EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr. W. Sheppard	v	**Jaguar Land Rover Limited**

Heard at: **Birmingham via CVP** **On:** **22 March 2022**

Before: **Employment Judge Wedderspoon**

Representation:

Claimant: **In Person (assisted by Mr. Singh)**

Respondents: **Mr. Barker, solicitor**

JUDGMENT

1. The complaint of direct disability discrimination is dismissed upon withdrawal.
2. The complaint of discrimination arising from disability is well founded and succeeds.
3. The complaint of failure to make reasonable adjustments is well founded and succeeds.
4. The complaint of unfair dismissal is well founded and succeeds.
5. The claimant is awarded a basic award of £2,362.50.
6. The claim for re-instatement and/or re-engagement is refused.
7. The claimant is awarded £500 for a loss of statutory rights.
8. The respondent will pay the claimant compensation for loss of earnings for 49 weeks in the net sum of £24,255 (having deducted 3 weeks of PILON).
9. The claimant is awarded an injury to feelings award of £9,000.
10. The claimant is awarded a personal injury award of £3,000.
11. By 12 April 2022 the claimant will provide details of the state benefits he received (for the period from the date of dismissal for 12 months) to the Tribunal and the respondent.
12. By 26 April 2022 the parties will provide written representations to the Tribunal and each other about (i)interest calculations on the award and (iii)grossing up the award.

REASONS

1. By claim forms dated 18 October 2019 and 24 January 2020 the claimant brought complaints of unfair dismissal, direct disability discrimination, discrimination arising from disability and failure to make reasonable adjustments. An agreed list of issues was prepared by Employment Judge Battisby on 8 April 2021 (page 73-76) for the final hearing following the fourth preliminary hearing.

2. By letter dated 2 March 2022 (page 79-81) the respondent conceded liability as follows :-
(a)Time limit/limitation issues; the respondent accepted that the allegations relied upon by the claimant and set out within the agreed list of issues were brought in time;
(b)Unfair dismissal; the respondent accepted that the insisting the claimant return to work against his GP's advice render the claimant's dismissal unfair. The claimant was dismissed because of his absence which arose in part in consequence of his disability;
(c)Discrimination arising from disability; the respondent accepted that the claimant was treated unfavourably by reason of his dismissal that such treatment was because of something (his absence) that arose in consequence of his disability. The respondent's actions could not be objectively justified.
(d)Failure to male reasonable adjustments; it is accepted that the respondent could have made further reasonable adjustments to alleviate the substantial disadvantage to the claimant in or around the time of his dismissal and the respondent therefore failed to comply with its duties in this regard.

3. The hearing was conducted by CVP with the agreement of the parties. The remedy hearing was heard by a Judge sitting alone pursuant to section 4 (1)(g) of the Employment Tribunal Acts 1996. In the course of the hearing the claimant was given regular breaks as a reasonable adjustment.

4. The claimant confirmed at the commencement of the hearing that he no longer pursued the complaint of direct disability discrimination. It was explained to the claimant that if the claim was dismissed he could not pursue it. He took some time to discuss this with Mr. Singh who was assisting him and confirmed to the Tribunal that he no longer pursued it.

5. The claimant also confirmed that he primarily sought re-instatement to his position, or re-engagement and/or compensation. He accepted that he had not included this in a schedule of loss or amended schedule of loss but that throughout negotiations with the otherside he had made clear to the respondent that is what he wanted. He was no longer legally represented following a dispute with his solicitor as to how the case should be run but he was being assisted today by a friend Mr. Singh. There was no objection by the respondent for the claimant to have this assistance.

6. Mr. Barker for the respondent stated that although discussions had taken place prior to the hearing involving a number of different matters the claimant had failed to indicate in accordance with the order of EJ Battisby in his schedule of loss that he was seeking reinstatement. The respondent only became aware that the claimant pursued this upon receipt of the witness evidence received over the weekend prior to the hearing. Nevertheless, the respondent had attempted to seek evidence to support its contention that reinstatement was not reasonably practicable by way of a letter from Lucy Davies, HR Manager at the Castle Bromwich site of the respondent.

7. The Tribunal reminded the respondent that pursuant to 112 (2) of the Employment Rights Act 1996 the Tribunal were duty bound to explain reinstatement to the claimant at the hearing and obtain his wishes for such an order. On that basis the Tribunal requested enquiries be made as to whether Ms. Davies could be available to give evidence at the remedy hearing today. Upon taking instructions the respondent made arrangements for Ms. Davies to attend as a witness using her letter as a witness statement. The respondent did not request an adjournment.

8. The Tribunal was provided with an electronic bundle of 492 pages. The claimant relied upon his statement for remedy, his disability impact statement and submitted a written representation from his wife; the weight to be attached to this evidence was considered in the context that she was not available to be cross examined by the respondent. The respondent called Ms. Davies as a witness to provide evidence in accordance with her letter.

Context

9. The claimant was employed by the respondent as an integrated manufacturing specialist in its engine manufacturing centre from 12 January 2016 until his dismissal on 27 September 2019. The respondent is an automotive manufacturer with manufacturing sites in the West Midlands and in Halewood, Liverpool. The claimant had previously worked at the respondent's site on an agency basis from approximately 2014. The claimant has a long history of mental health issues including anxiety and depression.

