



EMPLOYMENT TRIBUNALS

Claimant: Ms C Pill

Respondent: Department for Work and Pensions

Heard at: Liverpool **On:** 17 & 18 October 2022

Before: Employment Judge Liz Ord
Ms Jean Pennie
Ms Carly Doyle

Representation:

Claimant: In person
Respondent: Mr S Lewis (Counsel)

RESERVED JUDGMENT REMEDY

1. The respondent is ordered to pay the claimant the total sum of £47,087.46 consisting of the following amounts:
 - 1.1. £1,776.72 as a basic award of for being unfairly dismissed.
 - 1.2. £21,500 for injury to feelings.
 - 1.3. £5,357.87 interest on the above sum for injury to feelings.
 - 1.4. £8,012.49 for immediate financial losses.
 - 1.5. £1,214.38 interest on the above sum for immediate financial losses.
 - 1.6. £7,046.00 for future financial losses.
 - 1.7. £1,680.00 for past and future bookkeeping fees.
 - 1.8. £500.00 for loss of statutory rights.
2. The tribunal recommends that, within 14 days of receiving this judgment, the respondent provides the claimant with a positive reference, which does not say or imply that she was dismissed for unsatisfactory attendance.

REASONS

Preliminary

1. This was a remedy hearing following liability judgment sent to the parties on 25 March 2022. That judgment determined that the respondent discriminated against the claimant for failing to make reasonable adjustments, and for discrimination arising out of disability, and that it unfairly dismissed the claimant.
2. The claimant initially sought reinstatement or alternatively re-engagement, in addition to compensation, as the remedy for unfair dismissal. However, as part of her closing submissions she indicated that she might have confused the terminology and that, in fact, it was re-engagement that she sought and not reinstatement.
3. With respect to the discrimination, she seeks compensation for financial losses and injury to feelings.

Issues

4. The issues to be determined were set out by the tribunal at the remedy hearing. They are as follows:

Unfair Dismissal

- 4.1. Whether the tribunal should make a reinstatement order and, in particular:
 - 4.1.1. Whether the claimant wants reinstatement;
 - 4.1.2. Whether it is practicable for the respondent to comply with an order for reinstatement;
 - 4.1.3. Whether the tribunal should exercise its discretion to order reinstatement.
- 4.2. Whether the tribunal should order re-engagement and, in particular:
 - 4.2.1. Whether there is employment comparable to that from which the claimant was dismissed, or other suitable employment;
 - 4.2.2. Whether it is practicable for the respondent to comply with an order for reengagement;
 - 4.2.3. Whether the tribunal should exercise its discretion to order re-engagement.
- 4.3. If the tribunal does order re-engagement, on what terms the claimant should be re-engaged, as set out in s115(2) of the Employment Rights Act 1996.

4.4. What basic award the tribunal should order.

Disability Discrimination

4.5. Whether the tribunal should make a recommendation that the respondent provide the claimant with a new reference.

4.6. What compensation should the tribunal award for injury to feelings?

4.7. Whether the tribunal should award aggravated damages and, if so, how much.

4.8. What compensation the tribunal should award for financial losses, taking into account whether the claimant took reasonable steps to mitigate her loss.

4.9. Whether there was a chance the claimant would have been fairly dismissed anyway and, if so, whether her compensation should be reduced under the *Polkey* principle.

4.10. Whether the tribunal should award an ACAS uplift and, if so, for what and for how much

4.11. What award, if any, should be made for loss of statutory rights.

Evidence

5. The tribunal had before it a remedy bundle of 297 pages; extracts from the original liability bundle; 2 pages of additional medical evidence from the claimant; a 2 paged article on bookkeeping from the respondent.
6. We received witness statements from the claimant, and from Lynne Fell (Service Leader) on behalf of the respondent, and heard evidence on oath from both.
7. The parties submitted written closing submissions, and made oral closing submissions at the hearing.

The Law

8. When claims are made under both the Employment Rights Act 1996 (ERA) and the Equality Act 2010 (EqA), there can be no double recovery with respect to any particular loss.
 - 8.1. Section 126(2) ERA states: An [employment tribunal] shall not award compensation under [either of those Acts] in respect of any loss or other matter which is or has been taken into account under [the other] by the tribunal (or another [employment tribunal]) in awarding compensation on the same or another complaint in respect of that act.
9. In *D'Souza v London Borough of Lambeth* 1997 IRLR 677, EAT, The EAT stated that, where it was possible to claim compensation for the same loss under both the ERA and the EqA, employment tribunals should award

compensation under the discrimination legislation, thereby avoiding the cap on the unfair dismissal award.

Discrimination

General

10. Section 124 of the Equality Act 2010 applies relatively where an employment tribunal has found a contravention of a provision relating to work. It states:

(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.

