



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Davin

**Respondent:** R1 The Governing Body of District Church of England Primary School  
R2 St Helen's Borough Council

**Heard at:** Liverpool

**On:** 12 November 2021 and  
7 December 2021

**Before:** Employment Judge Aspinall  
Mr A Clarke  
Mr J Murdie

## Representation

Claimant: in person

Respondent: Mr Mensah, Counsel

## Reserved Judgment on Remedy Part 1 – non pension loss

**The respondent is ordered to pay to the claimant £ 131,945.00<sup>1</sup> made up as follows:**

Basic Award:	£14 175.00
Compensatory Award:	
comprising	
Immediate loss of earnings (after deduction of income and benefits)	£ 68 772.00
Future loss of earnings	£ 4,804.00
Loss of Statutory Rights:	£ 500.00
Loss of death in service	£ 542.00
Injury to feelings award	£ 25,000.00
Aggravated damages.	£ 5,000.00

---

<sup>1</sup> The figures have been calculated as set out in the Reasons below and rounded to remove decimal places.

Interest on immediate loss	£ 7024.00
Interest on injury to feelings	£ 6128.00

# Reasons

## Background

1. The claimant was a teacher of 23 years standing when she was dismissed, in her absence, by a medical incapacity panel on 20 May 2019. Her employment came to an end on 31 August 2019. She brought a tribunal claim on 21 August 2019. The claim came to final hearing on liability only in November 2020. By a judgment dated 19 April 2021 the respondent was found to have unfairly dismissed her, discriminated against her because of absence which arose in consequence of the disability and failed to make reasonable adjustments. The tribunal found that she was dismissed as a result of disability discrimination.
2. The claimant prepared a schedule of loss claiming a basic award, compensatory award comprising immediate and future loss of earnings, an amount for loss of statutory rights, an ACAS uplift to the award, aggravated damages and interest on her award. She sought recovery of loans she had had to take out from family members due to loss of earnings and an award for injury to feelings in the upper Vento band. She also sought interest on her award, argued that the unfair dismissal cap on losses would not apply and sought pension losses. She was a member of the Teacher's Pension Scheme and in readiness for final hearing provided an email from a Senior Financial Adviser detailing that loss to be in the region of £ 366 000 before any deductions.
3. The respondent submitted a counter schedule arguing that no ACAS uplift would apply to a medical incapacity dismissal, placing any injury to feelings award in the lower Vento band and calculating pension loss not by the complex method used for defined benefits schemes but based on lost contributions. They were in the region of £144,218.55 before any deductions.
4. Those were the positions in the documents prepared as at the liability hearing.

## The hearing

5. On 12 November 2021 we met in person at Liverpool for the remedy hearing. The claimant who had had representation from Counsel at her liability hearing, was now appearing in person and told the Tribunal that she had only found out that her Counsel could not appear the evening before the hearing but that he had prepared written submissions. She wished to rely on those submissions but told the Tribunal she felt abandoned.

6. The claimant gave oral evidence as did her daughters and former partner. We found the claimant to be a reliable witness who did not embellish the impact of her dismissal on her mental health. She was able to outline a timeline, with hindsight, of her deterioration and to explain what she had been able to do and not been able to do to mitigate her loss at points on that journey.
7. The respondent did not need to cross examine the claimant's other witnesses so the statements of Ms Emily Davin and Ms Laura Davin and Mr Michael Kelly were accepted as their sworn evidence in chief. We found all of their evidence to be reliable as to the impact of the dismissal on the claimant's physical and mental health and her financial circumstances. We found Mr Kelly's evidence of the impact of the dismissal on the breakdown of his relationship with the claimant to be compelling.
8. We found Mrs Barker, for the respondent, to be a helpful witness who gave us numbers of teaching vacancies available within the region. It was her contention that the claimant could and should have applied for those roles from September 2019 onwards and that she had failed to mitigate her loss. Mrs Barker's figures did not show us which of those roles were for teachers of the claimant's seniority and specialism and which were for newly qualified teachers or for part time roles.

#### **Outcome on 12 November 2021**

9. The Tribunal identified this to have the potential to be a complex case for pension calculation and adjourned to allow the claimant time to achieve actuarial advice/pension information. She was asked to provide details of the difference between the pension and lump sum she would have achieved but for her dismissal and the pension and lump sum she would achieve now. The claimant told us that she has started new work for the Together Trust from 1 November 2021 and that this will entitle her to rejoin the Teachers Pension Scheme. She was asked to provide information as to the entitlement to pension under the terms of the scheme which she had rejoined in a non teaching role.
10. It was agreed we would reconvene to discuss the basis of pension calculation further and to hear closing submissions and a date was fixed for 7 December 2021.

#### **Reconvened remedy hearing on 7 December 2021**

11. The claimant again appeared in person and again said that she felt abandoned and out of her depth with the figures. She produced additions to the Remedy Bundle as follows:
  - (i) Pension Loss enquiry documents
  - (ii) Final Written Submissions on Remedy from Mr Greatly-Hirsch
  - (iii) Medical Notes showing the claimant's prescription history
12. The respondent had prepared a schedule showing its and the claimant's

calculations on the various heads of loss and the claimant had annotated it and submitted her annotated version. The Tribunal called these documents the Respondent's Analysis and Claimant's Response to Respondent's Analysis. The respondent had used the contributions method of calculation of pension loss.

### **The Facts**

13. The claimant's date of birth is 9 August 1970. She was employed on a salary of £ 39, 406.00 at the date of dismissal. The salary achieved increments between the date of dismissal and the remedy hearing date of an increase to £ 40,490 from 18 March 2020 and £ 41,604 from 18 March 2021.
14. The claimant was a member the Teacher's Pension Scheme, a defined benefits scheme. Her employer made contributions of 16.48% of salary. Her pension benefit statement to March 2019, two months before dismissal, anticipated an annual pension on retirement at normal pension age of 60 for the final salary part of the scheme at £ 10,130.97 and a further £2938.09 for her career average part of the scheme at age 67. It anticipated a lump sum payment of £ 30,392.91 and afforded death in service benefit of £ 118,218.00
15. The claimant started work at the respondent on 1 January 1996. Her employment ended on 31 August 2019. She achieved a new permanent full time role on 1 November 2021 and rejoined the Teachers Pension Scheme.

