# EMPLOYMENT TRIBUNALS

**Claimant:** X

**Respondent:** Volkerrail Limited

**Heard:** **6 to 8 July 2022 (in person) in Leeds**
**13 July 2022 by telephone**

**Before:**
Employment Judge JM Wade
Mr M Brewer
Ms J Hiser

**Representation**
Claimant: Mr M Duggan, Queen's Counsel
Respondent: Mr J Horan, Counsel

**Introduction**

A summary of the written reasons provided below was provided orally in an extempore Judgment delivered on 8 July 2022, and in one matter on 13 July 2022. The short remedy judgment was sent to the parties on 22 July 2022. A request for written reasons was made by the respondent on 8 July 2022. On 21 July 222 the claimant requested that the parties have the opportunity to comment on these reasons given the provisions of the Rule 50 Order which is in place. The reasons below corrected for error and elegance of expression, are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the unanimous Judgment sent to the parties on 22 July 2022 are repeated below:

"*The respondent having contravened the Equality Act 2010 as found in the Judgment sent to the parties on 19 November 2021;*
*The final reasons having been sent to the parties in April 2022;*
*The Tribunal having announced its decisions on causation, general damages, future loss, (including likely future earnings), on 8 July, with clarification on the approach to cost of living increases on 13 July; and*
*The parties thereafter having agreed all other consequential calculations and sums*[1]*:*
*The unanimous Judgment of the Tribunal is:*

[1] By excel spreadsheet provided to the Tribunal today.

# *REMEDY JUDGMENT*

*In accordance with Sections 119 and 124 of the 2010 Act the respondent shall pay to the claimant the sum of **£419,352.94**, which includes the following sums:*

| | |
|---|---|
| *Injury to Feelings* | *£ 24, 000.00* |
| *General Damages (psychiatric injury)* | *£ 30, 000.00* |
| *Interest thereon* | *£8142.90* |
| *Past Pecuniary Loss to 8 July 2022* | *£93180.00* |
| *Interest thereon* | *£7025.52* |
| *Future Pecuniary Loss* | *£122,090.42* |
| *Tax/grossing up* | *£134914.10"* |

# REASONS

Introduction and Hearing

1. The claimant brought Equality Act claims including harassment by her line manager, R2, and further harassment and victimisation claims concerning the respondent's response to her grievance. The claims concerning the conduct of R2 were dismissed for limitation reasons. Four complaints against the respondent were upheld by the Tribunal and the facts and conclusions on all matters are set out in reasons sent to the parties on 25 April 2022 (referred to variously in these reasons as "our reasons").
2. The contraventions occurred on or around 22 July, 30 July, 3 August (harassment by the grievance treatment), 10 August (victimisation by a refusal to accept resignation withdrawal), 20 August and 14 September 2020 (harassment by grievance appeal treatment). The entirety of our reasons need to be read into these remedy reasons, but we draw attention to particular paragraphs to assist the parties.
3. The claimant's mental health had been under strain at the last hearing, as it was during this hearing; and her remedy case included damages for personal injury. There was a need to delay the original date for this hearing for reasons unconnected with the parties. The Tribunal continued to manage the adjustments required for a claimant and her advocate, both with disability, including by the provision of screens.

4. We are very grateful that the parties were able to address the right questions to Dr Hallstrom in a joint instruction, to give us clear expert evidence in a report dated 18 February 2022. That report confirmed that the claimant is very unwell. The respondent instructed new representation after that report and at this hearing posed further causation questions to Dr Hallstrom, having sought his attendance. This judgment principally adopts Dr Hallstrom's conclusions and evidence because, having had the benefit of his lengthy report and having heard from him in person, we considered him a very reliable expert witness in whom we could have confidence: decisions based on that evidence were safe.

5. Other witness evidence included that of the claimant, Mr Tichiaz the respondent's HR director, and Mr Drobac, a third party specialist recruiter for the rail sector.

6. The Tribunal had previously made comprehensive case management orders with a direction for the parties to agree a final list of issues. We had refused an application for further expert evidence by employment or recruitment consultant. The parties' respective cases on remedy were set out in the claimant's updated and very detailed schedule of loss, the respondent's equally detailed counter schedule, supported by an Excel financial model, and a helpful note prepared by Mr Duggan. Mr Horan was content to make oral submissions at the conclusion of the evidence and Mr Duggan developed his note and the counter schedule in further submissions.

7. The parties could not agree all of the questions to be decided at this hearing, despite further correspondence with the Tribunal. Neither Mr Duggan nor his instructing solicitor appeared at the November liability hearing, nor a subsequent telephone hearing at which the likely remedy issues were discussed. Principally there were four additional causation points raised in the respondent's counter schedule and draft issue list, and these were addressed in witness evidence from Mr Tichiaz. We addressed our decision making in the sequence which was convenient having heard the evidence immediately prior to submissions.

