EMPLOYMENT TRIBUNALS

Claimant: **Karen Luker**

Respondent: **South Tyneside & Sunderland NHS Trust**

Heard at: **Newcastle Employment Tribunal (remotely by CVP)**

On: **24TH February 2023**
(Deliberations on 30th March 2023)

Before: **Employment Judge Sweeney**
David-Dorman Smith
Stephen Carter

Representation
Claimant: Colin McDevitt, counsel
Respondent: Paul Sangha, counsel

RESERVED JUDGMENT ON REMEDY

The unanimous Judgment of the Tribunal is as follows:

1. The Respondent is ordered to pay the Claimant **£77,687.05** as compensation for failure to make reasonable adjustments as follows:

   1.1 **£23,835.74** in respect of loss of earnings from **30 December 2019** to **09 June 2021**.

   1.2 **£10,689** in respect of loss of earnings from **10 June 2021** to **31 December 2022**.

   1.3 **£4,895.93** interest on financial losses

   1.4 **£18,000** in respect of injury to feelings (pre-termination of employment)

   1.5 **£5,105** interest on injury to feelings

1.6 **£3,942** in respect of an uplift of 10% of the amounts in paragraph 1.1 to 1.3 above, pursuant to section 207A Trade Union and Labour Relations (Consolidation) Act 1992

1.7 **£2,310.50** in respect of an uplift of 10% of the amount in paragraph 1.4 and 1.5 above, pursuant to section 207A Trade Union and Labour Relations (Consolidation) Act 1992

TOTAL COMPENSATION BEFORE GROSSING UP

1.8 **£68,778.43**

GROSSING UP OF SUM IN EXCESS OF £30,000

1.9 **£8,908.62**

Taxable element of award = [1.1, 1.2, 1.3 and 1.6: £43,362.93 less £30,000 = £13,362.93

[£13,362.93 / (100 - 40 = 60) x 40] = £8,908.62

TOTAL GROSSED UP AWARD

1.10 **£77,687.05** [£52,271.55 + £25,415.50]

REASONS

1. On **05 October 2022**, a judgment was promulgated upholding the complaint of failure to make reasonable adjustments. The parties were unable to resolve matters, therefore, a Remedy Hearing was listed by way of CVP to take place on **24 February 2023**. That hearing finished late in the day and the Tribunal was unable to reconvene for deliberations until **30 March 2022**.

Preparation for the Remedy Hearing

2. The parties had prepared an agreed bundle of documents consisting of 170 pages (‘the Remedy Bundle’ of ‘**RB**’). During the hearing, it became apparent that a number of emails had been omitted from the bundle which had to be emailed to the Tribunal. The Claimant had prepared a further witness statement. She gave evidence and was cross-examined by Mr Sangha. The Respondent served two further witness statements, one from Laura Berry and one from Paul Jackson, Divisional HR Manager. Only Mr Jackson gave oral evidence for the Respondent. He too was subject to cross-examination by Mr McDevitt. Mr Sangha had prepared written submissions, which he subsequently developed in oral submissions. Mr McDevitt advanced oral submissions only.

Issues on Remedy

3. At the outset of the hearing, the tribunal discussed with counsel the issues we would have to consider. Those were agreed as being:

    3.1. Compensation for injury to feelings

    3.2. Compensation for financial losses, consisting of:

        3.2.1. Losses claimed up to **09 June 2021**,
        3.2.2. Losses claimed from **10 June 2021** to **10 June 2027**,

    3.3. Whether there should be an uplift pursuant to section 207A Trade Union and Labour Relations (Consolidation) Act 1992 (**'TULRCA'**). The Claimant contended that there was an unreasonable failure to comply with paragraphs 42 and 45 of the Code.

    3.4. Interest

    3.5. Grossing up

Points of Agreement

4. In paragraph 20 of Mr Sangha's skeleton argument, he had identified the net figure of the Claimant's earnings (which she was claiming as financial losses up to **09 June 2021**) to be £30,063.77. This had been calculated based on losses claimed from **01 December 2019**. However, he amended that date to **31 December 2019** and the figure to £28,042.05. Mr McDevitt confirmed that the date and the amount of **£28,042.05** as amended was agreed, in the sense that this was the total amount of net remuneration that could have been earned in that period.

5. The only other point of agreement was that any award of injury to feelings would fall in the middle Vento band. However, there was no agreement as to the appropriate amount within that band.

Findings of fact

The Claimant's pay and sick leave

6. The Claimant commenced a period of sick leave on **17 July 2019** from which she never returned, as she remained on sick-leave until her retirement on **09 June 2021**. Her sick pay started to reduce from the end of **December 2019**, in accordance with the contractual sick pay policy. It reduced to half pay on **01 January 2020** and then ended entirely on **28 June 2020**.

7. We find, as confirmed and agreed by counsel, that the net income to the Claimant from **December 2019** to **09 June 2021** (had she not been absent on sick leave or if she had been paid full pay while on sick leave) was **£28,042.05.**

The Claimant's grievance

8. On **22 July 2019**, the Claimant submitted a formal grievance, which was investigated by Kay Stidolph, Associate Directorate Manager for Urgent and Emergency Care. The outcome of that grievance was sent to the Claimant on **27 November 2019** (see paragraph 88 liability judgment). She appealed the grievance outcome on **10 December 2019**. The appeal was never heard or decided.

