# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Ward

**Respondent:** Department for Work and Pensions

**HELD AT:** Manchester ; by CVP **ON:** 18 and 19 September 2023 & 25 September 2023 (In Chambers)

**BEFORE:** Employment Judge Holmes
Ms B Hillon

**REPRESENTATION:**

**Claimant:** Mrs Ward, Wife
**Respondent:** Mr E Beever of Counsel

# RESERVED JUDGMENT ON REMEDY

It is the unanimous judgment of the Tribunal (comprising, with the consent of the parties , of only two of the Panel) that:

1.The claimant is entitled to the following remedy:

Compensation for disability discrimination:

| | | |
|---|---|---|
| Injury to feelings: | £12500.00 | |
| Interest: | £8857.53 | |
| Total: | | £21,357.53 |
| Loss of earnings: | £28106.00 | |
| Interest: | £9961.07 | |
| Total: | | £38,067.07 |
| Grand Total: | | £59,424.60 |
| Less paid: | | £5000.00 |

Total due that the respondent is ordered to pay the claimant : **£54,424.60**

2. For the avoidance of doubt, all other claims made by the claimant stand dismissed, and this reserved judgment concludes these proceedings.

# REASONS

1. The claimant was again represented by his wife, Mrs Ward, and the respondent by Mr Beever of counsel. By a claim form presented on 21 March 2015, the claimant brought claims of disability discrimination against the respondent, his former employer. The claims were heard in September 2017 , February 2018 and March 2018 . By a reserved judgment sent to the parties on 2 November 2018, the claimant succeeded in three of his claims of failure to make reasonable adjustments.

2. The Tribunal gave directions for the determination of remedy, and there ensued further preliminary hearings, dealing with the claimant's remaining claims, and the determination of remedy. On 21 April 2021 the Tribunal made further orders for the determination of remedy, with a view to listing a remedy hearing in the near future.

3. That did not prove possible, partly because of issues relating to medical evidence, and partly because of the effects of the COVID – 19 pandemic.

4. In due course, however, the Tribunal was able to list the remedy hearing for 18 and 19 September 2023. That was listed, of course, before the full panel that had conducted the liability hearing in 2017 and 2018. Tragically, and suddenly, however, in October 2022 Graham Barker, the employer side non – legal member, died. The parties were informed of this, and their agreement was sought to the Tribunal continuing as a panel of two, with the Employment Judge having the casting vote in the event of a tied decision. The parties helpfully and pragmatically agreed to this proposal.

5. Consequently the remedy hearing was held before the panel of two on 18 and 19 September 2023. There was a remedy hearing bundle (to which any pages numbers in this judgment will refer) , and a witness statement bundle, before the Tribunal. In the latter were two witness statements for remedy from the claimant , one dated 1 June 2021, and the other 1 March 2022, and one from his wife, dated 1 March 2022. For the respondent there was a witness statement from Mark Thomas, and two from Sarah Smith. The claimant gave oral evidence, but his wife did not, and Sarah Smith gave oral evidence, as did Mark Thomas . The Tribunal thereafter convened in Chambers to deliberate and this reserved judgment is now promulgated. The Employment Judge apologises for the further delay, occasioned largely by his continued involvement in a long running case , into which this hearing was interposed, and other pressure of judicial business. The considerable patience of the parties is appreciated, as is the considerable tenacity , and industry , of Mrs Ward , who has represented her husband throughout this difficult case, and is now (perhaps as a result of it) on her way to obtaining legal qualifications, in which the Tribunal wishes her every good fortune. She has truly been , to use her own analogy, a "David" to the respondent's "Goliath".

6. The issues to be determined on remedy were identified by the Tribunal in its orders sent to the parties on 2 November 2021 at Annexe 2 (pages 136 to 137 of the bundle), as follows:

## DRAFT LIST OF ISSUES ON REMEDY

**1.Loss of Earnings - quantification.**

a)What were the claimant's net earnings in November 2014?

b)What, if any , loss of earnings did he suffer in the period from 11 November 2014 to the date of the termination of his employment on 28 February 2016?

b)Was that loss of earnings mitigated in any way by the receipt of any benefits which the claimant would not otherwise have received, and if so, in what amounts, and should such sums be deducted from any award for loss of earnings for this period?

c)What earnings would the claimant have been likely to receive had his employment continued beyond February 2016? What ,if any, increases or other sums affecting his remuneration, would he have been likely to receive, and when?

d)What sums has the claimant received by way of IHR, or other payments or benefits received since the termination of his employment, and what , if any, credit must the claimant give against any loss of earnings award that the Tribunal may make in respect of the period after his employment ended?

e)For how long, had the respondent complied with its duty to make reasonable adjustments, is it likely that the claimant would have remained employed by the respondent ?

**2.Loss of Earnings – pension loss.**

a) Irrespective of how receipt of pension upon termination should be treated as reducing the claimant's loss of earnings claims, has he suffered , in the period November 2014 to February 2016 any loss of future pension , and if so, how much , and how is the same to be calculated?

b)In relation to the period after the claimant's employment terminated, if the Tribunal is minded to award loss of earnings for any period after that date, what loss has the claimant suffered by reason of taking IHR, in terms of the effect upon what would have been his future pension entitlements, and how, if at all, should the Tribunal compensate him for such loss ?

**3.All losses – causation.**

a)Did the found acts of discrimination cause:

i)The claimant's absence from work from November 2014 to February 2016?

ii)The termination of his employment by his decision to seek and accept IHR with effect from 28 February 2016?

iii)To the extent that either of the above were caused by the claimant's physical or mental health conditions, which of his conditions caused either of the above, and, in

turn were either of those conditions caused by, or exacerbated by, any of the found acts of discrimination?

**4.Injury to Feelings.**

a)What injury to the claimant's feelings did the found acts of discrimination cause ?

b)What is the appropriate level of award for such injury to feelings?

**5.Personal injury.**

*[It is presently unclear whether the claimant is seeking an award for personal injury, and if so which condition he says was caused or exacerbated by which act of found discrimination]*

**6.Aggravated damages.**

a)What are the factors , in the period in respect of which the Tribunal has found discrimination (and not, therefore, before it) which the claimant contends entitle him to seek aggravated damages ?

b)Does the Tribunal find that those circumstances do entitle it to make an award of aggravated damages ?

c)If so, by what proportion should the award that the Tribunal proposes to make should the Tribunal increase any award by way of aggravation?

**6.Uplift for failure to follow a relevant ACAS Code of Practice**

a)What relevant ACAS Code of Practice did the respondent fail to follow, and in what respects?

b)If so, by what proportion should the award that the Tribunal proposes to make should the Tribunal increase any award ?

**7.Interest.**

a)Over what period should the Tribunal award interest in respect of

i)Financial losses;

ii)Non – financial losses?

b)What rate or rates of interest should the Tribunal apply to the awards?

Those were the issues upon which the parties prepared their respective cases for this remedy hearing. To them should be added the issue as to whether any grossing up will be required. The claimant had prepared an updated Schedule of Loss , dated 23 November 2021 (pages 139 to 141 of the bundle) , and the respondent had prepared a counter – schedule dated 23 June 2023 (pages 147 to 151 of the bundle).

7. Having heard and read the evidence , and considered the submissions of both parties, the Tribunal finds the following further facts relevant to the issues on remedy, which should be read in conjunction with the facts already found in the Tribunal's reserved judgement on liability sent to the parties on 2 November 2018:

7.1 The claimant suffered an infection at birth, which resulted in the need for an operation in which his hip was fused. This has resulted, over time, in his hip being at an angle which causes him difficulty with his posture, resulting in severe back pain, and limitation of movement. The condition has worsened over time, and has been conceded by the respondent to amount to a disability at all material times.

7.2 Further, the claimant has for some time (from precisely when is unclear, but the respondent concedes disability in this regard too at the material times with which this judgment is concerned) suffered from depression.

7.3 The facts relating to the events after the respondent had failed by 11 November 2014 to provide the claimant with a suitable chair are set out in paras. 5.209 to 5.301 of its liability judgment.

7.4 In short, the claimant went off work sick on 11 November 2014, and never returned, taking Ill Health Retirement on 28 February 2016.

