EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms K Jhuti	**- V -**	Royal Mail Group Ltd

Heard at: London Central

On: 23-25 May 2022 (26-27 May, 30 August & 3 October 2022 in chambers)

Before: Employment Judge Baty
Ms N Sandler
Mr P Alleyne

Representation:

For the Claimant: Mr M Jackson (Counsel)
For the Respondent: Mr S Gorton KC (Counsel)

RESERVED JUDGMENT

The tribunal makes the findings set out in the reasons below in response to the 17 questions set out in the agreed list of issues provided by the representatives. This has been done on the basis that those answers will enable the representatives to calculate and agree, without further recourse to the tribunal, the amount of the award which will be payable to the claimant.

REASONS

Background

1. This hearing was the remedies hearing in relation to the claimant's successful claim.

2. By a claim form presented to the tribunal on 18 March 2015, the claimant had brought a complaint of automatically unfair dismissal pursuant to section 103A Employment Rights Act 1996 ("ERA") (protected disclosures) and various

complaints of being subjected to a detriment pursuant to section 47B ERA (protected disclosures). The liability hearing took place in September 2015, before a tribunal consisting of Employment Judge Baty, Mr M Simon and Mr DL Eggmore (the "original tribunal"). The claimant was represented by Mr S Paxi-Cato (Counsel) and the respondent by Mr S Peacock (Solicitor). That tribunal's judgment was sent to the parties on 12 November 2015. The claimant succeeded on four of her detriment complaints, but the remaining detriment complaints and the unfair dismissal complaint did not succeed.

3. A remedies hearing was originally listed for 2016 but this was postponed as there were then several appeals over a number of years, culminating in the Supreme Court's 2019 judgment which finally determined that the claimant's automatically unfair dismissal complaint succeeded. In the meantime, various issues in connection with one of the detriment complaints which had not succeeded were separately remitted to the original tribunal by the Employment Appeal Tribunal ("EAT"). Following this, the original tribunal found that that further detriment succeeded and that all of the successful detriment complaints were presented in time. That remitted hearing took place on 16 November 2018, with both parties represented by the same counsel as has represented them at this remedies hearing, and with the reserved judgment from that remitted hearing sent to the parties on 3 December 2018.

4. In summary, therefore, the outcome of the various appeals meant that the claimant succeeded on her automatically unfair dismissal complaint and on the following five detriment complaints:

1. Being bullied, harassed and intimidated by Mike Widmer, who imposed mandatory weekly one-to-one meetings and targets solely on the claimant.

2. Being served with a document entitled "Performance Plan Objectives" by Mike Widmer and informed that it was a condition of her passing her probation to complete this and provide all her key contacts from her previous employment in the travel sector.

3. Being invited by Rita Rock on or about 28 February 2014 to accept three months' pay and leave the respondent's employment.

4. Being called by Rita Rock and offered a year's salary to leave the respondent's employment.

5. The respondent's deliberate failure to provide an outcome to the claimant's grievance/appeal in a timely manner because it put the investigation in relation to that grievance/appeal on hold from early May 2015 until 5 August 2015.

5. There were then several attempts to list a remedies hearing from 2020 onwards but all these hearings had to be postponed for reasons to do with the pandemic. These are the reasons why there has been such a long period of time between the original liability hearing and this remedies hearing.

6. The remedies hearing took place in person at the London Central Employment Tribunal.

Tribunal panel for remedies hearing

7. Neither of the members who were on the original tribunal were available for this remedies hearing. The tribunal had informed the parties of this well in advance of the remedies hearing and both parties had confirmed in writing that they did not object to the remedies hearing taking place before a different tribunal comprising the same judge but with different members.

8. The judge had ordered the parties to provide the bundles for the hearing to the tribunal in electronic form a few days in advance of the hearing itself. In view of the unusual fact that two members of the tribunal were new to the case and had not participated in the original liability hearing, the tribunal reserved time on the working day prior to the start of the hearing for the members to read into the case so that they did not start the remedies hearing without any background knowledge of the case. This was extremely useful, given the long history of the case and the number of lengthy documents involved (including the original liability judgment). In addition, as it turned out, the decision to do this meant that the amount of reading which needed to be done on the first day of the hearing was dramatically reduced, which meant that the hearing could be completed within the three days allocated to it; had the tribunal not done this advance reading, the remedies hearing would almost certainly have gone part heard.

The Issues

9. The judge had in advance of the hearing ordered the parties to liaise to produce a list of issues for the remedies hearing. A list of issues was presented on the first morning of the hearing. However, this extended to some 14 pages and did not set out clearly the legal and factual issues which the tribunal would need to decide. After some discussion between the representatives and the tribunal, the representatives agreed that they would narrow these issues down to a manageable list which would assist the tribunal. They did so whilst the tribunal was doing its remaining pre-reading on the first morning of the hearing. The list that they then agreed between themselves was given to the tribunal at the beginning of the afternoon and agreed with the tribunal. That list of issues was as follows:

Questions of fact:

1. What was C's previous employment history / income?
2. What was C's previous health history?
3. What was C's likely career path with R?
4. What was C's likely career path generally?
5. What was C's likely health history generally (without Rs conduct).
6. What is C's likely future career path?
7. When would C have been likely to retire?
8. What is C's likely future health path?

Questions of judgment

9. What is the correct manner to calculate loss?
10. How long should C be compensated for?
11. Statutory rights - Is C entitled to a payment for loss of statutory rights?
12. Injury to Feelings - How much should be awarded?
13. Personal injury - How much should be awarded?
14. Should there be apportionment? If so, how much (as a percentage) of C's psychological harm and loss was caused by R's unlawful actions? Does apportionment apply to the C's entire losses, or does it apply only to the award for personal injury?
15. Polkey - When do the pecuniary losses end
16. Aggravated damages - Is C entitled to an award and if so how much?
17. ACAS - Should there be an uplift, if so what percentage and how much?

10. The representatives informed the tribunal that the tribunal would not need to do an actual calculation of final figures which would make up the award payable to the claimant but that, by answering the questions set out in the agreed list of issues, this would enable the parties quickly to calculate and agree what that award would be. The tribunal agreed to proceed on that basis.

11. However, when it came to closing submissions, the representatives took a slightly different approach in terms of the extent of the submissions they made. On some areas of issues 9 and 10, for example, both representatives made detailed written submissions as to how they considered the tribunal should calculate the claimant's ongoing losses in relation to salary and bonus, including for example which table in the Ogden Tables it should use and as to what discount rate we should apply; whereas, in other areas, for example pension calculations, Mr Jackson made full submissions but Mr Gorton did not. There was clearly a misunderstanding between the representatives as to the extent of what the tribunal would determine in this respect. In fairness to each of them, the list of issues they produced is not clear in this respect. However, when it became clear at the end of their submissions that there was this difference in perception between them, the tribunal informed them that it would not determine the pension calculation (including the relevant discount rate) as this would be prejudicial to the respondent which had not made submissions on the issue, but it would determine those areas relevant to the issues where both parties had made submissions.

12. Having said that, the tribunal is mindful that the parties prepared the list of issues on the clear basis that the answers to the questions in the list of issues would enable them to agree the overall amount which should be awarded to the claimant. Given that assurance, the tribunal expects that the parties will be able to do exactly that within a short period after receiving these written reasons. It does not expect any suggestion that the absence of further findings on the pension issue (which it has not made because the respondent did not make submissions on the point) prevents the respondent from agreeing the overall award with the claimant.

The Evidence

13. Witness evidence was heard from the following:

For the Claimant:

Ms Jane Atkinson, a long-term friend of the claimant and formally her litigation friend in these proceedings; and

the Claimant herself.

For the Respondent:

Ms Hayley Hayes, who was until 31 March 2021 employed by the respondent as the "Service Manager for Appeals and ETs - Service Delivery Central & All Admin Support Functions" and who carried out an investigation in 2016 following the tribunal's judgment on liability. Ms Hayes' evidence-in-chief came in the form of two witness statements, the first dated 15 November 2016 and the second dated 9 May 2022.

14. An agreed bundle in five volumes marked A-E was produced to the tribunal. In addition to this, Mr Jackson produced an opening note. The tribunal read in advance the witness statements and the documents set out on reading lists provided by both representatives, as well as Mr Jackson's opening note. It did this on the morning of the first day of the hearing although, as noted above, it had been able to read a large number of the documents on these lists in advance of the hearing.

15. Several of the court documents which the tribunal was asked to read in advance were medical reports in relation to the claimant from a variety of medical professionals, as well as employment reports from a Mr Trevor Gilbert, an employment expert. For ease of reference, we list these expert reports below.

16. The medical reports are as follows:

1. Dr Lockhart (psychiatric report dated 19 June 2015);
2. Dr Aldouri (psychiatric report dated 25 February 2016; plus two addenda of 4 April 2016 and a further addendum of 18 November 2016);
3. Doctor Bansal (capacity report dated 24 December 2016);
4. Doctor Nayrouz (psychiatric report dated 18 February 2020).

17. The employment expert reports are as follows:

1. Mr Gilbert (28 July 2016)
2. Mr Gilbert (14 February 2020)

18. It is noteworthy that none of these individuals were called as witnesses to the tribunal and their expert opinions were not subject to cross-examination. There is no reason, as far as the tribunal is aware, why they could not have been called. Instead, the respondent has sought to undermine the findings in those expert reports in its cross-examination of the claimant, which lasted over a day. As we shall come to, Mr Jackson submits that, as no one else in the room is an

expert in those areas, including the tribunal, we should not go behind the clear findings made in those expert reports. We will return to this in due course.

The hearing

19. Although the judge had in previous correspondence to the parties made clear that the three-day listing was to include one day for the tribunal to deliberate and reach its decision, the timetable presented to the tribunal by the parties at the start of the hearing made that an impossibility. As it was, the tribunal agreed an indicative timetable which would enable the evidence and submissions to be completed within the three days and that was duly achieved.

20. The three-day listing was originally set to cover not only the issue of remedies but also to determine a costs application by the claimant. The tribunal had not yet seen that costs application and raised this with the representatives at the beginning of the hearing. Mr Jackson said that he did not have the details of that costs application (which was by this stage quite historic and was an issue which had been raised originally by previous representatives of the claimant) and that he would not be making that application at this hearing.

21. At the start of the hearing, the judge asked what adjustments might be necessary to enable those at the hearing, and in particular the claimant, to participate properly in the hearing. Mr Jackson indicated that the claimant would need lots of breaks (which were duly allowed) but that beyond these, no specific adjustments were required. At Mr Gorton's sensible suggestion, and with the agreement of the tribunal and Mr Jackson, the claimant gave her evidence from where she was seated at the "claimant's desk" rather than from the witness desk which was next to the "respondent's desk", so that she was physically further removed from the line of questioning.

22. As noted, the claimant was cross-examined for over a day. The claimant was tearful on a number of occasions during the course of her evidence. At one point during her evidence on the second day of the hearing, when she was forced to recollect her interactions with Mr Widmer, she became very distressed and the tribunal had to take a break. Mr Jackson reported that the claimant was having symptoms consistent with a panic attack and was hyperventilating. The tribunal agreed with the representatives that a longer break and indeed an early lunch break was necessary. It was not clear whether or not the claimant would even be able to continue after lunch and arrangements for interposing Ms Hayes' evidence that afternoon were discussed. However, the claimant was able to continue after lunch and her evidence was completed by the end of that day.

23. Whilst Mr Gorton made every effort to be as sensitive as possible in the way he phrased his questions and conducted his cross-examination, the subject matter of the questioning was of its nature at times clearly distressing to the claimant.

24. Subject to the issues referred to in the paragraphs above, the hearing otherwise ran reasonably smoothly. The tribunal only had intervene in managing

the hearing on rare occasions when the representatives interjected during their opponents' cross-examination. On one occasion, however, during the cross-examination of Ms Hayes, Mr Gorton interjected to complain that Mr Jackson was not letting Ms Hayes answer her question. The judge rejected this; in his view, Mr Jackson had asked Ms Hayes the same question (relating to whether or not Ms Hayes accepted one of the findings of the original tribunal's liability judgment) on a number of occasions and was not getting a direct answer; it was a case of his pushing her to give that direct answer rather than of him talking over Ms Hayes and refusing to let her answer. Indeed, following Mr Gorton's interjection, this was exemplified further when the judge himself rephrased that same question with the result that, after a couple of attempts, Ms Hayes did give a direct answer to it.

25. Both representatives produced written submissions, which the tribunal read prior to the representatives supplementing them with their oral submissions.

26. The tribunal's decision was reserved.

HMRC disclosure order and arrangements for further submissions

27. When the hearing reconvened after lunch on the first day and after the tribunal had completed its pre-reading, Mr Gorton raised an issue about disclosure. This related to obtaining from the claimant an HMRC statement of her earnings for the period from 1998 to date. This was something which had originally been requested by the respondent's representatives a couple of years previously prior to the postponement of one of the earlier listed remedies hearings. The respondent had made this request again on 3 March 2022 in advance of this hearing. The respondent had wanted the claimant to give permission to the respondent's accountants to contact HMRC to obtain this information. The claimant had been unwilling to give this permission. However, the claimant's representatives had, a couple of weeks before this remedies hearing, contacted HMRC to obtain this information. However, no reply had been received from HMRC.

28. There was some considerable discussion between the representatives and the tribunal about how to deal with this matter. The tribunal at that stage considered that this information could be potentially relevant to the issues which it would need to determine. The representatives therefore agreed with the tribunal the terms of an order to HMRC to disclose "a "proof of employment statement" and provide a statement of earnings for the period of 1998 to date" in relation to the claimant. That order was signed by the judge and issued that day with the responsibility for serving it on HMRC being left with the respondent. It was envisaged that, if HMRC responded promptly, the documents disclosed by HMRC could be adduced to the tribunal and put to the witnesses before the end of this hearing. As it turned out, no response was forthcoming from HMRC prior to the end of the hearing. It was therefore agreed between the representatives and the tribunal that, whilst the absence of this information did not prevent the tribunal from deliberating and giving its judgment, if information was forthcoming from HMRC which the respondent considered might impact upon the judgment

which the tribunal made, the respondent would in these circumstances have the usual right to apply to the tribunal for reconsideration of the judgment.

29. In fact, HMRC complied in part with the tribunal's order in June 2022, before the tribunal had issued its judgment, providing a statement for the period of the tax years 1997/1998 to 2013/2014 inclusive. In the light of the material provided, the respondent applied on 27 June 2022 to make further submissions in relation to the HMRC material provided. The claimant, whose then solicitors, Moore Solicitors, had come off the record on 22 June 2022 and who was therefore by that stage representing herself, opposed this application. As the tribunal had identified at the hearing the potential relevance of the documents which were the subject of the HMRC disclosure order, the judge decided to allow the parties the opportunity to make further submissions in relation to them.

30. By letter of 5 July 2022 from the tribunal, therefore, the parties were given the opportunity to make submissions in relation to the HMRC material by 15 July 2022 and to make further submissions in response to those submissions by 29 July 2022. This meant that the tribunal would need to reconvene to consider the submissions and that the judgment would be considerably delayed and could not be issued until at least September 2022. However, that delay was still likely to be less than the delay which would have been incurred if the tribunal instead had simply issued a judgment and then needed to arrange a reconsideration hearing in future.

31. The respondent submitted written submissions to the tribunal and the claimant on 14 July 2022.

32. On 15 July 2022, Leigh Day Solicitors informed the tribunal and the respondent that they were coming on the record as the claimant's new representatives. In the same letter they stated that they had a copy of the tribunal's correspondence dated 5 July 2022 and that in accordance with those orders they would not be submitting any written submissions on the HMRC material but that they would, however, review the respondent's written submissions and, if necessary, submit a response by 29 July 2022.

33. On 31 July 2022, the claimant's submissions were submitted to the tribunal by Leigh Day (they had been drafted by Mr Jackson). Leigh Day apologised for the delay, which they said was due to an administrative error. However, as the deadline of 29 July 2022 was a Friday and they were in fact submitted on the following Sunday, and as the tribunal would not in any case have had the opportunity to consider them until much later, there was no prejudice at all to the respondent in that minor delay and the tribunal decided that it would indeed consider them.

34. On 8 August 2022, the respondent made further submissions in reply to the claimant's submissions. In them, the respondent complained about the manner of the claimant producing her submissions on this issue (through not supplying initial submissions but only responding to the respondent's submissions). We found this criticism somewhat surprising given that the claimant was without solicitors for the period leading up to 15 July 2022 (by

which date initial submissions were ordered to be produced) and could not instruct Mr Jackson directly and given the difficulties she would have in producing such detailed legal submissions as a litigant in person with the medical conditions which she has; it seemed to us that what the claimant did was the most practicable thing to do in the circumstances. In any case, the respondent had chosen to submit further submissions itself on 8 August 2022 (also outside the framework set out originally by the tribunal). There has been no objection from the claimant to those and the tribunal decided therefore to consider those as well. As the respondent has had that further opportunity, there is no prejudice to the respondent.

35. Finally, on 8 August 2022, Leigh Day drew to the tribunal's attention (copied to the respondent), the case of Re W-A [2022] EWCA Civ 1118, which was handed down after the remedies hearing and which related to the case of Hollington v Hewthorn [1943] 1 KB 587, which had been referred to by Mr Jackson at the hearing and which is discussed in our findings below.

36. The tribunal was able to reconvene on 30 August 2022 by video to discuss the further submissions referred to above.

Findings of Fact

37. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues. Although we set out a general summary of the law in a later section, there are areas in our findings of fact where it is necessary to refer to particular aspects of case law etc in order to make the relevant finding of fact; in those circumstances, and indeed for ease of reference, we set out the relevant pieces of law in the sections where those findings are made.

Chronological overview

38. In order better to put into context the findings which we make below, we first set out a brief chronological overview of the period of time relevant for the purposes of this decision.

39. The claimant was born in the UK to Indian parents. Her father died of a brain tumour in 1970 at the age of 35. She was aged 20 months at the time of his death. She was brought up by her mother. She has one brother and one sister both living in the UK and is the youngest of those siblings. She has had no contact with them for many years, except for the litigation to which we refer below.

40. The claimant's mother was clearly a very significant influence on her life and someone whom she regarded as a role model and with whom she had a very close relationship. The claimant's mother died of cancer in 2010. She had been ill for periods during the years leading up to her death, including from 2007 onwards. The claimant had been her mother's main carer in her mother's latter

years. During the period prior to her death, the claimant's mother did not have contact with the claimant's two siblings.

41. Both siblings contested the claimant's mother's will (which left the majority of the claimant's mother's estate to the claimant) and, in the aftermath of her death, threatened to bring or brought legal proceedings.

42. The claimant has a daughter, who is currently about 18 years old. The claimant and her daughter's father, however, split up when her daughter was 2½ years old. From that point on, the claimant brought up her daughter on her own as a single mother.

43. The claimant worked for Gerrard & Deakin Advertising Ltd from 1995 until 1998.

44. From 1998-2002, the claimant worked for BSkyB as a Key Account Manager New Business Development Sales & Marketing. Her income gradually increased over the period of her employment so that, by the end, she was earning just over £50,000 per annum.

45. She then set up her own business, JK Media Ltd, which operated between 2002 and 2011. The business had a high turnover, up to around £650,000 in one year, and the claimant employed staff and engaged contractors in the course of that business. However, it was not very profitable; annual profits were generally within the range of £5,000 - £10,000 per annum and, towards the end, the business started to make a small loss. The claimant devoted less time to her business from the point when her mother became ill around 2007. She eventually discontinued it and decided to refocus.

46. In the light of the low profitability of the business, the claimant survived during this period on the savings which she had built up over a period of time prior to starting her business (she said she had had around £200,000 of savings). Mr Gorton cast doubt on this assertion when cross-examining the claimant and in his submissions; however, in the light of the amounts that she was earning in her previous employment, we do not find it surprising that she had built up a reasonable amount of savings and we accept that she did. Furthermore, whatever sources of funds she relied on, she clearly had enough to support herself and her family throughout.

47. The claimant then did contract work, first for Komli Media in 2011-2012 and then in 2012 for Mirabelle Communications Ltd. The rates she received for this work were around £500 a day. However, the claimant did not work full-time and the amount of work she did and the number of days she worked per week varied over time.

48. Between September 2012 and July 2013, the claimant was employed by Verifone Media Ltd as Client Sales Manager. Her salary was £48,000 and she was entitled to a bonus of up to £32,000 per annum. Although, Mr Gorton challenged the salary figure in his further submissions, the HMRC records

indicate that her earnings over that period, which is split over 2 tax years, were over £42,000, which equates to roughly £48,000 over the course of a whole year.

49. The claimant's employment with the respondent commenced on 17 September 2013 and terminated with effect from 21 October 2014. She was entitled to a salary of £50,000 per annum plus bonus.

50. The respondent's unlawful detrimental treatment which the original tribunal found to have occurred started on 13 November 2013. The claimant was signed off sick from 12 March 2014 with work-related stress, anxiety and depression, and remained off sick for the remainder of her employment.

51. The claimant has since then not been able to find employment (with the exception of a handful of unsuccessful attempts to do so which resulted in no more than a few days or weeks work, for the most part unpaid).

52. In late 2016, there were a number of hearings in the context of the litigation brought by the claimant's brother in relation to her mother's will.

53. On 24 December 2016, the claimant was found not to have mental capacity in relation to her ability to conduct proceedings at the employment tribunal or Court of Appeal (see the report of Doctor Bansal, which recommended that she should have a "litigation friend"). Ms Atkinson duly acted as her litigation friend (the EAT having confirmed in a judgment handed down on 31 July 2017 that employment tribunals have the power to appoint a litigation friend). The claimant subsequently recovered capacity around 18 months or so after Dr Bansal's report and Ms Atkinson from that point ceased to act as her litigation friend, notifying the tribunal of this on 30 May 2018. The tribunal has not been able to locate any specific order from this tribunal appointing Ms Atkinson as the claimant's litigation friend; however, it is clear that she was acting as her litigation friend during that period from hearings in this litigation before the higher courts where that is stated on the judgments to be the case.

54. Following the original tribunal's judgment on liability, Ms Hayes conducted an internal investigation. This included interviewing Mike Widmer, Peter Reed and Graham Davis on 26 April 2016. In summary, those individuals disagreed with the tribunal's judgment. Ms Hayes did not recommend disciplinary action or any other action against any of them. Whilst Ms Hayes did not in her witness statements specifically state that she accepted their version of events, and was at pains to say that the respondent respected the tribunal's judgment and "accepts the tribunal's findings", it is clear from her witness statements and the fact that she did not recommend disciplinary or any other action to be taken against any of the individuals, that she and the respondent do not in fact accept the findings of the tribunal. Indeed, in her second witness statement, she makes a number of what are effectively submissions as to why the tribunal's conclusions as to what happened between Mr Widmer and the claimant might be wrong (see for example paragraphs 24-27 of her second statement). As already alluded to above, Mr Jackson in cross-examination repeatedly asked Ms Hayes whether she accepted that there was effectively a plan by Mr Widmer to remove the claimant (as the original tribunal had found);

Ms Hayes originally didn't answer the question but stated that the respondent accepted the tribunal's judgment; and finally, after Mr Gorton's interjection and the judge's repeating of Mr Jackson's question, Ms Hayes stated she genuinely did not believe there was such a plan. It is, therefore, clear, that the respondent does not accept the core findings of the tribunal, in particular concerning the actions taken by Mr Widmer in relation to the claimant following the claimant's protected disclosures.