### May – September 2019

16. Immediately following her dismissal the claimant was physically unwell with a condition which later came to be diagnosed as bile acid malabsorption (BAM). The dismissal affected her mental health. She suffered depression and anxiety about the fact of and reason for her dismissal. She was prescribed an increased dose of anti-depressant medication sertraline that she had been taking to ease bowel symptoms, and diazepam.
17. Miss Davin, was well known in her area by generations of parents and children within the school community and by teachers in her school and other primaries in the region. It was a huge source of anxiety for her that she did not know what was being said about her dismissal or what people might be thinking she had done. This meant that she hid away. Some days she did not get dressed or get out of bed. She was isolated, lonely, feeling guilty and suffering low mood. She had a daughter at home to look after and other members of the family stepped in to help care for her daughter. If she had to go food shopping she went late at night so as to avoid bumping in to people who might know her or know of her and what had happened at school. She believed that for a teacher, especially one of long standing, to be dismissed would lead people to think that the teacher must have done something wrong, and something egregious, to be dismissed.
18. The claimant was planning to appeal and awaiting appeal and so felt she could not talk about what had happened. She had no trade union representative or

workplace colleague to support her and was so embarrassed about what had happened to her that she did not tell anyone outside her closest contacts and did not even tell family members that her employment had ended. For some of them, the first they knew was when they read of her case in the Liverpool Echo after a report of the tribunal hearing in November 2020 was published in Spring 2021.

19. The claimant, despite being very unwell and still under medical expert care for her bowel condition, and in post operative recovery for an elective hysterectomy she had had in March 2019, worked on her own appeal from May to June 2019. The claimant made a subject access request of the respondent.
20. The claimant found the appeal hearing on 24 June 2019 to be a traumatic experience. The appeal panel accepted, unchallenged a report that had been prepared for the dismissal hearing which appeared to hold her accountable for non attainment or under attainment of children in her class. She argued that was not what the data showed. There was implicit criticism of her by the appeal panel for not having made enquiries of the welfare and progress of the children that she had taught. She found it deeply upsetting that there was a suggestion that she had contributed to non attainment and that she had not cared what happened to the children. Two of the panel members were parents of children she had taught. Concern for the children continued to trouble her beyond termination of her employment. The remarks at appeal and the lack of scrutiny of the data adversely affected her mental health.
21. The claimant had vivid dreams every night at this time about the children in her class, about children that she had taught over the years and about school in general. She has been greatly troubled by the accusation that she had not cared about the children or that she had let the children down and continued to November 2020 and beyond to experience bad dreams and anxiety around having let the children down. The anxiety the claimant was suffering was exacerbating her bowel symptoms.
22. The claimant suffered financial hardship as a result of her dismissal. Her pay came to an end at the end of August 2019 and she had to learn about and make applications for benefits. This was not easy for her and she had to borrow money, thousands of pounds, to tide her over from her older children and other family members. She needed this money to maintain mortgage payments and to provide for her and her daughter living at home. She found having to borrow money embarrassing and stressful.
23. The claimant had a series of cognitive behavioural therapy sessions and access to online materials but did not find them to be effective. The claimant was referred to Talking Matters in Warrington and had to wait for counselling.
24. The claimant found out that her appeal had failed and brought her Tribunal complaint. This was difficult for her and something that she did despite being very unwell.
25. In September 2019 she applied for a teaching job in a private special school called Chaigely. In September 2019 she also applied for an NSPCC role. She

was not well enough to consider working in a mainstream school in Wigan or St Helens because of connections between the respondent's Ms Shelford and those regions.

26. The claimant was still not sleeping due to bad dreams related to school and invasive thoughts and was prescribed diazepam medication to help her sleep.

#### October 2019 – March 2020

27. From 16 October 2019 through to March 2020 the claimant had weekly telephone counselling sessions. In November 2019 the claimant achieved benefit payments of Contributions Based Job Seekers Allowance. In order to be in receipt of this benefit she had to show that she was actively job seeking. Her mental health meant that she wasn't well enough to be in work at that time but she made efforts to job seek so as to secure her benefit. Agency work, temporary or intermittent would have meant a cessation of benefit and need to reapply so that it was not feasible for her to compromise the security of receiving benefit for just one or two days work. Although the claimant registered with Local Authority sites and monitored them for available roles she did not register with an agency as peripatetic work would have compromised her benefits.
28. In November 2019 the claimant's anti-depressant medication dose rose from a previous 50mg to 150mg per day.
29. In December 2019 she applied for virtual school teacher role in Warrington but was not successful.
30. In January 2020 her anti-depressant medication sertraline was again increased this time to 200mg per day.
31. In February 2020 the claimant applied for a role at St Joseph's Family Centre and got an interview but was not successful. She also applied for a role as a Virtual Schools Education and Welfare Officer but was not successful.

#### March 2020

32. In March 2020 the claimant thought perhaps she should try an agency and had an interview with an agency but no work was offered. She was desperate for work and tried applying for a teaching role at Astmoor Runcorn even though she knew that if she had been successful she would not have been well enough to go back into a teaching role.
33. In March 2020 the pandemic lockdown began and schools were closed. There were extremely limited opportunities for recruitment into schools at this time. The claimant was struggling with her mental health and her GP was again checking on her with regular telephone contact. The claimant had registered with local councils but wasn't well enough to work in primary teaching in the region.
34. In April 2020 the claimant applied to register with an agency called Supply Register Limited for supply teaching work. She was not sure she could do that work. She also made an application for work as a vetting officer and for two

special educational need roles.

