EMPLOYMENT TRIBUNALS

Claimant: Mr T Myles

Respondent: Leadec Ltd

HELD AT: Manchester (by CVP) **ON:** 27 July 2022, 6 October 2022
25 October 2022, 6 and 9 December 2022 (In Chambers)

BEFORE: Employment Judge Ainscough
Mr A Egerton
Mr R Cunningham

REPRESENTATION:

Claimant: Ms Kponou, Solicitor
Respondent: Mr Denis, Counsel

JUDGMENT

1. In accordance with Section 119 of the Employment Rights Act 1996 the respondent is ordered to pay a basic award of £13,716.

2. In accordance with Section 123 of the Employment Rights Act 1996 the respondent is ordered to pay to the claimant an award for loss of statutory rights of £600.

3. In accordance with Section 124 of the Equality Act 2010 the respondent is ordered to pay the following to the claimant:

   a. Injury to feelings £52,135.44

b.	Aggravated damages	£8421.36
c.	Loss of wages	£172,622.90
d.	Loss of pension	£7256.03

REASONS

Introduction

1. The claimant was successful with his claims for unfair dismissal and disability discrimination. The judgment was sent to the parties on 25 January 2022.

2. The Tribunal heard evidence and submissions from the parties on the issue of remedy on 27 July 2022 and 6 October 2022. The Tribunal sat in chambers to make this decision on 25 October 2022, 6 December 2022 and 9 December 2022.

Issues

3. At the outset of the remedy hearing, it was agreed between the parties that the issues to be determined by the Tribunal were as follows:

1) Whether the claimant's financial losses flowed from the finding of unfair dismissal or the finding of unlawful discrimination.

2) The rate of pay and the rate of pension contributions.

3) Whether the claimant had mitigated his loss.

4) Whether there would be any uplift in light of the finding of a breach of the ACAS procedures and

5) The level of award for injury to feelings.

4. By the time the parties made their submissions following evidence, it was agreed that there would be a sixth issue as to whether the Employment Protection (Recoupment of Benefits) Regulations 1996 applied.

Evidence

5. The parties agreed a bundle of some 521 pages. At the outset of the hearing the claimant's representative submitted a revised Schedule of Loss with additional documents and a short break was needed for both the respondent's representative and the Tribunal to read the same. The respondent's representative had already prepared a Counter-Schedule of Loss with an Annex for the Tribunal's consideration.

6. The claimant submitted a remedy witness statement and was subject to cross-examination and questions from the Tribunal. The claimant also submitted witness statements in support from Dorothy Johnson, Sandra Williams and Gillian Miles. The Tribunal read those statements and those witnesses were not required to give live evidence.

7. The respondent submitted witness statements from Emma Clausson – Human Resources Advisor and Chris Powell – Site Contract Manager. Both witnesses gave live evidence and were subject to cross-examination and questions from the Tribunal.

Relevant findings of fact

February 2019 – May 2019

8. The claimant was dismissed on 12 February 2019 by which date, he was 55 years old.

9. On 13 February 2019 the claimant had a GP appointment. The GP record reveals that the claimant was feeling better, and the medication was working. There was no discussion about the claimant losing his job. However, there was also a significant increase in the medication from 50mg to 100mg.

10. By 1 April 2019 the GP records that the claimant is of low mood because of a road traffic accident and increased the claimant's medication to 150mg.

11. The claimant's counterbalance fork-lift truck certificate of training, which was obtained on 12 January 2017, was due to expire on 12 January 2020. There was, therefore, a period of 11 months after the claimant's dismissal during which his counterbalance fork-lift truck licence was valid.

12. The claimant held a copy of the fork-lift truck licence. The certificate of training was retained by the respondent. The claimant confirmed he attended a refresher course every three years.

13. In evidence the claimant admitted that he had the licence at home but could not find it and had not tried to find it since his dismissal. However, it was also the claimant's evidence that Andrew Dobson, the appeal manager, had told him that the licence belonged to the respondent and the claimant could not use it after his dismissal.

14. This interaction is not recorded in the appeal hearing notes. The Tribunal did not hear any evidence from Andrew Dobson on this point. The Tribunal recalls that Andrew Dobson did not have a positive view of the claimant. The Tribunal finds that the claimant was truthful about this point.

15. The Tribunal therefore determines on the balance of probabilities that Andrew Dobson did say this to the claimant at the end of the appeal hearing. As a result, the claimant was looking for jobs that did not require a counterbalance fork-lift truck licence.

16. The claimant had never had to move to another job since he started employment. Each time he worked for a different company it was because there had been a transfer of his employment to a new company. By the end of the disciplinary process the claimant had lost his job and he had accepted what had been said to him about his licence. The Tribunal determines that it was reasonable that the claimant did not query what he had been told.