55. The furthest that Ms Hayes goes in her witness statements by way of any acknowledgement of what happened to the claimant is an expression that *"it is clear that Ms Jhuti's short employment with Royal Mail was an unhappy one and that is something we very much regret. On behalf of the wider business we are very sorry that Ms Jhuti's experience with us was a negative one and has impacted on her in the way outlined in the medical evidence of Dr Elham Aldouri"* (paragraph 4 of her first statement) and *"we are very sorry that Ms Jhuti's employment with us was so unhappy and as a consequence ended so soon after it had started"* (paragraph 8 of her second statement).

56. After the decision of the Supreme Court which upheld the claimant's unfair dismissal complaint was handed down, a spokesperson for the respondent stated in November 2019 to Sky News and the Times (amongst others) that:

"Royal Mail is disappointed by the Supreme Court's judgment which relates to events that happened six years ago.

Our whistleblowing policy makes it clear that whistleblowers should not suffer any detrimental treatment as a result of raising a concern.

Royal Mail's whistleblowing hotline, "Speak Up", allows all of our people to raise concerns anonymously should they so wish."

57. In 2019, the claimant's daughter, who was then 15 years old, moved to live with her father and stopped having contact with the claimant.

<u>The medical reports</u>

58. As noted, several medical reports were provided in the documentation for the hearing. There is a huge amount of detail in these reports, both individually and collectively, and it would be disproportionate to repeat all of them here. However, we set out below the key elements, albeit in some detail. As we do so, we also set out some of our factual findings which arise from these reports. We note at this point that the respondent, although it has not sought to call any of the medical professionals as witnesses, has sought to challenge the medical evidence on a number of grounds (including relating to the claimant's credibility). We reject those submissions and set out our reasons in a later section as to why we do so. However, the factual findings that we make in the section below are made on the basis that we have rejected those submissions.

Dr Lockhart (19 June 2015)

59. Dr Lockhart is a consultant psychiatrist. The subject matter of his report included a *"statement of opinion as to the degree to which any psychiatric symptoms or disorder may be attributed to [the claimant's] experiences in the workplace since September 2013; and statement of opinion on treatment and progress"*. He was instructed by the claimant's then solicitors, Net Solicitors, in advance of the liability hearing in these proceedings and his report predates that liability hearing.

60. The report notes that the claimant was "distressed and tearful" while speaking of her experiences at the respondent.

61. It includes a review of the claimant's previous medical history. It references the claimant's personal history, including events such as her mother's death and a "family dispute" in 2010, which we understand to have been a reference to her siblings' decision to contest her mother's will.

62. The report notes that the claimant has in the past, prior to her employment by the respondent, had depressive episodes and been prescribed antidepressant medication and had on occasion received counselling. However, as the claimant's medical records show, the size of the doses of medication which she was prescribed in relation to episodes prior to her employment by the respondent were far lower than those prescribed afterwards, for example, in relation to one particular antidepressant, 5mg before and 300mg after.

63. Doctor Lockhart's conclusions include the following:

4.5 In my opinion Ms Jhuti continues to suffer from a moderate Depressive episode with somatic syndrome F 32.11…. It should be noted that in a moderate depressive episode "the patient is likely to have great difficulty in continuing with ordinary activities" (International Classification of Diseases, 10th edition, World Health Organisation).

4.6 On the balance of probabilities it is my opinion that the disorder may at some point over the past year have satisfied the criteria for a severe Depressive Episode without psychotic features… There were associated levels of high anxiety…

4.7 Ms Jhuti's symptoms need to be seen in the context of her history and previous experiences. She had childhood anxiety traits… which are likely to have been at least in part genetic in origin and which will in my opinion have rendered her vulnerable to stress. Furthermore, her family background, and especially her mother's example… has in my opinion given her values of working well, reliably and efficiently and of gaining the approval of colleagues. This is her preferred self schema - that is, the image of herself as she wishes to be and believes she should be…- and it is this which has been impacted by the work experiences as described…

4.8 Other stresses have also been present. She has responsibilities as a parent. In November 2013 she had a minor road traffic accident…. In 2014-15 she had bad experiences in key relationships…

4.9 However, in my opinion the records establish that there was a clear change in the nature and severity of psychiatric symptoms after late 2013, which I'm told was the time at which the employment problems began…. I have seen no evidence that there were other significant stressors at that time and on the balance of probabilities I have reached the opinion that the psychiatric disorder arose as a direct result of the occupational stress and has been exacerbated

and prolonged by her dismissal and by the demands of and delays in the legal action arising out of it.

4.10 Other life stresses have in my opinion played only a minor role in exacerbating and prolonging the disorder. While Ms Jhuti does show evidence of pre existing psychological vulnerability, she has not previously had an episode of this severity and duration. In my opinion, the depressive episode would not have occurred had she not been subjected to the experiences in the workplace.

4.11 Considering Ms Jhuti's account of events, the disorder would not have occurred had her employers made a different response to her report of breaches of policy and regulations. In particular, other factors in her account of events, if established as having happened, were in my opinion powerful triggers for her subsequent psychiatric disorder. These factors are lack of an appropriate response from management and Human Resources, what appear to have been punitive measures against her over several months…, and delays in dealing with her grievance.

4.12 While improved by treatment, the depressive disorder has not been in remission since its onset and has been prolonged by the loss of her employment and by the stress of the continuing legal action. The disorder remains active.

4.13 In my opinion, the prognosis, while good, is difficult to define in terms of time required for recovery. Much will depend on the treatment and psychological support provided for Ms Jhuti and on the progress of the legal action, the stress of which will inevitably prolong the disorder. Increase of stress from this source, and any additional life stress should it occur, will exacerbate her symptoms. Additional delay in the legal action would constitute an additional stress. These factors are not predictable but on the balance of probabilities I would expect Ms Jhuti to be significantly affected by the depressive disorder for a period of at least 12 months from the date of my assessment, which took place on 8 June 2015.

4.14 In the longer term I see nothing to prevent Ms Jhuti from returning to full time employment at a level of responsibility similar to those which she was previously able to sustain.…

4.16 In my opinion Ms Jhuti is not currently fit for work and has not been so since the start of her period of sick leave.

4.17 Ms Jhuti is suffering a mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities, and in my opinion is disabled under the Equality Act 2010."

64. The report is therefore clear that the claimant's psychiatric disorder arose directly as a result of her treatment by the respondent and not as a result of other life events. Furthermore, it highlights that resolution to these proceedings would be a key factor in her recovery as the stress of them would "inevitably prolong the disorder".

65. The focus of much of Mr Gorton's cross-examination and submissions was on other things which were going on in the claimant's life and suggesting that these contributed to the claimant's psychiatric disorder and not just her treatment by the respondent. However, that flies in the face of the conclusions in Dr Lockhart's report. In it he specifically references life events such as the death of the claimant's mother, the family dispute in 2010, her parenting responsibilities, her traffic accident in 2013 and bad experiences in key relationships in 2014-2015, but he specifically discounts them as being significant stressors.

66. In summary, although prior to her employment by the respondent the claimant faced challenges in life, some of them significant, she was able to face them and get over them and carry on. That was not the case following her treatment by the respondent.

Dr Aldouri (25 February 2016)

67. Dr Aldouri is a consultant psychiatrist. She was jointly instructed by the parties' then respective solicitors to interview and examine the claimant and prepare an independent psychiatric report in relation to the claimant's case in the tribunal proceedings.

68. She had had sight of the tribunal's judgment on liability prior to preparing her report and was aware of the four detriment complaints (as it was at the time) on which the claimant had succeeded.

69. The report goes through the claimant's health and personal history. It is in this respect similar to Dr Lockhart's report in identifying certain difficult life events in the claimant's life and the fact that she had from time to time been prescribed antidepressants. There is an overlap between the two reports in the life events in question. Dr Aldouri's report also, however, references problems which the claimant had with her siblings in August 2012 in relation to their trying to contest her mother's will. In these sections, the report also notes that:

"3.6 in terms of her premorbid personality, Ms Jhuti states that she was an extrovert person, outgoing, confident, able to socialise and had a lot of friends."

70. The report then goes into detail of the claimant's experiences at the respondent.

71. The report noted that, as a result, the claimant stopped going out and did not want to see her friends and felt uncomfortable about people coming to her house.

72. It notes that she became suicidal and, on 8 September 2014 (whilst she was still an employee of the respondent but was on sick leave) she took an overdose of medication which resulted in her being taken to hospital.

73. The report references that the claimant was assessed at Ealing Hospital in September 2014 as suffering from depression and post-traumatic stress disorder and that she was recommended an increase in her antidepressant medication. It also referenced CBT sessions which she had.

74. It references ongoing anxiety and depression in 2015 and the reluctance to go out and socialise; that she was sleeping excessively and overeating and had therefore put on five stone in weight.

75. It referenced the fact that the claimant complained that:

"She is still suffering with nightmares and flashbacks relating to her experiences with her line manager at Royal Mail. On further questioning she states that these nightmares occur twice a week waking her up from sleep feeling scared and frightened."

76. The report states that, when Dr Aldouri interviewed her, the claimant *"was very emotional during the interview crying while talking about her experiences when working at Royal Mail and recollecting her traumatic experiences"*. It states that the claimant was experiencing anxiety and panic attacks occurring twice a week, although there were no psychotic symptoms and her cognitive function including orientation and memory was normal.

77. The report included a review of the claimant's health records. These go into detail in referencing the symptoms of her condition, the manifestation of those symptoms and the medication she was taking in the period following the discriminatory treatment by the respondent. They also include the following reference:

"She was reviewed on the phone by Marie Davies on 17 December 2014 and stated that she had a difficult few weeks as she had discovered that her partner was having an affair and she threw him out of the house, she had been consoled by an old friend and she is now in a relationship with this person, she has a lot of other family and friends around and feels she has coped reasonably with this situation."

This is almost certainly a reference to the "bad experiences in relationships in 2014 to 2015" referred to in Dr Lockhart's report. Both these relationships were short term. The records also referenced the fact that the claimant was concerned that she might be pregnant around that time, which caused her temporarily to stop taking her antidepressant medication, although she in fact soon discovered that she was not pregnant. We mention these issues here only because much was made of this by Mr Gorton in cross-examination and submissions.

78. Dr Aldouri's report contains a lengthy and detailed summary of the evidence relating to the claimant's medical state both for a long period before (at least as far back as 2005) and after her employment by the respondent.

79. The "Summary and Opinion" section which follows this contains the following conclusions:

"12.3 Ms Jhuti has a previous history of psychological problems. Examination of her GP records revealed that she had suffered with anxiety, panic attacks and depression in 2005. Her partner was not supportive at that time. She experienced stress and low mood in 2007 when her mother was diagnosed with cancer and was prescribed antidepressant medication. It is documented in the GP records that she suffered with depression in 2008 and was under a lot of stress in 2010 during her mother's illness and subsequent death. GP notes also record stress-related problems and low mood in July and August 2010 in response to family problems and her siblings contesting her mother's will. She was offered counselling at that time. Furthermore she suffered from depression in May 2011 and there is a record of stress related problems, low mood, too many social problems, panic attacks and anxiety in March 2012. There is no record in the GP notes of psychological problems during 2013. So it seems that her mental health was stable at that time and prior to her employment at Royal Mail.

12.4 Ms Jhuti therefore has a predisposition and vulnerability to develop psychological symptoms and psychiatric illness in response to stressful situations and adverse life events. As said above

her mental health seems to have been stable in the year 2013 and in the period prior to her employment at Royal Mail and that she became mentally unwell in the period after her employment at Royal Mail.

12.5 In terms of the diagnosis, it is my opinion that Ms Jhuti has been suffering from Post Traumatic Stress Disorder, ICD10 F 43.1 and Moderate Depressive Disorder ICD10 F 32.1. This diagnosis is made according to the diagnostic classification of the ICD10 (The WHO international Classification of Mental and Behavioural Disorders, Version 10). With regards to the causation, in my opinion the main factor has been the adverse and traumatic experiences she has sustained and was subjected to during her working with Royal Mail and specifically the 4 detriments which the Employment Tribunal has decided in her favour."

80. In her "Recommendations and Prognosis" section, Dr Aldouri then goes on to recommend further antidepressants and a further course of cognitive behaviour therapy. She then states:

"13.2 It is difficult at present to predict a timescale for recovery but on the balance of probabilities I would expect her condition to improve and maybe return to her normal level with the further treatment recommended above and the conclusion of her Employment Tribunal case.

13.3 At present Ms Jhuti remains psychologically unwell and therefore is unfit to return to her role as media specialist. She has been thinking of doing voluntary work involving low level of stress and I think that might help her in the process of recovery."

81. Once again, the clear medical advice is that the main reason for the claimant's condition was the discriminatory treatment by the respondent. Furthermore, the conclusion of the employment tribunal case is set out as a significant factor in her recovery; indeed, Dr Aldouri's conclusion is effectively that it is a precondition if there is to be a possibility of the claimant returning to her normal level.

Dr Aldouri addendum (First of 4 April 2016)

82. Solicitors representing both parties then asked further questions of Dr Aldouri following her initial report. She therefore prepared two brief addenda reports, both dated 4 April 2016, in response.

83. The first, in response to questions from the claimant's then solicitors, Net Solicitors, contained the following:

"3.2 … As I said in my original report Ms Jhuti has already made some improvement in response to the psychiatric treatment she has already received. I would expect her to make a recovery to the level she was at prior to her employment at Royal Mail and on the balance of probabilities I would expect this to happen within 3-6 months of the conclusion of her case, the Employment Tribunal and/or any other civil proceedings. She should be able to return to paid employment in the future depending on her finding a suitable job that does not involve high level of stress. As stated in my original report under paragraph 12.3 Ms Jhuti has a previous psychiatric history and she has suffered from stress related problems, panic attacks, anxiety and depression in the years prior to her employment at Royal Mail. This means that she has a predisposition and vulnerability to develop psychiatric illness in response to stressful events and situations.

3.3 In my opinion Ms Jhuti is fit to return to work of the kind that does not involve high level of stress. Whether she would be able to return to her role as media specialist in the future, this will depend on her progress and improvement to the level of mental health that she had prior to her employment at Royal Mail…

3.5 I understand that Ms Jhuti's career has been mainly as a media specialist and on the balance of probabilities I think the loss of that might have an adverse effect on her mental well-being."

Dr Aldouri addendum (Second of 4 April 2016)

84. Dr Aldouri's second addendum of 4 April 2016, in response to questions by Weightmans Solicitors, the respondent's solicitors, included the following in relation to one particular question:

"3.3… You asked - *"specifically, the degree to which any mental impairment has been caused or exacerbated by the 4 detriments which the ET decided in favour of the claimant as opposed to other issues which were not the subject of a finding in favour of the claimant"*. I acknowledge that it is difficult to make a distinction about the impact of the different alleged detriments on the claimant's mental health and to be absolutely certain on medical grounds as to the distinction between the impact of the successful and unsuccessful detriments and I would rather leave this matter to the employment tribunal."

Dr Aldouri, therefore, does not answer this question but says that she would rather leave it to the employment tribunal.

Dr Aldouri addendum (18 November 2016)

85. Weightmans pursued the matter further, asking a further detailed question on this issue, which Dr Aldouri sets out in the subsequent addendum report which she produced dated 18 November 2016:

"2.3 *"at paragraph 12.5 of your report dated 25 February 2016 you make the following comment — "with regards to causation, in my opinion the main factor has been the adverse and traumatic experiences she has sustained and was subjected to during her working with Royal Mail and specifically the 4 detriments which the Employment Tribunal has decided in her favour. In order to assist the parties and the Employment Tribunal in the exercise of apportionment/attributability of loss consequent on the 4 detriments in respect of which the claimant succeeded as distinguished from the 19 detriments in respect of which the claimant failed to establish liability, can you please provide an opinion from a medical perspective as to the following together with the basis for that: in percentage terms where 100% is all of the PTSD(ICD10) and MDD(ICD10) attributable to the 23 detriments alleged by the claimant as responsible for her loss, what % can be directly attributable to the 4 detriments in respect of which the claimant succeeded?. In order to assist we have grouped together the 23 detriments into the following table*…"

86. To be clear, the total of 23 alleged detriments is in fact only 13 alleged detriments as the list of issues for the original liability hearing repeated several of those detriments three times over in relation to different alleged protected disclosures (and which Weightmans effectively acknowledges in their table referred to above, which it is not necessary to set out but which actually only refers to 10 alleged detriments). Furthermore, following the various appeals, the reality was that the claimant was in fact successful in five of those 13 detriments, plus her automatically unfair dismissal complaint.

87. Dr Aldouri's reply to this question is the following:

"4.1 On the balance of probabilities and based on the history given by the claimant in respect of the most important factors causing her psychological trauma and subsequent diagnosis of PTSD and MDD, in my opinion 60% can be attributed to the four detriments that the claimant has succeeded."

88. That is the extent of the reply; there is nothing further than that. We shall return to this in due course.

Dr Bansal (24 December 2016)

89. Dr Bansal is a consultant psychiatrist. He was instructed by the claimant's then solicitors, Net Solicitors. Since about August 2016, Net Solicitors had become concerned that the claimant had become increasingly suspicious, illogical and irrational in her thinking, appearing not fully to understand matters relating to her tribunal case that were being explained to her and requiring hours of time to try and help her to understand. They were concerned that she was behaving in such a way that indicated that she may lack capacity. They therefore instructed Dr Bansal, in summary, to assess whether she did have mental capacity in relation to the employment tribunal proceedings.

90. Dr Bansal interviewed the claimant, Ms Atkinson and a representative from Net Solicitors. He produced a report dated 24 December 2016.

91. Dr Bansal interviewed the claimant at home. The interview lasted 90 minutes. Many of the details from that interview which Dr Bansal references in his report are similar to those in previous reports. He references that she told him that it was because of the harassment at the respondent that she lost her confidence, started to withdraw from friends, and cried most of the time when alone. He references also that she told him that she had taken three overdoses in the last three years and had required hospital treatment on two occasions. He also references that she informed him that *"everybody is against her and therefore she took some impulsive decisions for example writing emails to her solicitor, signing paperwork for another court case (where she was involved in a dispute with her brother over an inherited property) without even looking at the papers. She said that she did it in a desperate attempt to end the stress from the situation she is in".*

92. In relation to his interview with Ms Atkinson, he states in his report that Ms Atkinson told him that she had known the claimant, whom she had met through work, since 1999, that the claimant was smart, honest, and fun to be with and that they became friends. The report goes on:

"Jane said in 2013, Ms Jhuti was very excited with her new job with Royal Mail but a few months into the post she stopped answering her calls, Ms Jhuti would not meet her when Jane was in London. She suspected something was not right and later found out about her work situation. She said she could not believe when she met her as she was completely different person i.e. she had put on significant weight, (she said, Ms Jhuti was size 8 but when she met her she was size 16), she was withdrawn, she would cry for anything and everything, she would not go out; she was neglecting herself and had started drinking alcohol heavily."

This description is consistent with the evidence which Ms Atkinson gave regarding the claimant at this tribunal.

93. Dr Bansal's summary at the end of his report included the following:

"During the whole interview process Ms Jhuti was crying. She was low in mood, was anxious and needed repeated reassurance. She had negative cognition towards everything in life, which included her relationship with solicitors, family, and friends.

Ms Jhuti presented with low mood, anxiety, anergia, anhedonia, reduced concentration, reduced libido, poor sleep, poor appetite and thoughts of self-harm. These symptoms suggest that she suffers from Severe Depression at the time (ICD 10 code F 32), as per International Statistical Classification of Disease and related health problems (ICD), a medical classification list by World Health Organisation (WHO).

Ms Jhuti's mental illness had significant effect on cognition and day to day functioning. The symptoms of depression have progressed to a degree where she is having difficulties in completing simple tasks for example shopping, cooking etc…

Because of the negative cognition and poor concentration she takes decisions impulsively and often digresses from the topic in discussion and is therefore unable to weigh the pros and cons of each aspect of litigation that may arise during the tribunal and or court proceedings.

It is possible that this will continue to be the same in the tribunal and or court of appeal, if her mental state did not improve and therefore she may not be able to engage in the litigation process including being able to give evidence and giving and receiving instruction from counsel (*Dunhill v Burgin*).

Ms Jhuti was able to understand, retain and communicate information but she was unable to weigh the pros and cons of various aspects of litigation process in tribunal and or court of appeal and hence, it is my professional opinion that Ms Jhuti lacks mental capacity at present in relation to her ability to conduct proceedings at employment tribunal and or court of appeal (*Mastermann–Lister v Brutton & Co; 2003*)."

94. Dr Bansal therefore made the recommendation that she should have a litigation friend. As noted, Ms Atkinson acted as her litigation friend and continued to do so until May 2018.

Dr Nayrouz (18 February 2020)

95. Dr Nayrouz is a consultant in General Adult Psychiatry. He received a joint instruction on behalf of both the claimant and the respondent to act as a single joint expert and to provide a report regarding the claimant's mental health in relation to the employment tribunal proceedings. By this stage, all of the various appeals had been completed, in other words it was confirmed by this stage that the claimant had been successful in both the unfair dismissal complaint and five of the detriment complaints.

96. Dr Nayrouz was asked to address a number of different questions. These included: providing an updated report upon the nature and extent of the claimant's current psychiatric state; prognosis; to the extent that he was able, *"the extent of the influence and contribution (expressed in percentage) to the psychiatric injury"* of the claimant of *"the 4 successful detriments and the 19 detriments which were dismissed by the tribunal"* and *"the dismissal, to the extent you are able to distinguish the effect of that from other detriments"*. (To be clear, by this stage, it had been found that the claimant had been successful in 5 rather than 4 detriments.)

97. Prior to completing his report, Dr Nayrouz had had sight of all of the previous medical reports of Dr Lockhart and Dr Aldouri (including the addenda)

and of the claimant's medical records. He also carried out an in-person assessment of the claimant, which lasted around 90 minutes.

98. At the start of the background section in his report, Dr Nayrouz notes that the information below is based on the claimant's account as outlined in Dr Aldouri's report of 25 February 2016.

99. In a section about the claimant's history of mental health problems, he notes her previous mental health issues as follows:

"2005: anxiety, panic attacks and depression;

2007: stress and low mood when her mother was diagnosed with cancer. She was prescribed antidepressant medication;

2008: depression;

March 2010: bereavement, stress-related problems and panic attacks following her mother's death;

July/August 2010: stress-related problems and low mood as a result of family problems when her siblings contested their mother's will. Was offered counselling;

May 2011: depression;

March 2012: back pain related to a slipped disc and was prescribed Diazepam (as a muscle relaxant). Stress-related problems with anxiety and panic attacks, prescribed Paroxetine 20 mg/day (an SSRI antidepressant) and Zopiclone (sleeping tablets);

August 2012: stress due to problems with her siblings who contested their mother's will. Stress and anxiety, prescribed Diazepam (as an anxiolytic) by GP;

2013: there is no record in the GP medical notes of psychological problems during 2013 which may suggest that her mental state was reasonably stable at the time. She was still taking on Diazepam 5 mg tablets once or twice a week but said it was as a muscle relaxant for back pain."

