EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms R Jandu		Marks and Spencer Plc

Heard at: London Central **On**: 9 and 10 November 2022

Before: Employment Judge H Stout
Tribunal Member S Pearlman
Tribunal Member N Sandler

Representations
For the claimant: Patrick Tomison (counsel)
For the respondent: Hitesh Dhorajiwala (counsel)

WRITTEN REASONS FOR REMEDY AND COSTS JUDGMENT

1. Reasons were given orally at the hearing and written reasons were requested. What follows is the corrected transcript.

REMEDY

2. This is the Tribunal's unanimous judgment on the points of principal that arise in relation to remedy following our Reserved Judgment on Liability that was sent to the parties on 22 April 2022 following the Hearing between 8 and 14 March 2022.

The law

3. Compensation for discrimination is governed by s 124 of the Equality Act 2010 (EA 2010). Compensation for discrimination is to be awarded on a tortious basis (s 124(2)(b) and (6)), i.e. it should put the claimant back in the position they would have been but for the discrimination: *Ministry of Defence v Cannock and ors* [1994] ICR 918. There is no statutory cap on discrimination awards and recoupment for state benefits under *The Employment Protection (Recoupment of Benefits) Regulations 1996* does not apply. Rather, credit must be given for benefits received consequent upon the dismissal that would not otherwise have been received.

4. Compensation for unfair dismissal is to be calculated in accordance with ss 112 to 124A of the Employment Rights Act 1996 (ERA 1996) and comprises a basic award and compensatory award. In this case, the parties are agreed that the Claimant's redundancy payment of £8,300 negates the basic award of £4,573 and means that £3,727 credit must be given in the compensatory award.

5. So far as the compensatory award is concerned, by s 123(1) the Tribunal is to award *"such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer"* (s 123(1)). By subs (2), that includes any expenses reasonably incurred by the complainant in consequence of the dismissal and any benefit which the Claimant might reasonably be expected to have had but for the dismissal. By sub-s (4) the same rule concerning the duty to mitigate loss applies as in tort. In principle the recoupment provisions apply, but we consider compensation for discrimination first and as there can be no double recovery we will not in this case be making a separate award for compensation for unfair dismissal.

6. We take each of the issues that the parties have invited us to determine in turn.

Net weekly pay

7. We begin with the calculation of the Claimant's weekly net pay. We consider that the appropriate approach is to take all the evidence that we have about the Claimant's full pay before us, which amounts to seven payslips. The average monthly pay based on those payslips is £1,950.03.

8. Included in those payslips are an amount for a student loan that in accordance with usual arrangements the Respondent was paying off for the Claimant. As such, this was an amount that was deducted from what would otherwise have been her salary and paid over gross to the student loan company on her behalf. Now as a result of the dismissal the Claimant has lost that benefit and what she has lost in our judgment is a period of time during which those amounts would have continued to be paid off her student

loan on her behalf. They are thus amounts she would have had the benefit of on a gross basis. If she wanted, and if the student loan rules permit (I do not know whether they do), but if she wanted voluntarily to pay those sums off now she would need to receive the student loan amount in gross in order to pay off the same amount as would have been paid off if she had remained employed. We therefore consider that the proper approach is to add the student loan amounts back on to her net pay and to add them back on in gross.

9. The average amount of the student loan over the seven months of payslips that we have comes to £86.29. Add that to the previous full pay figure that I have given and that gives a net pay monthly figure of £2,045.32. Multiply that by 12 and divide by 52 to get the weekly pay and round it up to the nearest penny that is £472. That therefore is the net weekly pay calculation that should be used to calculate the compensation that the Claimant receives in these proceedings.

From what point should the Claimant be compensated on full pay

10. There was an argument between the parties as to whether or not from 31 October 2020 (the Claimant's effective date of termination) she should have been compensated on the basis that she would have been back at work and on full pay if she had not been dismissed redundant on that date. The Claimant's position was that she would have been, based on her understanding that her colleagues who had previously been placed on furlough with her would have returned to work by that point. The Respondent suggested that it would not have been immediate but would have been in about three months' time. However, evidence as to when the Claimant would have returned from furlough would have been within the Respondent's knowledge, yet the Respondent has produced no evidence of it. Based on our understanding of the position at the time of the liability hearing, which reflects the Claimant's understanding based on what she has been told by a colleague, other employees were back at work at the point that she was made redundant. In any event, although the evidence the Claimant has is second or third hand, there is nothing to contradict it and we therefore find that the Claimant would have been back at work and on full pay from 31 October 2020 if her employment had continued at that point.

Mitigation of loss

11. The legal principles that we have to apply are as follows:-

12. The Claimant is under a duty to take reasonable steps to mitigate her loss, and the burden is on the Respondent to show that she has failed to do so. Whether the Claimant has taken reasonable steps is to be judged objectively but by reference to the particular circumstances of the Claimant's case and her personal characteristics of the time of dismissal including her age, health, and any disability.

13. The Claimant has referred to *Cooper Contracting Limited v Lindsay* UKEAT/0184/15/JOJ and we have taken into account the points made at paragraph 16 in that case. If we find that there was a failure to take reasonable steps to mitigate loss, we must consider what the position would be if reasonable steps had been taken.

14. The evidence that we have received consists of a witness statement from the Claimant and accompanying bundle of 526 pages of evidence from the Claimant and also the material that was in the bundle that the Respondent prepared for this hearing. The Claimant was cross examined on her witness statement.