35. In May 2020 the claimant was informed that she would have to repay some of the benefits that had been paid to her. This increased the financial pressure on her to find permanent paid work. She would have sought work in a mainstream school but for her mental health. She was well known and anxious about her reputation and had not yet had her tribunal claim come to hearing so she felt she was in a limbo, couldn't say she had been unfairly dismissed or discriminated against, and couldn't explain why she had been dismissed. The claimant applied for other positions as a virtual teacher in Warrington and Halton as she thought this might be manageable for her, working from home with children who were struggling to learn in their homes but she was not successful.
36. The claimant had her 14 year old daughter at home trying to study but there was no laptop or printer. The claimant was making job searches on her phone and sometimes applying for positions but was not able to retain copies of applications or searches. In lockdown the claimant's partner Mr Kelly bought a laptop and printer for her daughter to use for home school and to assist the claimant with job searches.
37. From the date of dismissal to the date of the remedy hearing the claimant made multiple job applications but had not been able to retain copies of the evidence of those applications because of a lack of computer and printer. She desperately needed work and made applications for a wide range of roles. She made sufficient applications to generate 7 interviews. She attended interviews but was not successful. She did not apply for mainstream primary teaching roles in her area because she was not mentally well enough to cope with going back into a teaching role where she perceived people would know about her and have made negative assumptions about her, or would know Ms Shelford.
38. She applied for a role as a safeguarding development officer working with visually impaired people but did not get the job. In August 2020 she applied for a SEND role and in September 2020 for a role she described as the Autism job. She was not successful.
39. From September 2020 the claimant's mental health started to deteriorate further. In October 2020 the GP changed her medication from sertraline to citalopram and started her on a dose of 20mg per day. She was still being prescribed diazepam to help her function and to help her sleep. The claimant tried to remain focused on her case which was coming to tribunal in November 2020. The claimant was so unwell that she became eligible as a person suffering a disability due to her mental health condition for a Personal Independence Payment benefit and was assessed for it and awarded it for three years.

#### October to December 2020

40. This was the lowest point of mental health for the claimant. She had to face the tribunal hearing which was coming up in November 2020 and relive events that had caused her dismissal. Her medication was changed by the GP and increased. At this point the GP was so concerned for the mental health of the claimant that the GP was ringing to check on her well-being on a weekly and

sometimes daily basis

41. The claimant's financial position was dire. In October 2020 she obtained a crisis loan of £ 549.90. The GP declared the claimant unfit for any work at this time and provided a fit note covering 19 October 2020 – December 2020. The GP also re-referred her to Talking Matters for counselling support. The claimant was given on line materials to work through to assist with her mental health whilst awaiting face to face counselling.
42. The claimant secured some support from a barrister through a non fee paying scheme but the support was limited so that she was carrying out most of the preparatory work herself.
43. Her partner Mr Kelly found that the claimant had become introverted and ashamed since her dismissal and had lost all of her confidence. He supported her financially to keep her home but the person he had met was disappearing into mental illness. The claimant often confided in him just how low she was and this caused him to drive to her house to check on her as he feared she might harm herself. The claimant had persuaded him not to tell his family that she had lost her job. The pressure on their relationship meant that it broke down and they separated. This affected the claimant and her partner and the wider family. At this point the claimant felt that the dismissal and its impact had emotionally and mentally destroyed her so that she was no longer the person that she had been before her dismissal and no longer the person her partner had met and fallen in love with. She feels she is no longer the same sort of mum or daughter or friend that she was before the dismissal and its impact on her mental health.
44. After the trial in November 2020 the claimant's mental health deteriorated. She had had to relive events of her dismissal and appeal. The GP prescribed a new anti-anxiety medication in addition to the anti-depressant and the diazepam, called propranolol. The claimant could not contemplate ever returning to teaching at that time and considered, though did not act on, setting up her own photography business. She even looked at a role as an island keeper on a remote island off the coast of Wales because she could not envisage going back into a school and was still anxious about going out in her own area.

#### December 2020 to Spring 2021

45. On 17 February 2021 the claimant asked the respondent to provide her with a reference. It was provided by 9 March 2021 by the Council not the School, but it was a testimonial type reference only giving start and end dates of employment and stating that there had been no safeguarding issues. The Tribunal accepts the claimant's evidence that the implication of not getting a full character and performance reference would be that a prospective school employer would be deeply suspicious and would not consider the candidate. In February 2021 the claimant felt well enough to resume job searching, though not as a classroom teacher in a primary school, and she applied for a COVID prevention outbreak officer role.

#### Spring 2021 to November 2021

46. From March 2021 the claimant was fit to work though still mentally unwell and



taking citalopram. From March 2021 the claimant undertook some work as a SEND teaching assistant. It was a supply role but the claimant needed permanent work. She had total earnings from supply appointments of £ 12 755.21 and total benefits received from date of dismissal to date of reemployment of £ 10 538.00. She achieved a permanent full time position with the Together Trust from 1 November 2021 earning £ 35,197.49 per annum and entitling her to rejoin the Teachers Pension Scheme with an employer pension contribution rate of 8.6%.

## Relevant Law

### Unfair dismissal basic award

47. The Employment Rights Act 1996 at section 119 provides the formula for calculation of a basic award where a claimant has succeeded in a complaint of unfair dismissal.

#### Section 119

(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—

(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,

(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and

(c) allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) “the appropriate amount” means

(a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,

(b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and

(c) half a week's pay for a year of employment not within paragraph (a) or (b).

(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.

### Compensation for losses flowing directly from an act of discrimination

48. Section 124 Equality Act 2010 provides that if a Tribunal finds that an employer has discriminated against an employee it may order the respondent to pay compensation to the claimant. The aim is to put the claimant in the position, so far as is reasonable, that she would have been in had the discrimination not occurred. Any loss flowing directly from the discriminatory act will be recoverable.