100. There then follows a section on the claimant's *"account of the stress she has been experiencing in relation to the ongoing legal case as well as other stressors since April 2016"*. This essentially contained two items. The first is the ongoing employment tribunal litigation and the long process of the various appeals in relation to it. The second is set out as follows:

"5.4 Ms Jhuti said that "this year has been messy" and that faced stress because her daughter "has been playing up". Ms Jhuti reported that her daughter is not living with her anymore and has been living with her father since December 2018. Ms Jhuti said that her daughter told her that she "cannot take it anymore" and that "being with [the claimant] is upsetting her too much".

5.5 Ms Jhuti reported that her daughter had said "life is just crap with you, mommy" and that she will "come back when [the claimant] is better".

5.6 Ms Jhuti said that her daughter "won't even call to talk to [her]" and that she last called in the summer (which would be around 5-6 months ago).

5.7 Ms Jhuti became very tearful, stating that she "can't help it, can't help who [she is]" and that she "just wants to get better" to get her daughter back".

101. These are the only two factors mentioned in the section concerning *"other stressors since April 2016"*. There is no mention, for example, of the litigation with her brother.

102. There is then a lengthy section (section 6) setting out the various symptoms of her condition, much of which is covered elsewhere and which it is not necessary to repeat here.

103. However, in this section, Dr Nayrouz also sets out how the claimant explained to him that she tried not to think about her experiences during her employment because it made her feel *"very upset"*. The section goes on:

"6.41 Ms Jhuti said that when she thinks about what her ex-line manager did to her, she feels "angry" stating, "why did he do it, I didn't do anything wrong, I can't understand how he could be so horrible to a human being, I don't get it".

6.42 With regard to Ms Jhuti's memory of her employment in question, she said: "I try not to think about it… but I remember certain situations with him (ex-line manager) finishing some meetings and was feeling so shit that I had to stop myself from falling".

6.43 Ms Jhuti added, "I remember what I felt in that particular moment, I become overwhelmed by what I felt, I want to be sick, my head feels like the way I was feeling inside at the time comes back".

6.44 Ms Jhuti said that she often recalls "things that had been said" such as: "you won't be believed before he will be believed" or "are you sure this is the place for you". Ms Jhuti, referring to her ex-line manager, said that she remembers "his looks, so menacing, really, really menacing, I work very hard to try and block it, that's why I am eating so much".

6.45 Ms Jhuti reported that she occasionally dreams about the events which took place during her employment and stated that she tries "to manage" when she wakes up and tries "to block them".

6.46 Ms Jhuti reported that when she remembers what happened during her employment, she would tell herself "don't think about it, don't think about it" and then she would "forget them"."

104. One reason why we have chosen to quote these passages in full is that, in terms of the detail, they are so reminiscent of how the claimant reacted in her cross-examination when she was forced to think about her interactions with Mr Widmer at the respondent, in particular during that passage of cross-examination which resulted in the tribunal having to take an early lunch break and Mr Jackson then reporting that the claimant was hyperventilating and having symptoms consistent with a panic attack. Having to confront the memories of her interactions with Mr Widmer, even as a result of a single question as was the case at this particular point, clearly had an enormously detrimental effect upon her; there was during cross-examination what we can only describe as a sense of terror in her as she was forced to confront the recollections of his presence and of what he said to her, which is reflected in her repeated use of the word "menacing" in the description she gave to Dr Nayrouz set out above. As a tribunal we found it very hard to observe.

105. Section 7 of the report concerns the claimant's "account of the impact of symptoms on her day-to-day function and quality of life". Again, it is not necessary to repeat all of these but the claimant goes through, amongst other

things, the negative impact on her: weight; ability to fill in simple things like forms; confidence and ability to deal with people; social life; personal hygiene; inability to work; and general quality of life.

106. The section ends with a number of paragraphs about the claimant's own views, as described to Dr Nayrouz, of the impact of the respondent's actions/behaviour on her mental health:

"7.15 Ms Jhuti said that she thinks that the cause of her mental health condition/symptoms is "related to the man that put [her] through what he put [her] through… it was relentless". Ms Jhuti said that "it made [her] feel so bad about [her]self… that [she] was worthless". Ms Jhuti said that she "can't help it" and that she "just cr[ies] all the day", stating "I don't think a day goes past without me not crying" [sic].

7.16 When I asked Ms Jhuti about the actions/behaviours by her ex-employer which she considers to have affected her mental state the most, she stated: "the worst part of it was the bullying… it was constant… I had meetings every week for months and months, no matter what I did, and I was good, I really was".

7.17 Ms Jhuti said that, in her opinion, the bullying by her ex-line manager had been responsible for triggering 90-99% of her subsequent depression and anxiety. Ms Jhuti said that the bullying almost caused 10/10 of her mental her [sic] problems and that the rest are relatively less/not important."

107. Section 9 of the report, concerning the claimant's mental state on the date of her assessment by Dr Nayrouz on 10 February 2020, includes the following:

"9.11 When I asked Ms Jhuti if she feels hopeful about her future, she said, "the case has been won apparently" and that "the judgments had come back in [her] favour" and that "the Supreme Court said it was unfair dismissal".

9.12 When I asked her why this news had not helped her feel better, she burst into tears and stated, "because look at me, look what they done to me", "I cannot cook anything any more, what am I going to do. I don't feel it will get better", "I want to be gone; I don't know how to help myself".

9.13 When I asked Ms Jhuti if she has any feelings of guilt about anything, she said, "of what?… I used to be so strong, I feel sad that I am where I am, I wish I never opened my mouth".

9.14 Ms Jhuti stated, "I do not want to be like this, I'm really done, I want to get better, to get my baby back, I raised her on my own, she's my biggest pride and joy, she's 15, I don't want her life being impacted because of having a mum like me".

9.15 Ms Jhuti said that she is "hoping to try something… need to figure something out" as otherwise her daughter won't come home."

108. Section 10 of the report contains Dr Nayrouz' findings and opinions. They contain the following:

"10.4 Although it is not possible in the context of litigation to be 100% certain that there has never been any degree of conscious or subconscious exaggeration of feelings or symptoms, I consider, on the balance of probabilities, and taking into account evidence from medical records, that Ms Jhuti's symptoms are genuine."

109. Dr Nayrouz then acknowledges that the claimant has a *"long history of experiencing recurrent mental health symptoms, namely anxiety, depression and panic attacks when she is under stress which predates her employment with the Royal Mail"* and that she *"therefore has a lifelong vulnerability and predisposition to develop anxiety, depression and panic attacks as a response to psychosocial stressors in her life*".

110. He then goes on:

"10.6.1 There is evidence that Ms Jhuti started to suffer from symptoms of anxiety, depression and panic attacks around early 2014, which were apparently stress-triggered and related to her employment at the time. Those symptoms were significantly worse than those experienced on previous occasions.

10.6.2 Ms Jhuti appears to have continued to suffer from ongoing symptoms of anxiety, depression and panic attacks since 2014 while the Court case has been ongoing, despite receiving adequate treatment and support. There is evidence that Ms Jhuti has also experienced other stressors in the last year, such as losing her daughter and suffering from serious physical health problems.

10.6.3 Ms Jhuti's mental symptoms may have played a significant factor in the loss of her daughter according to her…

10.7.2 Ms Jhuti has consistently been diagnosed with Moderate Depressive Disorder, ICD-10 F32.1 by Dr Picton Jones, Dr Aldouri, Dr Lockhart, Dr Chaudhry and Dr Mukherjee since 2014.

10.7.3 Based on the history provided by Ms Jhuti and taking into account all other available information, I am of the opinion that Ms Jhuti appears to have suffered from symptoms of "Recurrent Depressive Disorder, current episode moderate, with somatic syndrome", International Classification of Diseases ICD-10, Code F33.1.11 since 2014.

10.7.4 However, it is my opinion that, according to Ms Jhuti's description of her symptoms, there is a possibility that her symptoms may have at some points over the last six years reached the threshold for "Severe Depressive Episode, without Psychotic Symptoms", ICD-10, Code F 33.2.
10.7.5 While Ms Jhuti has experienced many symptoms of PTSD, I am not of the opinion that a diagnosis of "Post-Traumatic Stress Disorder", ICD-10, Code F 43.1 is appropriate.…

10.10 The extent to which there is been any deterioration in Ms Jhuti's condition

10.10.1 It is difficult to accurately map out the severity of Ms Jhuti's mental conditions over the last 4 years. However, the severity of her depressive and anxiety symptoms appears to have fluctuated over the last 4 years in relation to various psychosociai stressors, mostly the ongoing Court case, while remaining most of the time to be of at least moderate severity.

10.10.2 Ms Jhuti's symptoms over the last 4-6 years have been significantly worse than those experienced in previous occasions.

10.10.3 It is highly likely that Ms Jhuti's symptoms depressive and anxiety symptoms were at times 'severe'.

10.10.4 It is difficult to separate the effect of the stress related to her employment from other psychosocial stressors that could have worsened her symptoms at a time, such as Ms Jhuti's physical conditions, the effect of medications, menopausal symptoms, the loss of her daughter, and the effect of alcohol during a period of excessive drinking…

10.12 I would not be able to specifically establish the extent of the contribution (expressed in percentage) of the 4 successful detriments versus the 19 detriments which were dismissed by the tribunal, or the contribution of the dismissal to Ms Jhuti's psychiatric injury due to the complexity

and overlap of those aetiological factors related to her employment, as well as the effect of other detriments.

10.13 Ms Jhuti said that, in her opinion, the bullying by her ex-line manager had been responsible for triggering 90-99% of the subsequent depression and anxiety. Ms Jhuti said that the bullying almost caused 10/10 of the mental problems and that the rest are relatively less/not important.

10.15 Prognosis, when and to what extent the remaining symptoms are likely to resolve, effect of psychiatric injury on Ms Jhuti's future social, domestic and recreational activities and upon her enjoyment of life generally.

10.15.1 There is evidence that Ms Jhuti's depressive and anxiety symptoms have been ongoing and never been in remission since they started in 2014. Ms Jhuti's lack of improvement despite continuing treatment with medication and psychological therapy is, in my opinion, likely to be mainly due to the prolonged, and still ongoing, employment legal case.

10.15.2 Other psychosocial factors may have also contributed to her ongoing symptoms, especially the loss of her daughter in the last year. However, this would be difficult to quantify.

10.15.3 In my opinion, Ms Jhuti's depressive and anxiety symptoms are likely to start to gradually improve after her employment case has been completely concluded, provided that she felt satisfied with its outcome.

10.15.4 Considering that Ms Jhuti's anxiety and depressive symptoms have been ongoing for such a long time (6 years) and have had such a substantial effect on her ability to function, as per her account, it is difficult at present to predict a timescale for recovery.

10.15.5 it would not be unreasonable to expect that Ms Jhuti's would take significantly longer than the average time to achieve significant and consistent improvement in her depressive and anxiety symptoms, and to return to an adequate level of functioning.

10.15.6 The prognosis in terms of the extent of recovery from her ongoing currently depressive and anxiety symptoms and the return to premorbid level of function, as well as the timescale required to achieve this, will depend on various factors, including the conclusion of the employment court case and its outcome, her response to further CBT therapy if provided, the relationship and contact with her daughter and any other future stressful life events, including her physical health status.

10.15.7 While it is difficult to predict the above factors, I would on balance of probabilities, predict that Ms Jhuti is likely to achieve significant improvement in her symptoms and functioning. However, she may take a year or significantly longer to achieve this.

10.16 Whether Ms Jhuti has been disadvantaged on the open labour market as a result of the injuries sustained.

10.16.1 Evidence available suggests that Ms Jhuti has not been able to work/hold employment over the last six years due to her mental symptoms.

10.16.2 Ms Jhuti, in my opinion, remains to be unfit to work at present time.

10.17 Whether Ms Jhuti satisfies the "disability" criteria under the Equality Act 2010.

10.17.1 Ms Jhuti, in my opinion, satisfies the disability criteria under the Equality Act 2010 as her symptoms have had a long-standing and substantial impact on her ability to day-to-day function."

111. Dr Nayrouz' conclusions are, therefore, that, notwithstanding that the claimant has a lifelong vulnerability and predisposition to develop anxiety, depression, and panic attacks, she started to suffer from symptoms of anxiety, depression and panic attacks around early 2014, which were apparently stress

triggered and related to her employment with the respondent and, significantly, that those symptoms were significantly worse than those experienced on previous occasions.

The cause of the claimant's mental health condition from early 2014

112. Dr Lockhart and Dr Aldouri were similarly cognisant of the claimant's mental health history prior to 2013/2014. Dr Lockhart's report is even clearer than Dr Nayrouz' that the claimant's psychiatric disorder arose directly as a result of her treatment by the respondent and not as a result of other life events (see paragraphs 4.9 to 4.11 of Dr Lockhart's report, quoted above). Similarly, Dr Aldouri concluded that the main factor was the adverse and traumatic experiences the claimant sustained and was subjected to during her working with the respondent and specifically the 4 detriments which the employment tribunal had decided in her favour. Dr Aldouri noted, as did Dr Nayrouz, that this dramatic deterioration in the claimant followed a period in 2013 when the claimant appeared not to have had any mental health issues. The clear medical evidence is, therefore, looking at three separate medical professionals' reports, that the claimant's mental health condition, stretching from early 2014 to February 2020 (the date of Dr Nayrouz' report) has been ongoing and never in remission and was caused by her treatment by the respondent; we, therefore, find as a fact that that was the case and that the claimant's losses as a result flow directly and naturally from this treatment. (We consider further below which aspects of the respondent's treatment were those responsible.)

113. Furthermore, there is nothing to suggest that the claimant's mental health condition has not been ongoing beyond Dr Nayrouz' report until the present point in time. All three medical professionals emphasise that the most important precondition to an improvement in the claimant's mental health is the conclusion of these employment tribunal proceedings. The proceedings are, of course, still ongoing. We, therefore, find on the balance of probabilities that the claimant's mental health condition, as described by the doctors, has continued at the same level of severity until the present time. We make this finding without prejudice to any finding as to how long it may continue into the future.

Severity of claimant's mental health condition

114. As a result, since 2014, the claimant has consistently been diagnosed with "moderate depressive disorder", and, in Dr Nayrouz' opinion, there is a possibility that the symptoms may have at some points over the six years since early 2014 reached the threshold for "severe depressive episode, without psychotic symptoms". Dr Lockhart's conclusion was similar; he considered that the disorder was "moderate" but that it may at some point over the year prior to June 2015 have satisfied the criteria for a severe depressive episode without psychotic features. Dr Aldouri's conclusion, by contrast, was that the claimant had suffered from "moderate depressive disorder" since her experiences at the respondent, but she made no finding as to whether at any point the claimant's condition may have satisfied the criteria for a severe depressive episode. The tribunal are not medical experts and, relying on the medical reports, we, therefore, consider that, on the balance of probabilities, the claimant has, since her treatment by the

respondent, suffered "moderate depressive disorder" but that at some points over the period between early 2014 and the date of Dr Nayrouz' report in February 2020, she satisfied the criteria for a severe depressive episode without psychotic features; we come to this conclusion based on the opinion of the majority of the medical professionals (Dr Lockhart and Dr Nayrouz) and based on the fact that Dr Nayrouz' report is the most recent.

Eggshell skull

115. To be clear, the fact that the claimant has a lifelong vulnerability and predisposition to develop anxiety, depression and panic attacks does not absolve the respondent from any liability for mental injury caused by its behaviour. This is because of the so-called "eggshell skull" rule; one takes one's victim as one finds him or her. The respondent has not made such a submission and we do not therefore feel we need to discuss the point further. However, for completeness' sake, we felt that the point should be stated.

Causation - ongoing litigation/loss of the claimant's daughter/physical health

116. We also consider that, for completeness' sake, we should deal briefly with a point that arises from paragraph 10.15.6 of Dr Nayrouz' report, even though it is not something which has been raised by the respondent in submissions. In that paragraph, Dr Nayrouz stated that the extent of the claimant's recovery and return to premorbid level of function, as well as a timescale required to achieve this, would *"depend on various factors, including the conclusion of the employment court case and its outcome, the claimant's response to further CBT therapy if provided, her relationship and contact with her daughter and any other future stressful life events, including her physical health status"*. It has not been directly argued that any failure to resolve the court case, lack of improvement in the claimant's relationship with her daughter or the claimant's physical health status might amount to a break in causation in terms of ongoing losses caused by the respondent's treatment of the claimant in 2013/2014.

117. However, notwithstanding that, we find as a fact that there is no such break in the chain of causation in relation to any of these factors. That is because all of them were caused by and were consequent upon the treatment by the respondent in 2013/2014 which brought about the claimant's mental health condition. They are not supervening factors; rather, they flow from that treatment. The litigation, which is ongoing, is self-evidently something that has arisen because of the respondent's treatment of the claimant. Similarly, the fact that the claimant's daughter chose to stop living with the claimant and break off contact with her was, as is clear from the passages in the medical evidence quoted above (and indeed corroborated by the evidence of the claimant and of Ms Atkinson) entirely as a result of the state of mental health which the claimant was left in as a result of the treatment by the respondent; the claimant's daughter left because of the condition which the claimant was in and its impact upon the claimant's behaviour. These factors do not, therefore, cause any break in the chain of causation.

Prognosis

118. In terms of prognosis, the medical professionals all see a conclusion to the employment litigation is being key to the claimant's recovery. However, as Dr Nayrouz' report is far more recent than any of the others, his conclusions on prognosis are the most relevant. In summary, he considers that: *"her depressive and anxiety symptoms are likely to start to gradually improve after her employment case has been completely concluded, provided that she felt satisfied with the outcome"* (our emphasis); as the symptoms have been ongoing for such a long time (six years) and have had such a substantial effect on her ability to function, it is difficult to predict a timescale for recovery but *"it would not be unreasonable to expect that she would take significantly longer than the average time to achieve significant consistent improvement in her depressive and anxiety symptoms, and to return to an adequate level of functioning"*; the extent of her improvement depends on a number of factors; but that *she "is likely to achieve significant improvement in her symptoms functioning. However, she may take a year or significantly longer to achieve this"* (our emphasis).

119. A conclusion to the employment litigation is therefore a prerequisite for the claimant starting to recover, and indeed one where she feels satisfied with the outcome. Subject to that, she may take a year or significantly longer to recover. We have no reason to disagree with Dr Nayrouz' expert professional analysis and therefore accept it.

120. To be clear, Dr Nayrouz does not at any stage state when he considers the claimant might be likely to be able to work again, whether as a media specialist or otherwise; his opinion is limited to when it might be reasonable to expect her to return to an *"adequate level of functioning"* in terms of her mental health conditions.

Percentage of losses caused by the detriments/dismissal

121. Having found that the claimant's mental health conditions were caused by the respondent's treatment of her, we turn now to the question of what treatment caused the harm in question. The respondent submits that our finding should be that the respondent is only responsible for 60% of any losses, based on the opinion that Dr Aldouri expressed in her addendum of 18 November 2016 that "*60% can be attributed to the four detriments that the claimant has succeeded".*

122. The burden of proof is on the respondent in relation to whether apportionment is appropriate and, if so, what level of apportionment should apply. For the reasons below, we find that the respondent has not discharged that burden and that there should be no apportionment. We, therefore, find as a fact that the respondent is responsible for 100% of the losses.

123. First, Dr Aldouri's addendum is singled out in the context of a long series of medical reports. It dates back to 2016 and has been superseded by the report of Dr Nayrouz from 2020. Since that addendum, the situation has changed in that the claimant has been found to have been successful not only on a further

detriment but also on her unfair dismissal complaint. That addendum is, therefore, no longer applicable. Furthermore, as Mr Jackson rightly submitted, it would require complete speculation to make any assessment of the impact of the grievance delay detriment, or indeed of the dismissal.

124. The question of apportionment as between the various detriments was not put to Dr Lockhart following the production of his report and he had simply and clearly identified that the claimant's psychiatric symptoms arose as a direct result of the employment issues with the respondent. Dr Nayrouz was asked this question and specifically declined to answer it, stating that he *"would not be able to specifically establish the extent of the contribution of the 4 successful detriments versus the 19 detriments that were dismissed by the tribunal, or the contribution of the dismissal to Ms Jhuti's psychiatric injury*". However, he added that the claimant said that, in her opinion, the bullying by Mr Widmer *"had been responsible for triggering 90-99% of her subsequent depression and anxiety"* and that *"the bullying almost caused 10/10 of her mental problems and that the rest are relatively less/not important"*.

125. Even Dr Aldouri's initial response in her addendum of 4 April 2016, when she was first asked the question, was to state that *"it is difficult to make a distinction about the impact of different alleged detriments on the claimant's mental health and to be absolutely certain on medical grounds as to the distinction between the impact of successful and unsuccessful detriments and I would rather leave this matter to the Employment Tribunal"*. It was only when pressed further by Weightmans further question on the matter that she gave the one sentence opinion which forms the basis of the respondent's submission in this respect, which was: *"On the balance of probabilities and based on the history given by the claimant in respect of the most important factors causing her psychological trauma and subsequent diagnosis of PTSD and MDD, in my opinion 60% can be attributed to the four detriments that the claimant has succeeded."*

126. Furthermore, the very brevity and lack of analysis in that one sentence opinion is striking. Mr Jackson referred us in this respect to the case of Griffiths v TUI (UK) Ltd [2001] EWCA Civ 1442; [2022] 1 WLR 973, which concerned submissions made to a trial judge on the basis that an opinion in an expert report, in a personal injury case where the expert was not required to attend court, was insufficient to satisfy the burden of proof in that case. It is not necessary to quote the case as extensively as Mr Jackson did in his written submissions. However, the legal principles derived from it are that: there is no rule that an expert's report which is uncontroverted cannot ultimately be rejected by the judge and that it all depends on the circumstances of the case, the nature of the report itself and the purpose for which it is being used in the claim; unless the matter is one of personal observation, an expert must explain the basis for his or her conclusion; a mere assertion by an expert is of so little weight that it is likely to be worthless; proper evaluation of the opinion can only take place if the process of reasoning which leads to the conclusion is set out; and where the expert evidence is in the form of an evaluative opinion, a mere "ipse dixit" is all but worthless.

127. We accept Mr Jackson's submission that the one sentence opinion proffered by Dr Aldouri is a mere "ipse dixit". The only evaluation is by reference to the history given by the claimant in respect of the "most important" factors causing psychological trauma. Nowhere else, however, in any report, is it identified what these "most important" factors are or what has led to the conclusion that 60% is the appropriate figure as opposed to any other figure. We also remind ourselves that, in terms of this "history", Dr Aldouri is in this opinion distinguishing as between successful and unsuccessful detriments, all of which related to the claimant's employment by the respondent; she is not making any distinction between the claimant's experiences at the respondent and any other factors in the claimant's life and nothing in this opinion detracts from her original opinion that *"the main factor has been the adverse and traumatic experiences she has sustained and was subjected to during her working with Royal Mail"*. In that respect, we are not sure why the reference in Dr Aldouri's addendum opinion to the "history" given by the claimant is relevant to this opinion as the opinion is not concerned with historical factors which may or may not have contributed to the claimant's condition but rather with a distinction between "successful" and "unsuccessful" allegations of detrimental treatment within the self-contained period during which she was employed by the respondent.

128. In addition, it seems rather odd to attribute any weight at all to the effects of detriments which were not proven, let alone 40%. Whilst we accept that it is technically possible for the perception of detrimental treatment which did not happen or was not proven to have an impact on the claimant's mental health, the impact is likely to have been far less than the proven detriments. Furthermore, even though she had access to the liability judgment, the focus in that judgment was far more on the proven detriments and Dr Aldouri had not heard any of the evidence about the unproven detriments; we have seen no reference at all from her to the details of the unproven detriments, let alone an assessment of their impact on the claimant. It is therefore hard to see how she could attribute any weight, let alone so much weight to the unproven detriments.

