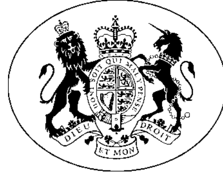

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr L Portelli	**v**	**London Legal + Imaging Solutions Limited**

Heard at: London Central
On:

Before: Employment Judge Hodgson
Ms L Moreton
Ms S Samek

Representation

For the Claimant: in person
For the Respondent: Mr D Barnett, counsel

JUDGMENT

The respondent shall pay to the claimant the sums below.

1. Unfair dismissal[1]
   a. Basic award (agreed) - £8,636.00
   b. Compensatory award - £1,246.25

2. Discrimination
   a. Injury to feelings £22,500
   b. General damages - personal injury £5,000
   c. Losses £16,424.69[2]

[1] Recoupment does not apply.
[2] This includes a grossed-up element for tax. If the sum is insufficient the claimant should apply for a reconsideration and time for doing so is extended to 1 September 2022.

d. Interest - £6,994.00

3. Failure to pay wages £113.30[3]

4. Summary - grand total £60,914.24

REASONS

Introduction

5. By two claims, the first presented on 2 April 2018 and the second presented on 26 August 2018, the claimant alleged failure to pay wages, unfair dismissal, and age discrimination. The liability hearing took place in May 2019. The claimant was successful in his claims of unfair dismissal, direct age discrimination, and unlawful deduction of wages.

6. The claimant sought reinstatement or re-engagement and the first remedy hearing took place on 6 and 7 January 2020. The tribunal refused to order reinstatement or re-engagement. Written reasons were later requested.

7. This second remedy hearing was to consider compensation. The remedy hearing was initially listed to commence on 2 June 2020, but could not proceed on that date, and has been delayed. Case management instructions were given. The respondent proposed joint instruction of a medical expert. The claimant would not agree to this. There was no prospect of the parties agreeing a joint letter of instruction. The claimant consented to being examined by the respondent's medical expert. The background and reasons are set out in the previous case management record.

The issues

8. At the commencement of the hearing, we explored the matters to be resolved at this remedy hearing.

9. The claimant seeks recovery of the following:

   a. the basic award (£8,636.00);

   b. full payment of the 5.5 hours previously ordered as unlawful deduction from wages;

[3] Wages are always awarded gross and are subject to tax. They do not fall to be grossed up.

c. past loss of earnings including loss of overtime and pay rise;

d. loss of pension contributions;

e. future loss of earnings and pension contributions;

f. damages for injury to feelings;

g. general damages for personal injury; and

h. aggravated damages

10. In addition, he seeks the following specific sums:

a. the cost of purchasing an equivalent mobile telephone (£329.00);

b. replacement of the mobile telephone tariff (£25.00 per month);

c. £10.57 from his wages in January 2018;

d. the Christmas bonus of £250;

e. travel costs for medical appointments £192 from December 2017 to March 23

f. travel costs for the citizens advice bureau from October 2017 to March 2020;

g. travel costs and benefits assessments in 2018 to March 2020 at £60;

h. printing costs of £100;

i. costs of attending the preliminary hearings (£60);

j. cost of attending the tribunal hearing (£80);

k. an uplift of 25% failure to follow the ACAS code of practice; and

l. Interest.

11. The respondent relied on a counter schedule and a skeleton argument. Concessions were made in the skeleton argument that did not appear in the counter schedule. We have relied on the skeleton argument.

12. The counter schedule continues to allege that the claimant contributed to his own dismissal.[4] The respondent accepts the claimant suffered injury to feelings but disputes personal injury. The respondent concedes that personal injury may be found from the evidence contained in the claimant's GP records, despite the lack of expert medical evidence.

13. The respondent alleges the claimant has failed to mitigate his loss by obtaining employment. The respondent alleges the claimant's employment would have ended and relies on two arguments. The first is that the relationship had broken down, such that there was a real chance dismissal would have occurred in any event without unfairness. Second, it is alleged the claimant would have been fairly dismissed in any event, within a short period because of breaches of confidentiality which amounted to gross misconduct.

14. The respondent does not concede the claimant would have received any pay rise.[5]

15. The parties have been unable to agree what sum is payable for the 5.5 hours deduction from wages.

16. The respondent disputes the claim for costs of attending the CAB in the preliminary hearing on the basis it is a claim for costs and not compensation.

17. There is a claim for uplift for breach of the ACAS code of practice 2015. We explored in submissions which paragraphs of the code the claimant relied on. We agreed that the claimant alleged breaches of paragraph 5, 9, 26 and 33.[6]

18. The following concessions were made:

    a. the basic award is agreed at £8,636 (based on maximum week's pay £508);
    b. loss of statutory rights is agreed at £600;
    c. there would be an annual Christmas bonus of £50;
    d. pension contributions would have been 2% until April 2019 and thereafter 3%;
    e. travel costs, medical appointments and benefits assessments are agreed at £192 and £60 respectively, but the respondent alleges

[4] It is difficult to understand why the respondent continues to assert this. The allegations of contributory fault were considered at the first remedy hearing and they were rejected.
[5] There is a conflict between the respondent's counter schedule (which records salary as £37,550) and the skeleton argument (which records salary as £38,250).
[6] At the hearing, during submissions, we referred to paragraph 26, but the claimant did not identify the specific paragraphs. The claimant's allegation is that the appeal was not dealt with adequately. This falls more naturally as a breach of paragraph 27. We made clear findings about the appeal in the liability hearing about the inadequacy and lack of impartiality. This falls naturally under paragraph 27.

they relate to the pre-dismissal condition and fall away if the Polkey argument does succeeds; and

f. printing costs in the sum of £100

19. The respondent disputes the claim of unlawful deduction from wages. The claimant seeks £1,575.70 being the difference between SSP and full salary from January 2018 onwards. It is the respondent's case this was not claimed as a deduction from wages and does not flow from the dismissal, and therefore is not a claim before the tribunal.

The evidence

20. At this second remedy hearing, the claimant relied on evidence from two witnesses who are directors of the company, Mr Raymond Lawson, and Mr Mark Sprules. Neither had given evidence previously.

21. The claimant gave oral evidence. The claimant's wife, Mrs Katie Portelli, also filed a statement, which was treated as sworn evidence. The respondent elected not to cross-examine her.

22. We received further documents, albeit many have been disclosed previously.

23. The claimant relied on a schedule of loss. The respondent relied on a counter schedule. Counsel for the respondent, Mr Barnett, served a skeleton argument.

24. Following the hearing, we received written copy of the claimant's submissions, as presented to us orally. We made enquiries as to the treatment of benefits, and further submissions were filed by the respondent at our request.

The relevant facts.

25. In our conclusions, we will rely on the conclusions and findings of fact from our previous judgments. We will refer to those, as necessary. We will now consider further relevant findings of fact.

Medical evidence

26. As noted above, the claimant cooperated in obtaining a report from a psychiatrist, Dr Lanka. That was not a joint report, and it has been withheld from the claimant. The respondent has elected not to rely on the report obtained and asserts professional privilege. We have confirmed that non-disclosure is the respondent's right, and it cannot give rise to any adverse inferences. Further, it is not possible to infer any finding of fact, or to infer the nature of any opinion held by an expert.

27. The claimant tells us that Dr Lanka, during his examination of the claimant, stated the claimant suffered from depression. It is not in dispute that he has developed anxiety and depression.

28. The medical evidence we have is in the form of the claimant's GP notes, and it is conceded that they demonstrate that he has suffered from anxiety and depression.

29. The claimant registered with his current GP practice on 11 January 2018. Prior to then he had not been registered with a GP practice since 8 August 2005.

30. We find that the claimant's mental health became increasingly compromised over a period of months leading up to December 2017. Difficulties were apparent in May 2017, when the respondent first introduced conditions relating to dress code. The working relationship then became strained. We have previously explored the history.