8. The relevant parts of the Tribunal's remedy orders are set out below. New matters raised by the respondent, or those which had fallen away by this hearing, are underlined:

*"Introduction: this hearing was arranged immediately following the delivery of a liability judgment to the parties on 15 November 2021. The parties have been able to make progress on the instruction of a joint expert, and many matters today were addressed by agreement. I directed my clerk today to share with the parties the typist's transcription of the indications the Tribunal gave as to remedy issues and matters which may assist in agreement of remedy. Those indications were obiter the liability judgment and will not therefore appear in the draft liability reasons ordered below (although the facts and conclusions preceding and underpinning those remarks will obviously appear). The transcript may however assist in reconciling in the interim the parties' notes, if there are any omissions or differences between them, on what was said by way of indication.*

***REMEDY ORDERS***

*1. There shall be a three day remedy hearing in Leeds in person…*
*2. The remedy hearing shall determine the issues in the Annex below, subject to a revised schedule of loss/counter schedule, evidence including expert evidence, and any other matters developing in due course…..*
*……*
*10 By no later than **10 May 2022** the parties shall send to the Tribunal an updated schedule of factual and legal issues……*
*11.2 the parties are to seek to agree an indicative timetable on the basis that:*

*11.2.1. the Tribunal will take two hours reading back into the case and the remedy issues before commencing evidence;*
*11.2.2. The Tribunal will require the large part of a day to deliberate and give Judgment;*
*11.2.3. The parties are therefore likely to have little more than a day and a half for expert, claimant and any respondent witnesses.*
*……*

***… LIKELY REMEDY ISSUES***

*This Annex takes into account the claimant's remedy case at 119(i) and following, her draft list of issues for today, the respondent's likely case, and is adjusted to reflect the Tribunal's findings on the liability case, in particular that the victimisation contravention trumps the earlier resignation and amounts to the effective cause of the loss of employment in all the circumstances. The more difficult question is the extent to which any financial loss is caused by ill health, or the loss of employment, or both – this will involve findings about the pay the claimant would in all likelihood have received,* ***which necessarily includes consideration of the path her employment would have taken*** *absent contravention 13(b)* ***and contraventions 1 (s) (t) and (u)****.* ***The parties are encouraged to recognize such an assessment of fact is difficult enough without them falling into disagreement about the breadth of matters to be considered. The respondent's asserted case on a second resignation in the future, had the claimant been permitted to withdraw the first resignation, is not outside the breadth of matters that ought properly to be considered[2].***

1. *What recommendations does the claimant seek and does the Tribunal consider they are appropriate and would obviate injury to feelings arising from the contraventions?* The claimant sought no recommendations - this matter fell away.

2. *What financial losses have been caused to the claimant by contraventions 1(s)(t) and (u) (harassment) and victimisation (13(b)), including consideration of:*

2.1.1 With regard to the victimisation claim which is based entirely on the decision of Paul Tichiaz not to accept the attempted withdrawal by the Claimant of her resignation, would the chain of causation have been broken in any event on the ground that **the path her employment would have taken absent contravention 13(b) and contraventions 1(s),(t) and (u)** is that the attempted withdrawal of her resignation would in any event not have been accepted for a non-discriminatory reason, as set out in paragraphs 33-40 of the Counter-Schedule so that there would be no continuing loss on an ongoing basis?[i] (Causation 2)

[2] The text in bold was added after correspondence from the parties about the development of the list of issues

2.1.2 Would the chain of causation have been broken by a resignation in the future by the claimant because the respondent did not meet her salary expectations? (Causation 3)

2.1.3 Given that the Claimant had resigned on 20th May 2020 and the findings of harassment relate to a period after that date, is the Claimant limited to the victimisation claim in respect of claiming ongoing losses so that the harassment claim does not give rise to a remedy other than injury to feelings? (Causation 4)

2.1.4 What is the period of time from termination on 20th August 2020 during which the Claimant has been and is likely to continue to be unable to work? The evidence is that the Claimant has not worked up to the remedy hearing and the assertion is that the Claimant will not be able to work until up to 31st August 2023.

*2.1 To what extent was there injury to the claimant's mental health rendering her unfit to work* as a result of the matters relating to the Second Respondent which were found to be out of time) *prior to the contraventions? (Causation 1)*

*2.2 To what extent was there exacerbation of existing ill health as a result of those contraventions?*

2.3 *To what extent might the claimant's health have recovered more swiftly permitting her to return to work absent those contraventions?*

*2.4 When is the claimant likely to recover from any injury such that she is able to earn the sums (£60,000 plus benefits) that she would have earned continuing in employment absent ill health/victimisation? Note: the claimant's remedy case based on earnings from the respondent greater than £60,000 (as at the dates of the contraventions) is not arguable in light of the Tribunal's findings.*

*2.5 Is 2.4 above affected by any treatment pathway, or could a return to health/earnings be expedited in different treatment scenarios?*

*2.6 To what extent does the respondent prove that had the claimant taken particular reasonable steps (there are no details of those asserted as yet), she would have been able to mitigate financial loss and to what extent?*

*This part of the respondent's case was not pursued because of the claimant's proven ill health preventing work throughout the period before the hearing and in all liklihood for some time in the future.*

