Case Number: 3200383/2017

EMPLOYMENT TRIBUNALS

Claimant: **Ms D Simeon**

Respondents: **(1) London Borough of Havering**
(2) Ms Sarah Homer

Heard at: **East London Hearing Centre**

On: **15 and 16 November 2021; 21 January 2022**

Before: **Employment Judge Gardiner**

Members: **Mrs S Harwood**
Mr S Woodhouse

Representation

Claimant: Mr James Wynne, counsel

Respondent: Miss Ijeoma Omambala QC

REMEDY JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant is awarded the sum of £191,886.48 by way of remedy, comprising the following heads of loss:-

a.	Personal injury		£20,000
b.	Injury to feelings		£15,000
c.	Loss of earnings		£91,365.77
d.	Loss of pension		£35,833.90
e.	Interest:		
i.	On personal injury		£4,200
ii.	On injury to feelings		£6,300
iii.	On loss of earnings		£19,186.81
		Total	£191,886.48

2. The Claimant should give credit for the sum of £18,609 already received from the First Respondent, comprising an injury to feelings award of £16,000 together with interest on that sum of £2,609.

3. The balance owing to the Claimant is £191,886.48 - £18,609 = £173,277.48.

4. The further sum of £54,839.28 should be awarded to the Claimant to reflect the likely amount of tax payable on this balance ("grossing up").

5. Therefore, the total amount to be paid to the Claimant is £173,277.48 = £54,839.28 = **£228,116.76**.

REASONS

Introduction

1. The EAT remitted to a differently constituted Tribunal Panel the quantification of various remedy issues following the Claimant's success at a liability hearing. The EAT considered that the original Tribunal Panel's approach to remedy was incorrect in law.

2. We need to determine the sums to be awarded to the Claimant for two acts of victimisation, found to have been influenced by the Claimant's allegations of race discrimination made in her formal grievance of 14 October 2016. These were, firstly, the First Respondent's decision to make the Claimant an offer to leave her employment and withdraw her grievance conveyed in a protected conversation; and secondly the First Respondent asking the Claimant to remain at home whilst she considered whether to accept that offer.

3. Evidence and submissions were considered on 15 and 16 November 2021. The parties were asked to return to the Tribunal for the Remedy Judgment to be delivered orally on 21 January 2022, and to enable discussions to take place as to the appropriate calculations to be made in the light of the Tribunal's decisions on matters of principle. Oral reasons were given on that occasion. In the event, it was not possible to finalise the figures on that occasion. As a result, there were further written submissions on the correct calculations. There was substantial further agreement, with the remaining dispute on the issue of grossing up.

4. In order to ensure that the Judgment and explanations for the sums awarded is contained in a single document, these written reasons have been drawn up. In substantial respects they reflect the oral reasons given when the parties were present in January 2022.

5. The only medical evidence was and is that these acts of proven victimisation caused the Claimant to suffer from severe depression. At the original Remedy Hearing, a Tribunal chaired by Employment Judge Martin Warren ("the Warren

Tribunal") had found that the Claimant would have suffered from severe depression in any event as a result of her subsequent dismissal. As a result, the Warren Tribunal limited the Claimant's remedy to a sum for injury to feelings. Its reasoning was that the Claimant would have suffered the financial losses flowing from the dismissal in any event.

6. The Claimant successfully challenged that decision in her appeal to the EAT. At paragraph 34, HHJ Martyn Barklem reasoned as follows:

> "In my judgment, the only conclusion open to the ET on the evidence was that the injury was indivisible, to use the language of the authorities, and the Respondent thus liable for the loss to which flowed from that. Pursuant to *Jafri v Lincoln College* [2014] EWCA Civ 449. I therefore substitute such a finding. It follows that the appeal is allowed, and the case must be remitted to the ET to make determinations as to the losses which flowed from the severe depression caused by the act of victimisation on the basis that this was not divisible from any act which took place thereafter".

7. At this remitted Remedies Hearing, the Claimant has been represented by Mr James Wynne of counsel, as she was before the EAT. Mr Wynne is instructed on a pro bono basis. The Tribunal is grateful to him for his assistance in this way. The First Respondent has been represented by Ms Omambala QC, who has represented the Respondents throughout. There was a Remedy Bundle running to [331] pages, including at its end a six-page long witness statement from the Claimant dated 24 September 2018, and a second witness statement, running to four pages dated 11 June 2021.

