EMPLOYMENT TRIBUNALS

Claimant: Mr T Williams

Respondent: Ministry of Defence

Heard at: Cardiff, by video **On:** **14 & 15 November 2022**

Before: Employment Judge R Harfield
Mr M Pearson
Mr M Lewis

Representation
Claimant: Mr N Roberts (Counsel)
Respondent: Ms J Williams (Counsel)

RESERVED JUDGMENT

We previously issued a short form partial remedy judgment which said:

"This matter came before us for a remedy hearing. We issue an unanimous partial remedy judgment on some issues put before us in particular to decide, as follows:

1(a) There is a 50% prospect that the claimant would have commenced a phased return to work in June 2018 in the UKSV role;

(a) There is a 50% prospect that the claimant would have maintained that attendance in work through to and including December 2018;

(b) From January 2019 there is a 40% chance that the claimant would have commenced a return to his AFO duties and a 40% chance that he would have successfully maintained that return to AFO duties for the foreseeable future (through to the end date of the period before us of March 2021);

(c) For the periods of sickness absence where the claimant seeks to recover loss of earnings the calculation should be undertaken on that basis;

(d) Calculation of pension losses should be calculated at the rate of 30% as claimed by the claimant (the calculation method not being opposed by the respondent), albeit adjusted as above by the same principles and periods of loss that apply to the loss of earnings calculations;

(e) The claimant is awarded the sum of £22,000 (twenty-two thousand pounds) injury to feelings;

(f) Interest on injury to feelings should be calculated at 8% from 8 May 2018;

(g) Interest on financial losses should be calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations;

2. *By consent, the claimant is awarded the sum of £7,965.81 interest on injury to feelings.*

3. *The Respondent accepts that the Claimant is entitled to an award of costs but the amount is in dispute. Unless the parties are able to agree terms, they are agreed that the disputes about costs will be decided by the Tribunal on the papers without the need for another hearing. The Claimant's cost application is to be set out in writing by 20 January 2023 and the Respondent's are to reply by 3 February 2023. Any further reply by the claimant is due by 10 February 2023.*

4. *By 6 December 2022 the Respondent is to produce a witness statement explaining each entry on each payslip and what it means and how it has been calculated from June 2018 to date.*

5. *The parties are to write to the Tribunal by 6 January 2023 to confirm if they have reached agreement as to the calculation of the remainder of the claimant's losses (and whether a Consent Judgment can and should then be issued) or alternatively to set out their points of agreement and areas of dispute. If a further remedy hearing is needed it will take place on 24 January 2023 by CVP. The parties (the respondent having primary responsibility) are to file a bundle for the further remedy hearing via the DUC at least 7 days before the hearing date.*

6. *Due to time constraints only very limited reasons were given by the Tribunal for the decisions set out above. Written reasons were promised and EJ Harfield is endeavoring to get these to the parties as soon as possible."*

These are those written reasons.

REASONS

Introduction and initial case management

1. This matter came back before us for a remedy hearing. At the start of the hearing we had to decide the extent of the involvement of the respondent resulting from their failure to comply with the unless order made by EJ Harfield on 28 October 2022. The respondent was ordered to provide (a) a counter schedule, (b) remedy disclosure and (c) confirm a date for remedy witness statement exchange by 2 November 2022 in default of which the respondent would be debarred from (a) relying on a counter schedule, (b) relying on its own remedy documents and (c) calling its own witnesses. EJ Harfield ordered the extent of the respondent's ability to participate would be decided at the start of the remedy hearing. The respondent failed to comply with any of the unless order by the compliance deadline.

2. On the evening of 4 November 2022 the respondent sent the claimant a counter schedule. We are told that on 10 November 2022 the respondent also produced a witness statement from Mr McGuren relating to the claimant's pay. During the course of the hearing we received a copy of this statement by email but we did not consider because we did not at the time grant relief from sanction to allow the

respondent to rely upon their own witness evidence. On 11 November 2022 the respondent made an application for relief from sanction or to set aside the unless order.

3. We heard submissions from the parties and, for oral reasons given at the time, granted permission to the respondent to participate to an extent. The Government Legal Department's lawyer asserted that the reason for the default was his personal ill health but he declined to give any further detail or to provide medical evidence. There was no explanation before us (as Ms Williams had no instructions to enable her to proffer one) as to how and why such unidentified ill health stopped the respondent from complying with getting the case ready for hearing, or responding to the repeated contact from the claimant's solicitor, or not updating the tribunal or making an application to the tribunal, nor why no other lawyer in GLD was unable to pick up the case or assist in preparation. As we observed at the hearing what happened is remarkable, bizarre, and largely unexplained.

4. We gave oral reasons for our decision on the participation of the respondent at the time which we do not repeat fully here, but instead summarise. One of the key issue the claimant was inviting us to determine at the hearing is when, but for the respondent's unlawful conduct, he would have returned to work (the counterfactual). The respondent was not here seeking to rely on witness or documents but on submissions, referred to in their purported counter schedule. Taking the consequences of the unless order at their most extreme it could potentially have meant that the respondent would not be able to rely on their arguments because they were in their counter schedule, which was not filed in time. But an assessment of this question was inherently before the tribunal to adjudicate upon in ay event. We granted relief from sanction, if required to allow the respondent to ask the claimant questions about this in cross examination and to make their submissions upon it. The assessment of this issue was a point before us in any event and we did not consider the claimant would suffer substantive prejudice if we allowed the respondent to participate to the extent identified.

5. We were also asked to determine when the claimant's losses continued to, and for particular periods of absence where the claimant asserts that, but for the respondent's unlawful conduct, he would have received full pay. Here we made a similar decision, again allowing the respondent to cross examine the claimant about the absence periods and to make submissions but not to adduce their own new evidence or witnesses. Again it was a point we had to determine for ourselves in any event.