*2.7 To what extent does the respondent prove the claimant would have been made redundant, and if so when, absent the contraventions? The respondent had abandoned this part of its remedy case by the time of this hearing and Mr Tichiaz confirmed that in his evidence*

*To what extent should earnings in new employment completely offset any claim for ongoing loss?*

*2.8 To what extent might her earnings have risen (for inflation or other ordinary reasons) during the period of alleged loss, absent any ill health/victimisation preventing a return to work? (This may require a consideration of pay awards to comparable posts over the alleged period of loss, if any).*

*2.9 Has the claimant received any sums from economic activity which mitigate her financial loss, and to what extent is she likely to do so?*

3. *Non financial loss*

*3.1 What injury to feelings did the contraventions cause the claimant?*

*3.2 Within which degree of seriousness (Vento Band) do they fall?*

*3.3 What is the just sum to compensate the claimant for those injuries (but not seeking to punish the respondent)?*

*3.4 Should a global sum be awarded or separate sums?*

*3.5 Have the four contraventions caused the claimant personal injury?*

*3.6 If so (see the financial loss questions above)?*

*3.7 Where does any injury fall within the JSB guidelines, taking into account, severity, prognosis and other relevant factors?*

*3.8 What is the just award in respect of person injury (if proven), observing caution to avoid double recovery?*

*3.9 Are there matters, and if so which matters, which give rise to consideration of aggravated damages?*

*3.10 If so what is the just award?*

*3.11 Standing back and conducting a final "sense check" is the sum for non pecuniary loss disproportionate such that justice is compromised?*

*3.12 What is the just interest award?*

This was a matter of calculation agreed by the parties in the excel model.

3.13 *What is the permissible and lawful tax treatment of any awards, taking into account Slade but also that any losses may be found to arise from both injury and the termination of employment?*

As above

9. It was apparent from the claimant's revised schedule of loss and her witness statement for this hearing, that her remedy case forecast a rapid acceleration of salary and benefits had she remained with the respondent, absent the contraventions - her counter factual case, as described by Mr Horan. This was not strictly a contradiction of the Tribunal's indication above (salary in excess of £60,000 at the time of the contraventions, was not arguable), but forecasting a rapid rise in salary had she remained with the respondent did not appear to grasp the detail or obvious consequences of findings made on the last occasion.

10. The parties had also fallen into dispute about the documents to be before the Tribunal for this remedy hearing. The Tribunal had to decide a disclosure application and did so as follows:

*"The claimant's application dated 1 July 2022 that the Tribunal order further disclosure is refused, albeit the Tribunal notes that the respondent has agreed to provide information within request 4. Request 3 may well be satisfied by annexing SAP, SAGE or other snapshot payroll information for [fomer colleague] for the material period to Mr Tichiaz' statement, and this may well assist the Tribunal. The Tribunal makes no order, given the lateness of the first request (27 June) on this matter. Mr Tichiaz will be given permission to address [former colleague]'s pay in supplemental witness evidence.*

*Reasons: The parties are reminded that for a three day hearing, a typical bundle would be in the order of 400 pages.*
*It is sometimes cost effective to put before us all possible documentation in the knowledge that only a fraction will be addressed in evidence, or for fear that one key document will be missed if the bundle is culled, but the approach in this case indicates a lack of realism about the time the Tribunal will be able to spend. That is the context for the application. The timing of the application is late. The relevance of the requests are marginal other than in one respect, but it is not necessary to order the respondent to provide the information at this stage. The Tribunal has been clear about the key factual issues to determine at issue 2.8. Mr Tichiaz' statement does not address [fomer colleague], albeit paragraphs 73, 81 and 82 of the Tribunal's liability reasons explain the basis on which [former colleague] was part of the factual landscape found, and indicate why [the] position may assist findings on remedy. It may not, but it is likely to assist the Tribunal if Mr Tichiaz addresses it. The overriding objective is not served by an Order at this stage.*

11. Unhappily the Tribunal did have a very large bundle – over 1000 pages – for this hearing, most of which arose because both the claimant and Mr Tichiaz sought to relitigate matters about which we had already made comprehensive findings. To some extent both parties appeared to be in denial or ignorance of the findings we had made on the last occasion. We indicated that we would not expand the findings already made, save to the extent necessary to determine the remedy issues. Nor would we re-visit facts or conclusions already determined. That curtailed much of the cross examination which Mr Duggan had expected would be necessary for the claimant and we therefore agreed with the parties to hear the respondent's case first, thereby minimising the time and strain involved in questions for the claimant.

The Law

12. The law applicable to remedy in Equality Act cases such as this informed the framing of the questions in the issue list.

13. The Tribunal applies sections 124 and 119 of the Equality Act to make awards for compensation on the same basis that would arise in any tortious claim in the County Court. That is, to put the claimant as far as money can do it, in the same position that she would have been but for the contraventions that we found. As to causation and loss in psychiatric injury cases, see eg Olayemi v Athena Medical Centre and another 2016 ICR 1074.

14. As for injury to feelings awards, they are compensatory in nature and not punitive. They compensate for subjective feelings of upset, frustration, mental anguish, anxiety, depression and mental torment.

