EMPLOYMENT TRIBUNALS

Claimant: Miss S Molyneux

Respondent: Apprentify Limited

Heard at: Manchester (by CVP) **On:** 28 September 2023 and in chambers on 6 October 2023

Before: Employment Judge McDonald (sitting alone)

REPRESENTATION:

Claimant: Mr Morris, Solicitor
Respondent: Mr P Drew

JUDGMENT ON REMEDY

The judgment of the Tribunal is that:

1. The total award to the claimant is the sum of **£52348,25**. It is calculated as set out in paras 62-72 of the attached Reasons.

2. That sum must be paid to the claimant free of any deductions.

REASONS

Introduction

1. On 28 September 2023 I conducted a final hearing in this case under Rule 21 of the Employment Tribunal Rules 2013. The claimant was represented by Mr Morris and the respondent by Mr Drew.

2. The respondent had not filed a response to the claim. As a result, on 14 June 2023 Employment Judge Leach directed that it might only participate in the final hearing to the extent permitted by the Judge conducting that hearing. I decided at the start of the hearing that the respondent should not be allowed to take participate in that part of the hearing dealing with liability. However, I decided that it was in

accordance with the overriding objective to allow Mr Drew to make submissions on remedy were I to find that any of the claims succeeded.

3. I found that the claims of discrimination arising from disability, failure to make reasonable adjustments and victimisation in breach of section 27 of the Equality Act 2010 did succeed. I gave oral reasons for my judgment which were not requested in writing. The judgment ("the Liability Judgment") was sent to the parties on 4 October 2023.

4. After giving my judgment on liability I heard oral submissions from Mr Morris for the claimant and from Mr Drew for the respondent on the issue of remedy. I reserved my decision because there was insufficient time for me to deliberate and give judgment on remedy and to allow Mr Drew an opportunity to seek advice particularly on the question of injury to feelings compensation. I directed that the parties provide any further written submissions they wanted to make by 4 October 2023. Both parties did so. I have taken the written submissions they made and the Schedule of Loss and Counter Schedule of Loss into account in reaching my decision along with the oral submissions made at the hearing.

Findings relevant to remedy

Findings from the liability hearing

5. At the liability hearing I found that the claimant was at the relevant time a disabled person by reason of dyscalculia and anxiety and depression. At the time of the incidents giving rise to her claim she was completing a Digital Marketing Apprenticeship with the respondent. The respondent provides apprenticeship training to the digital sector. At the time of the incidents giving rise to the claim it was a relatively small business with no internal HR function.

6. The claimant had started her apprenticeship with another company but from 14 May 2022 she was employed by the respondent as a Social Media Executive. From that date the respondent was both her employer and the apprenticeship provider.

7. It was anticipated that the claimant would complete her apprenticeship by 11 September 2022. To do so she was required to pass a Level 2 Functional Skills maths exam. That was an externally imposed requirement for completing the apprenticeship and not one it was within the respondent's power to waive.

8. The claimant's evidence (para 19 of her witness statement) was that because she has dyscalculia she finds maths very difficult. She had not tried sitting a maths exam since she did her GCSEs a number of years previously. She had an Additional Learning Support Individual Learning Plan (pp.40-50) which explained her specific needs and support which could be provided to help meet those needs. In brief, the plan refers to the claimant struggling with abstract notions; needing time to process her understanding; and becoming distracted by topics she feels more interested in learning a task incomplete. It notes her strengths as being a strong independent learner; thriving in small groups where she is comfortable and can be heard and trying hard and wanting to succeed. At the time of the incidents giving rise to the case the claimant was getting ongoing maths support from a Functional Skills Tutor who was preparing her to sit the maths exam.

