By the date of the claimant's dismissal, 15 March 2019, he had had a course of 6 sessions of CBT counselling via the NHS (199) and one counselling session with Dr Straffer-Kruse funded by his employer's medical expenses insurance (310).

30. The claimant told his GP on 29 January 2018 that he had had two meetings with the NHS therapy provider and he was feeling positive about the plan. He was also considering a private referral to a psychologist.

31. On 28 February 2018 he emailed his GP to get a written referral to enable him to use his private medical insurance for counselling. He was also issued with a medical certificate until 1 April 2018 (199 – 200). This was a slightly shorter medical certificate than others he had been given.

32. On 6 March 2018, the claimant's regular GP was not able to meet him for his regular review and so the claimant did not enter into any discussion about the effectiveness, or otherwise, of the counselling.

33. The claimant met with his employer on 7 March 2019, but his employer did not ask him about his counselling (199).

34. On 9 April 2018, the claimant's GP notes refer to him having had six sessions of counselling with the NHS and having started private counselling. There is no record of him telling the GP whether he felt the treatment was helpful or not helpful. He told his GP that he had been dismissed from his job and so he was applying for universal credit and needed a sick note. The was issued with a longer medical certificate covering the period from 1 April 2018 to 1 June 2018 (199).

35. On 18 June 2018, the claimant told his GP that he felt generally better and was still seeing his therapist and considering options regarding work. He was issued with a medical certificate covering a lengthy period from 1 June 2018 to 5 September 2018 because he was planning to visit his family in Canada during the summer (198).

36. On 6 September 2018, the claimant told his GP that he still had some therapy sessions left which he was looking forward to as he was finding them useful. He was issued with a fit note for the period from 5 September to 3 December 2018 (198).

37. On 20 November 2018, he saw a different GP and told her that the six sessions of therapy he had had with the NHS had not been helpful. There is no note of what he said about his other therapy. We know that he was due to attend the tribunal hearing the following day, but this was postponed as a result of a judge not being available.

38. The report of Dr Nunez says in relation to this question:

> "I am of the opinion that had this entire process not occurred as it did, that [the claimant] would likely be able to work more capably than his current state, potentially not to the same degree for an initial time period accounting for medical and psychiatric recovery, but given his premorbid level of high functioning and commitment to his position, he likely would have been able to maintain his position with more appropriate handling of his case and a more timely mental health treatment regimen in place." (PH Bundle page 33).

39. In relation to the timeline involved, he suggests that:

"In a hypothetical world where [the claimant] had not been dismissed, and all other factors in the history provided to me remained the same I am of the clinical opinion that it is more likely his psychiatric conditions would have been less severe and thereby more responsible to treatment within eh given timeframe of a three month period though not necessary fully abating or ceasing to be clinically significant." (385)

When and how will the Claimant recover?

40. According to the report of Dr Nunez, the claimant's recovery is dependent on the implementation of an available and appropriate treatment regimen (PH Bundle page 30). He anticipates that the claimant could be able to work again within a high performance capacity as before, although he would need to have completed adequate treatment for an appropriate period of time (PH Bundle page 30 - 31).

41. Dr Nunez does not give a time for full recovery, but does say he would expect to see an initial improvement in three months of beginning treatment.

42. We note that in his report Dr Nunez made several recommendations for treatments for the claimant, one of these included a change in his medication. The claimant has considered this option, but has chosen not to implement it as he is content with the medication he is currently taking, due to being able to manage the side effects.

43. The claimant has been seeing a therapist who has estimated that the claimant would need weekly or bi-weekly counselling for at least two to three years (376).

Financial Facts

44. The claimant's earnings and likely future earnings were not in dispute. This included the amounts of bonuses that he would have received had he remained employed,

45. The claimant received benefits following the termination of his employments. He claimed these in the UK initially and then when he returned to Canada. One of the matters that was in dispute between the parties was whether the claimant's entitlement to receive Disability Benefit in Canada would be affected by a compensation award, with the risk that his benefit would cease. We were not provided with sufficient evidence to enable us to conclude that this would happen.

