5 **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case Nos: 4102702/2012 & 4107069/2012

10 **Remedy Hearing on Monday 24th July to Thursday 27th July 2023**

Employment Judge Frances Eccles
Tribunal Member Lorraine Brown
15 **Tribunal Member Thomas Lithgow**

Professor R Sheikholeslami	**Claimant** **Represented by:** **Mr S Gorton KC** **Ms K Dingwall - Instructing Solicitor**
The University of Edinburgh	**Respondents** **Represented by:** **Mr D Reade KC** **Mr R Turnbull - Instructing Solicitor on 24th to 26th July** **Ms M McGrady – Instructing Solicitor on 27th July**

20 25 30 35

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

40 The unanimous judgment of the Employment Tribunal is that;

(i) The claimant should be awarded economic loss by the respondent based on an 80% chance that she would have returned to remunerative employment with the respondent in January 2011 and have remained in their employment to the age of 66;

(ii) The claimant should be awarded economic loss by the respondent based on a 60% chance that the claimant would have continued in the respondent's employment from the age of 66 to the age of 70 when she would have retired;

(iii) The claimant is awarded compensation for injury to feelings for discrimination arising from disability in the sum of £50,000 with interest of £46,119.68 to 20 October 2023;

(iv) Any sum to be paid by the respondent to the claimant for NHS, bank and bankruptcy costs shall be continued for further consideration by the Tribunal and

(v) Calculation of any uplift to be awarded under ACAS, interest on past economic loss, adjustment for accelerated receipt on future economic loss and taxation shall be continued for further consideration by the Tribunal.

REASONS

BACKGROUND

1. This case has a lengthy procedural history. The claimant's employment with the respondent started on 1 May 2007. It ended on 12 April 2012. The claims were presented on 11 March 2012 and 11 July 2012, respectively. The claimant brought a number of complaints including unfair dismissal and

different types of sex discrimination and disability discrimination. By judgment dated 15 March 2017 ("the first liability judgment") (RB62 to 119), the claimant was found to have been unfairly dismissed and to be entitled to holiday pay. A complaint of victimisation succeeded in part. The complaints of sex and disability discrimination were dismissed. The claimant appealed to the Employment Appeal Tribunal ("EAT"). By judgment handed down on 5 October 2018 (RB120 to155), the EAT allowed the claimant's appeal in relation to the reasonable adjustments, discrimination arising from disability, sex discrimination and victimisation complaints The case was remitted to the same Tribunal for reconsideration.

2. By judgment dated 15 May 2019 ("the second liability judgment") (RB156 to 210), the reasonable adjustments and disability related complaints succeeded in part. The Tribunal dismissed the remitted victimisation and sex discrimination complaints.

3. The case proceeded to a remedy hearing in March and April 2020. The Tribunal by judgment dated 3 July 2020 ("the remedy judgment") (RB Volume 3 pages 162 to 196), awarded the claimant (i) a basic award of £2,850 and a compensatory award of £312.50 in respect of unfair dismissal; (ii) an agreed figure of £8,241.52 for arrears of holiday pay; (iii) an injury to feelings award of £2,000 with interest of £1,360 in respect of the failure to make reasonable adjustments, (iv) an injury to feelings award of £2,800 with interest of £2,072 in respect of victimisation; (v) an injury to feelings award of £25,000 with interest of £16,200 together with a monetary award equivalent to 8 months' NHS benefits with interest in respect of discrimination arising from disability.

The remedy judgment was subsequently reconsidered and by judgment dated 3 July 2020 (Volume 3 pages 198 to 203), the Tribunal increased the awards where appropriate to take account of uplifts under Section 207A of TULRCA 1992.

4. The claimant appealed the remedy judgment to the EAT. By Order dated 31 May 2022 (Volume 4 1595), the EAT allowed the appeal to the extent of setting aside the remedy judgment on the following issues;

   (1) the amount of any compensatory award due in respect of the respondent's unfair dismissal of the claimant;

   (2) the amount of any further economic loss caused to the claimant by the respondent's disability discrimination against and victimisation of the claimant referred to in the Employment Tribunal's Judgments of 15 March 2017 (the first remedy judgment) and 15 May 2019 (the second remedy judgment); and

   (3) *the amount of any injury to feelings award due in respect of the respondent's discrimination against the claimant arising from disability in terms of the Employment Tribunal's Judgment of 15 May 2019 (the second remedy judgment).*

5. The above issues were remitted for a rehearing before a differently constituted Employment Tribunal.

6. When determining the scope of the remit from the EAT, the Tribunal gave careful consideration to the terms of the above Order and the EAT's judgment dated 31 May 2022 (Volume 4 1566 to 1594).

5 7. In terms of the compensatory award for unfair dismissal, the EAT summarises (at paragraph 8 (a) of its judgment) the findings in fact from the first liability judgment as follows;

"*the respondent's reason for dismissing the claimant was that it believed that*
10 *the claimant's 5 year work visa was due to expire such that she could no longer legally continue to work in the UK. The dismissal was, however, not within the band of reasonable responses and was procedurally unfair. The respondent had failed to explore options that might have allowed the claimant to remain in the UK and had failed to engage with her about her medical condition or*
15 *whether she could return to work. It also did not offer a meeting before dismissing her and had not offered an appeal against the dismissal*."

8. In terms of the complaint of victimisation, the EAT summarises (at paragraph 8 (c) of its judgment) the findings in fact from the first liability judgment as
20 follows;

"*on 14 April 2010, the claimant had made a formal complaint of sex discrimination against the respondent. That complaint was a protected act. The claimant was thereafter subjected to detriments on a number of occasions*
25 *because she had done that protected act. Specifically, the claimant found that she was regarded by a number of colleagues as "an individual to be distrusted*

and disliked." An instruction was issued by a representative of the respondent that no contact was to be made with the claimant other than through her solicitors. In consequence, certain decisions about the claimant (which decisions were not themselves found to be acts of discrimination/victimisation) were not intimated to the claimant as they should have been. The respondent's failure to communicate those decisions because there was an instruction not to contact the claimant. That instruction came about because the claimant had done a protected act."

