EMPLOYMENT TRIBUNALS

Claimant:	Mr I Sadiq
Respondent:	National Audit Office
Heard at:	London Central Employment Tribunal
On:	17 February 2020
Before:	Employment Judge Quill; Ms H Craik; Mr J Carroll

Appearances
For the claimant: In person
For the respondent: Mr L Dilaimi, counsel

RESERVED JUDGMENT

(1) The Respondent must pay the Claimant a basic award of £1956 for unfair dismissal.

(2) The Respondent must pay the sum of £32606.52 in respect of the contraventions of the Equality Act (this sum also covering the compensatory award for unfair dismissal, for which no separate award is made). The aggregate sum is made up of £15000 for injury to feelings (plus interest on that) and £11384.15 for financial losses (plus interest on that).

REASONS

Introduction

1. Employment Judge Quill would like to apologise to both parties for the severe delay in promulgating this decision, caused partially by the pandemic and partially by personal circumstances. None of the delay is attributable to the other panel members. This remedy decision relates to the liability decision dated 5 February 2020.

The Issues

2. Our liability judgment dismissed the complaints of direct discrimination and failure to make reasonable adjustments.

3. The Claimant was unfairly dismissed, and we needed to calculate the basic award and the compensatory award, taking into account his losses, and taking into account – amongst other things – the decision we made that there should be (a) no reduction in relation to losses in the period up to 31 December 2017 and (b) a reduction of 75% in respect of financial losses from 1 January 2018 onwards. (See paragraphs 198 to 203 of reasons for liability judgment).

4. We found in the Claimant's favour on some (but not all) his allegations of discrimination from something in consequence of disability. We needed to decide on the appropriate remedy, including interest.

The Evidence and the Hearing

5. We had a bundle of around 240 pages from the Respondent and around 100 pages from the Claimant. We had a schedule of loss and an update to that from the Claimant and a counter-schedule from the Respondent. We heard evidence from Mr McCann and from the Claimant and submissions from both sides.

6. Due to the length of time taken to hear the evidence and submissions (not aided by delays caused by evacuation of the building due to the fire alarm), and the number of issues we had to consider, we did not think we would finish our deliberations within a reasonable period of time on the day, and so we sent the parties home and said we would write with our decision.

7. We did, however, have time to give the parties our decision that we would not order reinstatement or re-engagement and that the remedy would be financial compensation, including compensation for loss of employment.

The findings of fact

8. The Claimant commenced a new job in financial services on Monday 11 February 2019 with Mazars Ltd. His last day of employment with the Respondent had been Wednesday 29 November 2017 (see paragraph 96.1 of liability judgment). He was therefore out of employment for a period of 62 weeks and 4 days.

9. For the period from November 2017 to shortly before January 2019, the Claimant was not well enough to do work for any employer, and he did not work for any employer in that period. He did not receive state benefits until the end of 2018 when he began to receive Universal Credit. The maximum rate of Universal Credit at the time for a single person over 25 was £317.82 per month.

10. In January 2019, the Claimant felt well enough to begin to apply for new jobs, and he did so. Mazars was not the first job for which the Claimant applied, but it was the first for which he was offered an interview.

11. He was successful and as well as employment, the new job gave him the opportunity to resume his training contract with ICAEW. (See paragraph 10 of liability judgment). The job with Mazars was subject to a 26 week probation period. The salary was £35,000 per year. It was a higher gross salary than the Claimant had had immediately prior to leaving the Respondent's employment. There was an employer's pension scheme and employees were automatically enrolled, subject to the right to opt out.

12. Prior to starting with Mazars, the Claimant completed a medical questionnaire and signed the declaration on 3 February 2019.

    12.1 In it, he answered "yes" to the question about "mental illness, depression, anxiety or any other psychological disorders". He also referred to the medication he had had, describing it as "mild antidepressant medication in the past".

    12.2 He answered "no" to questions about whether he had ever had an illness caused by his work and whether he had ever left a job for health reasons.

    12.3 He stated that he had had "occasional mild to moderate instances of depression in the past", and that he might need occasional time off for doctor's appointments, and possible change to start times to take account of disrupted sleep.

    12.4 He stated that he had taken approximately 10 days of sickness in 2017 triggered by difficult family circumstances which had been resolved.

