EMPLOYMENT TRIBUNALS

Claimant:	**Miss W Lewis**	
Respondent:	**Secretary of State for Justice**	
Heard at:	**Cardiff (CVP)**	**On: 29 and 31 March 2021 (half day)** **and in chambers on:** **16 April 2021 and 30 July 2021**
Before:	**Regional Employment Judge S Davies**	
Members:	**Ms C Mangles** **Mrs L Bishop**	
Representation:		
Claimant:	**Ms S Sleeman, counsel**	
Respondent:	**Mr J Hurd, counsel**	

RESERVED JUDGMENT ON REMEDY

It is the unanimous decision of the Tribunal that the following claims for compensation are upheld:

a.	Basic award (by consent)	£9,580.00
b.	Financial loss & loss of statutory rights (+ interest)	£40,797.25
c.	Injury to Feelings & Personal Injury (+ interest) (in part by consent)	£43,818.95
d.	Grossed up total	£99,290.51

It is the unanimous decision of the Tribunal that the following claims for compensation are dismissed:

e. loss of earnings prior to the FARM meeting of 10 November 2016;

f. medical expenses; and

g. aggravated damages.

REASONS

In the reserved liability judgment of 14 November 2018, the following claims were upheld:

(1) the Respondent's refusal to permit Ms Brelsford-Smith to act as representative in period 16 May to 17 June 2016 was a failure to make a reasonable adjustment;

(2) the Respondent's failure to allow the Claimant to work from home instead of dismissing her was a failure to make a reasonable adjustment;

(3) the complaint of 'ordinary' unfair dismissal (section 98 ERA) is upheld;

(4) the Claimant's dismissal was an act of discrimination arising from disability (section 15 EqA).

Reasons for delay between liability and remedy hearings

1. There have been several attempts to proceed with the remedy hearing. The first hearing listed in July 2019 was postponed at the request of the parties, as their expert medical evidence was not ready. A subsequent hearing listed in January 2020 was postponed due to counsel's bereavement and a further listing in May 2020 fell into the period of first national lockdown due to Coronavirus, at a time when the then President of the Employment Tribunal Judge Doyle, directed a moratorium on face to face hearings.

2. The remedy hearing was listed on the first open dates following the first national lockdown, when both parties were available, and was conducted wholly remotely on video (CVP) with the consent of both parties.

Consent Judgment

3. Due to the delay described above, the parties' views were sought on a Consent Judgment in respect of some elements of compensation. A Consent Judgment of 23 March 2020 was made upholding Basic Award of £9,580 and an interim Injury to Feelings award of £8,800.

4. It is noted that the Claimant subsequently claimed the sum of £9819.50 for basic award in the updated Schedule of Loss. The Tribunal declines to interfere with the Consent Judgment, which was made on the basis of figures the parties agreed. No reconsideration application was made within time.

Adjustments

5. Reasonable adjustments were in place for the liability hearing however the video hearing meant there was no travel for the participants, so that a 10am start was accommodated. Hourly breaks were taken during the hearing and a full 1 hour lunch break was taken on Day 1. All evidence was concluded by 3:30pm on Day 1. There was a gap of one day between Day 1 and Day 2 (due to the unavailability of one of the panel) and the hearing did not start until 12pm on Day 2, giving the panel time to read written submissions from both parties, which were supplemented by oral submissions at the hearing.

Witnesses and Documents

6. As well as an agreed remedy bundle of 527 pages, the parties provided Schedule and Counter Schedules of Loss and bundles of authorities. References in square brackets are to page numbers in the bundle and references in rounded brackets are to paragraph numbers in witness statements.

7. The Tribunal heard live evidence from the Claimant and from Jamie Barnett, on behalf of the Respondent, who both produced witness statements for the purposes of remedy.

8. The parties jointly instructed a medical expert, Dr Helen McCarthy, Consultant Clinical Psychologist. Dr McCarthy produced a report dated 28 May 2019 [363] and responses to supplemental questions dated 19 July 2019 [410] and 31 July 2019 [417]. Dr McCarthy was not called to give live evidence.

9. The parties were informed that the Tribunal intended to reserve their decision and a chambers day was listed on 16 April 2021. On that same date, the parties were directed to submit their calculations on remedy in

line with the Tribunal's preliminary determinations on remedy. Those directions were not complied with until 19 July 2021 when both parties submitted calculations, after several applications for variation of the date for compliance were allowed. By email of 29 July 2021, the Claimant provided comments on the Respondent's calculations of 19 July 2021, and made submissions in respect of the method of pension loss calculation and the period over which interest should be calculated.