10. The respondent had an attendance management policy (page117). The policy provided for a number of stages within a rolling 12 month period which triggered action under the policy. Where an employee had two occasions of absence or 5 absence counselling was actioned; 2 occasions of absence of or 7 days of absence stage 1 action was triggered; 2 occasions of absence or 7 absence days stage 2 is actioned and 1 occasion of absence can lead to a final counselling or employee review. Contained within the procedure is an exclusion of exempt sickness. At page 118, a point confirmed by Miss. Davies, the respondent can consider disability related sickness absence where occupational health confirms the medical reason for absence or where it meets the definition of disability under the Equality Act as advised by Occupational Health; reasonable adjustments on how the procedure will be applied in such circumstances may be considered by the respondent.

11. During the claimant's employment he was subject to an attendance management counselling on 22 June 2016. On 28 October 2016 and 8 March 2018 stage 1 was triggered under the policy. On 6 February 2019 stage 2 was triggered but the claimant successfully appealed this and stage 1 was re-instated on 27 March 2019. On 27 March 2019 the claimant commenced a period of 35 days sick leave (page 102) by reason of his mental health. On 4 September 2019 the claimant returned to work on a phased return to work for a period of 4 weeks and a stage 2 was issued. The claimant was late for work during a phased return to work on 5, 6 and 11 September 2019, he says by reason of his disability and received a

counseling on 6 September 2019 under the lateness procedure. On 12 September 2019 the claimant commenced sickness absence by reason of his mental health. On 27 September 2019 at an employee review meeting the respondent determined to terminate the claimant's employment with immediate effect with payment in lieu of notice. On 30 September 2019 the claimant appealed the attendance management procedure stage 2 but his appeal was rejected. His appeal against dismissal lodged on 7 November 2019 was rejected on 18 November 2019.

<u>Evidence at the remedy hearing</u>

12. The claimant has suffered with depression since about February 2003 and has been prescribed anti-depressants on and off over the years. In June 2005 Birmingham Solihull hospital noted that the claimant suffered sleep problems and low mood. From 21 July 2005 the claimant was on a high dosage of anti-depressants. In February 2019 the claimant complained about very low mood. In April 2019 it was noted that he was having problems with sleep and general activities and in September 2019 his symptoms were affecting his day-to-day activities.

13. From 2003 the claimant worked for a number of different employers in the semi-skilled sector. In between jobs he was on benefits and he would go after another job if he felt better mentally.

14. The claimant's evidence is that his mental health deteriorated after his dismissal. In August 2019, (pre-dismissal) the claimant was taking 150mg of sertraline and was complaining about work related stress (page 131), On 5 September 2019 the claimant informed his G.P. that his anxiety was very high partly due to being forced to go back to work. The G.P. consultation attendance notes on 29 October 2019 (page 128) state that the claimant's anxiety has been a bit worse since being dismissed by work. He had no thoughts intents or plans to self-harm or suicide. It was noted on 6 December 2019 that the claimant's mental health was stable on 150mg of sertraline and propranolol. On 22 January 2020 the claimant's anxiety had worsened; at this point he had been invited to a Tribunal and he sought a letter from the G.P. to delay the hearing. On 6 February 2020 (page 127) the claimant informed his G.P. he is very anxious leaving the house, has panic attacks, feels very unmotivated to do things, ant fall asleep constantly thinking about things. The last consultation noted on the medical material disclosed indicates a consultation on 23 March 2020 when the claimant was complaining about mixed anxiety and depressive disorder. He continued to be unfit for work. The claimant's oral evidence is that this was not the latest consultation; he had regular telephone consultations with his G.P who was managing his medication. In July 2020 the claimant was prescribed 150mg of sertraline (page 126). The claimant's evidence is that the medication was changed and on 15 February 2021 (page 132) his dosage was reduced to 100mg. More recently (a few weeks ago) his dosage was reduced to 50 mg and he feels his health has improved. He said that there was no reason for a medical update; he has regular reviews with his G.P about his medication by telephone and he remains on it long term but the dosage is altered as and when his symptoms require it.

15. The claimant said he had not applied for any jobs in the period from his dismissal. He stated that he remained on medication because the respondent *"destroyed him"*; he had *"a breakdown"*. He became his wife's full- time carer because as the main breadwinner losing his job meant he was not in a position to pay for care for his wife. He stated the main reason for not applying for roles was his mental ill health. He had moved into a bungalow with his wife because of her health.

16. In respect of other work, he had previously undertaken, he had previously travelled to a job some 25 miles away from home. In respect of advertised seasonal job opportunities (page 135) over Christmas and New Year, the claimant said he was too unwell to apply in 2019; further in respect of available jobs in Aston Birmingham with Lookers in November 2019, the claimant stated he had not been well enough to find a job then. Further he did not apply for West Midland railway vacancies in January 2020 because of his mental health and his caring responsibilities for his wife. He was not well enough to apply for available jobs at Birmingham Airport in January 2020. The claimant also stated he was ashamed to inform another employer he had been sacked by the respondent and he lacked confidence he would get another job at his age (he was 46 at the date of dismissal). In respect of the ONS statistics that stated there was about 578,000 vacancies between October to December 2020, the claimant stated that there was likely to be a number of available vacancies due to employees losing jobs during the pandemic but he did not believe with his mental health issue he stood a fighting chance of securing one. He wanted his job back with the respondent.

