EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102702/12 & 4107069/12

Held in Edinburgh on the 9th and 10th of March 2020 and the 21st April 2020

Employment Judge J Porter
Tribunal Member Z Van Zwanenberg
Tribunal Member R Duguid

Professor R Sheikholeslami	**Claimant** **Represented by** **Mr S Gorton, Counsel**
University of Edinburgh	**Respondents** **Represented by** **Mr D Reade, Counsel** **Instructing Solicitor** **Mr P Brown**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the judgment of the Employment Tribunal to order the respondents to make payment to the claimant of (i) the sum of £2,850 basic award and £312.50 compensatory award in respect of her claim for unfair dismissal; (ii) the sum of £8,241.52 gross in respect of the claimant's claim of holiday pay; (iii) the sum of £2,000 with interest of £1,360 in respect of the claimant's claim of failure to make reasonable adjustments; (iv) the sum of £2,800 with interest of £2,072 in respect of the claimant's claim of victimisation; (v) the sum of £25,000 with interest of £16,200 together with a monetary sum equivalent to 8 months'

NHS benefits plus interest in respect of her claim of discrimination arising from disability. The Tribunal makes no award in respect of the claimant's claim for psychiatric injury.

REASONS

Introduction

1. This case has considerable procedural history. By Judgments dated 15th March 2017 and 15th May 2019 (following a Judgment and remit from the EAT of 5th October 2018) the claimant's claims of discrimination arising from disability, breach of duty to make reasonable adjustments and victimisation succeeded in part under the provisions of sections 15, 20, 21 and 27 of the Equality Act 2010. The claimant's claims of unfair dismissal under section 98 of the Employment Rights Act 1996 and failure to pay holiday pay also succeeded.

2. Against that background, a Hearing on Remedy was fixed for the 9th and 10th March 2020 and the 21st April 2020. At the Hearing on Remedy the claimant gave evidence herself and led evidence from Dr Sarah Kennedy, her treating psychiatrist. The respondents led evidence from June Bell, formerly employed as Head of Human Resources for the University of Edinburgh's College of Science and Engineering. Dr Jacqueline Scott, also a psychiatrist, gave evidence as a jointly instructed expert. Her evidence was taken (with the agreement of both parties) by video link on the 21st April 2020. The evidence in chief of the witnesses was provided by witness statements.

3. The parties produced a Joint Bundle of Documentation numbered **1-1043**.

4. At the outset of the Hearing the parties were reminded that the Hearing on Remedy was not an opportunity to revisit the factual findings made in the Judgments of the 15th March 2017 and the 15th May 2019. The Tribunal found that in certain respects the evidence heard at the Hearing in 2015-2016 and the facts found in their two judgments were relevant to the issue of Remedy.

Findings in Fact

5. The claimant was absent from her employment with the respondents from January 2010 with work related stress and depression. The Tribunal found that since 2010 the claimant has experienced and continues to suffer from anxiety and depression and continues to suffer from significant psychiatric symptoms. The symptoms experienced by the claimant include difficulty in sleeping, concentrating, studying, and engaging in any normal social contact or activity.

6. The Tribunal accepted the evidence of June Bell that in spring 2010 an attempt was made by the respondents to refer the claimant to their Occupational Health service. The claimant failed to attend 3 Occupational Health appointments at that time. The respondents did not pursue the issue of attending an Occupational Health consultation with the claimant further in 2010, it being their practice not to persist in such circumstances as they considered it could be perceived as harassing the employee. However, the issue of a referral to Occupational Health was revisited by Dr Kim Waldron with a view to the claimant's reintegration to work in the correspondence of 19th July 2011, 21st July 2011, 19th August 2011 and 13th October 2011 (para 9, judgment of 15th May 2017).

7. The Tribunal accepted the evidence of Dr Kennedy that where, following an employee commencing a period of sick leave, there is an expeditious referral to Occupational Health such a referral is "*usually successful*" in bringing the employee back to work. The Tribunal also accepted the evidence of Dr Kennedy that unless a referral to Occupational Health comes reasonably soon after the employee's absence commences it is usual for the employee to view with suspicion any subsequent approach by their employer asking them to engage with Occupational Health.

8. The Tribunal accepted the evidence of Dr Kennedy that when the claimant was first absent from her employment with work related stress and depression in early 2010, "*given the lack of past psychiatric history I would have deemed her prognosis at that time to be good with a full recovery should she have been able to return to a*

supportive environment with issues which she identifies as stressful being addressed" **(817).** In accepting the evidence of Dr Kennedy on this point, the Tribunal observed that it did not differ to any material extent from the evidence of Dr Jacqueline Scott who spoke of the pattern being one of gradual recovery, and there being a better prognosis in the absence of significant pre existing psychiatric history or vulnerability (**818**.**2**)

9. The Tribunal accepted the evidence of Dr Kennedy (to be found in her report **(815-818)**) that in the period between January 2010 and December 2011: "*I would have expected her to become fit enough to return to work at any time during her time off. The factors which perpetuated her illness were work related and there were no external factors contributing to low mood."* To this end, the Tribunal accepted Dr Kennedy's explanation that the claimant is unusual in that her work is her life and that at that time there were few stressors present in her life aside from her work.

10. In reaching this conclusion, the Tribunal gave consideration to the evidence of Dr Scott to the effect that it is impossible to speculate whether the claimant would have been fit to return to work in the period January 2010 to December 2011 **(818.2).** The Tribunal preferred the evidence of Dr Kennedy in this respect as under cross examination and with reference to the activities listed in **358**-**359** Dr Scott did acknowledge that the claimant was fit for some work in this period.

11. The Tribunal considered carefully the evidence of Dr Kennedy and Dr Scott to the questions posed on the issue of the link between the claimant's referral to specialist care in February 2012 and her dismissal and the link between the claimant's significant psychiatric symptoms in 2012 requiring periods of hospitalisation and her dismissal. After such consideration the Tribunal preferred the evidence of Dr Scott, that psychosocial stressors including persistent stress caused the claimant's ill health. In evidence, Dr Scott described psychosocial stress as any stressor that an individual might encounter in life including, for example, difficulties with academic and immigration status and difficulties with finances and housing.

12. Although there was not a significant difference between the evidence of Dr Kennedy and Dr Scott in this respect (Dr Kennedy stating that the claimant's issues relating to her work were the major underlying factors in her decline in health) the Tribunal preferred the evidence of Dr Scott as they considered it to be more measured and thorough. In reaching this conclusion the Tribunal observed that Dr Scott has had the benefit of compiling four separate reports on the condition of the claimant. In concluding that the report of Dr Scott was more thorough, the Tribunal also observed that in her report of 7th February 2020 Dr Kennedy omitted making reference to the claimant's admission to hospital in March 2012.

