THE EMPLOYMENT TRIBUNALS

Claimant
Mr G.N. Thomas

Respondent
Berwick Academy

RESERVED REMEDY JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NEWCASTLE ON 14 June (deliberations 18 June) 2021
EMPLOYMENT JUDGE GARNON
Representation
Claimant: Ms. Sally Cowen of Counsel
Respondent: Ms. Claire Millns of Counsel

JUDGMENT

1. On the claim of breaches of contract, I award damages of £4002, being £755.50 for missing property and £ 3246.50. for wrongful dismissal.

2. On the claim of unfair dismissal, I award compensation of £42827.10 being a basic award of £3,429 and a compensatory award of £39,398.10. The Recoupment Regulations do not apply.

3. On the claim for compensation for untaken annual leave, I award £3293.28.

REASONS (Bold print is my emphasis and italics are quotations)

Introduction and Issues

1.1. At a liability hearing on 23 November – 3 December 2020, the parties were represented by the same Counsel. By a reserved judgment on 10 December, I upheld claims of unfair dismissal (but not under s103A of the Employment Rights Act 1996 (the Act)), wrongful dismissal, compensation for untaken annual leave and breach of contract relating to missing property. Claims of unlawful deductions from wages were dismissed. Remedy would, unless agreed, be decided at a hearing.

1.2. The respondent gave as the reason for dismissal gross misconduct by making Facebook posts ("the posts"), on the platform of the Berwick Advertiser, critical of its former Headteacher, Ms Alexis Widdowson, its School Leadership Team (SLT) and its governors ("Trustees"). The claimant said the posts themselves were protected disclosures. If not, he asserted other communications were and all were the principal reason for his dismissal. If not, he said he was unfairly dismissed anyway. I accepted he had made protected disclosures but held misconduct, not amounting to gross misconduct and properly separable from making protected disclosures, was the reason for dismissal.

1.3. The dismissal was unfair under s 98(4) for several reasons. My conclusions included
(a) No Polkey reduction was merited.
(b) The basic and compensatory award should be reduced 50%
(c) The case did not warrant an uplift for breach of the ACAS Code.
(d) The respondent was in breach of contract in dismissing without notice.
(e) The breach of contract claim about missing personal property succeeded.
(f) In the leave year commencing 1 September 2017 he took little or no paid leave before the date of termination on 27 July 2018, so was entitled to a proportion of his statutory 5.6 weeks leave less anything he received for the autumn 2017 half term. If unable to take 4 weeks statutory leave under Regulation 13 Working Time Regulations 1998 (WTR) in the year commencing 1 September 2016 because he was ill, he may be able carry it forward as provided for in NHS-v-Larner.

1.4. The issues for today are

(a) What was the claimant's loss in the notice period during most of which he was certified sick?
(b) What should be his award for unfair dismissal?
(c) Did he mitigate his losses reasonably and what was likely to be the tax treatment of his awards?
(d) How much holiday was accrued and untaken at the time employment ended, and to what compensation for that is he entitled?
(e) Having found there was an implied term in the claimant's contract the respondent would safely store his personal belongings and return them to him on termination, was there a breach, and to what compensation does it entitle the claimant?

2. Summary of the liability judgment as relevant to Remedy

2.1. Berwick Academy is in a rural area where the nearest state secondary school is 30 miles away in Alnwick. Ofsted is responsible for regulating the quality of education, including Academies. The role of the governing body is broadly to oversee financial performance and hold the Headteacher (who has responsibility for its day-to-day running) to account. As a state-funded school, Berwick Community High School was maintained by Northumberland County Council (NCC) until 1 November 2011, when it became Berwick Academy. Ms Widdowson was appointed in April 2013. The claimant said she undermined and eroded the performance of the school. He raised concerns within the Academy both as a parent and a teacher. Mr Wilkes was her deputy, who, when asked for support by a colleague of the claimant, said it was '*more than his job was worth*' and '*you know what she is like*'.

2.2. The claimant raised a grievance on 1 July 2017 against Ms Widdowson about her management of the school but alongside personal concerns. The written outcome on 29 September 2017 partially upheld his grievances. He appealed on 9 October 2017. An outcome letter dated 12 December 2017 broadly upheld the first decision. I wrote in my earlier reasons: " *I also accept his view was, and remains, the grievance process was badly handled and a "cover-up". People who understand education may have different views on how best to deliver it, but only bodies like Ofsted and the DfE have the knowledge to decide which is the better view. If there are concerns about an autocratic management style, people other than educators, eg an MP or Councillor, may be able to resolve them, if they have power to do so and are given specifics of allegations rather than generalised opinions. For several years discontent had been building, but no member of staff had taken any steps to address that outside the school through official channels*.

2.3. Ms Georgina Hill was a Berwick Town Councillor then elected to NCC. In the lead up to the elections in 2017 residents' concerns relating to discipline, bullying, academic performance, and every aspect of Berwick Academy were shared via social media and other means. Ms Hill weighed up the potential downsides of going public (which she accepted would add to reputational damage) and decided to do so, as, without exposure, it could take several years until the school improved. The claimant shared her views. She hosted a public meeting with the trade unions on 16 December 2017 attended by other Councillors, parents, students, members of staff, both staff trustees, and local press. The claimant spoke openly and was interviewed by reporters having identified himself as a teacher at the school. No-one contacted him saying he had acted inappropriately. **The respondent did not say at the hearing there was anything wrong with "going public" in itself, and I found there was not-- in the right circumstances and done in the right way.**

2.4. An Ofsted inspection took place on 30-31 January 2018. On the evening of 30 January, the claimant received text messages saying certain pupils, known for misbehaving, had been removed from lessons to the squash courts out of sight of the inspection team**.** He raised this to Ofsted through the online school teachers' portal. What he sent to Ofsted, he relayed to DfE, his trade union and the MP for Berwick, Ms Anne-Marie Trevelyan (a former Trustee). His reports were acknowledged by Ofsted, the DfE, the MP's office. In a telephone conversation on 8 February an un-named clerk at DfE denied it was dealing with matters but an email on 9 February confirmed it was. The claimant later received requests for further information from Ofsted and the DfE, which he provided. On 24 February 2018 he spoke to the MP and Mr Peter Jackson, Leader of NCC, at a meeting in Belford. The MP said she would raise his concerns.

2.5. A preliminary Ofsted report would have reached the SLT and Trustees in February. The final report , published on 26 March 2018, rated the Academy as '*inadequate*" and recommended it be placed in "*special measures*". It replicated disclosures and further information the claimant had made.