8. The Claimant argued that she should be awarded sums as set out in the Claimant's Schedule of Loss dated 5 May 2021 [216-219]. In response, there was a Counter Schedule from the First Respondent dated 11 August 2021 [220 – 229]. Somewhat unhelpfully, neither document was calculated to the date of the Remedy Hearing. Ms Omambala had prepared a sixteen-page Skeleton Argument which she submitted at the start of the hearing, seeking to justify the stance taken in the Counter Schedule.

9. This Tribunal is bound by the findings of fact made by the Warren Tribunal save to the extent to which they have been overturned or reopened by the effect of the EAT's decision. In its order, the EAT stated that "there be substituted a finding that the Respondent was liable for the losses which flowed from the personal injury suffered by the [Claimant] …in the form of severe depression which was caused by the acts of victimisation". HHJ Barklem stated that whilst the First Respondent could not now seek to introduce medical evidence to negative the finding of causation, it should be open to the fresh Employment Tribunal, should it consider it appropriate, to admit further evidence should the parties so wish, as to the quantum of damages.

10. At this Remedy Hearing, oral evidence was given by the Claimant, who was cross examined on her witness statements and on the documents in the agreed bundle. In addition, the Tribunal has had regard to the witness statement of Mark Porter, submitted on behalf of the Respondent. Mr Porter was not called to give evidence. No further medical evidence was before the Tribunal on the extent to which the Claimant's injuries had prevented her from seeking higher paid employment.

Correct legal approach

11. The following general principles of compensation were set out by Ms Omambala in her Skeleton Argument and are not controversial:

    a. The award of any remedy under Section 124(2) Equality Act 2010 is a matter of discretion for the employment tribunal; that discretion must be exercised judiciously;

    b. If an employment tribunal decides to award compensation the measure of damages corresponds to the damages that could be ordered by a county court in a claim for tort: section 124(6) Equality Act 2010. The aim in awarding compensation is, "as best as money can do it, to put the Claimant in the position she would have been in but for the unlawful conduct": *MoD v Cannock and others* [1994] ICR 918, EAT.

Personal injury

12. The two acts of victimisation took place on 19 October 2016. When Mr Porter spoke to the Claimant on 24 October 2016, she indicated to him that she was feeling stressed and that she was going to see her GP. The Claimant consulted her GP on 27 October 2016. The GP entry notes "traumatic meeting with manager flashbacks and nightmares, paranoid, isolating self". This is a reference to the workplace meeting at which the acts of victimisation took place. The GP diagnosed severe depression and anxiety and referred her for cognitive behavioural therapy. The Claimant was not immediately signed off work, apparently because she was currently off work at that point having been asked to go home following the meeting to consider the Respondent's offer. When she was next seen by her GP on 17 November 2016, the notes record that the Claimant should not have returned to work. At that point, she was signed off work for three months. The Claimant's evidence, which we accept, was that she experienced intense pain, which was not helped by painkillers. Her energy levels were significantly reduced. She continued to be unfit for all work until 31 July 2018.

13. Although the Claimant completed an initial psychological assessment on 22 November 2016, the CBT treatment did not start until February 2017. It continued over 13 sessions until February 2018. During that time, the Claimant's mental health fluctuated. The Claimant was noted to be anxious and tearful, experiencing a degree of paranoia and unable to relate to other people and reluctant to leave her room. She did not go to the gym and cancelled her gym membership. Her sleep

was significantly impacted. She started comfort eating and by March 2017 she had put on three stones in weight. She was referred to a dietician in August 2017, who noted that she had around three episodes of stress eating each week. Despite being signed off work throughout this period, she did apply for other roles, although the medical notes record she was struggling to concentrate.

14. In June 2018, she had a relapse and requested further therapy, describing periods of highs and extreme low moods including suicidal thoughts for the first time when she had finished helping her son with his GCSEs. The counselling notes record thoughts of being not around but no plans or intent. Despite this apparent deterioration, on 7 August 2018 she was recorded in a letter from her GP, Dr Barnie, as ready to go back to work. At that point, she had lined up a full-time job with less responsibility than she had previously. She was still anxious about returning to work, particularly the social interaction.

