# EMPLOYMENT TRIBUNALS

| **Claimant** | **Respondent** |
|---|---|
| Mr C Borg-Neal | Lloyds Banking Group PLC |

**Heard at**: London Central (CVP) **On**: 19 – 20 October 2023
Chambers: 4, 5, 7 and 19 December 2023

**Before:** Employment Judge Lewis
Ms Z Darmas
Ms J Marshall

**Representation**

**For the Claimant:** Mr T Coghlin, KC

**For the Respondent:** Ms I Ferber, KC

## RESERVED JUDGMENT ON REMEDY

The unanimous decision of the tribunal is as follows.

1. There is an ACAS uplift of 5% on the unfair dismissal compensatory award and the award for discrimination under the Equality Act 2010.
2. For unfair dismissal, we make a basic award of **£13,600**. (We understand this has already been paid.)
3. For unfair dismissal, loss of statutory rights and loss of long notice period including the ACAS uplift, we award **£3,150**.

4. For discrimination under the Equality Act 2010 we award:
   *Past loss (up to and including 5 December 2023, the agreed calculation date)*
   Past loss of earnings - £82,120.32
   Loss of Lloyds shares - £500
   Past loss of beneficial staff mortgage - £1,200
   Prescription fees - £237.82
   Chiropractor fees - £558

Sub-total = £84,616.14
With 5% ACAS uplift = **£88,846.95**
+ Interest to be calculated by the parties

Past loss of pension

Sub-total = £13,937.17
With 5% ACAS uplift = **£14,634.03**

*Future loss (from 6 December 2023)*
Future loss of earnings (after Ogden adjustment) - £231,827.85
Future loss of pension (after Ogden adjustment) - £51,392.98
Future loss of death in service benefit – £4,712.50
Future loss of Private Health Insurance - £7,068.75
Future prescription fees - £110.17

Sub-total = £295,112.25
With 5% ACAS uplift = **£309,867.86**

*Injury to feelings and personal injury*
Injury to feelings - £15,000
Aggravated damages - £3,000
Personal injury - £23,000

Sub-total = £41,000
With 5% ACAS uplift = **£43,050**
+ Interest to be calculated by the parties

5. We also award interest as appropriate on the above sums and an additional sum for grossing up as necessary. The parties have offered to make the calculations on interest and grossing up as they have agreed a method of calculation. They must agree the figures within 21 days of this Judgment and Reasons being sent to the parties.

6. We make the following Recommendations:

    (1) That on a date between 2 and 31 January 2024, the respondent circulate the tribunal's liability judgment to the respondent's UK Board, Mr Lewis, Ms Oxley, Ms McMahon, Martin Barrett and Janet Pope, and that they be asked to read and digest it.

    (2) That by 22 January 2024, the respondent place a note in the records it holds about the claimant (i) that a tribunal found his dismissal to be unfair and an act of disability discrimination (ii) attaching a link to the tribunal's liability decision and drawing attention to paragraphs 1 – 9 and paragraphs 160 - 161.

    (3) That the respondent inform the FCA in writing by 22 January 2024 that the tribunal has found the claimant's dismissal was procedurally and substantively unfair and an act of disability discrimination and attaching a link to the on-line judgment.

(4) That by 29 January 2024, the respondent provide to the claimant the wording of a neutral reference which it will provide on request to any future employer. The wording must cover the following factual matters: (a) dates of employment, job title, and a description of his duties and main achievements (b) sickness record (c) disciplinary record. If the claimant notifies the respondent by 5 February 2024 that he does not wish (b) or (c) to be included in that wording, the respondent must provide him with revised wording excluding (b) and (c) by 12 February 2024.

# REASONS

## Introduction

1. The tribunal's decision on liability was sent to the parties on 7 August 2023, following a hearing in June 2023. The tribunal found that the claimant was unfairly dismissed and that the respondent had subjected the claimant to discrimination arising from disability by dismissing him and not upholding his appeal.

2. The respondent submitted an appeal to the EAT on 18 September 2023, asking that the question of contributory fault and the section 15 claim be remitted to a differently constituted employment tribunal. The parties did not seek to defer this remedy hearing pending the EAT outcome.

3. The claimant originally asked for reinstatement. However, in the face of strong opposition from the respondent, the claimant reluctantly withdrew his request for this. Instead, he seeks compensation for long-term loss of career as well as injury to feelings, aggravated damages, personal injury, and various expenses. The loss of earnings claim includes loss of pension and various benefits.

4. The claimant also seeks interest on the award, and asks the tribunal to make recommendations.

## Procedure

5. The tribunal was provided with written submissions from each Counsel ie 'Submissions on Remedy' from the respondent, and the 'Claimant's skeleton argument for the remedy hearing'; an Authorities bundle, a main trial bundle of 660 pages and a supplementary bundle of a further 63 pages. We were also given an Excel sheet with an additional Ogden table – Males_Minus. Subsequent to the hearing and before the tribunal met in chambers, the claimant provided a corrected schedule of loss as at 3 pm on 20 October 2023 and then an updated schedule of loss dated 27

October 2023, and the respondent provided an updated counter-schedule of loss.

6. The claimant provided a witness statement from the claimant and from his brother, Graham Neal. The parties agreed that the tribunal could accept Mr Neal's witness statement on the understanding that he could only talk to his personal observations, and it was not necessary to call him as a witness.

7. The parties had instructed a joint clinical psychologist expert, Dr Bernard Horsford, to advise on causation and prognosis of the claimant's anxiety / depressive disorder. His report was in the trial bundle. The respondent accepted the findings in Dr Horsford's report. The claimant did not, and applied prior to the remedy hearing to call Dr Horsford to the tribunal to answer questions, so as to avoid the cost of asking him written follow-up questions. The Employment Judge refused this application, although she stated the claimant could renew his application at the full hearing. It appears that Dr Horsford was reluctant to answer further questions, possibly because these were now asked outside the timetable in his original instructions. The end result was that there was no agreement with him to answer any further questions. At the hearing, the claimant did not make any renewed application to call him.

8. The parties had also individually instructed their own experts with knowledge of dyslexia to act as work experts / employee consultants to discuss what avenues of alternative employment were realistically open to the claimant. The claimant instructed Mr Paul Doherty, who was the expert used at the liability hearing. The respondent instructed Dr Ian Anderson. The two experts met and provided a joint statement. Their reports and short statement were in the trial bundle. Mr Doherty's instructions were wider than Dr Anderson's. Dr Anderson was asked only to consider the impact of the claimant's dyslexia on finding a new job. Mr Doherty was asked to look at the impact of dyslexia together with all other factors which might impact on his finding a new job.

**Reasonable adjustments for the remedy hearing**

9. The tribunal asked at the outset of the remedy hearing what adjustments the claimant might need through the hearing. Mr Coghlin said he would be happy with short half hour breaks during his cross-examination, but they would not be necessary otherwise as he was happy to leave matters to his representative. The tribunal told the claimant that we would have short breaks every half an hour and at any time he asked. He should also feel free to stand up and stretch without asking permission if needed at any time because of his back. These adjustments were put into effect.

**Law**

10. The parties provided detailed skeleton arguments as well as updated schedules of loss. They also made oral submissions. They did not spend much time on the 'smaller' items.

11. It was agreed that 5 December 2023 would be taken as the date for calculation of past loss, since that was anticipated to be the approximate date when the tribunal panel would be able to meet and make its decision in Chambers. The calculations submitted by the parties were all submitted by reference to that date, which they were happy to work to. Although we did not complete our decision until 19 December 2023, any difference this makes to the calculations will be negligible.

12. There was no real dispute as to the law. We do not set out the law at length here, since it would be lengthy and repetitive. We will just mention a few introductory points.

Recommendations

13. Under s124(3) EqA, a tribunal can make a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate on the complainant. The tribunal has a wide discretion in the recommendations which it may make.

Injury to feelings

14. A tribunal can make an award for injury to feelings. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, stress, depression etc and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise. Nevertheless, employment tribunals have to do the best they can on the available material to make a sensible assessment. In carrying out this exercise, they should have in mind the summary of the general principles on compensation for non-pecuniary loss by Smith J in (1) Armitage (2) Marsden (3) HM Prison Service v Johnson [1997] IRLR 162, EAT, which can be summarised as follows:
(1) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.
(2) Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches.
(3) Awards should bear some broad general similarity to the range of awards in personal injury cases. This should be done by reference to the whole range of such awards, rather than to any particular type of award.

