Case Numbers: 2208142/2017, 2205586/2018 and 2201492/2019

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms S Macken **v** **BNP Paribas London Branch**

Heard at: London Central (by video) **On**: 2 – 9, 11 and 17 March 2021
Chambers: 30 - 31 March and 16 April 2021

Before: Employment Judge E Burns
Mr M Simon
Dr V Weerasinghe

Representation

For the Claimant: Ms S Aly, Counsel
For the Respondent: Ms D Romney, Queen's Counsel

A restricted reporting order dated 17 September 2021 is in place in this case. A copy of the order can be found in Appendix Three.

REMEDY JUDGMENT

The following are the remedies awarded by unanimous decision of the tribunal:

(1) Recommendations

We make no recommendations pursuant to section 124(2)(c) of the Equality Act 2010.

(2) Equal Pay Audit

(a) We order that the Respondent carry out an audit under regulation 2 of The Equality Act 2010 (Equal Pay Audit) Regulations 2014 (the "Regulations"). The audit must be received by the tribunal by **30 June 2022**.

(b) The audit must include the relevant gender pay information of anyone who was an employee (as defined in the Equality Act 2010) of the Respondent between 1 January and 31 December 2021.

(c) The relevant gender pay information is all monetary forms of remuneration, including base pay, pension contributions, allowances and discretionary bonus payments, but not benefits in kind.

(d) The content of the audit must comply with regulation 6 of the Regulations.

(3) Penalty under Section 12A Employment Tribunals Act

We do not order the Respondent to pay a penalty to the Secretary of State.

(4) Compensation

The tribunal orders the Respondent to pay the following compensation to the Claimant:

PAST LOSSES	
Equal Pay	
Salary	£217,946.63
Special Allowance	£35,416.67
Employer Pension Contributions	£30,943.56
Bonus	£117,491.00
Personal Injury	
Salary	£70,545.28
Special Allowance	£10,129.17
Employer Pension Contributions	£918.64
Bonus	£128,150.00
Past Treatment Expenses	£2,921.00
FUTURE LOSSES	
Future Earnings	£857,044.11
Future Treatment	£3,076.00
ADDITIONAL COMPENSATION	
The injury itself (aka pain, suffering and loss of amenity)	£51,400.00
Loss of congenial employment	£22,915.00
Injury to feelings	£35,000.00
Aggravated damages	£15,000.00
Total before adjustments	£1,598,897.06
ADJUSTMENTS	
Acas uplift @ 20%	£317,016.34
Interest on past losses and additional compensation	£162,773.23
Overall Total	**£2,081,449.70**

We note that the Respondent has paid the Claimant £667,380.75 (gross). It has also paid £25,879 as an employer pension contribution into its pension scheme on her behalf. These amounts are to be treated as satisfying the order in part, subject to clarifying the taxation position.

(5) Reconsideration

The time limit for any application for reconsideration of this judgment is extended to 60 days from the date this judgment is sent to the parties.

REASONS

INTRODUCTION

1. This was a remedy hearing in three claims that had been issued against the Respondent by the Claimant.

2. Liability was heard in the first two claims (2208142/2017, 2205586/2018) in March 2019. The reserved judgment from that hearing was finalised on 30 August 2019. It was sent to the parties on 2 September 2019.

3. After the liability hearing, but before the judgment was delivered the Claimant presented a third claim (2201492/2019) on 19 April 2019 raising several new complaints. Over the course of several case management hearings, the Claimant withdrew the complaints in the third claim on the understanding that key matters referred to in the third claim, together with additional matters raised subsequently, would be considered as part of the remedy hearing.

4. The remedy hearing was originally due to take place in May 2020. Unfortunately, it was unable to proceed, primarily because of the COVID-19 pandemic.

5. The legal members of the tribunal panel at the remedy hearing were the same as at the liability hearing. Employment Judge E Burns replaced Employment Judge Tayler (as he was then) however, following his appointment as a Senior Circuit Judge of the Employment Appeal Tribunal with effect from 27 July 2020.

THE ISSUES

6. The issues the tribunal panel were required to determine had been agreed with the parties in advance of the hearing. They are attached in Appendix Two.

THE HEARING

7. The hearing was a remote hearing. The form of remote hearing was V: video fully (all remote). A face-to-face hearing was not held because it was not

practicable due to the ongoing COVID – 19 pandemic and all issues could be determined in a remote hearing.

8. From a technical perspective, there were a few minor connection difficulties from time to time. We monitored these carefully and paused the proceedings when required.

9. The hearing was originally listed to take place for 5 days. We extended the length by an additional three days and the panel deliberated over the course of three days in chambers. It has taken nearly six months to prepare this written judgment.

10. There was an agreed main evidence trial bundle which grew to 3395 pages as the hearing progressed and both parties added further documents with the agreement of the other. There was also a pleadings and tribunal correspondence bundle and a bundle of interparty correspondence.

11. We read the evidence in the bundle to which we were referred and refer to the page numbers of key documents that we relied upon when reaching our decision below.

12. The Claimant gave evidence. She also called Dr Fourie, a Consultant Psychiatrist who has been treating the Claimant since 21 July 2018. We received written witness statements from the Claimant from the following:

- Margaret Macken, the Claimant's mother
- Monica Ciervo, a friend of the Claimant
- Ursula McMillan, another friend of the Claimant
- Sharon Davies, an ex-employee of the Respondent

13. For the Respondent we heard evidence from:

- Denis Pihan, the Claimant's line manager
- Helen Bonelli, Head of HR Engagement for the Respondent
- Ceri Lawrence, Senior Employee Relations Advisor for the Respondent

14. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. We were satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

15. Two issues of note arose at the start of the hearing.

16. First, the Respondent made an application that certain paragraphs of the statement of Ms Davies should be excluded. Having heard submissions from both parties, the panel agreed that the paragraphs should be excluded and gave oral reasons for our decision. Once this decision had been made, and the paragraphs had been excluded, the Respondent accepted the remaining evidence of Ms Davies, who was therefore not called to be cross examined.

17. Second, the Respondent raised a concern that the Claimant's witness statement referred to matters which were irrelevant and contained a number of unfounded allegations. It was suggested that if the Respondent was required to cross examine on the entirety of the matters with which it disagreed in the witness statement, the hearing would be disproportionately lengthy.

18. The tribunal panel allowed the parties time to discuss this issue which led to the Claimant agreeing to make several redactions to her statement. We are grateful to the parties for the constructive way in which they approached this issue. The panel were left having to make a decision on just one small paragraph of the Claimant's witness statement, which we decided should be excluded as it referred to a "without prejudice" discussion. We gave oral reasons for our decision.

19. The tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net

20. We received requests from members of the public for inspection of the witness statements and access to the bundle and closing submissions. Two requests were made orally during the course of the hearing (one was later withdrawn) and one was made in writing.

21. As some of the witness statements contained sensitive details of the Claimant's medical conditions the panel made a restricted reporting order. Hard copy versions of the witness statements, with redactions for sensitive medical information, were made available for inspection at Fox Court. The request for access to the bundle was withdrawn, although the individual involved reserved his position. He did not make a further request. We confirmed during the final day of the hearing that hard copy redacted versions of the closing submissions could also be made available for inspection upon application, but received no such applications.

22. The tribunal has reviewed the original restricted reporting order. We note that it refers to the possibility of a penal sanction which is incorrect. The order was made under our general powers under rule 50(1) of the Tribunal Rules rather than under sections 11 or 12 of the Employment Tribunals Act 1996. This means that the sanction for breach would be committal proceedings for contempt as discussed in *Fallows and others v News Group Newspapers Ltd* [2016] IRLR 827 (paragraph 40). We have therefore issued a fresh order to correct this error. The fact that the order is made under Rule 50(1) means that it can be remain in place indefinitely. It is subject to review under rule 50(4). A copy is attached in Appendix Three.

FINDINGS OF FACT

23. We begin by recording the facts that are relevant to the decisions we have made. The conclusions we have reached, based on those facts, can be found in the section headed Analysis and Conclusions.

24. When considering remedy, the matters decided at the liability stage are key and are the basis of the remedy decision. In this case, however, there were matters, that required us to make additional findings of fact. Many of the facts were undisputed, but where they were, our findings were made on the basis of the evidence before us on the balance of probabilities.

Remuneration

25. We begin by recording the respective positions of Comparator 1 and the Claimant in relation to each element of their remuneration. These facts are largely undisputed, save in respect of the Special Allowance.

Base Salary and Special Allowance

Comparator 1

26. Comparator 1's earnings for the period we are considering (8 July 2013 to 31 March 2021) were:

- July 2013 – February 2020: £160,000 base salary
- 1 March 2020 to 31 March 2021: £177,000 base salary

27. Comparator 1 was paid a Special Allowance of £17,000 per annum from 1 January 2017 to 29 February 2020. This was converted to base salary from 1 March 2020. We make further findings in relation to the Special Allowance below as this was one of the most heavily disputed matters between the parties.

Claimant

28. The Claimant continues to be an employee of the Respondent. She has not worked since July 2018, however, having been on long term sick leave since then. She received full pay for the first six months of her absence.

29. From 1 February 2019, the Claimant has been receiving her salary by way of a benefit under the Respondent's Group Income Protection (GIP) Scheme. We deal in more detail with the Scheme below, but for now note that the basic entitlement under the scheme is to 70% of base salary. In addition, recipients of the benefit under the scheme receive an annual percentage increase based on RPI. Such schemes are commonly referred to as PHI schemes and when we use that term in this judgment, we are referring to the GIP Scheme.

30. The Claimant's earnings up to 31 March 2021 were:

- July 2013 – Feb 2015: £120,000
- March 2015 - January 2019: £125,000
- February 2019 – March 2019: £87,500 (GIP benefit)
- March 2019 – August 2019: £89,687 (GIP benefit)
- September 2019 – March 2020: £114,800 (GIP benefit)
- April 2020 – March 2021: £117,899.64 (GIP benefit)

31. The Claimant's base pay was adjusted by the Respondent in November 2019, following delivery of the liability judgment and a request from the Claimant. The adjustment was backdated to 30 August 2019.

32. The Respondent calculated the adjustment by using the comparator's base pay rate of £160,000 with a 2.5% increase, giving a reference salary of £164,000. It calculated 70% of the reference salary to give an annual salary of £114,800 which was paid to the Claimant from September 2019 to March 2020 (2266).

33. The Respondent's reason for doing this was because the Claimant had started receiving the PHI benefit in February 2019 when the comparator was earning £160,000. The 2.5% increase on top of £160,000 was applied to reflect the RPI increase under the rules of GIP scheme benefit made in April 2019.

34. In April 2020 a further RPI increase of 2.7% was applied and the Claimant's annual salary under the PHI scheme increased to £117,899.64.

35. The Respondent did not factor Special Allowance into its calculation of the GIP benefit to be paid to the Claimant. This was because the rules of the GIP scheme say that any GIP benefit is based on base salary alone. This is considered further below.

36. Subsequently, the Respondent made a lump sum payment to the Claimant in the March 2020 payroll totalling £320,301. The intention was to pay to the Claimant the arrears of back pay she was owed due to the Respondent's equal pay breach. The lump sum included payments in respect of base salary and special allowance (2297)

37. The amounts when separated were:

    - Base salary backpay of £216,990 plus interest of £63,211 – said to be the total difference in the Claimant's base salary when compared with Comparator 1's base salary for the period from 8 July 2013 to August 2019, taking account of the fact that the Claimant had been in receipt of the GIP benefit since 1 February 2019.

    - Special Allowance backpay of £35,417 plus interest of £4,684 - said to be Special Allowance backpay for the period from the date Comparator 1 started receiving a Special Allowance (1 January 2017) to the date before the Claimant started to receive the GIP benefit (31 January 2019) plus interest.

38. According to the letter that accompanied the payment, the Respondent, "*calculated the interest figures in two ways: first, by calculating the interest on the overall duration of time between the midpoint date and [30 August 2019] (the midpoint date being the midpoint between the relevant act and [30 August 2019] and, secondly, on a granular basis, month on month [as set out in a spreadsheet attached to the letter].*" The letter indicated that

when comparing these two methods of calculating interest, it became apparent that overall the granular method of calculation was more favourable to the Claimant and therefore the Respondent decided to pay the interest sums to her on the basis of those calculations (2297).

39. The payments were made "*less any tax and National Insurance as the company is obliged by law to deduct*." We have not been provided with any information as to the tax treatment of the payments.

Special Allowance

40. As noted above, once of the keenest areas of dispute between the parties concerned the payment of the Special Allowance to the Comparator. The amount was £17,000 for the period from 1 January 2017 to 29 February 2020. As of 1 March 2020, the Special Allowance was absorbed into Comparator 1's base salary.

41. The Special Allowance was significant for two reasons.

42. First, because Special Allowances are not treated as pensionable or taken into account for the purposes of the GIP. (Terms and Conditions of GIP (2506)). This is the reason why the Claimant's current GIP benefit does not factor in the Special Allowance. The Claimant considered her pay has not been equalised as a result.

43. Second, the Claimant believed that the Respondent has tried to deliberately deceive her about the Special Allowance and that this is among the reasons why a section 12A penalty should be ordered. She invited us to treat it as base pay by another name. Her case was that the Respondent has tried to cover up the existence of the Special Allowance in three ways: (a) at the initial liability hearing; (b) at the Case Management Hearing held on 12 March 2020 and (c) by its actions to remove Special Allowances before the remedy hearing.

44. Although the Respondent was required to disclose all information relating to Comparator 1's pay for the purpose of the liability hearing, it did not come to light that Comparator 1 was in receipt of a Special Allowance. The Special Allowance simply did not feature in the liability hearing.

45. The Claimant and the tribunal were aware at the time of the liability hearing that Comparator 1 was being paid £177,000. The Claimant was provided with a table setting out the pay of various comparators (2278) upon which she was relying at the liability hearing. For Comparator 1 the following information was given:

Base Pay 2017	£160,000 + £17k SA. (Jan 17)

The Claimant was not aware what the reference "SA." meant and unsurprisingly, because it was mentioned in a row with the title "Base Pay 2017", assumed it was part of Comparator 1's base salary. This was also the assumption made by the Tribunal Panel.

46. Because of the inclusion of the information in the above table, we find that the Respondent did not deliberately try to avoid disclosing the fact of the Special Allowance at the liability hearing. It just didn't occur to either side that it was important to understand this reference at the time.

47. The Claimant learned about the Special Allowance subsequently, in November 2019, when she wrote to the Respondent to ask about equalisation of her salary (email dated 8 November 2019 p. 2264). Once she had learned about the Special Allowance, she sought disclosure of information about the payment of Special Allowances across the Respondent more generally. Her concerns were that Special Allowances were being used to hide pay inequality between male and female employees at the Respondent and also that they were unlawful under European Banking Rules.

48. The claimant raised a whistleblowing complaint with the Respondent, the FCA and the EHRC. The internal investigation of her complaint had not been completed at the time of the remedy hearing, over a year later.

49. The Claimant alleges that the Respondent deliberately delayed investigating her whistleblowing complaint so that it could take action to remove Special Allowances. With effect from 1 March 2020, Special Allowances ceased to be paid to 64 of its employees, including Comparator 1. The 64 employees receive increases to their base pay equally the Special Allowances.

50. The Claimant also accuses the Respondent of trying to avoid disclosing any information about Special Allowances as part of the remedy litigation. She says Ceri Lawrence knowingly provided misinformation to the Employment Judge Tayler, as he then was, at the case management hearing held on 12 March 2020. She is accused of saying that Comparator 1's Special Allowance could not have been an attempt to thwart the Claimant's right to equality because it was paid in January 2017 before the Claimant raised any concerns about her pay when comparted to Comparator 1.

51. Our findings are that the Special Allowance paid to Comparator 1 was a genuine Special Allowance rather than an increase in base pay by another name. It was awarded to him on 27 September 2017, but backdated to January 2017. It only became part of his base pay from 1 March 2020.

52. Comparator 1 received a letter dated 27 September 2017 (an Individual Notification Letter) (34) confirming he would be receiving a Special Allowance, backdated to 1 January 2017. The letter explained that the award was in accordance with the Respondent's Special Allowances Terms and Conditions - version 2016 (2502 – 2505). According to this document, eligibility to a Special Allowance is based on an employee's role rather than a dependant on individual or collective performance. The letter gives no reasons as to why Comparator 1 was deemed eligible to participate in the scheme.

