EMPLOYMENT TRIBUNALS

Claimant Ms C Burton-York

Respondent Diocese of Westminster Academy Trust

Heard at: Watford (in public; by video)

On: 6 and 7 October 2022

Before: Employment Judge Quill; Ms G Bhatt; Ms A Brosnan

Appearances:

For the Claimant: Mr D Stephenson, counsel
For the Respondent: Mr K McNerney, counsel

JUDGMENT having been sent to the parties on 16 November 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REMEDY REASONS

Introduction

1. This remedy hearing followed on from the liability judgment which the same panel issued after a hearing in March 2021. This hearing had been previously listed and postponed. There had also been a case management hearing on 10 March 2022, dealing with expert evidence, amongst other things.

Hearing

2. The entire remedy hearing took place by video.

3. The remedy hearing involved us hearing the evidence from 3 witnesses. These were the claimant and, for the Respondent, Mr Corish and Ms Metcalfe.

4. We also had a written statement on behalf of the Claimant from her daughter. It was agreed that we would take this statement as read, giving it the same weight that we would have given it had she sworn to the written statement on oath.

5. The documents that we have had available are all of the documents from the liability hearing together with a remedy bundle prepared specifically for this hearing, of around 1296 pages. This included an expert report.

6. We also had the skeleton arguments from each side, counter schedule, and some additional documents which were submitted that had not been included in the bundle.

Law

7. The purpose of compensation is to provide proper compensation for the wrongs which we found the Respondent to have committed. The purpose is not to provide an additional windfall for the Claimant and is not to punish the Respondent.

8. Section 124 of the Equality Act 2010 ("EQA") states, in part:

> 124 Remedies: general
>
> (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
>
> (2) The tribunal may—
>
> (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
>
> (b) order the respondent to pay compensation to the complainant;
>
> (c) make an appropriate recommendation.
>
> (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.
>
> (6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court … under section 119.

9. Section 119 of EQA states, in part

> (2) The county court has power to grant any remedy which could be granted by the High Court—
>
> (a) in proceedings in tort;
>
> (b) on a claim for judicial review.
>
> (4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).
>
> (6) The county court … must not make an award of damages unless it first considers whether to make any other disposal.

10. For financial losses, we must identify the financial losses which actually flow from complaints which we upheld. We must take care not to include financial losses caused by any other events, or losses that would have occurred any way.

11. For injury to feelings, we must not simply assume that injury to feelings inevitably flows from each and every unlawful act of discrimination. In each case it is a question of considering the facts carefully to determine whether the loss has been sustained. Some persons may feel deeply hurt and others may consider it a matter of little consequence and suffer little, if any, distress.

12. When making an award for injury to feeling, the tribunal should have regard to the guidance issued in Vento v Chief Constable of West Yorkshire Police (No 2) [2003] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318, CA, and taking out of the changes and updates to that guidance to take account of inflation, and other matters. Three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury, were identified:

    a. The top band was (at the time) between £15,000 and £25,000. Sums in the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment.

    b. The middle band was, initially, £5,000 and £15,000. It is to be used for serious cases, which do not merit an award in the highest band.

    c. The lower band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. Awards in this band must not be so low as to fail to be a proper recognition of injury to feelings.

13. In Da'Bell v NSPCC (2009) UKEAT/0227/09, [2010] IRLR 19, the Employment Appeal Tribunal revisited the bands and uprated them for inflation. In a separate development in Simmons v Castle [2012] EWCA Civ 1039 and 1288, [2013] 1 WLR 1239, the Court of Appeal declared that - with effect from 1 April 2013 - the proper level of general damages in all civil claims for pain and suffering, would be 10% higher than previously. In De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879, the Court of Appeal ruled that the 10% uplift provided for in Simmons v Castle should also apply to Employment Tribunal awards of compensation for injury to feelings and psychiatric injury.

14. There is presidential guidance which takes account of the above, and which is updated from time to time.

15. Two of the Claimant's claims were issued 26 April 2019 and 26 November 2019 respectively. The relevant guidance applicable to those claims is the

second addendum which states:

> *In respect of claims presented on or after 6 April 2019, the Vento bands shall be as follows: a lower band of £900 to £8,800 (less serious cases); a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band); and an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000.*

16. The relevant guidance applicable at the time that the third claim was issued, on 23 April 2020, was the third addendum which states:

> *In respect of claims presented on or after 6 April 2020, the Vento bands shall be as follows: a lower band of £900 to £9,000 (less serious cases); a middle band of £9,000 to £27,000 (cases that do not merit an award in the upper band); and an upper band of £27,000 to £45,000 (the most serious cases), with the most exceptional cases capable of exceeding £45,000. .*

17. There can be an award for aggravated damages where the necessary factors have arisen. Where it arises, it is part of the overall award of compensation for injury to feelings. The award is made as a recognition that the existing injury to feelings has been aggravated further by factors which are in some way related to the act of discrimination but may not necessarily form part of the statutory tort itself.

18. In Alexander v Home Office [1988] 2 All ER 118, the court said:

> *compensatory damages may and in some instances should include an element of aggravated damages where, for example, the defendant may have behaved in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination.*

19. In Commissioner of Police of the Metropolis v Shaw UKEAT/0125/11/ZT, the EAT undertook a review of aggravated damages. It stated that it may be appropriate to make an award of aggravated damages based on analysis of

    a. The manner in which the discrimination was committed and/or

    b. The motive of the discriminator and/or

    c. The discriminator's subsequent conduct.

20. An analysis of these things might determine that there has been conduct which is capable of being "aggravating". However, the purpose of analysis is not to determine whether the discriminator acted so badly that they deserve some sort of punishment; it is to consider whether, because of the manner of the conduct, some further injury has been caused to the claimant.

21. Section 123 of the Employment Rights Act 1996 ("ERA") provides tribunals with a broad discretion to award such amount as is considered just and equitable in all the circumstances, having regard to the loss sustained by the claimant because of the unfair dismissal. However, compensation for unfair dismissal under s.123(1) cannot include awards for non-economic loss such as injury to feelings (see the House of Lords decision in Dunnachie v Kingston upon Hull).

22. As part of the assessment, the tribunal might decide that it just and equitable to make a reduction following the guidance of the House of Lords in Polkey v AE Dayton Services [1987] IRLR 503. For example, the tribunal might decide that, if the unfair dismissal had not occurred, the employer could or would have dismissed fairly; if so, the tribunal might decide that it is just and equitable to take that into account when deciding what was the claimant's loss flowing from the unfair dismissal.

23. A similar approach should be taken when analysing and deciding what financial loss to award for a dismissal which has been found to be a breach of the Equality Act 2010. In other words, the Tribunal must ask itself what might have happened in the absence of such contraventions, and consider the possibility that there might have been a dismissal which was (not unfair and) not discriminatory and not an act of victimisation or harassment. See Chagger v Abbey National plc Neutral Citation Number [2009] EWCA Civ 1202. There it was said that: *The task is to put the employee in the position he would have been in had there been no discrimination; that is not necessarily the same as asking what would have happened to the particular employment relationship had there been no discrimination*. That was in the context of pointing out that, the employee might have been seeking to leave anyway, but there is potentially a difference in scenarios between: (a) being an employee, who has not suffered from discrimination, and who is a current employee voluntarily applying for jobs for career progression reasons, or personal reasons, and only intending to leave if they have an offer to their liking and (b) being an ex-employee, who has suffered discrimination, and being obliged to apply for jobs as someone who has been dismissed (including constructive dismissal).

24. In making such an assessment the tribunal, there are a broad range of possible approaches to the exercise.

    a. In some cases, it might be just and equitable to restrict compensatory loss to a specific period of time, because the tribunal has concluded that that was the period of time after which, following a fair process, a fair and non-discriminatory dismissal (or other termination of employment contract) would have inevitably taken place.

    b. In other cases, the tribunal might decide to reduce compensation on a percentage basis, to reflect the percentage chance that there would have been a dismissal had a fair and non-discriminatory process been followed (as well as acknowledging that such a process might have led to an outcome other than termination).

    c. If a tribunal thinks that it is just and equitable to do so, then it might combine both of these: eg award 100% loss for a certain period of time, followed by a percentage of the losses after the end of that period.

