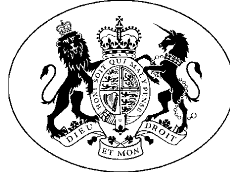

EMPLOYMENT TRIBUNALS

Claimant: Mrs Stella Bates

Respondent: Chesterfield Royal Hospitals NHS Foundation Trust

Heard: via Cloud Video Platform

On: 13 December 2022 and, in chambers, on 4 January 2023

Before: Employment Judge Ayre, sitting with members
Ms L Woodward
Mr G Edmondson

Representatives:
Claimant: Ms A Hallam, solicitor
Respondent: Miss K Nowell, counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the respondent is ordered to pay the sum of £50,219.81 to the claimant by way of compensation for unfair dismissal and unlawful discrimination.

REASONS

Background

1. In a judgment sent to the parties on 27 September 2022 ("**the Liability Judgment**"), following a 13 day hearing the Tribunal found unanimously that:

    a. The claimant was unfairly dismissed;
    b. Four of the twenty five allegations of direct disability discrimination were upheld (three having been withdrawn during the course of the hearing);

c. The respondent discriminated against the claimant contrary to section 15 of the Equality Act 2010 by commencing the absence management process and by dismissing her; and
d. One of the allegations of failure to make reasonable adjustments was upheld. The others were dismissed.

2. The case was listed for a Remedy Hearing to determine what remedy should be awarded to the claimant. In advance of that hearing both parties prepared Schedules of Loss. The claimant's Schedule included total compensation of £117,953.32; the respondent's Schedule calculated the total compensation as £34,355.24.

The Remedy Hearing

3. We heard evidence from the claimant who had prepared a witness statement for the Remedy Hearing. Miss Nowell did not cross examine the claimant on that statement.

4. There was an agreed bundle of documents running to 83 pages. The bundle included the witness statement prepared by the claimant for the final hearing of the claim, and both parties referred to that statement in submissions.

5. Miss Nowell also prepared written submissions and provided us with a number of authorities for which we are grateful. Ms Hallam made oral submissions on behalf of the claimant.

6. Each party had prepared a Schedule of Loss. The claimant's Schedule contained the following figures:

a. Gross weekly pay: £419.38 (based on the p60 to 5 April 2019);
b. Net weekly pay: £350.23;
c. Basic Award: £2,516.28
d. Loss of earnings (pre and post dismissal): £17,545.60;
e. Pension Loss: £3,311.68;
f. Loss of statutory rights: £500;
g. Injury to feelings: £45,000;
h. Aggravated damages: £20,000;
i. Interest on financial losses: £2,485.63;
j. Interest on injury to feelings: £13,640.54;
k. 15% uplift for not following the ACAS Code: £12,953.59;
l. Total claimed: £117,953.32.

7. The Respondent's Counter-Schedule included the following:

a. Gross weekly pay: £356.07 (calculated using average pay in August and September 2019);
b. Net weekly pay: £291.35;
c. Basic Award: £2,136.42;
d. Loss of earnings pre dismissal: £1,577.38;
e. Loss of earnings post dismissal: £13,236.03 less PILON of £1,292.28;
f. Pension Loss: £2,313.21;
g. Loss of statutory rights: £350;

h. Injury to feelings: £10,000;
i. Nothing for aggravated damages;
j. Interest on financial losses: £2,132.24;
k. Interest on injury to feelings: £3,031.23;
l. No uplift for not following the ACAS Code;
m. Grossing up: £871.01
n. Total: £34,355.24.

The issues

8. Ms Hallam confirmed at the start of the hearing that the only remedy sought by the claimant is compensation. It was therefore not necessary for us to consider any other remedies. The parties had been able to agree some of the principles applicable to the calculation but there remained a number of areas in dispute.

9. The issue that fell to be determined at the Remedy Hearing was what compensation should be awarded to the claimant in respect of the unfair dismissal and the unlawful discrimination. This included considering:

    a. What was the correct weekly rate of pay to be applied both to the unfair dismissal basic award and to any compensation for loss of earnings?

    b. What sum should be awarded for loss of statutory rights in respect of the unfair dismissal claim?

    c. What sum should be awarded in respect of injury to feelings?

    d. Should there be an award of aggravated damages? If so, how much should be awarded?

    e. Should there be an uplift in the compensation payable to the claimant for a failure to comply with the ACAS Code of Practice in relation to the grievance raised by the claimant and the process leading to her dismissal?

