EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr T Mohammed	**v**	Crown Prosecution Service

Heard at: Reading

On: 9 and 10 January 2023
And in private on 17 January 2023 and 27 February 2023

Before: Employment Judge Hawksworth
Mr J Appleton
Mrs A E Brown

Appearances
For the Claimant: Mr M Jones (counsel)
For the Respondent: Ms C Hayward (counsel)

RESERVED JUDGMENT (REMEDY)

The unanimous decision of the tribunal is as follows:

1. The respondent must pay the claimant the sum of £135,862.73, comprising compensation for:

    a. past financial losses of £46,822.58 and interest on those losses of £13,895.40;
    b. pension loss of £10,288.23;
    c. psychiatric injury in the sum of £8,000 and interest of £2,374.14;
    d. injury to feelings in the sum of £16,800 and interest of £9,971.38;
    e. treatment costs of £1,320; and
    f. grossing up for tax of £26,391.00

2. We recommend that within 6 weeks the respondent should, in respect of managers referred to in our liability judgment and reasons as having been involved with the claimant's case from September 2015 to 24 September 2018 (and who remain employed by the respondent), review whether its training programmes have been implemented and put in place any additional training it considers would be appropriate for them.

REASONS

The claims and responses

1. The claimant is a barrister. He was employed by the respondent as a Senior Crown Prosecutor from October 2004 to 23 April 2020.

2. This hearing was a remedy hearing in three claims brought by the claimant which are being heard together. The first (3323914/2016) was presented on 15 July 2016, the second (3325340/2017) on 13 July 2017 and the third (3327768/2017) on 9 September 2017. The claimant brought complaints of disability discrimination, harassment and victimisation.

3. The respondent presented its ET3 and grounds of resistance on 30 August 2016, 18 August 2017 and 26 October 2017. Initially, the respondent defended the claims in full. Before the liability hearing, in a letter dated 2 July 2019, the respondent admitted some parts of the claims. It admitted some complaints of failure to make reasonable adjustments and discrimination arising from disability.

Liability hearing and judgment

4. The liability hearing in these three claims took place over 10 days with an additional 4 days in private for tribunal reading and deliberation. The dates of the liability hearing were 2, 3, 4, 5, 6, 9 and 10 December 2019, 28 January 2020 and 7 and 8 July 2021. The complex procedural history was explained in the written reasons for our reserved judgment on liability.

5. Our reserved judgment and reasons on liability were dated 22 November 2021 and were sent to the parties on 13 December 2021. The claimant's claim succeeded in respect of the complaints admitted by the respondent, namely that the respondent failed from September 2015 to make the following adjustments:

    5.1. Allowing the claimant to work from home for 2 days a week;
    5.2. Reducing the claimant's workload so as to alleviate his stress;
    5.3. Allowing the claimant to reduce his contractual working hours so as to enable him to finish his working day at 4pm in order that he may take the prescribed medication; and
    5.4. Allowing the claimant to perform some court duties, making the necessary arrangements with the court service.

6. The claim also succeeded in light of the respondent's admissions that it subjected the claimant to discrimination arising from disability in two respects:

    6.1. removing the claimant from court duties on or around 23 February 2016; and
    6.2. refusing or failing to take appropriate action having received reports from the respondent's Occupational Health Advisor.

7. The admitted discrimination concerned matters which were included in the claimant's first and third claims. The claimant's other complaints failed, for reasons explained in the reasons for our judgment on liability.

8. The claimant's fourth claim, which concerned the period when he worked in a role at CPS Direct from September 2018 to April 2020, was heard separately. The judgment was sent to the parties on 12 December 2022. The claim did not succeed.

Remedy hearing and evidence

9. The remedy hearing took place in January 2023. It was a hybrid hearing (some people attended in person and some by video). Earlier hearing dates in June 2022 had to be postponed because of a delay in the claimant providing his GP records and other documents.

10. An agreed remedy bundle was prepared for the remedy hearing. It had 1151 pages. References to page numbers in these reasons are references to the hard copy page numbers in that bundle.

11. We had witness statements on remedy prepared by the claimant and (on behalf of the respondent) by Kevin Moloney. Mr Moloney was the claimant's line manager from 24 May 2017 to 28 September 2018.

12. We also had two witness statements by the claimant's wife, Fatema Ara. These were prepared for the liability hearing. At the time of that hearing, the respondent's counsel said as that Mrs Ara's evidence related to the question of remedy not liability, she would not need to ask her any questions until the remedy hearing. We considered Mrs Ara's statements as part of the remedy hearing.

13. We also had reports from two medical expert witnesses, Professor Robin Choudhury, a cardiologist and Dr Jenny McGillion, a clinical psychologist. These reports were provided on unilateral instruction by the respondent following a preliminary hearing on 4 April 2022 at which the employment judge made orders about medical evidence. There was a discussion at that hearing about joint instruction of experts. The judge explained to the parties that when considering whether to give permission for a medical report, the tribunal would first want to consider whether to grant permission for a medical report prepared on joint instructions, and this would be the preferred course. She explained that if the respondent decided to apply for permission to rely on expert evidence instructed solely by the respondent, it should clearly explain the reasons why it was doing so. The respondent subsequently sought permission to instruct its own experts because it had been unable to agree the terms of joint instructions with the claimant who was unrepresented at the time. On 6 October 2022 the judge granted permission for the respondent to obtain its own expert medical evidence.

14. We took time at the start of the hearing to read the liability judgment, the schedules of loss, the remedy witness statements, the documents referred to in the statements, the two medical expert reports and some key documents which the parties asked us to read. We also read the respondent's written submissions on remedy, dated 9 January 2023.

15. We started hearing evidence at 12.15 on 9 January 2023. We heard evidence from the claimant on 9 January and on the morning of 10 January 2023. He attended the hearing in person. Mrs Ara attended the hearing by video; she started her evidence at 12.00 on 10 January 2023. The respondent's witness Mr Moloney also attended by video. He started his evidence at 12.20 on 10 January 2023.

16. We heard submissions from both parties' counsel on the afternoon of 10 January 2023.

17. The tribunal deliberated in private on 17 January 2023 and 27 February 2023.

The issues for us to decide

18. We have to decide what compensation the claimant should be awarded. The areas of dispute as to remedy were listed in the respondent's written submissions.

19. The claimant also asked us to make recommendations.

Findings of fact

20. We set out here our findings of fact from the liability judgment which are relevant to the remedy issues, together with the further findings of fact we have made.

21. The claimant's employment with the respondent began on 4 October 2004. He was sent a letter on 11 October 2004 which contained the employment particulars required by section 1 of the Employment Rights Act 1996 (page 218). The claimant signed a copy of the letter on 21 October 2004 and returned it to the respondent (page 218 and 224).

<u>The claimant's grievance complaints</u>

22. A summary of events relating to the claimant's grievance complaints follows, including facts we found in our liability judgment.

23. The claimant said he wanted to make a grievance complaint on 4 November 2015 but took some time to consider whether he wanted to proceed. On 21 December 2015 he told his manager that he had decided to pursue a complaint. He was told to complete a grievance form which he did on 15 February 2016. The claimant made another formal grievance against his manager on 8 March 2016.

24. The claimant was told on 15 March 2016 that an investigating officer had been appointed to consider both grievances. A grievance meeting date was suggested but this had to be changed when the investigating officer had a family bereavement. On 7 April 2016 new meeting dates in May 2016 were suggested. On 15 April 2016 the claimant said that he was on sick leave and he hoped to meet the investigating officer when he was well and back to work.

25. The investigating officer took advice from HR and decided to take no further action while the claimant was on sick leave. The HR officer checked in with the claimant from time to time to ask whether he wanted to continue with his grievance. The claimant did not want to go ahead at any point.

26. On 31 March 2017 the respondent's occupational health advisor said that resolution of the claimant's grievance as soon as possible would be likely to benefit his health. The respondent arranged for the investigation of the grievance to be resumed. A new investigating officer, Melanie Trust, was appointed on 29 June 2017. She met with the claimant in July 2017; interviews with the subjects of the grievance were delayed because of holiday and sickness absence, they took place in August, September and November 2017 (page 494).

27. Ms Trust prepared a long and detailed report dated 23 January 2018. She explained that work commitments and the Christmas break had led to delays in finalising the investigation. She found that some reasonable adjustments recommended by occupational health had not been made. Other complaints by the claimant were not upheld by Ms Trust.

28. Ms Trust made two recommendations: i) that appropriate discussions be held with the claimant to agree the best way forward and ii) that the claimant's manager Ms Phillips should receive appropriate management training and support to equip her with the necessary skills to effectively manage individuals and address underlying concerns with regard to performance, attendance, conduct and disability (page 528 and 529).

29. On 5 March 2018 the claimant submitted an appeal against the outcome of the grievance investigation. The appeal manager met with the claimant on 3 April 2018. A second stage appeal took the form of a paper based review, as provided for in the respondent's grievance policy. Written appeal outcomes were provided to the claimant. Neither appeal was upheld.

<u>The claimant's pay and benefits during September 2015 to September 2018</u>

30. The claimant's calculation of net weekly pay in his updated schedule of loss (page 92) is accepted by the respondent, subject to an arithmetical correction as set out in paragraph 6 of the respondent's counter schedule of loss (page 144). We accept that the correction to the claimant's calculation is required and that the claimant's net weekly pay was £763.92, based on net monthly pay of £3,319.87.