    12.5 He stated that in 2018 he was on a career break to care for family.

13. In around December 2019, Mazars took a decision (confirmed by their letter of 9 January 2020) to terminate the Claimant's employment due to a failure to pass probation. His high levels of absence were a factor in their decision. Mazars' letter stated that the Claimant had given reasons for absence which included, amongst other things, housing issues and settling in, as well as wellbeing struggles which had been long-lasting.

14. Because of his high absence levels, the Claimant did not actually receive payments at the rate of £35,000 per year from that employment, because he was not entitled to full pay for all of his periods of absence.

15. The evidence from the Claimant was that he had last worked for Mazars in May 2019, after which he had been continuously absent due to illness. His account to us (and we accept that he was seeking to be honest) was that he had commenced having intermittent absence immediately after starting work with Mazars. However, our finding is that - immediately after starting employment with Mazars - the Claimant was able to attend work regularly. Later, he had high levels of absence. This led to his probation period being extended. We prefer to rely on the contemporaneous evidence of the payslips, combined with the fact that the Claimant's contract said that he was entitled to 10 working days paid sickness absence in any 12 month period.

    15.1 The Claimant was paid as normal for February to May 2019.

    15.2 Absence(s) which affected his pay were first shown on the June 2019 payslip. The pay reduction in June is inconsistent with a continuous absence which commenced in May, following on from significant earlier intermittent absence.

    15.3 From July onwards he was continuously absent and receiving only SSP.

15.4 In his impact statement prepared as part of the liability proceedings, the Claimant suggests that his mood lifted in early 2019 because the hearing in the tribunal litigation was postponed, and that his health deteriorated in May 2019, and afterwards, because of the steps that were required in the litigation and the approach of the November 2019 hearing dates.

16. Following the end of his employment with Mazars, the Claimant's GP certified him as unfit for work, and advised the Claimant that he would be likely to remain unfit for work until at least April 2020. The medical advice he received, and the Claimant's own estimate, suggested that the Claimant would probably not be fit to work before June 2020 at the earliest (although we do note that it is the Claimant's honest opinion that he might be fit to work in April or May if an order for reinstatement or re-engagement was made).

17. We refer to some of the Claimant's absence while employed by the Respondent in the liability judgment/reasons: see, paragraph 16 to 19, in particular, and also, for example, paragraphs 27, 28, 34, 40, 46, 48, 65, 67, 71, 75, 78, 79, and 81. As per the bundle for the main hearing, the Claimant himself had commented on his absence in detail in his submissions to Ms Lower. As per paragraphs 141 and 142 of the reasons for the liability decision, we decided that the Claimant had met the definition of a disabled person since before April 2016 and that the Respondent ought reasonably to have been aware of that. In reaching those conclusions, we took into account the Claimant's absences from work and the information which the Respondent had received about them by then.

18. In summary, the Claimant had had high levels of absence in 2016 and 2017. He had also had about 11 days in each of 2013 and 2014. By the end of his employment, the Claimant had exhausted his entitlement to full pay in relation to sickness absence and would only have been entitled to half pay (at most) for future absences. If he had remained employed and had continued to have high levels of sickness absence in December 2017 and during 2018, then he might have reached a period where his entitlement to half pay was exhausted. He would have reached that stage if he had 305 days absence in a rolling 4 year period. As per paragraphs 17 to 18 of the liability judgment, in the period commencing 1 January 2015, he was already above 170 days by August 2017 (ie before the first discriminatory act).

19. Our finding is that, even in the absence of discrimination, if the Claimant had not been dismissed by the Respondent (with notice given in October 2017 and expiring in November 2017), the Claimant would have continued to have high levels of sickness absence while working for the Respondent. This is not a matter about which we can make a precise and exact determination of the date (if any) by which the Claimant's entitlement to half pay while off sick would expire. However, our finding that his absence levels would have been high takes into account (a) the Claimant's sickness absences from 2014 to August 2017 and (b) the fact that he was declared by his GP to be unfit for work for the whole of 2018 (which was after the dismissal, and after two of the acts which we found to be discriminatory, and we do note the GP thought that the Claimant might potentially be able to work in some circumstances, with adjustments) and (c) the fact that he was able to work for Mazars between February and May or June 2019, but subsequently commenced a period of absence from which he did not return (and we do take into account that the liability hearing took place within that period, and that working for

Mazars in 2019 is not an exact replication of the circumstances that would have existed had the Claimant worked for the Respondent in late 2017 and during 2018).