124 Remedies: general

- (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(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.

49. In Chagger v Abbey National plc [2010] IRLR 47 the factors to be considered in assessing compensation for discrimination losses included whether the employment would have terminated anyway, whether the individual would have been promoted or received a pay rise, what employment has been or will be obtained and what the financial rewards of new employment will be and whether they will increase to meet the losses currently being suffered at some point in the future.
50. The losses are calculated net (and can be grossed up where a tax liability will attach). There is no statutory cap on losses flowing directly from acts of discrimination. Interest can be added to the sum awarded. The claimant is under a duty to mitigate. Recoupment does not apply.

Loss of statutory rights

51. A tribunal may award compensation for the lost value of accrued statutory rights. The award will form part of the compensatory award but recoupment does not apply. There is no prescribed figure but the amount will range from £ 250 - £ 500 ordinarily.

ACAS uplift

52. A Tribunal may award a percentage uplift up to a maximum of 25% to reflect an unreasonable failure by an employer to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.
53. Harvey on Employment Law and Relations discusses the relevant law on the position in relation to medical incapacity.

**“the 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] EAT 664). Simler J observed that the Code is limited to internal procedures relating to disciplinary situations that include misconduct or poor performance but may extend beyond that, and are likely to be concerned with the correction or punishment of culpable behaviour of some form or another. For example, culpable behaviour of some kind connected with incapacity will come within scope of the Code. Here, the only issue preventing the employee from performing his role as a security guard was illness and thus the Code was not applicable and the employer was not liable for an uplift under it. Although a capability procedure involved an assessment of poor performance, it could not properly be characterised as a 'disciplinary situation.'**

### Injury to feelings

54. An injury to feelings award is available where a tribunal has upheld a complaint of discrimination. The award is to compensate the claimant for the anger, distress and upset caused by the discriminatory treatment. It is compensatory not punitive and should be just to both parties. The award should not be too low as that would diminish respect for the anti-discrimination legislation but should not be too high either as suffering discrimination could then be seen as a path to untaxed riches. The award should take into account the value of the money in everyday life.
55. In Vento v Chief Constable of West Yorkshire Police (no2) 2003 IRLR 102 the Court of Appeal identified three bands of compensation. The top band should be awarded in the most serious cases such as a lengthy campaign of discriminatory harassment. The middle band should be used for serious cases and the lower band is for less serious cases where there might have been isolated or one off acts of discrimination.
56. The boundaries of the bands are updated regularly. The bands at the date of the claimant's dismissal and complaint to the Tribunal were lower band £ 900-£8,800, mid band £8,800 to £ 26,300 and upper band £ 26,300 - £ 44,000.

### Aggravated damages

57. Aggravated damages are available in discrimination cases. They are an aspect of the injury to feelings award and are awarded only on the basis and to the extent that the aggravating features have increased the impact of the discriminatory act on the claimant and thus the injury to her feelings. Wilson Barca LLP v Shirin [2020] UK EAT /0276/19. The award is compensatory not punitive. Interest can be applied.

### Interest

58. Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996 /2803. The interest rate to be applied is 8%. A Tribunal may award interest to compensate for the fact that the compensation is awarded after the loss compensated for has been suffered. Interest may be awarded on past financial loss, injury to feelings awards, aggravated and exemplary damages awards. Interest on injury to feelings awards is calculated from the date of the act of discrimination complained of until the date of calculation of the compensation. Interest on past financial loss is calculated as running from a mid point date between the date of the act of discrimination complained of and the date of calculation.

### Recoupment

59. This is the procedure by which the state recovers from the respondent the value of benefits paid to the claimant. The relevant law is set out in The Employment Protection (Recoupment of Job Seeker's Allowance and Income Support) Regulations 1996 SI 1996/2349. Recoupment applies to a complaint of unfair

dismissal and attaches to any amount ordered to be paid and calculated under section 123 in respect of compensation for the loss of wages for a period before the conclusion of the tribunal proceedings. Recoupment applies to unfair dismissal compensatory awards made under section 123 and not to basic awards made under section 119. It does not apply to losses flowing from acts of discrimination nor to awards for injury to feelings or aggravated damages parts thereof.

### Mitigation

60. An employee is under a duty to mitigate her loss and a deduction in compensation can be made if she has not fully done so. It is for the respondent to adduce evidence to demonstrate that the loss could have been mitigated. The EAT in Ministry of Defence v Hunt [1996] ICR 554 point out that it is for the employer to provide the evidence in support of its argument that the claimant could have mitigated loss. Vague assertions of a failure to mitigate are unlikely to succeed. Where evidence of failure to mitigate is adduced it is for the tribunal to conclude whether the claimant took all reasonable steps to mitigate her loss.

### **Submissions**

61. We heard submissions from both parties as to the non pension loss elements of the award.

#### The respondent's submissions

- 61.1 The claimant has not adduced any medical evidence to show that the effect of respondent's actions on her mental health was a significant she claims it to be.
- 61.2 During the period in which she says her mental health was so bad that she couldn't work she managed to conduct her own appeal in July 2019, submit and manage a subject access request, and her own complex case against the respondent, submit a claim form, manage her litigation, search for new jobs, apply for some new jobs, attend some interviews, prepare witness statements from her case, attend and participate in a six-day hearing in November 2020.
- 61.3 Her mental health was not so poor that she couldn't work from September 2019 to March 2021.
- 61.4 The claimant fails to obtain any new work for 18 months from the effective date of 20 termination 20 months from dismissal of her appeal in July 2019. Evidence of applications and job searches is thin.
- 61.5 The claimant's case at final hearing was that she could have been back in work by September or October 2019 but now says that she could not work until March 2021 and that she will not work in teaching again.
- 61.6 The claimant has failed to find another job in teaching despite many available vacancies and says that she cannot teach because of her mental health but there is no medical evidence to support this.
- 61.7 The claimant was motivated to find work only by knowledge that benefits would have to be repaid whereafter she found a job within one month.
- 61.8 The respondent provided the claimant with a reference.