(4) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.
(5) Tribunals should bear in mind the need for public respect for the level of awards made.

15. Three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury, were suggested in the case of Vento v Chief Constable of West Yorkshire Police (No.2) [2003] IRLR 102, CA. The middle Vento range for claims presented in the year starting 6 April 2022 was £9,900 - £29,600.

16. The decision whether or not to award aggravated damages and, if so, in what amount must depend on the particular circumstances of the discrimination and on the way in which the complaint of discrimination has been handled. This includes where the respondent's conduct is based on animosity.

17. 'The circumstances attracting an award of aggravated damages fall into three categories:
(a) The manner in which the wrong was committed. The basic concept here is that the distress caused by an act of discrimination may be made worse by it being done in an exceptionally upsetting way. In this context the phrase "high-handed, malicious, insulting or oppressive" is often referred to – it gives a good general idea of the kind of behaviour which may justify an award, but should not be treated as an exhaustive definition. An award can be made in the case of any exceptional or contumelious conduct which has the effect of seriously increasing the claimant's distress.
(b) Motive. Discriminatory conduct which is evidently based on prejudice or animosity or which is spiteful or vindictive or intended to wound is, as a matter of common sense and common experience, likely to cause more distress than the same acts would cause if evidently done without such a motive – say, as a result of ignorance or insensitivity. That will, however, only of course be the case if the claimant is aware of the motive in question: otherwise it could not be effective to aggravate the injury. There is thus in practice a considerable overlap with (a).
(c) Subsequent conduct. This can cover cases including where: the defendant conducted his case at trial in an unnecessarily offensive manner; the employer rubs salt in the wound by plainly showing that he does not take the claimant's complaint of discrimination seriously; the employer fails to apologise; and the circumstances are such as those in *Bungay v Saini*.' (Commissioner of Police for Metropolis v Shaw)

18. Conduct in the course of litigation may be taken into account in assessing the degree to which a person has suffered aggravation of injury to feelings. See City of Bradford Metropolitan Council v Arora [1991] IRLR 165 CA; Zaiwalla & Co v Walia [2002] IRLR 697 EAT. On the other hand,

respondents are allowed to defend themselves and mere aggressive advocacy is not a ground for an aggravated award.

19. Common sense requires that regard should also be had to the overall magnitude of the sum total of the awards of compensation for non-pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage. In particular, double recovery should be avoided by taking appropriate account of the overlap between the individual heads of damage. The extent of overlap will depend on the facts of each particular case.

Personal injury

20. An employment tribunal has jurisdiction to award compensation by way of damages for personal injury, including both physical and psychiatric injury, caused by the statutory tort of unlawful discrimination. (Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] IRLR 481, CA)

21. Under the Judicial College Guidelines for the assessment of general damages in personal injuries cases(16th edition), when making an award for psychiatric damage, factors to take into account are: (i) the claimant's ability to cope with life and work; (ii) the effect on the claimant's relationships with family, friends and those with whom she comes into contact; (iii) the extent to which treatment would be successful; (iv) future vulnerability; (v) prognosis. A 'moderately severe' case is where there are significant problems associated with factors (i) – (iv), but the prognosis is much more optimistic than 'very poor' as in a severe case. Work-related stress resulting in a permanent or long-standing disability preventing a return to comparable employment would fall within this category. In the latest edition of the Guidelines, (16th) the range is £19,070 - £54,830. A 'moderate' case is where there have been marked improvements by the hearing with a good prognosis. For this, the range is £5,860 - £19,070.

22. The Court of Appeal in BAE Systems (Operations) Ltd v Konczak [2017] EWCA Civ 1188 provides important guidance where factors other than the unlawful act have contributed to a claimant's mental ill-health. Psychiatric injury is single and indivisible if there is no rational basis for an objective apportionment of causative responsibility for the injury. An employer tribunal must try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part that was not so caused. That exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm. If the injury is truly indivisible, the claimant must be compensated for the whole of the injury. Having said that, if the claimant had a vulnerable personality, a discount might be required to take account of the chance that the claimant would have succumbed to a stress-related disorder in any event.

Loss of death in service benefit

23. In Fox v British Airways plc, the Court of Appeal had to deal with an unusual case where the claimant claimed on behalf of his son who had died shortly after his dismissal. In that case, the claimant's son's estate was entitled – if liability was established – to the full amount of the benefit that would have been payable under the scheme had he remained in employment at the date of his death. During the course of the judgment, the CA commented: 'In all ordinary cases, the cost of obtaining insurance which will provide equivalent benefits will be the appropriate measure; and even if for some reason that route is not available, so that the tribunal has to value the loss for itself, normally the loss will be less than a certainty and the exercise will be one of the valuation of a lost chance.

## Facts and conclusions

Recommendations

24. The parties did not address us orally on Recommendations. They referred to their written submissions.

25. The Recommendations sought by the claimant are at pages 411 – 3 of the Remedy Bundle. The respondent's comments are at paragraphs 41 – 47 of its Submissions on Remedy. The claimant's comments are at paragraphs 125 – 136 of the claimant's skeleton argument for the remedy hearing.

26. We do not make the recommendations exactly as requested because they require us to paraphrase and rephrase our original decision, which we do not think brings clarity to the situation as it loses the wider context. We believe the following recommendations achieve the spirit of what was requested. We recommend:

> One: That on a date between 2 and 31 January 2024, the respondent circulate the tribunal's liability judgment to the respondent's UK Board, Mr Lewis, Ms Oxley, Ms McMahon, Martin Barrett and Janet Pope, and that they be asked to read and digest it.
>
> Two: That by 22 January 2024, the respondent place a note in the records it holds about the claimant (i) that a tribunal found his dismissal to be unfair and an act of disability discrimination (ii) attaching a link to the tribunal's liability decision and drawing attention to paragraphs 1 – 9 and paragraphs 160 - 161.
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> Three: That the respondent inform the FCA in writing by 22 January 2024 that the tribunal has found the claimant's dismissal was procedurally and substantively unfair and an act of disability discrimination and attaching a link to the on-line judgment.

> Four: That by 29 January 2024, the respondent provide to the claimant the wording of a neutral reference which it will provide on request to any future employer. The wording must cover the following factual matters: (a) dates of employment, job title, and a description of the his duties and main achievements (b) sickness record (c) disciplinary record. If the claimant notifies the respondent by 5 February 2024 that he does not wish (b) or (c) to be included in that wording, the respondent must provide him with revised wording excluding (b and (c) by 12 February 2024.

27. In relation to recommendation one, we believe this action will reduce the adverse effect on the claimant of the respondent's discriminatory actions. It has hurt the claimant a great deal that he has been branded as a racist. It will help the claimant to know the full picture has been put to people who were involved or had been interested or should be interested. This is not an onerous recommendation for the respondent to comply with. The judgment is not a confidential document and it is in the public arena.

28. We believe that recommendation two will also reduce the adverse effect of the discrimination, partly because again the claimant will know that such a comprehensive descriptive of events is held on the respondent's records about him, and hopefully will prevent misleading shorthand descriptions of what conduct led to his dismissal.

29. Recommendation four was difficult because it is impossible to predict what questions a potential employer in the future might ask the respondent. We also cannot make a recommendation that the parties 'agree' wording because the respondent has no control over whether the claimant agrees. Nor can we require the respondent to make non-factual statements of goodwill which it might not feel. We are very conscious that a reference may make affect the type of work which the claimant is able to get in the future. We have done the best we can by way of formal recommendation.

30. We cannot constrain what is said or written in the media. The liability judgment and this remedy judgment will be in the public domain on the on-line register and available to the media. We would expect the respondent not to make comments to the press which give a wholly misleading impression, but we do not think it is practical for us to make any recommendations in that regard.

Past loss of earnings

31. This award is made for the discrimination under the Equality Act 2010. There is no separate award for unfair dismissal past loss of earnings, as this would be a duplication. Nor is there any separate claim for notice pay.