9. The Respondent initially fixed a date of **27 January 2020** for the appeal to be heard by Jackie Butterworth, Divisional Director, (**page 137 RB**). It had been envisaged that Ms Butterworth would write to the Claimant with an outcome within 7 calendar days of that hearing, or, if not possible, to provide a timeframe for an outcome to be provided along with an explanation for any delay. The appeal hearing did not go ahead as planned because, on **10 January 2020**, the Claimant emailed asking that it be postponed until her health improved. The Respondent agreed and referred the Claimant to Occupational Health for the purposes of assessing the feasibility of her engaging further in the grievance process. The Occupational Health report following that referral was at **pages 318 – 319** of the original, Main Bundle ('**MB**') and is dated **06 March 2020**. Dr Ndovela referred to the agents that were aggravating the Claimant's symptoms as being exposure to excessive heat and sweat and referred the Respondent back to the 'measures' (or adjustments) that had been recommended to ensure that there would be reduced heat and sweating. The doctor advised that the Claimant was in a heightened state of anxiety but that she appeared to be fit to attend meetings related to her employment issues. The doctor advised that she was fit to undertake her duties in the radiology department subject to the suggested adjustments and modifications to her role. Those adjustments were, the doctor reminded the Respondent, to minimize any prolonged exposure to excessive heat. Dr Ndovela referred to the Claimant experiencing anxiety and panic attacks for which she was taking medication. That was a reference to Amitriptyline, which the Claimant had been prescribed since about **January/February 2020**.

10. Although we were given few details, it is agreed that the Claimant subsequently asked for her grievance appeal to be determined in writing. It is more likely than not that this was due to a combination of the Claimant's continuing anxiety and the arrival of the COVID pandemic. It is a matter of record that the country went into the first national lockdown on **26 March 2020**. It goes without saying that the Respondent, and the NHS more widely, was fully occupied dealing with the effects of the pandemic from **March 2020** and beyond. We find that this was the reason for the failure to progress the Claimant's grievance appeal in **March**, **April** and into **May 2020**. On **12 May 2020**, Sonia Atkinson, Head of Employee Relations, responded to an email of **30 April 2020** from the Claimant. As confirmed by Ms Atkinson, the Trust was by then seeing a decline in the number of patients admitted with COVID and the number of staff self-isolating and requiring testing. Ms Atkinson went on to say that she would like to engage with the Claimant in setting the appeal hearing up to conclude it and asked if the Claimant was comfortable with her doing that. The Claimant replied on **12 May 2020** to say that she was to catch up with her union representative, Kristian Heaney, and that she would be in touch shortly after that. Ms Atkinson chased the Claimant for a reply on **20 May 2020** and again on **28 May 2020**. On **02 June**

2020, the Claimant then said she was not well enough at present to continue with the grievance appeal, that she was to see her GP on **12 June 2020** and would contact Ms Atkinson again after that with an update. On **08 June 2020**, the Claimant emailed to say why she felt anxious and unable to continue with the appeal process at that time. On **11 June 2020**, after her meeting with her union representative, the Claimant asked if the Respondent would proceed to deal with her grievance in writing and if so, if they would send her a list of questions which she would answer to the best of her ability.

11. On **12 June 2020**, Mr Jackson agreed that the Claimant's grievance appeal would be conducted in writing. In his email of that date to the Claimant, he explained that he was in the process of working with the Chair, Ms Butterworth, to scope out a means of undertaking the appeal in writing. He said he would be back in touch the following week to provide a proposed framework. Mr Jackson emailed again on **25 June 2020** to say that their intention was to break down the order of proceedings into a series of time defined written exchanges. He added that they would be in touch shortly to provide a proposed timeline for those exchanges.

12. That was the last update the Claimant received regarding the grievance appeal. The Respondent did not provide a timeline, nor did it send any questions or progress the grievance appeal in any way from **June 2020**. The next written communication was on **29 March 2021**. On that date, Mr Jackson, emailed Mr Heaney. He referred to a meeting between the two of them which had taken place the previous Friday (**26 March 2021**): "*as discussed, the Trust have considered this matter in great detail following the adjournment of the Employment Tribunal that was scheduled to take place 1 – 3rd March 2021. As a result, the Trust do not consider to be in a position to proceed with this, given the ongoing litigation and overlap with the Employment Tribunal and the issues raised in the grievance process. I appreciate you agreed that you would update Karen of this following our discussion.*"

13. The reference in Mr Jackson's email of **29 March 2021** to the 'Employment Tribunal' was a reference to the initial listing of the Claimant's disability discrimination claim before the tribunal. That hearing was postponed by Judge Green on the first day of the final hearing (see paragraph 2 of our reserved judgment on liability). The Respondent, following legal advice, considered there to be no point in proceeding with the grievance appeal because the matter was well advanced and in the hands of the employment tribunal. Mr Heaney forwarded Mr Jackson's email to the Claimant on **06 April 2021**.

Retirement

14. The Respondent has different policies covering normal retirement, retirement on ill health grounds and retirement on the grounds of redundancy or in the interests of the efficiency of the service. The Respondent's Retirement Policy relevant to these proceedings was found at **pages 70 to 101 RB**. Paragraph 3.5 (**page 76 RB**) refers to a 'Retire and Return Panel'.

15. The NPA (normal pension age) is set out in the policy at para 4.2, **page 77 RB**. This varies according to the relevant section of the NHS Pension scheme. If the employee was a member of the 1995 Section of the NHS Pension scheme, the NPA for 'Special Classes' is age 55. Special Class is the status that applies to members of the 1995 Section of the NHS Pension Scheme who have worked as a nurse since **06 March 1995**, have not had a break in pensionable employment of 5 years or more and have had this status for the 5 years leading up to retirement.

16. Section 5.2 of the Retirement Policy (**page 79 RB**) lists the 3 different levels of notice depending on the type of retirement. If the employee is retiring and not returning to employment with the Trust and who is retiring at NPA or earlier wishing to draw down their pension benefits, they are required to give 4 months' notice to access their pension (see paragraph 5.21). If the employee is retiring with approval to return to employment with the Trust (known as 'retire and return') the requirement is to give 5 months' notice to access their pension. The additional time is to allow time for the retire and return panel to consider the request to return to work (see paragraph 5.22).

