



EMPLOYMENT TRIBUNALS

at a Remedy Hearing

Claimants: Mr A and Ms B
Respondents: C and others

Heard at: Nottingham
On: 8, 9 and 23 August 2022
Before: Employment Judge Hutchinson
Members: Mr J Akhtar
Miss L Lowe

Representation

Claimants: In person
Respondent: Mr R Lassey of Counsel

RESERVED JUDGMENT

1. Mr A

1.1 Unfair dismissal

The First Respondent is ordered to pay to the Claimant;

Basic award	£962.88
Compensatory award	600.00

The Recoupment Regulations do not apply

1.2 Victimisation

The Respondents are ordered to pay to the Claimant;

Compensatory award	£10,879.44
Interest	£1,626.57
Injury to feelings	£12,000.00
Interest	£ 3,792.46
The total award for victimisation is	£28,298.47

The total award is	£29,861.35
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Reduced by Court of Appeal costs	£863.50
Total due to Mr A	£28,9997.85

2. **Ms B**

2.1 Unfair dismissal

The First Respondent is ordered to pay to the Claimant;

Basic award	£1,474.92
Compensatory award	600.00
Total award for unfair dismissal	£2,074.92

2.2 Discrimination award

The Respondents are ordered to pay to the Claimant;

Compensatory award	£22,759.92
Interest	£3,401.82
Injury to feelings	£35,000.00
Interest	£13,477.95

Total discrimination award	£74,639.69
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Total award for unfair dismissal and discrimination £76,714.61

The total grossed up award £91,154.51

Reduced by Court of Appeal costs £863.50

Total £90,291.01.

RESERVED REASONS

Background to this hearing

1. At a liability hearing conducted by this Tribunal between 26 July 2021 and 16 September 2021, we gave judgment in favour of the Claimants in respect of several matters.
2. In respect of the First Claimant (Mr A), we found that he had suffered two acts of victimisation;
 - 2.1 his suspension on 11 September 2018;
 - 2.2 the non-payment of his bonus on 15 October 2018.

3. He was also constructively dismissed by the Respondents.
4. The other claims that he made were either withdrawn or dismissed.
5. In respect of the Second Claimant (Ms B), she was successful in respect of;
 - 5.1 twelve claims of sexual harassment;
 - 5.2 three claims of age harassment;
 - 5.3 two claims of victimisation;
6. She was also successful with a claim of constructive unfair dismissal.
7. The Tribunal has already dealt with reconsideration in respect of three allegations of harassment and these have been dealt with by a Reconsideration Judgment. This followed an appeal by the Respondents against the decision previously promulgated.
8. At this remedy hearing we heard evidence from each of the Claimants and we have heard submissions from both the Claimants and all the Respondents in respect of this matter.
9. At the conclusion of the hearing on 23 August 2022, I explained briefly to the parties what our findings were and the amounts that we were ordering the Respondents to pay and I told the parties that I would write further with our full written reasons in due course.

Relevant findings of fact in respect of the remedy

10. Mr A
 - 10.1 Mr A was employed by the Respondent from 16 February 2016 until 29 November 2018. As at the effective date of termination, he was 26 years old and had been employed for 2 years.
 - 10.2 His basic contractual gross income was £472 per week based on a standard 40 hour working week. The Respondent's weekly pension contribution as at that date was £9.44 per week. His total basic pay was therefore £481.44 per week.
 - 10.3 He was employed under a contract of employment which provided that any bonus payment was discretionary.
 - 10.4 It can be seen though that each month, Mr A received a performance bonus which varied each month but was approximately £90 per month. He also received an annual profit bonus which was about £1,500 and the Company also paid for a gym membership in the sum of £24.93 per month.
 - 10.5 Taking all these matters into account, we calculate that Mr A's average net monthly income for the purpose of calculating his compensatory

award is £1,813.24.