17. The respondent asked the claimant about the available jobs as set out in the ONS statistics from May 2021 to December 2021 approximately 750 jobs (some of which may have been suitable); the claimant said by this stage he was his wife's full-time carer and he wanted to return to work for the respondent.

18. In respect of the attendance management process and the suggestion that due to his absence he could have been fairly dismissed within another three to four months, the claimant disputed this. He felt that his mental health should have been discounted as a disability when the attendance management triggers were actioned whilst he worked at the respondent. He said when he was required to come back to work on a phased return, he was also sanctioned for lateness; he felt he was set up to fail. He was not given any occupational health support. In his witness statement at paragraph 4 the claimant said *"The management team at JLR who failed to support and were wrong in their treatment of me are all still working without consequence this seems wrong somehow while my family and I are financially crippled. I feel really bad as I cannot look forward to my retirement or will ever have the chance to give my family the support I was able to whilst working at JLR."* When further asked about this, the claimant said he felt he could return to the respondent because the managers who treated him unfairly are not in the same positions and have been promoted.

19. He believes that there are available jobs at the respondent from his internet research.

20. In respect of the increase on his latest schedule of loss from £15,000 to £30,000 for an injury to feelings award, he stated he relied upon his solicitor (no longer instructed).

21. Lucy Davies, HR Manager for the respondent gave evidence in accordance with her letter. Her evidence was that the claimant's job role still exists at the respondent and there are several individuals doing the role. However, there are no available positions within the current budgeted headcount. To return the claimant to his original role would involve displacing an existing employee which is not in line with company policy. There are no permanent vacancies of an equivalent grade at any of the respondent's manufacturing sites which are similar/equivalent to the role the claimant was completing. Further, she stated that it was not practicable for the claimant to be re-instated or re-engaged because there were no plans to increase permanent headcount; temporary agency recruitment is taking place at present to support a short-term increase in production volumes; the longevity cannot be guaranteed. At the appeal hearing the claimant confirmed he could not commit 100% to the company because of external factors; he did not engage in a flexible working request. The respondent does have a flexible working policy. Reinstatement is untenable in circumstances that the claimant stated in his appeal hearing that he *"had not been looked after by managers"; "lost trust in the managers here';* and it was *"appalling how I have been treated."* Further the claimant's absence record was extensive. Ms. Davies confirmed that reasonable adjustments can be made to absence triggers where guided by occupational health to do so.

<u>The Law</u>

22. Where a Tribunal finds that the grounds of a complaint are well founded, the Tribunal is under a duty to explain to the complainant what orders may be made and in what circumstances under section 113 (re-instatement and re-engagement) and ask the claimant whether he wishes the tribunal to make such an order.

23. An order for re-instatement in accordance with section 114 of the ERA is an order that the employer shall treat the complainant in all respects as if he had not been dismissed. On making such an order the tribunal shall specify (a)any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement; (b)any rights and privileges (including seniority and pension rights) which must be restored to the employee and (c)the date by which the order must be complied with. If the claimant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for re-instatement shall require the claimant to be treated as if he had benefitted from that improvement from the date on which he would have done so but for being dismissed. Pursuant to (4) the Tribunal shall take into account so as to reduce the employer's liability any sums received by the complainant

in respect of the period between the date of termination of employment and the date of reinstatement by way of (a)wages in lieu of notice or ex-gratia payments paid by the employer or (b)renumeration paid in respect of employment with another employer and such other benefits as the tribunal thinks appropriate in the circumstances.

24. An order for re-engagement in accordance with section 115 of the ERA is an order on such terms as the tribunal may decide that the complainant be engaged by the employer in employment comparable to that from which he was dismissed or other suitable employment. The Tribunal is required on making such an order to specify the terms on which the re-engagement is to take place including (a)the identity of the employer (b)the nature of the employment (c)the renumeration for the employment (d)any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of termination of employment and the date of re-engagement (e)any rights and privileges (including seniority and pension rights) which must be restored to the employee and (f)the date by which the order must be complied with. Pursuant to (3) the Tribunal shall take into account so as to reduce the employer's liability any sums received by the complainant in respect of the period between the date of termination of employment and the date of reinstatement by way of (a)wages in lieu of notice or ex-gratia payments paid by the employer or (b)renumeration paid in respect of employment with another employer and such other benefits as the tribunal thinks appropriate in the circumstances.

25. In exercising its discretion under section 113 of the ERA, the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account (a)whether the complainant wishes to be reinstated (b)whether it is practicable for the employer to comply with an order of reinstatement and (c)where the complainant caused or contributed to some extent to the dismissal whether it would be just to order his reinstatement (section 116(1) of the ERA).