17. Section 5.7 of the Policy sets out process for Retire and Return. This enables staff to work longer, make an application to retire, access their pension and return to work with the Trust. The sort of factors that the Retire and Return panel would consider before approving – or not – an application can be seen in paragraph 5.7.5 (**page 83 RB**) where there are 8 bullet-point factors. An employee must additionally meet three criteria (para 5.7.8) all of which were met by the Claimant.

18. Under section 5.7.12 of the policy, it states: "*The Retire and Return option does not allow an employee to retire on a period of sickness. Any employee, who has a period of sickness absence of 28 days or more, will have their application suspended, until such time as they have returned to work and achieved satisfactory attendance as approved by the line manager and the HR Manager*."

19. If an employee wishes to retire and return, they must complete an application form, which is found at Appendix 4 of the policy. If a nurse does opt to retire and return, the normal practice would be to for her to return to the area she had worked in.

20. The Claimant turned 55 on **10 June 2021**. On **14 April 2021**, she emailed Helen Jackson attaching some documents which she asked to be forwarded for approval. The subject line of the email read: '*Request for Normal Age Retirement'*. The Claimant was seeking to retire on **09 June 2021**. The request for retirement was for Normal Age Retirement (under para 5.21). She completed the form found at **page 91 RB** (Appendix 3 of the policy). On **29 April 2021**, Lauren Carr, Radiology Nurse Manager, wrote to the Claimant to confirm that her request for retirement had been approved. Her last date of employment was, therefore, agreed as being **09 June 2021**. It had been agreed that the Claimant

could retire on shorter notice as she was not in receipt of any income/sick pay at that time.

21. Probably the most contentious issue at the Remedy Hearing was the Claimant's claim for financial losses after **09 June 2021**. The Claimant said in her written and oral evidence that, had the Respondent adjusted her working environment to accommodate her disability, she would have returned to work as a radiology nurse 2 days a week, which is 0.4 of a full time contract.

22. There were three iterations of the schedule of loss in the Remedy Bundle dated **23 March 2022**, **18 August 2022** and **10 January 2023** respectively. In only the latter was there any reference to post-retirement losses.

23. On **15 July 2019**, the Claimant mentioned to Laura Berry that she was intending to retire at age 55. She did not mention to Ms Berry that she was intending to retire and return. However, the Claimant had previously once mentioned to Dr Nasser that she was thinking of coming back to work on a retire and return basis.

24. There was no issue with regards to the Claimant's competence or record that would have prevented the Claimant retiring and returning according to the terms of the Retirement Policy, as confirmed by Mr Jackson. The only potential issue for the Respondent would have been whether it could have accommodated a request to work 2 days a week, that is 14 hours.

25. In **August 2022**, Janice Clayton retired and returned on 30 hours a week, which was 7.5 hours less than her full-time role. She works 0.8 of a full-time contract. Most of the applications for retire and return within the area in which Mr Jackson has experience, had been for part-time work of more than 2 days a week, closer to the sort of hours worked by Mrs Clayton.

The Claimant's health and emotional well being

26. In her witness statement prepared for the remedy hearing the Claimant gave an account of the impact of the Respondent's conduct – that is the unlawful discrimination – on her. We accept and find that it has, as she described, had a detrimental impact on her and caused her to suffer significant hurt feelings and emotional distress. She had enjoyed a fulfilling nursing career from 1985 up to the couple of years prior to her retirement. The Respondent's failure to make the adjustments which we found it reasonably could have made led to her suffer emotionally and with anxiety. The uncertainty regarding her future and the anxiety associated with such uncertainty which flowed from the Respondent's failure to implement reasonable adjustments from July 2019 was, we find, marked. She felt isolated and devalued. She was extremely tearful on **15 July 2019,** which was witnessed by Ms Berry. That upset was not caused by the fact that her skin condition was impacting on her work. That was clearly the context and background to it, but the real cause of the Claimant's distress on that day was the realization that the Respondent was going to be unshifting, having been told by

Mrs Clayton on **11 July 2022** that redeployment was the only real option for her – i.e. that the Respondent would not be making any of the adjustments she had proposed. We refer back to our findings in paragraphs 66 – 76 of the liability judgment. We infer from her subsequent diagnosis that she had experienced a panic attack on **15 July 2019**. The entry from her medical records on **16 July 2019** (**page 169 RB**) record the Claimant as crying over the phone, not sleeping and being unable to cope.

27. That upset, worry and anxiety, and to an extent anger at the way she was being treated, stayed with the Claimant for some time. There is an early reference by Dr Ewart to the stress around the issue of adjustments on **page 128 MB**. The Claimant referred to the stress in an email to Tracey Johnson on **12 August 2019** (**page 213 MB**). Indeed, the anxiety worsened to such an extent that she had to be prescribed anti-depressants. Her GP, Dr McCloskey identified work related stress in a letter of **10 December 2019** (**page 138 MB**) and again on **15 January 2020**. The Claimant continued to feel isolated and let down by the Respondent. She experienced subsequent panic attacks on occasion. Her pattern of poor sleep and a feeling of being unable to cope continued. In **December 2019**, she was prescribed diazepam (**page 168 RB**) and fluoexetine, although she could not tolerate the latter (**page 236 MB**). She was subsequently prescribed amitriptyline in about **February 2020**, which she took for about 16 months.

