EMPLOYMENT TRIBUNALS

Claimant: **Mr W Rogerson**

Respondent: **Busways Travel Services Limited**

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the Reserved Judgment on Remedy sent to the parties on 4 November 2021, is corrected as set out in block type at paragraph 83.

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Employment Judge Sweeney

Date: 17 November 2021

Important note to parties:
Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.

EMPLOYMENT TRIBUNALS

Claimant: Mr W Rogerson

Respondent: Busways Travel Services Limited

RESERVED JUDGMENT ON REMEDY

Heard at: Partly at Newcastle Employment Tribunal and partly by way of Cloud Video Platform ('CVP')

On: 15th June 2021 (evidence) and 19th July 2021 (submissions) and 20th October 2021 (deliberations)

Before: Employment Judge Sweeney

Members: Stan Hunter and Russell Greig

Representation: For the Claimant: Richard Ryan, counsel
For the Respondent: Edward Nuttman, solicitor

The unanimous Judgment of the Tribunal is as follows:

1. In respect of the complaint of **unfair dismissal** the Respondent is ordered to pay the Claimant a basic award of **£9,903.**

2. In respect of the complaint of wrongful dismissal the Respondent is ordered to pay the Claimant damages in the sum of **£3,307.93.**

3. In respect of the complaint of **disability discrimination** contrary to sections 20-21 Equality Act 2010 and section 15 Equality Act 2010, the Respondent is ordered to pay the Claimant compensation of **£19,088.19** consisting of:

3.1	**Injury to feelings**	**£11,000**
3.2	**Interest on injury to feelings**	**£1,968.97**
3.3	**Financial losses**	**£5,616.15**
3.4	**Interest on financial losses**	**£503.07**

4. **The total amount payable to the Claimant is £32,299.12**

REASONS

1. This remedy hearing was listed following promulgation of the Tribunal's judgment on liability on 26 January 2021, in which it upheld the Claimant's complaints of unfair and wrongful dismissal, discrimination because of something arising in consequence of disability and discrimination by failure to make reasonable adjustments. The Claimant and the Respondent were again represented by Mr Ryan and Mr Nuttman, respectively. Both advocates prepared written submissions.

2. The Claimant gave further evidence and called a second witness, Mr Stuart Gilhespy. The Respondent called Mr Malcolm Bell, an Operations Manager and the line manager of Mr Todd who gave evidence at the hearing in November 2020. We were provided with a bundle of documents consisting of 137 pages.

3. At the beginning of the remedy hearing the Claimant had asked to be reinstated. However, he subsequently withdrew this. Counsel confirmed that he sought an award of compensation only

4. We heard evidence in person on 15 June 2021 but there was insufficient time for submissions. Therefore, the hearing was adjourned to 19 July 2021, to resume by way of CVP. Those submissions took up the best part of the day and the Tribunal only had 1 hour to deliberate. Therefore, deliberations were adjourned. Regrettably, the Tribunal members were unable to reconvene until 20th October 2021.

Findings of fact in relation to remedy

5. At the date of the Claimant's dismissal he was aged 61. He had been continuously employed for 30 years.

6. He was paid a gross annual wage of £17,389.48. The parties agreed the figures set out in the Respondent's counter schedule of loss as follows:

   6.1.1. Gross weekly pay £396.12

   6.1.2. Net weekly pay £334.41

   6.1.3. Sick pay rate £191.95

   6.1.4. Weekly pension contributions £39.61

7. The Claimant was in receipt of half pay (sick pay) from **02 June 2019** and – had he not been dismissed - this would have continued for a period of 26 weeks until **01 December 2019**.

8. The Claimant had not secured alternative employment since his dismissal on 26 June 2019. He has received Employment Support Allowance ('ESA') OF £971.10 (£74.70 a week).

9. The bundle of documents contained extracts from Indded.com recruitment business and Stagecoach careers. Since the termination of his employment, the Claimant had not attempted to secure any alternative employment.

10. The Claimant was affected by his dismissal in the sense that it did for a period increase his anxiety and left him feeling devastated and let down by the Respondent for whom he had worked for thirty years. The Claimant has had some counselling in the period 08 February 2021 to 19 April 2021. He had feelings of being 'defeated' by what happened to him and found it difficult to relax. He became disengaged from his family and felt low in energy which put pressure on his marriage.

11. The depression, which was diagnosed in April 2019, before any discriminatory acts by the Respondent, got worse after his dismissal. The depression has not gone away but more recently, the stressor was the litigation (**page 21** remedy bundle).