129. Furthermore, no explanation is given by Dr Aldouri for her departure from her earlier opinion that it is difficult to be absolutely certain on medical grounds as to the distinction between the successful and unsuccessful detriments and that she would rather leave it to the employment tribunal. There is no explanation for the change of opinion and no reasoning to permit proper evaluation of the final opinion.

130. Furthermore, the proper test for compensation occasioned by detriments is whether losses flow *"directly and naturally from the wrong"* (Essa v Laing Ltd [2004] EWCA Civ 2; [2004] ICR 746, per Pill LJ at [37]). That is the test which must be applied. There is no indication that that is the test that Dr Aldouri has applied. The 60% figure has the feel of a figure plucked out of the air following further pressure for an answer from the respondent's solicitors, rather than something that comes from a reasoned analysis, in circumstances where, as set out in her earlier addendum, Dr Aldouri had already stated how difficult it was to make such distinctions and had declined to do so.

131. For all of the above reasons, we do not consider that reliance should be placed on this particular opinion of Dr Aldouri and we do not consider that the respondent has discharged its burden of proof in relation to apportionment in respect of this matter.

132. That is, therefore, the end of that matter. However, given that there is no medical opinion on the matter of the effects of the various alleged detriments (other than the opinion of Dr Aldouri that we have just discounted), we nevertheless make the following observations. In doing so, we are conscious that we are not medical professionals. We also acknowledge the assertion of Dr Nayrouz that he is not specifically able to establish the extent of the relative contribution and Dr Aldouri's original opinion that it was difficult to do this, but we also acknowledge that she suggested that the matter should be left to the tribunal, so we feel we should make some comment and a finding here.

133. The evidence in Dr Nayrouz' report, which is the most recent of the medical reports, was that it was the bullying by Mr Widmer which was responsible for 90-99% of the claimant's depression and which caused almost 10/10 of her mental problems and that the rest was less important or not important at all. Although this was what the claimant told him, we do not see any reason to doubt the claimant's credibility (as we shall come to later). Furthermore, when one looks back at the liability judgment, it is clear that the events which dominated were the ongoing bullying by Mr Widmer over a lengthy period of months, involving weekly meetings with the claimant; the detriments in relation to which the claimant was unsuccessful were far more tangential in the context of the case. Furthermore, we repeat our own observations of what we saw at the remedies hearing; when confronted by having to recollect Mr Widmer and his treatment of her, the claimant was distraught, including at one point to such an extent that she could not continue and the hearing had to be adjourned as she had symptoms consistent with a panic attack; this was in contrast to her reaction to other matters which were put to her during the course of a lengthy cross-examination, which she was able to deal with without such an emotional reaction. We accept, therefore, that it was that bullying which was by far the predominant cause of the claimant's losses and her mental condition from 2014 onwards. There is no basis for any departure from the conclusion that the losses flow directly and naturally from the treatment of the claimant by the respondent in relation to which the claimant was successful at the tribunal and therefore no basis for any apportionment.

<u>The employment reports</u>

134. As noted, two reports were prepared by Mr Gilbert, the employment expert, the first of these on 28 July 2016 and the second on 14 February 2020. As with the majority of the medical reports, these are very detailed and thorough and we do not repeat all of their provisions below. However, we do set out, in some detail, those provisions which are relevant. Again, as with the medical professionals, the respondent chose not to seek to call Mr Gilbert to give evidence at the tribunal. However, it has nonetheless sought to persuade us to go behind Mr Gilbert's reports on the basis of various factors, including submissions it has made about the claimant's credibility. Again, we reject those

submissions entirely and set out our reasons for doing so later. However, any findings of fact which we make in this section which arise out of the employment reports are made on the basis that those submissions have been rejected.

First employment report (28 July 2016)

135. Mr Gilbert was originally instructed by Net Solicitors, the claimant's solicitors at the time, to produce a report covering (as set out in paragraph 1.2 of the report) the claimant's qualifications and experience, employment history, her without dismissal earnings potential, the occupational implications of the dismissal, employability, transferable skills, and her efforts to return to the labour market. This was with a view to an objective estimate to be made of any loss of earnings she may have suffered or might suffer in the future. The report he produced is an extremely detailed and thorough analysis of the factual situation and the likely prospects of the claimant obtaining work and is a very impressive document (as is the subsequent report from 2020).

136. Mr Gilbert had available to him a variety of documentation, including the medical reports of Dr Aldouri up to that point, the employment tribunal liability judgment, the claimant's CV, various pay and other employment information from the respondent and a witness statement by the claimant. He also interviewed the claimant on 4 July 2016 at her home. Consequently, a lot of the information in his report was provided to him directly by the claimant (which, as we will discuss later, has been the reason for the respondent's attempts to persuade us to discount the conclusions of Mr Gilbert's reports on the basis of the claimant's credibility).

137. Mr Gilbert detailed the claimant's employment history in section 4 of the report. In relation to the claimant's transition from her employment at Verifone Media Ltd to her employment at the respondent, Mr Gilbert states:

"4.8 Ms Jhuti remained at Verifone until July 2013 when she said she was approached to join MarketResearch (sic) at Royal Mail Group in September 2013 as a Media Specialist…"

138. Based on what he described as Dr Aldouri's unequivocal opinion that the claimant was at that time unable to contemplate a return to work as a media specialist, or any job which involved stress, Mr Gilbert found that *"it is reasonable that Ms Jhuti should avoid, where possible, any employment which involves stress or pressure, although in reality that may prove difficult in these trying economic times."* (paragraph 9.7). He then noted:

"9.11 As will be seen below, Ms Jhuti is attempting to return to work in September in a part-time undemanding administrative job which, in my view, is probably the best way forward; that she undergoes a phased return to work at a level with which she may be able to cope with her administrative experience. Otherwise, I see no other option than a complete career change which has been addressed in a separate vocational rehabilitation assessment."

139. Section 11 of the report ("Efforts to mitigate loss (job search")) is as follows:

"11.1 Kam Jhuti has largely felt unable to conduct job search due to her psychological condition; feelings of worthlessness, lack of drive and motivation, depression, listlessness, lack of

concentration, anxiety and panic attacks. In general terms, Kam Jhuti told me that she hasn't the "get up and go" any more to search for work. She has no real idea of what she might be capable of.

11.2 However, following a conversation with a psychiatric nurse in early 2015, in which a return to work was discussed to enable her a possible phased re-entry to the labour market, a friend of Kam Jhuti who worked at Zinc Ltd suggested she tried working for two days a week cold calling, seeking qualified leads in the airlines and technology sectors, for which she would be paid at a rate of between £10-12 per hour. However, Kam Jhuti told me she found it difficult to make the calls and to speak with clients, feeling so embarrassed that she could not take the pay. She felt she had totally lost confidence and her contribution is worthless, so left.

11.3 Earlier this year this Ms Jhuti had thought about doing some voluntary work e.g. in a care home or at the local library. She contacted the latter and they asked if she would read to children, but she told me she was paralysed with fear at the prospect of this and did not take the offer any further.

11.4 Through the auspices of a friend she has been given the chance of a basic clerical job to start in September for two days a week at Transglobe for which she would be paid £11 or £12 per hour. She said she will try to use this to establish the boundaries vis-a-vis what she is capable of given her circumstances."

(As it turned out, the claimant was, because of the state of her mental health, not able to do this job.)

140. The type of description set out above is corroborated by Ms Atkinson's evidence (paragraph 11 of her witness statement). She too tried to help the claimant and gave her the opportunity to do some work for her for a few weeks in January/February 2015. However, whilst Ms Atkinson thought that the claimant would be able to help with sending emails and monitoring responses, she found the claimant could not focus on even the simplest tasks like sending ready scripted emails to a list of addressees, let alone talk to prospective customers at a trade event. The arrangements therefore ended after just a few weeks. Ms Atkinson commented in her statement what a shock it was for her to see that the claimant had become *"the complete opposite of the articulate, confident person that [Ms Atkinson] once knew and admired"*.

141. Mr Gilbert's "Summary and Conclusions" are at section 14 of the report and include the following:

"14.1 Ms Jhuti was dismissed from employment from RMG and as a consequence has suffered psychological injuries, to the extent that she has lost confidence in her ability, lacks concentration, unable to absorb information, has anxiety and panic attacks, cannot tolerate pressure of any kind e.g. deadlines, sales targets. She avoids social environments, crowded places and driving unless absolutely necessary. According to Dr Aldouri she is suffering from PTSD and moderate depressive disorder.

14.2 Before the circumstances leading up to her dismissal, Kam Jhuti had been a successful career woman, a highly experienced media specialist, particularly identifying, cold calling and presenting and negotiating with high value clients, excellent inter-personal and presentation skills, significant knowledge of and contact within the travel industry, experienced in coaching and training. Her key skills and strengths were tenacity, understanding budgeting and matching client needs so that her proposition fitted their overall marketing budget, flexibility, and highly sales target orientated.

14.3 Had she not been dismissed she had every intention of remaining with RMG in MarketResearch until retirement, though if an internal opportunity arose she would have applied

for it to widen her experience and skills base. I am of the opinion it is too speculative to consider promotion at this early stage of her employment and in any case I have not been provided with sufficient comparable evidence to draw a satisfactory conclusion.

14.4 Earnings had she remained at RMG would have been a continuing basic salary of £50,000 gpa rising in small increments, possibly annually, as well as benefits such as car and health insurance for her and her children. She would have been entitled to join the pension scheme and, importantly, participate in the bonus schemes operated by RGM (sic).

14.5 The total earnings she could have expected had she remained at RMG are in 2014; £65,947, 2015; £69,084 and 2016; £62,904. However these are the best figures I can arrive at as the spreadsheet provides a range of individuals at different basic salaries and widely varying bonuses. For this reason I believe it is fair to take the average.

14.6 Turning now to her present situation, Kam Jhuti has not been able to return to work as a result of psychological injuries. She is totally lost confidence in her ability and the other reasons stated in 14.1 above. She should not return to a sales environment and particularly one which is pressurised or that deadlines or targets must be met or exceeded, in fact any occupation which does not induce stress (sic). This is confirmed by the medical evidence of Dr Aldouri.

14.7 It is preferable that Kam Jhuti should consider a phased return to work and, in fact, it seems this opportunity is within her grasp due to the intervention of a friend who has arranged for her to work two days a week in a basic clerical role for which she will be paid £11 or £12 per hour e.g. £176.00 to £192 gpw for an 8-hour working day x 2 days.

14.8 On the open labour market she would likely commence at £180 gpw in a part time role, rising to £360.00 when able to contemplate full time work, and expect her earnings to increase to £440.00 gpw once established, say after a period of two years.

14.9 Dr Aldouri ultimately feels she should be able to return to paid employment in the future and to her previous level within 3-6 months from the conclusion of her case, depending on finding a suitable job not involving high levels of stress. Dr Aldouri opined that whether she will be able to return to her former role as a media specialist will depend on her progress and improvement to the level of mental health that she had prior to her employment at Royal Mail.

14.10 From an employment perspective, Kam Jhuti has been absent from the labour market for 1.75 years and will find that, at the age of 47, or 48 perhaps by the time she makes a recovery, her career as a media specialist at managerial level will have stalled. I am not a psychologist but my lengthy experience in recruitment (over 40 years) tells me that she is bound to experience difficulty returning to her former role. As things stand, she will suffer the stigma of being unemployed and the potential additional stigma (see Chagger v Abbey National) of having to provide the reason for her dismissal from RMG to recruiters and potential employers.

14.11 Consequently, I am of the view that taking all matters into account, Kam Jhuti will be constrained to low level, undemanding office based work - work which should not involve stress, deadlines or dealing with customers face-to-face. Ms Jhuti will undoubtedly require assistance to enable her plan a return to work and this is addressed by Mr Perlin in his pathfinder assessment…" (our emphasis).

142. The reference at 14.3 above to the claimant having, had she not been dismissed, every intention of remaining with the respondent in MarketResearch until retirement is corroborated by Ms Atkinson's evidence. In her witness statement (paragraph 5), Ms Atkinson stated that, when the claimant first started at the respondent, she was very excited and looking forward to a long and successful career with them. We appreciate that the reference at 14.3 is based on what the claimant told Mr Gilbert in 2016, after the events which were the subject of these proceedings had taken place, but we have no reason beyond that to doubt that she was genuine in saying this. Furthermore, Ms Atkinson's

evidence is based on what the claimant told her right at the start of employment with the respondent, before the treatment which is the subject of these proceedings occurred, when there was no reason at all for the claimant not to be genuine. We therefore find that it was the claimant's intention to remain with the respondent until retirement.

Second employment report (14 February 2020)

143. Almost 4 years later, Mr Gilbert was instructed by Rainer Hughes (the claimant's then solicitors) to provide an updated report.

144. At the time he wrote it, he had not yet been provided with the updated medical report of Dr Nayrouz and therefore relied on the previous medical evidence (paragraph 1.4 of the report).

145. He interviewed the claimant again for the purposes of the updated report, on 13 February 2020.

146. The "Personal Profile" section of the report (section 2) contains the following:

"2.1 When I first met Kam Jhuti she presented at interview as a rather downcast woman. She remains so, perhaps even more since the passing of 3.5 years. She was and remains embarrassed at her size, having increased weight substantially...

2.2 Kam Jhuti was both welcoming and hospitable. However, on this occasion she was more tearful and very clearly not in command of herself. Nevertheless, she answered my questions to the best of her ability. She is an intelligent and articulate lady and co-operated entirely throughout the interview and gave me no reason to doubt the honesty of her answers.

2.3 Our interview took place in the living room but she told me she never uses it and, in fact, hardly spends any time downstairs, staying instead in the bedroom of her daughter, Sophie-Grace (12) (sic) who left in January last year to live with her father as she couldn't stand living with her mother's condition any more.

2.4 It was clear to me that although I have no doubt Kam Jhuti is naturally a pleasant, intelligent and articulate woman, the effects of her dismissal continue to this day due to psychological problems, and appear to have increased. She was very sad. She was tearful on occasion, had difficulty maintaining concentration and the replies drifted away from the subject in hand quite frequently. She presented lethargically in a way I would describe as wan - giving the impression of exhaustion. As before, I found Kam Jhuti to be of low mood and when we discussed her employment at RMG she found this very difficult and became emotional. She became even more emotional and distressed when she talked about her daughter. I should also add that at the conclusion of our interview, although I remain entirely independent and impartial, I was loath to leave due to her fragile presentation…

2.7 Kam Jhuti is in receipt of Employment Support Allowance of £128.90 per week. She is entitled to the support component following a decision on 30th September 2019 by the DWP that she should be treated as having Limited Capability for Work Related Activity. Part of the DWP's decision refers to a regulation which allows the DWP to consider whether being asked to partake in work related activity on a conditional basis would likely place Kam Jhuti's mental state in a position of risk of deterioration. This means she will not be asked to look for work, or to prepare for work…

2.8 In February 2019 Kam Jhuti suffered a mild heart attack and is currently taking the following medication: …

2.10 Kam Jhuti has suffered psychological injuries as a result of the Dismissal. As presented to me at interview in my opinion Kam Jhuti, currently and for the foreseeable future, falls within the ambit of the Equality Act 2010. Her disability would be immediately apparent to an interviewing employer if she presented as she did to me which was extremely low in mood and tearful. That the DWP does not consider her able to work underpins my view."

147. The "Skills" section (section 5) of the report contains the following:

"5.2 Had she not been dismissed it was Kam Jhuti's intention to remain at RMG, possibly until retirement as, initially, she very much enjoyed the challenge and although opportunities may not have arisen vertically they were, according to her, available horizontally, meaning in other sections of RMG.

5.3 in terms of sales and especially cold calling, Kam Jhuti's core skill, success relies on a high degree of self-confidence…

5.4 … From Kam Jhuti's employment history and my meeting with her, I have little doubt that she had previously oozed self-confidence, otherwise she would not have been able to pass the rigorous interview process which recognised her ability and experience, perform to the level she did, or reach the status she had at that time in her career."

148. That section goes on to consider the claimant's salaries, benefits and bonuses in a great deal of detail and, following a reasoned analysis, Mr Gilbert states in relation to the claimant's total gross earnings (in other words salary plus bonus but not including other benefits such as car allowance or private medical insurance or pension):

"5.23 It would be reasonable in my view for an average increase in earnings to be applied and in this regard I believe 2% per annum is appropriate and reflects national averages. Therefore, her earnings today but for her dismissal would likely be: 2016: £62,904; 2017: £64,162; 2018: £65,445; 2019: £66,754; and 2020: £68,089."

149. Section 8 of the report ("Present Transferable Skills") contains the following:

"8.1 It is my opinion that Kam Jhuti has lost none of her acquired occupational skills but it is the psychological consequences of her Dismissal which now prevent her from putting them into practice as she has lost all confidence in her ability and has very low self-esteem. She has low levels of concentration, is unable to absorb information and suffers panic and anxiety attacks.

8.2 Moreover, she has been absent from the workplace for nearly six years and will be out of touch with current practice."

150. Section 9 of the report ("Present Employability") contains the following:

"9.2 As a consequence of the Dismissal Ms Jhuti has developed psychological problems and if she presented to a recruiter as she presented to me I have little doubt she would not be hired, or even taken forward to interview were she to apply through a recruitment agency. She was of low mood and at times emotional, easily distracted and lacking in concentration…"

9.3… Above all, I would say that she has completely lost her confidence in her ability to carry out meaningful work to her level of experience, or any other for that matter for the foreseeable future….

9.6 The evidence of Dr Aldouri is unequivocal; it is his (sic) opinion Kam Jhuti is currently unable to complete a return to work as a media specialist, or a job which involves stress. However,

although Dr Aldouri noted Kam Jhuti had a history of depression and was predisposed and vulnerable. However, she was not suffering psychological issues in 2013 prior to joining Royal Mail Group. It was clear to Dr Aldouri that any future work which is pressurised would be entirely unsuitable to Kam Jhuti. Dr Aldouri is of the view that within 3-6 months of her case being concluded she may return to her former state. There is no up to date medical evidence available to me but to my non-medical eye Kam Jhuti's situation appears to have worsened. She lives in her daughter's bedroom, rarely coming downstairs. She was more tearful at a second interview.

9.7 Kam Jhuti has been absent from the labour market since going sick in March 2014, approaching 6 years now, and has lost touch with the changes which occur not only in the more fast-paced marketing sector but in business practice in general. This does not mean to say that under ordinary circumstances and absent the Dismissal she would not have been able to catch up and appraise herself of current practices, but her anxiety, lack of motivation, depression, avoidance of decision making and, at a basic level, a disinterest in basic household tasks and socialising, avoiding crowds and travel, make this a highly improbable proposition in my opinion.

9.8 Allied to this is the stigma of unemployment at 51, lack of income and, most of all, isolation from colleagues and work in general. Although it is unlawful for an employer to ask any job applicant about their health or disability unless until the applicant has been offered a job a recruiter is likely to ask the reason for the absence of six years and if Kam Jhuti responds that it is due to psychological injuries due to stress, in my opinion it is highly unlikely the recruiter would put her forward to a client, as unlawful as that may be.…

9.11 A further issue is the stigma attached to taking an employer to an employment tribunal; see the matter of Chagger v Abbey National…"

Mr Gilbert then goes on to set out in general terms the disadvantages of people with disabilities in the workplace (paragraphs 9.12 to 9.14).

151. In section 10 of the report ("Labour Market Conditions and Finding Work"), Mr Gilbert concludes:

"10.7 Given the medical evidence and especially the letter of the DWP I could not identify any jobs suitable to Kam Jhuti from vacancies posted on job portals such as Reed, Adzuna, Total Jobs, Gumtree etc."

152. In section 13 of the report ("Residual Earnings Capacity"), Mr Gilbert states:

"13.4 From my perspective and employment in general, that this matter has dragged on for nearly six years since her dismissal, and together with her worsened condition has caused irreparable damage to her chances of returning to the workplace.

13.5 I have completely revised my opinion as to her future opportunities and earnings capacity in the open labour market, or in a sheltered work environment. Taking all the circumstances into account and the decision of the DWP I am of the view Kam Jhuti will not be able to return to gainful employment in the foreseeable future and may be regarded to be excluded from the labour market on a permanent basis."

153. In his "Summary and Conclusions" section at section 14 of the report, Mr Gilbert states:

"14.3 Had she not been dismissed she had every intention of remaining with RMG in MarketResearch until retirement, although if an internal opportunity arose she would have applied for it to widen her experience and skills base. I am of the opinion it is too speculative to consider promotion at this early stage of her employment and in any case I have not been provided with sufficient comparable evidence to draw a satisfactory conclusion.

14.4 Her earnings had she remained at RMG would have been a continuing basic salary of £50,000 gpa rising in small increments, probably annually, as well as benefits such as car and health insurance for her and her children. She would have been entitled to join the pension scheme and, importantly, participate in the bonus schemes operated by RGM (sic). My assessment of the total gross annual earnings from 2016 to 2020 are shown thus:

2016: £62,904;
2017: £64,162;
2018: £65,445;
2019: £66,754; and
2020: £68,089.

14.5 She had been employed at RMG but a short while before she went sick and therefore it is not possible to posit how her career might have developed. She may, or not, have received promotion. There is no data provided which shows fair comparators and how their pay and status progressed.

14.6 Turning now to her present situation, Kam Jhuti has not been able to return to work as a result of her psychological injuries. As a consequence of my second interview, my observations and the information provided by Kam Jhuti, her psychological condition, her near 6 years absence and, most importantly, the DWP's decision that she will not be asked to look for work, or to prepare for work, I have completely altered my view as to her potential on the open labour market and her residual earnings capacity.

14.7 In my opinion, Kam Jhuti's chances of returning to work in any capacity is now severely compromised, to the extent I believe she will find herself permanently excluded from the labour market. (Our emphasis).

14.8 In my opinion the above considerations should be taken into account in relation to Ms Kamaljeet Jhuti's claim for loss of earnings."

154. Mr Gilbert's conclusion is, therefore, absolutely clear; he believes that the claimant will find herself permanently excluded from the labour market, in other words that she will not work again. Mr Gilbert is the expert in the field. Furthermore, there is nothing in his reasoning which indicates to us in any way that his conclusion is not a reasonable one or is not evidence based; his reasoning is set out in his report as a whole and is summarised neatly in the paragraph which precedes his conclusion in paragraph 14.7. We therefore accept that conclusion and find that the claimant will be permanently excluded from the labour market.

