# EMPLOYMENT TRIBUNALS

| **Claimant:** | | **Respondent:** |
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| Mrs M O'Donnell | **v** | Wokingham Borough Council |

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| **Heard at:** | Reading<br>and<br>In chambers | On: 11 and 12 December 2019<br><br>On: 22 June 2020 |
| **Before:** | Employment Judge Hawksworth<br>Miss J Stewart<br>Mr J Appleton | |

**Appearances**
**For the Claimant:** In person
**For the Respondent:** Ms N Hausdorff (counsel)

## RESERVED JUDGMENT (REMEDY)
### CORRECTED UNDER RULE 69[1]

The unanimous judgment of the tribunal is:

1. The respondent must pay the claimant compensation for discrimination of £235,046.37 comprising:

    1.1. £1,384.55 for pre-dismissal loss of earnings (of which £174.05 is interest);
    1.2. £7,769.32 for pre-dismissal injury to feelings (of which £2,769.32 is interest);
    1.3. £119,686.51 for financial loss related to dismissal (of which £10,786.06 is interest);
    1.4. £20,344.99 for injury to feelings related to dismissal (of which £4,344.99 is interest);
    1.5. £85,861 in respect of tax payable on the award ('grossing up').

[1] This reserved remedy judgment was corrected on 20 August 2020 under rule 69 (correction of clerical mistakes and accidental slips). There was a numerical error in the figure for the total award after grossing up in the final line of table 16, and in paragraph 1 of the judgment. The figure given was £225,892.50, made up of the total dismissal-related award (£140,031.50) plus grossing up for tax (£85,861). The correct figure is £235,046.37 made up of the total pre-dismissal and dismissal awards (£149,185.37) plus grossing up for tax (£85,861).

2. The tribunal makes the following recommendations:

    2.1. that within 6 weeks, the respondent's chief executive sends a written apology to the claimant for the unlawful treatment to which she was subjected; and
    2.2. that within 6 months, the respondent's chief executive writes to the claimant to tell her whether the respondent has carried out any reviews or made any changes to its policies or procedures, and if so what has been done, and whether it has learned any other lessons from her case.

3. The claimant's claim for pension loss will be decided at a second stage remedy hearing, a notice of hearing and case management orders for that hearing will be sent separately.

# REASONS

**Claim, hearings and evidence**

1. By a claim form presented on 19 October 2017 after Acas early conciliation from 24 August 2017 to 24 September 2017, the claimant brought complaints of direct disability discrimination, failure to make reasonable adjustments and unfair dismissal.

2. The liability hearing took place on 11 to 15 February 2019, and there was a deliberation day on 25 April 2019. Judgment was reserved and sent to the parties on 24 June 2019. The claimant's complaints succeeded.

3. A remedy hearing took place on 11 and 12 December 2019.

4. Two case management issues arose at the start of the remedy hearing.

5. First, an issue arose about amendments made by the claimant to her schedule of loss. The claimant had prepared an updated schedule of loss dated 5 November 2019. The respondent served a detailed counter-schedule of loss on 4 December 2019. The claimant amended her schedule of loss to address some of the points raised by the respondent in the counter-schedule. The respondent asked the tribunal not to admit the claimant's amended schedule of loss. It had particular concerns over changes to the calculations concerning loss of pension. We decided that it was helpful for us to see the calculations being put forward by the claimant to address the points raised by the respondent, for example, correcting the use of gross figures and using net figures instead. It was open to the respondent to cross-examine the claimant on any questions arising from her amended schedule of loss with which it did not agree.

6. Secondly, the claimant sought to introduce additional documents which she said she relied on in response to issues raised in the respondent's witness statement. This concerned a question raised by the respondent about the medication the claimant had been prescribed. The claimant sought to rely on a witness statement from a therapist and some translations of invoices from the therapist. The respondent said that the evidence, which had initially been obtained for the liability hearing but not relied on, had been provided very late in the day and without the leave of the tribunal. The claimant said she did not seek to rely on medical evidence, and the statement was only provided to address a credibility point which the respondent had raised. We decided that we should not consider the additional documents.

7. The parties had prepared an agreed remedy bundle with 651 pages. We took some time on the morning of 11 December 2019 for reading.

8. After reading we heard evidence from the claimant. The claimant had produced a witness statement. She also served statements for Ms Kemp, Ms George and Mr O'Donnell; the respondent did not have any questions for these witnesses. The claimant also served a statement by Mr Jamie Smart. His statement was not accepted by the respondent, but he had only limited availability to attend the tribunal and in the event he did not attend. The claimant asked us to attach such weight to his written statement as we thought appropriate.

9. The respondent served a statement for Mr O'Connor, the Head of Service for the respondent's legal department and he gave evidence at the hearing.

10. The tribunal reserved judgment on remedy. As the tribunal had insufficient time on 12 December 2019 to conclude its deliberations, a further day in chambers was arranged for 10 March 2020. Unfortunately, this had to be postponed because of the ill-health of one of the tribunal members, and there were then further delays caused by the Covid-19 measures. The employment judge apologises to the parties for the delay in promulgation of this reserved judgment.

**The issues**

11. The remedy hearing is for the tribunal to decide the compensation and any other remedy which the claimant should be awarded for unfair dismissal, direct disability discrimination and the failure to make reasonable adjustments. There are a number of issues we have to determine to decide the compensation the claimant should be awarded. These were set out by the respondent in its counter-schedule and at the start of the hearing and include:

    11.1. In relation to financial loss, was the claimant's decision to retrain and

pursue a career as a life coach reasonable?

11.2. Has the claimant failed to mitigate her losses?

11.3. Is the claimant entitled to claim her retraining costs and other expenses?

11.4. What injury to feelings award should be made?

11.5. Should there be any uplift because of a failure by the respondent to follow the Acas Code of Practice on Disciplinary and Grievance Procedures when it dealt with the claimant's grievance?

11.6. How should the tribunal approach pension loss? The claimant was a member of the Local Government Pension Scheme when employed by the respondent and claims loss of pension.

12. In addition, the claimant seeks recommendations about the respondent's policies, procedures and practices, in particular, for the respondent:

12.1. to put in place risk assessments and Personal Emergency Evacuation Plans (PEEPs) for all employees with disabilities which restrict their ability to evacuate the premises in an emergency;

12.2. to amend the annual leave and sick leave policies to record that people who are unfit for work are not precluded from taking annual leave;

12.3. to ensure greater scrutiny and oversight of interview and selection processes so that employees with protected characteristics are not disadvantaged.

## Findings of fact

13. We set out here our findings which are relevant to the remedy issues we have to determine. References to page numbers are to the remedy hearing bundle.

Background

14. The claimant began working at Wokingham Borough Council on 10 July 2000 as a Communications Team Manager. She was promoted to the role of Strategy Officer in Adult Social Care on 1 June 2006 and to Policy, Strategy and Commissioning Manager in Adult Social Care, a grade 10 role, on 1 July 2014.

15. At the time of her dismissal, the claimant had over 16 years' service and was aged 43.

16. The claimant's pay in grade 10 for 2016 and 2017 was as set out in table 1 below.

17. Gross annual salary is from the respondent's pay scales (page 280). The

net figures are from the claimant's schedule of loss and are the figures after deduction of the employee pension contribution. The respondent did not challenge the netted down figures given by the claimant in her schedule of loss. (The claimant's schedule of loss had a small slip in the annual gross salary for pay point 50 as it said £44,769 but this does not have any significant impact on the net figures.)

| Table 1: the claimant's salary in grade 10 role with the respondent | | | | |
|---|---|---|---|---|
| Date | Pay point | Gross annual salary | Net annual salary | Net weekly salary |
| April 2016 | 49 | £43,387 | £30,348 | £584 |
| April 2017 | 50 | £44,761 | £31,284 | £602 |

The discriminatory acts/omissions and their impact on the claimant

18. We include here a summary of our findings and conclusions from our liability decision on the discriminatory acts and omissions, and our findings about the impact they had on the claimant.

19. We found that the respondent failed to make reasonable adjustments to address accessibility issues over the period from 26 July 2013 to 11 December 2016. The claimant, who uses a wheelchair, could not access one of the desks occupied by her team. The claimant found the long-standing issues with the office layout demeaning and humiliating. It was embarrassing and disruptive to have to speak to team members across two desks because she could not access all of her team's desks.