15. Dr F Barnie, considered that the Claimant had symptoms of constant severe depression from October 2016 for a period well in excess of 12 months. By twenty-two months following the acts of victimisation, in August 2018, her depressive symptoms were noted to be at a moderate level.

16. In Dr Barnie's report, it was documented that the Claimant had suffered insomnia/nightmares and flashbacks to meetings and had shown signs of paranoia. She had anxiety and signs of post-traumatic stress disorder. Dr Barnie's recommendation was that she should go back to work on a part time basis and gradually ease herself back to work over the next 24 months whilst continuing with CBT. Although she started a new full-time role at the start of September 2018 with reduced responsibilities, she continued to receive CBT sessions until April 2019, given her ongoing anxiety about being part of a new team.

17. In around March 2020, the Claimant started actively looking for a higher paid role with additional responsibilities. This coincided with the start of the national lockdown to deal with the Covid-19 pandemic. Her evidence was she was making several job applications a week. Although the Claimant had around six interviews for other positions, the Claimant has been unable to obtain any higher paid roles. She has recently had a further interview for a role with the London Borough of Hackney and has been told she has secured that role. She is due to start as Head of Service for Strategy & Improvement in February 2022. The salary in that role is about £68,000, comparable to what she was earning in her employment with the Respondent.

18. In summary, the Claimant's injury caused by the acts of victimisation lasted a total duration of a little under four years. The symptoms amounted to a diagnosis of severe depression with elements of anxiety and PTSD. They prevented the Claimant from working in any capacity for around 22 months, and then limited the Claimant's ability to function at full capacity for a further 24 months. At that point, we find that the Claimant was able to function at her previous level. There is no

evidence that the Claimant has any future risk of suffering a relapse in her mental health, beyond that inherent in any equivalent psychiatric injury.

19. Ms Omambala argues that the Tribunal should not substitute an alternative diagnosis for the diagnosis given at the original remedy hearing and endorsed by the EAT. We do not do so. Rather we recognise that no two cases of clinical depression are the same. We must compensate the Claimant for the full extent of the symptoms she experienced which had been caused by the victimisation.

20. The Judicial College Guidelines for assessing personal injury for psychiatric injury are divided into different categories, each with their own suggested brackets for awards.

21. Category (b) is titled Moderately Severe, "which is applicable where there will be significant problems associated with factors (i) to (iv) but the prognosis will be far more optimistic than in (a) above … The majority of cases are somewhere near the middle of this bracket … Cases of work-related stress resulting in a permanent or long-standing disability preventing a return to comparable employment would appear to come within this category: £17,900 to £51,460". These factors are (i) the injured person's ability to copy with life, education and work; (ii) the effect on the injured person's relationships with family, friends and those with whom she comes into contact; (iii) the extent to which treatment would be successful (iv) future vulnerability.

22. Category (c), described as Moderate, is applicable where "there may have been the sort of problems associated with factors (i) to (iv) but there will have been marked improvement by trial and the prognosis will be good. Cases of work-related stress may fall into this category if symptoms are not prolonged." The bracket extends from £5,500 to £17,900.

23. Ms Omambala argues that the appropriate personal injury award is at the bottom of category (b) or at the top of category (c). Her figure is £17,900. Mr Wynne suggests that the extent of the symptoms here means that the injury must fall into category (b). His figure is £36,000.

24. The Tribunal finds that the Claimant's symptoms fall at the bottom end of category (b). We note that category (c) is appropriate where the work-related stress symptoms are not prolonged. In the current case, the symptoms were prolonged over a period of almost four years, but the Claimant has happily now made a full recovery. The present case therefore has many elements appropriate to category (c) but a dimension of the severity of category (b). We therefore award **£20,000**.

Injury to feelings

25. In a case where there is a separate personal injury element, the Tribunal must take care to ensure that the Claimant is not compensated twice over as a result of making discrete awards for personal injury and for injury to feelings.