13. For these reasons the Tribunal preferred the conclusions drawn by Dr Scott in her report and considered her conclusions to be more thorough and balanced than those of Dr Kennedy. In doing so, the Tribunal found that the claimant does not suffer from PTSD or a dissociative disorder as diagnosed by Dr Kennedy.

14. The Tribunal observed that both Dr Kennedy and Dr Scott gave evidence that the dismissal of the claimant and the discovery that she had been victimised impacted upon her health. The Tribunal observed that the wording used by Dr Scott - namely that such actions by the respondents would have been a significant stress and on balance would have had a negative and detrimental impact on the claimant's health- was more measured that the corresponding answer by Dr Kennedy and for this reason accepted the explanation of Dr Scott in evidence.

15. The Tribunal had regard to the evidence of Dr Kennedy and Dr Scott on the consequences of the dismissal to the claimant's long term mental health. The evidence reflected the terms of their reports **(815, 818.1)**. Again, there was little difference in the evidence given by both psychiatrists; on balance, the Tribunal preferred the evidence of Dr Scott in stating that it is only possible to state that the majority of individuals recover from depressive or anxiety symptoms, but that the ongoing stress would have significantly influenced the claimant's recovery. In preferring the wording of Dr Scott, the Tribunal observed that she has had the benefit of compiling four reports on the claimant, dating back to her first report of November 2014.

16. For the same reasons, the Tribunal also preferred the evidence of Dr Scott and did not find in fact that the actions of the respondents have caused or materially contributed to the claimant's ongoing incapacity to work.

17. Again, the Tribunal preferred the more measured tones of Dr Scott in finding that the claimant's post dismissal immigration status would be classed as a further stress influencing her mental health; her inability to access public funds would be classed as a further significant stress and would undoubtedly have impacted her ability to recover from her ongoing psychiatric conditions; and the loss of her right to access the NHS would be a psychosocial stressor.

18. On the issue of the claimant's prognosis, the Tribunal found that the evidence of Dr Scott provided some clarity in what is a difficult area and therefore preferred that evidence to the evidence given by Dr Kennedy. The evidence of Dr Scott was that it is hoped that with the conclusion of the present proceedings the claimant will begin recovery of her psychiatric symptoms. In her oral evidence, Dr Scott stated that 30% of those who suffer from a depressive illness never recover; and in her evidence did not categorise the claimant as belonging to that 30%.

19. The Tribunal were unable to make any Findings in Fact on what the consequences would have been for the claimant's health had she been fairly dismissed from her employment with the respondents as no evidence was led of the same.

20. Insofar as holiday pay is concerned, the Tribunal accepted the evidence of June Bell (which was not subject to cross examination) that all holiday pay due to the claimant was the subject of an arrestment by Sheriff Officers and was paid over to Shepherd & Wedderburn Solicitors in satisfaction of an earnings arrestment. There was no evidence that the claimant was due any further sums by way of holiday pay.

21. Notwithstanding the foregoing, however, the Tribunal noted that in their submissions the respondents state that the claimant is entitled to a further 28 days' holiday pay. This sum equates to the figure of £8,241.52 gross.

22. The Tribunal accepted the evidence of June Bell and finds in fact that as the claimant commenced her employment on point 61 of the salary scale the only way for her to progress would have been for her to be nominated by her line manager and for that recommendation to be approved by the Head of School, College Committee and ultimately a central committee chaired by the Principal. The Tribunal accepted that the claimant did not have any performance issues in the course of her employment with the respondents; however, in view of the evidence of June Bell they were not persuaded by the claimant's evidence that she would automatically have progressed from point 61 of the salary scale.

23. The Tribunal accepted the evidence of June Bell and finds in fact that staying on past normal retirement age is very much the exception not the rule in academia; and that for an individual to stay past retirement age there has to be a particular justification for them to retain an association with the University beyond the age of 65 - for example, if they are working in a grant funded post which ends after the age of 65. The Tribunal accepted the evidence of June Bell that continuing past 65 often requires nomination by the Head of School for an honorary position with the respondents. In these circumstances the Tribunal were not persuaded by the claimant that on balance of probabilities, and after having regard to the relevant legislation, she would have continued working for the respondents beyond the age of 65.

24. Insofar as the claimant's continued employment with the respondents was concerned, the Tribunal had regard to their Findings in Fact on the claimant's refusal to engage with Occupational Health to be found in the Judgment of the 15th May 2019. In particular, in para 26 of that Judgment the Tribunal reached the following conclusion: "*Accordingly the Tribunal finds that prior to the correspondence of 16th November 2011 the respondents were unable to progress an attempt to reintegrate the claimant into the workplace due to an "impasse" reached as a result of the claimant's failure to respond constructively to a reasonable request from the respondents that she engaged with Occupational Health.*" Paragraph 39 of that judgment then stated: (in respect of elements of the claimant's case of failure to make reasonable adjustments): *…"the Tribunal concluded that, because of the*

impasse reached, which was caused by the claimant the respondents were unable to obtain the medical information they required in order to attempt to re-integrate the claimant in an appropriate manner into the workplace."

25. In determining the issue of the claimant's continued employment with the respondents the tribunal accepted the evidence of June Bell (given in response to a Member's question) that a reasonable time frame for the respondents to have dismissed the claimant with regard to their Disability Policy would have been a year from the "*impasse*" resulting from claimant's refusal to engage with Occupational Health in 2011 (i.e. by late 2012). In accepting the evidence of June Bell on this point, the tribunal had regard to the terms of the respondents' Disability Policy itself **(921)**

26. The Tribunal accepted the evidence of June Bell (given in cross examination) that although dismissal of academic staff was rare, the respondents had rewritten their policies and procedures in 2011 and as a result, dismissal of academic staff would be a possibility going forward.

27. The Tribunal accepted that the Disability Policy, along with the respondents' Capability Policy **(888)** Absence Management Policy **(891)** and Sickness Absence Policy **(918)** were all applicable policies of the respondents in 2011/2012.