15. Tribunals are first required to assess the severity of the tortious conduct applying the Vento bands. The top band is for the most serious conduct, typically involving a lengthy campaign of discriminatory harassment, the middle band is for serious cases, and the lowest band for less serious discriminatory conduct - an isolated or one off occurrence, or conduct not properly in the middle band.

16. In this case we have to address injury to the claimant's mental health and the cause or causes of that. The respondent cannot be ordered to compensate for harm for which it is not responsible. In making assessments of damages we have to bear in mind the value of money in every day life to the parties in front of us. We were helped by being referred to the Judicial College Guidelines, the 15th edition published in November 2019. The current edition, the 16th, now has three categories of psychiatric and psychological injury recognised, with a third separate category for the victims of sexual abuse. In Part A, general psychiatric injury, the introduction records: "*some of the brackets contain an element of compensation for post traumatic stress disorder. This is of course not a universal feature of cases of psychiatric injury and hence a number of the awards upon which the brackets are based did not reflect it. Where it does figure any award will tend towards the upper end of the bracket. Cases where post traumatic stress disorder is the sole psychiatric condition are dealt with in Part B of this chapter*". The introduction to part B records: "..cases within this part are exclusively those where there is a specific diagnosis of a reactive psychiatric disorder following an event which

creates psychological trauma in response to actual or threatened death, serious injury or sexual violation." We indicated to the parties that the claimant's case was therefore within Part A.

17. The following factors are to be taken into account in assessing psychiatric injury: the injured person's ability to cope with life, education and work; the effect on the injured person's relationships with family, friends, and those with whom he or she comes into contact; the extent to which treatment would be successful; future vulnerability; prognosis; whether medical help has been sought – and a separate consideration for sexual or physical abuse cases.

18. There must not be duplication where both injury to feelings and psychiatric injury are sought. Any awards must command public respect, being neither too low nor too high.

19. It is convenient then to address our findings and conclusions by reference to the matters outstanding on the list of issues in order.

Causation 1 (including issues 2.1 to 2.4, 3.5 and 3.7). Causation 3, and Causation 4

20. The respondent's case on both injury to feelings and psychiatric injury was that Dr Hallstrom had been misled and that the claimant's mental ill health had been caused by the conduct of R2, or at least there were multiple causes such that the respondent could not be found to be responsible for that injury.

21. The respondent asked Dr Hallstrom about this, including whether the conduct of the second respondent towards her had been discussed in his assessment with the claimant, because it was mentioned little in his report. In fact the background of R2s conduct was set out in paragraphs 6 to 22 of the report. The respondent's assertion was that the claimant had not talked about it in her assessment. Dr Hallstrom was clear, and we find: these matters **had** been discussed in an interview, which was twice as long as his usual assessment; he was quite reliant on the claimant's account of the cause of her condition, but that account was supported by the contemporaneous medical records; he did not consider the claimant was misleading him about the cause, and what she said matched up with the records: but for the grievance process, and had her job been secure, she would have made a reasonable recovery back to work within three months. That conclusion is entirely consistent with our reasons, and our findings about the resilience of the claimant in rebuffing R2, and her emotional state during her employment (our reasons paragraphs 3, 42, 47, 48, 55, 61, 68, 80, 92, 93, 114 to 120).

22. Dr Hallstrom further said in his report: …Although there may have [been] some symptoms of anxiety prior to 1 July 2020 and there was a previous episode at the time of redundancies with her previous employer, [May 2019] the indications are that her symptoms were relatively under control and did not cause her any great distress, in 2020 up until the 1st of July. She was still managing work and had not felt the need to contact her GP until the end of June [2020]. There were minor problems but they had not assumed significant proportions. (See also our reasons paragraphs 28 and 29). The claimant had recovered from the May 2019 episode quickly. The claimant had no recorded history of mental ill health before May 2019; at that time she complained of

anxiety to her GP and was prescribed mirtazapine and a small amount of diazepam to help her sleep. She then recovered before starting employment with the respondent, and we know that was from September of that year.

23. Dr Hallstrom was clear there had been injury as a result of the contraventions: "*C has developed a stress related disorder which I consider primarily to be an Anxiety Disorder with panic as a direct consequence of the events during the critical period between 1 July 2020 and 14 September 2020. Associated with her significant Anxiety Disorder she also had significant symptoms [more aligned?] with depression than those of a Post-Traumatic Stress Disorder. In my opinion her Anxiety Disorder is the primary condition, which is interwoven with other aspects of the syndrome*".

24. As to the effects and prognosis of the injury: "*this [R's harassment of C during the grievance and appeal procedures] all resulted in a substantial deterioration in her Anxiety Disorder from what had previously been symptoms that were moderate and controllable into those of major impact resulting in significant symptoms of anxiety depression, with some symptoms of a Post -Traumatic Stress Disorder and a substantial deterioration in her overall functioning and her Activities of Daily Living. She had previously been able to work effectively until at least mid June 2020 and really up until the beginning of the grievance process. Following that her condition deteriorated to the point where she became disabled….* He identified the claimant experiencing suicidal thoughts in reading the grievance outcome.