26. Pursuant to section 116 (2) of the ERA if the tribunal decides not to make an order for reinstatement it shall the consider whether to make an order for re-engagement and if so on what terms. In doing so the tribunal shall take into account (a)any wish expressed by the complainant as to the nature of the order to be made (b)whether it is practicable for the employer to comply with an order of re-engagement and (c)where the complainant caused or contributed to some extent to the dismissal whether it would be just to order his re-engagement. Except in a case where the tribunal takes into account contributory fault it shall if it orders re-engagement and if so on what terms which are so far as is reasonably practicable as favourable as an order for reinstatement.

27. Pursuant to section 116 (5) of the ERA where in any case an employer has engaged a permanent replacement for a dismissed employee the tribunal shall not take that fact into account in determining for the purposes of

section116 (1)(b) or 3(b) whether it is practicable to comply with an order for reinstatement or re-engagement.

28. Subsection (5) does not apply where the employer shows – (a)that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement or (b)(i)he engaged the replacement after the lapse of a reasonable period without having heard from the dismissed employee that he wished to be re-instated or re-engaged and (ii)when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.

29. In the case of **Davies v DL Insurance Services Limited (UKEAT/0148/19)** Mr. Justice Choudhury reviewed the authorities in this area. At paragraphs 13 and 14 it was stated *"These provisions have been interpreted so as to require the Tribunal to make an express determination on the evidence as to whether it is practicable for the employer to comply with an order for re-engagement. That obligation arises from the wording of the provision which is in the mandatory form "shall take into account"; see* ***Port of London Authority v Payne (1994) ICR 555 at 569 A to B****. In* ***Coleman v Magnet Joinery Limited (1975) ICR 46*** *the Court of Appeal in considering the predecessor provisions held that the term practicable in this context means not merely "possible" but "capable of being carried into effect with success." Per Stephenson LJ at 52B to C. In assessing practicability, the matter is to be judged as at the time the order is made* ***Rembiszewski v Atkins Limited (UKEAT/0402/11) at 39*** *and due weight should be given to the commercial judgment of management; see* ***Port of London Authority v Payne at page 574 D to F.***

30. Where there is a breakdown in trust and confidence the remedy of re-instatement or re-engagement has very limited scope and will only be practicable in the rarest of cases (**Wood Group Heavy Industrial Turbines Limited v Crossan 1998 IRLR 680).** In **British Airways Plc v Valencia (UKEAT/0056/14)** the determination of whether or not reinstatement or reengagement is to be ordered is a question of fact for the Tribunal

31. Pursuant to section 118 of the Employment Rights Act 1996 ("ERA") where a tribunal makes an award of compensation for unfair dismissal the award shall consist of a basic award calculated in accordance with section 119 to 122 and 126 and a compensatory award calculated in accordance with sections 123,124,124A and 126.

32. Pursuant to section 123 (1) of the ERA the amount of compensatory award shall be the amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

33. Pursuant to the case of **Polkey v AE Dayton Services Limited (1987) ITLR 50** the Tribunal has a discretion to reduce any award for future loss to reflect the chance that the individual would have been dismissed fairly in any event. In the case of **Software 2000 Limited v Andrews (2007) IRLR 568** Mr. Justice Elias set out the principles emerging from the case law :-
(a)In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal using its common sense experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal;
(b)If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed or alternatively would not have continued in employment indefinitely it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself (He might for example have given evidence that he had intended to retire in the near future)
(c)However there will be circumstances where the nature of the evidence wishes to adduce or on which he seeks to rely is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made;
(d)Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of that exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.
(e)An appellant court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role;
(f)Even if a tribunal considers some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did or alternatively would not have continued indefinitely;
(g)Having considered the evidence the Tribunal may determine (i) that if fair procedures had been complied with the employer has satisfied it – the onus being firmly on the employer that on the balance of probabilities the dismissal would have occurred when it did in any event;
(ii)that there was a chance of dismissal but less than 50% in which case compensation should be reduced accordingly;
(iii)that employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself or
(iv) employment would have continued indefinitely.

34. Following **Compass Group v Ayodele (2011) IRLR 802**, if an employer seeks to argue a Polkey point it must be properly raised and supported by evidence.

35. The employee is under a duty to mitigate his loss but is under no duty to prove that he has done so. He must take reasonable steps to obtain alternative employment. If the employee has not made reasonable efforts to find other work, his compensation will be reduced to reflect the tribunal's view of what would have happened if he mitigated his loss. The burden of proving a failure to mitigate is on the employer and the standard of that is reasonably required of the employee should not be set too high (**Fyfe v Scientific Furnishings Limited (1989) ICR 648).**