25. There is no one single "one size fits all" method of carrying out the task. The tribunal must act rationally and judicially, but its approach will always need to

be tailored specifically to the circumstances of the case in front of it. When performing the exercise, the tribunal must also bear in mind that when asking itself questions of the type "what are the chances that the claimant have been dismissed if the process had been fair and non-discriminatory?", it is not asking itself "would a hypothetical reasonable employer have dismissed"? It must instead analyse what this particular respondent would have done (including what are the chances of this particular respondent deciding to dismiss) had the unfair and discriminatory dismissal not taken place, and had the respondent acted fairly and reasonably instead.

26. Awarding a loss based on a decision that the employee would have remained with the same employer until retirement date is justified only in exceptional circumstances.

27. When assessing alleged loss of earnings, we apply the same rules concerning the duty of a claimant to mitigate their loss as apply to damages recoverable under the common law. Where the employee has mitigated, a tribunal should give credit for sums earned.

28. When assessing the amount of deduction for the employee's failure to mitigate their loss, the tribunal does not reduce the award that it would otherwise make by a percentage factor. The correct approach is to make a decision about the date(s) on which the Claimant would have found work (and/or work at higher income than they actually obtained) had they been acting reasonably to seek to mitigate their losses, and then make an assessment of what income they would have had from such work.

29. So the approach is:

    a. Consider what steps it would have been reasonable for the claimant to have had to take to mitigate their loss;

    b. Ask if the claimant failed to take reasonable steps to mitigate their loss;

    c. Decide to what extent would the claimant have mitigated their loss had they taken those steps

30. It is for the Respondent to prove that the Claimant has unreasonably failed to take appropriate steps, and that – on balance of probabilities - had those steps been taken, then the losses would have been mitigated.

Facts

31. As set out more fully in the liability decision and reasons, the Claimant is a teacher who had worked for the Respondent for many years. She enjoyed her job. She was in a leadership role as Head of Year, and she enjoyed that aspect of the role, as well as teaching. The Respondent contravened the Equality Act 2010 ("EQA") in its actions which led to the Claimant ceasing to be Head of Year. We decided that the later termination of the Claimant's

employment was a constructive dismissal, and that the dismissal was unfair.

32. Our liability judgment included decisions that:

    a. There was an act of discrimination in May 2016, requesting that the Claimant relinquish the Head of Year role.

    b. There was an act of harassment in April 2017, not reappointing the Claimant to Head of Year role.

    c. There were acts of discrimination between April 2017 and October 2018 in relation to the contents of 5 references.

33. In giving his opinion, Dr Ornstein used the phrase “index events” to refer to these incidents of harassment/discrimination (see paragraph 10 of his report, as cross-referenced in paragraph 187).

34. Our finding is that the claimant was highly motivated to stay with the respondent for the reasons which she gave in her evidence, including the convenience of reaching the workplace from her own home. She did not wish to move home because of ties to the community, and the fact that, prior to the events set out in the liability decision, she had renovated her house recently and had not planned to move.

35. We have not seen evidence of the Claimant applying for jobs elsewhere prior to the discrimination and harassment as set out in the liability decision. The Claimant was not, for example, applying to be Deputy Head at a school elsewhere.

36. We do not think that there is a high chance that the claimant would have applied for Deputy Head jobs elsewhere had it not been for the discrimination. That does not mean she would not have applied for such post at the respondent, if and when such vacancies became available at the school in which she had been based since 2004, but we do not think there is a high chance that she would have applied elsewhere, but for the discrimination.

37. We do not think that there is a significant chance that, in the absence of discrimination and harassment, the Claimant would have been successfully appointed as deputy head or assistant head at the school. These posts only become available from time to time. The mere fact alone that the Claimant had more years service than one or more people who have been appointed to the roles does not imply that the Claimant necessarily had a good chance of being successful, if indeed she did choose to apply.

38. In the liability reasons, we discussed the marking for the Head of Year (paragraphs 62 to 69 of liability decision and reasons). We did not have every single marking sheet, and the exercise was discriminatory for the reasons set out in the liability decision, including that there were more vacancies than

applicants, and that there was no pre-determined pass/fail criteria. It was not necessarily proven that the Claimant was the lowest scorer out of all the candidates (given the lack of a full set of marking sheets).

39. However, the findings we made (discussed at paragraph 66 of the liability reasons in particular) demonstrate that the Claimant was scored the lowest of four candidates by Mr McGee and was either lowest or second lowest of the scores given by Ms Mead. (She was also scored lowest of four by Mr Corish, but we upheld allegations of discrimination in relation to his conduct. She was scored either lowest or second lowest of the scores given by Mr O'Reilly.)

40. The questions (and interviewers) for Deputy Head or Assistant Head would have been different, of course. However, it is by no means an automatic progression for a teacher (even one in a leadership role such as Head of Year) to progress to Deputy Head or Assistant Head. Had the Claimant applied, she would not necessarily have been competing just against the other Heads if Year. She might have been competing against internal candidates in different leadership roles (such as subject head) and possibly external candidates too. The Claimant has not provided reliable evidence that she had a significant chance of obtaining this promotion (assuming no discrimination by the Respondent) and such evidence as there is counts against her.

41. We also have to assess the chances of the Claimant leaving the Respondent in the absence of discrimination or unfair dismissal. The greater the chance of the Claimant applying to another school, successfully, for a post of Deputy Head or Assistant Head in that school, the greater chances of the Claimant leaving the Respondent in the absence of discrimination or unfair dismissal. We do not think there was a high chance of the Claimant making many such applications.

42. However, even in the absence of the Claimant voluntarily moving because of a successful application elsewhere, we have to assess the other factors that might lead to a termination of employment (in the absence of discrimination or unfair dismissal). These include, amongst other things, the possibilities of termination because of ill-health, redundancy, and other potentially fair dismissal reasons. We also have to assess the chances that the Claimant's preference to remain at the same school could potentially change over time as well.

43. The Claimant has argued that she was motivated to (a) not move home and (b) not take a job which would be a lengthy journey from her home. We accept her evidence that when she re-mortgaged, she did so on the basis that she was expecting to (and told the mortgage provider) that she was expecting to work until 67. She is not due to finish paying the mortgage until the mid-2030s. We accept her evidence that that was her opinion at the time.

However, people's opinions and intentions can change, and we have to take account of factors which might either lead the Claimant to decide to retire before 67, or to leave the Respondent of her own accord for another reason.

44. Amongst other things, we take into account the possibilities of the Claimant's taking an early retirement and using her lump sum to help pay off the remaining mortgage.

45. In the bundle prepared for the liability hearing, there is a report dated 16 January 2019. It starts on page 266. It lists the Claimant's absences from September 2008 until the date of the report.

46. The report extensively uses the category "other paid authorised absence", which we do not consider relevant to our decision. We have noted the absences ascribed to "sickness". Nothing in this document causes us to doubt the Claimant's commitment to being a teacher with as successful and as long-term a career as possible. Furthermore, she has some absences due to an underlying physical condition for which she later had surgery. If the surgery was successful, then the number of future absences would potentially have reduced in future. The absences for the surgery itself were significant, and, without those being counted, the Claimant's sickness absence history was considerably better. We also have to take into account the possibility of a recurrence of the problem.

47. We also take account of the other grievances which the Claimant had brought in the past. We alluded to these in passing in the liability reasons in the context of pointing out that we did not need to discuss them in detail because the contents were not the subject matter of complaints in the employment tribunal claim. However, the Claimant made complaints about other members of staff, not Mr Corish, which were not upheld by the employer, and which did not lead to employment tribunal proceedings. There is a finite possibility that the Claimant might have decided, at some point, to leave, because she was not getting along with colleagues. There is also a finite possibility that, in due course, if relations in the department were not good enough, some formal action might have been taken by the Respondent.