LAW

Compensation for Unfair Dismissal

46. Compensation for unfair dismissal is in two parts, a basic award and a compensatory award.

47. The basic award is calculated in accordance with section 119 of the Employment Rights Act 1996. Gross weekly pay is used in the calculation subject to the relevant maximum cap in place at the date of the dismissal.

48. Section 123 of the Employment Rights Act 1996 provides for the compensatory award to be "such amount as the tribunal think is just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer." It is subject to the relevant maximum cap in place at the date of the dismissal.

49. The claimant is under a under a duty to take reasonable steps to mitigate any loss and this must be taken into account by the tribunal. Account by way of mitigation includes benefits that are not recouped.

50. In accordance with the principle established in *Polkey v AE Dayton Services Ltd* [1988] ICR 142 we are required to consider the possibility that the respondent would have been in a position to fairly dismiss the claimant and reduce the compensatory award by an appropriate percentage accordingly. This includes considering when a fair dismissal would have been able to take place (*Mining Supplies (Longwall) Ltd v Bake*r [1988] ICR 676 and *Robertson v Magnet Ltd (Retail Division)* [1993] IRLR 512).

Recoupment provisions

51. Where the claimant has received statutory benefits, where the tribunal makes an unfair dismissal compensatory award, the tribunal is required to issue a recoupment notice pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996 (SI 1996/2349) which orders the respondent to pay part of the compensation awarded to the authority that paid the benefit rather than to the claimant. This does not apply where the compensation is for discrimination however.

Failure to follow 2009 ACAS Code of Practice 1 on Disciplinary and Grievance Procedures.

52. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, enables an employment tribunal to adjust the compensatory award for an unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance procedures. The award can be increased or decreased by up to 25% if it is just and equitable in all the circumstances. In *Holmes v Qinetiq Ltd* [2016] ICR 1016 the EAT held that the ACAS Code did not apply to situations in which an employee was dismissed for ill-health capability.

Compensation for Discrimination

53. The tribunal's power to award a remedy in a discrimination case is governed by section 124 of the Equality Act 2010.

Compensation for Financial Loss

54. The measure of loss is tortious with the effect that a claimant must be put, so far as possible, into the position that he would have been in had the act of discrimination not occurred (*Ministry of Defence v Cannock* [1994] IRLR 509). Thus, the tribunal must ask itself, 'If there had been no unlawful discrimination, what would have happened?'

55. Compensation for discrimination is uncapped.

56. Where the act complained of is a discriminatory dismissal, the tribunal will have to decide whether the complainant would have been dismissed in any event if there had been no discrimination (*Abbey National plc v Chagger* [2009] ICR 624).

57. The duty to mitigate loss applies.

58. An employee is not entitled to double compensation where there is an overlap between the compensatory award and compensation awarded for financial loss in discrimination.

59. Damages for the stigma of a discriminatory dismissal can be awarded where it has an impact on the claimant's position in the labour market (*Chagger*).

Injury to Feelings

60. The tribunal has the power to award to compensation to an employee for injury to feelings resulting from an act of discrimination by virtue of sections 124(5) and 119(4) of the Equality Act 2010.

61. The purpose of the award is to compensate the complainant for the anger, upset and humiliation caused by the fact that he knows that he has been discriminated against.

62. In determining the amount of the award, we are required to follow the *Vento* guidelines in place at the date of the discrimination.

Personal Injury

63. A tribunal is able to award compensation for personal injury consisting of psychiatric illness where this has been caused by a discriminatory act (*Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481). Such damages are recoverable for any harm caused by a discriminatory act and not simply harm which was reasonably foreseeable (*Essa v Laing Ltd* [2003] IRLR 346, [2003] ICR 1110, EAT).

64. Personal injury compensation potentially includes compensation for pecuniary losses arising from the injury and for the injury itself.

65. An award for personal injury may be made in addition to an award for injury to feelings (*Hampshire CC v Wyatt* (UKEAT/0013/16/DA) although a tribunal should be careful to guard against double recovery.

