EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		***Respondent***
Ms Paige Elizabeth Hyde	**AND**	**Northern Care Alliance NHS Trust**

JUDGMENT OF THE TRIBUNAL

Heard at: Manchester (by cloud video platform)

On: 20 July 2022
Deliberations in Chambers (by cvp): 30 August 2022

Before: Employment Judge A M Buchanan

Non-Legal members: Ms E Cadbury and Mr J Ostrowski

Representation:

Claimant: In person
Respondent: Mr James Upton - Solicitor

JUDGMENT ON REMEDY

It is the unanimous judgment of the Tribunal that:

1. The claimant is awarded compensation for unlawful disability discrimination pursuant to section 124 of the Equality Act 2010 made up as follows:
1.1 an award of **£12,338.92** for injury to feeling including interest thereon.
1.2 an award of **£856.50** in respect of her past losses including interest thereon

2.The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply to any aspect of these awards.

3. The total amount due forthwith from the respondent to the claimant pursuant to this Judgment is **£13195.42.**

REASONS

Preliminary matters

1. By a Judgment ("the Liability Judgment") dated 12 March 2022 and sent to the parties on 17 March 2022, the Tribunal upheld one complaint advanced by the claimant namely a complaint of discrimination arising from disability in respect of her dismissal by the respondent advanced pursuant to section 15 of the Equality Act 2010 ("the 2010 Act") Another claim of failure to make reasonable adjustments was dismissed and a claim of unfair dismissal had been struck out at an earlier stage for lack of qualifying service.

2. On 17 March 2022 orders made by the Tribunal of its own motion to prepare for the remedy hearing were sent to the parties. There was no application made for any additional orders. Those orders included the requirement for the parties to agree a list of issues to be determined at the remedy hearing.

3. The remedy hearing took place on 20 July 2022. There was insufficient time at the end of the hearing for the Tribunal to reach its decision. Accordingly, the Tribunal arranged to meet in Chambers on 30 August 2022. This Judgment is issued in writing with full reasons in order to comply with the provisions of Rule 62(2) of Schedule I of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Witnesses

4. The Tribunal heard from the following witnesses at the remedy hearing:

4.1 The claimant who produced a witness statement comprising two pages.

For the respondent:

4.2 Keith Meldrum Director of HR (Corporate Services and Estates and Facilities) who produced a witness statement comprising 2 pages and 5 paragraphs.

Documents

5. The Tribunal had various documents before it including:

5.1 An agreed remedy bundle comprising 62 pages.
5.2 The original bundle used at the Liability hearing which comprised 661 pages with some additional pages added.
5.3 The claimant's updated schedule of loss.
5.4 The respondent's closing submissions extending to 74 paragraphs.
5.5 Band 6 pay scales from February 2019 onwards.
5.6 The payments received by the claimant in benefits from 21 January 2020 until 21 March 2022.
5.7 The claimant's universal credit statement from 15 April 2020 until 14 May 2020.
5.8 A list of vacancies
5.9 An agreed list of issues for the remedy hearing.

The Issues

6. The list of issues agreed by the parties was a follows:

Loss of earnings, pension loss and loss of statutory rights

6.1 The claimant contends for several years past/future loss of earnings and pension losses as set out in the schedule of losses previously submitted to the ET and to the Respondent.

6.2 The respondent asks the Tribunal to consider the following points –

a. The salary figures set out in the Schedule of Loss appear to be gross figures. Net figures should be used to calculate loss.

b. The respondent asks the Tribunal to consider whether any figure for lost earnings should be no more than salary in the period 22.11.19 - 2.12.19, to reflect the fact that SB was due to return from maternity leave on 02.12.19.

c. Alternatively, if the Tribunal do find that the claimant should be awarded loss of earnings over a prolonged period, should the claimant's losses stop at the point that the claimant was offered an alternative job, which was subsequently withdrawn by the prospective employer, for apparently unlawful reasons. The claimant states that she has not been successful in securing any other employment until March 2022 due to the impact of the discriminatory treatment endured and the effect this has had on the claimant's pre-existing and continuing disability.

d. The claimant contends for reimbursement of both employer and employee pension contributions. Employee pension contributions would, ordinarily, be deducted from the salary that has already been claimed above. The claimant is, therefore, claiming this sum twice. The claimant states: this is not true if the Tribunal awards on net salary basis unless the respondent commits to make such payments to the claimant's NHS pension fund on her behalf?

e. The claimant claims for loss of statutory rights—but has not actually lost any statutory rights. The claimant did not acquire sufficient length of service with the respondent for unfair dismissal rights. This is refuted by the claimant as she had been continuously employed within the respondent for over 2 years.

Injury to feelings (compensation for disability discrimination) and aggravated damages

6.3 The claimant claims £100,000 "*compensation for disability discrimination".* The respondent presumes this is a reference to the potential injury to feelings award. The claimant responds that she is seeking an award for the actions of Disability Discrimination AND Injury to Feelings, as well as Aggravated Damages

6.4 The Tribunal will need to determine the appropriate sum to award for injury to feelings, when considering the actual findings of unlawful discrimination. The respondent would suggest that an award in the Vento lower band is appropriate, given

the finding of discrimination and the injury to feelings, which can reasonably be said to have been caused by that discriminatory act.