15. The findings of fact that we make in the light of that evidence are as follows. We mention only those that are material to our judgment. The fact that we do not mention a fact does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

16. The Claimant was dismissed with effect from 31 October 2020. At the time of dismissal she had already begun looking for alternative work. In the 15 months between August 2020 and November 2021 the Claimant applied for what we can see from the index of the remedy bundle amounts to about 300 jobs. She was ultimately successful in obtaining a role at Ralph Lauren which she started on 1 February 2022. The Claimant's position is that the Ralph Lauren job wholly mitigates her loss, and no losses are claimed beyond that date.

17. Prior to her dismissal there were two roles available at the Respondent which the Claimant was referred to in the course of the redundancy process. They were an International Foods Commercial Planner Seasonal Events role and an International Planner Role. The Claimant and Ms Gaskell at the time considered that she may have been suitable for those roles, but the Claimant did not in the end apply because as she explained to the Respondent in the redundancy process (see paragraph 55 of the liability judgment) she had not felt able to do so as she was so upset about losing the job that she loved and leaving the employer for whom she had worked for 22 years.

18. Having been employed by the Respondent for such a long time, the Claimant found it hard to start looking for jobs. She had not in all that time prepared a CV for herself or been in the job search market. Companies that required online assessments she found particularly hard as she would need to read a lot about each company so one job could take her all day to apply for and she began the job search by comparing CVs and covering letters specific to the five main areas of work in which she considered she had experience, specifically Interior Design, Merchandising, Buying, Administration and Space Planning. Realising after a short period that she needed professional assistance, in November 2020 she paid £119 for professional CV writing help. Recognising that the new CVs were better than those she had been using previously, in the case of one job for which she had recently received a rejection (a role at IKEA: see page 71 of the claims bundle), the Claimant

emailed again with her new CV asking to be reconsidered as a result of which she secured an interview but was not successful. The Claimant obtained several other interviews over the time that she was seeking employment but was not successful until she secured the Ralph Lauren role.

19. In May 2021, she was offered and accepted assistance from a government funded Employment Support Officer (ESO). The initial meeting with her ESO was on 5 July 2021 when an initial action plan was drawn up. Regular reviews began on 12 August 2021 and continued until she was successful in being offered a job with Ralph Lauren. It is apparent from the notes of these meetings that the support provided was intensive, including CV advice, interview preparation and also well-being support. At one of the reviews on 10 November 2021 it was noted that the Claimant had had a 'Time to Talk' career advice session of 1.5 hours during which she had been advised to 'focus on quality rather than quantity' in terms of applications. The Claimant's ESO also arranged for her to go on an intensive online 12-week course called 'Room for Work' beginning in September 2021. It was difficult to get on that course and her ESO had arranged it for her even though she was not in the right geographical area for it.

20. The Claimant felt that all the support she had received helped her ultimately to be successful in her Ralph Lauren application, which was for her, her 'dream job'. In November 2021 the first interview with Ralph Lauren went well and she was told that she would be appointed to a job subject to further interviews. The Claimant was also by this time acting on the professional advice she had received and focussing only on jobs she really wanted. In the end there were five further interviews for the Ralph Lauren role (more than the Claimant was expecting) and the Claimant started the role on 1 February 2022. The Claimant did not make any further applications after November 2021, once she was '99% sure' (in her words) that she was getting the Ralph Lauren job.

21. In the course of cross-examination, which took over two hours, Mr Dhorajiwala for the Respondent suggested to the Claimant that she had acted unreasonably in various respects in her job search, and we deal with the evidence in relation to these points now:-

22. First, Mr Dhorajiwala suggested that the Claimant had been applying for roles outside her area of expertise. In answer to questions in cross examination the Claimant confirmed that her work with the Respondent had involved planning shop layouts and that this was a specialised technical role that had required her to work with multiple other individuals. Questioned about why she had therefore applied for visual merchandising roles, she accepted that visual merchandising was not the same role, although there was a about a 5% overlap. She went on, however, to explain that she did have relevant previous experience of visual merchandising and that the job she has secured at Ralph Lauren is a 'buying and merchandising planner' role. She feels that role overlaps significantly with the work that she was doing at the Respondent as presumably do Ralph Lauren. She explained how buying is the beginning of the product process and merchandising is more creative and

how to sell it. The Claimant in the course of her job search applied for a number of buying and merchandising roles. It was suggested by Mr Dhorajiwala that this was unreasonable because it was outside her core area of expertise, but as the Claimant explained in cross examination, she regarded buying and merchandising as being among her core areas of expertise and indeed had prepared specific CVs dealing with those areas. Mr Dhorajiwala also challenged her on her applications for diversity and inclusion roles, particularly one on page 44 which was a Gender Equality Coordinator role and one at page 127. In response to this, the Claimant explained that as a result of her role with the Respondent as BAME group leader, she had experience in diversity and that had included sitting in on meetings dealing with gender equality, so she had felt it was appropriate for her at least to apply for such roles.

23. The Claimant had also applied for a number of junior roles in areas where she felt her skills may be transferrable and where she could possibly get a 'foot in the door' in a junior capacity, for example: page 103, the Fizzy Junior Property Manager role; page 123, the Field Research Coordinator role; page 150, the Logistics Administrator role. The Claimant had also applied at page 93 for a Commodity Trading Assistant role as that is something that she had been doing as a hobby and in which she had attended some 'high level' courses and she felt that, as it was a junior assistant role, she might stand a chance of being successful despite her lack professional experience. The Claimant felt that at least 90% of the roles that she had applied for fell within her core areas. She explained that she had also tried for roles outside her comfort zone in order to maximise her chances of finding alternative employment.