32. The claimant was dismissed without notice by letter dated 17 December 2021 with effect from Sunday 19 December 2021. The claimant's past loss of earnings covers the period 20 December 2021 to 5 December 2023

inclusive. The respondent does not argue that the claimant failed to mitigate his loss in this period.

33. The parties agreed the claimant's net monthly earnings at the termination date were £3,276/month and £756/week. That sum includes the value of Sharesave deductions of £200/month, netted down to £160/week. The respondent's updated schedule of loss contains a table which then shows the annual increases given or proposed to be given by the respondent to its Band E managers.

34. By reference to the net figures in the respondent's table:
    - 20 December 2021 – 31 March 2022 = 102 days @ £107.70 net/day = £10,985.40
    - 1 April 2022 – 31 March 2023 = £40,491.36 net for the year
    - 1 April 2023 – 30 June 2023 = 91 days @ £116.48 net/day = £10,599.68
    - 1 July 2023 – 5 December 2023 = 158 days @ £126.86 net/day = £20,043.88

    Total = £82,120.32

35. We therefore award £82,120.32 for past loss of earnings plus an ACAS uplift which we will deal with separately. Interest and grossing up will also apply as we mention elsewhere.

Future loss of earnings

*What may the claimant earn and when in the future?*

36. The parties agree, and it is obvious to us, that the claimant is not fit for work at the moment, and has not been able to work since his dismissal.

37. Dr Horsford says that on the balance of probabilities, the claimant is likely to recover from his mixed anxiety and depressive disorder within 1 – 2 years. He says 61% of individuals with this condition have recovered within a year. He also notes research suggesting that individuals under 60 recover more quickly than other groups. On that last point, we observe that the claimant is only just under 60.

38. Dr Horsford says that recovery depends on the right medication along with an intensive programme of treatment by a skilled therapist. The claimant has received very little therapeutic input to date, but he is receptive to getting medical treatment.

39. It is clear that the tribunal proceedings have caused the claimant stress and anxiety. Dr Horsford says that it is likely when these proceedings are concluded there will be an improvement in the claimant's mental health, although the comorbid physical illnesses which the claimant has are likely to make recovery more challenging.

40. As for when the tribunal proceedings will be concluded, that is hard to say because the respondent has lodged an appeal which has not yet reached the stage of the sift. The respondent says that we should not work on any assumption that the tribunal proceedings will continue beyond the sift because that is too speculative and would involve the tribunal in the impossible task of assessing the likelihood of the EAT believing there may be errors in the tribunal's decision. The claimant argues that we can factor in the possibility that the appeal proceedings will extend beyond the sift stage and potentially up to a full EAT hearing.

41. Dr Horsford also says there is a high chance of relapse. He says there is an approximately 50% chance that the claimant's mixed anxiety and depressive disorder will reoccur in his lifetime.

42. The claimant's schedule of loss is based on him being able to find work in Spring 2026, which allows time for the litigation to end, then 1 – 2 years' recovery from his mental illness, then time to find new work. The claimant envisages that he will start work on a part-time, ie 50% basis, and that 12 months later, he will start full-time work.

43. The respondent argues that the claimant will be able to obtain new employment at a rate of pay which eliminates his losses two years after the estimated date of the sift, ie from that point, allowing 1 year for recovery and 1 year to find a job. The respondent accepts full loss of earnings up to then. The date of the sift is unknown, but the parties' guess is that it would be in a few months time.

44. As always, there is an element of speculation regarding what will happen. Based on the various expert reports, we find that the claimant will have obtained some form of paid work as at 1 April 2026. That allows a period for the proceedings to come to an end, broadly 1 year to recover enough to look for work, and broadly 1 year to find work. These estimates are relatively optimistic. However, we make these estimates on the basis that we think the claimant will only be working 50% for the year starting 1 April 2026. From 1 April 2027, we find the claimant will be working on a full-time basis. We think it unrealistic to believe the claimant will at any stage earn anywhere near what he was earning with the respondent. Our reasoning in terms of both time-scale and pay is as follows.

45. The claimant has a number of obstacles to obtaining and then holding down a new job which are cumulatively very severe. First, the claimant needs to recover from his mixed anxiety and depressive order or at least to get it substantially under control, which plainly it is not at the moment. The medication has been steadily increased and it has not solved matters. The claimant has had a number of counselling sessions which have helped temporarily to a limited extent, but Dr Horsford himself says that recovery will depend on finding the right medication plus an intensive programme of treatment by a skilled therapist who the claimant can identify with. Although the claimant has shown he is keen to seek treatment, there is no indication when these measures might be put in

place. There is also the likely delay to any recovery for as long as there remain tribunal proceedings. The length of these is impossible to predict, but even estimating how long it might take to get to the EAT sift could take the claimant to Spring 2024.

46. In addition, the claimant has certain physical conditions which preoccupy him and in some cases, affect his functioning, eg his back condition. The claimant also has Bodily Distress Disorder. This means he tends to worry excessively about his physical ailments. Generally he tends to catastrophise, ie worry about poor outcomes in life. All this would get in the way of him functioning effectively to find a new job, in his presentation to potential employers, and in holding down a new job.

47. At the moment, the claimant's mental health, state of mind, and verbal tics mean he could not begin to seek work, let alone navigate an interview. It may be that his verbal tics disappear when he is relaxed, but a job search and interview process is highly stressful. Not only would the claimant not present well during an interview because of such verbal tics, his interview performance would be affected by his embarrassment.

48. Another difficulty is that the claimant's self-confidence is likely to be permanently affected by his dismissal, even after his mental health has substantially recovered.

49. There are further difficulties. the claimant's job did involve use of a number of professional skills areas such as change management, project delivery, management, business analysis and risk management. But his work experience going back many years was with one employer and for the last 10 years, in one role which had developed to be very niche, centring on inside knowledge of the respondent's internal systems. The claimant has no formal qualifications. Retraining at the claimant's age, with limited time left before his intended retirement age of 67, and with his dyslexia strikes us as completely impractical, even for an intelligent and resourceful individual, as the claimant clearly is.

50. It is also a problem for the claimant in seeking future employment, that having been employed by one employer for such a large part of his working life, such employment ended with dismissal for gross misconduct. Moreover, the nature of the gross misconduct was the claimant's use of a racist word. Even though some employers might accept the tribunal's nuanced decision about context, it is likely that other employers – particularly those who are concerned to maintain their profile as working to eliminate discrimination and promote equality – would be deterred. There is also the problem that in order to 'defend himself' the claimant would have to show the tribunal decision. Unfortunately many employers could well avoid recruiting someone because they had brought tribunal proceedings. This might be unlawful, but that does not stop it happening, and it is hard to prove against any potential employer. We find Mr Doherty's assessment of this entirely convincing.

51. Many potential employers will also look less favourably on a candidate who has been out of the job market for several years, and even more so when the candidate has had lengthy periods of mental ill-health.

52. Possibly the largest obstacle is the claimant's age. All the other factors need to be seen in that context. The claimant is 59. By the projected time when he could start a job (say 1 April 2026) he will be aged 61. He has no time to retrain or go in at entry levels and slowly build up his skills to a level of pay comparable with what he had with the respondent. Moreover, the chances of employers employing him at that age, let alone with all the other factors, are realistically very low. As Mr Doherty says, it is not that the claimant is unemployable or that there are no potentially suitable jobs out there; it is that the range of factors combined particularly with his age, means he is unlikely to get such jobs. The picture would look quite different if the claimant was in his 30s or early 40s.

53. We have not given a great deal of weight to the effect of the claimant's dyslexia because the experts disagree, and we do not consider it is the largest obstacle facing the claimant. Nevertheless, we find more persuasive Mr Doherty's reasoned view that the claimant's dyslexia, even with support and adjustments, would reduce the range of jobs which he could effectively undertake. We take into account that the claimant was able to hold down his job successfully with the respondent for a very long time. We note that he never told the respondent that he had dyslexia prior to these events and that he managed without asking for reasonable adjustments, although Mr Bailey had noticed it could take the claimant time to articulate verbal questions. However, the point is that this was a niche job which suited the claimant and which had developed in a way which suited his skills and thought processes. So holding the job without explicit reasonable adjustments is not in itself strong evidence that the claimant's dyslexia would not affect his ability to apply for or carry out certain other jobs. In addition, as the claimant's dyslexia impacts his oral fluency when expressing complex thoughts, it may well make it more difficult for him to navigate interviews, especially when asked tricky questions about why he left his employment.