6. We added, however, a caveat. There is a substantial mathematical dispute between the parties as to what the claimant has received in pay over the period in question, what the pay is for, and whether he has been overpaid or underpaid including a large disputed payment in May 2020 which the claimant's schedule of loss did not give credit for because it is said it was not known exactly what it represented. The statement of Mr McGuren and an accompanying letter potentially went to these mathematical issues. However, at the time we were being asked to determine some key principles in the hope the parties could then agree the maths between them. We therefore did not grant relief from sanction to allow the respondent to rely upon Mr McGuren's evidence or the letter[1] as it was not relevant to the issues we were being asked to decide. However, our

[1] For completeness it emerged later in the hearing that the letter appeared to have been before us in any event as part of the claimant's remedy bundle, but we were not aware of that at the time

caveat was that notwithstanding the respondent's default we were troubled by the notion of the claimant potentially receiving from tribunal public money to which he may not be entitled if his schedule of loss did not give full credit for sums actually received. We did not consider that such a practice would accord with the interests of justice. We stated that if down the line there remained large mathematical points of dispute between the parties, the respondent was at liberty to renew their application for relief from sanction.

7. We were also being invited to determine the method of calculation of the claimant's pension loss. The respondent had not put forward a counter proposal for the method of calculation, albeit the adjudication of loss flows in the first instance from our primary decision making about the claimant's likely return to work and absence periods. We did not grant permission for the respondent to put forward any alternative method of calculation which should have been contained within their counter schedule and filed in accordance with the unless order (which it was not).

8. We were also invited to assess an injury to feelings award. Again we granted relief from sanction to allow the respondent to ask questions in cross examination and to make submissions about the amount. We did not consider there was substantive prejudice to the claimant as we had to determine this matter in any event. The same applied to the claim for aggravated damages (albeit in the end the claimant did not pursue the aggravate damages claim). We were also being asked to determine what date interest should be calculated from and the method of calculation. As this was a legal submission we granted relief to the respondent to the extent they were permitted to make submissions about it. Again it was a point for us to determine and there was no substantive prejudice to the claimant.

9. We then proceeded with the hearing and heard evidence from the claimant who also provided a remedy witness statement. We heard submissions from both parties which for reasons of expediency we do not set out in detail here but were taken fully into account and are incorporated in our decision making below. We had before us a remedy bundle extending to 454 pages. Page references in brackets [ ] are a reference to that remedy bundle. We had a skeleton argument from the claimant's counsel.

Initial remedy issues to be decided

10. We were invited to decide the following issues:

(a) When would the claimant's phased return to work have begun but for the respondent's unlawful conduct. The claimant says this would have been around 1 June 2018 and as a phased return to work it would have been on full pay;

(b) When the claimant's losses continued until. The claimant says his losses continued until he returned to a continuous period of full pay in March 2021. He argues that in the period between his reinstatement in July 2019 and March 2021 there were periods where he was unpaid and he argues that but for the respondent's unlawful conduct he would not have gone unpaid. There are 3 particular periods referred to in the claimant's counsel's skeleton argument:

i. August to December 2019 when the claimant says he was waiting for the respondent to approve his return to work;
ii. December 2019 to February 2020 when the claimant had a period of sickness absence; and
iii. July 2020 to January 2021, a further period of sickness absence.

(c) How the claimant's pension loss should be calculated;

(d) What the injury to feelings award should be;

(e) Whether aggravated damages should be payable;

(f) From what date should interested be calculated and the method of calculation.

11. We gave our oral decision on these points before us, as follows, with (these) written reasons to follow. This decision is to be read in conjunction with our reserved liability judgment.

The legal principles

12. Section 124 Equality Act 2010 sets out the remedies the tribunal can aware which include an order that the respondent pays compensation to the claimant, including compensation for injury to feelings. Awards of compensation should apply the principles that would apply in a civil claim brought in tort, as discrimination is a statutory tort. The claimant is seeking compensation as a remedy.

Injury to feelings

13. The Tribunal reminds itself of the long-established guidance in Prison Service v Johnson [1997] ICR 275, that the general principles underlying awards for injury to feelings are as follows:

• Awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party;

• An award should not be inflated by feelings of indignation at the guilty party's conduct;

• Awards should not be so low as to diminish respect for the policy of discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches;

• Awards should be broadly similar to the range of awards in personal injury cases;

• Tribunals should bear in mind the value in everyday life of the sum they are contemplating;

• Tribunals should bear in mind the need for public respect for the level of awards made.

14. The Tribunal also reminded itself of the relevant Vento guidelines. The claimant's counsel set these out in his skeleton argument. At the relevant time, the lower band was £900 to £8800, the middle £8800 to £26,300 and the upper £26300 to £44,000.

When would the claimant have returned to work?

15. A central point of dispute is when, absent the acts of discrimination found by the tribunal at the liability stage, the claimant would have returned to work. The claimant's position is that it is likely he would have started a phased return to work around a month after the meeting on 8 May 2018 i.e. around 1 June 2018 and that, as a phased return to work, it would have been on full pay. The

claimant's position is that the tribunal should find a definitive date when we considered the claimant would have returned to work, rather than looking at it from the loss of a chance perspective. The respondent's primary position is that the claimant has not established on the balance of probabilities that the claimant would have returned to work any earlier than when he was reinstated, by consent, at the Police Appeals Tribunal in July 2019. The respondent's position, analysing the medical evidence from around the time, is that the claimant would not have been well enough to return to work until July 2019 in any event and that whilst the claimant says he wanted to try a return to work, the reality was, the respondent submits, that we cannot be satisfied that there was any likelihood of a return to work at that time. The respondent submits that by the time of the claimant's reinstatement, the position had changed, and he was fit for a return, hence the respondent's consent to the claimant's reinstatement by the Police Appeals Tribunals. The respondent's secondary position is that there should be an assessment of the loss of a chance of a return to work, which they put at no higher than 10% and starting from September 2018, when the claimant made his formal part time working application.

16. The parties' primary positions are therefore polarised with the claimant saying, in effect, it was certain that the claimant would have returned to work (on a phased return on full pay) in June 2018 and should recover 100% of his losses, and the respondent saying there was zero prospect of this in the period May/June 2018 to July 2019 and therefore no award should be made for that period. The respondent had other submissions to make as set out below in respect of absence periods after July 2019.

