EMPLOYMENT TRIBUNALS

Claimant:	Ms J Hotte
Respondent:	Feversham Education Trust
Heard at:	Leeds Employment Tribunal
Before:	Employment Judge Deeley, Ms Brown and Mr Lannaman
On:	**Full hearing:** 6-16 December 2020 (by CVP), 17 and 18 December 2020 and 11 January 2021 (in chambers) **Reconvened hearing:** 20 April 2021 (by CVP) and 14 May 2021 (in chambers)
Representation:	
Claimant:	Ms A Dannreuther (Counsel)
Respondent:	Mr T Wood (Counsel)

RESERVED REMEDIES JUDGMENT

1. The claimant is awarded a total of £4,805.67 in relation to her claim for constructive (unfair) dismissal. This award is calculated as follows:
   1.1 a basic award of £3766; and
   1.2 a compensatory award of £1039.67.
2. The claimant is awarded a total of £1096 in relation to her claim for victimisation. This award is calculated as follows:
   2.1 an award for injury to feelings of £1000; and
   2.2 interest on that award at the rate of 8% per annum for the period from 2 March 2020 until 14 May 2021 of £96.

CERTIFICATE OF CORRECTION

3. The reserved judgment on liability for this claim which was sent to the parties on 19 January 2021. Unfortunately that judgment contained an error in the heading of the judgment, which stated stated “Draft Judgment”, rather than “Reserved Judgment”. However, the judgment was in fact in final form.
4. We discussed this error with the parties at the start of the reconvened hearing on 20 April 2021 to consider remedy. Neither party raised any issue in relation to this error.

RESERVED REMEDY JUDGMENT - REASONS

INTRODUCTION

Tribunal proceedings

5. Neither party objected to holding this hearing as a remote hearing. The form of remote hearing was “V: video - fully (all remote)”. A face to face hearing was not held because it was not practicable and all issues could be determined at a remote hearing.
6. This claim was originally listed for a full hearing to dispose of both liability and remedy from 6-18 December 2020. We reserved our judgment on liability at the end of that hearing due to time constraints. The reserved judgment on liability was sent to the parties on 19 January 2021 (the “**Liability Judgment**”). Our detailed conclusions regarding the claimant's successful complaints were set out at the following paragraphs of the Liability Judgment:
   6.1 constructive (unfair) dismissal: paragraphs 296 - 332; and
   6.2 victimisation (relating to the delay in providing the claimant’s reference): paragraphs 352-361.
7. We considered the following evidence during the remedies hearing:
   7.1 a remedies witness statement and oral evidence from the claimant; and
   7.2 a joint file of documents and other documents that were disclosed (without objection from either party) during the hearing.
8. We also considered the submissions made by both representatives.
9. After the hearing, the respondent’s solicitor submitted a revised counter-schedule of loss by email to the Tribunal. The respondent’s solicitor stated that the purpose of the revised counter-schedule was to confirm *“in writing the arithmetic demonstrated in the remedy hearing and clarifies employee pension contribution issues, in light of the submission of payslips on the morning of the remedy hearing”.* The claimant’s solicitor did not comment or object to the revised counter-schedule of loss.

10. Both parties raised the issue of costs during the hearing. A separate case management order was made in relation to any costs applications in order that these could be dealt with during the Tribunal's deliberations on 14 May 2021. Neither side sought to pursue a costs application in accordance with those orders.

CONSTRUCTIVE (UNFAIR) DISMISSAL AWARD

Basic award

11. The parties agreed that the claimant was entitled to a basic award of £3766, which was calculated as set out in the table below.

Employment dates	4/9/12-17/4/20
Length of service	7 complete years
Age at dismissal	32
Multiple	7
Weekly wages (capped at £538 per week)	£538
Basic award	**£3766**

Compensatory award

12. The Tribunal has considered the legislation and caselaw referred to below, together with any additional legal principles referred to in the parties' helpful submissions.