36. Section 124 of the Equality Act 2010 applies where the Tribunal finds that there has been a contravention of a provision. The Tribunal has a discretion to make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; order the respondent to pay compensation to the complainant and make an appropriate recommendation. An injury to feelings award is available where the Tribunal upholds a discrimination claim and compensates for non-pecuniary loss. The award is not punitive but compensatory intended to compensate for anger, distress and upset caused by the unlawful treatment. The focus is on the actual injury suffered by the claimant and not the gravity of the acts of the respondent. The EAT in the case of **Prison Service v Johnson (1997) IRLR 162** the general principles to be applied when making an injury to feelings award are as follows (a) injury to feelings awards are compensatory and should be just to both parties; they should compensate fully without punishing the discriminator. Feelings of indignation at the discriminators conduct should not be allowed to inflate the award (b)awards should not be too low that would diminish respect for the policy of anti-discrimination legislation. Society has condemned discrimination and wards must endure that it is seen to be wrong. On the other hand awards should be restrained as excessive awards could be seen as the way to untaxed riches.(c)Awards should bear some broad general similarity to the range of award in personal injury cases not to any particular type of personal injury but to the whole range of such awards (d)Tribunals should take into account the value in everyday life of the sum they have in mind by reference to purchasing power or by reference to earnings (e)Tribunal should bear in mind the need for public respect for the level of awards made. In the case of **Vento** the Court of Appeal identified three broad bands of compensation for injury to feelings; this had been updated by the Presidential Guidance so that where claims are brought on or after 6 April 2019, the three bands are now lower band £900 to £8,800; middle band £8,800 to £26,300 for cases that do not merit an award in the upper band; and an upper band of £26,300 to £44,000 with the most exceptional cases capable of exceeding £44,000. Lower band discrimination typically concerns one off incidences of discrimination such as a single discriminatory insult or slur. Middle band discrimination cases include a serious.

37. Awards may be made for personal injury (see **Sheriff v Klyne Tuggs 1999 IRLR 481**). Where an individual is awarded sums both for injury to feelings and personal injury (such as depression) caused by the discrimination, the injury to feelings and personal injury awards must compensate for different injuries and not overlap.

Submissions

38. The respondent submitted that the claimant had the benefit of legal advice until last Friday and should have been aware of the need to mitigate his loss. In respect of the claimant's request to be re-instated or re-engaged the respondent was only aware of these points 48 hours ago and had not been flagged up by the claimant in his two schedules of loss. The respondent accepted that the Tribunal had a duty to consider this issue but the respondent has provided the best evidence it could in the circumstances. The respondent accepted that it did not seek an adjournment of the hearing today.

39. The respondent invited the Tribunal to consider Ms. Davies evidence which established that it was not reasonably practicable to reinstate the claimant. The respondent referred to the case of **Coleman v Joinery** and submitted that such an order was capable of success and there were a number of points that suggested that it was not including (a)the claimant's role was no longer available; (b)there were no equivalent roles (c)the use of agency workers showed that there was a restriction on headcount (d)the evidence of Ms. Davies as to what was said at the appeal hearing (e)the claimant's own evidence today that the respondent ignored his mental state; destroyed his mental health, mentally broke me; fighting against managers; caused his mental breakdown (f)his significant absence levels whilst employed by the respondent so that he was on a stage 2 process (g)his personal change in circumstances and becoming a carer for his wife (h)he had not worked for nearly 3 years (i)he felt targeted by the respondent because he was a shop steward.

40. In respect of any compensation the claimant had failed to act reasonably by failing to apply for a job; the ONS statistics indicated there were a vast number of jobs available in the summer of 2020 but the claimant failed to apply. The claimant described his age being a barrier to successful job applications but he was only 46 years at the time. The claimant described being embarrassed to apply for jobs and having to confirm he had been dismissed; pride was no bar to a job application. The claimant had confirmed he had carried out a wide range of jobs during his employment history therefore there was a wealth of jobs the claimant could have applied for.

41. There was no medical evidence to establish that the claimant was too ill health that he could not apply for work. At page 126 the claimant was prescribed medication of 150mg; at page 132 this was reduced to 100mg. There is no medical evidence to cover the period. The claimant has suggested that there was a reduction in medication between August 2020 to

February 2021 but it is not clear and there has been a lack of disclosure of medical evidence. The respondent submitted that the claimant has unreasonably failed to mitigate loss and compensation should be limited to 6 months. In the circumstances the claimant was paid 3 weeks pay in lieu his claim is limited.

42. In respect of **Polkey** the respondent accepted the dismissal was unfair but there were clear issues with the claimant's attendance at work. At the time of the dismissal the claimant was already at stage 2 of the attendance management procedure. The claimant's attendance at work to this stage had been poor. Thereafter it was submitted it was likely that the claimant's attendance would have remained poor. In respect of mental health pursuant to the policy not every mental health absence is discounted. It was submitted that the claimant would have been dismissed fairly 6 months later; there was a 50 % prospect that the claimant would have been dismissed in any event.

43. In respect of the claim for injury to feelings, it was submitted that the claim of £30,000 in the updated schedule of loss was too high. The respondent referred to the case of **Miss. SJ Austin v Leeds Teaching Hospital Trust (Case No. 1801339/2017)** who was awarded the sum of £27,000. The case concerned an employee with 25 years service who had supporting psychiatric evidence. Here the claimant had 3 years service and has not produced any medical evidence as to the causation of illness. Realistically the respondent valued the award at no more than £4,500. Furthermore, the receipt of state benefits needed to be taken into account.