- 10.6 In his schedule of loss, which is at page 216 of the bundle, he claims compensation for all sorts of other payments. In particular;
- loss of Christmas bonus;
 - daily provision of communal food, tea and coffee;
 - weekly provision of Friday lunch;
 - Company socials every two months;
 - annual Company retreat.
- 10.7 We are not satisfied that these matters should be considered in calculating a compensatory award. They do not represent profit in the hands of Mr A.
- 10.8 We do not doubt that he received certain benefits with his employment, but we cannot say that Mr A had a reasonable expectation to continue to receive those benefits as part of his losses.
- 10.9 Mr A is claiming losses for the period from the termination of his employment until today's date and beyond. This is because he says that he has been designated as being unfit for work since October 2018.
- 10.10 Mr A has not produced any evidence to satisfy the Tribunal that the reason for him being unfit for work is solely or mainly attributable to the Respondents' conduct.
- 10.11 We have seen his medical records and we can see that he had a pre-existing and longstanding history of depression.
- 10.12 His mother was diagnosed with cancer in around January 2019 and we are satisfied that was a contributory factor towards him being unfit to work.
- 10.13 In his cross-examination, Mr A accepted that the cause of his illness was "*multifaceted and not straightforward*" and we have no expert medical opinion produced to us which shows the cause of it was solely or mainly attributable to the Respondents' conduct.
- 10.14 We also note that Mr A was suffering from a gastric condition from at least May 2018, which was later diagnosed as gastritis. This is why he had been absent in June 2019 and this predates any act of victimisation that he suffered.
- 10.15 We also note that Mr A has not provided any evidence that his anxiety and depression continued to render him unable to work from February 2021 onwards. On that date, his GP notes record him as having stated that he was: "*Starting to lift his mood*" (page 243R) following which there are no further entries in relation to anxiety and depression. We

note that there has been no medical intervention for a period of well over 18 months since this period.

- 10.16 We note that Mr A has not made any effort whatsoever to undertake any search for any form of work, undertake training or even do any voluntary work. In our view, he has failed to mitigate his loss.
- 10.17 He impressed us as an articulate and intelligent graduate and holds a degree in business administration.
- 10.18 In this case, we are satisfied that he has made an active and conscious decision not to look for work for almost 4 years. That is not mitigating your losses.
- 10.19 We note that his GP was actively encouraging him in March and April 2019 to look for work and, despite this encouragement, which has continued since that date, he has not made any effort to find anything to do.

11. Ms B

- 11.1 Ms B was employed by the First Respondent from 12 October 2015 until 29 November 2018. As at the effective date of termination, she was 33 years of age and had been employed for 3 full years. Her basic contractual income was £482 per week based on a standard 40 hour working week. The Respondent's weekly pension contribution at the effective date of termination was £9.64 per week. The basic pay for Ms B was therefore £491.64 per week.
- 11.2 As we have seen from her payslips at pages 126 to 163, she received various sums for performance bonus.
- 11.3 Whilst these were not contractual, performance bonuses were paid each month and varied but were generally about £95 per month.
- 11.4 She also received an annual profit bonus of about £1,500.
- 11.5 We are satisfied that her average net pay per month was £1,895.66.
- 11.6 As with Mr A, we are satisfied that it is not appropriate to compensate her for the other matters that she claims, which are the same as Mr A. This is for the same reason.
- 11.7 It can be seen from Ms B's schedule of loss that, like Mr A, she says that she has been unfit to work since she resigned from her employment with the Respondents. In fact, she had been signed off sick from October 2018.
- 11.8 The original reason for her absence from work was stated as being PTSD (page 94R).

