Case number: 1400727/2020

EMPLOYMENT TRIBUNALS

Claimant: Mrs B Knight

Respondent: Havant & South Downs College

Heard at: **Southampton (by CVP)** **On:** **23 November and 8 December 2022**

Before: **Employment Judge Dawson, Dr Thornback, Mr Spry-Shute**

Appearances

For the claimant: Mr Davies, solicitor
For the respondent: Mr Griffiths, counsel

JUDGMENT ON REMEDY

1. Pursuant to section 124(2) Equality Act 2010 within 28 days of the date when this judgment is sent to the respondent, it must write to its staff at the Alton College campus in the following terms:

   Dear Colleagues,

   You may be aware of the recent race discrimination tribunal brought by a member of staff at Alton College. The Tribunal has found that an email sent on 5 December 2019, by a member of staff for whom the college was responsible, stating /,“unfortunately Mrs Knight is throwing the E&D black comment at me too” amounted to harassment related to the claimant’s race. The tribunal found that the claimant resigned, in part, because of that email and, therefore, the constructive dismissal of the claimant was an act of harassment.

   We wish to apologise to Ms Knight for that act and our distress caused by that treatment to her.

2. In respect of the claim of discrimination, the claimant is awarded the following sums:

    a. injury to feelings – £12,000.00

    b. interest on injury to feelings - £2661.70

    c. loss of earnings to 8 December 2022 - £25,349.00

    d. interest on loss of earnings to 8 December 2022 - £1705.67

    e. future loss of earnings - £19,332.00

    f. loss of pension contributions - £3952.00

3. The respondent is ordered to pay the above sums to the claimant.

4. The parties are to agree the appropriate award to take account of the need to "gross up" the above figures and submit a figure to the tribunal within 14 days.

5. In respect of the claim of unfair dismissal the claimant is awarded a basic award of £3529.44 and the respondent is ordered to pay that sum to the claimant.

REASONS

1. This is the decision on remedy in this case.

Procedural matters

2. The remedy hearing was listed for a one day hearing on 23 November 2022. Directions had been given for the remedy hearing which limited the page limit of the bundle and the word count of the witness statements for the parties. Unfortunately those directions were ignored and the tribunal was faced, on the morning of the hearing, with a remedy bundle running to 387 pages and 24 pages of witness evidence from the claimant as well as a much shorter witness statement from the respondent.

3. The claimant was claiming a career loss of earnings and her total schedule of loss was £274,684. By the time the tribunal had read the documents and heard cross examination of the witnesses, it was not possible to hear submissions during the hearing and both parties were asked to provide written submissions and the matter was listed for a further day to hear any submissions in reply and for the tribunal to make its decision.

4. On the morning of the resumed remedy hearing Mr Griffiths was unable to connect to the hearing and the hearing did not start until 11 AM. Although the tribunal had asked for written submissions to include question of recommendations, when the tribunal proposed the wording of a recommendation to the parties, Mr Griffiths then asked for a further 7 days to make further representations. We gave him that time.

5. During the course of the hearing we heard from Mrs Knight and her husband from Ms Berry for the respondent.

6. Neither party produced a medical expert (in the sense of a report which might be said to be compliant with part 35 of the Civil Procedure Rules) but the claimant adduced letters dated 5 October 2020 and 15 August 2022 from her general practitioner.

Issues

7. The heads of loss claimed are set out in the Updated and Revised Schedule of Loss which appears at page 27 of the witness bundle prepared for the remedy hearing. Although that schedule claims losses to the claimant's anticipated retirement date, in his closing submissions the claimant's solicitor modified the claimant's position as follows:

    a. The claimant would be able to return to the "non-respondent" part-time work which she was doing before her dismissal within 1-2 years of the hearing; however the tribunal should take no account of that from a financial point of view because the claimant was earning those moneys before her dismissal. The claimant has not sought any loss of earnings from the respondent in respect of the loss of "non-respondent" earnings.

    b. The likely period until the claimant will be able to earn the equivalent sums that she was earning with the respondent is at least five years

    c. The claimant will not, however, be able to return to teaching and therefore has suffered a loss of vocation for life.

8. In respect of the question of recommendation, at the hearing, the claimant agreed to the tribunal's proposal. The written submissions sent by Mr Griffiths after the hearing proposed an alternative wording of the letter which should be sent to members of staff did not say why the respondent did not agree with the tribunal's proposed recommendation.

9. Otherwise the position of the parties remained as set out in their written submissions.

10. We will make some general findings of fact and then set out our findings and conclusions in respect of each head of loss individually.

11. In an attempt to aid clarity, we will deal with the law in respect of each head of loss separately rather than in one section within the judgement.

Findings of Fact

12. The parties have agreed the following facts;

    a. the claimant's pre-termination gross salary was £15,294.24 per annum and £1274.52 per month and did not vary from month to month,

    b. the claimant's net salary was £12,888 per annum and £1074.11 per month (and again did not vary from month to month),

    c. for the purposes of any award, the claimant's pension loss should be calculated as being £95 per month,

    d. the claimant is entitled to a basic award of £3529.44 (based on our finding that she was unfairly dismissed)

13. We will not repeat the findings which we have already made in this case but the salient findings on which we base our decision are as follows.

14. On 5 December 2019 an email about the claimant was sent which amounted to harassment because of race on the date that she became aware of it. We found, in our reconsideration decision, that the claimant was aware of that email by 26 May 2020 at the latest. The claimant in her witness statement in respect of remedy says that she became aware of it on 2 March 2020. That was not challenged and we accept that evidence.