10. A final chambers meeting was listed on 30 July 2021 to finalise this reserved judgment with the benefit of the parties' calculations and submissions referred to above. The parties' views were sought on whether a further in person hearing was required on remedy and both demurred. The Tribunal, in accordance with the overriding objective and to avoid further delay, agrees that a reserved decision based on the information and submissions provided was just and fair.

Law

11. Counsel for both parties are thanked for their helpful written submissions. Although not repeated in this judgment the submissions were carefully considered in full and are incorporated by reference.

12. The tribunal referred to the legislative provisions relating to compensation at s124 Equality Act 2010 (EqA), s123 Employment Rights Act 1996 (ERA), Regulation 6 of the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996.

13. We also referred to the Presidential Guidance on Employment Tribunal awards for injury to feeling and psychiatric injury dated 5 September 2017 (the claim having been presented prior to 11 September 2017) and the Principles for Compensating Pension Loss (fourth edition, third revision 2021).

Unfair dismissal

14. The Claimant referred to **Leonard and others v Strathclyde Buses Ltd [1998] IRLR 693**, in the context of section 123(1) ERA, and the fact that the Tribunal may take a broad-brush approach to what is just and equitable when considering the compensatory award for unfair dismissal.

15. In conceding that a downward adjustment to compensation, under s 207A Trade Union and Labour Relations (Consolidation) Act 1992, for failing to appeal dismissal was not applicable, the Respondent referred to **Holmes v Qinetiq Ltd UKEAT/0206/15/BA** which confirms that the ACAS Code does not apply to dismissal for incapacity due to sickness absence.

Discrimination

16. The approach to assessing compensation under EqA 2010, should be to place the complainant in the position she would have been in but for the discriminatory conduct of the employer (**Ministry of Defence v Cannock [1994] IRLR 509**).

17. The Court of Appeal in **Wardle v Credit Agricole Corporate and Investment Bank [2011] IRLR 604** recognises that, although rare, career-long losses may be compensated where appropriate (paragraph 50).

18. **Abbey National plc and Hopkins v Chagger [2009] EWCA Civ 1202** provides that (1) the Tribunal should determine the chances that dismissal would have occurred absent discrimination, to avoid the Claimant making a 'windfall' recovery in circumstances where she would have likely been dismissed in any event and (2) if the discriminatory dismissal altered the Claimant's subsequent career path, and where, absent dismissal, the Claimant would only have left the Respondent's employment for an equivalent or better job, the assessment of future loss of earnings is determined by when the Claimant might have been expected to obtain another job.

Personal Injury

19. The Tribunal referred to the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases (15th edition) - chapter 4 Psychiatric and Psychological Damage.

20. Compensation for personal injury claims which flow from a discriminatory act can be awarded **(Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] IRLR 481)**. Counsel for the Respondent agreed that there is no requirement that the losses suffered should be reasonably foreseeable and compensation may be awarded in respect of all harm that arises naturally and directly from the acts of discrimination (**Essa v Laing [2004] IRLR 313**).

21. The "eggshell skull" principle is applicable to discrimination cases (**Olayemi v Athena Medical Centre [2016] ICR 1074),** in this case the Claimant's predisposition to further harm due to existing PTSD.

22. The Respondent relies upon **BAE Systems (Operations) Ltd v Konczak [2017] EWCA Civ 1188** as authority for the proposition that apportionment was not appropriate in this case; apportionment only being legitimate where the injury is 'divisible' but not where it is not divisible. The issue of

whether an injury is indivisible is one of fact (paragraph 32). Paragraph 71 sets out the approach a Tribunal should take: "*what is therefore required in any case of this character is that the tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused… the exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm. In other words, the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong: not whether it can assess the degree to which the wrong caused the harm*."

23. **Konczak** was applied in **Olayemi,** in which it was confirmed that the tribunal had to consider whether the injury was divisible and how it might be divided between the causes. With psychiatric injuries, it might be difficult to separate out the impact of different causes owing to the complexity of the human mind, but the exercise still had to be undertaken.

24. Finally, it is necessary for the Tribunal to keep a due sense of proportion to compensation and look at the individual components of any award and then look at the total to make sure that the total award seems a sensible and just (**Cannock**).

