EMPLOYMENT TRIBUNALS

Claimant: **Mr A. Rogers**
Respondent: **Microlise Limited**

Heard at: **Bristol**
On: **8 September 2023** (in person)
and
15 September 2023 (Tribunal meeting in Chambers)

Before: Employment Judge Le Grys
Dr C. Hole
Mr E. Beese

Appearances
For the Claimant: Ms S. Crawshay-Williams (counsel)
For the Respondent: Mr G. Anderson (counsel)

JUDGMENT ON REMEDY

1. The Claimant is entitled to recover his losses for a period of **18 months** from the date of his dismissal.

2. The appropriate award for injury to feelings is **£25,000**.

3. The Respondent shall pay compensation in the sum of **£500** to reflect the Claimant's loss of statutory rights.

4. A further hearing shall be listed to determine total compensation in line with the reasons given in this judgment.

REASONS

Introduction

1. In its decision on liability, the Tribunal found that the Claimant was unfairly dismissed and that the Respondent subjected him to discrimination arising from disability and discrimination on the basis of a failure to make reasonable adjustments.

2. For this hearing on remedy we heard from the Claimant and Gemma Wililams. Both gave oral evidence and were cross examined. We also had an agreed bundle of 322 pages, to which the Claimant added a further 5 pages during the hearing. The Respondent provided written submissions running to 24 pages.

3. Given the number of issues that the Tribunal needed to resolve it was agreed that this hearing would be limited to the determination of issues of principle, and the Tribunal would reconvene on a later date to finalise the exact figures.

4. The Claimant confirmed that he has not received any State benefits following his dismissal and so no issues of recoupment arise in respect of past losses.

5. The Claimant is not seeking reinstatement or re-engagement. These are the principal remedies for unfair dismissal, although orders for reinstatement or re-engagement are rarely made.

6. The Claimant was born in July 1964 and was aged 56 when he was dismissed on 5 March 2021.

Issues

7. The issues to be decided on compensation were agreed as follows:

    1. The Claimant's basic award is agreed at £8,070.

    2. How long would the Claimant have remained in the Respondent's employment following his dismissal if the Respondent had acted lawfully? In particular:

        2.1 How long would a further consultation/trial period have lasted?

        2.2 What are the chances that the Respondent would have fairly dismissed the Claimant following that further consultation/trial period? In particular, what are the chances that the Respondent would have had available and the Claimant would have accepted alternative employment?

        2.3 How long would the Claimant have been absent from work as a result of the osteoarthritis in his hip (the "hip condition")? In particular, how long would it have taken the Claimant to be in a position where he was able to work noting:

            2.3.1 In the real world, the Claimant has been prescribed an arthroscopy operation.

2.3.2 In the hypothetical world, what are the chances that the Claimant would have been prescribed arthroscopy operation. Applying that percentage chance:

2.3.2.1 Would the Respondent's private medical insurance have covered an arthroscopy?

2.3.2.2 When would the Claimant have received that operation (noting it was prescribed on 12 August 2021)?

2.3.2.3 What are the chances that the operation would have been successful?

2.3.3 In the hypothetical world, what are the chances that the Claimant would have been prescribed a hip replacement?

2.3.3.1 Would the Respondent's private medical insurance have covered a hip replacement?

2.3.3.2 When would the Claimant have received that operation?

2.3.3.3 It is accepted that the hip replacement would have had a 90% chance of success.

2.3.4 In either event, how long post-operation would it have taken the Claimant to return to work?

2.3.5 What are the chances that, in the interim, the Respondent would fairly have dismissed for capability? In particular, what are the chances that the Respondent would have had available and the Claimant would have accepted alternative employment?

2.4 What are the chances that, in the interim, the Respondent would fairly have dismissed for capability? In particular, what are the chances that the Respondent would have had available and the Claimant would have accepted alternative employment?

3. At what point was it or will it be reasonable for the Claimant to have mitigated his loss with alternative employment?