9. In terms of the reasonable adjustment complaint, the EAT summarises (at paragraph 8 (d) of its judgment) the findings in fact from the second liability judgment as follows;

"*the Tribunal identified adjustments that it considered the respondent ought to have made for the claimant's disability in terms of section 20(1) EA. The adjustments it found that the respondents had failed to make were:*

(i) "*to apply its own procedures and policies in respect of sickness absence and disability;*

(ii) *to apply its grievance procedure and dignity and respect policy;*

(iii) *to take steps that it reasonably could to try to ensure the claimant's immigration status would not be compromised by her absences caused by her disability and if necessary, take all*

reasonable steps to ensure that the claimant would not be at risk of losing her lawful working status;

(iv) to apply all of its relevant procedures in connection with the claimant's dismissal; and

(v) to engage with the claimant in respect of her work permit status, informing her of all options with a view to trying to ensure her work status was not lost at the expiration of her 5 year work permit."

10. The EAT emphasised that adjustments (iii) and (v) above were particular to the claimant's position, related to the issue of immigration status and were relevant for the purposes of the appeal.

11. In terms of discrimination arising from disability, the EAT summarises (at paragraph 8 (e) of its judgment) the findings in fact from the second liability judgment as;

"the claimant's lengthy absence was due to her disability; (ii) in consequence, the respondent's view was that the claimant was never going to return to work; and (iii) her dismissal was "something arising in consequence of her disability" and was not justified."

12. As regards the counterfactual findings - what might have been had the claimant not been unfairly dismissed or discriminated against by the respondent - the EAT observed (at paragraph 52 of its judgment) that the Tribunal did not seem

to have considered what would (or might) have happened if the respondent had complied with its duties. The EAT also observed (at paragraph 52 of its judgment) that the Tribunal's conclusion about "*the impasse*" did not "*sit comfortably with the Tribunal's earlier conclusion that the respondent had failed to engage with the claimant about her medical condition or whether she could return to work*". The EAT decided (at paragraph 53 of its judgment) that "*the Tribunal's conclusion that there would have been a fair dismissal in any event in December 2012 cannot stand*".

13. The EAT states (at paragraph 55) that the parts of the remedy judgment dealing with (i) basic award; (ii) holiday pay: (c) injury to feelings awards for victimisation and failure to make reasonable adjustments and (d) the refusal to make a separate solatium award are all unaffected by its conclusions. The remaining parts of the remedy judgment were set aside for a re-hearing on the three issues identified above at paragraph 4.

14. The parties were in agreement that when calculating the award for injury to feelings in respect of the complaint of discrimination arising from disability, the Tribunal should not have reduced the award to £25,000 to reflect the irrelevant consideration of the likelihood of a future fair and non-discriminatory dismissal.

15. At the start of the remedy hearing before this Tribunal, the parties were allowed time to finalise an agreed list of issues. As part of the above exercise, parties asked the Tribunal to give directions on whether, in its opinion, the scope of the EAT's remit allowed it to disturb certain findings made by the earlier Tribunal. The findings related to the following matters;

The claimant's age at retirement had she been able to return to work.
The claimant's position on the respondent's pay scale (the spinal point) had she been able to return to work
5 *Loss of any external earnings had the claimant been able to return to work.*
Bank and bankruptcy related costs
The claimant's entitlement to a sabbatical had she been able to return to work.

10 16. From its reading of the EAT's Order and judgment, the Tribunal understood that it had to determine what the claimant should be awarded having regard to the losses that flowed from the respondent's failure to comply with its obligation to make reasonable adjustments and not to discriminate against the claimant including victimisation. The Tribunal recognises that this is about causation and
15 whether and to what extent the respondent's unlawful acts occasioned the claimant's economic losses. To comply with the terms of the remit, the Tribunal must ask itself what would have transpired had the respondent complied with their legal duties. The findings of the previous Tribunal identified by the parties above are closely linked to this question. They are counterfactuals. In all the
20 circumstances, the Tribunal was not persuaded that it was prevented from making its own findings on the above matters if it was to fully comply with the remit from the EAT.

17. Before this Tribunal, the claimant was represented by Mr S Gorton KC and
25 Ms K Dingwall, Instructing Solicitor. The respondent was represented by Mr D Reade KC and Mr R Turnbull, Instructing Solicitor on 24 to 26 July and by Mr D Reade KC and Ms M McGrady, Instructing Solicitor on 27 July 2023. The Tribunal enquired about any reasonable adjustments it might make to facilitate participation in the proceedings. Apart from the Tribunal providing regular

breaks and breaks when requested, no further reasonable adjustments were identified by the parties.

18. The Tribunal was provided with a Joint Bundle consisting of four volumes to which additional documents (1989 to 2042) were added by the claimant at the start of the hearing. The Tribunal was also provided with a Schedule of Loss and counter Schedule. June Bell, the respondent's former Head of Human Resources at the College of Science and Engineering was recalled to answer further questions from the claimant in cross examination. The Tribunal heard submissions from the parties and was provided with position statements and a written summary of each parties' submissions. The claimant was allowed an opportunity to provide additional information in the form of vouching to support her claim for NHS, bank and bankruptcy costs. The Tribunal considered these along with the respondent's submissions which were provided in response.

ISSUES

19. The parties identified the following issues for consideration by the Tribunal;

Injury to Feelings/Solatium

(i) What is the appropriate award in respect of the combined claim for Injury to Feelings and solatium (there is an issue between the parties as to whether that should include a claim for loss of congenial employment and reflect aggravated damages)?

Economic loss

5

10

15

20

(ii) The parties are in agreement that the Tribunal is determining economic loss on the basis of what the claimant's earnings would have been had the unlawful acts which the Tribunal had previously found had not occurred. The claimant says that the Tribunal can determine losses on the basis that losses are certain. The respondent's position is that the Tribunal can only determine the chances the events would have occurred absent the unlawful acts.