13. The statutory provisions relating to the compensatory award are set out at s123 of the Employment Rights Act 1996 ("**ERA**"):

> **123 Compensatory award**
>
> (1) …the amount of the compensatory award shall be such amount as the tribunal consider just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
>
> (2) The loss referred to in subsection (1) shall be taken to include –
> (a) any expense reasonably incurred by the claimant in consequence of the dismissal, and
> (b) …loss of any benefit which he might reasonably be expected to have had but for the dismissal.
>
> …
> (4) In ascertaining the loss referred to in subsection (1), the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales…

14. The claimant's compensatory award is capped at the lower of:

14.1 52 weeks' gross pay (inclusive of employer's pension contributions - *University of Sunderland v Drossou* UKEAT/0341/16); and

14.2 £88,519 (for dismissal after 6 April 2020).

15. The claimant was employed by the respondent as the Head of Modern Foreign Languages, based at the Queensbury Academy, at the date her employment terminated.

16. The claimant resigned with notice and her employment terminated on 17 April 2020. We found at paragraph 326 to 329 the Liability Judgment that the claimant resigned partly in response to the respondent's ongoing failure to support the claimant adequately during her long-term sickness absence from 1 October 2020 onwards. The claimant started her new role with Parkside School on 19 April 2020, however her remuneration was lower than her remuneration with the respondent.

17. The claimant changed pay bands whilst working at Parkside School with effect from 1 September 2020 (moving from upper pay scale 2 to upper pay scale 1). In addition, the Department for Education's School teachers' pay and conditions document 2020 (the "**DFE Terms**") stated that all local authority employed teachers would receive a 2.75% pay increase. The claimant's unchallenged evidence was that the respondent normally adhered to the DFE Terms in relation to its staff, despite being an Academy Trust rather than a local authority school.

Claimant's past and future loss of earnings

18. We considered the claimant's past loss of earnings and reached the following conclusions:

18.1 the claimant received no earnings during the short gap between the termination of her employment with the respondent on 17 April 2020 and the commencement of her new employment with Parkside School on 20 April 2020;

18.2 the claimant took reasonable steps to mitigate her past loss of earnings up to the date of the hearing on 20 April 2021 by continuing to work at Parkside School. The claimant's initial difference in remuneration was £30.97 per week (which we have calculated by reference to her net pay plus employer pension contribution, less her employee pension contribution – please see table below);

18.3 the claimant further mitigated her past loss of earnings with effect from 1 September 2020 when she moved from upper pay scale 2 to upper pay scale 1, leaving an estimated difference in remuneration of £12.92 per week (which we have calculated by reference to her net pay plus employer pension contribution, less her employee pension contribution – please see table below). When calculating the estimated difference in remuneration, we concluded that the claimant would have received the DFE Terms 2.75% pay increase for her basic pay with effect from 1 September 2020, if she had remained in employment with the respondent at that date;

18.4 the claimant was working full-time for Parkside School during this period and it was not reasonable for the claimant to seek additional employment to 'top up' her earnings during this period;

18.5 we note that teachers are subject to the restrictions in the 'Burgundy Book' which set out specific windows during the school year when they are able to resign and start work at another school; and

18.6 it would not be reasonable to expect the claimant to move roles again within 12 months of the termination of her employment with the respondent to seek additional remuneration.

19. We considered the claimant's future loss of earnings and concluded that the claimant should be able to mitigate her losses fully by 1 September 2021, either by seeking alternative employment or by obtaining a further pay increase from her existing employer.