24. Mr Dhorajiwala disputed the Claimant's 90% estimate. We have not attempted a detailed analysis ourselves, but our impression of reading the bundle is that the Claimant's assessment is broadly accurate. We observe that Mr Dhorajiwala's impression that this is an over-estimate may be because in his mind jobs involving general interior design (rather than specifically shop floor design), merchandising, buying and administration were outside the Claimant's core skill set, whereas in fact the Claimant regards those as being within her core skill set and she had from the outset developed CVs specifically to address those areas.

25. Secondly, Mr Dhorajiwala suggested the Claimant had been doing applications too quickly and thus could not possibly have tailored them properly to each company. There were a number of examples of this that were put to the Claimant, most extreme being those on 29 and 30 June. On 29 June the Claimant had made 14 applications within less than two hours and on 30 June she had made 7 applications in a similarly short time period.

26. The Claimant explained that researching an application for a particular company might take her a whole day, but that for other standard applications she had her five area-specific CVs and covering letters which she submitted as appropriate for the different jobs. For some online applications, including those through 'IndeedApply', the Claimant already had her CV uploaded on

the system so applying was effectively a matter of clicking submit. She would, however, still read what the job was about and tweak the application accordingly to fit what she understood to be that company's priorities. Sometimes, she would tweak more than the basic elements that had been indicated on her letter templates for tweaking (see pages 51-53).

27. Thirdly, Mr Dhorajiwala put to the Claimant that it was not possible to tell from the material disclosed by her what the quality of all her applications was, and the Claimant accepted that. She said that she believed that what she was doing was good enough. Until she went on the 'Room for Work' course which enabled her to refine her approach having done that course, she realised she had been *"clueless"* before, although at the time she was doing the best that she could with the help (paid and free) that was available to her. Mr Dhorajiwala acknowledged that examples of her CVs and covering letters did appear in the bundle and we observe that those appear to us in general terms to be of perfectly acceptable quality.

28. Mr Dhorajiwala in particular took the Claimant to page 227 and asked her if this was an example of how she might 'tweak' an application. At page 227 there is an email sent as an application for a Help to Claim Advisor role for CAB but the covering email from the Claimant is drafted as if it was an application for a Logistics Administrator role. The Claimant accepted on being shown this that she may have rushed this application and she also accepted that errors may have crept into other applications when she was making them quickly. She said that this sort of thing is due to her Dyslexia.

29. Finally, we record that the Claimant was asked about other sources of income whilst she was out of work. She said that she received financial assistance from her parents and family while she was out of work, but did not receive money from any other employment or source. We deal with the question of the benefits the Claimant received separately.

30. We do not summarise here the submissions that both parties made at the end of the evidence, but we have taken those submissions carefully into account and our conclusions are as follows.

31. We find that the Respondent has not shown that the Claimant failed in her duty to take reasonable steps to mitigate her loss for the following reasons:-

32. Despite her distress at losing her job with the Respondent, the Claimant applied herself with vigour to the task of finding a new job, beginning her search even before she was dismissed. She sought professional help with that search including reviewing her CVs and covering letters and securing, with her ESO's help, a place on a sort of course that is rarely available to individuals in her position, and which ultimately enabled her to succeed in obtaining her 'dream job' with Ralph Lauren just over a year after her dismissal. There can be no suggestion that the Claimant could have obtained that sort of assistance at any earlier stage. Nor can it sensibly be suggested that the Claimant ought reasonably to have known all the things she learned from that professional assistance before she received it.

33. We take judicial notice (supplemented by the evidence we heard at the Liability Hearing) about the effects of the Covid-19 pandemic on the retail sector generally. The Respondent was not the only retail employer making redundancies at the end of 2020 (members of the panel have personally sat on a number of other cases dealing with large-scale redundancies in the retail sector). We therefore accept the Claimant's submission (not disputed by the Respondent) that it was in general terms a difficult job market into which the Claimant was released at the end of October 2020.

34. The Respondent contends that the Claimant failed to take reasonable steps to mitigate her loss by applying for two job with the Respondent during the redundancy process. However, it was not the Respondent's case at the liability hearing or at this hearing that she would have got one of those jobs if she had applied for it, so her failure to apply has on the Respondent's own case made no difference. In any event, we find it was reasonable for the Claimant not to apply for those two jobs given how upset she was by the way the Respondent treated her during the redundancy process after 22 years of service.

35. The Respondent contends that the Claimant failed reasonably to mitigate her loss by applying for jobs between November 2021 and January 2022 after she understood that she was likely to be successful in her Ralph Lauren application. However, the Claimant was 99% sure she had the Ralph Lauren job, and that judgment was reasonable based on what she had been told as is confirmed by the fact that she was indeed offered the job. There was nothing unreasonable there and, in any event, any applications she made during that period could not have got her a job any quicker in our judgment. A two-month lead in from application to job offer is normal.

36. The Respondent has criticised the Claimant for making too many applications too quickly, but the Respondent's submissions in this regard applied only to a handful of the job applications of which we see evidence in the bundle. The vast majority of the 300+ jobs the Claimant applied for were applied for in unremarkable timescales. Further, what the Respondent needs to do is to show that the Claimant failed to take some reasonable step that was open to her to mitigate her loss. The fact that the Claimant may have expended time and energy on some applications on which she might have taken more care does not assist at all if the Respondent is not able to show that there were jobs available that she might have got that she has <u>not</u> applied for. Indeed, the cross-examination of the Claimant in this case was the inverse of what we normally see. It is normally the Respondent in the claim who is arguing that a Claimant has failed to make enough applications. In any event, job applications that require only a generic covering letter and CV can be made very quickly by someone who already has materials prepared, tailored for a particular industry and job as the Claimant did. There is nothing unreasonable in that. Quite the reverse: the Claimant's approach enabled her to apply for many more jobs than might be usual and it was reasonable for her to consider that doing so increased her chances of success.