(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.

11. In accordance with the Employment Tribunals (Interest on Awards etc) Regulations 1996, interest is awarded on injury to feelings awards from the date of the act of discrimination complained of until the date on which the tribunal calculates the compensation (reg 6(1)(a)); for all other sums it is from the mid-point of the date of the act of discrimination complained of and the date the tribunal calculates the award (reg 6(1)(b)).

12. Where a tribunal considers that serious injustice would be caused if interest were to be calculated according to the aforementioned approaches, it may calculate it on such different periods as it considers appropriate (reg 6(3)).

13. Where discrimination extends over a period of time, the tribunal is afforded some discretion in deciding when the discrimination starts for the purposes of calculating interest.

14. The recoupment regulations do not apply to discrimination awards, and relevant benefits obtained because of the dismissal are deducted from any compensatory award.

15. A sum, usually in the order of between £250 to £500 may be awarded for loss of statutory rights as part of the compensatory award.

Injury to feelings

16. Injury to feelings compensation is designed to compensate a claimant in discrimination cases for the impact caused by the acts found by the tribunal to be unlawful. The injury must flow from the acts of discrimination. The level of damages should be comparable to compensation awarded in personal injury cases.

17. In *Vento v Chief Constable of West Yorkshire Police (No.2)* 2003 ICR 318, CA, the Court of Appeal gave specific guidance on how employment tribunals

should approach the issue. Three bands of compensation were identified, namely:

- A top band for the most serious of cases, such as where there has been a lengthy campaign of discriminatory harassment;
- A middle band for serious cases that do not merit an award in the highest band; and
- A lower band for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

18. For the year 6 April 2019 to 5 April 2020 (the year in which the claimant presented her claim), the Vento band were:

- Top band - £26,300 to £44,000;
- Middle band - £8,800 to £26,300;
- Lower band - £900 to £8,800.

Aggravated damages

19. Aggravated damages may be awarded where the behaviour of the respondent increased the impact of the discriminatory act on the claimant and therefore, the injury to her feelings. They are compensatory and not punitive. In *Alexander v Home Office* 1988 ICR 685, CA, the Court of Appeal held that aggravated damages can be awarded where the behaviour was carried out in a "high-handed, malicious, insulting or oppressive manner".

20. In *Commissioner of Police of the Metropolis v Shaw* UKEAT/0125/11/ZT, Mr Justice Underhill, the then President of the EAT, identified three broad categories of case for awarding aggravated damages:

- Where the manner in which the wrong was committed was particularly upsetting;
- Where the motive for the conduct was evidently based on prejudice or animosity, or was spiteful, vindictive or intended to wound;
- Where subsequent conduct added to the injury, for example, where the employer conducted tribunal proceedings in an unnecessarily offensive manner, or "rubed salt in the wound" by plainly showing that it did not take the claimant's complaint of discrimination seriously.

21. The tribunal must consider whether the overall award of injury to feelings and aggravated damages is proportionate to the totality of the suffering caused to the claimant. In *Wilson Barca LLP and other v Shirin* [2020] UKEAT/0276/19, the EAT said that, if the tribunal makes an aggravated damages award it should explain why the amount of the injury to feelings award is insufficient to compensate the claimant, and the extent to which the conduct giving rise to the award of aggravated damages has increased the impact of the discriminatory act on the claimant

Mitigation

22. Claimants are under a duty to take reasonable steps to mitigate their loss.

23. In *Cooper Contracting Limited v Lindsey*, [2016] ICR D3, EAT, it was stated that the burden of proof in showing a failure to mitigate lies with the employer.

24. In *Ministry of Defence v Hunt and ors* 1996 ICR 554, EAT, the EAT stressed that the employer must adduce evidence in relation to mitigation and that a vague assertion of failure to mitigate unsupported by any evidence is unlikely to succeed.

25. In seeking to mitigate loss, it may be a reasonable step for a claimant to set up his or her own business. In *AON Training Ltd (formerly Totalamber plc) and anor v Dore* 2005 IRLR 891, CA, the Court of Appeal held that it was reasonable for the claimant, who had dyslexia, to set up his own business, given the likely difficulty of obtaining another appropriate job.

ACAS uplift

26. The ACAS Code of Practice on Disciplinary and Grievance Procedures does not apply to capability dismissals based on ill-health. In *Holmes v QinetiQ Ltd* 2016 ICR 1016, EAT, Mrs Justice Simler upheld an employment tribunal's decision that a "disciplinary situation" did not extend to procedure to terminate an employee's employment as a result of his incapability due to ill health, where there was no element of culpable conduct on the part of the employee.

