EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	Respondent
Ms J Lamb		**The Gerrard Academy (Formerly Bexley Business Academy)**

Held at: London South by CVP
On: 08 October 2020 (in chambers 23 October 2020)

Before: Regional Employment Judge Freer
Members: Ms S V MacDonald
Mr W Dixon

Appearances
For the Claimant: Ms C Lord, Counsel
For the Respondent: Mr R Johns, Counsel

RESERVED JUDGMENT ON REMEDY

The Respondent shall pay to the Claimant the sum of £159,126.13, comprising past loss of earnings of £37,613.09; future loss of earnings of £17,899.20; pension loss of £40,533.22; injury to feelings of £15,000; personal injury of £6,200 ; treatment costs of £600; interest of £26,814.61 and an ACAS uplift of 10%. The parties shall agree and submit to the Tribunal an appropriate figure for a grossed-up award.

REASONS

1. This matter has been remitted by the Employment Appeal Tribunal to consider remedy including the issue set out in paragraph 73 of its reasons.

2. It was not possible to reconstitute the original Tribunal panel and therefore the parties agreed for a new panel to be appointed.

3. Further the Claimant applies for her costs arising from the postponement of a hearing in September 2019 which the Claimant argues was postponed because the Respondent did not engage with the medical expert. It was agreed that this matter would be held over.

4. The Tribunal received a written witness statement and oral evidence from the Claimant.

5. The Tribunal was provided with a main remedy bundle, updated schedule of loss, updated medical records, comparable cases and written closing submissions. The main bundle includes two reports by Dr Bowers of 24 October 2019 ('the main report") and 12 December 2019 ("the December report").

6. The essential facts found by the initial employment tribunal and which were not controversial between the parties, are set out and endorsed by the Employment Appeal Tribunal at paragraphs 5 to 11 of its decision:

7. The grievance raised by the Claimant in March 2012 complained of two central incidents, both of which related to the Respondent's Deputy Head, Ms Michalski.

8. In the first incident Ms Michalski informed the Claimant that she was responsible for causing an unnamed boy to feel suicidal as a result of her treatment of him and refused to name the boy. The Claimant believed that she was seeing this boy every day in her class. This caused her intense anxiety. Four months later Ms Michalski told her that it had been a case of 'mistaken identity' and that the child was not in fact in the Claimant's class. It is not in dispute that the

Respondent's Chief Executive, Samantha Elms, accepted in cross-examination, that this was a child protection issue which should have been dealt with very urgently and Ms Michalski's failure to escalate it would have merited an informal warning to Ms Michalski at the very least.

9. In the second incident the Claimant passed on to Ms Michalski written complaints by some of her pupils that a particular pupil had used racist language. Ms Michalski put them in the bin without looking at them. Again, it is not in dispute that in cross-examination Mrs Elms said that 'Ms Michalski either should have looked at them or escalated them to Child Protection'.

10. The Claimant's grievance was investigated by the School's head of HR, Maureen Haylett. It was the Respondent's pleaded case that Ms Haylett 'failed to interview any alleged perpetrators or any other appropriate witnesses'. It is not in dispute that in cross-examination, Mrs Elms agreed this was wrong. Amongst the many interviews Ms Haylett did conduct was one with Ms Michalski, in which Ms Michalski admitted that she had done what the Claimant described in each of the two incidents. In fact, Ms Haylett upheld the Claimant's grievance, but her report presented to Mrs Elms in July 2012 was regarded as inadequate, and set aside. None of the supporting material provided by Ms Haylett (including manuscript notes of the Michalski interview) was looked at by Mrs Elms. Ms Haylett left the Respondent's employment (for unconnected reasons) at or about the same time.

11. Mrs Elms told the Claimant at the meeting of 18 July 2012 that she would deal with the two central complaints herself. It is common ground that she accepted in cross-examination that she then changed her mind. Her letter of 17 August 2012 confirms both her original intention and her change of mind. Mrs Elms agreed that this change of mind must have been' very disturbing' for the Claimant.

12. Mrs Elms commissioned a fresh investigation from Ms Haylett's replacement, Mr Atkinson. He did not commence employment until the autumn term in September 2012. He started the grievance investigation from scratch. His report was submitted in January 2013, and rejected the grievance.

13. It was accepted by the Respondent that, in the course of cross-examination, Mrs Elms agreed (amongst other things) that anyone looking at the supporting material Ms Haylett had supplied would have been able to make the connections between her conclusions and the supporting evidence; the grievance 'was not complicated'; if Mrs Elms had done so herself, she would have upheld the grievance; all the information was available to the Respondent by July 2012; and if the grievance had been upheld, it would have given the Claimant great comfort and reassured her that she was valued and taken seriously by the Respondent.

14. The Claimant was absent from work through illness from 03 September 2012 and did not return to work until her dismissal on 25 February 2014 on the ground of capability.

15. In its conclusions the Employment Appeal Tribunal states at paragraph 71:

"For the reasons given above, we are unanimously of the view that this appeal must be allowed in relation to the Employment Tribunal 's conclusions on date of knowledge; whether the Respondent was under a duty to make reasonable adjustments; and whether proposed adjustments were in fact reasonable. The relevant conclusions cannot stand and are set aside.

The Respondent accepted that the Employment Appeal Tribunal could make substituted findings in relation to those issues, and we make findings in exercise of our powers under s35 ETA 1996 as follows:

(i) The Respondent ought reasonably to have known that the Claimant was a disabled person by July 2012; and had actual knowledge of her disability by 18 July 2012;

(ii) the setting aside of Ms Haylett's report put the Claimant at a substantial disadvantage;

(iii) the Respondent should have sought to remove that disadvantage by way of the first two adjustments contended for by the Claimant (namely, reading the Haylett report with care, and building on it to complete the grievance investigation before the end of the summer term), both of which were reasonable.