25. Asked to comment on causation he said: "*following the submission of her grievance and the way it was dealt with over the ten week period between the 1st of July and the 14th of September 2020, she underwent a substantial and quantum deterioration over the way she perceived that R1 and its agents were dealing with her complaint. She felt her complaints had not been investigated properly, that she was not being listened to and the situation was being twisted and distorted."* As to the refusal to accept the withdrawal of the resignation on 10 August, he said*: "This was an additional source of distress. She felt victimised by having had her complaints of sexual harassment dismissed and that she was then herself dismissed which added to her distress and feelings of victimisation."*

26. Asked to comment on whether there were multiple factors which had caused injury, Dr Hallstrom said *that there are always vulnerability factors, precipitant factors and maintaining factors….the overwhelming precipitant was the way she felt the grievance was handled.. the ongoing litigation is the maintaining factor, together with her inability in confiding with those around her; a lesser factor was the failure to accept the resignation withdrawal*.

27. Further: "*The way that her grievance was handled and the appeals process exacerbated her psychiatric condition substantially, resulting in a quantum deterioration from what was a relatively minor condition into one of substantial impact on her overall functioning and mental wellbeing*."

28. We find that the claimant would otherwise have recovered quickly, as she did in 2019, absent the harassment contravention. She would have recovered to be able to return to work, whether with the respondent or another employer, by October 2020, but for the respondent's harassment of her. The victimisation was a lesser factor.

29. The only sound conclusion from Dr Hallstrom's report, jointly instructed, and supplemented by his oral evidence, is that the respondent's harassment of the claimant caused her a significant and debilitating psychiatric condition, where previously she had experienced a minor episode. The condition is anxiety disorder with depression and PTSD symptoms. The PTSD symptoms were significant and severe at the point that they were measured in November 2021.

30. We assess that injury to have been "moderately severe" applying the guidelines. The claimant remains unable to work and to do ordinary things; she remains unable to tell her parents or family or community what has happened; she is living a fiction that she remains working from her bedroom, when in truth she is unable to get out of bed at times. Treatment with medication has not enabled recovery and recovery is unlikely to begin until these proceedings are at an end. On balance the evidence is that she will recover to be able to work to her previous capacity, but in 25% of cases recovery does not happen. The claimant will retain, in all likelihood, a vulnerability throughout her life. She certainly has not, "largely recovered", and the prognosis is, on balance, recovery over time with professional help.

*31.* It follows from these conclusions that the respondent's contraventions are responsible for both the injury and the financial losses arising from it. These conclusions also address Causation 3 and 4. The claimant's May 2020 resignation does not break the chain of causation: had she not been injured by the respondent's harassment of her from July to September, she would have recovered to replace her earnings by October 2020, whether with the respondent, or, as she did in 2019, by securing new employment with a different employer. The injury, the *quantum deterioration from what was a relatively minor condition into one of substantial impact on her overall functioning and mental wellbeing*, has prevented that, and it is the cause of her lost earnings. The earlier resignation did not cause her injury; without the injury she would have been able to secure other work.

*32.* Similarly, leaving the respondent because of salary unhappiness in the future, even if likely, does not break causation in these circumstances. It is the claimant's inability to earn her previous remuneration (whether from the respondent or another employer) that its tortious conduct has caused. Any party causing tortious injury will be liable for lost earnings for until those earnings might recover, irrespective of where those earnings might have come from, subject, in very long loss periods, to discounts to recognise the vicissitudes of life – that nothing is certain. That was not the basis on which these points were put, nor is the loss period that we have found, at the claimant's age, such that such a vicissitudes discount would be appropriate.

<u>Issue 2.1.4: What is the period of time from termination on 20th August 2020 during which the Claimant has been and is likely to continue to be unable to work? The evidence is that the Claimant has not worked up to the remedy hearing and the assertion is that the Claimant will not be able to work until up to 31st August 2023.</u>

33. To address not only this question, but the positions in the parties' schedules as to the claimant's likely earnings going forward, we were helped by a mix of evidential material: we had our previous findings about the salaries paid by the respondent and earned by the claimant (our reasons paragraphs 29, 32, 81, 82); the claimant's statement for this hearing; email correspondence from a recruitment contact of the claimant; Mr Tichiaz' statement and a supplemental statement addressing a pay increase of a former colleague of the claimant; and Mr Drobac's statement. We have to make findings about what will happen from now, the claimant's future trajectory, doing the best we can tethered to the evidence we have. The claimant has been unable to work because of the psychiatric injury she sustained because of the respondent's harassment of her.

34. The issue of when the claimant might recover is addressed in Dr Hallstrom's report. His report forecast some "responsible employment" within two years and back to her previous level within three years, of the conclusion of these proceedings. He explained those conclusions during his oral evidence and we accept that summary. He considered necessary a three month period of rest, followed by a year of re-integrating into the workplace. In a year and three months from now the claimant will be in a position to start applying for "proper jobs", returning to her previous level within three years. That is the hope, and on balance, the likelihood. His assessment was made after a very lengthy discussion and consultation with the claimant, with a great deal of information exchanged. At the time of their consultation in February 2022, recovery over this period was the claimant's hope.

