



# EMPLOYMENT TRIBUNALS

**Claimant:**

Mr M Richards (deceased)  
by his personal representative  
Mrs W Richards

v

**Respondent:**

Brocade Communications Ltd

**Heard at:**

Reading (by CVP)

**On:** 5 and 6 October 2022 and  
10 October 2022 (in chambers)

**Before:**

Employment Judge Hawksworth  
Ms G Binks  
Mr A Kapur

**Appearances**

**For the Claimant:** Miss H Platt (counsel)

**For the Respondent:** Mr N de Silva KC (counsel)

## RESERVED REMEDY JUDGMENT

The unanimous decision of the tribunal is that the respondent must pay the claimant the sum of £1,768,369.22 comprising:

1. £1,244,975.86 for financial losses (of which £119,115.21 is interest);
2. £38,678.36 for injury to feelings (of which £10,678.36 is interest);
3. £500.00 for loss of statutory rights;
4. £484,215.00 in respect of tax payable on the award ('grossing up').

## REASONS

### Claim, hearing and evidence

1. The claimant's claim was presented on 11 April 2018 after a period of Acas early conciliation from 16 January 2018 to 31 January 2018. The claimant complained of unfair dismissal, disability discrimination and age discrimination. The respondent presented its response on 2 July 2018 and defended the claim.
2. The liability hearing took place wholly by video, on 12 to 15 July 2021 and 28 October 2021, with a deliberation day on 20 December 2021. The

claimant's complaints of failure to make reasonable adjustments and unfair dismissal succeeded. The complaints of direct and indirect disability and age discrimination failed and were dismissed.

3. Very sadly, the claimant died on 16 April 2022. The remedy hearing was due to take place on 25 April 2022 but at that time no personal representative had been appointed. We decided that, in the absence of a personal representative, there was no representative of the claimant's estate with legal standing to continue the claim, and as the tribunal had no power under the Equality Act 2010 to appoint a person to continue the claim, the remedy hearing could not proceed on that day.
4. Probate in Mr Richard's estate was granted on 28 September 2022. Mrs Richards and her co-executor were granted administration of the estate and Mrs Richards, as personal representative, continues the claimant's claim:
  - 4.1. under section 206(3) of the Employment Rights Act 1996 in respect of the claimant's complaint of unfair dismissal; and
  - 4.2. under section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 in respect of the claimant's complaints of disability discrimination under the Equality Act 2010.
5. The re-listed remedy hearing took place on 5 and 6 October 2022 with a deliberation day on 10 October 2022, all by video. We heard evidence from Mrs Richards. On behalf of the respondent, we heard from Mrs Mattison (HR director) and Mr McGrath. All these witnesses had prepared and exchanged witness statements. We also heard evidence from the claimant's consultant oncologist, Professor Pandha. We had four reports prepared by him between 12 July 2019 and 18 March 2022.
6. We also had a supplemental witness statement on remedy issues which Mr Richards had prepared. We considered our approach to Mr Richards' statement carefully, bearing in mind that his evidence in that statement could not be the subject of cross-examination. We have explained in our findings of fact those areas where we have accepted Mr Richards' evidence on factual issues which were in dispute, and why we have done so.
7. There was a main remedy bundle of 520 pages. References to page numbers in this judgment are references to the main remedy bundle. After the postponement of the remedy hearing on 25 April 2022, a supplemental remedy bundle was prepared (it had 12 pages). It included the updated schedule of loss and counter schedule.
8. The claimant's counsel prepared a skeleton argument on remedy. Both counsel provided helpful written and oral closing submissions.
9. The tribunal reserved its judgment on remedy and met in private for deliberations on 10 October 2022.

## The Issues

10. The remedy hearing is for the tribunal to decide the compensation which the claimant should be awarded for disability discrimination (that is, failure to make reasonable adjustments) and unfair dismissal.
11. The parties had produced updated schedules of loss and counter-schedules of loss for the hearing, and a largely agreed list of issues for determination of remedy. A copy of that list is attached as an annex.

## Findings of Fact

12. We set out here our findings of fact from the liability judgment which are relevant to the remedy issues, together with the further findings of fact we have made.
13. The claimant was employed by the respondent from 28 June 2004 until his dismissal for redundancy on 31 December 2017. The claimant died on 16 April 2022. He was 63 when he died.

## The claimant's pay and benefits

14. At the time of his dismissal, the claimant's gross annual basic pay was £150,150 (equivalent to net weekly basic pay of £1,745.01). The claimant had an additional contractual element of variable pay which was related to performance and targets. In his contract this was referred to as a 'variable compensation portion' which was paid 'in addition to ...base salary' (page 53).
15. The claimant's total pay (basic pay plus variable pay) was called On Target Earnings (OTE). The parties agreed that at the time of his dismissal the claimant's gross annual OTE was £200,200 (equivalent to net weekly OTE of £2,252.68). The claimant always met his performance targets and achieved his OTE.
16. The claimant was a member of the respondent's pension scheme. The respondent contributed 7% of his gross salary (OTE) per year.
17. The claimant had other benefits as an employee of the respondent. After the acquisition of the respondent by Broadcom Inc, some of the providers of these schemes (and the terms of the schemes) changed. The benefits were:
  - 17.1. Medical insurance which provided private healthcare cover for the claimant and his wife. The claimant had had private healthcare funded under this policy for a period of around 12 years at the time of his dismissal.
  - 17.2. Life insurance which provided a death in service benefit. The respondent's scheme provided a lump sum payment of 4 x annual OTE. After the acquisition of the respondent by Broadcom Inc, the scheme changed. The scheme in place for the period 1 September

2021 to 31 July 2024 provided a lump sum of 4 x salary. Salary was defined as basic annual salary prior to any salary sacrifice in respect of pension (page 481 and 483).

- 17.3. Permanent health insurance (PHI) which, after 6 months' absence from work, provided 75% of basic salary up to age 65 (page 479). The scheme which applied before the acquisition included a cap on annual payments which could be made under the scheme, but the scheme after the acquisition, which applied from 2018, did not have any cap.
18. The claimant was also entitled to a car allowance which was £9,000 per annum by 2017. However, this allowance was discontinued after the acquisition by Broadcom Inc, and it was replaced with mileage reimbursement for business travel. We accept the evidence of Mrs Mattison that no compensation was paid to employees for the loss of the car allowance. The loss of the allowance was taken into account in the stocks (Restricted Share Units, or RSUs) which were offered to employees at the time of acquisition, and it was anticipated that these stocks would exceed the value of the car allowance over time (page 491).
19. The parties agreed that if the claimant had not been dismissed, he would have received RSU stocks at the time of the acquisition which today would have been worth £153,000.

