EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mrs Susan Boyers	**AND**	**Department for Work and Pensions**

JUDGMENT OF THE TRIBUNAL

Heard at: Newcastle upon Tyne (by cloud video platform)

On: 29 and 30 June 2021
Submissions: 6 August 2021
Deliberations in Chambers: 24 August 2021

Before: Employment Judge A M Buchanan

Non-Legal members: Mr S Carter and Mr R Dobson

Representation:

Claimant: Mr I Ahmed of Counsel
Respondent: Mr A Tinnion of Counsel

JUDGMENT ON REMEDY

It is the unanimous judgment of the Tribunal that:

1. The claimant is awarded compensation for unlawful disability discrimination pursuant to section 124 of the Equality Act 2010 made up as follows:
1.1 an award of **£23204.74** for injury to feeling and interest thereon
1.2 an award for personal injury of **£9727.60** and interest thereon.
1.3 an award of **£8449.03** in respect of her past losses and interest thereon
1.4 an award of **£46710.01** in respect of her future losses (including pension loss).

2. The respondent is ordered to pay to the claimant **£6269.64** compensation for unfair dismissal.

3.The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply to any aspect of these awards.

4. Having grossed up the sums awarded to the claimant to account for the incidence of taxation, the total amount due forthwith from the respondent to the claimant pursuant to this Judgment is **£111528.26p.**

REASONS

Preliminary matters

1. By a Judgment ("the First Liability Judgment") dated 9 May 2019 the Tribunal upheld two complaints advanced by the claimant namely a claim of discrimination arising from disability in respect of her dismissal by the respondent advanced pursuant to section 15 of the Equality Act 2010 ("the 2010 Act") and a claim of unfair dismissal advanced pursuant to sections 94/98 of the Employment Rights Act ("the 1996 Act"). Other claims of failure to make reasonable adjustments, harassment related to disability and of unauthorised deduction from wages were dismissed.

2. The respondent appealed the First Liability Judgment to the Employment Appeal Tribunal ("EAT") in respect of the complaint under section 15 of the 2010 Act and the claim of unfair dismissal. There was no cross appeal. On 24 June 2020 the EAT handed down its judgment ("the EAT Judgment"). The appeal in relation to unfair dismissal was dismissed. The appeal in relation to the section 15 claim succeeded on the issue of proportionality and the question of whether the dismissal of the claimant by the respondent on 10 January 2018 was proportionate pursuant to section 15(1)(b) of the 2010 Act was remitted to this Tribunal to reconsider.

3. By a Judgment ("the Second Liability Judgment") dated 4 November 2020 this Tribunal decided the decision to dismiss the claimant on 10 January 2018 was not proportionate for the purposes of the section 15 complaint.

4. On 9 December 2020 a Private Preliminary Hearing by telephone was held to make arrangements for the Remedy Hearing which by consent had been postponed pending the handing down of the EAT Judgment. Orders were made for the preparation of a remedy trial bundle and for a joint expert report. The matter was listed for 29 and 30 June 2021.

5. On 21 December 2020 the respondent filed a notice of appeal with the EAT in respect of the Second Liability Judgment and by an Order of Deputy Judge of the High Court John Bowers QC dated 19 April 2021 the appeal was allowed to proceed to hearing. It has not yet been heard.

6. On 18 May 2021, supplemented by further representations on 24 and 28 May 2021, the claimant sought an adjournment of the Remedy Hearing pending resolution of the appeal against the Second Liability Judgment. The respondent objected. On 28 May 2021, the Tribunal refused the application to adjourn, and the parties were so notified on 2 June 2021.

7. On 28 June 2021 the claimant applied ("the Application") again for an adjournment of the Remedy Hearing, and the Tribunal directed that the Application would be considered at the outset of the Remedy Hearing on 29 June 2021.

8. At the outset of the hearing Mr Ahmed spoke to the Application making the point that the joint expert report had only been received on 28 June 2021 and that there were some matters on which the claimant wished to put questions to the expert. In addition, no composite trial bundle had been prepared and there would be three bundles for the Tribunal to look at. It was suggested that some progress could be made in the two days available but that an adjustment to the procedure, to allow for written submissions to be made after questions to the expert had been put in writing, would go some way to alleviating the concerns of the claimant. The Application for an adjournment was not pursued. For the respondent, Mr Tinnion objected to any adjournment of the hearing. He confirmed that there would be no attack on the findings of fact already made by the Tribunal but that the respondent would lead evidence on the question of what the result of the Eston work trial would have been if "properly evaluated".

9. The Tribunal considered the Application and decided to proceed. The Tribunal expressed concerns about the vulnerability of the claimant as detailed in the Application and indicated that regular breaks in the hearing would be allowed - in particular during the time the claimant was being cross examined. The Tribunal indicated that it would consider how to proceed in terms of written questions to the expert and written submissions at the conclusion of the hearing. Applications made by the claimant for restricted reporting orders and for an anonymity order were refused. It was noted that the respondent reserved its position as to an application for costs in respect of the Application.

10. The hearing proceeded as planned. Evidence was heard from the claimant and from her son and from two witnesses for the respondent. At the conclusion of the hearing on 30 June 2021, there was insufficient time in any event to hear oral submissions. For the claimant Mr Ahmed did not pursue any application to raise written questions of the joint expert. Orders were made for the preparation and exchange of written submissions and for written comments and for filing with the Tribunal by 6 August 2021. The Tribunal arranged to meet in Chambers on 12 August 2021. In the event, due to unforeseen circumstances, that meeting had to be postponed until 24 August 2021. This Judgment is issued in writing with full reasons in order to comply with the provisions of Rule 62(2) of Schedule I of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Witnesses

11. The Tribunal heard from the following witnesses at the remedy hearing:

11.1 The claimant.
11.2 Gerard Boyers – the son of the claimant.

For the respondent
11.3 Stephanie Cowen HR Consultant in the Civil Service Casework Team of the respondent.

11.4 Gayle Nixon an Administrative Officer who oversaw the claimant's work trial at Eston.

Documents

12. The Tribunal had three bundles before it and other documents namely:

12.1 The claimant's bundle of 513 pages - (Prefix "C")
12.2 The respondent's bundle of 274 pages – (Prefix "R").
12.3 The respondent's work trial bundle of 108 pages – (Prefix "WT").
12.4 The claimant's updated schedule of loss dated 28 June 2021 (7 pages).
12.5 The claimant's complex pension loss calculation (2 pages).
12.6 The respondent's counter schedule of loss (5 pages).
12.7 The joint expert report ("the Report") from Doctor S B Nabavi dated 25 June 2021 (50 pages).
12.8 Written submissions from the claimant (159 paragraphs -50 pages) and the claimant's reply to the respondent's submissions (107 paragraphs -25 pages).
12.9 Claimant's authorities in support:
12.9.1. Extract from Harvey on Industrial Relations and Employment Law on Mitigation.
12.9.2 Essa -v- Laing Limited 2004 EWCA Civ 2
12.9.3 Giwa -Amu -v- DWP (first instance decision of Cardiff ET 1600465/2017).
12.9.4 Extract from JSB Guidelines on Psychiatric and Psychological damage.
12.9.5 Komeng -v- Creative Support Limited UKEAT/0275/18
12.9.6 O'Donoghue -v- Redcar and Cleveland BC 2001 EWCA Civ 701
12.9.7 Olayemi -v- Athena Medical Centre 2016 ICR 1074
12.9.8 Pinnock -v- Birmingham City Council UKEAT/185/13
12.9.9. Secretary of State for Justice -v- Plaistow UKEAT/0016/20
12.10 Written submissions from the respondent (74 paragraphs -19 pages) and the respondent's reply to the claimant's submissions (87 paragraphs -19 pages).
12.11 Respondent's authorities in support:
12.11.1 Griffiths -v- TUI UK Limited 2020 EWHC 2268 (QB)
12.11.2 Extract Harvey - Exemplary Damages.
12.11.3 ET Presidential Guidance on Awards for Injury to Feelings and Psychiatric Injury (third addendum).
12.11.4 Wardle -v- Credit Agricole Corporate and Investment bank 2011 EWCA Civ 545

13. We invited counsel to produce an agreed list of issues. This was done and is summarised below.

14. Certain agreed facts emerged from the list of issues, and they appear below immediately before our findings of fact on remedy.

The Issues

Compensation for unfair dismissal pursuant to the Employment Rights Act 1996 ("the 1996 Act")

15.1 How should the basic award for unfair dismissal be calculated: section 119 of the 1996 Act. Should any award be reduced due to conduct on the part of the claimant?

15.2 Should there be an award for loss of statutory rights as part of the compensatory award for unfair dismissal and if so, in what amount? - section 123 of the 1996 Act. It was agreed the appropriate range was £300-£500. Is this loss offset by the Civil Service Compensation Fund Award ("the CSA")?

Financial losses

15.3 For what period of time should the claimant receive compensation for financial loss caused by her dismissal?

15.4 Has the claimant discharged her duty to mitigate her losses arising from dismissal?

15.5 If so, is it likely that the claimant will find alternative employment considering her health and her circumstances and if so, by when?

15.6 What was the chance of the claimant being able to attend work with the respondent if not dismissed on 10 January 2018?

15.7 What was the likelihood of the claimant remaining in the employ of the respondent if not dismissed on 10 January 2018?

15.8 Did the claimant suffer any financial loss during her notice period of 12 weeks?

15.9 Did the claimant suffer any loss for the period between the end of her notice period and the time she would have gone onto nil pay? Is any such loss offset by the CSA?

15.10 What would a "proper" assessment of the claimant's performance/competence have been during the Eston work trial in September/October 2017?

15.11 What would the likely outcome/evaluation have been of the claimant's performance /competence during any second Eston work trial?

15.12 Should any award be reduced by any culpable or blameworthy conduct on the part of the claimant? Should any award be reduced by any other issues categorised as Polkey type issues?

15.13 Should the claimant give credit for the CSA against any losses and if so, how?

15.14 Does the Tribunal have jurisdiction to determine if there was any underpayment of the CSA and provide any remedy if there was?

Compensation for discrimination: Equality Act 2010 ("the 2010 Act")

15.15 Should financial losses be compensated under the 2010 Act or the 1996 Act? If the 2010 Act, the issues at 15.3-15.14 above will apply.

15.16 Should the claimant be awarded a sum for injury to feelings? If so, in what amount? What are the start and end dates for determining any award for injury to feelings? What was the cause of any injury to feelings? - it being noted that only any injury caused by the dismissal can be compensated.

15.17 Should the claimant be awarded damages for personal injury by reason of injury (or deterioration) to her mental health? If so, in what amount?