2.6. Ms Widdowson resigned at the end of February. At some point after, the claimant copied Mr Cairns, then Chair of Trustees and Mr Wilkes into various emails in which he had raised concerns with the regulatory agencies, NCC and the MP. The claimant thought there was a risk of repetition of past failures if no decisive action was taken, but there was a greater likelihood of action now than there had been for years. Up to this point, my liability judgment found the claimant had done no wrong.

2.7. The Berwick Advertiser published an article about Ms Widdowson's departure and posted a link to it on its Facebook page on 28 February 2018 showing Mr Cairns thanked Ms Widdowson for her contribution to the Academy. On 1 March 2018 Dr Barbara Henderson, a parent of a child at the school who had been a critic of Ms Widdowson and the Trustees made a post criticising the Trustees but suggesting Ms Widdowson had tried her best. The claimant replied agreeing with some comments but asking her not to "excuse" Ms Widdowson using blunt terms eg her *"ability to manipulate, persuade, bully and lie"* and *"dishonesty in dealings with pupil premium and SEN issues"* adding "*Governors role is to challenge and ensure accountability of the HT . the Governors have been abject".*

2.8. Even when it became apparent the posts were seen by a wider audience, the claimant's later comments show no moderation of language. A person he does not know, a Mr Patterson, posted saying the claimant, as a current member of staff, should be cautious of posting such strong views

publicly. The posts were reported to Mr Wilkes as Acting Headteacher by Mr Cairns. The respondent commenced a disciplinary process.

2.9. When Mr Steve Griffiths joined the Academy, its behaviour problems were described by him in graphic terms eg. it took him 20 minutes to get through a corridor in which pupils were misbehaving. He had been a trade union representative and had significant experience of disciplinary processes in the education sector. Mr Wilkes asked him to act as "Nominated Officer". I need not repeat the reasons I gave for finding the process followed was outside the band of reasonableness, but I made no findings either Mr Griffiths or Ms Dalkin, the investigating officer, were personally ill motivated. Her report, dated 18 May 2018, did not look into why the claimant made the posts, just the fact he did and they were in breach of policies. This is the approach rejected in Ladbooke Racing-v-Arnott. Her investigation failed to look for any exculpatory signs or mitigation, as required in A-v-B.

2.10. I accepted the claimant genuinely and reasonably believed the respondent was in breach of its legal obligations. His concerns having built over time and Dr Henderson's post appearing to him to excuse Ms Widdowson, he erupted**.** He did not appreciate that, to many, the way he expressed his views would come across as generalised, personalised and opinionated. **Why** he erupted was obviously relevant, at least to sanction. Mr Griffiths **even at the disciplinary hearing** looked at the nature of the comments and breaches of various policies i.e. what was done, **not why**. He said Academy policies expressly permit employees to contact appropriate external bodies but not to take to social media to make, "*gratuitously critical, insulting or abusive posts regarding the Academy or specific individuals".* I agreed, but all the more reason to examine **why** a previously loyal employee did so. I accepted the claimant came across at the disciplinary hearing as feeling justified legally and morally in making the posts but any reasonable employer would also have considered why he and his union representative approached the hearing "with all guns blazing". Procedurally, the respondent gave every appearance the outcome was a foregone conclusion.

2.11. Ms Goddard, who chaired the appeal panel, readily agreed it is impossible for teachers to teach and pupils to learn if discipline is lacking. That is also the claimant's view. He did not see the effect of dwelling on his sick absence and grievance was to give to the panel an appearance his differences with Ms Widdowson led him into a personal attack on her, and others he saw as aligned with her. As Ms Goddard said the natural progression of the complaint to Ofsted and others would have been continuing to participate in their investigation, not post derogatory comments on Facebook. Although the claimant referred to having "exhausted" the correct processes, he had not.

2.12. Ms Goddard said if the claimant had toned down his language in the posts saying Ms Widdowson was an autocratic but poor leader (rather than a *liar*, *bully* and *dishonest*) and Trustees, who are volunteers had been ineffective (rather than *abject* and needing to *hang their heads in shame*) that would have been better**.** The claimant# did not know the Trustees' had tried to control Ms Widdowson and been met with a bullying complaint by her. A panel member Ms Christine Robinson, who became a Trustee in September 2018, interjected saying neither she nor Ms Goddard had anything to do with any previous failings of a Board of Trustees of which they were not at the time members and she wanted that minuted. In my view, rightly so.

2.13. When the claimant realised his posts had gone public, he decided not to take them down because, as he said to me, he was convinced they were right and it would be *cowardly* to withdraw

them. He did not put this argument to the appeal panel to whom he said it was "*utterly ridiculous*" he was disciplined , he was "*absolutely disgusted as a human being*" and Mr Wilkes and Mr Cairns were the reason he was dismissed. The furthest he went to show any regret about the posts was "*maybe I should have taken it down*". He had still not removed them.

2.14. Ms Goddard's answer to my question "*If the Claimant at the appeal hearing had said "I reacted as I did for good reasons because I was frustrated, but with hindsight maybe that was the wrong thing to do" may the outcome have been different?* was "*Yes…. I can't be confident without speaking to the other members of the panel, it would have definitely have been a mitigating factor for me. Everybody makes mistake from time to time.* Due to what he said at the appeal hearing the panel had no confidence he would not do the same again if reinstated. Ms Millns wisely focussed on the appeal stage saying (a) as the final arbiters, the appeal panel should be considered the "employer" (b) the principal reason for it upholding the dismissal was not the disclosures to Ofsted, DfE, the MP or anyone else (c) they saw the posts as separate and, though they may be protected under s 43G (3), conduct distinguished from their making was the principal reason for dismissal. **I agreed**.

2.15. Ms Goddard had not seen earlier an e-mail from the MP's Chief of Staff to the claimant four weeks after the posts: "*You will be aware that there has been over many months a lot of negative comments about the school and its issues in the social media arena, this has not been helpful, the effect of this has been to exasperate the situation*". She said these remarks resonated with her own view. In my judgment that was entirely reasonable because, in schools, improvement is assisted if people work together looking to the future while learning the lessons of the past, but hampered by public calls for retribution on those who failed previously.

2.16. As at the disciplinary hearing the claimant approached the appeal hearing "with all guns blazing" because he thought it was a "show appeal" and inevitable dismissal would be confirmed . Nothing the panel said or did could have been more clearly reassuring it was not. The damage to his confidence any internal process could go in his favour had been done at an earlier stage. So, rather than admit some fault and give an explanation, he attacked everyone. To an extent, he still did at the liability hearing. I found the appeal could not correct the unfair investigation and disciplinary hearing. The damage done at the earlier stages was so great nothing the appeal panel did, or could have done, would result in the outcome envisaged in Taylor-v-OCS of a process which was fair overall. I therefore found the dismissal was unfair, but not for under s103A, relying on the decision of the appeal panel.