4. If it is appropriate to award future loss:

4.1 When will the Claimant become entitled to claim universal credit (at £175.17 per week)?

4.2 The parties agree that an appropriate figure to reflect the loss to the Claimant of:

4.2.1 Private health insurance is £18.62 a week;

4.2.2 Life insurance/death in service benefit is £5.77 a week.

4.3 Is it appropriate to award past losses in respect of private health insurance and life insurance?

5. It is agreed that the appropriate figure to reflect the loss to the Claimant of the company car is £4,914 plus £81 per week. What, if any, discount is appropriate to reflect the extent to which the Claimant used the car for personal reasons?

6. What is the appropriate award for injury to feelings?

7. Does the ACAS code apply to the Claimant's claim? In particular:

7.1 Does the ACAS code apply to SOSR dismissals in principle?

7.2 In any event, is the Claimant's claim one that raises a "disciplinary situation" or a "grievance situation"?

7.3 If so, was there an unreasonable failure to follow the code by either party?

7.4 If so, what is the appropriate uplift/reduction?

8. Is the Claimant entitled to lost earnings between July 2019 and his Effective Date of Termination on 3 March 2021?

9. Is the Claimant entitled to £14,000 to cover the cost of a hip replacement?

10. It is agreed that the Claimant's net weekly wage was £420.91;

11. The Respondent's pension contribution is 4%;

12. There would have been a 3% increase in July 2021, 2022, and 2023. What is an appropriate figure to represent the chances of a pay increase in any future loss?

The law on remedy

<u>Compensation for unfair dismissal</u>

8. An award of compensation is the most common result in unfair dismissal cases. It is assessed under two heads; the basic award and the

compensatory award (see section 118 of the Employment Rights Act 1996 ("ERA")).

9. The provisions relating to the basic award are contained in ERA sections 119 to 122 and in section 126. The award is calculated according to a formula based on age, length of service and gross weekly pay. A week's pay is subject to a statutory maximum (see ERA section 227). It is agreed in this case that the basic award is £8,070.

10. The provisions relating to the compensatory award are contained in ERA sections 123, 124, 124A and 126.

11. A compensatory award is intended to compensate for loss actually suffered and not to penalise the employer for its actions. Furthermore, where a loss of earnings would have been taxable in a Claimant's hands, loss must be calculated net of tax and NI (see British Transport Commission v Gourley [1956] AC 185). The relevant questions are: whether the loss was occasioned or caused by the dismissal; whether it is attributable to the conduct of the employer; and whether it is just and equitable to award compensation.

12. Permissible heads of loss include: past and future loss of earnings, loss of pension and fringe benefits, expenses incurred in looking for other work, and compensation for loss of statutory rights. The award for loss of statutory rights reflects the fact that the dismissed employee will have to work for 2 years in new employment to reacquire the right not to be unfairly dismissed. The award is generally for a conventional amount, at present somewhere in the region of £500.

13. An employee who has been unfairly dismissed must mitigate his loss by taking reasonable steps to reduce his losses to the lowest reasonable amount. This does not mean he has to take 'all possible' steps. The burden of proving a failure by a Claimant to mitigate lies on the Respondent.

14. ERA section 124 places a cap on the compensatory award for unfair dismissal.

Remedies for discrimination

15. Where a Tribunal finds that an employer has discriminated against an employee, there are three types of remedy available (see section 124 of the Equality Act 2010 ("EQA")). The Tribunal may:

    a. Make a declaration as to the rights of the complainant and the Respondent in relation to the matters to which the proceedings relate;

    b. Order the Respondent to pay compensation to the complainant;

    c. Make a recommendation that the Respondent take specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate on the complainant.

16. Each of these remedies is discretionary but it is highly unusual for a remedy not to be awarded.

Compensation for discrimination

17. The central aim of any award of compensation is to put the Claimant in the position, so far as is reasonable, that he would have been in had the discrimination not occurred (Ministry of Defence v Wheeler [1998] IRLR 23 and Chagger v Abbey National plc [2010] IRLR 47). The types of financial loss that are recoverable are, in general, the same as for an unfair dismissal compensatory award and include the value of lost earnings and benefits. The same principles of mitigation apply.