20. We also found that the respondent failed to carry out a risk assessment and put in place a Personal Emergency Evacuation Plan for the claimant over the period from 31 May 2015 to 11 December 2016. The claimant worked on the first floor and there was no specific plan in place for how she should be evacuated in a fire or emergency. The claimant did not feel safe.

21. At the liability hearing, the head of service for the respondent's property team said that it was the claimant's responsibility to know how to evacuate herself from the building in an emergency. The respondent's failure to take steps to ensure the claimant's safety made the claimant feel like a lesser class employee who did not deserve to be protected from harm.

22. From 1 June 2016 to 12 December 2016 the claimant took on additional management responsibilities to cover a vacant grade 11 post, including managing additional team members. We found that the respondent directly discriminated against the claimant when on 22 November 2016 it failed to appoint her to the vacant grade 11 post following an internal recruitment process.

23. The claimant was very upset about not being given the post. She cried all

the way home and all evening that day, and frequently in the following days and weeks. She could not understand why she had been rejected. She felt humiliated that after she had managed the team for six months she was not given the permanent post and it was felt that it was better for someone else to do it. This impacted on her self-esteem and confidence.

24. The successful candidate Ms Rees took up this role on 1 January 2017, but she moved from another department to take up the role. At the time Ms Rees was offered the role, the claimant was already performing some elements of it, and she was asked to continue to do so in the period before Ms Rees took up the role. We find that if the claimant had been offered this role, she would have been able to start immediately, on 22 November 2016. If she had been offered the grade 11 role, the claimant's annual salary would have increased. Instead, the claimant remained in her grade 10 role with a grade 10 salary.

25. The claimant had a period of sickness absence from 12 December 2016 to 31 May 2017 which arose from and was related to her disability. During the claimant's sick leave, the respondent underwent a council-wide restructuring process. There were no grade 10 roles in the claimant's department in the new structure. The claimant was required to go through an interview and selection procedure while she was on sick leave. She was not successful in being assimilated or appointed to a grade 11 or a higher SM1 role. She was offered a grade 9 role as a suitable alternative. We found that the respondent failed to make reasonable adjustments to the interview and selection procedure and that had it done so, the claimant would have been permanently appointed to a grade 11 role.

26. The respondent required the claimant to complete an application for assimilation and lengthy expressions of interest as part of the restructure process. She was asked to provide more information about her expression of interest on 12 and 28 April 2017. The respondent required the claimant to take these steps even though she was on sick leave and the respondent was aware that the claimant's doctors had advised limiting all activities to reduce further nerve damage. The respondent was aware that the claimant was in constant pain, on painkillers and struggling to type. This caused the claimant very significant worry and distress. She was also caused high levels of anxiety about whether she would have a suitable job after the restructure, and this lasted from February 2017 until May 2017, a time while the claimant was waiting for and recuperating from two operations.

27. After the claimant was told that her application for assimilation was unsuccessful, the respondent did not reply to the claimant's request for this to be reconsidered. After considering the claimant's expressions of interest, the respondent sent the claimant an email to say that she was not successful in securing a grade 11 or SM1 role. The claimant found this

news devastating. She had held managerial positions for most of her career with the respondent. She felt rejected. The grade 9 role the claimant was offered was not a managerial position and was a demotion. We found that the claimant was entitled to reject it. It would have resulted in the claimant working alongside those she had previously managed. The claimant felt her career of 16 years was over. On the day she received the email she cried inconsolably for the rest of the day and frequently afterwards. She found it hard to sleep. She feels a deep sense of injustice about what had happened to her.

28. The claimant wrote to the respondent on 26 May 2017 to raise the possibility of redundancy as she felt she had not been offered any suitable role. The respondent dismissed the claimant for redundancy four days later; the dismissal took effect on 31 May 2017. We were not provided with any explanation as to why the claimant was given (largely) pay in lieu of notice rather than the 12 week notice period to which she was entitled, or why there was no response to the claimant's request for 7 days to consider the offer of redundancy.

29. We found that the respondent's failure to make adjustments for the claimant by requiring her to go through an interview and selection process amounted to conduct extending over a period, starting with the notification on 9 February 2017 that her role was at risk under the restructure programme and ending with the termination of her employment on 31 May 2017.

30. We also found that the respondent failed to make reasonable adjustments when (before the claimant's dismissal) it refused to allow the claimant to take annual leave for a three-week period from 9 to 30 June 2017, because she was not fit to return to work at this time. This made the claimant feel that the respondent did not want to support her in any way. Its actions left her feeling stressed, upset and anxious.

31. We find that the claimant would have been fit to return to work on 3 July 2017, this was the date on which she had been advised that she would have recovered sufficiently to return to work. If the respondent had allowed the claimant to take annual leave, which we have found would have been a reasonable adjustment, and if the claimant had not been dismissed, she would have continued to receive full pay until her return to work.

32. The claimant told us, and we accept, that the respondent's actions had a profound effect on her and were continuing two and a half years after her dismissal. She is still upset about the unfairness of her successful career of over 16 years ending in her dismissal. She thought she had job security and never expected to leave the respondent before her retirement.

33. The respondent has not made any apology to the claimant and the claimant

feels that the respondent has failed to take ownership for the findings made against it. Her perception, which we accept is reasonable, is that there was no evidence that the respondent took any actions or had any intention of putting right any of its wrongdoings, not just for her, but also for other disabled employees.

The claimant's dismissal

34. The claimant was dismissed with effect from 31 May 2017. She received a statutory redundancy payment of £8,557.50, an enhanced redundancy payment of £6,894 and pay in lieu of notice of £11,190 (page 117).

35. We found that the claimant was unfairly dismissed for redundancy as there were suitable alternative roles available to which she could have been redeployed. We concluded that it was reasonable for the claimant to reject the grade 9 role that she was offered as it was not a suitable alternative role for her.

36. We also found that the claimant's dismissal was discriminatory. It was because of the discriminatory treatment to which she was subjected, the failure to make reasonable adjustments by assimilating her to a grade 11 role (or by waiting for her to be well enough to go through an in-person interview process). We found that if the discrimination had not taken place, the claimant would have been assimilated to or appointed to a grade 11 role and that the role would have been made permanent.

Salary for grade 11 role

37. We set out here our findings about the salary for grade 11 at the respondent from April 2016, and likely future salary for the grade to April 2022.

38. The annual salary for grade 11 roles at the respondent for the years starting April 2016 and April 2017 were set out in the respondent's pay scales (page 280). For April 2018 and April 2019 the claimant relied on NICVA pay scales which set out nationally agreed local government pay scales (page 278A to 278D). For April 2020 the claimant estimated the gross annual figure by assuming an annual increase of 1% on the relevant pay point (57) for the previous year: £53,727 x 1.01 = £54,264 (there was a small slip in the claimant's schedule as it gave this annual figure as £54,364 but this did not affect the net figures to any significant degree). The estimate for annual salary for April 2021 assumed annual increases of 1% on the relevant pay point (58) for April 2019 for two years: £54,775 x 1.01 x 1.01 = £55,875. The respondent did not challenge these figures. We have used the same approach for April 2022 for pay point 59: £55,820 x 1.01 x 1.01 x 1.01 = £57,511.

39. We accept the netted down salary figures for the years up to April 2021 given in the claimant's schedule of loss. These figures were not challenged by the respondent. We have calculated the net figure for 2022 proportionately with the net/gross figures for 2021. The grade 11 salary figures are set out in table 2 below (net salaries are after pension contribution).

| Table 2: salary in grade 11 role with the respondent | | | | |
|---|---|---|---|---|
| Date | Pay point | Gross annual salary | Net annual salary | Net weekly salary |
| April 2016 | 53 | £47,129 | £32,738 | £630 |
| April 2017 | 54 | £48,547 | £33,643 | £647 |
| April 2018 | 55 | £50,617 | £35,069 | £674 |
| April 2019 | 56 | £52,681 | £36,418 | £700 |
| April 2020 | 57 | £54,264 | £37,847 | £728 |
| April 2021 | 58 | £55,875 | £38,661 | £743 |
| April 2022 | 59 | £57,511 | £39,792 | £764 |

The claimant's employment if she had not been subject to discrimination

40. We have next considered what would have happened if the claimant had been appointed to a grade 11 role, and how long the claimant would have remained employed by the respondent.