31. On 22 December 2017, the claimant presented a written grievance. He alleged workplace bullying. The grievance referred to a number of matters starting with the request from Mr Wilson that the claimant wear dark jeans and polo shirt. The claimant stated "I disagree with the company repeatedly changing my work clothes requirements…" He took issue with Mr Wilson accusing him of negligence in an email of 14 December 2017. He alleged his pay rise had been cut in half. He objected to not being involved in discussions about the staffs’ summer and Christmas bonus. He objected to his emails not being answered and stated it was "designed to cause me maximum stress." He objected to being sent on an external management training course. He objected to a letter of 16 November 2017 alleging non-compliance. He made allegations about the directors ignoring him. He objected to not being permitted to organise management meetings. He objected to the delay in dealing with his request to clarify overtime. He referred to his role in the company being deleted. He stated "Another constant source of my frustration is that fact that Graham Wilson keeps doing my job behind my back." He gave what he considered to be examples. He alleged that his functions for organisation had been removed. He asked for the matter to be resolved amicably. This is a four-page grievance letter. It demonstrates significant unhappiness in relation to both specific aspects of his treatment and the way in which he considered himself to be marginalised.

32. This grievance does reveal a deterioration in the relationship between the parties. The claimant was becoming increasingly distressed. His evidence is that his wife had become increasingly concerned. She told him he must do something about it, which we take to be his stress. Matters came to a head on 28 December 2017 when the claimant attended the accident and emergency department at 10:33. His presenting complaint was "stressed/anxiety/not sleeping." He was not self-harming. He had no suicidal thoughts. He was referred to his GP and guidance was given. He was discharged at 13:37. This was the initial culmination

of a deteriorating situation. The claimant never returned to work thereafter. The specific trigger for his attending hospital is described by his wife in her statement.

> **The day before pay day the Respondents informed my husband, Mr Lea Portelli, that they had deducted 5.5 hours overtime pay from his wages, for no apparent reason. We were left short of money over the Christmas period and we had to start borrowing money. This was after months of discriminatory treatment, accusations and stress caused by the Respondents. As we hadn't received an explanation, we were very concerned that wage deductions would continue to be made, and we would not be able to cover our future bills. This caused financial worries and extreme stress, which made my husband so ill he had to visit a doctor for the first time in 12 years. This was the onset of the debilitating depression and insomnia my husband suffers with. I have never known him to be unwell previously. It was an extremely distressing and upsetting time for the whole family at Christmas.**

33. The reference to the doctor refers to the claimant's attendance at the hospital. Thereafter, the claimant registered with his GP.

34. The claimant had a telephone consultation on 12 January 2018 in which it was said he was feeling better, and the diagnosis was "anxiety, work-related stress, duration 3 January 2018 to 12 January 2018." It was said he was not keen to continue medication.

35. He was next seen on 6 February 2018 presenting with chest infection and blurred vision. Pneumonia was diagnosed; there was no record of ongoing anxiety or depression.

36. Thereafter, he attended his GP on 17 July 2018. (The claimant was dismissed on 4 May 2018.) The GP records that the claimant stated he had been wrongfully dismissed and was tearful and unable to sleep but was planning to challenge the decision "in court." He was prescribed mirtazapine for sleep and advised to "contact IAPT for counselling." The notes record the claimant "needs sicknote for work-related stress."

37. He attended a telephone consultation on 24 July 2018, the day before the first tribunal hearing. It is said that he was "tossing and turning, not sleeping discussed short-term sleeping tablets to help bridge."

38. The entry of 7 August 2018 records the zopiclone gave him nightmares and the claimant was still struggling to sleep. He is described as "worried and stressed, low mood given finances and worries about family post job termination. Knows that this process is causing additional family burden but knows wrongful dismissal which is why pursuing." The notes state "Letter written to support medical impact of his termination of job role." The notes record he continues to struggle with mood but is not suicidal.

39. The letter of 7 August 2018 records the history of consultation and states "he continued to feel very stressed and anxious at work throughout this time until he came to see me on 17/7/18 having had his job terminated

with wrongful dismissal as of 4/5/18." He is described as struggling with his mood since dismissal finding "sleeping, daily functioning and depressive symptoms very hard to cope with." The letter refers to mirtazapine to help him sleep and a trial of promethazine. It says he has been very low "especially immediately following the termination."

40. He saw his doctor again on 10 September 2018. A MED3 was issued to 14 October 2018. It is said there was still ongoing stress and there is reference to being in court in three weeks. It records he “is not sleeping well.” There was no indication of self-harm or suicidal thoughts.

41. On 25 September 2018, the claimant agreed to stop mirtazapine and to start a trial of citalopram. The notes record the "main issue anxiety – likely situational with existential angst." He was given a mental health emergency number and talking therapy details. The review was set for two weeks.

42. On 26 October 2018, the notes record the claimant had been told by the assessment centre that he was fit for work and temporary work was discussed. The doctor stated, "discussed benefits of temporary contract work in interim for financial reasons, confidence and mood." The claimant referred to having lots of paperwork for the tribunal proceedings. There was discussion about increasing the dosage of citalopram.

43. On 30 November 2018, the claimant requested a further MED3. It was recorded that he continued with stress/anxiety.

44. There then continued a pattern of consultation. On 25 January 2019, it is said that he has been accepted by the psychological talking therapy service. On 22 March 2019, he was seen in the mental health clinic. It is the claimant's position that he had one consultation concerning CBT on 7 March 2019, which he found unhelpful. The outcome, communicated by letter of 22 March 2019, was the claimant may benefit from contacting his local counselling centre. The claimant has had no specific talking therapy.

45. On 6 June 2019, he reported to his GP that the tribunal hearing had gone well. He was not suicidal. The doctor continued to issue MED3 certificates with a diagnosis of "anxiety/depression." The consultations then continued to report the claimant communicating that he was anxious but not suicidal.

46. We do not have the notes beyond 11 September 2019. It is the claimant's position that the respondent has not requested them, and he has not supplied them.

47. In his statement, the claimant says he started self-harming. This takes the form of picking at cuts, sores, or scabs in various parts of his body including his wrist, forehead, and inner thigh. This leads to scarring. The GP has given no specific treatment other than the prescription of cortisone

cream. He says the behaviour developed soon after the dismissal. He did not report it to his GP at that time.

48. In his remedy statement, the claimant describes his perception of this period as follows:

> **(d) Once the two Tribunal cases began, it totally consumed me. During the phase between starting the claims and the outcome of the final hearing, it was all I could think about. Whatever I was doing, my mind was only on organising my case and preparing for the hearing. I knew I had been totally wronged and the desire to fight my case and get justice and my job back took over my life.**
>
> **(e) I spent an average of 12-16 hours a day preparing my case. When I did sleep, I would wake up and my mind was instantly on fighting for justice. My head was often spinning and felt like it was going to explode from the stress. I would find myself lying in bed at night frantically researching tribunals and employment law. I simply could not switch off from the case at any given time.**

Mitigation

49. The respondent has provided evidence that there were numerous jobs available for which the claimant could have applied. Those jobs are in the printing industry. We have had no specific evidence on the effect of the pandemic. However, prior to that, there were jobs available, including jobs managing print rooms which paid up to £42,000. There are also assistant jobs which paid more in the region of £25,000. We do not need to explore the detail of this. We are satisfied that there were jobs available for which the claimant could have applied.

50. The claimant has contacts and various friends who work in the industry. He accepts that he could approach those individuals for work; he believes, subject to his health improving, that he would have a good prospect of securing work through his contacts, albeit he is pessimistic about the stigma caused by this case adversely affecting his chances.

51. The claimant accepts that he has made no job application at any time since his dismissal. He has not approached any contact or friend seeking employment.

52. We are satisfied that the claimant understands that there is an obligation to mitigate his loss; this has been raised with him by the respondent in correspondence. It is the claimant's case to us that he claimed benefits and receipt of benefits is mitigation of his loss.