18. There are a number of key differences, however:

    a. There is no statutory cap on the amount of compensation;

    b. The Tribunal does not award simply what it considers 'just and equitable' but must assess loss under the same principles as apply to torts (see EQA s124(6) and s119(2)), though the two approaches will often lead to the same result.

    c. The Tribunal can award compensation for non-financial losses such as injury to feelings, aggravated damages and general damages for personal injury.

    d. The Recoupment Regulations do not apply (recoupment does not arise in this case in any event).

    e. The Tribunal has power to, and generally should award interest on past losses.

Compensation for injury to feelings

19. An award for injury to feelings is intended to compensate the Claimant for the anger, distress and upset caused by the unlawful treatment he has received. It is compensatory and not punitive, but the focus is on the actual injury suffered by the Claimant and not the gravity of the acts of the Respondent (see Komeng v Creative Support Ltd [2019] UKEAT/0275/18).

20. Tribunals have a broad discretion about what level of award to make. The matters compensated for encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (see Vento v Chief Constable of West Yorkshire Police (No2) [2003] IRLR 102). The general principles that apply to assessing an appropriate injury to feelings award were set out by the EAT in Prison Service v Johnson [1997] IRLR 162, as follows:

    - Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the

discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award;

- 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;
- Awards should bear some broad general similarity to the range of awards in personal injury cases – not to any particular type of personal injury but to the whole range of such awards;
- Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings;
- Tribunals should bear in mind the need for public respect for the level of awards made.

21. The Court of Appeal in Vento v Chief Constable of West Yorkshire Police (No.2) [2003] IRLR 102 identified three broad bands of compensation for injury to feelings. There is within each band considerable flexibility, allowing Tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case. Compensation must relate to the level of injury to feelings experienced by the particular Claimant.

22. Presidential Guidance states that in respect of claims presented on or after 6 April 2021, and taking account of Simmons v Castle [2012] EWCA Civ 1039, the Vento bands shall be as follows: a lower band of £900 to £9,100 (less serious cases); a middle band of £9,100 to £27,400 (cases that do not merit an award in the upper band); and an upper band of £27,400 to £45,600 (the most serious cases), with the most exceptional cases capable of exceeding £45,600. This claim was presented on 16 July 2021.

Interest

23. A Tribunal can, and usually will award interest on awards of compensation made in discrimination claims under s124(2)(b) EQA and the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the Regulations"). Interest is limited to past loss, that is loss to the date of the Remedy Hearing. The current rate of interest is 8%.

24. Interest is awarded on injury to feelings awards from the date of the act of discrimination complained of until the date on which the Tribunal calculates the compensation (see reg 6(1)(a) of the Regulations). Interest is awarded on all sums other than compensation for injury to feelings from the mid- point date (reg 6(1)(b)). The mid-point date is the date halfway through the period between the date of the discrimination complained of and the date when the Tribunal calculates the award (reg 4).

25. The Tribunal has a discretion to award interest on a different basis if it considers that serious injustice would otherwise be caused.

Other matters common to compensation under the ERA and EQA

The burden of proof

26. It is for a Claimant to prove his loss and, generally speaking, this will include proof of the causal link between the unlawful treatment and the loss. In many cases this will be obvious or relatively easy for a Claimant to achieve.

27. As noted above, the Claimant is under an obligation to take *reasonable* steps to mitigate her loss, but it is for the Respondent to prove with evidence that he has failed to do so.

Choice of basis for compensation

28. It is a matter for the Tribunal to decide whether to award compensation either under the ERA or EQA. It must, however, avoid double recovery.

The relevance of Codes of Practice

29. Under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A") an award of compensation for unfair dismissal can be increased by up to 25% if the employer has unreasonably failed to comply with a relevant Code of Practice issued by ACAS or the Secretary of State (there is a corresponding power to reduce awards by up to 25% where an employee unreasonably failed to comply with a relevant Code). This power to increase or reduce does not apply to a basic award for unfair dismissal (see ERA sections 118 and 124A).