28. The Tribunal finds on the unchallenged evidence of Dr Kim Waldron, given at the Hearing in 2016, that in 2012 the respondents took legal advice on the issue of the claimant's immigration status. The advice then given was that the claimant's work visa was linked to her specific appointment with the respondents and that were the claimant to cease that role then then her work visa would lapse. This advice was reflected in the letter from Dr Kim Waldron to the claimant of 16th December 2011 in which it was stated: *"In investigating this issue further, I now understand that because you are employed on a work permit, the University cannot simply offer you another post. Your work permit is specific to your position as a Professor of Engineering at the University of Edinburgh. In order to comply with UKBA regulations, the University could only support a new work permit application if you*

were successful in being offered a position that was externally advertised." (para 69 of the Judgment of 16th March 2017).

29. Kim Waldron also gave unchallenged evidence that the legal advice then given to the respondents was that the claimant might have the right to remain in the UK by other means such as applying for indefinite leave to remain but that that was something the claimant had to activate herself.

30. The Tribunal finds on the evidence of the claimant that following her dismissal she had to pay for her NHS treatments.

31. The Tribunal finds on the evidence of June Bell that there was no guarantee that academics such as the claimant would be granted a paid sabbatical with the respondents. The Tribunal accepted this evidence after having regard to June Bell's position as the former Head of HR with the respondents and her experience with the respondents between January 2007 and July 2019.

32. The Tribunal accepted the uncontradicted evidence of June Bell that under the terms of their pension scheme the respondents do not make any pension contributions if an individual is on nil pay. For this reason the respondents made no pension contributions to the claimant's pension from October 2010 onwards, as by that date the claimant had exhausted all her sick pay.

33. The Tribunal finds on the evidence of the claimant that the claimant has not engaged in consultancy work since November 2009, prior to her absence on sick leave in January 2010.

Observations on the Evidence

34. In advance of this Hearing on Remedy, there was careful case management of this case. In particular, the Preliminary Hearing of 14th January 2020 set out a timeline for production of all relevant documentation. Notwithstanding this, some of the key

evidence came out piecemeal and there was fault on the part of both representatives in the inevitable failure to give fair notice which ensued.

35. Insofar as June Bell is concerned, the Tribunal observed that she retired from her employment with the respondents some time ago but, notwithstanding that, attended the Tribunal willingly to give evidence. The Tribunal found that June Bell did give reliable and valuable evidence; however, on the key issue of whether the claimant would have been dismissed fairly in the course of time the Tribunal noted that June Bell stated in evidence that the claimant would have been dismissed under the respondents' Disciplinary and Disability policies due to her failure to engage with OH. The Tribunal observed that the evidence of June Bell that the claimant would have been dismissed under the respondents' Disciplinary Policy was not relied upon or referred to in the respondents' closing submissions.

36. The Tribunal noted that in the full submissions produced by Mr Gorton issue was taken with the fact that there was no fair notice of the evidence given at the remedy hearing to the effect that there had been 3 previous referrals to OH in the spring of 2010. The Tribunal observed that the issue of referrals to OH in the spring of 2010 was foreshadowed in the ET3 **(38).**

37. The Tribunal observed that neither party led expert evidence on the issue of the claimant's immigration status and in particular the issue of the claimant's status had she been fairly dismissed on a date after April 2012. In these circumstances the Tribunal relied upon the evidence of Dr Kim Waldron on immigration given at the 2016 hearing and observed that she was not cross examined on this passage of evidence at that hearing.

SUBMISSIONS

Each party produced a summary of submissions. The summaries are replicated here. The numbering in the undernoted submissions is that of the parties.

For the claimant

1. The ET has expressly asked the parties to summarise their cases in an executive overview or summary.

2. This is C's such document. It should be read expressly with (i) C's previous closing submissions on the remitted liability hearing (ii) C's Position Statement (iii) C's closing submissions on Remedy and (iv) C's responsive submissions of the same date as this document.

3. C proposes to adopt themes for this document which weave in relevant issues for the ET.

4. **Work and C:**

    4.1. Work was C's life. She is one of a type of ultra-focused professionals whose work is their life and their life is their work. C has no immediate family of her own (save for a sister) and no children. C had very few extracurricular diversions;

    4.2. Absent the ordinary distractions in life (children, family and hobbies e.g. gardening or travel) and maintaining good health, there is every reason to believe that C would have worked as long as her drive and energy for work would have permitted. That, conservatively, here would be well into her 70s and likely beyond – just like the academics identified in their 80s in RB.819+;

    4.3. C was hired as a recognised world leader in her field. R was so eager to attract C that they invested in her home and expressly agreed that C would work until retirement;

    4.4. C's career path would have been in line with her dynamism. She was identified as suitable for 2 internal posts (at Vice Principal and Dean level) within a short period of being employed. She would not have been a professorial seat-filler i.e.

not being dynamic and moving positively forward. The assumptions in C's schedule of loss about her progression are moderate and cautious;

4.5. Even if C had left R's employment (for whatever cause) there is no possible reason to think that C would have become economically inactive. She would likely have left for another equally well paid post or job. C needs to work as much financially as she does for her professional drive and professionalism. Thus, even if C was not to spend the rest of her working life at R, she would have been economically driven and active and found an alternative post in the UK or abroad (paying equally well if not better with comparable benefits) working to the age as set out above in addition to her lucrative private consulting work.

5. **R's unlawful conduct**:

5.1. R's unlawful conduct commenced in early 2011 with the retaliatory injunction to send C to Coventry that was an act of victimisation;

5.2. C was driven to raise another grievance in May 2011 when she was a disabled person. That was ignored when it should not have been. R never treated C as a disabled person. To make matters worse, the reason for not following those policies was an inherently discriminatory one: because C was unwell;

5.3. Had that not been the case, it is simply inconceivable that the Gupta memo would have been framed in the way it was let alone actioned in the way it was i.e. C's dismissal. Had R's grievance and disability policies been properly followed, the position would have been fundamentally different to that which C was confronted with in January 2012 with a peremptory dismissal letter based on C's soon to lapse but eminently extendable work permit;

5.4. The effect of that dismissal (in breach of all good relevant policies and the ACAS code) has been devastating for C as analysed below. From an economic point of view, it has been disastrous: C cannot work and thus mitigate her loss (of which there is no suggestion that she has failed to do so) and thus all her losses that flow from dismissal continue. This has effectively deprived C of her career; she has not been able to move to another job and secure income; she has not been able to move on.