53. As to his ability to work, the evidence is sparse. His GP encouraged him to seek work during the consultation on 26 October 2018. The assessment centre had deemed him fit for work. (We treat the view of the assessment centre with some caution.) It is clear that the claimant’s focus was on his paperwork for the tribunal proceedings and there is no

indication that he was not capable of performing work in preparation for the hearing.

54. At the first remedy hearing in January 2020, the claimant indicated that he believed he could return to work. He said he would be able to return to work within six months, albeit initially on a phased basis. He believed he would, thereafter, be able to return full-time.

55. We have no expert evidence which assists us to determine whether the claimant was capable of work at any time, and if not currently capable, when he will be able to return to work. It remains the claimant's position that he hopes, and believes, that his depression and anxiety will improve such that he will be able to return to work.

<u>Polkey arguments</u>

56. It is agreed the claimant signed a confidentiality agreement which was referred to in his statement of terms of employment. The confidentiality agreement does not define confidential information. The opening paragraph states –

> **I understand that I must not use, in a manner prejudicial to London Legal Response Ltd (LLR), confidential information to which I have access to the performance of my duties or due to my position in company.**

57. It goes on to say

> **I further acknowledge that client papers and matter that is entrusted to the company must be handled with discretion. Copies may only be taken if it is necessary to carry out work on these copies must be destroyed by shredding at the earliest opportunity.**

58. There is reference to other matters including trade secrets.

59. The policy does not define any emails which refer to the fact of a client relationship as confidential. Certain information, including the information regarding business affairs of the company, is referred to as a trade secret.

60. In our liability judgment, we noted that breach of confidentiality had initially been included as an allegation of misconduct. That allegation was abandoned.[7] The evidence of Mr Wilson was that there was no investigation into the claimant's actions. It is common ground that, prior to the dismissal, the claimant referred to various emails which were in his possession and had been printed by him. On 14 March 2018, the claimant disclosed approximately 118 pages. One email identified several failed jobs. They gave no information about client affairs, other than confirming the fact that work had been undertaken for clients. Subsequently, following the dismissal, the claimant did refer to having more documentation.

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[7] See, for example, paras. 7.13, 7.31, 7.52, and 7.76 of the liability reasons.

61. We reviewed the documents Mr Lawson referred to by as being confidential. We do not need to review all the letters referred to. Mr Lawson refers to an email at page 687. This is an email from Mr Wilson to the claimant. The email accuses the claimant of failing in his duties. It asserts that the proposed new checking form may cause a minor infraction at the ISO audit. This is a document which Mr Lawson relies on as being confidential. It is difficult to see the basis on which the claimant's reliance on it could be a breach of the confidentiality agreement. It was an email sent to the claimant. In no sense whatsoever was the claimant using it in a way which was prejudicial to the company's interest.

62. Mr Lawson's statement asserts that the claimant would have been subject to further disciplinary proceedings for disclosing confidential information which would have led to his dismissal. Mr Sprules simply supports Mr Lawson. They both assert that any future hypothetical dismissal would not have been an act of age discrimination. In their evidence both confirmed that they did not accept that the original dismissal was an act of age discrimination. Neither were able to give any explanation as to how any further dismissal would avoid the taint of discrimination.

63. To the extent that the witnesses suggested there was some form of investigation following the original alleged disclosure of confidential information, we reject that evidence. The fresh evidence is self-serving and contradicts Mr Wilson's evidence given in the liability hearing. It is not supported by any detail of any conversation with any member of staff. There is no single email or document to substantiate it.

64. We do not accept there was a process which in any manner could be meaningfully said to be an investigation into the claimant's alleged breach of confidentiality or breaches of confidentiality generally. The reality is that the potential breach of confidentiality was apparent at the time of dismissal. It was raised as a possible allegation of misconduct and abandoned. There is no reasonable or rational ground for supposing that it would have been pursued further in any manner independent of the actual processes which led to the claimant's dismissal. That process was, as we have found, tainted by discrimination.

65. We are invited to assume that we should assess the possibility of the claimant being dismissed for a breach of confidentiality on the basis of a new or hypothetical tribunal deciding these claims absent the original dismissal.

66. This type of Polkey argument frequently arises in two circumstances. The first is when there has been a procedural failure and the tribunal is asked to form a view about what would have happened had a fair procedure been followed. That may lead to a finding that dismissal was certain by a particular time, or there may be a percentage chance. The second situation concerns conduct subsequently discovered which was not taken into account at the dismissal.

67. The respondent's argument concerning potential hypothetical dismissal for breach of confidentiality fits into neither scenario. The alleged breach of confidentiality was known at the time of dismissal, but was not a matter relied on, and so questions about breach of procedure do not arise. The essence of the conduct, namely printing documents alleged to be confidential, was known prior to the dismissal. It is no answer to say that further documents became known thereafter. There is nothing in those documents which is materially different to those already disclosed.

68. It seems to be the respondent's case that, in some manner, a hypothetical tribunal would be expected to ignore the totality of the evidence which led to the original conclusion that the original decision was age discrimination. As we have noted, there were reasons for turning the burden, including the fact that the respondent's conduct was unreasonable and there was no explanation for it. The respondent's approach to this hypothetical dismissal fails to consider the basis on which the actual dismissal would not have taken place or why the hypothetical tribunal would ignore the totality of the interaction between the parties. We must assume that the respondent's actual conduct would be considered, and that the respondent would produce no explanation for it, as no adequate explanation has been given.

69. Any hypothetical tribunal would have to note that there had been a previous set of disciplinary proceedings (presumably, hypothetically, not leading to dismissal) which were entirely unreasonable and without adequate explanation. Further, there is no argument advanced as to why all of the facts we relied on when shifting the burden would not have been before the hypothetical tribunal. In our view it is inevitable that the burden would shift. Moreover, we are not satisfied that the respondent would be able to establish any form of explanation.

70. The confidentiality agreement has been interpreted to include any email which may refer to the fact of a client relationship should be treated as confidential. The confidentiality agreement does not go that far. Dismissal on that basis, particularly given the fact that any initial reliance on breach confidentiality had been abandoned, would inevitably lead to a finding of unreasonableness. We do not accept the respondent has pointed to any reason which could explain the inevitable unreasonableness. It follows that the failure to explain unreasonable conduct would be a matter form which a contravention could be found. The burden would shift. A finding of failure of explanation would be inevitable. The hypothetical tribunal would find the hypothetical dismissal tainted with discrimination.

<u>Earnings</u>

71. Mr Lawson, supported by Mr Sprules, states the claimant was at the top of his pay band and at most, could have expected inflation increases. We do not accept his evidence. The respondent has no specific pay bands. No

pay bands are published. The claimant had enjoyed previous pay rises when his pay increased significantly. The evidence the respondent had produced reduced in relation to the market would indicate similar posts may attract a salary up to £42,000. The respondent has not disclosed details of the pay given to any other manager. On the balance of probability, Mr Lawson's evidence is influenced more by the fact of this litigation than a realistic assessment of what pay increases may been given to an employee performing his duties normally.

72. We find the claimant had a reasonable expectation of a pay increase of approximately 3 - 5% per year. This is consistent with the proposed rate of £38,250 for the first year's loss. We will apply 4% after that for each financial year.

Aggravated damages

73. We will deal with the arguments and evidence in relation to other losses, including aggravated damages later in the reasons.

The law

74. The general common law principles are well known. In **Ministry of Defence v Cannock and ors** 1994 ICR 918, the EAT said the aims is that "as best as money can do it, the applicant must be put into the position she [or he] would have been in but for the unlawful conduct."

75. Under the Equality Act 2010 compensation is awarded pursuant to section124(6) in combination with section 119(2)(a) and (3)(a). The tribunal must ascertain the position that the claimant would have been in had the discrimination not occurred.