155. As noted, at the time at which Mr Gilbert wrote his report, he had in front of him the medical evidence of Dr Aldouri but not the medical evidence of Dr Nayrouz (which was not produced until a few days after Mr Gilbert's second report was produced). However, we do not consider that, had Mr Gilbert seen Dr Nayrouz' report, that would or should have made any difference to the conclusion which he reached in his own second report. Dr Nayrouz' assessment of and prognosis in relation to the claimant's medical conditions is (with the exception of the fact that he disagrees with Dr Aldouri about the PTSD diagnosis), no milder than Dr Aldouri's opinion; in fact, in many respects his assessment of the claimant's condition and prognosis is more serious. For example, whereas Dr Aldouri considered that the claimant suffered from "moderate depressive disorder", Dr Nayrouz considered that she suffered from "moderate depressive disorder" but that at times she also satisfied the criteria for a "severe depressive

episode". Furthermore, Dr Aldouri considered that the claimant might recover 3-6 months after the conclusion of the employment litigation, whereas Dr Nayrouz considered that she might recover a year or significantly longer after conclusion of the employment litigation (and even then only on the basis that that conclusion was something with which the claimant was satisfied). To be clear, the respondent has not submitted that having sight of Dr Nayrouz' medical report would have resulted in Mr Gilbert's conclusion on the claimant being permanently excluded from the labour market being any less strong; however, we nonetheless thought it important to make clear that we do not consider that it would have made such a difference; if anything, having had sight of Dr Nayrouz' report would have been more likely to further strengthen and support Mr Gilbert's conclusion.

Findings regarding the claimant's credibility

156. As noted, the respondent chose not to call any of the medical experts or Mr Gilbert, the employment expert, to give evidence at the tribunal. Rather, the respondent has nonetheless sought to persuade the tribunal to go behind the findings in the expert reports and to reject many of those which are adverse to the respondent's case. The respondent has done so essentially on two bases. First, Mr Gorton notes that a lot of the conclusions reached in those expert reports were based on information given to the compiler of the report by the claimant in interviews with the claimant and submits that the claimant is not a credible witness and that, on that basis, we should not rely on the information given by her to the experts. Secondly, Mr Gorton submits that there are discrepancies between the evidence given by the claimant to this tribunal and details in documents before the tribunal, in particular in relation to the claimant's previous earnings over the period from 1997 up to her employment with the respondent which commenced in 2013, and that this should lead us to conclude that the picture of the claimant's earning capacity and "job stickability" over that period is such that we should not accept that it was likely that the claimant would remain at the respondent until retirement and that, in all likelihood, she would only have remained at the respondent for a short time anyway (even if she had not been dismissed by the respondent).

157. A huge proportion of the cross-examination of the claimant and Mr Gorton's original submissions was devoted to this, with for example the claimant being taken through the accounts of JK Media Ltd over the years in considerable detail, being taken through her GP medical records over the years in considerable detail, being questioned on all sorts of aspects of her personal life in order to try and cast doubt on the clear conclusions reached by the doctors as to the cause of the claimant's mental health conditions from 2014 onwards and, without the word "dishonest" actually being used, the repeated implication that the claimant deliberately gave false information to the doctors and Mr Gilbert (although, importantly, Mr Gorton never actually put it to the claimant in cross-examination that she had somehow lied to or misled any of the experts). Furthermore, the supplementary submissions that were made in July 2022 following the production of the HMRC documents also related to these two strands although, as we shall come to shortly, they made little difference to the position that had already been put in cross-examination and the respondent's original submissions based on the documents in the original bundle.

158. Submissions made by the respondent in this context, many of which fly in the face of the conclusions of the expert reports, included *"C's focus has been to tie all her woes and incapacity to the short employment with R and the mistreatment by Mr Widmer … That is to seek to blame R for something it is simply is not responsible for"* (4d); *"From the outset it is R's position that C has shown "considerable strategic thought" in the disclosure of documentation, the presentation of evidence to experts, but also her evidence to this tribunal"* (5); *"There was an acute lucidity in C giving lengthy explanations in her evidence about matters she was asked about in XX. This was striking. It was accompanied by complete composure and a grasp of fine detail. That suggests a (sic) who will be able to function fully when the litigation ends"* (6a); *"C's evidence has a myopic focus solely on R being both the source and responsibility for all C's response to the vicissitudes of life after 2014…"* (35). The pattern is continued in the respondent's supplementary submissions.

159. It is neither necessary nor proportionate to go through every single aspect and alleged example set out in the respondent's submissions in connection with these issues. Rather, we deal with the points raised in logical groupings.

General credibility/discrepancies in evidence

160. It is correct that, during her cross-examination, the claimant did get a lot of the details wrong and there were discrepancies between matters which she recalled in her cross-examination and contemporaneous documents. However, this is hardly surprising.

161. First, she was being asked to recall details of things which happened over a huge period of time, from 1997 to the present time, a period of some 25 years.

162. Secondly, of course, she is someone with significant mental health issues (even the respondent appears to accept that, albeit it seeks to suggest, contrary to the medical evidence, that the blame for those issues lies other than with the respondent).

163. Thirdly, the claimant was certainly not "lucid" in giving lengthy explanations in her evidence, as Mr Gorton submits; rather, she was rambling, confused and digressed. As someone who is both intelligent and articulate, she was of course able to string sentences together but, rather than a guarded, premeditated set of answers, her evidence was more of a stream of consciousness which drifted and went off on tangents, punctuated as it was by tearful episodes (and worse) when she was confronted with distressing elements such as having to recall her interactions with Mr Widmer. The way she presented was indeed very much akin to the way in which Mr Gilbert observed her at their second meeting in 2020 when he stated that *"although I have no doubt Kam Jhuti is naturally a pleasant, intelligent and articulate woman, the effects of her dismissal continue to this day due to her psychological problems, and appear to have increased. She was very sad. She was tearful on occasion,*

had difficulty maintaining concentration and her replies drifted away from the subject in hand quite frequently…".

164. Fourthly, as indicated above, the reactions of the claimant which we witnessed during some of the particularly sensitive passages of cross-examination (especially in relation to Mr Widmer) were extreme and visceral. As Mr Jackson submitted orally, the claimant would have to be the most phenomenal actor for that to have been staged. We do not, of course, accept that she was acting; these were entirely genuine responses.

165. Fifthly, although she did get a lot of the detail wrong, the general gist of what the claimant said and the key points were essentially consistent with the contemporary documents, with other witnesses such as Ms Atkinson, with other evidence given by the claimant, with the findings of the experts and with the findings of fact that we have made above. We will return to this point in relation to some of the individual examples below.

166. Sixthly, we note the impressions which the experts had of the claimant's credibility. Dr Nayrouz stated in paragraph 10.4 of his report that *"although it is not possible in the context of litigation to be 100% certain that there has never been any degree of conscious or subconscious exaggeration of feelings or symptoms, I consider, on the balance of probabilities, and taking into account evidence from medical records, that Ms Jhuti's symptoms are genuine*". Dr Nayrouz is stating that the claimant didn't even consciously or subconsciously exaggerate in what she told him, let alone deliberately fabricate (as the respondent implies she does). Mr Gilbert in his 2020 report stated at paragraph 2.2 that, while she was *"more tearful and very clearly not in command of herself"*, the claimant *"nevertheless answered my questions to the best of her ability. She is an intelligent and articulate lady and cooperated entirely throughout the interview and gave me no reason to doubt the honesty of her answers"*. These are intelligent experienced professionals who are well used to making such assessments and their judgments in this respect therefore carry considerable weight.

167. For all of the above reasons, we emphatically reject the respondent's submissions that the claimant's evidence was not credible, including the submission that she was giving her evidence with "considerable strategic thought" and the implication that she was being dishonest. We consider that the claimant did her best to give honest evidence to the tribunal within the constraints of her abilities. Furthermore, we see no reason to doubt that she did likewise when she was interviewed by the medical and employment experts.

Credibility - disclosure

168. In the same vein, the respondent has sought to undermine the claimant's credibility by making criticisms in relation to disclosure, in particular the fact that HMRC documents were not disclosed in advance of the hearing, implying that this was a deliberate ploy on the part of the claimant. However, we reject these submissions too. The fact that the claimant, following the respondent's request on 3 March 2022, was unwilling to give permission to the

respondent's accountants to contact HMRC to obtain the information is understandable (as they were representatives of the respondent). Furthermore, when she was pressed for the information, her representatives made efforts to obtain it from HMRC; that it was not available prior to the hearing as a result of that request is perhaps unsurprising in the context of the fact that, even in response to the tribunal's subsequent order, it took HMRC about a month to respond (partially) to that order. Furthermore, as it turned out, and as we have found, the information provided added very little of importance to the information that was already before the tribunal. The bottom line is that, had the respondent considered that this information was so crucial, it could and should have applied to the tribunal to make an order for HMRC to produce it well in advance of the hearing, rather than on the first day of the hearing itself; however, it did not do so. There are no reasonable grounds to lay the blame for this at the claimant's feet, let alone to impugn her honesty on this basis.

The "Falk" Judgment

169. In the context of the claimant's credibility, however, we are also obliged to consider submissions made by both representatives in relation to specific elements of the reasons for a judgment of 15 July 2020 given by Mrs Justice Falk in the High Court in relation to the separate litigation between the claimant and her brother (the "Falk judgment").

170. We try to deal with this as briefly as possible in the circumstances. However, by way of background, Mrs Justice Falk was hearing an application by the claimant to set aside orders dated 31 October and 16 December 2016 respectively in that litigation on the basis that the claimant did not have capacity at the time those orders were made. Mrs Justice Falk declined to set those orders aside, finding that the claimant had not established that she did not lack capacity for the purpose of <u>those</u> proceedings (notwithstanding Dr Bansal's medical opinion that the claimant did not have capacity <u>for the purposes of the employment tribunal proceedings</u>) and finding that, even if she was wrong about that, she would not have set the orders aside anyway on the basis that it was unlikely that the claimant would have been able in the circumstances to have obtained orders which were more favourable to her than the ones that were made. This is a very brief summary of what is a long and reasoned decision.

171. In the course of her analysis of whether she considered that the claimant had capacity at the relevant time, Mrs Justice Falk made the following findings:

"32… v. … I was shown a significant body of emails between Ms Jhuti and IBB, Ms Jhuti's solicitors, in the first half of November 2016, following the Tomlin order. I agree that some of the emails from Ms Jhuti appear rather erratic, and a number of them make unpleasant reading, but the ones in that category are invariably sent late at night, and in one case Ms Jhuti asked in the morning that a set of emails sent the previous night be disregarded because they were sent in error. The ones sent during the day are much more lucid. I agree with Mr Daniels for Mr Jhuti that the email exchanges show that Ms Jhuti was well aware of the nature of the dispute, and appeared to be <u>acting with considerable strategic thought</u>, including in particular choosing not to disclose until after the first payment was due under the Tomlin order that the liquid funds that it had been assumed were being held by the estate, and which would have allowed the first payment under that order to be made, simply did not exist. Overall, the emails which I have read indicate to me that Ms Jhuti was able to make decisions within the meaning of sections 2 and 3 of

the Mental Capacity Act, and that this must have been the view reached by both Irwin Mitchell and three CLIPS barristers.

vi. The sixth piece of evidence is Ms Jhuti's very late witness statement which I read this morning. That would suggest that, essentially, she did not really know what was going on, especially at the 16 December hearing. But it needs to be treated with caution, and in a number of respects it clearly contradicts the contemporaneous evidence, including in particular the emails to which I have referred, but also the evidence from the hearings on 9 and 16 December." (Our emphasis.)

172. We have underlined certain passages in the sections above because these are the passages which the respondent has seized upon in its submissions regarding the credibility of the claimant's evidence at this remedy hearing and which wording it has incorporated into its own written submissions in various places.

173. Mr Jackson had objected to the claimant being cross-examined on these findings in the Falk judgment on the grounds of relevance, namely that a finding of fact in another jurisdiction is irrelevant and therefore not admissible here. He similarly submits that the tribunal should not and is not permitted to take these findings into account in its decision. He relies in this respect primarily on the case of Hollington v Hewthorn [1943] 1 KB 587 in support of this submission. Again, without needing to quote the entirety of the section of the case (Goddard CJ, beginning at page 594) which Mr Jackson quoted in his written submissions, the principles that can be derived from it are: that the court which has to try one claim knows nothing of the evidence that was before the other court and that it cannot know what arguments were addressed to it or what influenced the court in arriving at its decision; and that the finding of the other court is not relevant. There are exceptions to the rule and the case of Re W-A [2022] EWCA Civ 1118 which, as noted, was handed down and sent to the tribunal after the remedies hearing, sets out an analysis of those exceptions (for example, in the context of family court litigation, there is an exception in relation to a sexual offences conviction in a foreign jurisdiction which was nevertheless ruled to be admissible in the UK family court). However, those exemptions do not cover the present situation. We, therefore, consider that the principles in Hollington apply and that the passages in the Falk judgment are not admissible for the purposes of this employment tribunal litigation.

174. That is the end of the matter. However, if we are wrong, we address Mr Jackson's second submission, which is that fundamentally, challenging the claimant either for the purposes of credit or credibility would be an impermissible collateral attack on an order made by the employment tribunal; following Dr Bansal's report, the claimant was deemed not to have capacity for the purposes of the employment tribunal proceedings and a litigation friend was appointed. As indicated, the tribunal is not aware of any order issued by it appointing Ms Atkinson as the claimant's litigation friend; however, she certainly did so act in hearings before the higher courts in this litigation and, based on Dr Bansal's evidence, the judge on this tribunal certainly would have made an order, had the matter been referred to him at the time, appointing Ms Atkinson as litigation friend based on Dr Bansal's report and the other information available at the point in 2017 when the EAT confirmed that employment tribunals do have the power to appoint a litigation friend. We therefore accept that, whatever the

position may have been in the High Court litigation, the claimant between autumn 2016 and May 2018 did not have capacity for the purposes of the employment tribunal litigation. Therefore, we cannot take into account the comments in paragraph 32(v) of the Falk judgment, which concern emails written by the claimant in November 2016, during the period when she did not have capacity for the purposes of the employment tribunal litigation. That is not, however, the case in relation to paragraph 32(vi), because that concerned a witness statement produced shortly before the hearing in July 2020, by which time the claimant had recovered capacity. Consideration of that paragraph would not therefore be in contravention of the tribunal's view of the claimant's capacity.

175. However, in case we are wrong in relation to both of the above conclusions and the paragraphs in the Falk judgment are both admissible, we analyse whether that would have had any impact on our findings regarding the claimant's credibility. The answer in the case of each of these paragraphs is no.

176. First, to be clear, it has not been suggested that, if we consider these two paragraphs admissible, that we are bound by these findings; nor are we. The issue is only whether as evidence they impact upon our findings.

177. In general terms, even if Hollington does not apply, the considerations set out in Hollington are relevant. The context of what Mrs Justice Falk was deciding was simply the issue of whether she considered that the claimant had capacity for the purposes of the High Court litigation, which is a very different matter from the considerations which we have to deal with in this litigation. Apart from the contents of the Falk judgment itself, we do not know what evidence was presented and what arguments were made so we consider that, without that context, it is very hard for us reasonably to draw any conclusions from these paragraphs. Some aspects of the Falk judgment do tie in with what we have observed, for example the reference to the claimant's emails appearing "erratic" and indeed the reference to the claimant's witness evidence contradicting the contemporaneous documents: we have found that in places the claimant's evidence has not been consistent with other documents, but in our view for understandable reasons and in a way which does not impact upon our view of her general honesty and credibility. In others, for example the reference to "considerable strategic thought", the finding in the Falk judgment does not tie in with our observations, although we again appreciate that a finding that an individual could and did think strategically is of more significance in the context of a judgment as to whether that person had mental capacity to act or not (as it's particularly relevant to the test regarding mental capacity). However, in any event, those elements of the Falk judgment are very different to the picture that we have seen, in particular through reading the unchallenged expert medical evidence and observing the claimant's lengthy cross-examination at this tribunal. For these reasons, even if we are permitted to consider these provisions of the Falk judgment, they do not alter the findings concerning the claimant's credibility which we have made above.

178. Having made these general findings on the claimant's credibility, we go on to consider the specific areas raised by the respondent.

Going behind the expert medical and employment evidence generally

179. Mr Jackson's primary submission is that the respondent had the opportunity to call the medical and employment experts and did not do so; that, realising that it should have done and regretting this, it now impermissibly seeks to invite us to depart from and go behind the conclusions in the reports; but that, given that they are reasoned conclusions the basis of which has not been challenged with the authors of those reports, we should not do so and that that is the end of the matter.

180. We acknowledge that, under the principles in the case of Griffiths referred to above, we are permitted to reject an expert report which is uncontroverted (indeed, we have already done so in relation to the opinion of Dr Aldouri in her November 2016 addendum report), and it all depends on the circumstances of the case. The distinction, however, between that addendum and the remainder of the reports is that the conclusions in the remainder of the reports are evidence-based and reasoned and the process of reasoning is set out.

181. In those circumstances, given that the reports were compiled by medical and employment experts (which neither counsel nor the tribunal are), we do consider that it would be inappropriate for us to go behind those conclusions, in these circumstances where the respondent could have called the experts to challenge those conclusions but chose not to do so.

182. That is, therefore, the end of that matter. However, notwithstanding this conclusion and for completeness' sake, we nonetheless consider the respondent's submissions in relation to both the medical and employment expert reports.

Going behind the expert medical evidence

183. The aim of the respondent asking us to reject the clear medical evidence is to persuade us to accept that the claimant was *"in reality… a vulnerable if not fragile [individual]"* and that *"life events would likely blow her over"* (paragraph 37 of the respondent's submissions) and that, therefore, firstly other events were responsible for the condition post 2014 apart from the treatment by the respondent and secondly that she would most likely have been reduced to this state by other life events after 2014 even if she had not been so treated by the respondent. That obviously flies in the face of the clear conclusions of the medical evidence.

184. With that in mind, the claimant was in cross-examination taken through vast amounts of information about her personal life and her medical records, which then formed the basis of many of the submissions which the respondent made. However, in our view, none of it would make any difference to the conclusions in the expert medical reports, even if we felt that we were able to take it into account. We deal with the main examples below.

185. The respondent submitted that the claimant had frequently taken antidepressant medication at times over a long period going back to at least 2005. That is true. However, as we have already found, the level of the doses which she took and which she had prescribed were far greater during the period from 2014 than they were in any of the periods between 2005 and 2012. As a matter of judicial notice, we note that it is quite possible and not uncommon for individuals to take antidepressant medication and to be able to function otherwise quite normally. Furthermore, the medical experts were fully aware of the claimant's medical records and the medication which she had been taking during her history prior to 2014, which is referenced in the medical reports they produced, so they clearly took that into account in forming the opinions which they did, acknowledging, as they did, that the claimant had a pre-existing vulnerability to depression. Nevertheless, they came to the conclusion that the claimant's condition post 2014 was as a result of her treatment by the respondent.

186. The respondent also focused on "other events" in the claimant's life to back up this submission and, as noted, the claimant was taken through these in some considerable detail in cross-examination. They include: her mother's illness and death; the dispute about the will with her siblings, both in 2010 and 2012 and at the time the litigation with her brother in 2016; references in the medical records to a dispute with neighbours; the fact that the claimant went through a number of sets of solicitors, in relation to this and other litigation (including Net Solicitors with whom she has had a dispute about fees); and two relationships which the claimant had in the immediate aftermath of the respondent's treatment of her in 2014/2015 and which the respondent's submissions characterised as the claimant's *"chaotic personal life"*.

187. However, none of this casts any doubt on the correctness of the medical reports. Again, the medical professionals, who had the claimant's medical records in which many of these details are found and who also all interviewed the claimant themselves, were aware of the majority of these events and the impact they had on her (and indeed, certain of them such as the claimant's mother's death, did cause the claimant depressive episodes at the time). However, they nonetheless concluded that it was not these events but the respondent's treatment of the claimant which caused her major mental health problems from 2014 onwards.

188. In addition, we reiterate our own observations of how the claimant reacted to having these things put to her over the lengthy period of her cross-examination. She was able to talk with ease and without any apparent discomfort about her siblings, whom she said had *"always been like that"* and whose behaviour she was used to; about her dealings with the solicitors; about the dispute with the neighbours; and about the relationships in 2014/2015. There were only three areas where the claimant became emotional. The first was in relation to the loss of her daughter which, as we have already found, was a consequence of the respondent's treatment anyway. The second was in relation to her mother, who, as we have already found, was the most significant role model and influence for her and in relation to whom the claimant repeatedly expressed the sense of shame which she felt through not being able to hold

herself together in the way she perceived that her mother had; this clearly caused her pain and she was tearful. However, her emotional reaction was in this respect as nothing compared to her emotional reaction in cross-examination when she was forced to recall her dealings with Mr Widmer. As already noted, that triggered a considerable and visceral response and almost a sense of terror in her as she was forced to recall it, with her declaring *"I can see his face in front of me"*, with the memory so stark and real as if he was almost in the room in front of her (to be clear, Mr Widmer was not present at any stage of the remedies hearing). As well as the claimant breaking down in tears in the tribunal (to an extent that far exceeded any emotional reaction in relation to her daughter and her mother), her reaction was at one point so extreme that, as noted, the tribunal had to take a break and Mr Jackson reported that the claimant was hyperventilating and had symptoms consistent with a panic attack.

189. What we saw was so powerful and, as we have already found, so genuine, that we have no hesitation in accepting that, as the medical experts found, the cause of the claimant's ongoing mental health problems from 2014 was the respondent's treatment, and in particular the bullying by Mr Widmer. Prior to that, and in the light of her vulnerable predisposition which the medical professionals noted and acknowledged, the claimant had had depressive episodes and difficulties; however, she had coped with them, sometimes with the assistance of antidepressant medication, and had been able to carry on a functional life, including looking after her mother, raising her daughter, running her own business and holding down several demanding jobs. After 2014, she was not able to function.

190. Finally, there appears to be an attempt by the respondent to run a further apportionment argument by suggesting that the litigation with the claimant's brother, which came to a particular head in hearings in late October - December 2016, was a supervening event which should lead to some sort of apportionment in relation to the losses caused by the respondent's earlier treatment of the claimant in 2013/2014. In this context, it is worth noting that it was in December 2016 that Dr Bansal's report was issued which stated that the claimant did not have mental capacity for the purposes of the employment tribunal proceedings and which recommended the appointment of a litigation friend. However, it is also worth noting that the claimant's then solicitors, Net Solicitors, who instructed Dr Bansal, informed him that the claimant's behaviour which led them to doubt whether she had mental capacity had been observable from August 2016 onwards, well in advance of the October/November/December 2016 hearings.

191. There is no basis for the respondent's submission and its suggestion that the litigation with the claimant's brother was a supervening event is entirely speculative. There is nothing in any of the medical reports to suggest it had any impact, including in Dr Nayrouz' report which post-dates the events of October/November/December 2016. For the reasons set out above, that is the end of the matter and we do not consider it is appropriate for us to go behind that report.

192. However, if we did consider it was permissible for us to look behind Dr Nayrouz' report in principle, there is, for reasons already touched on, no basis to believe that the litigation with her brother did amount to a separate cause of the claimant's mental condition. It was difficult for her to participate in that litigation and to deal with it but that was the case in relation to most aspects of life after 2014, because of the respondent's treatment of the claimant. But for the respondent's treatment, the claimant would have been able to deal with that litigation, as she was in relation to litigation and other disputes she was involved with prior to 2014. There is no evidence whatsoever that the fact that she lost mental capacity for the purpose of the employment tribunal litigation was linked to the litigation with her brother; indeed, as noted, the concerns about her capacity had been noted several months prior to the October - December 2016 hearings in the litigation with her brother. Finally, we refer again to our observations of the claimant's evidence before this tribunal; the claimant was able to talk with ease about all aspects of the litigation with her brother whereas, by contrast, she was utterly distraught when confronted with the memories of Mr Widmer.