- 11.9 We have been able to view her medical records and it can be seen from those medical records at that time that this was given as the reason for her absence.
- 11.10 We also note, and have been reminded by the Respondents, that my colleague, Employment Judge Blackwell, made a factual finding that her PTSD stemmed from sexual abuse in her childhood (page 222R).
- 11.11 This Tribunal is bound by that finding. The Claimant knew that this would be the case because she discussed that at a preliminary hearing held with Regional Employment Judge Swann on 14 and 22 June. She had an opportunity to appeal that factual finding but chose not to do so.
- 11.12 It can be seen then that the operative cause of Ms B's absence was, according to her own medical records, because of an illness that was entirely unrelated to the Respondents actions.
- 11.13 We acknowledge that the Claimant does not accept this, saying that it was the discrimination that she suffered that caused her to be unfit to work.
- 11.14 There is no medical evidence to show us that the losses are solely or mainly attributable to the Respondent's conduct in this case.
- 11.15 The Tribunal also notes that the Claimant has not provided us with any evidence that her illness continued to render her unable to work from around August 2019 onwards. On her visit to her GP in July 2019, her mood was: "*stable*" and that anxiety and depression was: "*under control*" (page 92R).
- 11.16 It can be seen from her medical records, and indeed it is confirmed by Ms B, that her medication had been stabilised at this point and she only visited her GP sporadically thereafter.
- 11.17 Despite this, Ms B maintains that she has remained unable to work on account of her anxiety and depression throughout the period.
- 11.18 We note in respect of Ms B that she holds a first-class LLM degree and speaks five languages. Like Mr A, she is articulate and intelligent and we are satisfied that she could have reasonably been expected to take some steps to find alternative work or to mitigate her losses in some way.
- 11.19 We are satisfied that Ms B has made an active and conscious decision not to work for almost 4 years. She has not even attempted to apply for non-office-based roles, or take any opportunity for part-time, or voluntary work or even to undertake any further training.

- 11.20 Insofar as her claim for losses, Ms B does have a responsibility to satisfy us that she is making some attempt to move on with her life, but she has not.
- 11.21 By saying this, we do not want anyone to have the impression that we expected the Claimant to go out and get a job immediately after she had suffered the way that she had from the behaviour of the Respondents.
- 11.22 We are satisfied that if she had acted reasonably, she would have been able to obtain alternative work within 12 months of leaving her employment and that is what we have decided in terms of her compensatory award.
12. There are several matters that this Tribunal has been asked to rule on in respect of the issues of remedy. We must determine the following matters:
- 12.1 What is the appropriate basic award?
- 12.2 What compensatory award should we make in respect of the unfair dismissal? If we are satisfied that the resignations related to the discriminatory treatment the Claimants received, then the compensatory award should be awarded under that heading and not under the unfair dismissal heading.
13. The next matter for us to determine would be the amount of loss that the Claimants have suffered as a result of the discriminatory treatment.
14. Once we have determined the compensatory award, we then go on to consider injury to feelings.
15. The next award is personal injury. Both Claimants are claiming personal injury caused by unlawful discrimination.
16. The Claimants then also claim aggravated damages.
17. Once we have considered those heads, we then must decide whether interest is payable on the awards and if so, how much.
18. Mr Lassey also argues that we should reduce the compensatory award under the principle of **Polkey** and also under contributory fault.
19. The Claimants also claim an ACAS uplift for the breach of ACAS Codes of Practice on Disciplinary and Grievance Procedures.
20. We then must consider recoupment.
21. We then must consider an application for costs/preparation time made by the Claimants, the time they have spent in preparing their cases.

The law

22. Mr Lassey has helpfully guided us on the relevant parts of the Equality Act 2010 (EqA) that deal with the amount of compensation that we should award.

General principle

23. We were referred to section 124 EqA which provides:

124 Remedies: general

- (1) *This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).*
- (2) *The tribunal may—*
- (a) *make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;*
 - (b) *order the respondent to pay compensation to the complainant;*
 - (c) *make an appropriate recommendation.*
- ...
- (6) *The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119.*
- ..."

24. Mr Lassey referred us to a number of cases and in particular:

- ***Ministry of Defence v Cannock & others [1994] ICR 918***
- ***Ministry of Defence v Hunt & others [1996] ICR 554***

Future loss

25. With regard to mitigation of loss, as Mr Lassey reminded us, the question is not whether the employee has behaved reasonably in general terms but whether he or she has taken reasonable steps to mitigate his or her loss. The Claimants are under a duty to mitigate their loss and if they chose not to do so, they will not be taking reasonable steps to mitigate their loss.