Conclusions

30. Apart from those awards that can only be made under the ERA, namely a basic award for unfair dismissal and compensation for loss of statutory rights, we have decided to assess the Claimant's losses under the EQA. This is so that we can award interest on the compensation to which the Claimant is entitled to reflect the time which has elapsed since his discriminatory dismissal. We find that this reflects the justice of the case.

Issue 2: How long the Claimant would have remained in the Respondent's employment

31. We begin by considering the hypothetical position had the Respondent acted lawfully, and the Claimant had not developed the hip condition.

32. It is important context that the Tribunal did not conclude in our liability findings that it would have been reasonable for the Respondent to continue employing the Claimant in his original role indefinitely. At paragraph 90 of our reasons it was noted that the Respondent had

legitimate business aims and that it was reasonable for it to seek re-organisation.

33. The issue was instead whether something less discriminatory could have been done to achieve these reasonable goals. The Tribunal found that there had been a failure to consider alternative job opportunities, and previously agreed reasonable adjustments had been removed without explanation. The Respondent also brought the consultation to an end after an ineffective trial period rather than further considering the position.

34. Had the Respondent acted lawfully, therefore, we consider it likely that it would instead have embarked on a further period of consultation. Having recognised that the Claimant had not conducted any installation work during his trial, and that there remained a lack of clarity as to what additional work (if any) he could manage, we find it likely that this would have involved an additional trial. During this the Respondent would have continued with the previously agreed adjustments, and clarified - both to the Claimant and anyone he was working with - the exact parameters of his work, in other words what he was and was not expected to do.

35. As the original trial period was for four weeks it is likely that any new trial would have been for a similar length of time. At the end of this the Respondent would consider the results as part of the ongoing consultation.

36. The Tribunal does not consider it likely that the further consultation would have resulted in the Claimant moving to the adjusted role, even taking into account the reasonable adjustments previously agreed. He had been adamant throughout the process that he could not complete installation work and that this was substantially different to what he was already doing. He had stated that the work he had seen during his first trial was beyond his capability. He had already indicated to the Claimant that, regardless of his medical condition, he would not agree to any changes in his contract. Furthermore, the report of Dr Gately had stated that any additional responsibilities or roles may be detrimental to his health, while the Occupational Health Report of Lesley Seagars dated 13 January 2021 had stated that he could not carry out all aspects of the adjusted role and was not medically fit to work the proposed 12 hour shift.

37. Taking into account both the attitude and approach of the Claimant and the medical advice, therefore, while it would have been reasonable to conduct a further, effective, trial period, we do not find it likely that the Claimant would have moved to the amended role at its conclusion. We instead find that the Claimant would have remained either unwilling or unable to undertake the additional duties.

38. The Respondent would therefore have re-assessed the position. Given that it had previously touched upon the option of alternative jobs, including possible pay protection, it is likely that this would have included a consideration of such alternatives. Furthermore, the Respondent had shown with other employees that it was willing to consider such alternative

roles, including the possibility of returning to their original consultation period if these were not successful after a reasonable trial. It was also agreed throughout the process that the Respondent did not want to lose the Claimant and was keen to find a mutually agreeable solution.

39. While the Claimant had expressed doubts as to whether he would be able to undertake an alternative role he had indicated a willingness to consider the options, subject to clarification on issues such as pay protection and whether he would need to apply as part of a competitive process. He was also clear throughout proceedings that he liked working for the Respondent and had wanted to continue doing so, and also expressed his concerns about finding a new employer if he had to leave. Given that the alternative in these circumstances would have been a potential dismissal for capability we find it likely that he would have agreed to explore the possibilities.

40. Taking this all into account we consider it likely that the Respondent would have given a reasonable period to find a suitable alternative role. As a large employer who had shown an ability to find such work for other employees it is likely that it would have been successful in such a search, albeit it may have taken time to identify a position, consult with the Claimant, and make the arrangements for the transfer. Given the time already afforded to the process, however, as well as the fact that it was not time critical that the Claimant's role changed immediately, it would have allowed for this time.