The question that arises by reference to ground 4, whether had the Respondent done so, the Claimant would have continued in the Respondent's employment, has not been addressed and falls to be addressed in light of this judgment, at the remedy hearing".

16. It is also relevant to note that the Claimant had been successful in parts of her claim that were not subject to the appeal, as concluded at paragraphs 109 and 112 of the initial employment tribunal decision. These matters are, however, interlinked with the appeal issues:

"We find that a reasonable adjustment which would have minimised delay would have been for Mr Atkinson to abandon his 'standard' procedure and instead to build on the work done by Ms Haylett". This only related to a period from 21 November 2012 onwards

"We conclude that it would have been a reasonable adjustment in order to minimise the effect on the Claimant to have sought to resolve the appeal more quickly. We therefore find that the Claimant succeeds in this part of her claim".

17. The instant Tribunal reads the Employment Appeal Tribunal decision as it having concluded that both reading the Haylett report with care and building on it to complete the grievance investigation before the end of the summer term, were reasonable adjustments that should have been made in order to avoid the disadvantage of Ms Haylett's report being set aside. The Employment Appeal Tribunal states at paragraphs 58 and 59:

"It seems to us, in the absence of any evidence from the Respondent that the material available, had it been read and built on, could not have enabled the Respondent to come to a conclusion about whether the grievance should be

upheld; and in the face of positive evidence that flatly contradicted that position, there was simply no material to support the Tribunal's conclusion that the adjustments contended for in terms of reading the report carefully and using the report as a platform for reaching a conclusion before the end of July, were not reasonable adjustments that should and could have been made.

The Respondent had a third option advocated by the Employment Tribunal itself. The only difference was timing, and the person involved. If this could and "should" have been done by Mr Atkinson in September, there is no reason why Mrs Elms could not have done it in July. The adjustment was undoubtedly reasonable and the contrary is unarguable. The Employment Tribunal's conclusion to the contrary must accordingly be set aside".

18. The Tribunal relies upon the propositions agreed by the Respondent at paragraph 62 of the Employment Appeal Tribunal decision:

"It was expressly put to Mrs Elms in cross-examination, and she accepted, that she could have asked questions of both the Claimant and Ms Michalski at a hearing (before the beginning of the autumn term) and remedied any gaps in the Haylett report. Mrs Elms accepted, at the meeting on 18 July 2012, she told the Claimant that she would personally deal with the Claimant's allegations against Ms Michalski. Mrs Elms accepted that she could have dealt separately with the two core issues, which were both against Ms Michalski".

19. With regard to the question posed by the Employment Appeal Tribunal of whether, had the identified reasonable adjustments been made, the Claimant would have continued in employment, there is a dispute between the parties over whether someone else could have built on Ms Haylett's grievance report and delivered an outcome by the end of summer term 2012 and also have rejected the grievance.

20. This question is relevant because it is the Respondent's position that the Employment Appeal Tribunal judgment in relation to July 2012 does not find that it was a requirement that Mrs Elms finished the report and the Respondent refers

to paragraph 61 of the Employment Appeal Tribunal decision where Counsel for the Claimant contended that the written closing submissions at the original tribunal hearing was that "Mrs Elms or one of the executive team" should have built upon the Haylett report, cured its defects and completed the process by the end of the summer term 2012". The Respondent argues that this is not an opportunity for the Claimant to reinvestigate her grievance to a positive conclusion using the employment tribunal and that the failure to complete the grievance in July 2012 did not cause the grievance outcome to be negative.

21. The Tribunal concludes from the material set out above that had the grievance been completed by July 2012 it would have been done by Mrs Elms. Although this Tribunal has reached its view independently, it is self-evident that the Employment Appeal Tribunal was also of that view and the Tribunal refers to paragraphs 59, 61 and 62 of its decision.

22. The Tribunal concludes that although Counsel for the Claimant had suggested in written submissions at the original hearing that Mrs Elms or one of the executive team could have undertaken the two adjustments identified, the person best placed on the material before this Tribunal and on balance the significantly most likely person to undertake the task was Mrs Elms. Mrs Elms accepted that she probably could have done it herself. Indeed it has not been suggested by Respondent who else on the executive team could equally have been in a position to undertake the task by July 2012.

23. The Tribunal further concludes that even if another member of the executive was in a position to adopt the two reasonable adjustments, or it was done by Mrs Elms, the outcome would have been as anticipated by Mrs Elms in her evidence as recorded by both the original employment tribunal and accepted by the Respondent at the Employment Appeal Tribunal: anyone looking at the material would have been able to make the connections between Ms Haylett's findings and the supporting evidence; if Mrs Elms had gone through the material she would have made those connections; it was not complicated; Mrs Elms would have upheld the grievance; all the information was available to the Respondent by July 2012; Mr Atkinson should have made those connections; and his

recommendation ought to have been that the Claimant's grievance should have been upheld.

24. The Tribunal concludes that 'but for' the discrimination and had the two adjustments been made, the Claimant's grievance would have been upheld and not rejected.

25. It is noted with regard to the Respondent's position that it is axiomatic from the decision of the Employment Appeal Tribunal that having identified the substantial disadvantage arising from the applicable pcp of setting aside Ms Haylett's report and that two reasonable adjustments should have been made, it cannot be said that the grievance would certainly have been rejected. There must at least have been a *prospect* for the suggested adjustments to have avoided the disadvantage for them to have been reasonable (see for example **Leeds Teaching Hospital NHS Trust -v- Foster** [2010] UKEAT/0552/10).

26. The Tribunal further concludes that had the two adjustments been made and the Claimant's grievance upheld, the Claimant would have returned to work for the Respondent. The Claimant's evidence to the Tribunal was that she loved her job. She made that very clear and the Tribunal accepts her evidence. The Tribunal also refers to paragraphs 193 and 194 of the main medical report by Dr Bowers of 24 October 2019. The Tribunal also concludes that had the Claimant returned to work she would have stayed there, subject to health issues arising or any favourable future alternative job opportunities.