6.5. The Tribunal will also need to consider whether this is an appropriate case for an aggravated damages award.

Other alleged losses

6.6 Finally, the claimant asks the Tribunal to order that the respondent fund emotional therapy for the claimant, in the sum of £5,000 and also that the total award is uplifted by 10% for the reasons set out in the Schedule of Loss.

7. The Tribunal's List of Issues

Financial losses

7.1 Did the discriminatory act cause any financial loss to the claimant? If so, for what period of time should the claimant receive compensation for financial loss caused by her dismissal? The relevant financial losses being loss of salary and employer pension contribution.

7.2 Has the claimant discharged her duty to mitigate her losses arising from dismissal?

7.3 What was the chance of the claimant being able to attend work with the respondent if not dismissed effective from 22 November 2019?

7.4 What was the likelihood of the claimant remaining in the employ of the respondent if not dismissed effective from 22 November 2019?

7.5 Did the claimant suffer any financial loss during her notice period of 8 weeks?

7.6 Did the claimant suffer any loss for the period between the end of her notice period and the time she would have gone onto nil pay?

Other losses

7.7 Should the claimant be awarded a sum for injury to feelings? If so, in what amount? What are the start and end dates for determining any award for injury to feelings? What was the cause of any injury to feelings? - it being noted that only injury caused by the dismissal can be compensated.

7.8 Should the claimant be awarded damages for personal injury by reason of injury (or deterioration) to her mental health? If so, in what amount?

7.9 What is the extent of that deterioration? Would the claimant have suffered a deterioration in her mental health even if not dismissed? Double recovery with any award for Injury to feelings must be avoided.

7.10 Should there be an award for aggravated damages? If so, in what amount?

7.11 Should interest be awarded pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996?

7.12 Should any award be increased/decreased by reason of the provisions of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") for failure to comply with the ACAS Code of Practice on Discipline and Grievance Procedures 2015? If so, which elements of any award should be adjusted and to what extent?

7.13 Is grossing up of any award appropriate?

Submissions

Respondent

8. The submissions are briefly summarised:

8.1 Any loss of earnings should be calculated on a net basis. The most representative figure for the claimant's net monthly wage is £1880.35 to which should be added pension benefit of £235.61. this gives a total of £2115.96 per month net.

8.2 If the claimant had been in the workplace the respondent would likely have kept her employment until 2 December 2019 when Sara Bates returned to the workplace and that would mean compensating the claimant for the period 22 November 2019 until 2 December 2019. It is possible the respondent might have retained the claimant's services until SB returned from maternity leave on 13 January 2020 but no longer than that.

8.3 It would not be reasonable to consider an award for loss of earnings beyond 13 January 2020. The claimant secured temporary employment in March 2022 and apparently does not seek to claim any loss of earnings after that date. A list of vacancies for the period November 2020 - June 2022 is produced which demonstrates that there were positions available which the claimant was qualified for and had the skills to perform. Similar positions would have been available at other local NHS trusts. The claimant says that she was unfit for work for most of the period from November 2019 to March 2022 and that that state of affairs had been caused by the unlawful treatment of the claimant by the respondent. The question must arise as to whether the claimant made proper attempts to mitigate her losses between those two dates when, as she contends, she was fit for work. The respondent denies that its unlawful treatment of the claimant was the cause of her ill health. It is possible that the claimant taking on the band 6 role may have contributed towards an ongoing deterioration of her health but the Tribunal has expressly found that there was no breach of the duty to make reasonable adjustments.

8.4 The claimant appears to suggest that the respondent behaved unlawfully in one or more of three ways thus rendering the respondent liable for loss of earnings beyond January 2020 namely:
a. by failing to retain the claimant in the band 6 role or by failing to retain the claimant in an alternative role or
b. by rendering the claimant unable to work for the respondent or

c. anyone else as a result of allegedly unlawful treatment which amounts to the personal injury claim.

8.5 Band 6 role. The claimant accepts that her employment in the band 6 post was temporary and, despite all the support being offered to her, she was struggling with that role. The claimant's colleague JS would have been better placed to take on the band 6 role following the resignation of SB on 7 January 2020. The claimant began submitting sick notes on 2 July 2019 and continued to submit them effectively until June 2020. It would not have been reasonable for the respondent to have kept open the band 6 role for the claimant in the hope that her health would recover.

8.6 The claimant made it clear in the investigation into her grievance that she would not work for the respondent in the future in any role. The respondent did attempt to redeploy the claimant into an alternative role, but the claimant did not engage with the redeployment process. However, the claimant was well enough to engage with the grievance process It is arguable that the most important point for the claimant when she raised a grievance was the 28 hours unpaid overtime. There is no prospect that the claimant would have remained an employee of the respondent if it had acted entirely lawfully. The claimant would still have refused to engage with the redeployment process due to her perception that she had been treated unreasonably and not adequately supported during her period of employment with the respondent. Even if the claimant was fit to have had a discussion about redeployment, it appears that it would not have been possible to redeploy her because she was unfit for work.