76. He or she will, however, be able to claim for any injury to feelings caused by the treatment and, in exceptional cases where psychiatric illness results, damages for personal injury.

77. Causation requires tribunals to form a view about what would have happened, despite many unpredictable factors. The question of what loss is caused by a particular act of discrimination is related to the question, in a discriminatory dismissal case, of whether the employee could or would have been fairly dismissed were it not for the discrimination.

78. Tribunals may need to consider whether, were it not for the discriminatory dismissal, there could have been a non-discriminatory dismissal at the same time, or whether there would have been a non-discriminatory dismissal at some definable point in the future. The chance that the claimant could or would have been dismissed in any event, with no discrimination, can be recognised by making a reduction in compensation for future loss. This may take the form of a percentage reduction to reflect

a chance. It may also be possible to say that employment would have come to an end in any event by a certain point.

79. This principle is well established in the context of unfair dismissal. In **Polkey v AE Dayton Services Ltd** 1988 ICR 142, HL, the House of Lords established that where a dismissal was procedurally unfair, but the employer could show that there was a significant chance that, had it followed a fair procedure, it would have dismissed anyway, compensation could be reduced.

80. Respondents may invoke **Polkey** to argue for a reduction in compensation on the basis that a fair dismissal was likely at some point in the future.

81. **O'Donoghue v Redcar and Cleveland Borough Council** 2001 IRLR 615, CA, is supportive of the proposition that tribunals may use **Polkey**-type reasoning to limit the period of loss.

82. In **Abbey National plc and anor v Chagger** 2010 ICR 397 CA. Lord Justice Elias stated that the possibility of dismissal of the claimant had to be factored into the measure of loss.

83. An employment tribunal might also consider the chance of the claimant remaining in employment in any event.

84. It may also be necessary to consider if the chain of causation has been broken. However, an employer cannot rely on its own wrongful act to limit the damages that would otherwise flow from its earlier act of discrimination. This point is underpinned by the decision in **Prison Service v Beart** (No.2) 2005 ICR 1206, CA. The Court of Appeal upheld the decisions of the employment tribunal and the EAT that the unlawful dismissal did not break the chain of causation.

85. The Court of Appeal in **Sheriff v Klyne Tugs (Lowestoft) Ltd** 1999 ICR 1170, confirmed the tribunal can award compensation for personal injury. There should be no double recovery and tribunals must be clear about what is compensated as injury to feelings and what amounts to personal injury.

86. Compensation (e.g., for loss of earnings) may overlap in the claims of unfair and discrimination. Double recovery must be avoided. Section 126 Employment Rights Act 1996 prevents double recovery, but does not specify when the award should be made as compensation for unfair dismissal or discrimination. In these circumstances, the EAT has suggested that tribunals should award compensation under the discrimination legislation, thereby avoiding the cap on the unfair dismissal compensatory award (**D'Souza v London Borough of Lambeth** 1997 IRLR 677, EAT).

87. A tribunal may find it more appropriate to award damages under the unfair dismissal provisions than for discrimination. It may be appropriate to allow recoupment, but this may not be appropriate if the compensation exceeds the statutory cap and the benefits are unclear (see **Cooper and anor v Smith** EAT 0452/03).

88. Whilst interest is available if the award is made under the Equality Act, the need to deduct benefits, and thereby limit compensation, may reduce any award under section 207A Trade Union and Labour Relations Consolidation Act 1992. Further, there may be uncertainty about what benefits should be deducted. If a claimant wishes to argue that not all benefits should be deducted, it will normally be for the claimant to demonstrate how the benefits are made up and to justify the objection to any deduction. Where a claimant has failed to address this, and wishes to do so, the claimant may possibly consider applying for reconsideration, but such an application would not be granted automatically.

89. In unfair dismissal the Employment Protection (Recoupment of Benefits) Regulations 1996 SI 1996/2349 ('the Recoupment Regulations') apply. Universal credit will not be taken into account by the employment tribunal in calculating the claimant's net loss. The Secretary of State may, under the Regulations, recoup the value of those payments from the employer. The Regulations do not apply to discrimination.

90. In **Hodgson v Trapp** [1989] AC 807, the House of Lords stressed that the aim of damages is to compensate, and the courts must be wary of exceptions which allow double recovery. Lord Bridge stated, at para 819E:

> **If, in consequence of the injuries sustained, the plaintiff has enjoyed receipts to which he would not otherwise have been entitled, prima facie, those receipts are to be set against the aggregate of the plaintiff's losses and expenses in arriving at the measure of his damages.**

91. To avoid double recovery, the value of the benefits should be deducted when assessing the claimant's compensation.

92. For the purpose of assessing lost earnings, elements of social security benefits that a claimant receives in respect of children and/or household are not distinguished from benefits paid in respect of the claimant him or herself. (See **Chief Constable of West Yorkshire Police v Vento** (No.2) 2002 IRLR 177, EAT - not appealed on this point).

93. There may be the possibility of claw back following an award. However, when the argument has not been raised, there is a limit as to what the tribunal can or should do. If there is a clear injustice, reconsideration may be considered.

94. We have considered the Social Security (Recovery of Benefits) Act 1997. In some civil claims, the Compensation Recovery Unit will issue a recoupment certificate against compensation for past loss of earnings in much the same way as is done under the 1996 Regulations, and a

tortfeasor has to pay the prescribed element back to the DWP rather than to the claimant.

95. Section 1 of the 1997 act provides –

> **Cases in which this Act applies.**
> **(1) This Act applies in cases where—**
> **(a) a person makes a payment (whether on his own behalf or not) to or in respect of any other person in consequence of any accident, injury or disease suffered by the other…**

96. We find, but not without some hesitation, the act does not apply. The statutory tort of discrimination is not accident, injury, or disease. It may be argued that damages for personal injury is an injury as contemplated by the act. We do not believe that application of the 1997 act can depend on whether a claim is made for damages for personal injury consequent to a statutory tort, when there is no requirement to make such a claim.

97. It follows we will deduct universal credit against loss of earnings.

98. It is well established that there can be an award for aggravated damages. Such cases may include the distress caused by an act of discrimination made worse by (a) being done in an exceptionally upsetting way, e.g., In a high-handed, malicious, insulting or oppressive way, (b) by motive: conduct based on prejudice, animosity, spite or vindictiveness is likely to cause more distress provided the claimant is aware of the motive; (c) by subsequent conduct: e.g., where a case is conducted at a trial in an unnecessarily offensive manner, or a serious complaint is not taken seriously, or there has been a failure to apologise.

99. A tribunal should consider whether, objectively viewed, the conduct is capable of having aggravated the sense of injustice and having injured the complainant's feelings further.

100. Whilst aggravated damages can be awarded. There should be no double recovery, and it may be appropriate to reflect behaviour alleged to justify an award for aggravated damages in the award for injury to feelings.

101. The leading case on compensation for injured feelings by reason of unlawful discrimination is **Vento -v- West Yorkshire Police** [2003] ICR 318.