66. When more than one event contributes to the injury suffered by a claimant then, save where the injury in question can be said to be 'indivisible,' the extent of the respondent's liability is limited to the contribution to the injury made by its discriminatory conduct (*Thaine v London School of Economics* [2010] ICR 1422 EAT, *Olayemi v Athena Medical Centre* [2016] ICR 1074, *BAE Systems (Operations) Ltd v Konczak* [2017] EWCA Civ 1188, *Blundell v Governing Body of St Andrew's Catholic Primary School* [2011] EWCA Civ 427).

Interest

67. Interest is payable on any compensation we award for discrimination pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (SI 1996/2803). It is ordinarily calculated in accordance with those regulations, although the tribunal does have a degree of discretion with regard to the ability to calculate interest by reference to periods other than those set out in the regulations in exceptional cases.

Tax

68. When making an award of compensation, the tribunal must take account of tax payable on the various elements of the award. It may therefore be necessary, in accordance with the principles in *British Transport Commission v Gourley* [1955] 3 All ER 796, once the amount of the award has been calculated using net figures for earnings and pension loss, to 'gross up' the award so as to ensure that the claimant is not left out of pocket when any tax required to be paid on the award has been paid.

Order of Adjustments

69. The order in which the various adjustments that can be made to awards of compensation are made, can change the overall amount awarded. The leading case on the order in which adjustments should be made is *Digital Equipment v Clements* [1997] EWCA Civ 2899 which confirms the order is as follows:

    (1) Calculate total losses suffered
    (2) Reduce by the amount of earnings which have mitigated C's loss (or any sum representing a failure to mitigate)
    (3) Apply any *Polkey* deduction to reflect the chance that C would have been dismissed in any event
    (4) Interest is then calculated

    We consider we are bound by this decision.

ANALYSIS AND CONCLUSIONS

Would the claimant have been able to return to work in a reasonable period of time?

70. We have reached the conclusion that there was a chance, had the claimant not been dismissed on 15 March 2018, that his medical condition would have improved sufficiently, as a result of counselling, to enable him to begin to return to work on a phased basis by the middle of May 2018. We think that he would have continued his counselling and been able to increase his working hours to the extent that he would have returned to full time working by the end of July 2018. We have estimated this chance at 25%.

71. We have reached this conclusion for the following reasons.

72. The claimant gained some benefit from the six sessions of CBT received through the NHS. He was anticipating building on this through the private counselling with Dr Stauffer-Kruse. By the middle of May, he would have had a further eight counselling sessions, bringing the total to 14 sessions overall.

73. The third occupational health report anticipated that the claimant would be well enough to return to work in three months once he had started his counselling. It predicted that the claimant needed 12-18 counselling sessions, but would not need to have had all of these before returning to work on a phased basis.

74. We have also speculated, based on our general understanding of the wellbeing benefits of work, that being in work, even on a reduced basis, would have helped with the claimant's recovery. In particular, we consider he would have benefited from day to day social interaction with his colleagues and establishing a working relation with his manager.

75. We consider that our conclusion is consistent with the opinion of Dr Nunez and his view that upon the initiation of a comprehensive treatment plan the claimant would have begun to recover within three months (384). The claimant would not have needed this treatment plan to have included therapies targeted to treat PTSD.

76. We have, however, assessed the chance as only 25% because this reflects our assessment of the likelihood of the above scenario becoming a reality. This is influenced by:

- the opinion of Dr Nunez that the claimant's condition was exacerbated by other aspects of the respondent's behaviour

- the opinion of Dr Nunez that the delay of 12 months in the claimant receiving approved CBT counselling "gravely exacerbated the impact on ability to work" (PH bundle - 29)

- the reality that the claimant has continued to be unwell for much longer than was anticipated in the third occupational health report.

77. The impact of our decision is that, once the claimant's net earnings are calculated, less the benefits he received, his compensation for financial loss should be reduced by 75% as we are making a *Polkey/Chagger* deduction.

In other words, we are determining that there was a 75% chance that the respondent would have been in a position to fairly and non-discriminatorily dismiss the claimant.

Period of Loss

78. We have decided that the claimant should be awarded losses up to the date of the last day of the first remedy hearing (i.e. 13 October 2020) and for one year into the future (i.e. until 13 October 2021).