Aggravated Damages

25. The EAT gave guidance in **HM Land Registry v McGlue [2013] EqLR 701** on the grounds for an award of aggravated damages. Langstaff P (para 31):

'*First is the manner in which the wrong was committed. The distress caused by an act of discrimination may be made worse (a) by being done in an exceptionally upsetting way, e.g., "In a high-handed, malicious, insulting or oppressive way" per Lord Reid in* ***Broome v Cassell [1972]*** *; (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: for example 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, e.g.* ***Prison Service v Johnson, HM Prison Service v Salmon [2001] IRLR 425*** *and* ***British Telecommunications v Reid [2004] IRLR 327'***

26. These categories were not an exhaustive list, and the emphasis is one of degree. Langstaff P goes on to say at paragraph 35:

'*the Tribunal should also be aware and be cautious not to award*

under the heading "Injury to Feelings" damages for the self same conduct as it then compensates under the heading of "Aggravated Damages" It must be recognised that aggravated damages are not punitive and therefore do not depend upon any sense of outrage by a Tribunal as to the conduct which has occurred'

Medical evidence

27. Regrettably, despite the significant passage of time since the events of the Claimant's employment, concluding in 2017, the delivery of the liability judgment in 2019 and this remedy judgment in 2021, she remains very unwell.

28. The Claimant is not working and told the Tribunal that she is not presently ready to do so. She describes having limited interaction with people (38) including close family (36 and 40). She suffers with anxiety, nightmares, flashbacks and panic attacks and cannot take pleasure in pastimes such as reading or watching television as she used to (38-40). The Claimant is anxious of crowded places and confined spaces (31) and fearful of strangers (34). The Claimant also describes a lack of attention to self-care (36) which appears to have deteriorated since Dr McCarthy's report (paragraph 25).

29. The Claimant remains on anti-depressant and anti-anxiety medication (43) and on the waiting list for NHS Eye Movement Desensitisation and Reprocessing (EMDR) therapy. The Claimant tells us that she requires face to face treatment, rather than online, as she experiences migraines which can be triggered by online treatment. The covid pandemic has exacerbated the already long waiting times for NHS treatment.

30. The Claimant had private therapy (EMDR and Cognitive Behavioural Therapy (CBT)) with Dr Herrieven whilst in employment in 2015/2016 [412], shortly after termination of employment and then again for a period in February and March 2019 but she then discontinued private treatment for financial reasons. This evidence was given under cross examination. The parties agreed the dates of appointments in 2019 at the start of day 2 of the remedy hearing, the Claimant having disclosed text messages confirming the appointments after day 1 of the remedy hearing.

31. Despite the Claimant's hope that a future course of EMDR would assist her recovery (32), during cross examination the Claimant described discontinuing private EMDR therapy as she found it was too traumatic, at times, when viewing source trauma. During EMDR therapy it had taken Dr Herrievan a long time to bring the Claimant back to the present moment. Due to this regression, latterly the Claimant engaged in CBT with Dr Herrieven instead of EMDR.

Dr McCarthy's report

32. The report notes that on 2 May 2017, Dr Reddy diagnosed PTSD, adjustment disorder with mixed anxiety and depressive reaction [385] noting the adjustment disorder as being a consequence of stressful events at work with colleagues involved in fraudulent activity.

33. Dr McCarthy confirms the PTSD diagnosis [389] and the self-reported severe symptoms of depression and anxiety [390]. The Claimant's PTSD is attributed to the work that she carried out with client X (paragraphs 9 – 13 and 29). Further events at work compounded matters; work relationships at the Swansea office, "whistleblowing" and the anonymous letter (paragraph 14 – 17).

34. Dr McCarthy opines that the PTSD led to three areas of impairment (paragraph 39) affecting (1) the type of work the Claimant could do, (2) her ability to function in social/work situations where she does not know people and (3) where she could work. Additionally, Dr McCarthy's view is that the chronicity of PTSD plus the office issues affected the hours she could work because of accumulated stress/strain [395].

35. Relying on Dr Critchley's contemporaneous report of 26 October 2016, as well as the Claimant's description, Dr McCarthy opines that the Claimant would have been unfit for her own role in the period between dismissal and effective date of termination (17 November 2016 to 15 February 2017). Dr McCarthy considers that she may have been able to work from home as long as the work was not related to criminal cases and on the basis of half time hours (paragraph 55). Dr McCarthy concludes that the Claimant would not have been able to engage in full-time work during her notice period (paragraph 40). Dr McCarthy's view is that the Claimant's PTSD would likely remain chronic over time and would have led to a reduction in hours (paragraph 45).