193. There is, therefore, no basis for this apportionment argument and it is rejected.

Going behind the expert employment evidence

194. Similarly, the respondent is trying to persuade us to go behind the expert employment reports of Mr Gilbert, specifically with a view to our rejecting his unequivocal conclusion that *"she will find herself permanently excluded from the labour market"*. In doing so, it has focused on the details of the documents in the bundle and the HMRC documents which were provided after the hearing, comparing these with the findings in Mr Gilbert's reports.

195. We have already dealt above with the respondent's attack on the claimant's credibility and the suggestion that she misled Mr Gilbert with the information she provided to him (which we rejected).

196. We also made the finding that, despite the fact that the claimant got details wrong, the general gist of what the claimant said to the tribunal in evidence and the key points were essentially consistent with the contemporary documents, with other witnesses such as Ms Atkinson, with other evidence given by the claimant, with the findings of the experts and with the findings of fact that we have made above. We develop this further in the context of the employment reports.

197. As noted, much time was spent in cross-examination going through details of the claimant's previous employment in the almost 20 year period prior to her employment with the respondent. Various inconsistencies were identified (although many of these areas were examples of lack of clarity rather than inconsistent statements made by the claimant) and were then highlighted in the respondent's submissions and supplementary submissions. This was done with a view to the respondent then submitting that the claimant's previous employment pattern indicated that she did not in fact earn at significant levels

and did not hold down jobs for a long period, such that we should go behind Mr Gilbert's finding that she intended to remain at the respondent until her retirement and instead find that it was likely that (had the respondent not treated her in the way that it did and dismissed her) she would have left the respondent relatively soon afterwards in any case.

198. As we have already found above, we do not consider that it is appropriate for us to go behind Mr Gilbert's findings because the respondent has chosen not to call him. It could have done so and put these various inconsistencies to him and asked him if it made any difference to his opinion. However, it did not do so. It is no defence to suggest that it could not have done so because, at the time the hearing, the HMRC documents had not yet been produced, as most of the relevant material was available in the existing documentation anyway and, as we shall come to, the HMRC documents made little difference to the matters that were covered in relation to this area in considerable detail at the tribunal hearing itself.

199. The HMRC tax documents broadly confirm the evidence at the hearing in terms of the claimant's employment pattern and earnings. There are some anomalies/discrepancies. For example, the HMRC documents suggest that the claimant had no employment in the tax year 2005/2006 but the JK Media Ltd documents and accounts suggest a profit. That is unexplained. Furthermore, there is no reference in the HMRC documents to Komli Media Ltd or to Mirabelle Communications, for whom the claimant did consultancy work in 2011 and 2012, whereas the HMRC documents include a reference for the tax year 2011/2012 to income from "Indoor Media Ltd"; it is not clear whether Indoor Media Ltd is one of those companies or not. Furthermore, there is a reference to the claimant receiving income from a company called "EG Media Ltd" in 2002/2003, which is not a name that was on the claimant's CV, on which most of the claimant's employment history from 1995-2013 is set out. (The claimant's CV is the version that was current prior to her employment by the respondent in 2013 (and therefore prior to these proceedings) and was a document which Mr Gilbert had available to him.) Similarly, there is a reference in the HMRC documents for the tax year 2009/2010 to a small amount of earnings from "Jones Publishing Ltd". However, none of this is very important, because the core pattern of the claimant's employment and earnings as described in the HMRC documents (including the substantial roles that she had and the earnings from them) is essentially the same as the position in the CV and that outlined in the evidence at the tribunal hearing itself.

200. That core pattern is as set out below:

1. From 1995-1998, the claimant had stable employment at Gerard & Deakin Advertising Ltd.

2. From 1998 to 2002, the claimant had stable employment at BSkyB. Her salary gradually increased over this period and by the end she was earning over £50,000 per annum.

3. She then started her own business, JK Media Ltd, which she operated from 2002 and 2011. The business had a high turnover, up to around £650,000 in one year. However, it was not very profitable; annual profits were generally within the range of £5,000 - £10,000 per annum and, towards the end, the business started to make a small loss. Given the turnover, the claimant was clearly doing a great deal of work and must have been able to deal with the challenges inherent in running one's own business over such a long period. Towards the end of that period, however, she devoted much less time to it after her mother became ill.

4. It was only in the relatively short period from 2011 to mid-2012 when the claimant was doing variable consultancy work.

5. She then acquired permanent employment at Verifone Media Ltd as Client Sales Manager between September 2012 and July 2013. Her salary was £48,000 and she was entitled to a bonus of up to £32,000 per annum. Although, Mr Gorton challenged the salary figure in his further submissions, the HMRC records indicate that her earnings over that period, which is split over 2 tax years, were over £42,000, which equates to roughly £48,000 over the course of a whole year.

6. She was then approached to join MarketReach at the respondent as a media specialist. After a very competitive interview process (which is detailed in the liability judgment at paragraphs 34-35), she was appointed in September 2013 on a salary of £50,000 per annum plus bonus.

201. From that summary and the other evidence, we draw the following conclusions. First, the claimant's lengthy career has been almost entirely within media and advertising, her specialist area. Second, she has had considerable "stickability" of employment: two stable employments of 3-4 years each; nine years running her own business; then, after a brief period of doing consultancy work for a year or two, a further stable employment at Verifone which she only left to pursue what she thought would be a better opportunity at the respondent. Thirdly, in her employment roles, she did challenging work and commanded high salaries (£50,000+ at BSkyB, £48,000 plus bonus at Verifone and finally £50,000 plus bonus at the respondent). Whilst her own business was not very profitable, she clearly did extensive amounts of work within the media industry in the light of its high turnover.

202. Finally, we utterly reject the respondent's submissions that the claimant was a poor performer at the respondent or was likely not to have passed her probationary period anyway. These were based upon paragraph 34 of Ms Hayes' first statement in which she sets out that, when she interviewed Mr Widmer as part of her investigation, he had told her that the claimant had not had a good start to her employment, and on various other assertions made by the respondent about the claimant's performance which were not accepted by the original tribunal in the liability judgment. In the light of the actual findings in the

liability judgment that, rather than the claimant being a poor performer, there was a conspiracy between Mr Widmer and others to remove her and this was done through a sham performance process, we find that the fact that the respondent has chosen to make this submission somewhat shameless. The respondent may not agree with the findings of the original tribunal in its liability judgment (which, of course, went all the way up through the appeal courts as far as the Supreme Court), but it cannot permissibly make submissions at the remedies hearing which are inconsistent with those findings. Furthermore, that it has chosen to do so and to impugn the claimant's performance only rubs further salt into the wound.

203. By contrast, the claimant was sought out by the respondent, presumably on the basis of her abilities and track record, and she had to go through an extremely competitive interview process, involving two lengthy interviews and a presentation, at the end of which only 2 out of 9+ candidates were offered the media specialist position.

204. We do not, therefore, find that there were any genuine question marks about her abilities. Furthermore, we do not accept that there is anything in this evidence which indicates that the claimant was likely to leave the respondent in the short or medium term future anyway had the respondent not dismissed her. She may, as Mr Gilbert set out, have moved within the respondent. Furthermore, if she got a better opportunity, it is possible that she would have moved to another role outside the respondent; but her ability to do so was removed as a direct result of the respondent's treatment of her and its impact on her ability to function generally, let alone in the challenging media environment which was her specialist area.

205. We do not therefore consider that this in any way breaks the chain of causation. Similarly, we do not consider that there is any reason why we should go behind or not accept the conclusions in Mr Gilbert's reports.

Further findings of fact

206. The respondent produced to the tribunal its annual report for 2019/2020. This indicates that there is a very low churn rate within its employees: 6.7% per year when compared with 20.9% in the UK workforce as a whole; a third as much. The same report indicates an average of 17 years employment with the respondent.

207. It is hard to discern informative churn rates from the brief data produced in relation to media specialists annexed to Ms Hayes' first statement or the data at page E103 of the bundle as, whilst they detail numbers of starters and leavers for specific periods, they do not state the number of media specialists as a whole. We do not feel that we can draw any specific conclusions from this data.

208. In her witness evidence, Ms Hayes mentioned the prospect of future potential redundancies. However, there is little detail on how any future restructuring might have directly affected the claimant's employment had it continued.

209. We do not, therefore, find that there would have been any specific cut-off date by which the claimant's employment would in any event have ended had she not been dismissed earlier by the respondent. Nothing in the evidence referred to above would lead us to conclude that there is anything which would have precluded the claimant from carrying on working for the respondent until her retirement age of 67 had she wished to do so.

The factual issues

210. Having made the findings of fact above, we now set out the answers to the eight factual questions in the list of issues. These answers inevitably summarise the more detailed factual findings set out above and are deemed to incorporate those more detailed factual findings.

1. What was the claimant's previous employment history/income?

211. The detail of the claimant's previous employment history/income is as set out in more detail above. First, the claimant's lengthy career has been almost entirely within media and advertising, her specialist area. Second, she has had considerable "stickability" of employment: two stable employments of 3-4 years each; nine years running her own business; then, after a brief period of doing consultancy work for a year or two, a further stable employment at Verifone which she only left to pursue what she thought would be a better opportunity at the respondent. Thirdly, in her employment roles, she did challenging work and commanded high salaries (£50,000+ at BSkyB, £48,000 plus bonus at Verifone and finally £50,000 plus bonus at the respondent). Whilst her own business was not very profitable, she clearly did extensive amounts of work within the media industry in the light of its high turnover.

2. What was the claimant's previous health history?

212. The claimant's previous health history is as set out in the expert medical professionals reports and as reflected in our findings of fact above.

213. In summary, the claimant had a pre-existing vulnerability to depressive episodes prior to her employment by the respondent but was able to function normally. That ceased to be the case after and as a result of her treatment by the respondent which was the subject of her successful complaints at the liability stage.

3. What was the claimant's likely career path with the respondent?

214. The claimant intended to remain at the respondent until retirement. In the light of her experience and abilities and our finding that there were no genuine question marks about her abilities, coupled with the low churn rate and long service of employees at the respondent, we find that it is likely that, had she not been mistreated and dismissed by the respondent, she would have remained employed by the respondent until her statutory retirement age of 67.

4. What was the claimant's likely career path generally?

215. In the light of our findings regarding the claimant's previous career, her experience and abilities, and our rejection of the respondent's arguments to the contrary, it is likely that the claimant's general career path would have been on an increasing scale. She may have moved internally within the respondent; she may have left to pursue another better employment if such a situation arose; however, the possibility of any employment, whether at the respondent or otherwise has, in accordance with the conclusion in Mr Gilbert's report, now ceased. It is done so as a result of the respondent's treatment of the claimant which was the subject of her successful complaints at the liability stage.

5. What was the claimant's likely health history generally (without the respondent conduct)?

216. Without the respondent's conduct, and in the light of the medical evidence which we have accepted, it is likely that the claimant would have remained with her pre-existing vulnerability to depressive episodes but in such a way that it would not have impacted on her ability to function, including her ability to work and to work in her career as a media specialist with the corresponding challenges of such jobs. She would not have suffered the moderate and at times severe depression which she has now had on an ongoing basis since 2014.

6. What is the claimant's likely future career path?

217. As per the conclusion in Mr Gilbert's report, which we have accepted, the claimant is permanently excluded from the labour market.

7. When would the claimant have been likely to retire?

218. The claimant would have been likely to retire at her normal retirement age of 67. That is a normal position and is what the claimant stated was her intention. There is no evidence that her intention was anything to the contrary.

8. What is the claimant's likely future health path?

219. All of the medical reports state that, as a prerequisite to the claimant beginning to return to a degree of adequate functioning, this litigation must first be concluded and, in the case of Dr Nayrouz, that it must be concluded in a way with which the claimant is satisfied. That is therefore a significant variable and it is very much contingent on how the respondent chooses to behave going forwards.

220. Subject to that, the most recent medical evidence (of Dr Nayrouz), is that it is difficult to predict a timescale for recovery and the claimant may *"take significantly longer than the average time to achieve significant and consistent improvement in her depressive and anxiety symptoms, and to return to an adequate level of functioning"*. He opines that *"she may take a year or significantly longer to achieve this"*.

221. It should be noted that this opinion is in relation to her getting back to an *"adequate level of functioning"*; that is not the same as getting back to the level when she could rejoin the labour market, let alone carry out the sort of work that was the basis of her career up to her employment with the respondent. In that respect, of course, Mr Gilbert's conclusion is that she is permanently excluded from the labour market; in other words, she will never get back to it.

The Law

222. We set out below a general summary of the relevant law. However, as we have already noted, we have for ease of reference already set out certain legal provisions at points in our findings of fact where it has been necessary to refer to them to make that specific finding of fact. Similarly, we also set out in our subsequent conclusions on the legal issues those aspects of the law which we need to refer to in relation to specific points which we have to determine, again for ease of reference. We do not repeat those legal provisions in the general summary in this section below.

Principles of compensation

223. Unfair dismissal compensation comprises a basic award calculated by reference to a statutory formula set out in section 119 of the ERA and a compensatory award. In relation to the compensatory award, section 123 ERA provides:

> **123 Compensatory award**
>
> (1) …the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
> (2) The loss referred to in subsection (1) shall be taken to include—
> (a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
> (b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.
> …
> (4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

There is no cap on the compensation which a tribunal can award in relation to a successful unfair dismissal complaint under section 103A ERA.

224. In relation to the detriment complaints, section 49 ERA provides:

> **49 Remedies**
>
> (1) Where an employment tribunal finds a complaint under section 48 … (1A) … well-founded, the tribunal—
> (a) shall make a declaration to that effect, and
> (b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint

> relates.
> ...
> (2) … the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to—
>
> (a) the infringement to which the complaint relates, and
> (b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right.
>
> (3) The loss shall be taken to include—
>
> (a) any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and
> (b) loss of any benefit which he might reasonably be expected to have had but for that act or failure to act.
>
> (4) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

225. Compensation under this section may include awards for injury to feelings.

Calculating future losses

226. Calculating future losses using the Ogden Tables and a multiplier and multiplicand approach is permissible if it is established that there was a prima facie career long loss, provided that the tribunal should consider future loss by matching "old job facts", such as the likelihood of the employee remaining in the job and if so for how long, personal or economic factors, the likelihood of promotion and stability of earnings, with "new job facts", such as the likelihood of a change of jobs and of promotion and stability of earnings, and on the balance of probabilities arrive at a figure for estimated loss, then apply an estimated discount for accelerated payment; at that stage the Ogden Tables could be a useful tool in the accurate calculation of the discount for accelerated payment and the risk of mortality (Kingston upon Hull City Council v Dunnachie (No 3) [2004] ICR 227.

227. Mr Gorton drew our attention to Blamire v South Cumbria Health Authority [1992] EWCA Civ 20, which is authority that, where there are too many imponderables and uncertainties in relation to, for example, a claimant's future work prospects, a tribunal is not bound to take the multiplier/multiplicand approach for assessing future loss set out above and may award a lump sum.

228. Mr Gorton also drew our attention to Sutherland v Hatton [2002] IRLR 263, where the Court of Appeal set out at paragraph 43 of its judgment 16 principles in relation to assessing losses caused by psychiatric injury, specifically principles 15 and 16:

"(15) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment…

(16) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress-related disorder in any event."

229. In BMI Healthcare v Shoukrey UKEAT/0336/19/DA, which was a protected disclosures case, HHJ Tayler summarised the law at paragraphs 34-48:

"34. The ERA requires an assessment of the loss that is "attributable" to the unlawful act, and for the award to be of a sum that the tribunal "considers just and equitable". The provision does not put the assessment of loss at large. In considering what loss is attributable to a detriment, the approach is as it would be at common law, involving a determination of whether the detriment caused the loss: the starting point being "but for" causation, but subject to the possibility that there is some intervening event that wholly breaks the chain of causation or that the loss is too remote from the detriment. Once the tribunal has assessed what loss is attributable to the detriment, it can still consider overall justice and equity in determining the award. Singh LJ put the matter this way in **Wilsons Solicitors LLP v. Roberts** [2018] ICR 1092 at 1102 para. 59:

> **In my respectful opinion, Simler J confused two different concepts in para 26 of her judgment. First, there is the question of what "attributable to" means. The second - but different - question is what is the overall function of the tribunal when it considers an award of compensation under section 49? Simler J was right to observe that the answer to the second question is that the tribunal has a discretion to determine what is just and equitable in all the circumstances. But that does not answer the first question. One of the things that the tribunal is required by the legislation to have regard to is what loss is attributable to the act, or failure to act, complained of. That raises the first question, the meaning of "attributable to". In my view, that phrase does import the common law concept of "but for" causation.**

35. It is possible that an intervening event might be established that entirely and completely breaks the chain of causation. In that case the loss comes to an end. However, the chain of causation might not be broken, but there may be events other than the unlawful detriments that contributed to the Claimant's resignation that resulted in the loss, and could be the principal reason for the loss. Mr Laddie relied on a decision in the context of constructive dismissal, in which it is only necessary that a breach of the employment contract is an effective cause of the resignation for an employee to establish dismissal; **Wright v North Ayrshire Council** [2014] IRLR 4, in which Langstaff (P) noted in at para. 32:

> **As to compensation we should note that where there are a variety of reasons for a resignation but only one of them is a response to repudiatory conduct the compensation to which a successful claimant will be entitled will necessarily be limited to the extent that the response is not the principal reason. A tribunal may wish to evaluate whether in any event the claimant would have left employment and adjust an award accordingly. This does not affect the principle to be applied in deciding breach: it is merely to recognise that the facts have a considerable part to play in determining appropriate compensation.**

36. Similarly, even if the chain of causation from the protected disclosure detriments that the Tribunal found proven, to the financial loss resulting from the Claimant's resignation of his practising privileges, was not broken by any intervening event, compensation might have been reduced if the Tribunal considered that, absent the unlawful detriments, the Claimant would, or might, have resigned his practising privileges because of other concerns that did not involve any unlawful conduct on the part of the Respondent: see **Timis v Osipov** [2019] ICR 655, Underhill LJ at para. 84.

37. Assessing future loss is difficult. It involves assessing what would have happened but for the unlawful conduct and what will now happen. Mr Laddie adopted Morrison J's naming of these scenarios in **Kingston-upon-Hull City Council v. Dunnachie (No.3)** [2004] ICR 227 as "old job

facts" and "new job facts". As the different scenarios may not involve a change of job, we prefer to refer to the "what would have been" and the "what will be" scenarios.

38. Schedules of loss commonly are pleaded on the basis that it would have been the best of times, but now it will be the worst; a claimant would have had a brilliant career, but now will have none. Sometimes that is the case, particularly if the actions of a respondent have destroyed the claimant's health. But it is rare for lifetime loss to be awarded, particularly if a claimant is healthy and performing well at work at the time of the assessment. A claimant who was likely to have a brilliant career will generally be strongly placed to mitigate loss.

39. Assessing the "what would have been" and the "what will be" scenarios, necessarily involves an assessment of likelihoods, things may turn out better than expected, or may turn out worse. Rising stars may suddenly fall, and slow starters may go on to excel. One can only be sure that the future is not certain.

40. These are not new points. In **Mallet v McMonagle** [1970] AC 166, Lord Morris of Borth-y-Gest stated at 173F:

> **In cases such as that now being considered it is inevitable that in assessing damages there must be elements of estimate and to some extent of conjecture. All the chances and the changes of the future must be assessed. They must be weighed not only with sympathy but with fairness for the interests of all concerned and at all times with a sense of proportion.**

41. It is necessary to consider not only the possible upside, but also the potential downsides. Lord Pearce held at 174D:

> **Any assessment must contain elements of reasonable prophecy and arithmetic. In assessing the proper figure, the jury have to take into account both the possibilities for good and for bad, striking a fair balance as they see it, on such evidence of the future probabilities as is given to them. To assume for certainty all the most advantageous possibilities and take no account of the disadvantageous is not to strike a fair balance.**

42. Just as it was for the jury in the High Court 50 years ago, so it is for the industrial jury today; there must be a balance between the advantageous and disadvantageous possibilities.

43. Generally, in assessing loss of future earnings, this balancing exercise is carried out by assessing a date on which the claimant will obtain work with equivalent remuneration, from which date the loss ceases: **Wardle v Credit Agricole Corporate and Investment Bank** [2011] ICR 1290. This is not, in reality, a determination on balance of probabilities that the claimant will obtain such a job on the date the tribunal fixes, but is an assessment of just compensation, taking into account the chances that such a job might be found sooner, or later. In **Griffin v Plymouth Hospital NHS Trust** [2015] ICR 347 Underhill LJ held at para. 9:

> **"At the risk of spelling out the obvious, that is not a finding that it was more probable than not that the Claimant would find a job after precisely one year. Rather, it is an estimate, made on the assumption that the Claimant continued to make reasonable efforts to mitigate her loss, of the mid-point of probabilities."**

44. An award made under ERA is compensatory, not penal: **Morgans v Alpha Plus Security Ltd** [2005] ICR 525.

45. The need to assess the possibilities, ranging from good to bad fortune, and to avoid penal awards, means that it is rare for loss lasting a whole career to be awarded. Before making such an award, an employment tribunal should consider the matter with great care.

46. A claimant cannot limit attempts at reasonable mitigation relying on the receipt of compensation from a respondent. In **Wilding v British Telecommunications plc** [2002] ICR 1079 it was put this way at para. 37:

> **"It was the duty of Mr Wilding to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from BT as his former employer."**

47. The onus is on a respondent to establish that a claimant has acted unreasonably in failing to mitigate loss in the past. In looking to the future, the assessment of earnings in the "what will be" scenario is made on the assumption that the claimant will take reasonable steps to mitigate loss: see Dunnachie (No.3) at para.28(ii).

48. It is also important to step back and take an overview of compensation. In **Ministry of Defence v Cannock** [1994] ICR 918 Morison J stated at 950H that:

> **"We suggest that tribunals do not simply make calculations under various different heads, and then add them up and award the total sum. A sense of due proportion involves looking at the individual components of any award and then looking at the total to make sure that the total award seems a sensible and just reflection of the chances which have been assessed."** "

230. In Secretary of State for Justice v Plaistow UKEAT/0016/20/VP UKEAT/0085/20/VP, Mrs Justice Eady found that the tribunal had been entitled to award losses on a career loss basis and to make only a 5% discount to the claimant's future losses to retirement on the basis of what it had found to be the very slight prospect of the claimant retiring before his pension age as well as the equally remote prospect of his returning to work. However, she nonetheless upheld the employer's appeal against the decision on the limited basis that its reasoning did not reveal a *"more general consideration of the uncertainties involved in its predicted loss of earnings in the claimant's case. There is nothing to suggest that the ET allowed for the more general vicissitudes of life: the possibility, that all of us must accept, for working life cut short by reason of early death, disability or an other unforeseen circumstances…"* (paragraph 83).

Conclusions on the issues

231. We now turn to the "legal issues" or "questions of judgment" (issues 9-17 of the list of issues) which we have been asked by the representatives to determine. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

9. What is the correct manner to calculate loss? AND
10. How long should the claimant be compensated for?

232. There is a certain overlap between these two questions because determining the correct manner to calculate loss depends to a large extent on the length of time for which the claimant should be compensated; as set out in our summary of the law above, the multiplier/multiplicand approach will be applicable in relation to career loss earnings, whereas a different approach may be appropriate for earnings which do not fall into this category. We therefore address these questions in the same section.

