



EMPLOYMENT TRIBUNALS

Claimant:

Ms Amy O'Sullivan

v

Respondent:

Secretary of State for Justice

Heard at:

Reading (by CVP)

On: 3 June 2021

Before:

Employment Judge Hawksworth (sitting alone)

Appearances

For the Claimant: Ms E Grace (counsel)

For the Respondent: Ms L Robinson (counsel)

RESERVED REMEDY JUDGMENT

The respondent is ordered to pay the claimant the sum of £40,372.14 comprising:

1. a basic award of £5,250.00;
2. a compensatory award of £1,050.00;
3. £7,817.76 in respect of financial losses (of which £6.71 is interest);
4. £20,688.81 for injury to feelings (of which £3,138.81 is interest);
5. £5,565.85 in respect of tax payable on the award ('grossing up').

REASONS

Claim, hearing and evidence

1. The claimant was employed by the respondent as a prison officer from 13 October 2008 until her dismissal which took effect on 29 April 2019. The claimant's claim was presented on 16 August 2019 after a period of ACAS early conciliation from 17 June 2019 to 17 July 2019. The claimant complained of unfair dismissal and disability discrimination. She also brought complaints of breach of contract (notice pay) and for compensation under the Civil Service Compensation Scheme but those payments have since been made by the respondent.
2. The ET3 was due to be presented on or before 3 October 2019. No ET3 had been presented by 2 March 2020. I issued a default judgment on liability under rule 21 of the Employment Tribunal Rules of Procedure 2013

on 2 March 2020; this was sent the parties on 10 March 2020. A hearing under rule 21(2) was listed for 17 August 2020 to decide remedy.

3. The respondent's draft ET3 was presented on 22 May 2020 and the substantive grounds of response on 19 June 2020. At the hearing on 17 August 2020 I considered applications for an extension of time to present the ET3 and for reconsideration of the default judgment. For reasons given at the hearing and summarised in the case management summary of 27 August 2020, I refused the respondent's applications.
4. I went on to consider whether the respondent should be permitted to participate in the remedy hearing pursuant to rule 21(3). I decided that it would be in the interests of justice and in line with the overriding objective for the respondent to be permitted to participate in the remedy hearing. As the fact-finding exercise required to determine remedy was likely to be more extensive than it would be at a remedy hearing taking place after a liability hearing, I decided to make case management orders to allow the parties to prepare fully for the remedy hearing, and to list that hearing for one day.
5. The remedy hearing took place by video on 3 June 2021. As a hearing under rule 21(2), it was heard by me sitting alone. The parties both confirmed that they did not wish to apply for the remedy hearing to be heard by a full tribunal.
6. At the hearing I heard evidence from the claimant and, for the respondent, from Ms Megan Cox, the Head of Human Resources for Yorkshire and Humberside National Probation Services.
7. There was an agreed remedy bundle of 386 pages. References to page numbers in this judgment are references to that remedy bundle.
8. I reserved my judgment on remedy as there was insufficient time on 3 June 2021. I apologise to the parties for the delay in promulgation of this judgment. This reflects the current pressures of work in the employment tribunal.

The Issues

9. The claimant's complaints were of unfair dismissal, discrimination arising from disability in respect of the instigation of capability proceedings and dismissal, and failure to make reasonable adjustments in respect of the capability procedure. Those complaints succeeded by virtue of the rule 21 judgment.
10. The remedy hearing is for the tribunal to decide the compensation which the claimant should be awarded. No other remedy is sought by the claimant.
11. The parties produced a schedule of loss and a counter-schedule of loss.