37. Likewise, attempts to criticise the Claimant for spreading her net wide and applying for jobs outside her core skill areas were misplaced. Much of the Respondent's criticism focussed on applications for jobs involving things such as buying and merchandising which were within her core skill areas as is apparent from her tailored CVs in those areas and the fact that ultimately, she got a role at Ralph Lauren in those areas. The burden is on the Respondent to prove a failure to mitigate and if it wanted further information from the Claimant about her CV or the applications she made it should have requested that. The Respondent has had the Claimant's mitigation evidence in full since before the hearing in March 2022, and has known since April 2022 that it had lost on liability. There is no excuse for not having requested further disclosure of the Claimant earlier if, notwithstanding the voluminous evidence of job applications, it had concerns about the approach the Claimant had taken or wished to question the tactics she had adopted in making her applications. As it is, there was no reason for the Claimant to volunteer this sort of information in advance. It is not the usual focus of the argument where a failure to mitigate is in issue. Indeed, the employer's argument is normally that a Claimant who has been unsuccessful of finding employment after six months or so should have 'widened the net'.

38. Likewise, issues as to the quality of an individual's applications do not normally form part of consideration at a remedy hearing. If that was to be the line of cross examination, requests should have been made in advance to the Claimant for the evidence of the nature of the applications that were made so that questions could have been put on a proper evidential basis.

39. In any event, the reasonableness of what an individual does by way of a search for jobs is to be judged by reference to the individual's personal circumstances, including age, health, and any disability they may have. The Claimant is someone who had been out of the job market for 22 years and who has Dyslexia. The effects of the Claimant's Dyslexia on her we set out at paragraph 104 of the liability judgment and also at paragraph 116 where we addressed what 'somethings arising in consequence of her disability' have been taken into account by the Respondent in selecting her for redundancy in the first place. Those 'somethings' included making mistakes and errors in work, communications feeling rushed, accuracy and attention to detail and communication tone. The thrust of Mr Dhorajiwala's cross examination, in particular the part focussed on rushing applications, the mistaken CAB application and alleged failures to tailor applications sufficiently, was that these sorts of issues had affected the Claimant in her job search and as such she had acted unreasonably in that search. When the Claimant's counsel raised the connection between the Claimant's disability and these arguments of the Respondent in closing submissions, and we reminded Mr Dhorajiwala of the content of our liability judgment, he sought to justify this line of questioning by saying that he had not been suggesting the Claimant had made *"spelling mistakes"* in applications *"or anything like that"*. He apologised, however, making clear that he had not intended his questions to give offence. We acknowledge that his apology was genuinely meant. We observe, however, that it was most unfortunate that Mr Dhorajiwala expressed himself thus given the content of paragraph 10 of the

Claimant's witness statement for this hearing where she raises her specific hurt at the Respondent having considered Dyslexia related only to spelling mistakes and our findings at paragraph 64 of the liability judgment that Ms Waller's belief at the appeal stage that the Claimant's Dyslexia affected only spelling mistakes was mistaken (and unreasonably so).

40. Putting all that together, we find that there was no failure by the Claimant to comply with the duty to mitigate her loss and the Claimant is entitled in principle to compensation for her loss of earnings on the basis that she would have continued in employment on full pay from 31 October 2020 through to 1 February 2022 when she secured the job with Ralph Lauren.

Injury to feelings

41. We move on to deal with injury to feelings. The legal principles that we must apply are set out in a number of authorities. We have in particular reminded ourselves of the guidance in *Prison Service & Others v Johnson* [1997] ICR 274, which is that: awards for injury to feelings are decided to compensate the injury and party fully but not to punish the guilty party; an award should not be inflated by feelings of indignation at the guilty party's conduct; awards should not be so small as to diminish respect for the policy of the discrimination legislation, nor should they be so high that they are regarded as untaxed riches; awards should be broadly similar to the rate of awards of personal injury cases; and Tribunals should bear in mind the value of the award in everyday life.

42. The updated *Vento* guidance for claims presented on or after 6 April 2020 provides a lower band for the least serious cases between £900 and £9,000, a middle band of between £9,000 and £27,000 for cases that do not merit an award in the upper band and an upper band of £27,000 to £45,000, with the most exceptional cases being capable of exceeding £45,000.

43. In this case, the Claimant also claims aggravated damages. Aggravated damages will only be awarded in the most serious cases and guidance was given in *Commissioner of Police of the Metropolis v Shaw* [2012] ICR 464 about the approach to be taken to such awards.