102. The first addendum to the presidential guidance on employment tribunal awards, issued on 23 March 2018 states at para. 2 states:

> **In respect of claims presented on or after 6 April 2018, the Vento bands shall be as follows: a lower band of £900 to £8,600 (less serious cases); a middle band of £8,600 to £25,700 (cases that do not merit an award in the upper band); and an upper band of £25,700 to £42,900 (the most serious cases), with the most exceptional cases capable of exceeding £42,900.**

103. We have regard to the Judicial College Guidelines for Psychiatric and Psychological Injury. We note the following:

> **(b) Moderately sever -£16,270 to £45,780**
>
> **In these cases there will be significant problems associated with factors (i)† to (iv) above but the prognosis will be much more optimistic than in (a)†above. While there are awards which support both extremes of this bracket, the majority are somewhere near the middle of the bracket. Cases involving psychiatric injury following a negligent stillbirth or the traumatic birth of a child will often fall within this bracket. Cases of work-related stress resulting in a permanent or long-standing disability preventing a return to comparable employment would appear to come within this category.**
>
> **(C) Moderate - £5,000 to £16,270**
>
> **While there may have been the sort of problems associated with factors (i)† to (iv) above there will have been marked improvement by trial and the prognosis will be good. Cases of work-related stress may fall within this category if symptoms are not prolonged**
>
> **(d) less severe £1,440 to £5,500**
>
> **The level of the award will take into consideration the length of the period of disability and the extent to which daily activities and sleep were affected. Cases falling short of a specific phobia or disorder such as travel anxiety when associated with minor physical symptoms may be found in the Minor Injuries chapter.**

Conclusions

104. We will deal first with the respondent's contention that the claimant would have been dismissed in any event. This has been referred to as the **Polkey** argument. There are two arguments. The first is the claimant would have been dismissed fairly, and without discrimination for a breach of confidentiality which is said to amount to gross misconduct. The second is that the relationship had deteriorated to the point where there was a real chance that dismissal would have occurred in any event without unfairness or discrimination.

105. In our finding of fact, we have considered the evidential basis supporting the argument that the claimant would have been dismissed at some later date because of breach of confidentiality. We do not accept the respondent’s argument. The essential nature of the alleged breach of confidentiality was known at the time. The fact that all documents were not disclosed is not material for the reasons we have given. Whilst the claimant may not have had authority to print documents, we do not accept that clearly involved a breach of the confidentiality agreement that he signed. The manner of use of the documentation was not prejudicial to the respondent. It did not in any sense reveal any trade secret to any competitor. There was no possibility of disclosing any client information outside the business.

106. Mr Barnett's submissions refer to the case of **Brandeaux Advisors v Chadwick** [2011] IRLR 224. This case did not consider the position under either unfair dismissal or discrimination. It was a breach of contract claim. The downloading and use of documents in **Brandeaux** was far more extensive and serious. The case does observe that an individual may be expected to rely on the process of disclosure.

107. Mr Portelli's case is fundamentally different. Documents were not being preserved purely for the purpose of litigation. The claimant was citing evidence to support his position in an effort to resist dismissal and advance his grievance. There is no credible evidence on which we could find that he was accessing documents, other than those which came to him legitimately. The main example relied on by Mr Lawson concerns an email sent to the claimant about the claimant's performance.

108. This alleged breach of confidentiality was not pursued at the time when dismissal was being considered. We find that the respondent recognised it was not an act which would justify dismissal. This is clear from the evidence given during the liability hearing.

109. For the reasons we have given, we find had the claimant been dismissed at a later date for this alleged breach of confidentiality, it is inevitable the dismissal would be tainted by age discrimination. It would also be unfair, as it would have been outside the band of responses.

110. As to the second contention, there are occasions when a relationship fundamentally breaks down such that dismissal is justified. However, cases that concern this often revolve around an employee who is behaving in ways which fundamentally demonstrate the individual is not capable of accepting or not willing to accept decisions and instructions. It is not every case of a difficult relationship where it can be said that there is a breakdown which would justify dismissal for some other substantial reason. Moreover, when considering the possibility of fair dismissal, it may be necessary to consider the extent to which each party is contributing to any breakdown.

111. This is not a case where we can say that, as Mr Barnett has put it, the relationship "approaches the point where trust and confidence is unlikely to be salvaged." The reality is that the respondent did little, if anything, to actively salvage the situation. We have already explored various ways in which the respondent failed to engage adequately with the grievance process or explain to the claimant what it was that he had done wrong when considering dismissal. We have considered previously whether the claimant can be said to have contributed to his dismissal. We found that he did not. We do not need to consider those matters again.

112. That said, we cannot entirely ignore the fact that there were difficulties in the relationship. It is apparent that there was a clash between the claimant and Mr Wilson. The claimant believed he was being undermined

and he was resentful of Mr Wilson's management. He believed that his duties were being removed, and we have reviewed his grievance above.

113. It is apparent that the respondent's management style was changing. The respondent was expecting a particular dress code, and although the claimant complied, it is apparent that he was not happy with the arrangements and he was resentful. He objected to the removal of his influence in matters such as the Christmas and summer bonus. He considered that he was being ignored. Standing back and taking an overview, we find the claimant was resentful of the changes that were occurring. He cooperated with the respondent; nevertheless, he found the situation extremely stressful, and it is clear from his grievance that there was a general difficulty with the working relationship.

114. From May 2019, the difficulties escalated to the point in December 2019 when he had filed his grievance and then learned that he would not receive a few hours overtime. His reaction was extreme. It is difficult to imagine that the loss of a few hours overtime would endanger the claimant's financial stability, but that appears to be part of his reaction. The stress induced was so severe that the claimant attended accident and emergency because he had developed such anxiety. He never returned to work thereafter.

115. The extent to which the claimant did not return to work, or request return, because of his own ill-health and the extent to which he was prevented from returning by suspension is difficult to ascertain on the evidence before us. It appears there are elements of both.

116. Deterioration of mental health leading to depression and anxiety may have multiple and complex causes. It is difficult to say what specific event led to which specific outcome. Medical evidence can assist, but it does not always assist. Medical practitioners, generally, comment on the account as given by the individual being assessed. Such accounts are unlikely to reveal a full picture. In this case, we doubt that an expert psychiatric assessment would particularly assist.

117. It is important to stand back and look at the whole picture. By 28 December 2017, the claimant was in a vulnerable psychological state. He was already not sleeping, and he reacted very negatively to what was essentially a minor problem, being the deduction of a few hours overtime.

118. We accept that there were problems at work, but they are not specifically cited as acts of discrimination.

119. When considering what would have happened in the future, it is necessary to bear in mind that the claimant's mental health became fragile from at least May 2017 leading up to December 2017. The claimant points to the fact he had not been to a doctor in the previous 12 years, but that is not conclusive evidence of robust mental health. The evidence indicates that the claimant was in a vulnerable state.

120. It is significant that the claimant was experiencing difficulties in his friendships. In particular, the relationship with his best friend, Mr Chesney, deteriorated. The claimant has been unable to account satisfactorily for that. On the balance of probability, we find the claimant's mental health, and his increasing stress and anxiety, contributed to the difficulties he had with his relationships. The problem he had with Mr Chesney was symptomatic of a wider deterioration.

121. However difficult the task, we are required to assess what would have happened in any event had the discriminatory act not occurred.

122. We do not accept the respondent's assessment that the relationship was approaching the point where trust and confidence could not be salvaged; nevertheless, we do find that the working relationship would not have continued indefinitely.

123. It is not unusual for an individual who has started to develop depression and anxiety to experience a deterioration. Conflict at work may contribute to the deterioration. Here, the claimant was fundamentally unhappy with the way in which the work was developing. He saw changes in the workplace. The respondent was seeking to manage the work in a particular way and the claimant was resentful of those changes. That led to personality conflicts. The work environment was, and this is not necessarily the fault of either the claimant or the respondent, becoming toxic to the claimant. The respondent was pulling in one direction. The claimant was pulling in a different direction. The claimant resented that state of affairs. This led to individual resentments which neither the managers of the respondent, nor the claimant, handled well.

124. It is likely that the conflict would have escalated. Matters would have come to a head sooner or later, and it seems to us there are two broad possibilities. First, the claimant may have left voluntarily. This may be by him claiming constructive dismissal, or because he got another job. Second, the stress and anxiety would have increased in any event to the point where he would have been unable to continue working. In all likelihood, that would ultimately have led to either to his leaving, or his being dismissed because he was unable to continue working.