Polkey deduction

27. Where an employer has failed to follow procedures in dismissing an employee, the tribunal, when determining any compensatory award must ask itself what would or might have happened if a fair procedure had been followed. This involves an element of speculation. The proposition comes from the case of *Polkey v AE Dayton Services Ltd* [1988] ICR 142, HL, which held that where there is an unfair dismissal on procedural grounds, compensation may be reduced to reflect the likelihood that the employee would have been dismissed in any event had a proper procedure been followed.

Unfair Dismissal

Basic Award

28. The basic award is intended to compensate for loss of job security. The award is paid gross.

29. Section 119(1) ERA provides that it is calculated by –

- (a) Determining the period, ending with the effective date of termination, during which the employee has been continuously employed;
- (b) Reckoning backwards from the end of that period the number of years of employment falling within that period;
- (c) Allowing the appropriate amount for each of those years of employment.

30. In accordance with section 119(2), the appropriate amount is:

- (a) 1.5 weeks for each year the employee was 41 years or older;

- (b) 1 week for each year the employee was below 41 years but not younger than 22 years;
 - (c) ½ week for each week the employee was below 22 years.
31. Where an employee's service straddles an age of 41 or 22 years, the individual only receives the higher rate for the complete years of service worked after that age was reached.
32. Section 97(1) ERA defines the Effective Date of Termination. It states relatively:
- (1)"the effective date of termination" -
 - (a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or the employee, means the date on which the notice expires ;
 - (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect.
33. Section 97(2) extends the period in (1)(b) in certain circumstances. It states relatively that:
- (2) Where-
 - (a) the contract of employment is terminated by the employer, and
 - (b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)), for the purposes of section....119(1) the later date is the effective date of termination.
34. Section 86 provides relatively that:
- (1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more –
 - (c) Is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.

Reinstatement/re-engagement

Legislation

35. Sections 112 to 115 of the ERA provide relevantly:

- 35.1. If the complainant so wishes, the tribunal may make an order for reinstatement or re-engagement (ss112(3) and 113).

- 35.2. An order for reinstatement is an order that the employer shall treat the complainant in all respects as if she had not been dismissed (s114(1)).
- 35.3. An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer, or by an associated employer, in employment comparable to that from which she was dismissed or other suitable employment (s115(1)).
- 35.4. On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including (a) the identity of the employer, (b) the nature of the employment; (c) the remuneration for the employment, (d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal for the period between the date of termination of employment and the date of re-engagement, (e) any rights and privileges which must be restored to the employee, and (f) the date by which the order must be complied with (s115(2)).
36. Section 116 ERA provides relevantly:
- 36.1. In exercising its discretion under s 113 ERA, the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account (a) whether the complainant wishes to be reinstated, (b) whether it is practicable for the employer to comply with an order for reinstatement, and (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order her reinstatement (s116(1)).
- 36.2. If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms (s116(2)). In so doing the tribunal shall take into account (a) any wish expressed by the complainant as to the nature of the order to be made, (b) whether it is practicable for the employer to comply with an order for re-engagement, and (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order her re-engagement and, if so, on what terms (s116(3)).
- 36.3. Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of subsection (1)(b) or (3)(b), whether it is practicable to comply with an order for reinstatement or re-engagement (s116(5)).

Caselaw

37. *Department of Health v Bruce and anor* EAT 14/92 The EAT held that the Civil Service was not one "inalienable whole" for the purpose of determining the claimant's employer.
38. In *Pirelli General Cable Works Ltd v Murray* 1979 IRLR 190, EAT, the EAT ruled that an employment tribunal had not discharged its statutory obligations by simply ordering re-engagement on terms to be agreed between the parties.

The order was invalid because it failed to specify either the nature of the employment or the rate of remuneration as required by s.115.

39. In *Lincolnshire County Council v Lupton* 2016 IRLR 576, EAT, the EAT held that the terms of a re-engagement order must be specified with a degree of detail and precision.

Costs

40. In employment tribunals, costs do not follow the event and therefore, the winning party is not automatically entitled to their costs. If a party wishes to claim costs, they must do so in accordance with the provisions set out within rules 74 to 84 of the Employment Tribunals Rules of Procedure 2013. There are criteria to overcome, as set out in rule 76, before any award may be made, and the bar is set high.