15.18 What is the extent of that deterioration? Would the claimant have suffered a deterioration in her PTSD and RDD even if not dismissed? What is the extent of the deterioration? Double recovery with any award for Injury to feelings must be avoided.

15.19 Should there be an award for aggravated damages? If so, in what amount?

15.20 Should interest be awarded pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996?

General

15.21 Should any award be increased/decreased by reason of the provisions of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") for failure to comply with the ACAS Code of Practice on Discipline and Grievance Procedures 2015? If so, which elements of any award should be adjusted and to what extent?

15.22 Is grossing up of any award appropriate?

15.23 Does the Tribunal have jurisdiction to consider an award of costs in favour of the claimant in respect of the first appeal to the EAT and the second appeal?

15.24 If so, should costs be awarded? If so, in what amount?

Submissions

Respondent

16. The submissions are briefly summarised:

16.1 The Report does not say that 40% of the deterioration in RDD is attributable solely to the claimant's dismissal.

16.2 The most important issue is whether the claimant would have remained in the respondent's employment and, if so, for how long had she not been dismissed in January 2018. In that regard the Tribunal was referred to paragraph 2.17 of the Report which indicated the opinion of the expert that had the claimant not been dismissed in January 2018, she would still have remained off work for a considerable period of time, and she would have struggled to return to the workplace. The claimant's view that if allowed to remain at Eston, she would have remained at work is merely her opinion. It is the respondent's case that the claimant would not have been well enough to attend work in 2018, even if not dismissed, and would not have competently performed work in 2018, if not dismissed, and so would likely still have been dismissed on capability or long-term absence grounds later in 2018. If the Report had been before the decision maker in January 2018, the dismissal of the claimant would have been certain.

16.3 The evidence of Gayle Nixon demonstrated that if the Eston trial had been properly and fairly assessed, the only conclusion that could reasonably have been reached was that it failed and any re-implementation of it would also have failed. The evidence of the claimant to the contrary bore no resemblance to the evidence of Gayle Nixon. Given the claimant's morbid fear of seeing her former work colleagues, there is reason to doubt whether it was possible or even desirable for the claimant to continue to work for the respondent in Eston or any other office in the North-East. The evidence from Stephanie Cowan showed that the Eston workplace was the only alternative workplace within reasonable commuting distance of the claimant's home. The Tribunal should not speculate as to whether there were other avenues open in the absence of any evidence on the point.

16.4 The claimant is experienced and qualified to do a wide variety of work but has failed to make reasonable efforts to find any such work. One possibility is the claimant may not have been well enough to look for work but that bears on the question of how long the claimant would have remained in the respondent's employment.

16.5 Any basic award should be reduced by 50% by reason of the blameworthy conduct of the claimant prior to the dismissal in respect of her lack of engagement with the process which led to her dismissal.

16.6 The claimant suffered no net loss in income in the 12-month period following her dismissal and the CSA should be deducted in full. This was an ex-gratia payment. The Tribunal has no jurisdiction to consider whether that ex gratia payment was less than it ought to have been.

16.7 The claimant ceased to suffer any pension loss from the 23 March 2018 when she would have gone on to nil pay.

16.8 Any compensatory award for her dismissal should be reduced for the same reasons that the basic award should be reduced. There is no applicable ACAS code.

16.9 The correct level of injury to feelings award is at the upper level of the lower Vento band. The correct level of compensation for personal injury is between £1000 and £1500.

17. Mr Ahmed commented on those submissions and the comments are briefly summarised:

17.1 The submissions make a number of misconceived points in that they fail to recognise the respondent has to take the victim as they find her under the egg-shell skull principle and fail to recognise that where the respondent is the cause of the deterioration then that has to be recognised when attributing blame. The respondent seeks to label as blameworthy matters which arose from the claimant's disability and seeks to argue that the claimant would have been dismissed in circumstances which would themselves have been disability discrimination and they fail to recognise the difficult position disabled and mentally impaired claimants finds themselves in when dismissed. The work trial is relevant when considering what would have happened if the respondent had not discriminated against the claimant. The historical context in which this case occurred has to be considered. The Tribunal has found that the respondent would have known or should have known that the claimant was disabled from November 2017 and everything that happened after that has to be judged in that context. The respondent was under a duty to make reasonable adjustments before dismissing the claimant. It was the prospect and reality of being dismissed and losing her job that caused a significant downturn in the mental health of the claimant. The claimant was able to cope with her work and duties prior to the discrimination for which the respondent has been found liable. There is nothing to suggest that without the dismissal and the resulting Tribunal proceedings that the claimant would still be deeply unwell or unable to work.

17.2 The stressors, namely the bullies and managers, were confined to the Stockton and Middlesbrough offices and if they had been removed, the expert states that the claimant would have been able to return within six months (para 2.20). With understanding managers that return could have been even quicker.

17.3The Tribunal should find that the vast majority of the PTSD was caused by the acts of discrimination of the respondent. The claimant managed to attend work on all the days expected of her whilst at Eston. The submissions in respect of the claimant having no loss after dismissal do not stand because she would not have remained off work if allowed to continue at Eston or work somewhere other than Middlesbrough or Stockton.

17.4 The basic award should not be reduced and nor should any compensatory award.

Claimant

18. The submissions are briefly summarised:

18.1 The respondent must take the claimant as it finds her – the egg-shell skull principle. This principle should be applied when considering all aspects of remedy. The age of the claimant is a relevant factor when calculating the immediate and future losses. In this case, the claimant contends her loss of earnings is due to the effects of the discriminatory dismissal. Her future loss of earnings is attributable to and caused by the discrimination and she is entitled to recover. It is the claimant's

case that if she had not been dismissed, she would either have returned to her substantive role in telephony at one of the 638 offices except Middlesbrough or Stockton or would have resumed the work trial at Eston or another trial with appropriate support. In either case she would have built up back to full time within a few weeks and remained in employment with the respondent until she was 67 on 13 April 2035.It is clear the claimant did intend to remain with the respondent until she retired.

18.2 From the start, the claimant made clear she wanted to return to work but just not to the Middlesbrough or Stockton offices. This was the only factor preventing a return – there were no performance issues. There are many criticisms to be directed at how the work trial at Eston was managed. The Eston trial is no evidence that the claimant could not have returned to work within a reasonable period of time with the proper support and adjustments in place. The respondent could not say why no workplace adjustment passport had been considered for the claimant in accordance with the respondent's attendance management procedures. The evidence from Ms Cowan showed a remarkable lack of understanding as to reasonable adjustments or a remarkable refusal to recognise what the respondent should have done. The position has to be assessed on the basis that reasonable adjustments would have been made and given a reasonable time to take effect. It is not credible that Eston was the only alternative available. A depressed and anxious employee being assessed on the basis and in the manner carried out by the respondent is no basis for deciding if the claimant would have remained in employment.

18.3 The respondent did not adduce any evidence of alternative roles. Civil Service roles are only advertised internally. The Tribunal can and should infer that there were roles. Common sense suggests there would have been telephony vacancies available at other offices in January 2018 or shortly thereafter. The claimant would have been willing to commute or to relocate.

18.4 The question of whether a fair and non-discriminatory dismissal would have taken place has to be measured against the background of a fair and reasonable employer applying the proper reasonable adjustments in a non-discriminatory way. If the claimant had returned to work with the proper support, she would not have been dismissed. This is so whether she relocated to another office or returned to Eston.

18.5 In terms of mitigation of loss, the proper question is to consider the matter in light of the circumstances of the particular employee. The claimant has been in poor mental health since her dismissal. The respondent has failed to prove a failure to mitigate. The respondent's submission that the claimant should reasonably have found work within 3/6 months of dismissal takes no account of the devastating effect of the dismissal on the claimant. It takes no account of the difficulties which are faced by a disabled 50-year-old employee seeking work. The figure for future mitigation contained in the schedule of loss is a reasonable one.

18.6 The submission of the respondent that the claimant contributed to her dismissal by culpable and blameworthy conduct is misconceived. The respondent broke its own policy in regard to the medical evidence available at the time of dismissal. The claimant's refusal to return to work at either Middlesbrough or Stockton was because of her disability and thus neither culpable nor blameworthy. There was a wholesale

failure on the part of the respondent to recognise the disability and to act on it. The claimant failed to appeal the dismissal because of the effects of her mental health. The claimant was seen as a nuisance and that approach would have continued even if the claimant had appealed. That was demonstrated by the evidence of Ms Cowan which continued to show a grudging approach to the claimant's case. The failure to appeal was reasonable and there should be no deduction pursuant to section 207A of the 1992 Act. The Polkey reduction argument fails for the same reason. The fact that the claimant was not working her normal hours during the work trial is irrelevant as she was working a phased return to work because of her disability. The history of events from the date the claimant went away from work ill on 14 February 2017 until her dismissal shows very considerable delay on the part of the respondent. There is no reliable evidence that the claimant would have been fairly dismissed on 10 January 2018 or after another work trial and there should be no Polkey deduction.

18.7 In terms of injury to feelings, the Tribunal should concentrate on the actual injury suffered by the claimant and not the gravity of the acts of the respondent. The discriminatory act has had an impact on the claimant's relationships with colleagues, friends and family and these effects are ongoing. The upper band is appropriate, and the correct figure would be £45000.

18.8 The proper award for personal injury is £30000.

18.9 The actions of the respondent are such as to attract an award for exemplary damages. There should be an award of £2880 for private treatment for EMDR. There should be an award for pension loss depending on the period for which loss of income is awarded. The CSA was an ex-gratia payment which will not need to be brought into account if the Tribunal decides that a fair procedure would have resulted in a dismissal at some point. If that is so, the correct amount would have been paid and the Tribunal should consider the necessary correction of £3790.52. There should be a 25% uplift to any award under section 207A of the 1992 Act.

19.The respondent commented on the submissions:

19.1 The unchallenged opinion of the expert is set out at paragraph 2.17 of the Report to the effect that, if not dismissed on 10 January 2018, the claimant would have remained off work for a considerable period of time namely more than a year or indefinitely. It is not the expert's opinion that the dismissal caused the claimant to be unable to work. It is not the expert's opinion that there would have been no further deterioration in either of her conditions if she had not been dismissed. There are two relevant questions for the Tribunal: how much did the dismissal cause a further deterioration in each of the two conditions and what damages is the claimant entitled to by reason of that further deterioration.

19.2 The claimant's work life, family life, friendships and mental health were all considerably worse than the mild picture now painted before the act of dismissal.

19.3 It is not open to the claimant now to argue that reasonable adjustments should have been made in respect of those matters which the Tribunal adjudicated on and dismissed. In any event not a single adjustment to the work trial at Eston has been identified which would have made any difference to the outcome.