26. Mr Lassey referred us to the case of ***Atos Origin Services UK Ltd v Haddock [2005] ICR 277***.

Injury to feelings

27. As set out above, section 124 of the Equality Act 2010 shows that an award for compensation can include compensation for injury to feelings.
28. Mr Lassey referred us to a number of cases, namely:
- ***Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102***
 - ***Vinci Construction (UK) Ltd v De Souza [2017] EWCA Civ 879***
29. We have also considered the joint Presidential Guidance on Employment Tribunal awards for injury to feelings and psychiatric injury which was issued on 4 September 2017. That reviewed the effect of recent case law and inflation on the ***Vento*** bands and said that when awards are made by tribunals, the ***Vento*** bands should have the appropriate inflation index applied to them followed by a 10% uplift on account of the case of ***Simmons v Castle [2012] EWCA Civ 1039***.
30. The first addendum to that Guidance was issued on 23 March 2018, which makes clear that it is necessary to consider the relevant ***Vento*** band on the date on which the claim was presented. The relevant part states:
- “ ...
2. *In respect of claims presented on or after 6 April 2018, the Vento bands shall be as follows: a lower band of £900 to £8,600 (less serious cases); a middle band of £8,600 to £25,700 (cases that do not merit an award in the upper band); and an upper band of £25,700 to £42,900 (the most serious cases), with the most exceptional cases capable of exceeding £42,900.*
- ...”
31. Mr Lassey reminded us that the decision of ***HM Prison Service & others v Johnson [1997] ICR 275***, which summarised the general principles for awards for injury to feelings, namely:
- (a) Awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party.
 - (b) An award should not be inflated by feelings of indignation at the guilty party's conduct.
 - (c) Awards should not be so low as to diminish respect for the policy of discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches.

- (d) Awards should be broadly similar to the range of awards in personal injury cases.
- (e) Tribunals should bear in mind the value in everyday life of the sum they are contemplating.
- (f) Tribunals should bear in mind the need for public respect for the level of the awards made.

Stress at work/personal injury

- 32. In this respect, we were reminded of the case of ***Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] ICR 1170***.
- 33. We were also referred to the following cases:
 - ***Hampshire County Council v Wyatt [2016] EAT/0013/16***
 - ***Thaine v London School of Economics [2010] ICR 1422***
 - ***Osei-Adjei v EM Education Ltd (formerly RM Education plc) [2013] EAT/0461/12***
 - ***HM Prison Service v Salmon [2001] IRLR 425***
- 34. Mr Lassey also referred us to the Judicial Guidelines 14th Edition - (A) Psychiatric Damage Generally.

Aggravated damages

- 35. Mr Lassey reminded us that an award for aggravated damages can only be made in exceptional circumstances. He referred us to the following cases:
 - ***Armitage Marsden and HM Prison Service v Johnson [1997] IRLR 162***
 - ***Commissioner of Police of the Metropolis v Shaw [2012] IRLR 291***
 - ***Tameside Hospitals NHS Foundation Trust v Mylott [2011] UKEAT/0352/09***
 - ***HM Land Registry v McGlue [2013] UKEAT/0435/11***

Interest

- 36. We were referred to Regulation 6(1)(a) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. This states that for injury to feelings awards, the award of interest starts on the date of the discrimination complained of and ends on the day on which the Employment Tribunal calculates the amount of interest, which is the day of calculation.
- 37. For all other awards, interest is awarded for the period beginning on the midpoint date and ending on the day of calculation under Regulation 6(1)(b). The midpoint date is the date halfway through the period beginning on the date

of the act of unlawful discrimination and ending on the day of calculation under Regulation 4(2).

38. In his submissions, Mr Lassey dealt with the calculation of the basic award and the compensatory award for unfair dismissal. So far as the compensatory award is concerned, he referred us to section 123 of the Employment Rights Act 1996. In this case, the only award of compensation that we are making for unfair dismissal is for the loss of statutory rights.
39. Mr Lassey seeks a reduction of the compensatory award under the principles of **Polkey** and contributory fault under section 122(2) of the ERA.
40. In his submissions, he then goes on to talk about an ACAS uplift of up to 25% on financial contribution if we are satisfied that it is appropriate to apply an uplift in the circumstances of this case.
41. He referred us to **De Souza v Vinci Construction (UK) Ltd [2018] ICR 433**.
42. We could, if we thought it appropriate, apply an uplift of up to 25% of the awards made in this case in respect of a failure to follow the ACAS Code of Practice on Grievance Procedures.
43. Mr Lassey also referred to the case of **Wardle v Credit Agricole Corporate & Investment Bank [2011] IRLR 604**.
44. In deciding whether to make an uplift, we should have regard to the overall figure for compensation to ensure that the sum awarded is not excessive having regard to the sums awarded for injury to feelings.