7.5 During the ensuing period there was considerable activity, as set out in the paragraphs referred to, between the parties, and the claimed applied for IHR in 2015, but was initially unsuccessful. The reason for that was that the respondent's IHR assessment was that his condition was not such that he had shown that he would not be able to given adequate service up until his retirement date. There appeared to be the prospect of some further treatment , which might have enabled him to return to work, so, on what basis , the claimant did not qualify for IHR.

7.6 He remained off work sick, and the OH reports between November 2014 and February 2016, and fit notes in the liability bundle show that there were two elements to the claimant's continued absence, the physical, in terms of his continuing back pain, and the mental, in terms of his anxiety and depression, with a loss of trust in the respondent's management.

7.7 During the period that the claimant was off work he did not have the use of any particular chair or other equipment at home, and continued to suffer from painful symptoms when not working and being off sick at home. Since his retirement the claimant has not obtained alternative employment. He has not purchased any specific chair to assist him in sitting when at home .

7.8 As a result of his sickness absence the claimant was initially paid full sick pay, but this went down to half pay, and then no pay. The claimant's pay record during this period is set out in Table 3 attached to the witness statement of Mark Thomas (page 25 of the witness bundle for this hearing).

7.9 The claimant says this about the effect upon him, in terms of injury to feelings, of the discrimination that he suffered, in his first remedy witness statement:

*11. I am now, and have been for many years, on the poverty line, claiming out of work benefits. Applying for benefits was a complete nightmare, being told by Job Centre staff i would "have to beat a wheelchair and an oxygen tank" to get help.Through no fault of my own I have been subjected to such abusive treatment by the DWP and their agencies. I had to battle through appeals in order to get what I was entitled to but the misery didn't stop there as the DWP stopped my benefits on several occasions plunging me into hardship and despair; most of the misery I experienced was caused by DWP agents not doing the job properly at their end.*

*12. Drafting appeals and attending tribunals has put so much strain on my marriage and everyday life I don't honestly feel I can sum it up with words, I am broken and a shadow of my former self.*

*13. DWP left me to struggle with no money coming in; I was forced to use up all my savings to in order to pay bills, eat and to basically get by. Those savings were to protect me in my old age and ensure I could provide for myself any support be it physical or mental. I am now on the poverty line and cannot obtain any rehabilitation"*

And, later:

*26. I am still suffering mentally and have been diagnosed with PTSD. All DWP had to do was provide me with a suitable chair and I would still have a career. DWP employ numerous staff with disabilities varying in severity and they have the resources at their disposal to provide effective reasonable adjustments to accommodate disabilities; managers simply did not pay any attention to what I was saying, nor did they properly adhere to the law. Section 44 of the Employment Rights Act confirms it is my opinion that matters, managers were not permitted to disregard what I told them and force me to work when I had expressed concerns about safety and comfort, but that it exactly what they did. Knowing they could have easily put reasonable adjustments in place to help me which meant I could have kept my job is a particularly devasting realisation.*

*I'm honestly so beaten down by this entire case. The discrimination I suffered at worked has turned the last 7 years of my life into a nightmare and had such a devastatingly negative impact upon my own, and my wife's health. Not only has my life been turned upside down I have lost time that I can never get back. I don't know how long it will take me to recover from the effects of this discrimination."*

7.10 In his second statement, the claimant refers (pages 9 and 10 of the witness bundle) to difficulties that he has encountered in obtaining or retaining his ESA benefits. This necessitated two appeals, and he found the experience "hell". He goes on to refer to the effect of the proceedings upon him, and the painful examination to which he was subjected for the purposes of the medial report. He goes on to say this:

*"I have had little to zero chance of recovering from all that has happened. I have not been able to source any rehabilitation due to my financial situation. I asked the Respondent for an advancement regarding remedy payment, but this was flatly refused. I can't even afford to replace my shoe raisers, as even this has to come*

*out of my pocket, not to mention a new mattress and couch that I so desperately need in order to be more comfortable at home."*

***The medical evidence.***

7.11 There was before the Tribunal the following medical evidence:

Reports of Mr Wynn Evans:

14 September 2020 – pages 177 to 192 of the bundle

10 April 2022 (responses to questions) – pages 193 to 196 of the bundle

11 May 2022 (supplementary report) – pages 197 to 200 of the bundle

Report of Dr Tajinder Rai 22 August 2022 – pages 201 to 205 of the bundle

7.12 Additionally there are OH reports, and other medical evidence, which were before the Tribunal in the liability hearing.

7.13 Following the presentation of Mr Wynn Jones' first report, the claimant (through Mrs Ward) raised a number of issues with the report in a letter to Mr Wynn Jones dated 7 September 2020 (pages 173 to 176 of the bundle) . As a result he prepared the response letter to the respondent's solicitors dated 10 April 2022, and a second report dated 11 May 2022 at pages 197 to 200 of the bundle.

7.14 In terms of the claimant's lower back condition, Mr Wynn Jones's evidence in summary is this , under section 12 "Opinion" in his first report:

*"1. Mr Ward suffered septic arthritis of his right hip as a baby.*

*2. As a result of this Mr Ward underwent multiple procedures including arthrodesis of his right hip and femoral lengthening procedures to attempt to equalise his leg lengths.*

*3. As a result of his arthrodesis over time he has developed a degree of secondary lumbar degenerative disease with resultant chronic low back pain. This is common after a hip arthrodesis. A hip arthrodesis means that the hip is made completely stiff. This is effective in treating a painful hip in that it joins the femur to the pelvis so that painful movements from a severely damaged joint no longer occur. Unfortunately this results in increased secondary movements in the joints above and below the hip, which are the lumbar spine and knee respectively. These joints are more susceptible to degenerative arthritis because of these abnormal movements. As this degenerative process advances, the surrounding joints become stiffer and less able to compensate for immobility of the hip.*

*4. Mr Ward has a history of chronic low back pain documented in the medical record provided since 2009. There have been several acute exacerbations of chronic low back pain. His back pain has been documented to occur during sitting, standing and walking. He has reported that it is only alleviated by lying down. He has continued to have chronic low back pain since finishing work and unfortunately this remains severe.*

*5. Mr Ward has the typical pattern of progressively worsening chronic low back pain following a hip arthrodesis. This typically becomes a significant clinical problem 20-30 years after a hip arthrodesis. This is sometimes managed by 'taking down' of the hip arthrodesis and converting it to a total hip replacement when this is feasible and possible. The purpose of this is to facilitate increased movement of the hip to reduce the need for compensatory movements in the surrounding joints which in themselves have become stiff and painful.*

*6. With regards to the instruction, I can confirm that I have sufficient expertise and understanding of the seating (ergonomic) requirements of an individual with a 40-degree hip fusion. My clinical expertise in relation to this instruction is in the assessment and treatment of patients with stiff or fused hips, treatment options and the likely prognosis and symptom progression. This expertise enables me to give my opinion of whether specialist seats would provide symptomatic relief for an individual with low back pain caused by a stiff or fused hip. I am not a specialist in office or seating ergonomics or in the fitting of specialist chairs.*

*7. I confirm that I am familiar with split seats which can be used to accommodate individuals with stiff or fused hips.*

*8. The instruction questions whether split seats are better for those with a hip fusion in comparison to a standard office chair. Split seats are available and can be provided for individuals with a stiff hip. There is no evidence in the medical literature that split seats enhance ability to work in individuals with a hip arthrodesis. The hip arthrodesis is now an uncommon procedure and there are very few people who have a fused hip. It is my opinion that it is possible that some individuals with a very stiff hip or hip arthrodesis may experience a small degree of improvement in sitting tolerance with a split seat. It is my opinion that split seats are of most benefit to people who have back pain that is a problem specifically during sitting for prolonged periods, but who do not suffer back pain when standing or walking.*

*9. With regards to the question 'Was the Claimant's absence from work from November 2014 onwards as a result of his disability {the progressive nature of his arthrodesis), or as a result of the Respondent's failure to make reasonable adjustments?'*

*Mr Ward's absence from work related to an acute exacerbation of chronic low back pain and combination with depression. It is my opinion that he would not have been able to return to work until this acute exacerbation of his chronic back pain had abated. His back pain would have had to reduce to a tolerable level whist not working before he could have considered returning to work. Provision of a split chair or other reasonable adjustments would only have been beneficial if his pain had subsided to the degree that he was able to consider returning to work. A split chair or other adjustments would not have helped to accelerate his recovery from his acute exacerbation of chronic low back pain.*