2.17. The respondent did not prove the claimant was guilty of gross misconduct. I wrote in my earlier reasons *"Had it not been for the unfairness and bias shown in the early stages, the claimant would not have adopted at the appeal the attitude that having had one unfair hearing he was about to have another. He would have been more moderate, explained why he had acted as he did and given the reassurance he would not "erupt" again. I am convinced the appeal panel would then have overturned his dismissal and substituted a final warning. There is no chance he would have been fairly dismissed, so no Polkey reduction is merited. However, compensation should be reduced to take into account his contributory conduct, both in the terms he used in the posts and his stance during the disciplinary process, especially at the appeal hearing. His conduct prior to dismissal is such that is would be just and equitable to reduce the basic award and it clearly contributed to dismissal. The guidelines are that if he is equally to blame for his dismissal, which I think he is, a reduction of 50% is appropriate and I would apply that percentage to both parts of the award.*

3. Relevant Law

3.1. The WTR provides an annual statutory entitlement under Reg 13 of 4 weeks and 13A of 1.6 weeks totalling 5.6 weeks. Reg 14 provides for compensation for untaken annual leave on termination according to a formula. **In all civil proceedings the burden of proving a fact rests on the party asserting it and the standard of proof is on balance of probability, ie "more likely than not"**

3.2. An express term in the Burgundy book seems to say any loss of a teacher's personal property would not be the respondent's liability, but, where not attributable to negligence on the part of the teacher, it may be reasonable to make a compensatory payment. The terms are cryptic and need to be supplemented by an implied term. I had no doubt if an officious bystander had asked "*What will happen if a games teacher leaves his property in a staff changing room and it vanishes*?" both parties would have said "*But of course the school will recompense him for his loss*". On that basis, I found a breach of contract to the extent the respondent failed to safeguard his property

3.3. Damages for wrongful dismissal are separate from compensation for unfair dismissal, O'Laoire-v-Jackel Industries and limited to what would have been earned in the notice period, **if notice had been given**. In wrongful dismissal sums earned, or which should have been earned, in mitigation during the notice period fall to be deducted from loss. Neither damages for wrongful dismissal nor a compensatory award for unfair dismissal can include non economic loss such as injury to feelings, Addis-v-Gramaphone Company, Johnson -v-Unisys and Dunnachie-v-Hull Council. Section 87 and 88 oblige an employer to pay full pay to an employee incapable of work due to ill health during the notice period **only** if the period of notice was the statutory minimum. The claimant's was longer so that did not apply. Damages must include an element for employer pension contributions. Until 6 April 2018 damages were usually calculated on net pay but due to changes to the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) Post Employment Notice Pay (PENP) may now be taxable as "earnings".

3.4. In his unfair dismissal claim the claimant has never requested a re-employment order. It would wrong to make one if he does not, and may be even if he did. There are two elements to compensation: the basic award, in s 122, and the compensatory award in s 123 which as far as relevant says:
(1) ... the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to ***the loss sustained by the complainant in consequence of the dismissal 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—

(b) subject to subsection (3), ***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 ..

(6) Where a tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant , it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding .

3.5. The EAT said in Software 2000-v-Andrews "…*the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made...Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal ..should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate a degree of uncertainty is an inevitable feature of the exercise. The mere fact an element of speculation is involved is not a reason for refusing to have regard to the evidence.* Scope-v-Thornett held though speculation is involved the Tribunal should still try to predict what may have happened. In my judgment, this includes assessing the chance of attempts to mitigate being successful.

3.6. Where the chance of events occurring is very high, or very low, a tribunal may treat it as 100% or 0% (Timothy James Consulting Ltd-v-Wilton EAT/0082/14). As HHJ Hand QC said in Stroud Rugby Football Club-v-Monkman EAT/0143/13, the assessment of future loss is a '*rough and ready matter. It always has been and it always will be*'. In Wardle-v-Credit Agricole Corporate and Investment Bank 2011 IRLR 604, Elias LJ said: *" it is incumbent on the tribunal to do its best to calculate the loss, albeit that there is a considerable degree of speculation ... ".*

3.7. The burden of proving a failure to mitigate is on the respondent (Fyfe v Scientific Furnishing Ltd 1989 IRLR 331). An employee is expected to search for other work, and will not recover losses beyond a date by which the tribunal concludes he ought **reasonably** to have been able to find some not necessarily at a similar rate of pay. He is expected to take reasonable steps, not every conceivable step. A good rule of thumb is to ask what **a** person becoming unemployed, who had no expectation of an award in his favour, would have done. In unfair dismissal subsection123(4) is subject to the qualification in Norton Tool Co Ltd -v-Tewson 1972 ICR 501, affirmed in Burlo-v-Langley 2006 EWCA Civ 1778 that sums earned in mitigation during the notice period do not fall to be deducted from loss.

3.8. As affirmed in a discrimination case, Chaggar-v-Abbey National, damage to employability due to stigma caused by the dismissal can be taken into account if it explains why a person has remained unemployed and may continue to do so for some time in the future. I will return to the broader question of "stigma" damages.

3.9. Section 124 imposes limits on the amount of a compensatory award calculated in accordance with section 123. At the relevant time, it was the lower of £86444 or 52 week's pay. A week's pay includes the value of employer pension contributions (University of Sunderland-v-Drossou). Pension loss can be more than loss of such contributions. If "headline" losses exceeded £80000 and a 50% reduction is applied, the cap would be reached and a detailed calculation of total losses may be unnecessary. Digital Equipment Co Ltd-v-Clements (No.2) held reduction for contributory fault comes before applying the cap.

3.10. Somerset County Council-v-Chaloner held to achieve a just and equitable award, it is necessary to gross up losses calculated on net pay that exceed' £30,000. Hardie Grant London Ltd-v-Aspden 2012 ICR 6 held where a tribunal was contemplating making a compensatory award in excess of the £30,000 tax-free figure, the grossing-up of the figure to allow for the incidence of tax should take place before applying the statutory cap. I will return to the HMRC changes made in 2018

4. Submissions

4.1. Ms Cowen's skeleton argument rightly says the principle of damages for the common law claim of wrongful dismissal is to place the claimant in the position he would have been in, had the breach not occurred. The claimant was, at dismissal, on sick leave and on zero pay. She repeats an argument I rejected earlier that he worked on 26 February 2018 by attending a course in Manchester which should have "reset the clock" in relation to sick pay. She adds "*In defence of the amount claimed, the respondent relies on the fact that the claimant was on nil pay, fails to address the issue of why that was. This is reflective of the respondent's attitude throughout the claimant's disciplinary process and is central to the liability judgment.* Although he sent in sick notes for part of the notice period, it does not necessarily follow he would have been off sick in those periods had he been lawfully dismissed.