54. Looking at the individual adverts which the respondent produced by way of example did not show anything to change our view. Applying for jobs is a competitive exercise. Even where the claimant might have been able to do a job, eg the NHS post, after being advertised for 4 days solely on Linked-In, there had already been 93 applications.

55. We have taken account of the fact that the claimant has been able to continue his duties as a local Councillor to some extent, though he has missed meetings, but this is different from the pressures of finding and carrying out paid work. Nevertheless, his contacts in this role may assist him with finding some work or consultancy contracts.

56. We accept that the claimant is intelligent, entrepreneurial, has a strong work ethic and will get to a point where he is very motivated to work.

However, we find Mr Doherty's analysis very persuasive and evidence-based. It accords with our own experience. Neither of the other two experts were instructed to look at the matter holistically.

57. We suspect that the claimant will end up with a 'portfolio' of roles, some better paid than others. He may do some part-time employed work. He may be able to obtain some project work from a self-employed consultancy or contract basis. We do not think he will be satisfied working only with animals, but it might be part of a portfolio. Any work he does eg at a friends' café or an animal-related job, is likely to be very low paid as such jobs are. The claimant does not have the experience to get any higher paid animal-related jobs. On the other hand, he may be able to carry out some self-employed work for more pay.

58. Balancing this, we consider a fair estimate is that he would achieve 50% of our estimated future earnings in his first year back at work because of the time he will have been out of the job market, mainly due to poor mental health. He will need to ease his way back in, and it may also take additional time to find opportunities.

59. Mr Doherty thinks the claimant's likely earnings will be at the rate for the National Minimum Wage ('NMW') plus any statutory minimum contributions for pension auto-enrolment. We think the claimant's total earnings (pro rated for the first year) will average out at slightly above the statutory national minimum wage. Taking the national minimum wage at December 2023, a 40 hour week would be £416.80 gross pay in today's money (£10.42/hr current NMW x 40). We think the claimant will have some higher paid work, as we have said, so we anticipate the claimant earning in total £450 net/week in today's money. We apply a broad brush rise in earnings of 2% per year from 1 April 2024 on that figure (even if the NMW has a much larger rise in 2024). By 1 April 2026, the claimant's likely net earnings will be £468.18/week or £66.88/day. We have calculated the estimated earnings for each year up to age 67. We set out the calculation below.

60. At this point, we would acknowledge some points made in the respondent's submissions. We have been careful when analysing the claimant's evidence to bear in mind that he does tend to have a very pessimistic outlook, especially at present. We have also been careful to distinguish within Mr Doherty's report and oral evidence, Mr Doherty's observations about the claimant's then state of health, and observations about future prospects when the claimant's health is better. We add that many of Mr Doherty's observations about future prospects accorded with common sense and coincided with our own experience regarding factors which make attaining future work difficult.

*Ogden Tables*

61. As we find that the claimant will suffer a shortfall of earnings for the remainder of his working life, we need to factor in various contingencies. We have therefore used the Ogden Tables.

*The basic multiplier*

62. The claimant intended to retire at the age of 67. The parties agreed that 'Males_Minus' was the appropriate Ogden Table for the basic multiplier. This multiplier covers the issues of accelerated receipt and risk of mortality. Given the claimant's current age (59) and ongoing loss until his intended retirement age, the basic multiplier is 7.83.

*The further multiplier: what would have happened at Lloyds*

63. There is then a further multiplier to reflect the contingencies that the claimant might have left his old job before age 67 because of eg redundancy or his health. It also reflects contingencies in any new employment that it will cease for such reasons. Ogden Tables A – D cover these contingencies although only up to the age of 54, because Ogden considers matters become very individualised after that. Even prior to that age, the Tables can be departed from if there is something about the claimant's circumstances which suggests a strongly different picture.

64. Because the claimant is 59, not 54, and the Tables stop at 54, the claimant says we should not use them to assess these contingencies. The respondent says that we should still use them.

65. If we did use the Tables, and applied the age of 54 rather than 59, the multipliers would be as follows. Looking first at contingencies had he not been discriminated against and had remained at Lloyds, the appropriate Table would be for an employed man, and the claimant suggests at level 3.

66. A key difficulty would be whether to describe the claimant as disabled prior to the discrimination. On Table A (not disabled / employed) the Lloyds extra multiplier would be 0.76 far the highest age (54). Table B, (disabled / unemployed) would be 0.54 at that age. The definition of disability for Ogden purposes is not the same as in the Equality Act 2020. It must be the case that 'the effects of impairment limit either the kind or the amount of paid work he can do'. There may have been some kinds of work which the claimant could not do because of his dyslexia, but in the secure job which he held, he was not at all restricted. On balance, we would probably be looking at Table A.

67. However, we do not think it is appropriate to use the Tables A and B because Ogden says at paragraph 82 that where the claimant is older than 54, the likely future course of employment status will be particularly dependent on individual circumstances.

68. Looking at the claimant's individual circumstances, the claimant was in a secure job which he had held for a great many years. He was successful in the job. He got on with his line managers. He was happy. There was nothing to suggest things might go wrong. We were not told of any risk of redundancy. The respondent says the claimant might have left earlier, eg because of his physical health (back pain, sleep difficulties) or because of family issues or for other reasons. Regarding family issues, the claimant has a 3 year old. He wants to provide for her, so he is motivated to keep earning. As for health matters, the claimant had pre-existing Bodily Distress Disorder. It had not previously stopped him working. We were not told that he had any problematic sick record. Had there not been the discriminatory dismissal, there is no reason to think the claimant's health would have deteriorated to the point where he could not work. The claimant had had a few minor bouts of poor sleep and tiredness in 2015 and 2018 but they had not lasted long and his employment had continued. Those occasions were clearly different from the major sleep problems caused by the discriminatory event. As for the claimant's back, the evidence does not suggest that it would have been a major health problem interfering with his ability to work had the pain not been aggravated by the discrimination.

69. The claimant suggests 0.9 is a realistic multiplier. The respondent says 0.75, albeit a finger in the air, is much more realistic. Given the considerations we have described, we think that reasons why the claimant would have stayed at the respondent till age 67 are very strong. We make some allowance for contingencies including potential health issues. We find that 0.85 is an appropriate multiplier here.

*The further multiplier: what might happen in any future employment*

70. Moving on to the contingencies in any new employment (sometimes referred to as 'mitigation' or 'residual earnings'), there is no doubt that the claimant is now disabled. Subject to the age aspect, Table B would apply. The multiplier at age 54 under Table B is 0.54

71. Again we do not think it useful to use the Table. The claimant is much older than the upper age on it and has very individual circumstances. The claimant suggests 0.2 is appropriate. The respondent says that is hopelessly pessimistic and suggests 0.5.

72. We take account of the fact that at the moment the claimant finds it difficult to think positively about the future and also that he has a general tendency to catastrophise. However, we have considered the objective evidence. The claimant will face considerable difficulties in maintaining future employment. He will be getting older all the time. He is very unlikely to find secure full-time reasonably paid employment. He is most likely to achieve earnings by a portfolio of activities, many of which may of their nature be unstable, for example casual employment. On the other hand, the claimant is likely to continue with his Council work and this may offer him contacts which help with ad hoc work opportunities. In addition to these

risks, the claimant has some potential health issues and notably Bodily Distress Disorder which may prove more problematic than they would have been in stable employment with the respondent. In addition, Dr Horsford says the claimant has a roughly 50% risk of relapse, albeit this is a lifetime risk and not a risk confined to the period up to age 67. Putting these factors together, we consider an appropriate multiplier is 0.4.

*What would the claimant have earned with the respondent had he not been discriminated against?*

73. We first work out how much the claimant would have earned with the respondent from 6 December 2023 until 10 October 2031 inclusive (the day before the claimant's 67th birthday). The respondent provides figures for net earnings in a table in its updated counter-schedule of loss. Up to the year starting 1 April 2025, the annual pay rise is known - or as good as known because the trade union has recommended the rise to its members. We will take the respondent's net figures for those years. For years starting 1 April 2026, figures are unknown. Historically, the respondent agrees increases in line with inflation and Bank of England rates predict inflation to be down to 2% by 2025. The claimant suggests a 3% rise for each year from 1 April 2026. We think the safest measure is to work on the basis of a 2% rise

*Calculation applying Ogden multipliers*

74. We think the most reliable way to apply the Ogden multipliers is to calculate the actual figures for each year. We have been able to do this with the benefit of Excel spreadsheets and we have checked the calculation manually.