19.4 This is not a career loss case. The Tribunal should calculate loss up to a point where the employee is likely to get an equivalent job.

19.5 There is no basis on which to award the cost of any putative private treatment. This is not a case where the test for exemplary damages is made out. There should be no consideration given to any award for costs unless and until a proper application is made.

The Law

20.1 We have reminded ourselves of the provisions of sections 119-122 of the 1996 Act in respect of the calculation of a basic award of compensation for unfair dismissal and of the provisions of sections 123-126 of the 1996 Act in respect of the calculation of a compensatory award.

20.2 We have reminded ourselves of the provisions of section 124 of the 2010 Act in respect of the calculation of compensation for unlawful discrimination and the provisions of section 119 of the 2010 Act. Damages must be assessed in the same way as damages for a statutory tort. The measure of tortious damages is such amount as will put the claimant in the position she would have been in but for the employer's unlawful conduct as far as money can do. In calculating compensation according to ordinary tortious principles, the Tribunal must take into account the chance that the respondent might have caused the same damage lawfully if it had not done so on discriminatory grounds. In the context of discriminatory dismissals, this means asking what would have happened if there had not been a discriminatory dismissal**: Abbey National plc and Hopkins -v- Chagger 2009 ICR 624**.

20.3 A claimant is under a duty to mitigate her loss. The burden of proof in this regard lies on the respondent. What has to be proved is that the claimant acted unreasonably: she does not have to show that what she did was reasonable. What is reasonable or unreasonable is a matter of fact for the Tribunal to determine. The Tribunal is not to apply too demanding a standard to the claimant. She is not to be put on trial as if the losses were her fault when the central cause is the act of the wrongdoing respondent. The test in relation to mitigation can be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate.

20.4 Compensation for discrimination can include compensation for injured feelings. In **Vento-v-Chief Constable of West Yorkshire Police (No 2) 2003 IRLR102** the Court of Appeal held awards for injury to feelings of the most serious kind should normally lie in the range of £15,000 to £25,000. For less serious cases within a range of £500 to £5000 and £5000 to £15000 for cases falling in the middle ground. Those bands were updated in the decision of the EAT in **Da'Bell -v- NSPCC 2010 IRLR19.** In a separate development in **Simmons -v- Castle 2012 EWCA Civ 139** the Court of Appeal ruled that general damages should be increased by 10% and that has been applied to awards in the Employment Tribunal. Presidential Guidance was issued on 5 September 2017 in respect of claims presented on or after 11 September 2017 which updated those three so called Vento bands. On 23 March 2018 a first addendum to the guidance was issued which took account of all changes in the RPI

All Items Index to the 20 March 2018. In respect of claims presented to the Tribunal on or after 6 April 2018 the Vento bands were to be £900 to £8600 for a less serious case, £8600 to £25700 for cases which did not merit an award in the upper band and an upper band of £25700 to £42900 for the most serious cases. We remind ourselves that awards for injury to feelings are to be compensatory in nature and not punitive and we must have regard, in particular, to the impact of the discriminatory act on the claimant for it is that impact which determines the appropriate level of compensation.

20.5 A Tribunal may also award aggravated damages in appropriate circumstances for an act of discrimination. Such an award is compensatory and not punitive and is an aspect of injury to feelings compensation. A tribunal should have regard to the total award made to ensure that the overall sum is properly compensatory and not excessive. We note that such awards might be appropriate where the claimant's sense of injustice and injured feelings have been aggravated by actions being done in an exceptionally upsetting way or by conduct based on prejudice, animosity, spite or vindictiveness where the claimant is aware of the motive or by subsequent conduct such as where a trial is conducted in an unnecessarily offensive manner or a serious compliant is not taken seriously or where there has been a failure to apologise. An award of aggravated damages will not be appropriate however merely because an employer acts in a brusque and insensitive manner towards an employee or is evasive and dismissive in giving evidence.

20.6 A Tribunal may also award exemplary damages in appropriate circumstances. Such awards can be made in very limited circumstances. First, cases of oppressive, arbitrary or unconstitutional conduct by government servants. The central requirement in this category is the presence of outrageous conduct disclosing malice, fraud, insolence, cruelty and the like. Secondly, conduct calculated to result in profit and thirdly cases where exemplary damages is authorised by statute. The EAT in **Virgo Fidelis Senior School -v- Boyle 2004 ICR 2010** decided that it was possible for the award of exemplary damages to be made for statutory torts such as disability discrimination. Only if the amount of compensatory and aggravated damages is insufficient to show disapproval of the perpetrator's conduct and to provide a proportionate punitive element would exemplary damages be justified. Exemplary damages are punitive rather than compensatory

20.7 We have reminded ourselves of the Judicial College Guidelines ("JCG") for the Assessment of General Damages for Personal Injury 15th Edition published on 26 November 2019. A tribunal has jurisdiction to award compensation for personal injury provided the claimant proved that her injury was caused by the discriminatory acts: **Sheriff-v- Klyne Tugs (Lowestoft) Limited 1999 IRLR 481.** In **BAE Systems (Operations) Limited -v- Konczak 2017 IRLR 893** the Court of Appeal considered the proper approach to awarding compensation for injuries with more than one cause. The head note from the Court of Appeal decision reads:

"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. 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.

That distinction is easier to apply in the case of a physical injury. It is less easy in the case of a psychiatric injury, but such harm may well be divisible. It may, for example, be possible to conclude that a pre-existing illness, for which the employer is not responsible, has been materially aggravated by the wrong (in terms of severity of symptoms and/or duration), and to award compensation reflecting the extent of that aggravation. Even in a case where the claimant tipped over from being under stress to being ill, the tribunal should seek to find a rational basis for distinguishing between a part of the illness that is due to the employer's wrong and a part that is due to other causes: but whether that is possible will depend on the facts and the evidence. If there is no such basis, the injury will be truly indivisible and principle requires that the claimant is compensated for the whole of the injury (although if the claimant has a vulnerable personality, a discount may be required on that basis)".

20.8 In **HM Prison Service-v-Salmon 2001 IRLR 425** the EAT observed that it is important for tribunals making awards where there are damages both for injury to feelings and psychiatric injury to make clear what sums are attributable to which in order to avoid the danger of double counting, given that there is a considerable overlap in the effects the two types of awards are designed to compensate.

20.9 The JCG provides guidance for the assessment of general damages in personal injury cases. The guidance provides for the following factors to be taken into account when valuing claims of psychiatric injury namely the injured person's ability to cope with life and work, the effect on the injured person's relationships with family friends and those with whom she comes into contact, the extent to which treatment would be successful, future vulnerablity, prognosis, and whether medical help has been sought.

20.10 The JCG outlines 4 categories of awards in chapter 4 headed psychiatric and psychological damage. In part A the figures recognise an element of PTSD. Cases where PTSD is the sole psychiatric condition are dealt with in Part B. Including the 10% uplift in the Simmons -v- Castle decision, the severe band is £51460 - £108620, moderately severe £17900 - £51460, moderate £5500 - £17900 and less severe £1440 - £5500.

20.11 The loss sustained by the claimant is calculated on the basis of the net loss after deduction of the income tax which she would have been required to pay in the absence of the relevant wrong. Where an award of compensation is taxable however then, to avoid under compensating the claimant, the award should be grossed up in order to place the claimant in the position in which the tribunal's award seeks to place her after she has discharged her tax liability as set out in **British Transport Commission-v- Gourley 1956 AC 185.**

20.12 Part VI of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") provides for certain payments on termination of employment to be subject to tax. Certain amendments to that legislation took effect on 6 April 2018. Those amendments provide for an element of termination pay, referred to as post-employment notice pay, to be taxable as earnings. In addition, the amendments to ITEPA provided in effect the compensation for injured feelings arising from termination of employment is taxable. Before this amendment such compensation was not taxable. HMRC adopt the stand that an award of injury to feelings in respect of a dismissal before the amendments came into effect will not be subject to income tax. The dismissal of the claimant in this case occurred on 10 January 2018 before the changes came into effect. Damages for personal injury are not subject to income tax and will not be subject to grossing up.

20.13 The applicable tax rules in ITEPA can be summarised as follows:
(a) compensation for discrimination that is not made in connexion with the termination of a person's employment is not taxable
(b) compensation for discrimination that is made in connexion with the termination of a person's employment is not taxable if it is an award made for personal injury or (before 6 April 2018) injured feelings **Moorthy -v- Revenue and Customs 2018 EWCA Civ 847.**
(c) otherwise, compensation for discrimination arising in connexion with the termination of a person's employment is treated as employment income under part VI of ITEPA if and to the extent that it exceeds the £30000 pounds threshold. There is an exemption of £30000 available for sums paid to a claimant in respect of the termination of her employment which would otherwise be taxable.

20.14 We have reminded ourselves of the provisions of the Employment Tribunals (Recoupment of Benefits) Regulations 1994 ("the Recoupment Regulations").

20.15 We have reminded ourselves of the Employment Tribunals Principles for Compensating Pension Loss Fourth Edition (Second Revision) of December 2019 ("the Pension Guidance") and the earlier version. In respect of defined benefit pension schemes, we have noted that there are two recommended methods for calculating pension loss namely the so-called contribution method and the complex calculation method involving use of the Ogden Table and/or expert evidence. We have given the Pension Guidance detailed consideration. We have noted paragraph 5.32 which details the cases in which the contribution method is likely to be appropriate. We note the following extract from this paragraph: *"However if the tribunal is satisfied that there is a significant element of ongoing DB pension loss the contribution method is unlikely to be appropriate. The contributions method is a better choice where for example the reduction under the Polkey principle or because of contributory fault is high".* We have noted paragraph 5.53(i) and the guidance in respect of withdrawal factors if using the complex method of calculation. We note that where there would be a large discount for withdrawal factors that that can be an indication that the better method of calculation of pension loss is the contribution method and we have noted the words of Underhill LJ set out in **Griffin -v- Plymouth Hospital NHS Trust** detailed at paragraph (j).