20. On 31 October 2017, the Claimant visited his GP and discussed his ongoing depression and anxiety, and the fact that he regarded his work issues (and the threat of dismissal in particular) were a trigger. The notes record that he had had fleeting suicidal thoughts and that his mood was low. No referral for talking therapy was made (and the Claimant did not want one) but medication continued. A fit note was issued for the period 31 October 2017 to 30 April 2018 which stated that the Claimant might be fit for work with adjustments.

21. On 12 December 2017, a psychiatric referral was made by his GP, at the Claimant's request, and partly because the Claimant thought this might assist with his discussions with his employer. (This would have been in connection with his appeal against dismissal, although the GP did not realise that.) The hospital subsequently did a triage review and accepted the referral and made an appointment for him.

22. Following the rejection of his appeal, the Claimant visited the GP again in April 2018. He was awaiting CBT at the time. His mood was low and getting worse.

23. In July 2018, the hospital discharged him from on-going services, on the basis that it believed that he had failed to keep his appointment.

24. The Claimant visited his GP again in October 2018. His mood was low. He said he had not engaged in the psychological therapies because he did not find them useful. He found the medication useful.

25. He attended the GP again in December 2018. Amongst other things, he needed a letter to seek a postponement of the hearing due to take place in February 2019. He was having good days and bad days. His sleep continued to be erratic and he felt overwhelmed.

26. In March 2019, the Respondent replied to the Claimant's request to sign off (for the purposes of his ICAEW training contract) an additional 75 days of work, which the Claimant wanted to have treated as "relevant technical work experience". The Respondent refused to do so. The reason for the refusal was not that they asserted that the Claimant had not worked on those 75 days, but that the Respondent did not believe the days met the ICAEW requirements because, in the Respondent's expert opinion, the work did not meet the requirements in relation to the competence and capacity required, and the "fit and proper" element of the test was not satisfied. There was a delay in communicating this decision to the Claimant which was caused by the fact that the relevant decision-maker was absent during the period the Claimant made the request (in February 2019, around the time of his commencement with Mazars) and in early March 2019. Neither the substantive decision, nor the delay until late March 2019, were intended to cause annoyance to the Claimant. The Respondent made the decision which it believed it was required to make, in good faith, in view of its own (and its employees' own) obligations to ICAEW. The delay was due to circumstances unconnected with the Claimant and would have been the same for any other employee or former employee who made a similar request at that time.

27. The Claimant makes the assertion that, in 2019, the Respondent took too long to respond to a reference request from Mazars. That request was answered and the Claimant was appointed. There was no evidence before us about how long the Respondent usually took to respond to reference requests. Mr McCann's evidence was that the request had been through the usual processes, and – when giving the reference – the Respondent had taken into account its duties to the Claimant, its duties to Mazars, and had also considered its own position given the litigation. The length of time taken to answer the reference request was not unreasonable in all the circumstances, and, furthermore, was not deliberate conduct intended to cause harm to the Claimant. The offer was made (subject to references) on 31 January 2019, and the Claimant started work less than 2 weeks later.

28. The Claimant's training agreement would have been due to expire at the end of 2018 (as described in our liability decision). The cohort of trainees which the Claimant had been part of had long since (by February 2020) come to the end of their training. Therefore, it would have been impossible for the Claimant to simply rejoin that group. On the other hand, the Respondent takes on approximately 75 trainees per year, and so our finding is that there would be a "cohort" within the organisation that was at a similar stage of development to that which the Claimant had reached at the time of dismissal. On the balance of probabilities, and taking into account the provisions of the Equality Act for reasonable adjustments, we think it more likely than not that any third party consent to the Claimant's resumption of his training contract could have been obtained.

29. As noted in our liability decision, the Respondent did have legitimate reasons for being concerned about the levels of the Claimant's absence, and to actively consider instigating a fair and non-discriminatory process which might lead to dismissal. We decided that a change of the Claimant's manager (from Corinne Tanner to someone else) was not an adjustment that the Respondent was obliged (by Equality Act 2010) to have to make. We also referred to the complaints which the Claimant made about his treatment. In terms of the Claimant's performance, for example, paragraph 80 describes Ms Tanner's receiving feedback in relation to the Claimant's output. Paragraph 82 describes the reasons for commencing a formal process to review the Claimant's performance. Paragraph 83 summarises some of the contents of the formal report that was produced. Paragraphs 96 and 97 discussed the reasons for the Claimant's dismissal, including that Ms Lower had decided that, based on the evidence, the Claimant's performance was not up to the required standard.