(iii) For the avoidance of doubt, the respondent accepts on the evidence before the Tribunal that the claimant has been and presently remains unfit/unable to work due to (i) her mental impairment and (ii) the loss of her lawful right to work and live in the UK since the expiration of her work permit on 12 April 2012. Was the claimant's inability to work and to work lawfully since 12 April 2012 caused or materially contributed to by the respondent's failures in respect of disability and victimisation discrimination as found by the Tribunal?

(iv) When would the claimant most likely to have worked to i.e., what is her likely retirement age?

(v) More granular loss issues based on the claimant's career path:

a. Was the claimant fit to return to work in 2011 and if so when?

b. *Would the claimant have returned to work in 2011 or some time shortly thereafter with the respondent had the respondent acted lawfully as found by the Tribunal?*

c. *If yes:*

5

d. *How long would the claimant have remained in employment with the respondent and specifically would the claimant have continued working to 75?*

e. *What progression up the pay spine would the claimant have made?*

i. *Would the claimant have been promoted and/or had additional*

10 *responsibilities?*

ii. *Would the claimant have had the benefit of a sabbatical and if so, from when?*

iii. *What would have been the claimant's external earnings per annum?*

15

f. *If no, what would have happened – see questions under para 7 below*

(vi) *Had the respondent made the reasonable adjustments (under s20) and avoided the dismissal and took steps to avoid the dismissal (under s.15)*

20 *which the Tribunal found it ought to have made and/or taken, would the claimant's immigration status have been resolved so that she continued to have the right to work and remain in the UK?*

(vii) *If the claimant would not have returned to work with the respondent, or*

25 *not remained at work with the respondent some time, thereafter, would*

the claimant have found employment or earning opportunities elsewhere:

i. If so, when?

b. How long would the claimant have remained in employment and working and specifically would she have continued working to 75 or some lesser age?

c. At what rate of pay and benefits?

d. What would have been the claimant's external earnings per annum?

(viii) Should any discount be made on the whole career loss approach for the vicissitudes of life, including any possibility of returning to some form of future employment?

Other losses

Bank Costs

(ix) Did the respondent's unlawful actions cause or make a material contribution to the claimant incurring bank charges

(x) If so, what is the extent of that loss or claim?

NHS Medical Treatment

(xi) *Did the respondent's unlawful actions cause or make a material contribution to the claimant losing her entitlement to free medical treatment under the NHS?*

(xii) *If so, what is the extent of that loss or claim?*

Bankruptcy Damages

(xiii) *Did the respondent's unlawful actions cause or make a material contribution to the claimant's bankruptcy and consequent costs?*

(xiv) *If so, what is the extent of that loss or claim?*

Pension loss

(xv) *Is the claimant's methodology for calculation of pension loss correct?*

Contribution

(xvi) *Is any such argument legally permissible for remedy under the Equality Act 2010?*

(xvii) *What is the alleged conduct that amounts to contribution?*

(xviii) *Should a reduction be made in the compensatory award for unfair dismissal to reflect any contribution the claimant has made to her own loss and if so why and in what amount?*

(xix) *Should a reduction be made in the compensatory award for discrimination to reflect any contribution the claimant has made to her own loss and if so why and in what amount?*

5 *ACAS Enhancement*

(xx) *What uplift should be made for respondent's failure to follow the ACAS Code of Practice?*

Interest

10 (xxi) *Is the claimant's methodology for calculation of interest for injury to feelings and loss of earnings correct?*

Taxation

(xxii) *What is the claimant's total net loss?*

15

(xxiii) *Should the net losses or any elements be grossed up to reflect the incidence of tax on the tribunal award?*

(xxiv) *Is the claimant's methodology for calculation of grossing up correct?*

20

20. The parties asked the Tribunal to make findings based on which they can calculate and agree figures for the Tribunal to affirm. If agreement does not prove possible, the Tribunal will be asked to rule on any sums to be awarded.

25

LEGAL PRINCIPLES

21. Section 124(2)(b) of the Equality Act 2010 ("EA") provides that where a Tribunal finds that there has been an unlawful act of discrimination it may order the respondent to pay compensation to the claimant. Section 124(6) of EA provides that the amount of compensation which may be awarded corresponds to the amount which could be awarded by the Sheriff Court under Section 119 of EA. The claimant must show causation – that her losses would not have occurred but for the act or omission of the respondent. It is a well-established principle however that if a number of factors contributed to the loss, it is sufficient that the contribution which the factor attributable to the respondent's fault – in this case their acts of discrimination - made to the loss was material (**Simmons v British Steel 2004 UKHL 20**).

22. When determining any award of compensation, it is accepted that the Tribunal should seek to put the claimant in the position they would have been in had the unlawful conduct of the respondent not occurred (**Ministry of Defence v Cannock 1994 IRLR 509**). This will almost always involve the Tribunal having to consider a hypothetical – what would have happened had there not been the act of discrimination? The above exercise must however involve consideration of what the respondent would have done in the circumstances of the case as opposed to a hypothetical reasonable employer or the Tribunal (**Abbey National plc v Formosan 1999 IRLR 222, EAT**). In the case of **Vento v Chief Constable of West Yorkshire Police (No. 2) 2003 ICR 318, CA**, the Tribunal had to consider the issue of potential full career loss. The Court of Appeal confirmed that this involves the Tribunal having to assess, based on

the available evidence including any statistical evidence, the probability of the claimant remaining in the employment of the respondent on a long-term basis.

23. Where, on the evidence, the Tribunal is satisfied that there is some prospect that a non-discriminatory course of events would have led to the same outcome – for example in this case that the claimant would still have been dismissed in 2012 and/or lost her visa status – that possibility must be factored into the measure of loss (**Abbey National plc and anor v Chagger 2010 ICR 397, CA**). The Tribunal can therefore apply a *Polkey* approach to assessing future economic loss by reflecting the percentage chance of the same situation – in this case dismissal and loss of a work permit - having occurred in any event. There is also the “sliding scale” approach to assessing loss (**Dr E Michalak v The Mid Yorkshire Hospitals NHS Trust ET 1810815/08**). This approach involves the Tribunal making an award that reflects how the passage of time may gradually increase the chance, for example in this case, of the claimant being dismissed on non-discriminatory grounds.