17. In our judgment, the point is best determined on the basis of loss of a chance. We cannot accept, absent the discrimination, that it is certain the claimant would have returned to work in or around June 2018. But likewise we cannot accept that there was no prospect of a return. Neither party had obtained any expert medical evidence to guide us as to the counterfactual and we therefore had to make the assessment the best we could, as our panel of three.

18. In the tribunal's view, the best prospect of a return to work for the claimant at that time lay in the UKSV role. We found the respondent had failed to explore with the claimant why he did not consider the role suitable, and why part time working was so central to a return to work, which then could have led to the respondent telling the claimant that if he did try the UKSV role he could do so on a phased return at a slow pace without being overly pressured to increase his hours if he was not ready (paragraphs 245, 246 and 247 liability judgment). We said at the end of paragraph 247 of our liability judgment this was the "primary sensible way forward." We found that these failings amounted to a failure to make reasonable adjustments (paragraphs 252 to 257 liability judgment) and discrimination arising from disability (paragraphs 258 to 262 liability judgment).

19. At paragraphs 253 to 257 of the liability judgment we addressed the respondent's argument that the adjustments would not have alleviated the disadvantage the claimant was suffering on the basis he was simply not well enough to return to work. In our deliberations at the time we examined the contemporaneous medical evidence in detail and concluded that there was a sufficient prospect of the adjustment alleviating the disadvantage faced such that they were reasonable steps the respondent should have taken. We therefore did not at that stage find that there was no prospect of the proposed step succeeding in avoiding the disadvantage. If we had concluded there was no prospect then we would not have upheld the failure to make reasonable adjustments complaint. Similarly in relation to the discrimination arising from disability claim we said that the failings had deprived the claimant of a possibility that was not fanciful. We therefore cannot accept the respondent's primary position at remedy stage that there was

no prospect of the claimant returning to work in around June 2018 as that would be contradictory to and undermine our liability findings. What we said at paragraph 257 of our liability judgment is that the evaluation of the size of the prospect is a remedy question.

20. Our alternative finding was that similar discussions with the claimant had a prospect of the claimant trialling a phased return to work in his substantive role (paragraphs 274, 275, 276, 280 liability judgment). We held that the line management's failure to communicate with the claimant about how flexible a phased return to work could be continued through the period 8 May 2018 to 27 November 2018 (paragraph 366(c) liability judgment) and the failure to explore with the claimant what he thought the barriers were to the UKSV role from 13 June again through to 27 November 2018 (paragraph 366(a) liability judgment). The failures were then again repeated at dismissal stage.

21. On the other hand, we cannot say with absolute certainty that the claimant would, had the acts of discrimination not occurred, returned to work in or around June 2018. In our deliberations at the time of our liability judgment having heard the oral evidence of the claimant, Ms Batt, his line managers, and looking at the medical evidence available, we were of the view that the claimant was still very unwell at that time. But for the reasons given, and having examined the medical evidence, we did not consider there was no prospect, despite the level of his ill health, of him returning on phased basis. Likewise, as we said in our liability judgment, Ms Batt and the claimant's line managers who were interacting with him at the time, must have thought there was a prospect of the claimant returning to work in some way, as they set him a 12 week deadline in the Final Written Improvement Notice (which we found to be a reasonable target from their perspective). But that does also inherently mean that we cannot say with certainty that he would have successfully returned, or indeed that the return would have been maintained. Our fundamental view on the poor state of the claimant's health at that time has not changed. The claimant was facing nil pay which was causing him considerable distress, which would have been a driver to him attempting a return at that time. But again it does not mean that he definitely would have or that he would have maintained that return.

22. We are assessing here a counterfactual; an eventuality that never actually happened. There is therefore no exact science on which to base it, and as we have said we have no medical viewpoint to guide us. We have to undertake our best assessment. Doing the best that we could, we assessed the prospect of the claimant returning to work in June 2018 at about 50%. We considered that reflected the real risk that the claimant ultimately would not have been well enough at that time. We considered that the most likely successful return to work would be in the UKSV role on a phased return because it was a role that, on the face of it, could most easily meet the claimant's needs for a slow, controlled and flexible return, there was no fitness requirement for the role, and it also suited the respondent's needs given the limited light duties they could offer at Hereford and bearing in mind the respondent had a financial recharging arrangement with UKSV. We also considered, however, there was also a risk that even if there had been no acts of discrimination and proper discussions had been had with the claimant, he would still, given the state of his health at the time, have ultimately decided the UKSV role was too demanding for him at the time. Such an eventuality in turn had a risk of negatively impacting on the claimant's self confidence and therefore his willingness at that time to attempt a phased return to work at all, including in rehabilitative duties at Hereford. To be clear we are saying there was a prospect this could have happened, meaning the claimant did not in fact return to work at that time, even if there had been no acts of discrimination.

23. The UKSV training course that the claimant was earmarked for was due to start on 12 June and the claimant did not have his discussion with Inspector Musto until 13 June. But if the respondent had had the more generalised discussions with the claimant about how a phased return to work could be flexible in May 2018 that would have given the opportunity for the claimant to have had a different discussion with Inspector Carr about the UKSV role before he withdrew from it. Moreover, the claimant may have been able to join the course late, or join the next course, and return to work on rehabilitative duties until it was possible to go on the UKSV course (or on the basis of our alternative finding, return on rehabilitative duties at Hereford). Here we simply do not have any evidence before us as to whether it was possible to join a course late or when the next courses were given that we know the UKSV did in fact continue at that time, despite it being anticipated that the June course would be the last.

24. All of these factors led us to our conclusion, on balance, of a 50% prospect of the claimant returning to work in June 2018, most likely in the UKSV role. We did not consider it appropriate to take the approach, posited by the claimant's counsel, of (if we did not agree with the June 2018 date) finding a later date that we would find the claimant would have returned to work such that he was awarded losses from that date at 100% (subject to any other deductions). This is because we considered there were just too many uncertainties about the claimant's return to work and what would have then flowed from there.