35. Unsurprisingly by the time of this hearing she has reservations about that position because the future is not certain. The optimistic factors from Dr Hallstrom's point of view are that the claimant is young, she has lots of skills and she is highly motivated. These are factors relevant to both recovery and returning to previous earnings, albeit, given the clinical data on recovery outcomes generally, we appreciate why the claimant would exercise a great deal of caution in her sworn evidence. Exercising similar caution, the claimant sees the rehabilitation period of a year as taking place through volunteering or education, but we find it is unlikely to be solely that, and that she will achieve some paid work.

36. One aspect of the recent past and the immediate future is this litigation. It has been a maintaining factor. Dr Hallstrom's evidence is that the claimant has been treated with medication for two years' now, but remaining very unwell. Improvement will only start when the proceedings are at an end, was his assessment based on years of experience. The proceedings were expected to end in May, the original date for this hearing. Since Dr Hallstrom met the claimant, there has been the delay to this hearing, and, known to the parties and the Tribunal, there is an appeal against our liability findings. No one can say when that will conclude, and so the claimant submits we should err on the side of a longer period, or make some allowance before starting the recovery period. That appears to us difficult as a proposition, on general principles. We were without authority to help us.

37. We have decided that the proper approach in the interests of justice is to put the appeal entirely out of our minds and to assess matters on the basis of findings tethered to matters as they are today. The respondent is only responsible for injury, or a period of ill health, which its tortious conduct has caused. A respondent in such circumstances can seek to propose recovery measures or steps to shorten that period by offering to fund treatment and so on; and insurers often do so on receipt of appropriate medical evidence. On the other hand, if that recovery is extended by conduct found to be aggravating conduct, then that would properly sound in an award of aggravated damages, it seems to us. Presenting an appeal, unless it were manifestly and knowingly misconceived, cannot be such conduct. For our answer to this loss question then, we work from the basis that the claimant can start her rest period with a good degree of relief from the strain of litigation, upon this Judgment being confirmed.

38. We find that the claimant will remain unable to work or to do very much of anything other than rest, for the three months recuperation period described by Dr Hallstrom. There will then in all likelihood be a period of six months of volunteering or study, without any income at all, before she can reasonably secure paid activity. We find she will be able to enter the workplace in the following six months at an entry level or recuperative post, part time and three days per week. Deploying our industrial knowledge and the evidence of both parties, we find the likely salary level for such a post to be £25,000 (measured at today's salary levels).

39. We then find that she will in all likelihood be able to earn sums at that entry level, but full time after 15 months from today, until 21 months from today (uprated for inflation). In that time she will also be looking for the next mid-range post, of greater challenge and closer to her previous roles and skills. We consider, taking account of the claimant's well recognised ability and drive before she became unwell, that in all likelihood she will achieve a post on a salary measured at today's levels of £40,000, for the final 15 months of Dr Hallstrom's three year forecast – achieving the responsible employment within two years as he said – before progressing again to her previous earnings. Those salary levels will also need to be uprated for inflation.

40. We then have to answer the counterfactual question, but for the injury, what sums would the claimant have earned, from when?

41. We were very clear that the salary, benefits and grade decisions concerning the claimant's post, were made without any reference or knowledge of the matters alleged against the second respondent, nor with knowledge of the claimant's grievance. The decision was made for commercial reasons in context at that time. Nothing to do with R2, everything to do with the circumstances at the time and the judgments of the directors including Mr Tichiaz (see our reasons paragraphs 73, 75, 81, 82, 97, 115, 116). That decision would not have changed.

42. The claimant's evidence, is that she would have returned to the title which was in discussion between the parties, had harassment and victimisation not

happened, and we find that she would have done. Her previous employment had been five years in length; within those five years she had progressed (paragraph 28). We consider it safe to assess the claimant's likely counter factual future by reference to her past. We consider that she would have stayed with the respondent, having "outed" the pursuit of her and other conduct by R2. She would also have sought to improve her financial position. There are two parts for that endeavour to be successful: the claimant's aspiration, performance, enthusiasm and drive, on the one hand; and the respondent's oversight and prudent decision making on salary and benefits. It is certainly likely that had the claimant been dissatisfied with her progression at the mid-point within that five year period, she would have contemplated departure. That period is October 2020 (when, absent the contraventions the claimant's health would have recovered to enable her to return to the respondent or another employer), and October 2025, when we consider she will have recovered her previous earnings and high functioning.

43. These counter factual findings are entirely coherent with our previous findings – see paragraph 108. R2's conduct was very poor. It is unimaginable that the very important work that the claimant had been doing, and from which she would not have been made redundant, would have been permitted to continue under him. The most likely destination for the claimant's post in October 2020 would have been back to the team where it had first started, or to another director. She would have been starting a new line management relationship or renewing one, resuming delivery of the respondent's objectives.