4.2. The claimant's absence from February until his dismissal on 27 July 2018, was due to him not actually returning to work which he may have done had the disciplinary process been handled properly. She says the respondent wanted to keep him out of the school pending the investigation and disciplinary hearing. I accept had he presented as fit for work, it would have to suspend him and he would be on full pay before and during his notice period had he not been wrongfully dismissed.

4.3. Ms Cowen says alternatively, the breach of contract by the respondent, in dismissing him summarily when it was not appropriate in law, should lead me to consider an award for 'stigma' damages. A central theme of the liability judgment was the respondent failed to investigate or consider why the claimant made his Facebook comments. This was a breach of the implied term of mutual trust and confidence, led directly to damage to the claimant's reputation and caused a foreseeable loss Lord Nicholls said in Malik-v-BCCI 1997 ICR 606 losses which flow from damage to reputation are recoverable. Eastwood-v-Magnox Electric 2004 ICR 1064 permits such award which may otherwise appear to be contrary to the rule about not awarding non economic loss.

4.4. She distinguishes Meatyard-v-St Edmunds College Case No.1500896/97 where an employment tribunal concluded the claimant, a teacher who had been summarily dismissed, had not been guilty of gross misconduct and upheld his wrongful dismissal claim. He argued the fact he had been dismissed for misconduct made it more difficult for him to obtain new employment **and** sought "stigma" damages. The tribunal was of the view Malik was confined to exceptional cases in which there had been an unusual breach of the implied term of trust and confidence eg a business being run in a dishonest or corrupt manner. Its own findings would help "set the record straight" and restore his reputation. The claim for stigma damages therefore failed. An attempt to take the case to EAT failed.

4.5. As for the duty to mitigate Ms Cowen says Cooper Contracting-v-Lindsey UKEAT/0184/15 confirms it is not sufficient for the respondent to show there were other jobs available, they must prove the claimant has acted unreasonably in not taking steps to find employment. Wilding-v-British Telecom 2002 IRLR 524. The market for teachers within commuting distance of Berwick is limited and those within it, tend to know each other. The claimant made some attempts to find a teaching job but none were likely to succeed. He also looked to return to work he did prior to teaching in waste management but that was 20 years ago. His attempts have not been successful but he had acted reasonably.

4.6. For Future Loss, she argues setting up in business is reasonable and there is no failure to mitigate in doing so Gardiner-Hill v Roland Berger Technics 1982 IRLR 498. She says the claimant claims pension loss on the basis of the contribution method, despite his pension was a final salary one.

4.7. As for holiday pay the difference between the parties is whether the claimant was paid for the October 2017 half term holiday and the respondent's explanations at p 232 do not reflect their own spreadsheet. The claimant therefore requests the full amount of £3293.28. As for missing property, he lists the specific items and replacement cost as at today and is entitled to that sum.

4.8. Ms Millns agrees in wrongful dismissal the claimant must be put in the position he would have been had the contract not been breached, so damages must reflect salary and any other contractual benefits to which he would have been entitled had he worked his notice. By submitting Fit Notes from before his dismissal to 2 December 2018 p171 he was unequivocally declaring he was unfit to work. Burlo-v-Langley held damages for lack of notice was restricted to actual loss, so where a claimant would have been in receipt of only sick pay during the notice period that is the measure of his loss. Burlo considered Norton Tool, which held it was good industrial practice to make full payment in lieu of notice to a sick employee, was confined to unfair dismissal but failed at common law.

4.10. As for lost possessions as long ago as 24 March 2019 the claimant itemised his lost items in some detail 85-86 and cannot introduce eight new items not pleaded as part of his claim.

4.11. As for the duty to mitigate, what steps it is reasonable to take is a question of fact for the Tribunal The burden of proof is on the respondent to show the claimant acted unreasonably. She cites Cooper Contracting where Mr Justice Langstaff set out the key principles, one being the claimant's views and wishes are one of the circumstances the tribunal should take into account, but is the tribunal's assessment of reasonableness, not the claimant's, that counts. I agree .

4.12. She argues he should have applied for the Duchess' School jobs and, at the very least, signed up to any of the numerous teaching agencies. His explanation as to why he did not (despite each being apparently "more than willing" to take him on their books) is illogical and unreasonable. In the circumstances, his compensatory award (taking account of the 50% reduction for contributory fault) ought to fall significantly below the statutory cap of £39,398.32.

5. Findings and Conclusions on Remedy

5.1. The claimant gave evidence and I read the statement of his sister Andrea Lynne Thomas. The claimant's date of birth is 17 March 1968. For the basic award his capped gross weekly salary was £508.00. His basic award for 9 years continuous employment x 1.5 x £508.00 = £6858.00. Less 50%, **£3429.00.** This is agreed.

5.2. The claimant was on point M6 of the Teachers' pay scale. As at the EDT his gross weekly salary was £650.46. He was a member of the Teachers' Pension Scheme (TPS) which he joined on 1 September 2008. The respondents 's contribution was agreed to be16.48% of pensionable salary. The following pay figures are agreed, excluding employer pension contributions:

(a) £507.37 from 28/7/18 – 31/8/18 (£650.46 gross)
(b) £522.85 from 1/9/18 – 5/4/19 (£673.23 gross)
(c) £525.83 from 6/4/19 – 31/8/19 (£673.23 gross)
(d) £538.42 from 1/9/19 – 5/4/20 (£691.75 gross)
(e) £540.42 from 6/4/20 – 31/8/20 (£691.75 gross)
(f) £553.37 from 1/9/20 – 5/4/21 (£710.78 gross)
(g) £553.80 from 6/4/21 – 31/8/21 (£710.78 gross).

5.3. His actual gross week's pay at termination **including** employer pension contributions produces a statutory cap of £39,398.10. The respondent accepts, subject to arguments of failure to mitigate, his loss of earnings and pension would exceed this cap, even after a 50% contributory fault reduction.