10. The parties had helpfully agreed a number of issues, for which we are grateful. The agreed issues were as follows:

    a. The claimant received a net payment of £1,292.28 in lieu of four weeks' notice.

    b. The claimant suffered a loss of earnings between October 2019 and January 2020 when she was off sick as a result of the discrimination she experienced. The claimant alleges that she also suffered a loss in February 2020, the respondent denies this.

    c. The figures contained in the respondent's Counter-Schedule of Loss for net earnings received by the claimant in the period October 2019 to February 2019.

d. The period in respect of which the claimant's financial losses should be calculated following the termination of her employment is from 16 January 2020 when her employment terminated to 30 November 2020 when she started a new job in which she fully mitigated her losses – a total of 45.43 weeks.

e. That the correct multiplier or "appropriate amount" for the purposes of calculating the unfair dismissal basic award is 6;

f. The relevant period for calculating interest on the loss of earnings award is 531 days (to the date of the remedy hearing); and

g. The relevant period for calculating interest on the award for injury to feelings is 1383 days (to the date of the remedy hearing).

Findings of Fact

11. We make the following findings of fact unanimously. We also rely in making our decision on remedy on the findings made in the Liability Judgment.

12. The claimant was continuously employed by the respondent from 21 December 2015 until 16 January 2020 when she was dismissed. The claimant was born on 6 June 1968 and was aged 47 when her employment with the respondent commenced. She was 51 years old at the time of her dismissal.

13. The claimant was off work as a result of the discrimination she experienced, from August 2019 through to the date her employment terminated. She received normal pay in August and September, but from October 2019 onwards she was in receipt of sick pay and SSP. She was paid the following net amounts:

a. October 2019: £965.04
b. November 2019: £413.84
c. December 2019: £738.99
d. January 2020: £740.97.

14. After her dismissal the claimant did not carry out any paid work until 30 November 2020 when she obtained a job as an Executive Adviser with the Department of Work and Pensions ("**DWP**"). Although that position was initially a temporary one, it has since become permanent, and the claimant continues to work for the DWP.

15. The salary and pension that the claimant receives in her role at the DWP are the same as or greater than those she received at the respondent. The claimant therefore has no ongoing financial losses after 30 November 2020. The parties agree, and we find, that the period in respect of which the claimant suffered financial losses after the termination of her employment was 45.43 weeks.

16. The claimant suffered financial losses during her employment as a result of the discriminatory treatment by the respondent. In particular, we find that the claimant was paid less than her normal wages in October 2019, November 2019, December 2019 and January 2020. During that period, she was off sick because of the discrimination she experienced at work.

17. Between 16 January 2020 and starting her new job in November 2020, the claimant did not carry out any paid work. She received universal credit of £343.91 every four weeks beginning in April 2020. She subsequently attended a medical assessment at which she was assessed as having limited capacity for work and work related activity due to her hearing loss. This resulted in an increase of £343.63 to her four weekly benefit payment.

18. From July 2020 through to November 2020 when she started her new job the claimant received benefits of £678.54 every four weeks.

19. When the respondent dismissed the claimant, it paid her four weeks' pay in lieu of notice. The gross payment in lieu of notice was £1,354.13 and the net payment was £1,292.28. This equated to gross weekly pay of £338.53 and net weekly pay of £323.07.

20. The claimant was a member of the respondent's pension scheme. The employer contribution to the pension was 14% of the claimant's gross pay and the claimant's employee contribution was an average of £85 a month.

21. The first act of discrimination found by the Tribunal in its judgment occurred in March 2019. The last act of discrimination was in January 2020. The discrimination therefore spanned a period of ten months.

22. The impact of the discrimination on the claimant was significant. It caused a deterioration in her mental health, as a result of which she was unable to work for many months both before and after the date that she was dismissed. It also contributed to her developing suicidal thoughts and attempting to take her own life. On 12 August 2019 the claimant took tablets and alcohol in a suicide attempt. The suicide attempt was a result of what was happening at work, including the fact that her grievances had not been addressed.

23. Fortunately, the suicide attempt was not successful. The claimant continued however to suffer poor mental health for many months, including anxiety attacks and nightmares about what happened.

24. The discrimination caused the claimant to feel as though she was 'not good enough' and a second class employee. She experienced anxiety about going out and meeting someone from work in Chesterfield town centre. At times this anxiety was so bad that the claimant considered moving away to Cornwall.

25. The claimant's confidence has been knocked by the discrimination, and this effect is ongoing. She has however been able to find another job and has, to her credit, been working full time in the same role since

November 2020. Her employment with the DWP is ongoing and she now has more than two years' continuous service and has therefore acquired statutory employment protection. It is clear from her witness statement that the new job has helped significantly with her recovery, although she still feels anxious at work and worries about something similar happening to her again.

26. As a result of her experience with the respondent, the claimant could not consider working in a caring role again. She believes that the effects of the discrimination have permanently damaged her mental health and will stay with her for the rest of her life. She is still receiving treatment for her mental health and meets fortnightly with a Social Link Worker who has advised her that she has a social phobia because of what happened whilst she was working at the respondent.