The Claimant's mental well being

12. We see from **page 105** of the original bundle that by **24 January 2020** the Claimant's GP surgery refers not only to OSA but to depression. From what we have been able to discern this is a reference by a GP to 'reactive' depression, being a reaction to his dismissal.

13. By **November 2019**, the Claimant was suffering from anxiety and depression (we use the word 'depression' in the non-clinical diagnosis sense) and note that the term has been used by the Claimant's GP to describe his mental wellbeing.

14. The Claimant's evidence was that his initial anxiety was due to the uncertainty surrounding his diagnosis. What sent him into depression was, he said the dismissal. He was diagnosed with depression on **31 July 2019** (GP letter p**age 21** remedy bundle).

15. The Claimant had some counselling (**page 23-24** remedy bundle), However, that that did not start until 2021. We note that the Claimant had previously been on fluoxetine in April/May 2019 and was able to return to work in July 2019.Therefore, the anxiety (and depression) is something that the Claimant

had experienced before and was not something that had prevented him from driving as a bus-driver. The Claimant up until the remedy hearing was seeking to be reinstated to his position from which we infer that he saw himself as being able to drive despite the condition of anxiety and depression. There was no evidence that his condition has deteriorated between dismissal and the date of the remedy hearing in June 2021 when he was seeking reinstatement to the extent that it would prevent him from driving.

16. The letter from the GP of **24 February 2020** refers to depression worsening due to the stress of being finished. The Claimant was on 20mg a day. This was increased from 1 x 20mg a day to 2 x 20mg capsules (**page 33** remedy bundle) to 40mg a day in September 2019 (**page 33**). As of 24 February 2020 he was back on 20mg a day (see **page 32** remedy bundle). That was the level he was on back in **April 2019** and in **July 2019** when he returned to driving – prior to being told of the OSA diagnosis.

17. In the original hearing bundle, at **page 106** we see that the Claimant was reviewed on **10 December 2019**. It records that there has not been much change and previous issues with wife have resolved. The Claimant visited his GP on **24 February 2020** which was the date on which date the letter **at page 32** of the remedy bundle was written – it can only have been on **24 February 2020** that the Claimant's medication was dropped to 20mg a day. Either that, or the letter is wrong and no one suggested that it was. As it was advanced in evidence by the Claimant, we do not feel it appropriate to go behind what it says.

18. Recognising therefore that the Claimant was feeling the residual effects of anxiety and/or depression and considering that the medication he was prescribed as of **February 2020** was at the same level as in July 2019 and that he was able to return to full driving duties then, we feel that it is reasonable to conclude that the Claimant's anxiety and depression was not such as to prevent him from driving a bus from about **March 2020**.

19. The Claimant has not applied for any work either before or since March 2020. He accepted that bus operators were constantly recruiting for drivers, including the 'Go Ahead' company, whose depot was a five minute drive from his home. He accepted that, when ready to work again, he was highly likely to get a job, albeit the Claimant insisted he was not fit to work.

Relevant legal principles

20. Section 126 Employment Rights Act 1996 provides as follows:

(1) This section applies where compensation falls to be awarded in respect of any act both under –
(a) The provisions of this Act relating to unfair dismissal, and

(b) The Equality Act 2010

(2) An employment tribunal shall not award compensation under either of those Acts in respect of any loss or other matter which is or has been taken into account under the other by the tribunal or another employment tribunal in awarding compensation on the same or another complaint in respect of that act.

21. Thus, where a complaint relates to a dismissal which is determined to be both unfair and discriminatory, the heads of compensation may overlap and cannot be awarded twice.

22. In such circumstances, the general approach is to award compensation under the discrimination legislation: **D'Souza v London Borough of Lambeth** [1997] IRLR 677, EAT.

23. Section 124 Equality Act 2010 provides:

*(1) **……***

(2) The Tribunal may

(a) Make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b) Order the respondent to pay compensation to the complainant;

(c) Make an appropriate recommendation

(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.

(4) …….

(5) ……

(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119.