44. The respondent accepted that the Tribunal's role at this stage is to take a provisional view on re-instatement. In respect of not calling a positive case to deal with the issue of Polkey, the respondent submitted that there was sufficient evidence of extensive absence from work for the Tribunal to consider.

45. The claimant submitted a written submission. In the document the claimant submitted the only fair remedy is re-instatement. He felt in a better position mentally to return to work. He orally submitted that his mental health should have been taken into account when considering triggers under the management of absence policy. The respondent had used the policy of managing him out of the business. He continues to take anti-depressant medication but he is improving. He submitted the stage 2 disciplinary was invalid. He was written up late when he was on a phased return to work. He was unsure as to how to value his injury to feelings award.

Conclusions

46. By reason of the respondent's concessions, the claimant is entitled to a basic award which is calculated taking into account the claimant's gross weekly earnings (subject to the statutory cap) and the multiplier of 4.5 (representing the employees years of service and age). This is agreed to be £2,362.50.

47. The determination as to whether re-instatement should be ordered is a matter of fact to be determined by the Tribunal. The starting point is that the claimant wishes to be re-instated. Although it is accepted that this was not set out in his schedule of loss or updated schedule of loss, the claimant had intimated his preference to the respondent, the Tribunal is bound by statute to raise the issue with the claimant, the respondent obtained evidence to deal with the issue of re-instatement shortly before the hearing and there was no application today to adjourn the case. The Tribunal determined that it would consider re-instatement as a potential remedy.

48. The next matter to consider is whether it is practicable for the employer to comply with an order of re-instatement. The Tribunal rejects the respondent's case that the claimant's job is no longer available as being a valid reason not to reinstate the claimant. The statute is clear that unless the job could not be continued without a replacement this is no reason not to order re-instatement. There is no evidence before the Tribunal to indicate that the job could not be continued without a replacement. The Tribunal also notes that the respondent has taken on agency workers and this leads the Tribunal to conclude that work is available for the claimant if he was to be re-instated.

49. From hearing the claimant's live evidence and taken together with the views expressed in the appeal hearing, it was apparent to the Tribunal that the claimant blames the respondent for a decline in his mental health and harbours a great deal of resentment towards the respondent about his treatment whilst employed by them. It was apparent that there was a significant underlying mistrust between the claimant and the respondent whereby the claimant felt he was targeted in the workplace by reason of his role as shop steward. He also stated that involved in this campaign was the trade union which he believed conspired with the employer. The claimant articulated that the attendance management process was used deliberately to remove him from the organisation.

50. During the appeal hearing (and the Tribunal accepts that at this point the claimant was unwell), the claimant asserted (this evidence was unchallenged by the claimant) that he had *"lost trust in managers here"* and it was *"appalling how I have been treated."* The Tribunal does not find these views are wholly inconsistent with a genuine intent expressed by the claimant to return to work for the respondent but the Tribunal finds the claimant's genuine intent to be wholly unrealistic. The claimant stated that the managers who subjected him to ill-treatment and caused him a mental breakdown were no longer in a position whereby they could impact upon him; they had been promoted. Nevertheless, fundamentally the Tribunal concluded that the reference by the claimant to the respondent, even today, about having behaved in a way deliberately to cause the claimant harm indicated a serious underlying lack of trust and confidence by the claimant in the respondent's organisation. The Tribunal concluded that it could not be satisfied even at the provisional stage that such a re-instatement order would be "capable of success".

51. Further, the claimant has a long history of mental health issues. The Tribunal finds on the basis of the claimant's oral evidence that the claimant suffered a mental breakdown in about March 2021 and was prescribed, a significant dosage of 150mg of sertraline (an anti-depressant). The dismissal from the medical note did affect his mental health detrimentally. On the basis of the claimant's evidence, which the Tribunal accepts, his health has improved so that the dosage of his anti-depressant was gradually cut to 100 mg daily in February 2021 and is now being taken at 50 m.g daily.

52. Regrettably, there is lack of medical material before the Tribunal to satisfy it that the claimant could return to work within a reasonable period (with reasonable adjustments in place) and resume his former role of intergrated manufacturing specialist role with success. The Tribunal notes that the claimant has been out of the workplace for a significant period of time (since September 2019). There is no doubt that the claimant is genuine in stating that a return to work for the respondent is really what he wants to do but in order for the Tribunal to make such an order, even taking a provisional view, it must be satisfied that such a re-instatement order would be capable of success (see **Coleman**). In the absence of medical evidence including a fit note or medical opinion and taking account that the claimant is still on medication, the Tribunal cannot be satisfied today (the date of the order or within a reasonable period) the claimant could return to work for the respondent.

53. For the reasons set out above the Tribunal does not consider that re-engagement is "capable of being a success" because there is a lack of trust between the claimant and the employer and a lack of medical evidence to establish that the claimant could return to another role within the respondent's organisation.

54. In the light of these findings the Tribunal turns to the issue of compensation. The claimant claims a full loss from the date of effective termination until today's date.