The Law

Basic Award : Unfair dismissal

27. Section 118 of the Employment Rights Act 1996 ("**the ERA**") provides that:

"*(1) Where a tribunal makes an award of compensation for unfair dismissal…the award shall consist of –*

(a) A basic award (calculated in accordance with sections 119 to 122 and 126), and
(b) A compensatory award (calculated in accordance with sections 123, 124, 124A and 126."

28. Section 119 of the ERA contains the provisions for calculating a basic award, which shall be done 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, and
(c) allowing the appropriate amount for each of those years of employment…"

29. The 'appropriate amount' is "*one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one…*" (section 119(2)(a)).

Unfair dismissal compensatory award

30. Section 123 of the ERA contains the power to make a compensatory award where an employee has been unfairly dismissed, of "*such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant*

in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

Uplift for unreasonable non-compliance with the ACAS Code

31. Section 124A of the ERA (Adjustments under the Employment Act 2002) provides that:

"*Where an award of compensation for unfair dismissal falls to be –*

(a) reduced or increased under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (effect of failure to comply with Code: adjustment of awards)…

the adjustment shall be in the amount awarded under section 118(1)(b)…."

32. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("**TULRCA**") gives Employment Tribunals the power to increase or decrease compensation payable to an employee in certain circumstances. It applies to proceedings under any of the jurisdictions listed in Schedule A2, which includes complaints of discrimination at work under the Equality Act 2010, and complaints of unfair dismissal.

33. The relevant part of section 207A states as follows:

"*(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that –*

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) the employer has failed to comply with that Code in relation to that matter, and
(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

34. The power to increase compensation by up to 25% applies to awards to compensation for discrimination and to unfair dismissal compensatory awards. It does not however apply to unfair dismissal basic awards, by virtue of section 124A of the ERA.

35. The term "relevant Code of Practice" includes the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) ("**the ACAS Code**") which was produced under the authority given to ACAS by section 199 of TULRCA and subsequently approved by the Secretary of State and by Parliament in accordance with section 200 of TULRCA.

36. The ACAS Code contains the following relevant provisions:

"*1. This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.*

- *Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted.*
- *Grievances are concerns, problems or complaints that employees raise with their employers…*

4. …whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:

- *Employers and employees should raise and deal with issues* ***promptly*** *and should not unreasonably delay meetings, decisions or confirmation of those decisions.*
- *Employers and employees should act* ***consistently****.*
- *Employers should carry out any necessary* ***investigations****, to establish the facts of the case.*
- *Employers should* ***inform*** *employees of the basis of the problem and give them an opportunity to* ***put their case*** *in response before any decisions are made.*
- *Employers should allow employees to be* ***accompanied*** *at any formal disciplinary or grievance meeting.*
- *Employers should allow an employee to* ***appeal*** *against any formal decision made…*

33. Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received.

34. Employers, employees and their companions should make every effort to attend the meeting. Employees should be allowed to explain their grievance and how they think it should be resolved. Consideration should be given to adjourning the meeting for any investigation that may be necessary…

40. Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken."

Compensation for discrimination

37. Section 124 of the Equality Act 2010 ("**the EQA**") sets out the remedies available in a successful discrimination claim. Section 124(2) provides that the tribunal may "*order the respondent to pay compensation to the complainant*". Section 124(6) states that "*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".

38. Where a Tribunal finds that a dismissal is both discriminatory and unfair, compensation for financial losses can only be awarded once, to avoid double recovery. Section 126 of the ERA provides that:

"*(1) This section applies where compensation falls to be awarded in respect of any act both under-*
(a) The provisions of this Act relating to unfair dismissal, and
(b) The Equality Act 2010.

(2) 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."

39. Normally compensation will be awarded under the discrimination legislation (***D'Souza v London Borough of Lambeth [1997] IRLR 677***) although in some cases it may be more appropriate to award unfair dismissal compensation. This approach was approved by the EAT in ***Cooper and anor v Smith EAT 0452/03*** where the Tribunal was unable to calculate damages for discrimination net of social security benefits because it did not have the necessary information about benefits received, and instead awarded compensation for unfair dismissal to which the Recoupment Regulations applied.

40. In assessing compensation for discrimination account must be taken of social security benefits received so as to avoid double recovery. In ***Chan v London Borough of Hackney [1997] ICR 1014*** the EAT held that "*where a benefit is paid only because of incapacity to earn a wage, such payment ending immediately such incapacity is removed, it cannot…be right in assessing compensation to allow both the lost earnings and that benefit*".

41. Section 119 of the EQA contains the remedies available to the county court where it makes a finding of discrimination and includes, at section 119(4) the power to award compensation for injured feelings (whether or not it includes compensation on any other basis).

42. In determining the amount of injury to feelings, the tribunal must take account of the guidelines laid down by the Court of Appeal in ***Vento v Chief Constable of West Yorkshire Police (No. 2) 2003 ICR 318,*** as subsequently revised, and of the Presidential Guidance on Employment Tribunal awards for injury to feels and psychiatric injury, issued in September 2017 and subsequently updated.