28. From about **February** or **March 2020** the Claimant had ten sessions of cognitive behavioural therapy ('CBT') to help her with her anxiety. She then undertook a further nine sessions of CBT between **July** and **December 2020**. This was, we find, because her anxiety had increased as her request for reasonable adjustments remained unresolved and the ongoing uncertainty was causing her stress and anxiety. That stress and anxiety also impacted on her urticaria. The medical evidence established a sufficiently direct link between anxiety and exacerbation of her skin condition (**page 216 MB**), which was not contested by the Respondent either in these proceedings or indeed at the time (**page 229.52 MB**).

29. Since her retirement, the Claimant has come off her medication, amitriptyline. This happened in about **June 2022**. We accept her oral evidence and so find that her health gradually started to improve in 2022 and although she still suffered from anxiety, by the date of the remedy hearing it is, in the Claimant's own words, 'nowhere near as bad as it had been'. She is still registered as a nurse and able to practice as such.

Attempts by the Claimant to find employment since retirement

30. The Claimant has not made any attempt to look for any work to date, either as a nurse or in any other capacity. Initially, this was, we find, because of her anxiety. However, by the summer of 2022, that was no longer the reason, as her anxiety had reduced to manageable levels. We accept that the Claimant lost a degree of confidence after her initial experiences. However, it was not such that she was

prevented from working. Had the Claimant realistically been advancing any such proposition, we would have expected to have seen some supporting evidence of this. The Claimant is a highly skilled person and, it is a matter of common ground, that there are nursing jobs available to her. It is, after all, her own case that there is a national shortage.

31. The Respondent agrees that there is a national shortage of nurses. The Claimant says that moreover, there is a national shortage of radiology nurses. Mr Jackson was unable to confirm this specifically. However, it is not a significant leap to infer that, there being a national shortage of nurses in general, that there is within that a shortage of radiology nurses. Those jobs are paid at a nationally agreed rate of pay, which in the Claimant's case, would be at band 6. It would not be difficult for the Claimant to secure employment as a band 6 nurse.

Relevant Law

32. The essential principle, when assessing compensation in a discrimination case is that the successful complainant is to be put into the financial position she would have been but for the unlawful conduct of the employer: **Ministry of Defence v Cannock** [1994] ICR 918, [1994] IRLR 509, *EAT*. In assessing compensation according to ordinary tortious principles, the tribunal must take into account the chance that the Claimant might have suffered the same damage lawfully if the Respondent had not done so on discriminatory grounds. In that case, Morison J observed that it was wrong to assess loss in a situation where there had been a dismissal on grounds of pregnancy on the basis of what would have happened (judged on a balance of probabilities) to the woman in her job had she not suffered unlawful discrimination. Instead, the calculation of loss should be dealt with as the evaluation of the loss of a chance.

33. The basic principle of assessing the chances of a lawful dismissal or voluntary retirement is well established in the context of unfair dismissal. In **Polkey v AE Dayton Services Ltd** 1988 ICR 142, HL. The application of the so-called 'Polkey reduction' principle in discrimination cases has also been recognised: **O'Donoghue v Redcar and Cleveland Borough Council** 2001 IRLR 615, CA. In **Abbey National plc and anor v Chagger** [2010] ICR 397, CA. Lord Justice Elias, giving the judgment of the Court, stated that if there was a chance that, apart from the discrimination, the claimant would have been dismissed in any event, that possibility had to be factored into the measure of loss. In **Shittu v South London and Maudsley NHS Foundation Trust** 2022 ICR D1, EAT, Mrs Justice Stacey confirmed that a 'loss of a chance' assessed in terms of percentages was the correct approach when assessing both unfair dismissal and discrimination compensation, as opposed to an all or nothing 'balance of probabilities' approach by which, based on the evidence before it, the tribunal determines whether or not an event would have occurred. In **Shittu**, the employment tribunal found that there was a 100 per cent chance that the claimant would have resigned when he did in any event for other non-discriminatory reasons and regardless of whether or not the specific

circumstances which led to a discriminatory constructive dismissal had occurred. Although Stacey J upheld the tribunal's decision, she also made it clear that, in the absence of the 100 per cent chance finding, it would have been appropriate for the tribunal to have made an award for pecuniary loss on the basis of an assessment of the percentage chance that the claimant would have resigned in any event.

34. In **Wardle v Credit Agricole Corporate and Investment Bank** [2011] EWCA Civ 545, [2011] IRLR 604, the Court of Appeal gave the following guidance to tribunals having to assess future loss of earnings after a discriminatory dismissal:

(1) where it is at least possible to conclude that the employee will, in time, find an equivalently remunerated job (which will be so in the vast majority of cases), loss should be assessed only up to the point where the employee would be likely to obtain an equivalent job, rather than on a career-long basis, and awarding damages until the point when the tribunal is sure that the claimant would find an equivalent job is the wrong approach;

(2) in the rare cases where a career-long-loss approach is appropriate, an upwards-sliding scale of discounts ought to be applied to sequential future slices of time, to reflect the progressive increase in likelihood of the claimant securing an equivalent job as time went by

35. The amount of compensation may be reduced if the claimant has mitigated her loss or has failed to take steps which would have led to a reduction in the loss suffered. The burden of proof in relation to mitigation is on the wrongdoer. What has to be proved is that the claimant acted unreasonably. The tribunal must take care not to apply too demanding a standard of the victim of a wrong.

36. The general principles applicable when assessing an appropriate award for injury to feelings are:

36.1. The award must be compensatory and just to both parties. The award is not punitive.

36.2. Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches.

36.3. Awards should bear some broad general similarity to the range of awards in personal injury cases.

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

37. These principles were stated in **Prison Service v Johnson** [1997] IRLR 162 @ paragraph 27. A claimant must prove the nature of the injury to feelings and its extent. The sort of matters covered by an award for injury to feelings include feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression.