75. The relevant period is from the agreed calculation date, 6 December 2023, to 10 October 2031, the day before the claimant's 67th birthday inclusive.

76. We annex a copy of the spreadsheets to the end of this decision. The key figures are as follows:

    What the claimant would have earned from 6 December 2023 to 10 October 2031 with the respondent:

    Total net pay: £410,003.45
    Multiplier: 6.66 (ie 7.83 x 0.85 to the nearest two decimal points)
    Total adjusted figure: £273,062.29

    Anticipated earnings in same period (mitigation residual earnings):

    Total net pay: £131,739.42
    Multiplier: 3.13 (ie 7.83 x 0.4 to the nearest two decimal points)
    Total adjusted figure: £41,234.44

    Future loss of earnings: £231,827.85
    (£273,062.29 - £41,234.44)

Pension

77. The claimant was on a defined contribution scheme under which 13% of basic pay was paid into his pension. The parties agree that the contributions method of calculating loss should be calculated as set out at paragraphs 4.17 – 4.31 of the Principles for Compensating Pension Loss (4th edition, 3rd revision).

78. In this case, pension loss is therefore calculated as 13% of the claimant's pensionable pay, ie his gross pay.

79. The figure of £15, 014.93 for past pension loss was agreed (correcting for the claimant's miscalculation of one day).

80. For future pension loss, the method is the same, subject to the same adjustments as we may make for future loss of earnings. The only reason the parties have calculated pension loss separately is because no interest is awarded on pension loss.

81. We have not put into the calculation any credit for the possibility of the claimant receiving any future auto-enrolment pension. This was not coherently argued in front of us, and the respondent did not mention it at all, either in writing or orally. In our view, the claimant's future work will only partially involve paid employment as opposed to self-employment; the paid employment is likely to be close to the NMW, and he may well not even reach the level of paid employment which triggers such a pension.

82. Our calculation is as follows:

    Total gross pay as it would have been with the respondent, 6 December 2023 – 10 October 2031 = £81,908.73

    Pension at 13% = £77,166.64

    Multiplier: 6.66

    Adjusted total pension loss = £51,392.98

    For a year by year breakdown of this calculation, see Excel spreadsheet attached to these Reasons.

Other benefits

83. The parties agree that the value of loss of a beneficial staff mortgage rate was £100/month until the mortgage was paid off in December 2022. The parties agree the total loss under this head was £1,200.

84. The parties agree £500 as a reasonable estimate of the value of shares held by the claimant but lost following his dismissal.

85. Death in service benefit: The claimant says he could not get any quotes for getting such insurance in the future. He says the calculation should therefore be based on the lost chance – ie a percentage of the pay-out should he die before retirement age reflecting the chance that might happen. He puts this as £11,413.52. The respondent says the claimant provided no evidence of any attempt to get this insurance and therefore no past loss is recoverable. Alternatively the calculation should be based on premiums, which it estimates at £50/month.

86. We agree that the claimant has put forward no evidence of his attempt to find the cost of premiums for death in service benefit and what the responses were. There is simply a generic statement in the schedule of loss that 'C has been unable to obtain any quotes for equivalent cover'. This is too vague. We are not satisfied that route is unavailable. We cannot on this basis simply assume that he would be unable to obtain this cover. It would not have been difficult for the claimant to provide evidence on this. We cannot just guess in the absence of sensible evidence. We therefore accept the respondent's estimate of a premium at £50/month for future loss. We make no award for past loss as the claimant did not obtain and pay for any premium or prove any past loss. The period of future loss is 6 December 2023 – 10 October 2031, ie 94 months 5 days. The loss is therefore 94.25 x £50 = £4,712.50

87. Private Health Insurance: the parties agree the loss would in theory be the cost of premiums for equivalent cover. The claimant seeks £125/month for 96 months. He says that BUPA quoted him £75/month but that would not be comparable cover due to exclusions. The respondent says it understands that the claimant had the opportunity to extend his existing cover on a private basis on termination without exclusions, so the £75/month figure is relied upon.

88. The respondent further argues that the claimant provided no evidence that he had actually obtained the insurance so no past loss is recoverable. The claimant appears to accept this in his updated schedule of loss, and we had no evidence that the claimant had purchased private medical insurance in the period of past loss.

89. Again we have a lack of evidence. There are no documents from BUPA. We have no evidence supporting the quote for £125. The parties agree that BUPA quoted £75/month, albeit they disagree regarding whether there were exclusions. In the absence of any concrete evidence, we therefore award £75/month for the period of compensation for future loss of earnings.

90. The period of future loss is 6 December 2023 – 10 October 2031, ie 94 months 5 days. The loss is therefore 94.25 x £75 = £7,068.75.

Medical Expenses

91. The claim is for past loss of £1,116 for 31 appointments with a chiropractor and £237.82 for past prescription fees at the rate of £10.81/month for 22 months. The respondent agrees past loss for prescription fees at £237.82, but challenges the claim for chiropractor fees.

92. The claim for future prescription costs is for 4 years' worth at the rate of £129.72 per year. The respondent does not dispute the annual amount but suggests only two years. However. there are no NHS prescription charges from age 60. We therefore award future loss only from 6 December 2023 to 10 October 2024 inclusive ie 310 days = £110.17

93. The claimant has been seeing a chiropractor fortnightly for his back since March 2022. He says that his back pain was either caused or exacerbated by his stress over the dismissal. The respondent says this was an entirely separate issue and not caused by the respondent's discrimination.

94. We were not pointed to a great deal of first-hand evidence on this.

95. The claimant was referred for an MRI scan on 7 September 2023 on a severe bout of back pain. The suspected diagnosis was 'muscle injury: lower back'. The discharge letter notes that the claimant had a 2-year history of lower back pain. The MRI found 'very mild multilevel lower lumbar spine bulging closely related and possibly irritating a few nerves as described bilaterally. Mild cervical spine spondylotic changes.'

96. Dr Horsford comments that as the origin of the claimant's back pain was physiological, it cannot have been caused by the mixed anxiety and depressive disorder. He acknowledges that the claimant was likely to feel more depressed because of the back pain. He adds that the relationship between back pain and depression works both ways. He says that depression can make back pain feel worse.

97. The GP's local record of problems (printed 15 May 2023) lists back pain under 'minor past' as opposed to 'significant past' or 'active' problems. The dates are 1 September 2022 backache, 4 July 2022 backache and 18 February 2022 low back pain. Before that, the only back-related entry is in 2011.There is a GP entry 24 May 2023, the GP notes the claimant saying 'due court case next month – causing stress which in turn makes the back worse'. There is another entry on 3 February 2023 'lost job december 2022 – court case June this year. Physical symptoms getting him down – back pain especially. – sees chiropractor – agrees with point that anxiety/stress causing the pain'.

98. There was no mention of back issues in the GP record prior to 18 February 2022 since 2011. This suggests the claimant started experiencing back pain very soon after his dismissal. The back pain has been getting worse to the point where he was referred for the MRI scan as we have mentioned. We do not have any specific advice from a back doctor or even the chiropractor on this issue, but the timing strongly

suggests that although there was an underlying physical cause, the discriminatory dismissal was an aggravating factor.

99. Doing the best we can, we consider it appropriate to award 50% of the chiropractor's fees, ie £558.

100. There is no claim for future chiropractor fees.

Injury to feelings

101. The parties agree that the award should be within the middle Vento band. The claimant argues for near the top of the middle band. The respondent suggests the middle of the middle band (although it miscalculates what the middle figure is.) The appropriate band is that for the year in which the claim was lodged.

102. It is not easy in this case to separate what should be considered injury to feelings and what should be considered personal injury. The most important point for us is that there should not be duplication and that we look at the totality of the award. We bear this in mind when we broadly divide the injury into those categories.

103. For injury to feelings, the claimant was very shocked by his dismissal, which he had not been expecting. He found it awful to be told he had no empathy. He was angry that his dyslexia had not been taken into account. He felt panicky about his finances, which had not previously been a cause for concern. He was frustrated and angry. He felt humiliated and disappointed in himself, and that his reputation was damaged.