15. The claimant resigned from her employment with the respondent on 2nd February 2021. We found that there were 4 repudiatory breaches of contract which led the claimant to resign and she was, therefore, unfairly dismissed. Three of the repudiatory breaches are listed at paragraph 47 of our reconsideration decision (cf paragraph 239 of the original judgment) and the fourth was the sending of the email on 5 December 2019 which the claimant became aware of thereafter. The earliest repudiatory breach of contract was the way in which the claimant was given feedback in respect of a lesson on 3 December 2019.

16. The claimant was signed off work with stress from 24 December 2019 until her resignation (the resignation was on 2nd February 2021 and the effective date of termination was 2 April 2021).

17. On 11 February 2020 the claimant was diagnosed with mixed anxiety and depression. On 29 October 2020 the claimant was diagnosed with reactive depression from which, it is accepted by the parties, she has recovered.

18. We found in our reconsideration decision that the act of harassment, being the email of 5th December, sufficiently influenced the conduct that amounted to a repudiatory of contract to say that the constructive dismissal was an act of harassment.

19. There is a letter from the claimant's general practitioner dated 5 October 2020 addressed "to whom it may concern" which states "I am writing to confirm the ongoing medical conditions for which we are currently treating Mrs Knight. She

has a diagnosis of mixed anxiety and depressive disorder that dates back to 11th February 2020. We have no record of any mental health diagnosis prior to this. The respondent did not challenge that letter and we accept its contents.

20. In the GP's letter of 15 August 2022, it is stated that the claimant presented to the GP on 24 December 2019 with stress at work. She had nausea, insomnia, panic attacks and palpitations. She was diagnosed with mixed anxiety and depressive disorder in February 2020 and has been reviewed regularly. The claimant presented "out of hours" with symptoms of a panic attack in April 2020. The claimant has received various treatments for anxiety including medication and therapy through talk. The claimant had been reviewed on 29 July 2022 when she reported ongoing significant low mood, suicidal thoughts and insomnia. Those symptoms increased when Mrs Knight had tried to return to work in education in various forms including tutoring and examination and Mrs Knight had been re-started on sertraline. Again, in the absence of challenge from the respondent, we accept the contents of that letter.

21. Consistent with those letters, the GP records show a diagnosis of mixed anxiety and depressive disorder on 11 February 2020, the history is given as "still really struggling, not sleeping, feeling low and anxious, work have ignored the letter from her and her solicitor, so looking like it is going to need to go to tribunal which she realises she needs to be strong." The claimant was started on sertraline 50 mg tablets.

22. A telephone consultation on the 26 March 2020 records that the claimant had been having negative thoughts for 5 months especially at night, often waking at 3 am. She had stopped the sertraline after 3 weeks because it made her symptoms worse. She was described as having palpitations and shortness of breath and her energy levels being drained.

23. A review on 31 March 2020 stated that the claimant has started on mirtazapine and has started to sleep better. There had been no change in the mood/anxiety as yet, the claimant had thoughts of not wanting to be here but had no plans and was still really stressed with the work situation.

24. On 14 April 2020 a telephone consultation recorded that the claimant had attended out of hours "last night" due to an increase in symptoms of shortness and breath, it is stated that the claimant had got herself into a panic state, she had been feeling under the weather with hay fever and had some chest tightness and then got herself worked up about coronavirus. There is no reference to her work situation.

25. The records then record various telephone consultations where the claimant is given fit notes in relation to her anxiety and depressive disorder.

26. A review took place on 2 October 2020 where it was recorded that the claimant had an ongoing employment tribunal, the claimant made complaints about the opposition legal team and it was recorded that there was a profound impact on life, poor sleep, not going out, anxious about seeing former colleagues, the claimant had poor appetite and was using alcohol each day although within

guidelines. The record records "says has occasional thoughts in the middle of the night of "what's the point of going on?" But nil overtly suicidal."

27. On 29 October 2020 there was a further consultation, the claimant was not currently on any medication but was feeling low and hopeless about her case she had a sense of impending doom but "does not think she will do anything at present".

28. On 23 November 2028 a review recorded that the claimant had an ongoing anxiety rework issues but no thoughts of self-harm and was using minimal alcohol.

29. On 29 January 2021 there were ongoing issues recorded and it is recorded the claimant was thinking of resigning.

30. In addition to those matters, notes at page 88 of the remedy bundle show that the claimant had an episode of reactive depression from 29 October 2020 which was described as significant but also described as ending on 22 January 2021. The same document, which appears to be dated 8 October 2022, describes the mixed anxiety and depressive disorder as continuing.

31. The medical records show a letter from I talk dated 23rd February 2021 which shows PHQ – 9 and GAD -7 scores at the date of referral and at the date of discharge. The date of discharge was 23 February 2021 and the document shows that, at that point, the PHQ – 9 score was 5/27 (which correlates to the bottom end of the mild bracket of depression severity) and the GAD – 7 score was 5/21 (which correlates to the bottom end of the mild bracket of anxiety).

32. There is an entry in the GP records for 29 July 2022 which records that the claimant had won her case re-discrimination and stating "ongoing significant impact on mental health, low mood ++ suicidal thoughts at night, says self-medicating with alcohol. Husband aware. Husband and daughters are protective factors, "I wouldn't do it to them"… *Needs report for completion of court case about ongoing impact of work dispute on mood and work going forward*. Big trigger with anything related to education hasn't been able to work in examination/tutoring, loss of earnings." (Our emphasis)

33. The latter part of the entry appears to record what claimant was asking the GP to deal with in a report. It would appear to be the request by the claimant made on that day which led to the GP letter of 15 August 2022. It is noteworthy that, despite the fact that the GP was aware of why the letter was being requested, the GP has not suggested that they think the claimant will be unable to work in the future.