55. First, the Tribunal considers the issue of **Polkey**. Assessing any reduction in **Polkey** is a speculative exercise but as recognised by the case of **Software 2000** the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. The respondent relies upon its attendance management procedure and the history of absences of the claimant. Its case is that the claimant would have been dismissed fairly in any event some 3-6 months after the effective date of termination.

56. The claimant's evidence is that his treatment at work resulted in him becoming seriously unwell in March 2019 and he suffered a mental breakdown. The Tribunal accepts that prior to this date the claimant had absences from work but the most significant absence from work for the claimant commenced in March 2019.

57. The concessions made by the respondent include an unfair dismissal because of the claimant's absence which arose in part in consequence of

his disability; discrimination arising from disability and a failure to make reasonable adjustments around the time of his dismissal.

58. The sick notes and G.P. records indicate that the claimant was not fit for work up to March 2020 (page 127). Thereafter there are no other sick notes. The Tribunal rejects the respondent's submission that there was no evidence to establish causation of illness and discriminatory treatment. The oral evidence of the claimant which the Tribunal accepts taken together with the medical notes indicates a decline in the claimant's health following his dismissal; the claimant reported an increase in symptoms on 12 November 2019 as a consequence of his dismissal and by December 2019 the claimant was feeling anxious even walking to the shops (page 128). He was taking 150 mg of sertraline. This was reduced on or about 15 February 2021 to 100mg (see page132 and in accordance with the claimant's evidence). It has only recently been reduced to 50mg.

59. The respondent's management attendance policy as Ms. Davies confirms can make a reasonable adjustment for disability related absence. The Tribunal concludes that if a fair process had been adopted a reasonable adjustment would have been made to the claimant's disability related absence so that he would not have found himself in a dismissal situation at point in his employment. In the absence of reasonable adjustments to the management attendance procedures the claimant found himself in September 2019 at stage 2.

60. The evidence available to the Tribunal is that the claimant has a long history of mental health issues and had absences from work prior to the period he was dismissed. There is evidence to establish a causative link between the discriminatory dismissal and the decline in the claimant's health. However, the Tribunal finds in the context of this claimant's historical ill health it is likely that he would have been subject to the respondent's management attendance policy to the extent that he would have been eventually dismissed fairly and/or in a non-discriminatory manner.

61. The Tribunal rejects the respondent's submission that it would have been a period of a mere 3 to 6 months when a fair/non-discriminatory dismissal could have taken place. This fails to take account of the fact that the respondent should have made a reasonable adjustment to the triggers under the management attendance policy. The Tribunal must take into account, this is not a perfect science. Factoring in the claimant's historical ill health, the need to extend triggers for disability related absence, the respondent's clarification of the medical position and prognosis may take time to obtain, the impact of the discriminatory treatment in the decline of the claimant's ill health, the Tribunal concludes that the claimant would have been dismissed but for the unfair dismissal/discriminatory dismissal by 12 months after the effective date of termination.

62. Taking account that the claimant was paid in lieu for 3 weeks, the Tribunal calculates that the claimant should recover 49 weeks for loss of earnings at a net rate of £495 per week; this amounts to £24,255.

63. The claimant did not pursue a pension claim before the Tribunal.

64. Next the Tribunal considers the issue of failure to mitigate. The burden of establishing a failure to mitigate rests upon the respondent. The duty upon a claimant is to act reasonably to reduce any losses. The evidence produced by the respondent in the bundle of documents shows a large number of available roles for the period following the claimant's dismissal. The claimant accepts that he did not apply for any of these available roles nor did he apply for any work and that some of the available roles contained in the bundle were jobs within his work capabilities.

65. The Tribunal has already found that the claimant's health deteriorated after his unfair/discriminatory dismissal. The Tribunal rejects the respondent's contention that there was no material to establish causation. The claimant's oral evidence as to the effect of his dismissal on his mental health taken together with the medical evidence does evidence that following his dismissal the claimant's health deteriorated and there was an exacerbation to his mental health issues. The duty upon the claimant is to act reasonably. It was not unreasonable for the claimant in the context of ill health to fail to apply for work within 12 months after the effective date of termination. There is no failure on the part of the claimant for this period to mitigate his loss.

66. The unchallenged evidence of the claimant is that by reason of a deterioration of his partner's health and because of the loss of his employment (as the breadwinner), he was not in a position to afford to pay for his partner's care and took it upon himself to become a carer. The Tribunal finds that the claimant's poor financial state was a consequence of the claimant's unfair/discriminatory dismissal and the claimant had insufficient means to finance private care for his wife. The Tribunal finds that there is no inconsistency in the claimant's ability to care for his wife and an inability to apply and obtain alternative work; the role of caring for a loved one is an act of self-sacrifice.

<u>Loss of statutory rights</u>

67. The Tribunal awards £500 for loss of statutory rights. It will take the claimant another 2 years to obtain his full employment rights with another employer.

<u>Deduction of benefits</u>

68. The Tribunal has no detail as to benefits actually received during this 12 month period and these must be deducted from the loss of earnings claim. Although the claimant's recollection was not clear, the claimant stated he received some job seekers allowance and carer's allowance. The Tribunal finds that the claimant received these benefits as a result of the dismissal and these must be deducted from the past loss sum over the 49 weeks.