6. **The effect on C:**

6.1. The personal and health effects on C have been as serious as can be imagined;

6.2. C's health had improved by January 2011 and C was ready to return to work. All the medical evidence makes it clear that given C's lack of a 'psychiatric past' and that she is a person of considerable fortitude (to get to this place in this marathon litigation is testament enough to that) she would have returned to work (between January 2010 and December 2011, she was remotely conducting partial duties);

6.3. The failure by R to follow proper procedures and policies and treat C as a vulnerable, isolated disabled person, the dismissal letter of January 2012 and the dismissal itself with all its consequences (loss of job, status, immigration security and financial stresses e.g. bankruptcy etc) led inexorably to a significant and serious decline in C's health that at times bordered on the catastrophic e.g. March 2012 the dissociative episode. C's health steeply declined from a point of recovery to a point of a deep low from which she will likely never recover;

6.4. The only material explanation for C's collapse has been R's conduct and its effect on C. No other cause has been identified. R has desperately attempted to suggest that C was incapacitated prior to 2011 and would never have recovered – flatly in contradiction to what they argued at the liability stage i.e. that C was not incapacitated but was intentionally misleading the ET about that. There is no basis whatsoever for that highly self-motivated argument (it is the only way that R can think of trying to prevent C recovering the proper compensation she is entitled to) in fact, or on the expert evidence in which both medics concur with each other: C ought to have recovered and returned to work in 2011; R's unlawful actions explain C's profound decline and, as the medics also agree, no other matter does;

6.5. C has been caused to suffer a significant injury to her feelings stretching back to 2011. She has also suffered unquestionably personal injury as is agreed by both medical experts and is therefore entitled to a significant award for solatium;

6.6. Economically, C has lost her career with no hope of restoring it;

6.7. Connected with this, C has lost her lawful ability to work and mitigate her loss (if she were fit and able to). She is in a ghastly immigration prison as a result of R's actions. She has even asked R to assist to help her recover this through the Recommendation issue. Astonishingly, R has refused this.

7. **R's conduct of these proceedings:**

7.1. R unreasonably insisted C was not disabled and put C to the strictest proof and in the process, R has attempted to denigrate C and cast aspersions on her honesty. Not only were those efforts rightly rejected by the ET, but they fly in the face of R's considerable efforts to employ C;

7.2. In a desperate attempt to avoid the consequences of the discriminatory conduct, R has resorted to blatantly misconceived or unsustainable arguments;

7.3. R tried to suggest that C would have been dismissed in any event but failed to identify any sustainable reason for such dismissal;

7.4. R has incorrectly misstated key parts of the medical evidence which is agreed by the medics as to the cause of her ongoing illness;

7.5. R has misinterpreted the law in suggesting there is scope to reduce C's compensation for discrimination on the basis of contributory conduct (none having been found by the ET in any event);

7.6. As was true for R's own witnesses including Prof Lesley Yellowlees who deliberately lied and tried to mislead the ET, the ET is unable to rely on R's submissions which are unreliable and patently self-serving; the ET should reject them.

For the respondents

1. This is a brief summary of the R's submissions on remedy.

2. It is necessary to distinguish between the acts or omissions for which the R is liable and those for which it is not. The acts and omissions which were not found to be unlawful still have their effect and those have to be brought into account.

3. This reflects the fundamental approach to remedies: that it is necessary to consider what would have happened had the unlawful acts not occurred. That is the only basis on which remedies can properly be assessed so as to place the C in the position she would have been in had the unlawful acts not occurred. That is the correct approach to remedies, both under the Equality Act 2010 and in relation to the unfair dismissal claim under the Employment Rights Act 1996.

4. The C's contributory conduct in relation to her losses can properly be brought into account on both heads of remedy.

5. Considering the world as it would have been, absent the unlawful acts, involves determining a counterfactual. The R's submission is that properly analysed on the findings the Tribunal has made as to the impasse which was reached in 2011 there are two possible counterfactuals:

   5.1. The C had changed her attitude and co-operated with the R's proposal for referral to OH (the first counterfactual);

   5.2. The impasse had remained because the C persisted in her unreasonable refusal to take the R's proposed referral to OH (the second counterfactual).

   <u>First Counterfactual</u>

6. Either the return to work would have been successful or the C's health would have meant that it was unsuccessful. In either case no losses would flow against the R.

7. Logically the C's refusal to co-operate with the R's reasonable proposals for referral to OH materially contributed to all her claimed losses and to her dismissal. In the light of the Tribunal's findings the R's primary position is that the C should be found to have

contributed to the extent of 100% to all the financial losses and remedies she claims, other than possibly the injury to feelings award in respect of the instruction not to communicate. If the Tribunal is against this primary submission, that the reduction should be 100%, then a lesser reduction should be made but it is submitted that a substantial reduction should be made in any event. This reduction to be made against again any, and all, awarded losses.

Second Counterfactual

8. Following the C's unreasonable refusal to co-operate with the referral to OH the impasse arose. In addressing the C's claims in relation to remedy it is necessary to consider the position of what would have happened if the unlawful acts had not happened in respect of the each of the heads of claimed loss.

9. The inevitable conclusion is that the C would not have returned to the workplace and would not have returned to receiving payments of salary, having exhausted her sick pay entitlement. The C's case that extending sick pay was a reasonable adjustment was rejected.

10. Faced with the impasse and the fact that the C would not have returned to work, because of the impasse created by her own unreasonable conduct. Either then she would have remained employed but without income, because she had exhausted her sick pay entitlement, or she would have been dismissed. In either case no losses flow. There would be no issues about disability discrimination as this must have been a proportionate means of achieving a legitimate aim.

11. The termination of the C's employment would have been a psychosocial stressor as described by Dr Scott and she accepted in XX, by R, that termination would be a stressor in itself. If follows that even if the C had been fairly dismissed the termination would still have had the same impact on her mental well-being. There is nothing to support the proposition that the fairness or otherwise of the dismissal made a material difference in this respect.

12. Equally lawful termination would have led to the C experiencing the same immigration issues. The evidence was only that her work permit might have been extended by the R so she could have continued in employment but that would have not extended beyond he lawful end of her employment.

13. There is no basis for the C's case, on her closing submissions, that her attitude would have changed had the grievance and disability policies of the R been followed. Her attitude to the reasonable proposals of the R for referral to OH are clear on the findings of the Tribunal which have been made.

14. It follows that even on the second counterfactual the C would still have been dismissed and that would probably have had the same impact on the C's health as the unfair dismissal. It follows that as the exercise is the calculation of remedies putting the C in the position she would have been in but for the unfair dismissal there is no basis for including any consequences for the C's health of the unfair/discriminatory dismissal as the consequences would have been the same. Further the consequences for her immigration status would have been the same.

15. Thus properly analysed through the counterfactual the C's continuing health issues were not the product of the unlawful acts as the same health consequences were likely on the counterfactual.