34. The claimant's witness statement presents a slightly different picture to the medical records. She describes using alcohol as a sleeping aid every night, although she is fully aware of the harm it is causing to her health, she talks of self-harming with a hot water bottle to suppress negative thoughts, experiencing regular flashbacks and anxiety attacks, not eating properly, nausea that sometimes ends in projectile vomiting when she goes on car journeys, migraines, being tearful when overwhelmed by intrusive and suicidal

thoughts that come in waves, sometimes imagining different scenarios which she could use to end her life that might not be too traumatic for her family, forgetfulness, lethargy, struggling to complete writing tasks, not responding to social invitations, having nightmares, becoming very anxious when her younger daughter goes out and being fearful of leaving the house during daylight.

35. The claimant says that the mere thought of returning to a UK classroom fills her with dread, that she feels as if her teaching wings have been broken and will never heal and that the teaching profession is no longer a psychologically safe environment for her. She states that she believes it is very likely she will be unemployed for a long time and probably until her retirement at 67 years of age.

36. As we will set out in more detail below when we deal with the question of injury to feelings, we have no doubt that the incidents which the claimant experienced whilst at work were upsetting for her and have had a significant impact on her, perhaps a more significant impact than they might have had on another person. However, we are also cognisant of the fact that a witnesses' recollection of events changes over time.

37. To the extent that there is a difference between the level of the claimant's symptoms as presented in her witness statement and the level of her symptoms as presented through the general practitioner report and records, we consider the general practitioner reports are more likely to be an accurate record of how the claimant was feeling at any one time.

38. Having said that, we do not find the claimant was anything other than honest with us and note that even in her statement the claimant gives cause for some hope, stating at paragraph 94 "despite the gloomy prognosis, based on my experience of my mental ill-health date, I am determined to get better and determined to create self-employment opportunities for myself." At paragraph 109 she states "…, when and if I recover my health, and optimistically I hope I will improve once this litigation has concluded, and I can eventually and finally close this chapter of my life..."

39. Against those general findings of fact we turn to the particular claims being brought.

Injury to feelings.

40. The claim was issued on 9 February 2020. The appropriate Presidential Guidance is, therefore, the 2nd Addendum to the Presidential Guidance originally issued on 5 September 2017 which refers to claims presented on or after 6 April 2019. That guidance updates the *Vento* bands so that the lower band is £900 to £8,800, the middle band is £8800-£26,300 and the upper band is £26,300 - £44000.

41. We have taken into account, in reaching the appropriate figure for compensation for the claimant's injury to feelings, the following matters.

42. We are compensating for both the act of harassment when the claimant became aware of the email of the 5 December 2019 and the subsequent resignation which amounted to an act of harassment because the claimant resigned, in part, because of the email of 5 December 2019. The respondent submits that it is effectively one injury, because both findings of racial harassment arise from the same email. That is true to an extent, however there was also a significant lapse of time between the claimant becoming aware of the email and her decision to resign. The decision to resign would have been a painful one for her and there would, therefore, have been 2 specific episodes which influence the injury to feelings. The first when the claimant became aware of what had been written about her and the second when the claimant decided, partly for that reason, that she could no longer work for the respondent.

43. As we have already said, one of the matters we are compensating the claimant for is the fact that she was dismissed. An act which ends somebody's employment is likely to significantly injure their feelings.

44. The claimant was suffering with mixed anxiety and depression prior to becoming aware of the email. It cannot be said, therefore, that the act of harassment caused her to be anxious and depressed. The review of the medical records we have set out above does not show any significant change to the claimant's condition after she became aware of the email of 5 December 2019 or after she resigned. As we set out below in respect of personal injury, we have not found it possible to say that the acts of discrimination, which we have found proved, aggravated the pre-existing condition to the extent that we can say they caused personal injury. However, the respondent must take their victim as they find them. At the point when the claimant became aware of the discriminatory email she was a vulnerable person suffering from anxiety and depression. It is likely that she was suffering from anxiety and depression because of the behaviour of the respondent, given the proximity of timing between the claimant getting her negative feedback on 3 December 2019 and her going off sick, but nothing turns on that point for the purposes of this part of our judgment. We accept that reading the email of 5 December 2019 would have been particularly distressing for the claimant given that she was already suffering from anxiety and depression. The claimant in her witness statement in respect of remedy describes feeling completely stunned by the unprofessional and offensive tone of the email and we can readily understand that. The claimant had not "played the race card" she had not thrown an E & D Black comment at Ms Scott and we can well understand why it would have been upsetting for the claimant to read that. The claimant's witness statement states that her heart was racing as she read the email and she was left physically shaken after reading it and the nanny asked if she was okay. We accept that evidence.

45. At paragraphs 41 to 62 of her witness statement the claimant sets out a number of matters which she says, through her solicitor, should lead to an award of aggravated damages. For reasons which we set out below, we do not consider that this is a case where aggravated damages are appropriate. However, some of the matters referred to will have increased the injury to the

claimant's feelings and they should be reflected in the injury to feelings award. In particular we note that the email was copied to the Assistant Principal who appears to have taken no steps to correct the wrong impression given by the email or the fact that it related to the claimant's race, and the response to this claim denied that the claimant was accused of throwing the E & D Black comment, which is incorrect.