Costs

45. In this case, the Claimants make a claim for costs, ie Preparation Time Order under Rule 76 of the Employment Tribunal Rules of Procedure.
46. Under Rule 76, we have to be satisfied first that;

“(a) a party (or that party’s representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success ...”
47. If we are satisfied that one of the grounds applies, we then have to decide whether to exercise our discretion and make an award for preparation time.

The amount of the award

48. **Mr A**
 - 48.1 **Unfair dismissal**

Basic award (2 x £481.44)	£962.88
Compensatory award	£600.00
Total award for unfair dismissal	£1,562.88

48.2 Discrimination claim

Compensatory award (26 x £418.44)	£10,879.44
Interest on compensatory award (£682 x 2.385)	£1,626.57

Injury to feelings	£12,000.00
Interest on injury to feelings £1,442 x 2.63	£3,792.46

Total award for discrimination claim	£28,298.47
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Total award for Mr A	£29,861.35
Less Court of Appeal costs	£863.50

Total due to Mr A	£28,997.85
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48.3 Explanation

Unfair dismissal

48.4 The unfair dismissal award is straightforward. As referred to above, the Claimant had two years' service and his gross pay was £481.44. He is therefore entitled to 2 x £481.44 which gives £962.88.

48.5 So far as the compensatory award is concerned, we are only making an award for loss of statutory rights. This is because we have made an award for compensation under his discrimination claim for his loss of earnings and therefore an award under the unfair dismissal legislation would be a duplication.

48.6 Mr Lassey has made a submission that we should reduce any award under the principles of **Polkey**. He says that both Claimants had admitted that they would not necessarily disagree if the Respondent had decided to dismiss them for gross misconduct upon discovery of the various racist, xenophobic, anti-semitic, Islamophobic, transphobic and generally highly inappropriate messages they had exchanged between themselves.

48.7 In the circumstances of this case, we do not agree with his contention that we should make a **Polkey** reduction in either case. Whilst they did make those sorts of remarks, we have already found in our liability judgment that this must be seen in the context of the culture of the Respondent. We are not satisfied that if the First Respondent had been aware of these exchanges that there was any prospect that the

Respondent would have dismissed the Claimants because of these comments. We are not therefore making any deduction under this principle.

- 48.8 Similar comments apply in respect of the question of contributory conduct. This Tribunal is not satisfied that it would be just and equitable to reduce the Claimants' basic awards on account of their conduct prior to dismissal. We do not agree that by not doing so we would be condoning the Claimants' actions in that regard. We are satisfied that it would not be just and equitable to reduce the basic awards.
- 48.9 Having decided that we are not prepared to reduce the awards because of **Polkey** or contributory conduct, we are satisfied that it would not be appropriate to increase or reduce the awards because of a breach of the ACAS Code of Practice. It is fair for Mr Lassey to point out that this is not a case where no process was followed at all.
- 48.10 The Claimants were invited to attend suspension meetings when the allegations were put to them and an investigation was conducted externally into those matters.
- 48.11 We are also satisfied that an uplift in awards would be excessive given the broad degree of compliance with the ACAS Code of Practice in this case.
- 48.12 So far as the grievances are concerned, we are satisfied that the Respondent did follow the ACAS Code of Practice. Shortly after the submission of their grievances, they were invited to and attended grievance meetings with external HR consultants. Following those grievance meetings, further investigations were conducted before compiling reports. The Claimants were then provided with outcomes to their grievances and provided with rights of appeal, which they exercised. There were then further appeal meetings, and they were given an outcome in respect of that.
- 48.13 We are not satisfied in this case that there is any breach of the ACAS Code of Practice in respect of those grievances and no uplift would be appropriate.
- 48.14 In respect of Mr A's discrimination claim, we have made an award of compensation in the sum of £10,879.44. This represents 26 weeks of net pay. We have calculated his net average weekly pay of £409 and added to that his pension contributions of £9.44, making a total of £418.44.
- 48.15 We are satisfied that although Mr A has been designated as unfit to work since October 2018, there has been a complete failure to mitigate his loss. There is no evidence that his medical issues relate to the discrimination he says that he suffered. We remind ourselves that there