Findings of Fact

12. The claimant was employed by the respondent as a prison officer from 13 October 2008.

The claimant's dismissal and the background to it

13. After a period of sickness absence of 10 days between 21 July 2016 and 14 August 2017, the claimant was issued with a Stage 1 Attendance Warning by the respondent on 28 September 2017. She saw occupational health on 5 April 2017 and a report was produced which referred to her mood being affected by a recent bereavement (page 63). She was diagnosed with anxiety and depression on 23 April 2018.
14. On 6 June 2018, after returning to work from another period of sickness absence, the claimant completed a stress risk assessment. She told her line manager that she was on medication for anxiety and depression, and that she was not sleeping, not relaxing and felt constantly anxious. The claimant's line manager told her on 7 June 2018 that she was on "thin ice".
15. At an Attendance Meeting on 14 June 2018, the claimant was issued with a Stage 2 Attendance Warning.
16. Following further short absences in 2018, the claimant saw occupational health again. Two reports were produced, dated 28 August 2018 and 12 September 2018 (Page 64). Both of these recorded that the claimant was fit to work and was working full duties. The report of 12 September 2018 said the claimant's symptoms were well controlled and she had been attending work regularly since July 2018.
17. The claimant had an Attendance Review meeting on 30 October 2018 at which she confirmed that she was on medication, that it was helping, and she was due to undergo therapy.
18. The claimant was absent from work for 33 days between 6 December 2018 to 7 January 2019 due to stress. The claimant had stopped her medication, but her GP prescribed it again in December 2018.
19. The claimant saw occupational health in January 2019. The occupational health report of 22 January 2019 confirmed that the claimant was fit to attend work, saying: "*[the claimant's] anxiety appears to be well managed, and although I cannot guarantee that she will have no future absence linked with this, my expectation is that she be able to undertake her full role and provide regular and effective service going forwards*" (page 385). The occupational health report recorded that the claimant's recent period of absence had been triggered by feeling unsupported regarding the management of a grievance.

20. The claimant had no sickness absence after 7 January 2019 (page 377). Her grievance concluded at a meeting on 19 February 2019 when her grievance was partly upheld.
21. On 11 March 2019 the claimant attended a further Attendance Review meeting following which she was dismissed on 18 March 2019 on the ground that she had failed to maintain an acceptable level of attendance and her absence history indicated that she was unlikely to maintain an acceptable level of attendance in the future.
22. The claimant had a total of 99 days sickness absence from July 2016 until her dismissal of which 78 were due to anxiety and depression (page 377).
23. The claimant appealed against her dismissal. The outcome, dated 29 April 2019, was that the dismissal was upheld. Unusually, where an employee appeals against dismissal, the respondent extends employment until the outcome of the appeal. The claimant's effective date of termination was therefore 29 April 2019.
24. I find that if the claimant had not been dismissed, she would have remained working with the respondent and would still have been employed by the respondent by the time of the remedy hearing. She had worked as a prison officer for over 10 years, having started at age 21, and there was no suggestion that she was thinking of leaving her job. The respondent did not suggest that she would have been dismissed for any other reason.

The claimant's pay at the time of and after dismissal

25. At the time of her dismissal, the claimant's gross basic pay was £30,212 (page 71). She was also entitled to some allowances and other payments (see page 72 for example). Her P60 for 5 April 2019 shows that her gross pay for the year was £33,843.93, which equates to gross weekly pay of £650.85 (page 66). The P60 shows deductions for tax (£4,011.20), employee national insurance contributions (£3,050.39) and employee pension contributions (£1,848.46). The claimant's net annual pay was therefore £24,933.88 which equates to net weekly pay of £479.50.
26. The claimant was a member of the civil service alpha pension scheme which is the calpha scheme (page 74). The respondent made pension contributions of 27.1% of salary per year (page 71).
27. The respondent continued to pay the claimant in May and June 2019 in error. These overpayments have been paid back by the claimant.
28. On 30 August 2019 the claimant received her pay in lieu of 11 weeks' notice in the sum of £6,377.04 (page 109). On 30 September 2019 the claimant received a payment under the Civil Service Compensation Scheme of £17,456.82 (page 110). These payments were paid late and the claimant had to chase for them. The claimant's expenses associated with this were £75.01.