53. Comparator 1's pension contributions did not increase as a result of the Special Allowance being paid to him. They did increase, however, from 1 March 2020. This is consistent with the Special Allowance being genuine.

54. Ms Lawrence has no recollection of saying anything at the case management hearing about the Special Allowance and it is not in her notes of the hearing or in the notes of the hearing taken by the paralegal from the Respondent's instructing solicitors.

55. We find that Ms Lawrence did say that the Special Allowance pre-dated the Claimant's grievance, but we do not find that there was a deliberate attempt to provide misinformation to Employment Judge Tayler. Ms Lawrence was not representing the Respondent and any comments she made were side comments to the Respondent's professional representatives, hence they would not have been noted. The argument was not formally put forward by the Respondent as a reason not to disclose information about the Special Allowance to Comparator 1. The Respondent legitimately wanted to avoid having to disclose information about all of its Special Allowances generally, for proportionality reasons, but did not seek to resist disclosure of the documentation relating to Comparator 1's special allowance. We consider the most likely explanation for the comment made by Ms Lawrence is that she was not aware of the backdating position in March 2020.

56. We find that the Respondent's actions with regard to the removing the Special Allowances from the 64 employees were not a cover up connected to the Claimant; s whistleblowing complaint.

57. The Respondent's evidence, which we accept, was that the decision to do this was taken at a Global policy level and not by anyone internally at the Respondent. Similar adjustments were made in other parts of the Respondent's group in other countries. Although invited to by the Claimant, we have not considered whether the payment of the Special Allowances was in breach of the European Banking Rules. In our view, such an exercise is beyond the scope of what we need to decide and would have been disproportionate. We note, however, that the respondent denies that Special Allowances are unlawful generally and says that it is still paying some to other employees. We were told, and accept, that the decision to stop paying Special Allowances to the group of 64 employees that included the claimant was because the payments were regard as "*too low to be impactful*" in the current market. This is entirely plausible in our view.

58. The Respondent says that the delay in dealing with her complaint was simply because the relevant people in the Reward Team were very busy at the time. We do not accept this is accurate, however. A far more likely explanation in our view is that this has been influenced by the ongoing litigation.

59. Although we found that the Special Allowance paid to Comparator 1 was a genuine Special Allowance, we nevertheless considered the Respondent's motivation for it. This would have been a live issue at the liability hearing if proper disclosure had taken place.

60. The Claimant first raised concerns about her pay in comparison to Comparator 1 to Mr Pihan as early as 2014 (J82). Her concerns intensified in 2017. She raised them in a meeting with Mr Pihan and Mr Pinnock on 20 March 2017 (J149). This was followed by a number of meetings with HR where she raised the same issues.

61. In the summer of that year, Mr Pihan was seeking a replacement for the Claimant and seeking advice from HR about the fact that the Claimant had been expressing discontent about her remuneration. On 23 August 2017, the Claimant made it known in writing that she had sought legal advice in relation to her concerns about equal pay and sex discrimination when making a DSAR (J 169). Her concern about equal pay was a live issue that was escalating at the time the increase in Comparator 1's remuneration was awarded.

62. The only document provided by the Respondent, other than the awarding letter, to explain the background to the payment, was an email from August 2017. This too was not disclosed for the liability hearing. The email is dated 23 August 2017. Mr Pihan had emailed Mr Pinnock to suggest Comparator 1 should get a base salary pay rise. In his email he explained that Comparator 1 had been at the bank for nearly four years and had not had a base salary pay rise since then. He gave four reasons for a proposed increase for him (95).

63. Mr Pihan's evidence before us was that he wrote this email in response to a request from Mr Pinnock for feedback about Comparator 1. He accepted that his email requested an increase in base salary for Comparator 1 and said that the decision to award Comparator 1 a Special Allowance rather than an increase in base salary was made by Mr Pinnock in consultation with HR. He told us he was unable to shed any real light on the decision making process other than to say that he believed it was justified because the Claimant was undertaking a special high profile project.

64. We note that Comparator 1's project work was one of the four bullet points in Mr Pihan's email to Mr Pinnock but have reminded ourselves that at the liability hearing, the tribunal had found that there was no justification for paying the Claimant and Comparator 1 differently due to projects.

65. Before us, Mr Pihan strenuously denied that payment of the increase in the form of a Special Allowance was because of the Claimant's grievance about pay. He admitted, however, that the Claimant's grievance was in his and Mr Pinnock's thoughts at the time they had discussed Comparator 1's pay in August 2017. He recalled them agreeing that it was not fair to penalise Comparator 1 by not giving him an increase just because there was a grievance.

66. In our judgment, the Respondent wanted to give Comparator 1 an increase in base pay, but chose not to do so and to give him the Special Allowance instead. This decision was because of the Claimant's grievance. It was an

attempt, albeit a very clumsy one, to manipulate the pay comparisons that could be made between the Claimant and Comparator 1.

67. We have primarily reached this conclusion because of the email and Mr Pihan's evidence. We have also been influenced by the fact that paying Comparator 1 the increase of £17,000 as an increase to his salary would not have raised his salary above his salary band. This is often given as a reason for paying an increase by way of an allowance, but did not apply here. In addition, Comparator 1 continued to receive the Special Allowance even when the so-called high profile project reached a conclusion, pointing to the project not being the underlying reason for the Special Allowance.

Pension Contributions

68. The Claimant and Comparator 1 are both members of the Respondent's pension scheme. They receive an employer pension contribution of 12% of base salary. Special Allowance and bonuses are not pensionable. The scheme operates a cap on the annual reference salary for the purpose of calculating pension contributions (2298).

69. From February 2018, the Claimant's employer pension contributions have been being paid by the GIP Scheme. Under the scheme, the entitlement is to be paid in full and not at a reduced rate.

70. From November 2019, the Respondent changed the Claimant's pension contributions. It adopted the same rationale as described above in paragraph 33 and treated the Claimant as having a reference salary for the purposes of the GIP scheme of £164,000 (i.e. £160,000 plus 2.5%). This produced the result that the Claimant's pension contributions were increased to £19,680 per annum (i.e. 12% of £164,000). We note that this was more than Comparator 1 was receiving by way of pension contributions at the time. The increase was backdated to 30 August 2019 (2266).

71. In March 2020, a lump sum was paid into the pension scheme on behalf of the Claimant of £20,759 plus interest of £5,120 (2298). This was said to be "*the difference between the employer pension contributions that you received on your salary and the employer pension contributions that she (sic) you would have received if you were paid the same salary as Comparator 1, between [8 July 2013] and [30 August 2019]"* plus interest.

72. The interest calculation was as described above in paragraph 38 above.

Bonus

73. The Claimant's contract of employment (which is in the Respondent's standard form) has the following relevant provisions dealing with her entitlement to annual bonus payments at clause 4.3:

"*You will be eligible to participate in the Company's discretionary annual incentive award scheme, subject to the terms and conditions of scheme as in force from time to time….*

Payment under the Company's discretionary annual incentive award scheme is at the absolute discretion of the Company….

For the avoidance of doubt, any discretion exercised by the Company to make a payment under the Company's discretionary annual incentive award scheme not be based on any single criterion such as past individual, financial or team performance but on a range of criteria that may vary from year to year as the Company considers reasonable." (3)

74. Bonus pots are set at a firmwide level depending upon the Respondent's global and country performance. Decisions are then made in relation to individuals by their compensation manager depending upon the individual's performance. In some years bonus awards are flat, in some years they increase and in some years they decrease.

75. Annual appraisal ratings inform decisions made about bonuses. According to the documentation provided by the Respondent for 2019, Year-End Appraisal assessments should give equal weighting to Performance against Objectives, Performance against Role/Job Description and Behaviours (including conduct) (2672).

76. The Claimant and Comparator 1 received the following bonus payments for the bonus years 2013 to 2020.

Bonus Year	**Claimant**	**Comparator 1**	**Percentage of base pay and special allowance**	**Payable**
2013	£3,822	£8,492	-	March 2014
2014	£10,000	£50,000	31.25%	March 2015
2015	£10,000	£50,000	31.25%	March 2016
2016	£10,000	£68,950	43.09%	March 2017
2017	£0	£70,000	41.18%	March 2018
2018	£0	£66,000	37.29%	March 2019
2019	£0	£73,000	41.24%	March 2020
2020	£0	£75,000 plus top-up of £19,000 making a total of £94,000	42.37% (excluding top up)	March 2021 (page 3096)

77. The top up payment of £19,000 shown in the table for 2020 was awarded to Comparator 1 in recognition of a special integration project in which he was involved. We accept the Respondent's evidence that the top up was exceptional and is unlikely to be paid on a regular basis.

78. The Respondent made a payment to the Claimant, via its February 2021 payroll of £347,079.75 gross, less deductions for tax and national insurance. The payment represented the difference between the Claimant's bonus awards for the bonus years 2013 - 2018 and bonus awards made to Comparator 1 during the same time period (3050). In other words, the

Respondent treated the Claimant as entitled to the same level of bonus as Comparator 1 for these bonus years.

79. The lump sum included interest calculated at 8% for the period from the date the relevant bonus was due to February 2021. A schedule showing the amounts paid was provided to the Claimant, but there was no breakdown as to how the interest was calculated (3050).

Other Relevant Terms of the Claimant's Employment Contract

80. It was relevant to our decision on remedy to make certain findings about the Claimant's potential to receive future increases in basic salary, the position under the Group Income Scheme and her entitlement to medical expenses insurance. These matters derive, at last in part, from her contract of employment.

Increases in Basic Salary

81. The Claimant's contract of employment contract of employment contains the following relevant provision about base salary increases at clause 4.2:

"Your basic salary will be eligible for review as part of the Company's standard annual salary review process for all employees …" (2)

82. We were told that increases in basic pay across the Respondent organisation are driven by changes in the market rather than performance. The Respondent uses its bonus to reward performance rather than increase base pay. We were not presented with any evidence as to how the Claimant's role might be affected by market forces in the short, mid and long term.

83. Only one member of the Claimant's team received a pay increase between 2017 and 2020. This was an increase of 7.14% in 2019. We do not know who this was. Since his employment started in July 2013, Comparator 1 has had a single increase to his basic salary from £160,000 to £177,000. This was when the special allowance was consolidated into his basic pay from 1 March 2020, although he had been receiving it from 1 January 2017. It amounted to a pay increase of 10.625% in a period of eight years.

Group Income Protection Scheme

84. The Claimant's standard terms and conditions of employment contain the following relevant provision about the insurance benefits she receives at clause 5:

5.1 As an employee, you will from the Start Date automatically be enrolled into the Company's private medical insurance scheme, personal accident insurance scheme, dental insurance scheme and group income protection insurance scheme, subject to prevailing rules of the schemes and terms of any insurance provider.

5.2 You acknowledge that any and all benefits provided to you under these schemes are subject to the prevailing terms and conditions of the schemes and are conditional on you complying with and satisfy any requirements of the insurer. The Company does not accept any liability to pay any benefit or cash sum to you under these schemes.

5.3 The Company reserves the right to change the insurer used at any time. The Company reserves the right to vary or cancel these ensuring benefits at any time at its absolute discretion, including if at any time the Company is unable to ensure benefits under the scheme (S) at the usual premium rates applicable to a person of your age due to the state of your helpful. (11)

85. The Respondent's Group Income Protection (GIP) Scheme is provided by Assicurazioni Generali S.p.A United Kingdom Branch ("Generali".)

86. As noted above, under the scheme employees of the Respondent receive 70% of their Insured Salary. The Insured Salary is base salary and excludes other elements of pay such as Special Allowances and bonuses. The scheme also pays the employer national insurance contributions for the relevant employee and the employer pension contributions. Recipients of the benefit receive an annual increase for RPI each year in April, subject to a maximum increase of 5% per annum and can remain in receipt of the benefit until their 65th birthday.

87. The definition of Incapacity which applies in the case of the Claimant is:

"As a result of illness or injury, the Member is incapable of performing the Material and Substantial duties of their occupation, and they are not carrying out any other Work or occupation." (2602)

88. The definition of Work is contained in the Terms and Conditions which apply to the scheme:

"Work" means on the part of a Member, any employment, self-employment or consultancy or engaging in any work or physical activity which gives rise, or is capable of giving rise, to any remuneration, income, fees, profits, capital or other gains, whether or not they are taxable and whether or not they are paid to, or to the order of, or enjoyed, whether directly or indirectly, by the Member or any person with whom he lives or to whom he is related or who is dependent on him. (2525)

89. We note that the terms and conditions contain provisions at clause 2.5 dealing with termination of an employee's membership of the Scheme. The clause includes provisions whereby an individual ceases to be a Member and any entitlement to Benefit ceases if:

- they cease to be an employee of the Respondent
- they commit, or attempt to commit, any fraudulent act, deception, or deliberate or reckless breach of the duty of fair representation for the purpose of the Insurance Act 2015

- if, while incapacitated, they undertake any gainful Work without the consent of the Respondent or Generali
- the Policy terminates, other than in respect of claims arising prior to the termination date (2511).

90. Clause 2.5.2 of the Terms and Conditions envisages that where a member who is in receipt benefit transfers to another employer, the benefit will transfer with them. The Respondent is required to notify Generali in this event (2511).

91. While employees at the Respondent are in receipt of GIP benefit, they are transferred into a different cost centre. This protects them from the risk of business reorganisations in their departments.

92. The Terms and Conditions contain the following provision at 4.1.3:

"The Benefit payable will be reduced by any other income payable as a result of and received by the Incapacitated:

- *Income from any other accident, sickness, or long-term Incapacity insurance Policy covering illness or injury;*
- *the loss of earnings element of any personal injury award; and*
- *any uninsured sickness payments or benefits received by the Incapacitated Member from their Employer." (2514)*

93. The Claimant and Respondent have been in separate email correspondence with Generali. The purpose of the correspondence has been to try and establish Generali's intentions towards the claimant's entitlement to GIP benefit with regard to the remedy she may receive. The key questions have been whether Generali intend to claw back any payments made to the claimant to date or reduce her benefit going forwards. This is a power Generali have under the terms and conditions where someone in receipt of benefit recovers compensation for loss of earnings in a personal injury claim.

94. The correspondence has been with the Claims Manager dealing with the Claimant's payments. His email to the Claimant confirmed that if the Claimant recovered the "top up" 30% of her salary by way of a personal injury award, Generali would not seek to recoup this from her. The claimant asked him to provide a legally binding guarantee in the form of a waiver of contractual rights to exercise the power, but this has not been forthcoming (3107). In a later email dated 25 March 2021 to the Respondent he confirmed:

"…*where the tribunal award is only a lump sum payment and is the difference between full time at work salary and reduced GIP salary then Generali will not seek to adjust the benefit payment for the future and Generali will not seek recovery of past payments…"* (3396)

Private Medical Expenses Insurance

95. Another of the benefits the Claimant receives pursuant to clause 5 of her contract of employment with the Respondent is private medical expenses insurance. This is provided via a Healthcare Trust Scheme set up with Axa PPP Healthcare Administration Services Limited.

96. The scheme has covered the cost of the Claimant's medical treatment to date and is anticipated to do so in future, for as long as she remains an employee of the Respondent. It does not, however, cover the costs of medication.

Claimant's Career in Banking and Potential Retirement Age

97. It is relevant to note some basic facts about the Claimant's background and career. We need to consider what her future career would have been and how long she would have continued working.

98. The Claimant is a qualified accountant. She went to university in New Zealand where she grew up.

99. At university strategic management was her favourite topic. When she left university, she had multiple offers from the big six accountancy firms. She chose to accept the offer from Ernst and Young solely because they performed strategic audits.

100. The Claimant left Ernst & Young and relocated to London in 1999. It was her interest in banking that led to this. She initially worked as a contractor in a variety of roles to acquire a broad banking knowledge across all products for a period of 6 years. She then moved into the Prime Brokerage business in a Front Office strategic project development role where she remained for 16 years.

101. The Claimant describes this role as her dream strategic role. She has never wanted to leave it as she enjoyed the focus on strategy and found the variety of work intellectually stimulating. In particular, she liked the mix of high level and detailed thinking involved and that the role involved contact with all areas of the Respondent's business.

102. The Claimant's arrival at the Respondent represented a promotion for her. She had previously applied for promotion three times at Deutsche Bank, but not been successful, despite being 'very well thought of'. The Claimant told us that it was normal to apply for promotion this many times before being successful.

103. The Claimant's move from Deutsche Bank to the Respondent, involved a pay increase of £15,000 from £105,000 to £120,000. This was an increase of 14%.