17. The claimant's fit note did not expire until 4 June 2019, and it was therefore reasonable for the claimant not to start work prior to this date. However, the claimant

did give evidence that he was still making calls about jobs prior to this date. The claimant gave evidence that he could not afford to take a new fork-lift course to obtain a new licence. The Tribunal read evidence that the claimant's partner Sandra applied for a job at Tesco on the claimant's behalf. The claimant took a test at Tesco but could not finish it.

18. The Tribunal finds that between February 2019 to May 2019 the claimant applied for approximately 24 jobs. The claimant followed leads that had been given to him by his friends but was unable to look at job adverts and complete application forms.

May 2019 – January 2020

19. From 30 May 2019 until 13 January 2020 the claimant was a carer for his granddaughter and received Carers' Allowance. As a result, during this period, the claimant did not apply for jobs. It was the claimant's evidence and that of his family, that during this period he was rebuilding his confidence and the Tribunal determines that that was a reasonable position to take given the nature of the claimant's dismissal.

January 2020 – March 2020

20. Between 13 January 2020 to 6 March 2020 the claimant had stopped caring for his granddaughter. From 6 March 2020 the claimant began volunteering as a handyman at a care home where his daughter worked. The Tribunal determines that this was a reasonable position for the claimant to take given that he was seeking to rebuild his confidence and was unable to apply for jobs or take tests for jobs that required reading and writing.

March 2020 – December 2020

21. From 6 March 2020 to 21 December 2020 the claimant volunteered at the care home.

December 2020 - date

22. Since 21 December 2020 the claimant has received wages for his work as a handyman at the care home and continues to work in this role.

23. The claimant has been in receipt of Universal Credit and Personal Independence Payment since his dismissal.

Rate of pay

24. Emma Clausson gave evidence that when the claimant's employment was terminated, he received £15.45 per hour which equated to gross weekly pay of £618. In his Schedule of Loss, the claimant asserts that his gross weekly pay was £667.

25. The rate of £15.45 was recorded in the claimant's payslip The claimant was unable to provide any evidence of why his hourly rate was greater than £15.45. The Tribunal accepts Emma Clausson's evidence and concludes that the claimant's rate of pay on the date of termination was £15.45.

26. The Tribunal also determined that on 11 May 2020 there was a reorganisation at the respondent's business. Following the reorganisation, the number of balers reduced from six to four because two employees took voluntary redundancy.

27. From 11 May 2020 the claimant's hourly rate of pay would have been £13.16. From 1 April 2021 this rate increased to £13.58 and from 1 April 2022 this rate increased to £13.92. In addition, the claimant's hours would have reduced from 40 hours per week to 37.5 hours per week. The Tribunal accepts the evidence of Emma Clausson that there was a reduction in the rate because of the loss of the premium for the nightshift.

Pension

28. From 6 April 2019 employees qualified for auto-enrolment into a pension scheme. On auto-enrolment every employer contributes at least 3% of an employee's gross pay to a pension scheme. Therefore, between February 2019 to April 2019 the pension contributions made by an employer could have been less than 3%.

29. It was the evidence of Emma Clausson that from 6 April 2019 auto-enrolment applied to the respondent's pension scheme and all employees would have received a 3% contribution.

30. The claimant gave evidence that he already received a 3% contribution prior to his termination of employment in February 2019. The respondent did not have access to the claimant's personnel file and was unable to contradict the claimant's evidence.

31. However, it can be seen from the payslips that the position for the claimant prior to his dismissal was that he received a 2% contribution of his gross pay. Therefore, the Tribunal concludes that had the claimant remained in employment between the termination date and 6 April 2019 he would have continued to receive a 2% contribution to his pension. That contribution would have increased to 3% from 6 April 2019 on auto-enrolment.

Mitigation

32. The respondent provided a number of fork-lift truck vacancies which it says the claimant could and should have applied for in order to mitigate his loss. The Tribunal notes that all of the vacancies provided by the respondent are dated 2022. There is no evidence of the vacancies that were available from the claimant's termination date on 12 February 2019. Despite this, the Tribunal has considered the range of vacancies that were available and has made the following findings:

a. At page 342 is a vacancy for a counterbalance fork-lift truck driver. The second bullet point of the advert reveals an applicant will need to be able to read.

b. At page 343 is a vacancy for the servicing of water coolers. This role would require industry training which would include reading and writing.

c. At page 344 is a vacancy for the shopping channel QVC. Training would be required for this role.

d. At page 345 is a vacancy which requires co-ordination of paperwork and maintaining of records and data.

e. At page 348 is a vacancy which requires the applicant to have 5 GCSEs.

f. At page 350 is a vacancy which requires the applicant to have basic computer competence.

g. At page 360 is a vacancy that involves the use of hand-held scanners and a requirement to deal in a specific order, in accordance with procedures.

h. At page 355 is a vacancy specific to the car part industry and is intricate to a production line.

i. At page 352 is a vacancy that is intricate a production line.