25. In our remedy deliberations we were also acutely conscious of the fact that a return to the workplace on a phased return to work, does not necessarily equate with that return being maintained long term. It was within the tribunal's industrial experience that it is not uncommon for individuals who have been absent on long term sickness, including those with mental health difficulties, to attempt a phased return to work, but then having attempted it, find that it is too much and be signed off sick again. Likewise, it is not uncommon for individuals to return to work for a period of time, or even complete a phased return, but then unfortunately go off sick again. The claimant was, as we have said, still very unwell at the time. The occupational health reports also speak of the fact that the claimant's condition can be a recurring one and that it is not possible to predict when or how severe a recurrence is likely to be. For example Dr Scott said at [325] "This type of illness is what is called "endogenous" depression because no obvious cause for it has been identified. That makes it harder to treat by measures such as counselling and there is no trigger to "cure", which means that there is a risk of it happening again. However, it is not possible to say if that will happen, when, or how long it might last next time."

26. The contemporaneous medical evidence also shows the claimant continuing to be unwell and suffering side effects of medication. He continued to be signed off by his GP. The 10 July 2018 occupational health report said that the claimant was unfit for work in any capacity (albeit as we said in our liability judgment, this was after the potential for the UKSV arrangement had fallen apart, that proposal had never been put to occupational health for them to comment upon, and the claimant was believing that he would have to return to work full hours fairly quickly, unless he could get a formal part time working arrangement agreed). By 13 September 2018 the claimant was reporting an increase in his medication. In October 2018 occupational health reported little improvement and no prognosis was given for a return to work. By November 2018 the claimant was expressing frustration with the clinical management of his condition saying he was on his fifth set of medication and on the second highest dose he could be on. He was complaining of feeling constantly tired and felt blank minded very often. The claimant at that time said he did not feel ready to return even on a phased basis, which Inspector McIlwraith agreed (paragraph 128, liability judgment). By 19 December 2018 Dr Scott was reporting that the claimant was much the same as

in July and was not well enough to return in any capacity which an expectation the claimant would recover but he could not say when.

27. We accept that given we are assessing a counterfactual that it is not so straightforward to say the above would have been the medical position/the claimant would have been unfit for work, even if the acts of discrimination had not occurred. One possibility is, for example, that the UKSV course and role could have gone really well for the claimant, and helped him with his confidence and wider recovery meaning he could maintain attendance in work and work through a phased return to work programme. But there is, in our judgment, a very real risk that would not have been the case. There is a risk the claimant may have had difficulties caused by a change or increase in medication in any event, or as we have said, simply not had a linear pathway in terms of his recovery and maintaining a return to work even if the acts of discrimination had not occurred. He had other stressors in his life, such as family challenges. We did factor in to our analysis that if the claimant had successfully returned to the workplace he would have avoided the significant stressor of nil pay and we also factored in to our analysis the impact of being told he had to return operationally full time before he could be part time, and the impact of feeling that a phased return would be too pressurised, and with the UKSV arrangement not having worked out, and that this would likely have contributed to his low mood. But we simply cannot say on the evidence before us that we are satisfied that all would have been well for the claimant in a return to work if he had been communicated with properly about a phased return to work /the UKSV role. There are too many unknowns, risks, and other possibilities.

28. We also consider that there was a risk that the claimant could have attended the UKSV course or part of the course and then concluded it was not for him, or that his health did now allow it. Inspector Carr's evidence at the liability hearing was that there was an attrition rate of about 30 to 40% from the role and that some officers did the training and then withdrew because it was not for them. In the claimant's case there was the added risk that if he tried the UKSV course or role, but decided that he could not or did not want to do it going forward, that it would have a serious effect on his confidence and wider recovery, and with it damage his ability to pick up other rehabilitative duties instead, as opposed to being signed off again on sick leave.

29. For these reasons we determined that there was an ongoing prospect of the claimant maintaining attendance in work at 50% for the period through to end of December 2018, most likely in the UKSV role, as part as a phased return to work and with the claimant also starting to work on his fitness. In terms of that counterfactual, we also considered it likely that there would have been movement in around January 2019 to moving the claimant back to rehabilitative AFO duties. The UKSV role was intended as rehabilitative, relatively short term, duties. We considered that from January 2019 there was a 40% chance that the claimant would have commenced a return to some AFO duties in Hereford and a 40% chance that he would successfully maintain that return to the foreseeable future, thereafter, and through to the end date of the assessment period before us of March 2021. This would have involved the claimant, over time, continuing to build up his fitness and doing the requisite retraining and requalification.

30. We assessed this at the lower amount of 40% because we considered as time went on we were less certain about the long term prospect of the claimant successfully maintaining a return to work, completing a phased return to work, rebuilding his physical fitness, regaining his full AFO accreditation, and maintaining his attendance in work, all without further periods of sickness absence or other obstacles arising. As we have said already above, the tribunal's industrial experience is often that individuals who have had a fairly lengthy

sickness absence period (which the claimant had had by May 2018) do not have a linear pathway in terms of returning to and maintaining a return to work. The claimant also had other stressors in his life which may have at times caused exacerbations to his health or other work difficulties. In particular in March/April 2019 the claimant because the primary carer of his son who has a disability. That would have, in any event, presented to the claimant additional stress, childcare difficulties, and the claimant requesting to reduce his hours to part time (with part time pay) in any event. Whilst the claimant may say that this move to part time hours never happened in real life, it does not necessarily follow it would not have happened in the counterfactual or, if not, that it would not have caused the claimant difficulties with attending work. We factored this all into our overall assessment of 40% that applies to the absence periods that the claimant is seeking compensation for. It also factors into it the risk of the claimant having other absences for his depression or other reasons, whether at the time that actually happened to the claimant or potentially at other times given we are dealing with a counterfactual. We deal with some of these specific points below. We also did not agree with the claimant's counsel's submission that relapses in the claimant's condition were only caused by, or would not have happened, but for the respondent's unlawful conduct. It is too simplistic an approach to the vicissitudes of life.

August to December 2019

31. The period August to December 2019 followed the claimant's reinstatement by the Police Appeals Tribunal on 31 July 2019 where he was not on certified sick leave but was not in work because the arrangements were not in place for his return.