38. In the case of **Vento v Chief Constable of West Yorkshire** (No.2) [2003] I.C.R. 318, the Court of Appeal identified three broad bands of compensation for injury to feelings. Those bands are uplifted annually. As this was a claim presented after **06 April 2019** the appropriate bands were as follows:

    38.1. Lower band: £900 - £8,800 (less serious cases)

    38.2. Middle band: £8,800 - £26,300 (cases that do not merit an award in the upper band)

    38.3. Upper band: £26,300 - £44,000 (the most serious cases)

ACAS Uplift

39. Section 207A Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

    (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

    (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that –

        a. The claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

        b. The employer has failed to comply with that Code in relation to that matter, and

        c. That failure was unreasonable,

        The employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

40. Paragraph 42 of the Code of Practice on Disciplinary & Grievance Procedures says: appeals should be heard without unreasonable delay and at a time and place which should be notified to the employee in advance. Paragraph 45 says that the outcome of the appeal should be communicated to the employee in writing without unreasonable delay.

41. The EAT in **Allma Construction Ltd v Laing** UKEATS/0041/11 gave some guidance to tribunals when considering an uplift under section 207A of the 1992 Act.

Discussion and conclusion

Injury to feelings

42. We start with the non-pecuniary aspect of the claim for compensation, injury to feelings. We refer to our findings in paragraphs 27- 30 above and remind ourselves of our findings and conclusions in the reserved judgment on liability:

    42.1. **paragraph 10**: "*She suffers from chronic urticaria, which in days gone by was, and is still sometimes today, referred to as 'hives'. Since first developing the condition in January 2019, she has tried to keep it under control with the use of mild steroid cream and over the counter antihistamine. However, the condition can be triggered and/or exacerbated by stress"*.

    42.2. **paragraph 87**: "*The Respondent's inactivity with regards to the proposed adjustments, and its failure even to engage with other professionals, as the Claimant had asked, had set the Claimant back and was causing her anxiety and upset*"

    42.3. **paragraph 145**: "*By the time the Respondent agreed to trial the use of light lead aprons, the Claimant was suffering from anxiety and stress due to her perception of being met with resistance from management*".

43. It was common ground that the appropriate 'Vento' bracket was the middle bracket. We agree. In the first two iterations of the schedule of loss (**pages 44 and 46 RB**) the Claimant sought an award of £15,000. In the third iteration, this had been increased to £20,000 (**page 48 RB**). In oral submissions Mr McDevitt explained that this had been his valuation and that, on reflection, an amount of £22,000 might even be the more appropriate figure. Mr Sangha pitched in at a lower amount, submitting that an appropriate award would be £12,000.

44. The exercise is not a scientific one and at best can be described as imprecise. We did not consider Mr Sangha's suggested figure to be sufficiently compensatory in light of what she had been through and experienced. However, we also concluded that Mr McDevitt's assessment was on the high side. We considered carefully the examples from Harvey referred to by Mr McDevitt in his oral submissions. We have also had regard to the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases, which set out factors to be taken into account in valuing claims of psychiatric damage generally and post-traumatic stress disorder. Those factors include a consideration of the person's ability to cope with life, education and work; the effect on the person's relationships with family, friends and those with who he or she comes into contact; the extent to which treatment would be successful; future vulnerability;

prognosis; whether medical help has been sought. The guidelines then set out a range of awards according to whether the damage is (a) severe, (b) moderately severe, (c) moderate or (d) less severe. Cases within the ‘moderate’ category are said to be those where, while there may have been the sort of problems associated with the factors described, there has been marked improvement by trial and the prognosis is good. It adds that cases of work-related stress may fall within this category if symptoms are not prolonged. The range for such category in the 16th edition of the guidelines is £5,860 to £19,070. We also saw that the moderate post-traumatic stress category suggested a range of £8,180 to £23,150.

45. Although there was no evidence of (and no allegation of) a psychiatric or other injury in the Claimant’s case, the effects on her emotional well-being, the injury to her feelings as set out in our findings, can said to be moderate in a sense similar to that conveyed in the Judicial College guidelines under general psychiatric damage. The effect on the Claimant was significant and of substantial duration. In addition to the anxiety and stress which she experienced, she was deeply upset at the way a long and cherished career in nursing came to an end. She had to be prescribed anti-depressants. There was also some limited effect on her relations with her husband However, there was a marked improvement in the Claimant’s wellbeing by the middle of 2022 and she came off medication. There is no prognosis of which we were made aware that suggests she continues to suffer the effects of what happened during the latter years of her employment. We considered an appropriate amount of compensation for injury to feelings to be **£18,000**.

Financial losses

46. This fell to be considered under two periods of time:

46.1. From **30 December 2019** up to **09 June 2021** (during which period the Claimant was still employed)

46.2. From **10 June 2021** (after the Claimant’s retirement)

The period 30 December 2019 up to 09 June 2021

47. There was no dispute that the Claimant had sustained financial loss of earnings in this period**.** What we had to determine was what was recoverable by the Claimant in consequence of the unlawful discrimination which occurred, on our findings, on **15 July 2019**. Mr Sangha submitted that there must be an attendant risk that the adjustments might not have worked and that we must factor this in to our assessment of the Claimant’s loss, to ensure that the Claimant is compensated for losses attributable to the unlawful conduct of the Respondent and not for losses that would or might have occurred in any event. Mr McDevitt submitted that we should approach this aspect on the balance of probabilities: that if we were to conclude there was a 51% chance that the adjustments would

have worked, the Claimant should recover 100% of her losses in this period. However, if he was wrong about this, he submitted that the chance that the adjustments would have worked were very high.

48. We agreed with Mr Sangha. The approach we took to this element of loss was to consider:

    48.1. What are the chances that the reasonable adjustments would have worked so as to enable the Claimant to continue to work and earn her normal remuneration?