26. The applicable bands for assessing the appropriate award for injury to feelings were set out in the case of *Vento v Chief Constable of West Yorkshire Police (No 2)* [2002] EWCA Civ 1871. The brackets suggested in that case need to be uprated for inflation and for the impact of *Simmons v Castle*. In Presidential Guidance given in September 2017, the Employment Tribunal Presidents of England & Wales and of Scotland set out a formula for determining the uplift:

> "In respect of claims presented before 11 September 2017, an Employment Tribunal may uprate the bands for inflation by applying the formula x divided by y (178.5) multiplied by z and where x is the relevant boundary of the relevant band in the original Vento decision and z is the appropriate value from the RPI All Items Index for the month and year closest to the date of presentation of the claim (and, where the claim falls for consideration after 1 April 2013, then applying the *Simmons v Castle* 10% uplift)."

27. Applying that formula here, the lower bracket is £833 to £8,337; and the middle bracket is £8,337 to £25,013.

28. Mr Wynne for the Claimant argues that there is a high degree of insult to the Claimant here – the act of offering the Claimant a settlement was done in order to avoid having to investigate allegations of discrimination. This, he says, justifies an award within the upper middle *Vento* band. The figure in the Claimant's Schedule is £25,200. By contrast, Ms Omambala argues that the lower *Vento* band is the applicable band. Her figure is £8,337.

29. The Tribunal awards the sum of **£15,000** for injury to feelings. We award this because the Respondents were trying to close down a serious complaint of race discrimination without any investigation, by making an offer for the Claimant to leave her employment on the basis she would withdraw her complaint. This was serious behaviour that would necessarily have been very upsetting and shocking to the Claimant, given her perception that the reason for her treatment had been because of her race. It would have significantly undermined her confidence in her employer as an equal opportunities employer committed to ensure fairness in all aspects of working life. We accept her evidence that she was upset at the stance taken by the Respondents and she was concerned as to what her colleagues would perceive to be the reason for her absence. The hurt was compounded by being asked to leave the workplace and to remain at home until 31 October 2016, without any access to the First Respondent's IT systems.

30. In deciding on this figure, we have been careful to ensure we are not double counting the effect of the treatment in terms of her injury to feelings with the personal injury award. We have restricted our award for injury to feelings to those sums which are properly injury to feelings caused by the treatment. There is therefore no overlap.

Loss of earnings

31. The Respondents argue that the Claimant would have been dismissed in any event when she was. Her dismissal was not an act of discrimination or victimisation. As a result, she would have suffered an equivalent loss of earnings in any event, at least until she had been able to secure equivalent alternative employment. This, it is argued is the consequence of the established fact that the Claimant was dismissed for failing her probation period, and that this was not an act of direct discrimination or victimisation.

32. Notwithstanding this established fact, the Claimant argues that she would have secured a similarly paid job in an agency by the end of her period of notice. Whilst working in an agency role, she would have made job applications to find a permanent job with the same salary level as she was receiving with the First Respondent. Within three months, she would have started an equivalently paid permanent role. As a result, on the Claimant's case, the Tribunal should assume that the Claimant's earnings would have continued at the same level since the date of her dismissal.

33. The Respondents contend that the Claimant would have been psychiatrically unwell in any event, and this would have limited her employment options. However, there is no medical evidence to support such a contention. Therefore, we do not accept this argument. We assess the Claimant's post dismissal career path on the assumption that she would have been psychologically well throughout this period.

34. We find the Claimant would have been out of work for around three months until say 1 April 2017 before obtaining local authority work at a lower earnings figure, to get back into this area of work. It has been suggested that there would have been no period of unemployment, because the Claimant would have been able to obtain equivalently paid agency work. We disagree. There is no cogent evidence that very short-term agency work would have been available to perform the transformation change management work that was the Claimant's speciality. We think it more likely that work opportunities would have been based on fixed term work being available in other local authorities in London and the South East. However, in assuming that paid work would not have started again until 1 April 2017 we reflect the possibility that there may have been some earlier agency work as well as the possibility that she would not have started work until a later point in time.