The impact on the claimant

29. The claimant was passionate about her career with the respondent and felt that she did her job in an exemplary and professional manner. The claimant's dismissal made her feel that she had had something taken away from her for the wrong reasons. She found this hurtful and very upsetting. She was left feeling worthless, embarrassed and extremely lonely. She felt that she had not been supported by the respondent and that the decision was made with no concerns regarding her mental health. The dismissal affected her confidence and made her doubt her ability.
30. After her dismissal, the claimant took some time out to recover and concentrate on her well-being.
31. The claimant said that as a result of her dismissal, her mental health deteriorated and that she was not able to start looking for work until October 2019. However, there was no evidence that the claimant was unable to work for medical reasons during that period (or at any time during the period from January 2019 to 11 March 2020). Her GP records showed that she did not seek medical advice and was not treated by her doctors for anxiety and depression during this period. She was not certified unfit for work at any time from 7 January 2019 to 11 March 2020. She stopped taking anti-depressants at the beginning of March 2019 and has not been prescribed them again at any time since.
32. The claimant said that after her dismissal she was unwell but did not feel that going to the doctors and being put on anti-depressants would help. It seems likely that if the claimant had had a severe deterioration of her mental health such that she was unable to work for such a lengthy period of time for medical reasons, she would have seen her doctor about it. Her previous engagements with her GP about her mental health were positive and had led to improvement: she confirmed to her employer in October 2018 that she had been prescribed anti-depressants and these were helping, and, after another period of sick leave in December 2018, she recovered sufficiently and was able to return to work the following month, after seeing her doctor and receiving treatment.
33. I find that the claimant's decision to take time out after her dismissal was her choice rather than a medical requirement.
34. In around October 2019 the claimant applied for social security benefits. Her application for employment support allowance was initially successful but she could not be paid because she received her civil service compensation scheme payment at around that time and this affected her eligibility for benefits. The claimant began receiving universal credit payments in December 2019 (page 92).

The claimant's job search in 2019

35. The claimant began to look for work in October 2019 and registered with two online recruitment agencies in November 2019. In November 2019 she applied for a job with the Metropolitan Police but her application was unsuccessful.
36. In December 2019 the claimant applied for a job supporting young people with head injuries. Her application was successful but it turned out that the role was not as advertised and was actually a role working with older people with severe mental health problems. She did not feel that she was suitable for the position because of her mental health issues.
37. In late December 2019 the claimant found a temporary job as a receptionist. She was paid £9.50 per hour. She worked two three-hour shifts before Christmas, then worked around 10 hours a week between 24 January 2020 and 17 March 2020. In total she earned £57.00 (gross) in December 2019 and £624.30 (net) between 24 January 2020 and 17 March 2020.
38. The claimant said that because the skills she gained from her work with the respondent were not part of a recognised qualification, new employers did not recognise the value of her skills.

The claimant's health and job search in 2020

39. On 11 March 2020 the claimant was diagnosed with breast cancer. She was signed off work by her GP from 16 March 2020 and continued to be signed off sick while she was receiving treatment. The first national lockdown for covid-19 began shortly after this, and the claimant was told by her doctor that she should shield. She was signed off sick until 22 March 2021.
40. The claimant applied for six jobs in September and November 2020. In September 2020 she applied for a job as a receptionist in a doctor's surgery (page 378). In November 2020 she applied for two receptionist/administrator jobs and one job as a local authority housing officer (page 379, 380, 381). At about the same time she applied for a job with the Border Force (page 382) and another job as a local authority housing officer (page 383). In May 2021 she applied for a job as a medical receptionist/administrator (page 383).

The roles suggested by the respondent

41. The respondent's witness, Ms Cox, is the Head of Human Resources for Yorkshire and Humberside National Probation Services. She said, and I accept, that a band 3 prison officer role (the role the claimant had) is equivalent to a band 3 administrative officer post except that the prison officer role is operational and the administrative post is not. Within the prison service, the same level of skills would be required for the two roles.

42. The respondent produced 160 pages of band 3 jobs taken from the civil service jobs website, a public website (pages 216 to 376). This showed that during the period from October 2019 to February 2020 there were civil service job vacancies in the area where the claimant lived, for example:
- 42.1. HMCTS: various administrative officer roles including bailiff 25 October 2019, 3 administrative officer roles 31 October 2019, bailiff 19 November 2019, bailiff 20 November 2019, bailiff 23 December 2019, administrative officer 14 January 2020, 3 administrative officer roles 29 January 2020, 2 administrative officer roles 30 January 2020, bailiff 14 February 2020;
 - 42.2. Forestry Commission: various administrative officer roles including visitor centre officer 4 October 2019, recreation ranger 29 October 2019;
 - 42.3. MOD: various administrative officer roles including medical board administrative support 3 October 2019, medical centre receptionist 18 November 2019, rehabilitation department administrator 12 December 2019, medical centre administrator 4 January 2020, medical information programme administrator 7 January 2020, station administrator 9 January 2020.
43. The claimant agreed that these were roles which she could have applied for and which she could have done. She said that she did not want to work for the civil service because of her experience with the respondent, and she was not aware of these vacancies. She said that by January 2020 she already had temporary work and would not have applied for these roles because of that.