are only two acts of discrimination, although they also led to his resignation.

- 48.16 In this case, we note that Mr A has not done anything at all since he went off sick in October 2018. That is a period of almost 4 years, during which not only has he not sought work at all, but he has not undertaken any training or even done any voluntary work. We also note that his GP in the notes has been encouraging him to find work, but he has failed to do so.
- 48.17 Whilst the Claimant had been suffering from anxiety when he left, we are satisfied that he should have been able to start looking for work within 4 - 6 weeks and should have been able to obtain appropriate work within a 6-month period.
- 48.18 Considering his bonuses and other benefits, we are satisfied that his net pay would have been in the sum of £1,777.32 per month, which works out at £409 per week. We have added to this his pension contributions of £9.44, which give a total of £418.44 per week.
- 48.19 We then multiply that sum by 26 weeks to give us £10,879.44.
- 48.20 Interest on this award should be calculated from the midpoint of the act of discrimination to the date of this hearing. In this case, the midpoint is 10 October 2020.
- 48.21 When we announced our calculation, we had made a mistake in respect of this and had not calculated the interest on this element of the award at the midpoint as we should have done.
- 48.22 To the date of the hearing (23 August 2022) there are therefore 682 days from the midpoint date and the daily rate of interest is £2.385. This means that the total interest on that element of the award is £1,626.57 and not as we announced at the hearing.
- 48.23 So far as injury to feelings are concerned, we have taken into account that whilst there were only two acts of discrimination and victimisation in Mr A's case, they did result in him losing his employment, i.e. he resigned because of the discriminatory behaviour towards him.
- 48.24 We are satisfied that for him the injury to feelings award should be in the lower middle band of **Vento**, which at the time that the claim was presented was £8,600 to £25,700. We are satisfied that an award of £12,000, in the circumstances of the case, is appropriate.
- 48.25 To be added to this should be interest and in respect of the injury to feelings interest that is calculated from 11 September 2018 until 23 August 2022. This is a period of 1,442 days at the daily rate of £2.63 which gives interest of £3,792.46.

48.26 In the circumstances therefore grossing up is not necessary because the total award comes to less than £30,000.

48.27 The total award of compensation is therefore £29,861.35 and from this is to be deducted the cost of the Court of Appeal which has already been set at £863.50 which gives a final total due to the claimant of £28,997.85

48.28 We emphasise that the First Respondent is responsible for the awards of unfair dismissal, but all the Respondents are jointly and severally responsible for the discrimination award.

48.29 The reason for this is that indivisible harm cannot be apportioned. We can only apportion the losses if we are satisfied that the losses or harm suffered by the Claimants are properly divisible on the facts of the case. In this case, it is simply not possible to apportion the losses as between the Respondents. We appreciate that the parties in this case will have different resources available to them to satisfy the award but that cannot be a factor that we can consider in this case.

48.30 So far as Mr A's other claims are concerned, we see that he has claimed personal injury. In this case, all that we have seen was Mr A's GP reports. We have had no expert medical evidence as to his background and precise medical history nor have we had any evidence about the cause of any issues that he has had.

48.31 As we have described above, we have seen that there have been several possible causes to his various conditions and, without any medical advice, we cannot make any finding that the respondents are in any way responsible for any conditions he has suffered from.

48.32 In this respect, we remind ourselves that the burden of proof is on the Claimant to show that the Respondents' conduct caused the psychiatric injury Mr A says that he suffered, and it is just not possible for us to make any findings in respect of that in this case.