125. Absent discrimination, on the balance of possibility, the claimant would not have been dismissed for conduct or because of some fundamental breakdown in the relationship. However, he may have been dismissed following absence because of ill health. Whatever the position, we find that he would not have continued to work for the respondent indefinitely. If he had been capable of continuing to work, he would have left within eighteen months. If he had reached the point when he was unable to continue working because of ill health, that point would have been reached in any event by 18 months.

126. We find on the balance of possibility that he would have continued to work and he would not have become incapable of work. Whilst a serious deterioration that would have led to him being unable to work is a possibility, it is the less likely outcome. We reach this conclusion because, despite all the difficulties the claimant faced, we have found that he was capable of returning to work around six months after his dismissal. Had he continued to be capable of working, we find, on the balance of possibility, that he would have continued to work and left within 18 months for another job.

127. It follows that we accept, albeit for different reasons to those advanced, that the claimant would not have continued working indefinitely. The relationship would effectively have come to an end at some point with a long stop of 18 months.

128. We stress that these are Polkey arguments and represent our best judgement as to what would have happened if the discriminatory dismissal had not occurred.

Personal injury

129. The respondent accepts the anxiety and depression, as diagnosed, may amount to personal injury. This is a case where the claimant was already displaying symptoms of anxiety and depression prior to the dismissal. Those symptoms had been developing for approximately a year before dismissal. Following the dismissal, those symptoms increased, albeit the claimant seemed to improve initially and then deteriorate again. The worsening of a condition can itself be a personal injury which qualifies for an award of general damages.

130. In claims of this nature, it is very difficult to separate the claim for personal injury from that of injury to feelings.

131. The respondent, rightly, accepts that the claimant suffered injury to feelings. Following the dismissal, the claimant's anxiety increased. He was extremely resentful of the respondent. He was particularly distressed at losing what he saw as valuable employment. The respondent failed to articulate adequately or at all the reason for dismissal and this added to his distress. The procedure adopted had been unfair and the claimant obsessed about the way he had been treated; this fuelled his obsession with seeking justice through the tribunal system. It is clear he became obsessed with the tribunal case. It occupied his thoughts daily and at times he was working up to 16 hours a day preparing for this case. Realistically, no one can work on any claim for that length of time in any reasonable or structured way; it is simply a sign of obsession.

132. The claimant worried about his family, his finances, and his future. His sleep pattern was disturbed. He developed patterns of self-harm. His relationships were adversely affected, and the dismissal contributed to the deterioration of his friendships.

133. Any award for discrimination is compensatory. It is the harm caused by the discriminatory act which falls to be compensated. We bear in mind that the harm itself may have divisible causes. Here there are several broad possibilities. The initial treatment from May 2017 onwards which contributed to his psychological deterioration may be one cause. The dismissal may be another. The respondent urges us to find that his obsession with the subsequent litigation is a further cause

134. We acknowledged that the single act of discrimination found is the dismissal. The loss to be compensated is that caused by the discriminatory act. That said, not all single acts of discrimination are equal.

135. In our liability judgment, we did find that the act of dismissal was the final act in a course of conduct.[8] That finding has not been appealed. Nor has it been suggested to us that we were wrong in that finding. The fact that a dismissal is the final act in a course of conduct does not mean that each aspect of the dismissal process was in itself an act discrimination. However, the cumulative effect of the process cannot be wholly ignored.

136. There may be situations where there is clear single act (for example, a one-off specific use of inappropriate language). There are other occasions when the single act is the end of the process. That does not mean the entire process is discriminatory.

137. We would note that it is possible for a claimant to site multiple allegations of discrimination, which seek to identify each conceivable step in a process as a discreet act of discrimination. This approach may lead to dozens, and sometimes even hundreds, of discreet allegations and it creates unwieldy, unnecessarily long hearings that may have little regard to proportionality. It would be unfortunate if the law were interpreted in such a way that claimants are encouraged in that disproportionate approach lest the claim for injury to feelings and compensation be unreasonably restricted.

138. We suggest that the concept of a single act, such as dismissal, which demonstrably occurs at the end of a process, particularly when the process has been unreasonable with no explanation for that unreasonableness,[9] should not be interpreted in an unduly restrictive manner.

139. A single act which is the end of the course of conduct may well be seen as more damaging and more serious than something which is truly an isolated incident. This possibility is recognised when considering whether

[8] The fact that dismissal is the culmination of a course of conduct does not mean that each act is in itself discrimination. We are not finding that any act, other than the dismissal, is an act of discrimination.

[9] As we have found in our liability reasons.

the injury to feelings falls in the lower, mid, or upper band as now defined in the presidential guidance on compensation for injury to feelings.

140. The law recognises that there should not be double recovery between those matters properly attributable to personal injury and those which are attributable to injury to feelings. Inevitably there is an overlap, and it is extremely difficult to delineate where one starts and the other stops

141. Before going on to consider the award for injury to feelings and personal injury, it is necessary for us to consider one further matter. The claimant alleges that he should receive aggravated damages. This largely arises out of the way the respondent has behaved in litigation. The evidence the claimant has given is extensive, but the main part of his argument comes down to delay in complying with tribunal orders on three specific occasions. The first involves a delay in disclosure from 2 November to 9 November. The second involves a delay in preparing the bundles from 15 to 22 February 2019. The third involves a delay in exchanging statements on 29 March to 2 April 2019.

142. More generally, the claimant argues that the respondent has behaved negatively and has sought to cause him stress. In particular, there has been difficulty in preparation of the bundle. We have sympathy with the claimant in relation to this. It is surprising that the respondent, which specialises in organising documents for legal proceedings, should find such difficulty. Nevertheless, the test is a high one, as described above.

143. We cannot ignore the claimant's behaviour. As we have noted, he has been obsessed by these proceedings. Moreover, he has made a number of comments which could be interpreted as threats. There has been a degree of mudslinging. As previously noted in out liability reasons, the claimant has suggested the respondent sought to bribe clients. At various times he has indicated that he would seek to damage the respondent's reputation by exposing the respondent in these proceedings. We need not dwell on these matters. The reality is that there has been difficulty with this litigation and the preparation has, at times, been conducted in an antagonistic manner.[10]

144. However distressing the claimant found the three delays indicated above, they are not unusual in proceedings of this nature. The conduct, whilst at time hostile and intemperate on both sides, does not justify an award of aggravated damages. Some of the conduct of the respondent is questionable, but the claimant has also contributed to the negative way in which the litigation has proceeded.

145. That said, there are aspects of this litigation which are concerning. The respondent chose not to call the directors who were responsible both for

[10] We should note that the difficulties have not carried over into the conduct of the hearing before us. The claimant's conduct before us was helpful and cooperative. Mr Barnett has recognised the difficulties of the approach adopted before his involvement and has actively sought to approach the litigation in a courteous and constructive manner.

the decision to dismiss and for the decision to refuse the appeal. The evidence from Mr Wilson simply demonstrated the undisclosed involvement of the directors at the dismissal and appeal stages. The respondent may choose what witnesses it calls. That is its litigation choice. However, we did find that the evidence given before us by Mr Chapman was in a number of respects untrue. The respondent's directors would have known it to be untrue. Further, there has been a material failure to disclose documents, as we have previously found. That in itself has caused considerable distress and there can be no justification for it

146. Whilst we do not consider that this is a case which is appropriate for aggravated damages, nevertheless, the distress caused to the claimant by those elements of the approach to litigation which are not justifiable is significant and should, and can, be reflected in our award for injury to feelings.

147. We have taken all those matters into account. We have regards to the judicial College guidelines for psychiatric and psychological injury as helpfully provided by Mr Barnett. We bear in mind this is a case where the claimant symptoms have been exacerbated and worsened rather than wholly caused by the discriminatory act. We cannot find that the injury has prevented the claimant from working. This is an exacerbation of a continuing condition and we find it is probably more than the minor category, and just fits into the moderate category.