27. The Tribunal has read with care and detail the medical evidence produced to it. The Tribunal will not set out in these reasons the Claimant's medical history as recorded in detail in the main medical report by Dr Bowers dated 24 October 2019 at pages 190 to 239 of the bundle, but particularly refers to the "myriad of evolving psychiatric symptoms" from Summer 2011 that were very significant indeed, as set out in paragraph 175 of the report, and the diagnosis of "a complex post-traumatic stress disorder" at paragraph 176. These matters preceded any of the key events relating to the Claimant's claim and any act of discrimination by the Respondent.

28. Dr Bowers records at paragraph 179 of the main report that: “Since the summer of 2011 this condition has followed a chronic and fluctuating course that remains ongoing”.

29. Dr Bowers also concluded at paragraph 180 that there had been a number of stressors over the intervening time period between 2012 to 2019 that periodically had served to exacerbate and maintain the Claimant’s condition. These are listed within paragraph 180. There are eleven very significant matters of which the description of only two describe circumstances relating to the Respondent or the discrimination.

30. It was the conclusion of Dr Bowers at paragraph 191 that: “The 3 discriminatory acts (failures to make reasonable adjustments) both exacerbated and perpetuated the complex post-traumatic stress disorder that the Claimant was experiencing”.

31. In answer to the question of whether the Claimant would on the balance of probabilities have suffered any further periods of absence due to her mental health, Dr Bowers considered at paragraphs 197 to 199 that the Claimant would have done so in June 2013 for approximately six months and been able to re-start in the start of the Spring term 2014. Dr Bowers notes that between 2015 and 2017 the Claimant suffered with physical ill-health relating to a number of conditions outside his field of expertise such that he was unable to comment on whether these conditions would have been of a degree to have prevented her from working. Dr Bowers also identified a period of approximately three months from April 2019 when a condition would have been triggered likely to prevent the Claimant from working over this period.

32. The Tribunal has received no evidence from which it could conclude that the Claimant would have been dismissed for any of the suggested periods of absence identified by Dr Bowers. It took the Respondent over a year to reach a decision to dismiss the Claimant on capability grounds in respect of her absence.

33. The Tribunal concludes that it is self-evident from the circumstances and conclusion reached by Dr Bowers that the discrimination by the Respondent formed only part of the Claimant's ongoing substantial condition and symptoms.

34. Dr Bowers was asked to comment on the extent to which he considered that the Respondent's discrimination has caused or contributed to the Claimant's state of unemployment since her dismissal in 2014. Dr Bowers concluded at paragraph 205 of the main report that: "Since 2014 there is evidence within the contemporaneous records that the Respondent's discrimination and subsequent Employment Tribunal process has contributed to her state of unemployment since 2014. I also note, as described above, there have been other unrelated adverse factors that have also contributed to her state of unemployment".

35. Dr Bowers also concluded at paragraphs 209 and 210 that as at October 2019: "Due to her current psychiatric symptomatology she would be unable to work on the open labour market without significant disadvantage". However, the Claimant would, on balance: "be able to currently manage at least part-time self-employed private tutorial employment. She would not, on the balance of probabilities be able to be able to work as part of a team or within a line managed structure".

36. With regard to the likely prospects and/or timing of the Claimant returning to work generally Dr Bowers concluded at paragraphs 219 that: "On the balance of probabilities, following the resolution of current proceedings and the treatment outlined above (i.e. over next 6 to 8 months) Ms Lamb would be able to return to the work place. She would, on the balance of probabilities, be disadvantaged on the open labour market as she would probably only be able to cope with self-employed work".

37. At paragraph 221 Dr Bowers considered that relating to the above: "it is likely that Ms Lamb would be able to return to teaching in the form of a self-employed private tutor. I would not anticipate that she would ever have the emotional and interpersonal resilience to cope with working within mainstream education. The educational system is likely to present a multitude of triggering stimuli along with

the potential for hierarchal professional relationships that will, in combination, inevitably result in a deterioration of her psychiatric condition".

38. It should be confirmed that Dr Bowers did not base his conclusions regarding the Claimant's prospective employment only on the discrimination of the Respondent, but based on the whole significant and complex medical and personal history.

39. For example there is no confirmation that the reference to "hierarchal professional relationships" inevitably resulting in a deterioration of the Claimant's condition is an exclusive reference to the Claimant's circumstances with the Respondent and the discrimination as found, rather than the other personal circumstances detailed by Dr Bowers and/or the non-discriminatory issues of the actions of Ms Michalski and the Claimant's dismissal.

40. The Tribunal also had some difficulty reconciling Dr Bower's view of the Claimant's prospective return to work should the reasonable adjustments have been made (where he identifies a few periods of absence up to July 2019) with his view expressed later that the Claimant as from October 2019 is only able to manage self-employed work and cannot work as part of a team or within a line managed structure, in circumstances where Dr Bowers has explained that there has been other post-discrimination and *unrelated* adverse factors that have contributed to the Claimant's state of unemployment. The Tribunal refers to those significant stressors that have served periodically to "exacerbate and maintain" the Claimant's complex post-traumatic stress disorder set out at paragraph 180 of the main report.

41. If the Claimant is now unable to work in mainstream education again because of the discriminatory acts *and* the unrelated adverse factors contributing to her state of unemployment, it appears difficult to reconcile why, 'but for' the discrimination, she would have been able to return to work with only a few periods of absence. Dr Bower's description of the discrimination was to "exacerbate and perpetuate" the complex post-traumatic stress disorder she was experiencing. If his view was that the discrimination took the Claimant's circumstances from being able to

return to work with a few absences to a situation whereby she was permanently no longer able to work in mainstream education, one might have expected those devastating consequences of the discrimination to have been referred to in different and more significant terms, particularly when compared to the unrelated historic and continuing factors.