- 61.9 The claimant adduced no evidence of having engaged in four-month counselling with talking matters.
- 61.10 The claimant has failed to mitigate.
- 61.11 The claimant should have been in a new job by January 2020 any immediate loss of earnings should be at a maximum of 5 months post effective date of termination only, in the alternative if the tribunal takes the pandemic into account it should be a maximum of 8 months only.
- 61.12 There was a national shortage in teachers the claimant would have had no difficulty achieving a teaching role had she wanted one.
- 61.13 This is a case where the immediate loss flows from the act of unfair dismissal and not from any taint of discrimination. The respondent therefore submits that the unfair dismissal cap losses applies in this case.
- 61.14 The respondent submits the ACAS uplift is not appropriate in this case as it was a medical incapacity dismissal.
- 61.15 In relation to an award for injury to feelings the respondent submits that this is a middle band case, there are no ongoing consequences for the claimant who could have returned to teaching and this was not a lengthy campaign of discrimination.
- 61.16 The maximum award for injury to feelings should be £20,000. This is not an aggravated damages case.
- 61.17 This is not a costs award case.
- 61.18 The claimant claims reimbursement of loans from family members but has not adduced enough evidence to prove that those loans were made and are payable.

The claimant's submissions on 7 December 2021

The claimant made the following closing submissions. We also had regard to the submissions prepared for the liability hearing by the claimant's Counsel, the October 2021 written submissions from Counsel and the statement attached to the Schedule of Loss.

- 61.19 The claimant found the whole process of remedy very stressful and has felt abandoned and disadvantaged by not having representation. The claimant had less support from counsel than the tribunal might imagine.
- 61.20 The claimant is concerned that her witnesses did not get the opportunity to speak at the last hearing and feels that if she had representation they would have been allowed to speak as her representative would have spoken up for her and for themselves.
- 61.21 The claimant still has mental health problems
- 61.22 She was subjected to unpleasant cross examination on remedy including about the reference.
- 61.23 November 2020 through to Spring 21 was her lowest point. The claimant had changes in the medication which had stopped working for her. She found a six-day hearing incredibly stressful as she had to see the people who discriminated against her on screen. She was only able to participate in the hearing by covering their images with a card on her screen
- 61.24 In November 2020 the GP was checking with daily calls as she was so

concerned for the claimant's mental health. The claimant was no longer well enough to continue a job search so the GP supported her in an application personal independence payment which she achieved for mental health grounds in November 2020.

- 61.25 The claimant was taken by surprise by the respondent's cross-examination when it suggested that there had been a national shortage of teachers. She did her own independent research and found an annual report of Parliamentary figures which show that there was no annual shortage in teachers in 2020 - 2021, on the contrary teachers were recruited to 6% above target to 30% above target for primary schools. The claimant was here attempting to adduce new evidence in closing submissions. The respondent did not object.
- 61.26 The impact of the discrimination is lifelong to the claimant. Her professional reputation has been damaged. She continues to be a subject of interest, speculation and gossip. An example of this was when her daughter overheard one of the respondent's witnesses talking about her outside the court after the first remedy hearing.

At this point the employment judge interjected and said that these matters had not been adduced in evidence and had not been subject to challenge. The parties agree that it will be a matter for the Tribunal as to how much weight if any to attach to the allegation that one of the respondent's witnesses had made an adverse remark about claimant outside the court last time.

- 61.27 The claimant's overarching submission is that she is still the subject of gossip within the community and the ongoing assumption is that she must have done something wrong because teachers with 24 years service do not just lose their jobs. The claimant has found a new role and loves her new role.
- 61.28 It would have been inappropriate for her to take agency work because agencies recruit on a short-term temporary ad hoc basis. Those roles include no holiday pay no fixed-income and no certainty. It was not financially viable for her to disrupt the supply benefit for what might only be one or 2 days agency work.
- 61.29 The claimant applied to full-time permanent roles as soon as she was mentally well enough to do so. She registered with all local councils except St Helens. She tried to find remote work during the pandemic but found that schools were closed and when they reopened they were not recruiting.
- 61.30 The claimant remains mentally ill and in receipt of personal independence payment until 2023 caused by her dismissal. The respondent's treatment of her has had a profound lifelong long-term effect on her professional life and on her personal life. Her relationship broke down because of this matter.
- 61.31 The ACAS uplift does apply because the claimant was criticised by the respondent for not being able to give a definitive date of return. She felt that this meant she was in some way culpable therefore the ACAS code should apply.
- 61.32 She says this is a case for aggravated damages because the judgment says that the respondent had an "exit agenda" for her. She also says of

the respondent providing a reference that only gave dates of employment and said that she had not been safeguarding risk made it almost impossible for her to find a new role. She said that anyone in teaching would know that the reference needs to be a full reference and without a full character reference adverse inferences would be drawn about the individual so that they would not achieve employment. Knowing that she did not have that kind of reference meant that the claimant would have been unable to make full and genuine applications for teaching employment even if she been well enough to do so and this was an aggravating factor for her. The claimant says the conduct of the appeal hearing and in particular the suggestion that she had contributed to under attainment and had not cared enough about the children to ask about them was an aggravating factor that affected her mental health.

61.33 The claimant accepts that she has not got proof of the family loans and she does not pursue their reimbursement. Similarly, the claimant has not set out what she seeks in costs and why she says the respondent has behaved in such a way as to entitle her to costs. She has found the process stressful and exhausting and has had to do this on her own whilst mentally unwell.