16. That means that the loss claims do not flow out of the unlawful acts.

<u>Specific Issues</u>

17. All of these issues are addressed without prejudice to the primary submissions above that there is 100% contribution and or that the losses do not flow out of the unlawful act as unlawful acts.

Salary Progression

18. There is no basis for annual spinal increase in the C's salary had she remained in employment and no basis for advancement beyond spinal point 61. All there was the chance of an exceptional contribution allowance or an allowance for the performance of a role whilst the role was performed.

Retirement Age

19. It is not possible to say with certainty with all the elements of chance that the C would have continued in employment until the age she now professes.

Sabbatical

20. There was no right to a sabbatical and no loss should be attributed to this.

Alternative Employment

21. As to the position until now the C has remained unfit for work and would have done so on the counterfactual. As to the future the evidence of Dr Scott is that the chances are that the C will start to recover. Dr Scott did not place the C in the 30% of chronic cases where there was no prospect of improvement. On the C's case as to her desire to work it is therefore reasonable, even on the C's best case, to discount her losses to account for the future earning capacity.

Impact on Personal Business

22. As to the position till now the C has remained unfit for work and would have done so on the counterfactual. The future position has to be addressed as per alternative employment.

NHS Medical Costs

23. On the counterfactual the C's immigration status would always been in doubt with the consequences for her medical costs. This head should not be awarded as it would have occurred in any event.

Bank Costs

24. The logic of the claim is that these would not have arisen but for the C's loss of income. However the C's loss of income ran from the date of the end of the C's sick pay which, as set out above, did not flow out of any wrongful act on the part of the R.

25. These losses should not be awarded against the R.

Bankruptcy Costs

26. Essentially this is an exercise in double recovery and should be rejected. The C is seeking to recover debts as well as the lost earnings from which the liabilities which form the debts would have been paid. In any event the debts arose before the unlawful acts. This head of loss should be rejected.

Holiday Pay

27. This is accepted but only in the amount of £8,241.52 gross, being 28 days of Directive holiday pay carried over from 2011 to termination.

Injury to feelings

28. Any award should be at the bottom end of the Middle Band of Vento at the appropriate time: £6,000 to £18,000.

Personal Injury

29. The primary submission is that there is no discernible personal injury occasioned by the unlawful acts. The dismissal and the impact on the immigration would have happened in any event with the consequent psychosocial stressors.

30. The R's position is that on the present expert evidence there is no basis for asserting that the unlawful acts of discrimination occasioned the C any personal injury or made a material contribution to her condition at the date of the unlawful acts:

    30.1. The C's underlying depressive condition relates back to 2010 and she has not made a recovery yet, but if there was an opportunity to seek to do so in 2011 but the C unreasonably declined the proposed referral to OH which might have formed the basis of a return to work;

    30.2. In so far as there are psychostressor events which may have caused the episodes in the C's medical history these are events which would have happened in any event, even if they had not been unlawful, thus the C would been dismissed, she would have experienced the uncertainly over her immigration status and her financial position would have become strained.

31. If there is an award for personal injury it needs to be apportioned to reflect the lawful and unlawful contributing factors. Applying the approach in *BAE Systems Ltd v Konczak* [2017] IRLR 893 it is submitted that it is not possible to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong, in the sense of a unlawful acts, and a part which is not so caused, i.e. the pre-existing condition of the C's depression and or the events which would have occurred in any event, so far as the C's dismissal, her immigration status and the financial pressures she experienced.

32. There is then no basis for making a separate award for personal injury in this case.

33. If there is an award it should only be on the basis of the discreet psychotic episodes.

34. If there is an award it should be in the moderately severe bracket, £5,000 to £16,270. The most that can be said on the medical evidence is that this is an exacerbation case in respect of which recovery is likely.

35. Any such award has to be reduced to reflect the overlap with injury to feelings, it is necessary to consider the quantum for personal injury and the injury to feelings award and adjust them both so that there is no overlap between the two, *HM Prison Service v Salmon* [2001] IRLR 425.

Aggravated

36. No award falls under this head in Scotland.

Congenial Employment

37. No comparables are advanced for this alleged head of loss and there appears to be double recovery in claiming this and full loss of earnings. No basis is given for the figure advanced.

Stigma Damages

38. No evidence has been led to support the case that the C is stigmatised on the labour market. The C's case is that she cannot work. This is simply unstainable even if, as Dr Scott opines, the C's condition will improve once the litigation is over.

Interest

39. The principle is accepted but it should not run from 2010 but only from the end of 2011.

Grossing Up

40. This issue cannot be addressed until the primary findings on remedies are made.

Recommendation

41. The proposed letter achieves no purpose which could not have been addressed by the C herself. The remedy should be rejected.

ACAS uplift

42. If the Tribunal makes any uplift should have regard to the amount of the award to be uplifted, per *Chagger v Abbey National plc [2009] EWCA Civ 1202*, *[2010] IRLR 47 (CA).* Thus if the total amount of the award is substantial the uplift, if made, should be a small one.

Expenses

43. The C's application for expenses, which appears only to relate to the issue of disability should be rejected. The R was entitled to test this issue and no costs appear to have been incurred by the C in relation to this issue.

Discussion and Decision

38. The Tribunal commenced its deliberations by reminding itself that in assessing Remedy the onus of proof lies upon the claimant, on the balance of probabilities, to prove her losses.

Unfair Dismissal

39. In terms of the judgment of the 15th of March 2017, the claimant succeeded in her claim of unfair dismissal.

40. In considering the claimant's loss arising from her claim of unfair dismissal, the Tribunal had regard to the terms of s119 and s123 of the Employment Rights Act 1996. S119 of the Employment Rights Act 1996 provides for a basic award to a successful claimant. The parties have agreed in the Joint List of Issues that the

correct sum to be awarded by way of a basic award is the sum of **£2,850**. The Tribunal therefore awards the claimant the sum of **£2,850** basic award.

41. s123 of the Employment Rights Act 1996 provides:

> *123 Compensatory award*
> *(1) …the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal so far as that loss is attributable to action taken by the employer."*

42. In assessing compensation, the Tribunal had regard to not only the terms of s123 of the Employment Rights Act 1996 but also to the principles in the case of **Polkey v AE Dayton Services Ltd 1988 ICR 142, HL.** In applying the words of s123 these principles provide for a reduction in compensation to reflect the likelihood that the employee would still have been dismissed in any event had a proper procedure been followed.