48. The contraventions of EQA, as set out in the liability judgment, caused the Claimant significant distress.

49. Amongst other things, students and parents asked the Claimant from time to time about why she was no longer a Head of Year. This caused her embarrassment, and she felt humiliated. She sought to avoid having conversations, so that the topic would not arise.

50. Her sleep suffered. Her personality changed, and she became irritated easily, which was a significant difference in comparison to the period before the discrimination.

51. Her alcohol intake increased, and she ceased to pay as much attention to her personal appearance.

52. She became distrustful of other people, and had a generally negative reaction to suggestions of friend and family for leisure activities.

53. She had some physical effects as a result of the emotional distress, including panic attacks. Her memory was affected, and she became pre-occupied with what the Respondent had done. Everyday tasks became a struggle.

54. With the permission of the Tribunal, the parties had instructed a joint expert, Dr Jonathan Ornstein. His updated Psychiatric Medicolegal Report is in the remedy hearing bundle at pages 448 to 482.

55. Dr Ornstein conducted a review of the Claimant's GP notes. At paragraph 80 of his report, he notes that the Claimant had been suffering depression in 1995 and prescribed antidepressant medication (sertraline). In paragraph 81, he comments on the stresses which the Claimant had been having in 2004, and mentions that the GP notes had recorded, at that time, that the Claimant was "not depressed".

56. Paragraphs 82 to 110 comment on the contents of the GP's notes in the period after the first contravention of EQA, and up to 30 March 2022, insofar as they contain information which he considers relevant to his report. The earliest extract mentioned dates from 14 August 2017, and the latest from 17 July 2020.

57. In 2020, the Claimant was referred to the Community Mental Health Team for assessment. The referral letter suggested that GP's opinion was that the tests that had been carried out on the Claimant were indicators for severe depression and severe anxiety. It was reported that she had had suicidal thoughts in around April 2019, but this had ceased.

58. The contents of the GP records are consistent with the evidence of the Claimant and her daughter, as are the contents of the Claimant's interview with Dr Ornstein on 30 June 2022, as described in paragraphs 113 to 180 of his report.

59. In paragraphs 181 to 188 of his report, Dr Ornstein commented on the Claimant's past psychiatric history (that is, before the contraventions of EQA). He opined that these were relevant in that they made her "more vulnerable than the average person to further psychiatric difficulties" (paragraph 185). However, the past incidents were not particularly relevant, in his opinion, as causes of the more recent episodes (paragraphs 186 to 188).

60. After leaving the Respondent's employment, the Claimant did agency work as a supply teacher. Payslips for that work were in the bundle, although the parties had not placed them in order. Chronologically, they were:

Date	Bundle	Net Amount	Description
28.02.20	905.01	£544.12	5.00 days @ 140.00
06.03.20	905.10	£652.92	4.00 days @ 215.00
13.03.20	905.17	£312.32	2.00 days @ 215.00
20.03.20	905.23	£458.52	3.00 days @ 215.00
27.03.20	905.30	£458.52	3.00 days @ 215.00
10.04.20	905.13	£264.20	1.00 hours @ 327.99 (sic)
17.04.20	905.20	£264.20	1.00 hours @ 327.99 (sic)
24.04.20	905.26	£264.20	1.00 hours @ 327.99 (sic)
	905.27		*duplicate*
01.05.20	905.07	£379.80	1.00 hours @ 327.99 (sic) + PAYE
08.05.20	905.12	£292.99	1.00 hours @ 327.99 (sic)
15.05.20	905.19	£284.79	1.00 hours @ 327.99 (sic)
22.05.20	905.25	£284.79	1.00 hours @ 327.99 (sic)
29.05.20	905.04	£284.79	1.00 hours @ 327.99 (sic)
05.06.20	905.09	£284.79	1.00 hours @ 327.99 (sic)
12.06.20	905.16	£284.79	1.00 hours @ 327.99 (sic)
19.06.20	905.22	£284.79	1.00 hours @ 327.99 (sic)
26.06.20	905.29	£284.79	1.00 hours @ 327.99 (sic)
03.07.20	905.08	£284.79	1.00 hours @ 327.99 (sic)
10.07.20	905.14	£284.79	1.00 hours @ 327.99 (sic)
17.07.20	905.21	£284.79	1.00 hours @ 327.99 (sic)
24.07.20	905.28	£284.79	1.00 hours @ 327.99 (sic)
31.07.20	905.05	£284.79	1.00 hours @ 327.99 (sic)
07.08.20	905.11	£284.79	1.00 hours @ 327.99 (sic)
14.08.20	905.18	£284.79	1.00 hours @ 327.99 (sic)
21.08.20	905.24	£284.79	1.00 hours @ 327.99 (sic)

28.08.20	905.02	£284.79	1.00 hours @ 327.99 (sic)
	905.03		*duplicate*
11.12.20	905.15	£809.96	4.00 day (24 hours) @ 135.00 + PAYE
	905.06		*Duplicate in different format*

61. The agency used for all of these was "Generate". Each contained a comment that the wages included an element for rolled up holiday pay. From 15 May 2020 onwards, all contained a deduction for auto-enrolment pension contribution (and none of the earlier ones did).

62. The Claimant was not working 1 hour per week between 10 April and 28 August. That is just how her hours were displayed on the payslip.

63. The Claimant did not work for this agency between after the 28 August payslip, until the period (30 November to 6 December) covered by the 11 December one.

64. Furthermore, as confirmed by the P60 on page 907 of the bundle, she did not work for them after that date. Her total gross pay from Generate in the year to 5 April 2021 was £7240.43.

65. She also worked for Educ8 Services Ltd during that tax year; she earned more from them than from Generate. Her total gross pay from Educ8 in the year to 5 April 2021 was £9594.94.

66. She also worked for Educ8 Services Ltd during the following tax year. Her total gross pay from Educ8 in the year to 5 April 2022 was £7464.00.

67. A selection of payslips from Educ8 from around 16 October 2020 to 13 May 2022 are in the bundle at pages 699 to 734. They are not in date order. The pay is described as being in "units" at a particular rate, which we infer to being days.
    a. She worked 5 days in a week, on some occasions, including those in the payslips for 20 November 2020, 22 January 2021 5 March 2021, 1 April 2021.
    b. She worked 4 days per week, as shown in the payslips: 18 December 2020, 15 January 2021, 7 May 2021, 21 May 2021, 2 July 2021

68. At page 968 of the bundle, there was a "to whom it may concern" email dated 29 September 2022 from Educ8 which said:

> I have worked with Cathie since 2020 as her main teaching agency offering daily and long term supply work.
>
> Cathie is a very popular and strong teacher of Geography and Maths.

> However I can confirm unfortunately due to Cathie' s on going health issues that she's been unfit for work.
>
> This has progressively got worse in the past year and has resulted in her cancelling several bookings. Including a lucrative long term position at Gumley House last year.
>
> This has also affected her attending interviews and mainly turning down lots of days of ad hoc cover offered.

69. Dr Ornstein commented that the Claimant had been doing agency work, but felt barely able to cope with it (paragraph 170). He said: "*She has been able to work as a Supply Teacher but cannot imagine getting a permanent post and she feels she can barely cope with her role as a Supply Teacher*" (paragraph 176).

70. Dr Ornstein's opinion was that the Claimant was suffering from:

    a. Moderate to severe depression (paragraphs 190 to 192 of his report), and

    b. Generalised Anxiety Disorder, as described in paragraphs 193 to 196.

71. In paragraph 198, he expressed the opinion that the Claimant would not have suffered (these or) any psychiatric issues, but for the contraventions of EQA (or "index events", as he termed them). Or, at least, she would not have done so in the absence of some other significant life event.