46. The claimant had raised her grievance of 6 February 2020 before she saw the email of 5 December 2019 and therefore it did not, specifically, form part of her grievance. However the email was contained within the bundle of Grievance Hearing Documents which was put together by the respondent for the purposes of the claimant's grievance. The claimant submits, and we accept, that the failure by the respondent to note or disapprove of that email in the grievance process caused further injury to her feelings. The fact that the email formed part of the grievance investigation meant that it was circulated to those managers involved in the grievance and the claimant could well have felt that the fact that it was circulated without any comment meant that the respondent was accepting the veracity of the statement within the email.

47. Looked at from the respondent's point of view, this would have been one email amongst a large number of issues forming the claimant's grievance and, as we have said, the claimant's grievance did not expressly refer to the email. Therefore, we do not think that it is a particularly aggravating feature that a disciplinary investigation was not commenced in relation to the sender or recipient of the email and we do not think that the respondent airbrushed the email out of the internal grievance. It is more accurate to say that it failed to appreciate the significance of it. The fact that Ms Richardson did not attend the tribunal hearing is not an aggravating feature in circumstances where the tribunal accepted that she had not been told of the allegations against her and she was travelling. We do not think that it is an aggravating feature that the author of the email was allowed to leave the respondent's college with a good reference. The email was inappropriate but was not such that we consider the author of it should not be allowed to progress with her career.

48. Along with those matters the respondent makes the powerful point that the claimant did not raise, in her original statement, how she felt when she read the email, nor did she expressly say that it was a reason for her resignation. We do not believe that the failure to mention it meant that the claimant was not troubled by it, it is more likely to be a drafting error. However we cannot overlook the fact that at the point when the claimant drafted (or signed) her witness statement the significance of the email was not so great that she insisted on adding paragraphs to deal with her feelings in relation to it.

49. Taking all of those matters into account, we have concluded that the fact that the email had gave rise to 2 separate acts of harassment (being claimant's feelings on the day when she read the email and her resignation), the fact that the harassment resulted in the termination of the claimant's employment and the length of time for which the claimant's feelings have been affected mean that this award must fall within the middle band. The midpoint of the middle band is £17,550. The fact that the claimant was able to overlook the incident in her first statement means that we feel the award is in the lower half of that

band but having regard to the aggravating features that we have set out above, we think the appropriate award is £12,000.

Interest on injury to feelings

50. The respondent agreed at the hearing that the appropriate period for interest is from 2 March 2020 which is a period of 1012 days. The respondent also agreed that the appropriate interest rate is 8%. Thus interest amounts to £2661.70 (£12000 x 0.08/365 x 1012)

Aggravated Damages

51. There was no real dispute between the parties as to the appropriate circumstances where aggravated damages should be awarded. It was held in *Commissioner of Police of the Metropolis v Shaw* [2012] IRLR 291 that aggravated damages are an aspect of injury to feelings and held in *HM Land Registry v McGlue UKEAT/0435/11*, that such an award may be made where the act of discrimination has been made worse by being done in an exceptionally upsetting way, by motive or by subsequent conduct.

52. We do not find that this case falls within those categories. The claimant's written submissions make reference to the fact there has been no apology in this case and no remedial action has been taken. The latter point is not entirely true, we accept Ms Berry's evidence that the college has engaged with the Black Leadership Group and the judgment has been considered at various levels within the organisation. In any event, we do not consider that the respondent's behaviour, in the circumstances of this case, is out of the ordinary and is not such that brings it within those categories of cases where a separate award is needed. Although the claimant's submissions state that the claimant has a psychological need to set the record straight and therefore staff should be told what has happened to the claimant because she is concerned that they may think she resigned of her own volition or because she was ill, that fact does not warrant an award of aggravated damages. It would not be usual for an employer to circulate to members of staff details of discrimination done to an employee. Many employees would not want those details to be circulated and we consider that the claimant's criticism in this respect is unwarranted. We do, however, accept the genuine nature of the claimant desire to set the record straight and have taken that into account in preparing our recommendation below.

53. The respondent complains that the breaches of the Equality Act were not reported to OFSTED, however that failure does not fall within the types of category identified in McGlue and even if the categories are not closed, it is still not conduct of the type which warrants an award of aggravated damages.

54. The claimant's grievance was not treated in a trivial way, it was considered thoroughly. It overlooked the email of 5 December 2019 but that is not same as saying that the grievance was treated trivially or inappropriately.

55. The claimant's submissions say that because Ms Richardson gave false and misleading information to the internal investigation that should give rise to an award of aggravated damages, but the tribunal did not find facts from which it

could conclude that Ms Richardson's evidence was misleading because of race. We have not found that Ms Richardson gave that evidence because of the email of 5 December 2019 and, in those circumstances, this is not a matter which warrants an award of aggravated damages.

56. There are some features of the case where the conduct of the respondent can be said to have increased the injury to the claimant's feelings. We have reflected those features in the award for injury to feelings. A separate award of aggravated damages is not appropriate.

Personal Injury

57. The claimant puts the case primarily on the basis of there having been an exacerbation of the claimant's illness of anxiety and depression as well as a short period of reactive depression.

58. The claimant does not assert that the anxiety and depression was caused by an act of discrimination or harassment. The diagnosis was before she found out about the email of 5 December 2019.

59. In the absence of any medical report which states that there was an exacerbation of the condition, we must make our own conclusions on the evidence that we have.

60. The claimant has pointed to no evidence which shows an exacerbation of the pre-existing anxiety and depression and when we study the medical records in detail (as summarised above) the records do not show that the claimant's condition materially worsened after she became aware of the December email or when she chose to resign. Indeed, the review on 31 March 2020 states that the claimant had started to sleep better.