61.34 The claimant wants to thank the court for the support that she has had as a litigant in person at the remedy hearing. The claimant does not want any further postponement or adjournment but wants to get on and achieve an award.

## Applying the Law to the Facts

### Basic award

62. The claimant's date of birth was 9 August 1970. She was dismissed with effect from 31 August 2019. She was 49 years old when dismissed. Working backwards from the date of dismissal she had 8 years service at over age 41 and she had 15 years service at or under the age of 41 so that the formula for calculation of the basic award, agreed by the parties, is  $8 \times 1.5 \times$  a week's pay plus  $16 \times 1 \times$  a week's pay.

The claimant is awarded

£ 14,175.00

### Compensatory award

63. immediate loss of earnings from date of dismissal to date of final hearing. We heard arguments about failure to mitigate and we have rejected those arguments. We accept the evidence of the claimant that she was mentally not well enough to contemplate a return to work at all until March 2021. She was then able to do supply teaching work. She was not well enough to return to a classroom primary school teaching role, even if she had been able to secure one without a full reference, up to the date of the remedy hearing.

The claimant is awarded immediate loss of earnings of **£ 68,772.82**

64. But for the act of discriminatory dismissal the claimant would have expected to continue working in the respondent school and to continue to achieve pay increments as follows:

1 September 2019 – 17 March 2020, at salary rate £39,406.00 =	£ 21,484.37
18 March 2020 – 17 March 2021, at salary rate £ 40,490.00 =	£ 40,490.00
18 March 2021 – 6 December 2021, at salary rate £41,604.00 =	£ 30,091.66
Giving a total loss of earnings of	£ 92,066.03
From which we deduct the claimant's earnings from supply work and her benefits received, <sup>2</sup>	£ 12,755.21 £ 10,538.00
Leaving the awarded amount of	£ 68,772.82

Loss of death in service benefit

65. The claimant was without death in service benefit from the date of dismissal to the date of her reemployment. Her financial adviser calculated the cost of replacing that benefit for that period to have been £20.08 per month. She was without that benefit from 1 September 2019 until reemployment on 1 November 2021 being 27 months at £ 20.08.

The claimant is awarded £ 542.16

Loss of statutory rights

66. The claimant had over 23 years service as at the date of dismissal so it is appropriate, and not contested by the respondent, that the award for loss of statutory rights should be at the higher end of the usual range.

We award £ 500.00.

Future loss of earnings

67. We find that the claimant ought to be able to achieve a classroom teacher role in a primary school on her full national pay scale pay point from September 2022. We acknowledge in setting this date that the claimant has returned to a full time role in the Together Trust from 1 November 2021, that she is enjoying this role and managing well. She remains on anti depressant medication but not so as to stop her from working and enjoying her work. She still has no full reference from the respondent. By May 2022 she could, if she wished, secure a teaching role and return to teaching in September 2022.

68. We acknowledge that there are difficulties for more experienced teachers who are on a higher pay scale point to achieve appointment over younger, even newly qualified and therefore less experienced teachers, but nonetheless we think that given the number of vacancies available on Ms Barker's evidence, and given the claimant's return to work albeit in a different role in November 2021, the claimant ought to have be able to work as a teacher again by September 2022. She will

---

<sup>2</sup> The amounts of deductions were agreed in discussion and can be provided in a schedule should either party require it and request it within 14 days of the date of promulgation of this judgment.



have been wholly vindicated by the judgment of the Tribunal, the case will be behind her and she will have had a period of work to build her self esteem and confidence.

69. Her mental health is still an issue but it is well managed with medication and coping strategies. The claimant had had periods of poor mental health before her dismissal, been prescribed sertraline, and been able to return to teaching. Clearly, what happened in 2019 was more severe and as a direct result of discrimination but this Tribunal finds that three years on the claimant could return to primary school classroom teaching.
70. We therefore award future loss of earnings by way of a shortfall in earnings between what would have been her teaching salary and what is now her Together Trust salary until 1 September 2022. From 7 December 2021 until 1 September 2022 the classroom teacher salary of £41 604.00 per annum, (the claimant has not adduced evidence of any increment amount to be awarded in March 2022 so we calculate it at the March 2021 onwards rate) being £ 3467.00 gross per month for 9 months is £ 31,203.00 less Together Trust salary from 7 December 2021 until 1 September 2022 being £ 35,197.49 per annum, £2933.12 gross per month for 9 months £ 26,398.11 giving a shortfall in earnings from the date of the second remedy hearing on 7 December 2021 until 1 September 2022, the date on which we find the claimant could if she chose resume primary classroom teaching.

We award

£ 4804.89

#### Failure to mitigate

71. We reject the submission that the claimant failed to mitigate her loss. We accept her oral evidence, corroborated by her medical records and the time line in increase in her medication, that she was not well enough to have gone back into a teaching role from dismissal through to the start of the coronavirus pandemic lockdown in March 2020. We find that the lockdown made things very difficult for recruitment for teaching and ancillary education sector roles. We find that the claimant made what efforts she could to find work and that this was very difficult for her because she had been dismissed and because she had no full reference.
72. In cross examination Mr Mensah asked “why is being dismissed as a teacher embarrassing and why couldn’t the claimant say she had been dismissed for incapacity”. The Tribunal accepts the claimant’s submissions that for a teacher to be dismissed is unusual, noteworthy and carries with it a stigma because people speculate as to the cause of the dismissal and often make negative associations.
73. Following the release of lockdown in the autumn of 2020 the claimant’s mental health was at its worst and the claimant did all she could to find alternate work. By Spring 2021 the claimant had the liability judgment and made continuing efforts to find work. The tribunal accepts that there is a calendar to teacher recruitment with most teachers seeking work in the spring and finding appointment so as to give notice to their schools by the end of May for a

September new academic year start. The claimant was making efforts in spring 2021 but was not well enough to contemplate going back into a primary school classroom teacher role just yet. The respondent has not shown how many of those roles on a full time basis were available to the claimant at that time but even if it had we would have made no criticism of the claimant for not being ready for mental health reasons to return to the classroom at that point.