72. He said: "Her thoughts and feelings and reactions are directly around the events that occurred to her at work. She found the events shocking and humiliating and extremely affecting of her self-confidence and mood." (paragraphs 199 and 200). He went on to say that, in itself, the 2016 incident caused a brief "adjustment reaction" which would not necessarily have caused "specific or significant psychiatric injury in isolation". (Paragraphs 202 to 205)

73. He then describes the Claimant's reaction to the April 2017 failure to reappoint the Claimant as Head of Year. This incident caused a psychiatric injury, he believes (paragraph 206). He discusses the nature of the injury in paragraphs 207 to 212. Recognising that he was examining the Claimant in 2022 (and therefore after the further discrimination between April 2017 and October 2018 in relation to the contents of 5 references), Dr Ornstein gives his opinion about what might have happened, if the failure to reappoint the Claimant as Head of Year had "occurred in isolation, without the background of racial discrimination and poor references which appeared to prevent her from getting further employment".

74. It seems to us that, in paragraphs 209 to 212, Dr Ornstein is not merely hypothesising about a scenario in which the Claimant was not discriminated against by the contents of references, and in which she was able to get a new

job at another school; he is also contemplating a scenario where (as well as that), the Claimant's loss of the Head of Year role was not because of, or related to, race.

75. His hypothesis is that a reaction to the loss of Head of Year post probably would not, in itself, have prevented the Claimant applying for jobs elsewhere and that, had she successfully obtained a job elsewhere (and the discrimination in relation to references had not occurred) then it was more likely than not that her mental health would have recovered. (Presumably he means fully recovered by some date earlier than June 2022).

76. In paragraph 213, he comments that the references "*had a very long-lasting, shocking effect in my opinion on the Claimant*."

77. As made clear by paragraphs 214 to 216, he was not simply saying that it was the reference issue which, by itself, caused this. He was commenting that (contrary to the hypothetical situation in paragraphs 208 to 212) the actual situation was that there had been prior discrimination, before the references, and the reference issue both "[brought] home the discrimination she felt she was experiencing" but also made her feel that there was no way out by means of successfully obtaining comparable employment elsewhere.

78. As summed up in paragraph 216 and 217:

> 216. When taken as a whole with their being evidence of racial discrimination which again further added to her sense of anxiety, depression and shock, it is my opinion that the loss of her role and the prevention of her gaining a further role seemingly on the basis of racial discrimination has had a disastrous effect on the Claimant's mental health.
>
> 217. Overall this combination of factors has caused, perpetuated and led to deteriorations in the Claimant's mental health to the point where she is as described above.

79. He described at paragraphs 219 to 231 what treatment he thought the Claimant should have. The need for counselling (and the number of sessions and likely cost) was discussed. He recommended both consultations with a consultant psychiatrist and a clinical or counselling psychologist. He thought the latter might recommend CBT and/or related therapies. His estimates were:

    a. For psychiatrist: 6 x £300. So £1800.

    b. For psychologist: 18 to 24 x £150 So £2700 to £3600

80. The parties have agreed that the Respondent will pay £5400.

81. In terms of future work, Dr Ornstein's report included:

> 237. I note she is still able to do some agency teaching but finds this extremely

difficult and stressful.

238. In my opinion, given the severity of her mental state, I am surprised she is able to do this work at all.

239. I note there is a financial imperative for her to do so as she is extremely worried about losing her property if she is unable to meet the mortgage payments.

240. In my opinion it would not be possible for her, in her current mental state, to return to any regular or full time teaching and certainly not at a senior level required of a Head of Year.

82. Those paragraphs were discussing the Claimant's situation as of the date of the examination. Under prognosis, he wrote, amongst other things:

242. I would be hopeful that with careful supervision of antidepressant medication and regular psychological therapy her mental state would improve.

244. I also note that she is extremely anxious and stressed by the ongoing legal process and so, again, whilst this is ongoing this would be a negative prognostic factor.

245. I would be hopeful that with the end of these proceedings, the prognosis would improve.

246. I would advise that it would be useful for her to see a psychiatrist prior to this to maximise any positive effect from antidepressant medication.

247. In my opinion it would most likely be more useful for her to see a Psychologist once these proceedings have ended rather than prior to this so that the trauma has essentially ended by then.

248. Overall, in my opinion it will be at least a year until a true picture of her recovery is possible

83. The summary included, amongst other things:

- As described above, in my opinion the complaints that were upheld have combined to create these injuries although had each of them occurred in isolation the effects may well have been different. It is difficult, though, to meaningfully divide the impact of these events in real life.

- Whilst some improvement is certainly possible, I do not believe she would make a full recovery from her condition.

- In terms of her teaching capabilities, I believe she would be able to continue doing agency work and, on the balance of probability, more likely than not take on a permanent role but I would not expect her to be able to return to working in a senior position as she had done prior to the index events.

84. The Claimant disputes the last bullet point. She believes that Dr Ornstein failed to understand the differences between supply work and employment in

a “permanent” role on a teacher’s contract. The differences include that the supply work is largely covering/teaching a lesson that has been prepared by someone else, and without the other responsibilities such as lesson preparation, marking, liaising with parents, pastoral care and so on which form part of the duties of an employed teacher.

85. However, that is speculation on the Claimant’s part. The panel is satisfied that Dr Ornstein had a good enough understanding of the fact that agency work is different in nature to work as an employee.

86. The Claimant has been unable to participate in interviews for permanent employment since having sight of the references, given by Mr Corish, that are discussed in the liability reasons.

87. She has not been able to work since April 2022. It is our finding, based on what work the Claimant was able to do in early 2020, and through to the end of that academic year, that part of the Claimant’s difficulties in working have been caused by the strains of this litigation and that, once the litigation is behind her, she will be likely to be able to work more hours than she has previously.

88. Furthermore, although Dr Ornstein acknowledges that the future is uncertain, if the Claimant follows the recommended treatment programme (and there will be an element of compensation from the Respondent to pay the amounts estimated by Dr Ornstein) her ability to work longer hours will improve significantly.

Discussion and Analysis

89. The basic award and the award for the expenses were agreed between the parties.

90. For loss of statutory rights £500 is the appropriate sum that we think we should award to the claimant bearing in mind her length of service with the same employer and her notice period as per the contract of employment.

91. The respondent argued that for the period of sickness absence, during the Claimant’s employment, we should not compensate the Claimant for the difference between the sums she received as sick pay, and the full remuneration that she would have received had she not being off sick.

92. The Respondent accepted based on the evidence, including Dr Ornstein’s report, that the discrimination and harassment (as we found in our liability decision) was a contributory factor to the Claimant’s absences. However, the Respondent argued that it was not appropriate for us to order them to compensate the full financial loss in that period, because not all of that loss flowed from the harassment and discrimination.

93. In terms of the May 2016 incident, the Respondent pointed to the time gap after that and before the start of the sickness absence. The Respondent makes similar arguments in relation to the April 2017 loss of Head of Year job.

94. Further, the Respondent also suggests that the claimant's resignation (subsequently retracted by mutual agreement) at the start of November 2018 came before she had sought the five references discussed in our liability reasons.

95. However, we are satisfied that there was a course of conduct over a period of time which contributed to the claimant's ill health. We are satisfied, taking into account what Dr Ornstein says in his report, and our own findings of fact, that if it were not for the discriminatory conduct the claimant would not have had this long period of sickness absence. The fact that some of the allegations failed does not change that.

96. Some of the allegations (those which alleged victimisation in relation to the grievance outcome, the way the grievance was dealt with, the way in which the grievance appeal was dealt with) came after the sickness absence had started in any event. Thus the fact that those allegations failed does not mean that we have to conclude that the Claimant's absence was because of things which were found not to be contraventions of EQA.

97. Some of the other allegations which failed were about not being appointed to specific jobs after she had left the head of year post. However, but for the harassment/discrimination the claimant would not have been interested in applying for those jobs. Thus whether her feelings were injured and whether those things contributed to her absence does not stop the ultimate cause of being the harassment/discrimination which resulted in her ceasing to occupy the Head of Year post.

98. Another failed allegation was that it had been alleged that Mr O'Reilly had failed to formally investigate after the claimant had come to him and had been very tearful. We found against the Claimant on that, but we do not find that that particular incident played any particular part in the claimant's absence from November 2018 onwards.