9. In my Liability Judgment I found that the claimant's dismissal with effect from 3 August 2022 was an act of discrimination in breach of section 15 of the Equality Act. I found that it was unfavourable treatment because of the claimant failing Part 1 of her maths mock exam on 14 June 2022 which was something arising from the claimant's dyscalculia. I also found the dismissal was an act of victimisation in breach of section 27 of the Equality Act 2010. I found it was significantly influenced by the claimant having done protected acts by reporting an allegation of sexual harassment of a colleague to the respondent on 11 July 2022 and attending a meeting with that colleague about the allegations on that same date. I also found that the respondent had failed to make reasonable adjustments when the claimant sat her maths mock exam on 14 June 2022. I found that those adjustments would have reduced the disadvantage the claimant experienced in sitting that exam because of her dyscalculia.

<u>Findings relevant to ACAS uplift</u>

10. Mr Drew accepts there was no proper disciplinary process followed in dismissing the claimant.

11. I find that there was an appeal process. The claimant exercised her right to appeal her dismissal. That appeal was to Mr Omar Rashid of HR Dept, an external provider of HR Support. The claimant appealed on 7 August 2023. The original appeal deadline was 5 working days from the 2 August 2023. The claimant requested additional time to provide the full details of her appeal. Mr Rashid granted her an extension until 15 August 2023. The claimant sent her grounds for appeal on 15 August 2023. They alleged the respondent had incorrectly recorded that the claimant had withdrawn from her apprenticeship; that the respondent had dismissed her due to her disability and that it had failed to fully accommodate her disability,

12. Mr Rashid held an appeal hearing on 30 September 2022. The claimant attended supported by Marie Nulty, a former employer of the claimant's who had a good understanding of her needs and disability. The claimant disputed that the notes of that hearing (pp.68-74) were accurate. She set out in her witness statements what the inaccuracies were. Taking those into account, I find that Mr Rashid took time at the hearing to give the claimant an opportunity to set out her concerns. He allowed Ms Nulty to intervene when the claimant was getting overwhelmed or distressed. He made it clear at the end of the hearing that it would take some time to talk to the people the claimant had mentioned as having been involved and consider the relevant documentation.

13. Based on the claimant's evidence (which was unchallenged) I find that the claimant confirmed at the appeal hearing that she had at no point said she wanted to resign or terminate her apprenticeship. I also find that she made clear that in her view she had been dismissed because of her disabilities and because she was seen as a troublemaker, having raised issues of bullying and sexual harassment. I find she also criticised the lack of support by the respondent and the failings in the way the apprenticeship had been planned and conducted.

14. Mr Rashid's appeal outcome letter was dated 31 October 2022. He did not uphold the appeal. He said that there was evidence of the claimant having said that she wanted to leave the apprenticeship. He quoted comments made by the claimant to that effect. He found that that was the reason for the claimant was dismissed

rather than any discrimination. He also concluded that the claimant had been given support to help her pass maths. These included tutoring support and being allowed to listen to music or podcasts while doing the exam. I find that Mr Rashid had sought evidence from witnesses but not provided the claimant with an opportunity to comment on their evidence. In particular, the claimant's case is that the quotes which appear to show her wanting to end her apprenticeship were taken out of context. She also says that Mr Rashid focussed on the support provided rather than on the other reasonable adjustments which the respondent failed to make.

Findings relating to financial loss, injury to feelings and mitigation

15. The claimant's evidence on the impact of the discrimination is unchallenged because the respondent was only allowed to take part in the remedy hearing to the extent of making submissions.

16. Based on her evidence and the documents in the bundle for the final hearing I make the following findings.

17. The parties were agreed that the claimant's gross weekly pay during her apprenticeship was £346.15 which equated to £311.54 net. The claimant received Universal Credit while she was employed by the respondent. However, after dismissal her Universal Credit was increased by £506.89 per calendar month. That equates to £116.97 per week net. She would not have received that amount of increased Universal Credit had she still been employed. That means that during her apprenticeship her net weekly loss of earnings was £311.54 minus £116.97 = £194.57 per week. The claimant's financial loss until the end of her apprenticeship, which was due to be on 11 September 2022, was therefore £972.85. There appears to be an arithmetical error in the Schedule of Loss prepared for the claimant which calculates the amount as £974.20.