5.4. The claimant's final leave year was 1 September 2017 – 31 August 2018 during which he was employed for 330 days. He does not claim to carry forward any leave from the previous year. The proportion of the leave year which had expired before termination is 90.411% so 5.063 weeks remain untaken. If none was paid as holiday, he rightly claims £3293.28 gross (90.411% of 5.6 x £650.46). The respondent agrees the general method of calculation but says the claimant was (retrospectively) paid for the October 2017 half-term at half (sick) pay (pp.202-206, 208-219, 221 & 232-233) so 0.5 weeks' pay is set off against the 5.063 meaning he is entitled to 4.563 weeks' holiday pay at £650.46 per week= £2,968.05. The claimant's statement for today says *I **was not paid and have not been paid** for holiday pay covering the Half-Term period 23-27 October 2017. The printout of the spreadsheets showing entitlement to Full and Half-pay during my absence at that time clearly demonstrate this (p.217,218). **I should have been awarded 5 days compassionate leave following the death of my mother and a further 5 days due to my role as Primary Carer, Next of Kin and Executor and Administrator of her Estate because of the distances involved and the complexities of her funeral arrangements (p.203,204). This was retrospectively acknowledged (p.210).** My Nil-pay had initially commenced 11 October 2018, but 10 working days were added after the omission was identified. The amended spreadsheet (p.217), following recalculation, shows the adjustment for October 2017 changed from 7 to 17 days. October 2017 had 17 working days and 5 days of half-term (22 days). The adjustment covers 11-13 October (3 days), 16-20 October (5 days) and 30-31 October (2 days) therefore 10 days in total. It does not include the 5 days of half term. I was in receipt of partial salary at that stage, and I had untaken holiday, as a result of forced absence from work, I am therefore entitled to be paid for that holiday.*

5.5. Ms Millns says he was paid in retrospect a sum of about £1291 because the respondent realised with hindsight he had gone onto nil pay too soon and this sum covered the half term. She says he has misunderstood the documents. The respondent has called no evidence from anyone in "payroll" to explain the plethora of ambiguous documents in the trial bundle and demonstrate any of that figure can be attributed to payment for a statutory leave period. The difference is a trivial amount but it rests with the respondent to **show** he was part paid as leave. In all civil proceedings the burden of proving a fact rests on the party asserting it. **I am not satisfied it is "more likely than not" the claimant was paid for annual leave in October 2017, so award 5.063 weeks pay £3293.28 gross.**

5.6. The claimant provided equipment for his work as a Games teacher with Mr Wilkes' knowledge to whom he spoke when he asked to collect his belongings. They were not where he had left them **in the**

male staff changing rooms. I find the school must have failed to take reasonable care of his belongings, because I cannot see they could have been accessed, let alone taken, had the staff changing room been kept locked as it should be. The claimant says they are now accurately listed and valued, using a recognised, best-price, online retail outlet. The items and replacement values are:

a. 2 x Men's Astroturf trainers (Puma King / Nike Tiempo): £130
b. 1 x Men's Asics Lethal Tigreor SG rugby boots: £100
c. 1 x Men's Indoor non-marking sole Adidas Climacool trainers: £80
d. 1 x Elevate lifting belt & back protector: £32
e. 1 x Men's RDX gym gloves: £10
f. 1 x Yonex Nanoray 10F badminton racket: £45
g. 1 x Wilson Pro squash racket: £36
h. 1 x Wilson Pro Nitro tennis racket: £40
i. 1 x Adidas Fingersaver Goalie Gloves: £38
j. 2 x Men's sports Gym / swim trunks (Nike / Asics): £55
k. 3 x Men's Sports Vapoori-dri t-shirts (Canterbury/Adidas/Nike): £60
l. 1 x Men's Canterbury base layer: £25
m. 1 pack Men's Adidas gym socks: £15.50
n. 1 x Men's Canterbury outdoor rain-proof full contact training top: £49
o. 2 x Mitre match footballs: £40
Total £ 755.50.

5.7. The respondent says the claimant was earlier ordered to provide a list of what was missing (p.84) and provided one which confirmed his claim was worth £523 (pp.85-86). He is now asking to be compensated for further items (d), (g), (i), (l), (m), (n) and (o); 3 t-shirts under (k) whereas his claim only included 2. The respondent submits he should not be permitted to amend his claim at this stage to include additional items. I disagree. The earlier list was provided by the claimant himself as a litigant in person in response to very extensive orders for further information made by Employment Judge Buchanan at the first case management hearing. I accept Ms Millns argument it became part of his pleaded case. However, the hearing I conducted last November was agreed to be liability only so quantifying loss should be done today. If formal amendment is necessary, I would allow one applying the well known tests of balance of hardship set out in Selkent Bus Co-v-Moore. It would be wrong to hold the claimant to a list he explains was prepared at a time when he was under great pressure, rightly concentrating on more important issues, and estimating rather than researching, replacement value.

5.8. The claimant's witness statement covers a wide variety of complaints, which may be valid, but are simply not compensable in these proceedings eg Fiona Hall's management of his absence from school following the death of his mother, Ms Widdowson "riding roughshod" over accepted employment procedures and standards of conduct and the current Headteacher, Tracy Hush failing to complete a work-based Stress Risk Assessment (SRA) or follow expert advice from the school's Occupational Health provider, Northumbria Healthcare Trust (NHCT). Parts of his statement and that of his sister, focus on how unfair the process was and how bad it made him feel, for which I can make no award.

5.9. In September 2016 the family decided to move their daughter out of Berwick Academy, to The Duchess's High School, Alnwick a 60 mile round trip. The claimant's mother became very ill and he looked after her in her final days. He went sick from 9 November 2016 following her death as he felt

unable to teach. Her death and his daughter going to a new school was concurrent to "*everything that was going on with my employment and the unfair treatment I was subject to.* His absence was certified as sick and he was paid full pay until 8 April 2017 then half pay for six months after which he received no pay at all. He said at the point he raised his grievance on 1 July 2017, he ought to have reverted to full pay, as the ill health management process should be suspended during the grievance process. At the liability hearing I could not anchor that argument in any express or implied term and it appeared nonsensical a person on sick leave can re-activate his right to full pay just by raising a grievance.

5.10. The Burgundy book says teachers are entitled to full pay where sickness absence is attested by a medical practitioner to have arisen out of and in the course of employment. The wording refers to absence due to "*accident injury or assault*", not **anything** happening at work. No such attestation was made. The claimant said the way in which he had been treated caused his sickness. His grievance appeal outcome was received 16 December 2017. As this was immediately preceding the final week of term, he thought he would be contacted by the school in the first week of the new term in January 2018 to discuss his return. He rang at the end of that week to ask for an update and received a letter dated 9 January 2018 which contained "*inaccuracies*". The respondent did not take steps to confirm whether he was fit to return to work, so he stayed at home and continued to be paid nothing .

