Case Number: 1404996/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Phillips	**v**	Bournemouth and Poole college

Judgment On remedy

Heard at: **Southampton** **On:** **30 January 2023**

Before: Employment Judge Rayner
Mr R Spry-Shute
Mr P English

Appearances
For the Claimant: Ms Ni'man, friend of the Claimant
For the Respondent: Mr Islam-Choudhury, Counsel

Declaration of Remedy

1. The Claimant suffered an injury to feeling and the respondent will pay the Claimant the sum of **£14,000.00** for that injury to feeling.

2. The Claimant is entitled to interest on the award at the rate of 8% for the period from the date of the discrimination, which was the until the date of hearing. Interest is awarded of **£4200.00.**

3. The Clamant suffered loss of earnings as result of discrimination and dismissal of **£16,969.91.**

4. The Claimant is awarded interest on his loss of earnings at 8% for the period of 21 months of **£2375.79**.

5. The Clamant suffered pension loss, calculated using the complex method of **£52, 214.55.**

The Respondent will now pay the Claimant the total sum of **£89,760.25** as compensation for discrimination.

Reasons

1. This remedies hearing was listed in person over two days following judgement and reasons dated 13 July 2022 being sent to the parties. It was not possible to resolve all the matters of remedy within that time, and therefore with agreement of the parties, the judgment was reserved.

2. Mr. Phillips worked as a lecturer at the Bournemouth and Poole college for 25 years until he was dismissed by reason of redundancy with notice. The parties agree that his notice pay (paid in lieu of notice) meant that he did not start to suffer any loss of earnings until 28 April 2019.

3. The employment tribunal found both that the respondents knew that the Claimant was disabled within the meaning of the Equality Act 2010 at the material times and that the Claimant had been unfairly dismissed; discriminated against for a reason which arose from his disability in the manner of scoring him in respect of the redundancy selection exercise and that his dismissal was an act of unlawful disability discrimination.

4. The parties have produced a large bundle of documents for this remedies hearing and have put in a significant amount of work to prepare a schedule of loss with counter arguments and responses. We are grateful to both parties for the work they put into the production of these documents.

5. We heard evidence from the Claimant on his own behalf and also heard or received written evidence from Mrs. J Steinberg, Ms A Miller and Ms S Gauntlet supporting him.

6. We are grateful to Mrs Ni'man, who has assisted the Claimant throughout and who has carried a large amount of responsibility for preparing the paperwork for this case. She is not a lawyer. She has worked on a voluntary basis, and we recognise, as the Claimant does, that on occasions, it has been difficult for her to obtain clear instructions from the Claimant. This is not a criticism of the Claimant, who we acknowledge has found his dismissal and the process of the tribunal claim difficult and distressing. However, we recognise that there have been a number of frustrating delays and failures to disclose relevant materials, but that this did not happen because of any want of effort by Mrs Ni'man.

7. We are also very grateful to both the respondent solicitor Mr Hodge, and the respondent counsel, Mr Islam-Choudhury, for their diligence and professionalism in preparing for this case. It is evident from some the correspondence that there have been numerous difficulties in preparing an agreed bundle and the schedule of loss. There have been issues with disclosure which have led to further documents being produced on both days of this remedy hearing. We pay tribute to the patience of them both.

8. Mr Phillips is disabled, and the Respondent conceded that he was disabled by reason of diabetes and by reason of stress anxiety and depression in their ET3, filed on 17 December 2019.

9. They conceded in their amended ET3, that they had knowledge of the Claimant's disability of diabetes at all material times but denied that they had actual or constructive knowledge of disability by reason of stress, anxiety and depression.

10. The ET found that the respondent knew or ought reasonably to have known of this second disability of stress, anxiety and depression, at the material times, which were the point at which the Claimant was identified as a person at risk of redundancy up until his dismissal by reason of redundancy.

11. We made no findings that the Claimant was disabled by reason of any other impairment, although we were told that the Claimant suffered with double

incontinence, both whilst an employee of the respondent, and he asserts, following his dismissal. We accept that this was true.

Background to the damages claim – what is claimed by C?

12. The Claimant has submitted a detailed schedule of loss and the respondent has provided a counter schedule which the Claimant has commented on. In the process of finalising the schedule for the purposes of this hearing the parties have managed to reach agreement over a number of matters, although the level of award for injury to feeling and the length of time and level of award for past loss of earnings; future loss and pension loss all require determination.

13. The Claimant claims past loss of earnings from the effective date of termination of the 31 July 2019 until the 6 June 2022, which is the date of the liability hearing. This is a period of 148 .71 weeks.

14. The parties agree that the Claimant's annual gross salary was £27,612.06 (0.8% of a FTE) and that the relevant figure for gross weekly pay was £531.00 per week and that the Claimant's net weekly pay was £426.13.

15. The parties agree that no basic award is payable to the Claimant as he had received redundancy payment.

16. The parties also agree that the matters to be determined by the ET are as follows;

    16.1. what steps had the Claimant taken to mitigate his loss;
    16.2. did the Claimants employment by the police on a part time contract bring any period of loss to an end;
    16.3. what was the period of the Claimants loss of earnings?
    16.4. what level of award should be paid in respect of injury to feeling?
    16.5. in respect of pension loss is the appropriate method of calculation the simple calculation or other?

17. We remind ourselves at the outset of the key legal principles that we must apply when considering remedy in cases of unfair dismissal and in cases of disability discrimination, and we summarise these as follows.

Key Legal Principles

18. Mr Islam-Chaudhury has helpfully set out the key legal principles within his skeleton argument. These provide a fair overview of the legal principles relevant to this case.

19. In respect of a claim for unfair dismissal the employment tribunal can award compensation that is just and equitable in the circumstances the tribunal should take a broad brush approach to what is just and equitable see section 123 ERA 1996.

20. We remind ourselves that the purpose of compensation is not to express disapproval but is to compensate for any financial loss. (see for example Clarkson International Tools Limited v Short 1973 IRLR 90.)