104. The only obvious direct promotion opportunity for the Claimant in her role, is into the role held by Mr Pihan. The structure in the department where she works is quite flat.

105. The Claimant has prioritised her 22 year career in banking over other lifestyle choices. This includes remaining single and not having children. She enjoyed her work and was fulfilled by it. Other than keeping her personal fitness at a high level she pursued no other hobbies or interests.

106. The Respondent does not have a fixed, compulsory retirement age. It has a Retirement Policy in which it "*acknowledges that retirement is a matter of choice for individuals and will not expect nor pressurise employees because they have reached or are approaching a certain age*." (2500)

107. The current average age of employees at the Respondent is as follows:

Under 50	81%
50+	11%
55+	6%
60+	2%
65+	0.14%

108. There are four permanent staff in London who are aged 65 or over out of a total population of 2,813.

109. Ms Bonelli told us employees at the Claimant's seniority normally leave the Respondent by around 55 to 60 years old at the latest. According to her research, older employees at the Respondent (above around age 62) tend to have more junior or back office roles. A notable exception to this is Anne Marie Verstraeten, the Respondent's UK Country Head who is 67.

110. The Claimant's evidence was that people in her area of work are more likely to work for longer because of the nature of the work and the fact that it is a strategic role. She provided evidence of two older people of whom she was aware working in the area of Product Development. One was a former employee of the Respondent aged 55. The other was an employee of BNP Parabis in New York aged 63.

111. The Claimant is aged 50. Her state pension age is 67. She has no history of illness (other than her current mental illness) and when her health was assessed in 2014 she received a very positive assessment. We note that she reported a family history of high cholesterol and that her grandparents had had high blood pressure, heart attacks and strokes. Despite this, the women on both sides of her family have a tendency to live into their 90s.

112. The Claimant suggested to us that beginning her career in New Zealand means she is not in the same financial position as her peers working for the Respondent. We were not provided with any evidence to support this. We consider it likely that the Claimant's decisions to remain single and not have children will have lessened the impact of not spending her whole career in

London. It is also probable that a proportion of her peers have had similar mobility in their careers.

Medical Evidence

113. We turn now to the medical evidence presented to the tribunal.

114. The tribunal was provided with three medical reports which had been prepared by Dr Fourie, the Claimant's treating Psychiatrist. They were dated 20 March 2020 (2817), 20 October 2020 (2827) and 4 February 2021 (2970). We were also given Dr Fourie's typed file notes. We note that we also had the Claimant's GP and dermatologist notes, but our primary focus was on the evidence of Dr Fourie and what the Claimant herself told us about her medical condition, including the information in the Claimant's impact statement.

Reliability

115. The Respondent has invited us to not to rely on the medical reports of Dr Fourie, on the basis that she was the Claimant's treating psychiatrist rather than an independent medical expert instructed on behalf of both the parties.

116. No such independent expert was instructed. We note that the Respondent did not at any time either prior to or at the start of the remedy hearing make an application for a joint medical report, or seek a postponement to enable this or to instruct its own medical expert.

117. Dr Fourie is the psychiatrist who has been treating the Claimant privately since July 2018. Her evidence cannot therefore be treated as that of an independent expert.

118. We were provided with Dr Fourie's CV. It is notable that she has over 30 years' experience as a psychiatrist in South Africa and the UK. She worked as a Consultant Psychiatrist in the NHS from 2006 but moved into full time private practice in 2012. Her private experience includes treating professionals working in different fields in the City of London.

119. Dr Fourie provided all the letters of instruction sent to her and the entire set of her medical notes. She attended the hearing and was cross examined at length on behalf of the Respondent. She also answered questions from the Tribunal Panel.

120. Having considered the matter carefully, we have decided that we have no reason to doubt Dr Fourie's medical expertise or integrity and, in our judgment, her medical reports are reliable to the extent that they correctly diagnose the Claimant's medical condition and provide a prognosis for the future.

121. We consider Dr Fourie's opinion as to what types of alterative work the Claimant might be capable of in the future not to be reliable, however. Dr Fourie and the Claimant had not discussed work types in any depth and Dr

Fourie accepted that she would need more information about the demands of particular potential roles before being able to give an opinion on the Claimant's likely ability to perform them in the future.

The Medical Evidence

122. The first medical report is dated 20 March 2020 (2817) and is relatively brief. In it, Dr Fourie confirmed that the first time she met the Claimant was in July 2018 and that the Claimant had no past psychiatric history or family history of mental health problems. Dr Fourie explains that she had diagnosed the Claimant as having Mild Anxiety and Depressive Disorder and that the Claimant had begun treatment with anti-depressants and had talking therapies, but had not improved. Dr Fourie believed this was largely due to the ongoing litigation. She said:

"At this stage it is not possible to give an exact time frame for when Ms Macken may be able to return to work. In the future I will be in a better position to assess a likely timescale but we are not sufficiently close enough to that to give a prognosis due to the ongoing dispute.

When the time is right, Ms Macken is likely to require a carefully orchestrated and phased return to work. The type and phased return 'plan' will depend on the colleagues and role she will return to."

123. The second medical report is dated 29 October 2020 and is much more detailed (2827). In it, Dr Fourie explains that she had initially diagnosed Mild Anxiety and Depressive Disorder because both anxiety and depression were equally present. However, subsequently, due to the length of the presence of the symptoms her diagnosis had changed into a Dual Diagnosis of:

1) Depressive Disorder – severe; and

2) Generalised Anxiety Disorder.

She confirms that the Dual Diagnosis had been present for at least six months since January 2019. ICD Code for Depression: F33.0 and ICD code for Generalised Anxiety Disorder F 41.1

124. The report confirms Dr Fourie's opinion that the Claimant's condition was caused by the dispute between her and the Respondent.

125. The long term prognosis given by Dr Fourie at this time is:

"In my opinion, at this point in time, on the balance of probabilities it is more likely than not that she will experience an initial deterioration once the dispute is resolved, followed by a gradual improvement of symptoms over a 2-3 year period, provided she receives appropriate treatment. However, it is my opinion that she is likely to not recover fully to where she was before the event.

126. Under the heading "***Future Impact***" Dr Fourie states:

"Based on the length of onset of these problems and development to the current situation: it is likely to take a very long time, many months or years, for Ms Macken to return to work, either in the same or similar role. It is unlikely that she will manage the same pressure In a job as what she did successfully in previous roles before the start of the current events. Based on experience with some similar cases I dealt with in the past, it is unlikely that she will be able to return to any form of employment with in the first 24 months after the end of this event. I am not confident that she will ever be able to work in a demanding role as the risk of relapse will be high. To minimise pressure, working on a part-time basis (2 to 3 days per week) may be more appropriate. Recovering from the depression and anxiety will take time and is likely to have an ongoing effect on her social, leisure and personal life until she is in complete remission. The experience is likely to make her vulnerable and fragile for future pressures and stressors."

127. The third report is dated 4 February 2021 (2970) and is an update to the October report. In full, it says:

"This addendum report must be read in conjunction with the previous medical report dated the 29th of October 2020.

Since the report dated above, I assessed Ms Macken in November 2020 and January 2021, as part of my continued assessment and treatment. I have noticed further symptoms that is (sic) concerning and important to take note of. Her short term memory is poor and she is more forgetful than previously. This is affecting her activities of daily living. She forgets what she set out to do and fails to complete tasks. She described episodes of getting lost and feeling confused when on familiar routes that she has done for many years and it has become a daunting task to leave her home. Her recall is poor and she described episodes when she could not remember bank details, which has never been a problem before. Ms Macken always had an exceptional memory, but over the last three months her memory has deteriorated further and she finds recall difficult. She is extremely forgetful, it is difficult to focus and it is a great effort to plan and organise things. She now finds it challenging to get things done.

She has become increasingly more tired. I assess her to suffer from extreme exhaustion - rendering her incapacitated. For this reason I recently started prescribing Modafanil to help with fatigue to enable her to function especially in regard to activities of daily living and improve cognitive task performance.

I am concerned, as it is likely that Ms Macken is showing symptoms of "burnout" following the prolonged exposure to the stressful events of the dispute with her employer. Burnout refers to a syndrome caused by chronic stress, which is associated with impaired cognitive functioning and is characterised by symptoms of memory and concentration deficits, diffuse aches, profound fatigue and a feeling of being emotionally drained. Ms Macken is mentally exhausted, has no motivation and is losing hope and enthusiasm in all aspects of her life. She has become disillusioned with her

profession and at times her own life. I noticed during my assessments that she is very negative and pessimistic. I already described the cognitive problems in the previous paragraph. She is neglecting her personal needs, and has become very isolated, not making contact with "society ".

Based on my experience with similar clinical cases in the past, it is my professional opinion that Ms Macken is highly unlikely to return to work in her previous or a similar role. Ms Macken describes her role as requiring high levels of concentration on complex matters in a high octane environment with a significant degree of pressure to meet deadlines. She is likely to experience significant ongoing mental, physical and emotional problems that will make it difficult for her to take on demanding roles and responsibilities. She is likely to experience a further deterioration in her mental state once the dispute is resolved. I have had professional experience with patients that never recovered fully and therefor never returned to the employment market.

The risk of relapse (depression and/or anxiety) is high and likely to be precipitated by even just moderate stressors. I have noticed that since I met Ms Macken in July 2018, her life has completely changed: from being a passionate, enthusiastic, energetic and positive person to becoming pessimistic, weak, having no self-esteem and doubting herself all the time."

128. When asked what the Claimant's chances of recovering her cognitive functions, Dr Fourie gave her a 70% chance of recovery.

Deterioration

129. The Claimant's condition has undoubtedly deteriorated between May 2020 when the remedy hearing should have taken place (it was postponed due to the Covid-19 pandemic) and March 2021 when it did take place. The Respondent invited us to find that the deterioration is due to the Claimant catching Covid-19 and/or the delay in the remedy hearing and so we have reviewed the available evidence carefully in this regard.

130. The Claimant was not confirmed as having Covid-19 through testing as public testing was not available at the time when she had symptoms. Due to her symptoms was advised to isolate in mid-April 2020. Dr Fourie's notes indicate that she reported being symptomatic to her between mid-April 2020 and the end of May 2020. We find, on the balance of probabilities, that the claimant did have Covid-19.

131. In Dr Fourie's medical opinion is that Covid-19 is not the reason why the Claimant's condition deteriorated.

132. Dr Fourie's notes record that the Claimant was very unwell at the time of having Covid-19 and continued to be tired after it. She reduced her anti-depressant does from 25 mg to 20 mg in June 2020 (2824), because of the tiredness, but reverted to the original dose in September 2020 (2825).

133. The significant deterioration in the Claimant's condition occurred in the Autumn of 2020 several months after she had recovered from Covid-19. This was when Dr Fourie prescribed a new drug, Modafinil, which was specifically aimed to treat the cognitive difficulties the Claimant was having at the time. The significant deterioration in the claimant's condition overall results from these cognitive difficulties (2973).

Medical Treatment

134. The claimant's medical treatment to date has been paid for by her private medical expenses, with the exception of her medication.

135. Dr Fourie has recommended that the Claimant continue to see a psychiatrist for up to three years, on a 3 to 4 weekly basis and that she receives psychotherapy incorporating treatment for PTSD, namely EMDR, to help break her pattern of anxiety. Her report confirms that the current costs of psychiatric outpatient follow up assessments are £200 a session and psychotherapy, around £140 - £150 per 60 minute session. The total cost of the future treatment she recommends is £18,200 plus the costs of medication.

Respondent's Remedial Action

136. We turn now to the remedial actions that the Respondent has taken since the liability judgment was issued.

Remediation Programme

137. The Respondent established a remediation programme in consultation with the FCA following the delivery of the liability judgment. Ms Bonelli, an experienced HR professional who has worked for the Respondent in various HR roles since 1997, was asked to lead it from October 2019 onwards. Ms Bonelli was not responsible for determining the scope of the project, but has been responsible for implementing it. According to her evidence, the project has been supported at the highest levels with the aim of improving the Respondent's internal processes and culture and ensuring its decision making is fair, objective, and free from discrimination in the future.

138. The project, which was ongoing at the time of the remedy hearing, has covered the following areas:

- Preparation of job descriptions and review of hierarchies across the Respondent
- An annual equal pay review
- Recruitment
- Performance review and assessment
- Additional training

139. We were told that a key priority was addressing the lack of transparency as to where the Respondent's employees sit within the internal hierarchy. This exercise affects 3,747 employees across the Respondent and is ongoing.

Job descriptions have been prepared and there has been a process of ensuring that the specific content of job descriptions appropriately differentiates between different job levels. The Respondent has developed a job family framework. Within each of its seven Job Families it has identified a hierarchy, differentiating between the levels based on purpose, key accountabilities, knowledge, skills and experience and competencies or attributes.

140. The new job descriptions and hierarchies will be kept under regular (annual) review and used to inform pay going forwards. The Respondent does not plan to adopt pay transparency, but employees will have transparency of their own job level and the levels of the colleagues they work with.

141. The Respondent has begun to conduct an annual equal pay exercise at the start of the annual compensation review process each year. We were told that following the delivery of the liability judgment and as part of the equal pay review carried out within the compensation review process for performance year 2019, the Respondent made a specific budget allocation available for any equal pay adjustments to emphasise to senior managers the importance of scrutinising and identifying any specific cases and to ensure those cases were prioritised and addressed appropriately.

142. We were provided with minimal detail as to what the annual equal pay review involves and no information about the exercise in 2019.

143. The one page overview included in the bundle (3339) said:

"The purpose of the annual equal pay review is to ensure that a review is conducted by the HR Business Partner in conjunction with the Reward team within each Global Business Line ("GBL") and Function within the UK to:

- *Review and identify any potential gender pay inequalities between employees carrying out equal work;*
- *Consider whether there is any genuine, material, fair and non-discriminatory explanation for any potential pay inequalities;*
- *Escalate any potential pay inequalities that cannot be explained on non-discriminatory grounds for review by the UK Head of Human Resources, the Head of Reward and relevant Business Line manager for remedy."*

144. The methodology followed is described as follows:

"Following the completion of the annual hierarchy exercise each HR Business Partner should:

"Review the hierarchy for their GBL/Function and identify any male and female employees doing work of equal value (by reference to factors including the type of role/work carried out/level of seniority and responsibilities);

- *Review the fixed compensation of those male and female employees in relation to salary and any allowances (the review should compare each element of fixed pay separately);*
- *Identify any potential gender pay inequalities between the identified employees;*
- *Record the details of any potential inequalities in the template spreadsheet (circulated at the outset of the Annual Equal Pay Exercise);*
- *Consider whether there are any genuine, material, fair and non-discriminatory reasons for the potential difference in pay and record these reasons on the template spreadsheet, if applicable;*
- *Send the completed spreadsheet to the UK Head of Human Resources and Head of Reward in the first instance for review.*
- *Agreed proposals to address any differential and ensure the elimination of any gender based inequalities that cannot be explained on non-discriminatory grounds should then be discussed with the relevant Salary Manager and incorporated as appropriate into the Annual Compensation Review Process in Compas before the deadline relevant to each business line."*

145. It appears that HR Business Partners are sent an email asking for information each year. We were provided with a copy of the email sent out on 11 December 2020 which said:

"*Dear HRBPs,*

As you know conducting a diligent and formal Equal Pay review in each business area in the UK is one of our critical processes every year to ensure that we regularly review those performing equal work and ensure that we identify any differences in fixed pay between men and women that cannot be objectively justified, ensuring that any cases identified are flagged and communicated to relevant managers to be reviewed as part of the annual salary review process.

Compas is open to you as HRBP and you have access to relevant compensation data. Using the attached template (password is to follow), please can we ask you to:

1. *Review your population together with any relevant managers using your recently approved hierarchy* and record in the spreadsheet any cases where there are differentials of fixed pay greater than 1.5% between men and women performing similar roles at similar levels (please record identified flagged cases only, not your full population).*

2. *Ensure you complete all sections including your proposals for salary adjustment, associated rationale, and overall total proposed salary increase spend for your business area.*

3. *Please ensure you confirm clearly the agreed salary adjustment to be input to Compas and/or record the rationale*

on the spreadsheet where it is determined no adjustment is required.

4. Complete and send the final spreadsheet to the UK Compensation team inbox by COB 7th January 2021.

Thank you for your efforts on this critical exercise during such a busy period."