The law

Compensation for discrimination

44. The remedy for complaints of discrimination at work is set out in section 124 of the Equality Act 2010.
45. Under section 124(2)(b), where a tribunal finds that there has been a contravention of a relevant provision, as there has been here, it may order the respondent to pay compensation to the claimant. The compensation which may be ordered corresponds to the damages that could be ordered by a county court in England and Wales for a claim in tort (section 124(6) and section 119(2)). There is no upper limit on the amount of compensation that can be awarded.
46. The aim of compensation is that '*as best as money can do it, the [claimant] must be put into the position she would have been in but for the unlawful conduct*' (*Ministry of Defence v Cannock and ors* 1994 ICR 918, EAT). In other words, the aim is that the claimant should be put in the position she would have been in if the discrimination had not occurred. This requires the tribunal to look at what loss has been caused by the discrimination.

47. Loss includes past and future financial losses and injury to feelings.
48. In *Prison Service and others v Johnson* [1997] ICR 275 EAT, the EAT set out the following principles that the ET should consider in making an award for injury to feelings:
- “(i) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.*
 - (ii) Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use the phrase of Sir Thomas Bingham M.R., be seen as the way to “untaxed riches.”*
 - (iii) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards.*
 - (iv) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.*
 - (v) Finally, tribunals should bear in mind Sir Thomas Bingham's reference to the need for public respect for the level of awards made.”*
49. In *Vento v Chief Constable of West Yorkshire Police (No. 2)* [2002] EWCA Civ 1871 the Court of Appeal identified three broad bands of compensation for injury to feelings awards. The 25 March 2019 Presidential Guidance on injury to feelings set out updated *Vento* bands which include the 10% ‘*Simmons v Castle*’ uplift. The guidance says that for claims presented on or after 6 April 2019, as the claimant’s was, the lower band is £900 to £8,800 (less serious cases); the middle band £8,800 to £26,300 (cases that do not merit an award in the upper band); and the upper band £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000.
50. In *Hampshire County Council v Wyatt* UKEAT/0013/16 the EAT rejected an argument that medical evidence is an absolute requirement for an award for personal injury. It found in that case that there was sufficient evidence from occupational health reports and from the claimant’s evidence from which the tribunal could conclude that the claimant had shown on balance of probabilities that the unlawful discrimination caused or materially contributed to her depressive illness.

Unfair dismissal compensation

51. Section 118 of the Employment Rights Act 1996 provides that compensation for unfair dismissal consists of:

- a) A basic award; and
- b) A compensatory award.

52. Section 123 of Employment Rights Act says that 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 insofar as that loss is attributable to action taken by the employer”.

Mitigation of loss

53. In *Gardiner-Hill v Roland Berger Technics Ltd* 1982 IRLR 498, EAT, the EAT said that when considering whether there has been a failure to mitigate, the employment tribunal should:

- (i) identify what steps were reasonable for the claimant to have to take in order to mitigate her loss;
- (ii) consider whether the claimant did take reasonable steps to mitigate loss; and
- (iii) assess to what extent, if any, the claimant would have actually mitigated her loss if she had taken those steps. That requires the tribunal to determine the date on which those steps would have produced an alternative income, and to reduce the compensation by the amount of income that would have been earned.

54. In *Cooper Contracting Ltd v Lindsey* [2016] ICR D3 the EAT set out guidance on mitigation of loss:

- 54.1. the burden is on the respondent to demonstrate failure to mitigate. If evidence of failure to mitigate is not put forward by the respondent, the tribunal has no obligation to find it;
- 54.2. the employer must show that the claimant has acted unreasonably, not that she failed to act reasonably or that failed to take all reasonable steps (and there is a difference between acting reasonably and not acting unreasonably);
- 54.3. the ET is not to apply *“too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer”.*

55. In *Wilding v British Telecommunications plc* [2002] ICR 1079) the Court of Appeal considered whether a dismissed employee had failed to mitigate

his loss by unreasonably refusing an offer of re-employment by the respondent. It said that the test of unreasonableness is 'an objective one, based on the totality of the evidence' and that in applying that test all the surrounding circumstances should be taken into account. These include the attitude of the former employer, the way in which the claimant had been treated and the state of mind of the claimant.