42. This is not, of course, any criticism of Dr Bowers. He cannot reasonably foresee the queries and potential uncertainties that may arise in Tribunal proceedings from his report.

43. To work through this deceptively difficult decision, the Tribunal first concludes that it is just and equitable to make an award of compensation to the Claimant.

44. The Tribunal reminds itself of some basic principles:

45. Any award of compensation will be assessed under the same principles that apply to torts (see sections 124(6) and 119(2) of the Equality Act 2010). The aim is to put the claimant in the position, so far as is reasonable, that she would have been had the tort not occurred (see **Ministry of Defence -v- Wheeler** [1998] IRLR 23 and **Chagger -v- Abbey National plc** [2010] IRLR 47). Causation and remoteness limit the damages available to the claimant as only those losses caused by the unlawful act will be recoverable.

46. The 'eggshell skull' principle of the law of tort also applies in cases of unlawful discrimination: a discriminator must take their victim as they find them. That means that the wrong-doer takes the risk that the wronged may be greatly affected by reason of their own character and psychological temperament and the respondent must meet the losses claimed *provided* they can be shown to be causally linked with the unlawful act.

47. The Tribunal in the instant case concludes that ‘but for’ the discrimination the grievance would have been concluded in her favour, the Claimant would have returned to work and her employment would not have terminated when it did.

48. The thin skull rule applies to the parties. However, despite the Claimant's pre-existing complex post-traumatic stress disorder (Dr Bower's main report at paragraph 176), historic life events (Dr Bower's main report at paragraphs 64 to 110), and comprehensive list of symptoms (Dr Bower's main report at paragraph 175), the Respondent bears only the consequence of the exacerbation and prolonging of the condition in so far as it causatively arises from the acts of discrimination.

49. Particular complexities arise, as in this case, where the discrimination exacerbates or accelerates the effects of a pre-existing condition, which can be particularly difficult to assess in cases of disability discrimination where the claimant necessarily has some mental or physical impairment in order to have the protected characteristic of disability.

50. However, reductions from awards for injury to feelings and psychiatric injury because of pre-existing conditions, for example, should not be confused with contingency reductions from awards for financial loss. Reductions can be made to an award of financial loss by a percentage to reflect contingencies, such as the likelihood that the claimant would have succumbed to a stress-related disorder in any event.

51. The Tribunal refers to the Court of Appeal case of **BAE Systems -v- Konczak** [2017] IRLR 893, which endorsed the approach taken by the EAT in **Thaine -v- London School of Economics** [2010] ICR 1422, where in a sex discrimination case the EAT upheld the employment tribunal approach of awarding compensation for psychiatric ill health as well as for injury to feelings and loss of earnings, but then discounting the award by 60 per cent to reflect the fact that there had been a number of 'concurrent causes' for the claimant's ill health for which the employer was not liable, such as issues in her personal life and incidents of sexual harassment that she had suffered, or perceived herself to have suffered, but for which the respondent was not responsible.

52. The principles relating to the assessment of damages at common law are to be applied when making an award of compensation. The test for causation when

more than one event has caused harm suffered by a claimant is whether the respondent's breach of duty had materially contributed to the harm. However, the extent of the respondent's liability is limited to that contribution. The Court of Appeal expressly endorsed the following comments by the EAT:

"As Mustill J said in **Thompson -v- Smiths Shiprepairers (North Shields) Ltd** [1984] ICR 236, one of the original cases on the topic which was expressly approved and followed in both the *Holtby* and Allen cases: "If we know—and we do know, for by the end of the case it was no longer seriously in dispute that a substantial part of the impairment took place before the defendants were in breach, why, in fairness, should they be made to pay for it? The fact that precise quantification is impossible should not alter the position. The whole exercise of assessing damages is shot through with imprecision … I see no reason why the present impossibility of making a precise apportionment of impairment and disability in terms of time, should in justice lead to the result that the defendants are adjudged liable to pay in full, when it is known that only part of the damage was their fault. What justice does demand, to my mind, is that the court should make the best estimate which it can, in the light of the evidence, making the fullest allowances in favour of the plaintiffs for the uncertainties known to be involved in any apportionment."

Past loss of earnings

53. With regard to past loss of earnings from the date of the Claimant's dismissal on 31 March 2014 up to the date of this remedy hearing judgment, the Tribunal concludes that it is expressly clear from the report of Dr Bowers that there were a number of very substantial stressors over the time period from the acts of discrimination up to the date of his report that were causally unrelated to the discrimination and which served to periodically exacerbate and maintain her pre-existing complex post-traumatic stress disorder condition (paragraph 180). Dr Bowers also expressly states that these unrelated adverse matters also contributed to the Claimant's state of unemployment.

54. The Tribunal has considered all of the stressors occurring over the intervening time period from the acts of discrimination and is aware that it is highly probable that each stressor has brought a different weight to exacerbating and maintaining the Claimant's complex post-traumatic stress disorder. There is nothing in the reports of Dr Bowers that provides further guidance in that respect and indeed it may not be medically possible to do so.

55. The Tribunal concludes that the estimate of absences by Dr Bowers at paragraphs 197 to 199 as relied upon by the Claimant does not fully address the point. For example the very significant events referred to in paragraph 197 of the main report would have, on Dr Bower's estimation, resulted in six months absence from work for the Claimant, but he later states at paragraph 205 that it contributed to her actual state of unemployment.