36. Dr McCarthy's view is that additional stressful events at work, particularly at the Swansea office, would have precluded the Claimant's return to work there, rather than her PTSD symptoms themselves. The PTSD however would preclude her from undertaking the role which involved accounts of violence, murder or terrorism but would not have compromised her ability to carry out administrative work of an emotionally neutral nature (paragraph 42 – 44 and 47). Dr McCarthy's view is that, had the Claimant undergone successful EMDR treatment, she would have been able to return to work in other roles in the Respondent and potentially resume a full-time role (paragraph 47).

37. On causation, Dr McCarthy's opinion is that matters causing the Claimant significant stress were: "*being asked to make alterations to files in October 2013, being investigated herself for being malicious and vindictive, being the subject of an anonymous letter and "been told to go off sick" in September 2015 and not being allowed to resume working at home*." (Paragraph 50). Further, Dr McCarthy notes that issues in the Swansea office "*appear to have led to a significant worsening of her mental health and this may have been the final trigger (perceived injustice) for her being unable to work*." (Paragraph 51)

38. It is noted that the Claimant was not considered well enough to work at the stage she was assessed by Dr McCarthy in 2019 (shortly following the most recent private therapy with Dr Herrieven). Dr McCarthy's view is that the Claimant will not be able to secure employment in the open labour market because of her mental ill-health (paragraph 53).

39. In summary, Dr McCarthy considers that had the Claimant not been dismissed and had occupational health recommendations, to explore alternative options for possible redeployment, been followed, the Claimant would likely have been able to resume working. "*The type of work would have had to exclude criminal work, and working in the Swansea office, and would have needed to involve half-time rather than full-time working. Without further psychological treatment my opinion is that Ms Lewis's prognosis is poor but with treatment she is likely to be able to engage in job seeking albeit with suitable support. Whilst undergoing therapy she would potentially be able to resume working initially at home, with a view to seeking work outside the home again eventually*." [402]

Junior Clerk Role

40. The Claimant gave additional evidence about the billing duties she carried out for the advocacy unit whilst working from home. The job description for the band D role is at [292]. The Claimant accepted that whilst covering this role, pending recruitment of a junior clerk, she performed the duties at bullet points 2, 3, 5 and 6. The Claimant accepts that she did not cover the duties at bullet points 1 and 4:

    '1: create and maintain systems of recording and tracking the PDS advocates casework and other activities ensuring accurate and up-to-date information on the PDS advocacy unit's caseload and case progression is available

    4: support the senior clerk by covering a range of clerking duties including undertaking complex diary management, allocating cases to suitable advocates and arranging substitute advocates when necessary,

contacting instructing parties to obtain case documents and provide updates, liaising with courts to reschedule hearings, responding to telephone enquiries/correspondence and supporting the advocates day-to-day.'

41. The Claimant predominantly worked from home at hours of her choosing, to accommodate fluctuations in her mental health. The Claimant had some limited contact with colleagues and also carried out one trip to London whilst covering the junior clerk role. The Claimant performed the role to the Respondent's satisfaction and the period she covered the role was extended.

42. The Claimant was paid on a full-time basis whilst performing the role and there was no discussion about a reduction in her hours, nor was any change in hours recorded in writing. The Claimant described working at what would generally be considered 'unsocial' and irregular hours, as this suited her personal circumstances.

43. When the Claimant took up the role, the was a backlog of bills for the barristers working for the advocacy unit. The Claimant cleared this backlog before the newly appointed junior clerk started work. The Claimant accepted in cross examination that, with the appointment of the junior clerk and the completion of the handover period, the role came to an end.

Hours of work

44. We find that there was no agreement with the Respondent that the Claimant's hours of work were reduced, at any point in time. There is a total absence of contemporaneous evidence to this effect, and she was paid in full during the period that she worked from home. Whilst working from home, the Claimant was able to adapt her working pattern to successfully complete billing work (29i).

45. Whilst we accept the Claimant's evidence, that she continued to work full time hours, we consider it likely that it took her longer than it usually would have done to complete the tasks required. So, whilst there is no issue that the Claimant worked full time hours, the tasks she worked on were unlikely to have amounted to a full time role. This conclusion is reached on the basis of the Claimant's ill health and symptoms at the time, the fact that she accepts she was not performing the full role of Junior Clerk, that the role was a grade down from her substantive role and one for which she was more than qualified based on the experience she describes in her witness statement (5).