Conclusions

56. I have applied these legal principles to the facts as I have found them, to decide the claimant's award. I have started by assessing financial losses and non-pecuniary losses to be awarded as part of the uncapped discrimination complaint, then considered whether any additional award should be made in respect of the unfair dismissal complaint. I have first considered mitigation of losses.

Mitigation

57. First, I have found that the claimant decided to have some time off for her own well-being after she was dismissed. I accept that this is reasonable, particularly as the claimant had been dismissed from a role she had been doing for 10 years and which she was passionate about. Although the need to take time off was not a medical requirement, I accept that it is reasonable in the claimant's circumstances for her to take some time to recover from the considerable distress caused by being dismissed, to take stock and to plan for a new future. I accept that it was not unreasonable for the claimant to take the period between May and September 2019 to do this.
58. I have next identified what steps it was reasonable for the claimant to take from October 2019 to mitigate her losses.
59. The claimant felt ready to look for employment in October 2019. At that point, after a five month break, it would have been reasonable for the claimant to have begun a search for alternative employment in earnest, by identifying and applying for any vacancies for permanent jobs that were suitable for her in terms of location and role. It would be reasonable for the claimant to apply for as many suitable vacancies as she could find, because by applying for more jobs, the claimant would be more likely to be successful in obtaining suitable employment.
60. It would also have been reasonable for the claimant's job search to have included roles in the civil service. This would have been a reasonable step to take because the claimant had 10 years previous employment in a civil service role (with the respondent). Her skills would have been more readily understood and more easily transferable to other jobs within the civil service, and this would have mitigated the issue the claimant identified with her lack of formal qualifications. It would also have been reasonable because civil service jobs would have a similar salary structure to the claimant's role with the respondent and would include membership of the

same pension scheme (the civil service alpha pension scheme). There is a public website of civil service jobs which is easily accessible and which identifies vacancies by location and job role.

61. It would also be reasonable for the claimant to accept a part-time temporary role while job searching. This would assist with the transition back into work after time off. However, it would be reasonable for the claimant to continue her search for full-time permanent employment while in a part-time temporary position, especially if it was much lower paid than her role with the respondent.
62. Having identified what steps were reasonable for the claimant to have taken, I have considered whether the claimant has acted unreasonably in failing to take those steps.
63. After taking time off, the claimant was ready to look for employment in October 2019. However, she did not begin a job search in earnest at that point. She registered with two online agencies. She only applied for two jobs in the period between October 2019 and the end of February 2020, one application was for a role with the Metropolitan Police in November 2019 and one was for a support worker role in December 2019. The claimant was successful in obtaining the support worker role but she turned it down because it was not as advertised, and she did not consider herself to be suitable. The decision to turn down the role was not unreasonable, given that the claimant was concerned about her suitability for the role. However, it was unreasonable to apply for only two jobs in this five-month period. That was less than one permanent job application every 10 weeks. The claimant would have been more likely to have obtained alternative employment if she had applied for more roles.
64. It would have been a reasonable step for the claimant to have included civil service vacancies in her job search. The claimant did not do so in the period between October 2019 and the end of February 2020. She said that she did not want to apply for civil service roles because of her experience with the respondent. However, this reason was not consistent with her later decision to apply for a role with the Border Force. I have concluded that it would not be unreasonable for the claimant not to want to return to a role with HM Prison and Probation Service itself, but the civil service is a very large employer and it was unreasonable to rule out or fail to consider applying for roles in other parts of the civil service as part of the claimant's job search in October 2019 to February 2020. It meant that the claimant was not looking for jobs in the sector in which she had spent her career and in which her skills would be most readily understood and transferrable.
65. It was not unreasonable of the claimant to accept hourly paid temporary work in late December 2019 to March 2020 as this partly mitigated her losses and was a way to return to work after a long period off. However, the claimant's evidence was that she would not have applied for the January 2020 vacancies suggested by the respondent because she was already working in a temporary role. It was unreasonable not to continue to

search for a full-time permanent role when the claimant's temporary role was around 10 hours a week, and therefore was a role which only mitigated her losses to a very limited extent and was on a temporary basis. Because the role was only 10 hour a week, the claimant would have had time in the week to continue her search for a permanent role.