233. Mr Gorton advanced five scenarios in this respect: (1) that the claimant would likely have failed her probation period and that, for a variety of related reasons, her losses should be capped at 12 months post termination of employment; (2) that the claimant's losses should be capped to 2015 or early

2016 at the very latest; (3) that the claimant's losses are too speculative and uncertain to award anything beyond 2015/2016 other than a Blamire award; (4) that losses should be capped at late December 2016/early 2017 on the basis that there was a complete cessation of any loss attributable to damage inflicted by proven acts of the respondent by that point; and (5) that any losses that go beyond scenarios 3 or 4 are subject to an ultimate safe date of one year following the remedy hearing.

234. As is evident from the findings of fact that we have made and from the medical and employment expert evidence, none of those scenarios are applicable. We summarise the relevant points in those findings, mindful of and applying the relevant principles referred to in the summary of the law in Shoukrey.

235. The claimant's losses are entirely "attributable" to the unlawful treatment by the respondent. Taking into account her vulnerable predisposition, her moderate/severe depressive disorder and consequent inability to function is nevertheless entirely attributable to that unlawful treatment (Shoukrey paragraph 34).

236. In this respect, we have rejected the respondent's arguments that there should be any apportionment of blame for the claimant's losses, either on the basis of apportionment between successful/unsuccessful detriments or due to other events which the respondent has cited such as the litigation with the claimant's brother. We have found that the claimant's losses were 100% attributable to the unlawful treatment by the respondent. Even if that were not the case, it would certainly be the case that the harm was not "properly divisible" between the respondent's unlawful actions and anything else and so, on that basis too, no apportionment is appropriate.

237. We have found that there was no supervening or intervening event which broke that chain of causation.

238. The evidence is clear that the claimant will never work again. This is, in fact, an unusual case in that very often evidence which assesses the likelihood of an individual working again will give a percentage chance of that individual being able to work again; Mr Gilbert's report in this case, however, is absolutely categorical that she will not.

239. We have considered the possibility of whether, had she not been treated in the way she was by the respondent, the claimant would have chosen to leave the respondent in any event and have accepted that she would as she intended, have remained with the respondent until her retirement, unless she left to pursue another better opportunity. Her ability to pursue other better opportunities has, of course, also been removed through the unlawful conduct of the respondent (Shoukrey paragraph 36).

240. In doing so, we have in our findings of fact been through and assessed the "what would have been" and the "what will be" scenarios (Shoukrey paragraph 37-43) and we do not repeat all of that here. That exercise has of

course been simpler because of Mr Gilbert's unequivocal finding that the claimant will not work again; it follows from that finding that an assessment of her chances of getting another job is indeed a simple one, as she will not do so; she will not work again. Furthermore, in the light that finding, there is no unreasonable failure to mitigate her loss on the part of the claimant (Shoukrey paragraphs 43 and 46-47).

241. The career loss assessment which flows from these findings is not penal to the respondent; it merely reflects the losses suffered by the claimant as a result of the respondent's unlawful actions (Shoukrey paragraphs 44-45) .

242. As noted, Mr Gorton referred us to principles 15 and 16 in Sutherland v Hatton. However, neither of them make any difference on the facts which we have found. Principle 15 is that the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing; however, we have found that the entirety of the harm was attributable to the respondent's wrongdoing and we have specifically rejected its arguments that there should be any apportionment. Principle 16 is that the assessment of damages should take account of any pre-existing disorder or vulnerability and the chance that the claimant would have succumbed to stress-related disorder in any event; however, that was fully taken into account both by the medical professionals in their reports and by us in our findings and we have found as a fact that the claimant was able to function despite her vulnerability but was no longer able to do so following and as a result of the respondent's treatment; there is no medical or other evidence (beyond the respondent's assertion, which we reject) suggesting that she was likely to lose her ability to function in future had she not suffered the unlawful treatment by the respondent which she did.

243. The correct manner to calculate loss is therefore the multiplier/multiplicand approach using the Ogden tables.

244. Furthermore, for the reasons set out above, the claimant should be compensated until her retirement age of 67.

245. The claimant should, therefore, be compensated for past losses from the date of the unlawful treatment up until the date of the hearing and for future losses until the age of 67.

Components of those losses

246. We turn now to the components of those losses. Much of the information in relation to this is set out in the claimant's schedule of loss and in the respondent's counter-schedule of loss. Many of these elements are agreed and we have identified as such those which are agreed.

247. Net weekly pay (excluding bonus and uprating) is agreed at £827.75.

248. The basic award is agreed at £718.50.

249. The claimant's car allowance at the respondent was £4,500 annually (£86.54 per week) (agreed).

250. The claimant's private medical insurance at the respondent was £1,800 annually (£34.62 per week) (agreed).

251. As regards calculation of bonus losses, the respondent's position in its counter-schedule of loss appears to be to ascribe a figure of £15,000 (gross) (which amounts to £288.46 per week) in relation to bonus losses on an ongoing basis. However, given that we have found that career loss is the appropriate measure in this case, we accept Mr Jackson's submission that that would be inappropriate and that, as per Mr Gilbert's report, an average of the relevant years would be appropriate for long-term forecasting, as set out in section 5.23 of his 2020 report, which is quoted in our findings of fact above. Mr Gilbert suggests 2% per annum in relation to salary and bonus and sets out the figures for the years 2016-2020 in his report. He is the expert in the field (not the tribunal or the representatives) and his analysis is reasoned and based on data and we adopt it. 2% may seem a little on the low side at the moment in these days of very high inflation but, taking into account the rate of inflation over the past 6 years overall and the hope and expectation that things will return after the present energy crisis to a similar rate of inflation in the future, we do not consider it is necessary or appropriate to depart from Mr Gilbert's 2% figure.

252. We therefore adopt the 2% which Mr Gilbert does. Mr Gilbert has in his second report set out the increases in salary and bonus using the 2% figure over the period from 2016-2020 and that mathematical process should be continued in relation to the years between 2020 and the date of the remedy hearing for the purposes of calculating the claimant's past losses up to the date of the remedy hearing. Furthermore, that 2% figure can be used to calculate what would be the claimant's total future losses from the date of the remedy hearing up to her retirement age of 67 and an annual average of those total future losses can be used as the basis for the multiplicand for future losses.

253. For the sake of clarity, and for the same reasons, the 2% increase suggested by Mr Gilbert should also be used in relation to increases in respect of car allowance and the value of private medical insurance, both in relation to past losses and future losses. In addition, the same process of calculating the claimant's total future losses from the date of the remedy hearing up to her retirement age of 67 and then an annual average of those total future losses should also be used as the basis for the multiplicand for future losses of car allowance and private medical insurance.

254. We turn now to the issue of the correct multiplier and the Ogden Tables in relation to future losses. We were provided by the parties with a copy of the eighth edition of the Ogden Tables (which was updated in May 2021). As we have found, the relevant date is the claimant's retirement age of 67. However, there is no specific table for "67 (females)", rather only tables for "68 (females)" (Table 12) and "65 (females)" (Table 10). Mr Gorton generously suggested in his submissions (at paragraph 113) that we should assume a retirement age of 68. However, we consider that this would give an unjustifiable windfall to the claimant

and that the more appropriate approach is the one envisaged in the Ogden Tables themselves under which a multiplier is chosen which is interpolated between the tables in question (see the example at section A paragraph 24 on page 65 of the Ogden Tables).

255. The relevant discount rate which applies and which has applied since August 2019 is -0.25. The claimant's age at the date of the remedy hearing was 53. The multiplier at the discount rate of -0.25 in Table 12 ("68 (females)") is 14.86. The multiplier at the discount rate of -0.25 in Table 10 ("65 (females)") is 11.93. Adopting a multiplier that is two thirds of the way between those two multipliers (to reflect the claimant's retirement age of 67) gives a multiplier of 13.88.

256. However, that is not the end of the matter. The tables referred to above take into account mortality and accelerated receipt but they do not take into account other risks. Section B of the introductory notes of the Ogden Tables considers this and sets out further reduction tables A-D which it states (at paragraph 60 on page 74) *"should generally be used unless there is a good reason to disapply or to adjust them. The suggested reduction factors adjust the baseline multiplier to reflect the average pre- and post-injury contingencies according to the employment risks associated with the age, sex, employment status, disability status and educational attainment of the claimant when calculating awards for loss of earnings and for any mitigation of this loss in respect of potential future post-injury earnings"*. The procedure for applying these calculations is set out at paragraph 98 of the Ogden Tables.

257. Mr Gorton submits that we should apply a further discount (of 0.17) in respect of contingencies other than mortality in accordance with *"Table A"* which *"places C as Level 2"* (paragraph 115 of his submissions). (The "Level" relates to educational attainment and its categories are defined earlier in that section of the Ogden Tables and we agree that the claimant falls into "Level 2", which is not disputed). We think that Mr Gorton must in fact mean Table C (on page 81) as Table A (on page 80) relates to males whereas Table C relates to females (not disabled), which of the 4 tables is the nearest category that would apply to the claimant. Taking into account that the claimant was before her injuries both non-disabled and employed, the applicable reduction factor in Table C at Level 2 is 0.83. Using the process outlined in paragraph 98 of the Ogden Tables, the multiplier of 13.88 would then be multiplied by 0.83 to give an adjusted multiplier of 11.52 (which would then be applied to the multiplicand to give the award for future loss of earnings).

258. We are mindful of the guidance in Plaistow, and to take into account the other "vicissitudes of life" referred to in that. We are also conscious, as is clear from the authorities (e.g paragraph 40 of Shoukrey), that what we are tasked to do is not an exact science and that it is inevitable that there *"must be elements of estimate and to some extent of conjecture"*. However, we do not consider that there is any reason to depart from the approach provide by the Ogden Tables and calculated in the paragraph above, either to reduce or increase the amount of that adjustment. We, therefore, find that the further discount of 0.83 should be

applied in relation to the award for future losses but that no further discount should be applied.

259. Finally, we reject the further submissions made by Mr Gorton at paragraphs 116-117 of his submissions that there should be a further considerable discount under principle 16 in Sutherland v Hatton and, as he puts it, the "*likelihood of the claimant falling down in any event"*. As we have found, and in accordance with the conclusions of the expert medical reports, the claimant was not likely to do so; although she had a pre-existing vulnerability, she was able to function over the whole course of her life, until the point when she was treated by the respondent in the way that she was. We do not, therefore, make any discount in this respect and see no reason to make any further discount beyond those set out above; it would not be just and equitable so to do. If we are in any way wrong about this and there is any reason why any remote chance of the claimant *"falling down in any event"* should be taken into account, that is more than adequately covered by and as part of the 0.83 reduction factor set out in the paragraph above.

Interest on past losses

260. We turn now to the question of interest in relation to the claimant's past losses. As Mr Jackson rightly submits, past loss is not subject to a discount for accelerated receipt. He further submits that, although future loss is, the discount should either be reduced to reflect the fact that the claimant has been kept out of her money for 8.5 years or a sum equivalent to interest on past loss added to that award at 8%. As regards past losses, we note that we are not bound by the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (the "Discrimination Interest Regulations") (which provide for interest at the rate of 8%) as this is not a discrimination case. Furthermore, in the light of the prevailing Bank of England base interest rates over the last 8.5 years, we consider awarding interest at the rate of 8% would lead to a sizeable and unjustifiable windfall for the claimant. Those interest rates were: 0.5% from 2013-2016; 0.25% in 2016; 0.5% in 2017; and 0.1% in February 2020, although they have since risen above 0.5%. Since 2014, therefore, the rate has for the most part been 0.5%. We therefore consider that it is just and equitable, in relation to the claimant's past losses from the date of dismissal to the date of the hearing, to apply an award of interest of 0.5% from the midpoint between the date of the claimant's dismissal and the date of the remedy hearing. This in fact adopts the "midpoint" methodology of the Discrimination Interest Regulations, which we consider appropriate, but not the interest rate in them, which we do not consider appropriate for the reasons above.

Pension

261. As regards pension, it is agreed that the claimant was in a defined contribution scheme where the respondent pays 7% of pensionable salary into the fund. Furthermore, pension losses should also be calculated on a career loss basis for the reasons set out above. However, beyond that, we have not, for the reasons referred to in our introductory section, specified the exact method of pension loss calculation. However, in the light of the findings that we have made

(in particular that career loss compensation applies), and the assurances of the representatives that answering the questions which they wanted us to answer would enable them to calculate and agree the total award, we do not consider that this should preclude the parties from doing exactly that.

Recoupment

262. It is agreed that, for any period of past loss, the Employment Protection (Recoupment of Benefits) Regulations 1996 (the "Recoupment Regulations") apply.

Special damages

263. The claimant's schedule of loss sets out £1,565 as the sum due by way of special damages, based on a combination of three elements: counselling; private hypnotherapy treatment; and therapy sessions. The sums in relation to the first two are agreed in the respondent's counter schedule of loss. However, the respondent ascribes a value of £225 to the therapy sessions whereas the claimant ascribes a value of £535 to them, such that the total special damages set out in the respondent's counter schedule is £1,255. That leaves a discrepancy of £310. We have not been taken to any evidence in relation to these special damages and can rely only, therefore, on what is set out in the schedule and counter schedule of loss. However, the counter schedule does not set out any basis of calculation for the figure for the therapy sessions but merely states their value as being "£225". By contrast, the claimant's schedule does set out a basis for calculation, specifically that the figure of £535 is based on "107 (weeks) x £5 (hourly rate) x 1 (hours per week)". As that is all we have to go on and given its greater detail and the fact that the claimant and/or her advisors are likely to know how many sessions she attended, we find on the balance of probabilities that the claimant's figure is correct.

264. The total special damages awarded is therefore £1,565.

<u>11. Statutory rights - is the claimant entitled to a payment for loss of statutory rights?</u>

265. There is nothing in respect of statutory rights in the up-to-date schedule of loss provided by the claimant which we have been referring to; there is such a reference in an earlier schedule of loss dated 22 August 2016, which sets out £800 as the amount sought, but without any explanation for the basis. Due to the length of her employment at the respondent, the claimant never acquired the statutory rights which arise after two years' continuous employment, such as the ordinary right to claim unfair dismissal.

266. Mr Jackson submits that the claimant should be entitled to a payment for loss of statutory rights because she is excluded from the workplace in any meaningful sense and will never obtain the rights she had, even those which require less than two years' service. Mr Gorton submits that no such award should be made, as the claimant had not acquired statutory rights through length

of service and had no right to claim unfair dismissal (with the automatically unfair dismissal claim requiring no statutory rights).

267. We prefer Mr Gorton's submission; the claimant had not obtained the statutory rights for the loss of which this kind of compensation is normally made and did not therefore lose them as a result of her dismissal. We do not, therefore, consider that any award of compensation for loss of statutory rights is appropriate and we do not make any such award.

12. Injury to feelings – how much should be awarded?

268. At an earlier hearing in these proceedings before EJ Baty on 19 February 2020, the parties agreed an interim payment of compensation of £70,000, of which £40,000 was attributed to "non-dismissal-related injury to feelings" and £30,000 to "future loss of earnings". Mr Gorton submits that the fact that this interim payment was agreed was not an admission that the claimant was entitled to an injury to feelings award of £40,000. In the absence of any submission to the contrary, we accept that.

269. We refer ourselves to the general principles in relation to injury to feelings awards set out in Armitage, Marsden and HM Prison Service v Johnson [1997] IRLR 162 and to the guidance set out in Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871, including the three bands of compensation set out. We remind ourselves that an award for injury to feelings is compensatory and is determined by the impact on the victim of the wrongdoer's actions; it is not punitive based solely on the seriousness of the infringement.

270. Mr Jackson submits that the award made should be £40,000; Mr Gorton submits that it should be "a very maximum of £25,000". Their submissions in relation to the parameters of the various bands vary. Mr Gorton submits that the upper band for injury to feelings awards which applied at the time when the claim was brought in 2015 was £18,000 - £30,000 (the original Vento band updated by the subsequent case of Da'Bell v NSPCC [2010] IRLR 19). Mr Jackson notes that the acts of discrimination in the case predate the current Presidential Guidance on injury to feelings but that applying the RPI uprating as per Da'Bell to the original Vento bands, the upper band as at March 2022 is £27,184.87 - £45,308.12. We do not disagree with his maths.

271. We will return to what the relevant band is shortly but it appears that each party acknowledges that any injury to feelings award ought to be in the upper band, as even Mr Gorton's submission of a maximum of £25,000 is well within what he considers the applicable upper band (£18,000-£30,000). The upper band is reserved for *"the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment"* (Vento)

272. We certainly agree that the treatment of the claimant by the respondent is of the most serious type. Despite the respondent's attempts to minimise this by reference to what it has repeatedly referred to as the claimant's *"short"* employment and the *"short term nature of the wrong inflicted by the respondent"*,

this was in fact a lengthy and intense period of bullying which started in November 2013 and carried on over a course of meetings on a weekly basis until the claimant finally went off sick in March 2014. That can in no way be characterised as "short-term"; rather, it was a continuous course of detrimental treatment – a *"lengthy campaign"* - which is precisely what makes it potentially appropriate for the upper band. However, we remind ourselves that the nature of the award is compensatory and determined by the impact on the victim. It is hard to imagine a case where the impact on the victim could be more profound and we refer again, without repeating them, to the findings in the medical expert evidence and the employment expert evidence. The impact of the campaign of bullying, intimidation and harassment by Mr Widmer in this case has undoubtedly been profound. We refer again to the claimant's own evidence and cross-examination about the severe triggering effect of even having to think about Mr Widmer and the visceral impact that having to do so had upon her. We also reference the medical reports which detail the impact that this treatment has had on all aspects of the claimant's life, from her ability to take care of herself, her ability to work, and the consequent loss of her daughter and the period of years for which it has so far lasted. This impact unquestionably means that an award at the very top of the upper band is appropriate. Such an award is not punitive to the respondent; it merely reflects the enormous impact which the respondent's treatment has had on the claimant.

273. We return to the issue of what the correct bands are. We note first of all that we are not in fact constrained as a matter of law by whatever the upper limit the top band is; if we reasonably consider the case is serious enough and warrants it, we can make an award in excess of the upper limit of the upper band. We agree with Mr Gorton that, at the time the claim was brought, the upper limit of the upper band was £30,000, a figure which was, in terms of the RPI, out of date at the time the claim was brought and looks far more out of date eight years later than that. We consider, in the circumstances of this case, that limiting any award to £30,000 would be to do a gross injustice to the claimant and the impact that the respondent's treatment had on her. Furthermore, we accept Mr Jackson's submission that the lengthy period for which the respondent had the benefit of earning interest on the money can properly be reflected by using up-to-date figures for the calculation of the bands, rather than an artificial stop when the claim was issued in 2015. We therefore consider that the upper limit of the upper band is for these purposes £45,308.12 and we therefore make the award for injury to feelings of £40,000 sought by Mr Jackson. If we are wrong about what the correct band is, we consider that, because of the extreme nature of the case and the impact on the claimant, it would be entirely appropriate to make an award in excess of a top band with an upper limit of £30,000 and instead to make an award of £40,000 for injury to feelings.

274. The injury to feelings award is therefore £40,000.

275. As regards interest on the injury to feelings award, we again note that we are not bound by the Discrimination Interest Regulations. Furthermore, in the light of the overall size of the injury to feelings award, we do not consider that it is appropriate to add interest to it, even at the 0.5% rate we adopted in respect of

past loss of earnings, let alone the 8% rate set out in the Discrimination Interest Regulations. We therefore make no award of interest in this respect.

13. Personal injury – how much should be awarded?

276. In relation to any award for general damages for personal injury, both representatives referred us to the Judicial College Guidelines 16th edition, a copy of which was in the bundle at page E740. That sets out the following:

"Chapter 4 - Psychiatric and Psychological Damage

Section (A) - Psychiatric Damage Generally

The factors to be taken into account in valuing claims of this nature are as follows:

(i)the injured person's ability to cope with life, education, and work;
(ii)the effect on the injured person's relationships with family, friends, and those with whom he or she comes into contact;
(iii)the extent to which treatment would be successful;
(iv)future vulnerability;
(v)prognosis;
(vi)whether medical help has been sought.

(a) Severe

In these cases the injured person will have marked problems with respect to factors (i) to (iv) above and the prognosis will be very poor.

£54,830 to £115,730

(b) Moderately Severe

In these cases there will be significant problems associated with factors (i) to (iv) above but the prognosis will be much more optimistic than in (a) above. While there are awards which support both extremes of this bracket, the majority are somewhere near the middle of the bracket. Cases involving psychiatric injury following a negligent stillbirth or the traumatic birth of a child will often fall within this bracket. Cases of work-related stress resulting in a permanent or long-standing disability preventing a return to comparable employment would appear to come within this category.

£19,070 to £54,830

(c) Moderate

While there may have been the sort of problems associated with factors (i) to (iv) above there will have been marked improvement by trial and the prognosis will be good. Cases of work-related stress may fall within this category if symptoms are not prolonged.

£5,860 to £19,070

(d) Less Severe

The level of the award will take into consideration the length of the period of disability and the extent to which daily activities and sleep were affected. Cases falling short of a specific phobia or disorder such as travel anxiety when associated with minor physical symptoms may be found in the Minor Injuries chapter.

£1,540 to £5,860"

277. As noted, both representatives directed us to the Judicial College Guidelines and we accept that it is appropriate for us to take them into account in assessing the correct level of any award. In doing so we refer to the professional opinions of the doctors in relation to the claimant's condition.

278. All the doctors were of the opinion that the claimant had a moderate depressive disorder on an ongoing basis following the respondent's treatment of her. However, the majority of them also considered that the claimant's depression had satisfied the definition of severe including, taking Dr Nayrouz' report as the latest one, at times over the period from 2014 to 2020 (albeit not continuously). We also accept Mr Jackson's submission that we are entitled to take judicial notice of the fact that psychiatric conditions vary over time; the regularity with which a number of different medical professionals described the claimant's depression as "severe"; and that they attribute the cause of this to the respondent's actions.

279. Considering the 6 factors which are set out in the top of the Guidelines, the claimant's case does indeed appear to fall into the description of category (a) (Severe) rather than category (b) (Moderately Severe). As per the description of category (a), the claimant did have marked problems with factors i-iv and her prognosis was "very poor". Her prognosis could not be described as "much more optimistic than in (a) above" given the uncertainty as to when she might recover to a reasonable level of function, which is in itself contingent on this ongoing litigation, and the fact that she will never be able to work again.

280. For all these reasons, we therefore consider that the claimant falls into the category of "severe", for which the guidelines are for an award of between £54,830 and £115,730.

281. We turn to the question of whereabouts within the range the award should be. We consider that it should be at the lower end for two reasons. First, the doctors' reports stated that she satisfied the definition of severe, but not all the time. Secondly, we are very conscious of the risk of double recovery and the possibility of a windfall and are conscious that we have made an award in relation to injury to feelings of £40,000. For these reasons, we do not consider that the award for general damages should be in the middle or at the top end of that range but rather at the lower end.

282. We therefore make an award for general damages of £55,000.

<u>14. Should there be apportionment? If so, how much (as a percentage) of the claimant's psychological harm and loss was caused by the respondent's unlawful actions? Does apportionment apply to the claimant's entire losses, or does it apply only to the award for personal injury?</u>

283. This question has already been answered above. There is no basis for apportionment. The whole of the claimant's psychological harm was caused by the respondent's unlawful actions. To be clear, the fact that there is no basis for

apportionment is a finding which applies to the claimant's entire losses, including both loss of earnings and the award for personal injury.