44. We have in particular taken note of what President Underhill (as he then was) said at paragraph 21 that aggravated damages are awarded only on the basis and to the extent that the aggravated features increased the impact of the discriminatory act or conduct on the applicant and thus the injury to his/her feelings. At paragraph 22, we have had regard to the three categories case of case that President Underhill identified as being potentially appropriate for awards of aggravated damages: first, those focussed on the manner in which the wrong was committed which is where treatment has been high handed, malicious, insulting or oppressive (that wording being taken from *Broom v Cassell Co Ltd* [1972] AC 1027 on which the Respondent relies) and we agree that this is a very high threshold to meet; the second category of case is where the motive for the conduct was based on prejudice or animosity

which was spiteful or vindictive or intended to wound; and the third category is cases where the subsequent conduct of the Respondent aggravates the injury. We note that President Underhill there observed that the basis of awarding aggravated damages by reference to subsequent conduct is rather different from the other two categories in as much as it involves reliance on conduct by the defendant other than the acts complained of themselves or the behaviour immediately associated with them. He stated a purist might object that subsequent acts of this kind should be treated as distinct wrongs, but the law has taken a more pragmatic approach and then expresses words of caution to Tribunals which we have taken into account. He gives in that paragraph examples of the sort of case that might fit within that category: *"where the defendant conducted his case at trial in an unnecessarily offensive manner … where the employer rubs salt in the wound by plainly showing that he does not take the claimant's complaint of discrimination seriously … a failure to apologise may also come into this category, but whether it is in fact a significantly aggravating feature will depend on the circumstances of the particular case"*. Finally, we note by reference to paragraph 23 of the *Shaw* case that whatever sum we award must be proportionate to the suffering caused to the Claimant.

45. The evidence that we have received on this issue is as follows: the Claimant in her witness statement describes how distressing she found the handling of the redundancy process and her dismissal by the Respondent from a job that she loved after 22 years. She states, as she did at the liability hearing, how hurtful she found it that the Respondent was dismissive of what she was saying about her disability and the connections between it and the redundancy marking. She describes how she did not sleep well for a good three months after her dismissal, cried a lot, and felt very low not knowing what to do in her life. She said that she was *"confused, upset and hurt"* that she had been treated unfairly in comparison to her peers. She was: *"anxious and with low mood for days on end not wanting to get out of bed"*. She said that dismissal felt 'like a death' and that she was going through a process of grieving a major loss of being a loyal employee to the Respondent. It was a *"big loss to her emotionally and financially and she went to a low place in her life and never wishes this to happen to anyone else"*. She added that because she was dismissed for reasons connected with her disability that has knocked her self esteem and confidence and she has been anxious about whether another employer will want her or whether she will have further experiences like this again. She states that even bringing this claim has been difficult for her as she realises there will be a public judgment and she is highlighting her issues to the world and that she felt that she needed to do so in view of the injustice and to assist in her own healing.

46. The Claimant did not go to her GP about her feelings initially or at all until it was recommended by her ESO that she should do so. She does not adduce much medical evidence in support of her claim; she does not claim to have suffered any particular mental health injury. The notes from her conversation with her ESO in July 2022 record the Claimant as having said to her ESO that her emotional wellbeing was impacted from going through a *"trial of unfair dismissal after 22 years in work"*. The Claimant was questioned about this in

cross examination. It was put to the Claimant that she was more affected by the Tribunal process than losing her job. She denied this. She accepted that she had found the Tribunal proceedings stressful, but said that it was the whole thing that had caused her stress. We observe that these sentiments are reflected in the notes to which the Respondent took us with the emphasis in the notes being not only the trial but on dismissal 'after 22 years in work'. She said that it was all about the redundancy process and the loss of the company for which she had worked for 22 years. She said that everything she knew had come to an end, it was hard to do anything or get up when you have no reason to get up to talk to people or have conversations or be around people. She added that it was Covid time and an uncertain time for the whole world and that it was scary and lonely, she was eating badly, not exercising or socialising with friends because she had no money, she said previously she had been a bubbly and lively person and what had happened had changed that.

47. When questioned about the role that the Covid pandemic and the restrictions had on her feelings, she accepted that the isolation because of the Covid pandemic restrictions may have added to her feelings as it did for anybody else, but she said it was not a big part of the problem, the main issue was the loss of her job.

48. Her ESO referred her for wellbeing support which began in September 2021 and on the advice of her ESO the Claimant also saw her GP as a result attending seven sessions of guide and self-help recommended by her GP. Her mood and anxiety scores at the start of the seven sessions were graded as 'severe'. The sessions ended in January 2022 and a letter of 3 February 2022 her GP notes that it had been agreed that her mood and anxiety scores were still 'moderate', and she would benefit from further cognitive behavioural therapy (CBT) around self-esteem.

49. Finally, it was put to the Claimant that the conduct of Ms Gaskell and Ms Waller had not been malicious, and the Claimant said she did not know but maybe it was.

50. Again, we intend no discourtesy to parties in not summarising the submissions made to us, but we have taken those carefully into account and our conclusions are as follows:-

51. We accept the Claimants evidence about how she felt following her dismissal and the discriminatory treatment that she had received. We have found her throughout these proceedings to be a frank and honest witness who was prepared to accept points that might go against her case, such as when she accepted that the effects of the Covid pandemic might have made things worse for her.

52. The Claimant did not attend her GP until sometime after her dismissal and she has not at any point specifically been diagnosed with depression or any other mental health condition as a result of her dismissal. This means that we do not treat her injury to feelings as being at the most serious end of the

cases that we deal with, but nonetheless, it is clear that her feelings were significantly injured by the whole redundancy process and the dismissal. Even nine months after dismissal her mood and anxiety were still assessed as severe on the self-assessment she did in sessions organised by the GP and her description of feeling the loss of the job after 22 years to be 'like a bereavement' is not in our judgment overstating the position. We find it plausible and accept that she felt like that.

53. We find that no discount should be made to reflect the impact of the litigation on the Claimant. Someone who has been wronged as the Claimant has may have to litigate to prove that. The proceedings need not be defended. If they are, they are likely to be stressful and the Claimant was naturally affected by the proceedings, but we do not find that this is anything out of the ordinary or that any injury to feelings caused by the litigation can fairly be regarded in this case as a 'third party' injury for which the Respondent should not be responsible. It is clear from the Claimant's evidence that the heart of the injury to her feelings has remained the discrimination that she suffered.