Other

41. The tribunal has taken into account the additional caselaw set out in the respondent's closing submissions.

Findings of Fact

Background

42. The claimant, who was born on 13 April 1981, started work with the DWP on 17 December 2001 and worked for them for over 17 years.
43. In around December 2012 she was diagnosed with Myalgic Encephalomyelitis (ME), otherwise known as Chronic Fatigue Syndrome. From 2013 she reduced her worked hours to 8 hours per week, which she worked in two blocks of four hours on non-consecutive days. Reasonable adjustments were put in place in May 2014 allowing her to work upstairs and avoid face to face contact with people, which she found difficult due to her ME.
44. From around 2016 the DWP started working towards the full service roll out of Universal Credit (UC). The legacy benefits the claimant worked on were to be phased out. The claimant was told she needed to train up on UC, although the training could not be fitted around her working hours. The respondent offered 1-2-1 training to other employees who joined the service singularly. The claimant could not work longer hours and no training was undertaken.
45. Thereafter, the claimant enquired about other jobs she might be able to undertake in an "Equality Act Move". She had worked in other sections of the organisation previously and was familiar with certain other work types. Some searches were made by the respondent up to June 2017, although nothing was offered to her.
46. In November 2018 the claimant's reasonable adjustments were taken away from her and, after a period of sick leave, she was dismissed on 13 March 2019. She claimed she was discriminated against and unfairly dismissed and presented a claim to the employment tribunal on 12 June 2019.

47. At the liability hearing held on 14 to 18 March 2022, the tribunal held that the respondent had failed to make reasonable adjustments on four counts by: 1) failing to be flexible in how the claimant undertook training from June 2017; 2) requiring her to work downstairs from November 2018; 3) not allowing her to work temporarily from home from November 2018; 4) not providing her with a laptop to work from home with from November 2018.
48. The tribunal also held that the respondent discriminated against her on two counts: 1) by failing from June 2017 to look for an Equality Act Move because of her inability to train more than 8 hours per week; and 2) by dismissing her on 13 March 2019 because of her absence, both matters of which arose in consequence of her ME.
49. Furthermore, it held that the respondent had not acted reasonably in treating capability as a sufficient reason to dismiss the claimant, both on a substantive and procedural basis. Therefore, the dismissal was unfair.

Reinstatement/re-engagement

50. The claimant lost trust and confidence in the managers of the Job Centre Plus office where she worked. She believed they tried for years to get rid of her, as well as failing to make reasonable adjustments and discriminating against her. On this basis, she confirmed at the hearing that she did not want to return there.
51. However, the claimant wished to be re-engaged part time for two days a week for 4 hours per day on non-consecutive days. If she were able to go into the workplace, it had to be within 20 minutes travel distance from home.
52. It has been well over three years since the claimant was dismissed and changes have taken place at the DWP, including the widespread rollout of UC, which has impacted much of the work. The claimant's knowledge and skills have deteriorated, as she has not been able to keep up to date over this period or do any work of that nature. In order to take up a new post, she would need substantial re-training to build up her knowledge and operate the new systems.
53. At the time of the liability hearing the claimant had been seeking a temporary adjustment to work from home. At the remedy hearing she confirmed that she still required home working for an initial 12 months and thereafter a review to ascertain whether she could do some work from an office.
54. The evidence from Ms Fell, which we accept, is that there are no relevant vacancies in the DWP, which would fit the claimant's requirements, and there is no obligation on the respondent to search for suitable positions across the wider Civil Service. Furthermore, the claimant has not identified any suitable vacancies, which she could step into.

Injury to feelings

55. The claimant suffered from anxiety and depression prior to the discriminatory acts found by the tribunal. She was diagnosed with depressive disorder on 4 April 2012. Following her diagnosis of ME in around December 2012, she

believed her capability was continuously brought into question and her conditions worsened as her confidence decreased.

56. Counselling had started some time before the discriminatory acts took place. The GP's letter of 9 June 2016 refers her to the Community Counselling Services on the NHS, and she also undertook PAM assist counselling (Employee Assistance Program) at work at around this time. She undertook both NHS and PAM assist counselling until just before her dismissal, when her quota on the NHS ran out.
57. Her conditions were exacerbated when she was required to work downstairs from November 2018. On 3 December 2018 she went off sick for the first time in 4 years with, what she describes, as an ME crash. Her resilience was low and she had psychological difficulties and panic attacks. The GP's FIT note records panic attacks. She obtained several FIT notes thereafter and did not return to work.
58. The Occupational Health Consultation Report of 14 January 2019 notes that she had recently increased her anxiety medication and was unable to return to the office due to anxiety. It records that she appeared tearful throughout the consultation. Using a well validated tool to assess symptoms of anxiety and depression, it identified both at a moderate level. She was advised to seek counselling and Cognitive Behavioural Therapy, and the report refers to ongoing personal stressors.
59. At her 2 month review meeting with her line manager on 29 January 2019 anxiety and depression is referenced.
60. The GP's letter of 12 April 2022 says that her conditions worsened, particularly her mental health, when her employer insisted that she see clients face to face and that she was coping much better undertaking phone discussions and working from home. There was particular worsening over the last 3 years, since her dismissal. It records that she continues to take antidepressant medication and Amitriptyline.
61. The claimant's medical records show that she has been taking the anti-depressant Citalopram (20mg). The Amitriptyline she took is a powerful benzodiazepine taken for pain and sleep, and is also an antidepressant. She did not take it prior to her dismissal. She took it as and when needed, as it affected her other medication.
62. Prior to November 2018, the claimant had generally been managing her conditions successfully with reasonable adjustments. She was a competent employee with a clean disciplinary record, who had worked for the respondent for 17 years. She enjoyed her job, which she found fulfilling and satisfying, and which gave her a sense of self-worth. It was hugely important to her.
63. Being dismissed on 12 March 2019 within 3 months of her capability meeting on 18 February 2019, came as a total shock and impacted on her self esteem and confidence, which to date she has struggled to build up again. She has been left with a feeling of being left on the scrap heap because she thinks, if the DWP with all their resources will not employ her, nobody else will.