43. The Vento guidelines, in summary, are that:

   a. The top band applies in only the most serious cases, such as where there has been a lengthy campaign of harassment;
   b. The middle band applies to serious cases that do not merit an

award in the top band; and

c. The lower band applies in less serious cases, for example involving a one off or isolated act of discrimination.

44. The Presidential Guidance provides that for claims presented on or after 6 April 2019 the Vento bands are 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. For claims presented on or after 6 April 2020 the lower band is £900 to £9,000, the middle band is £9,000 to £27,000 and the upper band is £27,000 to £45,000. These bands take account of the 10 per cent uplift set out in ***Simmons v Castle [2012] EWCA Civ 1288***.

Interest

45. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 give employment tribunals the power to award interest on awards made in discrimination cases. The tribunal is required to consider whether to award interest, even if the claimant does not include a sum for interest in her schedule of loss.

46. Under Regulation 3 interest is calculated as simple interest that accrues from day to day, and the current rate of interest is 8%. Interest on awards of injury to feelings runs from the date of discrimination to the 'calculation date' on which the tribunal makes its decision on remedy. Interest on other awards of compensation for discrimination, such as compensation for loss of earnings, runs from the mid-point between the date of discrimination and the calculation date.

Submissions

Claimant

47. Ms Hallam submitted on behalf of the claimant that the respondent had breached the ACAS Code in both the grievance and the dismissal process. In relation to the grievance process, she submitted that the respondent had not dealt with the grievance promptly and had failed to carry out necessary investigations. She reminded us of our findings that the respondent had unreasonably delayed in dealing with the grievance, had only interviewed two witnesses, and that a number of the issues raised in the grievance had not been investigated and there were no findings on them.

48. In relation to the dismissal process, she argues that the ACAS Code can apply to ill health dismissals and that the respondent had failed entirely to hold a Stage 1 meeting, so there had been no meeting invite, no informing the claimant of the problem, no meeting, no outcome and no right of appeal. Rather there was just the signing of a return to work form.

49. On the question of injury to feelings, Ms Hallam submitted that the correct Vento bands are those in place from 6 April 2020 as the second

claim presented by the claimant (2601217/2020) was presented on 13 May 2020 and 'reiterated' the complaints made in the first claim, as well as adding new ones.

50. An award of injury to feelings is, Ms Hallam accepts, designed to compensate the claimant for hurt feelings. The Tribunal must focus on the effect the discrimination had on this claimant, taking account of factors such as her vulnerability, the degree of hurt, the distress and upset caused to her as well as the positions of the discriminators.

51. Ms Hallam pointed out that, after experiencing discrimination, the claimant had raised a grievance to a higher level of management with a view to getting help. When doing so, she suffered further discrimination at the hands of more senior managers. They should have helped her and applied a fair and proper grievance process. They did not.

52. This was a case in which there were a number of findings of discrimination and in which the dismissal itself was also found to be discriminatory. The discriminatory conduct involved senior managers and caused more hurt for the claimant because she had nowhere to turn for help. No one in the organisation showed any understanding of or empathy towards the claimant's disabilities. This has had an ongoing impact on the claimant, causing her to have a social phobia.

53. In Ms Hallam's submission, the discrimination has had an ongoing impact. She is fearful of similar events happening again and has a complete lack of trust in others. The claimant's suicide attempt in 2019 was due to the way in which the grievance was handled and her treatment by Matron Shore. She tried to take her own life as a result of the discrimination she experienced.

54. The claimant was also, Ms Hallam submits, unable to work between August 2019 and November 2020 as a result of the discrimination she suffered, and her social phobia is such that she made enquiries about moving to Cornwall.

55. The award for injury to feelings should, in Ms Hallam's submission, be in the upper Vento band, as the discriminatory conduct occurred over a prolonged period of time going back to March 2019 and had a significant impact on the claimant who is a vulnerable individual.

56. Ms Hallam also submits that the claimant should be awarded aggravated damages. She accepted that the respondent could not be criticised for its conduct of the Tribunal proceedings, and that Ms Nowell had showed compassion towards the claimant. Ms Hallam argues, however that aggravated damages can still be awarded where a claimant can show a causal link between exceptional or contumelious conduct or motive by the respondent and her injury to feelings.

57. Aggravated damages may, Ms Hallam says, be appropriate where an employer has failed to investigate complaints of discrimination. In

support of this argument, she referred us to ***HM Prison Service v Johnson [1997] IRLR 162***.

58. Ms Hallam acknowledged that the Tribunal should seek to avoid double recovery but argues that nonetheless this is a case in which it would be appropriate for an award of aggravated damages to be made because of the failure of the respondent to deal with the claimant's grievance quickly, fully or properly.