    29.1 Our finding is that it would not be practicable for the Claimant to return to working under Ms Tanner, or her line manager, Mr Keane. Thus, if the Claimant were to be reinstated/re-engaged, it would have to be under different line managers. We note Mr McCann's evidence that, in his honest opinion, there has been such a breakdown in the relationship that it would be impossible for the Claimant to resume working for the Respondent at all, and that the Claimant's honest opinion is that he would be able to resume working provided that adjustments were made.

    29.2 The Respondent does not have trust and confidence in the Claimant's ability to carry out his contractual obligations.

29.3 If a re-engagement order were to be made, then the Claimant would not be able to start work straight away (having been signed off until at least April 2020). We are not persuaded to decide as a fact that – on the balance of probabilities – the Claimant would be able to start work in April 2020. Neither the Claimant nor his GP can accurately predict that, and the Claimant's evidence is that thinking about his time working for the Respondent causes his mood to be very low.

29.4 Our finding, not ignoring the fact that the Respondent has other managers available who could supervise the Claimant's work and training, is that it would not be practicable for the Claimant to be reinstated or re-engaged.

30. There is a difference of opinion in relation to the Claimant's net pay immediately prior to dismissal. The Respondent alleges that we should treat it as £2106.51 per month, and the Claimant argues for £2203 per month. We have the Claimant's payslips for July to November 2017, but we will ignore November because his employment ended part way through that month. We will also attempt to ignore sickness absence, and the adjustments because of that, but do need to include SSP as replacement income for the salary that he would have received if not absent. His net earnings were:

Jul:	£2680.84 - £315.20 - £240.10	=	£2125.54
Aug:	£2711.13 - £320.80 - £243.73	=	£2146.60
Sep:	£2830.25 - £343.40 - £258.03	=	£2228.82
Oct:	£2824.99 – £342.20 – £257.40	=	£2225.39

31. In the absence of a breakdown of how the Claimant's salary per week was calculated, for the purposes of considering net losses, we have taken the average of the months August to October, and converted to weekly. [£2146.60 + £2228.82 + £2225.39] divided by 3 is £2200.27. Converting to weekly by multiplying by 12 and dividing by 52 gives £508 per week (rounded up).

32. The parties agree (effectively) that the Respondent's monthly pension contribution was £590.43. That converts to £137 per week (rounded up).

The Law

<u>Reinstatement or Re-engagement</u>

33. When considering whether to make an order for reinstatement or re-engagement, we have a duty under S.116 the Employment Rights Act 1996 to consider:

33.1 whether the employee wants an order to be made

33.2 whether it is practicable for the employer to comply.

33.3 whether it would be just to make either type of order where the employee's conduct caused or contributed to some extent to the dismissal

34. We must always take all the factors mentioned in section 116 into account, but we also have a broad discretion to take into account such other factors as we decide are relevant and appropriate in a particular case.

35. When an employee wants to be reinstated or re-engaged, then the "practicability" or otherwise of the Respondent' being able to comply is a question of fact for us to determine. We must look at the circumstances of the case and take a common sense view based on the evidence. There is no presumption that it will be practicable, and we must take into account relevant considerations, based on the available evidence and submissions. The fact that it might be inconvenient for an employer to have to reinstate/reengage an employee does not necessarily lead to a finding that it would not be "practicable" for the employer to comply with an order. However, a mere finding that it would not be impossible for the Respondent to comply is not enough. "Practicable" means more than merely possible; it means "capable of being carried into effect with success" (See *Coleman and anor v Magnet Joinery Ltd* 1975 ICR 46.)

Injury to Feelings

36. If making an award for injury to feeling, the tribunal should have regard to the guidance issued in *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318*, CA*, and the changes and updates to that guidance to take account of inflation, and other matters.

37. There are 3 broad bands of compensation for injury to feelings (as distinct from compensation for psychiatric or similar personal injury):

    37.1 The top band. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment.
    37.2 The middle band should be used for serious cases, which do not merit an award in the highest band.
    37.3 The lower band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence.