99. For those reasons the full financial loss for that sickness absence period is awarded to the claimant. The loss which the Claimant incurred as a result of that absence (normal pay less sick pay) was £10,6010.84.

100. In terms of the claimant's resignation which we found to be an unfair dismissal, similar points apply to those we have just mentioned.

101. This resignation would not have happened but for the discriminatory conduct. The harassment/discrimination caused the dismissal. Other factors played a part too. However, to a large extent those other factors themselves flowed

from the conduct which caused her to be absent. For example, the claimant's sending queries to the respondent about her pay at the end of 2019 and making enquiries which were not answered were immediate trigger points for her resignation. They would not have happened if she had not been off sick and she would not have been off sick but for the contraventions of EQA.

102. We therefore award compensation for losses flowing from the termination of that employment.

103. The parties have very divergent views on what period of loss we should award. The respondent's primary position effectively being that the amount should just be an unfair dismissal compensation but failing that it should be for a comparatively short period for various reasons. The claimant states that we should award her losses on the basis that he would have carried on working for the respondent that least until the age of 67. She says her losses should be assessed for the whole of that period on the basis of the salary of Head of Year, but also with an additional component to reflect a chance of further promotion.

104. We fully accept that the claimant's evidence is truthful when she says that - thinking back to before the discrimination – she believes it would have been her intention to remain with the respondent until age 67.

105. We accept the Claimant had been telling the truth when she made the statement to the mortgage provider about the intention to carry on working as a teacher until age 67. Though that does not, in itself, mean that she thought, at the time of re-mortgaging, that she would definitely stay with the Respondent until 67. Paying off a mortgage by selling the home and moving elsewhere is not inconsistent with what the Claimant said on her mortgage application.

106. The fact that the Claimant is telling the truth to the Tribunal, and was telling the truth on the mortgage application, does not necessarily mean that working until 67 is an accurate prediction of what she would have done.

107. The Claimant does not know (just like nobody else knows) what is going to happen over the next several years. There are a number of factors which could have led the claimant to choose to leave the respondent's employment. There could have been changes in her own life circumstances, for example. She could have just taken a different view of her financial situation and decided to retire early using a lump sum to pay off the mortgage; there is a chance of somebody coming into some money by an inheritance or some other means; changes of family circumstances with plans for her children and, in the future, grandchildren. All of these are the types of things that can sometimes cause somebody to choose to leave their employment as a teacher prior to the age of 67.

108. In addition to those factors there is a non-zero chance that for some other

reason, while remaining in employment as a teacher, the claimant would have chosen to leave employment with this employer and go somewhere else.

109. As well as the voluntary factors that might have caused the claimant to leave her employment, there are also the potential for the employer to make the decision to terminate the employment contract. Obviously, we only take account of potential non-discriminatory and fair reasons; however, in principle there can be re-organisations and re-structures at any employer.

110. Potentially there could be performance management issues or ill-health issues that lead an employer to terminate a particular employee's contract of employment. For this particular claimant we discount any possibility of her being dismissed for conduct reasons. Her conduct was very good and the chances that her conduct would have ever been a fair reason to dismiss her are nil. However, the chances of the circumstances being such that a different fair reason to dismiss her arose are not nil.

111. As requested, we have looked through the liability bundle and reminded ourselves of the sickness absence record that was included in that liability bundle starting on page 266. It is in reverse order. We do not think that it is appropriate to make any reduction for the possibility of the claimant's being dismissed because of the absence from November 2018 onwards. Our reason for that decision is that that absence was caused by the employer's contraventions of EQA. Whether that absence might have – in due course – meant that the Respondent had a "fair reason" - in the Employment Rights Act 1996 sense - to potentially dismiss the Claimant is of very limited relevance when we found that the absence was caused by contraventions of the Equality Act 2010, which had not been rectified prior to termination; the Respondent had ceased communicating with the Claimant, as discussed in the liability reasons. We reject the Respondent's argument that the period of loss should cease at Summer 2020 on the grounds that it would have had a fair reason (long-term absence /ill-health capability) to dismiss by then.

112. However, we have looked back through the prior history of sickness absence. The 2019 report includes all sorts of absence. As mentioned in the findings of fact, we have ignored various paid absences and compassionate leave and so on and have just looked at the sickness absence periods.

113. There were some significant periods of absence for surgical operations. We do not think that that in itself creates a high risk of the claimant having recurrences of absence for that exact type of reason (ie surgery).

114. We have also taken into account the number of shorter absences for various reasons as stated, headache for example, flu for example and those described as "injury other". The claimant has had a notable number of fairly short periods of absence. We do not have any comparison to go by while it is Mr Corish's view that she exceeded the triggers for absence monitoring, in

fact, the people in charge of the school at the time (prior to Mr Corish) knew what the reasons for those absences were and decided that it was not appropriate to put her on absence monitoring.

115. We do not know how often the respondent has dismissed people with similar sickness absence records to the claimant's but we think that there is a non-zero chance that had the sickness absence continued at that level the claimant might have been put on some absence monitoring process in the future. Had that happened, of course, she might have improved her attendance and it might not have ultimately been a reason for dismissal. However, we cannot rule out that, if her sickness absence continued at past rates, then there might potentially have been a fair and non-discriminatory dismissal at some point in the future.

116. In terms of other employees of the respondent, we think there has been impressive evidence provided by the claimant's side that many people have stayed at the respondent for a long period of time. We take that into account.

117. However, in itself that does not necessarily take us any further in terms of whether the respondent would terminate the claimant's employment. It is true that the long service of other employees shows that the Respondent has not dismissed those specific individuals for any reason (fair or unfair). However, the exercise we need to perform is to decide what chance there would be that the Respondent might have a fair and non-discriminatory reason to dismiss this claimant. The fact that it has several employees who have been there for 20 years or so does not prove that it has not dismissed other employees, when it did think it had a fair reason to do so. At most, the Claimant's evidence of the longevity of some of her former colleagues potentially shows that the Respondent does not purport to dismiss people just because of their age, or just because they have been there for a long time. However, we would not have factored in such matters as potentially fair reasons to dismiss the Claimant either.

118. The respondent's evidence – which we accept - is that it has about 145 employees at any given time. Therefore, even though several have been there for 20 or 30 years, that does not mean that everybody – or even a majority - lasts that length of time there.

119. In terms of the statistical evidence offered by the Respondent, we do not think that it provides any helpful evidence that would demonstrate to us how likely it is for a given teacher (the Claimant) to leave employment at 59 or younger in comparison to leaving at 60 or older. A snapshot of the age profile of all those who are currently teachers (and of how many of those are currently over 60) does not provide any reliable evidence about what percentage of teachers who are currently the Claimant's age will carry on working until the age of 67 (or 60). In any event, we are seeking to assess the Claimant's actual circumstances; even if – as the Respondent claims – the vast majority

of teachers do cease work by age 60, they do not all do so, and statistical evidence does not disprove the Claimant's contention that her particular individual circumstances are such that she wants to, and financially needs to, carry on working. In other words, on the Claimant's case, even if only a small percentage of teachers work until 67 (or past 60), she is in that small percentage.

120. We have taken into account all of the evidence that we do have and we think it is appropriate to apportion the periods of loss of salary income on the following basis. It will be the same basis for the pension loss calculations as well.

121. For the period from the termination date up to 31 August 2020 there is 0% chance of the claimant leaving before that date and the losses we award her are 100% of her losses for that period.

a. That is £757.91 per week.

b. The period 20 December to 31 August is 36.4 weeks.

c. So 36.4 x £757.91 comes to £27,587.92.

d. So that is the loss from the end of employment up to 31 August 2020, and we apply no reduction because we assess there was a zero chance of a fair and non-discriminatory termination prior to 31 August 2020.