146. The reference to the fact that men and women have to be performing similar roles, suggests that the review only considers 'like work' cases and is not a broader 'equal value' review.

147. We were also told that there has also been a full review of the Respondent's recruitment process and procedures, supported by training (which includes training on unconscious bias) for all hiring managers. Recruitment is now against specific job descriptions. Those job descriptions are matched against pay codes before the recruitment process begins. The process includes an approval process and there is new management reporting on gender related recruitment for both actual hires and female representation on short lists.

148. The remediation programme has also sought to address concerns raised in the liability judgment about the Respondent's performance management process. Guidance on ratings has been developed. The roll out of the changes has been supported by mandatory training.

149. The remediation process has also included a review of the annual bonus template rationale for individual bonus allocations. New enhanced controls have been introduced into the annual discretionary compensation review process. Bonuses do not form part of the annual equal pay review.

150. The final area covered by the remediation programme has been training for managers. A new training programme called the "Manager Essentials programme" was rolled out to all managers which included defining a set of standards for behaviour and conduct for all managers called the "UK Management Charter". It incorporates a module which covers best practice management principles for treating all team members equally, and addresses topics including unconscious bias, discrimination and victimisation.

Other Activity

151. The Respondent has also, separately to the remediation programme, launched a Culture Programme which includes actions designed to ensure that diversity and inclusion are given a high priority. There have also been steps taken which are aimed at encouraging employees to raise concerns and issues and for their managers and leaders to listen to and tackle any issues raised.

152. The Respondent adopted a detailed Gender Strategy and Gender Action Plan, in part in response to its poor gender pay gap results. In order to try and increase the number of women at senior management level, a career development programme has been adopted (known as "RISE") aimed at women in the middle of their careers and seeks to give them the tools and resources to help them think more strategically about their careers and how to map out a path to senior management positions.

153. The Claimant has suggested that had she remained at the Respondent, she would have been an ideal candidate for the RISE programme. She was not able to map out the career trajectory she might have taken, however, other than to say she saw no reason why she could not have risen to the very top of the organisation.

Individuals Involved in the case

154. The focus of the remediation programme and Ms Bonelli's role was on corporate changes. Ms Bonelli was not able to tell us about any action taken in connection with any individuals involved in the Claimant's case or who were criticised in the liability judgment.

155. The tribunal heard from Mr Pihan and Ms Lawrence directly who were able to tell us about their own positions, but not that of anyone else.

156. Mr Pihan apologised for causing the Claimant distress when giving his witness evidence. He says he has reflected on the events and has received training to improve his management style and techniques. This includes mandatory training required of him by his employer and training he has undertaken proactively himself. Mr Pihan says he did not intend to behave in a way that was humiliating or degrading to the Claimant and now understands, with the benefit of hindsight and the training he has received, that he could have managed the situation better.

157. Mr Pihan did not acknowledge that he personally discriminated against the claimant, nor did he apologise for discriminating against the Claimant.

158. We note that the Respondent's disciplinary procedure defines gross misconduct as including "discrimination or harassment of a colleague" (1167). No disciplinary action was taken by the Respondent against Mr Pihan or Ceri Lawrence.

159. Mr Pihan received a full bonus for the financial year 2019, the year in which the liability judgment was issued. This was notwithstanding that the bonus scheme requires the Respondent to take behaviours into account when awarding bonuses (2672).

160. The Claimant was concerned that Ms Lawrence had been promoted following the outcome in the case, but that is not correct. At the time of the liability hearing and while dealing with the Claimant's case prior to this, Ms Lawrence held the title Senior Employee Relations Advisor. Between January 2020 and February 2021, she temporarily covered the role of Head

of Employee Relations and UK Employment Law as maternity cover. She has subsequently returned to her previous role, although is now providing an increased amount of employment law advice.

161. A final relevant fact to note is that Ms Lawrence is a qualified barrister and has a current practising certificate. The Employee Relations and UK Employment Law team sits within the HR department rather than the Respondent's legal department.

LAW

INTRODUCTION

162. We have been extremely fortunate in this case to receive lengthy written submissions from both counsel which contain helpful summaries of the legal principles that we have been required to apply when making our decision in this case. There was little difference between the parties as to the relevant legal principles.

163. We therefore set out below the basic principles and legal tests that we have applied when dealing with the issue of remedy in this case, but in relatively brief terms, save where the parties were in dispute.

164. We note here, by way of an introductory comment, our awareness of the important to not overcompensate the Claimant through double recovery. This was a complex case with a number of different heads of compensation, some of which are overlapping and it has been important to consider and apply this carefully.

165. In addition, the Respondent had made some changes to the Claimant's remuneration and made some lump sum payments to her, for which credit needs to be given. The dates of such payments affect the interest calculations.

COMPENSATION FOR EQUAL PAY

166. Compensation awards for successful equal pay claims are calculated differently to other types of successful claims. The tribunal's power to award compensation in an equal pay case is governed by section 132 of the Equality Act 2010.

Section 132(2) says:

If the court or tribunal finds that there has been a breach of the equality clause, it may—

(a) make a declaration as to the rights of the parties in relation to the matters to which the proceedings relate;

(b) order an award by way of arrears of pay or damages in relation to the complainant.

167. The rest of the section deals with the length of the arrears period and is not relevant in this case.

168. The framework is contractual. Where a Claimant succeeds in an equal pay claim, she is treated as having an amended contract so that it gives her the same entitlements as her comparator.

169. The contractual amendments are considered on a 'term by term' basis, rather than as a whole package. Where a Claimant succeeds in establishing a breach of the equality clause in relation to different elements of remuneration, separate awards must be made in respect of each element.

170. The tribunal does not have any power to make an award for injury to feelings in an equal pay claim.

171. As equal pay compensation is arrears of pay it needs to have deductions made for tax and national insurance contributions using the rates that were applicable in the year when the payments ought to have been made. This is because of the application of Rule 2 in section 18 of the Income Tax (Earnings and Pensions) Act 2003.

172. The usual interest rules that apply to discrimination claims (see below) apply to equal pay claims arrears.

REMEDIES FOR DISCRIMINATION

173. The tribunal's power to award a remedy in a discrimination case is governed by section 124 of the Equality Act 2010, which says:

> *"(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.*
>
> *(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."*

174. Cross referencing to section 119 confirms that compensation is awarded on a tortious basis and may include compensation for injured feelings. Financial compensation for discrimination is uncapped.

Recommendations

175. For a brief period, tribunals had the power to make recommendations of broad application in successful discrimination cases. This power was removed in 2013 when section 123(3) was amended by the Deregulation Act 2015. For proceedings commenced after 1 October 2015, our powers are limited to making recommendations that "*obviate or reduce the adverse effect on the complainant of any matter to which the proceedings relate*." They must therefore be claimant specific.

176. Any recommendations we make should also be practicable. They should be capable of being implemented and for that implementation to be able to be assessed.

177. There is also case law which supports the proposition that any recommendation ordered should not require an individual to make statements conceding certain matters in circumstances where they cannot do so in good conscience, even if the tribunal has made findings adverse to the respondent on those issues (*St Andrew's Catholic Primary School v Blundell* UKEAT/0330/09, [2010] EqLR 156).

Compensation

178. The measure of loss is tortious with the effect that a claimant must be put, so far as possible, into the position that he would have been in had the act of discrimination not occurred (*Ministry of Defence v Cannock* [1994] IRLR 509, *De Souza v Vinci Construction UK Ltd* [2017] EWCA Civ 879).

179. A tribunal is able to award compensation for personal injury consisting of psychiatric illness where this has been caused by a discriminatory act (*Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481). Such damages are recoverable for any harm caused by a discriminatory act and not simply harm which was reasonably foreseeable (*Essa v Laing Ltd* [2003] IRLR 346, [2003] ICR 1110, EAT). When it comes to the assessment of damages in relation to a proven psychiatric injury, tribunals are '*obliged to approach the assessment of damages for psychiatric injury on the same basis as a common law court in an ordinary action for personal injuries'* (*HM Prison Service v Salmon* [2001] IRLR 425).

180. We must first determine whether the loss is attributable to the unlawful discrimination, the starting point being a straightforward "but for" causation test, subject to any intervening event that wholly breaks the chain of causation. Provided we are satisfied that the loss is caused by the respondent, we must then assess the appropriate level of compensation.

181. When more than one event contributes to the injury suffered by a claimant then, save where the injury in question can be said to be 'indivisible,' the extent of the respondent's liability is limited to the contribution to the injury made by its discriminatory conduct (*Thaine v London School of Economics* [2010] ICR 1422 EAT, *Olayemi v Athena Medical Centre* [2016] ICR 1074,

BAE Systems (Operations) Ltd v Konczak [2017] EWCA Civ 1188, *Blundell v Governing Body of St Andrew's Catholic Primary School [2011] EWCA Civ 427*).

182. Personal injury compensation potentially includes compensation for financial losses arising from the injury and for the injury itself.

183. When calculating compensation for financial loss it is helpful to consider the past and future losses separately. The application of this basic principle to past losses is relatively straightforward. Past losses are ascertainable with some accuracy. The only difficulty is deciding whether the loss is attributable to the unlawful discrimination.

184. The application of the basic principle to future financial losses is more difficult. We must consider what ***would*** have happened, but for the unlawful discrimination and what ***will*** happen and compare the two. Neither of these are certain. There are often a range of potential scenarios, some which will be advantageous to the Claimant and others which will be disadvantageous. The burden of proof is on the Claimant.

185. We must assess the likelihood of the different scenarios occurring and strike a balance between the advantageous and the disadvantageous. The mid - point of the probabilities is where we aim to reach, although it is important to take a step back and take an overview of the compensation awarded.

186. The question of mitigation of loss also arises. The Claimant is expected to take reasonable steps to minimise the losses suffered as a consequence of the unlawful discrimination and to give credit for any payments she receives towards her losses. The Respondent cannot be expected to pay for any loss that flows not from the unlawful discrimination, but from the Claimant's failure to act reasonably in light of that unlawful discrimination.

187. The question of reasonableness as it relates to mitigation is to be determined by the tribunal itself taking into account all the circumstances. The Claimant's wishes and views are factors we must consider, but are not determinative.

188. In personal injury cases where the losses are long term, we have a choice between different approaches.

189. The first approach is to endeavour to undertake a reasoned calculation of the earnings in the "what would have happened" and "what will happen" scenarios and deduct the latter from the former to identify the gap. The Actuarial Tables with explanatory notes for use in Personal Injury and Fatal Accident Cases (referred to as the Ogden Tables) have been developed for this purpose. The relevant edition is the Eighth Edition.

190. In order to be able to use the Ogden Tables it is necessary for us to make findings, in both scenarios, as to:

- the Claimant's likely retirement date (to determine which tables should be used)
- her earnings including her prospects of receiving pay increases
- whether any of the discounts found in Tables A to D should be applied – a discount for early death is built into the actuarial calculations behind the Ogden tables

191. An alternative approach to the calculation approach, where the picture is very unclear, is a *Blamire* award (named after the case of *Blamire v South Cumbria Health Authority* [1993] PIQR Q1). This allows for a broad brush approach to be taken. This is only really appropriate in exceptional cases. The preference will always be to undertake a reasoned calculated approach where possible.

192. The possibility of a *Smith v Manchester* award, where a lump sum is awarded that recognises loss of earning capacity/handicap on the labour market, should also be considered, but is not necessary when using the Ogden Tables to calculate residual earnings. This is also factored into the Ogden Tables

193. We also need to be mindful on the one hand of the prospects that the Claimant might have been promoted, but equally might lose her job.

The Significance of Insurance

194. It is necessary for us to include a brief section on the law that we consider relevant because the Claimant is in receipt of PHI and medical expenses insurance provider

195. The normal principles of contractual interpretation are relevant, both in terms of interpreting the Claimant's entitlement to these benefits under her employment contract and when interpreting the relevant insurance contracts. This includes considering the express and any implied terms.

196. The principles that apply when varying contracts are also relevant in this case. A contract cannot be unilaterally varied by either party. Instead, agreement to variations must be sought. Often, however, contracts will contain variation clauses allowing one party to make variations without the agreement of the other. In the case of employment contracts, the requirement for the employer to act reasonably is implied into any variation clauses.

197. As a result of a series of cases dealing with PHI schemes, tribunals should imply into an employee's contract an implied term that their employer will not dismiss them without cause while they are in receipt of PHI benefit as this would defeat the purpose of the benefit (*Aspden v Webbs Poultry and Meat Group (Holdings) Ltd* [1996] IRLR 521, QBD: *Villella v MFI Furniture Centres Ltd* 1999 [IRLR] 468, QBD).

198. We have also reminded ourselves of the principle of subrogation. This provides insurers with the right, once they have paid out the insurance

monies due under an indemnity policy, to "*step into the shoes*" of the insured and to exercise any rights or remedies which arise out of the insured event, with a view to recouping all or some of their money from a culpable third party. This is a common law principle, but may also be incorporated into the contractual terms of a policy.

Personal Injury - Compensation for the Injury Itself

199. The process of attributing a financial value to compensate someone for the pain, suffering and loss of amenity suffered by an injured person has been carried out for tribunals through the creation of the Guidelines for the Assessment of General Damages in Personal Injury Cases produced by the Judicial College.

200. The relevant edition of the Judicial College Guidelines is the 15th edition (November 2019) which tell us that the following factors need to be taken into account when valuing claims of psychiatric injury:

a) the injured person's ability to cope with life and work
b) the effect on the injured person's relationships with family, friends and those with whom he comes into contact;
c) the extent to which treatment would be successful
d) future vulnerability
e) prognosis
f) whether medical help has been sought;
g) whether the injury results from sexual and/or physical abuse and/or breach of trust; and if so, the nature of the relationship between victim and abuser, the nature of the abuse, its duration and the symptoms caused by it.

201. The guidelines referred to four categories of award:

- Less Severe: between £1,440 and £5,500. Where the Claimant has suffered temporary symptoms that have adversely affected daily activities

- Moderate: between £5,500 and £17,900. Where, while the Claimant has suffered problems as a result of the discrimination, marked improvement has been made by the date of the hearing and the prognosis is good;

- Moderately Severe: between £17,900 and £51,460. Moderately severe cases include those where there is work-related stress resulting in a permanent or long-standing disability preventing a return to comparable employment. These are cases where there are problems with factors a) to d) above, but there is a much more optimistic prognosis than Severe;

- Severe: between £51,460 and £108,620. Where the Claimant has serious problems in relation to the factors at a) to d) above, and the prognosis is poor.

202. The figures above include the *Simmons v Castle* uplift.

203. An award for personal injury may be made in addition to an award for injury to feelings (*Hampshire CC v Wyatt* (UKEAT/0013/16/DA) although this is an area where a tribunal should be careful to guard against double recovery.

Injury to Feelings

204. The tribunal has the power to award to compensation to an employee for injury to feelings resulting from an act of discrimination by virtue of sections 124(5) and 119(4) of the Equality Act 2010.

205. The purpose of the award is to compensate the complainant for the anger, upset and humiliation caused by the fact that she knows that she has been discriminated against. It is compensatory not punitive.

206. In determining the amount of the award, we are required to follow the *Vento* guidelines in place at the time the claim was presented. The *Vento* guidelines in place in April 2018 were:

- a top band of between £25,700 to £42,900 to be applied only in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in very exceptional cases should an award of compensation for injury to feelings exceed £42,900.

- a middle band of between £8,600 to £25,700: for serious cases that do not merit an award in the highest band, and

- a lower band of between £900 to £8,600: appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

207. The figures above include account a 10% uplift pursuant to *Simmons v Castle* [2012] EWCA Civ 1288

Aggravated Damages

208. Aggravated damages are a sub-head of injury to feelings. They are awarded only on the basis, and to the extent that aggravating features have increased the impact of the discriminatory act on the Claimant and thus the injury to her feelings. They are intended to be compensatory, not punitive.

209. In *Alexander v Home Office* [1988] ICR 685, the court identified three broad categories of case where aggravated damages may be appropriate:

- where the act is done in an exceptionally upsetting way: Underhill P in *Commissioner of Police of the Metropolis v Shaw* UKEAT/0125/11/ZT cites the phrase 'high-handed, malicious, insulting or oppressive' behaviour

- Where there was a discriminatory motive — where the conduct was evidently based on prejudice or animosity, or was spiteful, vindictive or intended to wound and where the motive is evident.