20.16 We have reminded ourselves of the provisions of the 2015 ACAS Code of Practice on Discipline and Grievance Procedures ("the ACAS Code"). We have reminded ourselves of the provisions of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"). However, the ACAS Code does not apply to internal procedures operated by an employer concerning an employee's alleged incapability to do the job arising from ill health or sickness absence and nothing more: **Holmes-v- Qinetiq Limited 2016 IRLR 2016**. We have noted the following extract from the relevant IDS handbook:

"If the reason for dismissal, as found by the tribunal, does not involve a disciplinary offence, then the Acas Code has no relevance and it must follow that there can be no basis for awarding an uplift for failure to comply with it. In Holmes v Qinetiq Ltd 2016 ICR 1016, EAT, *the EAT held that a 'disciplinary' situation was one in which an employee faces a complaint or allegation that might lead to disciplinary action, and such action ought only to be invoked*

where there was culpable conduct or performance alleged against the employee. In that particular case, the employee was dismissed for capability/ill health. The EAT was of the view that, while poor performance was capable of involving both culpable and non-culpable conduct, where the poor performance was a consequence of genuine illness or injury, it was difficult to see how disciplinary action would be justified without some additional culpable element, and so on that basis the Code would not apply".

20.17 We have reminded ourselves of the provisions of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the Interest Regulations*").* We note that no interest shall be included in respect of any sum awarded in respect of a matter which will occur after the day on which the amount of interest is calculated by the tribunal. This includes pension loss.

The Report

21. We set out and summarise the contents of the Report:

21.1 The claimant suffers from two psychiatric conditions namely post-traumatic stress disorder ("PTSD") and recurrent depressive disorder ("RDD"). PTSD followed her involvement in workplace bullying and further deteriorated after her dismissal in January 2018.The claimant carried the symptoms of these conditions from 1 January 2017 until 31 December 2018. She has some genetic and psychosocial predisposition to psychiatric disorders. The deterioration would not have occurred but for the index incidents (ie workplace bullying and then dismissal). The PTSD has been caused almost to the extent of 100% by the events in the workplace being "*the index work-place incidents of bullying and her further dismissal in January 2018" (paragraph 2.13/2.14).* The deterioration in the RDD is caused as to 40% by the index events including dismissal and 60% to other events in her life. The claimant should be able to return to the workplace within 6 months of receiving appropriate treatment namely antidepressant medication and EMDR. There should be a noticeable improvement in 12 months. The anti-depressant medication received by the claimant to date has been inadequate in dose and duration. The claimant would benefit from EMDR and would need 16 sessions which on a private basis would cost in the region of £3250. The claimant is on a waiting list for that treatment through the NHS. The enduring mental health conditions of the claimant and her migraine condition will continue to disadvantage her in the workplace. A complete improvement is not achievable in the long term.

21.2 The claimant worked in restaurants after leaving school and then, after the birth of her son, worked for six years in a nursing home followed by two years working as a laboratory technician. She had intended to seek a career in administration in the NHS but instead began work for the respondent on 19 September 2005.

21.3 The claimant fulfils the diagnostic criteria for RDD. She has suffered from intermittent depression with concurrent anxiety symptoms since 2014 which had largely been precipitated by further deterioration in the severity of her chronic migraine condition. In the past she has been prescribed several different types of antidepressant medication. The claimant received a period of cognitive behavioural therapy in 2018. Her depressive symptoms are typically accompanied by anxiety and psychosomatic symptoms. The depressive episodes have fluctuated between mild and moderate in severity.

21.4 The claimant suffers from PTSD which is a delayed and/or protracted response to a stressful event or situation of an exceptionally threatening and catastrophic nature which is likely to cause pervasive distress in almost anyone. This diagnosis is based on the claimant experiencing intense psychological distress as a result of the workplace bullying. This was diagnosed in July 2018.

21.5 The two comorbid conditions of PTSD and RDD should be considered separately as the latter has a higher pre-incident proportion. At the time the report was prepared the claimant presented with features of low and anxious mood, situational panic attacks, impaired concentration, insomnia, anergia and partial anhedonia as well as frequent flashbacks, reliving of her traumatic experiences, avoidance, vivid dreams and nightmares. She has good days and bad days. She remains anxious and hypervigilant when going out for fear of accidental contact with her ex-colleagues and as a result she is almost housebound. She has a close relationship with her son. Her enduring mental health conditions continue to disadvantage her in the open labour market. Her conditions will improve but on balance she is unlikely to regain her pre-incident level of work capacity in the near future. A reasonable improvement in her conditions in around 12 months should be achievable. She will remain vulnerable and at a higher risk of experiencing further deterioration in her mental health.

Agreed Facts from List of Issues

22.1 The claimant was born on 13 April 1968. She began work for the respondent on 19 September 2005 and her employment ended on 10 January 2018. The claimant was aged 49 years at dismissal. Her gross weekly income at dismissal was £365.29 and her net weekly income £311.47 (at full rate). This equates to £18995 per annum gross and £16200 net per annum. The claimant was aged 53 years at the time of the remedy hearing. The claim in this case was filed on 6 May 2018.

22.2 The claimant was dismissed with pay in lieu of notice which totalled £4730.56. At the time of her dismissal the claimant was on half pay because of her illness. That was due to expire on 22 March 2018 and she would have moved to nil pay on 23 March 2018.

22.3 In July 2018 the claimant received £19209.48 as an ex-gratia payment from the Civil Service Compensation Fund ("the CSA").

22.4 At the time of her dismissal the claimant was a member of the Alpha Pension Scheme. The Respondent contributed 20% of gross salary to that scheme but made no contribution for an employee who was on nil pay. The claimant would have received a death in service lump sum had she died whilst still employed.

22.5 The basic award before any deduction is correctly calculated at £5844.64p. There is a typographical error in the List of Issues stating this agreed figure to be £5884.64p.

22.6 The claimant suffered from PTSD and RDD before her dismissal. She suffered a deterioration in those conditions after her dismissal.

Findings of fact

23. We adopt the findings of fact made in the First Liability Judgment and the Second Liability Judgment. Having considered the written and oral evidence from the witnesses called before us at the Remedy hearing and the documents to which we were referred, we make the following additional findings of fact on the balance of probabilities:

23.1 The claimant left school, with no qualifications in 1984. She attended a college and obtained a secretarial qualification. The claimant has the work ethic and has been in employment for most of her life save for periods when her son, who was born in 1989, was small. The claimant was a single parent. When her son was older, the claimant returned to work working in a nursing home as a health care assistant and also as a technician in a laboratory. The claimant undertook an administration course with the NHS for an NVQ and had experience in administrative work. In 2005 she began work for the respondent and until she became unwell in February 2017, she had a good record of attendance. When working for the respondent, the claimant would occasionally supplement her income by taking on bank shifts as a health care assistant in nursing homes.

23.2. We are satisfied that the claimant enjoyed her work with the respondent. It was work in which she took pride, and she was fulfilled by her role. The job gave her a measure of financial security which she had previously lacked. The claimant was good at what she did and had acted up to more senior roles at various times. Her performance had never given cause for concern. We are satisfied that she intended to remain in the employment of the respondent until her state retirement age of 67 years on 13 April 2035. We are satisfied that the claimant wanted to return to work for the respondent in 2017 but not in Middlesbrough or Stockton and indeed did so when the work trial at Eston was offered. We find that the claimant had not sought out promotion even though she had acted up to more senior roles and we conclude that had she remained in the employ of the respondent, it would have been very unlikely that she would have been promoted.

23.3 The claimant experienced difficulties in the workplace as detailed in the First Liability Judgment. The perceived difficulties with her colleague X led to a breakdown of her trust in her managers and her inability to return to work in Middlesbrough or Stockton where she would be managed by those same people. The claimant made it clear to the respondent that she wished to return to work but not at either the Middlesbrough or Stockton offices. This was quickly realised by Dawn Rogers who investigated the claimant's grievance in June 2017 and who effectively arranged for the claimant's managers to arrange the work trial at Eston. In her substantive telephony role, the claimant had no performance issues. The only thing preventing a return to work was a change of location from Middlesbrough or Stockton.

23.4. The work trial at Eston was badly managed. We heard from Gayle Nixon ("GN") who oversaw the process at Eston on a day-to-day basis. Her evidence was given in an entirely straight forward manner, and she was a credible witness. GN had not managed someone on a work trial before and had no training on how to do so, let alone for someone returning from a lengthy absence who had manifested mental health difficulties. She was told nothing about the circumstances of the claimant in

respect of her illness or otherwise. The claimant was hampered in the trial by reason of not having access to all relevant computer programmes. There was no discussion with the claimant with regard to her performance as the trial progressed. No warning of any kind was given to the claimant that the trial would end unsuccessfully unless her performance improved. GN was absent from the workplace after 5 October 2017 and thus there was no first-hand evidence about the claimant's performance in the final two weeks of the six-week trial. When the claimant received word, as she travelled home on 20 October 2017, to say that the trial had failed and she had to return the following Monday 23 October to James Cook House, she was both extremely shocked and distraught. We repeat our finding in the First Liability Judgment that the work trial was carried out by the respondent's managers grudgingly and with no wish to see it succeed. We conclude that, given the claimant's evident abilities in her substantive role and her wish to return to work, a work trial at Eston, if properly managed and carried out, would have had a very high chance indeed of being successful. The subsequent dismissal of the claimant on 10 January 2018 was because of attendance and not performance. In making this finding, we mean no criticism of GN. She did her best with the limited information available to her. It was only at the remedy hearing (she did not appear at the previous hearing) that GN became aware of the background which led up to the work trial and the claimant's difficulties. Her surprise – not to say shock - at what she heard was clearly apparent to us.

23.5 The respondent's Absence Management Policy was not followed in respect of there being any discussion with the claimant in relation to a reasonable adjustment passport or in relation to an extension of trigger points. No effort was made in terms of making reasonable adjustments for the claimant other than the work trial at Eston which arose from the investigation into the claimant's grievance and not from the managers of the claimant. That process was effectively imposed on the claimant's managers and as a result was conducted by them grudgingly. That attitude was starkly confirmed and continued by the witness Stephanie Cowan who appeared at the Remedy Hearing. We accept the criticism levelled at this witness in paragraph 29 of the original written submissions of Mr Ahmed. This witness either could not or would not accept that the respondent had failed to follow its own procedures in relation to the claimant or the criticisms levelled against the respondent in the First Liability Judgment. We found Ms Cowan to be an unimpressive witness.

23.6. We received no meaningful evidence from the respondent as to whether or not there were other offices at which the claimant could have been found alternative work. We take notice of the fact that the respondent is a very large employer. The claimant had indicated a willingness to travel to work and indeed did so during the trial at Eston. We infer that the claimant's managers had looked no further than Middlesbrough, Stockton and Eston. There were many offices in the North-East where work might have been found for the claimant. The work carried out by the claimant was at the level of administrative officer ("AO"). We infer that on the balance of probabilities there would have been a role which the claimant could have caried out for the respondent at an office other than Middlesbrough or Stockton and that that role would have been a telephony role or another role at the AO level which the claimant could have been trained to do. We conclude, having seen the claimant give evidence and having assessed the importance to her of her work, that she would

have been willing to commute a greater distance if it meant remaining in the employment of the respondent.