61. Whilst we accept that, at times, tribunals are required to speculate and the assessment of damages is rough and ready, there must be an evidential basis on which we can speculate. There is no principled way in which we could conclude that there has been an exacerbation of a pre-existing condition in this case, much less assess how much that exacerbation was. To the extent that the claimant's argument is that there is "bound to be" some exacerbation in all the circumstances, we have reflected that in our injury to feelings award as set out above. The claimant has not obtained medical evidence in support of her claim and whilst that does not prevent us from finding that there was a personal injury, it certainly makes it more difficult for us to find that there was. On the evidence we have, we are not satisfied that there was an exacerbation.

62. For the same reasons we are not satisfied that the claimant's reactive depression was caused by the acts of harassment. The reactive depression was diagnosed in October 2020 some months after the claimant found out about the email and some months before she decided to resign. There is no evidence that the claimant was reacting to the discrimination rather than any of the other issues which were affecting her life at that time.

63. In those circumstances no award is made in respect of personal injury.

Loss of Vocation

64. The claimant's case is that she will never be able to work in education again. Neither party took us to any authority as to when it would be appropriate to award this type of head of loss in an employment claim.

65. The general practitioner's letter dated 15 August 2022 does not state that the claimant will not be able to return to teaching, it only says that her symptoms were increased when she tried to return to work in education. However the claimant herself is somewhat optimistic that her feelings will improve once the tribunal has been concluded.

66. The only evidence that the claimant will not be able to return to teaching is the view of the claimant and her husband. Whilst those views are evidence which the tribunal must take into account, the tribunal must also take account of the medical evidence and tribunal's own knowledge that with time feelings do change and most people do recover from the effects of discrimination.

67. The contemporaneous medical evidence does not suggest that things were as bleak for the claimant as she recalls during the time following the act of harassment and when we focus on the objective evidence from the medical records, we consider that the outlook for the claimant is much more positive than she currently believes. It is only exceptionally that people are unable to return to a career as a result of discrimination and there is no evidence before us which puts this case into that type of exceptional category. As we have said above, at the date of her discharge from i-talk, the PHQ – 9 score was 5/27 (which correlates to the bottom end of the mild bracket of depression severity) and the GAD – 7 score was 5/21 (which correlates to the bottom end of the mild bracket of anxiety).

68. Doing the best we can, we think the claimant will be able to return to teaching, if she wants to, within around 18 months from the date of this judgment.

Disadvantage on the Labour market

69. We have concluded, for the reasons set out, that the claimant will be able to return to work, earning the same as she was before, within 1.5 years of the date of the hearing. Moreover we have concluded that the claimant will, if she wishes to, be able to return to teaching.

70. We do not think that the claimant will be disadvantaged on the labour market. We anticipate she will, with time, make a full recovery in this case. She herself presents a cause for optimism in her witness statement and the medical evidence does not begin to support an assertion of disadvantage on the labour market.

Loss of Earnings

<u>To the date of the hearing</u>

71. The schedule of loss splits the claim for loss of earnings between the period up to the effective date of termination and the period after the effective date of termination. The respondent did not dispute the claimant's assertion that her

losses commenced on 20 December 2020, after she had been signed off work for some time, and did not contend that the losses from then until 2 April 2021 were not because of the discrimination. (Had it been necessary to do so, we would have found that the act of harassment was a substantial cause of the claimant's being off sick and even if that loss was also caused by other matters, the distress that caused the claimant to be off sick cannot be divided between the act of harassment and the other factors operating on the claimant's mind. The harm is indivisible and the respondent must compensate for it.)

72. We consider it is more helpful in this case, as in many others, to deal with the question of past loss of earnings, being those losses to the date of the hearing, and future loss of earnings, being those losses into the future after the date of the hearing.

73. The claimant resigned, in part, because of the act of harassment. We found that the resignation was a dismissal and the dismissal was an act of harassment.

74. The respondent does not seek to argue, correctly in our judgment, that because the claimant resigned for other reasons as well as the harassment, the losses do not flow from the harassment. The respondent accepts that in circumstances where the other reasons for her resignation were repudiatory breaches of contract by the respondent, it should not be argued that the claimant would have resigned even if the harassment had not taken place.

75. The respondent does, however, seek to argue that the claimant's employment with the respondent would have come to an end for two other reasons.

76. Firstly it says that the claimant would have resigned because of the last straw which she relied upon in her claim. That was the email which was sent on 1 February 2021 stating that as an education provider the respondent played an integral role in challenging stereotypes and fighting against any form of racism or discrimination. The respondent's case is that in deciding whether the claimant would have resigned in any event, we should take no account of the harassment or the repudiatory breaches of contract by the respondent, but find that the claimant would have resigned because of that email. We do not accept that argument. We see no basis for concluding that if the claimant had not been subjected to harassment and had not experienced the other repudiatory breaches of contract which we have identified, the email of 1st February alone would have caused her to resign. We do not recall that argument being put to the claimant, but in any event we find that it is unrealistic. We have found that the claimant enjoyed teaching and she was a good teacher. It was a combination of the repudiatory breaches of contract (including the act of harassment) which led to her decision to resign. The email of 1 February 2021 alone would not have made her want to resign. We reject the respondent's argument in this respect.