49. We considered this approach to be consistent and required by authorities such as those referred to above.

50. Although it is sufficient, in establishing liability for failure to make reasonable adjustments, for there to be a prospect of the proposed adjustments avoiding the disadvantage, a different approach is required when assessing compensation. That is because, there may be cases where the adjustments (which we found reasonably could and should have been made) might not have worked, resulting in a chance that the employee might have suffered the same loss irrespective of any unlawful discrimination.

51. We had to consider, therefore, the chances of the adjustments succeeding. We could not say that there was a 100% chance that the proposed adjustments would have succeeded. Not even the Claimant had said this. Even at the time they were suggested, there was no certainty that they would work – she had, after all, suggested a trial period which, if it proved unsuccessful, she would have accepted. At the time, no-one knew for sure if the adjustments would work.

52. Mr Sangha submitted that there must, therefore, be some attendant risk that the measures might not have worked. We agree. However, we also agree with Mr McDevitt that the chances that they would have succeeded were very high. This is because the Claimant was not relying on a single adjustment. It was the combination of lighter lead aprons, standing behind a static screen when radiation was being emitted, reducing the temperature in the room and rotation of duties that led us to conclude that the chances of success were as high as **85%**. The whole rationale of the occupational health advice was to reduce pressure and heat because these were seen as aggravating the Claimant's skin condition (**page 170 RB**, the full version of this letter is on **pages 318-319 MB**), where the opinion is proffered that she would be fit to return to work if adjustments were in place. We also note that there is no suggestion that since the Claimant's retirement her skin condition has continued at the level it had been prior to **15 July 2019** or that she is unable to work in any particular environment, as a result of her skin condition. From this, we infer that the elimination of any excessive pressure and heat has been beneficial to her urticaria. However, she would have been required to work in a theatre, where temperatures would never be ideal all

of the time. There would also be occasions when she would have to wear lead (albeit a lighter) apron. For those reasons we could not say that there was a 100% chance that the adjustments would have worked. But the chances were, we infer, very high. Doing the best we could, we considered **85%** to be a reasonable assessment.

53. Therefore, the total financial losses in this period being **£28,042.05**, the amount recoverable by the Claimant is **£23,835.74** (£28,042.05 x 85%)**.**

The period from 10 June 2021

54. The Claimant contended that she would have sought to retire and return on a part-time basis for 2 days a week, earning net pay of £229.24 a week. She contended that she would have continued working on this basis up to the age of 61, when she would have retired completely to coincide with her husband's planned retirement. For this reason – in the third iteration of her schedule of loss – she claimed financial losses from **10 June 2021** to **10 June 2027** for the rest of her career.

55. It is, of course, an established fact, that the Claimant did not apply to retire and return. Her case was that, had the Respondent put the adjustments in place and had they worked, she would have applied for retire and return.

56. Applying the principles referred to in the above authorities (e.g. **Shittu**) the approach we took to this element of the claim was as follows:

    56.1. What are the chances that the Claimant would have applied to retire and return?

    56.2. What are the chances that the Claimant's application would have been approved?

    56.3. What are the chances the Claimant would have been in work up to the date of the Remedy Hearing?

    56.4. What are the chances that she would have continued in employment up to **10 June 2027**?

The chances that the Claimant would have applied to retire and return

57. This was one of the most contentious issues between the parties. If the Claimant had retired with the intention of returning she would have had to submit her application by **10 January 2021** (as five months' notice was required). Mr Sangha submitted that this was not something that the Claimant was ever going to do, that the notion of retiring and returning was an afterthought conceived only after the liability judgment had been sent to the parties, for the purposes of remedy. He submitted that we should award nothing in respect of the period after

09 June 2021. He relied on the first two iterations of the Schedule of Loss, the second of which had been prepared in **August 2022** wherein there was no reference to any ongoing loss. This was, he submitted, because the Claimant had intended to retire when she did.

58. We could understand why the Respondent was suspicious of this aspect of the claim. The Claimant confirmed that all three schedules of loss were prepared in conjunction with her lawyers. Only the third had input from Mr McDevitt and that was, indeed, prepared after the liability judgment.

59. Two things operated on our mind to cast doubt upon the assertion that the Claimant <u>would certainly</u> have applied to retire and return: the total lack of reference to it in the claim until after liability had been established and the fact that the Claimant has not attempted to work as a nurse since her retirement, despite there being a national shortage of nurses. We were acutely conscious of the potential for opportunism and inflation of the schedule of loss.

60. We were not convinced that retire and return was on the Claimant's mind in 2021 when she came to submit her application for normal age retirement. However, we concluded that had she not been unlawfully discriminated against there was a substantial chance that she would have applied for retire and return. We accepted that she had once mentioned to Dr Nasser that she was thinking of doing this. We conclude that it was mentioned by her because it is an attractive opportunity afforded to nurses and doctors in the NHS. The fact that she mentioned it to him does not of course mean that she would undoubtedly have applied, much as the fact that she did not mention it to Ms Berry on **15 July 2019** (or at all to Mrs Clayton) did not mean that she undoubtedly would not have applied.

61. We considered that there was a very good chance that the Claimant would have applied had she not been discriminated against in the way we found her to have been. She had extended her role to undertake Hysterosalpingogram Investigations and was one of two members of staff trained to implant loop recorders (see our findings in paragraph 13 of the liability judgment). There was a strong chance that she would want to continue to contribute to the radiology department as one of the more highly skilled nurses. Allied to the attractiveness of taking a pension and earning some further income and her husband's retirement plans, these things lead us to conclude that the chances that the Claimant would have applied were high, even factoring in the doubts expressed in paragraph 59 above. In our assessment, the chances she would have applied were about **75%**.

