Case Number: 1401084/2021

EMPLOYMENT TRIBUNALS

Claimant: Dr K Sharma

Respondent: University of Portsmouth

Heard at: Southampton **On:** 23 & 24, 25 October 2023

Before: Employment Judge Rayner
Mrs A Sinclair
Mrs CL Date

Representation
Claimant: Mr Sharma, Claimants husband

Respondent: Mr N Smith Counsel

JUDGMENT

Declaration

1. **The Claimant was discriminated against on grounds of race contrary to the Equality Act 2010, as set out in the merits judgment dated 28 November 2022 and is entitled to the compensation as set out below.**

Compensation	Award	ACAS Uplift	Interest	Total award
injury to feelings	£33,000.00	£825.00 (£33825.00)	£8162.48	£41,987.48
Psychiatric injury	£50,000.00	£1250.00 (£51,250.00)	£5808.33	£57,058.33
Loss of earnings to date of hearing	£27,546.00		£2938.24	£30,484.24
Future loss of earnings	£103,135.45			£103,135.45
Costs of past and future medical expenses, including treatment	Prescription costs - £477.60 Treatment £13,860.00		£191.15 (On basis of past medical expenses	£14,528.75

			of £1686.64)	
Total award calculated to date				**£247,194.95**
Amount payable on heads of claim determined to date; less the £80,000 paid on account.				**£167,194.25**
Loss of pension to be determined (see below)				**Estimated as between £200,000.00 - £400,000.00**
Grossing up TBD				
Costs (to be confirmed)				

REASONS

The remedies hearing

1. The remedies hearing took place across two days and the employment tribunal heard evidence from the claimant, Dr Sharma and Mr Sharma on behalf of the claimant and from Miss C Sparrow and Mrs F Hnatow on behalf of the respondent.

2. We had a bundle of documentation including the reports referred to below, as well as updated schedules of loss from each party. We also received written submissions from the respondent and the claimant and a bundle of authorities from the respondent.

3. The claimant has submitted a final and updated schedule of loss which includes six potential recommendations.

4. The respondent has provided a counter schedule of loss.

5. We are grateful to both parties for all the work that they have put into addressing the submissions and figures which each have provided. This is a complex case and our comments about the figures and calculations we do not

have are a reflection of that complexity, and not intended as a criticism of either party or their legal representatives.

Background to the remedies hearing

6. Following the full merits hearing, there have been a number of hearings to discuss case management of the remedies hearing and the evidence that the parties wish to rely upon.

7. Following a case management hearing and applications from the parties, an order was made for a joint expert to be identified and instructed to report on the claimant's psychiatric impairment.

8. The parties identified and instructed Dr Gupta, whose report was before us at the remedies hearing.

9. Following provision of that report, the respondent made an application to instruct a second expert. There were particular circumstances, including some not unreasonable concerns the respondent had about a number of parts of the report, as well as the level of the award that the claimant was now claiming. An order was therefore made giving the respondent permission to instruct a second expert, to comment on behalf of the respondent, on the report produced by the joint expert. The Claimant agreed to co-operate with the production of that report and did so.

10. The subsequent report of Dr Mallet is also before the employment tribunal.

11. The experts have also produced a joint report setting out areas of agreement.

12. Following the liability judgement, Dr Sharma approached an actuary and instructed them to advise her on possible pension loss, in a range of scenarios.

13. The respondent subsequently also instructed an actuary to advise them on pension loss in a range of scenarios.

14. The reports of both actuaries were produced to the tribunal and the parties rely upon their respective reports as setting out the basis on which this tribunal should make an award for pension loss.

15. Both parties had produced schedules/counter schedules of loss for the purposes of this hearing. We are grateful to both of them for the significant amount of work that has gone into preparing these documents and in seeking agreement where possible.

16. There is no agreement between the parties in respect of pension loss, either in respect of the period of loss for which compensation might be granted or on the rate of pay which might be expected at the point of retirement or on the assumptions that the respective actuaries should take into account.

17. We have not heard any live evidence from either actuary and each party has simply adopted the calculations within their respective actuarial reports as representing their submissions on pension loss.