46. We concur with Dr McCarthy's opinion that as of November 2016, the Claimant may have been able to work half time hours (at home – paragraph 40 [395]). This view is repeated in paragraph 42 [396]; by late 2016 the duration of PTSD meant it likely that working hours would have to be reduced to half time. The need for reduced hours is repeated at paragraph 45 [397]. Dr McCarthy confirms her view in her answers to questions dated 31 July 2019 [422].

Change in role

47. We conclude, based on Dr McCarthy's report and the findings in our liability judgment, that the Claimant's inability to return to a role within the criminal justice system flowed from the PTSD she experienced from work with client X.

48. By September 2015 representations were made on behalf of the Claimant, by Ms Brelsford Smith, that the Claimant was too unwell to work (paragraph 62 of liability judgment). The Claimant's application for Ill Health Retirement was not supported by medical evidence [383-384]. By the time of the final FARM meeting, on 10 November 2016, it was said by Ms Brelsford Smith to be 'unforeseeable' that the Claimant would return to a role in the (criminal) justice system.

49. The Claimant's career path had already changed prior to her discriminatory dismissal and the failure to make reasonable adjustments. The Claimant's evidence in cross examination was that, as the person who 'put her head above the parapet' she was dismissed, whilst colleagues who had lied retained their jobs. This evidence chimes with the view reached by Dr McCarthy that the issues at the Swansea office may have been the '*final trigger (perceived injustice) for her being unable to work*' [399].

Conclusions

50. The Claimant did not seek a recommendation under section 124(2)(c) Equality Act 2010.

51. Our conclusions on the heads of loss claimed are as follows:

Basic Award

52. Our conclusions are above; this award was subject to Consent Judgment.

The claim for compensation for loss of earnings prior to the FARM meeting of 10 November 2016

53. The Claimant accepts that the billing work came to an end with the appointment of a junior clerk and the end of the handover period. The Claimant remained unwell and as such moved to absence with sick pay.

54. Almost immediately after the role concluded the Claimant's representative, Ms Brelsford Smith impressed upon the Respondent that the Claimant must be exited from employment and that attempts to redeploy her would worsen her condition (paragraph 62 liability judgment). At that point in time the Claimant sought an exit via Ill Health Retirement which was expressed as the 'sole outcome' she sought.

55. When Mr Barrett took over as her line manager, the Claimant informed him that sending her adverts of available jobs from redeployment registers was a form of harassment and mocking her condition (paragraph 160 liability judgment)

56. In view of the Claimant's health at the time, and representations made on her behalf, she was appropriately paid sick pay when the billing work came to an end. The claim for compensation for loss of earnings is dismissed.

The claim for compensation for medical expenses

57. We conclude that the medical expenses claimed (cost of 2 years' EMDR treatment, cost of counselling to date and additional health premium) do not flow as a consequence of the claims upheld. Predominantly, the completed and anticipated treatments relate to the Claimant's PTSD which was pre-existing before the discrimination upheld. We are satisfied that the Claimant would have engaged with these therapies regardless of the impact of discrimination on her mental health and as such compensation would not place her in the position she would have been but for the discriminatory conduct.

58. The Claimant elected to take out private health insurance, this was not a civil service benefit. That is her choice, but it is not a matter for which we consider compensation should be awarded to be paid by the Respondent.

59. The Claimant chose to withdraw her claim for failure to make reasonable adjustments, with regard to the Respondent funding EMDR treatment, at the start of the liability hearing. This decision is a factor we considered when reaching our decision to dismiss this claim for compensation.

ACAS Code

60. There is no reduction for failure to follow ACAS Code (no appeal against dismissal) as a reduction was not pursued by the Respondent.

Financial loss award

61. At paragraph 174 of the liability judgment, we held that waiting an unspecified further period would not have assisted in avoiding the disadvantage (dismissal) to the Claimant.

62. The OH report dated 26 October 2016 noted that the Claimant was too ill to return to work in her substantive role and recommended that the Respondent should explore alternative roles as part of normal procedures.

63. Had they not dismissed the Claimant in an act of discrimination, we consider the Respondent would have been able to locate and offer her part-time project work, to be completed from home, at the FARM meeting on 10 November 2016. We are satisfied that as a large organisation some productive work could have been found. In accordance with Dr McCarthy's opinion this would have been part-time work due to the chronicity of the Claimant's condition and it would have been carried out from home.