64. The claimant's evidence, which we accept, is that the discrimination has had a lasting impact on her mental health and that following her dismissal, she was extremely depressed, anxious and very tearful. The claimant believes that the respondent was aware it was breaking the law.
65. However, there are other matters, which have had an effect on the claimant's mental health.
66. The effects and diagnoses of her ME in 2012 had a significant effect on the claimant and resulted in depression. Her mother's decline and sad passing away in September 2021 caused her to grieve. The COVID pandemic had an additional impact, although this was less than on many people, as she already had limited ability to go out because of her ME.
67. She was also affected by, what she perceived to be, a long-standing campaign by managers to get rid of her, including giving her unjust performance review marks, for which she raised several grievances.
68. There was also a comment made about her being "silly", which caused her distress, although this was an isolated incident with relatively little impact. Furthermore, her post termination payments were paid late and she was given a damaging reference, which caused some upset.
69. Overall, the unlawful discrimination was relatively limited in time and concentrated within the final stages of the claimant's employment.
70. In her updated schedule of loss, the claimant claims compensation at the top of the higher Vento band, namely £44,000. In her original schedule of loss she claimed £11,000, although this was drafted by a trade union official without proper consultation.
71. The respondent submitted that the level of award ought to be towards the bottom of the middle Vento band.

Mitigation

72. The claimant has not had any income since her dismissal other than her social entitlement benefits.
73. She was traumatised after her dismissal, and was very depressed, anxious and tearful, and her ME flared up. The GP's letter of 12 April 2022 indicates a worsening of her ME and severe anxiety depression over the previous three years since her dismissal from the DWP.
74. When she was in employment, she was limited to working 8 hours per week because of her conditions and she was not able to stand on her feet for long. Her deterioration reduced her energy and lessened her ability to undertake tests and interviews to secure new work.
75. The respondent submitted that the way the claimant conducted the liability hearing was impressive, personable, marketable and demonstrated an ability to concentrate and perform to a high standard. The tribunal accepts this. However, the claimant had taken a high dosage of anxiety medication, which

is addictive, in order to get her through the hearing. This was not something she would normally do and would be unsustainable on a frequent basis.

76. The claimant is a litigant in person and preparing for the employment tribunal, whilst coping with her conditions, often left her with little energy to do much else. Nonetheless, she did sign up for job alerts from a couple of job sites (Total Jobs and Reed). However, the COVID pandemic and lockdown from March 2020 reduced suitable job availability.
77. Whilst she searched for work, she found nothing suitable for her requirements; that is, nothing limited to 8 hours per week over non-consecutive days, within either a 20 minute drive from home, or working from home. Most suitable jobs also required full time training over a number of weeks. Even call centres required two weeks full time training.
78. The respondent also provided her with a damaging reference, which said "Caroline Pill's contract with the Department for Work and Pensions was terminated following dismissal due to Unsatisfactory Attendance". This would have reduced her chances of finding gainful employment. It was not disputed by the respondent that this reference was unhelpful to the claimant in finding new employment.
79. After the liability hearing, she contacted the respondent in an attempt to have the reference changed. Her previous line manager had left the DWP and so she was told to ring the Upton Jobcentre, where she had worked, and speak to any manager to raise a request. She did not do so, as she was left crying, upset and frustrated at the thought of having to explain her situation to an unknown manager. Consequently, the reference was not amended.
80. Realising that her prospects of finding employment were slim, the claimant enrolled on a bookkeeping course, which she hoped would give her the flexibility to do self employed work when she felt able to do so. She signed up for her first self-study online course on 23 August 2021 and by studying as and when she felt able to, she passed two Level 1 AAT Access Awards in Bookkeeping (equivalent to lower grades at GCSE).
81. She is currently working her way up to a Level 2 AAT Foundation Certificate in Bookkeeping (equivalent to GCSE grades 4-9) and thereafter plans to embark on the Level 3 AAT Advanced Certificate in Bookkeeping (equivalent to A Level/AS Level grades A-E). Based on an 8 hour week, this is likely to take her in the order of 55 weeks to complete. In evidence she said she hoped to have completed Level 3 by this time next year, but it would take her a good 12 months.
82. The claimant's evidence was that, in practice, to be a self employed bookkeeper and have cases referred, it was necessary to have Level 3. The respondent disputed this and produced a document to demonstrate that no qualifications are necessary to be a bookkeeper. The claimant stated that whilst it may be possible without qualifications to be part of a bookkeeping team in an organisation, to be self employed and deal with cases alone, in the absence of experience (which she did not have), Level 3 was in reality a requirement. We accept the claimant's evidence.