18. No order was made for expert reports in this respect, and there is no joint report. The tribunal have accepted that the evidence is helpful in setting out two different approaches to the calculation of pension loss and is also helpful in giving a range of scenarios and the loss that would flow in that scenario using the assumptions of the particular actuary.

19. The claimant argues that in this case there is career long loss and that pension loss is therefore a complex calculation, and future loss of earnings and the consequent pension loss should be calculated according to the principles set out in the Ogden tables and latest government actuary report.

20. The respondent asserts that there is a shorter period over which loss of future earnings should be calculated and asserted, although not forcefully, that a simple calculation could be appropriate.

21. Each report has been drafted with the purpose of supporting the relevant arguments made by each party, and unsurprisingly the claimants actuary has made assumptions of a very long period of loss with a higher projected final salary, whilst the respondents actuary has made calculations based on a shorter period of loss and a lower award for pension loss.

22. However, neither report address the factual circumstances that we have found and therefore we are not able to use them other than by way of guidance to assess pension loss.

23. We have therefore considered how best to deal with this matter taking into account the guidance to employment tribunals on the best way to assess pension loss.

Pension Loss - Next Steps

24. Whilst the actuarial reports have been of some assistance in helping us to consider the approach to pension loss and whilst we have been able to make findings of fact as to the basis on which we intend to calculate these losses, the reports themselves have not assisted us in making a final decision as to what that loss is.

25. Our findings of fact and conclusions in respect of the period of future loss of earnings; the impact of the discrimination on the claimant's career progression and the claimants potential career progression absent discrimination are set out below.

26. We have not at this point been able to calculate a figure in respect of pension loss, because we have not been provided by either party with figures or calculations in respect of the scenario which we have found.

27. There are a number of approaches to the calculation of pension loss and before making a final decision we all agree that it is appropriate to invite the parties to discuss the matter, having read this judgment, with a view to reaching an agreement on the level of award of pension loss.

28. The parties are therefore invited to consider the following options

    28.1. The parties may decide to agree a notional figure between them in respect of pension loss, taking into account the facts found by the employment tribunal. The Tribunal would then give judgment for that amount if so required.

    28.2. Alternatively The parties may write back to the employment tribunal within 28 days seeking a further hearing at which they may provide further verbal evidence and the ET will then make an assessment based on the evidence before us at that point .

    28.3. The parties may consider whether or not to agree to instruct a joint actuary to determine the figure, and agree to be bound by that figure. In this case further directions must be proposed and agreed with the Tribunal.

    28.4. In the event of no agreement as to a way forward, the parties must write back to the ET after 35 days and request a listing for a 1 day Case Management Hearing, to consider how to resolve the question of pension loss.

29. If the parties are not able to agree a figure, then a further hearing will be listed to determine pension loss, on the basis of the findings and conclusions of this tribunal, and any further submissions made by either party and in accordance with directions which will be given if necessary.

Grossing Up – Next Steps

30. A matter arose during the course of this hearing in respect of the usual process of grossing up of awards of loss of earnings, and the applicability of the rules in this case. The parties have opposite views as to whether or not there should be grossing up of the award or not.

31. We have not finally determined this matter, but the principles which we consider applicable are set out below. We all agree that the difference in

approach of the parties must mean that there is a risk that, at some point in the future, the claimant may be subject to an order to pay income tax to the revenue in respect of any amount awarded by this tribunal which represent future loss of earnings. This is despite the respondent's submissions that any award made by this court is not in an award in respect of termination, because the claimant remains employed at the point of the remedies hearing.

32. Before we make a final determination, the parties are therefore invited to agree that, in the event that the tribunal determines that any award for future loss of earnings will not be grossed up, and subsequently a determination is made by a different court , the decision of which will bind this employment tribunal, that the award is taxable, so that grossing up would have been necessary, that the claimant will then apply to the employment tribunal for a reconsideration of the determination of grossing up, out of time, and that the respondent will give an undertaking

    32.1. not to oppose any such application and
    32.2. to agree to that matter only being reconsidered by the employment tribunal out of time.
    32.3. The consideration of the matter will of course be subject to any submissions that the parties may make.