56. Therefore the Tribunal's conclusion cannot be scientifically accurate, but having considered the evidence in its totality as outlined above the Tribunal concludes that 25% of the Claimant's immediate loss of earnings is causally connected and flows from the acts of discrimination. This, on a broad brush assessment, factors in the circumstance that loss of earnings occurring closer to the claimant's dismissal (the act that flows from the discrimination that gives rise to the loss of earnings) are more likely to have a greater causative link to the discrimination, but as time elapses from dismissal that causative link to the discrimination diminishes due to the occurrence and/or effects of other substantial non-related factors.

57. With regard to alternative employment, the Claimant has not worked since the termination of her employment by the Respondent. It was clear from the Claimant's evidence that she has failed to mitigate her loss by looking for alternative employment. The Claimant's evidence to this Tribunal was unequivocal that she had not given any serious thought to doing any other work since the date of her dismissal and did not appear willing to attempt to undertake any.

58. The Claimant did do some private tuition work whilst off sick when working for the Respondent. Between December 2012 and May 2013 she undertook around 4 lessons per week for one student and charged £20 per hour.

59. Dr Bowers noted that as at October 2019 the Claimant was then currently able to manage at least part-time tutoring work. The Tribunal has noted the content of the Claimant's GP records that may indicate she was not in a position to work up to the report of Dr Bowers, but equally notes the symptoms recorded by her GP during the period when she was undertaking private tuition.

60. The Tribunal concludes on balance that the Claimant would have been in a position to undertake private tuition after the decision of the Employment Appeal Tribunal in her favour and concludes that from 01 January 2019 the Claimant could have mitigated her loss to the same extent that she had during 2012/2013 of £80 per week. For the sake of simplicity, because any amount earned would have affected the JSA and ESA payments the Claimant received and which have been taken into account, the Tribunal will assume that the sum earned approximates to the maximum allowable under ESA rules of an average of £120 as from September 2019 (which incorporates periods of annual leave).

61. The Tribunal has also used information contained in annexes 1 and 2 of the Claimant's updated schedule of loss of actual sums received by the Claimant; benefits received by the Claimant; and net earnings had the Claimant joined the Teachers' Pension Scheme (see below with regard to pension).

62. The Tribunal concludes on balance that the following calculations apply:

<u>September 2012 to August 2013</u>		
Net pay in August 2012 plus 2% increase:	£25,343	
Less credit for sums actually received:	- £13,419.56	
Net loss:		<u>£11,923.44</u>
<u>September 2013 to August 2014</u>		
Net annual pay after 2% increase:	£25,725	
Less half-pay for 11 weeks of sickness		

absence envisaged by Dr Bowers:	£5,441.83	
Less credit for sums actually received	- £3,728.40	
Net loss:		£16,554.77

September 2014 to August 2015		
Net annual pay after 2% increase:	£26,106	
Less credit for sums actually received:	- £3,764.80	
Net loss:		£22,341.20

September 2015 to August 2016		
Net annual pay after 2% increase:	£26,670	
Less credit for sums actually received:	- £5,350.00	
Net loss:		£21,320.00

September 2016 to August 2017		
Net annual pay after 2% increase:	£27,222.00	
Less credit for sums actually received:	- £6,535.68	
Net loss:		£20,686.32

September 2017 to August 2018		
Net annual pay after 2% increase:	£27,815.00	
Less credit for sums actually received:	- £9,756.44	
Net loss:		£18,058.56

September 2018 to August 2019		
Net annual pay after 2% increase:	£28,407.00	
Less credit for sums actually received:	- £9,792.58	
Less potential mitigated losses	- £693.33	
Net loss:		£ 17,921.09

September 2019 to August 2020		
Net annual pay after 2% increase:	£29,063.00	
Less credit for sums actually received:	- £9,903.40	
Less potential mitigated losses	- £6,240.00	

Net loss:		£12,919.60

September 2020 to date of Remedy Judgment		
Net annual pay in line with average median earnings for full time teachers :	£29,667.00	
Number of days: 241 (34.43 weeks)		
Pro rata net pay:	£19,588.35	
Less credit for sums actually received:	- £6,729.37	
Less potential mitigated losses	- £4,131.60	
Net loss:		£8,727.38

Total past loss of earnings	£150,452.36

Less 75% of loss of earnings not arising and flowing from the discrimination:

Total	**£37,613.09**

Future loss of earnings

63. The Claimant claims career loss. The Respondent argues that compensation is limited by causation and foreseeability. The Claimant relies upon **Essa -v- Laing Ltd** [2004] ICR 746 and for there to be no reference to foreseeability. The Respondent argues that this is not an **Essa -v- Laing** type of case.

64. The principle of foreseeability applies to those types of torts which can be committed unintentionally (such as claims of negligence and nuisance) and in an attempt to do justice between parties in circumstances that may be complex.

65. However, the Court of Appeal in **Essa -v- Laing** held that the principle of reasonable foreseeability does not apply to all statutory torts including direct discrimination and discriminatory harassment, which contain overt and intentional action by the wrong-doer. In those cases any loss proved to flow directly from the discriminatory act will be recoverable. It was the majority view in **Essa v Laing** that the decision in **Sheriff -v- Klyne Tugs Ltd (Lowestoft)**

[1999] ICR 1170, CA was to be preferred to that of **Coleman -v- Skyrail Oceanic Ltd** [1981] IRLR 398, CA.

66. LJ Pill in **Essa v Laing** stated: "It is possible that, where the discrimination takes other forms, different considerations will apply". In the context of the decision, the Tribunal does not understand this to be a reference to other types of discrimination, but was reference to the form of the particular discriminatory act, aptly described as a "grotesque" act of discrimination, that made an assessment of potential foreseeability of reduced relevance.

67. The Court of Appeal decision gave rise to much legal commentary on whether the removal of a requirement for foreseeability also applies to other discrimination claims that potentially may lack similar direct intent, such as a failure to make a reasonable adjustment. The Tribunal's view is that there is not much utility in examining overt and intentional action in respect of all of the statutory torts of discrimination. A failure to make a reasonable adjustment could just as easily be a deliberate act to place a disabled person at a substantial disadvantage as it is an unintentional accident. There is no appeal court authority to act as a guide, or at least none have been referred to this Tribunal.