- Where subsequent conduct adds to the Claimant's injury — for example, conducting the trial in an unnecessarily oppressive manner, failing to apologise, or failing to treat the complaint with the requisite seriousness. (*Bungay & Anor v Saini & Ors* UKEAT/0331/10 and *Zaiwalla & Co v Walia* [2002] UKEAT/451/00).

210. Tribunals must beware the risk of double recovery, and consider whether the overall award of injury to feelings and aggravated damages is proportionate to the totality of the suffering caused to the Claimant. There is no equivalent to the *Vento* guidelines for aggravated damages.

Stigma Damages

211. These are damages that can be awarded where the claimant has suffered stigma that has an impact on his or her position in the labour market (*Abbey National v Chagger* [2010] ICR 397)

Damages for Loss of Congenial Employment

212. A further type of compensation is an award under this heading. It is awarded to compensate a Claimant for the loss of fulfilment and satisfaction where they are unable to return to a former role.

Exemplary Damages

213. In contrast to injury to feeling awards and aggravated damages, exemplary damages are punitive, not compensatory. They can only be awarded if compensation is insufficient to punish the wrongdoer and if the conduct is either:

● oppressive, arbitrary or unconstitutional action by the agents of government; or

● where the defendant's conduct has been calculated to make a profit which may well exceed the compensation payable to the Claimant.

214. The EAT in *MOD v Fletcher* [2010] IRLR 25 has stated that exemplary cases are reserved for the worst cases of the oppressive use of power by public authorities, where the wrongdoing was '*conscious and contumelious'*.

ADJUSTMENTS

215. The relevant adjustments in this case are:

- Whether the Claimant's compensation should be increased pursuant to section 207A of Trade Union and Labour Relations (Consolidation) Act 1992
- Interest
- Tax and grossing up

216. The order in which the various adjustments that can be made to awards of compensation are made, can change the overall amount awarded. The leading case on the order in which adjustments should be made is *Digital Equipment v Clements* [1997] EWCA Civ 2899 which confirms the order is as follows:

(1) Calculate total losses suffered
(2) Acas procedure adjustment
(3) Interest is then calculated on past losses
(4) Tax and grossing up

Failure to follow ACAS Code of Practice on Disciplinary and Grievance Procedures.

217. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, enables an employment tribunal to adjust the compensatory award for an unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance procedures. It says:

"If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%"

218. We note that tribunals have suggested a lower award should be made in circumstances where, due to the value of other compensation, the ACAS uplift would itself amount to a sizeable sum (*Michalak v Mid-Yorkshire Hospitals NHS Trust and others ET/1810815/08* applying *Wardle v Credit Agricole Corporate and Investment Bank [2011] IRLR 604*).

Interest

219. Interest is payable on any compensation we award for equal pay and discrimination pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (SI 1996/2803).

220. The elements of compensation which attract interest are:

- Past financial losses
- Injury to feelings, aggravated damages, exemplary damages

221. The applicable rate of interest is 8% and it accrues daily.

222. For injury to feelings, aggravated damages and exemplary damages, interest is awarded from the date of the act of discrimination complained of and until the date of calculation, agreed with the parties as 31 March 2021.

223. For all other compensation, interest is awarded from the mid-point of the date of the act of discrimination and the date of calculation.

224. In cases, such as this, where there has been early payment, the date of the payment is taken as the date of the calculation.

225. We consider interest payments made under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (SI 1996/2803) are not taxable.

Tax

226. When making an award of compensation, the tribunal must take account of tax payable on the various elements of the award. It may be necessary, in accordance with the principle established in *British Transport Commission v Gourley* [1955] 3 All ER 796, once the amount of the award has been calculated, to 'gross up' the award so as to ensure that the Claimant is not left out of pocket when any tax required to be paid on the award has been paid.

227. Equal pay compensation is treated as arrears of pay and is taxable and subject to deductions for national insurance contributions. The application rates are the rates in force at the time that payments should have been paid (Rule 2, section 18 of the Income Tax (Earnings and Pensions) Act 2003).

228. Personal injury damages are not taxable (s. 51(2) of the Taxation of Chargeable Gains Act 1992). The exception applies to all aspects of damages for personal injury, including general damages, damages to pay for psychiatric treatment and loss of earnings and interest.

229. Awards for financial losses arising from discrimination that does not cause termination are not subject to tax. Injury to feeling awards, which are not related to termination of employment are tax free. *Moorthy v HMRC* [2018] EWCA Civ 847.

SECTION 12A – EMPLOYMENT TRIBUNALS ACT 1996

230. Section 12A of the Employment Tribunal's Act 1996 contains a provision enabling a tribunal to effectively fine a Respondent. The fine is not paid to the Claimant as an award of compensation, but is paid to the Government.

231. The tribunal's discretion can be exercised where the Respondent has breached the employee's rights and we consider the breach has "*one or more aggravating features*."

232. There is only one appellate case, *First Greater Western Ltd v Waiyego* [UKEAT/0056/18/RN] and the observations on section 12A are brief. Paragraph 105 of that judgment records that explanatory notes accompanying the legislation which introduced section 12A (section 16(1) of the Enterprise and Regualroity Reform Act 2013), stated that its purpose was "*to encourage employers to take appropriate steps to ensure that they meet their obligations in respect of their employees, and to reduce deliberate and repeated breaches of employment law*". It was held that the section 12A gives the tribunal the power to award a penalty, but does not place us under any form of duty.

233. In deciding whether to order the employer to pay a penalty under this section, we should have regard to the Respondent's ability to pay (subsection 12A(2)(a).

234. The amount of the fine is determined by the date of issue of the claim and is governed by subsections 12A(3) to (5).

EQUAL PAY AUDIT

235. In contrast to the position under section 12A above, the tribunal is placed under a duty when applying the Equality Act 2010 (Equal Pay Audits) Regulations 2014 (SI 2014/2559).

236. Regulation 2 requires that "where a tribunal finds that there has been an equal pay breach, subject to regulations 3 and 4, the tribunal ***must*** order the Respondent to carry out an audit." (emphasis added)

237. Regulation 3 says:

> *"(1) A tribunal must not order the Respondent to carry out an audit where it considers that—*
>
> *(a) the information which would be required to be included in the audit under regulation 6 were the tribunal to make an order, is already available from an audit which has been completed by the Respondent in the previous 3 years;*
> *(b) it is clear without an audit whether any action is required to avoid equal pay breaches occurring or continuing;*
> *(c) the breach which the tribunal has found gives no reason to think that there may be other breaches; or*
> *(d) the disadvantages of an audit would outweigh its benefits.*
>
> *(2) In paragraph (1), "previous 3 years" means the 3 years preceding the date on which the tribunal issues a judgment, orally or in writing, stating that there has been an equal pay breach."*

238. Regulation 4 has an exemption for micro businesses and new businesses that does not apply to this case.

239. Where a tribunal decides to order an equal pay audit, additional regulations apply (5 and 6) that determine what we must include in our order and the scope of the audit.

ANALYSIS AND CONCLUSIONS

240. In this section, we explain the decisions that we have taken with regard to the various heads of remedy we have had to consider. All detailed calculations are set out in Appendix One.

PAST LOSSES

241. We have agreed with the parties that past losses will be calculated to 31 March 2021. This is also the date the tribunal has performed the calculations for the purpose of any interest calculations. Given the length of time it has taken to produce the written judgment, the parties may wish to ask us to reconsider this.

Equal Pay

242. Because of her successful equal pay claim, the Claimant is entitled to have her pay equalised so that she is earning the same basic pay, special allowance and employer pension contributions as Comparator 1.

243. If the Claimant had not become unwell and eligible for the Respondent's PHI benefit, this would have involved a straightforward calculation. The Claimant would have been entitled to be treated as earning £160,000 (gross) up to the end of March 2020 and £177,000 (gross) between 1 April 2020 and 31 March 2021. In addition, she would be entitled to receive a special allowance of £17,000 (gross) per annum from 1 January 2017 to 31 March 2020.

244. From February 2019, however, the Claimant has been in receipt of the PHI benefit. The PHI scheme is based on base salary only and not special allowance. She is therefore entitled, by way of equal pay compensation to be treated as earning £160,000 (gross) as at the date she qualified for the PHI benefit.

245. This is because when applying the equal pay provisions of the Equality Act 2010, the tribunal can only equalise the Claimant's pay to match that of the comparator. We have made a factual finding that the Comparator 1 was genuinely paid a Special Allowance and did not have his basic pay increased between 1 January 2017 and 31 March 2020. Had Comparator 1 been put on the PHI scheme at the same time as the Claimant, his reference salary would have been £160,000 in February 2018. We have therefore compared the claimant's actual earnings with the earnings Comparator 1 would have received had he been on PHI in the detailed calculations we have performed.

246. The Claimant is also entitled to employer pension contributions which match those of the comparator. Pension contributions under the scheme do not have a discount applied to them. The Claimant is entitled to 12% of

£160,000 in order to match Comparator 1's employer pension contributions, subject to the caps that applied.

Discrimination

Past Losses - Bonus Payments

247. The tribunal found that the Respondent discriminated against the Claimant because of her sex and/or victimised her when awarding her bonuses for the financial years 2013 to 2017.

248. Based on the analysis undertaken by the tribunal of the work being performance by the Claimant and Comparator 1, we award her the difference in the bonus amounts paid to her and paid to him by way of compensation for the period 2013 to 2017.

249. The Respondent effectively conceded her entitlement to the same level of bonus as Comparator 1 for these financial years when it paid her the lump sum payment for bonuses. Although, when making the lump sum payment, the Respondent reserved its position to argue that the Claimant would not have been entitled to the same level of bonus, it did not argue this before us. We are satisfied, based on the tribunal's previous findings that matching the bonus payments to Comparator 1 is the correct approach and that, absent the direct sex discrimination or victimisation, the Claimant would not have earned the same amounts as Comparator 1.

Discrimination - Personal Injury Losses

250. We are satisfied, based on the medical evidence before us, that the Claimant has been unable to work since July 2018 because of the Respondent's discriminatory treatment of her. The Claimant had no history of mental health problems or psychiatric illness that predates the commencement of her illness in July 2018.

251. We are also satisfied, based on our findings of fact at paragraphs 129 - 133 above, that the Claimant getting Covid-19 should not be treated as an intervening act bringing the chain of causation to an end. This is also not a case where we need to consider if we should try and divide the harm from getting Covid-19 from the harm caused by the Respondent's unlawful discrimination. Our finding, based on the medical evidence, was that the Claimant did get Covid-19, but recovered from it. The worsening in her psychiatric symptoms came later, with no intervening cause, after she had recovered from Covid-19.

252. The Claimant is therefore entitled to compensation for her past losses arising from being unwell. She did not begin to suffer any past financial losses until February 2019. From this point onwards she suffered a loss in salary and special allowance because she started to receive PHI benefit. She also suffered the loss of bonuses.

Past Losses – Salary and Special Allowance

253. The Claimant is entitled to receive a lump sum payment by way of past losses for her personal injury representing the gap between:

- what she would have earned between February 2019 and 31 March 2021 had she been well enough to work. This includes the salary and Special Allowance that she would have been had she been treated the same as Comparator 1 from the start of her employment; and

- what she did earn under the PHI scheme.

254. Although this gap includes the discount that has been applied to the Claimant's salary of 30% and the Special Allowance, it is offset by the increases in RPI that the Claimant has received under the PHI scheme.

255. We have considered whether we should award the Claimant the full loss because of the PHI provider's ability, under the GIP scheme policy document to seek to claw back the payments that have been made to the claimant. As noted at paragraphs 93 - 94, the PHI provider has confirmed that it will not seek to recover the payments made to the Claimant.

256. The form in which this has been confirmed cannot be treated as a legally binding concession on behalf of the PHI provider. We consider we can rely on it, however. Our task is to determine the likelihood of something happening. Applying this test, we do not think it is likely that the PHI provider will seek to recover the PHI payments and therefore we only award the Claimant the gap in what she would have earned, once equalised, and what she did earn.

Past Losses - Bonus Payments

257. The Claimant was absent from work due to illness for part of the 2018 bonus year and for the entirely of the 2109 and 2020 bonus years. This is a difference in the circumstances between her and Comparator 1 that is relevant for us to note. However, as we have found that the reason for the Claimant's illness was the Respondent's discriminatory treatment of her, she is entitled to be compensated for the lost bonus payments.

258. We have decided to award the Claimant the same level of bonus payments for the years 2018, 2019 and 2020 as Comparator 1 received. The Respondent has already matched the payments made to Comparator 1 for the year 2018 and effectively conceded that the Claimant would have earned the same level of bonus as Comparator 1 had she been well enough to work for the entire year and had it decided her bonus award absent the direct sex discrimination or victimisation.

259. We see no reason to treat the years 2019 and 2020 any differently. Had the Claimant been well enough to work, we are confident, based on the evidence she presented, that she would have earned the same level of bonus as Comparator 1, absent any direct sex discrimination or

victimisation. This includes the entitlement to the one-off top up bonus paid to Comparator 1 for the bonus year 2020. Had the Claimant been working for the Respondent it is likely that she would have been required to work on the project that justified this top-up bonus. The Respondent has not adduced any evidence to contradict this.

Past Losses – Medical Expenses

260. The Claimant's past medical expenses have been paid by the medical expenses insurance scheme to which she is entitled as a result of her employment with the Respondent. She has however had to pay for her own medication and for medical reports. The Respondent does not dispute the costs of these items which come to £2,988.

261. The insurance company has confirmed that it does not intend to try to recover the payments already made and so we have followed the same approach as described in paragraph 255.

FUTURE LOSSES

Future Earnings Losses

Our approach

262. We begin this section by stating the approach we have taken to the determination of future losses and provide an explanation as to why we took this approach.

263. The approach we have adopted has been to undertake a reasoned calculation using the Ogden tables.

264. We took this approach because of a number of key factors.

265. The first was our acceptance of the medical prognosis from Dr Fourie that the Claimant will not be able to return to her original role. As explained above, we are satisfied that we can rely on her medical opinion regarding the Claimant's medical prognosis, even though she is not an independent joint expert.

266. The evidence before us regarding what alternative work the Claimant might be able to undertake in the future, however, was not sufficiently reliable for us to reach a precise conclusion. Dr Fourie accepted that she did not have the necessary expertise to evaluate this question fully and that in addition she had not discussed this question with the Claimant at any length. The Claimant's view of her future capabilities was extremely uncertain and most likely adversely affected by her current levels of depression. The evidential burden was on the Claimant, but we note that Respondent did not adduce any evidence that was helpful to us in this regard either.

267. Based on what we know about the Claimant's medical prognosis, we consider it is likely that the Claimant's medical condition will improve sufficiently such that she is able to do some work in the future. She has, for

example, been able to conduct this litigation, albeit with great difficulty at times, and is very able. Dr Fourie predicts that the cognitive impairments that she has experienced more recently are likely to improve, with a 70% chance that she will recover from these.

268. Had it not been for the existence of the PHI scheme in this case, we consider we would have had to adopt a *Blamire* broad brush approach because of the uncertainty regarding the type of work the claimant may be able to undertake in the future. The existence of the PHI scheme, however, ensures that we do have an appropriate degree of certainty to undertake a reasoned calculation.

269. This is because Dr Fourie's prognosis means that, if the Claimant remains employed by the Respondent, she will continue to meet the definition of Incapacity under the Respondent's scheme and remain eligible to receive PHI benefit under the Respondent's scheme up until the age of 65.

270. Although we predict the Claimant will be capable of some work in the future, we consider that it is unlikely likely that, at any time up to her retirement, she will become well enough to perform a role that will pay her as much as the PHI benefit. This means that, from a purely financial perspective, the Claimant remaining employed and in receipt of the PHI benefit, is the most effective method for her to mitigate her loss.

271. In our judgment, it is reasonable to expect the Claimant to mitigate her loss in this way. We have given this very careful consideration as we are aware that the Claimant does not want to remain in receipt of the PHI benefit.

272. The case law tells us that the financial position is only one of the factors that we should take into account when considering mitigation. When determining the question of appropriate mitigation, we must determine what is reasonable taking into account all the circumstances, including the Claimant's own views. The Claimant's views are not determinative. They are only one of the factors we must take into account, but they are important, hence our careful approach.

273. The Claimant's main concerns about remaining in receipt of the PHI benefit is this will create a lack of future stability for her, as there is a risk that the Respondent will dismiss her, meaning she will cease to be eligible for the benefit. She is also concerned that the Respondent may seek to vary her contract and remover her entitlement to the benefit that way.