35. We have decided to adopt 1 April 2017 as the appropriate start date for alternative work because there was a strong demand for the type of work she could perform. She could have been applying for such work since 15 November 2016 when her dismissal was confirmed. We also recognise her employment options would have been limited by the lack of a strong reference from the First Respondent given that she had failed her promotion. She would have needed to rely on her experience in the lower paid role she had been doing previously at Haringey, earning around £60,000. She would have stayed in this role for a year before successfully applying for work at a pay level equivalent to her work with the First Respondent. In so finding, we pay particular regard to the role that the Claimant has successfully

obtained relatively recently, which persuades us that the Claimant does have the ability to obtain work at this level. We are not persuaded, based on the failure of her probation period at the First Respondent, that she would necessarily have failed her probation period in such an equivalently paid role. The likelihood is that she would have learnt from her experience with the First Respondent and so would have been able to persuade an employer she was capable of working at that level.

36. The Claimant ought to give credit for the financial value of the benefits received since the end of her employment with the First Respondent against the sums which otherwise would have been awarded. The Claimant received Jobseeker's Allowance from 30 January 2017 of £73.10 per week. This was retitled Employment and Support Allowance but continued to be paid at the same rate from 10 October 2017 onwards. The benefit continued at the same rate throughout the 2017/2018 tax year. In the following tax year, she received £1580.77 in benefits until such point as she obtained full time work in September 2018.

37. From September 2018, the Claimant started full time employment, albeit in a lesser role, at the London Borough of Hackney. This was initially a one-year fixed term appointment but was subsequently extended to the present date. She was earning £52,089 per annum [238].

38. From that point onwards, until the present, the Claimant has suffered a partial loss of earnings of £68,935 - £52089 = £16,846 gross pa. This is the difference between what she would have received had she continued earning at the same level as she was at Havering, and the earnings she in fact received. The medical evidence is that the Claimant had not fully recovered by that stage. Ideally, she should have gone back to work on a part time basis so she could gradually ease herself back into work over the next 24 months whilst she continued with Cognitive Behavioural Therapy.

39. As a result, it is consistent with the medical evidence that there was an ongoing loss of earnings attributable to the victimisation from September 2018 for a period of around two years, until August or September 2020. The Respondent argues that there is in fact no loss of earnings from 1 September 2018 because the Claimant was earning at a level at that point that was equivalent to her earnings potential. Reliance is placed on the difficulties that the Claimant was experiencing in her role for the First Respondent to argue that that role was beyond the Claimant's capabilities. We find that the Claimant was capable of earning at the level she was earning with First Respondent, as shown by her recent job offer.

40. The Respondents argue that the Claimant has been fit for all duties from 1 August 2020, and so should not be entitled to recover any further losses at that point. To the extent to which there is an ongoing claim for loss of earnings from 1 August 2020, there has been a failure to mitigate her loss.

41. To this the Claimant responds that her opportunities to seek higher paid work at that point were inevitably limited by the impact of the pandemic. Where a

Respondent argues that there has been a failure by a Claimant to mitigate their loss of earnings, the onus is on the Respondent to show both that the Claimant has failed to take reasonable steps to apply for higher paid work; and that had she done so such work would have been obtained.

42. The Claimant started applying for higher paid roles in early 2020, as is shown by her interview for the post of Head of Change Delivery at London Borough of Hackney on 17 March 2020 [245], at a salary of up to £65,000. She subsequently applied for the role of Transformation Portfolio Lead at Surrey County Council in late August 2020 [281]. She also expressed an interest in the role of Strategic Programme Manager where the salary was in the region of £69,000 [284]. She was told in October that her application would not be progressed [293]. She also applied in October 2020 for the position of Strategic Lead (Change and Transformation) at Hackney [319].

43. In terms of the documentation provided to the Tribunal, there appears to be a pause in her job applications from late 2020 onwards for several months. However, the Claimant's oral evidence was that she continued to make job applications on a regular basis, albeit did not secure many interviews other than those evidenced in the bundle. We accept that the Claimant continued to make such applications. At some point in the second half of 2021, the Claimant applied for a different role at the London Borough of Hackney, namely Head of Service for Strategy and Improvement.

44. On 12 November 2021, the Claimant was offered this role which she is apparently due to start in February 2022. The salary we understand is likely to be at the bottom of the range given in the job advert, namely at around £68,898.

45. As a result, from February 2022 there is no shortfall in earnings. There is no medical evidence supporting any future loss of earnings beyond that point. However, the Claimant's schedule only asks for loss of earnings to 31 December 2021. We therefore only award losses until 31 December 2021.