33. The Tribunal determines that the claimant only had a licence for a counterbalance fork-lift truck and was therefore only capable of driving this type of fork-lift truck.

34. The Tribunal notes that the claimant is attending literacy classes and at the end of his literacy classes should have basic reading and writing skills. However, the Tribunal determines that all of these vacancies would require the claimant to be more competent with reading and writing.

35. There is a vacuum of evidence from both parties as to whether the claimant would be capable of securing any of the suggested vacancies with reasonable adjustments. Emma Clausson could only comment on the practice of one large retail employer. The claimant tried to take a test at Tesco but was unable to complete it. The Tribunal has therefore determined that the claimant would not have been capable of succeeding with an application for the suggested roles had he applied for similar jobs in 2019.

Relevant Legal Principles

36. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 of the Employment Rights Act 1996 onwards. Where re-employment is not sought, compensation is awarded through the basic award and compensatory award.

37. The basic award is a mathematical formula determined by section 119:

"(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by —

(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,

(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and

(c) allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) "the appropriate amount" means—

(a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,

(b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and

(c) half a week's pay for a year of employment not within paragraph (a) or (b).

(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years."

38. The compensatory award is primarily governed by section 123 as follows:

"(1) Subject to the provisions of this section and sections 124, 124A and 126 , the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer…."

39. Section 124 provides that the any amount awarded in accordance with section 123 shall not exceed £83,682 (for dismissal prior to 5 April 2019) or 52 weeks' gross pay, whichever is the lower.

40. If a discrimination complaint is well-founded, remedy is determined by section 124 of the Equality Act 2010, which states:

"(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 in which the proceedings relate; and

(b) order the respondent to pay compensation to the complainant."

41. Subsection 6 states:

"The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which may be awarded by the County Court or the Sheriff under section 119."

42. Section 119 of the Equality Act 2010 determines that:

"An award of damages can include compensation for injury to feelings."

43. In the case of **Komeng v Creative Support Limited UKEAT/0275/18/JOJ**, the Employment Appeal Tribunal confirmed that any injury to feelings award must focus on the injury suffered by the claimant and not the Tribunal's view of the gravity of the acts performed by the respondent.

44. In the case of **Prison Service v Johnson [1997] IRLR 162**, the Employment Appeal Tribunal set out general principles to assist Tribunals in assessing injury to feelings awards. Those principles are as follows:

    (1) Injury to feelings award should be compensatory and just to both parties. Such awards cannot punish the discriminator.

    (2) Awards should not be too low that they would diminish the respect of the antidiscrimination legislation. Equally they should be restrained so as not to be excessive.

    (3) Such awards should be similar to those awarded in personal injury cases.

    (4) Tribunals are advised to take into account the value of the sum in everyday life.

    (5) Tribunals need to consider the public respect for the level of awards made.

45. The case of **Vento v The Chief Constable of West Yorkshire Police (No. 2) [2003] IRLR 102** in the Court of Appeal determined that:

    "Injury to feelings awards can compensate for feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression."

46. The Court of Appeal also gave guidance on the bands of compensation that can be awarded for such injury to feelings as follows:

    (a) A top band for the most serious cases where there has been a lengthy campaign of harassment on the ground of sex or race;

    (b) The middle band, to be used for serious cases which do not merit an award in the highest band; and

    (c) The lowest band for less serious cases where there has been a one-off act of discrimination.

47. Following subsequent case law the President of the Employment Tribunal has issued Presidential Guidance on the applicable values to each band which at the time the claimant issued his claim on 25 June 2019 were as follows:

    - Upper band - £26,300 to £44,000
    - Middle band - £8,800 to £26,300
    - Lower band - £900 to £8,800

48. The value of any award in a particular banding will be calculated in accordance with the date on which the claim form was issued.

49. Interest can be awarded on compensation for discrimination, including injury to feelings. Regulation 6(1)(a) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 provides that interest accrues from the date of the discrimination and ends on the date the Tribunal calculates compensation.

50. Where a past financial loss is awarded as part of that discriminatory compensation, the interest will accrue from a mid point between the date of discrimination and the date of calculation.

Submissions

Respondent's submissions

51. It was the respondent's primary submission that the claimant's financial losses accrued from the unfairness of his dismissal rather than any unlawful discrimination. The respondent contended that even if the claimant had not been subject to unlawful discrimination he would have been dismissed.