44. In that context we reject the claimant's case that she would have, in January 2021, secured a pay rise to £70,000 at Grade E and with the bonus and so forth that is entailed in her schedule. To secure that situation, the respondent would have needed to agree to designate a new post, effectively to create a promoted post, within six months of declining to do so despite significant lobbying. It is right that it did create a new post for the colleague whose progression was also slowed by the turn of events (see paragraph 73), but there was no similarity in their posts. That colleague's division and responsibilities were revenue generating, and seen to have potential for growth. The claimant's functions were business critical, but not directly revenue generating. It does not follow that the promotion outcome would have been the same for the claimant's function or post, given the final position reached in June 2020. In fact, that made a promoted post in the short to medium term highly unlikely for the respondent, and we can safely reject it.

45. More likely, and we find, the claimant's post would have achieved an in-grade salary increase beyond the inflationary standard increases that were to be applied over the period (and about which the parties can agree). At the mid point between October 2020 and October 2025, we consider there would have been a role promotion, or market based uplift of £5,000, because the area of the claimant's work was an essential pillar for the respondent's delivery, in a highly competitive sector. See also our reasons paragraph 154. The claimant was also someone who would muster the arguments for such a rise. In that we deploy our industrial knowledge and we consider Mr Tichiaz' evidence overly pessimistic on that score. On the basis of the claimant's

clear track record in achievement and delivering, and her ambition for pay to reflect that, and having built up a track record with new line management, we consider that she would achieved such an increase. Had she not achieved that with the respondent, she could have secured it elsewhere, and would have done so.

Causation 2

46. Mr Duggan says that there is a preliminary or foundational point that we need to address. He says that we had clear evidence in this hearing that the reason why the claimant was not permitted to withdraw her resignation by Mr Tichiaz was his belief that there would be pay related unhappiness later on and the legal advice he received supporting his view that a withdrawal did not have to be accepted. Mr Tichiaz thereby does not accept the Tribunal's analysis and conclusions at paragraphs 151 to 159. Both in its counter-schedule and today the respondent says that because the ending of the claimant's employment through resignation would have happened anyway, through the refusal to accept the withdrawal, which on Mr Tichiaz evidence today was absent tortious conduct, her earnings would have ceased anyway and she cannot pursue this loss.

47. We expressed our reservations about this point being pursued in this way. The Tribunal's analysis of the evidence about why the respondent did not permit the claimant to withdraw her resignation, is set out in our reasons paragraphs 151-159. We upheld the allegation applying the burden of proof provision. We had not heard from Mr Tichiaz, who accepted in his statement for this hearing, that our finding that he was the decision maker was right. It is wholly unjust in those circumstances for the respondent to seek now to persuade us, in a different context, to reach a different conclusion. As it is, our concerns need not be addressed other than to repeat our findings at paragraphs 151-159, because the point does not succeed in any event.

48. We repeat our preliminary identification of the potentially difficult issue in this case: *The more difficult question is the extent to which any financial loss is caused by ill health, or the loss of employment, or both – this will involve findings about the pay the claimant would in all likelihood have received,* ***which necessarily includes consideration of the path her employment would have taken*** *absent contravention 13(b)* ***and contraventions 1 (s) (t) and (u)***. Our conclusions above are clear that the overwhelming cause of the claimant's financial loss, her lack of earnings, has been her ill health. This preliminary point, as put, may have been of greater significance if the medical evidence and our conclusion about the cause of the claimant's financial loss had been different. As it is, it can safely be rejected. The tortious harassment caused the injury – the quantum deterioration as described – and that injury has caused the claimant financial loss. The victimisation was a lesser cause of the injury, but it follows that even if Mr Tichiaz' decision to refuse to permit the claimant to withdraw her resignation on 10 August was not tortious, the claimant would have sustained the financial losses and injury that she did sustain.

Issues 3.1 to 3.4 and 3.8 to 3.11

49. We then come to the non-financial loss. The degree of injury to feelings has been substantial in this case. It is somewhat artificial to seek to distinguish from psychiatric injury, the element that is injury to feelings. Nevertheless, that is appropriate in this case. We have to arrive at a total that commands respect, and is not a path to untaxed riches, bearing in mind the Vento guidelines and the Judicial College Guidelines, standing back from the individual components.

50. We repeat our reasons paragraphs 130 to 169. The claimant felt punished by the respondent's treatment of her grievance, while R2 continued working apparently unaffected by matters. The claimant could not believe the outcome to the grievance when it was read out to her, nor that she was being told she was leaving the organisation, which compounded the upset. Reading the written report when sent to her was also terribly upsetting and brought on a panic attack in which she was struggling to breathe. She had suicidal thoughts and was in despair, contacting her friend for support. She felt extremely vulnerable and betrayed.

51. Those feelings were compounded by the appeal hearing and outcome. She felt very low and the appeal caused her to re-live detail and made her feel worse. She did not know how she could face her family and spent an hour or more crying in her car. She was mortified by Mr Gallagher's comments about her in the appeal outcome letter. His regretted comment concerning her treatment being a reward during the meeting was shocking to her.

52. Her feelings were not comforted or improved by communications with the respondent concerning setting up the appeal and its aftermath, nor Mr Tichiaz decision not to permit her to withdraw her resignation.