5.11. A letter was sent by his union in January 2018 asking for full pay. When chased in March 2018, the respondent refused. He says:*" BA continued to treat me unreasonably, unfairly and left me without salary; and even after completion of the grievance process BA, intentionally or incompetently, created a situation where I was unable to return to work and receive salary. I perhaps foolishly complied at every stage with every request made of me by the school, as did my GP, as we perceived it was inevitable the truth would out and the charade that was being played out would be exposed for what it was.* I rejected his wages claim because I can only find an unlawful deduction from what is contractually payable, not what he thinks should in fairness be paid, even if I agreed with him.

5.12. The claimant had informed Mr Wilkes he would require paying for attending courses, as he would be back "at work" under his Terms and Conditions. On or about 19 February Mr Wilkes visited the claimant's home to discuss his return to work and a training course in Manchester, which he attended. Nicola Shotton at Employee Services at NCC on 26 February 2018 confirmed attendance constituted a return to work so he should have full pay. He was paid for attending the course and would have continued to be paid had he returned to work after it, **but he did not**. He says the 'clock' for sick pay should be reset from this date. This is a strange proposition which I did not accept earlier or now. On that basis anyone off sick for six months less one day could drag themselves into work for that day, go back on sick the next day and have another six months full pay. The email from Nicola Shotton does suggest that may be so, but it does not bind the respondent or determine the point definitively. It is clear the claimant was already representing himself as sick when disciplinary events took over.

5.13. I found the claimant was not guilty of gross misconduct because any breach of lawful and reasonable instructions was not an indication of his disloyalty to, or wish to harm, the Academy as such, therefore not a fundamental breach of his contract. On that basis, the respondent was in breach of contract in dismissing as they did without notice. **The claimant is entitled to damages equal to the pay and benefits he would have received in the Notice Period.**

5.14. The claimant sent in GP Notes confirming he was not fit to work from 24 July to 2 December 2018 (p.171) and, the respondent says, had he not been wrongfully dismissed, he would have received (a) no pay up to 2 December 2018 (b) £2,166.09 net basic salary for 3–31 December 2018 (£522.85 x 4.14 weeks); and (c) £434.76 employer pension contributions in that period, so wrongful dismissal damages should be £2,600.85 (£2,166.09 + £434.76) **and** based on **net** salary. It says paragraph 4.37 of the liability judgment **has already dismissed the claimant's contention he was fit to work and/or entitled to be paid as such during periods. I disagree.** The paragraph reads:"*In his wages claims, I reject the "grievance argument" because I cannot anchor it in any express terms and there is no warrant to imply a term to the effect for which the claimant argues. I reject the "injury at work" argument* ***not*** *because mental ill health is not covered by the provisions but because there is no proof it was caused by the respondent's actions as separated from his other problems and it is not attested by a medical practitioner as being so merely by a change in wording of a sick note. The "back to work" argument was not his pleaded or argued case until submissions. Also from December 2017 to March 2018 the claimant says he ought to have been* ***brought*** *back into work but was* ***left to sit*** *at home awaiting instruction. Why did he not see his GP, obtain a fit note and just return? There is no reason. After the training course Fiona Hall told him to lodge sick certificates, which he did. He says was an error on the part of Ms Hall. It is no error at all. No employer is under a contractual duty to tell an employee what is in his best financial interests and, by consequence, in its worst.* ***His entire wages claim*** *is predicated not on what the contractual position was but what it might have been had he acted differently".* It is plain from the opening and closing words of the paragraph I was rejecting only his claim of unlawful deduction of wages prior to termination, not the contention he was, or would have been, fit to work in the notice period had he not been dismissed. The point is for me to decide today.

5.15. In my judgment, the respondent's argument is right on the key point. The question I must ask myself is whether it is more likely than not, had he not been wrongfully dismissed, ie been dismissed with notice rather than without, what would he have been paid? The claimant was submitting fit notes after his termination date because Fiona Hall asked him to. He was under no obligation to do so in the notice period **but he did**, thus representing to the respondent he was unfit for work. As a matter of contract, he would have been paid sick pay only, not full pay, for as long as he was certified sick by his G.P. In any event I doubt he would have been fit for work in the notice period if dismissed with notice. The only factor which would have improved his health would have been not being disciplined at all.

5.16. It would be different if I were compensating him for the notice period as part of his compensatory award for unfair dismissal when I could speculate, based on evidence, whether he might not have remained sick had he been treated fairly. He may have followed his training course with a full return to work. His mother's illness and death and his daughter's change of school were in 2016 **and, importantly, Ms Widdowson had left,** so his return to work was better placed to succeed than it had been previously. However, if I did that he would be worse off. The award would be subjected to a percentage reduction and then the statutory cap. That said, I agree with Ms Millns the speculation which case law allows me to engage in for unfair dismissal has no place in the contract claim.

5.16. As for "stigma damages of the kind awarded in Malik, I doubt Meatyard can be distinguished. As a decision of an Employment Tribunal I do not have to follow it, but,as I agree with it ,I will. Mr. Malik was employed by a corrupt bank and made a free standing claim for damages caused to his reputation by association with that bank. I accept that by dismissing this claimant wrongfully, the respondent

publicly indicated it felt he was disloyal and he has had to live with the career consequences of that since. This is a point which goes to mitigation only in my view and does not merit a Malik type award.

5.17.1. The respondent says damages should be based on **net** salary, because the PENP calculation under section 402D ITEPA (p.102) would be nil, as his 'basic pay' for the pay period prior to dismissal (i.e. June 2018) was nil. The respondent will not be **required to apply** any taxable deductions and says the claimant would receive an unjust windfall were this to be calculated on gross pay. I do not think the claimant will receive a "windfall". As said in British Transport Commission-v-Gourley 1956 2 WLR 41 "*Damages are awarded as compensation, not restitution, and must be decided by the application of reasonable common sense, taking all matters which might have affected the plaintiff's tax liability into account. The same principles would be applicable in a wrongful dismissal action*".

5.17.2. Termination payments are dealt with in Chapter 3 of ITEPA. Section 401(1) includes
*This Chapter applies to payments and other benefits which are received **directly** or **indirectly** in consideration or in consequence of, or **otherwise in connection with***
(a) the termination of a person's employment,.