Remuneration Term	**Earnings with respondent as at termination date - 17 April 2020**	**Earnings with new employer from 19 April 2020 to 31 August 2020 (inclusive)**	**Projected amount if the claimant had been employed by the respondent as at 1 September 2020**	**Earnings with new employer with effect from 1 September 2020 onwards**
Annual gross pay	£48,584.57 (consisting of a salary of £37,784.57 and a TLR1b allowance of £10,800)	£45,723 (based of a salary of £37,432 and a TLR1a allowance of £8921)	Total: £49,489.44 (based on a salary increase of 2.75% to salary but no increase in the TLR1b allowance)	Total: £48, 415 (salary of £40,124 after the claimant moved up a salary band plus an unchanged TLR1b allowance of £8921)
Net weekly salary	£703.64	£679.51	£718 (estimated)	£704
Gross weekly employer pension contribution	£220.65	£208.22	£224.76 (estimated)	£220.48
Gross weekly employee pension contribution (deducted from claimant's pay)	£95.04	£89.45	£96.81 (estimated)	£91.45
Total of net weekly pay and gross employer pension	£829.25	£798.28	£845.95 (estimated)	£833.03

Remuneration Term	**Earnings with respondent as at termination date - 17 April 2020**	**Earnings with new employer from 19 April 2020 to 31 August 2020 (inclusive)**	**Projected amount if the claimant had been employed by the respondent as at 1 September 2020**	**Earnings with new employer with effect from 1 September 2020 onwards**
contribution less gross employee pension contribution ("**Total Remuneration**")				
Difference in Total Remuneration	**£30.97 per week**		**£12.92 per week**	

Claimant's claim for loss of statutory rights

20. The claimant stated that she was seeking £700 for loss of statutory rights. Our view is that £350 would be the appropriate compensation for the claimant's loss of statutory rights. In reaching that view, we have considered the following points:

    20.1 the claimant started working for the respondent as a newly qualified teacher and was employed by the respondent for over 7 years;

    20.2 the claimant's role with Parkside School is a permanent role and there is no suggestion that this role is likely to terminate. We also note that the claimant moved to upper pay scale 1 with effect from 1 September 2020; and

    20.3 the claimant's contract of employment with Parkside School states that she will still benefit from the Burgundy Book redundancy entitlements based on her prior service at Queensbury Academy (which was a local authority controlled school, prior to becoming an Academy). This means that if the claimant were made redundant by Parkside School, any redundancy pay that she received would be calculated based on deemed continuous service from 1 September 2012.

Claimant's claim for childcare costs

21. The claimant did not include any claim for additional childcare costs in her schedule of loss. She referred to increased childcare costs in her witness statement, which was provided to the respondent shortly before the hearing on 20 April 2021 and gave oral evidence on those costs. The increased childcare costs provided in the claimant's witness statement differed to the costs that she referred to during her oral evidence. The claimant did not produce any documentary evidence of the difference in her childcare costs, stating that she had not been told to provide such documents.

22. We note that:

22.1 the hearing in December 2020 was originally listed to consider both liability and remedy and that the only reason why remedy was not dealt with during that hearing was due to time constraints; and

22.2 the claimant has been represented by her current solicitors since August 2020 and that she had the benefit of representation by her current Counsel at the December and April hearings. The claimant provided other documents to the respondent which were included in the joint bundle for the 20 April 2021 hearing.

23. We have concluded that it would not be appropriate to consider any compensation for the claimant in respect of additional childcare costs because she has not provided sufficient evidence of those costs.

S123 ERA - Polkey reduction

24. The respondent contended that there was a significant likelihood that the claimant would have resigned in any event and that her compensation should be reduced by 80% under the principles set out in *Polkey v AE Dayton Services Ltd* [1988] ICR 142.

25. The claimant stated that she would have remained employed with the respondent, but for their breach of contract leading to her resignation. We note that the claimant had worked for over 7 years for the respondent, since qualifying as a teacher, and had progressed her career with the respondent during that time.

26. However, we also note that the claimant was applying for other roles before she obtained her role with Parkside School. The claimant was clearly unhappy with events that had taken place during her employment with the respondent from mid-2019 onwards. These included the claimant's allegations set out in the Liability Judgment which we found did not amount to a repudiatory breach of contract, such as the final written warning that the claimant received in relation to the Tenerife trip disciplinary investigation.

27. The claimant was offered the role with Parkside School on 13 February 2020 and resigned the next day. It is clear that the timing of her resignation was driven by the claimant obtaining alternative employment.