53. On the basis of these findings, we have assessed the just award for the injuries to the claimant's feelings as £24,000. The respondent said this was a mid band case, towards the lower end, and the claimant, the top of the top band. Her evidence concerning the injury to her feelings was not challenged, save for seeking to make the point that it was caused by R2's conduct, which we reject above.

54. We first identify the conduct of the employer which puts us into a particular Vento band. This was conduct of senior, but different people, in three phases: the grievance, the resignation withdrawal rejection, and the appeal. Were each of these tortious acts considered separately we would award £10,000 each for the grievance and appeal treatment each, and £4000 for the victimisation. Together, they are properly towards the top of the middle band; the claimant did not distinguish between them, but this was a helpful way for us to sense check the matter. The cumulative conduct was not a prolonged campaign against her of the very worst kind, but it was serious. It was a betrayal by an employer in whom she had placed trust by reporting her treatment.

55. Our further assessment is that £30,000 is the just assessment of her psychiatric injury, having allocated it to the moderately severe category for the reasons above. The claimant had a vulnerability because of a minor episode of anxiety symptoms in 2019, but this is not an exacerbation case, and

nobody submitted that it was. The claimant has had several different types of counselling, the first spell of which was ultimately extended by the respondent, but not beyond January 2021. Subsequent counselling and medication does not appear to have brought improvement in her condition. We repeat the medical evidence above.

56. The claimant put her injury at the top of the moderately severe PTSD category. The claimant's approach to the risk of potential injury to feelings/psychiatric injury overlap was to say that she did not exceed the top of the most severe band in Part B - PTSD when amalgamating her claim with the injury to feelings award. The respondent said this was manifestly excessive.

57. We have placed our assessment in the moderate category, and in the middle of that band between £17,900 and £51,460. In doing so we take account of potential overlap, but are satisfied that the injury to feelings award above addresses the immediate feelings we have described, whereas the JCG award represents the sustaining of a much longer lasting and profound psychiatric injury. There is no duplication. The longevity and seriousness of the injury has not been helped by the matters the claimant seeks in aggravating damages, but this is addressed by the placement of her injury in the moderately severe category because, no doubt all the JCG factors have been maintained (rather than improved) by the matters below. To make a separate award of aggravated damages in the sum claimed, would, in our judgment then risk duplication, even if the matters were considered aggravating conduct by the Tribunal and we include our brief findings below in deciding not to make such an award.

58. The events that the claimant describes following the tortious acts, and which she seeks to pursue by way of aggravated damages, are as follows:

    58.1. Not answering the claimant's reasonable questions during the process; the claimant sought to pursue a resolution to her grievance by reference to the Equality Act in her communications with HR; she did not receive satisfactory replies, if any; we do not consider it in the interests of justice to make an award of aggravated damages for the reason above.

    58.2. Pushing the claimant towards a second appeal with Paul Tichiaz (who had plainly been involved earlier); this happened in fact, but we repeat the comment above.

    58.3. The nature of the grievance and appeal responses; this is remedied in the injury to feelings award – see our findings above.

    58.4. Derogatory comments in the "my thoughts" document and by HR in internal emails seen by the claimant after a subject access request; the first comments were part of the Tribunal's analysis in upholding the complaint; and the second is a person speaking frankly with genuine curiosity in unusual circumstances, and not in terms as to generate an award.

    58.5. The failure to support the claimant's therapy in January 2021; this may have been unwise with hindsight, but it is not in the character of aggravating conduct in our judgment.

58.6. The respondent's aggressive defence of her claim when the claimant was a litigant in person; this was not particularised. The claimant brought lengthy and complex claims and sought legal advice after the first case management hearing.

58.7. Four days of intensive and invasive cross examination; this is a wholly wrong characterisation of the events at the liability hearing; it may be the claimant's subjective perception, but the cross examination of her was undertaken with care and subject to the oversight of the Tribunal. Her claims were lengthy and complex and putting the respondent's case to her was necessary in the interests of justice.

58.8. The failure to apologise; this is a fair criticism of the respondent, save that it does not accept the Tribunal's judgment and an apology would arguably be inconsistent with that position. Had there been an apology the respondent may have relied upon it in challenging the extent of injury to feelings, but there was not, and the Tribunal has made an award in respect of injury to feelings.

58.9. Appealing the liability judgment: pursuit of this aspect was properly withdrawn during case management.

59. The claimant's unparticularised application for costs of "circa £100,000 plus VAT" is dismissed. The grounds asserted were that the respondent's defence of the successful aspects of her claim was unreasonable and misconceived, and the requirement to attend the remedies hearing was unreasonable.

60. The claims were complex and lengthy against two respondents. Many of them were dismissed including for limitation reasons. They were fact sensitive and required a hearing with evidence. Unless the parties agreed remedy a hearing with the claimant's attendance would be required. And it is clear that the Tribunal has not upheld all aspects of the claimant's schedule of loss. Neither the respondent's defence of the claim, nor of the remedy claimed, can be said to be unreasonable or misconceived in the face of the claims and arguments it faced.

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Employment Judge JM Wade

Dated: 25 August 2022