66. I bear in mind that there is more than one reasonable way to mitigate losses and that I should not apply too demanding a standard to the claimant who is not of course the wrongdoer. I have however concluded that the claimant did act unreasonably in applying for only two jobs during the period October 2019 to the end of February 2020 and in ruling out or failing to consider civil service vacancies during the same period.
67. I next assess whether and to what extent the claimant would have actually mitigated her losses if, during the period October 2019 to the end of February 2020 she had conducted a full job search including civil service vacancies.
68. I have concluded that, had these steps been taken, the claimant would have been very likely to have been successful in obtaining alternative employment in the civil service on an equivalent salary to her salary with the respondent and with the same pension. I reach this conclusion because:
 - 68.1. I accept that the claimant's skills were transferrable to administrative officer band 3 roles within the civil service;
 - 68.2. the respondent produced evidence of around 22 administrative officer band 3 vacancies during this period which were based near to the claimant's home and which the claimant fairly accepted she could have applied for and could have done. There may well have been other similar roles had the claimant looked;
 - 68.3. I agree that the vacancies were roles which either utilised the skills the claimant had gained from her work with the respondent (such as court administration or bailiff roles) or they were the type of roles in which the claimant has a particular interest as demonstrated by the applications she made later in 2020 (medical reception/administration roles);
 - 68.4. the claimant had already been successful in obtaining a job within three months of starting her job search, even though she had only made two applications;
 - 68.5. this was the period prior to the first national lockdown during the covid-19 pandemic, and so the claimant's job search would not have been affected by that;
 - 68.6. this was also prior to the claimant's diagnosis with breast cancer and so that would also not have affected her job search.
69. I have concluded that if the claimant had not acted unreasonably in failing to mitigate her losses, she would have fully mitigated her losses within five months of starting a full job search, that is by the end of February 2020. She would by then have been in a new role and would have been entitled

to sick pay from March 2020 to March 2021 (the period when she was signed off sick). Shielding arrangements would also have applied.

Loss of earnings

70. In light of my conclusion that the claimant would have fully mitigated her losses by the end of February 2020, I have calculated losses from the date of dismissal on 29 April 2019 to 29 February 2020. That is a period of 43 weeks and 6 days or 43.86 weeks. The claimant has no loss of salary after 29 February 2020.
71. The claimant's net weekly salary with the respondent was £479.50. In the period of 43.86 weeks, her losses were £21,030.87.
72. Credit must be given by the claimant for pay in lieu of notice and the compensation payment made by the respondent which are £6,377.04 and £17,456.82. The claimant must also give credit for her net earnings from alternative employment in the sum of £624.30. (I have ignored the December 2019 earnings of £57.00 gross as they are minimal and do not affect the position.) In total, the claimant must give credit in the sum of £24,458.16.
73. Once credit is given for this sum, the claimant has not suffered any loss of salary for the period from dismissal to 29 February 2020.

Pension loss

74. The claimant was a member of a defined benefit pension scheme. The claimant's counsel said that pension loss in the civil service pension scheme is usually dealt with as a complex pension calculation, but in her schedule the claimant had instead taken the approach of calculating loss based on the respondent's contributions. The respondent used the same approach as the claimant in its counter-schedule.
75. I have considered the use of this approach. The Employment Tribunals Principles for Compensating Pension Loss (Fourth Edition, Third Revision, 2021) explain that where the period of defined benefit pension loss to be compensated is relatively short, it can be appropriate to use the simpler contributions method (rather than the method used for complex defined benefit cases) (paragraphs 5.30 to 5.40). The principles suggest that, as a rule of thumb, a period of 12 months would probably be a short period for which the contributions method would be appropriate, although in cases involving mitigation with equivalent benefits, the tribunal should be alert to a change in the value of the benefits.
76. I have concluded above that the claimant would have obtained alternative employment with the same pension scheme by 29 February 2020. This gives rise to a 10 month period of pension loss. The claimant did not suggest that re-joining the civil service alpha pension scheme after a break of 10 months would give rise to any ongoing pension loss such as a

change in the value of pension benefits which would make the contributions method inappropriate. I have decided that it is appropriate to use the contributions method.