21. The award of any loss is subject to the duty of the person to mitigate any loss or damage recoverable.

22. When considering whether or not the Claimant has mitigated his losses, we must consider the point at which the Claimant would have found work and what his income would have been at that point. A Claimant must give credit for any income received.

23. We were referred to and take into account the steps set out by the EAT in Gardner Hill v Roland Berger Technics limited [1982] IRLR 498. We remind ourselves that this requires us to consider what steps were reasonable for the Claimant take to mitigate their loss; did the Claimant take reasonable steps to mitigate loss and to what extent would the Claimant have mitigated their loss if they had taken those steps.

24. The Respondent reminds us that the statutory cap in a case of unfair dismissal after grossing up for any tax would be 27,612 pounds and six being 52 weeks weekly pay the student to section 124(1ZA) ERA 1996.

25. In respect of any discrimination found we may award compensation which, as far as possible, puts the claimant in the same position he would have been in but for the unlawful acts of the respondent. (See for example Ministry of Defence v Wheeler [1998] IRLR23 and Chagger v Abbey National [2010] IRLR 47.).

26. Since the tribunal is entitled to award compensation corresponding to any amount that a County Court may award by virtue of section 124(2) and (6) of the Equality Act 2010, we must also take into account the tortious principles of both remoteness and causation.

27. When considering loss of earnings, we are entitled to consider what would have happened but for the discriminatory act. It is appropriate to consider whether or not the claimant would have been dismissed in any event. (See Chagger above.)

28. In relation to compensation for discrimination, in Citibank NA v Kirk [2022] EAT 103, [2022] IRLR 925 the EAT adopted the principles set out by Langstaff P in relation to compensation for unfair dismissal in Lindsey v Cooper Contracting Ltd UKEAT/0184/15 (22 October 2015, unreported). We have reminded ourselves of these principles and applied them when making our decisions and drawing conclusions below.

    28.1. The burden of proof in relation to mitigation is on the wrongdoer.

    28.2. If evidence as to mitigation is not put before the employment tribunal by the wrongdoer, it has no obligation to find it

    28.3. What has to be proved is that the claimant acted unreasonably; they do not have to show that what they did was reasonable.

    28.4. There is a difference between acting reasonably and not acting unreasonably.

    28.5. What is reasonable or unreasonable is a matter of fact.

    28.6. In determining reasonableness the views and wishes of the claimant should be taken into account as one of the circumstances, although it is the tribunal's assessment of reasonableness and not the claimant's that counts.

    28.7. The tribunal is not to apply too demanding a standard of the victim; after all, they are the victim of a wrong. They are not to be put on trial as if the

losses were their fault when the central cause is the act of the wrongdoer.

28.8. The test may be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate.

28.9. In a case in which it may be perfectly reasonable for a claimant to have taken on a better paid job, that fact does not necessarily satisfy the test. It will be important evidence that may assist the tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient.

29. In particular we remind ourselves that it is for the employer to show that the claimant has failed to mitigate his or her loss. This means that the employer must adduce evidence in relation to mitigation and that a vague assertion of failure to mitigate unsupported by any evidence is unlikely to succeed. (see for example Ministry of Defence v Hunt and ors [1996] ICR 554, EAT)

30. This means that, in the first instance, compensation will be assessed on the basis that the claimant took all reasonable steps to reduce his loss. Whether a claimant has mitigated his loss is a question of fact, and we remind ourselves that we must judge the matter on the particular circumstances of the case.

31. Unlike unfair dismissal there is no statutory cap on the compensation that may be awarded in a discrimination case.

32. In this case it is necessary for us to consider whether or not the Claimant's employment with Dorset Police had the effect of breaking the chain of causation. When considering whether or not an act breaks the chain of causation, it is for the tribunal to make findings of fact.

33. We remind ourselves that the duty to mitigate will not be allowed to operate oppressively. This means that it may be reasonable for an employee to give up a new job which proves unsuitable (see Dundee Plant Co Ltd v Riddler EAT 377/88). Whether or not a new job or job which the claimant then leaves, as in this case, breaks the chain of causation will be a question of fact for the employment tribunal to determine taking into account all the relevant factors in the case.

34. When the claim relates to a discriminatory dismissal, we remind ourselves that, in calculating future loss of earnings, we will have to consider the likely chance that

the claimant — but for his dismissal — would have continued in his employment until retirement.

35. We have been referred to the correct approach for determining this issue, as set out by the Court of Appeal in Vento v Chief Constable of West Yorkshire Police (No.2) [2003] ICR 318, CA (a sex discrimination case). In that case the question was what were V's chances of remaining in the police force until the age of retirement at 55 if she had not been discriminated against and dismissed? The Court of Appeal confirmed that this requires an assessment of a chance, based on material available to the tribunal, including the use of statistical information as to the probability of an employee remaining in the service of the employer on a long-term basis.

36. We remind ourselves that the Court of Appeal emphasised that since such an assessment of chance involves a forecast about the course of future events, it should not be approached as if the tribunal were making a finding of fact based on a balance of probabilities.

37. When making an award for injury to feeling the tribunal has a wide discretion but will take into account the Vento guidelines. We also remind ourselves that it is for the claimant to prove this loss.

38. Awards for injury to feeling are compensatory and not punitive and they should not be so low as to diminish respect for the policy of the discrimination or but nor should they be excessive and they should bear some resemblance towards incomparable cases in personal injury for example.

39. Compensation for unlawful discrimination may include an award for personal injury which has arisen as a direct consequence of the unlawful acts of discrimination. The claimant must prove injury to health. (See for example Sheriff V Klyne Tugs (Lowestoft Limited) [1999] ICR 1170.)

40. Psychiatric personal injury awards differ from an injury to feeling award in that there must be specific medical evidence of a psychiatric injury.

41. We remind ourselves that when considering whether to award compensation for psychiatric injury, we must decide whether the full injury is attributable to the respondent's unlawful accident or not where there has been a pre-existing condition. Whilst the discriminator takes the victim as he finds him a respondent will

only be liable full psychiatric injury which they have caused or contributed to. (see HM Prison Service v Salmon 2001IRLR 425.)