64. Despite the part time nature of the work, the Respondent would have been likely to have a paid the Claimant on the basis of her full time salary at Grade C for a period of 12 months. The likelihood of continued full time pay was conceded on behalf the Respondent during oral submissions. We concur that this is likely to have been the Respondent's approach to support the Claimant whilst she remained unwell and in the hope that she would eventually be able to return to work longer hours.

65. The nature of the project work would not have attracted payment of standby or overtime pay. The dismissal of the Claimant did not alter her subsequent career path, sadly the PTSD from working with client X had already altered her future career, and she would not have been working on matters which attracted these additional payments (as she previously had in her public defender role).

66. We consider that the Claimant's ill health would likely have remained such that, by 10 November 2017, the Respondent would have fairly dismissed her in the absence of discrimination. We reach this conclusion based on the fact that the Claimant remains seriously unwell in 2021, more than four years after termination of employment and two years after the liability judgment of this Tribunal. Although her claim was upheld, in part, even

that resolution has not enabled the Claimant to regain her health in the way that she no doubt wishes she could.

67. On the Claimant's own account, in September 2015 she needed to leave the Respondent and it was 'unforeseeable' that she would work in the criminal justice system again. Dr Critchley's view in October 2016 was that she was unfit for her substantive role would not be well enough to work with criminals in confined spaces for 12 months. Her future improvement required further treatment and the resolution of outstanding work issues.

68. Although EMDR therapy is recommended, the Claimant herself noted that at times it was too intense for her, and she had to cease treatment and move on to CBT therapy instead. Despite continuing with some private treatment following termination of employment her medical condition has not improved to date.

69. Although working from home may have assisted the Claimant to improve her wellbeing, we do not consider that she would have improved to such an extent that the working arrangement (part time project work from home) would have been considered sustainable after 12 months. From that point a fair and non discriminatory dismissal could have been effected.

70. On dismissal, the Claimant would have been entitled to payment of her notice period at full time grade C pay.

71. On 19 July 2021, the Respondent provided copies of payslips which showed payments of £494.78 and £1,145.37 were made to the Claimant in January and February 2017. Having considered the Claimant's submission of 29 July 2021 which did not comment on these payments or object to the Respondent's submission that credit should be given for them, the Tribunal considers it appropriate for credit to be given for these payments and they are deducted from the overall financial loss award.

72. Subject to the above, during her notice period the Claimant was initially paid half pay (to 13 December 2016) and then was on nil pay (to 15 February 2017). Calculations which take into account these pay arrangements have been included in our calculations.

73. The Respondent, in its letter of 19 July 2021, confirmed that the Claimant was entitled to a 1% pay increase and our calculations have been increased by this amount throughout.

Pension Loss

74. The Claimant was a member of the CARE (defined benefit) pension scheme. The period of loss for calculation is 12 months. The Principles for

Compensating Pension Loss (the Principles) suggest that a 'tolerably accurate' assessment of the value of lost pension benefits for short periods can be achieved with the contributions method (paragraphs 5.30 – 5.33).

75. Paragraph 5.33 (with our emphasis) provides an indication of what period of loss could be considered 'short':

> *'These Principles do not set in stone the period of loss that would be short enough to merit use of the contributions method in a DB case, since much will depend on the facts. As a rule of thumb, six months would very likely be a short period; twelve months would probably still be short; 18 months and above would probably not be short. As always, the parties will be free to make their arguments to the tribunal'*

76. When invited to provide submissions on paragraph 5.33 by the Tribunal, the Claimant submitted that the Tribunal should depart from the 'rule of thumb' set out in the Principles due to the Claimants age, ill health and that it was unlikely she would find alternative work with a similar pension scheme.

77. These factors are noted, and the Tribunal is mindful that the Principles offer guidance only. However, the Tribunal does not consider these factors provide sufficient basis upon which to deviate from the guidance and are satisfied that a tolerably accurate calculation can be achieved with the contributions method. The Principles are guided by the concepts of justice, simplicity, proportionality, pragmatism and flexibility. In the circumstances of the case and taking these concepts into account, the Tribunal considers this method of calculation of pension loss is appropriate.

78. The Respondent's pension loss figures of 19 July 2021 are adopted for the calculation, in the absence of objection regarding their numerical accuracy from the Claimant in her email of 29 July 2021.

Loss of statutory rights

79. The Claimant's claim for loss of statutory rights is upheld in the sum of 2 weeks net pay. It will take the Claimant 2 years of continuous employment to regain her unfair dismissal rights and we consider this sum amounts to appropriate compensation.