*10. "What would you consider a suitable chair for the Claimant to have been?" There is no evidence in the medical literature to support that one form of seating has significant advantage over another with regards to a person's ability to work following an arthrodesis of the hip with secondary lumbar degenerative changes. It is my opinion that specialist seating in the form of a split seat chair may have been of some benefit*

*to Mr Ward if his pain had settled to the degree he was able to return to work. The provision of a split chair may have provided a small degree of improved sitting endurance for Mr Ward compared to an alternative specialist chair. I think it is highly likely that Mr Ward would still have suffered from some pain whilst sitting, and that he would also have suffered pain on standing and walking.*

*11. "What was the likely prognosis for the duration of the Claimant's long term employment had a chair been provided to him? Would the Claimant's employment have ended anyway due to the progressive nature of his condition?"*

*It is my opinion that a suitable chair in isolation would not, on the balance of probability, have increased Mr Ward's long term employment capacity. It is my opinion that he would have unfortunately continued to suffer from severe chronic low back pain and would have had frequent acute exacerbations of this pain. He has a very vulnerable lumbar spine and activities of daily living continue to cause him pain. He continues to get pain on sitting, walking and standing now.*

*Mr Ward's employment capacity is a multifactorial issue and many of the factors affecting Mr Ward's ability to work in the longer term are outside of my expertise as an Orthopaedic Surgeon. Chronic low back pain secondary to degenerative changes resulting from a hip arthrodesis can cause significant incapacitating disability with regards to work, leisure, social and sporting activity. These degenerative changes unfortunately progress with time, and I would expect that the intensity of Mr Ward's chronic low back pain and frequency of acute exacerbations would increase with time.*

*In summary, Mr Ward unfortunately has followed a typical clinical pattern of chronic mechanical low back pain after hip arthrodesis at a young age. Mr Ward has had, and will unfortunately continue to get further progression of his lumbar degenerative disease and chronic mechanical low back pain. A specialist chair such as split leg chair would not have accelerated his recovery from an acute exacerbation of low back pain. A specialist chair may have improved his sitting endurance and ability to work at a desk, but only to a small degree. It is my opinion that this would have been marginal and of limited duration. It is my opinion that he would have continued to have severe episodes of acute on chronic low back pain and that a specialist chair alone would not have significantly increased his ability to continue his employment."*

7.15 Whilst Mr Wyn Jones does include in his supplementary report matters raised by the claimant , he did not change para. 11 set out above, and its terms are the same in both reports.

7.16 In his responses to the questions posed, dated 10 April 2022 (pages 197 to 200 of the bundle) Mr Wynn Jones says this, the questions being in bold:

***6. What was the likely prognosis for the duration of the Claimant's long term employment had a suitable chair being provided to him? Would the Claimant's employment have ended anyway due to the progressive nature of his condition?***

*It is my opinion that a suitable chair would not have prolonged Mr Ward's employment. The medical records suggest that despite being off work, Mr Ward was continuing to suffer from pain in the back. There is documentation in the medical records as far*

*back as 2009 that he was having pain from in his back. There is further documentation from 2013 onwards stating that Mr Ward was suffering from pain in his back. The documentation in the medical records suggests that Mr Ward's pain was severe despite being off work. It is therefore my opinion, given Mr Ward was suffering from back pain despite not being required to use an office chair, that a specialist chair would have been unlikely to alleviate his back pain sufficiently for him to return to work.*

***7. If the answer to question 6 is "yes", when would the Claimant's employment have been likely to end?***

*I am not of the opinion that Mr Ward's employment could have been extended beyond that which he was employed had a "suitable chair" been provided.*

***8. To what extent would allowing the Claimant to work from home, with a laptop, enable him to a) avoid sickness absence and b) prolong his employment?***

*It is my opinion that Mr Ward's back pain was severe to the extent that it is unlikely that he would have been able to comfortably work from home for any significant period of time. My reasoning for saying this is that there is documentation in the medical records stating that Mr Ward had pain which was severe enough that meant he was struggling to do everyday activities. It is stated that he was finding that he could not sit or stand for any length of time. The pain at this time was severe enough that consideration was given to taking down his arthrodesis to attempt to take some of the pressure off his back. From this time onwards, there are several notes in the medical records confirming that Mr Ward continued to have severe back pain. In 2017, it was documented that his pain was "worsened by any activity, sitting, standing, walking or any manual activity, even slight".*

*Given that the medical records suggest that Mr Ward had continued to get severe pain on even short durations of sitting and standing, it is my opinion that working from home with a laptop would have been difficult and that he would only have been able to manage to remain in one position for short periods."*

7.17 The claimant also had posed these questions, with these answers from Mr Wynn Jones (page 197 of the bundle):

***"1. Do you have any expertise with respect of overuse of muscles of the back in patients with hip fusions?***

*I am a Consultant Orthopaedic Surgeon with a sub-specialist interest in hip conditions. As such I see many patients with very stiff hips, major hip problems or fused hips who also have back pain. Back pain and degenerative spinal pathology as a result of a fused hip is common. The term 'over-use of muscles of the back' is not a recognized medical condition and does not accurately reflect the pathophysiology of back pain that occurs as a result of a stiff hip.*

***2. Is it your professional medical opinion that spasms were as a result of the Claimant's muscles becoming fatigued from over-use, and inability to rest, resulting from a lack of back support provided by the chair?***

*It is my opinion that Mr Ward's back pain is as a result of many years of abnormal movements in the spine, caused by a fused hip. This is highly likely to have resulted in chronic degenerative changes within Mr Ward's back. A specialist chair that accommodated for Mr Ward's fused hip may have provided some increased comfort on sitting at an earlier stage of his condition when his back pain was more mild and his symptoms were less severe, and if only caused by sitting at work, and relieved when off work."*

7.18 In respect of the report from Dr Rai, the main features of her report are as follows. She first saw the claimant in July 2022, when he presented with anxiety stress and low mood. She recorded his history of mental health difficulties going back to 2002. She carried out an assessment for PTSD, the claimant telling her that he had been diagnosed with PTSD after GP consultation. There is no evidence of such a diagnosis in any document in the bundle.

7.19 Her report contains the following entries :

***"Criterion A: Stressor***

*Simon reported a prior history of low mood and anxiety since 2002. Simon explained that he had his first court case related to the work-related stress in 2015 and he has experienced a very stressful process over the past 7 years. Simon stated that the whole process and how he experienced being treated at work and during this time was incredibly upsetting for him. Furthermore, Simon explained that he experienced that through this process the validity of his hip fusion was questioned and this itself was very demoralising for him.*

***Criterion F: Duration***

*Simon stated that he has experienced these symptoms since 2015.*

***Link to GP diagnosis and differential diagnosis:***

*Simon presented with experiences of severe anxiety. After clinical assessment it is highly probable that he has suffered with PTSD experiences following the trauma that he has experienced over many years. There appears to be no evidence for other physical causes explaining these psychological experiences.*

***Clinical Findings and Indications of PTSD:***

*Clinical assessment showed some evidence of experiences that would meet the criteria for PTSD (as outlined above).*

***Prognostic Assessment:***

*Simon's presentation was discussed with him, and he recognises the extent of these difficulties. A further psychological assessment is recommended due to the presentation of PTSD symptoms, as presented above. Due to this presentation, it may be beneficial for him to commence a treatment of E.M.D.R. (Eye Movement, Desensitisation Reprocessing) therapy (up to , 20-sessions). As there is currently low risk, this may be preferable within a primary care setting initially. However, if the Mind*

*Matters team assess him to require a higher intensity intervention, then his care may be stepped up to a CMHT.*

*In order to help Simon understand and manage his experiences, it is recommended that he has access to trauma-based therapy and E.M.D.R. could be the preferred intervention, considering that he struggles to talk about his experiences in detail. Overall, this may help him achieve some stability of his symptoms. With consistent sessions it is possible that Simon may experience an improvement in his symptoms and develop skills to manage the shift in his emotions that may be attributed to his past experiences.*

***Summary & Formulation:***

*Overall, Simon was referred to me for his anxiety experiences. He presented with anxiety and explained a history of work-related trauma. Due to the longstanding experience of this trauma, he at times feels low in mood. I have completed a psychology assessment to understand his needs further and he presented with many physiological, psychological, emotional and behaviour experiences related to trauma-based anxiety. Therefore, he may benefit from a trauma psychology intervention such as E.M.D.R. that helps him to process these experiences and develop coping mechanisms and help him gain some quality of life."*

***The use of a laptop as a reasonable adjustment.***

7.20 In relation to the use of a laptop on a long term basis as a means of enabling the claimant to continue in employment, working from home, the evidence of Sarah Smith was that at the time of the matters raised in the claims, home working was exceptionally rare. It was however the case that Debt Manager system administrators were provided with laptops to offer out of hours support. She accepted that the respondent should have explored the option of providing a laptop to the claimant and it may have been feasible as a reasonable adjustment.