33. The parties must seek to agree the approach, and write back to the ET and each other within 28 Days, setting out their position.

34. In the event that there is no agreement between the parties and no undertaking for the respondent, the panel will reconvene to determine the matter.

Pension loss discount rate

35. The claimant asserts that the appropriate rate that we should apply to pension loss, and future loss of earnings, for purposes of accelerated receipt is

-0.25%. The claimant refers to the government actuary report of August 2022 which had retained this rate.

36. Mr Sharma on behalf of Dr Sharma asserts that there is no need to deviate from this rate.

37. We accept that the reason for that figure being set in August 2022 was a recognition that money invested in 2022 would lose its real value over time, because of interest rates, amongst other matters.

38. Mr. Smith, counsel for the respondent asserts that whilst the rate of -0.25% has been the appropriate rate in the past, because of the level of interest rates and the rate of inflation, as at the date of hearing, and therefore the calculation date, it is no longer appropriate.

39. He argues that the tribunal should take account of the real-world situation and points out that a -0 .25% would mean an increase in the amount of pension loss awarded based on past inflation and interest rates, in effect giving the claimant an unjustified windfall.

40. Mr. Smith and the actuary instructed by the respondents consider that as at October 2023, the financial markets and interest rates and other factors affecting these matters have improved significantly so that any financial settlement in respect of future pension loss awarded by this tribunal could be expected to receive interest of 2.5%.

41. We remind ourselves that the tribunal is expected to take account of the impact of accelerated receipt, but also remind ourselves that we must make an award to compensate the claimant , not punish the respondent, and that we must have regard to the overall fairness of the level of any award. We accept that if we can make findings as a matter of fact, based on the evidence we have, that any future financial losses are likely to either decrease in value or increase in value as a result of being received in advance and invested that we should adjust any award accordingly.

42. We accept that the -0.25% rate was unusual and the result of some very particular financial circumstances in 2022/203, and we agree that there is some indication that matters have changed in recent months. However, no member of the panel is a financial expert and neither Mr Sharma nor Mr. Smith have called any one to give expert evidence before us.

43. We must therefore consider whether or not to deviate from the recommended approach which Mr Sharma sets out in his skeleton argument and if so, state why, and what rate if any should be applied.

44. We all agree that it is appropriate for us to take account of real-world changes since August 2022 and we all agree that as at October 2023 a rate of -0.25% is not inappropriate. From the evidence before us, from the submission made and taking notice of real world matters, we conclude on balance that, as interest rates having risen, and there being an indication of a slowing of inflation, that it is less likely, on balance for savings to lose value in the longer term.

45. We all agree that it is highly probable that a sum of money received in 2023, if invested, could be expected to at least retain its value. We cannot say whether there is any realistic expectation of any amount invested in 2023 gaining in value to any significant extent, although we accept that interest rates are higher at the point of writing than in the last 18 months.

46. Because we recognise that inflation remains high and that interest rates on loans remain high, on the basis of all the evidence we have before us we cannot conclude that investments will grow on the basis of 2.5% in the immediate future, as asserted by the Respondent actuary in the report. Whilst we recognise that any award of future pension loss might be expected, in Dr Sharma's case, to be invested for at least 15 to 20 years prior to the ordinary retirement age being reached, it is not possible for us to find , on the basis of the information that we have whether over that period of time an investment would be expected to grow a large amount or at all.

47. However, we do conclude from the evidence and submissions that there is a greater chance now of a longer-term investment keeping its value than losing value and therefore we make no award in respect of accelerated receipt either positive or negative.

ACAS Uplift

48. An award for compensation can be increased or reduced by up to 25% if the employer has unreasonably failed to comply with the relevant code of practise relating to the resolution of disputes. in this case the claimant argues that the relevant awards should be subject to the full 25% uplift the respondent disagrees and argues that, whilst there were failings identified within the grievance procedure, by the employment tribunal that any uplift should be no more than 10%.