18. Had the claimant completed her apprenticeship she would have been able to obtain work with the respondent at a salary of £21,000. That equates to a net salary of £351.97 per week. When the Universal Credit of £116.97 is deducted that leaves a net ongoing weekly loss of £235 per week from 12 September 2022.

19. The claimant has not found paid employment. I find that the claimant began applying for new jobs from around November 2022. On 5 December 2022 she started an unpaid internship through Virtual Internships with a company based in America called Corner Market. That internship finished on 28 February 2023. I accept the claimant's evidence that that helped the claimant gain some experience in social media, marketing, branding and graphic design. From February 2023 the claimant funded her own course in C++ coding with Codefinity. That course was due to finish in October 2023. The claimant's evidence was that she was hopeful that she would get a job within six months of finishing her coding course which was likely to pay around £25,000 gross per annum. She limits her claim for future loss to that six month period. There is evidence in the bundle that the claimant continued to apply for jobs unsuccessfully while she has been undertaking that coding course.

20. I find that the claimant's dismissal from the respondent had a significant impact on her self confidence and on her mental health. The claimant had a history of anxiety and depression. The claimant was diagnosed as meeting the diagnostic criteria for an autism spectrum condition in 2015. She has experienced associated

depression and anxiety for a number of years prior to the events at the respondent. The claimant had been undertaking counselling from around 2020 and this continued during her period of employment with the respondent. The counselling records for the relevant period were at pages 289-297 of the bundle. Based on those notes and the claimant's evidence I find that she had started to develop confidence through working with the respondent and had made some good friendships at work. Prior to her dismissal the claimant was starting to establish a firmer sense of self. I find that although at times work was challenging for the claimant it was important in developing her self confidence and sense of self. I find that the impact of the dismissal was to completely undermine that self-confidence. Her self esteem reached what she describes as an "all time low". She contacted Samaritans, Mind and the crisis team for help. Her counselling sessions record "bad thoughts" and the claimant indicating that life was not worth living. The claimant became a recluse and did not maintain self-care in the way that she had done while she was working at the respondent. The claimant's evidence is corroborated by the statement from her mother. The impact on the claimant was greater than it might have been on others because of her Autism and other disabilities.

21. When it comes to mitigation, in addition to the courses and the internship that the claimant undertook, she worked with Warrington Disability Partnership on their two job schemes (Springboard and New Leaf). She began working with Springboard in September 2022 and received one-to-one mentoring to support her in finding employment. There was a supporting letter from Warrington Disability Partnership in the bundle (page 86). It corroborated the claimant's evidence that she had been applying for numerous jobs without success despite what was referred to as "all her hard work and 100% commitment".

22. In submissions, Mr Drew submitted that the claimant would have been dismissed in any event at the end of the apprenticeship period had she not passed her maths exam. He submitted that I should reduce any compensation awarded to reflect that. The respondent was not in a position to submit evidence because it had chosen not to respond to her claim.

23. I find that the claimant had difficulties with maths because of her dyscalculia. Her disability discrimination claims relied on that. What I did not have was more specific evidence about the likelihood of her passing her maths exam if the respondent had made the reasonable adjustments which I found they had failed to make. I had no evidence about the extent to which she had failed the mock exam. She had not taken part 2 of the mock exam. The claimant's evidence, which I accept, was that she had been given no notice of the mock exam which added to the pressure on her. The claimant had at least 2 more months in which to pass the exam. Her CV states that she did obtain a Maths GCSE.

24. Mr Drew also submitted that on balance the claimant was unlikely to have completed the apprenticeship. She had, he said, expressed a desire to end the apprenticeship. The claimant disputes that. Her case is that the quotes which appear to show that were taken out of context and at worst refer to particular tasks the claimant was unhappy about not the apprenticeship as a whole. I prefer the claimant's version of events.

Relevant Law on Remedy

General principles

25. If an employment tribunal decides to award compensation for unlawful discrimination, s.124(6) of the Equality Act 2010 provides that it must be calculated in the same way as damages in tort. The aim, is that 'as best as money can do it, the [claimant] must be put into the position she would have been in but for the unlawful conduct' (**Ministry of Defence v Cannock and ors 1994 ICR 918, EAT**).