24. In the case of **Wardle v Credit Agricole 2011 ICR 1290**, guidance is provided as to how some consideration should be given to applying an overall discount to any award for a whole career loss to reflect the uncertainties and vicissitudes of life that could result in the claimant giving up work.

25. In terms of Section 123 of the Employment Rights Act 1996, compensation for economic loss shall be such amount as the Tribunal considers just and equitable in all the circumstances. When assessing economic loss, the Tribunal must have regard to the loss sustained by the claimant in

consequence of the dismissal so far as that loss is attributable to action taken by the respondent. As above, the Tribunal may also apply the principles in the case of **Polkey v AE Dayton Services Ltd 1988 ICR 142, HL** when considering whether the losses should be subject to a percentage reduction to reflect the prospects of the claimant having been fairly dismissed in any event. Where the reason for dismissal was found to be a potentially fair reason, upper limits of a year's salary or the statutory cap whichever is the lower, will apply to an award of compensation.

26. In terms of Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR (C) A), the Tribunal has the power to increase the amount of compensation where the respondent has unreasonably failed to comply with a relevant and applicable ACAS Code of Practice. The Tribunal may increase any award by no more than 25% "*if it considers it just and equitable in all the circumstances".* The overall amount of the award may be a factor that the Tribunal will take into account when deciding on the size of any uplift.

27. Section 119(4) of EA provides that an award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis). It is, of course, necessary for the Tribunal to be satisfied that the injury to feelings was caused by the act of discrimination. It should be proportionate, relying on guidance from, for example, the bands of compensation applicable at the date of injury in the case of **Vento v Chief Constable of West Yorkshire Police (No. 2) 2003 ICR 318, CA**. General principles applicable to awards for injury to feelings are summarised in the case

of **Prison Service and ors v Johnson 1997 ICR 275, EAT**. They include the principle that awards for injury to feelings are designed to compensate the claimant for the anger, distress and upset caused by the unlawful treatment they have received and not to punish the guilty party; awards should be broadly similar to the range of awards in personal injury cases; the Tribunal should focus on the effect of the unlawful discrimination on the claimant as opposed to the gravity of the respondent's discriminatory acts and that Tribunals should have regard to the need for public respect for the level of awards made.

28. An award for injury to feelings should not be reduced to reflect the likelihood of a hypothetical future event such as a non-discriminatory dismissal (**O'Donoghue v Redcar and Cleveland Borough Council 2001 IRLR 615, CA**).

29. In the case of **Way and anor v Crouch 2005 ICR 1362**, the EAT, referring to the Law Reform (Contributory Negligence) Act 1945, held that compensation for an act of discrimination may be reduced to reflect contributory fault. The EAT in the case of **Fife Council v McPhee EATS 750/00** observed that while a finding of contributory fault in relation to a successful claim for unfair dismissal would not necessarily bear on a quite separate claim for discrimination, where the two claims are inextricably bound up, logic dictates that a contribution in relation to unfair dismissal should also apply in respect of the compensation for discrimination.

DISCUSSION & DELIBERATIONS

ECONOMIC LOSS

30. The Tribunal began by considering whether the claimant should be awarded any further economic loss caused to the claimant by the respondent's acts of disability discrimination and victimisation. As referred to in the list of issues, the parties are in agreement that the Tribunal is determining economic loss on the basis of what the claimant's earnings would have been had the respondent's unlawful acts as found by the Tribunal not occurred. The onus is on the claimant to prove her loss. It is not in dispute that from the evidence before the Tribunal, the claimant has been and presently remains unfit/unable to work due to (i) her mental impairment and (ii) the loss of her lawful right to work and live in the UK since the expiration of her work permit on 12 April 2012.

31. The Tribunal considered whether the claimant's inability to work and to work lawfully has been caused or materially contributed to by the respondent's unlawful conduct of disability discrimination, failure to make reasonable adjustments and victimisation of the claimant.

32. In terms of when the claimant might have returned to work had she not been discriminated against by the respondent, the Tribunal had regard to the findings by the earlier Tribunal. The Tribunal found in the first liability judgment (paragraph 54) that in January 2011 the claimant wanted to return to work and saw a gradual reintegration via another school to be a way back to the workplace after being absent for a year with work related stress and depression. The Tribunal found that the respondent did not exclude the possibility of such a move and their Director of HR, Sheila Gupta agreed that

there would have been no work permit issues had the claimant's suggestion that she move school been implemented on a temporary basis (paragraph 56). Having regard to the medical evidence before the Tribunal, Dr Kennedy, the claimant's treating psychiatrist, was of the opinion that given the likelihood of a full recovery she would have expected the claimant to become fit enough to return to work at any time during her time off (826). Dr Jacqueline Scott, a psychiatrist jointly instructed by the parties, was less certain about the claimant's prospects of being fit to return to work in early 2011. Dr Scott did not however dismiss as a possibility the claimant's return to work, perhaps by way of a phased return, and subject to the claimant's ability to manage the demands of her work. (828). The Tribunal in the remedy judgment (paragraph 10) preferred the evidence of Dr Kennedy as regards the claimant becoming fit to return to work at some point during or before January 2011.

33. The claimant did not return to work. Dr Kennedy (at 817/826) provided evidence that the factors which perpetuated the claimant's illness during her time off were work related and there were no other external factors contributing to low mood. The Tribunal accepted this evidence in the remedy judgment (paragraph 9). The Tribunal also accepted Dr Kennedy's explanation that the claimant "*is unusual in that her work is her life*" and there were few stressors present in her life aside from work. From February 2011, as found by the Tribunal in the first liability judgment (paragraph 59), the claimant became the subject of an *"injunction*" preventing other employees and colleagues from contacting her apart from through solicitors. The claimant was in effect "*sent to Coventry*" (paragraph 61) from early 2011. This was found to be an act of

victimisation by the Tribunal in the first liability judgment. During December 2011, decisions involving the removal of the claimant's laboratory and supervision of a PhD student were not communicated to her. The *"injunction"* remained in place until April 2012 when the claimant's work visa expired and she was dismissed by the respondent, an act which was found by the Tribunal in the second liability judgment to be discrimination arising from disability.