77. The respondent's second argument is that because the claimant had been on long-term sick leave, the respondent would have taken capability proceedings against her. We raised with Mr Griffiths during the course of argument that we

did not recall any evidence to this effect. Given the passage of time since the liability hearing we gave him some time (including time over the lunch adjournment) to identify any such evidence. He did not do so. It is for the respondent to show some evidence that the claimant would have been dismissed on the grounds of capability in any event and it has not done so. No capability proceedings had been commenced against the claimant and there was no evidence that the respondent was even considering doing so. Moreover (and we do not consider it necessary to go this far) given Mr Griffiths acceptance that we should address this question on the basis that the respondent cannot take advantage of its own repudiatory breaches of contract, we are not satisfied that the claimant would have been on long-term sick leave if the respondent had not harassed her and committed the repudiatory breaches of contract. Thus, we reject the respondent's argument in that respect.

78. The claimant was signed off work for the period of time up to January 2022 and thereafter her general practitioner did not need to issue fit Notes pursuant to a DWP health assessment.

79. We accept the evidence of Mr Knight, which was not substantially challenged in this respect, that as a result of the way the claimant felt, she was forced to suspend her PhD study (as evidenced by the email at page 656 of the original bundle), she was forced to withdraw from her obligations to Pearson as a tutor and examiner (as evidenced by the email page 654 of the original bundle) and refused work as a private tutor for local students.

80. We also accept that the claimant did make some applications for work in overseas colleges where she thought she would be able to work but those were not successful.

81. Prior to the events in question, the claimant had some part-time work in addition to that which she was doing for the respondent, such as playing the saxophone. As set out above, no losses are claimed in that respect even though it is the claimant's case that she was unable to carry on doing those things as a result of the respondent's behaviour.

82. We are satisfied that the claimant has not returned to work since her dismissal and we do not consider there has been any failure to mitigate her loss. The medical evidence indicates that she has not been able to work as a teacher and we accept her evidence that she has not been able to do other work given her anxiety and depression. The respondent has identified some evidence which suggests that jobs in teaching were available during the time when the claimant was off work and we accept that teaching jobs would have been available. However we accept the claimant's evidence that due to the significant effect which the harassment had on her, she could not face returning to teaching prior to the date of this hearing. It may be that a different employee would have been able to do so, but the respondent must take the claimant as she was at the date of the harassment.

83. A further point arises in this context out of the cases of *Essa v Laing* [2004] IRLR 313, [2004] ICR 747, CA and *Abbey National plc and Hopkins v Chagger* [2009] IRLR 86, [2009] ICR 624.

84. The point, which appears to be agreed between the parties, is that whilst to recover damages in tort it would normally be necessary to show that the damages which occurred were reasonably foreseeable, in cases of deliberate discrimination compensation should be awarded in respect of all harm that arises naturally and directly from the act of discrimination, whether it was reasonably foreseeable or not.

85. The respondent submits that the act of harassment which we have found proved should not be seen as a deliberate act and therefore it is necessary for the claimant to show that the losses in this case were reasonably foreseeable. The claimant submits the opposite.

86. At paragraph 49 of the judgement in *Essa* Clarke LJ stated "as Pill LJ has observed the act or omission must be deliberate and in that sense intentional". In paragraph 63 he stated "such an approach affords justice to the claimant who has been unlawfully discriminated against and is not unjust to the perpetrator because he deliberately made the racist remark."

87. Mr Griffiths, for the respondent, submits that the harassment in this case was not deliberate in that the act of harassment was only completed when the email of 5 December 2019 was disclosed to the claimant as part of the grievance process and that disclosure was not intended to harass her.

88. We do not accept that argument. The focus must be on the whole of the act of harassment which is comprised both of the writing of the email and the fact that it came to the claimant's attention. The writing of the email was deliberate. It was as deliberate as the making of a racist remark. Whilst it can properly be said that the writer of the email did not anticipate it coming to the notice of the claimant, we do not consider that can be a reason to say that the act of harassment was not deliberate. The email was deliberately written and if it came to the attention of the claimant then the respondent must take the consequences of that.

89. However, even if we were wrong in that, we would find that the inability of the claimant to work from the date of the harassment to now, due to her distress caused by the email, was reasonably foreseeable.

90. The period from 20 December 2020 to 8 December 2022, being the date of the second remedy hearing is 23 months and 18 days. Assuming a 31 day month = 23.6 months. The claimant's monthly wage was £1074.11 giving a loss of £ 25,349.00

<u>Interest on Past Loss of Earnings</u>

91. The parties agree that interest runs from the mid-point of 2.4.21 to 8.12.22. Regrettably they did not tell us what that date was. There are 615 days

between those 2 dates. 308 days from 2.4.21 is 4.2.22. There are then 307 days to 8.12.22.

92. The parties also agree that interest accrues at 8%.

93. Interest on £25,349 at 8% p.a. for 307 days is £1705.68 (£25,349 x 0.08/365 x 307)

Future loss of earnings

94. The claimant's case (as presented at the final remedy hearing) is that she would be able to return to the types of self-employed work she was doing prior to the incident in question within 1 to 2 years and be able to earn the same as she did in as her previous employment within 5 years. She would not be able to return to teaching.

95. The test which we must apply (which again is not in dispute) is to ask ourselves when there will be a greater than 50% chance that the claimant will be able to return to earning her previous salary from teaching, around £12,000 per annum.

96. Whilst the salary which the claimant earned was not particularly high, having observed the claimant give evidence and having considered the medical evidence we do think it will take her a considerable time to recover to the extent that she feels able to return to work to the level needed to earn those sums. We must take account, however, of the fact that it is not as simple as the claimant being able to earn £12,000 on a full-time basis. In addition to working part-time for the respondent prior to the discrimination, the claimant also worked part-time doing other work. The claimant will restart that that other part time work and, therefore, will still only have "part-time" hours available to her to earn the sums which was earning for the respondent.