52. The respondent submitted that the claimant had not acted reasonably in mitigating his loss. It was the respondent's contention that the claimant had not applied for enough new jobs. In addition, the respondent submitted that the claimant could not reasonably have believed that he did not have a fork-lift licence. The respondent contended that the claimant was not a credible witness when he told the Tribunal that the appeal manager had informed him that the licence belonged to the respondent.

53. The respondent submitted that the claimant did not make any effort to mitigate his losses because he was receiving enough money as a handyman and through state benefits.

54. It was the respondent's case that had the claimant made a reasonable effort to mitigate his loss he would have obtained a new role earning national minimum wage within 12 weeks of dismissal and a comparable role earning the same wage to that earned with the respondent 36 weeks later.

55. The respondent maintained that it had provided a plethora of evidence to show that there were a large number of roles paying national minimum wage and further a large number of roles which the claimant was qualified to do as a fork-lift truck driver. The respondent contended that the claimant had always worked and that the evidence given by Miss Clausson was that he would have been assisted in the interview process with his disability.

56. The respondent asked the Tribunal to accept its calculations in regard to the claimant's rate of pay and pension contributions. The respondent relied upon the evidence within the bundle of the claimant's payslips up to the date of dismissal. The respondent accepted that from 6 April 2019 in accordance with the auto-enrolment provisions, the respondent's contribution would have increased to 3%.

57. The Tribunal was also asked to accept the evidence of Miss Clausson that from 11 May 2020 there had been a reorganisation at the respondent's business and the claimant's rate of pay and hours would have decreased.

58. The respondent accepted that it had failed to comply with the ACAS Code for Disciplinary Procedures and that there should be an uplift. It was the respondent's position that the uplift should be no greater than 10%. The respondent submitted that there had been substantial compliance and that the only failure had been in not reading the documents to the claimant during the process.

59. The respondent submitted that the claimant's approach to the injury to feelings award was incorrect. The respondent contended that any injury to feelings award must be a global figure and not for each act of discrimination determined by the Tribunal. The respondent submitted that it was not the failure to make reasonable adjustments that caused the dismissal and therefore the injury to feelings award should be in the region of £10,000. The respondent reminded the Tribunal that it had now issued an apology and reference.

Claimant's Submissions

60. The claimant submitted that whilst the Tribunal did not determine that his dismissal was an act of discrimination, the Tribunal did find that but for discrimination, he would not have been dismissed. The claimant submitted that any financial loss that flowed from his dismissal was because of unlawful acts of discrimination.

61. The claimant submitted that the average weekly pay figure had been based on a 40-week average from the date of the disciplinary procedure up to the date of dismissal, as opposed to the 12-week average used by the respondent.

62. The claimant maintained that the rate of pay should remain as at it was at the date of dismissal because the respondent had not provided any evidence that there had been a reorganisation and a reduction in pay since the claimant's dismissal.

63. The claimant complained that he had no access to his personnel file so was unable to provide evidence of the pension contributions paid during his employment.

64. The claimant submitted that he had reasonably attempted to mitigate his loss. The claimant submitted that caring for his granddaughter and working as a handyman was reasonable in light of the distress caused by his dismissal. The claimant maintained a retirement age of 70 because his job with the respondent was not physically taxing.

65. The claimant submitted that he has only been able to obtain a job as a handyman because his daughter worked at the care home and has been able to implement reasonable adjustments. The claimant submitted that he was working in a safe environment which helped his self-esteem issues.

66. The claimant reminded the Tribunal that the burden of proof was on the respondent to show that he has failed to mitigate his losses. The claimant maintained that the respondent has been unable to provide evidence of vacancies from 2019 and has only provided vacancies from July 2022 that were unsuitable for the claimant. The

claimant concluded that the respondent had not proven a failure to mitigate and had failed to take into account the severity of his disability and the impact this would have on his job search.

67. The claimant asked the Tribunal to consider his medical records when determining the injury to feelings award. The claimant maintained that he was entitled to a separate award for each discriminatory act for tax purposes.

68. The claimant also submitted that he was entitled to aggravated damages because the respondent's apology was only an attempt to mitigate the respondent's own actions.

69. The claimant submitted that the respondent had committed a most serious breach of the ACAS Code and the 25% uplift should apply. The claimant submitted that the respondent had done the bare minimum to show that it had followed a procedure but had no interest in implementing adjustments.

Discussions and Conclusions

A. Causation

70. The Tribunal determined that the denial of reasonable adjustments made the disciplinary procedure an unfair procedure. The Tribunal concluded that it was not just the application of the wrong policy which led to the dismissal but the failure to make reasonable adjustments. The Tribunal did not determine that the claimant would have been dismissed in any event. Therefore, the claimant's losses flow from unlawful discrimination.