23.7 Since her dismissal the claimant's health has been poor and remains so. She had four consultations with her GP or a health practitioner between January and the end of April 2018. On 22 May 2018 the claimant saw her GP. She was tearful and anxious (page C380) and was referred again to the mental health team at the hospital. A report (C186-C189) was prepared on the claimant by a community psychiatric nurse on 5 July 2018 in which it is stated that the claimant presented with symptoms of PTSD. A course of Eye Movement Desensitisation Reprogramming ("EMDR") was recommended as beneficial, but the claimant cannot properly access that treatment through the NHS whilst this litigation is ongoing. The claimant has continued to suffer from migraines, from stress and from depression since her dismissal and up to the date of the Remedy Hearing. The claimant has experienced suicidal ideation at various times since the dismissal. The claimant underwent a course of cognitive behavioural therapy in late 2018 and early 2019. Ultimately that therapy was not deemed successful (pages C438-439). The claimant attended a wellbeing workshop arranged by the charity Mind in May 2019 (page C247). The claimant was seen in hospital for chest pains in July and August 2019 and was told they were attributable to anxiety and PTSD. The claimant's father died suddenly in late October 2019 and the claimant was referred again to the mental health crisis team. The claimant saw her GP in January 2020 and was signposted to Talking Therapy for EMDR, and she attended 12 sessions. However, that course of treatment was interrupted by the covid-19 pandemic (page C446) and has not resumed. The claimant has sought assistance from various mental health charities and has resorted to seeking help from the Samaritans charity at times.

23.8 The dismissal had a very serious impact on the claimant. We accept that the claimant lost her sense of worth, purpose and security which her employment afforded to her. She felt and continues to feel ashamed to have no job and feels she is constantly judged by others because of that factor. She felt ashamed, humiliated and embarrassed by the dismissal. She has struggled to maintain any semblance of daily routine. She has very low motivation and self-esteem. She finds herself thinking about her dismissal very frequently and her sleep is disturbed. The claimant avoids visiting the town of Middlesbrough for fear of seeing her former managers and colleagues and has taken to shopping further afield in Coulby Newham, Teesside Park and Newcastle. She is scared and anxious to leave the house and her social life in virtually non-existent. The claimant receives very considerable support from her son, but he lives in Cambridge and is not available in person on a day-to-day basis: her relationship with her son has been adversely affected by her illness. The claimant has sought financial assistance from the DWP since her dismissal and that necessary interaction has served to reawaken her feelings about the dismissal.

23.9 Since her dismissal, the claimant has made applications for jobs, and we accept as accurate the 12 roles applied for detailed at paragraph 77 of her witness statement for the remedy hearing both in terms of the applications made and the outcomes. The roles applied for, or enquiries made have ranged from posts in retail, cleaning, healthcare, warehousing and public service including the NHS and local authorities. The claimant has attended courses to gain more qualifications since dismissal. She has a work coach who referred her to a career adviser at the Hope

Foundation on 10 May 2018 (page C169). She has joined the specialist employability support programme run by Kennedy Scott which is designed to help unemployed disabled adults into employment. The claimant has attended courses at the Mind Connect Recovery College run by the mental health charity Mind, and this will afford access for the claimant to courses aimed at managing depression and anxiety and sleep difficulties. These courses have not yet taken place.

23.10 Since dismissal the claimant has received employment and support allowance but ceased to be eligible for this benefit as from 29 November 2020 as a result of the receipt by her of a sum running into six figures being her share of the estate of her late father. The claimant has also received Personal Independence Payments. These payments are paid as a result of her ongoing medical conditions and the effect they have on her day-to-day activities. The payments are ongoing and are not means tested and are not taxable. They are payable to claimant whether in employment or not. The claimant does not have a driving licence.

23.11 We heard evidence from the claimant's son Gerard Boyers. That evidence could have been partial and unreliable but in fact we found the evidence to be given in a measured way. He was an impressive witness. We accept his evidence that the job held by the claimant with the respondent from 2005 was a lifeline for her. We accept his evidence that the claimant saw the work trial at Eston as a way to get back to work and to return to some normality after a lengthy period of difficulty. We accept his evidence of the effect on the claimant on 26 October 2017 when she was told the trial at Eston had failed and she was to return to James Cook House without explanation or discussion. We accept his evidence (paragraph 19) that, if offered a chance of a fresh work trial at Eston or elsewhere, the claimant would have returned within days. We accept the evidence of the effect on the claimant of receiving the dismissal letter and not being able to open it herself (paragraph 22). We accept that the dismissal caused the claimant immediately to fear she would be homeless and would lose everything she had worked hard to build up. We accept the evidence of the impact of the dismissal on the claimant and the subsequent deterioration in her mental health. We accept that the claimant is obsessed about the dismissal and the unfairness of it. We accept the evidence of the irrational behaviour of the claimant. We accept the evidence (paragraph 42) that the claimant has lost her whole livelihood, sense of independence and security.

23.12 The claimant was paid in full for her notice period from 10 January 2018 until 4 April 2018. She suffered no loss of income in that period.

23.13 From the beginning of her employment until 31 March 2015 the claimant was a member of the Premium pension scheme offered by the respondent to its employees. That was a defined benefit final salary scheme. That scheme closed on 31 March 2015 and the claimant transferred to membership of the Alpha pension scheme. That is a defined benefit scheme, but one based on career average salary. The annual pension to which the claimant was putatively entitled as of 31 March 2017 from the Premium scheme was £2930 per annum (page C130). This had risen to £3270.84 by the time of her dismissal. The amount of pension to which the claimant was putatively entitled from the Alpha Scheme on 31 March 2017 was £846 per annum and at the date of her dismissal was £1152.12 per annum. At the date of dismissal, the respondent contributed 20% of the claimant's gross salary to the Alpha Scheme

and the claimant contributed 4.6% per annum of gross salary. The Alpha Scheme gave the claimant a death in service benefit of £53475. The accrual rate to the claimant's pension from the Alpha Scheme was 2.32% of gross salary per annum (Page C129). The respondent made no contribution to pension for any employee who had dropped to zero salary entitlement by reason of prolonged absence. The claimant would have become entitled to a pension from the Alpha scheme on her 67th birthday.

23.14 In respect of any grossing up required by our award, we conclude that in the present tax year 2021/2022, the claimant has no income other than the personal independence payments detailed above. We note and accept that those payments are not means tested and are not subject to the income tax regime. We accept that since 20 November 2020 the claimant has been living on the capital inherited from the estate of her late father.

Discussion and Conclusions

24. We conclude that it is appropriate to award the claimant a basic award for unfair dismissal pursuant to section 119 of the 1996 Act and an award for loss of statutory rights pursuant to section 123 of the 1996 Act. We conclude that it is appropriate to award the claimant compensation for all other losses pursuant to section 124 of the 2010 Act. We will deal with the issue raised by the respondent in respect of deduction from the basic award separately below. We calculate the losses on 23 August 2021 ("the calculation date"). We deal first with the award under the 2010 Act.

Award for disability discrimination pursuant to the 2010 Act

25. There are various questions which we need to consider in order to formulate our decision as to the correct level of award under the 2010 Act. The questions emerge from the list of issues and the written submissions. We have considered all of those submissions in detail.

26. At the outset we remind ourselves that we are engaged in calculating the remedy due to the claimant for one single act of disability discrimination namely the act of dismissal on 10 January 2018. There were other claims of discrimination, but they did not succeed for various reasons and are not to be compensated. We must consider compensation for any loss caused by the dismissal. Within those parameters, we are to award compensation which is just and equitable. We note our finding in the First Liability Judgment that the respondent ought reasonably to have known that the claimant was a disabled person by November 2017 namely a few days after the end of the Eston work trial. It follows that in any repeat of the work trial at Eston, or elsewhere, the disabled status of the claimant should have been a relevant factor and the respondent's duty to make reasonable adjustments for the claimant would have been engaged.

The questions relevant to calculation of financial loss

27. The relevant questions posed in the list of issues are:
27.1 What was the chance of the claimant being able to attend work if not dismissed on 10 January 2018?

27.2 What was the likelihood of the claimant remaining in the employ of the respondent if not dismissed on 10 January 2018?
27.3 What would a proper assessment of the claimant's performance/competence have been during the Eston work trial in September /October 2017?
27.4 What would the likely outcome/evaluation have been of the claimant's performance/competence during any second work trial?

28. The relevant questions arising from the written submissions of counsel are:
28.1 Would the claimant have worked for the respondent until her retirement if not dismissed?
28.2 Could the claimant have worked for the respondent until her retirement?

29. We refer to our findings of fact at paragraph 23 above. We conclude that the claimant intended to remain in the employ of the respondent until her retirement. We accept that the claimant had the work ethic and she had worked for the respondent since 2005. She was good at her work and there were no performance issues. The claimant both wanted to and needed to work. Her work with the respondent suited her and she was fulfilled by it. Absent any problems with her health, we conclude that the claimant would have remained in the employ of the respondent until she retired from work. The answer to the question at paragraph 28.1 is in the affirmative.

30. The answers to the other questions all depend in the main on our findings in respect of the Eston work trial. Again, we refer to our findings of fact and in particular paragraph 23.4. The claimant began to suffer with mental health issues from 2014 which led to issues of perceived bullying and harassment. The claimant was the victim of harassment in the workplace as detailed in the First Liability Judgment but those acts of harassment are not to be compensated as they were advanced out of time. We conclude that the claimant was perceived as a problem by her managers and there was little, if any, appreciation of her illness and the effects of that illness on her. Before she went away from work ill in February 2014, her behaviour was already causing her managers some problems and they did not know how to deal with her. There was no appreciation or understanding of her illness and no consideration of any question of disability. We find that the claimant did not want to be away from work which she enjoyed but her illness meant that she perceived she could no longer work in Middlesbrough or Stockton. In the absence of any support to return to work, the claimant raised a grievance which was heard by Dawn Rogers who quickly saw the solution to getting the claimant back to work and that was to change office. Thus, the work trial at Eston was arranged through the intervention of Dawn Rogers. However, the work trial needed to be organised by the claimant's own managerial team and there was no enthusiasm to do so on their part. It was considered by them to be unnecessary and burdensome when they were concentrating on service delivery. The trial took place but was badly organised and no consideration was given to assisting the claimant back into work after a lengthy absence. On the face of it, the work required of the claimant on the trial was well within her capabilities. Given her 14 years' experience of working for the respondent it was work she should have been able to do without difficulty. We accept the evidence of GN that there were errors and many of them were basic errors. No-one thought to question why that might be or whether the claimant required additional support or longer to prove herself after what had been a lengthy absence from the workplace. The very unfortunate aspect of this case is that the respondent had in the claimant an able and committed employee

who, with even a basic level of understanding and assistance, would have very likely been able to return to the workplace and continue her good service. The longer the claimant was away from the workplace, the worse the symptoms of her mental illness became. However, when offered the chance of the work trial the claimant took it and attended as required albeit on a phased return basis. When that chance was withdrawn, in a most unreasonable and tone-deaf manner, the claimant's reaction was stark, and it triggered what amounted to a catastrophic deterioration in her mental health the effects of which are still plain to see some 3.5 years later.