83. The claimant's husband is self employed builder and she has helped out on a few occasions typing quotes for him. However, he has a bookkeeper to do his books and the claimant has not undertaken any bookkeeping work for him.

Social Entitlement Benefits

84. Because of her husband's income, the claimant was not entitled to Job Seekers' Allowance or any other means tested benefits. Her benefits received post dismissal were the same as before.

Other financial considerations

85. The parties agreed that the claimant's gross weekly pay was £107.68 (£101.94 net) at the effective date of dismissal.

86. The employer's contribution to pension was made at 20.9% of gross pay, which amounted to £22.06 per week.

87. The claimant's job attracted the following pay increases post termination:

87.1. On 1 July 2019 - £26,892 full time equivalent FTE ; equating to a gross monthly pay of £484.54 at 8 hours per week, or a gross weekly pay of £111.82.

87.2. On 1 July 2020 - £27,565 FTE; equating to a gross monthly pay of £496.67 at 8 hours per week, or a gross weekly pay of £114.62.

87.3. On 1 July 2022 = £28,117 FTE; equating to a gross monthly pay of £506.61 at 8 hours per week, or a gross weekly pay of £116.91.

88. The claimant was given a payment in lieu of notice (PILON) in the agreed sum of £1,576.16, and an ex gratia payment in the agreed sum of £14,970.01.

89. She incurred fees in undertaking the AAT bookkeeping courses. These consisted of £999.00 for the course itself, £92.00 for registration to take the exams, and £85.00 to sit an exam.

90. She will incur future fees of £50.00 for registration to take exams, and £454.00 for future exams (2 @ £89.00 and 3 @ £92.00).

91. She paid £150.00 in solicitors fees with respect to her tribunal claim.

Discussion and Conclusions

Whether the tribunal should order reinstatement

92. During the course of claimant's evidence it became clear that she did not want to return to the job she was employed in at the time of her dismissal, as she had lost trust and confidence in the management team. We consider that belief to have been genuinely held and consequently, it would not be practicable for her to be reinstated. Consequently, no order for reinstatement is made.

Whether the tribunal should order re-engagement

93. The hurdle the claimant would need to overcome to be re-trained is now likely to be too high to overcome, given the extent of training she would require and the small number of hours she would be available to devote to it each week. Consequently, even with reasonable adjustments, it would not be practicable for the respondent to comply with an order for re-engagement.
94. In any event, no suitable roles have been identified by either the respondent or the claimant in the DWP, and it would be unreasonable to request the respondent to search for jobs in the wider Civil Service.
95. The tribunal cannot simply order that the claimant be re-engaged in comparable employment. It would need to identify a role with some detail and precision and, on the evidence available, it is unable to do so. Therefore, the tribunal declines to use its discretion to order re-engagement. Re-engagement is not ordered.

Recommendation

96. If the respondent provided the claimant with a positive reference, she might stand a better chance of obtaining gainful employment, and new possibilities might be opened up. This would be especially so if she achieved her AAT Level 3 qualification.
97. The tribunal concludes that it would be appropriate for the respondent to provide the claimant with a positive reference and to avoid referring in it to her dismissal due to unsatisfactory attendance.

Injury to feelings

98. The injuries that are compensated for must flow from the acts the tribunal has found to be discriminatory and not from anything else of concern to the claimant. The tribunal has attempted to disentangle the impacts of the discrimination from the claimant's pre-existing anxiety and depression and from the hurt caused by other non-work matters or employment matters that were not found to be discriminatory.
99. We have considered the medical evidence, which shows that the discrimination exacerbated the claimant's mental health conditions significantly. Her own evidence demonstrates that her discriminatory treatment seriously impacted her confidence and self worth, which has had a lasting effect.
100. Taking a proportionate approach overall, the tribunal concludes that it would be fair, reasonable and just to place the injury towards the upper part of the middle Vento band. Accordingly we award £21,500.
101. In addition, the tribunal awards simple interest at the rate of 8%. Given that there were several discriminatory acts ranging in time from June 2017 to the claimant's dismissal on 13 March 2019, the tribunal needs to decide from when to calculate interest.
102. The claimant was mostly impacted by the discrimination from November 2018, when she was told to work downstairs, resulting in her going off sick

from 3 December 2018. On this basis, using our discretion, we have taken the mid point in November 2018, being 15 November, as the starting point for calculating interest.