7.21 She went on say that although the respondent has now had significant experience on shifting to remote work during and following the Covid-19 pandemic, this shift was unprecedented and certainly not something that was commonplace approximately five and a half years earlier. She took the view at this time that the claimant needed to be always visible and accessible to his team for supervision given his position as Executive Officer ("EO") within the business. To ensure he was fulfilling the entirety of his role, the claimant needed to ensure face-to-face engagement with direct reports daily. Whilst in a post-Covid world, staff can screenshare remotely using Microsoft Teams, even if a laptop had been available to offer the claimant at the time, the claimant would not have had use of such software to fulfil this requirement.

7.22 She also considered at that time, that there may have been security risks such that it would not have been considered a reasonable adjustment to permit the claimant to work from home. At that time, where laptops were provided to employees as necessitated by their role, these were to be used when visiting multiple locations of the respondent to undertake on-site audits, for example. To her knowledge, these employees did not complete their work at their home. Although the pandemic necessitated a rollout of a high security remote working platform, it would not have been reasonable or financially viable to roll this out only for the claimant and to allow

the claimant to work remotely (whether from home or otherwise) without the sufficient security platforms in place would place the business function at risk. This was not a risk that she considered would have been reasonable in 2014. From a security perspective, the claimant's explanation in October 2014 that he was only proposing to use the laptop to complete additional work at home after being in the office did not make a substantial difference. Any remote work for the respondent (however trivial or time consuming) would still need to pass the relevant security requirements. The fact that the claimant wanted to use the laptop at home rather than to work from other locations was a greater risk. She considered that the technology has now developed significantly since 2014 and what may be possible today might not have been possible back then.

7.23 The claimant's lost earnings in the period between 11 November 2014 and 28 February 2016 are agreed at £28,106.

7.24 On or about 13 June 2023 the respondent made a voluntary interim payment to the claimant of £5000.00

8. Those, then are the relevant facts as found by the Tribunal. Nothing in the determination of the issues on remedy turns upon the honesty of any party or witness. The Tribunal's main task has been, on the balance of probabilities, to assess what the claimant's continued employment prospects would have been had the reasonable adjustments identified in our liability judgment actually been made.

***The Submissions.***

9. Mr Beever prepared written submissions to which he spoke. It is not proposed to rehearse them in detail here, they will be considered as each issue is addressed.

10. Mrs Ward, whilst now studying law, has not yet become qualified, and is to be treated still as a lay representative. She had prepared a document dated 10 September 2023, entitled "Claimants Remedy position statement", and , dated 20 September 2023 a further document entitled "Claimants Final Remedy Submissions", upon which she made her final oral submissions at the conclusion of the hearing.

***Discussion and findings.***

***The principles to be applied in assessing compensation for unlawful discrimination.***

11. By way of overview, the following principles can be said to underpin the approach to compensation for all forms of unlawful discrimination:

The measure of damages is the same as it would be before a civil court, and in particular the Tribunal can award a sum for injury to feelings ;

There is no upper limit on the amount of compensation that can be awarded;

The Tribunal is not obliged to make an order for compensation if it does not consider it just and equitable to do so; but, having decided to make such an order, it must adopt the usual measure of damages: there is no jurisdiction to award only such as the

tribunal considers just and equitable in the circumstances ***(Hurley v Mustoe (No 2) [1983] ICR 422***).

In effect, the complainant is to be put into the financial position they would have been but for the unlawful conduct of the employer ***(Ministry of Defence v Cannock [1994] IRLR 509***).

Following the approach taken in personal injury claims, the complainant will not recover losses that are , or should be avoided by means of insurance paid for by the employer;

Unlike the approach in tort, however, there is no requirement that the loss suffered be 'reasonably foreseeable'; compensation can be awarded in respect of all harm that arises naturally and directly from the act of discrimination, at least in cases where the discrimination was deliberate and overt (***Essa v Laing [2004] IRLR 313,*** and ***Abbey National plc and Hopkins v Chagger [2009] IRLR 86***).

12. In calculating compensation according to ordinary tortious principles the Tribunal must take into account the chance that the respondent might have caused the same damage lawfully if it had not done so on discriminatory grounds. (***Livingstone v Rawyards Coal Co (1880) 5 App Cas 25***, 'damages … to put the party who has been injured … in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation'.) In the context of discriminatory dismissals this means asking the '***Polkey***' question, namely what would have happened if there had not been a discriminatory dismissal? (***Abbey National plc and Hopkins v Chagger [2009] IRLR 86***.)

13. The Tribunal now turns to the specific heads of claim, and will consider each of them.

***a) The loss of earnings claims.***

14. The first of these issues is the extent to which the Tribunal should award the claimant compensation for loss of earnings. There are two elements to this. The first is the loss of earnings that the claimant sustained whilst he was still employed by the respondent, but was off work, and the second is the loss of earnings claim that he makes following the termination of his employment by his ill health retirement on 28 February 2016.

15. In respect of the first period, the agreed figure for loss of earnings during this period is £28,106.

16. The respondent has not vigourously disputed the claimant's entitlement to this sum, but it has not been formally conceded.It is correct that the claimant has to prove on a balance of probabilities that is absence up until he took IHR was caused by the proven acts of discrimination. The evidence of Mr Wynn Jones is directed primarily to when the provision of a suitable chair would have kept the claimant in employment beyond the date of his IHR. He was however also specifically asked to address the issue of whether the claimant's absence from November 2014 was caused by the failure of the respondent to make reasonable adjustments. His response in para. 9 of his first report does, the Tribunal accepts question the extent to which the claimant's

absence from 11 November 2014 can be attributed to the failure to make the adjustment in respect of the chair.

17. Whilst his evidence is clear (as will be discussed below) that provision of suitable chair would not, in the long term, have enabled the claimant to remain in employment, he does not dismiss entirely the possibility of such a chair providing some respite and improvement for the claimant whilst at work. His point is that the claimant's degenerative condition was such that the point would still have been reached when, even with such a chair, he could no longer continue. He does, it seems , to us admit of the possibility that a suitable chair may have provided some improvement.

18. A further feature, as Mr Wynn Jones acknowledges, is that the reasons for the claimant's absence were multi-factorial, and included an element attributable to his mental health as well as his physical condition.

19. The Tribunal has reminded itself of the findings of fact at paras. 5.209 to 5.301 of its liability judgment, in which the evidence of what took placed between 11 November 2014 and 28 February 2016 is set out. That, and the OH evidence in the bundle for this hearing, show how the claimant's mental health was a significant factor in his continued absence. Further, and perhaps paradoxically, given its current stance on the inevitability of the termination of the claimant's employment, it is to be recalled that the claimant actually sought IHR in early 2015, but this was refused in September 2015 on the basis that there was the possibility of more treatment , and the administrators of the respondent's IHR were not at that stage satisfied that the claimant would remain prevented by his ill health from discharging his duties until pension age.

20. As the previous findings set out, during this period the claimant and the respondent had considerable interaction to address the claimant's issues, and he remained off work under a succession of fit notes.

21. Whilst not totally clear, the Tribunal is satisfied that the claimant was off work as a result of the proven acts of discrimination found by the Tribunal in terms of its effect upon him physically, to some extent, but also mentally. His history shows how he would try to stay in work for as long as possible, even when in pain. Further, even if the claimant would not have been able to return to work for the whole of the 16 month period in question, he would have continued to receive full pay for some of this period. If, therefore, his absences were sporadic, and not continuous, he may not have gone down to half pay, then no pay at all , which is why these losses occurred. The Tribunal is thus, on balance, satisfied that this loss of earnings during this period does flow from the proven acts of discrimination, and it will make an award for loss of earnings in this sum for this period.