148. When we stand back and consider all of these matters, we take the view that this is a one-off act of discrimination but that it is clearly so serious that it should fall within the higher part of the middle band for injury to feelings. We award £22,500. We consider the appropriate award for personal injury in this case, which we consider to be a moderate case of personal injury, and we award £5,000.

149. In reaching these figures, we are conscious that we must avoid double recovery. This is a case where there is clearly an overlap. It is appropriate to stand back and look at the overall figure when considering the correct apportionment and we have done so. The total combined award will be £27,500.

150. We next turn to the loss of earnings.

151. It is for the respondent to prove failure to mitigate. We accept that the respondent has shown that there were suitable jobs available for which the claimant could have applied. The position is less clear during the course of the pandemic. However, we have no doubt that jobs will be available in the future.

152. It is common ground that the claimant has applied for no job and he has not sought to use his contacts to secure employment. He is optimistic that he will be able to secure employment at least at the level he enjoyed prior to his dismissal, provided he is well enough to work.

153. We have limited evidence that the claimant is unable to work. His evidence to us is that he spent up to 16 hours a day working on this case. Whilst that is not, in itself, evidence that he could undertake any other work, it is evidence of an ability to focus and concentrate.

154. The evidence we have is that the claimant initially received benefits from 7 September 2018 at the rate of £2,089.55, from 7 January 2019 at £2,417.87, and from 9 June 2019 at £2,458.21. That sum has risen £2,814 on 7 May 2020, and £2,828.05 on 9 June 2020. This compares to his net salary, which was in the region of £2,450, as adjusted.

155. The claimant states the receipt of benefits was his mitigation. Whilst we do not say that this is causing him consciously not to look for work, we find that the fact that the benefits are broadly equivalent to, or even more than, the sum he would have earned with the respondent, has been a subconscious factor in his not seeking employment.

156. The claimant’s determination to seek reinstatement demonstrates both a failure to focus on mitigating by finding alternative work and his belief that he is capable of work.

157. The medical evidence we have indicates that the claimant's medical position varied. He became fixated on the tribunal case. By October 2018, approximately six months after his dismissal, there is evidence that he was able to return to work. However, the claimant's focus was not on returning to work, but was on winning the tribunal claim, and gaining reinstatement. During the entirety of that time, it was implicit that he accepted that he could continue to work for the respondent. The belief that he could continue to work is consistent with the approach to the final hearing in the first remedy hearing.

158. Claiming benefits is not mitigation. Mitigation involves actively engaging with the process of obtaining alternative employment. It is not open to an individual to continue to draw benefits whilst using the time that that permits to pursue litigation. The individual should engage actively with the process of seeking employment, provided that individual is able to do so.

159. We accept that the dismissal exacerbated an unstable condition and prevented the claimant, initially, from seeking alternative employment. However, the effect of the dismissal was limited. In this case, we find on the balance of probability that the claimant was in a position to seek employment by October 2019. We accept that the distress caused by the tortious act did exacerbate the claimant's depression and anxiety. That exacerbation is a personal injury. We find there is sufficient evidence to say that he was fit to work after six months.

160. We accept the claimant’s contention that there would have been stigma associated with the dismissal and that would have made it more difficult for him to find work. That difficulty can be factored in. The right way to

do that is to reflect it in the time it would have taken to obtain suitable alternative employment. In this regard we consider that we should allow a period of one year from when he could have returned.

161. This will give losses for a period of 18 months. We find he should have mitigated his loss by 18 months.

162. For the reasons we have given above we find that he would have continued in employment with the respondent for the same period and he would have continued to earn his salary. As we have found that there was a natural end point, we do not consider that there should be a percentage deduction during that time for the contingency that his employment would end.

163. We have considered above what would have been the effect but for the dismissal. Our primary finding is that the claimant was fit to return to work, and his failure to seek employment is a failure to mitigate. Further, our primary finding is that he would have left his employment withing 18 months in any event, and he would have gone on to secure new employment. We will calculate damages on that basis.

164. If we are wrong in the analysis that the claimant could have and should have obtained employment by 18 months post termination, that is because of his underlying mental health.

165. We do not have independent medical evidence and we are conscious that it is possible the claimant may not be fit for work. We find that if it is the case, contrary to our primary finding, that the claimant cannot work, we need to consider if it can be said that this was caused by the act of discrimination. We find that any continuing inability to work is not caused by the act of discrimination. That act exacerbated difficulties, and there is clear medical evidence of recovery and improvement. The effect of the discrimination is limited.

166. If, contrary to our primary finding, improvement has not occurred and the claimant remains unfit for work, we find that any continuing inability to work is the natural progression of the condition in any event. For the reasons we have already given in the context of our consideration of the **Polkey** arguments, he would have ceased to be able to work within 18 months of the dismissal, in any event. It follows whichever way we consider it, we find the loss caused by the dismissal stops 18 months post dismissal.

167. It follows that we award past loss of earnings on the basis of an 18-month loss. His gross pay[11] was £38,250 per year. This gives a net sum of £2,449.24 per month. We will use these figures for 12 months. For the final 6 months, we allow 4% for a pay increase (£1,530), as this would be

[11] Allowing for an increase in his salary.

subject to higher rate and national insurance, we deduct 52% giving a monthly increase of £61.20 (total net - £2,510.44).

168. In addition, he received overtime. We accept that the respondent was seeking to reduce overtime. It is likely there would have been less overtime; however, the respondent has not produced any adequate evidence to demonstrate the overtime pay to the managers. Mr Lawson's estimate is 20 to 30 hours. To the extent he has produced figures, it is suggested that the overtime paid to all employees in 2016 was a total of 5096 hours as compared to 3115 in 2019. This would suggest reduction to approximately 3/5 which would equate with 60 hours on a proportional basis. We take the view that the claimant would have worked at least five hours overtime per month (60 hours a year) at £21.01 per hour for the first year and £21.85 for the second year. From these must be deducted taxed at 52% to represent higher rate income tax and National Insurance. The first 12 months the net figure will be £629.28; for the second six months the figure will be £314.64.

169. The total net salary for the first 12 months should reflect the fact the claimant received notice pay. We allow 40 weeks.

- First 12 months [[£2,449.24 x 12) + £629.28] ÷ 52] x 40= £23,092.43
- Six months' salary is (£2,510.44 x 6) +314.64 = £15,377.28.

170. The net salary for the 18 months is therefore £23,092.43 + £15,377.28 = £38,469.71

171. For the reasons we have set out, there should be a deduction of the benefits the full amount claimed by the claimant over the 18-month period.

172. The best evidence we have is summarised in the respondent's supplemental submissions. From 7 September 2018 the claimant received £2,089.55 per month until 7 January 2021 when he received £2,417.87, until 9 June 2019 when he received £2,458.21 per month.

173. The calculation is this - £2,089.55 x 4 = £8,358.2; plus £2,417.87× 5 = £12,089.3; plus £2,458.21 × 5 = £12,291.05

174. The total is up to 8 November 2019 is £35,376.83. This may represent 4 – 5 days more than the actual 18 months and we allow a approximate deduction of £500 to give £34,876.83.

175. The net loss is £38,469.71 less £34,876.83 = £3,592.88.

176. We next consider the other losses and sums claimed.

177. Wages: this is based on a salary of £37,500. It appears the parties have approached the payment of wages on the basis that the net figure should be taken. The claim for wages is a claim for an unlawful deduction from

wages. It is not a claim for damages for breach of contract. As such it should be paid through PAYE. It is taxable and the gross figure should be taken. The hourly rate would appear to be £20.60; 5.5 hours at £20.60 is £113.30. This is the sum we award. The respondent should be given credit for any sum paid. Albeit that credit may be made against any part of the damages.

178. Both parties agree that the pension loss can be calculated by reference to the contributions payable. The respondent contributed 2% (£53.69) in his last month employment (April 2018). The contribution remained at 2% for one year and thereafter at 3% (£80.94 per month) for a further six months. The first year's pension contribution should be £644.28 plus £485.64 equals £1,129.92

179. We have considered the claim for a new mobile telephone handset. The claimant has retained the respondent's handset. In those circumstance he has not lost the benefit of the handset. We make no award.