68. The tribunal relies upon the decisions of LJ's Pill and Rix that: "The robust good sense of employment tribunals can be relied upon to ensure that compensation is awarded only where there really is a causal link between the act of discrimination and the injury alleged. No such compensation will of course be payable where there has been a break in the chain of causation or where the claimant has failed to take reasonable steps to mitigate his loss".

69. The Tribunal equally takes comfort in the words of HHJ Hand QC in **Stroud Rugby Football Club -v- Monkman** UKEAT/0143/13 that the assessment of future loss is "a rough and ready matter. It always has been and it always will be".

70. The Tribunal also refers to the approach endorsed by the Court of Appeal in the well-established case of **Vento -v- Chief Constable of West Yorkshire Police (No 2)** [2003] ICR 318:

"It was common ground that the correct approach to compensation for future loss of earnings was that described by Morison J in his judgment on behalf of the Employment Appeal Tribunal in *Ministry of Defence v Cannock*. The question is: what were the chances, if Ms Vento had not been discriminated against and dismissed, of her remaining in the police force until the age of retirement at 55? As Morison J pointed out, this hypothetical question requires careful thought before it is answered. It is a difficult area of the law. It is not like an issue of primary fact, as when a court has to decide which of two differing recollections of past events is the more reliable. The question requires a forecast to be made about the course of future events. It has to be answered on the basis of the best assessment that can be made on the relevant material available to the court".

71. Therefore this Tribunal has to make a decision about the chances that the Claimant's employment would have continued had the discrimination not taken place. It is important that this is done by reference to calculating the percentage probabilities, and not on a simple balance of probabilities. The Tribunal has to make an assessment of *the chance* the Claimant had of remaining in employment until retirement.

72. The Tribunal has also referred itself to another well-established authority of **Wardle -v- Credit Agricole Corporate and Investment Bank** [2011] ICR 1290, which although involved a discriminatory dismissal the Court of Appeal gives some helpful guidance to tribunals in assessing future loss of earnings that also may apply to the circumstances of this case:

- where it is at least possible to conclude that the employee will, in time, find an equivalently remunerated job (which will be so in the vast majority of cases), loss should be assessed only up to the point where the employee would be likely to obtain an equivalent job, rather than on a career-long basis, and awarding damages until the point when the tribunal is sure that the claimant would find an equivalent job is the wrong approach;

- in the rare cases where a career-long-loss approach is appropriate, an upwards-sliding scale of discounts ought to be applied to sequential future slices of time, to reflect the progressive increase in likelihood of the claimant securing an equivalent job as time went by;
- applying a discount to reflect the date by which the claimant would have left the respondent's employment anyway in the absence of discrimination was not appropriate in any case in which the claimant would only voluntarily have left his employment for an equivalent or better job; and
- in career-long-loss cases, some general reduction should be made, on a broad-brush basis (and not involving calculating any specific date by which the claimant would have ceased to be employed) for the vicissitudes of life such as the possibility that the claimant would have been fairly dismissed in any event or might have given up employment for other reasons.

73. Dr Bowers currently concludes that the Claimant cannot return to mainstream education and her work within this sector will be restricted to self-employed work, essentially tutoring.

74. The Tribunal has considered the totality of the relevant evidence and notes Dr Bower's opinion of the Claimant's pre-existing condition, that the Respondent's discrimination contributed to the Claimant's state of unemployment since 2014 and that there are other unrelated, non-causative, adverse factors that have also contributed to the Claimant' state of unemployment, particularly paragraphs 175 and 180. The Tribunal also refers to the Claimant's witness statement relating to the effects of the pre-existing condition, for example at paragraph 8, and the significant unrelated post-discrimination events that occurred, for example at paragraphs 34 and 35.

75. The Tribunal concludes that 20% of the Claimant's future loss of earnings is causatively connected to the acts of discrimination as found. The Tribunal has carefully considered the application of the thin skull rule to the Claimant's circumstances but equally has carefully considered causation with regard to the acts of discrimination as found.

76. The Tribunal has also considered a broad brush reduction to career loss to reflect the vicissitudes of life, having regard to whether the Claimant may have given up employment through illness or otherwise, or have been fairly dismissed also through illness or otherwise, or had a career change, or had a change emphasis with regard to her education based work that allowed her to work more than on a part-time basis. The Tribunal concludes that a reduction of 20% should be made and prefers to apply a slightly lower percentage overall than adopt some type of sliding scale percentages.

77. The Tribunal chooses to adopt a future career net average earnings of £31,000 per annum, which is in line with average earnings of female London full-time teachers if the Claimant had joined the Teachers' Pension Scheme. The Tribunal concludes that the Claimant would have stayed in employment until age 65 subject to the percentage reduction applied to career loss above.

78. At the date of the remedy judgment the Claimant is aged 54 and ten months and therefore has ten years and two months of remaining loss. The calculation of future loss of earnings is therefore £31,000 x 10.17 which gives a total loss of £315,270.

79. The Tribunal also concludes on balance that had the Claimant reasonably mitigated her loss the Claimant's suggested final position of a remaining career average of £20,000 net per annum would be achieved, based on private tutoring at a charging rate £25 per hour or less for group sessions. However, given the Claimant's failure to mitigate her loss and with an improvement in her health noted by Dr Bowers such that she can do part-time freelance tutoring, had the Claimant reasonably mitigated her loss from a time as set out above, the Tribunal concludes that she would be earning the career average sum immediately from the date of the remedy judgment. This would provide a net income of £20,000 x 10.17 giving a total income to age 65 of £203,400.