***The chair and the basis for the further loss of earnings claims.***

22. The second issue, however, is more contentious. For how much longer, had the reasonable adjustments been made, was it likely that the claimant could have remained in employment with the respondent? His case is that his employment would have continued for a number of years to come, until his pension age. Quite when that would have been is unclear, but the claimant has provided calculations (in his Schedule of Loss page 140 of the bundle) for retirement at 60, 65, and 70. He retired at the age of 38 on 28 February 2016.The respondent's case is that his employment would still have ended when it did, even with the adjustments in place.

23. The determination of this issue requires an examination of the medical evidence. It is important from the outset to bear in mind that there two relevant disabilities in play. The first, and more obvious, is the claimant's physical disability arising from his fused hip, with the associated severe back pain, and limitation upon his ability to sit for lengthy periods, which had afflicted the claimant all his working life, and was an established disability by the time he commenced his new role in January 2014. The other, less obvious, disability is his mental impairment in the form of depression. The respondent has conceded that as a disability as well (since the amended response – para. 9, page 153 of the Pleadings Bundle) , but it is not clear from what date that concession applies.

24. This has always been the nub of this case, and, in effect, all that Mrs Ward says the claimant ever wanted. Ms Trotter in her submissions on liability had conceded that the right chair would have relieved the claimant's symptoms at work, and would therefore have had the requisite effect of mitigating the disadvantages at which the claimant's back – related disability put him.

25. The basis of the claimant's claim in this remedy hearing is that had such a chair been provided he would not have been forced to leave his employment when he did, and his employment would have continued, possibly up until retirement age, or earlier, but still much later than when it actually ended on 28 February 2016.

26. Whilst there may seem that there would be some paradox if the Tribunal , having found that it would have been a reasonable adjustment to provide the claimant with a suitable claim, were then to find that it would not have had the effect of enabling the claimant to remain in employment, this is in fact not so. The reason for that is that for an adjustment to be a reasonable one to make , the adjustment need not have the effect of actually removing or reducing the disadvantage to which the claimant's disability put him, it need only have the prospect of doing so.

27. The adjustment contended for need not remove entirely the disadvantage. Section 20 of the Equality Act 2010 uses the phrase that the adjustment should 'avoid the disadvantage'. In ***Noor v Foreign and Commonwealth Office [2011] ICR 695***, an applicant for a job had dyslexia and dyspraxia and had been placed at a substantial disadvantage in comparison to non-disabled applicants by being required to answer questions on a competency which, because of error, had not been included in the advertisement for the job. The ET struck out the claim as having no reasonable prospect of success in light of evidence from the respondent that even if the claimant had received full marks for the questions relating to the 'missing' competency and all questions asked in the interview after that competency had been interrogated, he still would only have ranked third. The EAT held the ET had erred in holding that for the adjustment to be reasonable it must be shown that taking the step would prevent the disadvantage , but expressly said that this would be relevant to the issue of remedy.

28. In many cases whether the adjustment sought will remove the disadvantage will not be capable of a yes/no answer. In ***Romec v Rudham [2007] All ER (D) 206 (Jul)*** HHJ Peter Clark said that if the adjustment sought (in that case the extension of a rehabilitation program), would have had 'no prospect' of removing the substantial disadvantage, then it could not amount to a 'reasonable' adjustment. He considered however that it was unnecessary to be able to give a definitive answer to the question of the extent to which the adjustment would remove the disadvantage. If there was a

'real prospect' of removing the disadvantage it 'may be reasonable'. In ***Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep)***, HHJ McMullen said that 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage'. The EAT in that case then went on to uphold a finding of a failure to make a reasonable adjustment which effectively gave the claimant 'a chance' of getting better through a return to work. ***Romec*** and ***Cumbria Probation Board*** were applied in Leeds Teaching Hospital ***NHS Trust v Foster UKEAT/0552/10, [2011] EqLR 1075***, when the EAT again emphasised that when considering whether an adjustment is reasonable it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage—there does not have to be a 'good' or 'real' prospect of that occurring.

29. The issue on remedy, however, is different. The Tribunal is being invited by the claimant ,upon whom the burden of proving causation of loss lies, to find that had the respondent provided such a chair, his employment would have continued, certainly beyond the date that it actually ended.

30. This issue has to be determined on the balance of probabilities. In support of the contention that provision of such a suitable chair would have prolonged his employment, the claimant has, with respect, adduced no evidence. He clearly believes that , and it is his evidence.

31. The medical evidence , however, Mr Beever submits, identifies a typical pattern of worsening pain. The 20-30 year prognosis given is entirely consistent with what the claimant has experienced. What underpins the expert opinion and makes it robust and persuasive is the evidence that the claimant even when at home (i.e. not at work) for extended periods of months/years still struggled with all activities and was reduced to a 15 minute concentration span. The evidence is that the claimant's physical ill-health had reached a pitch by 2013 where it was evidently "severe", so that the claimant was required to have 12 months off work and, by July 2014, IHR was a topic of discussion. All of this factually underpins Mr Wynn Jones' conclusion at page 199, at point 6 that C's back was now so severe that it would not be alleviated except potentially in a "marginal and limited duration" (page 170 of the bundle).

32. A particular difficulty for the claimant is that he never actually obtained and tried a chair of the type that he says the respondent should have provided to him. His difficulties persisted when he was off work and at home, and he never manged to make any adjustments of his won at home which avoided the effects of his disability upon his ability to work, in that he found sitting at home no easier than he did at work.

33. The Tribunal is not criticising the claimant for not obtaining such a chair, and appreciates that cost may have been a factor, at least initially. He did receive, however, a lump sum upon taking IHR, so could have utilised part of that to obtain the type of chair that he says the respondent should have provided. That he did not do so means that the Tribunal has no evidence upon which to base an assessment of what difference it would have made. The Tribunal is therefore left simply speculating what, if any difference, such a chair would have made.

34. In the remedy phase of the proceedings the claimant has contended that his back condition involves what he has described as a form of "RSI" (repetitive strain injury), his argument being that had a chair been provided which met his requirements , this would have prevented his back muscles from being "overused", having to compensate

for the effected of his fused hip, causing spasms. This is the basis of the first two questions posed to Mr Wynn Jones, which he answered in his response document of 10 April 2022. In his responses to questions 1 and 2 he clearly discounts this theory, and does not recognise it as representing the pathology of the claimant's condition.

35. This is an understandable theory for a lay person to have, but is not supported by any medical evidence. That evidence remains that provision of any suitable chair was not likely to produce any significant improvement in the claimant's condition, which is degenerative, that would have enabled him to remain in work beyond the date that he took IHR. As is pointed out, when the claimant was absent from work, and therefore not forced to use any unsuitable chair provided by the respondent, his condition did not improve. That shows that the unsuitable chair was not causing or exacerbating his symptoms, because they continued, and have got worse even when he was not at work.

36. The Tribunal notes that there is some suggestion that provision of a suitable chair at an earlier stage may (it is no more than that) have had an ameliorating effect upon the claimant's symptoms had it been available at a much earlier stage, but the Tribunal can only make its award on the basis of the failure to make reasonable adjustments it has found in November 2014, not for any putative prior failures.

37. The Tribunal appreciates that the claimant may well subjectively feel that provision of a suitable chair in late 2014 may have kept him in employment, but that is speculation, and not supported by the evidence. The best the Tribunal can say is that it may have made a difference, but it equally may not. That, however, means that the claimant falls short of establishing that it was more likely than not that provision of such a would have enabled him to remain in employment for longer.

38. Viewed another way, the Tribunal considers that it was , on the balance of probabilities, more likely than not that the claimant would have taken IHR by 28 February 2016 , and hence no award for any losses after that date should be made (on the basis of the ***Chagger*** case cited above). Whilst this is not a discriminatory dismissal case, the claimant contends that his employment ended because of the proven acts of discrimination, and the Tribunal considers that it is entitled to consider whether it would have ended when it did , or sooner, or later, in any event. That is a simple application of the test of causation.

***The provision of a laptop.***

39. The chair, of course, is not the only aspect in respect of which the Tribunal found that the respondent failed to make reasonable adjustments for the claimant . The other finding (in addition to the third one relating to leave) was that the respondent had so failed in not providing him with a laptop, to enable him to work from home.