26. In assessing financial loss, the aim is to put the claimant in the position that she would have been in but for the discriminatory act. Loss caused by anything other than the discrimination is not recoverable.

27. The Tribunal has to decide what position the claimant would have been in had the discrimination not occurred. The question is "what would have occurred if there had been no discriminatory dismissal… If there were a chance that dismissal would have occurred in any event, even if there had been no discrimination, then in the normal way that must be factored into the calculation of loss" **(Abbey National plc and anr v Chagger [2010] ICR 397**).

28. The approach to deciding that issue in unfair dismissal cases also applies in the case of a discriminatory dismissal **(Shittu v South London &Maudsley NHS Foundation Trust [2022] EAT 18)**. That means the guidance given by the EAT in **Software 2000 Ltd v Andrews [2007] IRLR 568** is relevant. As quoted in **Shittu (para 74)**, that guidance is that:

> "54. …
>
> (1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.
>
> (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).
>
> (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.
>
> (4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise.

The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) ….

(7) Having considered the evidence, the Tribunal may determine

(a) ….

(b) That there was a chance of dismissal in which case compensation should be reduced accordingly.

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.

(d) Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

The ‘eggshell skull’ principle applies to loss arising from discrimination. That means the discriminator must take the victim as they find him or her. This means that even if the victim is unusually sensitive or susceptible, and the level of damage or loss sustained is therefore worse than it would have been for another individual, the discriminator will be liable for the full extent of the damage, loss or injury, so long as it can be shown that this flowed from the act of discrimination.

<u>Injury to feelings</u>

29. Awards for injury to feelings are compensatory. They should be just to both parties, fully compensating the claimant (without punishing the respondent) only for proven, unlawful discrimination for which the respondent is liable. Tribunals must remind themselves of the value in everyday life of the award by reference to purchasing power or earnings.

30. There are three bands of award for injury to feelings following **Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102 CA** and uprated in **Da’Bell v NSPCC [2010] IRLR 19 EAT:**

i) The top band: sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment

ii) The middle band: this should be used for serious cases, which do not merit an award in the highest band.

iii) the lower band: where the act of discrimination is an isolated or one-off occurrence.

There is within each band considerable flexibility, allowing a Tribunal to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.

31. Presidential Guidance was issued on the **Vento** bands on 5 September 2017. The fifth addendum to that guidance applies in respect of claims presented on or after 6 April 2022, which applies to the claimant's claim. It says the Vento bands shall be as follows: a lower band of £990 to £9,900 (less serious cases); a middle band of £9,900 to £29,600 (cases that do not merit an award in the upper band); and an upper band of £29,600 to £49,300 (the most serious cases), with the most exceptional cases capable of exceeding £49,300.

32. In making an award for injury to feelings the task of a Tribunal is to consider what degree of hurt feelings has been sustained and to award damages accordingly, **Murray v Powertech (Scotland) Ltd [1992] IRLR 257 EAT.** In **Ministry of Defence v Cannock [1994] I.C.R. 918** the EAT said that an award for injury to feelings is not automatically to be made whenever unlawful discrimination is proved or admitted. Injury must be proved. However, it went on to say that it will often be easy to prove, in the sense that no tribunal will take much persuasion that the anger, distress and affront caused by the act of discrimination has injured the applicant's feelings. But it is not invariably so.

Mitigation

33. Employees are under a duty to mitigate loss. The general approach to mitigation is summarised by Langstaff P in **Cooper Contracting Ltd. v Lindsay UKEAT/0184/15** at paragraph 16. In summary, the burden of proving a failure to mitigate lies with the respondent. If evidence as to mitigation is not put before the Tribunal by the respondent, the Tribunal has no obligation to find it. What has to be proved is that the claimant acted unreasonably; she does not have to show that what she did was reasonable. There is a difference between acting reasonably and not acting unreasonably. The Tribunal is not to apply too demanding a standard to the claimant; after all, she is the victim of a wrong. She is not to be put on trial as if the losses were her fault when the central cause is the act of the wrongdoer. In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient."