80. Therefore the total future loss of earnings for the period up to retirement is £315,270 less mitigation sum of £203,400 which provides the total loss of £111,870. Less 80% as only 20% is causally attributable to the discrimination

as found, which gives £22,374. That gives a sum for the total career loss attributable to the discrimination, which is then reduced by a further 20% to reflect a broad brush reduction under the principle in **Wardle**, giving a final total of **£17,899.20**.

81. The Tribunal considered applying the Ogden tables as suggested by the Claimant and has also considered the decision of the EAT in **Kingston Upon Hull City Council -v- Dunnachie (No. 3)** [2004] ICR 227 regarding the use of Ogden tables only in specific circumstances. The Tribunal concludes that the above calculation is a satisfactory method of placing the Claimant in the position she would have been in had the discrimination not occurred and the Ogden Tables do not introduce any additional degree of accuracy on the information available to the Tribunal given the Claimant's age and the surrounding circumstances.

Loss of pension

82. The Tribunal accepts the Claimant's evidence that she had been a member of the Teachers' Pension Scheme ("TPS") and took a break from the Scheme in 2010 when her partner was unable to work. This was not intended to be long term.

83. The Tribunal also accepts the Claimant's evidence that her partner had returned to work in or around May 2012 and had the discrimination not occurred, on balance the Claimant was likely to have re-joined the TPS in around September 2012.

84. The TPS was a final salary scheme entitling the member to a final salary based on 1/60th accrual for each year of pensionable service. The scheme changed in 2015 to a Career Average so that from 01 April 2015 members accumulate a pension based on 1/57th of earnings.

85. Dr Bowers states in his main report that he does not anticipate that the Claimant would ever have the emotional and interpersonal resilience to cope with working

within mainstream education and that the Claimant would be in a position to return to work as a self-employed private tutor. If so, the Claimant clearly would not benefit from any employer pension contributions.

86. The Tribunal adopts the method relied upon on behalf of the Claimant as being the best estimate of pension loss in the specific circumstances of this case. This method is based on the loss of employer pension contributions from September 2012 to the Claimant's anticipated retirement at age 65 on the TPS Career Average basis.

87. The Tribunal has taken the average gross earnings average of £42,000. 1/57 of that sum is £736.84. The number of years of pensionable service from September 2012 to retirement in June 2031 is 18.75. This gives an amount for pensionable pay of 18.75 x £719.30, totalling £13,815.75.

88. The discount for contingencies is 0.62 from the Ogden tables (which are appropriate to use for pension loss as opposed to loss of earnings), which gives a final sum for an annuity on retirement of £8,565.77. The pension loss multiplier from age 65 is 23.66, which gives a total pension loss of £202,666.12.

89. However, as with loss of earnings above, not all of this total loss flows from the acts of discrimination. The Claimant's state of unemployment was contributed to by factors unrelated to the discrimination. The Tribunal has considered the position with regard to pension and concludes that the same apportionment shall be applied to pension loss as was applied to future loss of earnings and that 20% flows from the discriminatory acts. This gives a total sum for pension loss of **£40,533.22**.

Injury to feelings

90. The Tribunal has reminded itself of some basic principles. The focus is on the actual injury suffered by the claimant and not the gravity of the acts of the respondent. The general principles that apply to assessing an appropriate award

of injury to feelings are set out by the EAT in **Prison Service -v- Johnson** [1997] IRLR 162:

- Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award;
- Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches;
- Awards should bear some broad general similarity to the range of awards in personal injury cases – not to any particular type of personal injury but to the whole range of such awards;
- Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings;
- Tribunals should bear in mind the need for public respect for the level of awards made.

91. The matters compensated for by an injury to feelings award encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (see **Vento -v- Chief Constable of West Yorkshire Police (No2)** [2003] IRLR 102, CA).

92. In **Vento** the Court of Appeal identified three broad bands of compensation for injury to feelings and gave the following guidance (with the figures stated being applicable to April 2014, the date when the Claimant's claim was presented to the Tribunal): The top band should normally be between £18,000 and £30,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000; The middle band of between £6,000 and £18,000 should be used for serious cases, which do not merit an

award in the highest band; Awards of between £600 and £6,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

93. Within each band there is considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.

94. The Tribunal concludes that there is overlap between the elements of the Claimant's injury to feelings and the personal injury element of her claim.

95. The Tribunal has referred to the main report of Dr Bowers and the Claimant's GP records as referred to in that report.

96. The Tribunal confirms that it is assessing the injury to feelings arising from the discrimination as found. It is not, for example, awarding injury to feelings in respect of the actions of Ms Michalski or the Claimant's subsequent dismissal.

97. Over the early period of the events the Claimant had sleep difficulties; headaches; anxiety; panic attacks; depression; being tearful; and not wishing to return to an education environment. The experience also triggered memories of abuse issues. However, the Tribunal also noted paragraph 175 of Dr Bower's report and the deterioration of the Claimant's mental state in the summer of 2011 which gave rise to similar and more significant symptoms. Soon after the summer 2012 events occurred, other events intervened and caused similar effects.

98. The Tribunal concludes on balance that the Claimant's injury to feelings award should be in the upper middle band (as they were when the claim was presented) and makes an award of **£15,000**.

Personal Injury

99. With regard to the claim for personal injury the Tribunal refers to the main report of Dr Bowers who confirmed that the Claimant has suffered a psychiatric injury that had been caused or materially contributed to by each of the three

discriminatory acts of failures to make reasonable adjustments. Dr Bowers at paragraph 190 set out the two very significant and unrelated matters that precipitated the Claimant's condition and states his view that the discrimination exacerbated and perpetuated it. He records that "The degree of suffering was such that she was unable to work within the Academy environment and engage in her usual social activities. She exhibited social withdrawal, episodes of dissociate 'blackouts' and struggled with concentration and motivation".