24. Compensation is to be calculated on tortious principles, the aim being 'as best as money can to it, to put the claimant into the position he would have been in but for the unlawful conduct: **MoD v Cannock and others** [1994] I.C.R. 918, EAT. This requires the Tribunal to determine the position the Claimant would

have been in had the discrimination not occurred. Therefore, the Tribunal must determine the loss that has been caused by the discrimination. In a discriminatory dismissal case, this assessment of what loss has been caused is closely aligned to the question, in an unfair dismissal case, of whether the employee could or would have been fairly dismissed. Therefore, in assessing loss, it is important to consider whether, were it not for the discriminatory dismissal, there could have been a non-discriminatory dismissal at the same time or at some point in the future. This is an extremely difficult exercise for any court or tribunal and the chance that the employee could or would have been dismissed fairly and without discrimination may be recognised by making a proportionate reduction in compensation for future loss: analogous to a 'Polkey' award in 'pure' unfair dismissal cases.

25. Monies received by the claimant as a result of social security benefits will also fall to be deducted from an award of compensation in a discrimination complaint. This is different to the position in respect of unfair dismissal but that is because the recoupment provisions that apply to the latter do not apply to cases of discrimination.

Polkey

26. The exercise involves considering whether the particular employer would have dismissed the claimant in any event had the unfairness not occurred. Whilst the Tribunal will undertake the exercise based on an evaluation of the evidence before it, the exercise almost inevitably involves a consideration of uncertainties and an element of speculation. The principles are most helpfully summarised in the judgment of Elias J (as he was) in **Software 2000 Ltd v Andrews** [2007] I.C.R. 825, EAT (paragraph 54):

(1) In assessing compensation for unfair dismissal, the Tribunal must assess the loss flowing from the dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal;

(2) If the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including evidence from the employee;

(3) There will be circumstances where the nature of the evidence which the employer adduces or on which it seeks to rely is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct

what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made;

(4) Whether that is the position is a matter of impression and judgement for the tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

27. As explained by Elias J in paragraph 53:

"The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to hwo the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating compensation even though it will be a difficult and to some extent speculative exercise."

28. The correct approach has been confirmed by the Court of Appeal in **Abbey National plc v Chagger** [2010] I.C.R. 397. There, the CA confirmed that if there was a realistic prospect, on the facts of the case, that the employee would have been fairly dismissed in any event, that possibility had to be factored into the measure of loss. The Tribunal will take account of the chance of events having occurred following the unlawful act and determine the award on the loss of that chance. For example, if a tribunal concludes that there was a 50% chance that an employee would have been dismissed fairly (without discrimination) in any event after a period of 6 months, the tribunal will calculate the losses suffered after that date as 50% of salary.

Mitigation of loss

29. There is a duty on dismissed claimant to mitigate their losses, the most obvious way of doing which is to seek and obtain alternative employment following employment. It is for the respondent to show that the claimant has failed to take reasonable steps to mitigate his loss. Compensation may be decreased under this head not only by such sums as the complainant has actually received but also by such amount as that complainant could reasonably have expected to

receive had they taken all reasonable steps to mitigate their loss. The Respondent must adduce some evidence of the failure. If the employer does show that the employee failed to take such steps an award may be reduced to reflect only those losses that would have been incurred if he had taken the appropriate steps. Whether an employee has mitigated his loss is a question of fact to be determined on the particular circumstances of the case.

Discussion and conclusion

30. We awarded the Claimant a basic award in respect of the finding of unfair dismissal. However, in respect of his financial losses we have awarded him his losses in respect of the act of discrimination.

Injury to feelings

31. Such awards are intended to compensate a claimant for the anger, distress and upset caused by unlawful treatment. They are compensatory and not punitive. Tribunals have a broad discretion as to what award to make, guided by well known cases such as **Vento v Chief Constable of West Yorkshire Police (No2)** [2003] IRLR 102 and **Prison Service v Johnson** [1997] IRLR 162.

32. Awards should not be too low, as this would diminish respect for the policy of the anti-discrimination (or public interest disclosure) legislation. On the other hand, awards must not be excessive. They ought to bear some broad general similarity to the range of awards in personal injury cases and recognised that there is a need for public respect for the level of awards made. The Tribunal should consider the value in every-day life of the sum they have in mind.

33. The Court of Appeal in '**Vento'** identified three broad bands of compensation for injury to feelings and gave guidance (which has been subject to revision since then). In respect of a complaint presented in December 2019, the bands were:

- Upper Band: £26,300 to £44,000 (the most serious cases);
- Middle Band: £8,800 to £26,300 (cases that do not merit an award in the upper band); and
- Lower Band: £900 to £8,800 (less serious cases)

34. There is Presidential Guidance which Tribunals must have regard to when assessing awards in respect of injury to feelings. Although, it is not inevitable that a tribunal will make an award, it is very unusual for none to be made. It is for the claimant to prove the nature and extent of the injury to feelings. Any award must be fair, reasonable and just, in accordance with the circumstances of the case.