41. The claimant's job with the respondent was her first job after leaving university. She had worked there for almost 17 years. She chose to accept the job with the respondent because she could drive to the offices within half an hour and park near the entrance. This was a particularly important factor for the claimant as she is not able to use public transport and is limited as to the length of time for which she can commute to work.

42. The respondent had flexible working hours, career progression option, training, generous holiday allowance, salary and pension. The pension was particularly important to the claimant. Both she and her husband are disabled and have permanent neurological conditions that impair their mobility and have had a detrimental effect on their overall health. They are likely to require more specialist care as they get older, although the claimant's GP provided a letter which said that the claimant would not be expected to have to retire before the usual age of 67 (page 370).

43. The claimant worked hard in her career with the respondent to gain skills, experience and qualifications to become a specialist in strategic commissioning.

44. For these reasons, we accept the claimant's evidence that she planned to remain working for the respondent until her retirement. We find it is very unlikely that the claimant would have decided to leave the respondent's

employment (unless she had found another local role at a similar level, which we think unlikely).

45. The claimant claims loss of salary for three years. To determine this aspect of her claim, we must make an assessment of the chance that she would have remained working with the respondent for another three years. We have found that it is very unlikely that the claimant would have decided to leave the respondent's employment. It was not suggested to us that if she had been appointed to a grade 11 role in the restructure, the claimant would have been made redundant in a future restructure in the near future. However, we think there is some possibility that future changes to the respondent's ways of working would have meant that another redundancy situation could have arisen at some point in the next three years, or that some other unforeseen circumstance could have led to the claimant's employment ending within this period. We assess this chance as low but not insignificant, and so we conclude that there was an 80% chance that the claimant would have stayed working for the council until December 2022.

46. We have next assessed the chance that the claimant would have remained working for the respondent from December 2022 until age 67, an additional 18 years. It is obviously more difficult to predict what will happen over that longer period. The uncertainties are greater. We take into account the fact that, as we have accepted, the claimant intended to remain with the respondent until retirement, but we find that there remains a possibility that the claimant's employment could have come to an end before her retirement date for reasons which were outside her control or because circumstances changed.

47. In her schedule of loss, the claimant suggested that factors which should be taken into account when assessing the likelihood of her continuing to work for the respondent until age 67 include redundancy, early retirement due to her disability or early retirement to care for her husband (page 120). We note that in a case of early retirement due to her disability, the claimant may have had the possibility of applying for an ill health pension, subject to meeting the qualifying criteria, and in that case she may not have had the same loss of pension as if she left the respondent's employment earlier for other reasons.

48. We accept that there are factors which could have led to the claimant retiring earlier than she expected, including those she has raised, and that there may be other unexpected factors which cannot be foreseen. Taking these into account, we have reached the conclusion that overall there was a 65% chance that the claimant would have stayed working with the respondent from December 2022 for the remainder of her career, until she reached the retirement age of 67.

49. In her schedule of loss, the claimant included an assumption that she would have been promoted to grade SM1 in 6 years' time. We find that there is too much uncertainty for us to make a finding about this; it is too hypothetical. We make no finding about any future promotion which the claimant would have had with the respondent.

The claimant's grievance

50. The claimant made a formal grievance complaint on the day of her dismissal. The respondent decided that as the claimant had been dismissed (with pay in lieu of notice) and her employment was not continuing, her complaint did not fall within its grievance procedure. Instead, her complaint was reviewed by Mr O'Connor, the Head of Service for the respondent's Legal Department.

51. Mr O'Connor did not write to the claimant to tell her that he would be dealing with her grievance, and he did not meet with the claimant. The first contact the claimant had from Mr O'Connor was his letter of 21 June 2017 in which he said that in recognition of the claimant's long service to the authority, the respondent would respond to the concerns she had raised. He set out his response which was not to uphold any of the claimant's grievances (page 558 to 562).

52. The claimant was not offered an appeal against Mr O'Connor's decision.

Factors restricting the claimant's job search

53. After her dismissal by the respondent on 31 May 2017, the claimant began looking for another job. There were a number of factors restricting the claimant's job search.

54. The claimant's disability severely limits her mobility and her job search is restricted in several ways because of this. First, her home has been adapted to meet her needs and so relocation is not a realistic option.

55. Also, the claimant is unable to use public transport and has to use her car to travel to work. She is unable to drive comfortably and regularly for more than an hour. This prevents her from taking a job which requires regular commuting of more than an hour, which includes jobs based in London. She is unable to apply for jobs which require travel to customer sites or which are located in buildings without parking or without wheelchair access. She cannot use on-street parking or multi-storey car parks because of the space needed for wheelchair stowage on her car.

56. A negative perception of disabled people as employees was another barrier to the claimant's job-search. The claimant has spina bifida. She relied on a

letter from Shine, a charity which provides advice and support for spina bifida, which said that employment will be far more difficult for the claimant to find than for non-disabled people because of limitations arising from the built environment, travel, inability to relocate and from a 'far from level playing field' in relation to recruitment (page 371 to 372). The respondent's representative said that it was 'simply not credible that employers would not make adjustments for [the claimant] in this day and age, especially local authorities'. We were surprised by this comment, as it was made in the context of a claim in which we had found that the respondent itself, a local authority, had failed to make adjustments for the claimant in three different ways, in relation to a physical feature of the workplace as well as two different PCPs, and over a lengthy period of time.

57. We accept the claimant's evidence that mobility and travel restrictions combined with the possibility that some employers would have a negative perception were very likely to have made her job-search more difficult than for a non-disabled person.

58. The claimant's evidence was that she also found her job search difficult as she was dealing with a lack of confidence and lack of self-belief as a result of being rejected for three roles by the respondent. This was supported by the evidence of Ms George, who provided the claimant with peer-coaching. We accept this evidence.

59. Another factor limiting the claimant's job search was the availability of suitable roles. The claimant's main area of expertise when she left the respondent's employment was policy, strategy and commissioning of social care services. The most likely alternative role for someone with those skills would be with a local authority. The claimant is unable to travel to most of the local authorities in Berkshire or any of the London local authorities because of distance and parking restrictions. Only Reading and Bracknell councils are within travelling distance for the claimant. No suitable jobs with those councils were advertised during the period of the claimant's job-search.

60. In addition, cutbacks in the funding of public services have reduced the number of vacancies in local authorities, for example Reading Borough Council, the local authority employer which is closest to the claimant's home, planned to cut 200 jobs in July 2016 (page 266).

61. These factors meant that there were very limited local employment opportunities for the claimant as a social care commissioning manager.

62. The respondent produced copies of job advertisements taken from online job searches relating to commissioning roles in and around London and the South East in October/November 2019 (pages 581 to 651). They were

vacancies in 2019, not when the claimant was looking for a job in 2017/18. Many of the jobs were multiple listings; there were about 26 separate vacancies in these adverts. The claimant submitted, and we accept, that of those 26 vacancies, 12 did not have the equivalent level of skills for her, and two were roles with the respondent. This left 12 jobs, none of which were in locations to which the claimant could commute. Therefore, although this exercise carried out by the respondent might have suggested that these could have been suitable roles for the claimant, when the claimant's particular circumstances were taken into account, none of them roles which were suitable for her.

63. The claimant also carried out an online job search for commissioning manager posts, on 4 November 2019 (pages 579 to 580). The search revealed around 40 jobs, of which only one was suitable for the claimant in terms of location: it was a vacancy with the respondent (it was one of the jobs the claimant applied for in the restructure).

The claimant's job search

64. The claimant registered with over 30 recruitment agencies after her dismissal. She considered jobs in Berkshire, Oxfordshire and the London area, however for roles in Oxfordshire and London, only those which offered home or flexible working were possible. She also signed up for alerts from relevant recruitment websites such as jobsgopublic.

65. The claimant applied for 21 vacancies. Examples of jobs the claimant applied for were Compliance Team Manager, Foundation Secretary and Grants Manager, Information Security Policy Manager, Engagement Lead, Business Transformation Project Manager and Learning Disability Home Operations Manager.

66. After making an application, the claimant had to follow up with a phone call to check whether the locations were wheelchair accessible. The claimant had to withdraw some applications because the locations were not wheelchair accessible. The claimant registered her interest in a vacancy with the Care Quality Commission in October 2017 but found that the job required travel to London which she was unable to do.

67. The claimant also sent out between 5 and 10 emails a week with her CV and cover letter to businesses in Reading including Microsoft, Oracle and the University of Reading. In total she made 230 speculative applications. She also spoke to friends and families in various industries about possible job opportunities.