34. In Dr Kennedy's opinion, the impact of the respondent's conduct in late 2011 and 2012 on the claimant's health was considerable (817/727). It had caused significant health issues, placing the claimant under considerable stress. Dr Kennedy described the impact of the respondent's conduct as compounding "*feelings of helplessness and complete uncertainty*." Similarly, Dr Scott was of the opinion (820) that the actions by the respondent in her dismissal, removal of supervisory duties and the expiry of her work permit would have been a significant stress and on balance had a negative and detrimental impact on the claimant's health. As found in the Tribunal's remedy judgment (paragraph 66) the claimant continues to suffer from significant psychiatric symptoms. There is no evidence before this Tribunal to persuade it that since her dismissal the claimant's ill health has been materially affected by anything other than the respondent's conduct towards her of unlawful disability discrimination and victimisation. In all the circumstances, this Tribunal agrees with the finding in the remedy judgment (paragraph 67) that the psychiatric evidence was sufficient to support the conclusion that the respondent's unlawful actions made a material contribution to the claimant's symptoms from 2012 onwards.

35. The earlier Tribunal found in the second liability judgment that there were adjustments that the respondent could reasonably have taken to avoid the substantial disadvantage to the claimant. The substantial disadvantage was identified (at paragraph 37 of the second liability judgment) as not being able to return to work. The earlier Tribunal had found in the first liability judgment (at paragraph 197) that the claimant was a disabled person from January 2010 and (at paragraph 198) that the respondent knew this to be the case by 14 April 2010. There is also a finding (at paragraph 198) that the respondent did not follow its own procedure in its disability policy to establish if the claimant was disabled and that if they did not, in fact, know that the claimant was disabled they could reasonably have been expected to have known. The Tribunal in the second liability judgment (paragraph 41) identified reasonable adjustments with which the respondent was obliged to comply as having (i) *to apply its own procedures and policies in respect of sickness absence and disability; (ii) to apply its grievance procedure and dignity and respect policy* and *(iv) to apply all of its relevant procedures in connection with the claimant's dismissal.*

36. The respondent had a number of policies and procedures in respect of sickness absence and disability including their Absence Management Policy (RB891), Disability Policy (under review version 2004) (RB936) and Guidance on Supporting Disabled Staff (RB931). There has been no finding that any of the above procedures and policies were given any meaningful consideration by the respondent during the claimant's absence from work or in an attempt to reintegrate her to the workplace. The Tribunal concluded in the first liability judgment (at paragraph 106) that Sheila Gupta was of the mistaken view that

the claimant was only interested in a settlement with the respondent to allow her to leave their employment. The earlier Tribunal concluded that there was a view among the respondent that the claimant was never going to return to their employment due to her health which was reflected in the material part played by Shiela Gupta in terminating her employment without consideration of other options under the respondent's Disability Policy (paragraphs 106 & 107 of the first liability judgment).

37. The Tribunal did not accept the respondent's submissions that none of their policies and procedures could be described as "*directly linked*" to restoring the claimant to remunerative employment. The Tribunal was also not persuaded by the respondent's submission that the earlier Tribunal's conclusion (at paragraph 39 of the second liability judgment) that it was not reasonable to expect or require the respondent to take any further steps to reintegrate the claimant into work must inevitably lead this Tribunal to conclude that there was no prospect of the claimant's reintegration into the workplace. As referred to above, there has already been a finding by the earlier Tribunal that applying the respondent's policies and procedures as reasonable adjustments could have avoided the substantial disadvantage to the claimant of being unable to return to work. The Disability Policy (RB936) for example, provides that "*Where practicable, the University will attempt to retain staff who become disabled and to ensure suitable employment for them. Senior staff should deal as sensitively as possible with these situations and seek help where required*." (RB926).

38. The Absence Management Policy (at RB903) provides that "*long term absence*" from work will normally be considered to be an absence which will last for more than four weeks. Long term absence management includes a referral to Occupational Health following indications that sickness will be prolonged. The claimant's period of illness began in January 2010. There was no persuasive evidence that the respondent followed its absence management policy in response to the claimant's absence. The earlier Tribunal found that a referral to Occupational Health was suggested in July 2011 when Dr Waldron responded to the claimant's proposed "*way forward*" (at paragraph 68 of the first liability judgment). There is a finding in the first liability judgment (at paragraph 66) that by the time of this suggestion, there was a "*general hostile attitude of certain elements of the School of Engineering to the claimant*". The suggestions made by the respondent to the claimant regarding Occupational Health were made against this background. While the referral to Occupational Health was found by the earlier Tribunal (at paragraph 25 of the second liability judgment) to be a genuine attempt to "reintegrate" the claimant to the respondent's employment, it was not an attempt made in accordance with the respondent's policies and procedures for employees such as the claimant on long term absence and which the Tribunal was satisfied would have improved the claimant's prospects of a return to work.

39. The respondent's Guidance on Supporting Disabled Staff (RB946 to 949) also gives examples such as alterations to working environment and changes to working patterns. This Tribunal was persuaded that taking such steps could have significantly increased the prospect of the claimant returning to work.

Similarly, had the respondent applied their Grievance Procedure (RB1010) and Policy (RB1016) and Dignity and Respect Policy (RB940) as opposed to assuming, without making direct contact with her, that the claimant did not want to progress her grievance while unwell, this Tribunal was persuaded that the prospects of avoiding relations between the parties becoming so mistrustful that they resulted in an "impasse" that was insurmountable were good and as found by the earlier Tribunal could, had they been applied, have avoided the substantial disadvantage of the claimant being unable to return to work.