Aggravated damages

103. There is no proper basis upon which to make an award of aggravated damages. No aggravating features have been proven with respect to the conduct found to be discriminatory. The ground put forward by the claimant is that the respondent was aware it was breaking the law. However, the tribunal has not found this to be the case. Furthermore, aggravated damages are not punitive.

104. In any event, the level of damages awarded for injury to feelings is sufficient to compensate for the harm caused by the discrimination, and it would be disproportionate to award aggravated damages on top of this.

Mitigation

105. It is unlikely that there were many, if any, jobs available for such short hours as the claimant needed, and that could also accommodate any required training. In the searches she made, she found none. Coupled with the damaging reference she was given, and her medical conditions, it is not unreasonable that she made no job applications.

106. Although the claimant showed herself to be very capable at presenting her case at the tribunal hearing, this was a snapshot in time and she was assisted by high doses of medication. Most of the time her conditions prevent her from working and her performance at the hearing should not be taken as an indicator of what she is capable of doing on a normal day to day basis.

107. Nonetheless, the claimant is an intelligent woman and is able to learn new skills. She wanted to find a gainful occupation and, working around her limiting health conditions, she undertook bookkeeping courses and successfully achieved qualifications at AAT Level 1. She is now studying Level 2 and plans to progress to Level 3, which should in due course equip her with the skills to bring in an income.

108. Under the circumstances, the tribunal concludes that the claimant did not act unreasonably and took reasonable steps to mitigate her loss.

The period over which the claimant should be awarded compensation

109. Taking account of its above views on mitigation, the tribunal concludes that no reduction should be made for failure to mitigate loss. The claimant should recover her full financial losses from dismissal to the remedy hearing.

110. With respect to future losses, we note that the claimant is currently studying for her AAT Level 2 and intends to progress to Level 3. There are reasonable prospects of her completing Level 3 within 12 months of the remedy hearing. This qualification will allow her to attract clients on a self employed basis. In the run up to her taking her final exams, we would expect her to be looking for clients in readiness for taking them on board after gaining Level 3.

111. The tribunal is of the view that, as a self employed bookkeeper post Level 3, the claimant's earnings are likely to be commensurate with what she would have been earning at the DWP. Furthermore, with a positive reference from the respondent, her prospects of obtaining gainful employment will increase, maybe as a trainee bookkeeper.

112. It is likely that, after about 12 months from the remedy hearing, she will be earning again, and it is likely that her financial losses will have ceased.

113. For the above reasons we award compensation for future financial losses from 18 October 2023 to 17 October 2023.

Loss of Statutory Rights

114. The claimant worked for over 17 years for the respondent. Due to her dismissal, she has lost valuable statutory rights. The tribunal awards £500.00 to compensate her for this loss.

ACAS Uplift

115. The claimant was dismissed on capability grounds due to ill health. Therefore, the dismissal process was not subject to the ACAS Code of Practice.

116. The claimant's complaint did not include any issues relating to the respondent's grievance procedure. Consequently, there has been no finding of any procedural breach in this regard.

117. Therefore, the tribunal does not make an ACAS uplift.

Polkey reduction

118. The claimant was diagnosed with ME and depression in 2012 and as a consequence reduced her hours to 8 hours per week from 2013. With reasonable adjustments from May 2014 she worked satisfactorily until November 2018, when her reasonable adjustments were taken away.

119. Whilst the legacy benefits she worked on were being phased out, she was experienced in other types of work the respondent undertook. The DWP is a very large public body, and the tribunal takes the view that, in an organisation of that magnitude, had they looked hard enough, they could have found a suitable alternative role for the claimant. At that stage, we believe the claimant's skills would have been sufficiently up to date to re-train, possibly on the job or with reasonably adjusted training.

120. Had the claimant not been treated unlawfully, as identified, the tribunal concludes that she would still be working for the DWP. We do not believe that there was a chance she would have been dismissed anyway, and therefore, we do not make any Polkey reduction.

Other Payments

121. The claimant seeks her past and future bookkeeping fees. The tribunal takes the view that these were a necessary expense in order to mitigate her losses and accordingly awards these fees, as claimed.

122. The claimant seeks her legal fees in the sum of £150.00. However, if she wishes to pursue this, she will need to make a separate application addressing the matters within the Employment Tribunal's Rules of Procedure. Accordingly, the tribunal makes no order.

Calculations

Unfair dismissal

The basic award

123. The claimant was dismissed on 13.3.2019, but was paid PILON. Therefore, for the purposes of calculating the basic award, 12 weeks is added to the dismissal date to bring the effective date of termination to 5 June 2019.