79. Although the claimant's current therapist envisages he will need treatment for two to three years, this opinion does not address when the claimant will be well enough to return to work.

80. Dr Nunez envisages improvement, with the right treatment, within three months, but he will need a longer period to achieve a full recovery. We have therefore settled on 12 months as the fair and equitable period.

University Fees

81. We do not award the university fees the claimant is seeking. This is because the medical evidence before us is that the claimant will become well enough to return to a similar position to the previous role he held. We understand that the claimant may wish to explore a different career. We wish him well if he wishes to do so, but this should be at his own cost.

Injury to Feelings

82. We consider that his is a case which falls squarely into the middle of the Vento middle band. There is only one unlawful act of discrimination, but it was a dismissal which gives it additional significance. In addition, the circumstances of the dismissal were particularly upsetting as it was done in writing following a difficult telephone meeting. We therefore award £17,000.

Stigma Damages

83. We do not make any award of stigma damages. We do not think that the manner in which the claimant was dismissed has had any material impact on his position in the labour market. His ongoing medical condition had had a far greater impact.

ACAS Uplift

84. The claimant is not entitled to an ACAS uplift because he was dismissed for capability, not conduct.

The respondent's contribution to the claimant's injury

85. The causes of the claimant's medical conditions are not all attributable to the respondent. As noted above when more than one event contributes to the injury suffered by a claimant then, save where the injury in question can

be said to be 'indivisible,' the extent of the respondent's liability is limited to the contribution by its discriminatory conduct.

86. We do not consider this is a case where the injury is “indivisible”. It is therefore necessary for us to determine the contribution made by the respondent’s discriminatory conduct. There is a dispute between the parties as to what we can take into account when under taking this exercise in this case.

What aspects of the respondent’s behaviour can we take into account?

87. The respondent’s position is that we should consider the act of dismissal in isolation. Counsel for the respondent, Mr Anderson has invited us to conclude that the dismissal had very little adverse impact on the claimant’s mental health, with presumably the other interactions between him and the respondent being the cause of the deterioration in his mental health.

88. The claimant’s position is that his dismissal came at the end of a long absence management process. His counsel says we can take into account the process in full when considering how to compensate the claimant. According to Mr Sangha this also includes the way the respondent dealt with the claimant’s grievance.

89. We note that the claimant’s original claim contained a long list of “wrongs” to which he felt he had been subjected by the respondent. He withdrew almost all of these allegations in the early stages of case management of the claim, however, and therefore we were not required to consider whether such interactions constituted acts of unlawful discrimination in their own right.

90. We agree with the respondent’s representative that we cannot take into account the entirety of the absence management procedure. We consider, however, that we are entitled to take into account the dismissal, the manner in which it was conducted (i.e. the meeting on 7 March 2020) and what the respondent said about why it had reached its decision to dismiss the claimant in its letter of dismissal. We made various findings in relation to these matters (which are set out in the written reasons for our liability judgment) including identifying the parts of the respondent’s reasons which contributed to our findings that the dismissal was unlawful.

91. This includes:

- the respondent’s failure to enquire at the meeting on 7 March 2018 about the claimant’s counselling or obtain an up to date medical report

- the accusation the respondent made in the letter of dismissal that the claimant of continually refused to engage in discussions about potential adjustments

- the view the respondent took of the claimant's failure to attend the occupational health meeting on 12 February 2018

- the reliance the respondent placed on the claimant's refusal to name his underlying condition or to provide consent to a GP report which would name the condition – this suggested they did not believe he was genuinely unwell to the extent that he was

- the fact that the respondent continued with the meeting on 7 March 2020 while the grievance appeal was outstanding

- that the respondent had exaggerated the degree of strain its business was under due to the claimant's absence

92. In our view, the above are discriminatory conduct that we can take into account. We consider the above conduct contributed to causing the claimant's depressive disorder to be exacerbated. Moreover, based on what the claimant told us in his evidence, we consider that the above were the primary cause of the claimant's PTSD.

93. We cannot however hold the respondent legally responsible for causing the claimant's social anxiety disorder. Although, according to Dr Nunez, this was caused by the respondent preventing the claimant having contact with his team, we did not judge this to constitute unlawful discrimination and it was not part of the matters that make up the dismissal. We cannot therefore take it into account.