48.33 So far as his claim for aggravated damages are concerned, Mr A has failed to demonstrate that the exceptionally high bar for an award for aggravated damages has been reached in this case. We refer the parties to our findings of fact in the liability decision. The sort of discrimination involved in respect of Mr A is not the sort of discrimination that warrants an aggravated damages award.

49. **Ms B**Unfair dismissal

49.1 Basic Award (3 x £491.64)	£1,474.92
Compensatory Award	£600.00
Total award for unfair dismissal	£2,074.92

49.2 Discrimination claim

Compensatory award (12 x £1,896.66)	£22,759.92
Interest on compensatory award (682 x £4.988)	£3,401.82
Injury to feelings	£35,000.00
Interest on injury to feelings (1,757 x £7.671)	£13,477.95
Total award for discrimination	£74,639.69
Total award for discrimination and dismissal	£76,714.61
Grossed up award	£88,393.26
Less Court of Appeal costs	£863.50
Total sum due to Ms B	£87,529.76

ExplanationUnfair dismissal

49.3 The basic award and the award for compensation as per Mr A is straightforward. Because she was employed for a period of 3 years and her gross pay was £491.64 per week, the basic award is therefore 3 weeks' gross pay which amounts to £1,474.92. As with Mr A, the compensatory award is simply the loss of statutory rights of £600 because the balance of the compensatory award is made under the discrimination claim.

Discrimination awardCompensatory award

49.4 In Ms B's case, whilst we understand and appreciate the distress that she suffered during her employment, she has not made any efforts to mitigate her loss at all, simply saying to us that she has been unfit to work for a period of about 4 years.

- 49.5 She has not made any effort to obtain any employment; to undertake any training or even to do any voluntary work.
- 49.6 The Claimant has some difficulty over the question of the causation of her loss. She blames the behaviour of the Respondents for her PTSD condition. Our difficulty was Employment Judge Blackwell's factual finding at the preliminary hearing to determine disability where he said that Ms B's PTSD stemmed from sexual abuse in her childhood. As Mr Lassey has pointed out, we are bound by that finding, as confirmed by Regional Employment Judge Swann at the preliminary hearings held on 14 and 22 June 2021. Ms B had an opportunity to appeal that finding but chose not to do so.
- 49.7 Accordingly, the operative cause of Ms B's absence from work from at least December 2019 was, according to her own medical records, because of an illness that was unrelated to the Respondents' actions.
- 49.8 Having been satisfied that there is this issue of causation of her failure to find employment, we then must consider how soon she would have been able to obtain employment if she had been making efforts to mitigate her losses.
- 49.9 We note that as early as July 2019 in her medical reports it refers to her condition as being stable and that her anxiety and depression was under control and that after July 2019, Ms B only visited her GP sporadically.
- 49.10 We are satisfied that by July 2019, the Claimant certainly should have been looking for alternative work and she should have been able to find alternative work within 12 months of the loss of her employment in November 2018.
- 49.11 We consider, as with Mr A, that Ms B was a highly qualified, not to mention articulate and intelligent, individual who should not have been out of work for 4 years.
- 49.12 In her case, her net monthly pay, considering her various benefits and bonuses, amounts to £1,896.66 per month. Over a period of 12 months, that amounts to £22,759.92.
- 49.13 As with Mr A, the midpoint as between 29 November 2018 and 23 August 2022, is 10 October 2020 and a compensatory award should attract a daily rate of interest from that date.
- 49.14 There are 682 days from that midpoint to date of this hearing; a daily rate of interest is 4.988, which gives a total interest of £3,401.82. This is a different figure to that given when we announced the decision at the hearing. This is caused by a miscalculation of the midpoint. As these are the written reasons this is the correct amount that we have decided and agreed between us.