77. The claimant's gross weekly pay was £650.85. The respondent's pension contribution was 27.1%. The pension losses run from dismissal to 29 February 2020, a period of 43.86 weeks.
78. In total, the award in respect of pension losses is $£650.85 \times 0.271 \times 43.86 = \underline{£7,736.04}$.
79. For completeness, I record that as pension loss is a separate head of loss to past financial loss (it is a form of future loss), the claimant does not have to give credit for the balance of the sums paid by the respondent or from alternative employment remaining after set off against her loss of salary.

Expenses

80. The claimant incurred expenses of £75.01 when she had to chase the respondent for payment of her pay in lieu of notice and compensation payment. These were expenses incurred as a consequence of her discriminatory dismissal, and are therefore a loss caused by the discrimination.
81. The award for the claimant's expenses is £75.01.

Injury to feelings

82. I have considered the *Vento* bands for awards of injury to feelings. The claimant said that an award in the middle band was appropriate. The respondent invited me to make an award of £2,000, towards the bottom of the lower band.
83. In instigating the capability procedure and dismissing the claimant, the respondent discriminated against the claimant because of something arising from her disability. The respondent failed to make reasonable adjustments in respect of the capability procedure. The respondent discriminated against the claimant in relation to the process it adopted and the dismissal. It was not a one-off act of discrimination.
84. I have found that the discrimination had a significant impact on the claimant. She felt worthless, embarrassed and extremely lonely. The dismissal affected her confidence and made her doubt her ability. She took some time off after her dismissal to come to terms with what had happened and to feel ready to apply for new employment.
85. Having considered those factors, I have decided that the appropriate award for injury to feelings in the claimant's case is an award in the middle of the middle *Vento* band. The middle band as updated in the 25 March

2019 Presidential Guidance on injury to feelings is £8,800 to £26,300. The claimant is awarded £17,550 in respect of injury to feelings.

86. Stepping back and considering the level of this award, I am satisfied that it is appropriate and not excessive, and that it is compensatory not punitive. It properly reflects the injury to the claimant's feelings which was caused by the respondent's discriminatory dismissal.
87. I have found that, although the claimant decided to have some time off work following her dismissal, this was not a medical requirement. There was no evidence that the discriminatory dismissal caused or contributed to any ill health such that I could make an additional award for personal injury.

Interest

88. I can award interest on awards for past financial loss and for injury to feelings.
89. In the claimant's case I have not made an award for past loss of salary. I have made awards for pension loss and for expenses. Even where the contributions method is used, pension loss is a form of future loss and therefore interest cannot be awarded on pension loss (paragraph 2.12 and Appendix 3 paragraph 4 of the Employment Tribunals Principles for Compensating Pension Loss).
90. This means that the only element of the financial loss award on which interest can be awarded is the award relating to expenses. Interest on financial loss is payable at a rate of 8% from the midpoint of the period which runs from the date of the discrimination to the date of calculation. The act of discrimination was the dismissal which took place on 11 March 2019.

Table 1: interest on past financial loss	
Interest start date	11 March 2019
Date of calculation	3 June 2021
Number of days	816
Number of days to midpoint	408
Daily rate of interest	0.08 x £75.01/365
Total interest calculation	408 days x daily rate of interest
Total interest	£6.71

91. The interest on this element of the award is £6.71.
92. Interest on injury to feelings awards is payable at a rate of 8% for the whole period from the date of the discrimination to the date of calculation. The calculation of interest on the injury to feelings award is set out in table 2 below.

Table 2: interest on injury to feelings	
Interest start date	11 March 2019
Date of calculation	3 June 2021
Number of days	816
Daily rate of interest	0.08 x £17,550/365
Total interest calculation	816 days x daily rate of interest
Total interest	£3,138.81

93. The interest on this element of the award is £3,138.81.

Unfair dismissal compensation

94. The claimant is entitled to a basic award of 10 weeks' pay. The claimant's gross weekly pay was £650.85 but the maximum amount of a week's pay for claims presented after April 2019 was £525 per week. The claimant is entitled to a basic award of £5,250.