38. In *Da'Bell v NSPCC* (2009) UKEAT/0227/09, [2010] IRLR 19 the Employment Appeal Tribunal revisited the bands and uprated them for inflation. In a separate development in *Simmons v Castle* [2012] EWCA Civ 1039 and 1288, [2013] 1 WLR 1239, the Court of Appeal declared that - in England & Wales - with effect from 1 April 2013 the proper level of general damages in all civil claims for pain and suffering, would be 10% higher than previously. In *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879 the Court of Appeal ruled that the 10% uplift provided for in *Simmons v Castle* should also apply to Employment Tribunal awards of compensation for injury to feelings and psychiatric injury

39. On 5 September 2017, the Presidents of the Employment Tribunals issued guidance, and the addendum applicable to this case was published in March 2018. Paragraph 2 states:

> *In respect of claims presented on or after 6 April 2018, the Vento bands shall be as follows: a lower band of £900 to £8,600 (less serious cases); a middle*

band of £8,600 to £25,700 (cases that do not merit an award in the upper band); and an upper band of £25,700 to £42,900 (the most serious cases), with the most exceptional cases capable of exceeding £42,900.

Aggravated Damages

40. We have the power to award aggravated damages where the behaviour of the Respondent has aggravated the injury caused to the Claimant. We will consider such an award if we decide that the Respondent has behaved in a high-handed, malicious, insulting or oppressive manner in committing the contraventions of Equality Act 2010. This could include cases where, for example, the Respondent (or the employee responsible for the contravention) had a spiteful or vindictive motive, and/or deliberately intended to inflict harm on the Claimant. It might also include cases where subsequent conduct adds to the injury, and such subsequent conduct might be the manner in which the employment tribunal proceedings were conducted.

41. "Aggravated damages" are compensatory, rather than punitive. When assessing quantum, the sum awarded must be one which takes into account the aggravating features of the Respondent's conduct as they have affected the Claimant.

42. When awarding aggravated damages as part of injury to feelings, tribunals must avoid compensating claimants twice for the same loss. The overall award must be proportionate to the totality of the claimant's suffering. The purpose of aggravated damages is to compensate for the additional distress caused to the claimant by the aggravating features in question. Where appropriate, the award of a component for aggravated damages might take the injury to feelings award above the top of the relevant Vento band (or up from one band to a higher band).

Pension Loss

43. We have taken into account the "Employment Tribunals: principles for compensating pension loss", 4th edition. Amongst other methods for calculating pension loss, that describes the "contributions method".

Interest

44. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 give us the discretion, but not the obligation, to award interest on awards made in discrimination cases.

Analysis and conclusions

45. An order for reinstatement or re-engagement is not appropriate. It would not be practicable for the Respondent to re-engage the Claimant and it would not be appropriate in circumstances in which the Respondent does not believe that the Claimant can perform his duties to a reasonable standard and given that the Claimant would not be able to start work straight away (in February 2020) or immediately after that. In fact, the date by which the Claimant might be able to start work is not certain, and the Claimant's estimate of April 2020 is probably over-optimistic.

Injury to Feelings

46. In our liability decision, we found that there was a breach of section 15 of Equality Act 2010. In particular, we found that the Respondent had treated the Claimant less favourably because of something arising in consequence of his disability by

    46.1 On 8 September 2017, initiating a capability process.

    46.2 On 23 October 2017, making a decision to terminate the Claimant's employment.

    46.3 On 15 March 2018, declining to uphold the Claimant's appeal against his dismissal.

47. These breaches of the Equality Act were related to each other, but they were not an isolated or one-off occurrence, and were not something which caused a minor injury to the Claimant's feelings. An award in the lower Vento band would not be appropriate in this case.

48. In our liability decision, we did not find that there had been a lengthy campaign of unlawful treatment of the Claimant by the Respondent. Our decision was that in September 2017, it had breached section 15 by instigating a procedure which could potentially lead to a speedy dismissal (see, for example, paragraphs 167 to 170) and then, the following month, breached section 15 by terminating employment (see paragraph 96 and, for example, paragraphs 171 to 176). There was then a time gap until the appeal outcome. While we found that the appeal outcome was a further breach of section 15, we did not hold that the time gap was, in and of itself, a breach of the Equality Act.

49. The effects of these breaches were to cause a significant injury to the Claimant's feelings. In assessing the injury caused by these contraventions, we have sought to take account of the fact that some of the adverse effects on the Claimant (as noted above) were caused by events earlier in employment, which the Claimant alleged were breaches of Equality Act 2010 (such as refusal to change line manager, and remarks made about his absences), but which were not resolved in his favour by our liability judgment. Our decision is that an award in the upper band is not merited. All contraventions of the Act are serious and potentially cause a significant injury to feeling. However, the upper band is reserved for the most serious cases of all. The comparatively small number of separate incidents, and the fact that the gap of time before the appeal outcome occurred during a period in which the Claimant's interactions with the Respondent were limited (to specific interactions in connection with his appeal and grievance) mean that this case does not cross the threshold into being at the most serious end of the range.