40. In addition to complying with their own policies and procedures in relation to the claimant as a disabled employee who was absent from work, the earlier Tribunal also found in the second liability judgment (paragraph 41) that it was reasonable to expect and require the respondent to comply with their duty to make reasonable adjustments (iii) *to take steps that it reasonably could to try to ensure the claimant's immigration status would not be compromised by her absences caused by her disability and if necessary, take all reasonable steps to ensure that the claimant would not be at risk of losing her lawful working status* and *(v) to engage with the claimant in respect of her work permit status, informing her of all options with a view to trying to ensure her work status was not lost at the expiration of her 5 year work permit".* The claimant was dismissed because the respondent believed that she could no longer legally continue to work in the UK on the expiry of her work visa on 12 April 2012.

41. Sheila Gupta gave evidence to the Tribunal (paragraph 71 of the first liability judgment) that there were possible options to extend the claimant's stay in

the UK which were not explored by the respondent and that there were possible steps which she did not take, and which could have enabled the claimant to stay in the UK. On reflection, Sheila Gupta accepted (at paragraph 73 of the first liability judgment) that she should have written to the claimant about other routes whereby she could retain her employment rather than simply authorising the letter of 11 January 2012 giving the claimant notice of the termination of her employment on 12 April 2012 when her work permit was due to expire (paragraph 70 of the first liability judgment).

42. In her evidence before this Tribunal, June Bell accepted that there were a number of opportunities – missed by the respondent - to signpost the claimant to the various routes to retain her visa status. The claimant was employed on what June Bell described as an "*open-ended contract*" (1749) with the respondent, "*subject to visa restrictions*". The respondent was involved in applying for the claimant's work permit when she was first appointed (524- 540) but it was not in dispute that the claimant was obliged to take certain steps herself to obtain the right to remain working in the UK. There was no evidence that the claimant had taken any such steps before April 2012. In her witness statement however (RB1749), June Bell states that "*under normal circumstances, we would have transitioned (the claimant) to a Tier 2 Certificate of Sponsorship and she could have applied for either an extension of her stay or indefinite leave to remain*". In all the circumstances, this Tribunal was persuaded that the claimant would have had good prospects of being granted an extension or right to remain had the respondent complied with the reasonable adjustments identified by the Tribunal relating to the extension of her right to work in the UK.

43. As referred to above, the Tribunal was satisfied that had the respondent complied with their obligation to make reasonable adjustments by applying their policies and procedures to the claimant's situation, the prospect of the claimant returning to remunerative work with them by April 2012 would have been significantly improved. Had this not been possible however, the Tribunal was satisfied that her continued absence from work on sick leave would not have precluded the claimant from successfully applying for the right to continue working in the UK. The fact that the claimant had exhausted her sick pay at the time of applying to continue working in the UK could, according to Sheila Gupta (1508), be remedied by "*a letter of support*" from the respondent; the return to work through another department was recognised by the respondent as a temporary situation and questioning whether the claimant had taken secondary employment while on unpaid leave was accepted to be an "*adverse and negative conclusion*" for her to have made without contacting the claimant to confirm the position.

44. The respondent's witness Don Glass gave evidence (page 1506 of Volume 3) that he had not encountered anybody who had not succeeded in having their work visa extended. In all the circumstances, this Tribunal is satisfied that had the respondent complied with their obligation to take all reasonable steps to ensure that the claimant would not be at risk of losing her lawful working status and engaged with the claimant in respect of her work permit status by informing her of all options to ensure that her work status was not lost, there was a good chance that she would have been able to extend her

work visa and continue working in the UK, avoiding the loss of her employment with the respondent on the expiry of her work permit. While it is not being suggested that the obligation was entirely on the respondent to apply for the extension, had the respondent complied with its obligations under the Equality Act 2010, the Tribunal was persuaded that there was a good chance that the claimant's right to work in the UK would have been extended.

45. The respondent submitted that applying the principles in *Polkey*, the Tribunal should find that the claimant would have been fairly dismissed in any event due to the "*impasse*" that existed between the parties. The" *impasse*" was something for which the respondent blamed the claimant. At the remedy hearing before this Tribunal, the respondent accepted that the "*impasse*" was not insurmountable. The EAT observed (at paragraph 52) that the "*impasse*" did not sit comfortably with the Tribunal's conclusion that the respondent had failed to engage with the claimant about her medical condition or whether she could return to work. The EAT also concluded (at paragraph 53) that the Tribunal's conclusion in the first remedy judgment that there would have been a fair dismissal in any event in December 2012 cannot stand.

46. The Tribunal was satisfied, that in all the circumstances, had the respondent complied with their obligation to make reasonable adjustments which included following their policies and procedures and taking steps to engage with the claimant about an extension to her work permit, there was a good chance that the parties would have been able to overcome the "*impasse*." The Tribunal was not persuaded by the respondent's submissions that the

earlier Tribunal's award of £2,000 for injury to feelings was a factor to which significant weight should be attached when assessing the potential effectiveness of the adjustments. The "*impasse*" arose around the time that the claimant was subject to an "*injunction*" and the respondent failing to notify her of changes directly affecting her work such as the loss of her laboratory and her removal from supervising a PhD student. This Tribunal was satisfied that had the respondent applied its own policies and procedures there was a good chance that the "*impasse*" could have been resolved. The Tribunal considered that the "*impasse*" was inextricably linked to the treatment by the respondent of the claimant having isolated her from other employees, creating an atmosphere of mistrust and by failing to respond to her as a disabled person using their policies and procedures in respect of sickness absence and disability.

47. The respondent submitted that the Tribunal should also have regard to the evidence of June Bell as regards concerns about how the claimant's teaching and ability to attract grant funding might impact upon her future employment with the respondent. The Tribunal was not persuaded that in all the circumstances and from the evidence before it that the claimant was likely to have been dismissed in any event by the respondent on such grounds. There was evidence that the dismissal of professors is a rare occurrence and while the Tribunal could accept that the above concerns might adversely affect an academic's career progression within the University, the Tribunal was not persuaded that in the case of the claimant they would have resulted in her being fairly dismissed.