The chances that the Claimant would have applied to retire and return

62. Of course, making the application is the first step. It has then to be considered and approved. This too is not a certainty. However, we considered the chances of the application being approved to be much higher. We had regard to Mr

Jackson's evidence and our findings thereon. His experience of retire and return applications was limited to those where the application was to retire on about 30 hours a week. He believed that there may be an issue in accommodating a nurse who wished to return on only two days a week.

63. We accepted that there was, therefore, an attendant risk that the application might not be approved. After all, there is a process of application, which must bring with it 'a' risk that an application will be refused. There is also the possibility that it would be difficult to accommodate fewer hours. However, we concluded that the Claimant would have been flexible on the days and that there was a good chance that she and the Trust could work around any such difficulties. It is recognised that there is a shortage of nurses and a desire to keep skills within the NHS. The Claimant was a significantly skilled nurse, who fitted the criteria and who would have a lot to offer. We concluded that the Trust would be keen to retain the Claimant's skills. We assessed the chance that the application would be approved as **90%**.

64. Taking stock at this stage:

    64.1. There was an **85%** chance that the Claimant would have been working with successful adjustments by the time the date for applying to retire and return arrived (**10 January 2021**).

    64.2. There was a **75%** chance that, she would then have applied for retire and return.

    64.3. There was a **90%** chance that any such application would have been accepted.

65. The Claimant is claiming losses for the rest of her career. We did not consider this to be an appropriate case for awarding career losses. On the Claimant's own case, there is a national shortage of nurses and in particular, radiology nurses. There is no supporting medical evidence that she is unable to work as a nurse. She has not suggested that she is physically or mentally incapable of working. At its highest she expressed, rather tentatively in our judgement, that she had lost trust in people.

Mitigation of loss

66. We then considered whether the Respondent had satisfied us that the Claimant had failed to take reasonable steps to mitigate this loss.

67. Allowing time for her health to further improve from June/July 2022, it is our judgement that the Claimant would have been and in fact was in a position to apply for nursing roles from about **October 2022**. Allowing for a few months to enable a prospective employer to ensure the working environment was adjusted and to accommodate her working pattern, we conclude that she would have

obtained a position by the end of 2022. The Claimant has come nowhere close to satisfying us that any trust that she might have lost in the Respondent transfers across to a lack of trust in others. Recognising that the burden is on the Respondent, this is a case where the failure to take reasonable steps speaks for itself. The Respondent has satisfied us that the Claimant has failed to take reasonable steps – by essentially making no attempt at all to obtain employment – to mitigate her losses. Given the uniform banding of nursing jobs (meaning any work she obtains as a nurse would be paid at band 6) she was in a position to fully mitigate her losses by the end of 2022. In those circumstances, the Respondent is not liable to compensate the Claimant for any losses from 01 January 2023.

68. There were 81 weeks in the period **10 June 2021** to **31 December 2022**. The amount claimed in that period is **£18,630** (£230 x 81). To this amount we apply the reductions as set out in paragraph 64, (85%, 75%, 90%) which leaves an amount of **£10,689**. The reductions reflect the chance that the Claimant would have suffered that loss as a result of non-discriminatory conduct as follows:

    68.1. A reduction of 15% to reflect the chance that the adjustments might not have worked

    68.2. A reduction of 25% to reflect the chance that the Claimant might not have applied for retire and return

    68.3. A reduction of 10% to reflect the chance that the Claimant's application might not have been accepted

ACAS uplift

69. The Claimant seeks an uplift in compensation for what she says was an unreasonable failure to comply with paragraphs 42 and 45 of the Code of Practice. There was no dispute about the application of the Code. As to the length of time to deal with the Claimant's grievance appeal, Mr Jackson does not dispute that there was an unreasonable period of time between June 2020 and March 2021. He says that in the context the reason for the delay – the pandemic – was understandable and that the Respondent did not act unreasonably in taking so long to deal with it. Of course, in the end the Respondent never dealt with the appeal.

70. Although he did not come prepared to argue the point, Mr Sangha ultimately landed on the submission that the Claimant required permission to amend the Claim to seek an uplift in respect of an alleged unreasonable failure to comply with the Code when that part of the Code said to have been breached (in respect of the grievance appeal) occurred after the presentation of the Claim Form. Mr McDevitt submitted that the Claimant did not need permission but that if she did, he sought permission to amend to claim such an uplift for the Respondent's unreasonable failure to comply with those paragraphs. There was and could be,

he submitted, no prejudice to the Respondent. It is right to say that Mr Sangha acknowledged this.

71. We agree with Mr McDevitt. No permission to amend is required. The claim of disability discrimination is a claim under section 120 Equality Act 2010, which is listed in Schedule A2 of the Trade Union and Labour Relations (Consolidation) Act 1992. The claim concerns a matter to which the ACAS Code of Practice on Disciplinary and Grievance Procedures applies in that the Claimant presented a grievance in respect of the failure to make reasonable adjustments. She appealed the decision on her grievance. The Act does not say or imply that the relevant failure needs to have occurred prior to presentation of the Claim Form. In any event, if we are wrong about that, we permit the application to amend to claim the uplift. We applied the well-known principles in **Cocking v Sandhurst (Stationers) Ltd** [1974] ICR 650, **Selkent Bus Co Ltd v Moore** [1996] ICR 836 and **Vaughan v Modality Partnership** UKEAT/147/20. The balance of prejudice comes down in favour of the Claimant. Her expectation was that the grievance appeal was to be determined. The Respondent ultimately took a unilateral decision not to do so, which was after the presentation of the Claim Form. The failure could not have been identified in the Claim Form which was presented on **28 November 2019**, before the relevant failures had occurred.