31. The claimant returned to work in March 2015 following a heart attack in October 2014. During the period from March 2015 the claimant had reduced duties and was not doing any overtime or Saturday court working. In our liability judgment we found that the claimant carried out weekend overtime working on one occasion on the weekend of 13/14 February 2016 but he was not permitted to do overtime after that. We decided that the refusal to allow the claimant to work overtime did not amount to victimisation of the claimant.

32. The respondent admitted that it failed to make reasonable adjustments from September 2015. The claimant initially remained at work on full pay at that time, but he began a period of sick leave on 13 April 2016. He was on sick leave until 24 September 2018 when he returned to work in a new role with CPS Direct. We refer to the period of sick leave from 13 April 2016 to 24 September 2018 as 'the 2016 sick leave'.

33. The respondent's policy provided for sick leave at full pay for not more than 6 months followed by 6 months on half pay, subject to an overriding maximum of 365 days in any rolling period of four years (liability hearing bundle volume 3, page 1121).

34. The claimant had already used some of his entitlement to sick pay during October 2014 to March 2015, when he had a period of sick leave after his heart attack. In the 2016 sick leave, he was paid full pay from 13 April 2016 until 16 September 2016. During the period from 17 September 2016 to 23 September 2018 he was not entitled to full contractual sick pay. We refer to the period of sick leave from 17 September 2016 to 23 September 2018 as 'the 2016 unpaid sick leave'.

35. Although the claimant was not entitled to full pay for the 2016 unpaid sick leave, he received some payments from the respondent during this time. The payments included sick pay at pension rate (page 216), statutory sick pay and paid annual leave. The claimant's payslips for this period show that, not including October 2017, the claimant received net payments of £27,186.31 during the 2016 unpaid sick leave (pages 171 to 195).

36. The payments to the claimant in October 2017 were more complicated and require more explanation. He was paid gross sick pay of £783.22 (page 184). He also received a gross payment of £12,304.68 for 56.5 days' annual leave accrued during the period 1 May 2015 to 30 August 2017; 25.5 days were in respect of days which accrued from September 2016 to 30 August 2017. The part of the annual leave payment which related to the period after September 2016 was therefore 25.5/56.5 x £12,304.68 = £5,553.44. The total gross payment received by the claimant in October 2017 not including annual leave for the period before September 2016 was £5,553.44 + gross sick pay of £783.22 = £6,336.66. In the tax year 2017/18, this equated to a net payment of £4,323[1].

[1] https://salary-calculator.org.uk/

37. In total, the net sum received by the claimant from the respondent in the 2016 unpaid sick leave was £27,186.31 + £4,323 = £31,509.31.

38. The claimant was a member of the civil service alpha pension scheme, a defined benefit pension scheme. The respondent accepts the figure for pension loss given in the claimant's schedule of loss of £383.91 per month, calculated by reference to the employer's contribution. This equates to a weekly pension loss of £88.60 (£383.91 x 12/52).

39. The claimant was in receipt of Employment Support Allowance during part of the 2016 unpaid sick leave. In the period from 23 November 2016 to 19 September 2018 he received £8,328.59 (page 93).

40. The claimant also received some payments during the 2016 sick leave from an income protection scheme provided by Legal and General. This is not a benefit referred to in the claimant's terms and conditions letter (page 218). The claimant also had a private pension with Legal and General (pages 670 to 672). We find that the income protection payments to the claimant were made under a scheme purchased by the claimant himself.

41. The claimant worked as a taxi driver for some periods while he was on sick leave. He applied for a licence in mid-April 2017 and then worked as a taxi driver until September 2018 when he returned to work. He worked as a taxi driver again later, between September 2019 and December 2019. The claimant's total earnings in both these periods were £350. On a broadly proportional basis, we find that £280 of these earnings were earned during the 2016 sick leave and £70 during the later period from September 2019 to December 2019.

<u>The evidence about the reasons for the claimant's sickness absence</u>

42. We need to make findings as to the reasons for the 2016 unpaid sick leave, so that we can consider the extent to which the loss of pay during this sick leave was caused by the discrimination. This is a complex factual issue which we need to consider carefully. We first set out the relevant contemporaneous evidence and our findings on it, starting with the fit notes completed by the claimant's GP and other evidence from the time. We then consider the expert evidence we had and issues about medical treatment.

43. In the claimant's first fit note in April 2016, the reason for the claimant's absence was chest infection and work-related stress and depression (page 840). Thereafter, the claimant's fit notes for 2016 gave the reasons for absence as both the claimant's heart condition and depression (and/or anxiety) (pages 848 and 853). Between October 2016 and August 2018 the GP's certificates gave the reason for absence as 'anxiety and depression, waiting for cardiac surgery' (page 866, 875, 890, 906, 757, 756). More detail/updates about the claimant's heart condition were added in November 2017 and March 2018 (page 925 and 931); those two certificates also included reference to anxiety and depression.

44. The claimant's GP says, and we accept, that the claimant was diagnosed with anxiety and depression in February 2015. At this time he was still on sick leave following his heart attack. His low mood had started with his heart attack. He was prescribed anti-depressants and was able to return to work in March 2015 (page 944). In April 2015 a heart defect was identified and the claimant was told this would require surgery (page 1034).

45. During the period March 2015 to April 2016, the claimant's heart condition and depression were managed (including by medication) such that he was fit to attend work (page 944). In September 2015 the respondent's occupational health doctor Dr Milne advised that the claimant was fit for work with limitations (page 828).

46. However, by April 2016 the claimant's depression and anxiety symptoms led to him being unfit for work. He was signed off work on 13 April 2016.

47. The claimant's saw his GP regularly throughout this period of sickness absence. She said, and we accept, that in May 2016 the claimant was at crisis point with stress, anxiety and low mood. She noted that at this time the recommendations she had made for reasonable adjustments had not been put in place and the claimant was signed off work (page 944).

48. The claimant was seen by Dr Milne again in March 2017 (page 892). In his report dated 31 March 2017 the doctor recorded that the claimant attributed his absence to lack of support relating to work adjustments. The doctor said that resolution of the claimant's depression was partly dependent on whether work issues were resolved, with sufficient support to help him return to work.

49. On 17 April 2017 the claimant's GP completed a medical assessment to accompany the claimant's application for a taxi licence (page 918). In that assessment she said that the claimant had had no history of significant psychiatric disorder in the previous 6 months. We find that this did not mean that the claimant no longer had anxiety and depression. It is more likely, given that the claimant's GP was continuing to record anxiety and depression in the claimant's fit notes up to August 2018, that she did not consider the claimant's anxiety and depression to amount to a 'significant psychiatric disorder' for the purposes of this medical assessment.

50. The claimant's GP wrote a letter on 7 June 2017 supporting the claimant's request for adjustments to be made at work (page 908). In the letter she said that the claimant had been signed off with anxiety and depression when workplace adjustments were not put in place[2].

51. In August 2017 the claimant was seen by the respondent's occupational health provider. Dr Arthur prepared a report (page 910). He recorded both

[2] This letter wrongly refers to the claimant's sick leave as starting in May 2016 but as the claimant's GP explained in another letter, 13 April 2016 is the correct date for the start of the claimant's sick leave: the first certificate was overlooked because it was handwritten (page 882).

anxiety/depression and heart problems as issues relevant to the claimant's absence from work. He also noted the claimant had sleep apnoea and diabetes. The sleep apnoea contributed to sleep disruption on top of that caused by anxiety and depression, but the claimant's diabetes was well managed.

52. In September 2017 the claimant had an angiography (page 1037). In a discussion with his manager Mr Moloney in October 2017, he said he hoped he would be having surgery shortly, and to return to work after the operation (page 478).

53. In March 2018 at a long term absence review meeting with Mr Moloney, the claimant explained that tests on his heart were continuing and other cardiovascular problems had been identified. (This was reflected in his fit note of that month (page 931).) He said he was not ready to return to work, but expressed an interest in moving to a different role within the CPS once he was ready to return (page 536).

54. The claimant was referred to the respondent's occupational health provider again in May 2018 (page 934). Dr Stehle's report said that stress at work seemed to be the main barrier for the claimant's return to work, apart from the physical health issues for which the claimant was still awaiting surgery.

55. In August 2018 the claimant's GP said that providing reasonable adjustments so that the claimant could return to work from home was the most viable option (page 944). At this point the claimant did not have a date for his cardiac surgery.

56. The claimant returned to work on 24 September 2018 to a new role in CPS Direct (CPSD) with working from home and flexible hours of work as reasonable adjustments. The claimant was still waiting for his cardiac surgery; the surgery eventually took place in July 2019 (page 1037).

Expert medical evidence

57. We were assisted in our understanding of the claimant's medical position by medical reports prepared by two experts instructed by the respondent:

    57.1. A report by Professor Robin Choudhury, a cardiologist, dated 23 November 2022 (page 1031). His report was prepared on the basis of a review of the claimant's medical reports and the tribunal's liability judgment. He did not meet the claimant or undertake any examination or assessment of him.
    57.2. A report by Dr Jenny McGillion, a clinical psychologist, dated 28 November 2022 (page 1052). Her report was prepared after a remote (Zoom) interview with the claimant. A table starting at page 1102 sets out the questions which were put to her alongside her answers (as she did not include the questions in her report).