28. We have concluded that there was a 50% chance that the claimant's employment would have ended in any event prior to 1 September 2021 (which is the date on which we have concluded that the claimant's future loss of earnings will end). We have concluded that it would be just and equitable to reduce the claimant's compensatory award by 50% under the principles set out in *Polkey*.

ACAS uplift

29. We have concluded that there should be no uplift of compensation under the ACAS Code of Practice on disciplinary and grievance procedures in this claim. The respondent's breach of contract does not relate to any disciplinary issues. In addition, we found in the Liability Judgment that the respondent was investigating the claimant's grievance in a reasonable timescale, given the nature and extent of the grievance raised and the investigation required.

VICTIMISATION AWARD

30. Awards of compensation in claims of discrimination are governed by section 124 of the Equality Act 2010 which gives to the Tribunal the same power to grant any remedy which could be granted in proceedings in tort before the civil courts.

31. The purpose of an award for injury to feelings is to compensate the claimant for injuries suffered as a result of the discriminatory treatment, not to punish the wrongdoer. In accordance with *Ministry of Defence v Cannock* [1994] ICR 918, the aim is to award a sum that, in so far as money can do so, puts the claimant in the position he or she would have been had the discrimination not taken place. Compensation based on tortious principles aims to put the claimant, so far as possible, into the position that he would have been in had the discrimination not occurred – essentially a "but for" test in causation when assessing damages flowing from discriminatory acts.

32. The EAT held in *Corus Hotels Plc v Woodward* [2006] UK EAT/0536/05 that an Employment Tribunal should not allow its feelings of indignation at the employer's conduct to inflate the award made in favour of the claimant. The EAT reiterated in *Komeng v Creative Support Ltd* that the Tribunal needs to consider the impact of the discriminatory behaviour on the individual affected, rather than the seriousness of the conduct of the respondent.

33. We have considered the *Vento* guidelines (derived from *Vento v Chief Constable of West Yorkshire* [2003] ICR 318), where reference was made to three bands of awards. Sums within the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory treatment. The middle band should be used for serious cases which did not merit an award in the highest band. Awards in the lower band are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. The decisive factor is the effect of the unlawful discrimination on the claimant.

34. The bands originally set out in *Vento* have increased in their value due to inflation and, a further uplift of 10% given to general damages pursuant to the case of *Simmons v Castle* [2012] EWCA Civ 1039. The claimant's ET1 was submitted on 14 January 2020. The Presidential Guidance dated 25 March 2019 stated that the lower and middle band for claims brought between 6 April 2019 and 5 April 2020 were as follows:

    34.1 Lower band: £900 - £8,800;

    34.2 Middle band: £8,800 - £26,300; and

    34.3 Higher band: £26,300-£44,000.

35. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 sets out the Tribunal's power to award interest for injury to feelings awards. Regulation 3(1) states that interest is to be calculated as simple interest which accrues from day to day. The current rate of interest is 8% and is to be calculated from the date of the act of discrimination complained of until the date on which the award is made (Regulation 6).

36. In the Liability Judgment, we upheld the claimant's allegation of victimisation which was set out as per the table below:

Withholding of and/or delay in issuing reference	The respondent withheld and delayed the issue of a reference to her prospective employers. A reference was sought on 25 and 27 February 2020, and on 4, 5 and 9 March 2020 and was provided on 10 March 2020.

Injury to feelings award

37. We concluded at paragraph 361 the Liability Judgment that the delay to the claimant's reference was caused by Mrs Monaghan and Mrs Hall's concerns that they felt 'vulnerable' in their dealings with the claimant, as stated in Mrs Monaghan's email of 6 March 2020. We also concluded that the reason why they felt 'vulnerable' was because they were aware that the claimant had brought legal proceedings against the respondent and they therefore sought Mrs Aspinall's advice before taking any further action.