40. The Tribunal expressly raised with the parties the issue of whether the provision of such equipment would have been likely to have enabled the claimant to remain in employment beyond the date that he did. This was an issue which assumed a higher prominence that previously given the experience of the whole country during the COVID – 19 pandemic, when home working for many employers in both the private and public sectors became much more common, and was accepted by many who thitherto would not have countenanced such working practices. Whilst such practices were, in 2014 to 2016 , pre – COVID , not common, and would be resisted by some

employers for various reasons, the intervening experience of many employers has shown that in many instances the reasons for rejecting extensive homeworking arrangements were not, in fact, valid ones, and this way of working became, and has in many instances, has remained a common feature of many peoples' working lives.

41. The Tribunal accordingly invited the respondent to comment upon this , and it duly adduced a further witness statement from Sarah Smith, who was called to give evidence on this issue. Her evidence was that provision of a laptop would not have been feasible long term solution. She cites, firstly , the need for the claimant , as an Executive Officer responsible for supervising a team, to be present for face to face engagement. Screensharing remotely, at the time, required software which would not have been available, and was undesirable. She further relies upon the security risks were the claimant to be permitted to work from home. She points out that where remote working is permitted, it is from other DWP locations, and only for limited purposes. Whilst the pandemic resulted in the roll out of a high security remote platform, this was not available in 2014 to 2016, and creation of one specifically for the claimant would not have been reasonable or financially viable.

42. For the claimant it is argued that as the respondent has subsequently been quite capable of providing remote working facilities during COVID – 19, it could just as easily have done so for the claimant in 2014.

43. The Tribunal has considered this issue carefully. It appreciates that there is a considerable risk of hindsight being applied unfairly. The Tribunal's task is to assess whether provision of a laptop between October 214 and February 2016 would, on a balance of probabilities , at that time, have enabled the claimant to remain in employment. The Tribunal is not satisfied that it would. At the time of the termination of the employment, let alone at November 2014, COVID was some 4 years away, and advances in technology made, and changes in working practices that ensued, were not even in contemplation at that time. Rather like the chair issue, the best the Tribunal can say is that provision of a laptop , whilst a possible temporary expedient, with some prospect of reducing the disadvantages to which the claimant was put, may have had some effect on the claimant's prospects of remaining in employment, the Tribunal is not satisfied that it is more likely than not that it would have kept him in his employment permanently. That is particularly so when one remembers that the claimant did not have at home any more suitable chair or other equipment that would have made his working day any more comfortable. Whilst a laptop would have avoided the need for him to come into the office and use an unsuitable chair, he has not really explained how, other than that, using a laptop at home would have been any more comfortable.

44. Whatever the position, the claimant has not established that provision of a laptop, and/or homeworking would have had the effect of him retaining his employment beyond February 2016.

45. It therefore follows that the Tribunal is not satisfied that the claimant's employment would , had the two main reasonable adjustments been made, have continued beyond 28 February 2016, and so will make no award in respect of any financial losses beyond that date.

***Personal Injury***

46. The claimant in his Schedule of Loss (page 140 of the bundle) seeks an award of £309,390 for "personal/psychiatric injury". He goes on to equate this to his "loss of earnings" , and this appears to repeat the figure for loss of earnings that he set out under "future losses" on the preceding page. With no criticism of the claimant or Mrs Ward, this is a confused claim. A claim for personal injury, if successful, entitles a claimant to general damages for the proven injury, and then, if any financial losses arise from that injury, an award for such financial losses. Causation must be proved, of course, and given the Tribunal's findings above as to recoverability of any loss of earnings beyond 28 February 2016, no such a claim for financial losses can succeed.

47. The claimant , however, could still seek an award of general damages for personal injury, if he can establish that the proven acts of discrimination have caused any such injury. An injury need not solely be caused by the tortious act, in some cases thee may be an identifiable exacerbation of a pre-existing condition which can be attributed to the tortious conduct.

48. The injury claimed is PTSD (in the Schedule it is put as "New psychological Injury caused by Discrimination and worsening/exacerbation of existing psychological injury"). The claimant continues:

*"Finding out after 16 years my employer should have done so much more to help me at work has been a devastating realisation. Rather than put the situation right when I returned to work January 2014, I was left to suffer pain and discomfort using the same equipment I had confirmed in 2013, was not supporting my back. The refusal to listen to me, and repeatedly subjecting me to inappropriate assessments of the needs arising from my disability, served only to deteriorate further my mental and physical health."*

49. The claimant relies upon the medical evidence, in particular from Dr Rai (pages … of the bundle).

50. In her Final submissions, Mrs Ward says this:

*23 - Post Traumatic Stress Disorder (PTSD), the Personal Injury claim, is caused by a traumatic event or injury. The recognition of the symptoms are at present much like those of dyslexia during the 1970's in that they are not well recognised and easily confused with other psychological disorders. Although there has been progress there is a long way to go.*

*24 - The claimant was finally diagnosed with PTSD August 2022. The symptoms have been present for many years and was one of the main reasons Mrs Ward asked the respondent to make an interim payment of Five-Thousand pounds (£5000.00) in 2019. The respondent resisted and did not authorise the advance until mid-2023. During those years between 2019 and 2023, as a result of underfunding and COVID restrictions, the NHS has been on skeleton duties and waiting lists enormous.*

*25 - As the claimant is thankfully not suicidal he is not a priority but during those years, 2019 to 2023, he has not received any support, other than that provided by his wife, with his psychological wellbeing. The claimant should not however, be penalised because he could not afford private health care. As it stands the claimant is trying to source rehabilitation but unsurprisingly those within the local area are not taking on*

*clients or do not specialise in PTSD. Impossible to recover when the case is still hanging over him.*

51. For the respondent Mr Beever submits that there is insufficient evidence of personal injury in order to make a separate/additional award and that, to the extent that the Tribunal finds causation/exacerbation, it can fairly be accommodated within an injury to feelings award.

52. He submitted that there is no diagnosis of PTSD. The claimant had accepted in evidence that he was "seeking" the diagnosis (apparently on the back of Mrs Ward's instigation).The GP notes are not instructive, as they seem merely to recount the fact that the claimant or Mrs Ward informed the GP that the claimant had scored highly in an online Minds Matter) score and the GP was content to refer the claimant for an assessment. Dr Rai's report at page 201 of the bundle does not diagnose PTSD albeit he says that is "some evidence of experiences that would meet the criteria for PTSD" (page 204 of the bundle) but he advised that a further psychological assessment was recommended.

53. There is , he submitted, no psychological evidence at all relating to any restrictions or inability to work. Most crucially, Mr Beever submits, there is no reference at all to any of the proven acts of discrimination. By contrast, there are numerous references within the report suggesting (as the claimant appeared to accept in evidence) that what was under discussion was a wide range of his complaints going well beyond the proven acts of discrimination. For example, in evidence reference was made to: "star jumps at 11 and 2"; "wheelchairs and marathons"; "suggesting I went under the knife to improve my situation", and these were all "mocking me". He also referred to , "the whole process of being treated at work" and "stressful process over the last 7 years" (pages 202 of the bundle).

54. He submitted that there was no evidence to establish that the proven acts of discrimination have caused the alleged PTSD. Nor was it likely that the evidence supports an inference that the proven acts of discrimination materially contributed to it. The evidence therefore falls short of a diagnosis of PTSD and arguably is more aptly categorised as part of the claimant's symptoms of generalised anxiety and depression: those of course being diagnosed and arguably becoming "severe" pre-liability in any event. The more appropriate outcome , it was submitted, was to reflect, as appropriate, any relevant injury as part and parcel of the Tribunal's assessment of injury to feelings.

55. If, however, the Tribunal was persuaded that that it should make an award for personal injury, he referred the Tribunal to the relevant Judicial College Guidelines, attached, with the caveat that the proposed figures within those guidelines risk overcompensating the claimant , given the limited evidence of causation and/or suggestion of exacerbation rather than cause.

***Discussion and findings on personal injury.***

56. The Tribunal agrees with the respondent's submissions. There is very little evidence upon which the Tribunal could be satisfied that the proven acts of discrimination caused , or exacerbated in any quantifiable way, the claimant's mental health issues. The Tribunal has certainly not been provided with anything like enough evidence to warrant a finding of the specific condition of PTSD. There has not been a diagnosis, as such in August 2022, there has been an acknowledgement of the possibility of the claimant having such a condition, and the need for a further referral.