54. We make some allowance for the fact that the Claimant did originally believe her dismissal to be the result alternatively or additionally of age and race discrimination and maintained that position from the redundancy process up until shortly before trial. We cannot award compensation for injury to feelings because of those beliefs and we infer that they must have formed some part of her injury although undoubtedly the main focus of the Claimant throughout has been the disability discrimination that we ultimately upheld.

55. We have also taken care not to take into account the aspects of the claim as dismissal that we found to be unfair rather than discriminatory as the injury to feelings award is only available for discrimination but the elements that we found to be unfair and not discriminatory have not be a particular focus for the Claimant personally.

56. As to the impact of Covid, despite the Claimant's frank acceptance that the pandemic had made things worse for her, we make no particular discount for it. We accept the arguments made on the Claimant's behalf that if she had not been dismissed, she would not have been out of work and socially isolated at home with limited financial resources. The proper way of viewing that in this case is that in our judgment it was the Respondent's conduct that exacerbated the effects of the pandemic restrictions on the Claimant rather than the other way round.

57. The redundancy process was a relatively protracted process over three months and there were features of that process which in our judgment aggravated the injury to the Claimant and can properly be regarded as 'high handed'. We have in mind specifically the failure by the Respondent to take seriously what she was saying about the link between the redundancy marking and her Dyslexia. This was reflected in the failure by the Respondent to seek occupational health advice about Dyslexia rather than simply ignoring or rejecting what the Claimant was saying. It was also reflected in Ms Waller obtusely maintaining that the Claimant at the appeal stage had said that

Dyslexia was all about spelling mistakes when that was both factually incorrect and also not what had been recorded in the Respondent's notes of the meeting. The Claimant has relied in particular on what we said at paragraph 155d of the liability judgment about the Respondent assuming *"without any investigation at all, that the Claimant was either lying or mistaken about the link with her Dyslexia"*. That sentence was in the unfair dismissal section of our judgment, but we consider the Claimant is correct to draw our attention to it as it is directly relevant to what we consider to be the high-handed nature of the discriminatory treatment in this case. The repetition of these arguments at this remedy hearing by way of protracted cross examination of the Claimant about a job search based on criticisms of her approach that were similar to the reasons for which she was marked down in the redundancy selection process has in our judgment further aggravated the injury. That is especially so given that Mr Dhorajiwala's explanation for why he pursued that line of cross-examination included that he did not consider it related to the Claimant's disability as he was not asking her about spelling mistakes or anything like that. The cross-examination was thus apparently pursued as a result of the same failure to appreciate the nature of the Claimant's Disability as was manifested by Ms Waller at the appeal stage, and this despite what we said in our liability judgment and what the Claimant said in her witness statement about having found this particularly offensive. Despite Mr Dhorajiwala's apology, we consider that the Respondent's conduct of this hearing 'rubbed salt into the wound'. Indeed, we felt uncomfortable listening to the questioning and intervened.

58. Putting all those factors together and recognising that the award of injury to feelings compensation is a far from exact science, but doing the best we can, we judge the appropriate level of the award to be £22,000 of which £2,000 reflects the elements of the award that we consider result from the aggravated elements of the injury to feelings that we have identified.

Loss of statutory rights

59. The final issue that the parties invite us to determine as a matter of principle is what amount should be awarded to the Claimant by way of loss of statutory rights. The Respondent submitted £250, the Claimant submitted £800. In our judgment, taking into account the Claimant's long length of service and also reflecting our own experience of levels awarded in other cases, we consider the appropriate amount to be £500.

Conclusion

60. The unanimous judgment of the Tribunal is that:

(1) The Claimant is entitled to compensation under s 124 of the Equality Act 2010 of £**53,855.99**, calculated as follows:-

a. Past loss of earnings from 31 October 2020 to 1 February 2022, less benefits received and ex gratia redundancy payment: **£21,297.15**;

b. Expenses incurred in mitigation of loss: **£119**;
c. Loss of statutory rights: **£500**;
d. Interest on the above sums under the *Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996:* **£1,887.79** (calculated at the judgment rate of 8% from the mid-point date between the date of contravention, 15 September 2020, and the hearing date, 10 November 2022, being 393 days at a daily rate of £4.80);
e. Injury to feelings: **£22,000** (including £2,000 by way of aggravated damages);
f. Interest on the injury to feelings award at the judgment rate of 8% from the date of contravention to hearing date, being 787 days at a daily rate of £4.82, giving a total of **£3,794.85**;
g. The total compensatory award is therefore £49,598.79. Allowing for £30,000 tax free, and £2,570 by way of unused personal allowance for 2021/22, the Claimant will be liable to tax at 20% on £17,028.79, so the total award must be grossed up by **£4,257.20**, giving a toal of **£53,855.99**.

(2) As the Claimant has been fully compensated for her losses under s 124 of the Equality Act 2010, no compensatory award is payable under s 123 of the Employment Rights Act 1996.
(3) As the Claimant received a redundancy payment more than equal to her entitlement to a basic award for unfair dismissal under s 122 of the Employment Rights Act 1996, no basic award is payable under that section.
(4) The Respondent must pay the compensation to the Claimant **within 14 days** of the date this judgment is sent to the parties.

COSTS

61. This is the Tribunal's unanimous Judgment on costs.

62. The Claimant has applied for her costs of the whole proceedings to be subject to detailed assessment if need be under Rules 76(1)(a) and (b) of the Tribunal Rules, specifically on the grounds that the Respondent's defence to the claim on liability stood no reasonable prospect of success, or alternatively that there has been unreasonable conduct of these proceedings.