43. In considering the **Polkey** principles, the Tribunal had regard to the authority of **Andrews v Software 2000 Ltd (2007) IRLR 568** and the guidance there given to the application of **Polkey**. In para 54 of the judgment Elias J summarised such guidance thus: *" (1) in assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal. …(4) (The Tribunal) must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.".*

44. The Tribunal reviewed the evidence before it, with the guidance in **Andrews v Software 2000** in mind. To this end, the Tribunal reminded itself again of the terms of paragraph 26 of the judgment of the 15th May 2019 in which the Tribunal found that by mid December 2011 the respondents were unable to progress an attempt to re-integrate the claimant into the workplace due to an "*impasse*" reached as a result of the claimant's failure to respond constructively to a reasonable request from the respondents that she engage with Occupational Health. The Tribunal noted that in this judgment they found that the claimant failed to engage with OH on 3 occasions in the spring of 2010 and observed that this only served to reinforce their Finding in Fact at paragraph 26 of the May 2019 judgment.

45. In deliberating this issue, the Tribunal had regard to the terms of the respondents' Capability Policy and Absence Management Policy **(888,891)**. The Tribunal noted that the latter document provides: *"12 **Long Term Absence** Long term absence from work will normally be considered to be an absence which will last for more than four weeks. **Long Term Absence Management** Where there are indications that the sickness will be prolonged or employees are unable to indicate when they are likely to return, managers, in conjunction with their HR Advisor, will arrange a referral to the OHU.... In the event that employees refuse to attend an appointment, or to participate in a referral to the OHU, then a decision regarding management of the case will be made on the information available."* To this end, the Tribunal observed that by late 2011 the claimant had been absent for almost 2 years; and that in that time she had refused to engage with Occupational Health. The Tribunal considered again their finding that by late 2011 an 'impasse' had been reached and the respondents were unable to progress the re-integration of the claimant to the workplace due to the failure of the claimant to respond to numerous requests to attend Occupational Health.

46. In deliberating this issue, the Tribunal had regard to the evidence of June Bell, that dismissal of academic staff was rare but that in 2011 the respondents had rewritten their policies and procedures which meant that dismissal of academic staff would be more of a possibility going forward. The Tribunal considered that the circumstances

in which the respondents found themselves in late 2011 were exceptional circumstances such as would justify the dismissal of the claimant.

47. The Tribunal also noted that in the course of this Hearing they found that a reasonable time frame for the respondents to have dismissed the claimant with regard to their Disability Policy would have been by late 2012.

48. In considering this issue, the Tribunal also took into account that the claimant's dismissal was found to be unfair on procedural grounds only.

49. After taking into account all of the foregoing, the Tribunal were of the unanimous view that, given the "*impasse*" that had been reached by late 2011, the claimant would have been fairly dismissed by December 2012 under and in terms of the respondents' Capability, Sickness, Disability and Absence Management Policies. In reaching this conclusion the Tribunal were of the view that the respondents could not be expected to maintain an employment relationship with an employee who, over a period of two years, failed to respond constructively to reasonable requests to engage with Occupational Health in an attempt to re-integrate her into the workplace.

50. The claimant had exhausted her right to sick pay by October 2010. As she was on nil pay the respondents had ceased paying pension contributions in accordance with their pension policy. In these circumstances the Tribunal makes no award for the claimant's salary or pension loss.

51. The claimant also claims £750 loss of employment rights. The Tribunal considered that it was correct to make such an award. However, given their conclusion that the claimant would have been fairly dismissed in December 2012, the Tribunal were unanimous in concluding that the appropriate figure for loss of employment rights is £250.

52. The claimant seeks an uplift under the Acas Code of Practice in terms of **s207A** of the **Trade Union and Labour Reform (Consolidation) Act 1992.** After considering their Findings in the Judgment of 15th March 2017, and in particular the respondents'

failure to follow any procedure in the claimant's dismissal and failure to deal with the claimant's grievances, the Tribunal determined that the appropriate increase for the claimant's compensatory award is 25%.

53. In assessing compensation, the Tribunal considered also the issue of contribution under and in terms of s122(2) and s123(4) of the Employment Rights Act 1996, relied upon by the respondents in their submissions. In assessing contribution, the Tribunal considered it apt to reflect on their findings on unfair dismissal, contained within the judgment of the 15th March 2017. It is there stated: *"Unfair dismissal 196 The tribunal considered that the respondents had a potentially fair reason for dismissal which was a belief that the claimant could no longer legally continue to work in the UK. However, the Tribunal considered that dismissal for this reason was not within the band of reasonable responses because of the procedure adopted."*

54. The claimant's dismissal was therefore found to be unfair on procedural grounds. The Tribunal went on to list such grounds. In these circumstances the Tribunal found it impossible to envisage how the claimant contributed to her unfair dismissal. In so finding, the Tribunal determined that the necessary causal connection between the claimant's conduct and her dismissal had not been established.

Holiday Pay

55. In view of the respondents' concession, the Tribunal orders the respondents to make payment to the claimant of the sum of **£8,241.52** gross, which represents 28 days' holiday pay.

Compensation for Discrimination

56. In assessing compensation for discrimination, the Tribunal had regard to the terms of s124(6)in combination with s119(3)(a) of the Equality Act 2010. The effect of these provisions is that the Tribunal must approach damages as Sheriff Court would in a case of reparation; in other words, the Tribunal must ascertain the position that the claimant would have been in had the discrimination not occurred.

57. In calculating loss, the principles in **Polkey v A E Dayton Services Ltd** are applicable in the approach to compensation **(Abbey National plc and another v Chagger 2010 ICR 397 CA)**.

Victimisation-s27 of the Equality Act 2010

58. In assessing compensation for discrimination, the Tribunal had regard to their previous Findings in Fact as well as those contained within this judgment. To this end, in terms of the judgment of the 15th March 2017 the Tribunal found that a failure to communicate two key decisions to the claimant arose because there was an instruction not to contact the claimant which, in turn, came about because the claimant had done a protected act (paragraph 193-194 of the judgment of 15th March 2017). For these reasons the claimant's claim of victimisation succeeded in part.

59. The Tribunal had regard to the fact that the decision not to communicate two key decisions to the claimant caused the claimant distress. However, this decision comprised a discrete passage of events. The Tribunal therefore awards the sum of **£2,800** to the claimant in respect of the victimisation element of her claim, being a sum at the mid point of the lowest band of the guidelines in the case of **Vento v Chief Constable of West Yorkshire Police (2002) EWCA Civ 1871** applicable at the material time, with interest thereon in the sum of **£2072**. Interest is calculated at the rate of 8% from February 2011.