Uplift in compensation for failure to comply with the ACAS Code

34. S.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("s.207A"), states at subsection (2):

'If, in the case of proceedings to which this section applies, it appears to the employment tribunal that

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

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

35. In **Acetrip v Dogra UKEAT/0016/20/VP (18 March 2019)** HHJ Auerbach in the EAT said at para 103:

> "There is, inevitably it seems to me, a punitive element to an adjustment award under these provisions, because the Tribunal is not simply compensating a claimant for some additional readily identifiable or quantifiable loss that he has suffered. The adjustment is bound, to a degree, to be reflective of what the Tribunal considers to be the seriousness and degree of the failure to comply with the ACAS Code on the employer's part."

36. In **Slade and anor v Biggs and ors 2022 IRLR 216, the EAT** confirmed that the discretion given to a Tribunal by s.207A is very broad, both as to whether there should be an uplift at all, and as to the amount of any uplift. While the top of the range of 25% should undoubtedly be applied only to the most serious cases, the statute does not state that such cases should necessarily have to be classified, additionally, as exceptional.

37. In **Slade**, the EAT suggested that a Tribunal in applying s.207A "might choose to apply a four-stage test:

a. Is the case such as to make it just and equitable to award any ACAS uplift?

b. If so, what does the Tribunal consider a just and equitable percentage, not exceeding although possibly equalling, 25%?

c. Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the Tribunal's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?

d. Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the Tribunal disproportionate in absolute terms and, if so, what further adjustment needs to be made?"

Interest

38. The Tribunal are obliged to consider whether to award interest on awards for discrimination. The basis of calculation is set out in the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations [1996] SI 2803 (as amended). For injury to feelings awards interest is awarded for the period beginning on the date of the act of discrimination and ending on the day the amount of interest is calculated. For other awards interest commences at a midpoint.

Taxation

39. In relation to taxation, the Court of Appeal in **Moorthy v HMRC [2018] EWCA Civ 847** held that awards for injury to feelings were to be treated as tax free whether or not related to the termination of employment. This position changed from 6 April 2018 by an amendment to section 406 of the Income Tax (Earnings and Pensions) Act 2003 so that although "injury" in subsection (1) includes psychiatric injury it does not include injured feelings. This amendment has effect for the tax year 2018-19 and subsequent tax years. Section 406 which deals with the tax exemption provides:

> "(1) This chapter does not apply to a payment or other benefit provided –
>
> (a) in connection with the termination of employment by the death of an employee, or
>
> (b) on account of injury to, or disability of, an employee.
>
> (2) Although 'injury' in subsection (1) includes psychiatric injury, it does not include injured feelings."

40. This means that an award of compensation for psychiatric injury falls within the tax exemption but an award compensating for injury to feelings does not if it is "in connection with termination of employment". Therefore, an award for injury to feelings is taxable to the extent that it exceeds £30,000 if made in connection with termination of employment.

41. To avoid any disadvantage to the claimant we should gross up any award to her over £30,000. It requires us to estimate the tax he will have to pay on receipt of the compensatory award and add that sum back into the award to cancel out the tax burden on her. The purpose is to place in the claimant's hand the amount she would have received had she not been discriminated against.

Discussion and conclusions

42. I have set out below my conclusion on each element of remedy. I have taken into account the oral and written submission Mr Morris and Mr Drew made.

Financial loss (including adjustment and mitigation)

43. The parties were agreed about the extent of loss up to the end of the apprenticeship (barring the arithmetical error in Mr Morris's Schedule of Loss). They were not agreed about the position post-dismissal. The exception was that there did not appear to be any dispute that had she completed her apprenticeship the claimant's salary would have risen to £21,000 per annum. The Schedule of Loss and the Counter-Schedule of Loss both used that figure. For the avoidance of doubt, I find that is the appropriate basis for calculating the claimant's loss post-apprenticeship.