122. The next period we have taken is the period from 1 September 2020 until this hearing date.

a. In the first 12 months of that, 1 September 2020 to 31 August 2021, the Claimant would have earned £40,364.21 as a head of year with the respondent.

b. In the next 12 months, 1 September 2021 to 31 August 2022, she would have earned the same amount again, £40,364.21.

c. In the remaining period up to this remedy hearing, so from 1 September 2022 to 7 October 2022, she would have earned £4,093.75.

d. Adding those three together the amount she would have earned up to this remedy hearing - as a head of year for the respondent - would have been £84,822.17.

e. She has had actual earnings during that period of £23,612.43

f. So the difference between what she would have earned with the respondent and the actual earnings that she has received, is £61,209.74.

g. We are reducing that by 20% to reflect the chances that she might have left

the respondent's employment during that period in any event for the reasons that we have mentioned earlier that the chance of her doing so is for the reasons we have mentioned earlier. So, after that 20% reduction, that leaves a figure of £48,967.79.

123. The next period we have considered is the period from today's hearing until 31 August 2029. The reason for that is that the claimant's 60th birthday falls in that academic year. She turns 60 in November 2028.

a. For period from today, 7 October 2022, until the end of this academic year, so 31 August 2023, the net amount she would have earned with the respondent is £38,481.25.

b. For the next academic year, 1 September 2023 to 31 August 2024, the earnings would have been £43,418.26.

c. For the next year 2024-2025 the earnings would have been £44,286.63.

d. For the year after that, 2025-2026, the earnings would have been £45,172.36

e. For the year 2026-2027, she would have earned £46,075.81 .

f. For the year 2027-2028, she would have earned £46,997.33.

g. Finally, for this period, for the year 2028-2029, the earnings would have been £47,937.00.

h. Adding those up gives the total of £312,368.91. That is the aggregate amount £312,368.91 that she would have earned had she remained in employment with the respondent as a Head of Year from today's remedy hearing up until 31 August 2029 (being the end of the academic year in which she turns 60).

124. We have to estimate what she will now earn in the actual reality that we are in. In other words, the actual reality in she has been dismissed (as per our decision on liability).

125. On the evidence presented to us, and particularly Dr Ornstein's report, we are persuaded that the Claimant suffered a psychiatric injury which was caused by the Respondent's contraventions of EQA. That is, the harassment/discrimination which we decided had occurred, and which Dr Ornstein labelled "index events".

126. We accept the claimant's evidence that she is not currently fit for work and has not been since April 2022. On that basis we do not think that she would have any earnings for the remainder of 2022 up to 31 December.

127. We will discuss Dr Ornstein's report again when we are discussing the injury

to feelings award. However, when assessing the likelihood of the Claimant's future earning capacity, we note – in particular – that paragraph 232 onwards describes the effects of the injury on day-to-day life and work and then paragraph 241 to 255 contain prognosis, and the bullet points at the end (paragraph 256) are of a summary which also describe the prognosis.

a. It was Dr Ornstein's opinion that there will be at least a year until a true picture of the Claimant recovery is possible, as he says that in paragraph 248. However, he also says, in 245, that he would be hopeful that at the end of these proceedings the prognosis will improve.

b. In 240 he says that in his opinion it would not be possible for the Claimant - in her current mental state - to return to any regular or full-time teaching and "certainly not" (he says) at the senior level required of a head of year.

c. It is clear to us from the context of 240 that when he says current state he means as of the date of his report. He is not saying that that is a state of affairs that will necessarily continue because he gives his specific opinions about the future under the headings "Prognosis and Summary".

d. At 249 he says that he hopes that the depression would improve to the point where it would no longer be moderate to severe.

e. At 250 he does not rule out a full recovery, but he expects it to still be present for the rest of her life. We accept that. Our finding is that the claimant will be affected for the rest of her life.

f. Dr Ornstein says that he would expect the anxiety still to be present in the future but at a mild level (paragraph 251). Based on what he says in 248-249, this is on the assumption that the litigation concludes, and that, over the 12 month period from the date of his assessment, the Claimant undertakes the psychiatric care and psychological care discussed elsewhere in his report.

g. In 252 he confirms he expects there to be some ongoing symptoms of anxiety and depression for the remainder of the claimant's life.

h. In 254, he states that the claimant is able to continue teaching and he would expect that capability to continue, but he would not expect her to recover to the point where she could take on a senior role as she had successfully done.

i. On this latter point (the contents of paragraph 254), he had also said in 238 that he was surprised given the severity of her mental state that she was able to do this work at all, referring to agency teaching. As mentioned in the findings of fact, the claimant says that Dr Ornstein has potentially not fully understood the difference between being an employed teacher and supply teacher. She says (and we accept) that, as a classroom teacher, there are

all sorts of responsibilities in terms of planning ahead, planning the lessons, record keeping, looking after the pupils throughout the academic year and so on. She says that, as a supply teacher, you are filling in for somebody who is absent on a very short-term basis, perhaps only coming in and doing an hour or two or a day or two as a replacement.

j. However, it was our finding that Dr Ornstein, while he was surprised that the claimant had been well enough to do the agency teaching work, was when expressing an opinion about the future prognosis, referred to ongoing work as an employed teacher. He distinguished between the duties of Head of Year and those of employed teachers in less senior roles. There is no reason for us to conclude that he believed that an employed classroom teacher simply did exactly the same thing as a supply teacher. There is no reason for us to conclude that he has failed to take into account that there are differences – for any profession or occupation - between anybody in any role as an agency worker on a short-term basis and someone in a permanent role.

128. Having considered Dr Ornstein's report, and the other available evidence, especially that given by the Claimant and her daughter, it is our decision that it is not likely that the claimant will be able to resume as a direct employee in the current academic year 2022/2023. Dr Ornstein's report indicates that she is severely unwell at the moment. While it is his opinion that she will potentially improve after the end of these proceedings he thinks it is potentially a year (so July 2023) before a full assessment can be done. Thus we assess the chances of the Claimant becoming an employed teacher in 2022/2023 as zero.

129. For the following year, September 2023/August 2024, while there is some chance that the claimant will have recovered in time to start work in September 2023, we also have to take account of the cycle of recruitment of teachers. She may have recovered before the academic year starts, but she might not have recovered by the time that such vacancies are being filled in the preceding summer term. While there may still be some vacancies being filled in August, the majority will probably have been filled some time earlier, by the end of the previous summer term. We therefore do not think that there is a significantly high chance of the claimant becoming a full-time employee from September 2023 to August 2024. We assess that chance as zero, taking account of the timetable for potential improvement in the Claimant's mental health set out by Dr Ornstein.

130. We do, however, take into account Dr Ornstein's final bullet point, where he says: "In terms of her teaching capabilities I believe she would be able to continue doing agency work and on the balance of probability more likely than not to take on a permanent role. I would not expect her to be able to return to working in a senior position as she had done prior to the index events." It is our decision therefore – taking account of the Claimant's obligation to, and

likely ability to, mitigate her losses – that there is 100% chance of her becoming a full-time classroom teacher, a subject teacher, from 1 September 2024. This takes into account the prognosis for her future health (this will be more than two years from Dr Ornstein's assessment) and takes into account the availability of permanent vacancies for teachers, and takes into account the demand for teachers with the claimant's experience.

131. Before 1 September 2024, she will still be doing agency work only, and will not be an employee.

    a. Because of her health, we do not think she will have any agency work between now and 31 December 2022. That is, we assess the chance at zero.

    b. For the remaining two terms of this academic year, so from January 2023 through to the end of the summer term 2023, we think that the claimant should be able to get work that is an average of around about 3 days a week for around about 20 weeks.

    c. Based on the evidence in the bundle, we assess that her likely average weekly pay would be around about £450.00 net for those 20 weeks. So we estimate earnings of £9,000 net for the remainder of this academic year.

    d. Given that her health is likely to improve for the following academic year when we expect her still to be working as a supply teacher, we base our estimate of her income on working for around about 35 weeks and for an average of around about four days per week.

    e. We assess the likely projected hearings for the academic year 2023/2024 to be £21,000 (which we arrived at by taking 35 x £600).