59. The claimant should, Ms Hallam says, be awarded £500 for loss of statutory rights, even though she only had four years' service with the respondent, because she would have remained in employment with the respondent as a Healthcare Assistant but was prevented from doing so.

60. On the question of a week's pay, Ms Hallam suggests that the correct figures to use are those contained within the claimant's Schedule of Loss, which are taken from the P60 before she became unwell, and which therefore more accurately reflect her actual losses. The two wage slips relied upon by the respondent cover periods when the claimant was not well and so did not work the additional hours she had previously worked.

61. The claimant is only claiming for loss of pension from the date her employment terminated through to the start of her new job on 30 November 2020 and has no ongoing pension loss from that date.

Respondent

62. Miss Nowell submitted that a number of the claimant's absences from work had been due to illness which was not a result of the discrimination found by the Tribunal. The claimant has not, she said, proved on the balance of probabilities that but for the discrimination she would have remained in work from October 2019 onwards, or that she would have been able to return to work in January 2020 following her dismissal. It is highly likely that the claimant would have been off sick anyway even without the discriminati8on.

63. She referred us to the comments of the EAT in ***Ministry of Defence v Cannock and ors [1994] ICR 918*** that compensation for discrimination should be calculated in the same way as for torts, with the aim being: "*as best as money can do it, the applicant must be put into the position she would have been in but for the unlawful conduct.*"

64. The causation issues, Miss Nowell says, apply to both the weekly rate of pay and injury to feelings. The claimant's claim was very extensive and included numerous allegations of discrimination dating back to 2017, the majority of which had been dismissed. A major cause of the claimant's ill health had been the incident on 24 January 2019 which the Tribunal found was not discriminatory.

65. In relation to the weekly rate of pay, Miss Nowell submitted that the claimant has not proven that she would have been earning overtime throughout the period covered by her claims but for the discrimination,

given that there were multiple causes for her absences, including non-discriminatory ones. She referred us to the provisions of section 222 of the Employment Rights Act 1996 on calculating a week's pay but accepted that these may not apply to the calculation of losses for discrimination under the Equality Act 2010.

66. On the question of injury to feelings, Miss Nowell said that much of the upset experienced by the claimant was attributable to incidents and alleged treatment which the Tribunal have not found to be discriminatory. She did not dispute that the claimant was very hurt by what happened, but she was clearly affected by matters which were not discrimination.

67. An award in the middle Vento band would, she says, be appropriate. She suggested that the award should be £10,000 – towards the bottom of the middle band. Injury to feelings is not punitive, and the Tribunal should identify what part of the claimant's upset is due to discrimination and what part was due to non-discriminatory events that upset her.

68. Miss Nowell submitted that no award for aggravated damages should be made. She referred us to the case of ***Commissioner of Police of the Metropolis v Shaw [2012] ICR 464*** which identified 3 broad categories of cases in which awards for aggravated damages are appropriate:

    a. Cases in which the manner in which the wrong was committed was particularly upsetting (referred to as acts done in a 'high-handed, malicious, insulting or oppressive manner' in ***Alexander v Home Office [1988] ICR 685***);

    b. Where there was a discriminatory motive, i.e., the conduct was based on prejudice or animosity, or was spiteful, vindictive or intended to wound; and

    c. Cases in which subsequent conduct of the respondent adds to the injury, for example, where the conduct of the Tribunal proceedings is unnecessarily offensive, or the employer 'rubs salt in the wound' by making it clear that it is not taking the allegations of discrimination seriously.

69. Whilst Miss Nowell acknowledged the criticisms made of the respondent's witnesses in the Liability Judgment, their treatment of the claimant does not, she says, fall into any of the above three categories. They acted out of ignorance or insensitivity rather than in a highhanded or deliberately discriminatory fashion.

70. In relation to the issue of uplift for breach of the ACAS Code, Miss Nowell submits that the ACAS Code does not apply to capability procedures based on ill health – ***Holmes v QinetiQ Ltd [2016] ICR 1016***. She also argues that the respondent had followed the recommendations of the ACAS Code in relation to the grievance process, and that therefore no uplift should be made.

Conclusions

71. We have reached the following conclusions having considered carefully the evidence before us, the legal principles summarised above, and the oral and written submissions of the parties. Our conclusions were reached unanimously.

A week's pay

72. The claimant suggested that a week's pay should be calculated using the figures from her P60 for the tax year ending 5 April 2019, the respondent suggested using the claimant's pay slips for July and August 2019.

73. As only limited information about weekly pay had been provided to us by the parties, and the payslips we had before us covered periods when the claimant was off work sick, it was not possible to calculate a week's pay using the methods set out in the Employment Rights Act 1996.

74. We therefore decided that the just and equitable approach to take to calculating a week's pay was to use the figures that the parties agreed had been paid by way of payment in lieu of notice ("**PILON**").