104. He lost a job which he had held a long time and which he loved. He desperately wanted to be reinstated, but the respondent was not agreeable. The claimant had found a niche where his dyslexia did not hold him back and may even have proved an advantage in terms of the skills used. He had intended to work there until retirement.

105. The claimant felt relieved when he initially received the tribunal decision but he did not feel that any weight had been lifted from him. He had hoped he would be reinstated and life would get back to normal, but he realised that would not happen. This removed his hope. Not only would the respondent not reinstate him, and not only did it not apologise, but it had appealed the decision, which sent him back into a state of uncertainty and the prospect of more solicitor meetings, hearings etc.

106. For the shock, hurt, humiliation and damage to his self-esteem, and loss of a job he loved, we award £15,000 injury to feelings. All these feelings have persisted over a long period and are continuing. We have been careful not to add anything for the effects described under the heading of personal injury below.

Personal injury

107. Dr Horsford diagnosed the claimant with mixed anxiety and depressive disorder.

108. Since his dismissal, the claimant has had persistent low mood, social anxiety, panic attacks, tearfulness, exhaustion, and anxiety. He is currently severely depressed. He no longer feels comfortable around groups of people. He is generally still able to meet certain old friends, eg rugby friends and friends in politics as well as family, although sometimes he even finds it difficult to spend time with family. The claimant used to be outgoing and very sociable. Now he turns down invitations to parties and has withdrawn into himself. His brother describes him as a hugely different person today to the person he has known all his life.

109. The claimant has always been very sporty, doing a variety of physical activities as well as coaching. This included coaching and refereeing for rugby. Since his dismissal, the claimant has felt unable to carry out any sport or exercise, because he prefers to stay indoors, away from people, and also finds it hard to focus and prepare for training sessions. At times, the claimant's back pain has also been a reason to avoid these activities.

110. The claimant's depression has worsened the effects of his dyslexia, so that he finds it even harder to keep focussed and he has become forgetful.

*111.* The claimant has mood swings, from anger to sadness. He gets frustrated and angry and goes over things in his mind.

112. As a result of his depression, the claimant eats unhealthy food or forgets to eat altogether. He has put on a substantial amount of weight. He has never previously been so big. Few of his clothes fit and he feels self-conscious.

113. The claimant has found it very hard to sleep since his dismissal because his mind is racing all the time. He has broken sleep, wakes early and not refreshed, and has weird dreams. He was prescribed sleeping tablets but his doctor would not allow him to use them for more than a week. The claimant has had a few periods of being tired all the time and of not sleeping well in the past (notably in 2015 and 2018), but none which have lasted as long as that triggered by his dismissal.

114. The claimant has developed a pronounced verbal and physical tic. This was very evident during the tribunal hearings, but it is not that pronounced all the time. When he is relaxed or thinking of happy things, he has no tic. It becomes worse during stress. He finds it very embarrassing.

115. The claimant was prescribed Sertraline in March 2022 at 50 mg which has since increased to 150 mg. This is for his depression / stress and anxiety. He was prescribed Vortioxetine 10 mg in August 2023 for the

same reason, but this was stopped after 2 weeks due to adverse side effects. He was prescribed one course of Zopiclone 3.75 mg to help him sleep in April 2022, but it was ineffective.

116. The claimant received mental health support from Vita Health Group in 2022 via the Bank Workers Charity. He was assessed for depression by a therapist on 14 April 2022 and 12 sessions of CBT were recommended. At the first session on 27 April 2022, the claimant noted that his mood had not changed much since his initial assessment. Apart from when his little daughter was with him, he struggled with motivation and leaving the house. He was napping during the day and struggling to sleep at night. He did not want to be around people. He did not have social energy. He had trouble concentrating, eg on a newspaper or television. He felt he was a failure or had let his family down.

117. The claimant was discharged following the CBT session on 29 September 2022. At that point, the claimant reported residual symptoms of severe depression and severe anxiety including twitching, poor concentration, disturbed sleep, lack of energy and motivation, and fidgeting. The therapist recommended further therapeutic support throughout the tribunal process.

118. On 8 February 2023, the claimant's GP referred him to the primary care mental health team. The claimant has had five CBT sessions every 2 – 3 weeks since then (there is a maximum of 6) and at the time of the remedy hearing was about to start group sessions on 'Emotional coping skills'.

119. At one point following his dismissal, the claimant had had suicidal thoughts, but he had immediately sought counselling and these feelings were resolved.

120. We find that the claimant's personal injury falls into the lower end of the Moderately Severe category of the Judicial College Guidelines. At present and since his dismissal, the claimant has had significant problems with his ability to cope with life and work. He is currently unable to work at all and he is unlikely to be able to seriously start looking for work for another year at least. He is also struggling to cope with life generally, although on this, we take account of the fact that he is still able to socialise to some extent with old friends and he is still able to carry out many of his duties as a Councillor. This aspect tends to bring us towards the bottom end of the category. Regarding prognosis, it is anticipated he will recover about 1 year after the tribunal proceedings end provided he has the correct treatment. This is neither a 'very poor' prognosis (which would be Severe category), but neither is this a case where there have been marked improvements by the time of the hearing with a good prognosis (which would be Moderate category). Indeed there have not been any improvements by the time of the hearing. There is high future vulnerability in that there is an estimated 50% chance of relapse. Balancing these factors, we consider that Moderately Severe is the correct category and

we award £23,000 for personal injury. In this, we have taken account of our award for injury to feelings in order to avoid duplication and reach an appropriate total.

*Other causes and apportionment*

121. The claimant has had certain other physical and psychological difficulties which have contributed to his mixed anxiety and depressive disorder.

122. The claimant's relationship with his daughter's mother was in difficulty from around 2020. Their relationship ended a few months after his dismissal. They had already been living in separate houses, although they were still in a relationship. The claimant suggests that his dismissal brought the breakdown of their relationship to a head. We are sure it did not help. Employment problems do tend to damage relationships in our experience. However, it seems to us that the relationship was already in considerable difficulty, so we would not directly attribute the end of the relationship to the respondent's discriminatory actions.

123. As regards the psychological impact on the claimant, the evidence is not clear. The claimant might well have been affected by the end of the relationship. It is also clear that his relationship with his 3 year old daughter was important to him. The GP notes in April 2023 refer to some shared parenting problems and the claimant needed to go to court at one point to get an extra access session with his daughter. We think it likely that this did cause some anxiety and even sleeplessness, but it is impossible to separate any such anxiety from the anxiety which the claimant was feeling as a result of his discriminatory dismissal.

124. The claimant has various physical problems with his bladder, prostate and spinal cord. The claimant also suffers from Bodily Distress Disorder, which pre-existed and is independent of his mixed anxiety and depressive disorder. This condition is where a person does have bodily symptoms which are distressing to him, but excessive attention is directed towards the symptoms, eg persistent preoccupation with their severity or negative consequences. The degree of attention is excessive in relation to the actual nature and severity of the condition.

125. We have not made any award in respect of these physical difficulties because that is a separate harm not caused by the respondent's discriminatory actions. However, in so far as any of those physical difficulties, or the claimant's anxiety over them, whether excessive or not, contributed to the claimant's mood swings, depression, anxiety or sleeplessness, there is no way to divide that from the claimant's mood swings, depression, anxiety and sleeplessness caused by the respondent's discrimination. Indeed it is clear from the evidence that the respondent's discrimination directly caused all those symptoms to a heavy degree.

126. The position with the claimant's back pain is more complicated. As we said in the section on Medical Expenses, we believe that the respondent's discrimination was an aggravating cause during this period. Moreover, in so far as the back pain contributed to the claimant's mixed anxiety and depressive disorder, we cannot separate that harm ie the harm of the mixed anxiety and depressive disorder.

127. So while there may have been a few other contributors to the claimant's mixed anxiety and depressive disorder, we cannot find a rational basis for apportioning the harm caused by these other factors and the harm caused by the discriminatory act. The various symptoms of the claimant's mixed anxiety and depressive disorder which we have set out above are all of a kind which is strongly consistent with the cause being the discriminatory dismissal, even if worries about other matters may have fed into some symptoms such as sleeplessness and anxiety.