63. We have considered the arguments advanced by the parties and we have reviewed the documents and correspondence in the bundles of without prejudice materials that both parties have relied on. The conclusions that we have reached in relation to the points of principal that arise are as follows:-

64. First, so far as the Respondent's case on liability is concerned, both as to disability discrimination and unfair dismissal, we find that this was not a case where the Respondent's defence stood no reasonable prospect of success. The Respondent's argument in correspondence and at the liability hearing that medical evidence was required to demonstrate that the Claimant was

disabled was a bad point, not well founded in legal principle and inappropriate to the nature of the disability relied on because the Claimant's impairment is a learning difficulty rather than a medical impairment and there can be no medical evidence of that impairment. However, it does not follow that it was unreasonable of the Respondent to defend the case on the issue of disability.

65. Dyslexia is not one of those conditions which inevitably amounts to a disability under the Equality Act, it depends on how it effects the particular individual in their particular case. Although it is not a medical issue, it is the sort of thing that an individual in the context of bringing a legal claim might usually be expected to obtain an up-to-date assessment from an Educational Psychologist (or similar). The Claimant in this case relied on an old report which, although it contained much of relevance, did not specifically deal with the impact of her dyslexia on her day-to-day activities (including her work activities) as at the times (and in the places and circumstances) that were relevant to the claim. In order to succeed on disability, the Claimant therefore needed to rely on her own witness evidence of the impact of Dyslexia on her day-to-day activities at work during the relevant period. This of course she did at trial and we accepted her evidence which is why her claim succeeded. It is clear from paragraph 104 of our liability judgment that the Claimant's case could not have succeeded on the study skills report alone, it needed the evidence that the Claimant gave us at Tribunal.

66. Although the Respondent's argument about lack of medical evidence was misconceived, therefore, it does not follow that its case stood no reasonable prospect of success on the issue of disability. From the Respondent's perspective, there was a realistic prospect that the Claimant's evidence would not stand up to scrutiny and if that had happened the disability discrimination claim would have failed.

67. It does not follow, however, that the Respondent's position was not a risky one. This is because it should have been obvious to the Respondent from the very clear letters from the Claimant's representatives (in particular that of 28 October 2020 and also the costs warning letter of 26 October 2021) that if it failed on the question of whether or not the Claimant was substantially disadvantaged in her day to day activities by her Dyslexia (and thus disabled within the definition of s 6), then it was highly likely the Respondent would also lose on the substantive disability discrimination claims. This is because, as was very properly explained in crystal clear terms in that correspondence, the things that the Claimant said caused her Dyslexia to have a substantial impact on her ability to carry out day to day activities were clearly the matters that had featured in the redundancy assessment. Thus, once the disability hurdle was overcome, it was highly likely that the whole disability discrimination claim would succeed. That does not make it a no reasonable prospect of success case, but it does make it a very risky one and that has a bearing on the reasonableness of the Respondent's conduct of the litigation to which we return.

68. So far as unfair dismissal is concerned, that was largely founded on the disability discrimination claim and so the same points apply. The Claimant

raised a separate point about the inevitability of the dismissal being found to be unfair for 'double counting' and although the Claimant is right that was relatively clear from the documents, in our judgment it was not obvious that that on its own (i.e. absent success on the disability discrimination claim) that this would have rendered the dismissal unfair. What happened at the appeal stage in terms of non-disclosure of documentation would have been obvious from the point at which the parties had disclosed documents to each other, but of course unfairness at the appeal stage in an unfair dismissal claim does not necessarily render a dismissal unfair if the underlying dismissal itself has been fair. That is especially so in a redundancy case where the Acas Code of Practice does not require an appeal to be allowed or granted.

69. So, for those reasons we find that the Respondent's defence to the liability aspect of all the claims was not one that stood no reasonable prospect of success.

70. We then turn to the arguments in relation to unreasonable conduct. So far as the reasonableness of maintaining the argument both in correspondence and at the hearing about the Claimant's need for medical evidence, we have already dealt with that. It was a bad legal argument, but not in our judgment unreasonable conduct in general terms to dispute disability in this case, certainly not up to the hearing, and we do not find that it was unreasonable (having got to the hearing and heard the Claimant's evidence) for the Respondent to maintain its position in closing submissions rather than simply conceding on the basis of the way the evidence came out at the Tribunal. So we do not find that there was unreasonable conduct with regard to that aspect of the case.

71. So far as the approach to settlement discussions is concerned, however, we consider that there has been unreasonable conduct by the Respondent, bearing in mind the relative strength of the Claimant's case and the relative riskiness of the Respondent's position for the reasons we have already set out. In our judgment, the Respondent's £2,000 offer made as 'best and final' on 25 February 2022 just before the liability hearing, coming as it does after a lengthy period in which the Respondent had not put forward any counter offer to the Claimant's £60,000 offer in our judgment was tantamount to a refusal to engage in negotiations at all. £2,000 was clearly pitched at the 'nuisance' level. It was in our judgment rightly regarded by the Claimant and her solicitors as insulting given the strength of the Claimant's case and the relative riskiness of the Respondent's position. We infer that the Respondent's assessment of the merits of the Claimant's case was infected by the same 'high-handed' approach to her disability that we have found merited an award of aggravated damages. In making our finding that this offer was insulting and tantamount to a refusal to negotiate that was unreasonable in this particular case, we have taken into account that at the point that offer was made the parties had only just exchanged witness statements late following the Respondent making an application to strike out the Claimant's case. The Claimant was of course at that point also still pursuing age and race discrimination claims which were subsequently dropped. We acknowledge that these factors would have made the Respondent's position