46. In circumstances, where the Claimant has been applying for higher paid roles during her time in her current role, has successfully obtained a higher paid role which she is about to start, and has evidenced at least some of her attempts to find better paid work, we do not find that the Respondents have established that there has been any failure to mitigate.

<u>Loss of earnings calculations</u>

47. The net earnings that would have been received:

Date of termination to 31 March 2017: £0

1 April 2017 to 31 March 2018: £60,000 gross. This is equivalent to £42,580.08 net

1 April 2018 to 31 March 2019: £68,935 gross. This is equivalent to £48,001.78 net

1 April 2019 to 31 March 2020 : £68.935 gross. This is equivalent to £48,521.74 net

1 April 2020 to 31 March 2021 : £68,935 gross. This is equivalent to £48,625.90 net

1 April 2021 to 31 December 2021 : £68,935 gross pa (Equivalent to £48,675.06 net pa or £4056.25 per month). The earnings would have been £4056.25 x 9 = £36,506.95

The total earnings that would have been received is therefore £42,580.08 + £48,001.78 + £48,521.74 + £48,625.9 + £36,506.95 = £225,235.75.

48. Credit must be given for benefits and earnings since the date of termination.

Benefits are £73.10 per week from *1 April 2017 to 5 April 2018* = 49.5 weeks @ £73.10 = £3,618.45.

For the period *until 2 September 2018*, the total paid was £1580.77.

Therefore, the total benefits until 2 September 2018 are £3,618.45 + £1580.77 = £5,199.22

Year to 5 April 2019 (from P60) : net pay = £27537.74 - £3135.60 - £2716.31 = £21,685.83

Year to 5 April 2020 (from P60) : net pay = £49,569.24 - £7,440 - £5048.52 = £37,080.72

Year to 5 April 2021 (from P60) : net pay = £50,933.52 - £8209.60 - £4973.19 = £37,750.73

6 April 2021 to 30 November 2021 (from payslip) = £37,110 - £5200.93 - £3328.24 = £28,580.83

December 2021 (as per November 2021 payslip, with no deduction for pension contribution) = £4638.75 - £650.07 - £416.03 = £3572.65

Therefore, net pay since 3 September 2018 = £21,685.83 + £37,080.72 + £37,750.73 + £28580.83 + £3572.65 = £128,670.76

49. Total credit for benefits and net pay = £5,199.22 + £128,670.76 = £133,869.98

50. Total loss of earnings = £225,235.75 - £133,869.98 = **£91,365.77**

Loss of pension

51. The Claimant argues that her pension has been impacted by her inability to work at all between December 2016 and August 2018, and by her need to accept lower paid employment thereafter. Her case is that this has affected both the Final Salary pension and the Career Average pension she will receive in the future. She argues

that the Tribunal should assess pension loss on the basis set out in her Schedule of Loss dated 5 May 2021.

52. The Respondents contend that any loss of pension is limited to the period from 1 January 2018 to 30 July 2018. They contend that a contributions method is the appropriate method for calculating pension loss during this period. It calculates 7 months pension loss at 22% as indicating an appropriate award for pension loss of £8,644.92.

53. We have found that the effect of the injury was that the Claimant would have been out of pensionable work for 17 months. We note that this puts the period of pension loss on the boundary between carrying out calculations based on a contributions basis and on a more complex basis. Our decision is that in this case we should use the complex basis for calculating pension loss. The Guidance says that 18 months and above would probably not be short – we consider that the same applies to 17 months.

54. The Claimant was originally employed on terms and conditions that provided for a Final Salary Pension Scheme. She was subsequently moved onto a Career Average or CARE Scheme. The result of recent appellate decisions on transitional provisions in such cases is that those in public sector defined benefit pension schemes before 31 March 2012 would not be compelled to switch to the new CARE schemes until April 2022 (see Appendix 1 of Principles). We consider it likely that the Claimant will elect for all of her service pre-April 2022 to be treated as part of a Final Pension Scheme. This is because she is clearly ambitious and so expects that her Final Salary will be higher than it is presently. It is likely that her Final Salary will be a more advantageous basis on which to calculate pension loss than a career average basis.

55. The Claimant argues that the impact of the injury on her career is that she has been forced to exit from the Pension Scheme, given the enforced career break from December 2016 to 1 September 2018. We are not persuaded that this is the case. It appears to the Tribunal that the link to final salary remains unless the career break is for more than five years [230].