#### The claimant's dismissal

20. The claimant was dismissed with effect from 31 December 2017. We found that the respondent failed to make reasonable adjustments to the alignment and consultation processes, including failing to offer the claimant suitable alternative employment by modifying his role or offering a new role. If the respondent had made adjustments, the claimant would not have been dismissed.
21. On dismissal, the claimant was paid in lieu of three months' notice (equivalent to pay to 31 March 2018). No employer pension payments were made in respect of the pay in lieu of notice (page 44).
22. The claimant received a statutory redundancy payment of £9,535.50 (page 44).
23. The claimant was not engaged in any paid employment after his dismissal on 31 December 2017. He helped out family members with some unpaid consultancy work.

#### The loss of medical insurance

24. The most significant impact of the dismissal for the claimant was that he lost the medical insurance provided to him as an employee of the respondent. The prospect of losing his medical insurance was a significant concern to the claimant throughout the alignment and redundancy process.

25. As we found in our liability judgment, it was not possible for the claimant to obtain similar medical insurance cover on a personal basis or it was prohibitively expensive. Some companies declined to provide cover. The lowest quotation the claimant received for medical insurance was £105,923.60 per year.
26. We found that the loss of access to private healthcare affected the treatment the claimant received in that he had longer waiting times for diagnosis and treatment and less continuity of care than previously.
27. We heard evidence at the remedy hearing from the claimant's consultant oncologist, Professor Pandha. He treated the claimant for many years and saw him on a monthly basis. We accept Professor Pandha's evidence that the most important impact of the claimant's loss of access to private health care was the speed and coherence of his care. If he had retained his private healthcare cover, all of the claimant's health issues could have been treated at one hospital. This would have made access to specialists quicker and more efficient, and would have reduced the claimant's anxiety. It would also have reduced the duration of certain symptoms, because of a longer wait for radiotherapy, although this was not clear cut because, even if the claimant had had medical insurance, a decision might still have been taken to delay radiotherapy in case the pain settled of its own accord.
28. In terms of differences in available medication and interventions between the NHS and the private sector, Professor Pandha suggested that it was possible he would have treated the claimant with one additional therapy if he had been treating him privately but that it was more likely that ultimately the claimant's treatment would have been the same. However, a 'joined up approach' in terms of coherence of care would have been a bit better for him. We find, based on Professor Pandha's evidence, that it was likely that the claimant received the same medication and interventions under the NHS that he would have had if he had been continuing with private treatment.
29. Longer waiting times and reduced coherence of care caused the claimant increased pain (that is, pain over a longer duration) and anxiety. This had a significant impact on his quality of life and overall health.
30. After his dismissal the claimant paid for some private healthcare. These payments were £1,175.10 in total (pages 173 to 181).
31. The claimant's medical insurance through the respondent also covered Mrs Richards. After the claimant was dismissed, Mr Richards paid for a personal medical insurance policy for Mrs Richards. For the period 1 May 2018 to 30 April 2021 (3 years, that is 36 months) the cost was £108.58 per month (page 108). From 1 May 2021 to 1 May 2022 (12 months) the cost was £350 per quarter which equates to £116.67 per month (page 114).

Other impacts of the dismissal on the claimant

32. We have accepted the claimant's evidence in his remedy statement about the impact of the dismissal on him. This is because it is consistent with what he said in his liability statement and what we heard at the liability hearing, and with Mrs Richards' evidence in her statement.
33. The claimant was devastated by the loss of his employment. He felt that the respondent had shown a throw away attitude towards him, as he had only one brief consultation meeting with a senior manager during the redundancy process, despite raising issues about disability.
34. The claimant's confidence and self-esteem was damaged by the loss of his job. He enjoyed his work and wanted to continue working as long as he could. This was supported by Professor Pandha's evidence and by the fact that the claimant had in the past had very little time off work even when experiencing very significant health issues. (For example, the claimant had 3 weeks off after surgery in December 2005, and 2 weeks off after a heart attack in November 2016.)
35. The dismissal meant that the claimant experienced a significant increase of stress and worry about his lack of income and pressure on his life savings, at the same time that he was dealing with the stresses arising from his health issues.

#### Permanent Health Insurance (PHI)

36. A claim could be made under the respondent's permanent health insurance (PHI) policy after 6 months' absence from work. If a claim had been accepted for the claimant, he would have remained employed by the respondent, and would have received monthly payments from the insurance company equivalent to 75% of basic salary up to age 65.
37. At the time of his dismissal, the claimant was not eligible to claim under the PHI policy because he had not been absent from work for 6 months. Mr McHugh, the respondent's director of HR, said in his evidence at the liability hearing that it would not 'sit right' to have considered making a claim under the PHI policy for the claimant as an alternative to dismissal. He said that because the claimant was still able to work, it would have felt 'almost fraudulent' to have considered making a claim. The claimant was shocked and upset by that comment.
38. Professor Pandha said, and we accept:
  - 38.1. whether someone with the claimant's health conditions should remain at work or not is very much a matter for the patient to decide in conjunction with their doctor;
  - 38.2. the claimant's symptoms and his underlying diagnosis would have justified him being signed off sick from work from 2018 onwards;
  - 38.3. the claimant preferred to remain at work as long as he could. The claimant's character and resolve were quite remarkable, and he was very much at the top end of the spectrum in terms of how much

normality he was able to keep in his life, given the health issues he had.