31. The claimant had pre-existing vulnerability in terms of her mental health, but she had managed these difficulties in the workplace for approaching three years without any adverse effect on her attendance. Given that history, we conclude that any likelihood of a future absence by reason of the effects of her mental health would not be great particularly once the respondent had knowledge that the claimant was disabled and on the basis that it would then fulfil its duty to make reasonable adjustments for its disabled employee.

32. In answer to questions 27.3 and 27.4, we conclude that if the Eston work trial had been properly handled, there was a very high likelihood that it would have been successful, and the claimant could have continued to work at Eston in fraud for the foreseeable future. We reach the same conclusion in respect of a repeated work trial. Any such trial would have been repeated in the period after the respondent acquired knowledge that the claimant was disabled. Assuming, as we should, that the respondent would comply with its duty to make adjustments to the way the trial was carried out to remove any substantial disadvantage to the claimant, we conclude that the chances of a second trial being a success was very high indeed – particularly given the claimant's evident wish that it should succeed and in particular, if the claimant had had a clear explanation of the likely result if any such trial was not successful.

33. The answer to questions 27.1 and 27.2 must be informed by the answer to the questions dealt with in paragraph 32 above. We conclude again that the chances of the claimant being able to attend work and remaining in the employ of the respondent after 10 January 2018 were very high.

34. Bringing all the considerable evidence before us together, we conclude that if the original work trial had been properly carried out or if a second work trial had been properly carried out, there is an 85% chance that it would have succeeded, and the claimant would have remained in the employ of the respondent for the foreseeable future. We will therefore deduct from financial loss 15% to reflect the possibility that the claimant would have been dismissed fairly and without discrimination. This is our conclusion whether we calculate losses under the 2010 Act or the 1996 Act.

Mitigation

35. We conclude that the claimant has not failed to mitigate her losses to date. The respondent has not established that the claimant acted unreasonably in the steps she managed to take to seek to find alternative employment. The claimant was very greatly upset by her dismissal and has remained unwell since that time. The ongoing Tribunal proceedings have also clearly affected her health. We note that the claimant

has made only a few applications for other posts since her dismissal, but we are satisfied on balance that she has simply not been able to work since her dismissal. We conclude that the claimant's inability to work since dismissal is as a result of the effect on her of the dismissal. In the course on a lengthy cross-examination of the claimant at the remedy hearing, it was suggested to the claimant that she ought to have applied for many more vacancies than she had done and many of the vacancies which featured in the respondent's bundle (R12-R206) were discussed with her. It was apparent that the vast majority of the vacancies discussed were not suitable for the claimant's skill set and in particular because she does not have a driving licence. The claimant was not in a position by reason of her health to do more than she did. We accept the submissions of Mr Ahmed on this point to the effect that the claimant did all she could to find alternative work up to the calculation date within the limits of her mental health and wellbeing. There has been no failure to mitigate loss to date.

36. Clearly the claimant must bring into account in calculating loss to date all income received by her since dismissal. In that regard we conclude that the Employment Support Allowance ("ESA") received by her since dismissal and up to 20 November 2020, when she ceased to be eligible, needs to be accounted for. We conclude that the Personal Independence Payments ("PIPs") received need also to be brought into account. The figures which appear below in respect of ESA and PIPs come from the claimant's witness statement and are supported by documentary evidence in her bundle. They were not the subject of challenge in cross examination. In passing, we mention that if we were to calculate the losses due to the claimant under the provisions of the 1996 Act, then the sums in respect of ESA would not be offset from her loss as the Recoupment Regulations would apply.

When will the claimant find work and at what level?

37. We have considered the Report and the evidence of the claimant. We do not accept that this is a career long loss case or anything approaching it. The claimant is only 53 years of age. We accept that she wishes to work and would have worked until aged 67. Potentially, she has 14 years of work ahead of her. We have taken account of the Report and note that an appreciable improvement in her condition should be achievable within 12 months.

38. We note that the Report speaks of the claimant undergoing EMDR and that a significant improvement to her condition should result. It would be reasonable to expect the claimant to fund that treatment privately if it is not available relatively quickly through the NHS.

39. We conclude that within 12 months from now by 1 October 2022 the claimant should be able to return to work and find work for 16 hours per week at something just above the level of the national living wage. We conclude that a return to work at 16 hours per week should be achievable by that date in a post paying £9 per hour. 16 hours at £9 per hour results in an earning capacity of £144 per week gross which we calculate will result in the same amount on a net basis as the incidence of income tax and national insurance is not applicable at that level of earnings.

40. We further conclude that by 1 October 2023 the claimant should be able to return to work at the same level of income she was receiving from the respondent at the date of her dismissal namely £311.47 per week net. Financial losses in terms of income will therefore cease at that time. We reach this conclusion having assessed all the evidence before us including the evidence received from the claimant at the remedy hearing. We conclude that once this litigation is complete and the stress and anxiety resulting from it is removed from the claimant, there will be a rapid improvement in the condition of the claimant as indicated by the Report. The claimant has a good work record, and she is clearly someone who wants to work and who finds fulfilment in being able to do so. We accept from the Report that the claimant will never fully recover from the conditions which affect her but there will be an appreciable improvement within 12 months, and we conclude that improvement will continue. The claimant has a vulnerability to mental health issues, but she carried that vulnerability whilst she worked for the respondent and managed to fulfil her duties until the events occurred which led to her going away from work in February 2017. Our industrial experience leads us to conclude that there will be ample job vacancies available to the claimant in the period between the calculation date and 1 October 2023. The claimant has considerable experience in administration and her skills and work ethic will be attractive to potential employers. We do not accept the bleak picture painted on behalf of the claimant that this is a career loss case in terms of income and pension loss. The claimant will have support from the employment services in seeking and finding work and she will have the benefit of the valuable advice and assistance of her son in that search for employment.

41. In terms of the pension enjoyed by the claimant at the time of her dismissal, we consider that it will take longer for her to achieve parity with that position. We conclude that within 4 years from now namely by 1 October 2025 the claimant should have secured employment – in the public sector - which will provide an equivalent pension in terms of employer contribution to that which she enjoyed at the time of her dismissal. We note the contents of the Report which speaks of an appreciable improvement in the condition of the claimant within 12 months and we conclude that, once these proceedings are at an end, the claimant's mental health will improve further and sufficiently to enable her to return to employment for the reasons we have set out above. In the first period of employment when we conclude the claimant should be earning for 16 hours a week, we accept that it is unlikely that there will be any pension provision for the claimant from that employment. Once the claimant returns to full time working on 1 October 2023, we conclude that she will have the benefit of an auto enrol pension and the benefit of an employer contribution to that pension of 3% and therefore for the period 1 October 2023 - 30 September 2025, we will compensate the claimant at the level of 17% of loss of contribution. Thereafter we conclude that the claimant will have returned to employment in which she will have no ongoing pension loss in terms of employer contribution.

42. We reach our conclusion that the claimant would be able to return to the public sector because she has a history of such work since 2005, our industrial experience leads us to conclude that work at the level of an administrative officer is plentiful and it is clearly work which the claimant is well qualified to undertake. She had a long period of successful service in the public sector prior to the unfortunate events leading up to her dismissal in this case and, even considering that she may never fully recover from her impairments, such work should be well within her capabilities.

43. We have considered how the loss of pension should be calculated. We conclude that the proper method of calculation in this case is the contribution method. We reach that conclusion because a calculation using the complex method would necessitate a high level of withdrawal to be factored into the calculation. The claimant's mental health history cannot be ignored when considering the possibility that, even though a return to work is achievable, a continuation of that work until 67 is far from certain. The claimant will carry the vulnerability which existed prior to the events with which we are concerned as well as a vulnerability resulting from the events with which we are concerned. In addition, there would need to be factored into that calculation the value of the pension the claimant will earn from the employment which we conclude she will obtain from 1 October 2023 onwards. The most recent iteration of the schedule of loss produced by the claimant shortly before the remedy hearing predicated the calculation of pension loss on the contribution basis. An alternative schedule of loss using the complex method of calculation was produced but that document was one upon which we received no submissions, and it is a document which is patently flawed in that it contains no reference at all to withdrawal factors and it uses a discount rate of 0.75% whereas the Pension Guidance uses a discount rate of 0.25%. Given that we are satisfied that the claimant's pension loss should cease in terms of contributions by 1 October 2025 and even though that is longer than the period usually compensated by the contribution method, we conclude that the contribution method in this case is the right way to proceed. We do not consider it appropriate to make any deduction from our awards in respect of accelerated receipt given the prevailing interest rates and the amounts involved.

Injury to feelings award

44. We refer in particular to our findings at paragraph 23.8 above and conclude that the injury to the claimant's feelings by the dismissal was severe. The effects on the claimant of her dismissal were extensive and long lasting. We accept that the effect on her feelings caused by the dismissal adversely impacted her relationships with her son and other family members and her friends. We accept the evidence given to us by Gerard Boyers that whilst suffering with mental health difficulties before the dismissal, the claimant was resilient and managed to lead a good life. We accept that all that changed with the dismissal and the claimant has had suicidal ideations and thinks constantly about her dismissal and the unfairness of it.

45. We remind ourselves that we are compensating the claimant for the injury to her feelings caused by the dismissal alone and, in particular, not the way in which the Eston trial was dealt with. We conclude the correct Vento band is the middle band and the correct amount to award is £18000 which reflects the very serious effect the dismissal had on the claimant's feelings. It is right to add interest to that sum for the period since dismissal to the calculation date pursuant to the Interest Regulations at 8%.

Personal Injury award

46. We have given detailed consideration to the Report and refer to paragraphs 21.1 – 21.5 above. We accept the contents of the Report and found it to be helpful to us.

47. We remind ourselves that we are compensating the claimant in relation to any personal injury attributable to the dismissal alone. The Report refers to the "index incidents" which we interpret to mean both the perceived workplace bullying and harassment and the dismissal. We are not compensating for injury caused by anything other than the dismissal. The PTSD suffered by the claimant was attributable to the index incidents. The deterioration (not the condition itself) of the RDD suffered by the claimant was attributable as to 60% to other causes and 40% by the index incidents.