Personal injury

35. A claimant may claim damages for personal injury caused by unlawful discrimination: **Sheriff v Klyne Tugs (Lowestoft) Ltd** [1999] IRLR 481. The claimant must prove that he has sustained a personal injury and whilst medical evidence is not an absolute requirement, it is advisable to obtain some medical evidence in support of the existence of and the cause of any personal injury.

Interest

36. Employment tribunals have the power to (and usually will) award interest on awards made in discrimination cases, both in respect of pecuniary losses (although obviously not for future losses) and non-pecuniary losses. Where a tribunal calculates compensation for discrimination it is obliged to consider awarding interest. If the Tribunal decides to do so, interest on compensation for injury to feelings is calculated from the date of the act of discrimination up to the date of the calculation. Interest on lost wages is calculated from the mid-point of that period.

37. Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803. Reg 2(1) requires tribunals to consider whether to award interest on compensation in discrimination cases, regardless of whether or not either party has asked it to do so. If the parties have reached agreement as to the interest that should be paid, however, reg 3(2) permits the tribunal to make an order in the terms agreed.

38. The interest is to be calculated as simple interest, which accrues daily (SI 1996/2803 reg 3(1)). In England and Wales, interest is fixed for the time being by s 17 of the Judgment Acts 1838; in Scotland the rate is to be fixed, for the time being, by s 9 of the Sheriff Courts (Scotland) Extracts Act 1892 (SI 1996/2803 reg 3(2)). In both cases, the current rate is 8 per cent.

ACAS Uplift

39. An award for compensation can be increased or reduced, bu up to 25%, if the employer or the employee has unreasonably failed to comply with a relevant code of practice: section 207(A) TULRCA 1992. The only relevant code is the ACAS Code of Practice: Disciplinary and Grievance Procedures (2015). The Code only applies in cases where there is 'culpable conduct' or performance correction or punishment: **Holmes v Qinetiq Ltd** UKEAT/0206/15). Capability cases involving poor performance are capable of falling within the Code but only were the performance involves culpable conduct. The Code does not apply to a capability dismissal arising from ill-health or sickness absence and nothing more.

Submissions by the Respondent

40. Mr Nuttman provided written submissions and expanded on them in oral submissions. His main focus was on the 'Polkey' argument. He posed two central questions:

    40.1.1. Would the Claimant have been issued with notice of dismissal again and if so, when?

    40.1.2. Would that dismissal have taken effect?

41. To these we would say must be added the obvious: in doing so, would the Respondent have acted reasonably and in a non-discriminatory way?

42. Mr Nuttman submitted that the Respondent (Mr Todd and/or Mr Bell) would have issued notice on 26 July 2019 to expire on 18 October 2019. He addressed us on what he submitted was likely to have happened and set out a time-frame within which it would take place. He set out a range of possible dates by which he submitted dismissal would have taken effect (paragraph 46 submissions). It was, he submitted not appropriate to award any compensation in respect of loss of earnings.

43. Mr Nuttman addressed us in oral submissions on the issue of mitigation of losses. He submitted that the Claimant was aware of the number of opportunities for bus drivers and that bus companies were recruiting drivers and very close to his home, yet he had not attempted to find any work since his dismissal. In the circumstances he submitted that the Claimant had taken no steps to mitigate his losses. He referred to the bundle of documents prepared for the remedy hearing which illustrated the availability of work which the Claimant could and reasonably should have attempted to obtain.

44. Mr Nuttman agreed that the appropriate Vento band was the middle band, submitting that any award should be at the lower end of that band. There should be no award for personal injury for reasons set out in the written submissions. The Claimant had not established any personal injury or causation.

45. In terms of unfair dismissal, the basic award was agreed.

46. As regards wrongful dismissal, Mr Nuttman submitted that the sum of £704.99 should be deducted. He submitted that if the Tribunal were minded to award compensation on the discrimination/unfair dismissal, one option was to do so from the end of what would have been the expiry of notice (**18 October 2019**) but to bear in mind that the Claimant would have been on the sick pay rate at that time, which would have continued through to **01 December 2019**.