15. Polkey – when do pecuniary losses end?

284. We have also already dealt with this question above. The claimant's pecuniary losses end at her statutory retirement age of 67.

16. Aggravated damages – is the claimant entitled to an award and if so how much?

285. The claimant submits that an award in relation to aggravated damages should be made on a number of grounds. Many of these are set out in the claimant's schedule of loss and, in addition, Mr Jackson made a number of submissions about the way this remedies hearing has been conducted which he says ought to give rise to an award of aggravated damages. We deal with these below.

286. However, first of all, we remind ourselves of the law in relation to awards of aggravated damages.

287. The classic statement of when aggravated damages are available was made by the Court of Appeal in Alexander v Home Office 1988 ICR 685, CA, where it held that aggravated damages can be awarded in a discrimination case where the defendants have behaved *"in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination"*. In Commissioner of Police of the Metropolis v Shaw EAT 0125/11, Mr Justice Underhill, then president of the EAT, gave a more detailed exposition, identifying three broad categories of case: where the manner in which the wrong was committed was particularly upsetting; where there was a discriminatory motive i.e. the conduct was evidently based on prejudice or animosity, or spiteful, vindictive or intended to wound; and where subsequent conduct adds to the injury, for example, where the employer conducts tribunal proceedings in an unnecessarily offensive manner, or *"rubs salt in the wound"* by plainly showing that he does not take the claimant's complaint of discrimination seriously.

288. The presence of high-handed conduct will not necessarily be enough, on its own, to lead to an award of aggravated damages. As the authorities make clear, aggravated damages are compensatory, not punitive. This means that there must be some causal link between the conduct and the damage suffered if compensation is to be available. In HM Prison Service v Salmon 2001 IRLR 425, EAT (to which we were referred by Mr Gorton), the EAT made it clear that *"aggravated damages are awarded only on the basis, and to the extent, that the aggravating features have increased the impact of the discriminatory act or conduct on the applicant and thus the injury to his or her feelings"*.

289. There is no authority which precludes the tribunal from making an award of aggravated damages as a stand-alone head of compensation as opposed to a subheading of an injury to feelings award, although in Shaw, Underhill P thought it would be preferable if a single award for injury to feelings were made, taking

into account aggravating features (although he noted that, although the question had never been addressed head on, separate awards of aggravated damages had been approved by the Court of Appeal too many times for him to be able to say that this was the wrong approach). The important point is that the tribunal must not lose sight of the ultimate purpose of aggravated damages, which is to compensate for the additional distress caused by the claimant by the aggravating features in question. Furthermore, there is no authority to suggest that an award for aggravated damages, whether separate or part of an award for injury to feelings, should not be able to take the total for injury to feelings and aggravated damages above the bands in Vento.

290. Mr Gorton also referred to the case of Wilson Barca LLP and others v Shirin [2020] UK EAT/0276/19, in particular the section at paragraph 63 of that judgment which states that *"It is incumbent upon a court or tribunal making an award of aggravated damages to explain why the amount of the basic award that it has made is insufficient to compensate the claimant and the extent to which the conduct giving rise to the award of aggravated damages has increased the impact of the discriminatory act on the claimant"*. To be clear, the reference in that judgment to the *"basic award"* is not a reference to the basic award for unfair dismissal but to the award of compensation made for the proven incidents of harassment related to sex in that case. However, as the judgment goes on to reiterate the principles in Salmon, that statement is not at odds with the principles which we have already outlined, the criticism of the tribunal in Wilson Barca being, as set out in paragraph 64 of the judgment, that *"the Employment Tribunal failed to explain why, having assessed the injury to feelings award for these two incidents at £10,000, a further award of £5,000 in aggravated damages was necessary to provide appropriate compensation to the Claimant, or what the additional impact was on the Claimant of the aggravating features of the Second Respondent's conduct"*.

291. With that, we turn to the various factors which have been said should form the basis of an award for aggravated damages.

Endorsement by more senior management of Mr Widmer's behaviour/Ms Hayes's investigation

292. Mr Jackson criticised the investigation carried out by Ms Hayes and the conclusions which it came to, including that it was not appropriate to bring disciplinary proceedings against any of Mr Widmer, Mr Reed or Mr Davis. As we have already found, it is clear that the respondent does not accept the core findings of the tribunal or that any of these individuals were responsible for any unlawful treatment of the claimant. However, we do not doubt that, having conducted her investigation in 2016, this is what Ms Hayes genuinely thought; essentially, she believed what these individuals told her. She had not had the benefit which the original tribunal did of reviewing all the evidence and, crucially, of hearing the claimant's evidence. Furthermore, we do not consider that there is anything inherently wrong in an internal investigation coming to a different conclusion to that of an employment tribunal, let alone that that in itself should amount to conduct which gives rise to aggravated damages. Having said that, disagreeing with the employment tribunal is one thing; continuing the litigation in

a way which is not based on the facts found by the tribunal at the liability stage is quite another; we shall return to this in due course.

Rejection of the claimant's grievance when there was plainly evidence that she was correct

293. This is a similar point to the point above. Again, notwithstanding the findings the employment tribunal made, we do not accept that the findings of an internal grievance investigation which are different to those made by the employment tribunal are in themselves ones which amount to conduct which gives rise to aggravated damages. This is not something which in this case and in our opinion amounts to "high-handed, malicious, insulting or oppressive" conduct and does not therefore form the basis of an award for aggravated damages.

Failure by the respondent to apologise

294. It is not correct to say that the respondent did not apologise and we have already referred to the apologies set out in Ms Hayes' witness statements. The issue is really the nature of those apologies. We accept that the apologies given are very limited, expressing regret for the claimant's unhappy employment at the respondent. We can entirely understand that, in the context of the claimant's experiences at the respondent and the findings of the original tribunal, receiving an apology of this limited nature which does not in any way reflect the tribunal's findings and indeed evidences the fact that the respondent does not accept those findings that it treated the claimant unlawfully, would have a deep emotional impact on the claimant and would feel like rubbing salt into the wound. However, we reiterate the point already made that we consider that the respondent is entitled to take a different view and that the nature of its apologies simply reflects that view rather than their being examples of high-handed etc treatment of the claimant. We do not, therefore, considered that this forms the basis for an award for aggravated damages.

Continual appeals to attempt to prevent any compensation being awarded at all

295. We are very conscious of the length of time this litigation has gone on and, as set out in the medical expert reports, the fact that its continuation is preventing the claimant from even starting on any possible road to recovery. It is very hard for the tribunal to judge exactly what has been going on behind the scenes between the parties over the course of the years since the liability judgment was promulgated. However, we note that in the core matter for appeal which related to the unfair dismissal finding, it was the claimant who appealed first and that litigation went all the way to the Supreme Court, going first one way and then another all the way up to the Supreme Court. It was that strand of appeal which was responsible for the longest delay in this litigation. In the light of the contentious nature of the legal arguments, we do not consider that the respondent's decision not to accept the EAT judgment and to appeal further was an unreasonable one, let alone one which amount to high-handed conduct such as to justify an award of aggravated damages.

Objection to the claimant being represented by a litigation friend and reliance on a case which would lead to her successful claims being struck out

296. The respondent did not object per se to the claimant being represented by a litigation friend but, at the point when this application was made to the tribunal by the claimant's solicitors, the respondent pointed out the case law at the time which indicated that the tribunal did not have the power to appoint a litigation friend. This is of course a jurisdictional issue by which the tribunal would be bound in any event, regardless of whether it was raised by one of the parties. Fortunately, the tribunal's decision was overturned on appeal in a judgment which made clear that the original case law did not apply and that tribunals do have the power to appoint a litigation friend. We do not, however, consider that the respondent's conduct in pointing out the original case law amounts to high-handed etc treatment such as to justify an award of aggravated damages.

297. We are not sure what is referred to in the reference to *"reliance on a case which would lead to her successful claims being struck out"*. If it is a reference to the separate appeal in relation to time limits, that is another jurisdictional matter and we do not consider that it was unreasonable for the respondent to have pursued this, let alone for that to amount to conduct in a high-handed etc manner such as to justify an award of aggravated damages.

Pulling out of mediation, then offering and continually failing to agree efforts at mediation after the EAT hearing in August 2019

298. As noted, it is very hard for us to judge what communications went on behind the scenes between the parties. Furthermore, we have (as is quite proper) no knowledge of what happened at the mediation itself. We do not, therefore, consider that we are able to make findings of fact about what happened and what the respondent did which would enable us to make a judgment on whether its conduct in this respect was high-handed etc. Generally, it is up to parties whether they wish to participate in mediation or not and the reasons that they accept, decline, or subsequently pull out of mediations are many and varied; we have no knowledge of the reasoning for any such decisions in this case. We do not, therefore, consider that this amounts to grounds for an award of aggravated damages.

The dismissive and minimising comments made by a Royal Mail spokesperson after the Supreme Court judgment in November 2019

299. We have already quoted the announcement in question in full in our findings of fact above. The announcement is "minimising" in the sense that it reflects the view which the respondent obviously has that it does not agree with the findings of the employment tribunal. As indicated, whilst we accept that such an announcement would have a deep emotional effect on the claimant and that it would feel like rubbing salt into the wound, we reiterate our finding that the respondent is entitled to disagree with the liability judgment. The announcement is in accordance with that belief. We do not, therefore, consider that it amounts

to conduct of a high-handed etc nature which should give rise to an award for injury to feelings.

The respondent's conduct of the remedies hearing

300. Mr Jackson made a number of submissions about why the respondent's conduct of the remedies hearing ought to give rise to an award for aggravated damages. Before we look at them, we make two observations in relation to the conduct of the hearing.

301. First, we noted above that the respondent does not accept the findings of the original tribunal. Whilst we do not take objection to that in itself, what is objectionable is that the respondent almost seems to have conducted this litigation in terms of the cross-examination it carried out and the submissions it made as if the findings of the original tribunal had not been made. The most noticeable example is its insistence that the claimant was a poor performer who would never have passed her probation anyway such that damages should be limited to a very short period after her employment actually ended; that flies in the face of the original tribunal's findings that there was a plan to remove her and that the performance procedure used as part of this plan was as sham.

302. Secondly, we note that the respondent chose not to call any of the medical or employment experts to challenge the findings in their reports, but instead chose to try and attack those reports through the cross-examination over a lengthy period of a damaged, vulnerable individual, whilst in the process raking over personal details of her life, questioning her integrity, and in so doing forcing her to recollect her dealings with Mr Widmer, which so obviously caused her such a degree of pain and distress.

303. In our view it was unacceptable not to call any of the medical or employment experts and to try and challenge them on the conclusions in their reports, which the respondent must have known in themselves would have led to the types of findings on quantum of compensation which we have made, if the alternative was to try and go behind those reports by means of the cross-examination of and submissions in relation to the claimant which we have referred to above. The picture which the respondent sought to paint flew in the face of the conclusions in those reports. In the process, it not only ignored those conclusions, but put the claimant to a considerable amount of pain and suffering.

304. We note the repeated emphasis on the *"short-lived events of November 2013 to March 2014"* and to the claimant's *"short employment"*, minimising the time period as if a continuous course of bullying over that period couldn't possibly cause the level of pain and suffering which the claimant has experienced and which the medical reports confirm that she did experience. We note the references to the claimant's *"chaotic personal life in 2014 that was the major cause of her problems"*, which involved raking over details of personal relationships of the claimant which happened in the immediate aftermath of the trauma caused by the respondent, where there was, in line with the conclusions in the medical reports, no basis for such an assertion. We note the vast amount of time spent going through details of the claimant's previous employment and

business, seeking to establish that she was a failure who was not capable of holding down employment for lengthy periods. We note the attack on the claimant's abilities in her career and the suggestion that her performance at the respondent was so bad that she would have failed her probationary period, for which there is no evidence other than the post event assertions of the discredited Mr Widmer during the course of Ms Hayes' investigation; the respondent kept referring in its submissions to the claimant not having made sales at the respondent, but that is hardly surprising given that over the long period of the bullying, she was being forced instead continually to write plans for Mr Widmer with which he was never satisfied (which is set out in detail in the liability judgment). We note the attack on the claimant's character and integrity where, without actually specifically putting it to the claimant that she had been dishonest and had misinformed the experts (amongst other things), the respondent effectively submitted that she was dishonest, with its allegations that the claimant had shown *"considerable strategic thought"* in *"the disclosure of documentation, the presentation of evidence to experts, but also her evidence to this tribunal"* and that she had an *"acute lucidity"* in her evidence and a *"complete composure and a grasp of fine detail*". This was all done against the background of those medical reports which indicated exactly the serious nature of the claimant's condition, her mental health, and the reasons for it.

305. The worst elements were where the claimant in cross-examination was forced to recollect her dealings with Mr Widmer. It was not always a direct question about Mr Widmer which caused this; however, where it was suggested to the claimant that the causes of her mental illness were for a whole range of reasons other than her treatment by Mr Widmer, that inevitably caused her to have to confront the recollections of Mr Widmer in denying that the other alleged reasons were the cause of her illness and instead stating what the real causes were. This was truly painful to witness. As noted, her reaction was visceral, at one point she had to have a break during which she was hyperventilating and experiencing symptoms consistent with a panic attack, and it unquestionably caused her a huge amount of pain and suffering. The respondent is entitled to examine the evidence, but it should have done so by putting the evidence to the doctors and employment experts who concluded as they did in their reports and challenging their conclusions that way; and not by causing such pain and suffering to someone whom they knew from the conclusions in those reports was a fundamentally damaged individual.

306. We therefore have little hesitation in concluding that this conduct was high-handed, malicious, insulting and oppressive. As identified in the third category in Shaw, this behaviour amounted to *"subsequent conduct"* which adds to the injury, and indeed is very much akin to the example given in Shaw, where the employer conducts tribunal proceedings in an unnecessarily offensive manner, or *"rubs salt in the wound"* by plainly showing that he does not take the claimant's complaint of discrimination seriously.

307. We consider that it unquestionably should result in an award of aggravated damages and one in the amount of £12,500 which the claimant seeks. In coming to this conclusion, we have taken into account the following.

308. We consider that it is appropriate to make the award of aggravated damages as a separate award from the award for injury to feelings (and indeed from the award of general damages for personal injury) because it relates to conduct which is entirely separable from the conduct for which those awards were made; in other words, it relates to the recent remedies hearing whereas the other awards related to the unlawful conduct of the respondent found by the original tribunal and the effects of that conduct.

309. Furthermore, the conduct giving rise to the award for aggravated damages was not taken into account in relation to those other awards; the awards for injury to feelings and general damages were made regardless of the conduct at the remedies hearing. The claimant has been put to significant extra pain and suffering as a result of the conduct at the remedies hearing and that therefore justifies and indeed demands a significant award for aggravated damages, hence the amount of £12,500 on which we have decided.

310. There is certainly a causal link between the conduct and the damage suffered; the pain and suffering experienced by the claimant in cross-examination was plain to see and it takes little imagination to see how painful the submissions, including those attacking her abilities and honesty, will have been. Furthermore, the extent of that pain and suffering was such as to warrant an award of aggravated damages at this level.

311. As to the questions which Wilson Barca provides that we should consider, we have essentially dealt with them already but by way of recap: the amount of the awards for injury to feelings and general damages for personal injury are insufficient to compensate the claimant as they have been calculated without reference to this separate and subsequent conduct, which by its effect demands a significant award for aggravated damages; and the conduct giving rise to the award of aggravated damages has increased the impact of the discriminatory act on the claimant because of the significant nature of the conduct and specifically the obvious and substantial impact which it had on the claimant. The award for aggravated damages is therefore in no way punitive; it is entirely compensatory based on the terrible impact which the conduct of the hearing had on the claimant.

17. ACAS – should there be an uplift, if so what percentage and how much?

312. Section 207A Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA) provides that, where there is a claim before the tribunal under any jurisdiction in Schedule A2 of TULCRA (which includes the claimants' successful complaints of detriment and dismissal) in cases where it appears to the employment tribunal that: (a) the claim to which the proceedings relate concerns a matter to which a relevant code of practice applies, and (b) the employer has failed to comply with that code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%. The relevant code of practice referred to in is the ACAS Code of Practice on Disciplinary and grievance procedures ("the Code").

313. In Acetrip Ltd v Dogra UKEAT/0238/18, HHJ Auerbach, drawing on earlier authorities such as Wardle, held at paragraphs 102-103:

"102 I conclude that, in a case where the Tribunal is considering making an award of an ACAS adjustment of a certain percentage which, having regard to the size of the underlying award, would be of a significantly large amount in absolute terms, it is an error for the Tribunal not to consider the absolute financial value or impact, before settling on the final adjustment figure.

103 There is, inevitably it seems to me, a punitive element to an adjustment award under these provisions, because the Tribunal is not simply compensating a claimant for some additional readily identifiable or quantifiable loss that he has suffered. The adjustment is bound, to a degree, to be reflective of what the Tribunal considers to be the seriousness and degree of failure to comply with the ACAS Code on the employer's part. However, the fact that it has a punitive aspect to it makes it, it seems to me, all the more incumbent on the Tribunal to consider the absolute value of its award, if that absolute value is likely to be significantly large, and bearing in mind that, in fixing on the amount which it considers just and equitable, the Tribunal must have regard to justice and equity to both parties.

104 In this case the absolute value of the uplift, at 25%, was in excess of £20,000. That is a figure which was certainly a significantly large amount. Therefore, in not considering the absolute value of this award before it determined upon the percentage level at which to set it, or, if it did consider it, certainly in not spelling out that it had considered it, and what view it took of it, the Tribunal erred in law on this point as well."

314. There is no dispute between the parties that in this case the provisions of section 207A TULCRA apply and that the ACAS Code also applies, which they both do. That answers question (a) above.

315. The Code provides that employees should be informed of the results of an appeal hearing *"as soon as possible"* (paragraph 29) and, in relation to both grievances and appeals from grievances, that the outcome should be communicated to the employee *"without unreasonable delay"* (paragraphs 40 and 45). The alleged breaches by the respondent are reflected in the fifth of the claimant's successful detriment complaints, namely the *"respondent's deliberate failure to provide an outcome to the claimant's grievance/appeal in a timely manner because it put the investigation in relation to that grievance/appeal on hold from early May 2015 until 5 August 2015"*. The respondent has not sought to argue that this did not amount to breaches of the Code and we find that, self-evidently, it did amount to breaches of the Code. That answers question (b) above.

316. We now turn to question (c) above, the question of whether or not the breaches of the Code were "unreasonable". Again, the respondent has not argued that the breaches were not unreasonable and we find that they were unreasonable; the finding was that the considerable delay in providing the outcome of the grievance/appeal was deliberate and no reasonable explanation has ever been given for it. To be clear, paragraphs 63-64 and Annex A of Ms Hayes' first witness statement give an account of why the respondent says TMIs were discontinued but they do not give any explanation as to why issues with TMIs, which were the respondent's original explanation for the delay in the outcome of the grievance/appeal, did actually cause a delay to that process.

317. We turn, therefore, to the level of any award we might make under section 207A TULCRA. The claimant seeks a 25% uplift; Mr Gorton argues for something considerably less.

318. We deal first with two arguments put forward by Mr Gorton. The first of these is that the delay is already being directly compensated for as it is a detrimental act. We do not consider that that in itself impacts upon the level of the award which we might make under section 207A. As HHJ Auerbach noted in Dogra, these awards have a punitive element; the fact that a part of the compensation awarded elsewhere in this judgment may relate to the claimant's success under the fifth detriment complaints is not relevant to that. Nor do we find his attempt to minimise the gravity of the detriment in order to argue for a lower award to be persuasive. It is true that the length of the delay identified by the tribunal was from early May 2015 until 5 August 2015 but that is still a significant period of time and, importantly, no good reason has ever been given by the respondent, which is of course a large well-resourced employer, for that delay.

319. Where we have more sympathy with Mr Gorton is in his submission that the breaches in respect of delay are only one aspect of the Code and the respondent did comply with the majority of the Code; this is not a situation where the employer has completely ignored the Code. For that reason, we accept that making the full award of 25% would be disproportionate and, but for the findings which we make below, we would have considered an award of 10% to be appropriate.

320. However, mindful of the guidance in Dogra, we need to consider the absolute financial value of such an award. In the light of the total overall award, an award of 10% of that total under section 207A TULCRA would be an award stretching into the hundreds of thousands of pounds. We consider that this would be completely disproportionate and would result in an unjustifiable windfall to the claimant which would not be in the interests of justice in relation to both parties. Taking into consideration the absolute financial value of the award as a whole, we consider that an award under section 207A of 0.5% of the total of the other awards made would be reasonable. That will still be a reasonable sum of money, but not one which would result in an unjustified windfall.

Overview

321. Finally, stepping back and taking an overview of the amount of compensation which will result from the findings that we have made above, we consider that, in the light of the findings of fact we have made and the losses the claimant has suffered, that although the award will be a large one, it is proportionate, sensible and a just reflection of the chances which we have assessed in our findings of fact and conclusions (Shoukrey paragraph 48); in short, that the award is a just and equitable one.

Summary of answers to the "questions of judgment"

322. For ease of reference, we set out below a summary of our answers to the "questions of judgment" in the agreed list of issues. It goes without saying that this summary needs to be read with the detailed reasons for our answers to those questions set out above and indeed with the findings of fact which we have made.

9. What is the correct manner to calculate loss?

323. Career loss, using multiplier/multiplicand and Ogden Tables, with a multiplicand as calculated above (average annual earnings from date of remedy hearing to 67 retirement based on 2% annual increase); and a multiplier of 11.52 (being 13.88 multiplied by a further reduction factor of 0.83).

324. See the full reasons for details of components of loss and interest on past losses.

325. Special damages £1,565.

10. How long should the claimant be compensated for?

326. Age 67

11. Statutory rights - is the claimant entitled to a payment for loss of statutory rights?

327. £0

12. Injury to feelings – how much should be awarded?

328. £40,000

13. Personal injury – how much should be awarded?

329. £55,000

14. Should there be apportionment? If so, how much (as a percentage) of the claimant's psychological harm and loss was caused by the respondent's unlawful actions? Does apportionment apply to the claimant's entire losses, or does it apply only to the award for personal injury?

330. No apportionment.

15. Polkey – when do pecuniary losses end?

331. Age 67. No Polkey reduction.

16. Aggravated damages – is the claimant entitled to an award and if so how much?

332. Yes. £12,500.

17. ACAS – should there be an uplift, if so what percentage and how much?

333. Yes. 0.5%.

334. For completeness and for ease of reference, the summary of our answers to the "questions of fact" set out in the agreed list of issues are at paragraphs 210-221 above.

Conclusion

335. Whilst as a rule we try to avoid language which might be deemed intemperate, it is nonetheless true to say that the respondent's treatment of the claimant has destroyed the claimant's life. Furthermore, all of the medical professionals are clear that the resolution of these employment tribunal proceedings is necessary as a prerequisite to the claimant beginning to make any sort of recovery.

336. The representatives were both clear that answering the questions in the list of issues which they asked us to do, and which we have now done, would enable them swiftly to calculate and agree the figure for compensation due by the respondent to the claimant. In the light of the doctors' evidence, it is clearly vital for the sake of the claimant's health and well-being that they do so and that that payment is speedily made. If the respondent has any shred of decency in the light of the catastrophic impact on the claimant of its treatment of her, it will ensure that this process is swiftly completed.

3 October 2022

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Employment Judge Baty

Judgment and Reasons sent to the parties on:

03/10/2022

For the Tribunal Office