94. In addition, we cannot hold the respondent responsible for the delay in the claimant obtaining specialist counselling treatments. The claimant brought a claim that the respondent should have followed the recommendation in the first occupational health report to pay for the claimant to have counselling as a reasonable adjustments. We did not uphold this claim.

Conclusion on respondent's contribution to medical conditions

95. As set out above, we have analysed the various causes of the claimant's medical condition and sought to identify what aspects of his four psychiatric conditions can be attributed to the respondent's discriminatory conduct. Based on our analysis we have concluded that the respondent's discriminatory conduct caused 15% of the claimant's current medical condition.

96. The consequences of this finding are that we consider it would be just and equitable to order the respondent to compensate him by paying 15% of the total possible injury to health and medical treatment costs.

97. We note that the claimant has claimed an amount for injury to health of £25,000. We are satisfied that this figure is in line with the Judicial College Guidelines. Our decision would result in an order of 15% of this amount.

98. With regard to the special damages being sought by the claimant, we consider the 15% figure should also be applied. However, there is a need to determine what amounts are included first.

99. The claimant is seeking payment of medical expenses covering the care of psychiatrist for two years and specialist counselling for two to three years. We award him 15% of these costs, for the period of two years as we consider this is just and equitable in all the circumstances.

CALCULATIONS

100. The tribunal is grateful to the parties for agreeing some of the figures between them. The parties also provided us with some calculations. As the figures used do not match the tribunal's own calculations, we have included this section explaining our approach and providing some detail of the calculations we made.

Basic Award

101. We have adopted the basic award calculation that was agreed between the parties.

Financial Loss

102. The parties agreed that the *Polkey/Chagger* percentage deduction should not be applied to the 2018 Bonus, the net value of which was agreed to be £3,900.

103. The financial loss figure uses the net figures agreed between the parties with regard to the claimant's earnings. The period of loss runs from 16 May 2018 to 13 October 2021.

104. The slightly higher bonus figure (put forward by the claimant and agreed by the respondent) for the 2021 bonus has been used. For the avoidance of doubt, the net bonus figures used are:

    2019 - £3,780.00
    2020 - £4,800.00
    2021 - £5,050.66

    Subtotal - £13,630.66

105. The parties agreed that the pension loss should be 2% of the total financial loss (i.e. earnings plus bonus) and so we have adopted this.

106. The claimant continued to benefit from the respondent's private medical scheme until 16 December 2018. The parties agreed a weekly figure for this of £26.67 and we have multiplied this by the number of weeks (148).

107. The parties agreed a figure of loss of statutory rights of £500 which we have adopted.

108. The parties agreed the mitigation figure which is made up of the state benefits that the claimant received in the UK and in Canada up to the date of the remedy hearing and for the future period of loss.

109. We added together the loss of earnings figure, the pension loss figure, the figure for the private medical cover, and the figure for the loss of statutory rights. We then deducted the mitigation figure. This gave us a subtotal which we divided by four to apply the *Polkey/Chagger* deduction. We added the 2017 bonus figure back in to give a total financial loss figure.

Injury to Feelings and Injury to Health

110. The tribunal panel determined these figures as explained above.

Personal Injury Special Damages

111. We have adopted the figure for this which was agreed between the parties.

Interest

112. The parties calculated that there were 982 days between the date of dismissal and 8 December 2020 (the final remedy hearing date). The applicable interest rate is 8%.

113. We have calculated the interest on the injury to feelings award using the formula:

    982 x 0.08 x 1/365 x £17,000 = 3,658.04

114. We have calculated the interest on the other awards that attract interest (financial loss and injury to health) using the following formula:

    982/2 x 0.08 x 1/365 x (£44,277.22 + £5,000) = 5,303.04

Recoupment and Grossing Up

115. As the award we have made is for discrimination it is exempt from recoupment. The claimant did not ask us to gross up the award to account for tax.

_____

Employment Judge E Burns
21 December 2020

Sent to the parties on:

15/1/21

For the Tribunals Office