Submissions by the Claimant

47. For injury to feelings, Mr Ryan submitted that the award should be at the upper end of the middle band of Vento and that the Tribunal should award damages for personal injury or reflect the significant psychological impact of the dismissal on the Claimant. He suggested a figure of £18,000 plus personal injury resulting in an overall award of £25,000.

48. On the question of personal injury, Mr Ryan submitted that there was sufficient evidence of a psychiatric injury, albeit he did not take us to any evidence other than to point to the letter from the Claimant's GP in the supplementary bundle.

49. As for financial losses, Mr Ryan also reconstructed the world, with a view to persuading us what – from the Claimant's perspective would have happened. He submitted that events would have moved faster had the Claimant not been dismissed. Mr Todd would have continued to have care and concern meetings and would not have issued a notice of dismissal but would have recommenced the process from the very first stage. Even if he had got to a point of issuing notice he would, as he had done before, withdrawn it once the Claimant had obtained approval from the DVLA.

50. He submitted that the Claimant was unable to work, as a result of his treatment and that his losses should extend until retirement.

51. On the subject of the ACAS Code, Mr Ryan simply submitted that there was an unreasonable failure to comply with the Code. He did not elaborate in what way.

52. Interest, submitted Mr Ryan, should be awarded at the rate of 8%.

Discussion and conclusions

53. Our task is to have a go at working out what could or would have happened had the Respondent not unfairly dismissed and discriminated against the Claimant on **26 July 2019**.

54. Referring back to our findings on liability we concluded in paragraph 153 that Mr Todd knew, or ought reasonably to have known as of **11 July 2019** that the requirement for the Claimant to work as a bus driver was likely to place the Claimant at a substantial disadvantage. It was the diagnosis of OSA that made Mr Todd appreciate this. He knew that the diagnosis meant that the Claimant would not be able to drive until approved by medical experts and DVLA.

55. Mr Todd was also aware that he and the Claimant had agreed to withdraw the earlier notice of dismissal and that he, was for all intents and purposes, back at work. Mr Todd was aware that the Respondent employed other drivers with OSA and he was reasonably familiar with the condition of OSA and understood that an effective means of treatment was an airways mask.

56. What, we asked ourselves is Mr Todd likely to have done, acting as a reasonable and non-discriminatory employer on and after **11 July 2019**, in the circumstances where – as we have found - he had experience of managing employees with this condition. By then he had the knowledge of the diagnosis and the implications of that for the Claimant and he was reasonably familiar with the nature of the treatment of that condition which did not prevent those with it from driving a bus.

57. We conclude that the manager, whether that be Mr Todd or Mr Bell, would have said to the Claimant now that they have a formal diagnosis he and the Claimant needed to sit down and discuss what is to happen with regards to the Claimant's employment. He would have explained that the Respondent had other drivers with the condition and he would have sought to reassure the claimant. He would have explained that the Claimant needed to get in touch with DVLA to approve his ability to drive and that medical evidence would be required to demonstrate that the symptoms of OSA were satisfactorily under control. He would have discussed with the Claimant what needed to be done.

58. This discussion would have taken place on **15 July 2019** when the Claimant attended the depot to speak to Mr Todd with his trade union representative.

59. We found in paragraph 61 of the liability judgment that Mr Todd had tried to contact Mr Oliver (**page 91**). In this reconstructed world, we conclude that having had no response, Mr Todd, would have tried again. In the circumstances, given the serious potential outcome for the Claimant, a reasonable employer would have tried again until he got to speak to Mr Oliver. Doing the best we can, we conclude that had Mr Todd done so, he is likely to have made contact with Mr Oliver in the week commencing **22 July 2019**.

60. Rather than write to the Claimant dismissing him on **26 July 2019**, Mr Todd would at that point have referred the Claimant to Occupational Health again. In cross examination, Mr Bell accepted that a report would indeed have been requested (had the Claimant not been dismissed). The purpose of this could only have been to establish the Claimant's suitability for driving. Considering the speed with which OH appointments had been arranged, it is likely that OH would have assessed the Claimant and reported back by **02 August 2019**.

61. Bearing in mind our finding that OH had seen the Claimant on **01 July 2019** and assessed him fit to drive, we conclude that it is highly likely that OH would have reported in much the way as they did in the case of Mr Carroll back in 2013 (**page 134** of the remedy bundle). The Occupational Health physician is likely to have advised:

    61.1.1. That the Claimant was seeing a specialist at Sunderland Hospital;

61.1.2. That DVLA will permit a return to driving when satisfied with the results of the specialist investigation;

61.1.3. That the process is not in the control of OH, the Claimant or the Respondent;

61.1.4. That they expect the Claimant will return to driving if and once the DVLA approve him as being able to drive a PCV.