Failure to Make Reasonable Adjustments- s 20 and 21 of the Equality Act 2010

60. In considering the claimant's claim of failure to make reasonable adjustments, the Tribunal had regard to their conclusions in the judgment of the 15th May 2019. There, the Tribunal found that the respondents failed to make reasonable adjustments in that they failed to apply their own procedures and policies in respect of sickness absence and disability; failed to apply their grievance procedure and dignity and respect policy; failed to take steps that they reasonably could to try to ensure that the claimant's immigration status would not be compromised by her absences caused by her disability and if necessary; failed to apply all of their relevant

procedures in connection with her dismissal; and failed to engage with the claimant by informing her of all the options with a view to trying to ensure her work permit status would not be lost. The Tribunal concluded that had the respondents taken these steps then there was a prospect that the substantial disadvantage (being the claimant's inability to return to the School of Engineering causing her future employment to be at risk – para 37 of the judgment of 15th May 2019) would be alleviated.

61. The Tribunal reminded itself again of the terms of paragraph 26 of the same judgment where the Tribunal concluded that by December 2011 the respondents were unable to progress an attempt to re-integrate the claimant into the workplace due to an "*impasse*" which had been reached as a result of the claimant's failure to respond constructively to a reasonable request from the respondents that she engage with Occupational Health.

62. At the Hearing on Remedy the Tribunal accepted the evidence of June Bell to the effect that there were further attempts to engage the claimant with OH in early 2010, but that at that time the claimant failed to attend 3 OH appointments. After considering this evidence in conjunction with their Findings in the Judgment of the 15th May 2019, the Tribunal finds that the adjustments identified would not have alleviated the substantial disadvantage identified, namely the claimant's inability to return to the School of Engineering, so causing her future employment to be at risk. The Tribunal drew this conclusion after reaching the collective decision that the respondents were unable to re-integrate the claimant into the workplace in any capacity due to her repeated refusal to engage with Occupational Health. For these reasons it is the decision of the Tribunal to award a relatively nominal sum in respect of pain and suffering in satisfaction of the claimant's claim of failure to make reasonable adjustments. In all the circumstances the Tribunal awards the claimant the sum of **£2,000**, being a figure in the lowest band of the guidelines in **Vento**. Interest on this sum is awarded in the figure of **£1,360**, calculated at the rate of 8% from December 2011.

Discrimination Arising from Disability- s15 of the Equality Act 2010

63. Insofar as the claimant's claim under s15 of the Equality Act is concerned in their judgment of 15th May 2019 the Tribunal found that the respondents were in breach of s15 by dismissing the claimant, avoiding her dismissal and taking steps to avoid her dismissal (including applying all relevant procedures). The claimant's dismissal was therefore found to be discriminatory.

64. In the light of the evidence accepted by the Tribunal at the Hearing on Remedy, however, it is the decision of the Tribunal that by December 2012 the respondents would have fairly dismissed the claimant due to the "impasse" that had been reached by late 2011.

Pain and Suffering

65. In assessing damages for pain and suffering the Tribunal had regard to their findings and conclusions in this Judgment, both from the evidence taken from the psychiatrists and on the fact that the claimant would have been dismissed fairly in any event by December 2012. The Tribunal also had regard to their findings and conclusions made in their Judgments of 15th March 2017 and 15th May 2019.

66. To this end the Tribunal observed that the claimant continues to suffer from significant psychiatric symptoms. The Tribunal noted that such symptoms were exacerbated shortly before and after the claimant's dismissal when she required periods of hospitalisation.

67. In considering the issue of damages for pain and suffering, the Tribunal had regard to the well known principle that if a number of factors contribute to an injury it is sufficient that the contribution which the factor attributable to the respondents' fault made to the injury was material **(Simmons v British Steel SC (HL) 1994)**. In this respect the Tribunal was of the view that the psychiatric evidence was sufficient to support the conclusion that the respondents' actions made a material contribution to the claimant's symptoms from 2012 onwards. To this end, the Tribunal noted that

they accepted the evidence of Dr Kennedy that between January 2010 and December 2011 there were no external factors contributing to the claimant's low mood and that in the view of Dr Kennedy the claimant could have become fit enough to return to work at any point during this period.

68. In assessing an award for pain and suffering, the Tribunal had no direct evidence before them as to the effect on the claimant of a fair dismissal in December 2012 on the claimant. However, the Tribunal concluded that, given the evidence before them and in particular the body of evidence that the claimant's work was her life then a fair dismissal would, in all likelihood still have had considerable impact on the claimant. In reaching this conclusion the Tribunal had regard to the reference made by Dr Scott to 'psychosocial stressors' being the cause of the claimant's exacerbation of her ill health in 2012. The Tribunal also had regard to the evidence that 'psychosocial stressors' could consist of any stressor that an individual might encounter in life, and observed that a fair dismissal would have also had a considerable effect on the claimant's academic status, her finances and her immigration status as, according to the evidence of Dr Kim Waldron the claimant's work permit was specific to her position as a Professor of Engineering with the respondents.

69. The Tribunal also had regard to the fact that the claimant was absent from her employment with work related stress and depression from January 2010. The claimant's absence at this time was not caused by any act of discrimination on the part of the respondents. The Tribunal found that in 2010-2011 the claimant had opportunity to engage with OH with a view to re-integration into the workplace but chose not to so engage. The Tribunal found that successful re-integration into the workplace would have resulted in a good prognosis for the claimant's recovery.

70. Finally, the Tribunal had regard to their findings on the evidence of Dr Scott that the claimant is not in the 30% of individuals who never recover from depressive illness; and that it is hoped that on termination of these proceedings the claimant will begin a process of recovery.

71. After having regard to the foregoing and to the terms of s124(6) and s 119(3)(a) of the Equality Act 2010, it is the decision of the Tribunal to award the claimant the sum of **£25,000** for pain and suffering being a sum in the mid-range of the top band of the Vento guidelines applicable in 2012. The Tribunal reached the decision to award such compensation after having regard to the evidence of the claimant's ongoing symptoms together with their observations on the effect of a fair dismissal on the claimant, the evidence of the claimant's pre-existing stress and depression and her failure to engage with OH in 2010-2011, and the evidence that was available to them on the prognosis for the claimant's recovery. Interest on this figure amounts to **£16,200**, calculated at the rate of 8% from April 2012.