The Respondent's position on remedy

42. The Respondent agrees that the Claimant is entitled to an injury to feeling award but submits that much of the distress and injury which the Claimant refers to was not injury caused by the Respondent but was the result of pre-existing disability or other ill health which the Claimant suffered from.

43. The Claimant's evidence is that his health has been affected by the discriminatory redundancy and the ET process, and that since the hearing, he has suffered significant episodes of poor health.

44. The Respondent took the Claimant through his health records and refers to them in submissions. Counsel has focused on the lack of evidence within them of the Claimant reporting significant changes to or deterioration in, his health, of the type which he has given evidence of before this employment tribunal and in his witness statement.

45. The respondent asserts that the Claimant is exaggerating the impact that the discrimination had on his health, and is also looking at it with hindsight, and recollecting things as being worse that they really were.

46. The respondent asserts that any loss of earnings claimed by the Claimant should be limited in time. Counsel points to two events which it is said bring the period of liability to an end. The first event is a short period of part time work with the police that the Claimant undertook and then resigned from, and the second is the point at which the Claimant started to carry out one to one teaching and tutoring for two different agencies, as well as privately.

47. The respondent asserts that the Claimant has in any event taken insufficient steps to mitigate his loss.

48. The Claimant asserts that his losses should be calculated on a continuing basis. He also asserts that the period of time that he worked for the police should not bring his period of loss to an end.

49. In respect of pension loss, the respondent recognises that the Claimant has suffered a loss of pension, but urges us to calculate any pension loss using the simple method of calculation. The Claimant asserts that the appropriate method for calculation is the complex method.

Chronology of events since the date of dismissal.

50. The Claimant was given notice of redundancy at the end of April 2019. He worked part of his notice, and the remainder was paid in lieu. The parties agree that the period of any loss therefore starts on the 31 July 2019.

51. The Claimant did not immediately start looking for work and told us in evidence that he initially felt unable to apply for any form of work or benefit. He also told us, and we accept, that having spent the majority of his working life at Bournemouth and Poole college, contemplating working somewhere else or knowing how to go about looking for it was very difficult for him. We also accept that Brockenhurst college, which is a Further Education College some miles away was associated or affiliated with Bournemouth and Poole college. We accept that the Claimant felt some wariness about applying for jobs there, but in any event, there is no evidence before us that there were any jobs available which the Claimant could have applied for either at Brockenhurst college or at Bournemouth and Poole college, or any other Further Education College, within the time frame following his redundancy.

52. The Claimant says that he started to look online for employment with employment agencies such as Indeed and we find that his first application was made at the end of July 2019.

53. We find that this was a reasonable point for the Claimant to start looking for alternative work following the discrimination and need for adjustment to his new circumstances.

54. We accept the Claimant's evidence that he made enquiries about many different types of work, although not teaching work, but he did not get interviews.

55. The Claimant filed his claim to the employment tribunal and we accept that this process did cause him additional stress.

56. In the autumn of 2019, the Claimant applied for and was offered a part time job with Dorset Police, as a counter services officer. He started work on the 19 November 2019.

57. He told us we accept that being offered the role gave him a boost to his self-esteem. We find that this is also indicative that the claimant was making efforts to find alternative employment and was willing to look at a different career path.

58. We accept that the reason he did not apply for the full- time post on offer with the police was because he was told at the point of interview that it had already been filled. It was reasonable for him to continue to apply for and accept the part time role.

59. We accept the Claimants evidence that he was suffering with double incontinence at this point in time and that on a number of occasions he had difficulty managing his condition both on his way to work and in the workplace. We accept that he was concerned that this may occur again and we also accept his evidence that he was teased by other members of staff about his need to use the toilet on the regular basis.

60. We accept his evidence that his double incontinence made it particularly difficult for him to adjust to a new workplace. We accept that he found his treatment by the staff distressing and upsetting and that he felt it was an affront to his dignity. We

also accept that as a relatively new employee he did not feel able to raise the matter by way of a grievance and we accept that the advice of many of his friends was that he was not well enough to continue working. His reasons for leaving were a combination of these factors.

61. We accept the Claimants evidence that this did impact upon his health and his mental health, and that having taken advice from his mental health advocate, Ailsa Miller, he decided that he could not continue working in that job because of the impact it was having on his diabetes and his mental health.

62. The Claimant resigned without giving notice on the 19 February 2020.

63. We have taken into account the Claimants resignation letter and note the reference to the probationary period. We cannot find, as the Respondent urges us, that the real reason why the Claimant left his employment was that he was failing his probationary.

64. In any event, even if he were to have been failing his probationary period we have no evidence before us as to why that might be and we observe that a man with a significant disability who is being subjected to harassment by colleagues may well not perform the best of his ability.

65. Shortly after the Claimant's resignation a national lockdown was imposed as a result of the COVID-19 pandemic.

66. We accept the submission of the Respondent that during the course of the pandemic lockdown many opportunities arose for online tutoring and teaching. We have no evidence before us however of any actual opportunities or vacancies which the respondent asserts the Claimant ought to have applied for.

67. The Claimant did in fact start looking at one to one teaching and we accept that he was assisted by his friends to put his details on various websites.

68. On the 23 August 2020 the Claimant registered with the Sugarman group, a teaching agency. He completed the applications and passed the relevant checks and was then offered work. We find that this was a reasonable time for him to take to identify opportunities and make applications.

69. The Claimant also subsequently signed on with a second agency called Teaching Personnel.

70. He continued to be offered and to accept teaching work with both agencies.

71. In addition, the Claimant carried out some private work tutoring students on a one to one basis in their own homes. The Claimant had not disclosed his earnings from this work to the Respondent in his initial schedules of loss, but he has given evidence of the work he did and the pay he received to this tribunal.

72. The Respondent submits that the Claimant's lack of openness in respect of this work was a deliberant concealment. The Claimant asserts that he did not realise that he needed to make disclosure in respect of this work, or this pay.

73. The work he received and the pay he received for it is clearly relevant to the question of his mitigation of his loss.