95. The claimant has lost her statutory rights as a result of the dismissal. I award £1,050 as compensation for loss of statutory rights, that is two weeks' gross pay capped at the statutory maximum to reflect the loss of statutory protections for the first two years of the claimant's new employment (*Countrywide Estate Agents and others v Turner* UKEAT02/08/13/LA).

96. The claimant's award for her discrimination complaints includes compensation for other elements of financial loss which she would have received in the compensatory award, such as pension loss. To avoid double recovery (compensating for the same losses twice) these losses are not included in the compensatory award.

97. No interest is payable on the unfair dismissal elements of the award.

Summary

98. A summary of the award with interest but before grossing up for tax is at table 3.

Table 3: Summary of award with interest		Totals
Pension loss	£7,736.04	
Expenses	£75.01	
Interest on expenses	£6.71	
Total financial loss		£7,817.76
Injury to feelings	£17,550.00	
Interest on injury to feelings	£3,138.81	
Total injury to feelings		£20,688.81
Basic award		£5,250.00
Compensatory award		£1,050.00
Total award before tax		£34,806.57

Taxation

99. Finally, I have ‘grossed up’ the award to calculate the tax which is likely to be payable by the claimant on her award. Grossing up ensures that the claimant is properly compensated after taking into account the amount of tax which she will have to pay on the award. The assessment of the tax payable in the grossing up exercise is an estimate on broad lines (*British Transport Commissioner v Gourley* [1955] UKHL 4).
100. As the award relates to termination of employment, it is taxable pursuant to section 401 and section 403 of the Income Tax (Earnings and Pensions) Act 2003. The total award before tax is £34,806.57. The first £30,000 of termination payments can be paid without deductions. The claimant has already received a termination payment in respect of this employment in the sum of £17,456.82, and so £12,543.18 of the £30,000 remains available, leaving £22,263.39 which will be taxable.
101. I need to estimate the claimant’s other income for the 2021/2022 tax year to work out the rate at which the taxable part of her award will be taxed. In her schedule of loss, the claimant estimates that she will be able to find work again from 31 August 2021 at an hourly rate of £9.50 for 22.5 hours a week. This equates to gross income of £6,626.25 for the 31 week period between 31 August 2021 and the end of the 2021/2022 tax year on 5 April 2022. However, I consider, for reasons explained above in relation to mitigation, that it is more likely that the claimant will be able to obtain better remunerated employment, at a similar rate as with the respondent. That would equate to gross income of £650.85 per week and for the 31 week period that the claimant estimates that she will be working, gross income would be £20,176.35. That means that the claimant’s personal allowance is likely to be used on her other income and the whole of the taxable part of the award will fall within the 20% band.
102. I have assumed that the claimant has the standard personal allowances and will not have any other taxable income from other sources. Universal credit is a non-taxable benefit so does not need to be taken into account in this calculation.
103. The grossing up calculation is set out in table 4.

Table 4: Grossing up for tax				
Tax rates (£)	Other income	Taxable tribunal award		
		Gross	Tax	net
Personal allowance (0%) band to 12,570 used on other income	12,570			
Basic rate (20%) 12,571 to 50,270 used on other income	7,606			
Unused basic rate (20%) band 20,177 to 50,270		£27,829.24	£5,565.85	£22,263.39
Totals	£20,176	£27,829.24	£5,565.85	£22,263.39

104. The amount to be added to the claimant's award in respect of tax payable on the award so that after tax the claimant receives broadly the net sum I have awarded is £5,565.85.
105. The total award to the claimant is summarised below.

Table 5: Summary of award with interest and tax		Totals	
Pension loss	£7,736.04		
Expenses	£75.01		
Interest on expenses	£6.71		
Total financial loss		£7,817.76	
Injury to feelings	£17,550.00		
Interest on injury to feelings	£3,138.81		
Total injury to feelings		£20,688.81	
Basic award		£5,250.00	
Compensatory award		£1,050.00	
Total award before tax			£34,806.57
Grossing up for tax			<u>£5,565.85</u>
Total award including interest and tax			£40,372.14

Employment Judge Hawksworth

Date: 26 July 2021

Sent to the parties on: 24/8/2021

N Gotecha
For the Tribunals Office

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