274. We are satisfied, however, that the Respondent has no intention of dismissing the Claimant while she is in receipt of the benefit. The Respondent takes steps to ensure employees receiving its PHI benefit are protected from dismissal, including as a result of restructuring activity. There steps, which are already in place, will continue to apply to the Claimant.

275. The Respondent would expose itself to fresh, expensive and complex litigation if it tried to dismiss the Claimant or to remove the PHI benefit from her. The case law on PHI schemes ensures that the Claimant enjoys a high

degree of legal protection from having her employment terminated by the Respondent while she is in receipt of the scheme benefit. She also has legal protection from any acts of victimisation. It is likely too, that she has protection as a disabled person under the Equality Act 2010.

276. Although the Claimant's contract allows the Respondent to make variations to her benefits, they cannot do this where the purpose is to deny her the benefit. This would be contrary to the implied term in her contact that requires the Respondent to act reasonably when varying terms. It would also be contrary to the spirit of the *Aspden* case law. Although those cases focus on termination of employment, the same principle would no doubt be applied in a variation of contract case.

277. In addition, the terms of the GIP Scheme ensure that if the Respondent decides not to renew the policy and change provider, the Claimant's cover continues as a result of the termination provisions found in the scheme terms and conditions (see paragraph 89 above). It is also relevant that the GIP Scheme provider has indicated that it does not intend to reduce the benefit payable if we only award the top up by way of personal injury compensation. We have explained that we consider we can rely on this despite the fact that the PHI provider has not waived its legal rights in this regard above.

278. There is a remote risk that the Respondent will cease to exist in the future, and the scheme may come to an end through this mechanism, but we think this is very unlikely. It is more likely that if the Respondent did experience financial difficulties, these would be resolved by way of a merger or acquisition. The Claimant's rights under the scheme would persist in such circumstances as a matter of contract in the event of a share acquisition or under TUPE in the event of an asset acquisition.

279. Another matter we have been careful to consider when reaching our decision on mitigation is the consequence that the Claimant will have to have ongoing contact with the Respondent. The Claimant would understandably prefer to break all ties with the Respondent. In our judgment, the fact that she will need to have some ongoing contract with the Respondent does not make remaining employed and receiving the GPI benefit unreasonable. The contact need only be limited and can be with people who had no involvement in the events that led to the Claimant's tribunal claim.

280. A matter that gave us significant pause for thought, is the impact of our decision on the Claimant's future ability to work. Under the GIP scheme rules she is prevented from undertaking paid work while in receipt of the scheme benefit. We consider it is likely that the Claimant will become well enough to do some form of work in the future and we anticipate that there could be therapeutic benefits for her from undertaking some work.

281. We have resolved this difficulty by reminding ourselves that under the GIP Scheme rules, remaining on the scheme benefit does not prevent the Claimant from undertaking unpaid voluntary work. In addition, she could

seek consent to do some paid work while continuing to receive the benefit. We consider it is likely that the Respondent and Generali would approach a request by the Claimant to be allowed to undertake some work for therapeutic reasons positively, ensuring this possibility would not be ruled out. This would make financial sense for Generali because it would be able to agree to pay a reduced benefit to reflect the claimant's earnings.

Calculating the Future Earnings Losses

"What Will Happen" Earnings

282. It is possible to calculate the Claimant's future earnings under the PHI scheme with a high degree of accuracy. The Claimant's earnings under the PHI scheme will continue up to the age of 65.

283. The benefit will continue to be based on the reference salary of £160,000 The Claimant will receive an annual increase for RPI each year. The only unknown is the rate of RPI as this is determined annually based on the most recent published figure as at the time of the increase, which is April each year. The value of RPI the last 10 years has varied between 0.5% and 5%. We have decided that an appropriate amount is 1.5% for the financial year 2021 to 2022 and 2.5% thereafter. We have used a lower figure for April 2021 because of the impact of the Covid-19 pandemic.

284. The Claimant will also continue to receive pension contributions based on 12% of the original reference salary with the cumulative RPI increases each year.

"What Would Have Happened" Earnings

285. In order to calculate the earnings the Claimant would have earned, had the unlawful discrimination not happened, we are required to reach decisions about the likelihood of the following:

- retirement age
- pay increases
- bonus payments

When doing so we reminded ourselves that we are considering the midpoint of possibilities. We considered this for each factor, but also stood back and took an overall perspective.

Retirement Age

286. Taking into account, the facts we recorded in the section headed The Claimant's Career in Banking and Potential Retirement Age, we have decided to use the retirement age of 65 for the purposes of our calculation. The Claimant suggested that she would have continued to work until 68 because her work was everything to her, she had no personal life other than work and was also in a poorer financial position than her peers. The Respondent's position was that the normal retirement age for her peers was between 55 and 60.

287. We consider that the factors point towards the Claimant having continued to work after her peers had retired. We judge it to be unlikely that this would have gone beyond 65, however. Retirement at 65 would still be exceptional when compared to her peers and represents an appropriately balanced approach. It is entirely possible that the Claimant's position on her retirement would have changed as she got older and/or that developments in her personal life led to a different perspective. She would have earned sufficient by the age of 65 to be able to retire very comfortably.

288. Using a retirement of age 65 has led to us using Table 10 in the Ogden Tables. The Claimant would have had us use Table 36 which does not take mortality into account in light of the longevity of the women in her family. We reject this approach in favour of the standard loss of earnings table as we do not consider the Claimant's evidence on not factoring in mortality is sufficiently compelling to divert from the standard approach. As the Claimant is aged 50 this gives a multiplier of 14.96 which we have split across the 15 years involved.

289. We have used Table C to identify the discount factor for other contingencies, based on the Claimant having an educational attainment level of 3 (degree level) and her being non-disabled. This gives a discount factor of 0.85.

Likely Pay Increases

290. We consider it most likely that the Claimant would have a similar trajectory with regard to pay increases and bonus payments as Comparator 1. We have compared her position to his rather than the whole of her team, as we consider that is the appropriate comparison based on their level of seniority.

291. Comparator 1 received a single pay increase of 10.625% in 8 years of employment. This was not an exceptional pay increase but reflected the change in market conditions. In the absence of any evidence to contradict this, or indeed any evidence of the market conditions, we anticipate that Comparator 1 will be likely to receive similar pay rises in the future.

292. In or model of "what would have happened", the Claimant would have continued to work for a further 15 years. We have therefore factored into our calculations two pay rises of 10% at year 5 and year 10.

Future Bonus Payments

293. In terms of bonuses, the percentage bonuses paid to Comparator 1 over the last 8 years is set out at paragraph 76. If we do not take into account the top up payment, the bonuses have ranged between 30 and 42 percent of his basic pay and special allowance. We have decided that an appropriate percentage figure to use for the Claimant's future bonuses is a figure of 35%. We consider this represents the mid-range of possibilities.

Future Earnings - Summary

The detailed calculations we have undertaken are shown in Appendix 1.

Future Treatment Costs

294. If the Claimant remains employed by the Respondent, her future treatment costs will continue to be covered by the medical expenses insurance cover she has as a result of her employment by the Respondent. As we have determined that it would be reasonable mitigation for the Claimant to remain an employee of the Respondent, we have limited the award under this head to the costs of her medication, for which she is not covered by the insurance. The cost of her future medication, which is not disputed by the Respondent is £1,088.

295. We have not factored the possibility of the insurance company clawing back the payments in the future into our analysis for the same reason as in the case of past losses.

ADDITIONAL HEADS OF COMPENSATION

Promotion / Career Advancement / Risk of Losing her Job

296. The Claimant sought additional compensation, in the form of an additional lump sum of £577,226, as compensation for the lost opportunity to advance her career further. She invited us to envisage that that at around age 56 she would have been promoted, either internally or through an external opportunity, which would have given her a pay increase of 28% and additional bonus entitlement.

297. We have not included any amount under this head of compensation.

298. We were not satisfied that the evidence that the Claimant's career would have advanced in this way was sufficient. In addition, we have been mindful of the need to balance possible highly advantageous possible scenarios with the possible highly disadvantageous possible scenarios. One such disadvantageous scenario could have seen the Claimant being made redundant from her role. In our judgment, the two possibilities balance each other out and therefore a zero award is appropriate under this head of compensation.

Loss of congenial employment

299. We have, however, awarded the Claimant £22,915 as compensation for the loss of congenial employment. The Claimant loved her job and is not able to return to it. The sum of £22,915 is based on a starting figure of £10,000 uplifted for inflation and with a Simmons v Castle uplift of 10%.

Stigma damages

300. As acknowledged by the Claimant, it would not be appropriate for us to award her anything to compensate her for the stigma she would face in the

financial services labour market, if she is not in fact able to work in that market. She will not face any potential stigma.

Personal Injury - Compensation for the injury itself (General Damages)

301. Based on the medical evidence and what the Claimant told us about her mental health, we consider that her psychiatric injury falls to be considered as Moderately Severe when applying the Judicial College Guidelines. This is appropriate in cases where there is a permanent or long-standing disability preventing a return to comparable employment, but the prognosis is more optimistic prognosis than cases that are Severe.

302. In this case, the medical evidence is that the Claimant will not be able to return to comparable employment. However, there is optimism that she will recover from the cognitive difficulties she has had and that her mental health will improve significantly after 2 to 3 years of treatment.

303. The range for a Moderately Severe injury is between £17,900 and £51,460. We consider that the Claimant's injury is at the top of this range and we therefore award her £52,400.

Injury to Feelings and Aggravated Damages

304. As noted above, an award for injury to feelings is not available in an equal pay claim. We have based our assessment of the appropriate award for injury to feelings on the findings of direct sex discrimination and victimisation made at the liability stage of the case. These are recorded at paragraph 379 onwards. Our assessment is based solely on the claims which succeeded and not any of the allegations that failed. This includes those that were upheld on their facts, but found to be out of time, the most obvious example being the 'witches hat' allegation.

305. In reaching our decision, we have reminded ourselves of the need to avoid overlap with the award we have made for the Claimant's psychiatric injury.

306. We consider that an overall award of £50,000 is appropriate. This is made up of an award of £35,000 (middle of the upper Vento bad) plus £15,000 in aggravated damages.

307. We consider that an award in the middle of the upper Vento band is appropriate in this case. The Claimant's situation is one where she was subjected to discrimination over a significant period of time. The sex discrimination dates back to the first time that she received a bonus of much less than Comparator 1, namely March 2014.

308. In response to the Claimant trying to raise concerns she began to be treated very badly. According to the findings made at the liability hearing, that bad treatment began in 2014 (Judgment paragraph 446) but became "*much more extreme*" from March 2017 (Judgment paragraph 448).

309. We have also decided to award aggravated damages as we consider two of the three tests from *Alexander* are met.

310. In our judgment this is a case where there was a discriminatory motive and where the conduct was spiteful and vindictive. Although the tribunal panel found there was no initial conscious sex-discrimination when setting the Claimant's salary and early bonuses, the position changed when she began to raise this as a concern. The liability judgment notes that "*After the Claimant made her allegations of inequality in pay and sex discrimination from March 2017 there was a very rapid deterioration in her relationship with Mr Pihan and Mr Pinnock.*" (paragraph 447). The Claimant was subjected to unfair poor performance reviews and her job increasingly came under threat. The mid-year review in 2017 is highlighted in the liability judgment as one where "*an extremely hostile approach was adopted*" (paragraph 424).

311. The judgment concluded that there was a continuing act as there was "*an act extending over a period involving the hostility of Mr Pihan and Mr Pinnock to the Claimant raising [complaints of discrimination*]" (paragraph 451).

312. Although the words are not used, we consider the tribunal panel found that Mr Pinnock and Mr Pihan behaved spitefully and vindictively towards the Claimant because she had raised concerns about her pay and that they did have a discriminatory motive.

313. We have also found, as a result of the new evidence available to us at the remedy hearing, that Mr Pinnock deliberately awarded Comparator 1 a Special Allowance rather than an increase in his base pay because of the Claimant's complaints about equal pay. In our view, this was also undertaken with a discriminatory motive.

314. We also consider that this is a case where the Respondent's subsequent conduct has added to the Claimant's injury. The Claimant's attempts to seek a resolution through the Respondent's grievance processes made matters worse not better. The tribunal panel found that the investigations carried out into the Claimant's concerns by members of the HR department were completely inadequate and effectively a sham process was adopted. The judgment says at paragraph 422 "*There was a determination to defend the Respondent against the allegations rather than investigate them properly."* This is reiterated at paragraph 437.

315. That same determination also led to a robust defence of the claim at the tribunal.

316. Finally, although Mr Pihan has now, while giving evidence at the remedy hearing, apologised for causing distress to the Claimant, he notably failed to acknowledge that he had discriminated against her and apologise for this. He was also treated with impunity by the respondent. It is surprising to the tribunal panel that he has not faced disciplinary action nor suffered any loss by way of bonus payments.

Exemplary Damages

317. We do not consider that we have the power to make exemplary damages in this case. The Respondent is not a public authority and we have made no findings based on evidence presented to us that the Respondent's conduct was calculated in order to make a profit.

ADJUSTMENTS

Failure To Follow Acas Code

318. The Claimant is seeking a maximum uplift of 25% to her compensation because of the Respondent's unreasonable failures to comply with the provisions of the Acas Code on Disciplinary and Grievances.

319. The Respondent recognised and accepted the criticisms of the tribunal panel at the liability stage of its internal procedures. Its position, however, was that there are no grounds for an award higher than 10% because it conducted a grievance process and a grievance appeal.

320. We have decided to award the Claimant an uplift of 20% in her compensation for the Respondent's failures in applying the provisions contained in the Acas Code on Disciplinary and Grievance Procedures.

321. The Respondent did not ignore the Claimant's grievances and did go through a process of a stage one grievance and appeal. It would not therefore be appropriate to award an uplift of 25%, which is the maximum uplift permitted.

322. There were, however, such significant failings, that in some respects there may as well not have been a grievance process followed at all. As documented in the liability judgment at paragraphs 404, 420, 422 and 437 there was a complete failure to carry out the necessary investigations to establish all the facts of the case or to approach the grievance impartiality - both fundamental principles of the Code.

323. The Claimant has invited us to consider three additional points.

324. The first was that the Respondent should not approached her with a without prejudice offer prior to hearing the appeal against the grievance. We have not taken this into account. In our judgment it is always rarely inappropriate for employers to explore alternative solutions at different stages of grievance and disciplinary processes. In this case, the approach was rejected swiftly and the Claimant's grievance appeal continued without delay.

325. The second point was that the Code should have been applied to her in relation to addressing her alleged underperformance. We do not agree. The performance management processes were only beginning to be pursued informally. Matters had not reached the stage where the code had become applicable.

326. The third point concerns the role of Ceri Lawrence. The Claimant considers that, as a qualified barrister, Ms Lawrence should not be investigating employee grievances and suggests that she is in a position of conflict of interest.

327. We do not agree with the Claimant on this point. We do not consider that Ms Lawrence is in any particularly different position to any other employee of the Respondent who is asked to investigate something on behalf of their employer. The ability of the employee to challenge the Respondent's decision making is always going to influenced by the fact that they rely on the employer for their own livelihoods. This is the reason that the Code envisages decisions being taken on an escalating scale of seniority, to ensure that the decisions are taken at the right level.

328. Where the investigator is an employment lawyer, this may well put the complainant in a stronger position as the lawyer's opinion about the case may be taken more seriously and given more respect than someone without the same background. Ms Lawrence told us that she does not investigate cases that she advises on and so is careful to guard against being in a position of actual conflict of interest.

329. Finally in this section, we have stood back and considered whether it is just and equitable to award the Claimant 20% of the total amount of her compensation or whether we should reduce the award because this is a sizeable sum. We have decided that although 20% of the Claimant's overall compensation is a sizable sum (£317,016.34) and larger than would be found in the average case, it is just and equitable to award the full amount in this case. In reaching this view we have taken into account the size and resources of the Respondent and that the nature of the breaches of the Code were so fundamental.

Interest

330. We have calculated and added interest on the Claimant's compensation as set out in this section.

Injury to feelings (with aggravated damages)

331. For injury to feelings (including aggravated damages) interest is awarded from the date of the act of discrimination complained of and until the earlier of the date of calculation, namely 31 March 2021, or the date payment has been made. No early payments have been by the Respondent so we have used 31 March 2021.

332. The calculation period for the injury to feelings award is straightforward. The period of discrimination for this interest calculation runs from 31 March 2014 as this was the date the Claimant received her bonus for the previous year (2013). The earlier period dating back to 8 July 2013 does not count for this purpose because we have not awarded injury to feelings or aggravated damages for the equal pay breaches.