68. In carrying out her job search the claimant incurred expenses of £60.00.

69. The claimant was successful in getting interviews for two roles which were home based with infrequent travel to London, but she was not appointed. She had an interview in October 2017 which the prospective employer cancelled (page 572). During the period January to March 2018 the claimant had a successful interview for a role as a learning disability co-ordinator, an opportunity which arose through one of her contacts. She was in discussions about the job offer, but it fell through when the company stopped trading.

70. From 5 October 2017 to 5 April 2018 the claimant was claiming contribution based job seekers allowance (JSA). The rate was £73.10 per week. The claimant had fortnightly appointments of 30 minutes with a job coach. She had to provide evidence of actively searching and applying for jobs, including copies of the job adverts for the jobs she was applying for and other applications she had made in the previous two week period. The claimant also attended careers fairs organised by the Job Centre at which she registered with companies including Thames Water, IKEA and Hilton.

71. Some examples of the claimant's job applications and interviews were included in the bundle. However, not all of the steps the claimant took to find an alternative role were evidenced in the bundle. The claimant said that she had folders and emails with records of her job search but in April 2018 she decided to change career, and she did not keep the information about her previous job search. She represents herself and did not realise that it would be relevant to the proceedings. We accept her evidence on this point. We accept that the steps taken by the claimant to find new employment would have been checked by the job coach at the Job Centre.

72. We find that the claimant did conduct a proper search for a new role. She made reasonable efforts to mitigate her losses by trying for a period of around 10 months to secure work in a similar position to her previous role, but she was unsuccessful.

The claimant's retraining and new business

73. In February 2017, while the claimant was on sick leave from the respondent and going through the restructuring process, she had some coaching and therapy. She felt she was not coping emotionally and coaching. She had online coaching sessions with a life coach at a total cost of £190 (page 318). In March 2017 the claimant started psychotherapy sessions by Skype with a psychiatrist/psychotherapist. She had six sessions over a three month period. She found the coaching and therapy helped her to get through difficult times.

74. After her dismissal, the claimant explored the possibility of having more coaching sessions. She discovered that undertaking a coaching course was

an effective way of doing this, as the course involves peer coaching and mentoring as part of the training, and also leads to a qualification. In August 2017 the claimant registered for a course for a coaching diploma at a cost of £8,400 (page 322). In August 2018 she registered for another course leading to a mentoring diploma at a cost of £4,674 (page 323).

75. The claimant undertook these courses between September 2017 and June 2019. The courses were undertaken by distance learning, with attendance one weekend a month for 10 months and peer coaching and some online sessions in the evenings. The claimant had around 60 hours of coaching on issues relating to the respondent's discrimination as part of her course.

76. We find that when the claimant first decided, in about August 2017, to take the first course, she did not intend to change career. She was still looking for a new job. If she had been successful in finding a new job, the course would not have prevented her from taking it up because the work for the course was during weekends and in the evenings. We accept the evidence of the claimant's peer coach, Ms George. She said that one of the main reasons for the claimant enrolling in the coaching programme was to help her deal with the emotional impact of the respondent's treatment and the negative feelings she had, including loss of self-belief, rejection, humiliation, dejection and stress. Ms George said that the claimant found it difficult to rebuild her self-belief and self-confidence and that this impacted her ability to build a new career after leaving the respondent. The respondent did not challenge Ms George's evidence.

77. In about March 2018, when she was still unable to find a suitable alternative role, the claimant decided that she would change career and become a life coach. The claimant's management roles with the respondent had included coaching and mentoring team members. She had gained these skills through a management diploma and she felt that she could utilise them in a career as a life coach.

78. The claimant set up a business as a life coach in April 2018 while she was studying for her coaching diploma. The claimant felt this was a good career option for her. It addressed some of the barriers the claimant was facing in finding new employment, in particular it can be done from home via Skype or telephone, meaning the claimant can work flexibly and does not have to travel.

79. The claimant did not produce any medical evidence of any psychological problem being the basis for her decision that she could not return to commissioning work. She did make reference in the bundle to the fact that she was prescribed amitriptyline which is a treatment for pain relief and is also an anti-depressant medication (page 369). The respondent invited us to find that as there was no evidence that the medication had been

prescribed to the claimant for anything other than pain relief, this cast the claimant's credibility in a negative light. We accept the claimant's evidence that she was prescribed amitriptyline for pain relief, and that she was told by her counsellor that in that case there would be no benefit to the claimant considering taking anti-depressant medication. We do not find that any doubt was cast on the claimant's credibility by this.

80. We find that that claimant's loss of self-esteem and confidence was a factor in her decision to retrain as a life coach, and we have accepted her evidence on this. However, we find that the main factor for the decision not to return to commissioning was that after 10 months the claimant had been unable to find a role in commissioning or a suitable alternative, and, given the limitations she was facing in finding that type of role, she thought it was likely that she would continue to find it difficult to do so.

81. We find that the claimant's decision in March 2018 to change career was not unreasonable in the particular circumstances of her case. The claimant faced limitations on her job search in terms of location, roles, and accessibility. The number of vacancies which were suitable for her had proven to be very limited. The claimant had searched for alternative work for a period of over 10 months in which she obtained only two interviews for posts where she had applied for a vacancy, and one interview from her speculative approaches. This situation was likely to continue. A career change to a new type of employment was also likely to be difficult, as the claimant would face issues relating to mobility in many industries, such as hospitality, construction or retail. Roles working in an office or at home are most likely to be possible for her.

82. The claimant was faced with a decision between continuing to search for employment despite there being very few suitable roles, and choosing a different option. Self-employment as a life coach addressed some of the barriers the claimant was facing in finding new employment, in particular it is much more flexible in terms of location as it can be done from home via Skype or telephone. It meant the claimant was able to begin to pursue a career again, rather than having to wait to find employment, without knowing how she may have to wait for. We find that in the claimant's circumstances, this was not an unreasonable decision to take.

<u>The claimant's earnings from her life coaching business</u>

83. The claimant spent much of the first year after setting up her new business on marketing activities and networking to build up her potential client base. In her second year of trading her business was growing. To the date of the hearing, she had earned £6,043.05 from her coaching business, with marketing and set up costs of £3,513.50 and national insurance contributions of £258.40.

84. The claimant estimated of her likely future income as a life coach assuming that her business will grow each year. We accept that it could take 3 to 5 years to build a coaching practice. The claimant's estimates of future income are based on an increasing hourly rate and an increasing number of clients, and include some additional income from training and workshops. We accept the claimant's estimate of her future annual earnings from her life coaching business as set out in table 3 below:

| Table 3: The claimant's estimated future earnings from life coaching | | | | |
|---|---|---|---|---|
| | Dec 2018/19 | Dec 2019/20 | Dec 2020/21 | Dec 2021/22 |
| Gross annual earnings | £14,680 | £23,580 | £31,360 | £41,870 |
| Net annual earnings | £13,518 | £19,570 | £24,860 | £31,667 |

The claimant's pension

85. The claimant was a member of the Local Government Pension Scheme, a defined benefits scheme. The claimant made contributions of 6.8% of salary to the scheme. The respondent made contributions of 14.2% of salary (page 377). With the respondent, the claimant was also a member of an Additional Voluntary Contribution scheme. In her self-employed life coaching business, the claimant has not started a pension.

86. In terms of mitigation of pension loss, the claimant could have remained an active member of the LGPS possible if she had found another job in local government, but we have found that no suitable roles were advertised with the local authorities to which the claimant can travel. If the claimant had found another job in the private sector, the benefits of the job may have included membership of a pension scheme, although this would much more likely have been a defined contribution scheme rather than a defined benefit scheme and the claimant would be likely to have still had a pension loss. In any event, we have found that it was not unreasonable for the claimant to mitigate her losses by setting up a business when she was unable to find another suitable job.

87. As a self-employed person, the claimant could start a private pension to mitigate her pension losses. We find that it would not be unreasonable to expect the claimant to set up a private pension once her business is more established, from December 2022. It would not be unreasonable for her to contribute the same percentage of her income that she did in the LGPS (6.8%) to a private pension scheme from that point.

**The law**

88. The remedy for complaints of discrimination at work is set out in section 124

of the Equality Act 2010.

89. Under section 124(2)(b), where a tribunal finds that there has been a contravention of a relevant provision, as there has been here, it may order the respondent to pay compensation to the claimant. The compensation which may be ordered corresponds to the damages that could be ordered by a county court in England and Wales for a claim in tort (section 124(6) and section 119(2)). There is no upper limit on the amount of compensation that can be awarded.

90. The aim of compensation is that 'as best as money can do it, the [claimant] must be put into the position she would have been in but for the unlawful conduct' (*Ministry of Defence v Cannock and ors* 1994 ICR 918, EAT). In other words, the aim is that the claimant should be put in the position she would have been in if the discrimination had not occurred. This requires the tribunal to look at what loss has been caused by the discrimination.

91. Loss may include past and future financial losses and injury to feelings. (The claimant did not make any claim for personal injury.)

92. When the claim relates to a discriminatory dismissal and includes a claim for future loss of earnings, the tribunal must consider the likely chance that the claimant would have continued in her employment until retirement if not for the discriminatory dismissal. The Court of Appeal in *Vento v Chief Constable of West Yorkshire Police (No.2)* [2003] IRLR 102 confirmed that this requires an assessment of a chance (based on material available to the tribunal, including the use of statistical information) as to the probability of an employee remaining in the service of the employer on a long-term basis. Such an assessment of chance involves a forecast about the course of future events, and so it should not be approached as if the tribunal were making a finding of fact based on a balance of probabilities.

Mitigation of loss

93. It is for the respondent to show that the claimant has failed to mitigate her loss; it has to show that the claimant acted unreasonably. The claimant does not have to show that what she did was reasonable. There is a difference between acting reasonably, and not acting unreasonably (*Cooper Contracting Ltd v Lindsey* [2016] ICR D3, EAT). The test of unreasonableness is 'an objective one, based on the totality of the evidence' (*Wilding v British Telecommunications plc* [2002] ICR 1079).

94. There may be more than one way to mitigate losses which is not unreasonable. It may be reasonable for a claimant who is unable to find suitable alternative employment to seek to mitigate her loss by retraining (*Orthet Ltd v Vince-Cain* 2005 ICR 374, EAT) and the cost to the claimant of

attending such a training course may be recovered as part of the compensation award. The particular circumstances of the claimant's case will be relevant to the question of whether it was reasonable or unreasonable for a claimant to retrain in order to improve her prospect of employment. This is a question of fact for the tribunal to decide. (*Hibiscus Housing Association v McIntosh* [2009] 7 WLUK 579).

95. It may also be reasonable for a claimant seeking to mitigate her loss to set up her own business. In *AON Training Ltd (formerly Totalamber plc) and another v Dore* 2005 IRLR 891, CA, the Court of Appeal accepted that it is a matter of fact for the tribunal whether it is a reasonable form of mitigation for an employee faced with likely difficulty obtaining another appropriate job to set up their own business. In the *AON* case, it was found to be reasonable for the claimant, who had dyslexia, to mitigate his losses by setting up his own business following his dismissal on the ground of disability. His unpleasant and unfortunate experience with *AON*, and the likely difficulty of obtaining another appropriate job were factors taken into account in reaching this conclusion.

96. The Court of Appeal said that in cases where setting up a business is a reasonable way to mitigate loss, then the proper approach to calculating loss is: 'The [tribunal] should, first, calculate what sum represents loss of remuneration. It should then consider the costs incurred in mitigating loss and such a sum, if reasonably incurred, should be added to the loss. From that sum should be deducted the earnings from the new business.'

97. The respondent's representative relied on the case of *Cooper Contracting Limited v Lindsey* [2016] ICR D3, EAT. In that case the judge found that there were opportunities for higher paid employment available to the claimant, but that he had not failed to mitigate his losses by deciding to become self-employed. However, the judge assessed future loss of earnings over a period of three months, on the basis that the continuing loss of earnings reflected 'the claimant's desire to be his own boss, rather than his value on the employed market'. This approach was upheld by the EAT.

<u>Acas Code of Practice on Grievance and Disciplinary Procedures</u>

98. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 applies to proceedings set out in Schedule A2, which includes claims for discrimination at work brought under section 120 of the Equality Act 2010. Sub-section (2) provides:

> *"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%."*

Recommendations

99. Section 124(2)(c) provides that an employment tribunal may 'make an appropriate recommendation'.

100. Section 124(3) says that 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'.

101. When the Equality Act 2010 was first enacted, section 124 introduced a power for employment tribunals to make 'wider recommendations' relating to all members of a particular group in the employer's workforce. This was introduced to address the fact that many employees involved in discrimination cases leave the organisation, and therefore tribunals' power to make recommendations which could prevent future discrimination in that workplace are limited. However, this wider power was repealed by section 2 of the Deregulation Act 2015. The change took effect on 1 October 2015, so, for employment tribunal cases that were commenced after 1 October 2015, there is no longer any power to make wider recommendations.

## Conclusions

102. We have applied these legal principles to the facts as we found them, to determine the issues as set out above.

Pre-dismissal financial loss

103. We have considered the claimant's actual financial position, from the date of the discriminatory acts to the date of the hearing, compared with what her financial position would have been if she had not been subjected to unlawful discrimination.

104. We found that the failure to appoint the claimant to the vacant grade 11 role in November 2016 was direct discrimination. If the claimant had been appointed to that role, her net weekly salary would have increased. Her losses for the period from 22 November 2016 to her dismissal on 31 May

2017 are set out in table 4 below.

| Table 4: Loss of salary 22 November 2016 to 31 May 2017 | | | |
|---|---|---|---|
| | 22 November 2016 to 31 March 2017 | 1 April 2017 to 31 May 2017 | Total |
| Number of weeks | 18 weeks | 8.5 weeks | |
| Net weekly earnings in grade 10 (from table 1) | £584 | £602 | |
| Net weekly earnings in grade 11 (from table 2) | £630 | £647 | |
| Weekly net loss | £46 | £45 | |
| Total net loss | £828 | £382.50 | £1210.50 |

105. In total therefore, net loss of salary for this period was £1,210.50.

Past financial loss in connection with dismissal

106. We also found in our liability judgment that it would have been a reasonable adjustment to have assimilated the claimant to a grade 11 role in March 2017, at the time of the restructure. We found that if the claimant had been assimilated into the grade 11 role it would have been found to have been a suitable role for her and (if she had been given a development plan or offered the role for a trial period) it would have been made permanent.

107. The respondent invited us, when considering financial loss from the date of the claimant's dismissal, to consider whether the claimant would have gone onto reduced sick pay and when she would have been fit to return to work on full pay. In our liability judgment, we found that it would have been a reasonable adjustment to allow the claimant to take paid annual leave as she had requested, from 12 June 2017 (when her entitlement to full sick pay came to an end) until 30 June 2017, and that her expected return to work date was 3 July 2017. We find that it is likely that that the claimant would have been able to return to work on 3 July 2017. If the reasonable adjustment regarding annual leave had been made, there would have been no loss of salary because of sick leave.

108. The claimant's past loss of salary is at grade 11 rates from 1 June 2017 until the remedy hearing. The loss of salary for this period is set out in table 5.

| Table 5: Loss of salary 1 June 2017 to 10 December 2019 | | | | |
|---|---|---|---|---|
| | 1 June 2017 to 31 March 2018 | 1 April 2018 to 31 March 2019 | 1 April 2019 to 10 Dec 2019 | Total |
| Number of weeks | 43 weeks | 52 weeks | 36 weeks | |
| Net weekly earnings in grade 11 (from table 2) | £647 | £674 | £700 | |
| Total net loss | £27821.00 | £35048.00 | £25200.00 | £88069.00 |

109. In total, loss of salary during the period 1 June 2017 to 10 December 2019 was £88,069. This sum represents the claimant's loss of remuneration for this period.

110. We have next considered the claimant's costs incurred in mitigating loss. The claimant incurred expenses of £60.00 for her job search. These costs are recoverable by the claimant.

111. We have found that the claimant's decision to retrain and set up a coaching business was not an unreasonable way to mitigate her loss. Her costs for setting up this business were incurred because of her discriminatory dismissal. They were losses caused by the discrimination. The claimant's costs setting up the business were £3,513.50. These were reasonable costs and are recoverable.

112. The claimant also paid fees for two courses. The fee for the first course was £8,400 and was paid in August 2017 (page 322). The fee for the second course was £4,674 and was paid in August 2018 (page 323). We have found that at the time she registered for the first course the claimant had not decided to change career and she was still pursuing her search for new employment so the fee for the first course was not a cost incurred in mitigating financial losses.

113. By August 2018 the claimant had decided to retrain and had set up her business. The fee for the second course, a mentoring diploma fee of £4,674, was a cost incurred in the mitigation of her losses. We find that this was a reasonable cost.

114. Returning to the fees incurred by the claimant for a coaching course in August 2017, which we have found was not incurred in mitigating losses, we have found that the claimant enrolled on the course as a way of dealing with the emotional impact of what had happened to her. We find that this was a reasonable cost. We find that the fee for the first course is recoverable as a cost caused by the discrimination.

115. The claimant also incurred expenses of £190 for online coaching to assist her to cope with the effects of the discrimination. We find that these were also costs caused by the discrimination and reasonably incurred, and that they are recoverable by the claimant. There is insufficient evidence for us to award the costs of the online counselling which the claimant had, as the invoices were in Polish and the translations were produced too late to allow the respondent to verify them.

116. In summary, the total costs incurred by the claimant in mitigating her losses and dealing with the emotional impact of the discrimination are £60.00 (job search expenses), £3,513.50 (business set up costs), £8,400 (course fees), £4,674 (course fees) and £190 (coaching), in total £16,837.50.

117. The claimant also suffered loss of statutory rights. We accept the figure put forward by the claimant of £300 for this loss. It was not suggested by the respondent that this was a loss for which the claimant should not be compensated because of her circumstances. Although the claimant is now pursuing a career in which she is self-employed and will not regain the employment protections she had with the respondent, if she did ever take up employment in the future she would have to earn those employment protections again. It is a loss consequent on her dismissal (*Cooper Contracting Ltd v Lindsey*, paragraphs 32 and 33).

118. The claimant's dismissal-related financial losses to the date of the remedy hearing were therefore £88,069 (loss of salary), £16,837.50 (costs incurred in mitigating loss and coaching costs) and £300 (loss of statutory rights). This gives a total figure of £105,206.50.

Mitigation

119. From this figure for the claimant's dismissal-related losses we need to deduct sums received by the claimant by way of mitigation including earnings from the claimant's new business, and any sums paid by the respondent for which credit must be given.

120. From 5 October 2017 until 5 April 2018, a period of 26 weeks, the claimant received job seekers' allowance at a rate of £73.10 per week. In total she received £1,900.60. As the recoupment provisions do not apply to discrimination compensation, the claimant must give credit for these payments in the usual way.

121. The claimant started her coaching business in April 2018. She spent much of the first year after setting up her new business on marketing activities and networking to build up her potential client base. In her second year of trading her business was growing. To the date of the hearing, she had earned £6,043 which after national insurance contributions was £5,784.65.

122. The claimant should also give credit for her enhanced redundancy pay (£6,894) and her payment in lieu of notice (£11,190), in total these payments were £18,084.

123. The claimant has received £25,769.25 from job seekers' allowance, earnings from her new business and payments by the respondent.

124. The award in respect of the claimant's dismissal-related financial losses to the date of the hearing is therefore £105,206.50 - £25,769.25 = £79,437.25.

Future financial losses

125. The claimant may have ongoing loss of salary until she retires. In her schedule of loss, she says she only wants to claim future losses of salary and benefits for a period of three years, from December 2019 to December 2022.

126. We have found that it was the discriminatory dismissal of the claimant which has caused her future financial loss, not her decision to change career. Her change of career was not an unreasonable way to mitigate her loss of salary and benefits in her circumstances, bearing in mind the significant limitations on her in terms of likely future roles, and the length of time she had already been searching for new employment.

127. The claimant's future losses are the difference between net annual salary she would have received if she had remained with the respondent, compared with her estimated net annual salary as a life coach. (In her schedule of loss, the claimant used net annual salary before deduction of the employee's pension contribution for this calculation. As the claimant would have been making a pension contribution had she remained in the respondent's employment, we have used the net annual salary after deduction of the employee's pension contribution.)

128. The claimant's earnings if she had remained with the respondent are set out in table 6.

| Table 6: claimant's future earnings if she had remained with the respondent | | | | | |
|---|---|---|---|---|---|
| | Dec 2019 to April 2020 | April 2020 to April 2021 | April 2021 to April 2022 | April 2022 to Dec 2022 | Total |
| Proportion of year | 4 months | 12 months | 12 months | 8 months | |
| Net annual earnings with the respondent (from table 2) | £36,418 | £37,847 | £38,661 | £39,792 | |
| Net loss of earnings for this period | £12,139 | £37,847 | £38,661 | £26,528 | £115,175.00 |

129. The claimant's projected net earnings from her life coach business for the period December 2019 to December 2022 are set out in table 7.

| Table 7: claimant's future earnings as a life coach | | | | |
|---|---|---|---|---|
| | Dec 2019/20 | Dec 2020/21 | Dec 2021/22 | Total |
| Net annual earnings from life coaching (from table 3) | £19,570 | £24,860 | £31,667 | £76,097.00 |

130. This means that the claimant's net loss of salary for the three-year period from December 2019 to December 2022 is £115,175 - £76,097 = £39,078.

131. We have found that there was an 80% chance that the claimant would have remained working for the respondent until December 2022 if she had been assimilated to or appointed to a grade 11 role in the restructure. We therefore award the claimant 80% of her future net loss of salary for this period, in the sum of £39,078 x 80% = £31,262.40.

132. The claimant does not seek loss of future salary beyond December 2022.

133. The adjustment for accelerated receipt of future losses is currently -0.75%. Bearing in mind the overall size of the award and the small rate of adjustment, we do not consider it appropriate to make this adjustment in respect of future earnings in this case.

Injury to feelings

134. In our judgment on liability we found that the claimant was subjected to unlawful discrimination over a considerable period of time. The period in which the respondent failed to make reasonable adjustments to address accessibility issues lasted from 26 July 2013 to 11 December 2016. The respondent failed to carry out a risk assessment and put in place a Personal Emergency Evacuation Plan for the claimant over the period from 31 May 2015 to 11 December 2016. These issues were long-standing and affected

the claimant on a regular basis. She felt humiliated by the access problems, and the lack of consideration given to her needs in an emergency made her feel unsafe at work.

135. The respondent directly discriminated against the claimant when it decided not to appoint her to the vacant grade 11 role on 22 November 2016. This impacted on the claimant's self-esteem and confidence. She is a conscientious and ambitious person who took a real pride in her work for the respondent. She felt that she was being told that she was not good enough to do a job significant parts of which she had been working very hard at for the past six months.

136. The failure to make adjustments to the interview and selection process in the restructure also extended over a period, starting when the claimant was told on 9 February 2017 that her role was at risk under the restructure programme and ending with the termination of her employment on 31 May 2017. The refusal to allow the claimant to take annual leave also occurred during this period.

137. The respondent's discriminatory treatment during the restructure had a very significant impact on the claimant. It was at a time when she was very unwell and struggling with family as well. She had been advised by her doctors to limit her activity. Having to apply for assimilation and make expressions of interest at this time caused the claimant additional pain and distress. Fearing for a period of around three months that she may not have a suitable job after the restructure also caused considerable worry at a time when the claimant was having her operations. She was devastated by the outcome of the restructuring process, and it had a real effect on her self-esteem and confidence. The claimant has had to change her life-long career plans, with a lasting impact on the claimant's working life.

138. We have considered the Vento bands for awards of injury to feelings. This is not a 'less serious case' where the unlawful treatment was an isolated or one-off occurrence in which an award in the lower band would be appropriate. It is not one of the most serious cases requiring an award in the top band. The appropriate award for injury to feelings in the claimant's case is an award in the middle Vento band.

139. The Presidential Guidance on injury to feelings dated 5 September 2017 provides that for claims presented on or after 11 September 2017, as the claimant's was, the middle Vento band is £8,400 to £25,200. We have decided that an award in the upper half of this band is appropriate. The claimant is awarded £21,000 in respect of injury to feelings.

140. The award in respect of the discrimination which was unrelated to the claimant's dismissal is treated differently for tax purposes to the dismissal-

related discrimination. We apportion £5,000 of the award to the acts of discrimination which were not related to the claimant's dismissal, and the remaining £16,000 to the discrimination which was related to the claimant's dismissal. The discrimination related to the restructure was the most damaging to the claimant's feelings, and had a life-changing impact on her.

Failure to follow Acas Code of Practice

141. The claimant's claim is one to which the Acas Code of Practice on Disciplinary and Grievance Procedures applies (a claim for discrimination under section 120 of the Equality Act 2010) and it concerns a matter to which the code applies (a grievance complaint).

142. The claimant was an employee at the time she made her complaint on 31 May 2017 (albeit for a very short period of time, as the respondent had decided to pay her in lieu of the majority of her three-month notice period). The Acas Code does not say that its requirements do not need to be followed in circumstances where an employee makes a complaint then leaves her employment before the outcome of the grievance procedure. We conclude that the Acas Code applied to the claimant's grievance.

143. When addressing the claimant's grievance complaint made on 31 May 2017, the respondent failed to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures. The respondent failed to:

    143.1. have a meeting with the claimant (a breach of paragraph 33 of the code);
    143.2. afford the claimant a right of appeal (a breach of paragraphs 40 and 42 of the code).

144. We find that the respondent's failure to follow the Acas Code in these respects was unreasonable. The breaches of the code were in relation to two key aspects of the code which permit the engagement of the employee with the process. The failures to include these required steps in the claimant's case meant that she was not aware of what steps were being taken in response to her complaint until she received the outcome, and she was not then given any further opportunity to raise her concerns via an appeal process.

145. We take into account that the claimant's dismissal took effect very shortly after she made her complaint. While there may be circumstances in which it would not be unreasonable for an employer to fail to follow the Acas Code after the employee's employment has ended, we consider that in this case, given the serious complaints being made by the claimant and the length of her service with the respondent, the failure to investigate the claimant's complaint in line with the Acas Code (which was reflected in the

respondent's grievance policy) was unreasonable.

146. We have found that the respondent has failed to comply with the Acas code and that those failures were unreasonable. Sub-sections 207A(2)(a) (b) and (c) are met.

147. We have therefore considered whether it is just and equitable to increase the claimant's award. We take into account that although the response was not under its own grievance procedure and was not compliant with the Acas Code, the respondent did reply to the claimant's complaint. More significantly, we take into account the overall size of the award in the claimant's case. We have concluded that it is not just and equitable to increase the claimant's award.

Summary of award before interest

148. Table 8 below shows the award to the claimant before interest.

| Table 8: Summary of award before interest | |
|---|---|
| Pre-dismissal financial loss | £1,210.50 |
| Dismissal-related financial loss to date of hearing | £79,437.25 |
| Future financial loss | £31,262.40 |
| Pre-dismissal injury to feelings | £5,000.00 |
| Dismissal-related injury to feelings | £16,000.00 |
| **Total before interest** | **£132,910.15** |

Interest

149. We award interest on the awards for past financial loss and injury to feelings.

150. For the award of non-dismissal related past financial loss, interest is payable at a rate of 8% from the midpoint of the period which runs from the start of the discrimination to the date of calculation. The acts of discrimination which we have found proven and which caused financial loss started on 22 November 2016.

| Table 9: interest on non-dismissal related financial loss | |
|---|---|
| Interest start date | 22 November 2016 |
| Date of calculation | 26 June 2020 |
| Number of days | 1,312 |
| Number of days to midpoint | 656 |
| Daily rate of interest | 0.08 x £1,210.50/365 |
| Total interest calculation | 656 days x daily rate of interest |
| Total interest | £174.05 |

151. The interest on this element of the award is £174.05.

152. For the award of past financial loss related to the dismissal, interest is payable at a rate of 8% from the midpoint of the period which runs from the start of the discrimination to the date of calculation. The acts of discrimination which we have found proven and which caused financial loss started on 3 February 2017 (the start of the restructure process).

| Table 10: interest on dismissal related financial loss | |
|---|---|
| Interest start date | 3 February 2017 |
| Date of calculation | 26 June 2020 |
| Number of days | 1,239 |
| Number of days to midpoint | 619.5 |
| Daily rate of interest | 0.08 x £79,437.25/365 |
| Total interest calculation | 619.5 days x daily rate of interest |
| Total interest | £10,786.06 |

153. The interest on this element of the award is £10,786.06.

154. Interest on injury to feelings awards is payable at a rate of 8% for the whole period from the start of the discrimination to the date of calculation.

155. For the award of non-dismissal related injury to feelings, the first act of discrimination was the respondent's discriminatory failure to make reasonable adjustments in respect of accessibility, this started on 26 July 2013.

| Table 11: interest on non-dismissal related injury to feelings | |
|---|---|
| Interest start date | 26 July 2013 |
| Date of calculation | 26 June 2020 |
| Number of days | 2,527 |
| Daily rate of interest | 0.08 x £5,000/365 |
| Total interest calculation | 2,527 days x daily rate of interest |
| Total interest | £2,769.32 |

156. The interest on this element of the award is £2,769.32.

157. For the award of dismissal related injury to feelings, the first act of discrimination was the respondent's discriminatory failure to make reasonable adjustments in respect of the restructure process which started on 3 February 2017.

| Table 12: interest on dismissal related injury to feelings | |
|---|---|
| Interest start date | 3 February 2017 |
| Date of calculation | 26 June 2020 |
| Number of days | 1,239 |
| Daily rate of interest | 0.08 x £16,000/365 |
| Total interest calculation | 1,239 days x daily rate of interest |
| Total interest | £4,344.99 |

158. The interest on this element of the award is £4,344.99.

Unfair dismissal compensation

159. The claimant is not entitled to a basic award as she received a statutory redundancy payment.

160. The claimant's award for her discrimination complaints includes compensation for the past and future financial losses which she would have received in a compensatory award, and for loss of statutory rights. To avoid double recovery (compensating for the same losses twice) no compensatory award is made.

Summary of award including interest

161. Table 13 below shows the financial award to the claimant including interest.

| Table 13: Summary of award with interest | | Totals |
|---|---|---|
| Pre-dismissal financial loss | £1,210.50 | |
| Interest on pre-dismissal financial loss | £174.05 | |
| Pre-dismissal injury to feelings | £5,000.00 | |
| Interest on pre-dismissal injury to feelings | £2,769.32 | |
| **Total award for pre-dismissal discrimination** | | **£9,153.87** |
| Dismissal-related financial loss to date of hearing | £79,437.25 | |
| Interest on dismissal-related past financial loss | £10,786.06 | |
| Future financial loss | £29,463.20 | |
| Dismissal-related injury to feelings | £16,000.00 | |
| Interest on dismissal-related injury to feelings | £4,344.99 | |
| **Total dismissal related award** | | **£140,031.50** |
| **Total award before tax** | **£149,185.37** | **£149,185.37** |

Taxation

162. We have conducted a 'grossing up' exercise, calculating the likely tax which will be payable by the claimant on her award. This is necessary because the figures used for losses are net figures, and the claimant will not be properly compensated if the award does not take into account the amount of tax which she will have to pay on the award. The assessment of the tax payable in the grossing up exercise is an estimate on broad lines (*British Transport*

*Commissioner v Gourley* [1955] UKHL 4).

163. We first have to estimate the claimant's other income in the tax year in which she will receive the award (April 2020 to April 2021). We have accepted the claimant's estimate of her gross annual earnings from her life coaching business as £23,580 in the year December 2019 to December 2020 and £31,360 in the year December 2020 to December 2021 (table 3).

| Table 14: estimate of claimant's other income in the tax year April 2020 to April 2021 | | | |
|---|---|---|---|
| | April 2020 to Dec 2020 | Jan 2021 to March 2021 | Total |
| Proportion of year | 9/12 months | 3/12 months | |
| Gross annual earnings from life coaching (from table 3) | £23,580 | £31,360 | |
| Gross earnings for this period | £17,685 | £7,840 | £25,525.00 |

164. The estimate for the claimant's gross earnings from her life coaching business during the tax year April 2020 to April 2021 is £25,525.00. We assume that the claimant has the standard personal allowance and will not have any other taxable income from other sources.

165. Next we consider which parts of the award are taxable and which non-taxable. The parts of the award which relate to pre-dismissal discrimination are not taxable (*Yorkshire Housing Ltd v Cuerden* EAT 0397/09, *Moorthy v The Commissioner for HMRC* [2018] EWCA Civ 847). In the claimant's case this is £9,153.87 (table 13).

166. The remainder of the award, £140,031.50, relates to termination of employment. Compensation for financial loss and (since the tax year 2018/19) for injury to feelings in cases of discriminatory dismissal is taxable pursuant to section 401 and section 403 of the Income Tax (Earnings and Pensions) Act 2003.

167. Under section 403 of the Income Tax (Earnings and Pensions) Act 2003 payments on termination of employment up to £30,000 can be paid without deduction of tax. This applies in the claimant's case. She has already received a statutory redundancy payment of £8,557.50 and an enhanced redundancy payment of £6,894, in total £15,451.50. There is £14,548.50 of the £30,000 remaining. The first £14,548.50 of the taxable part of the tribunal award can therefore be paid without deduction of tax. This leaves £140,031.50 - £14,548.50 = £125,483 which is taxable.

168. Table 15 shows the calculation of the grossing up of the award for tax.

| Table 15: Grossing up for tax | | | | |
|---|---|---|---|---|
| Tax rates (£) | Other income | Taxable tribunal award | | |
| | Gross | Gross | Tax | net |
| Personal allowance (0%) to 12,500 | 12,500 | | | |
| Basic rate (20%) 12,501 to 50,000 | 13,025 | 36,975 | 7,395 | 29,580 |
| Higher rate (40%) 50,001 to 100,000 | | 50,000 | 20,000 | 30,000 |
| Notional rate (60%) 100,001 to 125,000 | | 25,000 | 15,000 | 10,000 |
| Higher rate (40%) 125,001 to 150,000 | | 25,000 | 10,000 | 15,000 |
| Additional rate (45%) over 150,001 | | 74,369 | 33,466 | 40,903 |
| **Totals** | **25,525** | **211,344** | **85,861** | **125,483** |

169. The amount to be added to the claimant's award in respect of tax payable on the award so that after tax the claimant receives the net sum we have awarded, is £85,861.

Summary of award including interest and tax

170. The award to the claimant is therefore as set out in table 16.

| Table 16: Summary of award with interest and tax | | Totals |
|---|---|---|
| Pre-dismissal financial loss | £1,210.50 | |
| Interest on pre-dismissal financial loss | £174.05 | |
| Sub-total: £1,384.55 | | |
| Pre-dismissal injury to feelings | £5,000.00 | |
| Interest on pre-dismissal injury to feelings | £2,769.32 | |
| Sub-total: £7,769.32 | | |
| **Total award for pre-dismissal discrimination** | **£9,153.87** | |
| Dismissal-related financial loss to date of hearing | £79,437.25 | |
| Interest on dismissal-related past financial loss | £10,786.06 | |
| Future financial loss | £29,463.20 | |
| Sub-total: £119,686.51 | | |
| Dismissal-related injury to feelings | £16,000.00 | |
| Interest on dismissal-related injury to feelings | £4,344.99 | |
| Sub-total: £20,344.99 | | |
| **Total dismissal related award** | **£140,031.50** | |
| **Total award before tax** | | **£149,185.37** |
| Grossing up for tax | | £85,861 |
| **Total award including interest and tax** | | **£235,046.37** |

Pension loss

171. When employed by the respondent, the claimant was a member of the Local Government Pension Scheme, a defined benefit scheme. The claimant was also a member of an Additional Voluntary Contribution Scheme. She claims pension loss.

172. We have considered the Presidential Guidance on the Principles for Compensating Pension Loss dated 10 August 2017 (and the update of 7 November 2019).

173. The claimant's is a complex case, because her lost pension rights derive from a defined benefit scheme and the loss relates to a long period. The figures for pension loss in the claimant's schedule of loss are in the region of £250,000.

174. There is a significant difference between the claimant's and the respondent's figures for pension loss. A starting point for calculating pension loss is the projected annual pension at retirement. The respondent's figure for this (obtained through an online LGPS calculator) is 59% of the claimant's figure (calculated by the claimant on the basis of information provided by the administrators of the pension scheme).

175. At the hearing, the respondent asked us to consider whether, if our decisions on the other issues for determination were such that a substantial award for pension loss was possible, it would be appropriate for expert evidence on the pension issues to be obtained.

176. The Presidential Guidance provides that in some complex cases, it may be appropriate for the remedy hearing to proceed in two stages. At the first stage, the tribunal decides the non-pension aspects of the compensation and issues a judgment to that effect. The parties are then given a time-limited opportunity to agree the value of pension loss. In the absence of agreement, pension loss is decided at a second stage hearing. This approach gives the parties the opportunity to agree the amount of pension loss (with the benefit of the tribunal's findings of fact) and only bear the cost of expert actuarial evidence where it is necessary and proportionate to do so in view of the compensation at stake.

177. We have decided that, given the amount at stake in relation to the claim for pension loss and the significant difference between the parties on the calculation of pension loss, this is a case in which, although it will mean that the resolution of the claim will take longer, it would be appropriate to adopt the two stage approach suggested in the Presidential Guidance. This will give the parties an opportunity to give further consideration to the issues on pension loss and whether they can be agreed, and to obtain joint expert

evidence on pension loss if they cannot.

178. We regret that this will mean more time and potentially another hearing before these proceedings are concluded. We are mindful that these proceedings have been going on for some time, and that there have been delays, recently because of the Covid-19 measures. However, in circumstances where there is a large amount at stake and a large discrepancy between the parties, including in respect of the claimant's projected annual pension payments, a starting point for the calculation of pension loss, we have decided that it is the most appropriate approach to take.

179. A notice of hearing and case management orders for the pension loss issues will be sent separately.

Recommendations

180. The claimant seeks recommendations about the respondent's policies, procedures and practices and in particular recommendations that the respondent should:

    180.1. put in place risk assessments and PEEPs for all employees with disabilities which restrict their ability to evacuate the premises in an emergency;
    180.2. amend the annual leave and sick leave policies to record that people who are unfit for work are not precluded from taking annual leave;
    180.3. ensure greater scrutiny and oversight of interview and selection processes so that employees with protected characteristics are not disadvantaged.

181. The recommendations sought by the claimant are 'wider' recommendations, which seek to reduce the adverse effect on the respondent's disabled employees and employees on sick leave.

182. Since 1 October 2015 the tribunal no longer has the power to make wider recommendations. Its power in relation to recommendations is limited to making recommendations which have the purpose of obviating or reducing the adverse effect on the claimant, not any adverse effect on the wider workforce.

183. We have considered whether the power under section 124(3) allows us to make 'wider' recommendations of the type proposed by the claimant, on the basis that the adverse effect on the claimant herself would be reduced by her knowing that policies have been reviewed and that other disabled or sick employees of the respondent may be better treated in future. Although we think this is a possible interpretation of section 124(3), ultimately we

have concluded that section 124(3) does not give us the power to make wider recommendations on this basis, otherwise the introduction of previous legislative changes to allow wider recommendations to be made (which were then repealed) would not have been necessary.

184. However, we record that if we had had the power to make wider recommendations, we would, in the light of our findings in the liability judgment, have recommended that the respondent should take the following steps:

    184.1. within 3 months, to have reviewed its Fire Evacuation Procedures and ensured that risk assessments and PEEPs are in place for all employees with disabilities which restrict their ability to evacuate the premises in an emergency;
    184.2. within 3 months, to have amended its annual leave and sick leave policies to make clear that people who are unfit for work are not precluded from taking annual leave;
    184.3. within 6 months, to have considered whether any changes are required to its restructure and redundancy policies and procedures to ensure that employees on sick leave are not disadvantaged;
    184.4. within 6 months, to have reviewed the respondent's grievance procedure to provide for the situation where an employee who submits a grievance leaves the respondent's employment before the grievance or any appeal has been completed.

185. We set these points out so that the respondent can consider whether it wishes to take these steps in any event.

186. In relation to the effect on the claimant herself, the respondent's failure to apologise to her or to give her any assurance that it has learned lessons from her case has caused her additional upset. In order to obviate or reduce this adverse effect on the claimant, we make the following recommendations:

    186.1. We recommend that within 6 weeks, the respondent's chief executive sends a written apology to the claimant for the unlawful treatment to which she was subjected; and
    186.2. We recommend that within 6 months, the respondent's chief executive writes to the claimant to tell her whether the respondent has carried out any reviews or made any changes to its policies or procedures, and if so what has been done, and whether it has learned any other lessons from her case.

**Employment Judge Hawksworth**

Date: 26 June 2020

Sent to the parties on: 4 August 2020

Corrected on 20 August 2020

Corrected version sent to the parties on:

02/09/2020

For the Tribunals Office