56. The Claimant also argues that her final salary will now be lower as a result of the impact of the career break on her future career. We are not persuaded by this argument. We consider it is too speculative. It has not been sufficiently proven that there will be any impact on her final salary as a result of the time she has had out of work. The Claimant is now 41, soon to be 42. By the time she comes to retire, the likelihood is that her salary will be based on her abilities and the opportunities she had has over the remaining twenty years or so of her working life.

57. As a result, the Claimant's service up until April 2022 can be used to calculate the Claimant's pension. If that service has been shortened as a result of the consequences of victimisation by the Respondents, that will impact on the

Claimant's pension, by reducing the number of years of service to include in the relevant calculation.

58. Based on our findings of fact, the Claimant's Final Salary pension will now be lower. The Claimant will have 17 months less service on which her final salary pension will be calculated. Therefore, assuming a final salary of £68,935, the gross pension from age 65 will be £1627.63 lower each year. This is 17/12 divided by 60 x £68,935.

59. This means that at a marginal income tax rate of 20%, this is a net income of £1302.10. The appropriate Ogden Table multiplier = 27.52 (woman age 42, retirement age 65, discount rate -0.25%).

60. Therefore, the calculation of pension loss is £1302.10 x 27.52 = **£35,833.90**.

Aggravated damages

61. In the original Schedule of Loss dated 20 August 2018, which was before the Warren Tribunal, there was no claim that there should be a separate award of aggravated damages. Such a claim was introduced for the first time in the subsequent Schedule of Loss dated 5 May 2021. In his Closing Submissions, Mr Wynne fairly recognised that because such an award of damages was not sought in the original Schedule of Loss there cannot be any sum awarded for this at this Remitted Remedy Hearing.

Uplift for breach of the ACAS Code

62. The Claimant argued in the original Schedule of Loss that there should be "the appropriate uplift … on any applicable awards". In paragraph 62 of the Remedy Judgment the Warren Tribunal said this:

> "Although Ms Simeon's schedule of loss referred to "an appropriate uplift", this was not pursued in her witness statement nor in her submissions. It is not apparent to us that there was any breach of the ACAS Code"

63. The Claimant did not cross-appeal against this finding. Accordingly, it was not a matter that was set aside by the Employment Appeal Tribunal. In those circumstances it is not open to us to analyse this head of loss as if there had not been any prior judicial determination. There has.

64. Mr Wynne sought to argue that this aspect of the Warren Tribunal's decision should be reconsidered under Rule 70 of the 2013 Rules. However, in so arguing, he faced several hurdles. The first is that there is no formal application before the Tribunal, only an oral application from Mr Wynne. The second is that the 2013 Rules provide that any application to reconsider a judgment should be made within 14 days of the date on which the Judgment is sent to the parties. Here the oral application is being made almost two years after the Judgment was sent to the

parties. No good reason has been given why the Claimant has delayed until now in seeking to have the point reconsidered. Finally, any such reconsideration application must be made and considered by the same panel that made the decision in question, unless the Regional Employment Judge directs otherwise. Because there was no application before the last date of the hearing, the matter has yet to be considered by Regional Employment Judge Taylor.

65. For all these reasons, the reconsideration application must fail, and the Tribunal's conclusion on the uplift issue must stand.

Interest

66. Interest is to be awarded from the date of the act so far as awards for injury to feelings and for personal injury are concerned. On financial losses, interest runs from the midpoint of past losses.

67. Interest on injury to feelings is 5.25 years @ 8% = 42% x £15,000 = £6,300.

68. Interest on personal injury is 2.625 @ 8% = 21% x £20,000 = £4,200.

69. Interest on loss of earnings = 21% x £91,365.77 = £19,186.81.

Grossing up

70. Given the size of the financial remedy, both sides agree that tax will be payable on the loss of earnings element of the total sum awarded. An award for pension loss also falls to be grossed up – see *Yorkshire Housing Limited v Cuerden* UKEAT/0397/09 at paragraph 31; and *Chief Constable of Northumbria v Erichsen* UKEAT/0027/15. It does not come within Section 407(1) Income Tax (Earnings and Pensions) Act 2003 as being paid under a tax-exempt pension scheme.