Psychiatric Injury

72. The Tribunal considered carefully the issue of the making of an award for the claimant's claim in respect of psychiatric injury. The Tribunal declined to make this award as they were of the view that the cause of the claimant's significant psychiatric symptoms from April 2012 was the same as the cause of her claim for pain and suffering for discrimination arising from disability under s15 of the Equality Act 2010. To this end the Tribunal observed that that cause was the fact of and manner of the claimant's dismissal in 2012. Equally, the claimant's claim for an award for psychiatric injury is based on the evidence heard from Dr Scott and Dr Kennedy on the effect on the claimant's mental health of her dismissal in 2012. The Tribunal noted that the evidence of the effect of the dismissal on the claimant's mental health and the evidence of her psychiatric symptoms from 2012 was taken into account by them in formulating an award to the claimant for pain and suffering under s15 of the Equality Act 2010. Likewise, the factors that might discount such an award for psychiatric injury (such as the effect of a fair dismissal on the claimant, the claimant's pre-existing stress and depression and her failure to engage with OH and the claimant's prognosis for the future) were all taken into account by the Tribunal in assessing the award made to the claimant in respect of pain and suffering for her claim under s15 of the Equality Act 2010.

73. In these circumstances the Tribunal concluded that to make an award for psychiatric injury would result in the claimant benefitting by 'double recovery' in these proceedings.

Past and Future Loss

74. In ascertaining past and future loss, the Tribunal had regard to their conclusion that the claimant would have been dismissed fairly by December 2012 having due regard to the respondents' relevant policies.

75. On the evidence of Dr Scott, the Tribunal did not find that the actions of the respondents have caused or materially contributed to the claimant's ongoing incapacity to work.

76. In the period up to 12th April 2012 the claimant was not in receipt of sick pay from the respondents as she had exhausted her entitlement to the same. The Tribunal therefore finds that the claimant has sustained no wage loss by the discriminatory actings of the respondents and, as she was on nil pay, has sustained no pension loss.

77. The Tribunal finds, however, that the claimant is entitled to a sum equivalent to eight month's free NHS benefits. Interest is payable on this sum. No evidence was presented to the Tribunal to enable them to quantify this sum.

78. Insofar as the loss of the claimant's immigration status is concerned, the Tribunal noted that the claimant's work visa was unique to her job and, therefore, she would have suffered a loss of immigration status in December 2012 even had her work visa been renewed in April 2012.

79. The Tribunal observed that the claimant's position is that the loss of her immigration status prevented her from applying for other jobs in the UK. However, the Tribunal were hampered in ascertaining this loss due to lack of evidence. Aside from the claimant's own evidence in paragraph 41 of her witness statement (regarding an

email from an executive search firm about a vacancy at UCL) there is no evidence of alternative employment in the UK which the claimant would have been likely to secure had the respondents not allowed her work visa to lapse. There is no evidence that the claimant would have remained in the UK in circumstances where she had no family or ties to the UK.

80. The Tribunal makes no award in respect of loss of external earnings such as consultancy fees. To this end the Tribunal observes that the claimant ceased all consultancy work prior to absenting herself on sick leave in January 2010. The Tribunal concluded that there is no clear evidence linking the acts of discrimination for which the respondents are liable in these proceedings (commencing with the acts of victimisation in February 2011) to the cessation of consultancy and other external work undertaken by the claimant.

81. The Tribunal makes no award in respect of the bank charges incurred by the claimant or the costs of the claimant's bankruptcy proceedings as the Tribunal concluded that the claimant would have been fairly dismissed by December 2012 under the respondents' relevant policies. In any event the Tribunal noted that the cessation of salary and pension payments to the claimant in October 2010 was not found to be a discriminatory act on the part of the respondents.

82. Likewise, the tribunal makes no award of benefits the claimant might have received had her work visa not been allowed to lapse as the Tribunal concluded that the claimant would have been fairly dismissed by December 2012.

83. The Tribunal, having accepted the evidence of June Bell, makes no award to the claimant in respect of loss of rights to a sabbatical.

84. The Tribunal observes that aggravated damages are not recognised as a separate head of damages under Scots Law **(D Watt (Shetland) Ltd v Reid EAT 0424/01)**.

85. The Tribunal makes no award to the claimant in respect of loss of congenial employment and stigma damages. In reaching this decision the Tribunal had regard to the fact that the evidence is that in her career the claimant has not worked solely

in academia. Insofar as stigma damages are concerned there is no evidence on the effect of these proceedings on the claimant's reputation. The Tribunal observed further that there was evidence to the effect that the claimant had litigated in both Australia and Canada prior to coming to the UK; and that these litigations had not prevented her securing her position with the respondents.

Recommendation

86. The Tribunal observes that it has the power to make a recommendation under **s124(2)(c)** of the **Equality Act 2010**. In view of the terms of **s124(3)**, the Tribunal declines to make such an award as the claimant is no longer in the employment of the respondents.

87. Further and in any event, the Tribunal declines to exercise its powers to make such a recommendation in light of the conclusions reached in this judgment and in particular the Tribunal's conclusions that the claimant would have been fairly dismissed eight months after her actual dismissal, and that a fair dismissal would have had considerable impact on her immigration status.

Expenses

88. The Tribunal notes the parties' position on expenses (including the claimant's additional submissions of 22nd May 2020). After deliberating this issue, the Tribunal reserves the issue of expenses as they consider it would be beneficial to have further submissions on the same in view of the Judgment in this case.

Summary

89. The Tribunal awards the claimant the sum of **£2,850** basic award in respect of her claim of unfair dismissal. The Tribunal awards the claimant the sum of **£312.50** for loss of employment rights which comprises an award of £250 with an 25% uplift under **TULR(C)(A) 1992**. The Tribunal awards the claimant the sum of **£8,241.52**

gross in respect of her claim of holiday pay. The Tribunal awards the claimant the sum of **£2,000** with interest of **£1,360** in respect of her claim of failure to make reasonable adjustments. The Tribunal awards the claimant the sum of **£2,800** in respect of her claim of victimisation with interest of **£2,072**. The Tribunal awards the claimant the sum of **£25,000** in respect of pain and suffering with interest of **£16,200** together with a sum equivalent to 8 months' NHS benefits plus interest in respect of her claim for discrimination arising from disability. The Tribunal makes no award to the claimant in respect of her claim for psychiatric injury.

Future Procedure

90. This case will be set down for a PH on case management/future procedure in respect of quantum of this case including the issue of the grossing up of the award made to the claimant. At the PH there will also be a discussion on future procedure as regards the expenses of this action.

Employment Judge: **Jane Porter**

Date of Judgment: **1 June 2020**

Entered in register and copied to parties: **1 June 2020**