74. In respect of his health the Claimant has asserted that during the period between leaving the police and starting work on an agency basis, his self-esteem and confidence was affected and he felt more despondent and concerned for his future and his health. He explained that over the following seven months he tried to focus on his health but felt increasingly erratic and filled with anxiety. We accept that this is how he felt.

Discussion and conclusion

75. We have first considered the credibility and honesty of the Claimant. This is of particular importance given that much of what he says about his health, whilst

supported by those who have given evidence for him, is not reflected in his medical notes.

76. We all agree that the Claimant is fundamentally honest in the evidence he has given to the employment tribunal, but we accept the respondent submissions up to a point, that the Claimant is not wholly realistic about many of the matters he has given evidence of.

77. We accept, for example that he did suffer from double incontinence and that he did not discuss this with his doctor. We accept that he found this to be an embarrassing condition and understand why that would be the case. We also accept that Mr Phillips felt at times both that he was a burden on the health service and that he felt annoyed with himself and frustrated with his own ill health and that for this reason he may not have given the detail to his GP which he has set out in his witness statement and given evidence of before this court.

78. We also find that Mr Phillips has allowed the fear of an incident arising from his incontinence to affect his decisions about employment and his ability to carry out work, in a wholly negative way. Whilst it is understandable that the condition would cause anyone concern; potential embarrassment and worries about a loss of dignity, we note and accept the Claimant's own doctor's analysis of the Claimant is somebody who tends to catastrophize. We all agree that it is more likely than not that in reality Mr. Phillips would have been able to manage in a workplace with reasonable adjustments and medical assistance and would not being prevented from doing so by reason of double incontinence.

79. We accept that his disability of stress, anxiety and depression, make it significantly harder for him to manage the physical impairments and that the worry and distress that arise from the management of them, and his lack of realistic assessment of what might happen, is a symptom of his disability and not the result of any dishonesty or lack of effort on his part .

80. We also find that there is an inter relationship between the Claimant's disability of stress anxiety and depression and diabetes. It is understandable that diabetes and

raised blood sugars impact upon the management of stress and anxiety. These are again facets of the Claimant's disability.

81. From the evidence we have heard both from the Claimant himself but also from the witnesses who gave evidence on his behalf and who were not challenged by Mr Islam-Choudhury, we accept that the Claimant's life, both whilst he was employed at the respondent but in particular following him being made redundant and in the lead up to the employment tribunal hearing, both for merit and for remedy, has been chaotic.

82. We have found as fact that the Claimant had a pre-existing mental health condition, and that by start of the respondent's redundancy process he was a disabled person by reason of it. We remind ourselves that the Respondent takes their victim as they find him, in this case, as a disabled man and existing mental health impairment and diabetes.

83. We have made specific findings of fact, in our merits judgment that, had the issue of scoring been properly identified at the moderation meeting, the Respondent ought at that point to have realised that the Claimants scoring was potentially disability discrimination (see para graphs 218-227 liability judgment.)

84. We also found that the failure to offer the Claimant a suitable alternative vacancy was discriminatory. We found Mrs Griffins evidence to have been extraordinary. (paragraph 251).

85. We made findings of fact about the appeal process, and the requests made by the Claimant and his representative for information about the scoring process, which were not provided to him. (254-8)

86. We made findings about the process of the appeal, and the failure of the respondent to address the question of scoring. We have made findings of fact about what happened at the meeting, how the scoring issues were addressed and the steps taken by the respondent to investigate the Claimant's concerns. We have

made findings of fact about the respondent's failure to ask questions about the Claimant's assertion that he was a disabled person.

87. The respondent is right to point to these pre-existing illnesses as relevant to the question of whether or not the respondent caused or contributed to a psychiatric injury or a personal injury, both of which the Claimant claims damages in respect of.

88. These findings are also relevant to the assessment of the reasonableness of the claimant's actions post employment in seeking work, and then retaining work, as well as to the questions of injury to feeling more generally.

89. If the discriminatory acts of the respondent make it harder for the claimant as a disabled person, suffering with anxiety and depression to look for work, then that is a factor that flows from the discriminatory acts of the respondent, whether or ot the respondent caused the initial impairment.

Psychiatric illness

90. We have some evidence that the claimant's mental impairment was caused or contributed to by factors arising in his past. We have no evidence that the Respondents actions caused the mental impairment, and we find that it did not. The claimant had an existing mental impairment at the start of the redundancy process.

91.

92. We all agree that the respondent's behaviour towards the Claimant during the course of the redundancy process, in selecting him for redundancy and then dismissing him were inherently stressful and likely to have an impact upon Mr Phillips, and that it was foreseeable that a discriminatory process would have a negative impact upon Mr Phillips, given his disability.

93. We all agree that the Respondent's' actions had a negative impact on a pre-existing mental impairment, but all agree that the respondent did not cause the illness. Mr Phillips did suffer stress and anxiety, as result of being discriminated

against, and we find that this was in part due to the inherent stress of bringing employment proceedings.

94. We have therefore considered whether there was any significant change in the claimant's mental health impairment from before the discriminatory conduct and after.

95. The Claimant has been on medication throughout the period, and we accept that there have been fluctuations both in his diabetes and in his mental health.

96. We find it unsurprising that there were occasions when the Claimant saw his doctor and reported to be in a good place and we also find it unsurprising that there were other occasions as reported by the Claimant and others when he will not be. We all agree that this is a common feature of mental health impairment and disability of stress anxiety and depression, and was a feature of this case.

97. We also take into account that those who suffer with disabilities which Mr Phillips has, inevitably have to make more effort to manage their daily affairs. Whilst medication may assist, it is not our understanding that it is expected to entirely remove the effect of depression or anxiety, anymore than insulin will remove entirely the effects of diabetes. The condition inevitably still requires management on a daily basis and that very management of the condition takes time energy and mental bandwidth. We accept that other people may manage their disability differently, but we find that in this case Mr. Phillips genuinely found the day-to-day management of his ill health and his disability difficult and that this placed additional stress on him.