75. The gross payment in lieu of the claimant's four-week notice period was £1,354.13, which works out at **£338.53** per week gross pay (1,354.13 divided by 4). The parties agreed that the net PILON payment was £1,292.28 which equates to net weekly pay of **£323.07** (1,292.28 divided by 4). These are the figures that we have used to calculate the compensation due to the claimant.

Unfair dismissal basic award

76. The basic award is calculated by multiplying a week's gross pay (£338.53) by the agreed multiplier of 6. This results in a basic award of **£2,031.18**.

Unfair dismissal compensatory award

77. We have decided to award loss of earnings and pension following the claimant's dismissal by way of compensation for discrimination under the Equality Act, and not as compensation for unfair dismissal.

78. We do however make an award for loss of statutory rights by way of compensation for unfair dismissal. By the time of the remedy hearing the claimant had 'regained' her statutory rights as she had been employed by the DWP for more than two years. Her length of service with the respondent was only four years.

79. For these reasons we consider it appropriate to make an award of **£350** in respect of loss of statutory rights. The unfair dismissal compensatory award is therefore limited to £350.

Compensation for discrimination

(a) Loss of earnings prior to the claimant's dismissal

80. It would, in our view, be appropriate to award the claimant compensation for the loss of earnings that she suffered in October 2019, November 2019, December 2019 and January 2020. The parties agreed that the claimant had lost earnings in those months as a result of the discrimination that she experienced.

81. The claimant received a payment in lieu of notice in her February 2020 pay, and as the payment received in February relate to the period following the termination of the claimant's employment, we have awarded loss of earnings from 17 January 2020 onwards as part of the post termination losses.

82. In order to calculate the lost earnings prior to the claimant's dismissal, we have used the net figure for weekly pay of £323.07 set out above. Multiplying that figure by 52 and dividing it by 12 gives a net monthly figure of **£1,399.97**.

83. During the four months beginning October 2019 and ending in January 2020 the claimant received total net pay of **£2,858.84** (965.04 + 413.84 + 738.99 + 740.97). Her normal pay for that period would have been **£5,599.88** (4 x 1,399.97). The difference between those two figures (5,599.88 – 2,8858.84) is **£2,741.04**.

84. We therefore award the claimant £2,741.04 in respect of loss of earnings in the period prior to her dismissal.

(b) Loss of earnings and pension loss after the dismissal

85. The parties agree that the period between the claimant's dismissal and the start of her new employment on 30 November 2020 is **45.43** weeks.

86. The claimant lost earnings of 45.43 times £323.07 between the date of her dismissal and the date she started work at the DWP – a total of **£14,677.07**.

87. During the same period, she lost employer pension contributions of 14% of her gross pay of £338.53 a week. This gives a pension loss of £47.39 a week and pension loss for the 45.43 weeks that she was out of work of **£2,152.93** (47.39 x 45.43).

88. So, the total lost earning and pension loss between the date of termination and the date the claimant started her new job is **£16,830 (**14,677.07 + 2,152.93).

89. From this should be deducted the PILON of **£1,292.28** received by the claimant, plus the benefits that she received.

90. The claimant's evidence, which we accept, was that she received £343.91 in Universal Credit every four weeks from late April until July when her Universal Credit increased to £678.54 every four weeks.

She then continued to receive the increased amount until she started work on 30 November 2020.

91. We calculate the claimant's benefits as follows, assuming that the first payment was made on 24 April 2020:

a. 24 April £343.91
b. 22 May £343.91
c. 19 June £343.91
d. 17 July £678.54
e. 14 August £678.54
f. 11 September £678.54
g. 9 October £678.54
h. 6 November £678.54

Total: £4,424.43

92. So, the net loss between the date the claimant's employment ended and the date she started new employment is **£11,113.29** (16,830 – 1,292.28 – 4,424.43).

(c) Injury to feelings

93. In deciding what amount to award for injury to feelings we have reminded ourselves that compensation for injury to feelings is compensatory and not punitive.

94. In the Liability Judgment we upheld seven separate acts of discrimination : four acts of direct discrimination, two acts of discrimination arising from disability (including the dismissal of the claimant) and one failure to make reasonable adjustments. Many more allegations were not upheld.

95. The discrimination took place over a ten month period between March 2019 and January 2020 and involved a number of different individuals. The discrimination related to two different disabilities, and there was a failure on the part of the respondent to show any real understanding of either.

96. The discrimination clearly had a significant impact on the claimant. She was unable to work at all between August 2019 and November 2020 due to ill health that was caused, at least in part by the discrimination. One of the discriminatory acts, namely the manner in which the grievance was dealt with, contributed to the claimant attempting to take her own life in August 2019.

97. The impact of the discrimination on the claimant continues today. She has developed a social phobia and remains anxious.

98. We do however accept Miss Nowell's submission that the claimant's illness and absence from work was contributed to by actions of the respondent that were not found to be discriminatory. We also recognise that the claimant has recovered to some degree from what happened to her. To her credit she obtained a full time role in

November 2020 and has been working full time since then, in an environment which seems to be a positive one for her.