62. As to the latter, we are satisfied that this is highly likely to have been the advice considering OH's experience of other drivers, its knowledge of the approval process and the fact that it had approved the Claimant fit to drive on **01 July 2019**. What prevented him from returning was the diagnosis and the consequent need for DVLA approval.

63. Returning to the object of this exercise (which is to work out what would or might have happened) we conclude that the Respondent, acting reasonably and in a non-discriminatory manner **could** reasonably have given the Claimant notice of dismissal as of **02 August 2019** to expire **25 October 2019**. We bear in mind that the Claimant had a long history of absence through ill-health and we do not feel it unreasonable to take this into account. There is nothing in the Respondent's procedure that would prevent issuing of notice of dismissal. The Claimant has at this point a compulsory suspension of his licence and there was a fit note saying that the Claimant was unfit for 8 weeks. We consider it unrealistic to ignore the Claimant's past record of absences and we do not accept Mr Ryan's submission that it should have been or would have been ignored. The policy does not mandate the re-starting of the clock, demanding the manager to go through all the stages again. Mr Todd – or Mr Bell – could fairly and reasonably have issued notice of dismissal then. However, it is likely that Mr Todd would have issued the notice on the understanding that they would wait to see what came of the DVLA approval process. Considering all that prevented the Claimant from driving was the need for approval, it is highly likely that Mr Todd would have said that the notice would be withdrawn upon confirmation from DVLA. They would have continued to have 'care and concern' meetings and as Mr Bell accepted in evidence, it is likely that any discussion regarding chasing DVLA or doctors would have occurred, if at all, at such meetings with Mr Todd.

64. We know that the Claimant attended a meeting with Dr McFarlane at the RVI on **04 September 2019** (paragraph 69 of the liability judgment). We also know that he had been advised that he was safe to drive a car at that point and that he should inform DVLA. We infer that the Claimant notified DVLA around **06 September 2019**.

65. We also know that DVLA wrote to the Claimant's consultant on **24 September 2019**. Therefore, it took DVLA just under 3 weeks after notification to write asking for a medical report.

66. We also know from our findings in paragraph 55 of the liability judgment that the Claimant had said to Mr Todd that he was expecting to be back at work on **23 July 2019**. Had Mr Todd acted reasonably and in a non-discriminatory manner, as set out above, we conclude that it is highly likely that the Claimant would have notified DVLA earlier than he in fact did. He is likely to have done so by **17 July 2019,** after meeting with Mr Todd. Considering it took DVLA about three weeks to write to the Claimant's consultant (on **24 September 2019**), we conclude that by **07 August 2019** DVLA is likely to have written to the consultant seeking a medical report.

67. We also know from our findings (paragraph 60) that the Claimant was seen by a specialist on **19 July 2019** and that things were looking good with regards to OSA treatment. We conclude that, had Mr Todd issued notice of dismissal from **02 August 2019** he would have continued to meet with the Claimant (just as he had done in the past under previous notices) and the Claimant would have updated him about his visit to the hospital on **19 July 2019** and would have reported to Mr Todd what the specialists had said (just as he had done in the past).

68. We know from our findings that DVLA got no response from the Claimant's consultant and that it wrote again on **14 November 2019** (**page 130A** original bundle). Therefore, they took about 6 weeks to chase it. The DVLA then finished their medical inquiries in four weeks (**page 130B** original bundle). The effect of page **130B** was that the Claimant was going to be able to drive a PCV and that his Group 1 licence was subject to annual review. He was told what he then needed to do within 14 days. He then received another letter on **24 December 2019** (**page 130C**) to say that he should receive his new licence in the next two weeks.

69. What is very difficult to assess is the likelihood of there being the same period of delay by the specialist (6 weeks). Had DVLA written to the specialist on **07 August 2019** and had the specialist not responded, resulting in DVLA writing again 6 weeks after that, this means that DVLA would have chased the specialist by about **18 September 2019**. Had it done so, (given that it took four weeks for DVLA to complete its inquiries after writing to the consultant for the second time – **pages 130A-130B**) it would have written to the Claimant in the terms set out on page **130B** by about **16 October 2019**.