72. As set out in the case of **Allma v Laing**, the first question in considering any uplift of this sort is to ask whether a relevant Code of Practice applies? As indicated above, there was no dispute as to this. The ACAS Code of Practice on Disciplinary and Grievance Procedures is the applicable Code. The next question is whether there was a failure in any respect? Mr Sangha submitted that there could have been no failure to comply with paragraph 42, which requires an appeal to be 'heard' without unreasonable delay, because there was no 'hearing', the Claimant having agreed to this. He then argued that there could be no failure of paragraph 45, which required the employer to 'communicate' the 'outcome of the appeal'. If there was no appeal, there could be no outcome to communicate, therefore, no failure to communicate such an outcome.

73. We do not accept these arguments. The requirement to 'hear' an appeal is not, in our judgement, confined to conducting a hearing in person at which an employee attends before a manager. If that were the case, a person who was severely disabled, and unable physically to attend a hearing – and who was unable to attend a 'remote' hearing – could never have an appeal to which paragraphs 42 to 45 of the Code applied. Even in cases where the employee is not disabled or not well enough to attend a 'hearing', an unscrupulous employer might simply persuade an employee to agree to have an appeal conducted in writing, then delay the appeal or abandon it altogether, arguing subsequently that paragraphs 42 to 45 have no application.

74. It is right that the Code refers to a right to be accompanied at a hearing and that a hearing should have a 'time' and a 'place' but that is only insofar as there is to be a hearing in person. If, as happened here, there was an agreement that the

appeal should be dealt with in writing, it is still an appeal which is being 'heard' and it would be churlish to argue otherwise. The timing of that appeal can still be notified to the employee as can the 'place' where the appeal manager will determine it – or hear it.

75. As Mr Jackson said in paragraph 10 of his statement, the Respondent agreed to 'deal with' the Claimant's appeal in writing. It agreed that on **12 June 2020**. In the ensuing 9 months' there was no evidence of any attempts to deal with the appeal. It was then abandoned altogether in **March 2021**.

76. In our judgment the Respondent did not comply with paragraph 42 and as a consequence, paragraph 45. There was a failure to 'determine' the appeal and therefore a failure to communicate the outcome of the Claimant's appeal. There was no outcome to communicate because the Respondent failed to determine the appeal. Even if, in some way it could be argued that there was no failure in respect of paragraph 42, there was undoubtedly a failure to comply with paragraph 45. The 'outcome' of the appeal is the outcome of the appeal lodged by the Claimant in compliance with paragraph 41. Having agreed to dispose of that appeal in writing, the Respondent then failed to do so and failed to communicate the outcome. Communication of the 'outcome' was not dependent on there being an appeal 'hearing' (in the sense of a hearing attended in person). It was dependent on somebody determining it, which the Respondent failed to do and consequently failed to communicate an outcome.

77. The next question we had to ask, therefore, was whether the failure to comply was unreasonable. In our judgement it was. We did not accept that the pandemic was the reason for the failure. Admittedly, it explained the initial failures but not beyond May 2020 (see paragraph 13 above). We acknowledge that there were surges in Covid numbers thereafter and that the Trust had to cope with the winter of 2020. However, we heard no evidence about the impact on the Trust's ability to hear the grievance appeal beyond that set out in paragraph 10 of Mr Jackson's witness statement. The final decision not to proceed with the grievance appeal at all was, in our judgement, unreasonable. The fact that there was litigation before the Tribunal is not, we conclude, a good reason for unilaterally failing to complete the grievance process.

78. Having considered the failure to determine the appeal to amount to an unreasonable failure, we considered it just and equitable to increase the Claimant's award. However, we recognised that the Respondent had heard the initial grievance and had taken steps to hear the grievance appeal initially having set a date for it and then agreed with the Claimant's request not to proceed with it due to her ill health. Had the Claimant not made that request, it is highly likely that the Respondent would have disposed of the grievance appeal timeously, before the Covid pandemic took hold.

79. We did not consider the Respondent to be ill-motivated towards the Claimant or to be ill-disposed to dealing with the grievance. We considered it proportionate, therefore, to uplift the award by **10%** and not the 15% sought by Mr McDevitt.

Interest

80. From 16 July 2019 (the date of the discriminatory act) to 30 March 2023 (the date of the remedy hearing) is 1,294 days.

Interest on financial award

81. We exercised our discretion to award interest on the award of discrimination under the ET (Interest on awards in discrimination cases) Regulations 1996 at the rate of 8%. The total financial losses are £23,835.74 + £10,689 = **£34,525**. The interest calculation is 647 (mid-way point) x 0.08 x 1/365 x **£34,525** = **£4,895.93**.

Interest on Injury to Feelings award

82. The injury to feelings award is **£18,000**. The interest calculation is 1,294 x 0.08 x 1/365 x **£18,000** = **£5,105**.

Applying the ACAS uplift of 10%

83. This must be applied to the above awards:

    83.1. **£39,420.93** x 10% = £**3,942 = £43,362.93** financial losses

    83.2. **£23,105** x 10% = **£2,310.50 = £25,415.50** non-financial losses

Grossing up

84. The award of **£25,415.50** is in respect of the injury to feelings suffered by the Claimant in respect of pre-termination discrimination. This is not subject to tax.

85. The amount subject to tax is **£43,362.93.** The first £30,000 of this amount is free of tax. Therefore, the grossing up calculation is as follows:

    Grossed up element: £13,362.93 / (100 – 40 = 60) x 40 = **£8,908.62**

    Grossed up award: £43,362.93 + £8,908 = £52,271.55

TOTAL AWARD

86. The total award due to the Claimant is **£77,687.05** (£52,271.55 + £25,415.50)

Employment Judge Sweeney

Date: 13 April 2023