5.17.3. Basic and compensatory awards for unfair dismissal do not fall within the definition of **earnings**, under section 62, but do fall within section 401(1). Section 403 includes *(1) The amount of a payment or benefit to which this [section] applies counts as **employment income** of the employee or former employee for the relevant tax year if and to the extent that it exceeds the £30,000 threshold.* Previously the same applied to wrongful dismissal damages.

5.17.4. From April 2018, amendments to Chapter 3 restricted certain types of payment from qualification for the exemption of the first £30,000 of the termination payment. They introduced two new concepts: "*relevant termination award*" (RTA); and "*post employment notice pay*" (PENP).That part of the RTA which is a PENP is **deemed to be earnings**, so attracts liability to tax and NI . Only the balance is treated as employment income and taxable to the extent it exceeds £30,000.

5.17.5. PENP is defined in section 402D. So complex are the provisions that a notional example may help. If the claimant's award comprises £50,000 and the PENP was £15,000, the RTA less the PENP leaves £35,000. The RTA exceeds the PENP. £15,000 is treated as earnings and subject to tax and National Insurance. That leaves £35,000 of the RTA which is not treated as earnings but is income under s 401(1) and so taxable, to the extent it exceeds the tax-free threshold £30,000. It follows if the PENP is nil, the whole RTA is so taxed under s 401.

5.17.6. I do not claim to be a tax expert but a purpose, as I understand it, of the 2018 reforms was to stop employers making termination payments up to £30000 which would not be taxed **at all** by restricting certain type of payment, including PENPs from qualification for the exemption of the first £30,000 of the termination payment. I follow the respondent arguing the PENP, as calculated under s 402 D, would be nil because pay before the dismissal was nil, but that does not mean the damages award will not be **taxed in the hands of the claimant**. If, his unfair dismissal award uses up the whole of the £30000, all his notice pay will bear tax, and do so in the tax year in which it is paid. Before the 2018 changes, I would have calculated it net and the grossed it up together with the unfair dismissal award. By one route or another, HMRC will charge tax on the notice pay, so I will award it gross and by doing so give effect to the principle in Gourley.

5.17.8. I accept in his notice period, while waiting for the result of his appeal, he did not fail to mitigate loss. His gross salary for 3–31 December 2018 (£673.23 x 4.14 weeks) is £2787.18 and employer pension contributions at 16.48 % is £459.32, so wrongful dismissal damages are **£ 3246.50.**

5.18. But for his dismissal he would have continued to be employed by the respondent in the same role on scale M6, receiving annual cost of living pay rises and would have continued in the TPS. The claimant contends he has since taken appropriate steps to **mitigate his loss**. He has been unable to obtain DWP support, both before and during the COVID-19 restrictions. Following his dismissal, he attempted to claim Employment and Support Allowance (ESA) but his claim was refused. He has not received any benefits since his dismissal. What about loss from 1 January 2019 onwards?

5.19. I accept he would have been **fit** to carry out teaching-related work. He did not formally apply for jobs at Duchess' Community High School as a Teacher of Maths to commence 1 April 2019 (p.122) or Teacher of PE to commence 1 September 2019 (p.123). Had he obtained either role, he would have been paid on the appropriate point of the main pay scale and entitled to TPS membership. Further, the respondent submits he should from 1 January 2019 onwards have registered with a teaching supply agency where he could reasonably earn at least £250 per week net inclusive of auto-enrolment level pension contributions. I will return later to the **prospects** of him getting a teaching job.

5.20.1. As is her duty, Ms Millns sought to show he was so indignant about his treatment and focussed on revenge that he **did not try or want to look for work** and despite a long statement and many documents there was no paper trail of efforts to do so. The claimant made many comments blaming everyone but himself for his misfortunes, and did himself no favours by doing so. It is my duty to look beyond those comments and identify the reality of his efforts to mitigate.

5.20.2. A few examples of his unwise comments will suffice. His statement includes

" *I am disappointed to be at this stage in the process and at this point in my life and that these issues remain unresolved. That is neither fair nor reasonable. I entered into* ***this travesty*** *in good faith feeling the truth matters and the system, however cumbersome, would protect me. I feel badly let down by colleagues and failed by school leaders, trustees and the wider authorities with responsibilities for ensuring this type of mess is avoided at all costs ... Having fought hard to achieve a positive outcome,* ***I am at a total loss to understand why this has been allowed to continue for so long****..*"

The case was originally listed for a nine-day hearing and commenced 16 March 2020 but, he says, was "*stalled*", initially by the respondent and then inevitably due to Covid restrictions. In March Employment Judge Aspden was confronted with information that an acquaintance or relative of Mr Griffiths had been in contact with someone who had Covid so he should isolate. Even before the pandemic the longer the case, the longer it took to list it. I documented in the liability reasons efforts by Employment Judges Buchanan, Arullendran and Morris to get the claimant to focus on what may help his case. He continued to write prolix statements and produce more documents than were needed. All litigants, tribunal staff and judges worked hard during to the pandemic, to minimise delays. Had Employment Judge Aspden started the case she would have had to be the judge to finish it, and that would add to delay. In accordance with the Regional Employment Judge's wise policy at the time it was re-listed for 23 November 2020. I gave judgment in early December 2020. I and other judges have ensured delay is kept to a minimum. Most importantly, the delay has worked in his favour,

because factors which do explain his remaining unemployed are now a provable fact, not speculation as to what might have happened.

5.20.3. His case being ready by the start of lockdown on 23 March 2020, working to get ready for a hearing cannot explain his failure to look for work after that. His statement says "*Whilst this case was being **played out** through the Employment Tribunal Service my Brother-in-Law was diagnosed with Pancreatic Cancer, he died 2 December 2020, the day after my ET hearing concluded. ... As the situation became desperate, we were in regular contact as family support and carers (with the added complexities of COVID-19) and during preparation for the hearing and whilst it was being conducted. I very much had Noel and his family in my thoughts throughout*." This is tragic, but no-one's fault. It is a good reason for him not having as much time to search for work.

5.20.4. The claimant says looking for casual work was difficult due to his brother-in-law's health situation. Also, today he pointed out his daughter had to return from University due to the pandemic and his wife carried on work as a "key worker". December involved funeral arrangements, Christmas and probate requirements. He adds "***I had no work anyway**. Ironically, it proved helpful I had to undertake all the probate and estate administrator duties for my Mum's estate; and this case has been enlightening in the process of working through and dealing with the requirements and nuances of legislative procedures*". None of this explains why he found no work between January 2019 and early 2020. However, in that period, he attended two more preliminary hearings and, still as a litigant in person, was tasked with preparing for the full hearing which took a great deal of time.