48. The Tribunal was not however persuaded that there was every chance that the claimant would have returned to remunerative work with the respondent had they not unlawfully discriminated against her. For example, there were no guarantees that the respondent would have been able to comply with the claimant's suggestion that she return to work through another school or by applying some other alternative arrangement. The available medical evidence does not rule out altogether the possibility of the claimant struggling with the demands of work. The claimant may not have engaged with the respondent about the extension of her work permit and there is some possibility, albeit small, that her work permit would not have been extended. In all the circumstances, the Tribunal concluded that had the respondent not unlawfully discriminated against the claimant there was an 80% chance that she would have returned to remunerative work with the respondent in January 2011 and retained the right to work for the respondent from April 2012.

UNFAIR DISMISSAL

49. The Tribunal did not understand it to be in dispute that any additional economic loss awarded to the claimant by this Tribunal for unfair dismissal will be subsumed by the increased award under the EA. No further award has therefore been made for compensation due in respect of the respondent's unfair dismissal of the claimant.

LIKELY RETIREMENT AGE

50. The claimant is 67 (date of birth 18 September 1956). She was employed by the respondent from 1 May 2007 as the Professor and Chair of Chemical Process Engineering. The Tribunal concluded that, in all the circumstances

including assessment of demographic material (pages 834 to 837 of Volume 2), had the claimant not been discriminated against by the respondent, there was every chance that she would have continued working to the normal retirement age of 66 and that this would have been with the respondent given the reputation of the respondent as an educational institution and the claimant's position of Professor and Chair. If the claimant had not continued working with the respondent, the Tribunal was satisfied that she would have been working for an equivalent educational institution on equivalent terms and conditions until retirement. This Tribunal considered that the claimant would have continued working to 66 given that work was her life and on a practical level, to accrue a larger pension before retiring. The Tribunal was not however persuaded from all the evidence before it that the claimant would have continued working beyond the age of 70. There are the normal vicissitudes of life to consider and while the Tribunal, based on the finding that her work was her life, considered the claimant to be more than likely a member of the relatively small number of professors (13.4% according to June Bell) who work beyond the age of 65, there was a 60% chance that she would have continued working from the age of 66 to the age of 70, but no later.

PROMOTION & PAY SPINE PROGRESSION

51. The Tribunal was not persuaded from an assessment of the evidence before it that the claimant would have been promoted or acquire additional responsibilities had she not been discriminated against by the respondent. While the claimant had applied for promoted posts with the respondent – Vice

President in September 2008 and Dean in May 2009 - her applications were unsuccessful. Similarly, this Tribunal was not persuaded from an assessment of the available evidence that the claimant's pay would have progressed beyond spinal point 61 on the respondent's pay scale. There was no evidence of a contractual right to such an increase. The earlier Tribunal in the first remedy judgment (at paragraph 22) was not persuaded by the claimant's evidence that she would have automatically progressed from point 61 of the salary scale. This Tribunal was not persuaded that the above finding should be disturbed.

SABBATICAL/EXTERNAL WORK

52. Similarly, there was no evidence of a contractual right to a sabbatical and no persuasive evidence before the Tribunal that the claimant would have been offered one had she remained in the respondent's employment. There was evidence of academics having the right to request paid sabbatical leave (RB697 to 698) but as found in the first remedy judgment (at paragraph 31), no guarantee that such a request would be granted. The Tribunal in the first remedy judgement was not persuaded that any losses under this heading had been established. This Tribunal was not persuaded that in all the circumstances there was evidence that would entitle it to disturb the above finding.

53. The Tribunal was not persuaded by the claimant's submission that it should disregard evidence previously given by June Bell to the Tribunal because she

was employed on a consultancy basis and not, as presented by the respondent, a fully retired employee. The earlier Tribunal accepted June Bell's evidence about whether the claimant would have been offered a sabbatical given her position as the former Head of HR and her experience with the respondent from January 2007 to July 2019. The Tribunal was not persuaded that it should disregard this evidence. Similarly, this Tribunal was not persuaded that there was evidence to disturb the earlier Tribunal's finding that the claimant has not lost earnings from external work that flowed from the respondent having discriminated against her. As found in the first remedy judgment (at paragraph 33), the claimant had not engaged in any such work since November 2009, prior to her absence on sick leave in January 2010.

BANK / NHS / BANKRUPTCY COSTS

54. The Tribunal was satisfied that the respondent's unlawful actions of discriminating against the claimant materially contributed to her loss of the right to medical treatment under the NHS and that had the claimant returned to remunerative employment with the respondent in 2011 medical costs would not have been incurred. A monetary sum equivalent to 8 months' NHS benefits plus interest was awarded to the claimant in the first remedy judgment. These costs are recoverable from the respondent as losses incurred by their acts of discrimination. It was not in dispute before this Tribunal that had the claimant remained working in the UK, the health care that she has received since 2011 would have been provided without charge. The claimant has provided the Tribunal with invoices totalling £28,945

(£26,316 (631) plus £1,205 (632) plus £190 (633)). It is not in dispute that these costs have been incurred by the claimant.

55. The claimant has sought leave of the Tribunal to make representations to the Tribunal on the issue of whether she should also be awarded the cost of a hip replacement operation on 11 January 2019. To date the claimant has not been charged for this operation. In all the circumstances, the Tribunal decided that it is in accordance with the overriding objective to allow the claimant an opportunity to give evidence and/or make submissions on this issue. Accordingly, the total sum to be paid by the respondent to the claimant for NHS costs shall be continued for further consideration by the Tribunal following any further representations by the parties. Similarly, in relation to any sum to be paid by the respondent to the claimant for bank and/or bankruptcy costs, consideration has been continued by the Tribunal to allow the claimant to give evidence/and or make submissions on the above issues and for the respondent to make representations in response.

PENSION LOSS

56. As referred to above, in all the circumstances, this Tribunal is satisfied that the claimant would have remained in employment with the respondent or in equivalent employment until the age of 66 and that there is a 60% chance that the claimant would have worked beyond the age of 66 to the age of 70. The Tribunal does not understand it to be in dispute that this employment would have been pensionable. The brevity of this section of the judgment in no way seeks to minimise the significance of this part of the award to both

parties. The Tribunal understands however that based on the Tribunal's findings in relation to whether, and if so when, the claimant would have returned to remunerative employment had she not been discriminated against by the respondent and the date of her likely retirement that the parties will calculate pension loss for the purposes of agreement and/or further consideration by the Tribunal.

INJURY TO FEELINGS

57. The Tribunal is required to reconsider the amount of any injury to feeling award due to the claimant in respect of the respondent's discrimination against her arising from disability. To date the claimant has been awarded compensation for injury to feelings of (i) £2,000 plus interest for failure to make reasonable adjustments; (ii) £2,800 plus interest for victimisation and (iii) £25,000 plus interest for discrimination arising from disability. As referred to above, this Tribunal is required to reconsider the award of £25,000 for injury to feelings due to the claimant in respect of the respondent's discrimination arising from disability.

58. Reconsideration of the sum to be awarded for injury to feelings was referred to this Tribunal because the earlier Tribunal took into account the effect on the claimant of a fair dismissal. The issue of whether the award should be increased to include a claim for loss of congenial employment and/or reflect aggravated damages was not identified by the EAT as being subject to reconsideration by this Tribunal. The Tribunal does not know by how much

the sum awarded was discounted to take account of a fair dismissal and has therefore considered the relevant findings and evidence available to assess an award for injury to feelings.

5 59. This Tribunal had regard to the effect on the claimant of the unlawful treatment that she received from the respondent. The earlier Tribunal found that the claimant's dismissal was an act of discrimination arising from disability (paragraph 50 of the second liability judgment). The earlier Tribunal accepted that for the claimant, "*her work is her life*" and in the first liability judgment (at 10 paragraph 67), refers to the "*devastating effect*" on the claimant's health of the breakdown of her relationship with the respondent.

60. The respondent submitted that the Tribunal should treat the claimant's case as one of exacerbation. While the claimant was already absent from work with 15 work related stress and depression before she was subjected to acts of discrimination by the respondent, the Tribunal was not persuaded from the available evidence that when assessing compensation for injury to feelings significant weight should be attached to the claimant having previously suffered from a period of stress and depression. The earlier Tribunal accepted Dr 20 Kennedy's evidence that at the time of the claimant's absence, "*given the lack of past psychiatric history*" she would have deemed the claimant's prognosis "*at that time to be good with a full recovery*" subject to a supportive environment and stressors being addressed (paragraph 8 of the remedy judgment). There was also evidence from Dr Kennedy that the impact of the respondent's 25 conduct in late 2011 and 2012 on the claimant's health was considerable

(817/727). It caused the claimant significant health issues, placing her under considerable stress. In the remedy judgment (at paragraph 66), the earlier Tribunal refers to the claimant's "*significant psychiatric symptoms*" and that they were exacerbated shortly before and after the claimant's dismissal when she required periods of hospitalisation.

61. The claimant has been left feeling mistrustful and isolated by her dismissal. She has lost her career and status in the academic community. She has become isolated from friends and family. As referred to above, she has required periods of hospitalisation (paragraph 66 of the remedy judgment). Dr Kennedy described the impact of the respondent's conduct as compounding "*feelings of helplessness and complete uncertainty*." Similarly, Dr Scott was of the opinion (820) that the actions by the respondent in her dismissal, removal of supervisory duties and the expiry of her work permit would have been a significant stress and on balance had a negative and detrimental impact on the claimant's health. As found in the Tribunal's remedy judgment (paragraph 66) the claimant continues to suffer from significant psychiatric symptoms. The earlier Tribunal observed that the cause of the claimant's psychiatric symptoms from April 2012 was "*the fact of and manner of the claimant's dismissal in 2012*" (paragraph 72 of the remedy judgement). The claimant has been unable to pursue her academic career. The conduct of the respondent by dismissing the claimant has caused her to feel considerable anger and upset. While there is some possibility of the claimant beginning the process of recovery on conclusion of the Tribunal proceedings

(paragraph 70 of the remedy judgment), this is likely to be conditional upon the resolution of her immigration status.

62. Having regard to the guidance in **Vento**, the Tribunal was satisfied that the claimant's injury to feelings justifies an award that exceeds the maximum of the upper band in **Vento** applicable at the time of her dismissal. It is a case in which the respondent's discriminatory conduct has been found to have caused the claimant considerable anger, distress and upset. It has seriously affected her working life and well-being. The Tribunal has therefore decided that in all the circumstances and having considered the guidance in **Vento** and subsequent uplifts to the date of the claimant's dismissal, that the sum of £50,000 should be awarded to the claimant for injury to feelings. Interest has been calculated in the sum of £46,119.68 for the period from 12 April 2012 to 20 October 2023 (4,208 days at a daily rate of interest of £10.96).

63. The respondent submitted that the Tribunal should make a reduction to the injury to feelings award on the basis of contribution. The Tribunal was not satisfied that this was appropriate in all the circumstances. The Tribunal has not made any findings of contribution by the claimant to her losses from the discriminatory acts of the respondent. The earlier Tribunal did not make any findings of contribution in relation to the claimant's unfair dismissal. In all the circumstances, the Tribunal is not persuaded by the respondent's submission that it would be appropriate to reduce any of the awards made to the claimant under the Equality Act 2010 to reflect contribution on her part.

ACAS ENHANCEMENT, INTEREST & TAXATION

64. As agreed with the parties, any ACAS enhancement on the above awards will be determined by the Tribunal once the size of any award is known and it is possible to take into account the overall value of the award when applying an uplift. Similarly, the Tribunal considered that determination of any outstanding issues concerning interest on past economic loss and taxation was appropriate once the amount of awards has been agreed or subsequently calculated by the Tribunal. The Tribunal understood this to be the approach sought by the parties. There is also the issue of any deduction for accelerated receipt of the award for future economic loss. This is an issue that will, if not agreed between the parties, be determined by the Tribunal once the amount to be awarded has been agreed or calculated by the Tribunal.

Employment Judge: **F Eccles**
Date of Judgment: **20 October 2023**
Entered in register: **26 October 2023**
and copied to parties