32. The respondent's counsel confirmed that it is not in dispute that the claimant is entitled to full pay for this period. There is a mathematical dispute about what the claimant has been paid, when, what for, and whether there are backpayments, the clawing back of payments made, overpayments and underpayments since his reinstatement. It was not put before us to determine at this remedy hearing. It was initially anticipated that if the tribunal made a decision on certain points that were in dispute the parties may then be able to agree the figures. As the hearing went on and the parties spoke counsel to counsel, it became clearer that agreement would not be reached at that time because there was insufficient clarity as to what the claimant had been paid, when, what for, and how it had been calculated. Directions were therefore made, by consent, for the respondent to produce further evidence, and if necessary for there to be a further remedy hearing if agreement cannot be reached.

December 2019 to February 2020

33. Following occupational health advice, the claimant was due to commence his phased return to work on 9 December 2019. He was, however, signed off by his GP and remained on sick leave until 17 February 2020. He then took a period of annual leave so he did not start his phased return to work until 2 March 2020. This is a period of time that we were asked to make a decision about.

34. The claimant says that this was down to an adverse reaction to news he had received about the respondent's approach to without prejudice settlement discussions in this litigation. The claimant says that this would not have happened if the acts of discrimination had not happened as he would not have been in the middle of litigation, but would have successfully returned to work in the summer of 2018.

35. The claimant says that he was also being chased by the respondent for alleged overpayments and was being threatened with litigation and would not have been in that position if he had not been unlawfully dismissed.

36. The claimant also said he was at a low ebb having been on zero pay since May 2018 and since his reinstatement in July 2019 and he would not have been at that low ebb if he had been in stable paid employment for the past 18 months.

37. The respondent says the claimant has in fact never returned to work as an AFO and it is highly unlikely that the claimant would ever have become well enough to return to work as an AFO. The respondent says that is borne out by the fact the claimant has had further periods of absence related to his mental health and there is no medical evidence to say that none of this would have happened but for the discrimination. It is said the claimant's type of depression is one with no real known cause, it is difficult to predict how things might pan out, and the unknown nature of the cause makes it difficult to say whether it will recur. It is said it is the type of illness with recurrences and relapses. The respondent says the absence period in December 2019 to February 2020 was one of those recurrences that are part and parcel of the claimant's condition. The respondent says that there is no particular finding of discrimination about alleged trigger for this absence period and therefore we have to be satisfied that the failures in 2018 or the discriminatory dismissal caused this substantial time off. The respondent says that it is more likely the absence was simply because of relapse and recurrence of the claimant's condition. The respondent also points to the fact the claimant had in the spring of 2019 taken on responsibility for his son. The respondent also points to the fact the claimant had time off for depression in May and June 2022 as another example of the type of recurrence they submit would happen in any event and did happen, they say, in December 2019 to February 2020. The claimant says the respondent did not cross examine the claimant about the 2022 absence.

38. On 9 December 2019 the claimant emailed Ms Foster [184]. He talked about financial pressures exacerbating his health condition, including having been on zero pay since May 2018, having to privately fund litigation, the difficulties providing for his son and his escalating debt with, he said, no assistance from the respondent or the Police Federation. He said he had been informed that the respondent's legal team had refused to pay any form of compensation whatsoever without consideration of the impact on him financially and mentally. He said he had also received a letter requesting repayment of a dismissal payment of £3000 with a threat of legal proceedings if he did not get in touch with them shortly. He said he felt let down and humiliated by the respondent once again and that due to the huge impact the news had had on his mental wellbeing he had needed to contact his GP and had been given a sick note for depression.

39. We accept that email reflects how the claimant was feeling at that time and that his sickness absence was triggered by negative information about a potential settlement in this litigation on top of considerable, long term financial pressures that originated in his sickness absence period, and had continued since his reinstatement. Likewise it does also show the claimant's vulnerability to relapse.

40. We accept that there was a prospect of the claimant not having suffered this period of sickness absence, and therefore loss of pay, if the acts of discrimination had not occurred. For the reasons already given we accept that there is a prospect that the claimant could have successfully returned to work in June 2018 and maintained that return to work which would have significantly ameliorated the financial pressures on the claimant and not have led to this litigation. He also

would not have been dismissed, and then been reinstated with the clawing back of the dismissal payment. But for the reasons already stated we also accept there was a prospect of, even if the initial acts of discrimination had not happened, that the claimant may not have at that time managed or maintained a return to work. Even if there had not been this particular absence period, we accept there is a very real risk that the claimant would have had other absence periods as his condition waxed and waned.

41. We therefore considered that the claimant should be entitled to 40% of his lost pay and employer pension contributions for his period of absence December 2019 to February 2020. We considered that this figure adequately and justly reflected the risk that as at that time the claimant may not have maintained his return to work in any event for the reasons given above and therefore would have suffered a loss of pay in any event. It is important to remember that we are dealing here with a comparative counterfactual narrative, dating back to May 2018, that is removed from the real events the claimant in fact experienced by December 2019. So we do not consider it can simply be said that, but for these trigger events in December 2019, the claimant would have been fit and in work and therefore in the counterfactual he would also be fit and be in work and on full pay. There are too many vicissitudes, unknowns, and uncertainties about how that alternative pathway may have worked out. But likewise we cannot say but for the discrimination the claimant would have definitively been off work anyway and therefore should be awarded nothing. The 40% calculation builds into it the various risk factors and is, in our judgment, the just approach to take.

July 2020 to February 2021

42. The claimant returned to work in March 2020 but was off sick from 27 July 2020 to February 2021. This is another absence period that we are invited to make a decision about.

43. The claimant's case is that the absence was first caused by his depression which was a reaction to issues arising from his return to work that he says would not have arisen if he had returned to work in 2018/ the acts of discrimination had not occurred. It is said that the absence was then down to physical injury which was caused by the claimant's lack of fitness and efforts to return to fitness that would not have occurred if the claimant had returned to work in 2018. It is said that the claimant's fitness was significantly worse in 2020 than in May 2018 as the claimant had gained almost 3 stone in the period and he had been inactive since commencing sick leave for 3 years rather than 1 year. It is said that the fitness issues were compounded by the covid pandemic in March 2020 and the refusal to allow the claimant to use gym equipment and that the claimant suffered physical injuries as a result of training to train quickly to get back to fitness. Further it is said that if the claimant had returned to work in May/June 2018 he would only have needed to do 3 days of re-training, but due to the passage of time the respondent required the claimant to do two courses, respectively 8 and 9 weeks long and that the claimant learned of the second 9 week course in June 2020. It is said if the claimant had returned to work in May/June 2018 he would not have been so unfit as to cause his physical sickness or need to spend 19 weeks away from home whilst being the primary carer for his son, which is said to be the cause of the depression sickness absence.