44. For the claimant, Mr Morris submitted that the financial losses which flowed from the dismissal were fully reflected in the Schedule of Loss which he produced. The claimant should be compensated for losses to date and up to the 30 April 2024, which was 6 months after her coding course ended.

45. Mr Drew submitted that post-dismissal compensation for financial loss should be limited to 6 weeks from the end of the apprenticeship. That, he submitted, was a reasonable period of time for the claimant to find another job at the salary she was earning at the respondent. He also submitted that the likelihood was that the claimant would not have completed the apprenticeship or would not be retained by the respondent after she had done so. That was particularly given that it seemed unlikely that she would pass the Functional Maths exam. He said that it was clear that she was unhappy in the apprenticeship and had expressed her desire to bring it voluntarily to an end. He submitted that I should reflect that by reducing any compensation awarded to that 6 week post-dismissal period.

46. Mr Morris in response submitted that there should be no reduction based on a chance that the claimant would have been fairly dismissed because she would have failed her maths exam. He submitted that any such reduction would be too speculative given the lack of evidence on that point. He submitted that the same applied to the submission that the claimant would have left the apprenticeship even in the absence of discrimination because she was unhappy. In any event any unhappiness on the part of the claimant was due to the treatment (i.e. discrimination) that she suffered from the respondent and should not therefore lead to a reduction in the compensation she was awarded. That would be to allow the respondent to benefit from the effect of its own discrimination.

47. I have decided that the appropriate period for which financial loss should be awarded is the period up to 30 April 2024 as submitted by Mr Morris. Based on a salary of £21,000 that equates to a net weekly loss of £235.00.

48. I do not find that the claimant failed to mitigate her losses. The burden is on the respondent to show that she acted unreasonably. It has not done so. The evidence is that the claimant applied for jobs and took other steps to seek to improve her employability. I find that she also needed to take those steps to rebuild her self-confidence after her discriminatory dismissal. There is no failure to mitigate, and I do not reduce the financial compensation on that basis.

49. I considered carefully whether the compensation should be adjusted to reflect a chance that the claimant might not successfully complete her apprenticeship. **Software 2000** makes clear that it is for the employer to adduce evidence on this point. The respondent in this case was not in a position to do so because it chose not to respond to the claim. However, **Software 2000** also says I need to take into account all the evidence before me.

50. The first basis on which Mr Drew submitted I should reduce the compensation was to reflect the chance the clamant might fail her functional maths exam even if reasonable adjustments were made. If she had, the respondent would have dismissed her because she could not have completed the apprenticeship. The evidence on this was very limited. I accept that the claimant had difficulties with maths. I accept that had the reasonable adjustments been made they would have reduced the substantial disadvantage the claimant faced in passing the maths exam because of her dyscalculia. However, I also accept that there is no guarantee that she would have passed the exam even if those adjustments had been made. What I do not have is sufficient evidence to reliably assess the chance that the claimant would have failed the maths exam if the respondent had complied with its duty to make reasonable adjustments. I do not, for example, have any evidence about the

extent to which the claimant failed the part 1 mock exam. I have no evidence about whether she found the contents of the part 1 exam harder than the part 2 exam (which she did not sit). The limited evidence I had suggested that the conditions in which she sat the mock exam were more likely to lead to failure, with no advance notice being given. She also had a further 2 months in which to sit further mock exams and continue tutor support. On this issue, I find that this is a case falling within paragraph (3) of the **Software 2000** guidance, i.e. one where the nature of the evidence is so unreliable that no sensible prediction based on that evidence can be made. I make no reduction in the compensation on this issue.

51. The second basis on which Mr Drew submitted I should reduce the compensation was to reflect the chance the claimant would have left in any event because she was unhappy with the apprenticeship. I found on the evidence that the claimant had not expressed a desire to end the apprenticeship. I make no reduction on that basis.

52. In summary, that means that the financial compensation I award (before any ACAS uplift and/or interest) will be for the period from dismissal up to the 30 April 2024 without reductions.

Injury to feelings

53. When it came to injury to feelings, the claimant's position was that her case fell in the middle of the middle Vento band. Mr Morris submitted that the case involved dismissal and was therefore a serious one. There was also a finding of victimisation which increased the injury to feelings. The claimant was particularly impacted by the events because of her autism and other mental health conditions. The respondent had to take the claimant as they found her ("the egg shell skull" rule) and therefore the injury to feelings had to reflect the injury to feelings she actually suffered rather than the notional injury to feelings that some reasonable person might have suffered. On that basis Mr Morris submitted that the injury to feelings should be £20,000.

54. I gave Mr Drew an opportunity to make oral submissions or to reserve his position pending written submissions so that he could take any advice he thought appropriate. Mr Drew was happy to make oral submissions on the ACAS Code and on financial losses. He did ask for time to make submissions in relation to injury to feelings which is not something that he was familiar with. In the Counter Schedule of Loss the respondent submitted the case fell within the lower end of the middle Vento band. It submitted the appropriate level of compensation under this head was £11,200.

55. I prefer Mr Morris's submissions. I am satisfied that the evidence shows a significant impact of the discriminatory acts on the claimant. It led to a complete loss of self-confidence. It was sufficient to cause her to have "Bad thoughts" and to contact Samaritans, Mind and the Crisis Team. I take into account that the claimant had a history of anxiety and depression arising from her autism prior to her employment with the respondent. As I record in my findings, however, the claimant's job and friendships at work had led to a rise in self-confidence and an increased "sense of self" despite the challenges she encountered. The respondent's discriminatory acts took that away. The impact was all the greater because it was specifically linked to her disabilities with the maths exam failure being cited as a

reason for dismissal. I also accept Mr Morris's submission that the fact the dismissal was an act of victimisation increases the severity of the act, arising as it did from the claimant seeking to support a colleague in relation to sexual harassment.

56. For those reasons I find this was a case in the middle of the middle Vento band and award £20,000 for injury to feelings.

<u>Uplift for breach of the ACAS Code</u>

57. In relation to the uplift for the ACAS Code of Practice not being complied with, Mr Morris submitted that there was a significant failure to comply. He accepted that there had been an appeal hearing in this case and that the appeal process itself appeared to be compliant with the Code. However, he said that the respondent had otherwise wholly failed to comply with the Code. The reasons for dismissal which I had found i.e. the failure to pass the maths exam and making a complaint which was a protected act in relation to sexual harassment, were capability and conduct matters and therefore the ACAS Code did apply.

58. When it came to the actions of the respondent, they had dismissed the claimant without any kind of warning and without giving her the opportunity to be accompanied at the meeting on 26 July 2022 which led to her dismissal. That was clearly a wholesale breach of the ACAS Code and an unreasonable one. Mr Morris pointed out that although there had been an appeal that was not because the respondent has offered an appeal but rather because the claimant had asked for one despite there being no reference to it in the dismissal letter. That was why the Schedule of Loss sought an uplift of 25%.

59. Mr Drew in his submissions emphasised that an appeal hearing had taken place. He also said that the respondent was a small company which made very little by way of profits and was involved in education. He was sorry that the respondent had not been able to provide the support required for the claimant in this case because that is what it was set up to do. In the Counter Schedule of Loss the respondent submitted an uplift of 10% was appropriate.

60. I find that the ACAS Code did apply to this case. The respondent should have applied it to the capability issue (failing the maths exam) and if it thought there were conduct issues. It unreasonably failed to do so. There was, as Mr Drew accepts, no proper investigation or discipline procedure. I accept there was an appeal. The appeal hearing was conducted in accordance with the Code although the claimant was not given the opportunity to respond to additional evidence obtained following the hearing. I do not find the delay in the appeal outcome unreasonable given the steps taken to gather additional evidence.