98. The Claimant reported that they were many occasions from the end of his employment until this hearing when he felt overwhelmed and unable to deal with the preparation for the employment tribunal. We accept that this was true and that it was both in respect of managing the paperwork and in respect of communicating and liaising with those who were offering to assist him.

99. He has also told us that he found the process of looking for work difficult and that at times he felt overwhelmed and destroyed.

100. We remind ourselves that the Claimant had suffered with similar symptoms, leading to periods of sickness absence, before any discriminatory acts by the Respondent.

101. We accept that his medical notes, which record and report the occasions on which the Claimant saw his doctor and in brief what was discussed, do not reflect what Mr. Phillips has told us in evidence . We accept the Respondent's submissions that there is a fundamental difference between the Claimant's recollection of the state of his mental health and the comments that he was making to his doctor during some of the periods of time he refers to.

102. The Respondent asserts that this is because the Claimant is simply wrong. The Respondent asserts that had the Claimant really been feeling and suffering as badly as he now tells the tribunal he was, that he would have or should have raised these matters with his doctor.

103. The respondent urges us to draw conclusions that the Claimant is not a reliable witness of truth albeit that they accept that he is not being deliberately dishonest. Mr Islam- Choudhury submits that what Mr Phillips is doing is retrospectively catastrophizing events as well as looking at things with the light of hindsight in an attempt to excuse his failure to mitigate his loss.

104. The Claimant's evidence has been rambling and confusing in many instances. He had to be reminded several times to focus on the question being asked rather than giving a history or an explanation of why a particular context may have arisen.

105. He has, however, been perfectly capable of giving lucid evidence when pressed and we all consider that he has demonstrated an intelligent and articulate understanding of the proceedings even if, as with many litigants, he has not found it easy to give simple direct answers to simple questions.

106. We all agree that the Claimant's recollection of his own history is likely to be tainted by his stress and anxiety over these proceedings. We also consider that it is highly likely that he has focused on the more negative aspects of his feelings over the last two years and that the process of recalling and describing how his feelings have been injured and harmed is likely to have contributed to him focusing on the negative rather than positive.

107. We all agree that for the Claimant, the stress of being selected for redundancy; having to challenge his selection through the employment tribunal and having to search for new employment, were things that flowed inevitably from the fact that the Claimant had been discriminated against by the Respondent. The fact that there was also a national pandemic impacted the Claimant, although it was not something which flowed from discrimination, the fact that Mr Phillips had to deal with it as an unemployed disabled man, rather than as a disabled employee of the Respondent, impacted badly on him.

108. Not only was the discrimination by the Respondent a relevant factor when considering the steps Mr. Phillips was able to take to seek alternative employment, but we conclude that it was a contributory factor when Mr. Phillips decided to stop working for the police.

109. We have carefully considered the medical history and the dates of specific entries that we have been referred to by Respondent counsel. We have also taken into account and are grateful for the careful chronology set out within the respondent's helpful skeleton argument.

110. We agree that as a matter of fact there were occasions during that chronology when the Claimant was not recorded by his doctor as suffering any new or different or worsening adverse effects to his disabilities, because of discriminatory actions by the Respondent.

111. We also accept that there are a number of specific occasions when the Claimant talked to his doctor about a heightened level of stress which was linked to the fact of the employment tribunals; the fact of him no longer having

representation and the fact that he was having to prepare for the employment tribunal hearing.

112. The Claimant and his representative have pointed out that a number of concessions were made at the final hearing both in respect of the availability of suitable alternative employment and in respect of the scoring of the Claimant.

113. We find on the evidence we have before us that the Claimant did continue to suffer stress and anxiety throughout the period up to this hearing, and that it was at times worse as a result of the discrimination. We also conclude on the evidence from the medical notes, that on balance respondent did not cause or contribute by its discriminatory act directly to any psychiatric injury which the claimant suffered. we have no medical evidence at all to suggest that this was the case. rather we find that the claimants existing mental impairment, continued to be impacted and the claimant continued to suffer stress and anxiety, which impacted on his ability to mitigate his losses, and which caused him distress as a result of the discrimination he had suffered.

114. Following on we conclude that the claimant's decision to cease working was a reasonable one, because of his health and his difficulty in managing it. Although the double incontinence was not part of the Claimants disability, it was his inability to manage it in a new work place, as a disabled man with anxiety and depression, which we find lead to his decision to resign.

115. We conclude that this decision did not, in the circumstances of this case, break the chain of causation, or bring to an end the Respondents liability to the Claimant for loss of earnings.

Injury to feeling

116. The Respondent asserts that injury to feeling should be assessed in the low band of Vento on the basis that there was a one off instance of discrimination and that it was not deliberate or intentional.

117. The Claimant asserts that an award for injury to feeling should be in the top band of Vento and also asserts that injury to feeling award should take into account an award for personal injury on the basis of psychiatric injury.

118. We all agree that this is not a one-off act of discrimination and we also all agree that whilst we have not found that anyone's actions were consciously or deliberately discriminatory, we have found a persistent lack of care for Mr. Phillips and what happened to him coupled with a disinterest in ensuring a full and fair process and a total failure to address at all the question of disability despite the Claimant raising it with the respondent.

119. We find as fact that the Claimant was distressed by his treatment and that his distress did have an impact upon his mental health and that the stress itself was likely to have impacted upon his ability to manage his disability and to manage his other health conditions.

120. We conclude that the distress of the discrimination persisted and was worsened by the need to proceed to an employment tribunal and we conclude that the late concessions made by the respondent, compounded the distress anxiety and feelings of hurt suffered by the Claimant.

121. We find that the Claimant’s injury to his feelings were genuine and serious.

122. We find that with the Claimant’s psychiatric injury was not caused by the respondent because it was a pre-existing impairment but we do find with that in the short to medium term the Claimants mental health was impacted by the discriminatory treatment of the respondent.

123. On the basis of the information before us we all agree that the past treatment of him by the Respondent, contributed to the Claimant’s ongoing mental health issues and the need for him to find suitable employment in a new environment. We accept that after working for 25 years in the same establishment as a teacher that the difficulty for him as an older disabled man will be significant and bring inevitable stress and that for Mr. Phillips this continues to be hurtful and distressing.