44. The respondent submits that the claimant's claim is too speculative and it too speculative to say the claimant's physical injuries can all be linked back to failures in 2018. The respondent says the claimant has failed to provide cogent medical evidence to make the causative link and that on the evidence before us

we cannot conclude that the absence would not have happened in any event. It is said there is no cogent evidence that the claimant's ability to get fit to be an AFO was different in 2018 compared to 2020. It is said that the claimant would have been absent and on nil pay in any event even if the acts of discrimination had not occurred and therefore there should be no award for this period.

45. We accept that the claimant's witness evidence that his initial absence was triggered by an exchange he had with Sergeant Ray in July 2020 on the back of long term pressures on the claimant about his AFO requalification process which caused the claimant childcare difficulties in being away from home. In March 2020 the claimant had reluctantly agreed to attend an 8 week firearms course away from home, with his partner agreeing to live in the claimant's home and look after his son while the claimant was away, to provide continuity and honour the terms of the court order in place. In June 2020 he was then told he needed to attend an additional 9 week residential classroom course, to in effect largely complete the AFO new recruits course, due to start on 24 August 2020. The claimant's distress is evident from the email he sent on 15 June 2020 [190-191] where he said: *"This has added extra pressure to an existing fragile situation and has a profound effect upon my responsibilities to my disabled child, the court order I am subject to and as a result, my own well being."*

46. By July 2020 there was no agreed resolution and Sergeant Ray said to the claimant words to the effect that even if a way was found for the claimant not to have to do the classroom based learning at HQ, the claimant would not do the firearms course anyway. The claimant asked what he meant, and Sergeant Ray said the reason the claimant had gone off work before was because he did not want to do a 3 week driving course at HQ. The claimant was upset as he felt that Sergeant Ray was saying that the claimant had made up everything about his depression and anxiety was just because he did not want to do a driving course and felt it reflected a wider attitude towards individuals with mental health conditions. There was also an exchange between the claimant and Sergeant Ray about how the claimant's son's disabilities affected him. There were raised voices and the claimant felt that Sergeant Ray was smirking at him and goading him. Inspector MacIlwraith intervened and suggested the claimant go home early. On 27 July 2020 the claimant's GP signed him off with work stress [331] until 2 August 2020. The Claimant's GP said a period of time off would be a good idea to avoid further conflict in the workplace. The OH report of 2 September 2020 [442] records a similar history saying "…Mr Williams went off sick in July 2020 due to stress which he relates to work factors and specifically, related to the manner of the response he received from his manager when he disclosed his inability to attend a nine week residential course due to an ongoing home situation. His GP advised some time away from work to help restore his emotional wellbeing. Psychologically he reports feeling much better now." On a date between 27 July and 2 August 2020 when the claimant was out walking he lost his balance and twisted one with way his knee twisting another. The day after that he woke up with knee pain and swelling.

47. On 17 July 2020 Inspector MacIlwraith wrote to the claimant [194]. He said that in March 2017 the claimant had been mapped onto a new Diploma for MDP, which at the time had 3 units outstanding for completion. He said that as the claimant had not carried out any operational duties for over 3 years there would be skills fade in knowledge, understanding and demonstrating police action. He said the respondent could no longer give assurances that the claimant can meet the required standard. He said that the respondent was not able to offer a bespoke course to close the gap and the claimant would need to attend at HQ in

Wethersfield for the majority of the recruits training course. In relation to firearms training he said "where an officer has not maintained occupational competence for a period of three years or more, then a full review must take place and any development plan must evidence occupational competence in all areas of the officer's role profile prior to being authorised by the portfolio holder. Generally speaking after a long absence (3 years or more), a repeat of initial training is the only fair and practical method by which competence across all elements of an AFO role profile can be assessed." He also referred to significant changes to the AFO role since 2017 and said that the course requirements meant it needed to be taught at certain sites and over consecutive days. Hence the claimant's position that if he had returned to work in around June 2018, after an absence since May 2017, he would not have had to attend two lengthy residential courses with the consequential impact on him.

48. In our judgment, the claimant should be awarded his financial losses at 40% for the initial period he was absent due to work stress. We acknowledge his point that if he had returned to work on rehabilitative duties in around June 2018 it may well be the case that requalification requirements would have been reduced. However, we remain of the view that there is no certainty that the claimant would otherwise have been in work on full pay at this period of time in late July 2020/early August 2020. For the reasons already given there are risks that his phased return to work may not have been effective at that time or maintained throughout the period from June 2018 onwards. This brings the risk that the claimant may still have ultimately had period(s) of sickness absence with an impact on pay, and indeed the risk that if that did happen it could have affected the requalification programme, the length and location of it, and caused childcare difficulties and stress.

49. On 14 August 2020 the claimant's GP signed him off for 1 month with work stress, and likely lateral meniscus tear (knee problem) [332] to his left knee. The claimant's case here is that some time around June 2020 he was told that he needed to complete the Job Related Fitness Test within the next few weeks and that a trial "Bleep test" (i.e. Shuttle run test) would be carried out to see where his fitness level was (see claimant's email of 15 June 2020 at [191]) In that email the claimant said no gyms were available to train in (due to Covid restrictions) and he felt at a disadvantage, and that if he was not able to complete the bleep test to the required level it would have a detrimental effect on his confidence. He asked that the JRFT be postponed until he was able to resume cardio workouts in a gym. Inspector MacIlwraith responded [189] to say that the JRFT planned was a mock fitness test to assist the claimant and the PST instructor to identify the claimant's current level and so that PS Stevens could give advice. He said his understanding was that PS Stevens had given the claimant details of online training programmes. The claimant says he was told to practice on station and at home and he did not wish to be embarrassed by his effort, so he tried to practice at home with a demo on his phone. He says that a day or so after he had attempted the test one foot swelled up and was very painful. He spoke with his GP who he says told him it was tendonitis caused by a long period of inactivity and then a sudden change in activity levels. The claimant was given anti inflammatories, told to rest his feet, and his line managers said the fitness test would be postponed until there was an OH assessment. At [193] is an email from the claimant of 9 July 2020 in which he referred to his recent tendonitis and a referral to OH. The claimant's other foot then became painful and the GP diagnosed plantar fasciitis. The claimant says that when he spoke to OH they commented they had seen this a lot over the years and that it again was because

the claimant had been inactive for so long and then tried to rush to exercise to get back to where he had been prior to his depression.