61. I have to decide what uplift is just and equitable. In doing so I take into account the fact the respondent is a small company. It does not have an in-house HR resource. There was not a complete failure to comply because there was an appeal. I must ensure I am not "double counting" given I have made an award of injury to feelings. That award, however, reflected the impact of the reason and fact of dismissal on the claimant. I do not think it would be double counting to apply an uplift in this case. Given the complete failure to conduct any kind of pre-dismissal process I find that the appropriate uplift is 15%.

Calculation

The total award of compensation before interest and any grossing up

62. The total award before interest and any grossing up is therefore as follows:

a. Financial loss to 11 September 2022 (5 weeks at a net loss of £194.57)

= £972.85

b. Financial loss from 12 September 2022 to 20 April 2024 (5 weeks at a net loss of £235.00)

= £19,975.00

c. Injury to feelings: £20,000.00

Applying the ACAS Uplift of 15%:

ACAS Uplift on Financial Loss: £20,947.85 x 15% = £3142.17

Financial loss plus ACAS uplift = £24,090.02

ACAS Uplift on injury to Feelings: £20,000 x 15% = £3000.00

Injury to feelings plus ACAS uplift = £23,000

What interest, if any, is payable on that compensation?

63. When it comes to interest, I decided that it was appropriate to apply interest in this case on those awards to the date of the calculation i.e. my chambers day on 6 October 2023. As required by the Employment Tribunals (Interest on Discrimination Awards) Regulations I calculate interest on the injury to feelings for the whole of the relevant period and for other past loss on the mid point basis.

64. As to the date when it should start, I find the appropriate date is the date of dismissal. That is not to dimmish the impact of the failure to make a reasonable adjustment on the claimant. I find, however that the injury to feelings in this case arose substantially from the claimant's dismissal and that the equitable approach is to calculate interest from that date, i.e. 3 August 2022. The period of calculation from 3 August 2022 to 6 October 2023 is 430 days.

65. For the injury to feelings award, the sum upon which I calculate interest is £23,000. The rate is 8% per annum. That gives a daily rate of interest of £5.04 (£1840 per annum divided by 365). The interest on the injury to feelings award is therefore £5.04 x 430 days = £2167.20.

66. Interest on financial losses is based on the midpoint therefore 430/2 = 215 days. At a rate of 8% per annum on £24090.02 that equates to a daily rate of £5.28 (£1927.02 per annum divided by 365). The interest on this award is therefore £5.28 x 215 days = £1,135.20.

67. The total interest on the award is therefore £2167.20 + £1135.20 = £3302.40.

68. The total award plus interest is therefore **£50392.60** (£24090.20 + £23,000 + £3302.40).

Should any part of the award be "grossed up" to take into account the impact of taxation?

69. On the basis that the total amount awarded (including the compensation for injury to feelings) is potentially taxable I need to gross it up to ensure the claimant will end up with the net amount she should receive to be fully compensated. However, the first £30,000 is tax exempt as a payment in connection with termination of employment.

70. That means £20392.60 is potentially taxable. The claimant's Schedule of Loss indicates that £12,570 will fall within the claimant's personal allowance. That leaves £7822.60 potentially taxable. That will be taxed at 20%. That needs to be grossed up. Doing so gives a gross figure of £9778.25 (£7822.60/80 x 100). Adding that gross figure to the £42,570 untaxed award gives a total award of £52348,25.

Do the recoupment provision apply?

71. The recoupment provisions do not apply because I am awarding compensation under the Equality Act 2010 not a compensatory award for unfair dismissal consisting of immediate loss of income.

Conclusions

72. The total award to the claimant is the sum of **£52348,25.**

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Employment Judge McDonald

Date: 24 November 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

27 November 2023

FOR THE TRIBUNAL OFFICE

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

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990
ARTICLE 12

Case number: **2408746/2022**

Name of case: **Miss S Molyneux** v **Apprentify Limited**

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

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

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

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

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

the relevant decision day in this case is: 27 November 2023

the calculation day in this case is: 28 November 2023

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

For the Employment Tribunal Office