41. In all the circumstances we find it likely that this process (which, for the avoidance of doubt, includes the new trial period and any further consultation meetings) would have taken up to six months, during which time the Claimant would continue in his existing role. This would give a reasonable period for the alternatives to be explored without placing an undue burden on the Respondent to continue with the present situation indefinitely.

42. At the end of this period we consider it likely that the Respondent would have offered the Claimant an alternative role with an agreed form of pay protection, and that the Claimant would have accepted this revised position.

43. The Tribunal does not find it likely, however, that the Claimant would have remained in the new role for an extended period. During the consultation he stated that he did not believe he could manage such a job for more than six months, and that he believed he only had between one and two years of work left in him. He has also given clear evidence to the Tribunal as to the negative impact that staying in the house has had on him since his dismissal which is likely to have also been a factor in any position that required him to work from home, such that we consider his original estimates during the consultation to be accurate. While he would no doubt have made every effort to make the changes work in order to keep his job,

it is highly unlikely that he would have remained in a new position any longer than he had expected to remain in an entirely unchanged role.

44. Taking this all into account we do not find it likely that he would have remained employed by the Respondent longer than 12 months after the point at which changes were made to his role. This reflects the period during which the Claimant would have worked in the new position as well as the possibility of a short period where he reverted to his original role before a final consultation period.

45. The unanimous view of the Tribunal is, therefore, that had the Respondent acted lawfully, and putting the hip condition to one side at this stage, the Claimant would have left the Respondent's employment no more than 18 months later than he did (comprising of the 6 months additional consultation and 12 months in an adjusted role and final consultation period).

The hip condition

46. It is agreed that, following the Claimant's dismissal but not directly connected to it, the Claimant began to experience difficulty with his hip. It is therefore also agreed that, had the Claimant remained in the Respondent's employment, this would have impacted his ability to work (albeit the extent of this is disputed).

47. On 24 March 2021 the Claimant visited his GP and described the pain as *"so bad feels like will vomit"* (p113). On 29 March 2021 his medical notes show that he had been fitted for a walking stick; on 13 April 2021 it is recorded that he was *"struggling to go out due to hip pain, struggles to get some of his clothes on"* (p112). By 28 April 2021 it was recorded that he *"cant* [sic] *stand or walk for long or far"* and had had a bath seat fitted (p111). On 20 July 2021 it was recorded that the Claimant had made enquires about borrowing a wheelchair (p109).

48. The Claimant gave evidence that he believed he would have been absent from work for no more than a couple of weeks as a result of this, which was the time when the pain was at its most severe. After this he began to improve. He said that he was determined to keep working and had been avoiding taking any sickness absences and so would have been motivated to return. While he accepted that he did use a wheelchair for a couple of events in July, these were all day family events where he would be needing to stand or walk for an extended time and he did not routinely need one.

49. While we accept that the Claimant would have been motivated to return to work we do not consider it reasonably likely that the period of absence would be limited to two weeks. The medical notes show an extreme level of pain and, while the Claimant argues that he did not routinely need a wheelchair, the fact that he was making such enquires at all by as late as July strongly suggests in itself that his mobility remained restricted. In

addition to this, we note that Dr John's report of 23 August 2023 indicates that the Claimant's symptoms cannot be controlled without a full hip replacement (p144), and so these were clearly not issues that would have gone away entirely on their own. Furthermore, Gemma Williams gave clear evidence, which was not specifically challenged and so we accept, that the environment in which the Claimant worked was a potentially dangerous one where employees required full mobility; as such, the use of aids such as walking sticks would not be permitted. When this is all taken into account we do not find it likely that the Claimant would have quickly returned to work, nor that the Respondent would necessarily have permitted this without further assessments and referrals. The Claimant would, therefore, have commenced an extended period of sickness absence.

50. Given our earlier findings as to the Respondent's desire to keep the Claimant at work, however, as well as its demonstrated willingness to extend periods of sickness absence for longstanding employees where there was a hope or expectation that they would be able to return in some capacity, we do not consider it reasonably likely that the Respondent would have immediately moved to strictly apply the sickness absence policy, particularly in relation to pay. While we accept Gemma Williams evidence that the policy would have permitted this, the Claimant had a clearly defined medical issue and we consider that the Respondent, as a reasonable employer, would have supported him while this was investigated, as it had for others.

51. In the real world, the Claimant was referred for an MRI on 27 May 2021 which was conducted on 12 August 2021. An x-ray also took place on 20 May 2021. Following these assessments it was suggested that he would be suitable for an arthroscopy operation. While the Claimant assumed that he was on a waiting list he heard nothing more about this and no such surgery was ever undertaken.

52. In a new assessment in August 2023 Dr John concluded that a full hip replacement was required and that an arthroscopy operation was unlikely to have ever assisted him. A hip replacement would, however, have a high probability of allowing him to make a full recovery.

53. We do not consider it likely that, had the Claimant remained in employment, the situation would have been permitted to 'drift' in the manner that it did in the real world. Both the Claimant and Respondent would have had a clear incentive to see that the Claimant was returned to work as soon as possible, which would likely have seen both parties taking a far more proactive approach to chasing results and ensuring that things were moving towards a positive outcome. This would have included a referral to the Claimant's private medical insurance and would almost certainly have resulted in much earlier progress than was actually seen.

54. Given the firm conclusions in Dr John's report we consider it likely that this would have resulted in the early identification of the need for a hip

replacement. In contrast, the NHS notes suggest a lower degree of certainty (*"may be suitable"*, p125) with a need for further assessments. In circumstances where the situation was instead promptly investigated and the matters were properly followed up we find it likely that the need for a hip replacement would have been identified at this earlier stage.

55. We are also satisfied that such an operation is likely to have been covered by the private medical insurance. The email from Vitality (p316) does no more than state that it might be classed as a pre-existing condition in certain circumstances, but that a medical report would be needed to confirm. We do not consider this to take the matter any further forward; at its highest it does no more than state that there is a possibility it could be excluded, but that this would need to be checked. Given that Dr John's report makes clear that the hip condition is not, in fact, connected to the Claimant's pre-existing arthritis, we consider it unlikely that any such investigations by Vitality would have come to a different view.

56. We therefore find that, had the Claimant remained employed, the need for a hip replacement would have been identified within a reasonable period and such an operation would then have been organised through his medical insurance. There is no dispute that such an operation had a high probability of success, such that the Claimant would have been essentially placed back in the situation he was in before the hip condition arose.

57. Taking into account the agreed timescales for such an operation to take place we find it likely that the Claimant would have had this surgery, and been fit to return to work, by around the end of 2021. We are further satisfied, given the way in which the Respondent treated others in similar situations, that it would have continued to support him during this time, taking into account the fact that he had a clearly defined treatment path that was likely to see him return to work within a reasonable period.

58. We do not find it likely, however, that this process would have had a significant impact on the total time that the Claimant would have remained employed by the Respondent. It is agreed that a hip replacement would only address this specific health concern and would have had no impact on the Claimant's original conditions, nor the Respondent's intention to re-organise its business. As such, even if this health condition was fully resolved, the Claimant would merely have returned to the original consultation period.

59. While the Respondent would have then finished any uncompleted part of the trial period, there is no reason to believe that the outcome would have been any different.

60. Furthermore, while the Claimant may have been unable to work while awaiting his operation there was no reason as to why the Respondent could not have used this time to consider alternative job opportunities, which could then have been put to him immediately on his return. It is therefore likely in this hypothetical scenario that matters would in fact have

moved far more swiftly than the 6 months we allowed for had the hip condition not occurred. In addition to this, and as noted above, the Claimant had already indicated that he did not consider it likely that he would continue working for longer than a year or two regardless of the hip condition, and, given that his original conditions remained, there are no reasonable grounds on which to conclude that this would have changed.

61. We further note that both the Claimant's medical records and his evidence to the Tribunal demonstrated a clear deterioration in his mental health following his dismissal, including a diagnosis of PTSD. As a result of this he described having found everything more difficult. He told us that he considers this deterioration to be connected to his dismissal as it meant he spent a lot more time alone at home, causing him to think about things that he had previously been able to compartmentalise.

62. While we have considerable sympathy for the Claimant's situation we do not consider that responsibility for these mental health issues can be fairly placed at the Respondent's door. They are not directly connected to his employment and, even had the Claimant's situation been dealt with exactly as he would have liked, he would have faced an extended period at home and out of work. While we accept that in this hypothetical situation he would not have been dismissed, it would still have been a time during which he faced considerable uncertainty about his employment situation. Furthermore, any new role that he was offered would also likely have seen him at home for much of the time. In all the circumstances there is a reasonable likelihood that the mental health issues the Claimant is now experiencing, and the associated difficulties that this has brought, would have arisen regardless of the dismissal.

63. As such, while the exact point at which events happened would inevitably have been impacted by the Claimant's hip condition, the Tribunal does not consider it likely that he would have continued in work beyond the 18 months identified above. The medical condition would instead have resulted in a period away from work, during which the Respondent would have considered possible alternative roles. On his return, and following a short further consultation period, the Claimant remains likely to have accepted such an alternative but his deteriorating mental health, as well as his original estimate as to how long he expected to continue working, was such that he is unlikely to have remained in post for an extended period. In both scenarios, therefore, the Claimant would ultimately have reached his original estimate of one to two years remaining in work, and would then either have resigned or been fairly dismissed for capability.

64. The Tribunal finds, therefore, that the Claimant is entitled to recover his losses for a period of **18 months** following his dismissal.

65. Given that this period had already passed by the date of the remedy hearing it follows that we do not find that he is entitled to recover in respect of future losses.

Issue 3: Mitigation

66. It is accepted that the Claimant has experienced significant ill health since his dismissal, both as a result of his hip condition and his mental health. He continues to await the required hip operation and his mobility remains highly restricted. He has stated that he is not entitled to State benefits as a result of his savings. In the circumstances we do not consider it reasonable to have expected him to have mitigated his losses during the 18 month period we have identified.

67. While we do not find that the Claimant is entitled to recover future losses, and so no issue of mitigation arises in respect of this, we do briefly note that we do not consider the Claimant's claim for losses until retirement, a period which would cover more than 10 years from his dismissal, to be reasonable. We are satisfied that the Respondent has shown that there is strong demand for this sort of work and, while the Claimant had concerns that any prospective employer would not make any adjustments for him, they would be under a legal obligation to do so. The Claimant accepts that he has not actually made any attempts to apply and so it is not the case that he has been told that adjustments would not be made. Furthermore, while the Claimant deals with some of the suggested jobs in his witness statement there remain a significant number for which he raised no specific objections. Given that we have not found that his mental health issues can be attributed to the Respondent, as well as the evidence of high demand for workers with the Claimant's skills and experience, we are satisfied that it would have been unreasonable for the Claimant to fail to mitigate his losses for such an extended period.

Issue 4: Future loss

68. As we have not found it appropriate to award future loss no issue in respect of this arises.

69. We are, however, satisfied that the Claimant is entitled to past losses in respect of his private health insurance, life insurance, and employee pension contributions for the 18 month period we have identified. These are fringe benefits which the Claimant has lost and so is entitled to recover, with the value assessed simply by taking the difference between the cost to the employee of the benefit before dismissal and the cost on the open market after dismissal.

Issue 5: Company car

70. It is agreed that the Claimant is entitled to claim in respect of the loss of his company car, albeit the parties disagree as to what, if any, reduction should be made to reflect the extent to which he actually used it for personal use.

71. The Claimant was entitled to use his company car for personal use outside of working hours. This would include the ability to use it before or after

work, and at weekends. We accept as reasonable the Claimant's submissions that normal use may well have included matters such as popping to the shops while on the way to or from work.