124. from the facts set out above we conclude that the impact on Mr. Phillips mental health is properly compensated for within an injury to feeling award and in this case we make no separate award in respect of psychiatric illness.

125. When assessing the level of the injury to feeling award, we have taken into account the fact that they are other factors impacting upon Mr. Phillips mental health, including his other health conditions, a pre-existing mental health conditions not caused by the respondent, and we conclude therefore that the correct level of award for an injury to feeling in this case is the lower middle of the middle band of Vento. We award £14,000.00 for injury to feeling.

Loss of earnings

126. The first question we have considered is, has the claimant mitigated his loss and when

127. The Claimant did apply for other jobs. We find that he did not apply for very many, but he did apply for vacancies which he thought he would be able to do. We find that in the period from his dismissal until his application for with a job with the police, he acted reasonably, given the state of his health given his disabilities and given the evidence we have of available vacancies, in looking for suitable alternative employment to mitigate his loss.

128. We have considered whether or not this incident breaks the chain of causation in terms of the liabilities of the respondent for losses flowing from their acts of discrimination. We find that the Claimant was reasonable in remaining in the job for the period of time he did, but we also find that he was reasonable to leave when he did.

129. Firstly the Claimant had taken on a very different sort of employment in an attempt to return to the workplace. Secondly, he was working in a wholly new

environment in a wholly new job role with new colleagues who did not necessarily know of or understand him or his disability.

130. We accept his evidence that the front facing role within the police force posed particular difficulties for him, because he could not simply leave the desk when he needed to do so if he was dealing with a member of the public.

131. We accept that the employer had put in place some reasonable adjustments for him and we also accept the respondent's point that had the Claimant raised the matter it is entirely possible that further adjustments would be made. However, we do not find that the Claimant's failure to do this and his decision to leave instead breaks the chain of causation. For these reasons we conclude that it does not.

Pension Loss and period of loss

132. We next consider, but for the acts of discrimination, how long the Claimant was likely to remain in the employment of the respondent.

133. We have made findings of fact about the Claimant's ill health during the course of the substantive merits hearing. We have observed that the Claimant sought reasonable adjustments from the Respondents, and we take into account that were reasonable adjustments to be made so that the Claimant could manage his physical health conditions, it is highly likely that some of his anxiety would have been reduced.

134. We find as fact that nonetheless over the course of the past three years the Claimant's physical health has deteriorated. We find this fact on the basis of his own evidence and that of his medical advisers and the notes, that his incontinence has become worse and harder for him to manage. We accept his evidence that this causes him significant distress and affects his confidence particularly when having to deal with new people for example in a new workplace. We all agree that nonetheless the increase in the severity of his symptoms would, in any workplace have posed difficulties for Mr. Phillips which would have required attention and assistance from an employer.

135. We also find that the Claimant's diabetes has not been well controlled. We note from his medical records that he was advised on numerous occasions to take more exercise but that he had difficulty sticking to any particular regime. We find that this is highly likely to continue.

136. The Claimant has told us that there were periods of time when he was not well enough to work although not formally signed off by his doctor. We also find from his medical records that the Claimant's dose of citalopram was increased at least twice during the material times of this case.

137. The Claimant had a disability of anxiety and depression which predated the redundancy exercise and for which he was being prescribed medication, and part of our findings were that the respondent knew or had constructive knowledge of the fact of the Claimants mental health disability as well as his physical disability prior to the redundancy selection exercise. The Claimant had a significant period of time off sick prior to the redundancy exercise and we find that it is highly likely that he would have continued to have significant periods of sickness absence had he remained employed.

138. We find that on balance of probabilities his health would have deteriorated rather than improved in the years between 2020 and his retirement age under the new teachers' pension scheme of 67.

139. Mr. Phillips asserted before us that he had intended to work until he was 67 because that is when he would be able to pay off his mortgage. We accept that he would have wished to have continued working until 67.

140. He also told us that he would have intended to return to a full time teaching post rather than an 80% teaching post. Again we accept that this was his wish.

141. We find that there was no prospect of him ever returning to a full-time teaching contract. We find instead that it is more likely than not that he would have reduced his hours further, due to his ill health. We also find that it is highly likely that he

would have needed to take significant time off as sick leave due to a variety of health conditions and deteriorating health and that this may well have impacted on his ability to continue to do his job.

142. The respondent appeared to assert that the Claimant was well enough to work full time but chose not to do so when he applied for a job with the police.

143. We do not agree. The reason why the Claimant did not take a full-time post with the police was that although a full time and a part time post were both advertised when he attended for his interview, he was told that it was only the part time post that was available and when he was offered it he accepted that role.

144. We find that the Claimant was well enough to contemplate returning to work when he applied for the job with the police.

145. We find that his reason for leaving the job with the police was a combination of his own poor mental health and the impact of his other health conditions upon him. the Claimant had already been suffering with health conditions when he was employed by the respondent and had he remained with them would have been entitled to reasonable adjustments. whilst the Claimant was entitled to reasonable adjustments when he worked for the police and whilst some adjustments were made for him it is understandable that teasing from other members of staff and a lack of a network of personal support at work, combined with his anxiety and depression, meant that he did not feel able to continue working in that job.

146. Whilst we do not consider that his decision to leave the job with the police breaks the chain of causation, we do find that it is evidence of how the Claimant may have had difficulties in any job even if he had remained with the respondent.

147. Whilst the difficulties he had with teasing at work and a lack of a support mechanism would not necessarily have been issues, it seems likely to us that the nature of teaching work would have posed similar difficulties for the Claimant in managing his stress and anxiety his diabetes and his developing problems with incontinence.

148. We find that he is likely to continue doing the kind of work he is currently engaged with until he retires, and we conclude that he is highly unlikely to ever obtain employment with the benefit of a final salary pension scheme equivalent to the teachers' pension scheme into which he paid for 25 years.