58. We found both expert reports to be clear and helpful. Both summarise and cross-reference other available medical evidence. Both include statements of truth and compliance as expert witnesses to the tribunal.

59. We accept the evidence of Professor Choudhury that:

    59.1. between October 2014 and July 2019 the claimant was experiencing symptoms of exertional breathlessness which were attributed to his cardiac condition but Professor Choudhury could not find evidence that his symptoms were progressive or severe (page 1043); and
    59.2. there was no significant deterioration in the claimant's heart condition between October 2014 and July 2019, and any new symptoms were the result of the claimant's heart attack in October 2014 (page 1044).

60. We have taken into account the fact that Professor Choudhury did not see the claimant but his conclusions were consistent with other medical evidence we have seen and we accept his expert opinion on these points.

61. We also accept the expert evidence of Dr McGillion that:

    61.1. the claimant's psychological difficulties are highly complex and multi-factorial. The stressors have a 'cumulative nature' (pages 1103 and 1108);
    61.2. factors including a moderate pre-disposition to anxiety and low mood, the strength of identity he felt in his role as a barrister, family medical history and a strong sense of injustice about his treatment during his time with the respondent, made the claimant particularly vulnerable to developing psychological problems in the context of work-related problems after March 2015 (page 1085);
    61.3. a recurrence of the claimant's depression initially developed as a result of his heart attack in October 2014, and he had significant depression and anxiety symptoms before September 2015 (page 1069, 1086 and 1102);
    61.4. the claimant was struggling with work tasks and with work-related stress in June 2015, prior to the respondent's failure to make reasonable adjustments (page 1106);
    61.5. social (non-work) stressors significantly contributed to the claimant's depression symptoms in May and June 2016 (page 1102);
    61.6. whilst the claimant's psychological difficulties are multi-factorial in nature, the difficulties he has experienced in the workplace since his heart attack in October 2014 have played a significant role in his depression (page 1086);
    61.7. between 13 April 2016 and 23 September 2018, the claimant's depression symptoms were a significant obstacle to him working (page 1103);
    61.8. at several points during this period of time the claimant's primary problem was anxiety, though depression symptoms may well have continued alongside his anxiety (page 1103);
    61.9. it is difficult to state what part or parts of the period the claimant would have been off sick for reasons solely related to his depression rather

than his heart condition, as the two conditions are inextricably linked (page 1103);

61.10. the admitted discrimination from September 2015 did not cause the claimant's depression and, without the admitted discrimination, it is likely that his depression and anxiety would have persisted (page 1090);

61.11. however, the admitted discrimination cemented the claimant's longstanding feelings of injustice and of being treated differently, which contributed to his depression symptoms and probably led to an exacerbation of the claimant's depression and anxiety (page 1089, 1090 and 1106);

61.12. the degree of severity of the injury specifically caused by the respondent probably fell within the mild to moderate range (page 1107).

Medical treatment

62. In February 2015 the claimant visited his GP with suspected sleep apnoea (page 1069). The claimant was provided with a CPAP machine to treat the sleep apnoea symptoms but he found he did not get on with it. Dr McGillion said that if the claimant had been able to access treatment for his sleep apnoea, this would have led to at least some improvement in his depression symptoms, as poor sleep for prolonged periods is a vulnerability factor for depression and anxiety (page 1109). We find that the claimant's sleep apnoea condition made him more vulnerable to symptoms of depression and anxiety.

63. The claimant was referred for treatment for his psychological symptoms by his GP. He failed to engage fully with the therapy in early 2015 (page 816). The claimant's GP referred him for a course of psychological therapy again in early 2017 but the claimant did not attend some sessions and was late for others (page 894). We accept the evidence of Dr McGillion that even if the claimant had engaged with therapy in 2015 and 2016, his depression would probably have recurred because of his past history of depression, his physical health problems and the range of additional stressors he faced (page 1104). Those stressors included the respondent's failure to make reasonable adjustments. We make the same finding in relation to the failure to complete a course of therapy in 2017. As Dr McGillion says, the likelihood of benefit reduced as the years progressed (page 1104).

64. We also accept Dr McGillion's evidence that it is often appropriate to delay intervention until litigation is completed and that psychological treatment is unlikely to be of benefit to the claimant while a tribunal claim is ongoing. Dr McGillion recommends that once the tribunal claim is concluded, the claimant should access a course of 18-20 sessions of psychological therapy (CBT, ACT or EMDR), both to help him adjust to living with his chronic health conditions, and to process the stress he has been under for the last eight years (page 1108). We accept her evidence that with adequate therapy and support the claimant will experience some improvement in mood when this

claim is over, and that depression is unlikely to be a significant obstacle to the claimant engaging in some form of work.

Our findings about the reasons for the 2016 sick leave

65. Having considered the contemporaneous evidence and the expert medical evidence, we make the following findings about the reasons for the 2016 sick leave.

66. The respondent invited us to find that the 2016 sick leave could only be attributed to the admitted discrimination (or depression attributable to the admitted discrimination) for a period of 6 (or, alternatively, 16) months. It was suggested that after that period the claimant's heart condition and/or a failure to engage with treatment offered were the cause or causes of the 2016 sick leave.

67. We find that both psychological difficulties and the claimant's heart condition were causes of the 2016 sick leave. We have accepted the evidence of Professor Choudhury that the claimant's cardiac symptoms were not progressive or severe. The chronology suggests that the claimant would not have had to take sick leave during the 2016 sick leave period if his only medical issues were his heart condition and psychological issues relating to it. After his heart attack, the claimant was fit enough to work with adjustments during the period from March 2015 to April 2016, despite having psychological problems arising from his heart condition from February 2015, and having been diagnosed in April 2015 with the additional heart problem which required surgery. Similarly, he was able to return to work in September 2018 before his heart surgery took place.

68. We find that it is not possible to separate out the psychological and physical causes of the claimant's sickness absence for different parts of the 2016 sick leave, for the following reasons:

    68.1. the claimant's medical position is complex with a number linked conditions; we have accepted Dr McGillion's evidence that it is difficult to state what periods the claimant would have been off sick for because of his depression rather than his heart condition because the two are 'inextricably linked';
    68.2. the reasons for the claimant's sickness absence throughout this period as recorded on his fit notes were both anxiety/depression and his cardiac condition;
    68.3. although in his discussions with Mr Moloney the claimant focused on the position with his cardiac surgery, we find that this is likely to have been because he found it 'a battle' to explain his complex conditions, and the planned surgery for his physical health condition was easier to talk about.

69. For these reasons, we find that both the claimant's anxiety/depression symptoms and his heart condition were significant and interlinked causes of his absence from work during the whole of the 2016 sick leave.

70. We have also considered the background to and causes of the claimant's anxiety and depression, to enable us to assess the extent to which the sickness absence was attributable to the discrimination. Again, the medical position is complex.

71. First, the claimant had a vulnerability to psychological problems before February/March 2015, because of moderate pre-disposition, family history and other factors identified by Dr McGillion, and because of his lack of sleep arising from his sleep condition.

72. Further, the episode of anxiety and depression during the 2016 sick leave itself had a number of material causes. The claimant's psychological symptoms occurred as a result of a variety of stressors, including the discrimination. Other causal factors included anxiety around his heart condition and physical health problems, social (non-work) stressors in mid-2016 and work stressors prior to and concurrent with the failure to make reasonable adjustments. Work stressors included other matters the claimant complained about in his grievance and in his tribunal claim which we found not to amount to unlawful discrimination.

73. It is not possible to separate out (for example on a percentage basis, or by reference to different periods of time) the extent to which the claimant's sickness absence because of depression and anxiety was caused by the discrimination, from the extent to which it was caused by other factors. The stressors had a cumulative nature, as Dr McGillion says.

74. However, it is clear that the discrimination was a material cause. We make this finding based on the evidence of Dr McGillion and the claimant's GP. In her letters of 7 June 2017 (page 908) and 2 August 2018 (page 944) the claimant's GP referenced the failure to make reasonable adjustments as the background to the claimant's sick leave starting in April 2016, and recorded May 2016 as a crisis point for the claimant's stress, anxiety and low mood. We find that the discrimination was a significant factor in the development of the claimant's psychological difficulties from a manageable condition to a condition which resulted in his long-term absence from work.

75. We also find, based on the evidence of Dr McGillion, that the failure to engage with treatment was not a separate (divisible) cause of the 2016 sick leave. It was appropriate to delay psychological treatment, and even if the claimant had engaged with therapy, the anxiety/depression would have probably have recurred at some future point.

76. In our conclusions below, we have gone on to consider whether, based on our findings that the claimant had pre-existing vulnerabilities and that the claimant was facing other stress factors at the time, there was a chance that, even if the claimant had not been subject to discrimination, he would have experienced symptoms of depression and anxiety such that he would have had to take sick leave during the period from April 2016 to September 2018 (or part of it) in any event.

The impact of the discrimination on the claimant

77. In his remedy statement the claimant outlined some of the ways in which his feelings were affected by the discrimination. He said the failure to make reasonable adjustments made him feel that he had been left vulnerable and without support. After his manager David O'Driscoll left, the claimant felt it became 'a battle' to explain his conditions. He felt his disability was being ignored because it was not a visible disability. He felt angry and upset that previous arrangements had not been continued.

78. We accept the claimant's evidence on these points. It is supported by the statement of Mrs Ara of 31 August 2017. She says that after Mr O'Driscoll left, the claimant felt isolated, alone and miserable and would come home angry and frustrated.

79. The claimant also said (relying on a letter from his GP) that the failure to make reasonable adjustments and his removal from court duties contributed to his loss of faith in the respondent, and that his self-confidence and self-belief were dented. We accept this evidence.

80. The claimant's feelings have also been injured by other work-related matters which took place at around the same time but which were not part of the admitted discrimination, including in particular complaints made about him prior to the 2016 sick leave, and other conduct he complained about in his claims which we found did not amount to discrimination, harassment or victimisation. These matters also contributed to his injury and loss of faith in the respondent. (We return to this when assessing the injury to feelings award in our conclusions.)

The claimant's return to work in CPSD

81. The claimant returned to work on 24 September 2018. He had a return to work induction period in the South East area, before starting in a new role with CPS Direct (CPSD) on 26 November 2018. Reasonable adjustments as to working from home and flexible hours of work were put in place at this point.

82. At the time he returned to work in September 2018 the claimant was still waiting for his cardiac surgery. Unfortunately, due to waiting lists and other delays, the operation was cancelled several times. The surgery eventually took place in July 2019 (page 1037). The claimant was on sick leave for his surgery and the recovery from it. He did not return to work after that. The admitted discrimination was not a material cause of this period of sickness absence.

83. The claimant had 3 days paid special leave for the first three days of his absence. From 13 July 2019 until his dismissal on 23 April 2020 he was on unpaid sick leave; we call this period the 2019 sick leave.

84. During the 2019 sick leave the claimant was in receipt of statutory sick pay and pay for annual leave only. This was because the claimant had exhausted his entitlement to paid sick leave. He was not entitled to sick pay during the 2019 sick leave because the 2016 sick leave fell within the rolling 4 year period used to assess entitlement to sick pay.

85. The claimant did receive some payments from the respondent during the 2019 sick leave. In July 2019 he received SSP of £188.50. In total for the period from 1 August 2019 to his dismissal on 23 April 2020 he received SSP and paid annual leave in the net sum of £6,192.92 (pages 205 to 214).

86. During the 2019 sick leave the claimant also received 2 fortnightly payments of £219 Employment Support Allowance from 18 March 2020 to 23 April 2020 (£438 in total) (page 94) and £70 income from taxi driving (page 93).

87. The claimant was dismissed under the respondent's absence management procedures with effect from 23 April 2020 (page 589). That dismissal was not part of the claimant's claim. On dismissal, the claimant received a compensation payment under the Civil Service Compensation Scheme.

88. The claimant was entitled to 13 weeks' notice on dismissal. He was not required to work his notice period and was told he would receive a payment in lieu of notice (page 598). It is not clear whether this payment has been made to the claimant.

The law

89. The remedy for complaints of discrimination at work is set out in section 124 of the Equality Act 2010:

> *"124 Remedies: general*
>
> *(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).*
>
> *(2) The tribunal may—*
>
> *(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;*
>
> *(b) order the respondent to pay compensation to the complainant;*
>
> *(c) make an appropriate recommendation."*

<u>Recommendations</u>

90. Under section 124(2)(c) and 124(3), where a tribunal finds unlawful discrimination, it may make an appropriate recommendation that, within a specified period the respondent takes specified steps for the purpose of

obviating or reducing the adverse effect on the claimant of any matter to which the proceedings relate.

Compensation

91. Under section 124(2)(b), where a tribunal finds that there has been a contravention of a relevant provision, it may order the respondent to pay compensation to the claimant. The compensation which may be ordered corresponds to the damages that could be ordered by a county court in England and Wales for a claim in tort (section 124(6) and section 119(2)). There is no upper limit on the amount of compensation that can be awarded.

92. The aim of compensation is that 'as best as money can do it, the [claimant] must be put into the position [he] would have been in but for the unlawful conduct' (*Ministry of Defence v Cannock and ors* 1994 ICR 918, EAT). In other words, the aim is that the claimant should be put in the position he would have been in if the discrimination had not occurred.

93. To decide what position the claimant would have been in if the discrimination had not occurred, the tribunal has to look at what loss or injury has been caused by the discrimination. In cases where loss or injury has more than one cause, this needs very careful consideration. In *Olayemi v Athena Medical Centre* [2016] ICR 1074, the claimant had a psychiatric injury which the tribunal found was caused in part by the respondent's discrimination and in part by another factor. HHJ Richardson explained the principles which apply in cases where the claimant has a pre-existing vulnerability or where the discrimination is one of two or more causes of an injury (emphasis added):

> *"19. Although there is a degree of tension between these cases, the essential principles are not in doubt. The claimant must prove that the respondent's wrongdoing was a material cause of her psychiatric condition. If she does so the respondent must take her as he finds her; it is no defence for him to say that she would not have suffered as she did but for a susceptibility or vulnerability to that kind of psychiatric condition. The employment tribunal will award compensation for the psychiatric condition, although it may discount the compensation to take account of any risk that she may in any event have suffered from the psychiatric condition to which she was vulnerable. That will depend on the chance that she would have suffered some other cause—presumably harassment or similar—to trigger her condition, and also on the seriousness of that cause.*
>
> *20. It is open to the respondent to show that there was another material cause for the claimant's psychiatric condition—that is a cause going beyond mere vulnerability or susceptibility. Even so it is not a defence for the respondent to say that there was another material cause for her psychiatric condition unless the resultant harm is truly divisible. If, however, the resultant harm is truly*

divisible the tribunal concerned must estimate and award compensation for that part of the harm for which the respondent is responsible. In so doing it will apply the tortious measure of damage: it will identify the harm for which the respondent is responsible and award compensation for that harm, as opposed to the harm which would have occurred in any event. These propositions—including the propositions concerning divisibility—are not unique to claims arising out of a psychiatric condition.

21. As this analysis shows, the employment tribunal should always take account of any existing vulnerability or any divisible cause when it awards compensation. In the former case it will make allowance for the chance that the claimant would at some point have suffered the psychiatric condition in any event. In the latter case it will not award compensation for any harm which would have occurred in any event by reason of the other cause. How the employment tribunal takes account of such a factor will depend on the case.

22. There is no rule in such cases that the employment tribunal should make a blanket percentage reduction in the award. In some circumstances—such as those which obtained in Thaine v London School of Economics [2010] ICR 1422—it may be appropriate. In that case the claimant suffered from illness due to several causes operating in the same or a similar time frame, and a reduction of 60% was appropriate. But in other cases it may be quite inappropriate. The employment tribunal must always consider what a claimant has lost by reason of the wrongdoing of the respondent in the light of the specific facts of the case."

94. On the question of divisibility, the judge added:

"24. It is, therefore, clear in principle that when there are competing causes for an injury a court or tribunal must consider the question of divisibility: both whether the injury is divisible and how it may be divided between the causes. The two questions go together and are essential elements of the reasoning.

25. The passage which I have quoted from Dingle [v Associated Newspapers Ltd [1961] QB 162] also seems to me to indicate a common sense approach to divisibility. It is more likely that an injury will be held to be indivisible if the competing causes are closely related to the injury and it is difficult to separate out their consequences."

Injury to feelings

95. Loss may include injury to feelings. In *HM Prison Service and others v Johnson* [1997] ICR 275 EAT, the EAT set out the following principles that the ET should consider in making an award for injury to feelings:

"(i) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.

(ii) Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use the phrase of Sir Thomas Bingham M.R., be seen as the way to "untaxed riches."

(iii) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards.

(iv) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.

(v) Finally, tribunals should bear in mind Sir Thomas Bingham's reference to the need for public respect for the level of awards made."

96. The focus for the tribunal when assessing injury to feelings is the effect the discriminatory act had on the claimant, not the nature of the respondent's unlawful conduct (explained in, for example, *Base Childrenswear Limited v Otshudi* UKEAT/0267/18).

97. In *Vento v Chief Constable of West Yorkshire Police (No. 2)* [2002] EWCA Civ 1871 the Court of Appeal identified three broad bands of compensation for injury to feelings awards. The Presidential Guidance on injury to feelings of 5 September 2017 sets out updated Vento bands which include the 10% *'Simmons v Castle'* uplift. The guidance says that for claims presented on or after 11 September 2017, the lower band is £800 to £8,400 (less serious cases); the middle band £8,400 to £25,200 (serious cases); and the upper band £25,200 to £42,000 (the most serious cases), with the most exceptional cases capable of exceeding that upper band.

Personal injury

98. The tribunal has jurisdiction to award compensation for personal injury arising out of unlawful discrimination, subject to causation being made out (*Sheriff v Klyne Tugs (Lowestoft) Limited [1999] ICR 1170)*. There is no requirement for the injury to be reasonably foreseeable.

99. Chapter 4(A) of the Judicial College Guidelines for the assessment of general damages in personal injury cases sets out factors to be taken into account in cases where there is a recognisable psychiatric injury. These are:

(i) the injured person's ability to cope with life, education and work;

(ii) the effect on the injured person's relationships with family, friends, and those with whom he or she comes into contact;
(iii) the extent to which treatment would be successful;
(iv) future vulnerability;
(v) prognosis;
(vi) whether medical help has been sought.

100. The Judicial College Guidelines give four categories of compensation for psychiatric damage generally:

(a) Severe;
(b) Moderately severe;
(c) Moderate; and
(d) Less severe.

101. The Guidelines says that 'cases of work-related stress resulting in a permanent or long-standing disability preventing a return to comparable employment would appear to come within' the 'moderately severe' category, the bracket for which is £19,070 to £54,830. It says that in moderate cases, 'while there have been the sort of problems associated with factors (i) to (iv) above, there will have been marked improvement by trial and the prognosis will be good'. Cases of work-related stress may fall within this category if symptoms are not prolonged. The bracket for awards is £5,860 to £19,070.

102. When making awards for non-pecuniary losses, the tribunal must take care not to conflate the different types of award nor to allow double recovery (*HM Prison Service v Salmon [2001] IRLR 425, Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871*).

Acas Code of Practice

103. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides:

> *"If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*
>
> *(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*
> *(b) the employer has failed to comply with that Code in relation to that matter, and*
> *(c) that failure was unreasonable,*
>
> *the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."*

104. Section 207A applies to proceedings listed in Schedule A2, which includes claims for discrimination at work.

Interest

105. Interest on discrimination awards is provided for in the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The regulations give tribunals the power to award interest on the claimant's losses as part of the compensation for discrimination.

106. For injury to feelings, interest normally runs from the date of the discrimination to the date of calculation (regulation 6(1)(a)). For all other awards of damages, interest normally runs from the "mid-point" between the date of the discrimination and the date of calculation (regulation 6(1)(b)). However, the tribunal may refuse to award interest, or may calculate interest by reference to a different period, if it believes that serious injustice would be caused if the usual rules were applied (regulation 6(3)).

Grossing up for taxation

107. Grossing up is an exercise to calculate the tax which will be payable on the award. The exercise is necessary to ensure that the claimant is properly compensated, because the figures used to calculate the losses are net figures which do not take into account the amount of tax which will have to be paid on the award. The assessment of the tax payable in the grossing up exercise is an estimate on broad lines (*British Transport Commissioner v Gourley* [1955] UKHL 4).

108. Earnings in relation to employment, including salary, are taxable as employment income under Part 2 and section 62 of the Income Tax (Earnings and Pensions) Act 2003.

109. Section 62 may also apply to any payments of compensation which are in respect of amounts to which the employee would have been entitled 'but for discrimination'. In *Pettigrew v HMRC* (2018 TC 06473) a part-time judge received compensation for unequal pay because he had been underpaid compared to full-time colleagues. Applying *Mairs v Haughey* (1993 BTC 339), the First-Tier Tribunal found that the compensation should derive its character from the nature of the payment it replaces (which in that case would have been an emolument from employment and was therefore earnings). It also held that an 'interest-like' payment paid to compensate for the delayed payment of salary was taxable as interest under s369 of the Income Tax (Trading and Other Income) Act 2005.

110. Awards which do not represent employment earnings under section 62 but which are connected with the termination of employment are taxable under Chapter 3 of Part 6 of the Income Tax (Earnings and Pensions) Act 2003. Section 401 says:

> *"1) This Chapter applies to payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with—*
> *(a) the termination of a person's employment…"*

111. Payments to which section 401(1)(a) applies are called 'termination awards' (section 402A). Section 403 says that termination awards only count as employment income to the extent that they exceed £30,000 (the 'threshold').

112. Awards which are not employment earnings under section 62 and which do not relate to the termination of employment or otherwise fall under Part 6 will not be subject to tax. In *Yorkshire Housing Ltd v Cuerden* UKEAT/0397/09, the EAT accepted that awards for injury to feelings and psychiatric injury in respect of discrimination prior to dismissal were not subject to tax and therefore did not have to be grossed up. The EAT also held in that case that the award for pension loss would be subject to tax and should be grossed up.

Conclusions

113. We have applied these legal principles to our findings of fact and reach the following conclusions on the issues we have to decide on remedy.

Past financial losses during the 2016 sick leave

114. The claimant claims loss of pay during the 2016 sick leave. We have found that this period of sick leave had more than one cause, including the discrimination. When considering how we should compensate the claimant for this loss, we have applied the principles outlined in the case of *Olayemi.* Although those principles were set out in the context of an assessment of damages for a psychiatric injury arising from discrimination and other causes, the principles are the same for the assessment of compensation for financial loss arising from discrimination and other causes.

115. Heart condition: We have found that both anxiety and depression and cardiac problems were significant causes of the claimant's absence during the 2016 sick leave. These conditions were interlinked. The harm we are considering here is the loss of pay during sick leave. It is not possible to separate out the losses during sick leave caused by the anxiety and depression from the losses during sick leave caused by cardiac problems.

116. Depression/anxiety: We have accepted that the claimant was vulnerable to this kind of psychiatric condition because of a number of factors including a moderate pre-disposition, a strong sense of injustice, and sleep apnoea. We do not make any deduction in respect of pre-existing vulnerability (the respondent must take the claimant as it finds him). However, we need to consider the chance that, without the discrimination, the claimant may still have suffered from the psychiatric condition to which he was vulnerable, such that there is a chance that he would have had to take sick leave and incur financial losses during the period from 17 September 2016 to 23 September 2018 (or part of it) in any event. We return to this below.

117. Further, the claimant's depression itself had a number of causes. The claimant has established that the discrimination was a material cause of his

psychiatric condition and therefore of the 2016 sick leave and loss of pay. We have accepted Dr McGillion's evidence that the difficulties he experienced in the workplace after his heart attack in October 2014 played a significant role in his depression. These difficulties in the workplace included the discrimination, as well as other work-related stressors.

118. In addition to the discrimination, there were other material causes for the claimant's sickness absence because of his psychological condition. These were triggers or causes going beyond vulnerability or susceptibility. They included social (non-work) stressors in mid-2016 and other work stressors both prior to and concurrent with the failure to make reasonable adjustments.

119. In relation to these other material causes, we have to consider whether the resultant harm (in this case the loss of sick pay during the 2016 sick leave) is divisible. We take into account Dr McGillion's evidence that the claimant's psychological difficulties are highly complex and multi-factorial, with a cumulative nature. Some of the competing causes are closely related to the discrimination as they arise from work issues and it is difficult to separate out their consequences. We conclude that the claimant's loss of pay because of the 2016 sick leave is not divisible. We cannot separate out the harm for which the respondent is responsible from other harm.

120. To conclude our analysis on this issue, we have come back to the question of what would have happened if the respondent had not discriminated against the claimant. In the context of the claimant's pre-existing vulnerability, we need to consider the chance that i) the claimant's psychological condition would have developed at some point in any event, so that ii) even without the discrimination he would have had to take long term sick leave and suffer loss of pay.

121. In relation to i), we have concluded that it is likely that the claimant would have had psychological problems in any event. He had several pre-existing vulnerabilities. Dr McGillion's view is that without the discrimination, the claimant's depression and anxiety would have been likely to have persisted. There are a number of other factors which could have acted on the claimant's vulnerability and caused the claimant's anxiety and depression to increase in severity even if he had not been subject to discrimination. These include the social and other work stressors we have found to have been other material causes of the claimant's depression.

122. However, in the circumstances of this case, that is not the end of the analysis. We have to go on to question ii), that is to assess the chance that (without the discrimination) the claimant's psychological difficulties would have been sufficiently severe such that he would have been unfit for work and absent on sick leave, leading to loss of salary. Even if, without the discrimination, the claimant would have developed depression and anxiety, it is possible that it could have been managed, for example by medication, so that it did not result in sickness absence and loss of salary. This was the

position in the period from February 2015 to April 2016 and also from September 2018 onwards.

123. Dr McGillion does not say whether, without the discrimination, the claimant's depression and anxiety would have been severe enough to make the claimant unfit for work or for what period. She declined to offer a percentage assessment as to the degree to which the discrimination 'caused' the psychological injury, but her opinion was that the discrimination 'cemented longstanding feelings of injustice' and exacerbated the injury. We have found that the discrimination was a significant factor in the development of the claimant's psychological difficulties from being manageable, to being something which led to him having to take a period of long-term sickness absence.

124. Taking these factors and our findings on the medical evidence in general into account, our assessment is that there is a 20% chance that the claimant's loss of pay during the 2016 sick leave would have occurred in any event. We think it is likely that the claimant would have had an anxiety/depression condition during this period in any event, but we have decided that there is a good chance that it could have been managed such that he was able to continue working, had it not been for the discrimination. Nonetheless, there is some chance, which we have assessed at 20%, that without the discrimination the claimant's psychological difficulties would have reached a level of severity such that he would have been prevented from working during the period from April 2016 to September 2018 and would have suffered loss of pay.

125. We need to apply this percentage to the claimant's past financial losses and pension losses, to reflect our conclusion of the chance that the claimant would have suffered these losses in any event.

<u>The claimant's financial losses during sick leave in 2016 to 2018</u>

126. We have next calculated the claimant's loss of earnings during the 2016 sick leave.

127. 13 April 2016 to 16 September 2016: The claimant had no loss of earnings during this period as he was in receipt of full pay during this part of his sickness absence.

128. 17 September 2016 to 23 September 2018: The claimant was not in receipt of full pay during this period (105.15 weeks). His normal net weekly pay was £763.92. We have found that the claimant was not working overtime or Saturday working prior to this period of sickness absence. If he had been at work, the claimant would have been unlikely to have worked these additional hours, and so the claimant has not suffered any loss of overtime or Saturday working pay in this period. Total losses are £763.92 x 105.15 = £80,326.18.

129. From this total must be deducted payments the claimant received during this time:

129.1. The claimant received sick pay, statutory sick pay and annual leave from the respondent. We have found that in total he received £31,509.31.
129.2. The claimant must also give credit for benefits received during this period. We have found the claimant received £8,328.59 in ESA payments.
129.3. The claimant must also give credit for £280 income from taxi driving during this period.

130. The claimant is not required to give credit for the payments he received under his Legal and General income protection policy, as he funded this policy himself. No credit has to be given for sums received through insurance bought by the employee (*Parry v Cleaver* [1969] 1 All ER 555).

131. Total past losses after sums received in mitigation are £40,208.29.

132. To these losses we have applied the 20% reduction which we have assessed as appropriate to reflect the chance that the claimant would have suffered these losses by being on sick leave in any event, even if the discrimination had not taken place. This gives a total of £32,166.63 in respect of past financial losses for the period of sick leave from April 2016 to September 2018 as follows:

Table 1: Past financial losses from 2016 to 2018 before interest		
Losses 17 Sept 2016 to 23 Sept 2018	£80,326.19	
Less sums paid by the respondent	£31,509.31	
Less benefits received	£8,328.59	
Less income from taxi driving	£280.00	
Total		£40,208.29
Reduced by 20% to reflect chance of loss in any event		£32,166.63

The claimant's financial losses during the 2019 sick leave

133. We have found that the claimant had a further period of unpaid sick leave from 13 July 2019 to 23 April 2020, the 2019 sick leave. This was the period between his cardiac surgery and his dismissal. We have found that the claimant was not entitled to paid sick leave during this period because there was an overriding maximum entitlement of 365 days paid sick leave in a 4 year rolling period, and the 2016 sick leave meant that he had exhausted this entitlement.

134. The claimant seeks compensation for loss of pay during this period in his schedules of loss (page 93). The discrimination was not a material cause of the 2019 sick leave but we accept that the loss of pay during the 2019 sick leave is a loss flowing from the discrimination. This is because, if the claimant had not had the 2016 sick leave, he would otherwise have had his full sick pay entitlement during the 2019 sick leave. Before the 2016 sick leave, his previous period of sickness absence finished in March 2015, that is more than 4 years before July 2019.

135. We have found that the discrimination was a material cause of the 2016 sick leave, and of the loss of pay during that period. We have decided that the harm flowing from the discrimination and other causes is not divisible. The discrimination was therefore also a material cause of the additional loss of sick pay during the 2019 sick leave. The loss of pay during the 2019 sick leave flowed from the discrimination which was a material cause of the 2016 sick leave. Again, we do not consider the resulting harm in relation to the losses for the 2019 sick leave to be divisible, for the same reasons set out above in relation to the 2016 sick leave.

136. The period from 13 July 2019 to 23 April 2020 is a period of 40 weeks. The claimant's weekly pay was £763.92. Loss for this period are 26 weeks at full pay = £19,861.92 and 14 weeks at half pay = £5,347.44. In total the loss of pay for this period is £25,209.36. There is no loss of overtime pay or Saturday pay as the claimant would not have been working overtime or doing Saturday working as he was on sick leave for reasons unconnected with the discrimination.

137. From the loss of pay during the 2019 sick leave, we deduct the sums received from the respondent in this period, that is SSP of £188.50 in July 2019 and net SSP and pay for annual leave of £6,192.92 from 1 August 2019 to June 2020. In total, the claimant received £6,381.42 from the respondent during the 2019 sick leave.

138. The claimant also received ESA payments of £438 and £70 income from taxi driving which must also be deducted.

139. The claimant's loss of pay during the period 13 July 2019 to 23 April 2020 was therefore £25,209.36 - £6,381.42 - £438 - £70 = £18,319.94.

140. We have applied a 20% reduction to this figure. This is to reflect our assessment explained above that there was a 20% chance that the claimant would have had the 2016 sick leave in any event, even if he had not been subject to discrimination. In that case, he would not have been entitled to sick pay in the 2019 sick leave; the same reduction must be applied to losses for the 2019 sick leave to reflect this chance. This gives losses for this period in the sum of £14,655.95.

141. Total financial losses in respect of both periods of sick leave, after the 20% reduction, are £32,166.63 + £14,655.95 = £46,822.58.

Interest on past financial losses

142. Interest on financial loss is payable at a rate of 8% from the midpoint of the period which runs from the date of the discrimination. The act of discrimination was the admitted failure to make adjustments. That was accepted to have begun in the month of September 2015. No date in September was admitted. We have decided to award interest from the

midpoint of the period which runs from 30 September 2015, that is from the end of the month in which the respondent admits that the failure began.

143. Ms Hayward said that interest should not be awarded to the date of calculation. She said interest should only be awarded until the date on which a remedy hearing could have been held if the claimant had not chosen to pursue those elements of his claim which the respondent had not admitted. She suggested that an appropriate date would be 2 November 2019.

144. It is right that a remedy hearing could have been held sooner if the claimant had not continued with the remainder of his claims after the respondent's admissions in July 2019. However, we have decided that it was not unreasonable for him to continue with his claims. We take into account when reaching that decision that the claimant was unrepresented until this remedy hearing and that there have been a number of different causes of the regrettable delay between the respondent's admissions and this remedy hearing, including a postponement because of the claimant's ill health and delays because of the pandemic. One of the respondent's admissions was not made until the conclusion of the liability hearing. We do not consider that there would be a serious injustice if interest were awarded to the date of calculation.

145. We award interest to the date of calculation which is 27 February 2023. The interest calculation is below:

Table 2: interest on past financial loss	
Interest start date	30 September 2015
Date of calculation	27 February 2023
Number of days	2,708
Number of days to midpoint	1,354
Daily rate of interest	0.08 x £46,822.58/365
Total interest calculation	1,354 days x daily rate of interest
Total interest	£13,895.40

146. The interest on past financial loss is £13,895.40.

Loss of pension

147. The claimant was a member of a defined benefit pension scheme.

148. The Employment Tribunals Principles for Compensating Pension Loss (Fourth Edition, Third Revision, 2021) explain that where the period of defined benefit pension loss to be compensated is relatively short, it can be appropriate to use the contributions method (rather than the method used for complex defined benefit cases) (paragraphs 5.30 to 5.40). The principles suggest that, as a rule of thumb, a period of 12 months would probably be a short period for which the contributions method would be appropriate, although in cases involving mitigation with equivalent benefits, the tribunal should be alert to a change in the value of the benefits. A period of 18 months or more would not be short.

149. In his schedule of loss the claimant took the approach of calculating pension loss based on a monthly contribution. The respondent accepted the claimant's figure for monthly pension loss and suggested that the simpler contributions approach would be appropriate if the period of compensation for pension loss was short. We heard no other evidence about any change in the value of the claimant's benefits as a result of these periods of sickness absence and no evidence about how loss should be calculated if the complex defined benefit method were used.

150. The first period of pension loss here is the 2016 unpaid sick leave, from 17 September 2016 to 23 September 2018, that is 105.15 weeks or around 24 months. This is not a case involving mitigation with equivalent benefits: the claimant remained in the scheme, and after this period contributions to the claimant's pension recommenced at the normal rate. There is a further period of loss of pension for the 2019 sick leave, from 13 July 2019 to 23 April 2020, that is 40 weeks or 9 months. After this second period of sick leave the claimant's membership of the scheme ended when he was dismissed (the dismissal was not part of the admitted discrimination or the claimant's claim).

151. The periods of loss are longer than the rule of thumb suggested in the principles, but they are defined periods of loss. The claimant's membership of the scheme recommenced after the first, and ended after the second for reasons unrelated to the discrimination.

152. In considering how we should approach pension loss, we took into account the overriding objective and the need for proportionality and avoiding delay. We do not have sufficient evidence to use the complex approach for calculating pension loss. Adopting the more complex approach would require a further hearing. There is benefit to both parties of resolving the remedy issues without a further hearing, particularly given the long-running nature of this case, and the medical evidence that the claimant's recovery cannot start while the tribunal proceedings are ongoing.

153. We have decided in these circumstances and in light of the approach suggested by the parties that it is appropriate to use the contributions method in this case. The weekly pension loss has been agreed as £88.60. Pension loss runs for 105.15 weeks: £88.60 x 105.15 = £9,316.29 and for a further 40 weeks: £88.60 x 40 = £3,544. In total, pension loss is £12,860.29.

154. The 20% reduction must be applied to pension loss, as well as loss of salary. This is to take into account our assessment of the chance that, even without the discrimination, the claimant would have had this pension loss in any event, arising from the 2016 sick leave and the 2019 sick leave. After the 20% reduction, pension losses are £10,288.23.

155. Pension loss is a form of future loss and interest is not payable on it.

Claim for other periods of loss and future loss

156. The claimant returned to work in a new role with reasonable adjustments on 24 September 2018. He reverted to full pay on that date, and remained on full pay until he commenced a period of unpaid sick leave on 13 July 2019.

157. The claimant had no financial losses arising from the period from 24 September 2018 to 13 July 2019.

158. The loss of pay during sick leave from 13 July 2019 to 23 April 2020 was a loss flowing from the discrimination, as explained above, because the claimant had exhausted his entitlement to sick pay when on a period of sick leave in respect of which we have found the discrimination was a material cause. We have included those losses in our calculations above.

159. Other than this, the claimant's losses arising from the admitted discrimination ceased on 24 September 2018 when he returned to work to a role with reasonable adjustments. Losses following his dismissal in April 2020 were not caused by the discrimination. The tribunal in the fourth claim found that there was no failure to make reasonable adjustments in respect of the 2019 sick leave.

160. For these reasons no award is made in respect of future loss.

Psychiatric injury

161. This element of the award reflects the psychiatric injury to the claimant caused by the discrimination. We have accepted the evidence of Dr McGillion that the admitted discrimination caused a psychiatric injury, namely the exacerbation of the claimant's pre-existing depression. There were other causes for the claimant's psychiatric injury; we do not make any award in respect of those.

162. We have decided that, unlike the loss of pay flowing from the claimant's psychiatric ill health, the psychiatric injury is divisible, that is we can identify the extent to which the discrimination injured the claimant separately from the extent to which other causes did. This is because Dr McGillion has identified the injury to the claimant which was specifically caused by the respondent's discriminatory acts as a separate exacerbation injury.

163. Chapter 4(A) of the Judicial College Guidelines for Assessment of Damages (Psychiatric Injury and Damage) (the 'Guidelines') explains the factors to be taken into account in valuing claims of this nature. Ranges of awards are described as i) less severe, ii) moderate, iii) moderately severe, and iv) severe.

164. We considered the factors in the Guidance, noting first that this is a complaint of work-related stress and that work-related stress is mentioned in both the moderate and moderately severe categories of the Guidance. We had no evidence that the exacerbation of the claimant's pre-existing depression by the discrimination itself caused long-standing disability

preventing a return to comparable employment, and the expert evidence was that, but for the admitted discrimination, it is likely that the claimant's depression and anxiety would have persisted. Dr McGillion's view is that the claimant will experience some improvement in his mood once his claim is over, and that with adequate therapy and support his depression is unlikely to be an obstacle to him engaging in some form of work.

165. We have accepted Dr McGillion's evidence that exacerbation caused by the discrimination fell within the mild to moderate range. Dr McGillion does not use the names of the categories in the Guidelines in her assessment of the injury caused specifically by the respondent. She says the injury is 'mild to moderate' while the categories in the Guidelines are i) less severe ii) moderate iii) moderately severe and iv) severe. However, we conclude based on Dr McGillion's description and the fact that the injury is an exacerbation of a pre-existing injury, that the most appropriate category in the claimant's case is the moderate category. Given the description of the injury as 'mild to moderate', we have decided that an award in the bottom part of that range is appropriate.

166. We also bear in mind that we are making a separate award for injury to feelings, and we need to avoid compensating the claimant twice for the same injury.

167. We award £8,000 in respect of the exacerbation of the claimant's psychiatric injury which was specifically caused by the respondent.

168. We do not need to make any reduction to account for the other causes of the claimant's psychiatric injury or for the chance that the claimant would have had a psychiatric injury in any event, because our award is in respect of the specific additional injury to the claimant caused by the discrimination.

Interest on psychiatric injury

169. Interest on an award for psychiatric injury is payable at a rate of 8% from the midpoint between the date of the discrimination and the date of calculation (regulation 6(1)(b) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996). The act of discrimination was the admitted failure to make adjustments which began in September 2015. We award interest on this element from 30 September 2015.

170. For the reasons set out above in relation to interest on financial loss, we award interest to the date of calculation which is 27 February 2023. The interest calculation is below:

Table 3: interest on award for psychiatric injury	
Interest start date	30 September 2015
Date of calculation	27 February 2023
Number of days	2,708
Midpoint	1,354
Daily rate of interest	0.08 x £8,000/365

Total interest calculation	1,354 days x daily rate of interest
Total interest	£2,374.14

171. The interest on this element is £2,374.14.

Injury to feelings

172. In his updated schedule of loss, the claimant said that the injury to feelings award should be £45,600. In the counter-schedule, the respondent said that the injury to feelings award should be £13,000 to £20,000. In her submissions Ms Hayward said that having seen the claimant's remedy statement, an award of £13,000 would be appropriate.

173. An injury to feelings award is to compensate the claimant for injured feelings: to assess this we have to consider the effect of the admitted discrimination on the claimant's feelings. We have found that the admitted discrimination made the claimant feel unsupported and vulnerable, angry and upset. We have found that he felt his disability was ignored and that he had to battle to explain it. We have also found that the failure to make reasonable adjustments and the removal of the claimant from court duties affected his self-confidence and self-belief.

174. As we have made an award for psychiatric injury, we need to be careful to avoid overlap between that award and an award for injury to feelings. We have decided that the injuries to the claimant's feelings we have found are separate from the claimant's psychiatric injury. They can be the subject of an award for injury to feelings.

175. We have in mind that the claimant's feelings were also injured by other work-related matters which were not the subject of the admitted discrimination (such as complaints in 2016 and the conduct which we found not to amount to discrimination). These matters as well as the discrimination contributed to the claimant's upset and injured feelings which we must not include in the award for injury to feelings.

176. Having considered these factors, we have decided that the appropriate award to reflect the injury to the claimant's feelings caused by the admitted discrimination is an award in the middle Vento band.

177. The uprated Vento bands set out in the Presidential Guidance applied to claims presented on or after 11 September 2017. The claimant's third claim was presented after this date; it included complaints which were the subject of the respondent's admissions. We accept the suggestion in Ms Hayward's submissions that these uprated bands should be used in the claimant's case even though his first claim was presented before 11 September 2017. This is because it is not possible for us to make separate assessments of the injuries to the claimant's feelings caused by the admitted discrimination in his first and third claims.

178. The middle Vento band as uprated by the Presidential Guidance of September 2017 was £8,400 to £25,200. We have decided to make an award in the middle of that band, that is £16,800.

Interest on injury to feelings

179. The period for which interest on injury to feelings is payable is longer than for other sums of damages, compensation or arrears of pay. It is payable for the whole period from the date of the discrimination to the date of calculation, not the midpoint (regulation 6(1)(a) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996). The rate is also 8%.

180. Here, the act of discrimination was the admitted failure to make adjustments which began in September 2015. We award interest on the award for injury to feelings from 30 September 2015.

181. For the reasons set out above in relation to interest on financial loss, we award interest to the date of calculation which is 27 February 2023. The interest calculation is below:

Table 4: interest on award for injury to feelings	
Interest start date	30 September 2015
Date of calculation	27 February 2023
Number of days	2,708
Daily rate of interest	0.08 x £16,800/365
Total interest calculation	2,708 days x daily rate of interest
Total interest	£9,971.38

182. The interest on this element is £9,971.38.

Treatment costs

183. Dr McGillion has recommended that once the tribunal claim is concluded, the claimant should access a course of 18-20 sessions of CBT, ACT or EMDR, both to help him adjust to living with his chronic health conditions, and to process the stress he has been under for the last eight years. That stress would include but not be limited to the stress of the discrimination.

184. The claimant said that we should award these costs based on a rate of £300 per session. He did not provide any evidence to support this rate. The respondent said that costs should be £110 per session, based on the midpoint between the normal fees in the claimant's area, as identified by the respondent in an internet search, set out in the respondent's submissions. We accept the rate suggested by the respondent, as it is supported by evidence.

185. In his schedule of loss, the claimant sought the costs of 12 sessions. We accept that this is a reasonable broad-brush reflection of the proportion of the 18-20 sessions which might be required in relation to injury arising from

the discrimination, discounting 6-8 sessions as those required in relation to factors other than the discrimination such as adjustment to chronic health conditions and other stressors.

186. The award in relation to treatment costs is £110 x 12 = £1,320.

187. No interest is payable on this element, as it represents payment for future treatment costs.

Acas uplift

188. Under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 we may increase any award by no more than 25% where it appears to us that the employer has failed to comply with a relevant Acas code of practice, and that the failure was unreasonable.

189. The Acas Code of Practice on Grievance and Disciplinary Procedures applied to the claimant's grievances which the claimant made in early 2016.

190. In his schedule of loss the claimant suggested that any award of notice pay should be increased by 25% because of a refusal to follow the Acas Code of Practice (page 95, footnote 10). There is no claim for notice pay before us, as we explain below, so we do not have the power to make any award in respect of notice pay.

191. The claimant does not suggest that any other part of the award should be increased because of a failure to comply with the Acas Code of Practice. He has not put forward any details as to how he says the respondent failed to comply with the Acas Code of Practice or why any failure was an unreasonable failure.