39. We find on the basis of Professor Pandha's evidence that, if the claimant had not been dismissed on 31 December 2017, the claimant could, at any time from 2018 onwards, have made a decision with Professor Pandha that he should be certified unfit for work. (The view of the respondent's medical expert, Professor Waxman, was similar. He said that many patients would not have been able to continue working full time or part time with the symptoms the claimant had from late July 2018.)
40. We find that if the claimant had been certified unfit for work, he would have qualified for PHI after he had been absent for 6 months. He would have met the terms of the scheme. We find that the PHI payments paid to the claimant would have been 75% of net basic pay, not 75% of OTE. The terms of the scheme in the summary we have seen refer to basic pay not OTE. Although the variable element of the claimant's pay was contractual and the claimant always received his full OTE, the variable element of pay was still expressed in his contract as a separate element of pay than basic pay.
41. It was accepted on behalf of the claimant that he would not have wanted to reduce his hours and to work part time as a reasonable adjustment, because of the availability of PHI. We accept that once the claimant was no longer able to work full time, it is more likely that he would have gone onto sick leave and then onto the PHI scheme, rather than reducing his hours.

How long would the claimant have continued working if he had not been dismissed?

42. Therefore, the parties agreed that, if he had not been dismissed, the claimant would have continued working for the respondent full-time, and when he became unfit to continue in his role full-time, he would then have moved onto the PHI scheme. The move to the PHI scheme could only have taken place after the claimant had been on sick leave for six months. Neither party suggested that the claimant's pay would have been reduced during the six month period he would have been on sick leave prior to becoming entitled to apply for PHI.
43. We have to decide the point in time at which, if the claimant had not been dismissed, his health would have led him to stop full time work with the respondent, such that he would then have become entitled to PHI payments 6 months later. This is obviously a hypothetical question and is not easy to answer. We have carefully considered the evidence which is relevant to this question.
44. We find that the role that the claimant would have been performing if he had not been dismissed would have been likely to have been a regional sales manager or regional sales director role. In both roles the claimant would have been required to travel more regularly, within the UK and/or abroad. That requirement would have stopped in March 2020 when global

restrictions came into place because of the pandemic. Regular travel was unlikely to have been required again until the latter half of 2021.

45. The medical evidence showed that the claimant had major health episodes in 2018. He had increasing pain and symptoms for which he was treated during the period March 2018 to November 2018. During this time he had courses of radiotherapy to the clavicle, thoracic spine and lower spine (pages 115 to 131). The claimant had significant symptoms for about 9 weeks in about July/August 2018 and would have required time off work. He also had significant exacerbation of symptoms after radiotherapy in November 2018 (pages 128 and 131). By December 2018 many of his symptoms had settled down and he was able to go on a holiday abroad (page 130).
46. The claimant required tests and treatment for a number of issues in 2019 and 2020, including skin cancer in August 2019, cardio investigations in January 2020, blood pressure treatment in November 2020 and colorectal investigative procedures in March 2021. In his letter of 9 June 2021, Professor Pandha said:

*“...for the last two and a half years he has maintained a reasonable quality of life, all things considered, but is limited by his gastrointestinal issues and high blood pressure which is finally being resolved.”*

47. There was a significant difference between the parties about when the claimant would have stopped working full time. On behalf of the claimant, it was said that he would have been well enough to continue in full-time work for the respondent until July 2021 (and, as PHI payments could not start until after 6 months of sickness absence, that means that the claimant's case is that entitlement to PHI would have started at the end of December 2021). The respondent said that the claimant's health would have led him to stop work and move onto PHI much sooner, by 1 October 2018 (that means that on the respondent's case, the claimant would have stopped work by 1 April 2018).
48. Miss Platt relied on Professor Pandha's report dated 8 February 2022. In that report Professor Pandha said that the claimant could have continued working until mid 2021:

*“[His] current health is such that I fully agree he is not well enough to work. Looking back at his medical history and performance status he was able to travel to the USA in December 2017. I understand he stopped working in September 2020, but I think could have continued with suitable adjustment such as part-time work or working from home beyond that time. He has probably been too unwell to work since around the middle of last year.”*



49. We have to treat the suggestion that Professor Pandha's report means the claimant could have remained in full-time work until mid 2021 with some caution, because:
- 49.1. Professor Pandha's reference to the claimant having stopped work in September 2020 is not correct. The claimant had not been at work since 31 December 2017. That is an important difference in the factual background which Professor Pandha had in mind when assessing how long the claimant could have remained at work;
  - 49.2. Professor Pandha told us that normally he would wait for patients to have a discussion with him about whether they ought to remain at work. We understood his evidence to be that because he had had no such discussion with the claimant from 2017 onwards, that meant the claimant felt he was well enough to remain at work. However, the claimant was not at work after December 2017, so there would have been no need for him to have that sort of conversation with Professor Pandha. We do not think that the lack of a conversation about work meant that the claimant was well enough to remain at work;
  - 49.3. The claimant told us in his witness statement for the liability hearing that he had not been well enough to work since December 2017 ("Since my dismissal, I have not had the health to allow me to try to return to work in order to mitigate my financial loss.") and in his remedy statement that he had only 'initially' looked for other roles ("I did initially attempt to mitigate my losses and looked for other roles or consultancy opportunities");
  - 49.4. Professor Pandha's opinion is based on the claimant being able to continue for part of the period up to mid 2021 (he says September 2020 to mid 2021) on a part-time or home working basis, not on a full-time basis. He accepted that the claimant may not be doing prolonged international travel as he used to be doing and that a part-time role would have been better for him.
50. The respondent relied on a report from Professor Waxman, a consultant oncologist (page 496). Professor Waxman provided a report based on his review of the liability judgment, witness statements and some of the claimant's medical records (he did not meet the claimant). He said, with reference to the symptoms the claimant had from late July 2018,:
- "...it would have been unusual for a patient to continue at work full time, and for many patients indeed this would signal the end of part time employment.*
- However, it may have been possible for Mr Richards to have continued work on a part-time basis from the end of 2018 to August 2021..."*
51. Professor Waxman felt that if he had been able to remain at work until summer 2021, the claimant would have been likely to have been working part-time from the end of 2018.