99. In light of the above, we consider an award in the middle Vento band to be appropriate. Given the number of acts of discrimination, the period over which it lasted, the fact that one of the acts of discrimination was the dismissal of the claimant, and the impact of the discrimination on the claimant, it would not, in our view, be appropriate to make an award at the lower end of the middle Vento band, as Miss Nowell suggests.

100. Rather, we consider an award towards the higher end of the middle band to be appropriate. We award the claimant **£20,000** in respect of injury to feelings.

(d) Aggravated damages

101. We have considered carefully whether to make an award of aggravated damages in favour of the claimant. It is our view that this is not a case in which it can be said that the discrimination was committed in a 'high-handed, malicious, insulting or oppressive manner. The acts of discrimination were, we find, a result of incompetence, a general lack of care and a lack of interest in finding out about the claimant's disabilities. The discrimination was not, we find, deliberate or malicious.

102. In addition, the respondent did take a number of steps to try and support the claimant, for example by giving her trial periods in the café and the shop, and by extending the period of time that she had to complete the HCA training. Matron Shore also offered to speak on the claimant's behalf to the colleagues who had upset the claimant in January 2019. This indicated, in our view, that there was no ill will towards the claimant and no deliberate intention to discrimination.

103. It cannot be said that there was a concerted effort to get rid of the claimant, but rather that those managing the claimant formed a view of her and that view was not subsequently challenged by those involved in the grievance and dismissal processes.

104. For these reasons this is not a case that falls into the first category of claims identified in ***Commissioner of Police of the Metropolis v Shaw***.

105. For the same reasons we also find that the discriminatory conduct of the respondent was not based on prejudice or animosity, nor was it spiteful, vindictive or intended to wound. Rather, it was based on incompetence and a lack of care. It did not fall into the second of the ***Shaw*** categories either.

106. In relation to the last of the ***Shaw*** categories, Ms Hallam acknowledged, quite properly in our view, that the conduct of these proceedings by Miss Nowell has been compassionate and sensitive. The Tribunal was impressed by the manner in which Miss Nowell conducted these proceedings on behalf of the respondent, including at

the remedy stage. She made a number of appropriate concessions and did not put the claimant through cross-examination on the witness statement that she prepared for the remedy hearing.

107. We make no criticism of the way in which the respondent conducted these proceedings. The case does not therefore fall into the third ***Shaw*** category.

108. For these reasons it is our view that it would not be appropriate to make an award for aggravated damages. No award is therefore made.

Uplift for failing to follow the ACAS Code of Practice

109. We accept Miss Nowell's submissions that the ACAS Code does not apply to dismissals for sickness absence. In ***Holmes v QinetiQ Ltd*** the employee was dismissed because of ill health and the EAT held that the ACAS Code did not apply to such dismissals, as the ACAS Code's disciplinary provisions only apply to culpable conduct including poor performance. Her submissions are consistent with the view taken in the Employment Tribunal Remedies Handbook 2022-23.

110. Although the ***Holmes*** decision related to the previous version of the ACAS Code, there is nothing in the wording of the current ACAS Code that justifies a different approach. Rather, in our view, the introduction to the Code, contained in paragraph 1, makes it clear that the Code is designed to cover disciplinary situations which include misconduct and poor performance. Although there is reference to separate capability procedures, this is in the context of how an employer may choose to deal with performance issues. There is no mention of ill health.

111. The ACAS Code does therefore not apply to dismissals for ill health and sickness absence and did not apply to the dismissal of the claimant.

112. The ACAS Code did however apply to the grievance that the claimant raised. We made a number of findings in the Liability Judgment about the way in which the grievance was handled by the respondent. These included that Jane Walker did not cover all of the issues raised by the claimant in the grievance, that the grievance outcome was woefully lacking in detail and reasoning, and that it took five months to deliver the grievance outcome.

113. Uplifts for not complying with the ACAS Code have both a punitive and a compensatory element. When deciding on the amount of an uplift, the Tribunal must take account of the absolute value of the uplift as well as the percentage value. The EAT has suggested that Tribunals take the following approach when considering uplifts (see ***Rentplus v Coulson [2022] EAT 81*** and ***Slade v Biggs [2021] EA-2019-000687-VP***):

a. Is the claim one which raises a matter to which the ACAS Code applies?

b. Has there been a failure to comply with the ACAS Code in relation to that matter?
c. Was the failure to comply with the ACAS Code unreasonable?
d. Is it just and equitable to award an uplift because of the failure to comply with the ACAS Code and, if so, by what percentage?