8.7 There is no evidence that the respondent's unlawful treatment in dismissing when it did caused any injury to the claimant. In fact, the evidence available points away from any such conclusion. The evidence suggests that the claimant had a pre-existing health condition which was exacerbated by a variety of factors principally factors in the claimant's personal life and, if work was a factor, then the respondent's alleged failure to adequately support the claimant while she was at work appears to have been the factor which caused the claimant the most distress. However, the Tribunal has not criticised the respondent for any lack of support. There is insufficient evidence to allow the Tribunal to make a finding that the unlawful act of the respondent has been a distinct contributor or contributory cause of any psychiatric injury There is significant evidence that the claimant's health was deteriorating before the unlawful act on 27 September 2019. Furthermore, the respondent contends that any loss to the claimant is too remote, and the Tribunal should decline to make any personal injury award. There is no medical evidence available to the Tribunal which supports the making of a personal injury award to the claimant. Whilst such evidence is not always necessary, it should be required in this case given the complexity of the various potential contributing factors to the claimant's illness and the fact that the claimant's health was clearly deteriorating significantly as a result of various reasons before the respondent acted unlawfully towards the claimant on 27 September 2019.
8.8 If the Tribunal considers loss of earnings to be appropriate, then it should be at no higher band than band 4.

8.9 The claimant obtained alternative employment with Holt Doctors Limited in September 2020, but that offer was withdrawn. There is no evidence that the respondent had any involvement in that decision, but it appears it caused the claimant additional trauma, and the respondent cannot be held responsible for that.

8.10 An award in the lower Vento band only is appropriate for injury to feelings and no higher than the midpoint of that lower band. The claimant did not raise this matter specifically in her subsequent grievance or plead the matter in her case to the Tribunal. The grievance makes it plain that the principal matter of concern was the lack of support to the claimant, but the Tribunal has not criticised the respondent for that. The claimant did not respond to the dismissal and the manner of it in her correspondence with the respondent immediately after the dismissal. The claimant was more concerned with the identity of the person who communicated the news rather than the news itself.

8.11 Interest should be awarded on any award of damages. aggravated damages should not be awarded and there has been no finding that the respondent has failed to follow the ACAS code.

8.12 In oral submissions the above submissions were expanded upon. The claimant says now that she was enthusiastic about another role with the respondent particularly a band 5 role but at the time, she was not so enthusiastic. She was asked three times to engage in redeployment and declined. At the grievance interview she said she did not wish to work for the respondent anymore. The claimant says now that it was a flippant remark, but the respondent took it at face value. Accordingly, if a role had been available, the claimant would not have taken advantage of it. She was understandably too unwell to work. There is no realistic prospect that the claimant would have continued to work beyond 2 December 2019 for the respondent. The respondent did not know until today of the role to which the claimant has referred and has had no opportunity to lead any evidence about it.

8.13 In terms of the personal injury claim, there were multiple reasons for the deterioration in the health of the claimant which are impossible to separate out. If the unlawful act was an operative cause, the Tribunal must assess the percentage of the operative cause. The claimant was on half pay at the time of her dismissal and was about to go to nil pay. The suicide attempt is not linked in the medical evidence to the act of dismissal as opposed to the work situation generally. This is not a case for a personal injury award.

Claimant

9. The submissions are briefly summarised:

9.1 The claimant relied on her witness evidence and schedule of loss. The schedule of loss claimed the sum of £314952.74p.

9.2 The claimant stated that she would have been appointed to the band 6 role permanently if she had been in the workplace and able to apply when JS resigned.

9.3 The claimant stated she had always been in employment in spite of her difficulties and had the work ethic.

9.4 The claimant was having therapy in February 2019 in respect of her other difficulties and so that was not a cause of her suicide attempt. The attempt was after the dismissal – that was the cause.
9.5 The claimant now has two temporary contracts and is capable of earning,

9.6 It is not uncommon to move from band 4 to band 6.

9.7 The claimant asserted she had proved the dismissal led to the suicide attempt and her mental health deteriorated thereafter.

9.8 The Rule 50 application was not pursued.

The Law

10.1 We have reminded ourselves of the provisions of section 124 of the 2010 Act in respect of the calculation of compensation for unlawful discrimination and the provisions of section 119 of the 2010 Act. Damages must be assessed in the same way as damages for a statutory tort. The measure of tortious damages is such amount as will put the claimant in the position she would have been in but for the employer's unlawful conduct as far as money can do. In calculating compensation according to ordinary tortious principles, the Tribunal must take into account the chance that the respondent might have caused the same damage lawfully if it had not done so on discriminatory grounds. In the context of discriminatory dismissals, this means asking what would have happened if there had not been a discriminatory dismissal**: Abbey National plc and Hopkins -v- Chagger 2009 ICR 624**.

10.2 A claimant is under a duty to mitigate her loss. The burden of proof in this regard lies on the respondent. What has to be proved is that the claimant acted unreasonably: she does not have to show that what she did was reasonable. What is reasonable or unreasonable is a matter of fact for the Tribunal to determine. The Tribunal is not to apply too demanding a standard to the claimant. She is not to be put on trial as if the losses were her fault when the central cause is the act of the wrongdoing respondent. The test in relation to mitigation can be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate.