97. We also take on board the submissions by the claimant that she will not find it particularly easy to obtain another comparable job given the amount of time that she will have been out of the job market, her age of 55 and the fact that there is some stigma attached to having bought an employment tribunal proceedings. The claimant also says that she will find it more difficult as a result of her race. We were presented with no evidence in that respect but do accept that there are still some employers who are less willing to employ BAME people (adopting the same term used in the claimant's solicitors closing submissions). We also accept that the fact that the claimant's health has been very poor will make it more difficult for her to obtain alternative employment.

98. There is a large degree of speculation in reaching our conclusions in this respect, it is possible the claimant will be able to obtain alternative employment more quickly than we think or more slowly than we think. Doing the best we can we think it will take a further 1.5 years from the date of this judgment being finalised for the claimant to obtain alternative employment.

99. Again, to the extent that it is necessary for us to do so, we conclude that the fact that the claimant may be out of work to 2025 as a result of the harassment

was reasonably foreseeable. In this respect we note the judgment of Rix LJ at paragraph 118 of *Essa* that "On any view the fact that Mr Essa's reaction was extreme, even to an unforeseeable extent, does not in itself mean that it cannot be the object of compensation, for that is to ignore the egg-shell skull principle." In this case even if the length of time which the claimant will be out of work for can properly be said to be extreme, that is simply a consequence of the personality of the claimant.

100. We are not persuaded by the arguments set out in the claimant's submissions that had she carried on working she would have been promoted to a 0.5 contract work and/or promoted within one year. The claimant's witness statement states that she believes it is likely she would have been promoted to course leader within 2 years of her departure date and to head of department within 3 years but there is no real evidential basis to support that argument. We award damages on the basis that the claimant would have remained at the same salary.

101. Thus the claimant is awarded £12888 for 1.5 years = £19332

Loss of Pension

102. It is agreed that the respondent would have contributed £95 per month to the claimant's pension scheme for the time when she was working for it. Contributions ceased in December 2020 and the claimant is entitled to compensation between that date and the date when we find she is likely to obtain alternative employment. That is a period of 41.6 months (23.6 months to 8 December 2022 and 18 months thereafter) being 41.6 x £95 =£3952

103. No claim has been made for interest in respect of pension losses.

Unfair dismissal award

104. The basic award is agreed in the sum of £3529.44.

105. The compensatory award which is claimed is only for loss of earnings, capped at one year's gross salary. However, because the claimant has already been awarded those losses of earnings by way of compensation for discrimination, no additional award is made.

ACAS uplift

106. The claimant says that there should be an uplift to the award because there has been a breach of paragraph 4 of the ACAS code.

107. Paragraph 4 states as follows

> "That said, 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".

108. The claimant's argument is that the respondent ran a grievance process in which there was overt evidence in an email of racial harassment and that was not identified. The claimant also says that the grievance process sidestepped the act of racial discrimination committed by Ms Richardson in her evidence. In failing to identify and investigate those matters and in failing to adjudicate on them the claimant says the respondent failed to adhere to the code.

109. We refer to our findings set out at paragraphs 170 - 183 and at 190 – 198 and 200-201 of our original judgment.

110. We repeat that the tribunal did not find that Ms Richardson committed an act of racial discrimination in her evidence to the grievance. Generally we felt that the grievance was carried out fairly and thoroughly. We do not find that the fact that the grievance failed to tackle, in particular, the email of 5 December 2019 meant that there was a breach of the ACAS code. The claimant's submissions have the benefit of hindsight, they look at the grievance process through the lens of the claimant's case having been refined through a tribunal process and in the light of a tribunal judgment. If we stand in the shoes of the respondent conducting the grievance, at the time of the grievance and in the circumstances which existed at that time, we consider that the respondent did comply with the ACAS code. It is not correct to say, as the claimant does, that the respondent failed to investigate matters consistently and/or properly/reasonably fairly.

Grossing up

111. In the light of the awards we have made, the parties are required to agree the appropriate award including the amounts required for grossing up which should take account of the fact that the claimant will not have used her personal allowance for the year 2022/23.

112. We summarise our awards thus:

Discrimination Claim	
Injury to feelings	£12,000.00
Interest on injury to feelings	£2,661.70
Aggravated damages	£0.00
Personal injury	£0.00
Loss of vocation	£0.00
Disadvantage on labour market	£0.00
Loss of earnings	
20.12.20-8.12.22	£25,349.00
Interest on past loss	£1,705.67
8.12.22- 1.5 years later (8.6.24)	£19,332.00
Loss of Pension contributions	£3,952.00
Unfair Dismissal claim	
Basic award	£3,529.44
Compensatory award	£0.00
Total award ex grossing up	£**68,529.81**

Recommendations

113. The claimant has asked for a number of recommendations.

114. We have reminded ourselves of the test set down in section 124 Equality Act 2010 namely that an appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.

115. The respondent referred us to *Governing Body of St Andrews Catholic Primary School and others v Blundell UKEAT/0330/09/JOJ*, and in particular paragraphs 35 and 36. The respondent's submission is that a person should not be required to make statements which they do not agree with.

116. The first recommendation sought is that the respondent's principal and chair of the board should provide a written apology to the claimant for the distress caused which should be shared with all staff and current students.