52. We have to decide what we think would have been most likely to have happened. Based on the evidence we have set out above, our finding is that the claimant would have started a period of sick leave in mid 2018 and that he would have moved onto PHI payments from 1 January 2019. We have reached this finding because:
- 52.1. The claimant's role in 2018 would have been demanding, requiring more travel than he was used to previously;
  - 52.2. The claimant would have had to take a period of sick leave in July/August 2018 which was longer than he was used to taking. We think that absence would have been likely to have prompted the claimant to think about whether it was time to stop work and consider the PHI scheme, and that a decision to do so would have been reinforced by his further health episode in November 2018;
  - 52.3. Although he was able to take holidays abroad, for example in December 2018, the demands required to take a holiday would be much less than those of a full time job with regular travel.
53. We very much have in mind the fact that the claimant was at the top of the spectrum in terms of his ability to maintain normality, and that he wanted to remain at work. However, we also take into account that a key reason for his doing so was to retain his medical insurance. He had in the past been willing to take a pragmatic approach to achieve this, when he told Mr Jewell that he would accept a change in role so that he could remain employed and keep his private medical insurance, even if that meant having lower responsibilities.
54. We think that in light of a new and demanding role and the health episodes he was experiencing in 2018, at the time of his sickness absence in mid 2018 the claimant would have been likely to have taken a similarly pragmatic view, recognising that stopping work and making a claim under the PHI scheme would have preserved his employment and his medical insurance.
55. We find that the claimant would have been on sick leave from July to December 2018, and that he would have made a successful claim under the PHI scheme such that his entitlement to PHI would have come into effect on 1 January 2019. Therefore, he would have continued to receive his full OTE pay until 31 December 2018, and would have received PHI payments of 75% of basic pay from 1 January 2019 to 16 April 2022.
56. The respondent had suggested that the claimant might have been dismissed for redundancy at a later stage, even if he had not been dismissed on 31 December 2017, but it decided not to pursue this point.

#### Life insurance

57. Under the PHI scheme the claimant would still have been an employee of the respondent. At the time the claimant died, his estate would have been entitled to make a claim under the respondent's life insurance policy.

58. We find that the claim would have been accepted and that the claimant's estate would have been paid the sum of 4 x the claimant's annual basic salary. The lump sum would have been calculated by reference to basic pay, not OTE. Those were the terms of the scheme in place at the time a claim would have been made, as the scheme covered the period 1 September 2021 to 31 July 2024.
59. We find that it would have taken one month to make a claim under the policy, for the claim to be assessed and approved, and for the lump sum to be paid out.

## The law

### Compensation for discrimination

60. The remedy for complaints of discrimination at work is set out in section 124 of the Equality Act 2010.
61. Under section 124(2)(b), where a tribunal finds that there has been a contravention of a relevant provision, as there has been here, it may order the respondent to pay compensation to the claimant. The compensation which may be ordered corresponds to the damages that could be ordered by a county court in England and Wales for a claim in tort (section 124(6) and section 119(2)). There is no upper limit on the amount of compensation that can be awarded.
62. The aim of compensation is that 'as best as money can do it, the [claimant] must be put into the position [he] would have been in but for the unlawful conduct' (*Ministry of Defence v Cannock and ors* 1994 ICR 918, EAT). In other words, the aim is that the claimant should be put in the position he would have been in if the discrimination had not occurred. This requires the tribunal to look at what loss has been caused by the discrimination.
63. Loss may include financial losses and injury to feelings.
64. In *Prison Service and others v Johnson* [1997] ICR 275 EAT, the EAT set out the following principles that the ET should consider in making an award for injury to feelings:
- “(i) *Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.*
  - (ii) *Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use the phrase of Sir Thomas Bingham M.R., be seen as the way to “untaxed riches.”*

- (iii) *Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards.*
  - (iv) *In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.*
  - (v) *Finally, tribunals should bear in mind Sir Thomas Bingham's reference to the need for public respect for the level of awards made."*
65. In *Vento v Chief Constable of West Yorkshire Police (No. 2)* [2002] EWCA Civ 1871 the Court of Appeal identified three broad bands of compensation for injury to feelings awards. The Presidential Guidance on injury to feelings (as amended) sets out updated *Vento* bands which include the 10% '*Simmons v Castle*' uplift. The guidance says that for claims presented on or after 6 April 2018, as this claim was, the lower band is £900 to £8,600 (less serious cases); the middle band £8,600 to £25,700 (serious cases); and the upper band £25,700 to £42,900 (the most serious cases), with the most exceptional cases capable of exceeding that upper band.
66. The question for the tribunal when assessing injury to feelings is the effect the discriminatory act had on the claimant (*Base Childrenswear Limited v Otshudi* UKEAT/0267/18).
67. When making awards for non-pecuniary losses, the tribunal must take care not to conflate the different types of award nor to allow double recovery (*Base Childrenswear Limited v Otshudi* UKEAT/0267/18).
68. Interest on discrimination awards is provided for in the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The regulations give tribunals the power to award interest on the claimant's losses as part of the compensation for discrimination.
69. For past financial losses, interest normally runs from the "mid-point" between the date of the discrimination and the date of calculation (regulation 6(1)(b)). For injury to feelings, interest normally runs from the date of the discrimination to the date of calculation (regulation 6(1)(a)). However, the tribunal may refuse to award interest, or may calculate interest by reference to a different period, if it believes that serious injustice would be caused if the usual rules were applied (regulation 6(3)).

#### Unfair dismissal compensation

70. Section 118 of the Employment Rights Act 1996 provides that compensation for unfair dismissal consists of:
- a) A basic award; and
  - b) A compensatory award.

71. The amount of the compensatory award is such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal, in so far as that loss is attributable to action taken by the respondent (section 123(1)).
72. In relation to life insurance, in *Fox v British Airways plc* 2013 ICR 1257, CA, the Court of Appeal held that the full value of a death-in-service benefit would be payable in an unfair dismissal claim brought by the estate of a deceased former employee. This was to put the estate in the position that the claimant would have been if he had not been dismissed.