74. We did not have medical evidence in the sense of an expert report to that effect but we heard from the claimant and her daughters and former partner and we accept her evidence that the manner of the dismissal and appeal so adversely affected her that she was not well enough to teach at that time.
75. The Tribunal accepts that the claimant has now found a new role, at a lower rate of pay, but within the education profession and that she feels she can use her experience of discrimination and disability to assist and be a voice for the children and families the Together Trust supports. The claimant is enjoying this work. We find that following a period of readjustment in this role and hopefully the recovery of her confidence and full mental health the claimant would be able to be a classroom teacher again if she chose to be. Accordingly, we find that her future shortfall in earnings claim can run only until the date we find, and we accept that in this area of law we are required to speculate, that she would be well enough to go into a classroom. We find that this would be September 2022 and we make no criticism of her for failing to mitigate by finding a classroom teacher role on the same pay as before her dismissal prior to that date.

#### The statutory cap on unfair dismissal compensatory awards

76. The respondent argued that the loss of earnings flowed from the unfair dismissal. We reject that argument. The loss flowed directly from the discriminatory decisions (i) to fail to reasonably adjust by postponing the medical incapacity hearing on 20 May 2019 and (ii) to dismiss the claimant at the medical incapacity hearing and to uphold that decision on appeal. The loss of earnings is awarded as discrimination loss and therefore the cap does not apply. The claimant is awarded uncapped losses.

#### The loans

77. The claimant has not adduced evidence sufficient to pursue the recovery of loan amounts or interest charge on them. Even if she had there would have been arguments about double recovery given the immediate loss of earnings award we have made. We make no award on this point.

#### ACAS uplift

78. We reject the claimant's submission that because she had not been able to provide an exact date of return to work she was in some way being disciplined so that the ACAS Code on Discipline and Grievance applied. This was clearly a medical incapacity dismissal. We accept the respondent's submission that the Code does not apply to medical incapacity dismissals. No uplift is awarded.

Costs

79. The claimant has not established that the respondent ought to pay costs. She has not set out the claim for costs, what was incurred, when, by whom or why the respondent should be ordered to pay. No award is made for her costs.

Injury to feelings

80. The claimant submitted that this was an Upper Vento band case. We reject that submission. That is not to say that the effects of the discrimination will not be long lasting on her but this Tribunal finds that the injury to feelings is not one of the higher band types of cases because the claimant will recover and go on to have a productive role in education. She is already working in a special educational needs setting. She does not feel able to return to a classroom setting in a primary school in her area because of the ongoing discussion about her case. We accept her submissions that she and her case are still the subject of discussion and interest. We find as above though that this will pass and she will be able to return to a classroom teaching role by 1 September 2022 should she choose to do so.
81. The claimant suffered the “exit agenda” of Ms Shelford as set out in the Liability Judgment. The events of 20 May 2019, when she had prepared to go along to defend herself but was too ill and ended up in an ambulance, must have been particularly disempowering and frustrating for her. To find that she had been dismissed and that the respondent had not allowed her sister to speak for her must also have caused significant upset and distress. The Tribunal is persuaded of the impact of the discrimination on the claimant’s health, relationship and family life. We found Mr Kelly’s evidence compelling as to the impact of her dismissal on her health and the breakdown of their relationship. We found the fact that the claimant was awarded Personal Independence Payment from 2020 on grounds of her mental health for three years, to be of corroborating value in our assessment of the extent of the impact on her mental health. The way the respondent treated her will have medium to long term effects for her.

We make an award at the top end of the middle Vento Band of £ 25,000

Aggravated damages

82. We reject the submission that the exit agenda pursued by the head teacher, of itself, was an aggravating factor. We find that the process to move to incapacity dismissal was rapid and distressing for the claimant but no more so than in other dismissal cases.
83. We accept the submission that the remarks made by Mr Maguire at appeal hearing to the effect that the claimant had not enquired about the children in her class aggravated the claimant’s suffering. This was high handed and insulting behaviour. We also find that the failure by the appeal panel to scrutinize the data with which it was presented so that it perpetuated the (erroneous) argument that the claimant’s class were underperforming because of her or her absence was again high-handed and amounted to an aggravating factor. We were satisfied of

the impact of that treatment on the claimant. The claimant suffered and still suffers recurring nightmares and bad dreams about having let the children down. She had to be prescribed diazepam medication to help her sleep. She avoided going out and hid away in her home so as to not bump into people who might be connected with the respondent because she was ashamed and embarrassed that they might think that she had let the children down or done something egregious to lose her job. We find Mr Maguire's remarks and lack of scrutiny at the appeal hearing are aggravating factors.

84. Further, we find the reluctance of the respondent to provide anything other than a testimonial reference is an aggravating factor. The claimant argued, and we accept her submission, that without a full character reference a teacher is unemployable in a primary school setting. To this date she has not had that reference despite the respondent, at no point, ever suggesting that she underperformed. Withholding anything other than a testimonial reference appears to have been based on animosity as it was not founded in the claimant's performance and we find it is therefore an aggravating factor for the claimant. It left her feeling excluded from her profession.

We award aggravated damages of £ 5, 000.00

This takes the injury to feelings award to £ 30 000 in total.

#### Interest

85. The Tribunal awards the claimant interest on her injury to feelings award including the aggravated damages element from the date of the act of discrimination complained of (dismissal on 20 May 2019) until the date of today's calculations 7 December 2021.