100. However, what is clear is that the Claimant had the diagnosis of complex Post Traumatic Stress Disorder before the discrimination occurred and the discrimination was not the cause of it. The Claimant's circumstances were that the discrimination exacerbated and perpetuated a pre-existing condition. The condition was also periodically exacerbated and maintained by unrelated factors that occurred post-discrimination. The Tribunal refers again to the Court of Appeal decision in **BAE Systems -v- Konczak** which confirmed that where more than one event has caused harm suffered by a claimant, the test for causation was whether the respondent's breach of duty had materially contributed to the harm, but the extent of the defendant's liability was limited to that contribution.

101. Having regard to the Judicial College Guidelines on General Damages the Tribunal concludes that the Claimant's condition falls within Post-Traumatic stress disorder, moderately severe category, which accounting for the *Simmonds v Castle* uplift gives a range of £21,730 to £56,180. The Tribunal concludes that this category is the most appropriate as it accounts for a better prognosis with some recovery with professional help. However, the effects are still likely to cause significant disability for the foreseeable future. The Guidelines state that "While there are awards which support both extremes of this bracket, the majority are between £24,540 and £31,660 (£26,990 and £34,830 accounting for 10% uplift)". The Tribunal concludes that the appropriate sum is £31,000.

102. The Tribunal further concludes that the Respondent's liability shall be limited to 20% being its contribution to the harm, having regard to all the matters raised in the main report by Dr Bowers as set out in detail above and the GP notes, as also summarised in the main report. The Tribunal considers that it is able from

the causative elements apportion as best as it can the associated harm. Therefore the award made is **£6,200**. The Tribunal concludes when stepping back that, although there is some overlap, the sums for injury to feelings and personal injury are appropriate.

103. The Tribunal has not received evidence sufficient to make an award in respect of the Claimant's physical injuries. Dr Bowers, for example, could not provide any expert evidence in this respect and again the symptoms are recorded before the acts of discrimination. There is no cogent evidence of the conditions being caused by the acts of discrimination.

Treatment costs

104. The Claimant claims damages of £3,000 for 20 psychiatrist sessions at a cost of £150 each in order to treat her Post Traumatic Stress Syndrome condition as recommended by Dr Bowers. Other costs are claimed should the sessions be unsuccessful. In line with the above awards, the Tribunal concludes that the Claimant shall be awarded twenty per cent being **£600**.

Aggravated Damages

105. Aggravated damages are awarded only on the basis, and to the extent that the aggravating features have increased the impact of the discriminatory act on the Claimant and the injury to her feelings. They are compensatory, not punitive. The aggravating features include where the act is done in an exceptionally upsetting way so as amounting to 'high-handed, malicious, insulting or oppressive' behaviour; discriminatory conduct that is based on prejudice or animosity, or which is spiteful or vindictive or intended to wound where the claimant has to be aware of the motive in question; and subsequent conduct, for example of conducting the proceedings in an unnecessarily oppressive manner, failing to apologise, or failing to treat the complaint with the requisite seriousness. (see for example **Commissioner of Police of the Metropolis -v- Shaw** UKEAT/0125/11 and **Zaiwalla & Co -v- Walia** [2002] UKEAT/451/00).

106. The Claimant sets out the matters relied upon in paragraph 118 of her witness statement. The Tribunal has considered those matters carefully but concludes they do not give rise to aggravated damages. Those matters do not fall within the descriptions set out above. They are either matters that often arise in hard fought litigation or are matters of process falling short of aggravated damages but may potentially be matters to consider on the application for costs.

Interest

107. The Claimant is entitled to interest pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996/2803 at 8% per annum on the injury to feelings award (including aggravated damages) from the date of the first discriminatory act to the date of calculation and on other elements, excluding future losses, from the midpoint date.

108. Therefore the interest on injury to feelings is 8% of £15,000 for 8.75 years from the first act of discrimination in July 2012, which gives a total of £10,500.

109. The interest on past loss of earnings is 8% on £37,613.09 from the mid-point from the commencement of financial loss in January 2013, which is a period 4.63 years and gives a total of £13,931.89.

110. The interest on general damages and treatment costs is 8% of £6,800 from the mid-point from the first act of discrimination in July 2012, which is a period of 4.38 years and gives a total of £2,382.72.

111. Therefore the total sum for interest payable is **£26,814.61**.

ACAS Code of Practice on Disciplinary and Grievance Procedures

112. The Claimant raised her grievance in March 2012 and did not receive an outcome until 11 February 2013. The grievance appeal process took a further 3 months. The delay in concluding the Claimant's grievance amounted to a failure to make a reasonable adjustment. The Tribunal has considered the ACAS Code of Practice on Disciplinary and Grievance Procedures. Paragraph 40 states: "Following the meeting decide on what action, if any, to take. Decisions should

be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The Tribunal concludes that the circumstances did amount to unreasonable delay. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that an uplift up to a maximum of 25% can be applied where there is a claim to which the proceedings relate that concerns a matter to which the Code of Practice applies and as in this case the employer has unreasonably failed to comply with it. The Claimant suggests an **uplift of 10%** and the Tribunal agrees.

113. Therefore an uplift of 10% on an award £144,660.12 gives a final total of **£159,126.13**.

114. The Tribunal considers given the constituent parts of the award that it is not necessary to make a deduction for accelerated receipt.

Grossing up

115. The above sums require grossing up as appropriate, but for this exercise to be done, more information is required of the Claimant's income for this tax year. Accordingly, The Tribunal directs the parties to agree if possible and provide to the Tribunal within 42 days of this judgment being sent to the parties, an appropriately grossed up sum, together with calculations, to address any tax payable on the award and to be ordered by the Tribunal. This exercise shall not delay the Claimant receiving the sums awarded above.

Regional Employment Judge Freer

Date: 30 April 2021