124. The claimant was 38 years old (d.o.b 13/4/1981) at the effective date of termination and she had completed 17 years of service. Counting back 17 years from the effective date of termination takes us to 5 June 2002.

125. The claimant's gross pay on the effective date of termination was £107.68.

126. The claimant had reached 21 years of age by this date and her 22nd birthday was on 13 April 2003. Therefore, her basic award is calculated as follows:

$$\frac{1}{2} \times 107.68 = 53.84$$

$$16 \times 107.68 = 1,722.88$$

$$\text{Total basic award} = \mathbf{£1,776.72}$$

Discrimination

Injury to feelings award

127. We award **£21,500.00**

128. Add Simple interest @ 8% as follows:

$$\text{Number of days from 15.11.2018 to 26.12.2022} = 1,137$$

$$\text{Interest} = 1,137 \times 0.08 \times \frac{1}{365} \times 21,500 = \mathbf{5,357.87}$$

The compensatory award

129. Immediate losses between the day after the effective date of dismissal and the remedy hearing i.e losses incurred from 14.3.2019 to 17.10.22

129.1. *Earnings*

- The net pay/gross pay ratio = $101.94/107.68 = 0.95$
- From 14.3.2019 to 30.6.2019 (108 days or 15 weeks and 3 days) at the net rate of £101.94 per week; that is $15.426 \times 101.94 = 1,572.53$
- From 1.7.2019 to 30.6.2020 (52 weeks) at the net rate of 106.23 per week (0.95×111.82) = 5,523.96
- From 1.7.2020 to 30.6.2022 (104 weeks) at the rate of 108.89 per week (0.95×114.62) = 11,324.56
- From 1.7.2022 to 17.10.2022 (108 days or 15 weeks and 3 days) at the net rate of 111.07 per week (0.95×116.91); that is $15.426 \times 111.07 = 1,713.37$.

Total immediate loss of earnings = £20,134.42 ($1,572.53 + 5,523.96 + 11,324.56 + 1,713.37$)

129.2. *Employer's pension contribution*

- The employer's contribution to pension was made at 20.9% of gross pay.
- From 14.3.2019 to 30.6.2019 (108 days or 15 weeks and 3 days) at the weekly rate of 22.06 (0.209×107.68); that is $15.426 \times 22.06 = 340.30$
- From 1.7.2019 to 30.6.2020 (52 weeks) at the weekly rate of 23.37 (0.209×111.82) = 1,215.24
- From 1.7.2020 to 30.6.2022 (104 weeks) at the weekly rate of 23.96 (0.209×114.62) = 2,491.84
- From 1.7.2022 to 17.10.2022 (108 days or 15 weeks and 3 days) at the weekly rate of 24.43 (0.209×116.91); that is $15.426 \times 24.43 = 376.86$

Total immediate loss of employer's pension contribution = £4,424.24 ($340.30 + 1,215.24 + 2,491.84 + 376.86$)

129.3. Total immediate financial losses = £24,558.66 ($20,134.42 + 4,424.24$)

129.4. *Deductions*

- £1,576.16 (PILON) + £14,970.01 (Ex gratia payment) totalling £16,546.17

Immediate compensatory award after deductions = **£8,012.49** ($24,558.66 - 16,546.17$)

129.5. *Interest*

- Add simple interest at 8% from the mid point between the day after dismissal (14.3.2019) and the calculation date (26.12.2022) ie half the number of days between these dates.

129.6. $691.5 (1383/2) \times 0.08 \times 1/365 \times 8,012.49 = \mathbf{\pounds 1,214.38}$
(number of days from mid point x interest rate x immediate compensatory award)

Future losses from 18.10.22 to 17.10.23

130. Loss of earnings for 52 weeks at the net weekly rate of 111.07 =
£5,775.64

131. Loss of employer's pension contributions for 52 weeks at the weekly rate of 24.43 = £1,270.36

132. Total future losses = **£7,046.00** (5,775.64 + 1,270.36)

Tax position

133. As financial losses of up to £30,000 are tax free, there is no need to gross up the compensatory award.

Loss of statutory rights

134. Awarded at **£500.00**

Past and future bookkeeping fees

135. Awarded at **£1,680.00** (999.00 + 92.00 + 85.00 + 50.00 +454.00)

Employment Judge Liz Ord
Date 26 December 2022

JUDGMENT SENT TO THE PARTIES ON
29 December 2022

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgements and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2406177/2019**

Name of case: **Miss C Pill** v **Department For Work
and Pensions**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 29 December 2022

the calculation day in this case is: 30 December 2022

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note:

www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.
3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.
4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.
5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.
6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.
7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.
8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.
9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.