333. The period between 31 March 2014 and 31 March 2021 is 2557 days. The calculation is therefore:

£50,000 x 0.08 x 2557 x 1/365 = 28,021.92

334. For all other compensation, interest is awarded from the mid-point of the period between the date of the act of discrimination and the earlier of the date of payment or 31 March 2021.

Personal Injury Itself, Loss of Congenial Employment and Past Treatment

335. No early payment has been made in respect of any award for the personal injury itself, loss of congenial employment or the costs of past treatment. The calculation period for these awards is also straight forward. Although the Claimant did not become unwell until July 2018, the period still dates back to the first act of discrimination. This means the period is 31 March 2014 to 31 March 2021. The calculations are:

- Injury itself - £51,400 x 0.08 x 2557/2 x 1/365 = £14,403.27
- Loss of congenial employment - £22,915 x 0.8 x 2557/2 x 1/365 = 6,421.22
- Past treatment - £2,921.00 x 0.08 x 2557/2 x 1/365 = £818.52

Equal Pay – Salary and pension

336. The mid-point formulation has been used for calculating interest on the equal pay arrears for base salary. We have used 31 March 2020 as the end date to take into account the Respondent's early payment. The start of the period runs from 8 July 2013, with the total days being 2458. We have used the total compensation for our calculations.

Salary - £217,946.63 x 0.08 x 2458/2 x 1/365 = £58,708.14
Pension Contributions - £30,943.56 x 0.08 x 2458/2 x 1/365 = £8,335.26

Equal Pay Special Allowance

337. The mid-point formulation has been used for calculating interest on the equal pay arrears for special allowance. We have used 31 March 2020 as the end date to take into account the Respondent's early payment. The start of the period runs from 1 January 2017 which is the date from which Comparator 1 was given the Special Allowance. The total days are 1158.

£35,416.67 x 0.08 x 1185/2 x 1/365 = £4,599.32

Personal Injury – Past Losses

338. The mid-point formulation has been used for calculating interest on the additional past losses arising from personal injury. The reference period for the base salary and pension contributions is from 31 March 2014 to 31

March 2021 with a total of 2557 days. The reference period for Special Allowance runs from 1 January 2017 to 31 March 2021 with a total of 1150

Salary - £70,545.28 x 0.08 x 2577/2 x 1/365 = £19,768.14
Pension Contributions - £918.64 x 0.08 x 2577/2 x 1/365 = £1,720.57
Special Allowance - £10,129.17 x 0.08 x 1550/2 x 1/365 = £257.42

Bonus

339. The mid-point formulation has been used for calculating interest on the bonus awards. We have used 28 February 2021 as the end date to take into account the Respondent's early payment. We have also calculated different periods for each bonus however, with the start date being the 31 March of each bonus year. Our calculations are shown in the appendix.

340. We have not added interest on top of the award made for the ACAS uplift. It is not a past loss or another head of compensation that appears to us to attract interest.

Tax and Grossing Up

341. Compensation for personal injury, discrimination and injury to feelings where there is no termination (which includes aggravated damages) and the interest due on such compensation is not taxable. We do not, therefore, have to make any adjustment by way of "grossing up" for the Claimant's compensation.

342. Equal pay compensation is taxable as arrears of pay, but it is subject to deductions for tax and national insurance contributions at the rates that were applicable at the time it should have been paid. The figures we have awarded are gross and we therefore do not need to make any adjustments.

343. The Respondent paid a lump sum to the Claimant in respect of the arrears. We have not been provided any information about the tax rates applied. If the deductions were in excess of those that should have been made, the Claimant should be able to recover these from HMRC. We have not therefore made any adjustment to the compensation calculation under the gossing up principle.

RECOMMENDATIONS

344. The Claimant invited us to make 12 recommendations. The Respondent argued that as the Claimant will never actively work for the Respondent and therefore all excect one of the recommendations are outside our powers as they will not be recommendations that "*obviate or reduce the adverse effect on the complainant*."

345. The Claimant has highlighted that she is currently an employee of the Respondent and therefore she is affected by the policies and procedures the Respondent has in place.

346. The Claimant has also told us, however, that she is concerned about the treatment by the Respondent of other women working for it who may wish to complain about pay in future. She brought to our attention the recent decision by the Cardiff Employment tribunal in the case of *Mr M Shunmugarajav v Royal Mail Group Ltd (*1601036/2017). In that case, the tribunal was satisfied that making recommendations that improve the effectiveness of the Respondent's policies would reduce the anxiety that the Claimant, who had left the Respondent, felt about his friends continuing to work at Royal Mail. The decision is not binding on us of course.

347. The first recommendation sought is an order that the Respondent make a clear and unequivocal apology to the Claimant for its discriminatory treatment of her. This is a recommendation that "*obviate or reduce the adverse effect on the complainant*" and therefore one we consider is within our powers.

348. The Respondent says an order is not necessary as a public apology has already been made. The Claimant does not accept this.

349. We agree with the Claimant that the apologies made to date have not been sufficiently clear and unequivocal. As noted above, Mr Pihan apologised to the claim that she has been hurt, but not that he was responsible for any of it. The open offer of settlement included in the bundle does not contain an apology but says instead:

> *"… we wish to convey to you on behalf of our client that the Bank recognises you have had a very tough time and wishes to reassure you that it has taken the Employment Tribunal's decision very seriously and put in place a detailed remediation project. BNPP has undertaken a significant project to improve its approach to job description and hierarchy transparency, recruitment, performance management, and pay, including from a gender perspective."*

350. We consider the Respondent should apologise more fully from a purely moral perspective, but we decline from ordering it to do this. In our judgment, for an apology to be effective it needs to be genuine and heartfelt rather than ordered. As noted above, we have taken into account the Respondent's failure to apologise when awarding aggravated damages. We consider this is the correct approach in this case.

351. Our decision in relation to the eleven remaining recommendations sought is that we do have the power to order them, because, notwithstanding the arguments made by the Claimant, in our judgment they will not "*obviate or reduce the adverse effect on the complainant*."

352. In light of the view we have taken on reasonable mitigation, the likelihood is that the Claimant will remain employed by the Respondent until she is 65. She will not be actively working for the Respondent, however and so, is highly unlikely to have any policies applied to her. Her relationship with the Respondent will be very limited and governed by the PHI benefit scheme rules. In addition, given her mistrust of the Respondent, we do not think that

if we made any of the recommendations this would alleviate her anxiety or depression.

353. If we are wrong about this, and we do have the power to make some or all of the recommendations, we decline to do so in any event. We are satisfied that each recommendation sought should not be made, for the reasons set out below. Dealing with each of them in turn:

1. *The Respondent should provide detailed equality and diversity training, together with ongoing coaching for managers in relation to their own unconscious bias*

   This is incorporated into the Respondent's rehabilitation programme.

2. *The Respondent should implement a clear, objective policy and process for bonus awards;*

   This is incorporated into the Respondent's rehabilitation programme.

3. *The Respondent should implement a clear, objective policy and process for performance reviews, together with ongoing training and coaching in relation to how to conduct these in a non-discriminatory manner.*

   This is incorporated into the Respondent's rehabilitation programme.

4. *The administration of the complaints resolution process should be with the Human Resources department and not the Legal department and there should be a clear delineation between the two.*

   This request is based on a misunderstanding of where Ms Lawrence sits in the organisation. The complaints resolution process is already in the HR department.

5. *HR should report the number of grievance complaints to compliance together with the results of such complaints.*

   This is already happening.

6. *Any investigations in relation to pay systems should be reviewed by compliance. Compliance should log any issues that transpire on its FCA log. This will reassure staff that their complaints will be dealt with fairly and independently.*

   The FCA determines which complaints should be reported to it.

7. *If complaints are made under the Grievance process, the Respondent must ensure that there is adequate support, counselling and protection for the complainant, and ensure that they are not victimised for making the complaints whether it succeeds or not.*

This has been considered as part of the remediation programme and is being actioned.

8. *If a complaint is made and met by a counter-complaint, they should be investigated alongside each other;*

   The Respondent's processes already incorporate provisions enabling this. The process for investigating of each complaint and counter complaint should be considered on a case by case basis.

9. *If a woman raises a complaint of discrimination in pay or bonus, her performance reviews should be investigated to avoid the practice of the alleged discriminators attempting to justify unlawful action with poor performance reviews to try to justify their unlawful discrimination with an underperformance review or allegations of misconduct. If a complaint of pay discrimination is made then performance reviews should be put on hold until the complaint has been fully investigated.*

   The Respondent's processes already incorporate provisions enabling this. Each case should be considered on a case by case basis.

10. *If any manager is found to have discriminated against others then this misconduct should be recorded on his/her HR file and they should be subject to appropriate disciplinary processes.*

    As noted above, we are surprised that Mr Pihan has not been subjected to any disciplinary action and was awarded a full bonus for 2019. However, this was at the discretion of the Respondent and we did not hear from the decision makers involved. The recommendation sought is of general application. We decline to make a general recommendation, as each case would need to be considered on its own merits. The Respondent's procedures already allow for this.

11. *Mandatory training should be given to all Grievance investigators as be-spoke training to develop their skills prior to undertaking any grievance*.

    This is incorporated into the Respondent's rehabilitation programme.

SECTION 12A – EMPLOYMENT TRIBUNAL'S ACT 1996

354. The Claimant invited us to order the Respondent to pay a penalty under section 12A, but we decline to do so.

355. Although the Claimant's case is not the first in which findings have been made against the Respondent, we do not consider it is an employer that is seeking to deliberately and repeatedly breach employment law. We were impressed with the steps taken as part of the remediation programme. It is notable that we have found many of the recommendations the Claimant has suggested are already in place or being worked on as a result of the remediation programme. In such circumstances we do not consider a section 12A fine is appropriate.

EQUAL PAY AUDIT

356. Our decision is that the Respondent should be ordered to carry out an equal pay audit as required by the Equality Act 2010 (Equal Pay Audits) Regulations 2014 (SI 2014/2559).

357. We consider that we do not have any discretion in this matter because of the way the regulations are drafted. As noted above, we must order this where there has been breach of the Equality Act 2010 equal pay provisions unless the case falls under regulations 3 or 4, when we must not make an order. The current situation does not fall under regulation 4. We have considered the position under regulation 3 carefully and particularly the sub paragraphs which the Respondent says are applicable (3(b) -(d)).

358. It is not disputed that Regulation 3(1)(a) does not apply. The Respondent had not undertaken an equal pay audit in the three years before Ms Macken commenced her employment when the initial breach complained of and found in this litigation occurred.

359. The Respondent says that the Respondent clearly understands what action is needed to prevent equal pay breaches occurring or continuing without an audit. It points to the annual equal pay reviews and believes it has taken steps to correct any equal pay anomalies that may have existed as a result of its exercises in 2019/ 2020 and the work of the remediation programme.

360. The Respondent also argues that the tribunal did not find that equal pay breaches were widespread across the Respondent and so this is a case where the breach found gives no reason to think that there may be other breaches.

361. The tribunal panel disagrees with this proposition. The panel was only required to consider a breach in one case, that of the Claimant. However, a significant factor that led it to reach the decision it did, was the analysis it undertook comparing the Respondent's pay policies and practices with the recommendations set out in the Employment Statutory Code of Practice and the Equal Pay Statutory Code of Practice issued by the EHRC. The panel's analysis found that the Respondent's practice fell short of the recommendations by a significant degree and largely because it chose to have an opaque pay system in common with other financial sector organisations. The logical conclusion was that other women working at the Respondent may have been in the same position as the Claimant.

362. We accepted what Ms Bonnelli told us about the aspects the remediation process in which she was involved. It appeared to us that the Respondent has taken the liability judgment seriously and is making excellent strides in the right direction, but we must recognise that such significant cultural shifts take many years. In addition, it is notable that the Respondent has chosen to retain an opaque pay system, albeit with the introduction of increased transparency around its job hierarchies.

363. Although we have been told that the Respondent has taken measures to resolve any equal pay anomalies, we were provided with very little information about the equal pay exercise. Ms Bonnelli was not close enough to the equal pay review exercise to be able to tell us very much about it. We were not given any information about the methodology involved or sight of any example output. In addition, we were not provided with any information with regard to the comparative process undertaken and how the Respondent is confident that it is correctly comparing roles that are of equal value. This appears to be linked to its new job hierarchy, but we were not given an explanation as to how equal value considerations are taken into account. Finally, we were not given any information about the approach the Respondent takes to material factors that justify differences in pay between men and women doing the same or similar work or work of equal value.

364. We were also told that the equal pay review process does not consider bonus, just base pay, despite the findings that the tribunal made about sex discrimination with regard to the setting of her bonuses. We were told that controls and checks are included in the bonus approval process that ensure that sex discrimination is not present, but we were provided with no information about these checks and how they achieve this aim.

365. The evidence adduced by Respondent therefore leads us to conclude that the exceptions in regulations 3(1)(b) and (c) do not apply to this case.

366. The Respondent did not adduce any evidence relevant to the question we have to ask ourselves under regulation 3(1)(d) which is whether the benefits of the audit would be outweighed by any disadvantage. The only disadvantage the Respondent highlighted was the work that would be involved would duplicate what is already being done as a result of its internal equal pay audit. We see no reason why the Respondent would need to undertake a separate internal equal pay review if the timing of the audit we require is such that the audit we order can provide a substitute for its own internal process. The Respondent is free to decide not to undertake a separate equal pay review in addition to the audit we are ordering.

367. We therefore conclude that the exception in regulation 3(1)(d) does not apply either.

368. Under Regulation 5, we are required to specify descriptions of persons in relation to whom relevant gender pay information must be included in the audit, the period of time to which the audit must relate and specify the date by which the audit must be received by the tribunal.

369. The audit is to cover all of the Respondent's employees. To assist the Respondent and avoid duplication, we order that the audit should be for the same period of time and completed in the same timeframe as the Respondent's equal pay review planned for 2021. Our understanding is that the 2021 review will take place at the end of this year and will cover the calendar year of 2021. It should therefore cover all people who were employed by the Respondent at any point during the year. The definition of

employee for this purpose should be the definition used in the Equality Act 2010.

370. The regulations do not deal with the methodology which should be applied when carrying out an equal pay audit. The purpose, as we intend it, is to ensure that the audit is of the whole organisation and enables a proper comparison to be made of the remuneration levels of men and women employed by the Respondent who are doing work of equal value. We do not require the Respondent to duplicate the work carried out in calculating the overall gender pay gap. Instead, the outcome we are seeking should include a more sophisticated analysis whereby the Respondents explains its approach to equal value in the audit report. We also expect all elements of remuneration to be included i.e. base pay, pension contributions, discretionary bonuses and any other allowances, although not benefits in kind.

371. We are aware that our specified description of the persons to be included will include the following:

(a) individuals not employed for the entire year;

(b) a mixture of full and part time employees; and

(c) employees who absent during part of the year due to sickness absence or other forms of leave and may not have been in receipt of their full earnings.

This is not intended to cause the Respondent any difficulties. The purpose of the audit is to enable a comparison of pay to explore whether the Respondent is paying men and women equally where required to do so. We anticipate the Respondent will be able to deal with scenarios such as these through pro-rated calculations.

372. We require the Respondent to report on the exercise to the tribunal by 30 June 2022. We believe that allowing around 6 months gives the Respondent a sufficiently generous timescale to complete the work.

373. We add that we would expect the report the Respondent produces to be fully anonymised and we do not require any identifying information for the employees included in the report.

_____

Employment Judge E Burns
22 September 2021

First sent to the parties on:

.....4 October 2021.....

.....
For the Tribunals Office

APPENDIX ONE – CALCULATIONS

PAST LOSSES

EQUAL PAY

***** the calculations in the three tables below use figures for C1 as if C1 was receiving benefits under the PHI scheme from 1 Feb 2019

The figures used are gross because of the requirement that they are paid less deductions for tax and NI contributions at the rates applying at the time the payments should have been made.