B. Injury to Feelings

71. The ET1 claim form was issued on 6 April 2019. Therefore, the Tribunal has used the injury to feelings bandings that existed at the time that the claim was issued.

72. In light of the Tribunal's determination that the failure to make reasonable adjustments did cause the claimant's dismissal the respondent's submission that the injury to feelings award should be limited to £10,000 is rejected.

73. However, the claimant's submission that he should receive an individual award for each element of the injury to feelings award is also rejected. It is not possible to apportion the claimant's hurt feelings in such a way. There will invariably be an overlap of the claimant's upset for each element of his claim.

74. The claimant submitted that he was entitled to £56,400.

75. The Tribunal determined that the respondent took advantage of the claimant's disability. The Tribunal determined that the respondent knew that the claimant would be unable to read the written documentation and he would not be able to understand the proceedings.

76. In an unreported case of **Austin v The Leeds Teaching Hospital NHS Trust (2020)** the claimant had worked at the same employer for 25 years and was 50 years

old when her employment was terminated. The Tribunal found that post dismissal she was isolated although there was a likelihood that she would recover from the distress of her termination. The claimant had a strong bond with where she worked. The claimant felt safe in her role and any new job search was difficult. As a result, the claimant was awarded £30,470.92 for injury to feelings.

77. In the unreported case of **Mattu v University Hospitals Coventry and Warwickshire NHS Trust (2015)** the claimant lost his career and was awarded £30,000.

78. The Tribunal determines that the appropriate award for injury to feelings is £30,000.

C. Whether the claimant took reasonable steps to mitigate his loss

79. Any compensation for financial loss should put the claimant into a position he would have been but for the discriminatory act.

80. The respondent submitted that the claimant's financial loss ran until 12 weeks after termination of employment when, the respondent says, the claimant would have obtained a national minimum wage job. The respondent submitted that it would have taken the claimant an additional 36 weeks (48 weeks after termination of employment) to a find a job with comparable pay to that offered by the respondent after the reorganisation.

81. The burden of proof is on the respondent to show that the claimant has not taken reasonable steps to mitigate his loss.

(i) 12 February 2019 – 21 December 2020

82. When the claimant was dismissed on 12 February 2019, he believed that he did not have a counterbalance fork-lift truck licence. The claimant had a fit note which expired on 4 June 2019 and the Tribunal has concluded that it was reasonable for the claimant to not work during this period. However, from February 2019 to May 2019 the claimant was still applying for jobs despite being under a fit note. The claimant applied for the jobs on the basis he did not believe he had a fork-lift truck licence. From 12 February 2019 to 4 June 2019 the claimant was not capable of mitigating his loss.

83. From 30 May 2019 to 13 January 2020 the claimant was a carer for his granddaughter and received Carers' Allowance. The Tribunal has determined that it was reasonable for the claimant to act as a carer for his granddaughter and receive Carers' Allowance because he was also in receipt of Universal Credit and the Personal Independence Payment. The claimant had applied for jobs with a new skillset but had been unsuccessful.

84. Personal Independence Payment is a payment that is paid to those who have a condition which disadvantages them on a day-to-day basis. The Personal Independence Payment helps that person pay for extra services to minimise that disadvantage. This payment is not an income-based payment and therefore should not be deducted from any income-based award. The Tribunal has determined that during this period the claimant was still recovering from ill health and coming to terms

with his dismissal. The Tribunal therefore concludes that the claimant has not failed to mitigate his loss during this period.

85. From January 2020 to March 2020 the claimant had no income except for state benefits; from March 2020 to 21 December 2020 the claimant worked at a care home on a voluntary basis.

86. The Tribunal has determined that during this period the claimant believed he had no fork-lift truck licence; the claimant had lost his confidence. The claimant was reliant on family and friends to search and apply for jobs. The Tribunal determines that the claimant was trying to rebuild his confidence during this period in order to mitigate his losses.

87. The Tribunal therefore determines that from 12 February 2019 to 21 December 2020 the claimant is entitled to full financial loss minus the amount received for Universal Credit and received by way of Carers' Allowance for this period.

<u>(ii) 21 December 2020 – 27 July 2022</u>

88. From 21 December 2020 the claimant was in receipt of wages for his job as a handyman at the Care Home. The Tribunal accepts that the claimant received an average of £164 per week in this role. The Tribunal has determined on the balance of probabilities that there would have been periods when the claimant was asked to work longer hours in order to help with more extensive maintenance of the care home.

89. In order to determine whether the claimant has mitigated his loss during this period, the Tribunal has considered whether the claimant was capable of earning the national minimum wage during this period.

90. The claimant is attending literacy classes and his skills are improving. Despite obtaining basic literacy skills the claimant is still disadvantaged in applying for jobs and completing any necessary tests to obtain jobs. In addition, the Tribunal has concluded that the claimant will struggle to use computers. The fact that the claimant has been in receipt of Personal Independence Payment during this period means that he is already at a disadvantage in his normal day-to-day life as a result of his disability notwithstanding that any job would demand more of the claimant.

91. The Tribunal has determined that the claimant was not capable of earning a national minimum wage before the remedy hearing on 27 July 2022.

<u>(iii) 27 July 2022 – 7 June 2033</u>

92. The Tribunal determines that once the claimant is in receipt of this judgment, he will be able to move on from his dismissal. However, the Tribunal does not believe that there will be an immediate impact on the claimant.

93. The Tribunal determines that the claimant should be given a period of 12 months after receipt of this judgment to build up his literacy skills and build up his confidence before he will be capable of obtaining a different job to that at the care home.

94. The Tribunal determines that the claimant will not progress beyond a national minimum wage job. Whilst the claimant worked as a counterbalance fork-lift truck driver, his job was that of a cardboard baler rather than moving products around a warehouse within a complex organisational system.

95. The Tribunal is aware of the television presenter Jay Blades and his publicised struggle with illiteracy in his mid-fifties. This individual has had greater opportunity than the claimant to improve his literacy skills but he has struggled in doing so despite having a bigger support network in order to overcome his disability.

96. The Tribunal has determined that the claimant would have continued to work for the respondent until the retirement age of 70. The Tribunal has taken note of the remedy statement. In particular, the Tribunal noted paragraph 3 and paragraph 4 in which the claimant confirmed that the role was not physically demanding. The national retirement age for state pension purposes is currently 67. Whilst the claimant has sciatic and knee pain, there is no suggestion from his GP records that he would not have worked until the age of 70.

97. The respondent has not submitted any evidence to suggest that the claimant would not be capable of working until the age of 70.

98. The Tribunal therefore determines that the claimant would only be capable of achieving a national minimum wage job from March 2024 until his eventual retirement on 7 June 2033 at the age of 70.

99. There is therefore a loss of wages between what the claimant earned/earns as a handyman from January 2021 to March 2024 and what he would have earned with the respondent during the same period. The claimant's loss from what the claimant would have earned with the respondent and what he will earn in national minimum wage will continue from March 2024 until 7 June 2033.

100. Recoupment does not apply to the calculation because the claimant's losses flow from the unlawful acts of discrimination.

D.Pension Loss

101. Up to 21 December 2020 the claimant has suffered full pension loss contributions because he was not in receipt of pension contributions.

102. From 21 December 2020 to January 2024 the claimant should have been enrolled in the auto-enrolment scheme whilst performing the handyman role. Therefore, the claimant's loss for this period will be the difference between those contributions paid into the auto enrolment scheme and the contributions that would have been made by the respondent.

103. From January 2024 until the retirement date of 7 June 2033 the claimant will auto-enrol in a pension scheme whilst performing a national minimum wage role.

104. Therefore, the claimant's loss for this period will be the difference between the contributions that would have been paid into an auto-enrolment scheme by the

respondent and the contributions which will be paid into an auto-enrolment scheme with any new employer.

105. The only information the Tribunal had about pensionable pay is from the respondent at footnote 4 of the Counter-schedule of Loss. This information revealed that the respondent's contributions up to 1 April 2019 were 2% of gross pay based on the payslip from 8 February 2019 at page 197. This records pensionable gross to date as £30,187.77 at 2% which equates to £597.73.

106. The Tribunal was not given any pension documentation to establish whether pensionable gross pay was different to gross pay. The evidence given by the respondent witnesses was that they did not have access to the claimant's records. Therefore, the Tribunal determines that the respondent would pay contributions based on actual gross pay.

E.ACAS Uplift

107. Any ACAS uplift will only apply to the compensation elements of the claim.

108. The Tribunal determines that the respondent did not follow a fair procedure. Information used during the disciplinary process was not read to the claimant. The Tribunal does not agree that there has been substantial compliance with the ACAS Code of Practice.

109. The Tribunal relies upon the findings made from paragraph 174-176 to 190-193 of the liability judgment. Based on these findings the Tribunal determines that the uplift for the failure to follow the proper ACAS procedure is 20%. The respondent had two opportunities to follow a correct and fair procedure and failed to do so and as a result the claimant was dismissed.

F.Aggravated Damages

110. An award for aggravated damages award can be made in addition to an award for injury to feelings award if the Tribunal determines that the respondent's behaviour aggravates the claimant's injured feelings.

111. The Tribunal determines that the dismissal manager took advantage of the fact that the claimant would not know the correct policy to be followed during the disciplinary process.

112. The Tribunal determines that the respondent did not do this in ignorance or because it was insensitive. Instead, the Tribunal determines that this was a deliberate attempt to take advantage of the claimant's disability.

113. The appeal manager failed to correct the approach taken by the dismissal manager and in addition, at the end of the appeal hearing, compounded the claimant's dismissal by telling the claimant that his fork-lift truck licence did not belong to him and could not be used in other employment. The Tribunal determines that this was cruel and unnecessary.

114. The Tribunal determines that the apology letter which arrived on the first day of the remedy hearing, was too little too late and a meagre attempt by the respondent to mitigate. The Tribunal understands why the claimant would be offended by this apology. As a result, the Tribunal awards the claimant £6,000 for aggravated damages.

H. Loss of Statutory Rights

115. The claimant is awarded £500 for a loss of statutory rights. The claimant will not be capable of gaining new employment until March 2024 and will not have the full protection of his statutory rights until March 2026. By this date the claimant will have suffered a loss of statutory rights for approximately 7 years.

I. Interest

116. The claimant will be awarded interest at the rate of 8% in accordance with the Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.

Calculations

Actual Wage Loss

(i) 20 February 2019 – 13 January 2020

The Tribunal determines from looking at the claimant's payslips within the bundle that he was paid for the days of 13, 14, 15, 18, and 19 February 2019. Therefore, the loss period starts from 20 February 2019.

The claimant's gross weekly pay for the period from 20 February 2019 until 11 May 2020 would have been £605.49. The claimant's net weekly pay for this period would have been £485.90.

From 20 February 2019 to 30 May 2019 = 14 weeks at £485.90 = £6,802.60.

From 30 May 2019 to 13 January 2020 = 33 weeks at £485.90 = £16,034.70.

Minus Carer's Allowance of £2,588.30

Minus Universal Credit of £1,134.96

Gives a total loss for this period of **£19,114.04**

(ii) 13 January 2020 to 21 December 2020

From 13 January 2020 to 11 May 2020 = 17 weeks at £485.90 = £8260.30

From 11 May 2020 to 21 December 2020 = 32 weeks at £413 (£13.16 x 37.5 hours = £493 gross weekly pay; £413 net weekly pay) = £13,216

Minus Universal Credit of £5,035.32

Gives a true loss for this period of **£16,440.98**

(iii) 21 December 2020 to 27 July 2022

From 21 December 2020 to 1 April 2021 = 14 weeks at £413 = £5,782

Minus handyman wage of £1,225

Minus Universal Credit of £1,718.43.

Gives true loss for this period of **£2,838.57**

From 1 April 2021 to 1 April 2022 = 52 weeks at £424 (£13.58 x 37.5 hours = £509.25 gross weekly pay; £424 net weekly pay) = £22,048.

Minus handyman wage of £8,425

Minus Universal Credit £5,314.19

Gives a true loss figure for this period of **£8,308.81**

From 1 April 2022 to 27 July 2022 = 17 weeks at £432 (£13.92 x 37.5 hours = £522 gross weekly pay; £432 net weekly pay) = £7344

Minus handyman wages of £4,185

Minus Universal Credit of £1480.79

Gives a true loss figure for this period of **£1678.21**

Total actual wage loss is £48,380.61.

Future Wage Loss

(i) 27 July 2022 to 1 March 2024

From 27 July 2022 to 1 March 2024 is 83 weeks at £432 = £35,856

Minus handyman wage at £164 per week x 83 = £13,612

Minus Universal Credit from 28 July 2022 to 31 March 2023 = 35 weeks x £503.72 = £17,630.20. (Universal Credit will stop on receipt of award).

Gives a true loss figure of **£4613.80**.

(ii) 1 March 2024 – 7 June 2033

From 1 March 2024 to 7 June 2033 is 484 weeks at £432 = £209,088

Minus the national minimum wage for 2023 to 2024 = 484 weeks x £316 (£10.42 x 40 hours = £416.80 gross weekly pay; £316 net weekly pay) = £152,944

Gives a true loss figure for this period of **£56,144**.

Total future loss is £60,757.80.

There is no reduction for accelerated receipt of future wages given that no account has been taken for increases in wages should the claimant have remained in the respondent's employment or increase in the national minimum wage.

Pension Loss

Actual Pension Loss

(i)20 February 2019 – 21 December 2020

20 February 2019 to 1 April 2019 is 6 weeks at £605.49 = £3,632.94

Multiply by 2% = £72.65.

1 April 2019 to 11 May 2020 is 58 weeks at £605.49 = £35,118.42

Multiply by 3% = £1053.55.

11 May 2020 to 21 December 2020 is 32 weeks at £493 = £15,776

Multiply by 3% = £473.28.