149. The Respondent has criticised the Claimant for not applying for another teaching post in an equivalent organisation. The Claimant states that he could not have applied for work at Bournemouth and Poole College and we observed that since there had been a round of redundancies even absent discrimination it is highly unlikely that there would have been a job which Mr. Phillips could have applied for. In any event there is no evidence before us from the respondent of any actual job vacancy of a type which Mr. Phillips may have been eligible to apply for either with the respondent or with any other college or school or FE organisation. In the absence of any such evidence we find that Mr. Phillips did not act unreasonably in failing to apply for a teaching post with another further education college or school.

150. We accept his evidence that his experience at Bournemouth and Poole college, which included the process of redundancy his selection for redundancy and his dismissal, left him with trust issues and anxiety about entering a similar environment.

151. We also accept however that part of his difficulties going forward were because of his physical disability.

152. We find that his ill health and his need to take sick leave would have exposed him to the likelihood of Capability Management proceedings in future and that even with reasonable adjustments, there must have been a real chance that his ill health would make continued work in the classroom environment difficult if not impossible, and undesirable to him, even if it was what he hoped to do.

153. Since he would have to work for two years before he was protected from unfair dismissal and even with the benefit of reasonable adjustments, we find that there

was a real probability that he would find it difficult to obtain permanent, secure and continuing employment in the future, because of his continued and deteriorating ill health.

154. We find as fact that it was not simply the fact of the worsening of the Claimant's incontinence that caused him to leave, but that it was the anxiety that he suffered because of the private nature of his disability and because of the affront to his dignity of having to deal with the matter.

155. We accept that these things are more likely than not to have impacted upon his mental health and his general ability to deal with employment.

156. We also find that, since he had a protected pension which he could access at 60, there was an incentive for him to take retire at that age, as an alternative to the difficulties of remining in the classroom.

157. We observe that the majority of his income is now derived through agency work and through self-employed teaching work and we all agree that this was likely to have been the most appropriate form of work for him in the future even had he not been dismissed. It is flexible and enables him to structure it around his disabilities.

158. We conclude that there was a strong possibility that Mr Phillips could have been fairly dismissed either by Bournemouth and Poole college, or in any new employment, for ill health capability at some point in the future, but we find it most likely that Mr Phillips would have made a decision himself to retire at 60, when his first pension became available to him.

159. We conclude that it was appropriate for the Claimant to try a new job in an entirely different environment but we also find that it was reasonable for him to resign from the position when it was proved unsuitable for him. Whilst we recognise that in some circumstances a new job will simply bring to an end the liability of the respondent, we find that it does not do so in this case.

160. Had the Claimant not taken the position with the police, but continued to seek other more suitable work, we find that he would not have returned to teaching any

earlier than he in fact did. Therefore, we conclude that his period of loss would have continued and that the respondents would have continued to be liable to him.

161. We have therefore considered the period of time, following the Claimant leaving the police force for which the respondent remains liable for the Claimants losses.

162. We find that the Claimant took no steps to find alternative work in the following months. We accept that the Claimant may have suffered with poor mental health but we have also taken full account of the medical records he has put before the employment tribunal. We accept the respondent's submissions that the medical records do not indicate any mental health reason for the Claimant not applying for further employment during that period of time. We also find that there were reasons for the Claimant not taking steps to find new employment at this point in the chronology, which were nothing to do with discriminatory treatment by the college.

163. We also found that there were points when the Claimant was in fact in much better mental health. We infer this from the medical records that we have seen. and in particular the reference within them that on one visit to the GP, the Claimant was seeming to be in a much better place .

164. We do not accept the Claimant's evidence that at that particular point in time there was just one day when he felt better, and this was the day he visited his doctor, and that he only reported this to his doctor because he was putting on a brave face essentially for the practitioner.

165. Other than the Claimant's own assertions that he was not well enough to start to look for teaching work, there is no evidence the Claimant was not well enough to start looking for work and there is evidence to suggest that he was. On balance therefore we find that he ought to have started looking for work in or about May 2020.

166. We find that had he started looking for work in May 2020 that despite the fact there was a national lockdown he would have been able to find sufficient teaching

by the end of August 2020, and that from that point onwards, he would have been able to completely mitigate his losses.

167. We therefore consider that the Respondent's liability to the Claimant for any loss of earnings ends by the 1 September 2020.

168. The Claimant suffered no loss of income until the end of August 2019 because he was dismissed on notice and because he received pay in lieu of notice.

169. We find that the first day of loss for the Claimant was the 29th of August 2019.

170. We have therefore calculated the Claimant's loss of earnings from the 28th of August 2019 until the 1st of September 2020.

171. We find the Claimants loss of earnings is for a period of 53.14 weeks at the rate of £426.13 net per week.

172. The Claimant must give credit both for his earnings from the police and from benefits which he received.

173. His earnings from the police were £3151.58 net.

174. We find he received benefit payments of £2045.46. (see pages 331 onwards of bundle) and additional personal independence allowance for eight weeks at the rate of £59.70 per week.

175. We find that the amount received in benefits was £2523.06 in total during the relevant period.

176. The total net loss of earnings awarded to the Claimant is therefore **£16,969.91** (sixteen thousand nine hundred and sixty nine pounds and ninety one pence).

Pension Loss

177. We turn to consider the Claimants claims in respect of pension loss.

178. Mr. Phillips was enrolled in the teachers' pension scheme. Until April 2012 he paid into a final salary scheme which would have enabled him to retire at 60 (the first pension scheme). That scheme was changed with effect from April 2012, and for the remainder of his employment he paid into the teachers' pension scheme which provided for a new retirement age of 67, on a career average basis (the second pension scheme).

179. The benefits accrued under the first pension scheme until April 2012, were protected and Mr. Phillips remains entitled to claim his pension under that scheme from the age of 60.

180. We find it highly unlikely that Mr. Phillips will ever obtain employment which has a final salary pension scheme again.

181. We find that although the Claimant asserted that he wanted to continue working full time until he was 67, he would not have done so.

182. We find that the most likely outcome is that the Claimant would retire at 60, and that in the intervening years will work at a maximum of 0.8% of full time hours.