50. As previously stated, in late July or early August 2020 whilst on sick leave for work stress the claimant was out walking, lost his balance and twisted his knee. He says his GP advised that it was not safe for the claimant to drive to work and gave him a fit note for a knee injury. The claimant says that if he had returned to work in 2018 he would not have been so unfit as he was in 2020 and his feet would not have ended up being damaged. He says that this in turn led to his knee injury which has ultimately required surgery to correct. He says that an OH advisor told him that the knee injury was directly related to the fact his feet were swollen with tendonitis and plantar fasciitis. By October 2020 the claimant had not been able to return to work, his left knee remained very painful, he and was referred for an MRI scan. In February 2021 he returned to work, home working, due to the ongoing knee problems and he was awaiting surgery. On 31 October 2022 the claimant resigned.

51. We only have limited medical evidence as to the cause of the claimant's knee condition. We do not, for example, have a report from a consultant orthopaedic surgeon or other knee specialist. A report from an occupational health advisor at [450] which is undated as it is only be an extract, but presumably dates from around July 2020 says that the claimant felt his mental health had continued to improve but he had admitted he struggled with caring responsibilities for his young son at times due to the covid situation. The report said "*He has been building up his fitness levels to resume full duties but began experiencing pain in his right foot approximately 2 – 3 weeks ago, this can happen when regular exercise is resumed after a long time. He saw his general practitioner (GP) who thought he had tendonitis which has been successfully treated and he now has no problems with his right foot. Unfortunately, he began to experience pain in his left foot 3 – 4 days ago which, in my opinion, I related to the tendonitis. He has seen the GP for this who thinks he has plantar fasciitis (inflammation of the plantar nerve in the sole of the foot) and has been referred for physiotherapy treatment and prescribed medication, both should deal with the problem…*"

52. A report from occupational health dated 12 August 2020 says:

    "As you are aware Mr Williams suffered from a left foot condition of plantar fasciitis, which is where the sole of the foot becomes painful. He sought the advice of the GP and was prescribed pain relief medication and self-directed exercises. Due to the pain in his foot this changed the way he would put weight on his foot whilst walking and unfortunately this has caused left knee pain. He has been assessed by an NHS physiotherapist who has diagnosed a meniscus tear of the left knee. At present he has symptoms of swelling, constant pain and his knee joint is unstable. He has been referred for specialist NHS physiotherapy and is waiting for an appointment for this but unfortunately there is no date yet."

53. A further report from occupational health of 30 December 2020 [453] said: "*The prospect of being required to attend a residential course for 9 weeks he found very unsettling as he has domestic caring commitments. However, the reason for his current sickness absence (for which I understand he is not receiving pay) is due to his left knee pain. He tells me this started in July when he was walking in his personal and had a sharp pain. There has been some locking and giving way of the knee and he is in constant pain...".* The OH advisor speculated (as the MRI scan had not yet happened) that there may well be an underlying structural problem that required remedial surgery.

54. We did not consider that it was sufficiently established before us, on the balance of probabilities, that if the acts of discrimination had not occurred, and the claimant had returned to work in or around June 2018, that the claimant would not have suffered the meniscal tear resulting in time off work. Whilst acknowledging the claimant's point that as time went on, due to his depression and resulting lack of exercise, he put on more weight and became deconditioned, he would always have had to, to return to AFO duties, restore his fitness and pass the JRFT. On the counterfactual, if the counterfactual return to work was a success, that would have been a process of fitness training the claimant would have undertaken in the latter part of 2018 or into 2019, with the claimant having be deconditioned since May 2017. Even if we accept the claimant's training regime led to his tendonitis and plantar fasciitis we do not consider it sufficiently established that he would not have been at risk of these conditions occurring in any event. We have no medical evidence before us about that. The claimant says he would have had access to gym equipment (pre-pandemic) for low impact cardio vascular work and so could have gradually restored his fitness. However, that does not mean that he would not have been doing any running, or required to do a mock bleep test to assess his level and fitness at that time, bearing in mind that is the central element of the standard JRFT and the PTI was to be there to assess the claimant's fitness on a mock test and proffer advice.

55. Moreover, we do not consider that we have sufficient, good quality medical evidence before us to establish that the claimant's altered gait caused the meniscus tear or even if it triggered the tear at that point in time that the meniscal tear would not have happened at some point in any event due to pre-existing underlying damage. We bear in mind here, in particular, that the time the claimant injured his knee he was simply engaged in the act of walking. If the claimant's knee was going to be symptomatic at some point in any event, the claimant would also have had a period of sickness absence (with an impact on pay) because of the condition at some point in any event. On the evidence before us we do consider it too speculative to find that the knee condition was ultimately caused by the claimant's weight and rushing his fitness training in the pandemic or that we can say it would not have happened in the counterfactual analysis.

56. We therefore again consider that the claimant should be awarded 40% of his financial losses for the period that he was absent from work with this knee condition. We say this because we have decided there is a 40% prospect that, if the acts of discrimination had not occurred, the claimant would have returned to work and maintained that long term, as an AFO. That 40% builds into it various permutations of risks, eventualities that could occur in the vicissitudes of life including the risk of sickness absences, and indeed other medical conditions such as this one and it is therefore appropriate the claimant is awarded that rate. We consider that if we make a further deduction (or indeed award no loss for the period) we would be at risk of undertaking an unjust double deduction.