Base Salary

Time Period	Claimant	C1*	Monthly Difference	Total Difference
8/8/2013 – 31/3/2015 (21 months less 7 days)	£120,000	£160,000	£3,333.33	£69,232.88
1/4/2015 – 31/01/2019 (46 months)	£125,000	£160,000	£2,916.67	£134,166.67
1/2/2019 – 31/03/2019 (2 months)	£87,500	£112,000	£2,041.67	£4,083.33
1/4/2019 – 31/08/2019 (5 months)	£89,687	£114,800	£2,092.75	£10.463.75
1/9/2019 – 31/3/2020 (7 months)	£114,800	£114,800	-	
1/4/2020 – 31/3/2021 (12 months)	£117,899.60	£117,899.60	-	
			Total	**£217,946.63**

Special Allowance

Time Period	Claimant	C1*	Monthly Difference	Total Difference
1/1/2017 – 31/1/2019 (25 months)	£0	£17,000	1,416.67	£35,416.67
1/2/2019 – 31/3/2020	£0	£0		

			Total	**£35,416.67**

Employer Pension Contributions

Time Period	**Claimant**	**C1***	**Monthly Difference**	**Total Difference**
8/8/2013 – 31/3/2014 (9 months less 7 days)	£14,400	£16,992	£216	£1,944
1/4/2014 – 31/3/2015 (12 months)	£14,000	£17,568	£264	£3,168
1/4/2015 – 31/3/2016 (12 months)	£15,000	£18,000	£250	£3,000
1/4/2016 – 31/3/2017 (12 months)	£15,000	£18,144	£637	£,7644
1/4/2017 – 31/3/2018 (12 months)	£15,000	£18,576	£651.13	£7,813.56
1/4/2018 – 31/3/2019 (12 months)	£15,000	£19,200	£452	£5,424
1/4/2019 – 31/8/2019 (5 months)	£15,000	£19,680	£380	£1,950
1/9/2019 – 31/3/2020 (7 months)	£19,680	£19,680	-	-
1/4/20 – 31/3/2021 (12 months)	£20,211.36	£20,211.36	-	-
			Total	**£30,943.56**

PAST LOSSES CONTINUE - DISCRIMINATION COMPENSATION

Losses pre-dating the start of the Claimant's personal injury

Bonus

We show the gross annual figures below, but these have been converted to net figures. Net earnings are calculated as 55% of gross earnings.

Bonus Year	Claimant Gross	C1 Gross	Difference	Net
2013	£3,822*	£8,492	£4,670	£2,568.50
2014	£10,000	£50,000	£40,000	£22,000
2015	£10,000	£50,000	£40,000	£22,000
2016	£10,000	£68,950	£58,950	£32,422.50
2017		£70,000	£70,000	£38,500
			Total	**£117,491**

* Pro-rated to reflect the comparison period (C1 only worked from 8 July 2013)

Losses arising from the Claimant's personal injury

In order to avoid compensating the Claimant twice, we calculate below, the difference in the Claimant's actual income once equalisation has taken place and what she would have received had she not become unwell. She did not begin to suffer a loss in her salary until 1 February 2018. Net earnings are calculated as 55% of gross earnings.

Base Salary

	Amount C would have earned (gross)	Amount C would have earned (net)	C's Actual Income (after equalisation) gross)	C's actual income (after equalisation) (net)	Monthly difference (net)	Total difference
01/02/2019 – 31/03/2019 (2 months)	£160,000.00*	£88,000.00	£87,500.00	£48,125.00	£3,322.92	£6,645.83
01/04/2019 – 31/08/2019 (5 months)	£160,000.00*	£88,000.00	£89,687.00	£49,327.85	£3,222.68	£16,113.40
01/09/2019 – 28/02/2020 (6 months)	£160,000.00*	£88,000.00	£114,800.00	£63,140.00	£2,071.67	£12,430.00
1/3/2020 – 31/03/2020 (1 month)	£177,000.00**	£97,350.00	£114,800.00	£63,140.00	£2,850.83	£2,850.83
1/4/2020 – 31/3/2021	£177,000.00**	£97,350.00	£117,899.60	£64,844.78	£2,708.77	£32,505.22
					Total	**£70,545.28**

* based on comparator 1's salary of £160,000
** based on comparator 1's salary of £177,000 (increased from 1 March 2020)

Special Allowance

	Amount C would have earned (gross)	Amount C would have earned (net)	C's actual income after equalisation (gross)	C's actual income after equalisation (net)	Monthly difference (net)	Total difference
01/02/2019 – 28/2/2020 (13 months)	£17,000*	£9,350	£0	£0	£779.17	£10,129.17
					Total	**£10,129.17**

* Based on a special allowance of £17,000 per annum paid to C1

Employer Pension Contributions

The pension contributions are not subject to deductions so only gross figures have been used.

	Amount C would have earned in pension contributions	C's actual pension contributions (after equalisation)	Annual difference	Total difference
01/02/2019 – 31/03/2019 (2 months)	£19,200	£19,200	-	
01/04/2019 – 31/08/2019 (5 months)	£19,200	£19,200	-	
01/09/2019 – 28/02/2020 (6 months)	£19,200	£19,680	-£480	-£240
1/3/2020 – 31/03/2020 (1 month)	£21,240*	£19,680	£1,560	£130
1/4/2020 – 31/3/2021	£21,240*	£20,211.36	£1,028.64	£1,028.64
			Total	**£918.64**

* Based on C1's salary of £177,000, to which C would have been equalised had she not been in receipt of PHI

Bonus

Time Period	**What the Claimant would have earned, but for the injury (gross)**	**What the Claimant would have earned, but for the injury (net)**	**Claimant's Actual Net Earnings**	**Total net Difference**
2018	£66,000*	£36,300	0	£36,300
2019	£73,000*	£40,150	0	£40,150
2020	£94,000*	£51,700	0	£51,700
			Total	**£128,150**

* based on the bonus amounts C1 earned

FUTURE LOSS CALCULATIONS

Base Salary and Bonus

Age	Pay Rise [1]	Predicted Gross Earnings	Predicted Net Earnings	Predicted Net Bonus [2]	Total Predicted Net Earnings	Actual Gross Earnings [3]	Actual Net Earnings	Loss	Multiplier	Lost earnings
50		£177,000.00	£97,350.00	£34,072.50	£131,422.50	£119,668.09	£65,817.45	£65,605.05	1.00	£65,605.05
51		£177,000.00	£97,350.00	£34,072.50	£131,422.50	£122,659.80	£67,462.89	£63,959.61	1.00	£63,959.61
52		£177,000.00	£97,350.00	£34,072.50	£131,422.50	£125,726.29	£69,149.46	£62,273.04	1.00	£62,273.04
53		£177,000.00	£97,350.00	£34,072.50	£131,422.50	£128,869.45	£70,878.20	£60,544.30	1.00	£60,544.30
54		£177,000.00	£97,350.00	£34,072.50	£131,422.50	£132,091.18	£72,650.15	£58,772.35	1.00	£58,772.35
55	£17,700.0	£194,700.00	£107,085.00	£37,479.75	£144,564.75	£135,393.46	£74,466.41	£70,098.34	1.00	£70,098.34
56		£194,700.00	£107,085.00	£37,479.75	£144,564.75	£138,778.30	£76,328.07	£68,236.68	1.00	£68,236.68
57		£194,700.00	£107,085.00	£37,479.75	£144,564.75	£142,247.76	£78,236.27	£66,328.48	1.00	£66,328.48
58		£194,700.00	£107,085.00	£37,479.75	£144,564.75	£145,803.95	£80,192.17	£64,372.58	1.00	£64,372.58
59		£194,700.00	£107,085.00	£37,479.75	£144,564.75	£149,449.05	£82,196.98	£62,367.77	1.00	£62,367.77
60	£19,470.00	£214,170.00	£117,793.50	£41,227.73	£159,021.23	£153,185.28	£84,251.90	£74,769.32	1.00	£74,769.32
61		£214,170.00	£117,793.50	£41,227.73	£159,021.23	£157,014.91	£86,358.20	£72,663.02	0.99	£71,936.39
62		£214,170.00	£117,793.50	£41,227.73	£159,021.23	£160,940.28	£88,517.16	£70,504.07	0.99	£69,799.03
63		£214,170.00	£117,793.50	£41,227.73	£159,021.23	£164,963.79	£90,730.08	£68,291.14	0.99	£67,608.23
64		£214,170.00	£117,793.50	£41,227.73	£159,021.23	£169,087.88	£92,998.34	£66,022.89	0.99	£65,362.66
									14.96 [4]	£992,033.85
									0.85 [5]	**£843,228.77**

[1] takes into account two pay increases of 10% at 5 year intervals
[2] net bonus is calculated as 35% of predicted net earnings
[3] based on the Claimant's current PHI benefit using a reference salary of £117,900 but assuming an increase in RPI of 1.5% in 2021 and 2.5% thereafter

[4] The multiplier of 14.96 comes from Ogden table 10 and has been distributed as shown above
[5] Applying table C gives a discount factor of 0.85%

Employer Pension Contributions

Age	Predicted Pension	Actual pension	Difference	Multiple	
50	£21,240.00	£20,514.53	£725.47	1.00	£725.47
51	£21,240.00	£21,027.39	£212.61	1.00	£212.61
52	£21,240.00	£21,553.08	-£313.08	1.00	-£313.08
53	£21,240.00	£22,091.91	-£851.91	1.00	-£851.91
54	£21,240.00	£22,644.20	-£1,404.20	1.00	-£1,404.20
55	£23,364.00	£23,210.31	£153.69	1.00	£153.69
56	£23,364.00	£23,790.57	-£426.57	1.00	-£426.57
57	£23,364.00	£24,385.33	-£1,021.33	1.00	-£1,021.33
58	£23,364.00	£24,994.96	-£1,630.96	1.00	-£1,630.96
59	£23,364.00	£25,619.84	-£2,255.84	1.00	-£2,255.84
60	£25,700.40	£26,260.33	-£559.93	1.00	-£559.93
61	£25,700.40	£26,916.84	-£1,216.44	0.99	-£1,204.28
62	£25,700.40	£27,589.76	-£1,889.36	0.99	-£1,870.47
63	£25,700.40	£28,279.51	-£2,579.11	0.99	-£2,553.32
64	£25,700.40	£28,986.49	-£3,286.09	0.99	-£3,253.23
				14.96	-£16,253.34
				0.85	**-£13,815.34**

INTEREST CALCULATIONS

Bonus

Bonus	**Payment due**	**Calculation Date**	Number of Days	Compensation	Interest
2013	31/03/2014	28/02/2021	2526	£2,568.50	£711.02
2104	31/03/2015	28/02/2021	2161	£22,000.00	£5,210.08
2015	31/03/2016	28/02/2021	1795	£22,000.00	£4,327.67
2016	31/03/2017	28/02/2021	1430	£32,422.50	£5,081.01
2017	31/03/2018	28/02/2021	1065	£38,500.00	£4,493.42
2018	31/03/2019	28/02/2021	700	£36,300.00	£2,784.66
2019	31/03/2020	31/03/2021	365	£40,150.00	£1,606.00
2020	31/03/2021	31/03/2021	0	£51,700.00	£0.00
				total	**£24,213.86**

Total Interest

Type of Compensation	**Interest**
Injury to feelings	£19,615.34
Aggravated damages	£8,406.58
Injury itself	£14,403.27
Loss of congenial employment	£6421.22
Past treatment costs	£818.52
Equal pay base salary	£58,708.25
Equal pay special allowance	£104.79
Equal pay employer pension contributions	£8,335.26
PI – base salary	£19,768.14
PI – special allowances	£1,720.57
PI employer pension contributions	£257.42
Bonus (all)	£24,213.86
Total	**£162,773.22**

APPENDIX TWO – LIST OF ISSUES

1. **Employment Tribunal Recommendations**

    a. Are there any policies, procedures or controls that the Tribunal should order or recommend in relation to the Respondent's internal practices arising out of the discrimination claims? And if so, what time period is required for completion of these recommendations?

    b. Should the Tribunal recommend the Respondent make a public apology arising out of the discrimination claims?

2. **Equal pay audit**

    a. Should the Tribunal order the Respondent to carry out an equal pay audit, and if so

    b. What should be the scope of that audit in terms of:

        i. The period of time to which the audit must relate; and

        ii. The descriptions of persons in relation to whom relevant gender pay information must be included in the audit?

    c. By what date must the Respondent send the results of the audit to the Tribunal?

    d. By what date must the Respondent publish the audit on its website and inform all persons about whom relevant gender pay information was included in the audit where they can obtain a copy?

    e. By what date must the Respondent send the Tribunal evidence (d) has been completed?

3. **Equalisation of Salary and Special Allowance**

To what amount should the Claimant's base salary be equalized and should it include the £17,000 amount purported to be paid to the comparator as a special allowance awarded from 2017?

NB It is not disputed that the comparator's earnings increased by £17,000 from 2017. The Respondent says this was a special allowance that was only later incorporated into the comparator's base salary in 2020. R concedes, in this case that C was entitled to it. If, however, the increase was intended as an increase in base salary from 2017, disguised as a special allowance, C says she should also receive it as base salary and there is an impact on her entitlement to pension contributions and PHI.

4. Underpayment of Salary

a. What is the total amount of underpayment of salary and should it include the £17,000 amount awarded from 2017?

b. Should interest be awarded and from what date should it be calculated?

5. Underpayment of bonus

a. What is the total amount of underpayment of bonus?

b. From what date should interest be calculated?

6. Underpayment of pension

a. What is the total amount of underpayment of pension?

b. Should interest be awarded and from what date should it be calculated?

7. Injury to feelings

a. What is the appropriate level of compensation for injury to feelings?

b. Should interest be applied on injury to feelings under The Employment Tribunals (interest on awards in discrimination cases) Regulations 1996? And if so, from what date should interest be calculated?

8. Aggravated damages

a. Should there be a separate award for aggravated damages and if so, what amount should be awarded?

b. Has the threshold for aggravated damages been satisfied? Did the Respondent act in a high handed, malicious, insulting or oppressive manner? If so, did the Claimant suffer greater injury by reason of this conduct?

9. S12A fine – Employment Tribunals Act 1996

a. Can and Should the Tribunal order the Respondent to pay a financial penalty to the Secretary of State under section 12A of the Employment Tribunals Act 1996?

10. Personal (psychiatric) Injury

a. Has the Claimant suffered a psychiatric injury?

b. Was this injury caused by the Respondents' discrimination and victimisation of the Claimant?

c. What level of General Damages should be awarded?

d. Should the General Damages award be uplifted for inflation plus 10% pursuant to *Da Souza v Vinci Construction (2017) EWCA Civ 879*?

e. What amount of Special Damages should be awarded?

i. Past loss of earnings (salary, bonus, pension, benefits/allowances)

ii. Future loss of earnings (salary, bonus, pension, benefits/allowances)

What is the Claimant capable of earning in another role as credit must be given for that sum.

iii. Past and future medication and treatment costs

f. Should interest be calculated on personal injury past loss of earnings? If so from what date?

NB It is noted that there should be no double counting and any remedy for past loss of earnings should be applied after equalisation has taken place.

11. Stigma Damage

a. Has the Respondent caused the Claimant to suffer Stigma Damage?

b. Should interest be calculated on Stigma damages? If so from what date?

12. ACAS increased award - section 207A TULCRA

a. Does the claim concern a matter to which the ACAS Code of Conduct for Grievance and Disciplinary procedures applies?

b. Has the Respondent failed to comply with the ACAS Code of Conduct in relation to that matter and was the failure unreasonable?

c. What level of uplift/increase in award is just and equitable to apply pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992?

d. Over what period should interest be calculated on this uplift?

13. Gross up for taxation

a. Which, if any, elements of the Claimants award should be grossed up for taxation?

14. Reduction for amounts previously paid

a. What amount has the Respondent already paid to the Claimant in relation to the Tribunal's findings, and how should credit be given for that sum?

APPENDIX THREE - RRO

EMPLOYMENT TRIBUNALS

Claimant: **Ms S Macken**

Respondent: **BNP Paribas SA, London Branch**

RESTRICTED REPORTING ORDER
Employment Tribunals Rules of Procedure 2013

Pursuant to rule 50(1) of the Employment Tribunals Rules of Procedure 2013 (the Tribunal Rules) **THIS ORDER PROHIBITS** the publication in Great Britain, in respect of the above proceedings, of detailed medical information about the Claimant in a written publication available to the public, or its inclusion in a relevant programme for reception in Great Britain.

This does not extend to any details contained in the Claimant's redacted witness statement made available for inspection by members of the public in accordance with rule 44 of the Tribunal Rules.

This Order remains in force indefinitely. It supersedes the order made in this case on 10 March 2021.

Breach of this order could lead to committal proceedings for contempt

Dated: 17 September 2021

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Employment Judge E Burns

ORDER SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE