EMPLOYMENT TRIBUNALS

Claimant	Respondent
	v
Ms M	P Ltd (1) Mr T (2)

Heard at: **London South Employment Tribunal**

(via CVP)

On: **6-9 June 2022**

Before: **EJ Webster**
Ms G Mitchell
Mr R Shaw

Appearances
For the Claimant: **Mr C Crow (Counsel)**
For the Respondent: **Ms P Leonard (Counsel)**

JUDGMENT

1. The Claimant's claims for personal injury, injury to feelings and financial losses arising from discrimination were upheld.

2. The awards made are set out below.

Head of Damages	Amount
Financial losses to date of Tribunal	£115,177.90
Pension loss to date of Tribunal	£7,850
Future financial loss	£308,906.90
Future pension loss	£12,311.47

Personal Injury (PSLA)	£75,000
Injury to feelings	£17,000
Sub Total	**£552,546.25**
Interest on past financial loss (mid point 952 days @8%)	£28,571.03
Interest on general damages (from 22.3.17 @8%)	£38,392.99
Sub total of interest	**£66,964.02**
Total damages including interest	**£619,510.27**
Amount not to be grossed up	£127,561.47
Amount to be grossed up	£491,948.80
Grossed up total of £491,948.80	£867,566.20
Total payable to the Claimant	**£995,127.67**

WRITTEN REASONS

Background

3. An oral decision was delivered on the final day of the hearing. Subsequently, the parties were asked, according to the principles outlined in the Judgment, to agree the calculations regarding loss of earnings. The Tribunal was asked, at various points to make findings of fact on a number of issues as the parties worked together. The Tribunal then assisted the parties with the interest calculation and the grossing up calculation. However all calculations were agreed by the parties on the day.

4. Subsequently the Tribunal ordered the parties to send in their calculations showing how they had reached their agreed figures. That is attached to this Judgment as Annex A. In carrying out that process, the parties agreed that they had made an error in the calculations regarding the loss of earnings and the Claimant applied for a reconsideration to amend the amount awarded in the Judgment. The respondent agreed with the reconsideration application. The figures in this Judgment reflect the amended amount agreed by the parties.

5. All conclusions have been reached on the balance of probabilities.

6. The respondent indicated in writing, within the requisite 14 days, that they wanted written reasons which are now set out.

7. This Judgment should be read in conjunction with the factual conclusions reached in the liability Judgment. The respondent had appealed against that Judgment but prior to the remedy hearing the EAT refused the appeal at the sift stage. It is understood that a Rule 3(10) hearing has been requested but that was not brought to this Tribunal's attention prior to the remedy hearing.

The hearing

8. The Tribunal was provided with written witness statements and heard oral evidence from the claimant, her mother and her brother and the second respondent. We were also provided with a bundle of documents numbering 1043 pages which included two joint expert reports. The joint experts had both had opportunities to view each other's reports and comment on them as well as consider whether the other's report caused them to amend their own. Their CVs were attached to their reports and the Tribunal accepts that they were experts in their respective fields.

9. Also provided were a supplemental bundle, an updated Schedule of Loss, a Chronology, a counter schedule and written submissions and authorities from both sides. All the authorities and cases we were referred to were carefully considered when reaching our conclusions regarding quantum and approach even if they are not expressly referenced in our conclusions below.

10. The hearing was held entirely remotely by way of CVP which was not objected to by either party.

The law and principles considered when determining remedy for discrimination

Relevant legislation

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

"(2) The tribunal may—

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

(b) order the Respondent to pay compensation to the complainant;

(c) make an appropriate recommendation.

(3) An appropriate recommendation is a recommendation that within a specified period the Respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.

…

(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119."

12. Section 119 confirms that compensation is awarded on a tortious basis and may include compensation for injured feelings. Financial compensation for discrimination is uncapped.

Compensation principles in discrimination cases

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

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

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

16. When more than one event contributes to the injury suffered by a claimant then, save where the injury in question can be said to be 'indivisible,' the extent of the respondent's liability is limited to the contribution to the injury made by its discriminatory conduct (Thaine v London School of Economics [2010] ICR 1422 EAT, Olayemi v Athena Medical Centre [2016] ICR 1074, BAE Systems (Operations) Ltd v Konczak [2017] EWCA Civ 1188, Blundell v Governing Body of t Andrew's Catholic Primary School [2011] EWCA Civ 427).

17. Compensation for personal injury also potentially includes compensation for financial losses arising from the injury and for the injury itself. As does compensation for discrimination.

18. When calculating compensation for financial loss we have considered past and future losses separately. Past losses are ascertainable with some accuracy. Our decision is to decide whether the loss is attributable to the unlawful discrimination.

19. Future financial losses are more difficult to assess. We must consider what would have happened, but for the unlawful discrimination and what will happen and compare the two. That is an inherently uncertain exercise. There are often a range of possibilities. The burden of proof is on the Claimant.

20. We must assess the likelihood of the different possibilities occurring and try to assess the most likely possibility based on the evidence we have. It is

important to take a step back and take an overview of the compensation awarded to consider whether as an overall figure the Claimant has been appropriately compensated in accordance with the rules and to assess the overall picture carefully to avoid any possibility of double recovery.

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

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

23. The losses are long term. To assess those losses we have tried to undertake a reasoned calculation of the earnings in the "what would have happened" and "what will happen" scenarios and deduct the latter from the former to identify the gap. The Actuarial Tables with explanatory notes for use in Personal Injury and Fatal Accident Cases (referred to as the Ogden Tables) have been developed for this purpose. The relevant edition is the Eighth Edition.

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

(i) the Claimant's likely retirement date (to determine which tables should be used)
(ii) her earnings including her prospects of receiving pay increases
(iii) whether any of the discounts found in Tables A to D should be applied

25. The Ogden tables already include a discount for early death and this is built into the different tables.

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

Personal Injury - Compensation for the Injury Itself

27. The Guidelines for the Assessment of General Damages in Personal Injury Cases produced by the Judicial College attributes a financial value to the pain suffering and loss of amenity suffered by an injured person.

28. The relevant edition of the Judicial College Guidelines is the 16th edition which tell us that the following factors need to be taken into account when valuing claims of psychiatric injury:

a) the injured person's ability to cope with life and work

b) the effect on the injured person's relationships with family, friends and those with whom he comes into contact;

c) the extent to which treatment would be successful

d) future vulnerability

e) prognosis

f) whether medical help has been sought;

g) whether the injury results from sexual and/or physical abuse and/or breach of trust; and if so, the nature of the relationship between victim and abuser, the nature of the abuse, its duration and the symptoms caused by it.

29. An award for personal injury may be made in addition to an award for injury to feelings (Hampshire CC v Wyatt (UKEAT/0013/16/DA) but we must be aware of the risk of giving double recovery.

Injury to Feelings

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

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

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

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

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

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

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

Aggravated Damages

34. Aggravated damages are a sub-head of injury to feelings. They are awarded only on the basis, and to the extent that ,aggravating features have increased

the impact of the discriminatory act on the Claimant and thus the injury to her feelings. They are intended to be compensatory, not punitive.

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

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

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

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

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

Adjustments

37. The relevant adjustments in this case are:

- Interest
- Tax and grossing up

38. Guidance on the order in which the various adjustments that can be made to awards of compensation are made, is provided in the case Digital Equipment v Clements [1997] EWCA Civ 2899 which confirms the order is as follows:

(1) Calculate total losses suffered

(2) ACAS procedure adjustment

(3) Interest is then calculated on past losses

(4) Tax and grossing up

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

40. The elements of compensation which attract interest are:

(i) Past financial losses
(ii) Injury to feelings, aggravated damages, exemplary damages

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

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

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

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

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

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

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

Facts and discussion

Overall observations

48. During this hearing we broadly accept the claimant's evidence regarding her ill health. The respondent has tried extremely hard to find discrepancies in her evidence regarding her health both before and after the discriminatory event. We have considered those representations very carefully to determine whether they affect our findings today. Where we do not reference them that does not mean we have not considered them, it simply means that we have not thought them persuasive. We generally prefer the claimant's evidence in most regards concerning her health for the following reasons:
    (i) The claimant's assertions are by and large, backed up by her medical notes both contemporaneous and subsequent;
    (ii) The claimant's assertions are broadly supported by the joint medical experts whose reports we carefully considered;
    (iii) The claimant's main conditions are ones that fluctuate. This means that accounts of her symptoms will vary depending on the day she is being asked about them. That does not, in our view, mean that her accounts

are unreliable, it reflects the nature of her conditions. The claimant has never sought to assert that she will not improve in certain ways, nor that her bad days in respect of either condition, represent her every day. The only document that could detract from that conclusion is the PIP document. (We accept that there, her symptoms are not refined by bad days and good days. They paint a bleak picture without allowing for possible and probable improvements. Before us the claimant has readily accepted that such improvements have occurred and will happen. Taken in the context of all the evidence we have heard, we do not consider that this one document significantly affects our overall impression or understanding of the claimant's ill health given the joint expert reports and the evidence from the claimant.

(iv) The joint expert reports address the issues of any exaggeration in their assessment of her health at the time and her prognosis. We have had due deference to their assessments.

(v) The respondent has sought to argue that the claimant is both better than she suggests due to some of her conditions and worse than she accepts due to other conditions. Some of those lines of argument were clearly not supported by the evidence.

49. The first factual dispute we had to determine was whether the claimant would have been dismissed by the respondent in any event and if so when. We have been given very little evidence on which to make that assessment. In the liability hearing we accepted that the financial figures for the respondent's branches were extremely poor and that the respondent had concerns about the claimant's performance. However we also found that the concerns he had were not acted on between March and May when the claimant herself accepts that she may not have been performing well and that lack of any movement to get rid of the claimant during this period suggests that his concerns were not so serious.

50. There was an impending probation meeting and we accepted that there was a 'hire and fire' culture within the organisation. We therefore conclude that it is perfectly possible that the claimant's performance would have been raised seriously at the probation meeting. However given that the respondent had not dismissed the claimant during the period March to May, there was nothing to suggest that the claimant's dismissal would have happened immediately with absolutely no opportunity to improve.

51. In ascertaining when the claimant might have left the respondent we also have the claimant's evidence that she would probably have left soon anyway because she did not like the culture there or the respondent's behaviour even before the incident.

52. Taking into account all the above factors, we conclude that in the absence of evidence that the respondent was going to dismiss the claimant at the

probation meeting, on balance of probabilities, that for one reason or the other, the claimant would have left the respondent's business within 6 months of the incident had it not taken place.

53. We do not think that the claimant's losses would have altered because of the reason for termination. Had she been terminated for poor performance her notice pay of 3 months would have been payable. We consider it more likely than not that she would have found a job within that time frame rather than suffered a period of unemployment. We reach that conclusion because the claimant was highly motivated to work, she had a child to support and she had been in full time employment for the majority of her adult life. She had a good record and we consider that there would have been other opportunities.

54. Were she to have resigned we consider that she would more likely than not left with another job to go to. We therefore conclude that had the discrimination not occurred, the claimant would only have remained employed by the First respondent for 6 months.

55. After that, we consider that she would have been working elsewhere. In terms of the salary that she would have left to go to, we consider that the claimant would, on balance of probabilities, (in either of the possible scenarios outlined above) have been willing to take a job where the salary would have been slightly less if it meant remaining in work and leaving the respondent. We consider that the claimant has provided us with little evidence to demonstrate what commensurate salaries were in the recruitment business at this time. We have considered her previous salaries and those provided by the respondent. We have reached an estimate bearing all those salaries in mind that it is more likely than not that she would have earned approximately £68,000 which is part way between the salary she earned in her previous job and the salary that she earned at the respondent.

56. We conclude that it is more likely than not that the claimant would have worked until state retirement age. Work was a central factor in her life for the entirety of her adult life (apart from one episode following her hysterectomy). She returned to work full time after having her child.. She describes a sense of loss when she left previous jobs. We therefore conclude that it is more likely than not that she would have aspired to work until the state retirement age as work was an important part of her life and she had until the incident, wanted to work at all times.

57. It was not clear to us what age the respondent was asserting she would have retired at. They made various assertions regarding her health and pre-existing health conditions. We do not accept that any of them would have impacted on her desire or ability to work until retirement. We address the pre-existing health conditions below.

58. No evidence was given regarding a 'normal' retirement age for those within recruitment and we therefore consider it reasonable to believe that the claimant, given the importance of work to her and the fact that her pre-existing health conditions had not impacted on her ability to work previously, she would have continued until the state retirement age of 67. We have taken into consideration the fact that lifelong losses are rare when reaching that conclusion. We go on to use the Ogden Tables and discuss the multipliers therein which ensure that other aspects affecting life expectancy are factored into the calculation of those losses.

59. We now address the various health issues relied upon by the respondent as being indications of either the idea that she would have retired early due to ill health retirement or that would have meant that she would not have been able to work to the same extent regardless of the discrimination.

60. The knee arthritis may have caused the claimant pain and may continue to do so. However in the past it impacted very little on her ability to work and we accept the claimant's submissions that she had had little or no sickness absence during her entire working life prior to the discrimination. That is supported by the medical notes we saw. Certainly there was no evidence provided to us to suggest that her knee condition had caused prior absences nor were we provided with evidence that the condition would deteriorate and cause future absence. For those reasons we do not accept that the knee arthritis would have foreshortened or impacted negatively on the claimant's working life both in respect of duration or the type, hours or level of work she undertook.

61. We accept that she may have had a diagnosis of vertigo but no evidence was provided to suggest that it impacted her ability to work nor that it would deteriorate. We make the same observations regarding this condition as we do about the knee arthritis. There was no evidence to suggest it had impacted on her ability to work nor any evidence provided to us for us to assess that it would have done in the future. The same applies to the condition of sciatica.

62. The claimant had continued to work despite having these pre-existing conditions, some of them for many years and had had very little sickness absence as a result of them. We therefore do not accept that we have been provided with evidence upon which we could conclude that they would impact her ability to work in the future. The respondent has relied upon assertion but without sufficient persuasive evidence. We consider that the claimant has demonstrated that she worked consistently, without significant absence, despite being diagnosed with these conditions. They had not impacted on her career to date and we were provided with no information or evidence to suggest that they would in the future.

63. The respondents allsp suggested that the claimant had a cardiac condition and Chronic Obstructive Pulmonary Disease ('COPD'). It is clear from the medical notes that whilst the claimant was seriously investigated for both of these conditions, including a 10 day hospital stay for the heart condition, that she was in fact discharged from both speciality teams as she did not in fact have either condition and has not had any follow up treatment or monitoring. We therefore conclude that she did not have and does not have those conditions so they have no bearing on her ability to work in the future.

Causation and severity of Injury

64. Following the joint expert reports by Dr Andrews and Dr Fishman, and taking into account the surrounding medical evidence and the claimant's evidence to this Tribunal, we accept that the claimant's PTSD was caused by the event and that her fibromyalgia was significantly exacerbated by the incident.

PTSD

65. Dr Andrew is a Consultant Psychiatrist. His report was provided to the parties after having met the claimant. A joint letter of instruction was sent to him and after the production of his report, the parties were entitled to ask him further questions which they did. Dr Andrew was also given the opportunity to comment on Dr Fishman's report and vice versa. We found the report helpful and clear. Both parties were given the opportunity before us to make submissions regarding the content of the reports and the claimant and the second respondent gave evidence in respect of their content insofar as they were able both in witness statements and in cross examination.

66. Dr Andrew's report makes a clear unequivocal finding that the claimant's PTSD has been caused by the incident. He makes reference to earlier events in the claimant's life that might have predisposed the claimant to such a condition including a period of depression in 2013 and a previous sexual assault in her teens. Nevertheless, she was not unwell at the time of the assault and he is clear that the assault alone caused the condition. Whilst the claimant may have been predisposed to such a condition, applying the egg shell skull principle, this does not detract from the fact that it was the incident that caused the PTSD.

67. The report is unequivocal regarding causation and we accept its findings and have been given no substantive reason to doubt them.

"On the balance of probabilities, Ms M appears to have developed Post-Traumatic Stress Disorder (PTSD) (ICD11 6B40, ICD10 F43.21), following the sexual assault or rape, which developed as a result of the rape. Considering the diagnostic criteria for ICD11 PTSD, 'PTSD may develop following exposure to an extremely threatening or horrific event or series of events. It is characterised by all of the following: (1) reexperiencing the traumatic event or events in the present in the form of vivid intrusive memories, flashbacks or

nightmares. Re-experiencing may occur via one of multiple sensory modalities and is typically accompanied by strong or overwhelming emotions, particularly fear or horror and strong physical sensations; (2) avoidance of thoughts and memories of the event or events, or avoidance of activities, situations, or people reminiscent of the event(s); and (3) persistent perceptions of heightened current threat, for example, as indicated by hypervigilance or an enhanced startle reaction such as to unexpected noises. These symptoms persist for at least several weeks and cause significant impairment in personal, family, social, educational, occupational or other important areas of functioning.' Ms M developed symptoms, features or behaviours within all three of the categories defined, namely symptoms related to re-experiencing the trauma, avoidance behaviour aimed at avoiding re-living the trauma again, and symptoms resulting from generalised 'hyperarousal' such as generalised anxiety or hypervigilance." (para 10.8 pg 952-953).

68. In terms of the severity of the condition, we make the following findings. Initially the claimant had a depressive episode and experienced the symptoms as outlined at paragraphs 10.12-10.15 (pgs 954-955) and subsequently experienced periods of improvement such that the condition had resolved by the time of the ET liability hearing in 2021. We infer from Dr Andrew's conclusions that the claimant's condition fluctuated between being mild and moderate until the hearing in 2021 at which point it worsened and became moderate for that relatively short period of time. Dr Andrews also provides a good prognosis going forward particularly with regard to her ability to work in the future at a similar level as before.

69. Following that he also makes it clear that by the time of his appointment with her she was recovering and could reach a stage where she is sub symptomatic on many aspects of the PTSD diagnosis. We accept that Dr Andrews was reliant on the version of her health given by the claimant but he also had access to her medical records which demonstrate and confirm similar reports of the same symptoms she reported to him albeit not necessarily their severity. He says that the decision of whether the claimant was exaggerating her symptoms was for the Tribunal to decide. We do not consider that she was exaggerating her symptoms. We have set out above that we generally accept the Claimant's description of her health despite the respondent's challenges which we have considered. We do not go behind his findings on that basis and find that he gives a very balanced view of her past, current and future health. We accept his conclusion that although she had been worse around the time of the ET liability hearing, her PTSD was not severe relatively quickly after the discrimination incident though he does not give dates. We consider that his general prognosis is that subject to her maintaining the medication and barring other life event triggers, her PTSD will remain sub symptomatic and not affect her ability to work in the future. Were the claimant to have been exaggerating with the effect that it meant that Dr Andrews' diagnosis was more severe,

presumably he would not have given such a positive prognosis or suggested that she was better quite quickly after the discriminatory incident.

70. The relevant JC Guidelines are those under Section 4 (C) Psychiatric and Psychological Damage/ Sexual or Physical Abuse. They set out as follows:
Section (C) - Sexual and/or Physical Abuse

The factors to be taken into account in valuing general damages for the abuse and the psychiatric injury in claims of this nature are as follows:
(i)the nature and duration of the abuse and any physical injuries caused;
(ii)the nature and duration of the psychological injury and its effect on the injured person's ability to cope with life, education, and work;
(iii)the effect on the injured person's ability to sustain personal and sexual relationships;
(iv)abuse of trust;
(v)the extent to which treatment would be successful;
(vi)future vulnerability;
(vii)prognosis for psychological injury.

Aggravating features which would lead to an additional sum for injury to feelings include:
(i)the nature of the abuse;
(ii)the level of abuse of trust;
(iii)any manipulation following the abuse to stop reporting of the abuse, or to seek to put blame on the injured party;
(iv)the need for the injured party to give accounts and evidence of the abuse in criminal or civil proceedings, or in any other relevant investigation.

(a) Severe (£45,000 to £120,000)

In these cases the injured person will have suffered serious abuse and/or severe and prolonged psychiatric injury. At the upper end the abuse will have had serious effects on their ability to cope with education, work, and to sustain personal and sexual relations. There may be elements of false imprisonment. Where, despite the seriousness of the abuse and problems caused, the prognosis is good, the lower end of the bracket is appropriate. The majority of cases in this bracket fall within the range of £55,000 to £90,000.

(b) Moderate (£20,570 to £45,000)

Cases where the abuse is less serious and prolonged and there is a less severe psychological reaction with fewer effects on education, work, or relationships. This bracket also includes cases where there has been a more serious level of

abuse but the psychological reaction is limited and is either resolved or the prognosis is good. There may be some aggravating features.

71. Considering the relevant factors to take into account as set out in the Judicial College guidelines, we address them as follows. The assault was a one off incident with minimal physical injury caused but it was of the most severe type of sexual assault. The Claimant has been able to maintain relationships with her family and with sexual partners since the assault. There was a period of time where she was separated from her then partner but they are now together and have been for a significant period of time and she had intervening sexual relationships with others. She also maintains close relations with her immediate family (mother, brother, daughter).

72. Subject to our findings about the fibromyalgia where there is an overlap, we accept Dr Andrew's assessment that apart from the initial depressive episode her PTSD has had and will have minimal impact on these areas of her life given that she is seeking medical support in the form of anti-depressants and counselling.

73. Dr Andrew's report concludes that:

1.7 The prognosis generally from a psychiatric perspective has been worsened in that she will be more likely in the future to develop PTSD at times of severe psychological trauma, as well as being more likely to develop major depressive episodes, particularly at times of psychosocial stress, although she was already someone who was more vulnerable than normal, to developing major depression again within her lifetime. (pg 958)

74. We have also considered the nature of the assault. There was an abuse of trust by the very nature of the assault and the fact that the second respondent was her line manager and the CEO of the first respondent. The abuse of trust is further compounded by the fact that Claimant was intoxicated at the time of the assault and therefore more vulnerable than perhaps she would otherwise have been.

75. Taking into account all of the above factors we conclude that the award for the PTSD injury ought to be towards the top of the middle bracket and award £40,000**.**

76. The impact was a less severe psychological reaction with fewer effects on work or relationships but as stated in the JC Guidelines, this bracket also includes cases where there has been a more serious level of abuse but the psychological reaction is limited and is either resolved or the prognosis is good. We think that this describes the claimant's situation accurately and it is

therefore the appropriate bracket. There are aggravating factors which we have considered when reaching our decision of £40,000.

Fibromyalgia

77. Dr Fishman is a Consultant Physician and Rheumatologist. We accept Dr Fishman's report which confirms that the claimant's pre-existing condition of fibromyalgia was stable and well managed before the event without her needing significant amounts of medical support. The support that she did require pertained to physical symptoms such as restless legs and once treated had little or no impact on her ability to work and generally live her life. After the incident the symptoms have been varied and fluctuate. They include:

(i) Difficulties walking
(ii) Fibro fog including poor memory
(iii) Disturbed sleep
(iv) Restless legs
(v) Migraines
(vi) General flu like feeling
(vii) Allodynia
(viii) Fatigue

78. Dr Fishman's conclusions are that the claimant,

"In my professional opinion, on the balance of probabilities, the emotional trauma suffered by the claimant as a result of the index incident (a sexual assault) led to a flare up of her fibromyalgia syndrome, which is ongoing. It does not appear that any other coincident factors were related to this flare up.

4.2. She has had some, but not all, of the available therapies, so prognosis is not certain but she is likely - on the balance of probabilities and in my professional opinion - to remain at a similar level as she is now for the foreseeable future, particularly if she does not receive significant benefit from any future therapeutic interventions."

79. He goes on to state in answer to specific questions in the report (pg 874-875):

Question 5. Please clarify whether her symptoms relating to fibromyalgia have remained the same or have changed. If there has been a change, when did this change first develop?

9.6.5.1. Having interviewed the claimant, examined her and reviewed her medical records, it is my professional opinion that, on the balance of probabilities, her fibromyalgia has deteriorated significantly since the index incident. As discussed above, her fibromyalgia was stable in terms of her being a very infrequent attender in primary care prior to the index incident. She had no presentations for musculoskeletal symptoms for at least six months prior to the index incident.

Following that, she went off work, her mental health deteriorated, and she described to me a deterioration in her fibromyalgia symptoms, but these were not frequently recorded in primary care until later.

9.6.6. Question 6. What caused any such change to develop?

9.6.6.1. In my professional opinion, on the balance of probabilities, the change – i.e. significant deterioration in her fibromyalgia – was the result of her reaction to the (emotional) trauma of the sexual assault. As discussed above, fibromyalgia can flare independently, but this is unusual to be so severe and prolonged as this, and in my professional opinion, on the balance of probabilities, the flare must have been caused by some stimulus, and in this case it would have been the rape.

(See Ciccione reference, cited above).

9.6.7. Question 7. If there were multiple causes for any such change, please identify them.

9.6.7.1. It is not possible to state with absolute certainty that there were no other external factors which contributed to the deterioration in the claimants' fibromyalgia, such as other forms of stress. However, nothing else is indicated from the records, and the stress from the rape would have been more than enough to have triggered this flare. In my professional opinion, on the balance of probabilities, the emotional trauma of the rape was the sole cause of the flare of her fibromyalgia.

80. He was asked to clarify a number of points in questions put to him after the report and we have considered his answers carefully.
We note that he says as follows:

"14. This conflates two tests of causation. Are you saying you cannot say on the balance of probabilities that the index accident caused a deterioration but you can say the index accident made a material contribution?

Answer: On reflection, I acknowledge that this statement is unclear, and wish to clarify it, by stating that: "In my professional opinion, on the balance of probabilities, the index incident caused the deterioration in the Claimants fibromyalgia ".

81. We therefore conclude that the incident did exacerbate the claimant's fibromyalgia given Dr Fishman's conclusions. We have also considered the GP notes which confirm this and taken into account the claimant's witness evidence of the effect of that worsening. We do not repeat all the symptoms or issues that the claimant has experienced as they are wide-ranging and properly detailed in her witness statement and Dr Fishman's report all of which we have considered.

82. The main, pervasive and continuing symptoms experienced by the claimant are fatigue and 'brain fog'. The claimant relies upon these as being the main barriers to her being able to work at the same level or full time for the future.

The respondent asserted that the claimant was overstating her symptoms considerably but Dr Fishman has made clear in his findings, that the condition is one that fluctuates and the claimant accepts that, and Dr Fishman finds that she is unlikely to improve her ability to work given the extensive treatment she has had since the event. He in no way questions the causation as being that of the incident.

83. The Tribunal concludes that the 'base level' of symptoms experienced by the claimant had been raised permanently. Prior to the incident the base level of her condition was at one level (let's say level A) and from there, she experienced flare ups and good days and bad days. After the incident, the 'base level' of symptoms was worsened (let's say level B) and from there, the claimant experienced flare ups and good days and bad days. The change from A to B is a permanent one that is, according to Dr Fishman, unlikely to be alleviated by any of the treatments. There is permanent worsening of the base level for the claimant.

84. There is clearly an overlap between the psychiatric condition and the flare ups of the brain fog in particular but possibly with regard to some of the physical symptoms. The respondent sought to assert that therefore this means that because Dr Andrews has concluded that the claimant's PTSD is now sub symptomatic that the brain fog would also be less and certainly less than the claimant asserts. We accept the interplay between the two conditions but we do not accept that this necessarily means that the brain fog or fatigue ceases to exist or has been corrected to the point that it would not have the impact that Dr Fishman has concluded on her future ability to work. The claimant's base line experience of fibromyalgia has increased on a permanent basis and that is clear from his conclusions.

85. The relevant section of the JC Guidelines is that under Chronic Pain and Other Pain disorders.

"Section (B) - Other Pain Disorders

(a) Severe: In these cases significant symptoms will be ongoing despite treatment and will be expected to persist, resulting in adverse impact on ability to work and the need for some care/assistance. Most cases of Fibromyalgia with serious persisting symptoms will fall within this range. £42,130 to £62,990

(b) Moderate: At the top end of this bracket are cases where symptoms are ongoing, albeit of lesser degree than in (i) above and the impact on ability to work/function in daily life is less marked. At the bottom end are cases where full, or near complete recovery has been made (or is anticipated) after symptoms have persisted for a number of years. Cases involving significant symptoms but where the claimant was vulnerable to the development of a pain

disorder within a few years (or 'acceleration' cases) will also fall within this bracket. £21,070 to £38,490."

86. We conclude that the appropriate bracket for the claimant's compensation is moderate but it would have been severe had it not been for the fact that it was a pre-existing condition. The claimant has serious persisting symptoms of fibromyalgia that have had an adverse impact on the claimant's ability to work. However the tribunal recognises that the incident only exacerbated the condition it did not cause it. Nevertheless that exacerbation is significant and permanent even if not all of the exacerbated symptoms are permanent, the base level increase in the claimant's symptoms is permanent.

87. We have applied a discount for the fact that this was a pre-existing condition by placing the award within the moderate bracket. We confirm that we agree with the approach of claimant's counsel. The respondent sought to assert that the Tribunal ought to factor in another discount because it was a pre-existing condition relying on the case of Thaine v London School of Economics [2010] ICR 1422 EAT. We think that this would amount to a double discount.

88. Taking this into account and considering the brackets set out in the JC guidelines, we consider that the amount of £35,000 as set out by the claimant in her schedule of loss is wholly appropriate falling as it does in the middle bracket when her symptoms would in fact push her into the higher bracket had it not been a pre-existing condition. This accurately reflects the permanent base level increase and the probable continuation of the major symptoms of brain fog and fatigue.

Injury to Feelings

89. We consider that it is appropriate to award an additional injury to feelings award. This is to take into account the fact that the discrimination has caused something over and above her injuries, namely the loss of her career and the fact that she enjoyed and identified with her work. We consider that this is now not possible to the same exent. That is not reflected in the Personal injury awards.

90. The reason we have decided on this level of award has been due to a combination of the impact that the discrimination had on the claimant and by taking a step back from the overall amounts awarded under the Personal Injury awards and looked at the overall non-loss related compensation. This is the approach set out in the case of Ministry of Defence v Cannock and Al Jumard v Clwyd Leisure Ltd and guards against the possibility of double recovery. We are compensating the claimant for something 'other' than that which has been compensated by the injury awards above. Her loss of career has been considerable but not so serious that she cannot work in any field again.

However she will never be able to work at the same level of responsibility again and she is unlikely to be able to work full time again. For those reasons we consider that the middle bracket is appropriate. We award the claimant £17,000.

91. In reaching our conclusions regarding the Personal Injury and Injury to Feelings awards above, we have made sure that we have taken a step back and looked at the global award we are making. We have been careful not to double count injuries and consider that the overall award is proportionate to the injury sustained by the claimant in this case.

Physical Injuries

92. We make no award for the bruising or physical injury caused by the assault. We simply do not have the evidence on which to make such an award. Whilst the claimant describes discomfort and soreness after the assault we have no evidence to suggest the extent of that and the issue of the photograph regarding the bruise was highly contentious at the liability hearing. We consider that on balance we do not have the evidence to conclude that an award is suitable for this alleged injury as we do not have sufficient evidence to conclude that it occurred.

Aggravated Damages

93. We have considered the claim for aggravated damages and do not agree with the claimant's submissions on this point. The claimant submitted that aggravated damages were appropriate because of the manner of the discrimination, the motive and the respondent's subsequent conduct in particular, not making an interim payment to the claimant.

94. Whilst we consider that the act itself is of course a an oppressive form of sexual harassment and the motive for any such discrimination is always going to be negative, we consider that these matters are appropriately reflected in the personal injury and injury to feelings awards already made and have been taken into account. The only aspect that has not already been considered and compensated for is the respondent's behaviour during these proceedings. The respondents have defended themselves during a difficult and emotional process. We do not accept that their failure to make a payment on account was aggravating in circumstances where they had an outstanding EAT appeal pending until only a couple of weeks before the remedy hearing. The amounts were far from certain and there remained significant questions of fact for the Tribunal to determine. We therefore do not consider that the respondent's behaviour reaches the threshold for aggravated damages.

Loss due to sale of home

95. We do not have the evidence to determine whether the claimant has suffered loss as a result of the sale of her house. We have considered the claimant's

submissions that she had to sell her house because of the loss of her income. We accept that it is a plausible possibility. However we were not provided with sufficient evidence regarding any other elements of her financial situation at the time which could have demonstrated that there were other reasons for her decision to sell the house. There have been references to other unpaid debts which could have impacted on the situation and overall we consider that we are being asked to engage in an exercise of pure speculation. Whilst losses in such situations can engage some aspect of speculation, this appears to be almost entirely speculative.

96. We also did not have reliable evidence concerning the possible value of her house in 15 years' time to be able to properly assess the loss in value. We would have to not just make assumptions about the property market in 15 years time but also guess at many aspects of the possible losses or financial gains to the claimant that could arise from property ownership or lack thereof.

Loss of earnings

97. As set out above, the Tribunal's approach to this aspect of the damages was to reach factual conclusions regarding relevant points which then led to the parties collaborating and agreeing their calculations. Those are appended at Annex A.

Losses to date of the liability hearing

98. The parties had already agreed the figure for the financial losses to the claimant whilst she remained on sick leave. We agree with that assessment.

99. We find that the Claimant has effectively mitigated her losses. Her witness statement gave details of the various jobs that she has had since she ceased employment with the respondent. The claimant was signed off sick between 30 May 2017 and 4 October 2017. That period is covered by fit notes supplied to the Tribunal.

100. In October/November 2017 she did some work for Purplebricks accompanying people to house viewings. She was relatively successful in that role and continued it until May 2018 when she collapsed, hospitalised for 10 days and was advised to take time off so ceased working altogether. She also worked on a self employed basis for Viewber between October 2018 and January 2020. That work was sporadic.

101. She did undertake some work for her brother. He started two schemes. The first was to try to launch a hand sanitiser business. We accept the claimant and her brother's evidence that the scheme did not make money and there was therefore no payment to the claimant as a result. The second company was Last Minute Compliance. The claimant wrote some of his online training materials for locum doctors. She says that she undertook writing, from home,

often falling asleep for large parts of the day. That work was done between January and August 2019. She was not paid for the work until the company was taken into Pertemps when she was offered a 2 days per week role on a pro rata salary of £50,000. That started on 26 August 2019. She was then furloughed in that role and paid 80% of her salary between 25 June 2020 and 1 November 2020.

102. During that period she did some work as a locum covid test operator but could not do much of that work due to its physical nature. Since lockdown ended, the claimant has now increased her role at Pertemps and works 4 days per week.

103. We don't accept, on balance, having reviewed the evidence provided to us, that she was either earning from her brother's two schemes initially or that she has failed to make sufficient efforts to find work in all the circumstances . We find that she was making efforts – her health was not particularly good and she made efforts to obtain suitable employment. That has included various roles after a relatively short period of complete unemployment. We accept that she did not have to seek employment in the same field of recruitment given that such work would be demanding and stressful at the level that she worked at before, and that recruitment in her geographical area would be a small world where people may have known about what had happened to her.

104. We have also taken into account the fact that the claimant was looking for work during a global pandemic which restricted employment opportunities in almost all sectors and at all levels.

105. With regard to the respondent's assertion that she ought not to have remained at Pertemps (and this conclusion also applies also to her future losses) we disagree. We accept that as a starting point for the claimant it was reasonable for her to want to work somewhere safe given that the incident was carried out by her manager. Her brother working at the same organisation gave her that security. We also consider that it is a relatively moot point given that her role there is reasonably paid and allows her the flexibility she needs in terms of part time working and involves her working at an appropriate level according to her skill set and taking into account her health. Her full time salary equivalent would be £50,000 per annum which is a well paid job even if it is at al power salary than she would have been paid had she remained with the first respondent or working elsewhere at the same level as she had done previously. The job involves her learning new material as well as using her pre-existing skills and demonstrates a desire to work at a reasonable level of skill and expertise albeit at a lower level than before. She has management responsibilities but not too many. She now works 4 days per week which Dr Fishman found was likely to be the maximum she could work whilst maintaining her health. We do not consider that is unreasonable given her health and consider that this represents suitable employment in all the circumstances.

106. We accept that she is entitled to be compensated for the loss of the use of a car as part of losses to date and future losses. Had she remained in a role within recruitment she would, on balance of probabilities have had a car. We accept the respondent's submissions that she didn't have a car allowance but nevertheless, she has lost the benefit of the use of a car and it is therefore appropriate to compensate the claimant for that loss. In those circumstances we base the value of that loss on the payslips we have seen from the respondent which indicate a car allowance of £450 gross per annum for people in a similar role employed by the first respondent.

107. We do not accept the claimant's request for petrol expenses. We do not consider that we have had sufficient evidence to demonstrate how the petrol was used or spent nor that it contributed to her work or efforts to find work.

108. We now address the differences between what she would have earned and what she now earns.

109. What she would have earned had she remained employed at the respondent:

(i) We made findings above that we think her salary would probably have been in the region of £68,000 from 6 months after the incident.

(ii) On balance of probabilities we find that she would not have received pay rises in line with inflation whilst at the first respondent given the difficult financial situation the first respondent is in which has been evidenced before us. We also do not consider that she would have necessarily received inflationary pay rises at any other employer given that such pay rises are rare in the private sector particularly over the past few years.

(iii) She would have been furloughed for the period up until the end of the third lockdown receiving the maximum amount of £2,500 per month regardless of where she worked. Unless the claimant had demonstrated to us that she would have worked in an area of recruitment that was particularly needy during the pandemic (health/transport) we think it's more likely than not that she would have been furloughed.

(iv) We do not agree that she would have been made redundant by the first respondent as we have found that she would have been working somewhere else during this period.

Future loss

110. The level of the claimant's future loss is more difficult to determine. When considering the level and amount of work that the claimant could do in the future we have carefully considered the points made in the joint expert reports and how the claimant has worked since the incident.

111. Dr Fishman's conclusions on this point were as follows:

Question 9. Please provide your prognosis of Ms M's condition and the impact on her ability to work and in particular her ability to work at a senior level. Please set out the factors on which you base this opinion.

9.6.9.1. In my professional opinion and on the balance of probabilities I conclude that the claimant is likely to remain in a similar condition to that which she presents now, with respect to the level of her fibromyalgia symptoms, for the foreseeable future, unless any significant improvement occurs in association with additional treatment.

9.6.9.2. The claimant has now returned to work 4 days a week, in a different role to which she was previously employed. She is able to work remotely and has a day in the middle of the week to rest. This is common for many fibromyalgia sufferers. In my professional opinion, and experience as a General Physician and Rheumatologist, she will be able to maintain this level of work, and may, in the fullness of time, be able to achieve a small increase in hours to perhaps almost full time. Going to full time, and particularly if it is a stressful environment, is unlikely to be achievable for her. This is due to her fibromyalgia symptoms, particularly pain, fatigue and 'fibro fog' making concentration difficult.

9.6.9.3. In my professional opinion, she is unlikely to be able to work at a senior – and therefore likely inherently more stressful level – in the future. However, for a more detailed opinion on her ability to deal with work-related stress, I defer to a suitably experienced Psychiatrist/Psychologist for their opinion. From a musculoskeletal perspective, she could probably cope with the physical demands of a more senior role, especially now that remote working is more accepted, but I suspect the stress and her 'fibro fog' will preclude her from taking such a role."

112. We have taken into account that Dr Andrews states that her PTSD would not prevent her from working full time particularly after the treatment which he recommends. He states

"I note the opinions of Dr Fishman related to her working prognosis and his treatment recommendations related to the Fibromyalgia. I note particularly his discussion about the impact some of the Fibromyalgia symptoms are likely to be having on her working capacity and her ability to increase her working hours. I would support his treatment recommendation of a 'multidisciplinary pain management programme', although I would suggest input from a Clinical Psychologist rather than a Psychiatrist might be more appropriate, in order to deal with the psychosocial aspects of the Fibromyalgia (or so-called Somatic Symptom Disorder). Further psychological treatment within this context, could as he suggests, improve her Fibromyalgia symptoms, allowing her to increase her working hours, although I note his suggestion that her Fibromyalgia be reviewed following treatment. However, setting this treatment aside, the psychological treatment which I have recommended above should lead to

significant improvement if not resolution of the residual depressive and PTS symptoms, to allow her to consider full-time work again in the future." (pg 958, para 1.8).

113. We also note Dr Fishman's response to questions on this point (pg 1037)

"6. Given the Claimant was able to work full time in 2020/21 to include a physically demanding role, do you consider she could have continued to work full time?

Answer: The Claimant was clearly able to work full time, albeit in two different roles, for a period of 2 and a half months. I was informed that the Claimant now works 4 days a week (5.6.4). I am unable to comment as to whether she could have continued working full time for longer than the 2-and-a-half-month period, as I do not know how well she managed this and what her physical state was when the COVID swab collector role came to an end."

114. Whilst it is difficult to ascertain this with certainty, having considered the above opinions and the claimant's evidence to us, we conclude, on balance of probabilities that the claimant is unlikely to be able to sustainably work for more than 4 days per week at the level that she is currently working. We accept that she might be able to eventually work full time but consider that this would probably have to be in a less senior role with fewer or no management responsibilities but that would almost certainly lead to less pay. In contrast if she were to increase her level of responsibility we believe that it would likely lead to a reduction in the number of hours she could work. This is not an exact science but we have to make a predication on the balance of probabilities. The combination of her Kickstart and writing role for Pertemps are reasonably senior and involve some management responsibilities but we accept the claimant's evidence that this is probably the ceiling of what she can manage and that she may even have to resile from some responsibilities periodically. Currently she uses Wednesdays to rest so as to be able to continue working the 4 days per week at this level.

115. As a long term prediction, we therefore conclude that it is more likely than not that she will remain in a middling senior role with middling earnings for her sector. Her current earnings appear to be broadly reflective of a salary of £50,000 pro rata which will result in an income of £40,000 gross per annum. We therefore consider that her losses will be the difference between this sum and the sum of £68,000 which we found to have been the likely salary she would have earned once her employment at the first respondent had concluded had it not been for the discriminatory incident. This loss will continue until her retirement age which we have concluded will be the state retirement age of 67.

116. When making findings to assist the parties regarding which of the Ogden Tables was appropriate, we considered the following factors.

(i) We find that she would have retired at the state retirement age of 67.
(ii) We find that she was not disabled at the point that the assault took place so we apply the multiplier at Table C.

117. The respondent made submissions that she was disabled at the time of the assault. However we do not accept that. The definition of disability in the Ogden Tables is different from that under the Equality Act 2010. The definition is as follows:

"(d) Ogden Definition of Disability

It is important to note that the definition of disability used in the Ogden Tables is not the same as that used in the Equality Act 2010. The Ogden definition of disability is based upon the definition of disability set out in the Disability Discrimination Act (DDA) 1995 (supported by the accompanying guidance notes). This is because this is the definition that applied at the time of the underlying LFS research which underpins the suggested Table A to D reduction factors. In addition to meeting the DDA 1995 definition of disability, the impairment must also be work-affecting by either limiting the kind or amount of work the claimant is able to do.

The Ogden definition of disability is defined as follows.

"Disabled person": A person is classified as being disabled if all three of the following conditions in relation to ill-health or disability are met:
(i) The person has an illness or a disability which has or is expected to last for over a year or is a progressive illness; and
(ii) The DDA1995 definition is satisfied in that the impact of the disability has a substantial adverse effect on the person's ability to carry out normal day-to-day activities; and
(iii) The effects of impairment limit either the kind or the amount of paid work he/she can do.

"Not disabled": All others"

118. Given that the claimant has demonstrated that prior to the incident her various conditions did not limit her ability to work as she had very little sickness absence prior to this period we do not consider that she met the definition in the Ogden Tables.

119. The multiplier must be interpolated to allow for the fact that we have found that the claimant would have retired at the state retirement age of 67. That has been set out by the parties in the calculations attached at Annex A.

Other losses

120. The claimant will suffer pension loss in the future. Her loss will be 3% of £28,000 per annum (the difference between what she would have earned and what she is likely to earn). The parties must then apply the multipliers set out in the corresponding Ogden Tables as set out above for the loss of earnings.

121. We accept that the claimant would have taken roles with a car or a car allowance. We accept that she did not have a car at the respondent but consider that the best way to value the loss to the claimant is to pay her the Car allowance that others were provided with. Based on a previous colleague's payslip, the car allowance was £5,400 per annum gross which would have been taxed. We consider that it is likely that she would have maintained a role with such a benefit until retirement age given that it was an important part of the claimant's life to have a car or have access to a car.

Treatment costs

122. The Tribunal has accepted that the course of treatment proposed by Dr Andrew is an expense that she will incur and agree that the rate of £2,700 is appropriate. Dr Andrew's recommendation in this regard was specific and explained exactly the likely cost and the period of time the course needed to last for. (pg 957, para 1.3).

123. We do not accept the claimant's claim for the cost of the MDPM treatment recommended by Dr Fishman. This is because the treatment suggested was vague in its content and valuation. The claimant only provided us with the costs of one residential course. We heard arguments that there were few providers of this treatment and that this was an accurate source of costing the treatment. However we disagree. The treatment outlined was subject to a triaging process that the claimant had not undertaken, all we had was a brochure. In turning down the request we use the analogy of the claimant saying that she has been prescribed a car without giving us any detail of what type of car was necessary. The car required according to the doctor could be a second hand Skoda or top of the range Tesla. Whilst they have provided a quote from one provider it is not clear that this meets the treatment requirement recommended by Dr Fishman given that his recommendation is quite vague in terms of the duration of such a course of treatment and what is required, coupled with the fact that the claimant has not provided more than one quote that in itself provides very little specificity.

Employment Judge Webster

Date: 22 September 2022

APPENDIX A

IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL
CLAIM NO. 2302179/2017

B E T W E E N :

MISS M

Claimant

-and-

(1) P LIMITED
(2) MR T.

Respondents

CALCULATIONS FOR LOSS OF EARNINGS

In reply to Employment Judge Webster's request for information the parties respond as follows:

(i) **Net Figures**

The net figures used in the loss of earnings calculations (both past and future) were obtained from Facts & Figures 2021/2022 (Sweet & Maxwell), based on anticipated earnings of hypothetical new employer of £68,000 pa plus car allowance of £5,400pa.

The pension was based on 3% of £68,000 = £2,040pa and 3% of £30,000 (furlough) = £900

The figures are as follows:

Salary, Car Allowance and Pension

Date	Period	Net Salary	Net Car Allowance	Pension
01/10/2017 – 31/03/2018	6 months	£23,608.00	£1,566	£1,020
01/04/2018 – 31/03/2019	12 months	£47,452.00	£3,132	£2,040
01/04/2019 – 31/03/2020	12 months	£47,973.00	£3,132	£2,040
01/04/2020 – 31/03/21	12 months	£24,040 (furlough)	£3,132	£900
01/04/2021 – 30/09/21	6 months	£12,020 (furlough)	£1,566	£450
01/10/2021– 31/03/2022	6 months	£24,063.70	£1,566	£1,020
01/04/2022 – 08/06/2022	68 days	£8,966.20	£583.50	£380.06
Total		£188,122.90	£14,677.50	£7,850

Calculation for Future Loss:				
9/06/2022 onwards		£48,500	£3,132	See below

Loss to Effective date of Termination (EDT)

<u>As per schedule £13,899.98</u>

Past loss of earnings from EDT to Employment Tribunal (08/06/22):

The correct calculation for past loss of earnings is £188,122.90. During negotiations the parties agreed £198,590.32 for past loss of earnings. The parties consent to a reconsideration of the loss of earnings from EDT to Tribunal hearing to £188,122.90 in order to correct the mathematical error.

Car allowance: £14,677.50

Past Pension Loss - during negotiations the parties were apart on figures and the sum of past pension loss was agreed at £1,833.77. The correct calculation for past pension loss is £7,850 and the parties consent to a reconsideration of the pension to £7,850.00 in order to correct the mathematical error.

Total Losses from EDT to ET = £210,650.40

(Less deductions made for Claimant's Earnings as per Schedule - £87,622.50.)

Total loss from EDT to ET : £123,027.90

Please find attached revised calculations including interest and grossing up.

(ii) **The Ogden Table Multipliers and interpolation used**

The multiplier used for anticipated earnings with hypothetical new employer was 11.0805 calculated as follows:

Table 10 (female with 14 years to retirement age 65, i.e. a female aged 51.54 years) = 13.40

Table 12 (female with 14 years to retirement age 68, i.e. a female aged 54.54 years = 13.32

Interpolation between 13.32 and 13.40 = 13.35

Apply discount factor at Table C (not disabled), i.e. 0.83 (13.35 x 0.83) = 11.0805

The multiplier used for expected earnings (with Pertemps) was 8.1435 calculated as follows:

13.35 (as above) and apply the Table D discount (disabled), i.e. 0.61 (13.35 x 0.61) = 8.1435

Multiplicand for future loss:

Anticipated net earnings: £51,632 (£48,500 + £3132)

Expected net earnings: £32,320.44 (based on gross salary of £42,144.76)

Loss from ET to Retirement: £308,906.90

Pension

Future pension loss:

From calculation (age 53.54) until retirement (age 67.00) 13.46 yrs	£2,040.00 per year	£2,040.00	11.08	£22,603.20
From calculation (age 53.54) until retirement (age 67.00) 13.46 yrs	£1,264.34 per year	(£1,264.34)	8.14	(£10,291.73)

Total: £12,311.47

Agreed Calculations provided by parties – 20 June 2022

Losses to EDT	£13,899.98			
				£28,571.03
Losses EDT to ET:				£38,392.99
Anticipated earnings	£188,122.90			**£66,964.02**
anticipated car	£14,677.50			
pension	£7,850.00			
	£210,650.40			
Minus credit	£87,622.50			
	£123,027.90	**£136,927.88**		
Losses to retirement				
Earnings and car	£308,906.90			
Pension	£12,311.47			
Treatment	£2,400.00			
PSLA	£75,000.00			
ITF	£17,000.00			
			total damages plus interest	
	£552,546.25			**£619,510.27**

exclusions/tax free		
pension	£7,850.00	
Pension	£12,311.47	
PSLA	£75,000.00	
Treatment	£2,400.00	
tax free	£30,000.00	
Total:	**£127,561.47**	
figure for grossing up	£491,948.80	
Grossing up		
£20,725.24	£25,906.55	
£99,729.00	£166,215.00	
£491,948.80		
£371,494.56	£675,444.65	
Grossed up total	£867,566.20	
Add back exclusions/TF	£127,561.47	

£995,127.67