132. For the salary of a classroom teacher, a subject teacher without any leadership roles or leadership enhancements to their salary, we have accepted what the respondents argued in its counter-schedule. Thus we take the net earnings for such a teacher to be round about £32,948.24 a year.

    a. So from 1 September 2024 to 31 August 2029, we assess the claimant's future income as 5 x £32,948.24. That comes to £164,741.20.

    b. So our estimated calculation for the claimant's income for the period from today's remedy hearing up to 31 August 2029, the total is £9,000 plus £21,000 plus £164,741.20 and that comes to £194,741.20.

133. As we said earlier, we assessed the income from the respondent had she carried on being employed them as Head of Year to have been £312,368.91.

    a. £312,368.91 minus £194,741.20 is £117,897.71.

    b. That is the amount which we assess as the Claimant's loss for the period

from the remedy hearing up to 31 August 2029 if there had been 100% chance (but for the unfair dismissal, and the harassment/discrimination) of being an employee in the period until 31 August 2029.

c. However, our decision is that we must make a 50% reduction to that figure to reflect the chances of the claimant leaving the respondent anyway before the end of that period (for the possible fair and non-discriminatory reasons that we mentioned earlier).

d. So the loss which we award for the period 7 October 2022 to 31 August 2029 is £58,948.86.

134. To reflect the chances of the claimant carrying on with the respondent past 31 August 2029, after the academic year which contains her 60th birthday, we take account of projected earnings, as Head of Year, for 2029/2030, 2030/2031, 2031/2032, 2032/2033, 2033/2034, 2034/2035 and then up to her 67th birthday. We do not think that there is a sufficient likelihood of the Claimant being appointed Deputy Head, or Assistant Head, with the Respondent to make any award for that chance.

a. We have accepted the figures in the claimant's schedule of loss for those periods and so the net income that she would have had from the respondent for those full academic years is: £48,896.02; £49,873.94; £50,871.42; £51,888.84; £52,926.62; £53,985.15, respectively. For the part year from 1 September 2035 up until her 60th birthday, the net earnings would have been £13,125.05.

b. Her earnings as a teacher keeping the same £32,948.24 per year, for the six full years it would be six times that amount, £197,689.44 and then for the partial year just up to her 67th birthday, £7,853.39,

c. So the total difference between earnings with the Respondent, and actual future earnings for that period is £321,567.04 minus £197,689.44 minus £7,853.39 and that comes to £116,024.21.

d. However, to reflect the chances of the claimant leaving the respondent's employment prior to the end of that period we make a 90% reduction.

e. So the actual amount that we award her for that period for loss of earnings from 1 September 2029 to the Claimant's 67th birthday is £11,602.42.

135. As we have said already, these are the loss of earnings figures and do not include pension loss, but the pension loss is to be calculated using the same percentage reductions for the various periods, to reflect chances of a fair and non-discriminatory termination of employment prior to 67th birthday.

136. In terms of the non-pecuniary losses, we have taken account of Dr Ornstein's report. We have quoted from it extensively already. Therefore, it suffices to

say that we accept the claimant has suffered a serious psychiatric injury and she is continuing as of the present day to suffer from the effects of that serious psychiatric injury. She will improve but she will not completely get better; that is the prognosis of Dr Ornstein and we accept that opinion.

137. In paragraph 228 of the report, Dr Ornstein's opinion was

> It is my opinion that she is not suffering from Post-Traumatic Stress Disorder but nonetheless the events she has suffered are traumatic and there may be a role for trauma-focussed therapy. The precise nature of the therapy delivered would be at the discretion of the treating therapist.

138. The judicial college guidelines, include the following:

> In part (A) of this chapter some of the brackets contain an element of compensation for post-traumatic stress disorder. This is of course not a universal feature of cases of psychiatric injury and hence a number of the awards upon which the brackets are based did not reflect it. Where it does figure any award will tend towards the upper end of the bracket. Cases where post-traumatic stress disorder is the sole psychiatric condition are dealt with in part (B) of this chapter
>
> Section A
>
> The factors to be taken into account in valuing claims of this nature are as follows:
>
> (i) the injured person's ability to cope with life, education, and work;
>
> (ii) the effect on the injured person's relationships with family, friends, and those with whom he or she comes into contact;
>
> (iii) the extent to which treatment would be successful;
>
> (iv) future vulnerability;
>
> (v) prognosis;
>
> (vi) whether medical help has been sought.
>
> (a) Severe
>
> In these cases the injured person will have marked problems with respect to factors (i) to (iv) above and the prognosis will be very poor.
>
> £54,830 to £115,730
>
> (b) Moderately Severe
>
> In these cases there will be significant problems associated with factors (i) to (iv) above but the prognosis will be much more optimistic than in (a) above. While there are awards which support both extremes of this bracket, the majority are somewhere near the middle of the bracket. … Cases of work-related stress resulting in a permanent or long-standing disability preventing a return to

comparable employment would appear to come within this category.

£19,070 to £54,830

(c) Moderate

While there may have been the sort of problems associated with factors (i) to (iv) above there will have been marked improvement by trial and the prognosis will be good.

Cases of work-related stress may fall within this category if symptoms are not prolonged.

£5,860 to £19,070

(d) Less Severe

The level of the award will take into consideration the length of the period of disability and the extent to which daily activities and sleep were affected. Cases falling short of a specific phobia or disorder such as travel anxiety when associated with minor physical symptoms may be found in the Minor Injuries chapter.

£1,540 to £5,860

Section B

Cases within this category are exclusively those where there is a specific diagnosis of a reactive psychiatric disorder following an event which creates psychological trauma in response to actual or threatened death, serious injury, or sexual violation. … The symptoms may include nightmares, flashbacks, sleep disturbance, avoidance, mood disorders, suicidal ideation, and hyper-arousal. Symptoms of hyper-arousal can affect basic functions such as breathing, pulse rate, and bowel and/or bladder control.

(a) Severe

Such cases will involve permanent effects which prevent the injured person from working at all or at least from functioning at anything approaching the pre-trauma level. All aspects of the life of the injured person will be badly affected.

£59,860 to £100,670

(b) Moderately Severe

This category is distinct from (a) above because of the better prognosis which will be for some recovery with professional help. However, the effects are still likely to cause significant disability for the foreseeable future. While there are awards which support both extremes of this bracket, the majority are between £28,760 and £37,120.

£23,150 to £59,860

(c) Moderate

In these cases the injured person will have largely recovered and any continuing effects will not be grossly disabling.

£8,180 to £23,150

(d) Less Severe

In these cases a virtually full recovery will have been made within one to two years and only minor symptoms will persist over any longer period.

£3,950 to £8,180

139. In this case, there has been an effect on the Claimant's "ability to cope with life, education, and work" and there has been an effect on her "relationships with family, friends, and those with whom he or she comes into contact".

140. There is an effect of the Claimant such that she is not likely to be able to resume as Head of Year (or comparable) in the future, but will be able – in our judgment – to resume as an employed teacher, working in the classroom and teaching a subject.

141. We do not think that this is a case where it would be appropriate to consider it "less severe". By the date of the 2022 assessment with Dr Ornstein, the Claimant had already been experiencing severe symptoms over a long period of time (he sickness absence having started in November 2018, but some of the symptoms being earlier than that) and has not been assessed as likely to ever have a full recovery. The partial recovery discussed in his report will require at least a year's treatment, to around July 2023. She will still have symptoms over a longer period than that.

142. We also do not think it is "moderate". We do not think that this is a case where the claimant has largely recovered by the date of the remedy hearing, and that continuing effects after the remedy hearing (or in the longer term) will be minor. There has not been a marked improvement as yet. The symptoms will potentially improve, but only after a period which we would regard as "prolonged". She will continue to be severely affected for potentially around a year or so was Dr Ornstein's opinion onwards with a clearer picture only developing potentially in July 2023.

143. A severe case is described in Part B (the PTSD cases) as one in which there are permanent effects which prevent the injured person from working at all, or at least functioning at anything approaching the pre-trauma levels. In Part A, it is described more generally as "In these cases the injured person will have marked problems with respect to factors (i) to (iv) above and the

prognosis will be very poor." We do not think that the claimant's psychiatric injury falls into the "severe" category. Many aspects of her life have been severely affected but the prognosis as per the report is that with the assistance at mentioned in the report there is likely to be an improvement in her health in due course. The prognosis is not "very poor".