128. Dr Horsford said approximately 28.49% of the claimant's mixed anxiety and depressive disorder was caused or exacerbated by the respondent's unlawful treatment. He arrived at this figure by applying the Holmes & Rahe Social Readjustment Rating Scale. The Scale has normal impact scores, eg breaking up with a partner normally scores 65; personal injury or illness has a 53 impact score; being dismissed from work has a 47 impact score. Adding these together, the claimant had a total of 165, meaning that the dismissal would have contributed 28.49% to the deterioration in the claimant's mental health.

129. The respondent suggests that the psychiatric injury (ie the mixed anxiety and depressive disorder) is therefore divisible, that only 28.49% was caused by the discrimination and we should only award 28.49% of our total valuation of the injury. However, we agree with the claimant that this is legally the wrong approach. The question is not whether one can rationally divide the causes of the mixed anxiety and depressive disorder. The question is whether we can rationally divide the harm.

130. As an aside, and although not the relevant question, we would observe that we did not find the division of causes very reliable. Dr Horsford relied completely on the Holmes & Rahe Scale. We understand it is a recognised Scale for certain purposes, but it depends on the facts being fed into it. It can only be broad brush. As a matter of common sense, we would think that some dismissals are far more stressful than others. A dismissal which deprives someone of a long-standing job which they love in circumstances where they are accused of gross misconduct and know they are going to find it hard to find a new job, must surely be far more stressful than a dismissal for less controversial reasons, from a job which the individual has not held for long, does not like much, and where they have good reason to be optimistic about alternative job prospects.

131. In conclusion, having listened to and read all the evidence and had it tested on cross-examination, we cannot identify a rational basis to

apportion the part of the mixed and anxiety disorder caused by the respondent's discrimination and any part caused or contributed to by other factors.

132. We also do not find this is a situation where the claimant would have succumbed to a stress-related disorder in any event because of the other factors. There is nothing in any GP or counselling notes suggesting this was likely to happen.

133. The respondent draws attention in its submissions to Dr Horsford's observations which may suggest exaggeration by the claimant of certain problems, and also that the claimant can be pessimistic and self-critical during stressful times. The respondent says that it does not seek to minimise the claimant's undoubtedly serious psychological symptoms. Its point is that the claimant's currently bleak view of his own abilities and health is affected by the remedy hearing, and once he is no longer focused on assessing the financial value of his tribunal award, it is highly likely that his health and outlook on life will significantly improve. We have taken account of these observations, both in terms of his evidence as to when the claimant is likely to gain future work and in terms of the effect of his mixed anxiety and depressive disorder. As regards future work prospects, we have taken account of objective factors as we explain. In terms of injury to feelings and personal injury, we have taken into account the evidence in the round including a likely improved outlook once the tribunal case is completed. We have particularly looked at what the claimant told his GP and counselling services when he saw them, and not purely at what he told the medical experts for the tribunal and his evidence to the tribunal.

Aggravated damages

134. The claimant seeks aggravated damages. He relies on the respondent's response to the tribunal decision, and in particular its 'Grounds for refusing reinstatement' document. He also relies on what it told the press.

135. We have taken into account the fact that the respondent wished to resist reinstatement and that this document was designed to show why, in its view, reinstatement would not work. Of course an employer is entitled to make an argument that reinstatement of an employee will not work out in practical terms. However, we feel that paragraphs 1 – 2 were high-handed and rubbed salt into the wound by distorting the tribunal's liability judgment, and using selective quotes to make the tribunal sound like it was saying something it did not say. It omits the tribunal's constant emphasis on context. It omits the tribunal's references to the claimant's repeated apologies, that he never repeated the word, and that he had demonstrated by his behaviour that he had learned the lesson. It omits the tribunal stating it was a well-intentioned relevant question. It omits or quotes selectively from paragraphs 6, 7, 143, 160, 161 and 227. It omits the first sentence of paragraph 163: the claimant was never resistant to

furthering the objective of race equality and had even suggested training and a lesser sanction. Paragraph 227 concludes: 'The claimant had demonstrated he did now understand the point, he understood the hurt, and he would not repeat the word in future. There was no rational basis to think that he would do so'.

136. Paragraph 1b of the respondent's document distorts what the tribunal said in its judgment. The tribunal did not make an implicit finding that the claimant's use of the N word amounted to an act of discrimination by the two quoted sentences. We were simply saying the claimant did not have any track record of racist remarks. Clearly we were talking about his track-record prior to the incident in question which the respondent was judging. Hence the use of our words 'before' and 'previously'. This strikes us as a deliberate misreading of what we chose to say.

137. The claimant was very upset by this document. He felt that the respondent was manipulating the facts even after he had received a favourable tribunal decision. For this additional injury to feelings, we award £3,000 aggravated damages.

138. We would add our concern that paragraph 4 in our view amounts to victimising the claimant for bringing a race discrimination claim. However, the claimant did not specifically draw attention to this aspect as a cause of his increased injury to feelings, so we make no award for that.

139. We do not award any aggravated damages for the statement which the respondent gave to the press. The claimant approached the press first. The claimant was entitled to do this, but there are predictable consequences. It is hard to control what the media says. Bloomberg and other press contacted the respondent. As the claimant acknowledges, the respondent was entitled to respond. The respondent told Bloomberg that it was considering appealing the ruling and 'We have a zero-tolerance policy on any racial discrimination or use of racist language'. Telling the press that they disagree with the decision and that they will appeal is a very typical response by parties who lose legal cases. We do not think that should routinely attract aggravated damages. We agree that the respondent's single sentence gives an impression that the respondent believes the claimant was guilty of racism, but it actually says nothing about what the tribunal decided, and it is broadly accurate of the respondent's position. We think this is a different situation from the respondent in the reinstatement document twisting the words of the tribunal's decision to create a misleading impression regarding the tribunal's findings. We therefore make no award for aggravated damages in respect of the respondent's short statement to the press.

<u>Unfair dismissal only: Loss of statutory rights and loss of long notice period</u>

140. We award £3,000 jointly for loss of statutory rights and loss of a long notice period. The claimant had built up the maximum statutory notice entitlement with the respondent which he will almost certainly not acquire

again given his age and employment prospects. He may have difficulty even gaining employment that is sufficiently stable to give him the 2 year unfair dismissal protection. There are a large amount of contingencies in terms of what may happen. We believe that £3000 reflects these two intangible losses.

Unfair dismissal only: basic award

141. The basic award for unfair dismissal was agreed as £13,600 and it has already been paid to the claimant as an interim payment.

ACAS uplift on compensatory award

142. In the liability judgment, the tribunal made findings of breach of the ACAS Code, ie the initial delay between the incident on 16 July 2021, the training agency's email that same day and the opening of the HR file on 26 July 2021. We had not been given an explanation for the original 10 days delay, other than the speculation that it would take a period of time to find a manager to carry out the investigation. In our decision, we said 'We understand why it may have taken 10 days to find an Investigating officer, and we accept it is possible that the most suitable person already had a booked holiday (it being in August), however, we feel that given the complaint was about something which had been said, and the importance of verbal recall, the claimant should have been notified at the outset that there had been a complaint which may lead to an investigation. On the facts, we find this was a breach of paragraph 4 of the ACAS code which says employers 'should raise and deal with issues promptly' and should not unreasonably delay meetings, decisions or confirmation of those decisions' and paragraph 5 which says 'It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case.'

143. The claimant argues that the tribunal should award an uplift of 10%. The respondent argues the tribunal should award an uplift of 1% because the large underlying award will mean that even 1% is a large figure, and any more would be disproportionate.

144. On the one hand the respondent took a long time overall to investigate a small incident, and the breach was part of the delay. It is important to notify employees at the outset when there is a serious complaint against them. The respondent is a large employer with substantial HR resources. On the other hand, the respondent did carry out a thorough investigation and the breach was fairly minor in the context of what else was done and its impact. We did not find the 10-day delay made the dismissal was unfair, because in practice, as far as we can tell, the delay did not crucially affect the claimant's memory. We have also considered proportionately because the total award to which the percentage will apply is very large. Weighing all these factors together, we think an appropriate uplift is 5%.