71. The personal injury award is not subject to tax. This is specifically excluded by Section 406 Income Tax (Earnings and Pensions) Act 2003. The award of interest on this sum would also be excluded from tax for the same reason.

72. The parties agree that the injury to feelings award is not taxable. This is because it is said to relate to "pre-termination discrimination". We recognise that matters of taxation are not for the parties to agree between themselves, but a matter for statutory interpretation of the relevant statute, namely Section 401(1) Income Tax (Earnings and Pensions) Act 2003. This is worded as follows:

> "This Chapter applies to payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with—
>
> (a) the termination of a person's employment,
>
> (b) a change in the duties of a person's employment, or
>
> (c) a change in the earnings from a person's employment,
>
> by the person, or the person's spouse or civil partner, blood relative, dependant or personal representatives."

73. The Employment Appeal Tribunal recently considered the scope of Section 401 Income Tax (Earnings and Pensions) Act 2003 in the case of *Slade v Biggs* UKEAT (Case No: EA-2019-000687-VP), a decision of Griffiths J given on 1 December 2021. The issue in that case was whether the awards of injury to feelings and aggravated damages were taxable and therefore should be subject to grossing up.

74. Griffiths J said this at paragraph 88:

> "The phrase "directly or indirectly… in consequence of, or otherwise in connection with" [the termination of a person's employment] could hardly be broader and more ample than it is. Such wide wording does on the face of it cover more than damages for the dismissal itself. It appears expressly to cover awards for injury to feelings and aggravated damages which are made not only "in consequence" of the claimants' dismissals, but "in connection with them" also."

75. We have taken the view that the victimisation was in connection with the termination of the Claimant's employment, within the meaning of Section 401. The detrimental act was "holding a protected conversation and suggesting she should leave on terms" (Reasons, paragraph 164). The complaint of race discrimination in the Claimant's grievance was more than a "trivial influence on the decision to hold a protected conversation, make her a financial offer to settle potential claims on the termination of her employment, to withdraw her grievance and to tell her to stay at home whilst she thought of the proposal" (Reason, paragraph 165).

76. The first £30,000 of any award is also excluded from tax.

77. The total amount awarded will need to be "grossed up" to reflect the amount of tax payable on the Judgment sum, so that after taxation, the Claimant will retain the net figures awarded.

78. Therefore, on the face of it, the judgment sum which would be taxable is £91,365.77 (loss of earnings) + £35,833.90 (loss of pension) + £19,186.81 (interest on loss of earnings) + £15,000 (injury to feelings) + £6,300 (interest on injury to feelings) - £30,000 (tax exempt amount) = £137,686.48.

79. There is a dispute between the parties as to whether the award for interest is to be applied before or after grossing up. Ms Omambala QC argues that the loss of earnings figure should be grossed up and then interest should be added. This is because it is argued that interest does not represent a measure of financial loss sustained by the Claimant.

80. We have decided that interest is to be applied before grossing up. This is the order suggested in the Employment Tribunal Remedies Handbook 2021/2022 at page 36. It also makes logical sense – interest does represent a measure of financial loss. It is awarded to compensate the Claimant for the loss in the value of the financial award given the passage of time between the date on which it would have been paid and the date on which it is actually paid.

81. Credit must be given for the award of injury to feelings and interest made in the Warren Tribunal's Remedy Judgment. This is £16,000 plus interest of £2,609.

82. As a result, the total sum payable to which tax would be applied is £137,686.48 - £18,609 = £119,077.48.

Grossing up calculations

83. The Claimant's gross income in the current tax year April 2022 is £61,958.25.

84. She will therefore have to pay tax on the net award as follows:

(a) £150,000 - £61,958.25 = £88,041.75 (at a rate of 40%) which is: £35,216.70

(b) £119,077.48 - £88,041.75 = £31,035.73 (at a rate of 45%) which is: £13,966.08

(c) £12,570 (the lost personal allowance) (at a rate of 45%) which is: £5,656.50

85. Therefore, the total additional sum to be paid to reflect the tax payable on the net Judgment sum is £35,216.70 + £13,966.08 + £5,656.50 = **£54,839.28**.

Employment Judge Gardiner
Dated: 21 March 2022