Grossing up for taxation

73. Grossing up is an exercise to calculate the tax which will be payable on the award. It is necessary to ensure that the claimant is properly compensated, because the figures used to calculate the losses are net figures which do not take into account the amount of tax which will have to be paid on the award. The assessment of the tax payable in the grossing up exercise is an estimate on broad lines (*British Transport Commissioner v Gourley* [1955] UKHL 4).
74. Awards connected with the termination of employment are taxable under section 401 of the Income Tax (Earnings and Pensions) Act 2003. Section 401 says:
- “(1) This Chapter applies to payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with—*  
*(a) the termination of a person's employment...”*
75. Payments to which section 401(1)(a) applies are called ‘termination awards’ (section 402A). Section 402B says that termination awards are treated as earnings of employment. Section 403 says that termination awards only count as employment income to the extent that they exceed £30,000 (the ‘threshold’).
76. Section 406 establishes an exception for death or disability payments and benefits. Such payments are not subject to tax. Section 406 says:
- “(1) This Chapter does not apply to a payment or other benefit provided—*  
*(a) in connection with the termination of employment by the death of an employee, or*  
*(b) on account of injury to, or disability of, an employee.*  
*(2) Although "injury" in subsection (1) includes psychiatric injury, it does not include injured feelings.”*
77. Sub-section 406(2) was inserted by section 5 of the Finance (No. 2) Act 2017. Prior to that amendment, the position was that injury to feelings awards in discrimination cases were not grossed up, as they were treated

as falling with the section 406 exemption (*Moorthy v Revenue and Customs Commissioners* 2018 ICR 1326, CA).

78. The amendment to section 406 means that awards for injury to feelings do not fall within the section 406 exemption and are treated as taxable by HMRC. Section 5(10) of the Finance (No. 2) Act 2017 sets out when the amendment became effective:

*“(10) The amendments made by this section have effect for the tax year 2018-19 and subsequent tax years.”*

## Conclusions

79. We have applied these legal principles to the facts as we have found them, to determine the claimant's remedy. We have started by assessing financial losses and non-pecuniary losses to be awarded as part of the uncapped discrimination complaint, then considered whether any additional award should be made in respect of the unfair dismissal complaint. Finally, we considered grossing up for taxation.

### Loss of earnings

80. We have found that the claimant would have remained in full time work from 1 January 2018 until 31 December 2018. We have found that this period would have included a period of 6 months' sick leave.
81. The claimant would have earned his full pay from 1 January 2018 to 31 December 2018. His net weekly OTE was £2,252.68. (Neither party suggested that the claimant's pay would have been reduced during the six month period he would have been on sick leave prior to becoming entitled to apply for PHI.)
82. The claimant received notice pay from 1 January 2018 to 31 March 2018, and had no loss of earnings for that period. The loss of full pay starts from 1 April 2018 and continues until 31 December 2018. That is a period of 39 weeks and 2 days (39.29 weeks).
83. Loss of full pay is therefore  $£2,252.68 \times 39.29 = £88,507.80$ .
84. We have found that from 1 January 2019 the claimant would have been paid under the PHI scheme and that the calculation of PHI payments would have been based on net weekly basic pay (£1,745.01). PHI payments would have been calculated as 75% of net weekly basic pay, so net weekly PHI payments would have been £1,308.76. The claimant would have received these payments from 1 January 2019 to 16 April 2022, that is for a period of 171 weeks and 5 days (171.71 weeks).
85. Loss of PHI payments are therefore  $£1,308.76 \times 171.71 = £224,727.18$ .

86. Total loss of earnings for the period from dismissal to 16 April 2022 are £88,507.80 plus £224,727.18 = £313,234.98.

Car allowance

87. We do not make any award in respect of car allowance. We have found that it was withdrawn and that if he had remained employed by the respondent, the claimant would not have received any car allowance or compensation for withdrawal of car allowance.

Loss of full pay for annual leave

88. During the period the claimant was in receipt of PHI payments at 75% of his basic salary, he would have been entitled to full OTE pay for his statutory annual leave, that is 4 weeks per year (*Stringer v Revenue and Customs Commissioners (Case C-520/06) EU:C:2009:18*).
89. The calculation of the loss of full pay for 4 weeks annual leave during the PHI period is set out in table 1.

Table 1: Loss of full pay for annual leave	
Net weekly OTE (full pay)	£2,252.68
Less net weekly PHI payment (75% of basic pay)	£1,308.76
Loss for 1 week's annual leave	£943.92
Loss for 4 week's annual leave (= annual loss)	£3,775.68
Number of years in the PHI period (171.71 / 52)	3.3
Total loss of pay for annual leave (years x annual loss)	£12,459.74

90. Total loss of pay for annual leave during the PHI period is therefore £12,459.74.

Pension

91. Both parties approached pension loss using the simple (contributions) approach.
92. Employer's pension contributions would have been made for the claimant during the time the claimant was at work, while he was on sick leave and while he was in receipt of PHI payments.
93. The period of pension loss is:
- 93.1. from 1 January 2018 (no employer pension contributions were made on the pay in lieu of notice) to 31 December 2018 (a period of 52 weeks and 1 day) at 7% of gross OTE; and
- 93.2. from 1 January 2019 to 16 April 2022 (171.71 weeks) at 7% of gross PHI payments.
94. The claimant's gross annual OTE was £200,200 / 52 which is £3,850.

95. The claimant's gross weekly PHI payment was £150,150 / 52 x 0.75 which is £2,165.63.
96. The pension calculation is in table 2.

Table 2: Loss of pension contributions		
i) 1 January 2018 to 31 December 2018 = 52.14 weeks		
Gross weekly OTE (£3,850 x 52.14)	£200,739.00	
7% of pay for this period	£14,051.73	
ii) 1 January 2019 to 16 April 2022 = 171.71 weeks		
Gross weekly PHI payments (£2,165.63 x 171.71)	£371,860.33	
7% of pay for this period:	£26,030.22	
Total pension loss		£40,081.95

97. Total loss of pension is £40,081.95.

### Stocks

98. The parties agreed that the claimant would have been offered RSU stocks if he had not been dismissed. The claimant has lost the value of those stocks which is agreed to be £153,000.

### Total losses before medical expenses/insurance

99. The claimant's total losses of earnings (pay and paid holiday), pension and stocks is £313,234.98 (pay), £12,459.74 (paid holiday), £40,081.95 (pension) and £153,000 (stocks) which in total is £518,776.67.