57. More importantly , there is still no evidence of a causal link (which would need to go back almost 8 years to the acts of discrimination) to the proven acts of discrimination in October and November 2014. It is correct that the claimant told Dr Rai that his symptoms started in 2015, but he clearly had issues going back to 2002, and his medical history shows that he had previous mental health issues well before late 2014.

58. Paragraphs 2 to 5 of the claimant's witness statement (dated 1 June 2021) show how the claimant has been suffering with his mental health since 2002. He does, it is appreciated , also seek to attribute those difficulties to previous poor treatment by his employers, but the Tribunal's task is to try to identify what, if any, new personal injury has been caused by the proven acts of discrimination in late 2014. The Tribunal cannot, on this evidence , do so. Nor can it identify sufficiently the degree to which the proven acts of discrimination exacerbated any previous condition. All the evidence falls way short of establishing that the claimant suffered any new personal injury as a result of the proven ats of discrimination. Whilst there will, the Tribunal accepts, have been some exacerbation, and the claimant was clearly a vulnerable victim, separating out a degree of exacerbation to the proven acts of discrimination is not an easy matter.

59. The Tribunal agrees therefore that the appropriate way to deal with these issues is to consider them in the context of the claim for injury to feelings, to which it will now turn.

***Injury to Feelings.***

60. The Tribunal now turns to the another head of loss claimed by the claimant , injury to feelings. In assessing the correct level, the Tribunal has to repeat that it can only make its award on the basis of the findings of discrimination it has made, which specifically relate to the period from October 2014 onwards.

61. That means that the Tribunal cannot compensate the claimant for any injury to feelings that he may have suffered prior to that date, despite being continually asked to do so. That there had been a long running background to the claims which did succeed, and that the claimant was vulnerable in terms of his mental health, can and will be taken into account is assessing the correct level of award for the proven acts of discrimination, but the claimant must understand that the Tribunal cannot make any awards in respect of what he may perceive, but the Tribunal has not found to be, prior acts of discrimination.

62. The starting point is the relevant range of bands of ***Vento*** , which , by the effect of the ***Da'Bell*** and ***De Souza*** cases , in respect of claims presented on or before 11 September 2017, were set at:

a lower band of £800 to £8,800 (less serious cases);

a middle band of £8,800 to £25,500 (cases that do not merit an award in the upper band);

and an upper band of £25,500 to £42,000 (the most serious cases), with the most exceptional cases capable of exceeding £42,000.

***The claimant's case upon this head of award.***

63. The claimant's figure for this head of award is £45,000 (see the schedule of loss at page 140 f the bundle). This is clearly at the top of the highest band of ***Vento.*** The claimant's justification for seeking such a high award is set out in the schedule in these terms:

*"Injury to feelings – £45,000.00; High Vento £27,000 - £45,000. – Stress of the Employment Tribunal; legal aid cuts resulted in an inability to appoint expert legal practitioner to manage the claim which was a further disadvantage m(e) ; traveling in pain to attend hearings; financial instability; stress upon marriage and sex life; all aspects of daily living have been negatively impacted by the discrimination.*

*Losing my job has had a devastating impact upon my entire life. I cannot, as someone without my complex disability can, get any job due to the limitations of my complex physical disability.*

*I had to take maximum dose of morphine to cope with the pain I suffered at work using the equipment provided to me by the respondent.*

*I have been required to file a court case and during that time I have been made aware those party to the discrimination I suffered have been promoted whilst I have been plunged into financial hardship having to negotiate the benefit system where I have had to battle against the system to obtain what I am entitled to receive; I have suffered abuse by those agents being told I would have to "beat a wheelchair and an oxygen tank" to receive an award.*

*The whole experience has scarred me, and I am not sure I will ever fully recover. I am still experiencing panic attacks and anxiety as a direct result of the discrimination I have suffered. Therefore, I am claiming the maximum award of £45,000.00."*

The Tribunal has set out above the most salient extracts from the claimant's witness statements on this issue.

***The respondent's position on this head of award.***

64. The respondent has (sensibly) not contended that the appropriate award in this case should be confined to the lower band. It is accepted that an award in the middle band is appropriate , and the respondent's suggested award is £10,000.

65. The Tribunal is grateful for the realistic approach that the respondent has taken. Whilst the essence of the effect of the treatment that the claimant suffered was the end of his employment, this is not to be treated as a "one – off" dismissal case. In the case of ***Base Childrenswear Ltd v Otshudi [2019] UKEAT 0267/18/2802*** HHJ Judge Eady QC (as she then was) set out her reasons for agreeing the middle band of the Vento Guidelines was appropriate, even though there was a "one off" act of discriminatory dismissal;

*"The fact that the ET's finding of unlawful discrimination related to an isolated event - the Claimant's dismissal - did not mean it was required to assess the award for injury to feelings as falling within the lowest Vento bracket: the question was what effect had the discriminatory act had on the Claimant? On the ET's findings of fact in this case, it*

*had permissibly concluded that this was a serious matter (something acknowledged by the Respondent) that gave rise to an injury to feelings award falling within the middle of the middle Vento bracket. Moreover, in reaching that decision, the ET had been careful not to double-count matters that it subsequently considered relevant to the question of aggravated damages, personal injury or any ACAS uplift. It had, further, not taken into account irrelevant factors when it referred to the Claimant's grievance, her notification to ACAS or the pursuit of her ET proceedings; these were potentially relevant matters to which the ET was entitled to refer when testing whether the Claimant had genuinely been aggrieved by the Respondent's discriminatory conduct. There was, therefore, no proper basis on which the EAT could interfere with the award made."*

66. The respondent's position is that many , if not all, of the matters relied upon by the claimant in support of an award in the highest band of ***Vento*** are not relevant or permissible to be taken into account. Only those which postdate the proven acts of discrimination can be considered relevant, and the Tribunal should be careful not to conflate the effects of the proven acts with the effects of any treatment in respect of which the claimant's claims did not succeed.

***Discussion and findings.***

67. To start with, the Tribunal must disabuse the claimant of any notion that all of the matters he has relied upon will entitle him to an award in the highest band of ***Vento*** , however strong his perception of the effect of these factors upon him may be. Firstly, the matters referred to in the first paragraph (unfortunately they are not numbered) in this section all relate to the conduct of the litigation, they are not the result of the discrimination, they are a consequence of the claimant bringing the proceedings. Whilst that may appear a subtle distinction, and the claimant may regard one as the consequence of the other, the Tribunal can only award compensation for the proven acts of discrimination, but not (ordinarily) for the additional consequences of having to bring a claim in the Tribunal. That many of the claimant's claims failed further reinforces how inappropriate it would be for the Tribunal to begin to explore this aspect as being relevant to the quantification of injury to feelings.

68. The second paragraph, the Tribunal accepts, is indeed relevant, and will be taken into account in determining the appropriate award for injury to feelings.

69. In the third paragraph the claimant refers to taking the maximum dose of morphine to cope with the pain whilst using the equipment provided to him at work. As the claimant has only succeeded in respect of the respondent's failure to provide him with a suitable chair at work from 11 November 2014 , but he then went off work sick, this is not a matter which can be relevant to this head of award.

70. The matters raised in the fourth paragraph , whilst again, doubtless, matters which the claimant genuinely feels , are not ones that they Tribunal can take into account in assessing the award for injury to feelings. Whilst the contrast in fortunes felt by the claimant in comparison to others who were promoted in their employment , whilst he lost his, is doubtless another matter that he feels deeply, it is not, the Tribunal considers, a matter that it can legitimately take into account in determining the appropriate level of award for injury to feelings. Whereas in some cases (usually of direct discrimination or harassment) the promotion of a proven discriminator can justify an increase in the award for injury to feelings, the Tribunal can see no parallel in this

case, and this is not a factor that it can take into account. The other factors mentioned in this paragraph relate to the claimant's difficulties in obtaining the state benefits to which he was entitled. That, however, cannot be regarded as a consequence of the discrimination, but of the system of state benefits which is , coincidentally, also administered by the respondent, and in which the claimant himself was engaged. It is not contended (nor probably could it be) that the claimant's treatment in terms of establishing his entitlement to particular benefits was any further act of discrimination, so this too is not a factor that can be taken into account, save in general terms, as a consequence of the loss of employment.