180. We accept that the claimant should be entitled to recover the cost of replacing his mobile telephone tariff at the true cost of replacement. Over the period of 18-months we estimate the benefit to be £12 per month. We award £216.00.

181. If the claimant wishes to pursue an application for preparation time, this must be made separately.

182. We accept the claimant would have been paid £50 Christmas bonus and award him rewarding £75 for an 18-month period on a pro-rata basis.

183. The claimant has produced limited evidence to support the claim for travel to medical appointments and benefits assessments. We may allow expenses caused by the dismissal. Travel for the benefits assessment has been caused by the dismissal, as has some travel to the GP. A total of £6 per month is claimed for both. These sums are relatively small and we consider a broad brush approach is proportionate. We will allow £4.50 for 18 months = £81.

184. We do not allow the cost of attending the hearings.

185. We allow a cost of £100 for copying charges, as agreed.

186. Pursuant to section 126 Employment Rights Act 1996, when a head of damages can be awarded either pursuant to the claim of discrimination or as a compensatory award for unfair dismissal, we may choose either approach.

187. We need to deal with the ACAS uplift the first question is whether the claim to which the proceedings relate concerns a matter to which the relevant code of practice applies. The relevant code of practice is the ACAS Code 2015.

188. We accept the code applies. In our original liability hearing, we considered whether there was disciplinary action taken against the claimant. For the reasons we have already set out, we are satisfied that the respondent subjected the claimant to disciplinary proceedings. The claim concerns dismissal for alleged misconduct. This is a disciplinary issue. The code applies. Second, we must consider whether the employer has failed to comply with the code in relation to that matter. For the reasons we have already given in our liability hearing, we are satisfied that there is a breach. There was a failure of investigation, for the reasons already given. In submissions, it has been suggested that it is not always necessary to have an investigation meeting. We accept that is true, but paragraph 5 of the code goes on to state there may be occasions when the investigation stage may be the collation of evidence. In no sense whatsoever was that the case here; the investigation could not involve a simple collation of information. There was a total failure of investigation.

189. There was a breach of paragraph 9 of the code. Employees should be notified in writing if there is a case to answer. The notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences so as to enable the employee to prepare to answer the case at a disciplinary meeting. In no sense whatsoever was the claimant given that information, for the reasons we have already given.

190. It is suggested there is a breach of paragraph 8. It is less clear to us that the period of suspension was as brief as was reasonably possible. The position is, as we set out in these reasons, confused. We cannot find that there is a clear breach of paragraph 8.

191. As we have noted above, during submissions, we sought to understand the paragraphs to which the claimant was referring and initially we referred to paragraph 26. The nature of the claimant's submissions is that the appeal was not dealt with impartially, and that is a potential breach of paragraph 27. We dealt with the appeal in our liability reasons. The HR professional represented to the claimant that he, Mr Chapman, was considering the appeal and would have both the authority to make the decision and would make the decision. The reality is that the directors made the decision. The evidence received on this was untruthful and misleading. Those individuals who decided to dismiss also decided the appeal. No proper evidence was given, and we do not know the rationale. This was a serious breach of the provisions relating to providing the employee with an opportunity to appeal.

192. The final point we must consider is whether the failure was unreasonable.

193. In our view, the respondent had no regard to the code, or its principles. The respondent has continued to seek to obscure the fact that the code applied by suggesting there has been some form of breakdown. However, simultaneously, it sought to argue that the claimant contributed to the

dismissal because of his misconduct. Such an argument is contradictory. The reality is the code applied. The respondent ignored the key obligations. It failed to investigate. It failed to set out the nature of the case to answer. It failed to give sufficient information so that the claimant could respond. This meant that any disciplinary hearing was fundamentally flawed and unfair. The process of appeal is designed to allow rectification of wrongful or unjust treatment. Rather than engage with that process, the respondent misrepresented to the claimant who would be making the decision then sought to obscure that fact before the tribunal. It is clear the respondent's conduct was unreasonable and it is difficult to imagine a more serious or systematic breach of the code. We find this is a case which justifies the maximum uplift of 25% (subject to that being an appropriate and not a disproportionate amount having regard to the overall damages).[12]

194. Pursuant to section 126 Employment Rights Act 1996, we set out apportionment below.

195. Unfair dismissal

Basic award (agreed) £8,636.00

Compensatory award

a. Loss of statutory rights £600.00 (agreed)
b. Phone tariff £216.00
c. Copying £100.00
d. Travel £81.00

Subtotal £997.00

e. Acas uplift 25% of £997 - £249.25.

Total compensatory award £1,246.25

Total unfair dismissal award - £9,882.25.

196. Discrimination

Non pecuniary loss

a. Injury to feelings £22,500
b. General damages personal injury £5,000
c.

Subtotal - £27,500

[12] In this case the uplift is £8,304.95 and is appropriate; it is not dipropionate. We find it is just and equitable to make the award.

Pecuniary loss

d. Past loss of earnings – £3,592.88.
e. Loss of pension £1,129.92

Subtotal - £4,722.80

f. 207A increase on full award [(£27,500 + £4,722.8) x 25%] = £8,055.70

Interest – Assume calculation date is 31 May 2021

a. injury to feelings: 8% from the date of the dismissal (4 May 2018) to calculation date (31 May 2021) = 1,123 days - 8% x 1,123 days = 24.61% [£22,500 x 24.61%] = £5,537.25
b. loss of earnings (and other losses): from the mid-point between the date notice was paid until (26 July 2018) to calculation date (31 May 2021) = 1040 days. 8% x 1040days x 0.5 = 11.40% [(£4,722.80 + £8,055.70) x 11.40%][13] = £1,456.75
c. Total interest = £6,994.00

197. Grossing up.

a. Total award subject to grossing up [£8,636.00 + £1,246.25 + £27,500.00 + £3,592.88 + £1,129.92[14] + £8,055.70 + £6,994] = £57,154.75.
b. Less £30,000 tax free + nil rate band £12,570 = £42,570.
c. Balance - £57154.75 - £42,570.00 = £14,584.75.
d. Balance to be grossed up to allow for 20 % deduction (calculated by applying 25% to net figure to give a gross figure to allow for a 20% deduction). [£14,584.75 x 25%] = £3,646.19.

Total addition for grossing up = £3,646.19[15]

198. Failure to pay wages £113.30.[16]

199. The claimant has sought the additional sum of £1575.70. That claim would require an amendment. It is not before us. We make no order.

<u>Summary of awards</u>

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[13] The 207A adjustment is to the award pursuant to sec 120/124 Equality Act 2010. The Employment Tribunals (Interest on Awards in Discrimination) Regulations 1996 apply. Regulation 6 (1) (b) applies " all other sums of damages or compensation (other than any sum referred to in paragraph 5)…" It appears the 207A increase to the award forms part of the award and is subject to interest.

[14] Presuming a net figure has been used.

[15] This assumes the claimant will have no other paid work in tax year 21/22. If he does have paid employment the grossing up figure may increase. Time for applying for reconsideration is extended to 1 September 2022.

[16] Wages are always awarded gross and are subject to tax. They do not fall to be grossed up.

1. Basic award - £8,636,00
2. Compensatory award - £1,246.25.
3. Injury to feelings - £22,500.
4. Personal injury - £5,000.
5. Pecuniary loss (including 207A award) - £12,778.50.
6. Interest - £ £6,994.00.
7. Grossing up (to be part of discrimination award) - £3,646.19.
8. Wages - £113.30.

Grand total £60,914.24

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Employment Judge Hodgson

Dated: 31 May 2021

Sent to the parties on:

.01/06/2021.

For the Tribunal Office