192. For completeness, we have considered whether the respondent has unreasonably failed to comply with the Acas Code of Practice on Grievance and Disciplinary Procedures when dealing with the claimant's grievance. We have concluded that it did not. We found that the respondent held a meeting with the claimant to discuss his grievance, decided on appropriate action and communicated that decision to the claimant in writing, gave the claimant the opportunity to appeal the decision and communicated the appeal outcomes to the claimant in writing. There was no evidence of any failure to allow the claimant to be accompanied.

193. The Code of Practice provides that steps, including the meeting and communication of decisions, should be taken 'without unreasonable delay'. There were delays in the process in the claimant's case, but we do not consider any of them to have been unreasonable. There were good reasons for the delays, including the need to appoint an appropriate investigating officer, the claimant's sickness absence, and the holidays, sickness absence or work commitments of other witnesses and the investigating officer. It was also reasonable for the investigation to have taken longer than in other cases, because of the number of complaints being raised.

194. Therefore, we have not made any increase of the award in this respect, as we have not found there to have been any unreasonable failure to comply with the relevant Acas Code of Practice.

Summary

195. A summary of the award is set out below.

Table 5: Summary of award before grossing up		
Past financial losses	£46,822.58	
Interest on past financial losses	£13,895.40	
Pension loss	£10,288.23	
Psychiatric injury	£8,000.00	
Interest on psychiatric injury	£2,374.14	
Injury to feelings	£16,800.00	
Interest on injury to feelings	£9,971.38	
Treatment costs	£1,320.00	
Total		£109,471.73

Taxation

196. We have conducted a grossing up exercise, deciding what tax is likely to be payable on the award and then making an additional award to reflect that so that, after tax, the claimant receives a sum which broadly represents the net sum we have awarded.

197. We have considered each of the elements of the award to decide whether they are likely to be subject to tax as earnings from employment, or termination payments and if so how much should be awarded to ensure the claimant receives the amount we have awarded, after he has paid tax. We have in mind the principle that compensation should derive its character from the nature of the payment it replaces.

198. In respect of the award for past financial losses, like the compensation in *Pettigrew v HMRC,* this element is compensation for pay which would have been received by the claimant as earnings but for the discrimination. The award is made on the basis that, if he had not been subject to unlawful discrimination, the claimant would have been at work and in receipt of full pay, instead of being on sick leave (or that he would have been entitled to sick pay at a later stage if he had not been on sick leave as a result of the discrimination). This element is therefore an emolument of the claimant's employment which is treated as earnings under section 62, and subject to tax. In her submissions, the respondent's counsel accepted that the award for past financial loss will need to be grossed up (paragraph 35).

199. The interest on past financial loss will also be taxable, as interest under s369 of the Income Tax (Trading and Other Income) Act 2005, and a grossing up exercise will also be required in respect of this interest element.

200. The pension loss element of the award will also be subject to tax and should be grossed up, in line with the approach of the EAT in *Yorkshire Housing Ltd v Cuerden.* Again, the respondent's counsel accepted in her submissions that the award for pension loss should be grossed up.

201. The position in relation to the other elements of the award is different. Neither the injury to feelings or psychiatric injury awards are taxable as earnings from employment under section 62. They are referrable to the discrimination, not the employment. If the claimant had not been subject to discrimination, he would not have received these sums. As the discrimination occurred pre-termination, they are not taxable under section 401 either. The same applies to the award in respect of treatment costs. None of these elements will be taxable and therefore they do not need to be grossed up.

202. In summary, the elements of the award which will be subject to tax are the awards for past financial loss (£46,822.58), interest on past financial loss (£13,895.40) and pension loss (£10,288.23). In total the amount of the award which will be subject to tax is £71,006.21.

203. In the claimant's case, there is no £30,000 threshold before tax is charged, as this threshold only applies in respect of awards on termination or otherwise taxed under section 401, not awards taxable under any other provision. In this case, as explained, the taxable elements of the claimant's award are taxable under other provisions, not under section 401.

204. We need to conduct a broad-brush assessment of the tax which the claimant is likely to pay on the award. In doing this, we assume the claimant has no other taxable income in the current tax year. We were not told of any. We assume that the Employment Support Allowance the claimant receives is income related and therefore not subject to tax.

205. The grossing up calculation is set out below.

Table 6: grossing up for tax (rounded up to the pound)			
Tax rates (£)	Taxable tribunal award (£)		
	gross	tax	net
Personal allowance (0%) to 12,570	12,570	0	12,570
Basic rate (20%) 12,571 to 50,270	37,700	7,540	30,160
Higher rate (40%) 50,271 to 150,000	47,127	18,851	28,276
Totals		26,391	71,006

206. The amount to be added to the claimant's award in respect of tax payable on the award so that, after paying tax he receives the net sum awarded by us, is £26,391.

207. In total, including tax, the award to the claimant is £109,471.73 + £26,391 = £135,862.73.

Notice pay and other claims

208. There is no claim before us in respect of notice pay. The claims were brought before the claimant was dismissed in April 2020. For completeness we record that it was not clear at the remedy hearing whether the claimant has been properly paid his pay in lieu of notice at the time of his dismissal in April 2020. We suggested to the respondent's representative that the respondent might want to look into this to ensure that the claimant has been paid correctly in respect of his notice period, to avoid the need for further litigation which would not be in either party's interest given the length of time which it has taken to resolve these claims.

209. The claimant also claims for holiday pay and loss of statutory rights. There is no claim for holiday pay before us. In any event, the claimant was paid for annual leave for the 2016 and 2019 sick leave. There was no claim before us about annual leave accrued but untaken on dismissal. Loss of statutory rights is an award in respect of unfair dismissal: there is no claim before us relating to dismissal.

210. The claimant also claims an uplift under section 38 of the Employment Act 2002 in respect of a failure to provide a written statement of employment particulars. However, we have found that the claimant was provided with a written statement of employment particulars. We make no award in this respect.

Recommendations

211. The claimant has asked the tribunal to consider making the following recommendations:

    211.1. to prohibit the spread of gossip and rumour about the claimant's reputation as a court advocate relating to complaints made in November 2015;
    211.2. to reinstate the claimant to his old role or to reengage him to a new suitable role;
    211.3. to carry out the recommendation by Dr McGillion that the claimant access a course of 18-20 sessions of psychological therapy (page 1091);
    211.4. to ensure that the recommendations of Melanie Trust, who investigated the claimant's grievance, are implemented.

212. We remind ourselves that a recommendation under section 124 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 claimant of any matter to which the proceedings relate.

213. We have considered each of the recommendations sought by the claimant and have reached the following conclusions.

    213.1. We do not consider that we should make a recommendation that the respondent take steps to prohibit the spread of gossip and rumour

about the claimant. This is because such a recommendation would not be likely to obviate or reduce the adverse effect on the claimant. It would be more likely to have the opposite effect. The claimant's concern relates to things that happened over 7 years ago, and discussion about these matters within the respondent is very likely to have reduced or stopped. The complaints were mentioned in the liability judgment but have not been the subject of detailed findings in this claim. If we made the recommendation sought, then in order to act on it, the respondent would have to circulate information about the claimant, in order to make it known that discussion around it is prohibited. That seems likely to be counter-productive: if the respondent took this step now, it would be more likely to reactivate interest, and increase the spread of gossip and rumour than to decrease it. We have decided not to make this recommendation.

213.2. We will not make a recommendation that the respondent should reinstate the claimant to his old role or reengage him in a new suitable role. In light of our findings about the claimant's deep sense of injustice, his loss of faith in the respondent and the unsuccessful attempt to return to work in a new role in CPSD, we do not consider that reinstatement or re-engagement would obviate or reduce the adverse effect on the claimant.

213.3. We do not need to make a recommendation that Dr McGillion's recommendation for future psychological therapy be carried out by the respondent. We have included treatment costs in respect of this therapy in the compensation payable to the claimant. It will be up to the claimant to arrange this therapy as recommended by Dr McGillion.

213.4. Finally, the claimant seeks a recommendation that the recommendations made in Ms Trust's report be carried out. Ms Trust made two recommendations in January 2018: first, that discussions be held with the claimant and, secondly, that the claimant's line manager Ms Phillips should receive management training and support. The recommendation that discussions be held with the claimant is out of date and no longer appropriate, as the claimant no longer works for the respondent, and there would be no purpose or benefit to such discussions. We heard no evidence about the second recommendation at the hearing but, as some years have now passed, this is also likely to be out of date. We have decided that a recommendation in the form sought is not likely to be appropriate. However, we have decided that the claimant would be likely to derive some comfort from knowing that the respondent has given thought to whether appropriate training has been put in place for managers involved with these claims; this would reduce the adverse effect of the discrimination on him. We anticipate that this could be considered by the respondent as part of any learning of lessons process which it decides to undertake in light of the conclusion of these claims. For these reasons, we recommend that within 6 weeks of the date on which this judgment and reasons is sent to the parties, the respondent should, in respect of managers referred to in our liability judgment and reasons as having been involved with the claimant's

case from September 2015 to 24 September 2018 (and who remain employed by the respondent), review whether its training programmes have been implemented and put in place any additional training it considers would be appropriate for them.

Employment Judge Hawksworth

Date: 6 March 2023

Judgment and Reasons

Sent to the parties on: 13 March 2023

For the Tribunal Office