### Medical insurance

100. Miss Platt said that the claimant's loss of medical insurance should be compensated for by paying his estate the sums the claimant would have incurred if he had paid for personal medical insurance. That equates to £105,923.60 per year, or £450,175.30 for the period from dismissal to 16 April 2022.
101. Mr de Silva said that the claimant should be reimbursed the sums he paid for private healthcare which he would not have incurred if he had still had the benefit of the respondent's medical insurance scheme. In total, that was £1175.10.
102. The task for us is to put the claimant's estate in the position it would have been in but for the unlawful conduct. Money cannot always achieve this; we have to do this 'as best as money can do it'. If we award a sum representing the amount the claimant could have paid to replace his lost medical insurance even though he did not pay it, the money would not put him (or his estate) in the position he would have been in if he had not been dismissed. That is not a sum which, if he had not been dismissed, he would have had. He would have had had the benefit of medical insurance during that period. We cannot retrospectively give the claimant back his medical insurance. This does not however mean that we should award the cost of



personal medical insurance premiums instead. The claimant did not pay those insurance premiums, and therefore did not lose those sums. In short, the sums put forward on behalf of the claimant are not financial losses which flow from the discriminatory acts.

103. The sums the claimant spent on private healthcare after his dismissal are losses flowing from the discriminatory dismissal. They are costs that would in all likelihood have been covered by the claimant's medical insurance if he had still been employed. The claimant is awarded £1,175.10 in respect of private healthcare costs.
104. The very significant impact on the claimant of the loss of medical insurance is also a factor in the assessment of the non-pecuniary element of the award. We come back to this below.
105. We have found that the claimant paid for medical insurance for Mrs Richards, to replace the loss of her medical insurance after he was dismissed. The cost of medical insurance is a loss arising from the claimant's dismissal, in the sum of £5,308.88.
106. The total medical insurance element of the award is £1,175.10 plus £5,308.88 which is £6,483.98.

Life insurance

107. We found that the claimant's estate would have been entitled to claim under the respondent's life insurance scheme and that the claim would have been accepted. The loss of life insurance is a sum which is 4 x the claimant's annual basic salary, that is £600,600.
108. We award this element as compensation for discrimination. Although in the case of *Fox* the payment arose in the context of a complaint of unfair dismissal, the analysis would be analogous in a complaint of discrimination.
109. A summary of the award in respect of the claimant's financial losses before interest is below.

Table 3: Summary of financial losses before interest		Totals
Loss of earnings	£313,234.98	
Loss of pay for annual leave	£12,459.74	
Loss of pension contributions	£40,081.95	
Stocks	£153,000.00	
Total financial losses before medical and life insurance		£518,776.67
Medical insurance elements		£6,483.98
Life insurance element		£600,600.00

Interest on financial losses

110. We award interest on the financial loss elements of the award.

111. Regulation 6(1)(b) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 provides that interest on financial loss is usually awarded at a rate of 8% from the midpoint of the period which runs from the date of the discrimination to the date of calculation. Regulation 6(3) allows us to vary the period over which we calculate interest, if we consider that to do so would avoid serious injustice.
112. In this case, the date of discrimination is 31 December 2017, the date of dismissal. The date of calculation is 6 October 2022.
113. Miss Platt invited us to award interest on financial losses from the date of discrimination, rather than from the midpoint. Mr de Silva invited us to award interest from a date later than the midpoint in respect of the life insurance payment.
114. Other than the life insurance payment, the claimant's financial losses accrued on a broadly linear basis over the period from dismissal to calculation. The use of the midpoint is intended to reflect this. We do not consider that there would be a serious injustice in respect of these losses if we only award interest from the midpoint. The standard approach of calculating the period of interest from the midpoint is appropriate for the financial losses other than the life insurance payment.
115. Variation of the standard approach is required in relation to interest on the life insurance element. This loss did not accrue until after the claimant died on 16 April 2022. We have found that the life insurance sum would have been paid on 16 May 2022. We consider that there would be serious injustice if we award interest on this element from the mid-point, as that would mean interest being awarded for a period which pre-dates the point at which the sum would have been received. To avoid serious injustice, we have decided that interest on the life insurance payment should be calculated from 16 May 2022 to the date of calculation.
116. Tables 4, 5 and 6 set out the calculations for interest on financial loss. We have calculated the life insurance element of the award separately because of the varied approach to the period for which interest is awarded, as explained. We have also calculated the interest on the medical insurance/expenses element of the award separately, because (like the life insurance element), that is treated differently for tax purposes.

Table 4: interest on earnings, pensions and stocks	
Interest start date	31 December 2017
Date of calculation	6 October 2022
Number of days	1,740
Number of days to midpoint	870
Daily rate of interest	$0.08 \times \text{£}518,776.67 / 365$
Total interest calculation	870 days x daily rate of interest
Total interest	£98,922.89

Table 5: interest on medical insurance/expenses element	
Interest start date	31 December 2017
Date of calculation	6 October 2022
Number of days	1,740
Number of days to midpoint	870
Daily rate of interest	0.08 x £6,483.98 / 365
Total interest calculation	870 days x daily rate of interest
Total interest	£1,236.40

Table 6: interest on life insurance element	
Interest start date	16 May 2022
Date of calculation	6 October 2022
Number of days	144
Daily rate of interest	0.08 x £600,600 / 365
Total interest calculation	144 days x daily rate of interest
Total interest	£18,955.92

117. A summary of financial losses and interest is in table 7.

Table 7: Summary of financial losses and interest			
		Interest	Totals
Total financial losses before medical and life insurance	£518,776.67	£98,922.89	£617,699.56
Medical insurance elements	£6,483.98	£1,236.40	£7,720.38
Life insurance element	£600,600.00	£18,955.92	£619,555.92
Totals	£1,125,860.65	£119,115.21	£1,244,975.86

### Non-pecuniary losses

118. The claimant sought an award for personal injury (injury to health) as well as an award for injury to feelings. The loss of the medical insurance as a result of the discriminatory dismissal had a very significant impact on the claimant. However, we are mindful of the need to avoid overlap between an award for injury to health and injury to feelings, and it is difficult to make a separate assessment of the injury to the claimant's health arising from this.
119. Professor Pandha's overall view was that the main impact on the claimant's health was in terms of speed and coherence of care, and that this caused anxiety. There was increased duration of pain, but this was less clear cut.
120. Because of the nature of these injuries, and the inevitable difficulty with clearly delineating the scope of them, is difficult for us to separate these issues out from the wider injury to feelings the claimant suffered. We decided that we should include the impact on the claimant of the loss of medical insurance as part of our assessment of injury to feelings, rather than making a separate award.
121. On behalf of the claimant, Miss Platt also sought an award for aggravated damages, on two grounds. First, she said that the manner in which the claimant was treated at the point of dismissal was highhanded and he was dismissed in the full knowledge of the impact that this would have on him.