183. At the point of his dismissal the Claimant was 54 years old and would, we find have worked therefore for a further six years.

184. The loss of the pension contributions he and his employer would have made under his career average scheme during the final years of his employment will impact upon the annual level of his pension entitlement from the second pension scheme when he retires.

185. We take into account that he is eligible to pay into a private pension scheme and that he is eligible as an employee to be enrolled in the NEST scheme .

186. We have considered the most appropriate method for assessing his pension loss.

187. First, we have considered whether or not we can assess his pension loss on the basis of the simple approach as urged by the respondent or whether the more complex approach is required. to do this we have taken into account presidential guidance on the calculation of pension loss.

188. We bear in mind that the simple calculation method is usually suitable and appropriate where the losses are relatively limited, where they arise at the start of employment for example. In this case the Claimant is in the later years of his employment and was a beneficiary of a career average scheme.

189. The loss that the Claimant will suffer is significantly greater under that scheme than the simple loss of the contributions. The Claimant is highly unlikely to have any opportunity to significantly mitigate against those losses, all be it that he may be able to pay into other less generous schemes during the course of the remainder of his working life.

190. This is likely to have a significant impact on the level of pension which he ultimately receives.

191. We all agree that the appropriate way to calculate pension loss in this case is therefore to use the complex method full pension calculation rather than the simple approach.

192. First, we have considered the period over which contributions have been lost. When he was dismissed, we calculate that at the point of dismissal he had 6 more years to work until he reached the age of 60. We have therefore calculated the loss of 6 years pension contribution.

193. The complex method requires us to consider the pension that the Claimant would have received at retirement had he not been discriminated against

compared with the pension that he is likely to now receive at retirement. The difference between those two figures produces a multiplicand.

194. We calculated the multiplicand as follows.

195. Firstly, we remind ourselves that it is for the Claimant to prove his losses. despite the parties having spent a great deal of time in exchanging schedules and counter schedules the documentation that we have been provided with is limited. we remind ourselves that we must make our decision on the basis of the best evidence available to us, and in this case part of the evidence available to us his information probably TPA website, which gives rough calculations of the expected level of pension dependent on age; the level of any contributions made and number of years over which contributions are made.

196. In addition, we had information before us from the Claimant of a pension estimate based on a retirement age of 67 from his pension statement provided in April 2022. That estimate appeared to use the Claimants full time salary rather that the part time equivalent.

197. We did not have any statement from the Claimant or the respondent setting out what the Claimant's pension would have been, had he retired at 60 as we have found he is likely to do, rather than 67, and had he not been discriminated against.

198. Neither party addressed this on the specific figures and both parties were content for the tribunal to reserve our decision and make it on the basis of the information which we did have before us.

199. We have therefore used the calculators from the Teachers' pension scheme website. We have used the Claimant's date of birth, we have used the Claimant's final salary, the fact that he worked a 0.8% of FTE contract, and the fact that he ceased to pay into the pension scheme in early 2019. We have used a retirement age of 60, on the basis of our findings.

200. In 2012, when the first pension scheme was ended and benefits frozen, the Claimant was 47 and was there for 13 years left for him to work until the age of 60.

201. We note that under the second pension scheme the Claimant has not lost a lump sum.

202. The TPA calculator gives an estimated pension, had the Claimant continued to work at the respondents on a part time basis, until 60, of £4973.00 per annum, assuming no lump sum.

203. The TPA calculator gives an estimated pension of £3063.00 per annum, on the basis of the Claimant leaving the scheme in 2019, making no further contributions and retiring and drawing his pension at 60.

204. We have considered whether or not these are appropriate figures to use and determine that in the absence of any other better information from either party these are appropriate figures on which to assess pension loss.

205. Using these figures, we find a multiplicand of £1910.00.

206. Next, we considered the appropriate multiplier. We obtain this from the Ogden tables, which take into account the Claimant's age at the point of the remedies hearing and his proposed retirement age, and sex, and gives a multiplier which is calculated to so as to compensate for the loss of pension, and for the fact that the claims will receive payment in one lump sum, rather than over a number of years of retirement.

207. The multiplier produced also takes into account life expectancy.

208. We used table 26, from the Ogden tables, in respect of loss of pension for men with a discount of 0.25% in the UK and no two year adjustment, which gives us a multiplier of 28.10.

209. Using these figures, the Claimant's pension loss is 28.10 x £1910.00 = £53,671.00.

Calculations using the simple method

210. We find that the Claimant will however receive pension contributions from the work which he will continue to do for both teaching agencies. The Claimant must give account for this amount of money in order to avoid double recovery.

211. Whilst we used the complex method to calculate his loss of pension from the teachers' pension scheme we consider that the simple method is appropriate to calculate the benefit that he will receive from his employers contributions into the NEST pension fund.

212. We are told that the employer makes a 3% pension contribution amounting to £291.49 per annum on the basis of Mr Phillips' current earnings. Using a period of five years of employment until a potential retirement age of 60 we calculate that he must give credit for £1457.45 in respect of those pension contributions.

213. We therefore from the pension loss giving a final figure for pension loss of £52,214.55.

Interest

214. The Claimant is entitled to interest on the injury to feeling award from the date of the discrimination until the date of the calculation of the award.

215. The date of the discrimination is the date on which the Claimant was told that he would be dismissed by reason of redundancy which is the 29th of April 2019 the date of the tribunal determination was the 30 January 2023.

216. The period of time which the Claimant is entitled to interest is therefore 3 and years at 8%. We calculate this as £4200.00.

217. In respect of loss of earnings, the interest is calculated from the midpoint from the date of dismissal, which is the 29 April 2019, and the date of the remedies hearing which is the 30 January 2023. Taking into account the midpoint between those two periods of time we calculated a period of 21 months, which is 1¾ years at 8%. Using the figure for annual earnings of earnings of £16,969.91 we calculate interest of £2375.79.

Employment Judge Rayner
Southampton
Dated 24 March 2023

Sent to the parties on
24 March 2023