38. By contrast, we noted at paragraph 259 of our Liability Judgment that Ms Bithell's reference was completed by Mrs Monaghan as soon as she received a copy from Mrs Beevers on 30 January 2020 and that the delay in providing Ms Bithell's reference was due to the respondent's agreement that a copy would first be provided to Ms Bithell's union representative.

39. We have concluded that in the circumstances the respondent should have actioned the claimant's reference by 2 March 2020, following the request from Parkside School on 25 February 2020. The respondent did not provide the claimant's reference to Parkside School until 10 March 2020, having been chased several times by the claimant and by Parkside School before 10 March 2020.

40. We then need to turn to the impact of this delay on the claimant. The claimant said in her oral evidence at the hearing in December 2020 that she suffered from 'additional stress and anxiety' due to the delay in the respondent providing her reference to Parkside School. She provided further information about the impact of the delay on her condition during the hearing on 20 April 2021.

41. We considered the claimant's GP records and a letter from her counsellor provided in the remedies hearing file, together with the claimant's remedies witness statement and oral evidence. The claimant's remedies witness statement did not distinguish between the impact on the claimant's health resulting from the delay in providing her reference, as opposed to the claimant's perception of other events during her employment (which do not form part of her victimisation claim).

42. We note that the claimant initially informed her GP that she was suffering from symptoms of anxiety in July 2019, but that her health recovered following the Summer break. She was not diagnosed with anxiety or depression until 30 September 2019, following which she went on sick leave on 1 October 2019 with a fit note due to work-related stress. The claimant did not return to work until 23 March

2020, albeit that part of the reason for her absence from 3 February 2020 was due to an operation due to carpal tunnel syndrome and the recovery period following that operation.

43. The claimant suffered her first panic attack on 21 February 2020, following which she suffered further panic attacks. The claimant was also prescribed medication to assist her to deal with her condition during this period. The claimant said that her first panic attack was caused by her anticipating that the respondent would not provide a reference on her behalf to Parkside School, although we note that Parkside School did not in fact request such a reference until 25 February 2020.

44. The claimant produced a report from a private counsellor, from whom she has undertaken counselling sessions since 28 January 2021. However, the report did not provide any guidance as to the impact on the claimant's health resulting from the delay in providing her reference, as opposed to the claimant's perception of other events during her employment (which do not form part of her victimisation claim).

45. We have concluded that it would be appropriate to make an award at the bottom end of the lower band of *Vento* and award the claimant £1000 for injury to feelings. The key reasons for our conclusion are:

    45.1 we concluded that there was a short period of delay in providing the claimant's reference due to the claimant carrying out a protected act was from 2 to 10 March 2020 (inclusive);

    45.2 the claimant's job offer with Parkside School was confirmed after the School received her reference from the respondent;

    45.3 we accept that the delay caused the claimant some additional stress and anxiety, but note that she had already been on sick leave since 1 October 2020 due to work-related stress. We note that during this period, the claimant remained able to liaise with Parkside School and with the respondent regarding her reference by email and by telephone; and

    45.4 the claimant has not provided any medical evidence or report from her counsellor which specifically identifies the impact of the delay in providing her reference on the claimant's anxiety and depression, as opposed to the impact of other events during her employment which do not form part of the claimant's victimisation claim.

Interest

46. We have calculated interest on the claimant's injury to feelings award as follows:

    8% interest on £1000 award for 438 days (2 March 2020 to 14 May 2021) = £96

Claimant's claim for counselling sessions

47. We also note that the claimant attended private counselling sessions from 28 January 2021. The cost of these sessions was not included in the claimant's schedule of loss and no invoices were produced in relation to these sessions.

48. We have concluded that it would not be appropriate to consider any compensation for the claimant in respect of the costs of counselling sessions because there is no evidence that the reason for these sessions relates specifically to the delay in providing her reference (as opposed to other events which do not form part of her victimisation claim). In addition, we were not provided with any documentary evidence regarding the costs of such sessions or the number of sessions that the claimant would require as a result of her delayed reference.

Employment Judge Deeley

Date: 14 May 2021

Date: 17 June 2021