Injury to feeling

80. We have no doubt of the genuineness of the extent of the Claimant's injury to feeling. Although it related to a short period of time, the denial of her chosen companion at a time when that assistance was needed will have impacted the Claimant negatively.

81. The Claimant was distressed by the Respondent's refusal to allow Ms Brelsford Smith to be her companion even though during this short period of time there were no meetings scheduled. We found there was no ill motive on the part of Mr Jones; he made the decision that he could not communicate with Ms Brelsford Smith on the basis of her change in status from employee to ex-employee and an overly literal interpretation of policy.

82. Discriminatory dismissal is, of course, a serious matter and the failure to consider home working redeployment will have factored in the impact on the Claimant. Although it is the injury to the Claimant that we must consider, we do think it relevant to note that Mr Barnett's actions were ones of omission and were not motivated in any way by malice towards the Claimant.

83. The parties agreed that the award should fall within the middle band of Vento. Due to the date that the claim was presented, 22 August 2016**,** the maximum middle band award was £18,000 (**Da'Bell**).

84. The claim was issued only a few weeks before the Presidential Guidance of 5 September 2017 was published, uprating the Vento bands for the first time in many years.

85. The Claimant submits that we should engage in the calculation, envisaged in paragraph 11 of the applicable Presidential Guidance, to uprate Vento bands for inflation and make an award at the upper end of the middle band, which by her calculation would be £24,440 (inclusive of 10% uplift – **Simmons**).

86. Due to the significant impact on the Claimant as described in her evidence we consider it appropriate to award the sum of £19,800. This sum amounts, we consider, to appropriate compensation, falling towards the upper part of the middle band, when Vento bands are uprated in accordance with paragraph 11 of the applicable Presidential Guidance.

87. The claim for compensation for Injury to Feeling is upheld in the total sum of £19,800. The parties will take into account the Consent Judgment already issued with an interim award of £8,800.

Personal injury

88. Based on the Judicial College Guidelines for assessing psychiatric damage generally, where damage is considered "moderately severe" and apportioning causation to discrimination upheld, the claim for compensation in the sum of £13,872 is upheld.

89. This figure was reached by reference to the mid-bracket figure (including 10% uplift) of £34,680 and reducing that sum by 3/5 (based on the factors set out in paragraph 50 of Dr McCarthy's report of 28 May 2019).

90. We considered it appropriate to refer to part A (Psychiatric Damage Generally) of Chapter 4 of the Judicial College Guidelines rather than part B (PTSD). This is because the Claimant's PTSD was pre-existing before the acts of discrimination upheld. We concluded that the injury sustained by the Claimant in respect of her adjustment disorder and a worsening of her mental health fell for consideration under part A. The category of 'moderately severe' is applicable to '*Cases of work-related stress resulting in a permanent or long-standing disability preventing a return to comparable employment*' and as such we concluded it applicable to the Claimant's position.

91. Dr McCarthy's report does not directly address the question of causation but does, at paragraph 50, set out a number of aspects of the Respondent's treatment of the Claimant that have "caused significant stress" (see above).

92. As we are considering the exacerbation of a pre-existing disorder, the award of damages for pain, suffering, loss of amenity will reflect only the exacerbation or acceleration of the Claimant's mental ill health.

93. Taking the broad approach we are required to, we consider the five factors identified by Dr McCarthy as significant stressors, are the factors which exacerbated the Claimant's poor mental health and, in particular, her underlying PTSD. Broadly speaking we conclude that two of these five factors contributed to the harm experienced by the Claimant (being told to go off sick and not being allowed to resume working at home). The other three factors are attributable to matters pre-dating the discrimination upheld. Taking on the task as best we can, we consider apportionment is appropriate by reducing the award by 3/5 as only 2 of the factors that materially contributed were impacted by discrimination. In reaching this

conclusion we have considered the guidance in **Konczak** and **Olayemi** and tried *'to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused'.*

Aggravated Damages

94. The claim for compensation for aggravated damages is dismissed.

95. We do not consider that aggravated damages are appropriate in this case. The matters complained of do not, in our view, satisfy the test in **McGlue.** We do not consider that the conduct alleged to have aggravated the Claimant's upset and sense of injustice can objectively be viewed in such a manner.

96. In our liability judgment we concluded that the line managers of the Claimant, Mr Jones and Mr Barrett, attempted to support and assist her. When Mr Jones made the decision not to allow Ms Brelsford Smith to act as companion, we concluded that he believed he was acting within policy. The denial of a companion lasted for a month, during which period there were no meetings between the parties. The failure to make this adjustment did not arise from ill motive towards the Claimant. The Claimant was very unwell however we do not think that Mr Jones acted in any intentional way to further distress her.