10.3 Compensation for discrimination can include compensation for injured feelings. In **Vento-v-Chief Constable of West Yorkshire Police (No 2) 2003 IRLR102** the Court of Appeal held awards for injury to feelings of the most serious kind should normally lie in the range of £15,000 to £25,000. For less serious cases within a range of £500 to £5000 and £5000 to £15000 for cases falling in the middle ground. Those bands were updated in the decision of the EAT in **Da'Bell -v- NSPCC 2010 IRLR19.** In a separate development in **Simmons -v- Castle 2012 EWCA Civ 139** the Court of Appeal ruled that general damages should be increased by 10% and that has been applied to awards in the Employment Tribunal. Presidential Guidance was issued on 5 September 2017 in respect of claims presented on or after 11 September 2017 which updated those three so called Vento bands. On 27 March 2020 a third addendum to the guidance was issued which took account of all changes in the RPI All Items Index to the 25 March 2020. In respect of claims presented to the Tribunal on or after 6 April 2020 the Vento bands were to be £900 to £9000 for a less serious case, £9000 to £27000 for cases which did not merit an award in the upper band and an upper band of £27000 to £45000 for the most serious cases. We remind ourselves that awards for injury to feelings are to be compensatory in nature and not punitive and we must have regard, in particular, to the impact of the discriminatory act on the claimant for it is that impact which determines the appropriate level of compensation.

10.4 A Tribunal may also award aggravated damages in appropriate circumstances for an act of discrimination. Such an award is compensatory and not punitive and is an aspect of injury to feelings compensation. A tribunal should have regard to the total award made to ensure that the overall sum is properly compensatory and not excessive. We note that such awards might be appropriate where the claimant's sense of injustice and injured feelings have been aggravated by actions being done in an exceptionally upsetting way or by conduct based on prejudice, animosity, spite or vindictiveness where the claimant is aware of the motive or by subsequent conduct such as where a trial is conducted in an unnecessarily offensive manner or a serious compliant is not taken seriously or where there has been a failure to apologise. An award of aggravated damages will not be appropriate however merely because an employer acts in a brusque and insensitive manner towards an employee or is evasive and dismissive in giving evidence.

10.5 A Tribunal may also award exemplary damages in appropriate circumstances. Such awards can be made in very limited circumstances. First, cases of oppressive, arbitrary or unconstitutional conduct by government servants. The central requirement in this category is the presence of outrageous conduct disclosing malice, fraud, insolence, cruelty and the like. Secondly, conduct calculated to result in profit and thirdly cases where exemplary damages is authorised by statute. The EAT in **Virgo Fidelis Senior School -v- Boyle 2004 ICR 2010** decided that it was possible for the award of exemplary damages to be made for statutory torts such as disability discrimination. Only if the amount of compensatory and aggravated damages is insufficient to show disapproval of the perpetrator's conduct and to provide a proportionate punitive element would exemplary damages be justified. Exemplary damages are punitive rather than compensatory

10.6 We have reminded ourselves of the Judicial College Guidelines ("JCG") for the Assessment of General Damages for Personal Injury 15th Edition published on 26 November 2019. A tribunal has jurisdiction to award compensation for personal injury provided the claimant proved that her injury was caused by the discriminatory acts: **Sheriff-v- Klyne Tugs (Lowestoft) Limited 1999 IRLR 481.** In **BAE Systems (Operations) Limited -v- Konczak 2017 IRLR 893** the Court of Appeal considered the proper approach to awarding compensation for injuries with more than one cause. The head note from the Court of Appeal decision reads:

"The tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused. The exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm. The question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong: not whether it can assess the degree to which the wrong caused the harm.

That distinction is easier to apply in the case of a physical injury. It is less easy in the case of a psychiatric injury, but such harm may well be divisible. It may, for example, be possible to conclude that a pre-existing illness, for which the employer is not responsible, has been materially aggravated by the wrong (in terms of severity of symptoms and/or duration), and to award compensation reflecting the extent of that aggravation. Even in a case where the claimant tipped over from being under stress to being ill, the tribunal should seek to find a rational basis for distinguishing between a part of the illness that is due to the employer's wrong and a part that is due to other causes: but whether that is possible will depend on the facts and the evidence. If there is no such basis, the injury will be truly indivisible and principle requires that the claimant is compensated for the whole of the injury (although if the claimant has a vulnerable personality, a discount may be required on that basis)".

10.7 In **HM Prison Service-v-Salmon 2001 IRLR 425** the EAT observed that it is important for tribunals making awards where there are damages both for injury to feelings and psychiatric injury to make clear what sums are attributable to which in order to avoid the danger of double counting, given that there is a considerable overlap in the effects the two types of awards are designed to compensate.

10.8 The JCG provides guidance for the assessment of general damages in personal injury cases. The guidance provides for the following factors to be taken into account when valuing claims of psychiatric injury namely the injured person's ability to cope with life and work, the effect on the injured person's relationships with family friends and those with whom she comes into contact, the extent to which treatment would be successful, future vulnerability, prognosis, and whether medical help has been sought.