Interest on discrimination award

145. The parties have agreed how this should be calculated and say we can leave the calculation to them.

Grossing up

146. The parties have agreed how this should be calculated and say we can leave the calculation to them.

**Summary of our monetary awards**

Unfair dismissal

For unfair dismissal, we award

Basic award - £13,600. We understand this sum has already been paid to the claimant.
(Compensatory award) Loss of statutory rights and loss of long notice period - £3,000. Applying the ACAS uplift of 5% = **£3,150**

Note: We would normally include within the compensatory award, awards for loss of earnings, pension, other benefits and expenses. However, these items are awarded for discrimination and we do not make a duplicated award.

Discrimination

For discrimination, we award:

Past loss of earnings - £82,120.32
Loss of Lloyds shares - £500
Past loss of beneficial staff mortgage - £1,200
Prescription fees - £237.82
Chiropractor fees (50%) - £558

Sub-total = £84,616.14
With 5% ACAS uplift = **£88,846.95**
+ Interest to be calculated by the parties

Injury to feelings - £15,000
Aggravated damages - £3,000
Personal injury - £23,000

Sub-total = £41,000
With 5% ACAS uplift = **£43,050**
+ Interest to be calculated by the parties

Past loss of pension

Sub-total = £13,937.17
With 5% ACAS uplift = **£14,634.03**

Future loss of earnings (after Ogden adjustment) - £231,827.85

Future loss of pension (after Ogden adjustment) - £51,392.98
Future loss of death in service benefit – £4,712.50
Future loss of Private Health Insurance - £7,068.75
Future prescription fees - £110.17

Sub-total = £295,112.25
With 5% ACAS uplift = **£309,867.86**

The entire awards must be grossed-up as appropriate. The parties have agreed the method and have offered to make the calculation (i) for interest and (ii) for grossing up. They must do this within 14 days of the date when this Judgment and Reasons are sent out.

Employment Judge Lewis

Dated: 19/12/2023

Judgment and Reasons sent to the parties on:

19/12/2023

…….....
For the Tribunal Office

**ANNEX**

## FUTURE LOSS OF EARNINGS

| Age | St | End | days | years | payrise | Net pw | Net p/day | Total net per period | Pay adjustment for 6.66 |
|---|---|---|---|---|---|---|---|---|---|
| 59 | 06/12/2023 | 31/03/2024 | 117 | 0.320 | net pw agreed | £890.44 | £127.21 | £14,883.07 | £9,912.12 |
| 60 | 01/04/2024 | 31/03/2025 | 365 | 1.000 | net pw agreed | £926.05 | £132.29 | £48,286.89 | £32,159.07 |
| 61 | 01/04/2025 | 31/03/2026 | 365 | 1.000 | net pw agreed | £963.10 | £137.59 | £50,218.79 | £33,445.71 |
| 62 | 01/04/2026 | 31/03/2027 | 365 | 1.000 | 2% | £982.36 | £140.34 | £51,223.16 | £34,114.63 |
| 63 | 01/04/2027 | 31/03/2028 | 366 | 1.000 | 2% | £1,002.01 | £143.14 | £52,390.77 | £34,892.25 |
| 64 | 01/04/2028 | 31/03/2029 | 365 | 1.000 | 2% | £1,022.05 | £146.01 | £53,292.58 | £35,492.86 |
| 65 | 01/04/2029 | 31/03/2030 | 365 | 1.000 | 2% | £1,042.49 | £148.93 | £54,358.43 | £36,202.71 |
| 66 | 01/04/2030 | 31/03/2031 | 365 | 1.000 | 2% | £1,063.34 | £151.91 | £55,445.60 | £36,926.77 |
| 66 | 01/04/2031 | 10/10/2031 | 193 | 0.529 | 2% | £1,084.61 | £154.94 | £29,904.17 | £19,916.17 |
| | | **Total days/years** | **2866** | **7.85** | | | **Total pay** | **£410,003.45** | **£273,062.29** |

### EARNINGS WITH LLOYDS

**Adjustment for multiplier**

| | |
|---|---|
| Total loss | £410,003.45 |
| Multiplier | 7.83 |
| Contingency | 0.85 |
| Final multiplier | 6.66 |
| **Adjusted total** | **£273,062.29** |

### MITIGATION

| Age | St | End | days | years | payrise | Net pw | Net p/day | Total net per period | Pay adjustment for 3.13 |
|---|---|---|---|---|---|---|---|---|---|
| 59 | 06/12/2023 | 31/03/2024 | 117 | 0.320 | 0% | £450.00 | na | na | na |
| 60 | 01/04/2024 | 31/03/2025 | 365 | 1.000 | 2% | £459.00 | na | na | na |
| 61 | 01/04/2025 | 31/03/2026 | 365 | 1.000 | 2% | £468.18 | na | na | na |
| 62 | 01/04/2026 | 31/03/2027 | 365 | 1.000 | 2% | £477.54 | £68.22 | £12,450.24 | £3,896.93 |
| 63 | 01/04/2027 | 31/03/2028 | 366 | 1.000 | 2% | £487.09 | £69.58 | £25,468.08 | £7,971.51 |
| 64 | 01/04/2028 | 31/03/2029 | 365 | 1.000 | 2% | £496.84 | £70.98 | £25,906.47 | £8,108.72 |
| 65 | 01/04/2029 | 31/03/2030 | 365 | 1.000 | 2% | £506.77 | £72.40 | £26,424.60 | £8,270.90 |
| 66 | 01/04/2030 | 31/03/2031 | 365 | 1.000 | 2% | £516.91 | £73.84 | £26,953.09 | £8,436.32 |
| 66 | 01/04/2031 | 10/10/2031 | 193 | 0.529 | 2% | £527.25 | £75.32 | £14,536.95 | £4,550.06 |
| | | **Total days/years** | **2866** | **7.85** | | | **Total pay** | **£131,739.42** | **£41,234.44** |

**Adjustment for multiplier**

| | |
|---|---|
| Ttotal loss | £131,739.42 |
| Multiplier | 7.83 |
| Contingency | 0.4 |
| Final multiplier | 3.13 |
| **Adjusted total** | **£41,234.44** |

**TOTAL FUTURE LOSS OF EARNINGS**

| | |
|---|---|
| **Lloyds adjusted** | **£273,062.29** |
| **mitigation adjusted** | **£41,234.44** |
| **final** | **£231,827.85** |

## FUTURE PENISION LOSS FROM LLOYDS

| Age | St | End | days | Years | payrises | Gross pa | pension at 13% | Pay adjustment for 6.66 |
|---|---|---|---|---|---|---|---|---|
| 59 | 06/12/2023 | 31/03/2024 | 117 | 0.320 | Gross pa agreed | 67,245.38 | 2,797.41 | 1,863.07 |
| 60 | 01/04/2024 | 31/03/2025 | 365 | 1 | Gross pa agreed | 69,935.20 | 9,091.58 | 6,054.99 |
| 61 | 01/04/2025 | 31/03/2026 | 365 | 1 | Gross pa agreed | 72,732.61 | 9,455.24 | 6,297.19 |
| 62 | 01/04/2026 | 31/03/2027 | 365 | 1 | 2% | 74,187.26 | 9,644.34 | 6,423.13 |
| 63 | 01/04/2027 | 31/03/2028 | 366 | 1 | 2% | 75,671.01 | 9,837.23 | 6,551.60 |
| 64 | 01/04/2028 | 31/03/2029 | 365 | 1 | 2% | 77,184.43 | 10,033.98 | 6,682.63 |
| 65 | 01/04/2029 | 31/03/2030 | 365 | 1 | 2% | 78,728.12 | 10,234.66 | 6,816.28 |
| 66 | 01/04/2030 | 31/03/2031 | 365 | 1 | 2% | 80,302.68 | 10,439.35 | 6,952.61 |
| 66 | 01/04/2031 | 10/10/2031 | 193 | 0.529 | 2% | 81,908.73 | 5,632.86 | 3,751.49 |
| | | **Total Days** | **2866** | **7.85** | | Total | **£77,166.64** | **£51,392.98** |

**Adjustment for multiplier**

| | |
|---|---|
| Total loss | £77,166.64 |
| Multiplier | 7.83 |
| Contingency | 0.85 |
| Final mulitpier | 6.66 |
| **Adjusted total** | **£51,392.98** |