70. Even assuming the equivalent periods of delay, the Claimant is likely to have received the equivalent of the letter on **page 130B** within the 12 weeks of the notice of dismissal, which would have expired on **25 October 2019**. However, on balance, we conclude that the process is likely to have taken less time than

this because the Claimant would have remained in employment, would have been acutely conscious that his future employment depended on it and is highly likely to have chased his medical consultant to report to the DVLA much earlier. We doubt in those circumstances that the consultant would have delayed, appreciating the consequences for the Claimant. Returning to the real world (and not this reconstructed one forces upon us by the need to undertake this exercise) it probably took as long as it did because nobody was putting the pressure on the medical experts. The Claimant's mental health had deteriorated upon his dismissal and he was not pressing for the consultant to report. Had he not been dismissed he would have retained that sense of urgency he displayed prior to his dismissal, keen as he was to continue in employment.

71. Therefore, it is more realistic to conclude that the Claimant is likely to have received a letter in the same terms as set out on page **130B** by about **25 September 2019**. By early October 2019, he is likely to have been referred by Mr Todd to OH and OH is likely (as in the case of Mr Carroll) to have advised that he is fit to drive. It would then take about 2 weeks for him to obtain his licence which would continue to be subject to annual medical review. It is likely that he would have been back and able to drive with his licence by about **24 October 2019**. It is likely to have taken about a week to organise matters for the Claimant to return to driving and he is likely to have recommenced on **01 November 2019**, remaining on sick pay until such time.

72. In those circumstances, given Mr Todd did not wish to have to go and recruit a driver and considering other drivers with OSA have been retained following DVLA approval, it is likely that Mr Todd would have withdrawn the notice and that the Claimant would have agreed to this, leaving him able to continue in his role as a bus driver.

The Claimant's pay

73. The Claimant was in receipt of half pay (sick pay) from **02 June 2019** and this would have continued for a period of 26 weeks until **01 December 2019**. Mr Nuttman submitted that we should take account of this if we were minded to make an award of compensation. However, if matters had happened as we have set them out above, it is likely that the Claimant would have been back on full pay by about **01 November 2019**. We do not accept that he would have continued on sick pay for another month based on our timescales.

74. Considering our findings above under the heading 'mental wellbeing of the Clamant' and considering the ready availability of work as a bus-driver within close proximity of his home address, we would expect the Claimant to have been able to drive and to find full-time employment at a similar wage by **08 April 2020**. That allows him 6 weeks from the reduction of his medication on 24 February 2020 to be in a position to return to work. The Claimant accepted in cross examination that there were plenty of jobs available for bus drivers; that

companies were regularly recruiting and accepted that one such company was in close proximity to his home.

75. We could see no basis for uplifting any award. We were unsure which part of the Code was relied on – none was specified – and in any event, concluded that the Code did not apply as this was not a matter in respect of which the Claimant's conduct or performance was in issue.

76. We have expressed our conclusions in respect of this reconstructed world as 'likely'. We have to assess, as best we can, the degree of likelihood that these events would have occurred as we have set them out. We cannot say that they would certainly have happened. However, we conclude that it is highly likely that events would have transpired as we have described. We acknowledge the submissions of Mr Nuttman and the evidence of Mr Bell. The Respondent contended that it would have issued notice of dismissal and it would have taken effect and that this would have been reasonable and a proportionate means of meeting a legitimate aim (in response to a section 15 complaint). We agree that the Respondent could have issued notice of dismissal and that it could have given effect to it and that such would have been reasonable and proportionate. However, we have to determine the likelihood of Respondent issuing the notice and giving effect to it (not withdrawing it). In light of the evidence and considering our findings, we estimate that, even if the Respondent had issued notice of dismissal on **02 August 2019**, the chance that it would have withdrawn it is 80%. Therefore, there is a 20% chance that the Claimant would have been reasonably dismissed in a non-discriminatory manner We base this on:

1.1.1. The fact that on two previous occasions Mr Todd had issued notices of dismissal which were withdrawn following confirmation of the Claimant's ability to drive;

1.1.2. The fact that the Claimant was told he could drive and did drive in July 2019 shortly before his dismissal;

1.1.3. The fact that the key issue was the 'diagnosis' and the consequence of that diagnosis on his ability to drive from the perspective of DVLA;

1.1.4. The fact that DVLA did eventually approve the Claimant as able to drive;

1.1.5. The fact that other employees have gone through the same process and have continued to drive;

1.1.6. The fact that had DVLA completed their enquiries within a time frame as set out above it would have enabled the Claimant and the Respondent to understand precisely the position within the 12 week notice period;

1.1.7. The fact that the Claimant was keen to get back to work and had always kept Mr Todd up to date with what medical experts were saying;

77. This means that any financial losses will be reduced by 20%.

Mitigation of losses

78. We are satisfied from the evidence and from our findings above that the Claimant could and reasonably should have secured alternative employment as a bus driver by no later than **08 April 2020**. To the extent that he claims losses beyond that period we conclude that the Respondent has satisfied us that the Claimant has failed to take such steps as he could to mitigate his losses.