- 49.15 In respect of injury to feelings for Ms B, we note that the Respondents accept that an award for injury to feelings in the higher band on the **Vento** guidelines is appropriate. We remind ourselves that the object of the award is to compensate the Claimant and not punish the Respondents. We consider that the discriminatory treatment occurred over the course of a year and much of it did in fact amount to what could be regarded as immature comments and gestures perpetrated by Respondent 3.
- 49.16 At the time that the claim was presented, the higher band was in the range of £25,700 to £42,900. Considering all the circumstances of this case, we are satisfied that an award of £35,000 is appropriate.
- 49.17 Interest is payable we are satisfied on this award.
- 49.18 The relevant dates for the purpose of calculating interest are between 1 November 2017 (which was the first date of any act of discrimination) and 23 August 2022 (which is the date of the hearing). This is a period of 1,757 days and the daily rate of interest is 7.671. The total interest payable on injury to feelings therefore amounts to £13,477.95.
- 49.19 For the same reasons as in the case of Mr A, we are satisfied that it would not be appropriate to make any **Polkey** or contributory conduct deduction, or indeed apply an uplift for breach of the ACAS Code of Practice.
- 49.20 In respect of the claim for personal injury for Ms B, the issue for her is over the question of causation. As Mr Lassey describes, psychiatric injuries are often complex medical conditions and in Ms B's case we have no medical evidence regarding her background or medical history. The exact cause of the matters that she suffers from are not easily identifiable and, in this case, there are many possible causes or contributory factors to her medical conditions.
- 49.21 As with Mr A, we have to remember that the burden of proof is on Ms B to show that the Respondents' conduct caused the psychiatric injury complained of and the pre-existing condition of PTSD, which we are bound by, means that we cannot establish that Ms B has suffered any psychiatric injury as a result of the behaviour of the Respondents.
- 49.22 As with Mr A, Ms B has also failed to demonstrate that the exceptionally high bar for an award for aggravated damages has been reached in this case. We are satisfied that such an award would not be appropriate in this case.
- 49.23 This is not to belittle the seriousness of the conduct Ms B has suffered perpetrated by the Respondents in this case. We have satisfied ourselves that we have reflected in the injury to feelings award our view about the injury to feelings that she has suffered. The Respondents in this case have been guilty of serious behaviour towards Ms B but we are

satisfied that it is not appropriate to make an award for aggravated damages in this case.

49.24 The total award for Ms B for discrimination is £74,639.69

The award for both unfair dismissal and discrimination is £76,714.61.

49.25 Under the principles established in ***British Transport Commission v Gourley [1955] UK HL***, the damages awarded for loss suffered by Ms B should put her in the same position as she would have been if she had not suffered the unlawful conduct.

49.26 The award for Ms B should be grossed up where the sum to be received by her will be taxed.

49.27 To avoid disadvantage to Ms B, we have to gross up any award we make over £30,000. This requires us to estimate the tax Ms B will have to pay on receipt of the award and add a sum for that tax back to the award.

49.28 In this case, the amount by which the award exceeds £30,000 is £46,714.61. When that sum is grossed up, it gives the Claimant £58,393.26, which means that the total award after grossing up should be £88,393.26. The amount payable to Ms B has to be reduced by the legal costs of the hearing at the Court of Appeal and this amounts to £863.50. The total due to her after that deduction is £87,529.76.

49.29 This is of course a different sum to that which we announced because of the miscalculation of interest on the compensation payment.

50. Cost/preparation time

50.1 Both Claimants have made claims for costs/preparation time in respect of these proceedings.

We have the power to make such an award under Rule 76 of the Employment Tribunals Rules of Procedure 2013. That provides:

“76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party’s representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success;

...”

- 50.2 We are not satisfied that in this case the Respondents have acted in any way vexatiously, abusively, disruptively or otherwise unreasonably or that their Response had no reasonable prospect of success.
- 50.3 The Respondents were entitled to defend the case and call evidence to rebut the serious allegations made by Ms B.
- 50.4 Whilst the Respondents' evidence was ultimately not accepted and the Tribunal preferred Ms B's evidence, that does not mean that the Respondents' behaved unreasonably.
- 50.5 We also note that many of the claims that the Claimants made were either withdrawn during the proceedings or indeed dismissed by us.
- 50.6 This is not a case where it is appropriate to make an award in respect of preparation time as the Claimants claim.

Employment Judge Hutchinson

Date: 1 November 2022

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