10.9 The JCG outlines 4 categories of awards in chapter 4 headed psychiatric and psychological damage. In part A the figures recognise an element of PTSD. Cases where PTSD is the sole psychiatric condition are dealt with in Part B. The moderate band for psychiatric and psychological damage where PTSD is not the sole condition is £5500 - £17900 including the 10% uplift in the Simmons -v- Castle decision.

10.10 The loss sustained by the claimant is calculated on the basis of the net loss after deduction of the income tax which she would have been required to pay in the absence of the relevant wrong. Where an award of compensation is taxable however then, to avoid under compensating the claimant, the award should be grossed up in order to place the claimant in the position in which the tribunal's award seeks to place her after she has discharged her tax liability as set out in **British Transport Commission-v-Gourley 1956 AC 185.**

10.11 Part VI of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") provides for certain payments on termination of employment to be subject to tax. Certain amendments to that legislation took effect on 6 April 2018. Those amendments provide for an element of termination pay, referred to as post-employment notice pay, to be taxable as earnings. In addition, the amendments to ITEPA provided in effect that compensation for injured feelings arising from termination of employment is taxable. Before this amendment, such compensation was not taxable. HMRC adopt the stand that an award of injury to feelings in respect of a dismissal before the amendments came into effect will not be subject to income tax. The dismissal of the claimant in this case occurred on 22 September 2019 after the changes came into effect. Damages for personal injury are not subject to income tax and are not subject to grossing up.

10.12 The applicable tax rules in ITEPA can be summarised as follows:
(a) compensation for discrimination that is not made in connexion with the termination of a person's employment is not taxable
(b) compensation for discrimination that is made in connexion with the termination of a person's employment is not taxable if it is an award made for personal injury or (before 6 April 2018) injured feelings **Moorthy -v- Revenue and Customs 2018 EWCA Civ 847.**
(c) otherwise, compensation for discrimination arising in connexion with the termination of a person's employment is treated as employment income under part VI of ITEPA if and to the extent that it exceeds the £30000 pounds threshold. There is an exemption

of £30000 available for sums paid to a claimant in respect of the termination of her employment which would otherwise be taxable.

10.13 We have reminded ourselves of the provisions of the Employment Tribunals (Recoupment of Benefits) Regulations 1994 ("the Recoupment Regulations").

10.14 We have reminded ourselves of the Employment Tribunals Principles for Compensating Pension Loss Fourth Edition (Second Revision) of December 2019 ("the Pension Guidance") and the earlier version. In respect of defined benefit pension schemes, we have noted that there are two recommended methods for calculating pension loss namely the so-called contribution method and the complex calculation method involving use of the Ogden Table and/or expert evidence. We have given the Pension Guidance detailed consideration.

10.15 We have reminded ourselves of the provisions of the 2015 ACAS Code of Practice on Discipline and Grievance Procedures ("the ACAS Code"). We have reminded ourselves of the provisions of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"). However, the ACAS Code does not apply to internal procedures operated by an employer concerning an employee's alleged incapability to do the job arising from ill health or sickness absence and nothing more: **Holmes-v- Qinetiq Limited 2016 IRLR 2016**. We have noted the following extract from the relevant IDS handbook:

"If the reason for dismissal, as found by the tribunal, does not involve a disciplinary offence, then the Acas Code has no relevance and it must follow that there can be no basis for awarding an uplift for failure to comply with it. In Holmes v Qinetiq Ltd 2016 ICR 1016, EAT*, the EAT held that a 'disciplinary' situation was one in which an employee faces a complaint or allegation that might lead to disciplinary action, and such action ought only to be invoked where there was culpable conduct or performance alleged against the employee. In that particular case, the employee was dismissed for capability/ill health. The EAT was of the view that, while poor performance was capable of involving both culpable and non-culpable conduct, where the poor performance was a consequence of genuine illness or injury, it was difficult to see how disciplinary action would be justified without some additional culpable element, and so on that basis the Code would not apply".*

10.16 We have reminded ourselves of the provisions of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the Interest Regulations*").* We note that no interest shall be included in respect of any sum awarded in respect of a matter which will occur after the day on which the amount of interest is calculated by the tribunal. This includes pension loss.

The Medical Evidence (pages 459-522)

Fit Notes (pages 502-509)

11. We have considered the medical evidence in detail. The claimant was ill from 1 July 2019 until 24 October 2019 with stress/depression. The dismissal was communicated on 28 September 2019 and fit notes last through until June 2020 with a diagnosis of anxiety and depression.

GP Records (pages 490-500)

12. We have considered the GP records in detail and note mental health difficulties dating from 2003 with medication prescribed since November 2015. The claimant was seen by her doctor on 15 July 2019 shortly after she went away from work and was diagnosed with low mood and insomnia. On 25 July 2019 the claimant's counsellor was concerned about her and asked that she be seen by her GP again. On 26 September 2019 the claimant told her GP that she had struggled with her workload and lack of support in her role as a cancer manager and was looking for other jobs. On 15 November 2019 the claimant was referred because of a serious drug overdose. She discharged herself from hospital because of delays in being seen by medical staff. She was seen in the psychiatry clinic from then onwards for many months. On 14 December 2020 a diagnosis of ADHD was made.

Report from Nurse Bratley (pages 482-489)

13. We have considered this lengthy report which is dated 12 December 2019. The claimant had been referred because of suicidal ideation. The claimant told the nurse that the stressors for the suicide attempt were that she was fired from her job, that she lacked income, that she had debts and that she had responsibilities as a carer to her father and grandmother. She said she had applied for "*approx.120 jobs".* She had taken an overdose on 4 November 2019 but had then called an ambulance. She had discharged herself on 7 November 2019 because of a delay in being seen. She stated that she had been promoted but given no support when her manager went off sick. She had a history of depression and anxiety. A management plan was recommended.

Other reports

14. On 17 January 2020 a report (pages 477-479) was prepared by Craig Brotherton. Pervasive low mood had been evidenced since April 2019. In January 2019 the claimant's mood had been good. The trigger for the then current episode of low mood was "*when she had engaged with counselling".* Therapy focused on several life events that she had been managing for herself. "*Her job as a cancer support manager ended as the contract was cancelled. Paige believes this was because her relationship with her manager was so poor…. Impression: moderate depressive episode with underling long standing anxiety…. All of the above appears to have been triggered by therapy".*

15. The claimant's mental health deteriorated in mid-2020 and she was referred for cognitive behavioural therapy.

16. On 9 June 2021 Lancashire Autism Service Limited produced a report on the claimant (page 517-519). The claimant received a diagnosis of Autism Spectrum Disorder Level 1. A letter was written in support of a personal independence payment application by the claimant. (page 520).

The Grievance

17. The grievance filed by the claimant was dated 23 October 2019 and the claimant says her mother wrote it for her. The grievance says in terms of the dismissal "*I now find my FTC being terminated (due to the return to work of a colleague from maternity*

leave) which is contractually understandable but has been very poorly managed in the circumstances". The grievance sought three things: appropriate support in connection with my current absence from work, *"proper payment in relation to 28 hours outstanding and proper and appropriate communications in relation to the termination of my current contract in respect of HR policies which gives proper courtesy and respect".* She had been promised an urgent counselling appointment at OH meeting on 16 September 2019 which only came through 17 October 2019, but she was falsely accused of failing to attend that appointment. She raised her concerns about the letter terminating her contract coming from Makala Matthews band 5 and no contact from Nichola Remmington ."*I am so hurt with the lack of support I have had throughout this whole process from my manager from OH and from HR".*

18. The Grievance was investigated 21 November 2019 with the claimant (pages 360-367).The meeting focussed on the perceived lack of support. She stated she had not completed redeployment papers "*because she does not want to work for the Pennine Trust due to lack of support and terrible reputation"* (page 365).

19. The grievance outcome was dated December 2019. The various specific allegations were not upheld but the report stated: "*I feel that PH should have been given a comprehensive induction programme and also specific measurable objectives to support her develop into the band 6 role".* A file note to be made on the file of NR.

The Disability

20. The Liability Judgment provided that the claimant was a disabled person throughout her employment by reason of depression and anxiety and that the respondent had the required knowledge.

Findings of fact

21. We adopt the findings of fact made in the Liability Judgment. Having considered the written and oral evidence from the witnesses called before us at the Remedy hearing and the documents to which we were referred, we make the following additional findings of fact on the balance of probabilities.

22. The claimant was born on 21 June 1991 and began work for the respondent on a fixed term contract from 25 February 2019 until 24 February 2020 with provision for earlier termination. The claimant went away from work ill on 1 July 2019 and did not return. The claimant received the letter of termination of her contract on 28 September 2019 with effect from 22 November 2019. SB returned from maternity leave early on 3 December 2019 but then took holiday and actually returned to the workplace on 13 January 2020. SB had been due to return to work on 1 April 2020.

23. The claimant made a serious attempt to take her own life on 4 November 2019.

24. The claimant submitted the Grievance on 23 October 2019. She was interviewed about the grievance on 21 November 2019 and received the outcome on 31 January 2020.

25. The claimant began early conciliation on 7 May 2020 and filled the claim on 11 May 2020.

26. The claimant began to receive Disability Living Allowance from mid December 2019 until payments ceased in March 2022. The claimant is receiving personal independence payments which cease in May 2024.

27. The claimant found work on a self-employed basis from 22 March 2022. She secured further employment on 23 May 2022 until 19 August 2022.She is self-employed through a company she has created TeMH Limited. She now earns £300 per day and works 5 days per week. She takes £992.31 per month and the company retains the rest. When this work began in March 2022 the income level was £150-£160 per day and the claimant drew £736 per month from her company. There is no guarantee that the work will continue beyond August 2022.

28. The claimant felt better able to work after the hearing in January 2022.

29. The claimant told us in evidence that the receipt by her of a bill for Council Tax was the catalyst for the attempt on her life. Before the suicide attempt the claimant had applied for band 5 and band 6 roles in the NHS but after that she did not.

30. From September 2020 until January 2022 the claimant says she focussed on her mental health. Her father died in November 2021 and her grandmother 6 days earlier.

31. The claimant has not paid anything for therapy at this stage.

32. The respondent has no uniform policy governing when a temporary contract comes to an end when a substantive postholder returns to work. It can sometimes be the date the substantive post holder returns to payroll or it may be later if the postholder delays her actual return by the use of accrued holidays. If the claimant had been in work, she would not have been given the role when SB resigned but rather invited to apply through an open recruitment process.

33. The respondent offers temporary post holders the opportunity to find alternative roles on completion of fixed term contract through its redeployment register. The first step in that process is to complete an Aspiration Form which allows the respondent to search for appropriate roles. The claimant was invited to take this step but declined to do so (pages 335 and 344.)

34. The claimant was on half pay when dismissed and would have moved to nil pay at some point after the date the dismissal took effect.

Discussion and Conclusions

35. We conclude that it is appropriate to award the claimant compensation for losses pursuant to section 124 of the 2010 Act. We calculate the losses on 30 August 2022 (“the calculation date”).

Award for disability discrimination pursuant to the 2010 Act

36. There are various questions which we need to consider in order to formulate our decision as to the correct level of award under the 2010 Act. The questions emerge from the list of issues and the written submissions. We have considered all of those submissions in detail.

37. At the outset we remind ourselves that we are engaged in calculating the remedy due to the claimant for one single act of disability discrimination namely the act of dismissal on 27 September 2019. There were other claims of discrimination, but they did not succeed for various reasons and are not to be compensated. We must consider compensation for any loss caused by the dismissal. Within those parameters, we are to award compensation which is just and equitable. We note our finding in the Liability Judgment that the respondent ought reasonably to have known that the claimant was a disabled person throughout her period of employment.

Loss of earnings claim

38. We have first considered the period from 22 November 2020 when the dismissal took effect until 3 December 2020 which is the earliest date when the claimant could have been dismissed without discrimination as that was the date SB returned to the payroll of the respondent. The respondent accepted that it would be right to compensate the claimant for loss of earnings in this period. We calculate that the claimant was earning £30401 per annum at dismissal. This equates to £584.63 per week and £116.92 per 5 working days each week. There were 7 working days in the period from 22 November until 3 December 2020 and so the gross loss of earnings is £818.48.To calculate a net sum we reduce that figure by 15% namely £122.70 and reach a net sum of £ 695.78 to award for this period.

39. The respondent also paid a pension contribution for the claimant of 9.3% of gross salary. 9.3% of £818 is £76.Thus the award for the period to 3 December 2019 is £772 (£696 plus £76). We consider it right to add interest to that sum for one half of the period of time between 3 December 2019 and the calculation date pursuant to the Interest Regulations That period is 1000 days, and one half is 500 days.

40. We conclude that it is right to award loss of earnings to the date on which SB returned to the payroll of the respondent. We are satisfied that the respondent would not have maintained both SB and the claimant on the payroll beyond that date.

41. We are satisfied from the evidence provided to us that the claimant was not fit for work at any time from 3 December 2019 until 22 March 2022 when she recently began alternative employment. We conclude that the claimant's losses ceased on 22 March 2022. In those circumstances questions of mitigation of loss do not arise for we are satisfied the claimant simply was not fit to work in the period from December 2019 until March 2022.

42. We have considered whether the act of dismissal resulted in loss of earnings to the claimant by reason of the respondent failing to retain the claimant in her band 6 role beyond 3 December 2019 and in particular beyond the date when SB resigned her employment, which she did on 13 January 2020, shortly after she returned to work. For whatever reason, it is clear that the claimant was not performing well in her band 6 role despite what we have found to be reasonable support taking account of her disability.

We conclude that, if the claimant had entered into an open competition for the band 6 role in or around January 2020, there was no chance of her being appointed to that role because of her performance from February 2019 until the end of June 2019 in that role. Further, it is clear from the evidence that the claimant had given up on the respondent and, well before her dismissal, was actively seeking employment elsewhere. The claimant did not engage with the redeployment process when it was offered to her. The reality is that the claimant was completely disenchanted with the respondent because of what she perceived to be a difficult relationship with her line manager arising from what she perceived to be a lack of support. In our liability judgement we decided that that part of the claimant's claim was not made out. We conclude there was no prospect of the claimant being appointed to the substantive role which she was covering on a temporary basis during the maternity leave of SB.

43. We have considered whether the claimant would have been redeployed to another role with the respondent if she had not been dismissed when she was. It is clear that other roles were available both at band 4, band 5 and band 6. The claimant was invited to engage in the redeployment process, but she did not do so. The claimant was ill when the question of redeployment arose and remained ill for a very considerable period since that time. We have considered whether, if she had not been dismissed, the claimant would not have been ill and so would have been able to engage in the redeployment process. We have concluded that she would not because the illness of the claimant arose from July 2019 onwards and it arose through her perceived lack of support from the respondent. If the claimant had not been dismissed when she was, then she would still have been away from work ill and the medical evidence indicates no prospect of a return to work in 2019 or beyond. We conclude the claimant would have remained away from work ill even if she had not been dismissed because of her disenchantment with the respondent and her strongly held view that she had been treated very badly by them in terms of support. We conclude that the claimant would not have engaged in any redeployment process and that the act of dismissal has not caused any loss of earnings by reason of her unwillingness to engage in redeployment. We adopt our findings in respect of the medical evidence set out above and note the claimant remained unwell until March 2022.