48. We identify the suffering of the claimant since the dismissal in terms of the deterioration of the existing conditions of PTSD and RDD as attributable to the dismissal. By then the claimant had been away from the index events relating to harassment and bullying for many months. We do the best we can in assessing that deterioration.

49. If we were compensating the claimant fully for the conditions of PTSD and RDD, we would place the level of damage in the moderately severe band of section A of Chapter 4 of the JC Guidelines which, including the 10% uplift, gives a range of £17900 - £51460. The figure midway in that band is £34680 which is the figure we would adopt on a full liability basis. We are compensating only 40% of the deterioration in the RDD condition but of that 40% we assess that only half is attributable to the dismissal of the claimant. We consider it appropriate to award £3500 to reflect the injury caused to the claimant by the deterioration in the RDD condition caused by the dismissal. In respect of the PTSD condition, we note that the index incidents have caused symptoms since January 2017. That must therefore include the workplace bullying and harassment. The claimant had endured such matters for a considerable period of time before January 2017 and we conclude that the workplace incidents are a greater cause of the PTSD (diagnosed in July 2018) than the dismissal itself. However, there was a considerable deterioration in her suffering with PTSD after the dismissal and, we conclude, attributable to the dismissal. We note that deterioration lasted until December 2018. We assess that the dismissal contributed 50% to the deterioration of the PTSD from January 2018 onwards. We conclude that it is appropriate to award £5000 to reflect the deterioration caused to the claimant by the PTSD attributable to dismissal. Accordingly, we award £8500 for personal injury.

50. We therefore award £26500 in total for injury to feelings and personal injury. We have considered whether that figure properly compensates the claimant for the actions of the respondent attributable to the dismissal alone and we are satisfied that it does.

The Civil Service Award ("the CSA")

51. It is common ground that the claimant received the sum of £19209.84 as an ex-gratia payment from the respondent through the Civil Service Compensation Scheme. The respondent asserts that it should be entitled to full credit for that payment against whatever sums are now ordered in favour of the claimant. The claimant asserts that where an employee receives an ex-gratia payment that she would have received had she not been unfairly dismissed, it will not factor into reducing the losses suffered by the claimant. Further the claimant asserts that the ex-

gratia payment will be irrelevant if the Tribunal concludes that a fair procedure would still have resulted in dismissal at some point.

52. We have decided that compensation should be calculated on the basis that the claimant would not have been dismissed by reason of capability. However, we have decided that there is a 15% chance that the claimant would have been dismissed fairly and without unlawful discrimination by reason of capability. We conclude that in those circumstances, it is right that the respondent should have credit for 85% of the CSA and we will credit that amount namely £16328.36 when calculating sums due to the claimant.

Contributory fault

53. The respondent seeks a reduction to the basic award of compensation for unfair dismissal pursuant to section 122(2) of the 1996 Act and to any compensatory award for unfair dismissal pursuant to section 123(6) of the 1996 Act. The actions of the claimant relied on for these purposes are a failure on the part of the claimant to participate in Occupational Health ("OH") assessments and to release OH advice, refusing to discuss the causes of her stress with the respondent, insisting that "keeping in touch" contact be limited to e-mail, avoiding telephone contact with the respondent, refusing to permit home visits to her by her managers, refusing to work at either the Middlesbrough or Stockton offices, refusing to meet or talk with the manager charged with considering her case (Denise Brough) and refusing to work with anyone who had previously managed her. The respondent seeks a 50% reduction to the appropriate awards for these reasons.

54. We have considered these aspects of the history of this matter in detail. We refer to our findings of fact in the First Liability Judgment. We have considered the submissions of Mr Ahmed on these points and find ourselves in agreement with those submissions.

55. We conclude that the claimant was entitled to withhold her consent for the release of OH reports particularly when she had genuinely held concerns over the accuracy of the reports and the conduct of the persons who had interviewed her over the telephone – as we find she had. Whilst the failure to release a report is unfortunate, we do not categorise it, in those circumstances, as culpable or blameworthy nor do we consider it just and equitable to make any reduction from the awards on this basis in the circumstances of this case. We note that the reports in question were obtained prior to the work trial at Eston, and that the respondent made no attempt to request further reports once that work trial had been completed thereby breaching its own attendance policy. When the respondent began the review of the claimant's attendance after the work trial had failed, there was no new request made for a new OH report or a repeated request that the claimant release what were by then outdated reports.

56. We do not characterise the claimant's unwillingness to discuss matters with her managers or her wish to have contact only by email or her refusal to have telephone contact with managers or her refusal to have home visits from her managers as either blameworthy or culpable conduct or conduct rendering it just and equitable for us to reduce awards in this matter in the circumstances of this case. We are satisfied

that those aspects of the claimant's conduct all arose from the mental health conditions from which she was suffering at the time. The claimant's faith in the respondent, and in her managers in particular, was at a very low ebb even before the withdrawal of the work trial at Eston and the manner of that withdrawal. The result of those actions by the respondent badly affected the mental health of the claimant and that in turn led to the aspects of her behaviour which the respondent now seeks to categorise as blameworthy and culpable. We do not agree. We accept that he claimant's behaviour did not make the matter any easier for the respondent to deal with and, in a different case, such conduct by a claimant may well amount to culpable and blameworthy conduct, but not so in the circumstances of this case. The respondent failed at any time to stand back and ask the question why the claimant was acting in the way that she was. We conclude that it would be wrong to categorise that behaviour of the claimant as meriting any reduction from awards now being made.

57. We conclude that the refusal by the claimant to work at either the Stockton or Middlesbrough offices again evidences a position taken by her because of her disability. The claimant made it plain that she would work for the respondent at other offices and indeed did so at Eston. We do not categorise the refusal as blameworthy or culpable. Given that it arises from a mental health condition which amounted to a disability, we do not consider it just and equitable for any reduction in awards to be made on this basis.

58. The respondent criticises the claimant for failing to appeal to decision to dismiss her. We do not accept that there should be any reduction from any award for this reason. We accept the claimant had only 10 days in which to lodge an appeal and that the shock of being dismissed resulted in a further deterioration of her mental health. We note that in her evidence the claimant spoke of her shock at being dismissed, of trying to come to terms with the loss of her employment and financial independence and of the worry of applying for other jobs and state benefits. The claimant had lost all faith in the respondent and in her managers in particular and she genuinely did not think that an appeal would make any difference to her position. We accept the submission of Mr Ahmed to the effect that that conclusion by the claimant was evidently justified even now given the evidence we heard at the remedy hearing from Stephanie Cowan. We do not accept there should be any reduction from any award by reason of the claimant's failure to appeal the decision to dismiss.

59. In those circumstances there will be no deduction from any awards by reason of contributory conduct or the claimant's failure to appeal the decision to dismiss her.

Exemplary damages

60. We have considered the claimant's claim contained in the submissions of Mr Ahmed that we should award exemplary damages in this matter. We found that to be a surprising submission. There is no reference to any such claim in the claimant's schedule of loss. We refer to the statement of law at paragraph 20.6 above. We have considered whether the actions of the respondent were oppressive, arbitrary or unconstitutional. We have considered whether the actions of the respondent's employees disclosed malice, fraud or cruelty.

61. We conclude that there is no evidence before us of the respondent having acted in any of the above-mentioned ways in this matter. The dismissal of the claimant was rushed and, once the Eston trial had ended unsuccessfully, pre-ordained but we conclude that is evidence of insensitive and brusque conduct but not more than that. We have concluded that the actions of the respondent through its managers were the result of ignorance in how to handle the claimant's case and a failure to consider whether the challenging behaviour was a result of illness or disability. The managers of the respondent did not know what to do and were given inadequate direction. Whilst we are satisfied that the actions of the respondent's employees caused the claimant very considerable distress and injury, we do not find those actions to amount to oppressive, arbitrary or unconstitutional actions by servants of government. We find that the actions of the respondent do not cross the high threshold required for an award of exemplary damages. It would simply be wrong for us to make any such award.

62. We have considered whether we should award aggravated damages, but we decline to do so. There is no suggestion that the trial in this matter has been conducted in an insensitive manner. The actions of the respondent were crass but not intended to harm the claimant. We were concerned that it is clear from the evidence of Stephanie Cowan that the respondent even now does not appear to accept that it went badly wrong in its treatment of the claimant. Notwithstanding that, we do not consider this to be a case where even aggravated damages should be awarded.

Expense of Private Treatment for EMDR

63. We conclude that it is not appropriate to award the cost of private treatment for EMDR. We broadly accept the submissions made by Mr Tinnion on this matter set out at paragraphs 74-78 of the submissions in reply dated 29 July 2021.

64. In the latest iteration of her schedule of loss dated 28 June 2021, the claimant made no reference to this head of damage. As a result, the claimant was not cross-examined on this matter, and we accept that the respondent was prejudiced by this late claim. The claimant has not incurred any expenditure on private treatment for EMDR and there is no existing loss to compensate. We are not satisfied on balance of probabilities that the claimant will incur this expenditure in the future.

65. There will be no award under this head of claim.

ACAS uplift

66. The claimant seeks an uplift to compensation awarded pursuant to the provisions of section 207A of the 1992 Act.

67. The respondent dismissed the claimant by reason of capability. We refer to the statement of law set out at paragraph 20.16 above. We agree with the submissions of Mr Tinnion set out at paragraphs 51-53 of the written submissions dated 18 July 2021 that the ACAS Code on Disciplinary and Grievance Procedures 2015 has no application to a dismissal such as this which was by reason of absence alone. In any event, the basic requirements of the Code were broadly complied with by the

respondent in terms of investigation and meetings with the claimant and the offer of an appeal.

68. There will be no uplift awarded pursuant to section 207A of the 1992 Act.

Costs Application

69. The claimant's schedule of loss includes reference to an application for costs in respect of work required to present the claimant's defence to the appeal against the First Liability Judgment. That appeal was successful, and the issue was remitted to be considered again by this Tribunal. The Second Liability Judgment confirms that this Tribunal reached the same decision but that Second Liability Judgment is now the subject of a further appeal.

70. We conclude that we cannot consider this matter for two reasons. First, the issue to which the application for costs refers is still before the EAT and until the result of the second appeal is known, it would be difficult to consider the merits of any such application. As the matter is still before the EAT and there is to be another hearing, it seems to us that any such application for costs can and probably should be made to the EAT and not to this Tribunal. The Employment Appeal Tribunal Rules 1993 make provision for applications for costs to be made and considered (Rules 34-34D inclusive). In any event, the respondent succeeded in its appeal to the EAT and it would be unusual for a successful party to an application to have to pay the costs of the unsuccessful party.