144. The "moderately severe" category is distinct from "severe" because of the better prognosis for (some) recovery. However, the effects are still likely to be significant for the foreseeable future.

145. In our view, the Claimant's situation does not fall fully and exactly into moderately severe category. However, when we look at the descriptions for "moderate" and "moderately severe", the best match, in our judgment, is the moderately severe category. The effects of the injury are worse than those for the "moderate" category but do not meet all the criteria for "severe".

146. Our assessment is that, while in the "moderately severe" category, it is closer to "moderate" than to "severe".

147. The PTSD bracket was £23,150 to £59,860, and the non-PTSD bracket £19,070 to £54,830. It it is our decision that the injury award should be towards the lower end of the "moderately severe" range, and our opinion is that an award of £25,000 for personal injury would be appropriate if that was the only category under which these losses were being considered. However, we have to make sure to avoid double recovery.

148. We have also considered injury to feelings based on the liability decisions we made. We have accepted what is in the claimant's evidence and in the claimant's daughter's evidence and there are a large number of incidents described. For example, the claimant has broken down in tears with colleagues and her family has noticed changes in her personality. Her confidence has been affected. She was in a job which she loved and she was made to feel undermined in that job and distrustful of other people.

149. As a result of the discrimination and harassment, she went from a head of year job to losing the head of year status but remaining an employee. The knock-on effects on the claimant were such that she resigned in circumstances which we decided were a constructive dismissal and she has been caused significant and ongoing injury to feelings.

150. There were three claims issued on the dates specified in the liability reasons and the third of the three claims was issued after 6 April 2020 and that referred specifically to the constructive dismissal. We think it is more appropriate for the purposes of considering our decision and the relevant Presidential guidelines is to use the guidance that applies for the period in which the first two claims were issued and that is the period 6 April 2019 onwards.

151. For the claims issued on or after 6 April 2019 the Presidential guidance suggested that the lower band awards would generally be £900 to £8,800 and middle bands, £8,800 to £26,300 and upper bands £26,300 to £44,000. (For claims after April 2020, if we had used those figures for the middle band, then the slight difference is that that would be £9,000 to £27,000 instead.)

152. In this case, it is clearly not appropriate to make an award in the lower band and neither party has suggested that we do so. The upper band is for the most serious cases of discrimination. It is obviously important that everybody understands that every case of discrimination is serious, including any for which an award in the lower band is ultimately deemed to be appropriate. Injury to feelings awards are focused on the effects on the claimant. Different claimants might be affected to different extents by similar conduct by the employer. It is a mistake to focus too much on the actual conduct by the employer when fixing the award for injury to feelings, although of course the level of conduct by the employer is relevant because such relevance when assessing the causation and what injury to feelings has been caused by the respondent's actions.

153. For assessing the injury, we must ignore the effects of other things which the employer might have done, which were not found by us to contravene EQA. When performing that task, we do not think it is of the utmost importance that the victimisation complaints in claim 2 failed or that not all of the complaints in claim 1 succeeded.

154. The significant injury to feelings which the claimant has suffered flowed from the fact that she was removed from her Head of Year position. There was a connection to that to the May 2016 incident because that was when the Respondent had first suggested that she relinquish the Head of Year post. There was a connection also to the discrimination in the references, because she started applying for new jobs as a result of the respondent's treatment of her. The harassment and discrimination played an important part in the decision to apply for new jobs even if, in addition, there were other reasons (other disagreements with the employer or colleagues) which were not contraventions of EQA.

155. In this case, we do not think that it is appropriate to make an award in the upper band. We think that this is a serious case which falls into the middle band but put towards the top of the middle band. If we were ordering injury to feelings only and with no psychiatric injury, then we would have arrived at around about £24,000.

156. Thus If we were to aggregate those separate assessments of injury to feelings of £24,000 and personal injury of £25,000 then that would of course total £49,000. However, that is not the appropriate amount to order because there is an element of double counting in that.

157. Claimants who have not suffered a psychiatric injury are entitled to receive injury to feelings awards and the Vento bands and the Vento guidance take that into account. However, the guidance on the size of personal injury awards for pain and suffering due to psychiatric injury is guidance for all courts and tribunals, including those which do not have the power to make an award injury to feelings similar to that discussed in the Vento guidance.

158. To avoid double counting, in this case, it is our decision that the appropriate combined amount to award for both injury to feelings and the personal injury is £35,000.

159. In terms of stigma damages, we do not think that the reference issues give rise to stigma damages. We have already given injury to feelings for the references, as well as personal injury as a result of the references. However, references are, by their very nature given to specific prospective employers; they are not published to the world at large. We are not persuaded that the contents of the references would have been discussed by the recipient head teachers with their counterparts in other schools, and are not persuaded that the actual content of those past references will make it more difficult for the Claimant to obtain future work. That is, we are not satisfied that prospective employers will know about the content.

160. In terms of aggravated damages, we do take into account the Claimant's arguments about the way in which the respondent conducted itself after the discrimination. We are aware, for example, that the Respondent did not recognise there had been discrimination and try to reverse the effects. It did not uphold the claimant's grievance. It did not uphold the claimant's grievance appeal. We have already factored that into the awards we have made, both of financial losses and for injury to feelings. Those things were not separately contraventions of the Equality Act and while we accept that that would not necessarily - in itself - prevent us making a separate award for aggravated damages (that is, separately identifying the additional injury caused), we do not think that that is appropriate in the circumstances.

161. In terms of the way the litigation was conducted there could be potentially a lot of criticism directed at the way the case has been prepared for the hearings. We touched on that in the liability reasons. However, in terms of the way that the respondent's two barristers (one at liability hearing and one at remedy) conducted themselves during the hearing, including the respectful way in which they each carried out the cross-examination of the claimant, that conduct cannot be faulted. We think there were probably faults on both sides in the way that the case was prepared for the respective hearings and there are no grounds to make any separate award for aggravated damages based on the way in which the Respondent has conducted the litigation.

162. In terms of failure to apologise, we do not think that is in itself a factor such that we should award something separate. Had there been an apology, then

that may or may not have reduced the Claimant's injury to feelings. However, we assessed the actual injury based on the actual effects on the Claimant (which included that there was no apology). By the time of the Tribunal hearing in March 2021 and the publication of the judgment in June 2021, more than a year had passed since the end of the Claimant's employment. We do not consider the failure to apologise promptly after the judgment to be an aggravating factor. We certainly do not give the respondent any credit for the belated apology sent to the claimant's solicitors on the first day of the remedy hearing. In our opinion, that is transparently something that was done because of the remedy hearing, in an attempt to enable the Respondent to be able to say to this tribunal panel that it had apologised to the Claimant. Ms Metcalf accepted that it was something that the solicitors had advised the Respondent to do, rather than something the Respondent came up with of its own accord. So the respondent gets no particular credit for that letter. However, it is not an aggravating feature such as we should award a separate component for injury to feelings.

163. For our award of interest on the injury to feelings, we took the relevant date as being the date on which the Claimant was informed about non-appointment to Head of Year. As per paragraph 72 of the liability reasons, she received the email quoted there on 3 April 2017. Although the Claimant argues for the earlier date of May 2016 (the incident in paragraph 1(iv)(a) of the liability judgment), our decision was that the bulk of the injury to feelings was caused by April 2017 notification (couple with, as Dr Ornstein discusses, the realisation that it was discriminatory treatment, and the realisation that, because of the discriminatory treatment in connection with references, the Claimant would be hampered if she sought to get a Head of Year job elsewhere). Although we have taken the May 2016 incident into account when assessing injury to feelings, it would not be just and equitable for interest on the full £35,000 to run from then.

164. After we had orally given the parties our decision on the correct method, the parties agreed the figures for pension loss and grossing up.

Employment Judge Quill

Date: 22 December 2022

Judgment sent to the parties on

29 December 2022

For the Tribunal office