feel stronger at this point. Nonetheless, at the point the offer was made the Respondent did have the Claimant's witness statement and all the evidence that showed the strength of her case on disability discrimination and riskiness of the Respondent's position, and in our judgment the combination of the failure to make any offer at all previously, and then the making of a £2,000 offer which in our judgment was insulting, amounted in the context of this case to an unreasonable failure to negotiate and thus to unreasonable conduct of the proceedings. Although the Claimant's offer of £60,000 had been 'on the table' since October 2020, so that it could be said that the unreasonable failure to negotiate began at that point, we consider that the threshold of unreasonableness was actually crossed from the point that the Claimant's solicitors sent a costs warning letter on 26 October 2021. That ought to have prompted a thorough review of their case by the Respondent as they were from that point on notice of the Claimant's intention to apply for costs if successful.

72. The next point on which the Claimant relies is the Respondent's failure to concede knowledge of disability. No separate point arises in relation to this: the question of knowledge turned on the knowledge of substantial and disadvantage and for the reasons we have already set out it was not unreasonable for the Respondent to dispute that.

73. The Claimant's fourth point again related to the strength of the claim and we have already dealt with that.

74. Coming on to the remedy hearing, the aspects of the Respondent's conduct at the remedy hearing that we found aggravated the injury to feelings for the Claimant in this case must in our judgment also amount to unreasonable conduct. The tests are essentially the same.

75. We further find that the Respondent's case that there was a failure by the Claimant to comply with the duty to mitigate her loss was unreasonable. Indeed, we would go so far as to find that that argument stood no reasonable prospect of success based on the evidence the Claimant had produced prior to the liability hearing in March 2022 for the reasons we have already identified in our remedy judgment. In those circumstances, acting reasonably, the Respondent ought to have conceded that aspect of the remedy issue and thus we should either not have had a hearing at all or should have had a hearing only on injury to feelings.

76. We note that the Claimant's offers in between the liability hearing and the remedy hearing were high, but then the Respondent's were low. The Respondent made an offer of 70% of what it considered to be a realistic amount that the Tribunal would have awarded, but acting reasonably it should have conceded on mitigation of loss and thus made a higher offer and the consequences of that would in all likelihood have been that the parties would not have been back here for a remedy hearing as despite the Claimant's high offers, in the light of Mr Tomison's submissions, and his and the Claimant's approach to this case generally, we would expect that if the Respondent had adopted a reasonable position, so would the Claimant.

77. Putting all that together, we are satisfied that the jurisdiction to make a costs award has arisen. We have to decide whether as a matter of discretion we should make an award. We consider that it is appropriate to do so. The Respondent is a well-resourced and established high street retailer and it has been represented throughout professionally. The Claimant on the other hand has met the costs of this litigation out of her own pocket, has (as was explained by her solicitor to the Respondent's in correspondence) struggled at times to keep her solicitors in funds, but has been successful on all major aspects of the case. In our judgment, an award of costs in this case would be fair and appropriate and go some way to rectifying the imbalances between the parties.

78. We do not have to consider what costs specifically flow from the unreasonable conduct that we have found, but we have had regard to that because it appears to us that it would be just to take that approach. It does not follow that if the Respondent had acted reasonably with regard to settlement negotiations that there would not have been a liability hearing in this case. Indeed, in our judgment there is a good chance that there would have been a liability hearing even if there had been reasonable conduct by the Respondent in engaging in settlement negotiations. We so find in part because the £60,000 offer that the Claimant had been making since 28 October 2020 (although it has evidently ultimately proved to be a relatively realistic one) was a high one and we would not say that the Respondent unreasonably failed to accept that offer. There was also the complication of the age and race discrimination claims and the issue of the Claimant's failure to comply with orders. Although we do note what the reasons for those were (specifically the Claimant's funding difficulties and personal issues affecting her and her solicitor), but nonetheless so far as settlement of the claims were concerned, these issues would have reduced the chances of the parties managing to reach a negotiated settlement prior to the liability hearing. In our judgment, the appropriate split in relation to the costs of the proceedings from 27 October 2021 (the day after the Claimant's costs warning letter) up to and including the liability hearing are 70/30 with the Claimant being entitled to 30% of her costs of the proceedings up to that point.

79. Thereafter, up to the remedy hearing we consider it appropriate that the Claimant should have the whole of her costs. We acknowledge that it does not necessarily follow that if the Respondent had conceded the point on mitigation of loss that the parties would have managed to settle, but we think there is a very good chance that they would have managed to settle. In addition, there is the unreasonable conduct of the hearing itself which we consider to be appropriately marked by not making any discount for the chance that the parties might have settled previously. So, in our judgment the Claimant is entitled to 30% of the costs of the claim from 27 October 2021 up until the end of the liability hearing and then to 100% of her costs from that date to the end of today's hearing.

80. The costs will need to be subject to assessment on the standard basis, but we expect that the consequences of the decisions we have taken will mean

that the cost schedule will come down below the £20,000 limit such that it could be a matter for summary assessment rather than detailed assessment. We will make directions for the parties to consider whether they are able to reach agreement on the amount of costs and to notify the Tribunal if a decision is required, on the papers if possible or if not appropriate at a hearing.

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Employment Judge Stout

28 November 2022

WRITTEN REASONS SENT TO THE PARTIES ON

28/11/2022

FOR THE TRIBUNAL OFFICE