72. We also note, however, that a central part of the Claimant's case was that his medication made him unsafe to drive in the evenings, and that his hip condition would have restricted his ability to use it during the period while he was awaiting his operation.

73. Taking this all into account, in our judgment the Claimant is entitled to recover the value of 3/7 of the company car over the 18 month period identified. This covers the loss of use at the weekends while making a modest additional allowance for use during the week.

Issue 6: Injury to Feelings

74. The parties agree that this would fall into the middle Vento band, albeit there is disagreement as to where it should fall within this band.

75. In our judgment the matter does fall towards the upper end of the middle band. The Claimant has given clear evidence of the very upsetting nature of the dismissal which we accept and take fully into account. We note in particular the somewhat chaotic nature of his final dismissal from the company for which he had worked for 10 years, which included being told that he had no right to challenge the decision as well as a lack of clarity as to who was actually responsible for the original decision to dismiss. We further note that the dismissal followed a trial period that had been ineffective and did not appear to address his concerns, following which his previously agreed adjustments were removed without explanation. In such circumstances we do find that the upset caused was considerable.

76. In addition to this, while not directly attributable to the Respondent, we do consider that the Claimant's ability to process the life events that subsequently occurred, including both his hip condition and mental health issues as well as a cancer scare, was impacted by the treatment he received, such as to compound the upset.

77. Finally, we are satisfied that the effect on the Claimant's feelings has further been compounded by the fact that, but for the discriminatory treatment, it is likely that he would have received the required medical treatment by now.

78. We are therefore satisfied that the appropriate award is broadly towards the top of the middle Vento band, and consider £25,000 to be the just and equitable award for injury to feelings.

Issue 7: ACAS Uplift

79. In its liability findings the Tribunal found that the dismissal was for Some Other Substantial Reason [109]. As the reason for the dismissal did not

involve a disciplinary offence or matters relating to conduct there can be no basis for awarding an uplift for failure to comply with the Code (applying Holmes v Qinetiq Ltd 2016 ICR 1016, EAT and Phoenix House Ltd v Stockman 2017 ICR 84, EAT).

80. We further note that the claim did not previously include any claim for an uplift or in respect of the procedure, nor was this included in the list of issues in the original Case Management Orders of EJ Bax.

81. Taking all of these factors into consideration we do not consider it appropriate to make any adjustment to the award in respect of this.

Issue 8: Lost Earnings

82. The Claimant did not bring a claim for unauthorised deduction from wages, nor did the Tribunal make any findings that it had been discriminatory for him not to have been awarded a pay rise.

83. In such circumstances the Tribunal does not consider it appropriate to make any award in respect of this.

Issue 9: Hip Replacement Cost

84. While we are satisfied that the Claimant was likely to have received the required treatment but for the dismissal, he has not, as a matter of fact, suffered any direct financial loss as a result of this. Had he continued in employment and the costs of any treatment been covered by the insurers then this would not have resulted in a direct cost to him. While there is the possibility that he might have paid for this privately it is an inescapable fact that he did not.

85. Furthermore, the Claimant will now be entitled to this treatment on the NHS and so there is no requirement for him to pay privately. While he may choose to do so, this would be a personal decision rather than a future loss that can be directly attributed to the Respondent.

86. In our judgment, therefore, an award for treatment that the Claimant has not received not paid for would effectively amount to a windful payment for losses that he has not suffered.

87. While we accept that the Claimant did lose the opportunity to have the treatment undertaken earlier, we note that we have already made provision for the impact of this as part of our assessment of injury to feelings. In all the circumstances we do not, therefore, consider it to be just and equitable to make any further award in respect of this.

Loss of Statutory Rights

88. We are satisfied that a figure of £500 is appropriate, taking into account the Claimant's length of service.

Interest for discrimination

89. We award interest at 8% on those heads of losses arising under the EQA.

Employment Judge Le Grys
Date: 28 September 2023

Judgment sent to the Parties:
18 October 2023

For the Tribunal Office