Injury to feelings award £ 30,000  
Date of discrimination 20 May 2019  
Calculation date 7 December 2021  
Interest rate 8%  
Number of days 932 days  
Interest =  $932 \times 0.08 \times \frac{1}{365} \times £ 30,000 =$

We award interest on injury to feelings and aggravated damages of £ 6,128.21

86. The Tribunal awards the claimant interest on her immediate loss of earnings at the rate of 8% awarded from the mid point date between the date of the act of discrimination complained of (dismissal on 20 May 2019) and the date of today's calculations 7 December 2021. The formula for calculation is number of days from discriminatory act date (20 May 2019) to calculation date (7 December 2021) multiplied by half, (to find the mid point) multiplied by 8 % multiplied by 1/365 to get a daily rate and then multiplied by the amount of the award  $932 / 2 \times 0.08 \times \frac{1}{365} \times £ 68772.88$   
We award £ 7024.25

#### **Pension losses**

87. On 12 November 2021 the Tribunal invited representations from the parties as to whether they thought this would be a simple contributions method of loss calculation or a complex pension calculation for the claimant. The Tribunal proposed that this ought to be a complex calculation but noted that it did not have the requisite up to date information to carry out that calculation from the claimant and that the parties had not attempted those calculations between themselves.
88. The remedy hearing was adjourned, adopting the two stage approach advocated in the Principles for Compensating Pension Loss 2021. The claimant was directed to seek advice and to gather information, including from an actuary, so as to be able to return on 7 December and make submissions as to the method of calculation and, if arguing for a complex calculation, to provide information to the respondent in advance of the resumed hearing to enable the parties to try to reach agreement.

### **Resumed remedy hearing 7 December 2020**

89. The claimant provided new pension loss enquiry documentation which comprised:
- a statement to the effect that she has exhausted every avenue open to her to obtain a precise figure for pension loss and not been able to achieve a figure
  - copies of exchanges of correspondence with her financial adviser,
  - copies of enquiries that she made of the Teacher's Pension Scheme,
  - confirmation from the Together Trust that she can rejoin the Teacher's Pension Scheme and her accounts will be linked,
  - benefit statements from the Teacher's Pension Scheme dated 15 November 2021 calculated to 31 March 2018, to 31 March 2019 and to 31 July 2021.

### **The respondent's submission on pensions at the reconvened hearing**

90. The respondent submitted that the claimant could and should have been back in teaching work within 5 months of the date of termination of employment and that the appropriate method of compensating that pension loss is to calculate contributions that should have been made for the missing 5 months.
91. The respondent says the claimant has failed to adduce evidence by which a calculation of loss to lump sum could be made and it is not for the respondent nor the Tribunal to construct the claimant's case in this regard.

### **The claimant's submissions**

92. The claimant accepts that she has not provided all of the information needed to calculate the pension losses by the complex method or to compensate her for loss to lump sum. She says she has tried her best to obtain figures and now wants to put this behind her.
93. The claimant was offered a further adjournment and referred again to the Principles for Compensating Pension Loss and asked did she want specific case management orders for information that she could send to The Teachers'

Pension Scheme or to a privately instructed actuary.

94. The claimant wants to proceed today. She does not want an adjournment and does not want further delay in an award even if that means her pension award may be less than it would otherwise be. The claimant wants the Tribunal to do what it can to make an award to her for her pension loss and accepts that this might mean it is only on the basis of missed contributions from the date of termination of employment until her rejoining the scheme. She says she would have stayed in teaching and retired at 67. She envisages remaining with the Together Trust and does not imagine she will ever return to a classroom teaching role now.

### **Proposed Decision on Pension Loss**

95. The Tribunal proposes to make an award based on
- (i) the lost contributions at the rate of previous contribution 16.48% of gross annual salary from date of termination of employment 1 September 2019 until reemployment in a Teacher's Pension Scheme employer on 1 November 2021 and
  - (ii) a shortfall in contributions between the rate of contribution (in the Together Trust role from 1 November 2021 at 8.6% as revealed by a pay slip produced by the claimant) and the contributions the claimant would have had on the salary she would have had as a primary teacher (£ 41,604) until 1 September 2022 at 16.48%. The Tribunal makes no ongoing pension contribution award beyond 1 September 2022 as it finds, in the absence of medical evidence to the contrary, that the claimant could chose to return to primary school teaching by that date.
96. The Tribunal proposes to accede to the claimant's request that it does not delay or require further information so as to make a complex calculation or lump sum loss award.
97. The Tribunal proposes to issue a Remedy Judgment Part 2 – pension loss following representations from the parties as required by the case management orders, made of its own volition on 20 December 2021, below.

## **Case Management Order**

### **Calculations, right to object and right to be heard**

- 1.1 The parties have 21 days from the date on which this order is made to revert to the Tribunal and copy to each other their pension loss calculation based on the missing contribution methods outlined above or to object in writing with reasons to the proposal that that is the method of calculation to be used.
- 1.2 Upon receipt of the calculations above the Tribunal proposes to reconvene to make a decision in Chambers, without the parties present, on pension loss and

to issue a Remedy Judgment Part Two setting out its pension loss award.

- 1.3 Upon receipt of a written objection to the method of calculation to be used the Tribunal will issue further case management direction as appropriate.
- 1.4 Assuming the basis of calculation is agreed and calculations are shared, the parties have a further 7 days from the date on which they receive a copy of the other side's calculations to write to the Tribunal to object to a decision in Chambers and seek a hearing and the right to make representations on the calculations.

Employment Judge Aspinall

Date 20 December 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON  
23 December 2021

FOR EMPLOYMENT TRIBUNALS



## NOTICE

### THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2410971/2019**

Name of case: **Miss A Davin** v **1. The Governing Body of  
District Church of England  
Primary School  
2. St Helen's Borough  
Council**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 23 December 2021

"the calculation day" is: 24 December 2021

"the stipulated rate of interest" is: **8%**

Mr S Artingstall  
For the Employment Tribunal Office



## INTEREST ON TRIBUNAL AWARDS

### GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at [www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426](http://www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426)

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".
3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.
4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).
5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.
6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.