<u>Injury to Feelings award</u>

69. In the context of the concessions made by the respondent namely the admission of a failure to make reasonable adjustments and discrimination

arising from disability resulting in his dismissal. The Tribunal concludes that this was not a “one off” act of discrimination but amounts to discriminatory treatment over a period of time.

70. In the circumstances following the guidance in Vento the Tribunal finds that an injury to feelings award should fall into the mid band of Vento and not the lower band. The Tribunal does not find that the claimant’s injury to feelings falls within the highest band which is reserved to the most serious cases. This is not to minimise the upset the claimant suffered.

71. Care must be taken by the Tribunal to differentiate between (a) injury to feelings and (b)exacerbation of the claimant’s psychiatric health; there must be no double recovery. The Tribunal notes that the updated schedule claims £30,000. The claimant was unable to explain how this was quantified because it was prepared by his former legal adviser. The respondent has submitted this is a case in the lower band with a value of no more than £4,500 and requests the Tribunal to note significant differences in the factual background of the case of **Austin** (referred above). **Austin** concerned an employee with 25 years’ service. The claimant had supportive joint medical evidence which referred to an exacerbation of her mental health to a mild extent; she was awarded £3,000. Her award for injury to feelings amounted to £27,000 where the discriminatory treatment was suffered over a prolonged period and the injury to feelings was described as significant. The Tribunal accepts the respondent’s submissions that Austin can be distinguished from the present case by reason of the absence here of a full medical opinion and the longer period of employment of the Austin claimant along with the period of discriminatory treatment.

72. The claimant’s evidence is that the impact of the dismissal was significant and changed his life and his family’s life. His evidence is that the dismissal tarnished his unblemished employment record. His dignity and self-respect were taken away. He described his experience as a horrific ordeal. There has been a financial consequence to his dismissal so that he has fallen into debt. The Tribunal claim was made after 6 April 2019 (the dismissal claim) and the Tribunal relies upon the Presidential Guidance on injury to feelings awards for this period. The Tribunal awards £9,000 as injury to feelings taking account the impact on the claimant was for over a period of time; not simply a one off act of discrimination; the discriminatory treatment involved a failure to make reasonable adjustments and he was subject to a discriminatory dismissal which cannot be justified.

73. The Tribunal has already found that there was a deterioration of the claimant’s mental health by reason of his discriminatory dismissal. The case law determines a separate award should be made for personal injury. The tribunal has already rejected the respondent’s contention that there is no evidence of a causative link between the discriminatory treatment and the deterioration of the claimant’s mental health. The Tribunal conclude that the treatment of the claimant at the dismissal stage did exacerbate his ill health to the extent that he required a continued increase dosage of medication over a prolonged period; the claimant found difficulty in even going to the

shops. Taking account of the Judicial College's Guidelines for the Assessment of General Damages in Personal Injury cases 15th Edition a bracket for mild psychiatric damage is placed at £1,350 to £5,130. The Tribunal select this category because the claimant has a pre-existing condition and finds that the respondent's discriminatory treatment of the claimant exacerbated his condition. The Tribunal awards a sum in the mid point of this category taking account there was an exacerbation and awards the sum of £3,000 for an exacerbation of the claimant's mental health condition.

Interest

74. The Tribunal is not in a position to finalise the award because information as to the receipt of benefits received is incomplete.

75. These figures are draft figures and do not take into account, the deductions that must be made in respect of benefits received. Benefits to be deducted within the initial 49 week period include job seeker's allowance and carer's allowance (if received).

76. For financial losses the Tribunal takes the mid-point of 454 days.

77. Interest on past financial losses (loss of earnings) is calculated at 8% . Calculated at 454 days x 0.08 interest rate x 1/365 x £24,255 (less benefits).

78. Interest of injury to feelings is calculated at 8%. Calculated at 454 days x £9,000 x 0.08 x 1/365 =£895.56.

79. Interest on personal injury is calculated at 2% from the mid-point namely 453 days x £3,000 x 0.02 x 1/365 = £74.46.

Taxation

80. The Tribunal takes account of the effect of taxation on an award subject to section 401 ITEPA 2003; the Tribunal grosses up that part of the award which will be taxed. Pursuant to section 401 tax is payable on awards in connection with the termination of a person's employment. The first £30,000 is tax free. Amounts to be included in the calculation for section 401 purposes includes (a)loss of statutory rights; (b)past financial loss including interest (c)pension loss. Awards for personal injury are not taxable. Injury to feelings awards are taxable related to termination of employment to the extent that the £30,000 tax free allowance is exceeded. The Tribunal awaits full details from the claimant prior to finalising this calculation.

81. In order to assist in the calculations the Tribunal orders that by 12 April 2022 the claimant will provide details of the state benefits he received (for the period from the date of dismissal for 12 months) to the Tribunal and the respondent.

82. Further, by 26 April 2022 the parties will provide written representations to the Tribunal and each other about (i)interest calculations on the award and (iii)grossing up the award.

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Employment Judge Wedderspoon

Signed on: 29th March 2022

Sent to the parties on: 07/04/2022

For the Tribunal:

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