49. The claimant raised an internal grievance about the failure to repoint her to the grade 9 post as well as other matters and we have made finding such a critical of the respondents handling of that process.

50. We remind ourselves that when making an adjustment under these provisions we must take into account the absolute value of any given uplift rather than just the percentage value we must bear in mind that if we do not do so, and the award yields A significantly large amount in absolute terms it will be an error of law we referred to the case of ***Acetrip Limited v Dogra UK*** UKEAT/0238/18/BA.

51. We have also taken into account the guidance in the case of Secretary of ***State for justice V Plaistow 2021 UKEAT/0016/20***, in respect of high value cases such as this one as follows:
    51.1. Identify the amount of the awards to which the uplift is applied
    51.2. Determine the appropriate level of uplift assessing the employer's level of culpability and any harm to the employee.
    51.3. Consider what that award would mean in monetary terms assessing this against both the totality of the award if the up lift is applied and the proportionality of the uplift itself

51.4. If necessary, adjust the percentage in light of the actual sums involved.

52. Further guidance has also been provided both in the case of ***Rentplus v Coulson [2022] EAT 81***

52.1. Is the claim one which raises a matter to which the ACAS code applies?

52.2. has there been a failure to comply with the ACAS code in relation to the matter?

52.3. was the failure to comply with the ACAS code unreasonable?

52.4. is it just and equitable to award an uplift because of the failure to comply with the ACAS code and if so by what percentage?

53. The first matter that we are required to consider is whether or not the claim is one which raises a matter to which the ACAS code applies and we find that it is.

54. We accept the submissions of the respondent that the only issue before the ET under the heading is the finding at paragraph 2.1 of the judgement (Paragraph 309-321) that the respondent refused to provide the claimant with notes of the selection process. Whilst the claimant did bring a number of claims in respect to the grievance procedure, we dismissed them on withdrawal at the outset of the hearing.

55. We found that there were five occasions when the claimant should have been provided with them, and we also found that the notes which we have seen were insufficient to demonstrate a fair and appropriate process by the respondents we found that Mr Rees had made no notes at all. We concluded that in the absence of a valid and truthful explanation from the respondent there was a deliberant decision by the respondent, on more than one occasion to prevent the claimant from seeing the notes, because she had raised the complaint of discrimination.

56. We all agree that this is a serious breach and that it contributed to the claimant's ill health and that it contributed to her subsequent injury to feeling

and the subsequent psychiatric illness. These are therefore the awards that should be subject to the uplift.

57. We conclude with that the failure to comply with the ACAS code was unreasonable and that it is just and equitable to award an uplift to the relevant parts of the claimant's award.

58. The failure to provide the claimant with the notes of the hearing caused the claimant significant distress and impacted upon her ability to challenge the internal decision and impacted on preparation for the employment tribunal hearing. However of itself it did not directly cause the loss of earnings, which were the result of the discriminatory decision made by Mr Rees.

59. We all agree that the in this case it is appropriate to consider an uplift in respect of the injury to feeling and psychiatric award only. Our starting point is to consider an uplift in the region of 10%, but we have also considered whether it a should be awarded on the whole of those awards, or only part of the awards.

60. We conclude that the 10% should NOT be applied to the entirety of those amounts because this was one of a number of findings of discrimination, all of which contributed to these losses.

61. We agree that the uplift of 10% should be applied to 25 % of the relevant awards.

62. We have therefore considered what the uplift would be on the total award compared to a percentage , and calculate that an a 10% uplift on 25% of those awards would be . On the total of those awards, the uplift would amount to nearly £8000.00. That would have an impact on the interest, and increase that award, in global term by £640.00. We conclude that the award on 25% , which would be a global figure of £2075.00, and which will be taken into account when calculating interest is the appropriate figure for ACAS uplift in this case.

Interest on the award – legal principles, findings and application to facts and conclusions.

63. The claimant claims interest on the relevant parts of the award at 8%.

64. The respond has made an interim award of £80,000.00 and asserts that there would be an injustice to the Respondent if the full interest was awarded on that sum, from the point of it being offered to the claimant to the point of its acceptance. The respondent states that there was significant and inexplicable delay on the part of the claimant in accepting that payment.

65. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803, provide that the tribunal may award interest for discrimination awards made I respect of

    65.1. past financial loss
    65.2. injury to feelings
    65.3. aggravated and exemplary damages and
    65.4. physical and psychiatric injury.

66. Interest is calculated as simple interest and the current rate set out in regulations is 8%.

67. Interest is awarded on injury to feelings awards from the date of the act of discrimination complained of, until the date on which the tribunal calculates the compensation.

68. The period of calculation for all sums other than injury to feelings awards is from the midpoint of the date of the act of discrimination complained of and the date the tribunal calculates the award.

69. Where payment of any of the sum attracting interest has already been made by the respondent, the date of payment is taken as the date of calculation of the award for those particular sums.

70. If the tribunal considers that series injustice would be caused if interest were to be calculated according to the above approaches, it can calculate interest on such different periods as it considers appropriate see for example regulation 6(3) of the T(IADC) regs 1996 and see Ministry of Defence v Cannock 1994 IR|LR 509 .

71. Interest is not awarded in respect of future loss.

72. In this case the first task of the ET is to identify the relevant period for any injury to feeling award, and the relevant period for any other loss awarded.

73. We have found that the first act of discrimination was when the claimant was treated less favourably than others by Gary Rees in January 2016. We found a further act of discrimination in 2017, and a failure to support the claimant in 2018/19. Whilst these matters were upsetting for the claimant, they did not lead to any loss of salary at the time, and nor were they the reason why we have made awards for injury to feelings or for Psychiatric injury. We accept that the claimant was upset about the her treatment on these occasions, but the primary cause of her upset and her deterioration in health, was the failure to support her or reappoint her to the grade 9 post, on 31 October 2020.

74. We all agree that the appropriate start date the relevant period of interest in respect of injury to feeling, and for the calculation of interest in respect of Psychiatric injury in this case is 31 October 2021.

75. The claimants' wages were reduced following her reversion to the grade 8 post from 1 January 2021. This is the start date for the calculation of the loss of earnings.

76. The end date of the relevant period is the date of the remedies hearing, at which these losses were calculated or the date of payment of the Interim payment relevant to the awards.

77. The claimant has received an interim payment of £80,000.00. We have not been told the date on which the payment was made to the claimant. The respondent does assert that the claimant was offered the amount, but refused to accept it immediately. The amount was not paid in respect of any particular

head of claim, but the respondent noted that the claim was not earning and was incurring expenses for medical e treatment. We therefore attribute the whole amount to the loss of earnings medical expenses and psychiatric injury.

78. The payment of an interim award was discussed at the case management hearing in the summer of 2023, and the Respondents statement that the interim payment would be offered was specifically intended to mitigate against the prejudice to the claimant of a delay whilst second expert was instructed. On the basis of the evidence we have, we have worked out interest on the basis that the interim payment was paid at the end of August 2023. If this is not correct, the parties may apply back to the ET for a reconsideration in respect of this matter, with suggested corrections to the calculations.

79. The total amount for the 4 relevant heads of claim (psychiatric award; Loss of earnings and medical expenses) is £79,232.64. Therefore, the interim payment covers the sum of those payments, and we calculate interest for the period ending with the date on which we have determined the payment to have been made.

Interest on injury to feeling

80. The injury to feeling award is £33,000 +£825.00 ACAS Uplift = £33825.00.

81. Interest is therefore calculated at 8% for the period from 31 October 2020 until 25 October 2023. This is a period of almost 3 years (less 6 days) .

82. Calculation is (8/100 x £33825.00 x 2) +(8/100 x £33825.00 x 11/12) + (8/100 x 33825.00x 6/365) = £8162.48

Interest on loss of earnings

83. The relevant period in respect of **loss of earnings** is the 1 January 2021 until 31 August 2023, or a period of 32 months. Taking the midpoint means that interest is payable for a period of 16 month, at 8% on a simple basis.