Gives pension loss for this period of **£1599.48 x 0.8 = £1279.58 net**

(ii) 21 December 2020 – 27 July 2022

21 December 2020 to 1 April 2021 is 14 weeks at £493 = £6,902

Multiply by 3% = £207.06.

Any contributions made from the handyman role during this period will not be deducted because would not meet the threshold for automatic enrolment.

1 April 2021 to 1 April 2022 is 52 weeks at £509.25 = £26,481

Multiply by 3% = £794.43

Any contributions made from the handyman role during this period will not be deducted because would not meet the threshold for automatic enrolment.

1 April 2022 to 27 July 2022 is 17 weeks at £522 = £8,874

Multiply by 3% = £266.22

Any contributions made from the handyman role during this period will not be deducted because would not meet the threshold for automatic enrolment.

Gives pension loss for this period of **£1267.71 x 0.8 = £1014.16 net**

Total actual pension loss = £2867.19 x 0.8 = £2293.75 net

Future Pension Loss

(i)27 July 2022 – 1 March 2024

27 July 2022 to 1 March 2024 is 83 weeks at £522 = £43,326

Multiply by 3% = £1299.78

Any contributions made from the handyman role during this period will not be deducted because would not meet the threshold for automatic enrolment.

Gives a pension loss for this period of **£1,299.78 x 0.8 = £1039.82 net**

(ii) 1 March 2024 to 7 June 2033

1 March 2024 – 7 June 2033 is 484 weeks at £522 = £252,648

Multiply by 3% = £7,579.44.

Minus national minimum wage of 484 weeks at £416.80 = £201,731.20

Multiply by 3% = £6,051.94.

Gives a pension loss for this period of **£1527.50 x 0.8 = £1222 net**

Total future pension loss is £2827.28 x 0.8 = £2261.82 net

Summary – prior to adjustments

Basic Award	£13,716
Compensatory Award - loss of statutory rights	£500
Injury to feelings award	£30,000
Actual wage loss	£48,380.61
Future wage loss	£60,757.80
Actual pension loss	£2293.75
Future pension loss	£2261.82
Aggravated damages	£6,000

Adjustments

ACAS uplift

An uplift of 20% for the respondent's failure to failure the ACAS Code relating to disciplinary procedures, in accordance with section 207A of the Trade Union Labour Relations (Consolidation) Act 1992, is applied in the following way:

Compensatory Award (£500 x 20%)	£600
Injury to feelings award (£30,000 x 20%)	£36,000
Actual wage loss (£48,380.61 x 20%)	£58,056.73
Future wage loss (£60,757.80 x 20%)	£72,909.36
Actual pension loss (£2293.75 x 20%)	£2752.50
Future pension loss (£2261.82 x 20%)	£2714.18

Interest

Interest will be added to injury to feelings, actual wage loss, actual pension loss and aggravated damages at the rate of 8%. The interest calculation is as follows:

12 February 2019 (act of discrimination) – 9 December 2022 (date of calculation) is 1121 days

Injury to feelings award

1121 x 0.08 x 1/365 x £36,000 = £8845.15	£44,845.15

Actual wage loss

1121/2 x 0.08 x 1/365 x £58,056.73 = £7132.23	£65,188.96

Actual pension loss

1121/2 x 0.08 x 1/365 x £2752.50 = £338.14	£3090.64

Aggravated damages

1121/2 x 0.08 x 1/365 x £6000 = £737.09	£6737.09

Grossing Up

Section 401 of the Income Tax (Earnings and Pensions) Act 2003 provides that the first £30,000 of any award for financial loss following unlawful discrimination is free from income tax. The remaining amount therefore needs to be grossed up so that the claimant receives the sums owed to him without deduction of income tax.

The calculation is as follows:

Basic award (tax free)	**£13,716**
Compensatory award (tax free)	**£600**
(£15,684 of tax free amount remaining.)	
Injury to feelings	
£15,684 (tax free)	£15,684
£29,161.15 grossed up/0.8	£36,451.44
Total award	**£52,135.44**
Actual wage loss	
£65,188.96 grossed up/0.8	**£81,486.20**
Future wage loss	
£72,909.36 grossed up/0.8	**£91,136.70**
Actual pension loss	
£3090.64 grossed up/0.8	**£3863.30**
Future pension loss	
£2714.18 grossed up/0.8	**£3392.73**
Aggravated damages	
£6737.09 grossed up/0.8	**£8421.36**
TOTAL AWARD	**£254,751.73**

Employment Judge Ainscough

Date 14 March 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 March 2023

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

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

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990
ARTICLE 12

Case number: **2406434/2019**

Name of case: **Mr T Myles** v **Leadec Ltd**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 21 March 2023

the calculation day in this case is: 22 March 2023

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note:
   www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.