50. Our decision was that this award should be within the middle Vento band: £8,600 to £25,700. The mid-point of that band is £17,150. Our decision was that the appropriate award in this case was slightly below that mid-point, taking into account the number of separate contraventions, but also the fact that the contraventions were all inter-connected in that they led to the same outcome (that the Claimant was dismissed and stayed dismissed). The figure which we decided is appropriate is £15000.

51. In this case, we do not find that there were aggravating features.

    51.1 The Respondent adopted a formal procedure to consider dismissal, in circumstances which we found to be discriminatory. It did not have a spiteful or discriminatory motive for adopting that procedure. It followed that procedure because it believed that it was correct to do so. Furthermore, having adopted the procedure, it did not behave in a high-handed manner. For example, the Claimant's requests for more time to respond were granted. The Claimant's appeal and his complaints were considered by the Respondent. Although they were rejected, they were only rejected after the Claimant had been given the opportunity to fully state his position.

    51.2 The Claimant said that he had been threatened with costs during proceedings. The Respondent said that if the Claimant was seeking to give evidence about without prejudice communications, then that was inadmissible. We informed the Claimant that if he was seeking to argue that there had been such impropriety that one (or more) communication(s) which had been described as "without prejudice" should not be regarded as privileged, then that was a point that we could consider. The evidence that we were ultimately directed to were items of correspondence that were in the hearing bundle, and we took that into account.

    51.3 The Claimant failed to comply with various case management orders at all, and for others he was extremely late. It is uncontroversial (and is stated in the case management orders themselves) that a party who fails to comply with directions might face various adverse consequences, including costs. The Respondent sought strike out, and that was refused on the basis that a fair trial was still possible, and that adjustments could be made to the hearing to take account of the Claimant's failure to prepare a witness statement. We are not satisfied that anything which the Respondent did in the conduct of the proceedings should be treated as an aggravating feature, or that it went beyond what was legitimate in the attempt to defend its own position.

    51.4 For the reasons stated in our findings of fact, we did not find that either the alleged delay in providing a reference (and we found that there was no unreasonable delay) or the decision/delay in relation to the signing off of 75 additional days were aggravating factors.

52. The Claimant did not satisfy us that he had suffered a personal injury, caused by a breach of the Equality Act, for which a separate award ought to be made. There was no expert evidence to that effect and we consider that the pattern of the Claimant's engagement with his GP (including the hospital referral) is not significantly different after the unlawful acts compared to before them.

53. Our decision is that this is an appropriate case for us to exercise our discretion and to award interest. There was a breach of the Act before the dismissal (the instigation of the process, on 8 September 2017) and another after the dismissal (the failure to uphold the appeal in March 2018). On balance, our decision is to calculate the interest on the entire injury to feelings award from the date on which the decision to dismiss was communicated to the Claimant which was 23 October 2017 (see paragraph 96 of the reasons for the liability decision). We award the

interest up to 19 January 2021 and so the period is 3.25 years. Simple interest on £15000 at 8% per annum for 3.25 years is £3900.

Financial Losses

54. Our decision is that the losses caused by the Respondent's breaches of Equality Act 2010 and his unfair dismissal came to an end when he commenced work with Mazars.

55. We reject the Claimant's argument that it was the Respondent's unlawful treatment of him which caused him to lose the job with Mazars. We do not find that he unreasonably failed to mitigate his losses by failing to look for work until around January 2019, given the Claimant's evidence that he was signed off by his GP as being unfit for work until then. However, we do find that by January 2019, the Claimant and his GP believed that he was fit for work. The Claimant had a significant history of absence from work prior to September 2017 and the reasons he gave to Mazars in 2019 included a variety of reasons not related to the dismissal by the Respondent or the other unlawful treatment by the Respondent. The loss of his job with Mazars was not attributable to the Respondent's conduct.