117. We accept that the claimant's distress in this case is amplified by the fact that she believes people do not understand the reason for her leaving and that she was, in some way, responsible for the fact that she left. A letter which clarifies the tribunal's findings in respect of the email of 5 December 2019 and

the claimant's subsequent resignation would, we find, reduce the adverse effect of the harassment on the claimant. However, we do not think it is necessary for that letter to be sent to the respondent's students. Many of the students who were at the college at the time when the claimant left will now, themselves, have left and it is not clear to us how many would have been aware of the claimant's departure or have made assumptions as to the reason for it. It would be useful for the claimant to know that colleagues that she worked with understand the true position of her leaving and that will assist the claimant in returning to work. We proposed to the parties the following wording for a letter to be sent to the staff

> A tribunal has found that in an email sent to Mrs Knight dated 5th December 2019 a member of staff, for whose actions the college is responsible wrote "unfortunately, she [the claimant] Is now throwing the E & D Black comment at me too. I have spoken with People Services and they have advised that you now take this up with them. There are issues here with capability and compliance "
>
> The tribunal has found that email was wrong and unwarranted and amounted to harassment related to the race. It also found that the claimant resigned, in part, because of that email and that amounted to an act of racial harassment. We wish to apologise to Mrs Knight for that act and the distress caused by our unlawful treatment of her

118. Mr Griffiths asked for some time to speak to his client about that proposed recommendation and we gave him 7 days following the 2nd day of the remedy hearing.

119. His instructing solicitors thereafter sent, by email, a revised suggested recommendation as follows:

> Dear Colleagues,
>
> You may be aware of the recent race discrimination tribunal brought by a member of staff at Alton College. The Tribunal has found that in an email sent 5 December 2019 by a member of staff for whom the college was responsible stating "unfortunately Mrs Knight is throwing the E&D black comment at me too", amounted to harassment related to the claimant's race. Consequently, the constructive dismissal of the claimant was an act of harassment.
>
> We wish to apologise to Ms Knight for that act and our distress caused by that treatment to her.

120. The respondent also suggested that the "recommendation wording (if ordered) …be distributed to its staff at the Alton College campus, which is where the Claimant was based, rather than all schools within the trust"

121. The tribunal asked the solicitor for the claimant whether he had any comments but received no response. The suggestion from the claimant had also been copied to the claimant's solicitor.

122. The respondent's solicitors gave no reason for rejecting the tribunal's proposed recommendation or explanation as to why it preferred the alternative one advanced. We agree with the respondent's solicitors that to reduce the adverse effect of the discrimination on the claimant it is only necessary for the letter to be sent to the campus where the claimant was based rather than all schools within the trust.

123. In circumstances where the claimant has not objected to the proposed wording from the respondent, we consider that we should only depart from the wording suggested by the respondent with care. The difficulty which we have with the respondents wording is that the adverse effect that we are seeking to reduce is the claimant's concern that people do not understand the reason for her leaving and may believe that she was in some way responsible for that. The respondent's proposed recommendation does not make clear that the reason for the claimant's resignation was (at least in part) the act of discrimination. We consider that should be clarified but, otherwise, are content to use the respondents wording. The recommendation which we therefore make is as follows:

Dear Colleagues,

You may be aware of the recent race discrimination tribunal brought by a member of staff at Alton College. The Tribunal has found that in an email sent on 5 December 2019 by a member of staff for whom the college was responsible stating "unfortunately Mrs Knight is throwing the E&D black comment at me too", amounted to harassment related to the claimant's race. The tribunal found that the claimant resigned, in part, because of that email and, therefore, the constructive dismissal of the claimant was an act of harassment.

We wish to apologise to Ms Knight for that act and our distress caused by that treatment to her.

124. The 2nd recommendation sought is that members of the respondent's staff who had been found to have breached the Equality Act 2010 would be required to undertake formal equality and diversity training provided by a recognised external provider. The respondent agrees to such a direction in respect of Nathan Sibley and Nicola Kingsley and the claimant did not seek the order to be cast more widely. We are content to make that recommendation although in doing so we note that we did not find either person to have breached the Equality Act 2010.

125. The 3rd recommendation sought is that the respondent should ask the Equality and Human Rights Commission to consider what if any action should be taken to ensure that BAME teachers are not subject to such racial harassment at work. We do not consider that such a recommendation would obviate or reduce the adverse effects of the harassment on the claimant and we consider it sufficient that the respondent be aware of our findings of fact in moving forward.

126. The 4th recommendation sought is that the respondent provide the claimant with a signed original reference on headed paper, the respondent agrees with that and the parties will agree the terms.

127. The 5th recommendation sought is that the respondent be required to inform the board and all parents and current students that the claimant was unlawfully constructively dismissed due to racial harassment. We see no basis for doing so beyond the letter which we have recommended in our first recommendation. It is to go too far to expect the respondent to inform all parents and current students that the claimant, who left the respondent in April 2021 was constructively dismissed due to racial harassment. The claimant does not set out why such a recommendation would help and the recommendation sought has the feeling of seeking to penalise the respondent rather than help the claimant. The tribunal's judgment with its findings of fact has been published online without redaction and that, along with the first recommendation which we make, is sufficient to reduce the effect of the harassment.

Employment Judge Dawson

Date 23 January 2023

JUDGMENT SENT TO THE PARTIES ON
06 February 2023 By Mr J McCormick

FOR THE TRIBUNAL OFFICE

Notes

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

CVP
The hearing was conducted by the parties attending by Video Platform. It was held in public in accordance with the Employment Tribunal Rules.

Recoupment

The recoupment provisions do not apply to this judgment because no loss of earnings has been awarded in respect of the claim of unfair dismissal.