We would not describe the treatment of the claimant as highhanded. Further, an additional award in respect of the manner of dismissal risks overlapping with the injury to feelings award and compensating the claimant twice for the same loss.

122. The second ground on which the claim for aggravated damages was made was the comment made by Mr McHugh in the liability hearing that, because the claimant was not off sick at the time, it would not 'sit right' to make a claim for PHI, and that it would have felt 'almost fraudulent' to do so.
123. We have accepted that the claimant was shocked and upset by Mr McHugh's comment. It seems to us that the description of a claim by the claimant for PHI being 'almost fraudulent' was clearly wrong. The claimant's medical situation was much more complex than Mr McHugh, who had not sought medical advice, thought. We have accepted on the basis of Professor Pandha's evidence to us that the claimant would have been entitled to claim under the PHI scheme (and the respondent did not challenge this). We have found that he could have become entitled from 2018, shortly after the time Mr McHugh was considering the claimant's entitlements under the PHI scheme.
124. On the other hand, Mr McHugh did not say that the claimant had himself acted fraudulently, or that he had suggested acting fraudulently. Mr McHugh was essentially explaining that a claim under the scheme was not possible for someone who was still at work. We accept that this point is accurate, although the way Mr McHugh put it did not give the full picture in the claimant's case and he could certainly have explained this in a more sensitive way.
125. We have considered this carefully. An aggravated damages award is not to punish the employer, it is to compensate the claimant for additional injury. Here, we have decided that it is difficult to distinguish the additional injury caused by this comment from the claimant's other injured feelings. We have decided that rather than make a separate award for aggravated damages in this case, we should take this point into account in our injury to feelings award.
126. We started with the updated Vento bands for awards of injury to feelings: the lower band of £900 to £8,600 (less serious cases); the middle band £8,600 to £25,700 (cases that do not merit an award in the upper band); and the upper band £25,700 to £42,900 (the most serious cases).
127. The claimant said that the award ought to be £46,000, above the top of the upper band. The respondent invited us to make an award of £8,400, towards the top of the lower and bottom of middle bands.
128. We have to consider the effect of the discrimination on the claimant. We have found that the discriminatory dismissal had a considerable impact on the claimant. The prospect of and the eventual loss of his medical insurance were very significant for him. The respondent's failure to make adjustments

to the alignment and consultation process led to worry and anxiety for the claimant about the likelihood that he would lose his medical insurance. The loss of the insurance led to his care being less coherent, and to some increased duration of pain. This caused him further anxiety. The ongoing anxiety caused to the claimant about the loss of the medical insurance lasted for months before his dismissal and some years after it.

- 129. There were other injuries to the claimant's feelings. He was clearly a very valued and capable employee and it was very upsetting to him that more careful consideration was not given to his particular circumstances during the alignment and consultation process. His confidence and self-esteem were closely linked with his career and these were damaged when he lost his job. He was not able to work again; we have found that he would have been able to continue working for a further six months if he had not been dismissed.
- 130. The increased anxiety, worry and upset that the claimant experienced was more difficult for him to deal with because it came at a time that was already very difficult for him, when he was dealing with the stress of his health issues.
- 131. We have, as set out above, taken into account the impact of the loss of the claimant's medical insurance, the manner of the dismissal and the comment made by Mr McHugh.
- 132. Having considered those factors, we have decided that the appropriate award for injury to feelings in the claimant's case is an award in the upper Vento band. The injury to the claimant was of the most serious type. We award £28,000 in respect of injury to feelings.

Interest on injury to feelings

- 133. We award interest on the injury to feelings award.
- 134. Interest on injury to feelings awards is payable at a rate of 8% for the whole period from the date of the discrimination to the date of calculation.

Table 8: interest on injury to feelings	
Interest start date	31 December 2017
Date of calculation	6 October 2022
Number of days	1,740
Daily rate of interest	0.08 x £28,000 / 365
Total interest calculation	1,740 days x daily rate of interest
Total interest	£10,678.36

- 135. The interest on injury to feelings is £10,678.36.
- 136. The total injury to feelings award is £28,000 plus £10,678.36 which is £38,678.36.

137. Having reached our provisional conclusions, we stepped back and considered the overall level of the award. We are conscious that this award is larger than many employment tribunal awards. That reflects in large part the claimant's high level of earnings, and the fact that he was entitled to valuable benefits, including PHI, life insurance and stocks. In respect of non-pecuniary losses, we consider that the sum awarded is appropriate and not excessive, and that it is compensatory not punitive. We are satisfied that the award as a whole is at the appropriate level.

Unfair dismissal compensation

138. The claimant is not entitled to a basic award as he received a statutory redundancy payment.

139. The claimant lost his statutory rights as a result of the dismissal. The parties agreed that the claimant should be awarded £500 as compensation for loss of statutory rights.

140. The claimant's award for in the discrimination complaints includes compensation for other elements of financial loss which he would have received in the compensatory award, that is loss of earnings, benefits and pension. To avoid double recovery (compensating for the same losses twice) these losses are not included in the compensatory award.

141. No interest is payable on the unfair dismissal element of the award.

Summary

142. A summary of the elements of the award with interest but before grossing up for tax is at table 9.

Earnings, pension and stocks	£617,699.56
Medical insurance element	£7,720.38
Insurance element	£619,555.92
Injury to feelings	£38,678.36
Loss of statutory rights	£500.00
Total award before tax	£1,284,154.22

Taxation

143. Finally, we have conducted a 'grossing up' exercise to calculate the tax which is likely to be payable by the claimant's estate on the award. Both parties agreed that the award will be taxable as income despite the claimant's death.

144. The whole award to the claimant is taxable as earnings under section 401 of the Income Tax (Earnings and Pensions) Act 2003. The discrimination was 'in connection with' the termination of his employment, because it concerned the respondent's failure to make adjustments to the procedures

which culminated in the claimant's dismissal. The award for loss of statutory rights is also compensation for dismissal.