Wrongful dismissal

79. The Claimant was entitled to 12 weeks' statutory notice which would have expired on 18 October 2019. In that period the Claimant was entitled to his normal contractual pay (section 88(1)(b) ERA 1996). However, owing to the way in which the Respondent operated its company sick pay provision, a sum of £704.99 falls to be deducted – on the basis that the Claimant has already been paid this money in his pay from 16 June to 11 July 2019 (see final three payments on **page 142**). This was not disputed by Mr Ryan. Had he been given notice he would have been paid £4,012.92 (12 x £334.41) less £704.99, which comes to **£3,307.93**.

Compensation for discrimination

Injury to feelings

80. We decline to make any award in respect of personal injury. The Claimant has not satisfied us that he has sustained a personal injury or that it was caused by the Respondent. We have acknowledged that he suffered from depression – albeit there was insufficient evidence to conclude that this amounted to a psychiatric injury. Further, the Claimant had not followed any of the protocols for the obtaining or serving of expert evidence nor had he given the Respondent notice of his intention to claim damages for psychiatric injury.

81. We accept that the Claimant has suffered significant injury to feelings, however. We consider it appropriate to make an award in this respect. Both were agreed that the appropriate band was middle Vento.

82. The Claimant's ability to cope with family life was adversely affected in the way we have found. His relationship with his wife was damaged. He did seek some limited help through counselling although this was not until much later. Nevertheless, the effects were real and adverse. These feelings have remained

with him for some time and indeed were evidence at times to the Tribunal while the Claimant was giving evidence.

83. In our judgement the appropriate award is at the **lower** end of the middle band. We award the Claimant the sum of **£11,000** compensation for injury to feelings. That is what we consider to be a fair, reasonable and just award reflecting, as best we can do, the effects of the unlawful treatment on the Claimant.

Compensation for financial losses

84. We have assessed the Claimant's financial losses under the discrimination legislation from **01 November 2019**.

85. Looking at what the Claimant has lost we have broken it down into two periods (following expiry of the 12 week notice period):

1.1.8. **Period 1: 18 October 2019 to 31 October 2019** = 2 weeks at the sick pay rate of £191.95 (net £167) = **£334**

1.1.9. **Period 2**: **01 November 2019 to 08 April 2020** = 18 weeks and 2 days (18.4 weeks x £334.41 = **£6,153.14**)

<u>TOTAL discrimination financial losses</u>

Period 1 + period 2 = **£6,487.14 = loss of income**

+

Pension loss = £39.61 from 18 October 2019 – 08 April 2020 (30.4 weeks x £39.61 = **£1,204.14)**

+ Loss of statutory rights **£300** (although not compensating losses under unfair dismissal principles, the Claimant has suffered the loss of those rights as a consequence of the discriminatory dismissal, and as such this is recoverable under tortious principles)

= loss of **£7,991.28**

LESS ESA OF £971.10

= £7,020.18

86. Based on our conclusions and calculations, the Claimant is to be compensated for 80% of that loss = (£7,020.18 x 80% **= £5,616.15**

Interest on financial losses

87. There have been 817 days from 26 July 2019 – 20 October 2021.

88. The daily rate = £1.23 x 409 = **£503.07** interest on the financial losses.

Interest on injury to feelings

89. The daily rate is £2.41 x 817 = £1,968.97

Totals

90. The total amounts due to the Claimant therefore are:

Unfair Dismissal

Basic Award **£9,903 (agreed)**

Wrongful Dismissal

Damages **£3,307.93**

Discrimination

Injury to Feelings **£11,000**

Financial losses **£5,616.15**

Interest on injury to feelings **£1,968.97**

Interest on financial losses **£503.07**

TOTAL AMOUNT DUE: **£32,299.12**

Employment Judge Sweeney

3 November 2021

Sent to the parties on:

4 November 2021

For the Tribunal:

S Dodds