Personal Injury claim

44. We have next considered whether the act of dismissal caused any personal injury to the claimant and whether any loss of earnings arises from that personal injury. Put another way, did the act of dismissal mean that the claimant was prevented from working for another employer before she managed to find work in March 2022? We have concluded that the act of dismissal caused no personal injury to the claimant. We accept the submission of the respondent that there is no medical evidence before us that the act of dismissal (as opposed to the earlier perceived absence of appropriate support) caused any personal injury to the claimant. The medical evidence clearly shows that the claimant had a pre-existing health condition which had been exacerbated before her dismissal and which led to her becoming unable to work from 1 July 2019. The factors which had exacerbated the condition included personal factors in the claimant's life which we have alluded to in our review of the medical evidence. In addition, the claimant's perception that the respondent had failed adequately to

support her was clearly the factor that had caused her significant distress and led to her going away ill on 1 July 2019 some 3 months before she was dismissed. The medical evidence of any connection between the act of dismissal and her psychiatric illness simply is not present. The act of discrimination occurred on 27 September 2019 and therefore any resulting injury must have occurred after that date. There is significant evidence that any ill health was caused before that date as the medical evidence clearly demonstrates. We accept the submission of the respondent that there is no medical evidence which supports the making of a personal injury award to the claimant. If there was no personal injury caused to the claimant by reason of the dismissal, there can be no award for loss of earnings based on that claim.

Injury to Feelings

45. However the question of injury to the feelings of the claimant is an entirely different matter. The respondent accepts that an award is appropriate. We accept the evidence of the claimant that she was very greatly upset by her dismissal at the point and in the manner it occurred. We note that the injury caused to her feelings led to a significant downturn in her condition and conclude that it contributed to a serious attempt made by the claimant on 4 November 2019 to take her own life. The fact that the claimant did not refer in the Grievance to the act of dismissal specifically does not lead us to conclude that the injury to her feelings was minimal. It was not minimal – it was very considerable.

46. We conclude that the appropriate level of award for the injury to the claimant's feelings falls at the bottom of the middle Vento band applicable to this claim. We award £10000 for injury to feelings.

47. It is right to add interest on that award at 8% for the whole period since the act of dismissal which is a period of 1068 days. The daily rate of interest is £2.19 which multiplied by 1068 gives £2338.92.

Aggravated damages

48. We have considered whether it is appropriate to make an award of aggravated damages in the circumstances of this case. We conclude that it is not. We note that such awards might be appropriate where the claimant's sense of injustice and injured feelings have been aggravated by actions being done in an exceptionally upsetting way or by conduct based on prejudice, animosity, spite or vindictiveness where the claimant is aware of the motive or by subsequent conduct such as where a trial is conducted in an unnecessarily offensive manner or a serious complaint is not taken seriously or where there has been a failure to apologise. Whilst we have criticised the respondent for the timing of the act of dismissal and conclude that it was tainted by disability discrimination, we do not categorise the actions of the respondent as reaching the threshold where an award of aggravated damages should be awarded. There will be no award of aggravated damages.

Expense of Private Treatment for Therapy

49. The claimant accepted that she had not yet incurred expenditure on private therapy. We do not consider it appropriate to make any award for expenditure not incurred. In addition, there is no suggestion that the act of discrimination we are compensating, which we remind ourselves again is the act of dismissal, has created any necessity for private therapy treatment. If there is such a necessity, it arises from the claimant's pre-exiting condition and other factors such as her perceived lack of support from the respondent – a claim which has not succeeded. There will be no award for the expense of private therapy.

ACAS uplift

50. The claimant seeks an uplift to compensation awarded pursuant to the provisions of section 207A of the 1992 Act. The dismissal in this case was by reason of a return to work of the substantive postholder whose job the claimant was covering. In those circumstances, the Code had no application and the fact that the respondent did not follow the terms of the Code cannot result in any uplift of any award. There will be no award under this head of claim.

Final Comments

51. The total amount due to the claimant of £13195.42 is payable forthwith.

52. Given the level of the award, there is no necessity to gross up the award for tax purposes.

Table of Compensation Awarded Including Interest Calculation

Loss of earnings including pension contribution

22.11.19 – 3.12.19 **£772.00**

Interest on the loss of earnings to date.

3.12.19 – 30.8.22 1000 days
50% x 1000= 500 days at 8% per annum x £772
Daily rate £0.169
Interest awarded 500 days x £0.169 **£84.50**

Injury to Feelings **£10000.00**

Interest on the award for Injury to Feelings

Interest 28.9.19 – 30.8.22

2 years 338 days at 8% per annum
8% x £10000 = £2.19 per day
1068 days x £2.19 **£2338.92**

GRAND TOTAL **£13195.42**

EMPLOYMENT JUDGE A M BUCHANAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 9 September 2022

.....

JUDGMENT SENT TO THE PARTIES ON

15 September 2022

AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2405457/2020**

Name of case: **Miss P E Hyde** v **Northern Care Alliance NHS Foundation Trust**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 15 September 2022

the calculation day in this case is: 16 September 2022

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.