5.20.5. His statement includes: **"** *Ms Goddard in her evidence to the Hearing succeeded in presenting a view of events at my Dismissal Appeal Hearing that **in my opinion**, was not a fair or accurate reflection of the truth as it unfolded.* He says of his decision to instruct Ms Cowen *"This decision has obviously been beneficial in terms of progressing the case and securing a favourable outcome, **albeit not entirely getting to the whole truth in this matter**, but this decision has cost in excess of £40,000, not accounting for the (literally) hundreds and hundreds of hours of my time in research, reading, learning Employment Law and preparation. I have lived this case due to the serious nature of what has been allowed to happen to me, **directly as a consequence of speaking out about the actions of a HT and her school leadership team driving a school into the ground in the plain sight of Trustees and statutory agencies, officials and elected representatives**; and have woken each day and gone to bed each night thinking about how best to represent what has happened.* The claimant clearly does not agree with the liability judgment holding it was not his "*speaking out*" but the manner in which he chose to do it which caused his dismissal. Repeatedly during this hearing in answer to Ms Millns he referred to his feelings about his treatment as a reason for not doing more to find work. That is not a good reason, but those I have set out above and more I will now set out are.

5.21. He makes several good points about teaching jobs:

(a) his case was picked up by the media. This has resulted in local employers being aware of him and unwilling to engage someone who has spoken out about their employer.

(b) teaching roles at Duchess High School, for PE and Mathematics Teachers would not have been given to him anyway as he is not a secondary trained teacher with a subject specialism in Maths or

"academic PE" able to teach to A level. He was not, initially, employed at Berwick Community High School for those purposes but ended up teaching those subjects because colleagues recognised, he had an aptitude. He did speak to contacts at Duchess school before deciding applying would be futile

(c) he has spoken to schools in Leeds and Wakefield and considered a move back to West Yorkshire One of the schools was Outwood Academy, which has recently entered into "Special measures", but the principal felt his application would be problematic. In any case, he and his wife decided moving back to West Yorkshire and the implications for her would not be feasible or practical.

(d) He has spoken to numerous Teaching Agencies prior and post lockdown. After the liability judgment they could see why he left and recommended, he get back to them after the Remedy Hearing.

5.22. I reject the respondent's contention he ought to have obtained work at the Duchess school. This is where Ms Cowen's "stigma" argument is perfectly valid. The respondent having dismissed him for the reasons it gave, it could not have given him a favourable reference and the suggestion that, only months later, another school in Northumberland, who would not know of any mitigating background circumstances, would have employed him, is most unlikely. The same applies to supply teaching work at any other school, **within a reasonable travel distance of his home at any point before the liability judgment. Put bluntly, the respondent would be saying today his behaviour was so bad it could not employ him, but some other school should. I agree with the claimant's phrase that no education employer "*would touch me with a bargepole*".**

5.23. It must have been obvious to him he would not get a teaching job until the position he had taken was vindicated which, at least in part, it was. **My main concern was why he had not appeared to look for non teaching work from I January 2019 onwards**. I accept in the Berwick area such work is not plentiful. From March 2020, the pandemic made employment even more difficult to find. Despite there being little paper evidence, I accept he considered a return to Waste Management but he had been out of it for 20 years and it is an industry in which regulations change rapidly and frequently. He also considered more menial jobs but, as he said orally today, many of them are ones for which younger people are in greater demand. My initial view was any person becoming unemployed, who had no expectation of an award in his favour, would have found the time, and made the effort, to secure some remunerative work well before now. He has recently stood as a candidate in local elections and spent time campaigning, so he had the time. I accept his sworn evidence he has looked for jobs, mainly online, with no paper record but due to Covid and his rural location, found none which were viable for him in his family circumstances. Had he started looking in 2019 and been prepared to take anything, he may have found some casual jobs, probably not continuous and paying, **at most** an average £7000-8000 per annum, being about 40 weeks per year at about £12-13 per hour for 15-16 hours per week.

5.24. He owns some land to the rear of his property for which he has secured planning permission for two residential properties to be constructed as Holiday Cottages. The Northumberland Tourism Board are keen for him to consider letting part of his home too. He thinks the pragmatic alternative is to start his own business, but has no income or reserves. He has attempted to obtain a state funded small business loan, but a criterion is to be in receipt of a contribution-based allowance or Universal Credit. He does not qualify because his NI contributions are not up to date (p.220). He does not think this should be so. He has contacted DWP HMRC and written to his MP who is unwilling to take the matter

further because she is compromised by her former role as a Trustee. He has written to Kathryn Stone the Parliamentary Standards Commissioner and is awaiting her response. If he receives compensation sufficient to cover the initial outlay, he estimates it will take about 18 months to commence trading but the business is unlikely to yield a profit until its fourth year. I accept the preparatory work he has done for his business has been a reasonable step.

5.25. Now he has the liability judgment he has not ruled out a return to teaching . Most such jobs start at the beginning of an academic term. He assumes the annual salary for M6 will rise by 2% from £37,425 for 2021 – 2022, and by a further 2%, to £38,174 for 2022 – 2023. The notional Employer Pension Contribution rate for TPS will remain at its current level.

5.26. The compensatory award claimed for loss to date is (a) Loss of earnings 1 January 2019 – 14 April 21: £64,274.42 **net of tax** (b) Loss of pension contributions £17,850.46 (c) Loss of Statutory Rights: £500.00 Total £82624.88. If I add the two months to now it increases by about £5800 to about £88000. The very best the claimant could have hoped to achieve from any low paid casual work he may have found in the period would have been about £15000 and leave a deemed net loss of £73000.

5.27. Future Loss of earnings claimed are £69,731.86 and pension contributions £21,269.48. In view of paragraphs 5.32 and 5.35 of the “Employment Tribunals Principles for Compensating Pension Loss” he uses the “Contributions Method” to assess pension loss. Unsurprisingly the respondent does not object to this method'. A professional representative would have used a method more favourable to the claimant. His future loss will, I accept, continue for at least another 2 years if he sets up in business. Even if he returns to teaching, it will easily exceed 6 months net pay- £15000 at current rates.

5.28. His absolute miminum total loss past and future would be about £88000. If halved for contributory fault to about £44000 and grossed up, even at basic rate, over £30000, this is over £48,000. Applying a worst case scenario for the claimant, his compensatory award is well over the statutory cap.

Employment Judge T.M. Garnon
Judgment authorised by the Employment Judge on 18 June 2021