Pension Loss

57. The claimant seeks calculation of pension losses at 30% of his net loss of earnings, based on his calculation of the lost value of employer pension contributions when he was not receiving full pay. The respondent did not put forward an alternative method of calculation and had given no disclosure as to how pension is calculated. We therefore found that the claimant's calculation method should be adopted for the periods of loss in question (albeit for the two periods where the claimant is absent on sick leave it follows from our findings above about loss of earnings, that the amounts will also need to be ultimately calculated on the basis of the 40% loss of a chance.)

Injury to feelings

57. The claimant seeks the sum of £25,000. The respondent submits the sum of £10,000 is appropriate, as in the lower end of the middle Vento band. The respondent argues that the claimant had a large number of complaints dismissed. The respondent argues that the earlier acts of discrimination about a phased return to work were not so significant and their impact was reduced by the likelihood of the claimant not being able to return to work in any event. The respondent accepts that the most serious complaint upheld is the dismissal and what was said at the stage 3 dismissal hearing. Here the respondent argues that the claimant did not produce at that hearing the medical evidence that he did in July and therefore did not present his own case in the best light he could have done at the time. The respondent also relies on the fact the respondent then agreed to reinstate the claimant at a non contested PAT hearing. They submit that the claimant then was not due to return until December 2019 because they were taking time to ensure a safe return for the claimant. The respondent argues the relevant period is early June 2018 to January 2019. They accept that the claimant was caused upset, particularly by his dismissal, but that we should not take into account events that then followed which were not part of the claimant's case before us.

58. We award the sum of £22,000 (twenty-two thousand pounds); towards the top of the middle band. This was a serious case. The earlier failings in not adequately communicating with the claimant about a phased return to work whether at UKSV or on rehabilitative duties at Hereford deprived the claimant, who was vulnerable at the time, of the opportunity of an earlier return to work, and caused him and his family financial hardship which in turn further impacted on the claimant's mental health. These failings continued for a sustained period through to November 2018 and were repeated at the dismissal stage. The claimant was subject to discriminatory comments at the stage 3 meeting by a senior officer which were intimidating and humiliating. Most importantly the claimant was dismissed suffering (until his reinstatement) the loss of his career, further harmed the claimant's confidence and wellbeing at a time in which he was starting to feel more upbeat, and caused the claimant financial hardship with the consequential impact upon his ability to provide for his family, and the stress of that.

Aggravated damages

60. There was a claim before us for aggravated damages that we heard submissions about. The Tribunal expressed some concerns about adjudicating on the claim. The aggravated damages claim related to events occurring after the acts of discrimination found in the claim. At the time of the remedy hearing, the claimant had recently resigned on 31 October 2022 and further litigation was contemplated. Our concerns were about being asked to make findings of fact about the events in question that could potentially considerably overlap with the anticipated content of the next litigation, should the claimant decide to pursue it. The claimant's counsel was granted a period of time in which to take instructions. He did so and confirmed that the aggravated damages claim was not being pursued in this claim so as to fully preserve the claimant's rights in future litigation. We have therefore made no findings about it.

Interest

61. Interest is governed by the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Under Regulation 3(2) the rate of

interest is the rate fixed by section 17 of the Judgments Act 1838, currently 8%. For injury to feelings awards Regulation 6(1)(a) provides that the period of the award of interest starts on the date of the act of discrimination complained about and ends on the day on which the employment tribunal calculates the amount of interest. For all other awards interest is awarded for the period beginning on the "mid point date" and ending on the day of calculation (Regulation 6(1)(b)). The mid point date is the date halfway through the period beginning on the date of the unlawful discrimination and ending on the day of calculation (Regulation 4(2). Regulation 6(3) permits the tribunal to calculate interest for periods other than those specified in Regulation 6(1) where there would be "serious injustice" if different dates were not used.

62. In respect of injury to feelings, the claimant submitted that the start date for the calculation was 8 May 2018. The respondent submitted it was some time around 7 June 2018. We found the operative date to be 8 May 2018 as in our liability judgment we found that was the earliest date of an act of discrimination, in not communicating with the claimant about a sufficiently flexible phased return to work (see in particular paragraph 366(c) of the liability judgment). Thereafter the parties were able to agree the sum of £7965.81 interest on injury to feelings.

63. In respect of interest on financial losses, applying Regulation 6(1)(b) the mid point date will be the date halfway through the period running from 8 May 2018 to the date of calculation (i.e. the date of the remedy hearing). The claimant sought an alternative method of calculation in his schedule of loss that was calculated by the reference to each individual pay slip. The claimant's argument before us at the hearing was that the date of loss should be used and that to use the default calculation method in the Regulations is unjust to the claimant. The claimant argues that his losses do not continue after February 2021 and that the mid point date system in the Regulations is not designed for where the losses are front loaded in the period. He submits it would be just to calculate interest by reference to the date of actual loss.

64. We decided that interest on financial losses should be calculated in accordance with Regulation 6(1)(b), i.e. by using as the start date the mid point date between 8 May 2018 and the date of calculation at the remedy hearing, and the end date again being the date of calculation. The rate of 8% then applies. We were not satisfied that using this method as opposed to different dates would cause serious injustice to the claimant. Where losses are sustained over a period, the classic approach is to use a lower rate to reflect the fact that the claimant has lost more, in being deprived of his funds, at the start of the period than at the end; hence for example the half special account rate used in the county court which in many cases may produce a calculation similar to the mid point date method. The claimant's losses that he ultimately pursued at the remedy hearing range over a period August 2019 to December 2019, December 2019 to February 2020, July 2020 to February 2021. That scenario that the claimant's loss then cease with a gap to the date of the remedy hearing is not, in our judgment, particularly unusual such that he suffers injustice compared to other litigants. Indeed, he also in one sense benefits from a start date in the mid point date calculation running from May 2018, as to use a start date in the mid point date from, for example, the start of the claimant's losses would give him a shorter interest period. Likewise to simply award 8% from date of loss does not reflect the point losses are sustained over a period or that the Regulations adopt a mid point date for a reason.

Employment Judge R Harfield
Date - 12 January 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 12 January 2023

FOR EMPLOYMENT TRIBUNALS Mr N Roche