145. Under section 403 the first £30,000 of an award on termination of employment can be paid without deductions. This applies once in respect of each employment. At the time of dismissal, the claimant received a termination payment in respect of his employment by the respondent in the sum of £9,535.50, and so £20,464.50 of the £30,000 remains available.
146. The medical insurance, medical expenses and life insurance elements of the award will attract exemption under section 406, as they are payments on account of death, injury or disability.
147. Mr de Silva said that the injury to feelings award would also attract exemption under section 406, because section 406(2) (which excluded injured feelings from the definition of injury for the purpose of section 406) only became effective on 6 April 2018, after the claimant's dismissal date. He said that meant that the section 406 exemption would apply to the injury to feelings payment, as injured feelings were included in the definition of injury prior to 6 April 2018.
148. We do not agree that the section 406 exemption will apply to the claimant's injury to feelings award. The amendment became effective in respect of injury to feelings payments made after 6 April 2018, not cases involving dismissals after 6 April 2018. We have reached this conclusion on the basis of the wording of section 5(10) of the Finance (No. 2) Act 2017. Section 5(10) does not say that the amendment applies to dismissals after 6 April 2018. Rather, it refers to the amendment having effect 'for the tax year 2018-19 and subsequent tax years'. It is evident from this that the effective date must be considered in relation to the date of payment (to which the question of tax year is relevant) rather than the date of dismissal. This means that the claimant's injury to feelings award will be treated as taxable, and should be included in the grossing up exercise.
149. Therefore, the taxable elements of the award will be

Earnings, pension and stocks	£617,699.56
Injury to feelings	£38,678.36
Loss of statutory rights	£500.00
Total taxable element before tax	£656,877.92

150. The first £20,464.50 is deducted from this as it is the remaining part of the £30,000 threshold under section 403. That means the sum which is treated as taxable is £636,413.42.
151. We did not hear any evidence or submissions to suggest that HMRC will treat income tax on the award to the claimant's estate any differently to the position if the award had been paid to the claimant. We assume that taxation of the award will take into account the standard personal allowance in full,

as the claimant will not have any other taxable income from other sources in the tax year in which the award is paid.

152. The grossing up calculation is set out in table 11 (figures rounded to whole pounds).

Table 11: grossing up for tax			
Tax rates (£)	Taxable tribunal award (£)		
	gross	tax	net
Personal allowance (0%) to 12,570	12,570	0	12,570
Basic rate (20%) 12,571 to 50,270	37,700	7,540	30,160
Higher rate (40%) 50,271 to 150,000	99,729	39,892	59,837
Additional rate (45%) over 150,000	970,629	436,783	533,846
<b>Totals</b>	<b>1,120,628</b>	<b>484,215</b>	<b>636,413</b>

153. The amount to be added to the claimant's award in respect of tax payable on the award so that after tax the sum broadly represents the net sum we have awarded is £484,215.

Total award

154. The total award to the claimant is £1,768,369.22, calculated as set out below.

Table 12: Summary of award with interest and tax			
Financial loss	£1,125,860.65		
Interest on financial loss	£119,115.21		
Total financial loss		£1,244,975.86	
Injury to feelings	£28,000.00		
Interest on injury to feelings	£10,678.36		
Total injury to feelings		£38,678.36	
Loss of statutory rights		£500.00	
Total award before tax			£1,284,154.22
Grossing up for tax			£484,215.00
Total award including interest and tax			£1,768,369.22

**Employment Judge Hawksworth**

Date: 11 October 2022

Sent to the parties on: 20 October 2022

N Gotecha

For the Tribunals Office

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**Appendix – agreed issues for remedy hearing**

**ISSUES AGREED ARE:**

1. Loss of income from end of notice period to 1 October is agreed at £58,569.68.
2. Loss of stocks (RSUs) is agreed at £153,000.
3. There will need to be grossing up to account for taxation on the award.
4. Loss of statutory rights is agreed at £500.
5. Loss of income on whatever basis ended on 16 April 2022 when the Claimant died.

**CONCESSIONS FROM CLAIMANT:**

6. There is no ACAS Uplift available.
7. The accrued holiday pay claim of 7 days is not pursued

**THIS ISSUES FOR THE TRIBUNAL TO DECIDE ARE:**

8. (Not an agreed issue) What was the Claimant's gross annual salary? Did it include a variable aspect of compensation of at least £50,000 gross per annum? The Claimant contends it was £200,200; the Respondent contends it was £150,150.
9. (Not an agreed issue) If it did not include the bonus element, should there be a payment for loss of bonus, if so how much? The Claimant states that it was at least £50,000 per annum.
10. Would the Claimant have worked until October 2018 or July 2021 before moving onto PHI payments? The Claimant states he was well enough to continue working until July 2021; the Respondent states he would have moved onto PHI payments from October 2018.
11. What was the Claimant's loss of income, holiday pay, pension and bonus depending on whether he would have moved to PHI in October 2018 or July 2021?
12. Was the Claimant entitled to a car allowance of £9,000 per annum? The Claimant states that this was a contractual benefit and if it was withdrawn there would have been compensation offered. The Respondent states that the car allowance was withdrawn from all employees and replaced with a mileage claim system.
13. What was the value of the loss of life insurance? The Claimant states it was 4 x gross salary of £200,200 whereas the Respondent states it was 4 x base salary of £150,150.
14. What was the value of the loss of private medical cover? The Claimant states that this should be valued at the cost of cover on the open market that he would have paid rather than the actual cost of treatment. The Respondent states that this should be limited to actual cost only.
15. What was the loss of the Claimant's wife's medical cover? The Claimant states it is £185 per month for 4 years and 3 months.
16. What interest should be awarded and on which past losses? The Claimant states interest should be awarded at 8% from the date of dismissal, the Respondent states that interest should be awarded at 8% on certain losses (but not those in respect of life assurance) from the mid-point between dismissal and the calculation date.

17. What award should there be for ITF? The Claimant states upper Band, the Respondent states bottom of middle band. It is agreed that interest runs from the date of dismissal to date at 8%.
18. Should there be an award for Personal Injury? The Claimant contends for increased pain and suffering because of the loss of speedy access to medical care in the sum of £30,000.
19. Should there be an award for aggravated damages? The Claimant contends for £5,000 - £10,000. The Respondent states that there should not be any award.