114. Applying these principles to the current case, we find as follows:

a. This is a claim which raises a matter to which the ACAS Code applies. The claimant raised a grievance in writing and that grievance was covered by the Code.

b. There has, in our view, been a failure by the respondent to comply with the following provisions of the Code:

    i. The requirement to deal with issues promptly and not unreasonably delay meetings. It took a month to arrange the first grievance meeting, and it was four months before the claimant was invited to a meeting to discuss the outcome.
    ii. The requirement to carry out any necessary investigations to establish the facts of the case. Mrs Walker did not investigate all of the issues raised by the claimant, and her investigation was limited. She did not approach the investigation with a critical mind, but rather with a pre-formed view.
    iii. Mrs Walker did not set out in writing her decision on all of the points raised by the claimant in her grievance. She only responded to some of them.

c. The failure to fully investigate the grievance and to respond to all of the issues raised by the claimant was, in our view, unreasonable. There was no good reason put forward by the respondent as to why Mrs Walker did not deal with all of the issues raised. The delays in dealing with the grievance were, on balance, not unreasonable. They were not all due to the respondent, as the claimant was invited to an outcome meeting four months after raising her grievance, and the meeting was delayed due to the unavailability of her representative. The respondent is a large and public organisation. Four months to deal with a grievance, whilst not ideal, was not unreasonable for the purposes of section 207A TULRCA in the circumstances.

d. In light of the failure to comply with the ACAS Code it would in our view be appropriate to award an uplift under section 207A of TULRCA. The claimant has however already received some compensation for the way in which the grievance was handled as part of the injury to feelings award and the loss of earnings award. In these circumstances we consider an award towards the lower end of the range to be appropriate and have therefore decided to apply an uplift of 5%.

115. The uplift under section 207A of TULRCA applies to the following elements of the claimant's compensation (the uplift does not apply to the basic award for unfair dismissal):

a. The unfair dismissal compensatory award of £350;
b. The award of £2,741.04 in respect of loss of earnings in the period prior to her dismissal;
c. The award of £11,113.29 for financial losses following the dismissal; and
d. The injury to feelings award of £20,000.

Total : £34,204.33

116. Applying the 5% uplift results in the awards being increased as follows:

a. Unfair dismissal compensatory award: **£367.50**
b. Loss of earnings pre dismissal: **£2,878.09**
c. Financial losses post dismissal: **£11,668.95**
d. Injury to feelings: **£21,000**

Total: £35,914.54

117. The total amount of the uplift applied to the above awards comes to **£1,710.21**. This is, in our view, an appropriate amount taking account of the overall size of the awards made to the claimant.

Interest

118. We award interest on the compensation for discrimination under The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803. We calculate the interest at the rate of 8% (which has been agreed by the parties).

119. Interest on the compensation for financial losses (pre and post dismissal) runs from the midpoint between the date of the discrimination and the date upon which interest is calculated. The parties agreed that interest should be awarded in respect of 531 days up to the 13 December 2022, the date of the remedy hearing. As interest was calculated by the Tribunal on 4 January 2023, when the Tribunal met in chambers, we have added the 22 days from 13 December to 4 January to the 531 days, giving a total of 553 days.

120. Interest on compensation for financial losses arising from the discrimination is therefore calculated for the period of 553 days at 8%. The total compensation for financial losses pre and post dismissal (2,878.09 + 11,668.95) is **£14,547.04**.

121. Interest on this amount is calculated as follows: 553 x 0.08 x 1/365 x 14,547.04, giving total interest of **£1,763.28**.

122. On the injury to feelings award interest runs from the date of discrimination, which the parties agree was 1,383 days before the

remedy hearing. Adding on the 22 days to the date upon which interest was calculated gives a total period of 1,405 days.

123. Interest on the injury to feelings award is calculated as follows: 1,405 x 0.08 x 1/365 x 21,000, giving a total interest of **£6,466.85.**

Grossing up

124. The total award to the claimant, before grossing up to take account of tax, is as follows:

a. Unfair dismissal basic award: **£2,031.18**

b. Unfair dismissal compensatory award: **£367.50**

c. Compensation for financial losses incurred as a result of discrimination: **£14,547.04**

d. Interest on that compensation: **£1,763.28**

e. Injury to feelings award: **£21,000**

f. Interest on that award: **£6,466.85**

Total: £46,175.85

125. No tax is payable in respect of the first £30,000 of the award. The balance of £16,175.85 falls to be grossed up as the claimant will be required to pay income tax on it.

126. There was no information before us as to what tax bracket the claimant falls into. The respondent in its Counter- Schedule of Loss suggested grossing up at 20% and no objection was raised to this by the claimant. We have therefore decided to gross up at a 20% tax rate.

127. The grossing up calculation is as follows: £16,175.85 divided by 0.8 which gives a grossed-up amount of **£20,219.81.**

128. To this figure must be added the first £30,000 of the compensation, which is free of tax.

129. The total award to the claimant is therefore **£50,219.81**. The respondent is ordered to pay that sum to the claimant.

Employment Judge Ayre

13 January 2023