72. In this case, a number of factors combine to justify an award in the middle band. Firstly, there is the drawn out process of the claimant going off sick, never returning to work, going down to half and then no pay, then having to apply for ill health retirement. That process itself, as documented in the Tribunal's judgment on liability, was not straightforward , with delay and additional concern being caused for the claimant . Whilst not, as the Tribunal found, in itself discriminatory, this process was nonetheless a further ordeal for the claimant .

73. Further, the claimant lost a job he had held for 16 years. His employability when he obtained that employment was already compromised by his condition, and he was very keen to keep it for as long as he possibly could. That he has not been able , since his retirement , to return to any other form of paid employment shows how important this job was to him. Whilst the Tribunal has found that the claimant's employment would have ended in any event, so to that extent cannot attribute all the injury to feelings that he experienced by reason of the loss of his employment to the proven acts of discrimination, the Tribunal does accept , as the respondent does, that the claimant perceives that he has lost his employment for this reason, and, in any event, went through 16 months of uncertainty and worry about his long term future before this was finally resolved in February 2016.

74. Whilst, as other aspects of this judgment discuss, there was a degree of inevitability to the end of the claimant's employment well before what would be normal retirement age, that does not diminish the serious, and prolonged, injury to feelings that we are quite satisfied the claimant suffered as a result of the discrimination to which he was subjected in November 2014. That said, we do consider that the impact upon the claimant's mental health and injury to feelings that he sustained would have arisen in any event upon the , sadly inevitable, termination of his employment. Whilst it is hard to dissociate those effects , which would have occurred had there been no discrimination, from the effects of the specific acts of discrimination we found to be proven in late 2014, we have to do so. That is why we cannot accede to the claimant's plea for an award at the much higher level that he seeks.

75. Whilst (again, discussed elsewhere) we do not find that the claimant has established that any further specific personal injury was caused by his treatment, the Tribunal does take into account his prior vulnerable state in terms of his mental health. The respondent has to take its victim as it finds him. and the claimant clearly did react to his treatment by further periods of poor mental health, in the period leading up the end of his employment, and it is in respect of that period that the Tribunal considers it is entitled to make this award, and not upon the basis that the claimant ultimately lost his employment because of the proven acts of discrimination.

76. Taking all these factors into account, the Tribunal is satisfied that an award in the middle band of ***Vento*** is appropriate, and makes an award of £12,500 for injury to feelings.

***Aggravated damages.***

77. Whilst identified in the List of Issues, the claimant has not in his Schedule of Loss expanded upon his claim for aggravated damages, nor provided any basis upon which the Tribunal should award them. No mention is made of this head of claim either in the claimant's "Remedy position statement" document of 10 September 2023, nor in the claimant's Final Submissions document of 20 September 2023 .

78. In his submissions, Mr Beever makes these points. It is for the claimant to establish evidence of other factors connected for subsequent to the discriminatory act that has made its injury worse. The case of ***Commissioner of Police v Shaw UK EAT/0125/11*** is cited, which identified in essence three ways in which The tribunal might have the power to make such an award namely: (i) the manner in which the discrimination committed, (ii) motive , (iii) subsequent conduct. The claimant has not evidenced any of these. It needs to be seen as properly separable conduct aggravating the injury. Even then, the Tribunal must assess the "additional" injury to the claimant rather than the aggravating facts themselves in order to make a decision that it is appropriate to award an (additional) amount of aggravated damages. Above all the Tribunal needs to ensure that it is not seen to be making a punitive award. Further the Tribunal must ensure there is no double recovery and there is a need to step back and take a final view of the award overall, reference being made to ***Ministry of Defence v Cannock [1994] IRLR 509.***

79. Ultimately, however, in her oral submissions, after a break for consultation with the claimant , Mrs Ward did not pursue this head of award.

***Discussion and findings.***

80. Whilst, given the claimant's abandonment of this head of claim, it may not be strictly necessary for the Tribunal to rule upon it, as an abundance of caution, and to reassure the claimant that the issue has been considered, regardless of whether it is pursued, the Tribunal would not find any grounds upon which it would be appropriate to award aggravated damages. This is particularly so when the relevant acts that have been proven are only those in October and November 2014. What may have preceded them cannot be the subject of any award, nor can it justify any increase by way of aggravation of the later , proven , acts. The proven acts appear to the Tribunal to be no more and no less than failures on the part of the management of the respondent, and its outsourced partners, adequately , imaginatively, and robustly to address the claimant's issues. They were system failures, and poor management, which doubtless impacted greatly on the claimant , but that does not justify an award of aggravated damages.

***Claim for an uplift***

81. This was made by a brief reference in the Schedule of Loss (page 140 of the bundle) to "Uplift of 25% for discrimination" , but was not clear. In the Remedy position statement document of 10 September 2023 , at para. 4 , there is reference to breach of an ACAS Code of Practice, but that relates to handling requests for flexible working.

Again, no mention of this claim is made in the claimant's Final Submissions document of 20 September 2023. After consultation with the claimant , Mrs Ward indicated that this was not pursued.

***Discussion and finding***

82. Again, for completeness , and to assure the claimant that lack of legally qualified representation has not hampered his case, the Tribunal could not see any basis for an uplift in compensation. Whilst grievances were raised, they were dealt with, which is what the Code of Practice requires, not that they are upheld. No defects in the process which may trigger any uplift were identified, and this would not be a valid head of claim for any uplift. More latterly Mrs Ward appears to have introduced an element of the legal entitlement to seek flexible working, and how the claimant did, or could have, make such a request. That is, however, a wholly different jurisdiction, and was not a claim that has ever been made as part of these proceedings, and was not pursued.

***Awards and interest***

83. For completeness , no issues arise as to quantification of pension loss, as there is no loss to be awarded after the date that the claimant took IHR, and the figures up to that date take account of the fact that the claimant was still in the pension scheme and contributions continued to be made. Further, no grossing up will be necessary, given the relevant figures. To summarise, therefore , the Tribunal makes the following awards:

1.) Injury to feelings £12,500.00

2.) Loss of earnings £28,106.00

84. The claimant is entitled to interest. This is calculated in different ways for the two different types of compensation. For injury to feelings awards, Reg 6(1)(a) of the Employment Tribunals (Interest on awards in discrimination case) Regulations 1996 provides that the period of the award of interest starts on the date of the act of discrimination complained of and ends on the day on which the employment tribunal calculates the amount of interest — the 'day of calculation'.

85. For the loss of earnings award, interest is awarded for the period beginning on the 'mid-point date' and ending on the day of calculation — Reg 6(1)(b). The 'mid-point date' is the date halfway through the period beginning on the date of the act of unlawful discrimination and ending on the day of calculation — Reg 4(2).

86. The respondent has paid the claimant £5000 by way of interim payment, so the amount payable will be reduced by this amount. As however, it was paid only in June 2023 , it will be treated (unless it was specifically expressed not to be) as being on account of the loss of earnings element, in which case being paid after the mid-point for the calculation of interest , it will have no effect upon the amount of interest payable. Thus for the awards and interest are:

Injury to feelings:

Date of the act of discrimination : 11 November 2014

Date of calculation: 19 September 2023:

No of days : 3235

Rate: 8%

Interest: £8857.53

Loss of earnings:

Date of the act of discrimination : 11 November 2014

Date of calculation: 19 September 2023:

Mid – point : 16 April 2019 : No of days : 1618

Rate: 8%

Interest: £9961.07

Totals:

| | | |
|---|---|---|
| Injury to feelings: | £12500.00 | |
| Interest: | £8857.53 | |
| Total: | | £21,357.53 |
| Loss of earnings: | £28106.00 | |
| Interest: | £9961.07 | |
| Total: | | £38,067.07 |
| Grand Total: | | £59,424.60 |
| Less paid: | | £5000.00 |

Total due that the respondent is ordered to pay the claimant : **£54,424.60**

Employment Judge Holmes : Dated: 5 January 2024

RESERVED JUDGMENT SENT TO THE PARTIES ON

15 January 2024

FOR THE TRIBUNAL OFFICE

# NOTICE

## THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2402677/2015**

Name of case: **Mr S Ward** v **Department for Work and Pensions**

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: 15 January 2024

**the calculation day** in this case is: 16 January 2024

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

For the Employment Tribunal Office