97. The billing work which the Claimant performed from home came to a natural end when the new clerk was appointed. Mr Barrett's decision to dismiss the Claimant in November 2016 and his omission to raise with the Claimant the possibility of working from home was not, we conclude, driven by malice or an intention to upset the Claimant. Rather, it was an omission to think more widely as to what might have been possible for the Claimant in light of the previous stint working from home whilst unwell. We conclude that Mr Barrett genuinely felt that all options had been exhausted in the face of having been informed by the Claimant that sending her job adverts was a form of harassment.

98. We note Mr Barrett's apology both in his witness statement and given in live evidence and consider it to have been sincere. It is the Tribunal's sincere hope that hearing these words from Mr Barrett was of some comfort to the Claimant.

Interest

99. The parties provided submissions on the point in time to which calculation of interest should be made; whether that should be to the date when the remedy hearing was due to go ahead in May 2020 or to the point of calculation by the Tribunal in 2021.

100. The Respondent submitted that the intervention of the Covid 19 pandemic was an exceptional circumstance causing delay and that the Respondent would experience 'serious injustice' if interest was calculated to date (for an additional period of just over a year). The Claimant submitted that she should not be penalised for the events of the pandemic and that interest was provided to compensate her properly for the delay in receiving compensation for the unlawful discrimination found.

101. The Tribunal is persuaded that calculation of interest should run to the date of calculation and not the point in time where the pandemic intervened to delay the remedy hearing. The additional period is just over a year and will mean slightly higher interest payments for the Respondent, but not so much that they can be considered to amount to a 'serious' injustice.

102. It was open to the Respondent to agree, by consent, to make additional payments to the Claimant in respect of compensation when this issue was raised by the Tribunal in March 2020. This course of action would have minimised the exposure to interest payments. The Tribunal considers that in all the circumstances the relative injustice falls in favour of the Claimant.

103. The Tribunal concludes that payment of basic award and part payment of injury to feeling compensation was made by the Respondent on 3 March 2020. This is recorded in the Respondent's email of 19 July 2021 and reflected in the Claimant's response of 29 July 2021. There is some internal ambiguity in the Respondent's email of 19 July 2021, as its interest calculations are made to March 2021, however having read the correspondence from the Claimant of 29 July 2021, which acknowledges interim payments made 'in March 2020', we are satisfied that the correct year of payment is 2020 and that the Respondent made an error in its calculation period.

104. Finally, the Tribunal did not conclude its judgment until 30 July 2021 and its calculation of interest therefore runs to this date.

105. The calculation of compensation was made as follows:

Basic award

20 weeks x gross weekly pay (calculated by consent)	**£9,580**

Financial loss

Loss of net earnings

a. 23 November to 13 December 2016 (half pay)	£670.82
b. 13 December 2016 to 15 February 2017 (nil pay)	£4,287.61
c. 16 February 2017 to 2 February 2018	£23,501.91

Loss of statutory rights (2 weeks net pay)	£938.20
Loss of pension	£7,256.78
Less payment of salary January 2017	-£494.78
Less payment of salary February 2017	-£1,145.37
Total	£35,015.17
Interest at 8% (on the above, omitting pension loss) £6.08 per day for 951 days	£5,782.08
Total: Financial loss plus interest	**£40,797.25**

Non financial losses

Injury to feelings	£19,800.00
Interest at 8% on full amount from 16 May 2016 to 3 March 2020 = 1387 days x £4.34 per day	£6,019.58
Interest at 8% on £11,000 from 4 March 2020 to 30 July 2021 = 513 days x £2.41	£1,236.33
Total interest	£7,255.91

Personal Injury	£13,872.00
Interest at 8% from midpoint to date 951 days x £3.04 per day	£2,891.04
Total: non financial loss plus interest	**£43,818.95**
Grossing up net payments	
Tax free allowance	£30,000.00
Less Basic award	£9,580.00
Balance of tax free allowance	£20,420.00
Figure to be grossed up Compensatory award above tax free allowance	£20,377.25
That sum to be grossed up / 0.8	£25,471.56

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Regional Employment Judge S Davies

Dated: 30 July 2021

JUDGMENT SENT TO THE PARTIES ON 6 August 2021

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FOR THE SECRETARY OF
EMPLOYMENT TRIBUNALS