71. The second reason we cannot consider this matter is that no application for costs to this Tribunal has been made which complies with the provisions of the Rules of this Tribunal in respect of costs as set out in Rules 74-84 of the 2013 Rules of Procedure. We find ourselves in full agreement with the submissions of Mr Tinnion on this point set out at paragraphs 86 and 87 of his submissions in reply dated 29 July 2021. There will be no award in respect of the putative application for costs.

The alleged shortfall in the Civil Service Award ("CSA")

72. In the latest iteration of her schedule of loss filed on 28 June 2021 and for the first time, the claimant sought an award in respect of an alleged underpayment by the respondent of the CSA in the amount of £3790.52.

73. We received little evidence about this matter and the basis upon which the claimant was entitled to the sum which was paid to her of £19209.48 is far from clear. It was suggested by the claimant that she was contractually entitled to the CSA and that she should have received £23,000 as a minimum award. If the claimant was contractually entitled to such an award, then any claim for an underpayment should be advanced as a claim for breach of contract. No such claim was advanced before this tribunal. If there was an underpayment of the CSA, we do not accept that it is a head of damage which can be claimed as a result of the unlawful discrimination or the unfair dismissal.

74. In those circumstances, we conclude that we have no jurisdiction to deal with this matter. No application to amend the claim form to include a claim for breach of

contract was made. Accordingly, we will make no award in respect of the alleged underpayment of the CSA to the claimant. If there is a contractual claim to be made in respect of this matter, the claimant is still entitled to make that claim through the civil courts.

75. We note that when the sum of £19209.48 was paid to the claimant on 31 July 2018 (page C204), it was paid without deduction of tax. We note that we did not receive any submissions from counsel on this point, but we conclude that that payment was paid as a result of the termination of the claimant's employment and served to reduce the £30000 exemption from income tax in respect of termination payments referred to in section 403 of ITEPA. We conclude that for the purposes of any grossing up calculation we are required to make that the remaining exemption from income tax available is £10790.52p.

Award for unfair dismissal under the 1996 Act

76. We conclude that we should award the claimant a basic award in respect of the unfair dismissal calculated pursuant to section 119 of the 1996 Act. The claimant was aged 49 at dismissal and had served for 12 complete years. Her gross pay at dismissal was £365.29 which was less than the then maximum weeks pay figure of £489. The appropriate multiplier is 16. The basic award was correctly agreed at £5844.64p. We conclude for the reasons set out above that there should be no deduction made in respect of the conduct of the claimant before dismissal pursuant to section 122(2) of the 1996 Act.

77. We award £500 for loss of statutory rights. We conclude that this sum should be reduced by 15% to reflect the possibility that a fair dismissal could have occurred and for the reasons set out above. This dismissal was by reason of capability and there is no application for reduction to the compensatory award because of contributory conduct by the claimant pursuant to section 123(6) of the 1996 Act. The compensatory award for unfair dismissal is therefore £425.

Final Comments

78. We are aware that the Second Liability Judgement is the subject of an appeal. It seems to us that if that appeal is successful, then compensation due to the claimant will need to be calculated afresh pursuant to the terms of the 1996 Act alone. If that question was to be remitted to this Tribunal, we hope this brief comment will be of assistance to the parties. Given that the maximum compensatory award will then be governed by the provisions of section 124(1ZA) of the 1996 Act, it seems that, in light of our conclusions set out above, the maximum compensatory award will very quickly be reached. Accordingly, we express the hope, if it should become necessary to make that alternative calculation, that the parties will be able to do so without further recourse to this Tribunal and by agreement with the consequent saving of time and expense for the parties.

79. The Tribunal met in chambers on 23 August 2021 to deliberate on this matter. Very shortly after that date the Employment Judge began a period of annual leave which meant the preparation of this Judgment has been somewhat delayed. We express our apologies for that delay.

TABLES

Key Information

Claimant's date of birth: 13 April 1968
Date of Dismissal: 10 January 2018
Claimant's age at termination: 49
Calculation date: 23 August 2021
Claimant's age at calculation date: 53
Date claimant began to work for the respondent: 19 September 1995
Period between termination date and calculation date: 188 weeks 5 days (1321 days)
Gross pay at dismissal: £365.29 per week (£18995 per annum)
Net pay at dismissal: £311.47 per week (£16196.44 per annum)
Respondent contribution to Alpha Pension Scheme: 20% £3799 per annum (£73.05 per week)
Claimant's state pension retirement date: 13 April 2035
Amount of ex-gratia CSA paid to the claimant in July 2018: £19209.84
Date the claim was filed: 6 May 2018.

Table of Compensation Awarded

Loss of earnings to date

10.1.18 – 4.4.18 No loss – notice period paid in full.

4.4.18 - 23.8.21 177 weeks at £311.47 net per week		£55130.19
Less:		
Employment Support Allowance received		
4.4.18 - 18.1.19 41 weeks at £73.10pw	£2997.10	
18.1.19 – 12.4.19 12 weeks at £137.40pw	£1648.80	
12.4.19 – 13.9.19 22 weeks at £138.95 pw	£3056.90	
13.9.19 – 10.4.20 30 weeks at £194.30 pw	£5829.00	
10.4.20 - 29.11.20 33 weeks at £197.60 per week	£6520.08	
Christmas bonuses	£20.00	£20071.88
		£35058.31
Less:		
Personal Independence Payments received		
17.5.18 – 8.4.19 47 weeks at £57.30pw	£2693.10	
8.4.19 – 6.4.20 52 weeks at £58.70	£3052.40	
6.4.20 - 27.5.21 59 weeks at £59.70pw	£3522.30	
27.5.21 – 23.8.21 13 weeks at £60pw	£ 780.00	£10047.80
		£25010.51
Less: CSS Award (85% x £19209.84)		£16328.36
		£ 8682.15
Less: 15% reduction		£ 1302.32

Loss to date awarded **£ 7379.83**

Interest on the loss of earnings to date.

10.1.18 – 23.8.21 189 1321 days
50% x 1321 = 660 days at 8% per annum x £7379.83
Daily rate £1.62
Interest awarded 660 days x £1.62 **£1069.20**

Future Loss of Income

Loss 23.8.21-30.9.22 58 weeks at £311.47 per week £18065.26

Loss 1.10.22-30.9.23 52 weeks at £167.47 per week £ 8708.44
(weekly net loss of £311.47 less £144 per week notional income)

£26773.70

Thereafter no loss of income.

Less: 15% reduction £ 4016.05

Future Loss awarded **£22757.65**

Interest is not awarded in respect of future loss.

Pension Loss

Contribution Method of Compensating the Loss

10.1.2018 – 23.8.2021
3 years 225 day at 20% x £18995
1321 days at £10.40 per day £13738.84

23.8.2021 – 30.9 2023
2 years 38 days at 20% x £18995
768 days at £10.40 per day £ 7987.20

1.10.2023 - 30.9.2025
2 years at 17% x £18995
730 days at £8.84 per day £ 6453.20 £28179.24

Less: 15% £ 4226.88

Pension Loss awarded **£23952.36**

Interest is not awarded in respect of pension loss.

Injury to Feelings		**£18000.00**
Interest on the award for Injury to Feelings		
Interest 10.1. 2018 - 23.8.2021		
3 years 225 days at 8% per annum 8% x £18000 = £3.94 per day 1321 days x £3.94		**£5204.74**
Damages for personal injury		**£ 8500.00**
Interest on the award of damages		
Interest for 660 days (50% of the full period) 8% x £8500 = £1.86 per day x 660		**£ 1227.60**
Total amount awarded under the 2010 Act		
Loss to date	£ 7379.83	
Interest thereon	£ 1069.20	
Future loss of income	£ 22757.65	
Pension Loss	£ 23952.36	
Injury to Feelings	£18000.00	
Interest thereon	£ 5204.74	
Damages for personal injury	£ 8500.00	
Interest thereon	£ 1227.60	**£88091.38**
Award for unfair dismissal pursuant to the 1996 Act.		
Basic Award	£5844.64	
Loss of Statutory Rights	£ 500.00	
Less 15%	£ 75.00 £ 425.00	**£6269.64**
Total Award before grossing up		
2010 Act	**£88091.38**	
1996 Act	**£ 6269.64**	**£94361.02**
Total award after grossing up		
2010 Act	£88091.38	
Add Income Tax (see Table below)	£17167.24	£105258.62
1996 Act		£ 6269.64
GRAND TOTAL		**£111528.26**

Grossing Up Calculation Table

1. £30000 tax free sum reduced by CSA leaving £10790.16 available.

2. £10790.16 reduced by the amount awarded for unfair dismissal of £6269.64 leaves £4520.52 available as tax free sum to offset against the discrimination award.

3. The award of damages for personal injury is not taxable.

4. The award for injury to feelings for the dismissal being on 10 January 2018 is not taxable.

5. Amounts to be grossed up

Loss to date	£7379.83	
Interest thereon	£1069.20	
Future loss	£22757.65	
Pension loss	£23952.36	
Interest on injury to feelings	£5204.74	
Interest on damages	£1227.60	**£61591.38**

6. Reduce amount to be grossed up by £4520.52 leaving amount to be grossed up as £57070.86.

7. Personal allowance rate in tax year 2021/2022 is £12570. Basic Rate band is £37500.

8. The claimant has no other taxable income in tax year 2021/2022

Calculation

Amount	**Gross**	**Tax**	**Net**
Personal Allowance	£12570.00	Nil	£12570.00
Basic Rate of 20% on Next £37500	£37500.00	£7500.00	£30000.00
Higher Rate of 40% on Balance	£24168.10	£9667.24	£ 14500.86
Totals	**£74238.10**	**£17167.24**	**£57070.86**

9. The amount to add to the discrimination award in respect of income tax is £17167.24

Table of Interest calculation

Interest on loss to date
10.1.18 – 23.8.21 189 1321 days
50% x 1321 = 660 days at 8% per annum x £7379.83
Daily rate £1.62

Interest awarded 660 days x £1.62	£1069.20

Interest on the award for Injury to Feelings

Interest 10.1. 2018 - 23.8.2021	
3 years 225 days at 8% per annum	
8% x £18000 = £3.94 per day	
1321 days x £3.94	£5204.74

Interest on the award of damages

Interest for 660 days (50% of the full period)	
8% x £8500 = £1.86 per day x 660	£ 1227.60

TOTAL	**£7501.54**

EMPLOYMENT JUDGE A M BUCHANAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 11 October 2021

.....

Public access to employment tribunal decisions Judgements and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions -shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.