56. His salary with Mazars was higher than that which he had been receiving from the Respondent immediately prior to dismissal, albeit not as high as that which he would have received from the Respondent had he (a) passed his exams and completed his training contract and (b) been appointed to a fully-qualified position with the Respondent. However, even if we were to assume that it was 100% certain that the Claimant would have been appointed by the Respondent to a fully-qualified position fairly promptly after passing all exams and completing the training contract, the possibility of the Claimant's passing all exams and completing the training contract by November 2018 is referred to in paragraphs 201 and 202 of the liability decision, where we decided that it was not more likely than not to happen. We do not think that there is a realistic possibility that the Claimant would have been appointed to a fully-qualified post with the Respondent prior to 11 February 2019, even had there been no breach of the Equality Act (starting in September 2017 or at all) and no unfair dismissal.

57. We believe that it is appropriate to take the contributions method to calculating the Claimant's pension losses, taking into account the period over which the loss occurred. That is the method suggested by the Claimant in his schedule of loss.

58. For his financial loss for the period 30 November 2017 to 31 December 2017 inclusive (4.57 weeks) we award, for loss of salary income, the sum of 4.57 x £508 which is £2321.56. This ignores the possibility of the Claimant having any period of half pay, during that time. We also award £626.09 (4.57 x £137) for pension loss for that period. Thus, the total for this period is £2947.65 (£2321.56 + £626.09).

59. The period 1 January 2018 to 10 February 2019 (inclusive) is exactly 58 weeks.

    59.1 The Claimant received Universal Credit for some of this time. He was not eligible initially due to savings. We accept his evidence that it was towards the end of 2018 when he began to receive it. In the absence of direct evidence

as to the amounts that he received, but taking account of the maximum amounts, and of commencement towards the end of 2018, we think it is reasonable to treat the Claimant as having received approximately £1000 (broadly equivalent to beginning to receive the maximum rate in the first half of November 2018).

59.2 We do not think that it would be reasonable or appropriate for us to ignore the chances of the Claimant having sick leave during this period. As mentioned in our findings of fact, based on his previous absence record, the Claimant was likely to have high levels of absence during this period. At a rate of £508 per week, the Claimant's loss of salary income would be 58 x £508 = £29464. However, the Claimant had just about exhausted his entitlement to full sick pay, and absences would have been, at most, half pay. He also had less than 120 days at half pay left, before his absences would have been on nil pay (subject to any remaining SSP entitlement).

59.3 Doing the best that we can, taking into account the available evidence, and the likelihood of the Claimant being under pressure in 2018 from the obligation to potentially take exams, and potentially go through a fair and non-discriminatory process, we think we should base our assessment of his losses on a likelihood of being absent from work for more than a quarter of 2018 but less than a third.

59.4 Taking account of the approximated receipts of Universal Credit, and the approximated earnings that the Claimant would have received had he remained employed by the Respondent until 10 February 2019, we do not think that we should assess the Claimant's net losses for this period as any higher than £25000.

59.5 We will base his pension loss on the normal contribution, and that is therefore 58 x £137 = £7946.

59.6 Thus his net loss for the period 1 January 2018 to 10 February 2019 is £32946. After the 75% reduction mentioned in the liability decision, that is £8236.50.

60. For loss of statutory rights, we award a figure of £800 and after taking account of the Polkey deduction referred to in the liability decision, that is £200.

61. Thus the aggregate for financial loss is £2947.65 + £8236.50 + £200 = £11384.15.

62. The Claimant is entitled to interest on that loss, and it should run from the midpoint of the period in which it occurred. The midpoint of 29 November 2017 and 11 February 2019 is 7 July 2018.

63. The period from 7 July 2018 to 19 January 2021 is 2.55 years. Simple interest on £11384.15 at 8% per annum of 2.55 years is £2322.37.

Aggregate

64. The financial loss which we have calculated in relation to the discrimination means that we do not make any separate or additional compensatory award for unfair dismissal so as to avoid double recovery.

65. Thus, apart from the basic award for unfair dismissal, the aggregate of what we award is:

    65.1 £15000 for injury to feelings

    65.2 £3900 for interest on that

    65.3 £11384.15 for financial losses

    65.4 £2322.37 for interest on that

    65.5 This is an aggregate of £32606.52.

66. We must consider if grossing up is required. The Claimant will benefit from a £30,000 exemption for termination payments, leaving £2606.52 which is taxable in his hands. As far as we are aware, this will fall into the Claimant's annual allowance, and he will not have any tax liability on it, and therefore we do not need to gross up.

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Employment Judge Quill

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Date: 19 January 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

29/1/21

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FOR EMPLOYMENT TRIBUNALS