84. The calculation is therefore (£27546.00 x8/100) + (£27546.00x 8/100 x4/12) = £2938.24

Interest on Psychiatric loss

85. The award for Psychiatric loss, with ACAS Uplift is £50,000.00 + 1250 = £51,250.00. The period for calculation of interest I the mid point between from date of discrimination, 31 October 2020 until payment of the Interim award, 31 August 2023. This means a period of interest of 17 Months.
86. The Calculation is therefore (8/100 x £51,250.00) +(8/100 x £51,520.0 x 5/12) =**£5808.33.**

Medical expenses

87. The relevant period for the medical expenses is the midpoint between the Date of discrimination and the Date of the payment of the interim award. Which is 17 Months.
88. We find that the relevant amount of past medical costs is £1686.64. we make no award of interest in respect of the remaining medical costs as these are costs to be incurred in the future.

89. The calculation of interest is therefore (8/100 x £1686.64) + (8/100 x £1686.64 x 5/12) = **£191.15**

Findings of fact and Conclusions on heads of claim

The relevant medical records and expert medical reports

90. The claimant has disclosed a large part of her medical records including parts which predate and post-date the merits hearing.

91. Post hearing the claimant has received support for her mental health from the NHS and other professionals, attending video sessions and telephone sessions with mental health practitioners.

92. In November 2022 one therapist recorded that the claimant was worried about her job and being able to contribute financially. She, the claimant, felt she had no control and wanted to know why she was treated the way that she was. She could not understand how anybody could be so unreasonable to

their employee and she wants to know why she was being treated differently to others. She also wondered whether or not she would be able to leave her job, but was not in a position to think about that whilst at the same time being unable to think what would happen if she was mistreated again. Whilst awaiting the outcome of the tribunal she had concerns about returning to her workplace, regardless what the outcome was, but at the same time she didn't want to have to leave her workplace because she did not want to have to relocate. The claimant was concerned about additional travel time, and the financial impact of that on her family.

93. She asked *why, after doing everything right am I ending up with all these things I don't know what to do.* The claimant was recorded as reporting feeling very hopeless and stating that everybody else was suffering because of her. She was referred to a managing moods course for a period of six weeks from 28 November 2022 and she also took part in the *I talk* employment advice referral on the 23 November 2022.

94. At a therapy session on 7 March 2023 the claimant reported feeling like a big burden on her husband as she was not doing anything around the house. She had stopped going out of the house and hadn't met people and felt unable to trust anybody. She reported having thoughts of ending her own life which she said were very on and off. She stated she was trying to resist the thoughts and that whilst she had intentions to act on the thoughts, her husband was there and he doesn't leave her. She says if her husband wasn't around, she doesn't know if she would act on her thoughts but she feels safe when she was with her husband.

95. We find as fact that the notes record true statements from the claimant about how she was feeling at the time of the meetings.

96. We do not have evidence as to how long the suicidal ideations lasted but we do find that in March 2023 at least the presence of the claimant's husband at home was an important factor in managing the claimant’s poor mental health.

97. The claimant said that an escalating factor was the lack of repercussions for her line manager's actions, but also said that she did not wish to act on her thoughts because she had the responsibility for her children and she loved them and she did not want her family to suffer. We find this was true.

98. The claimant had returned to work for a short period of time in May 2022 and had found the process extremely stressful and felt that she was being treated unfairly while she was at work. She had started another period of sickness absence. We find that second period resulted from the injury caused to the claimant and was the result of her feelings about her workplace. We find that the Respondent had tried to make reasonable adjustments for the claimant, but that the claimants mental health was too fragile for her to be ready to return to work. The cause of her second period of ill health was the discrimination and the impact that it had had on the claimant, and not the treatment of her when she returned.

99. The claimant then attended a further occupational health appointment on the 5 May 2023 regarding her fitness to return to work.

100. The consequent report stated that Dr Sharma remained unfit for work and that there were no adjustments that she could advise that would enable the claimant to return to work at the university. It was recommended that an agreement was reached regarding the claimant's future employment at the university.

101. The report notes that Dr Sharma was distressed throughout the consultation and that the exploration of workplace situation was distressing to the extent that the practitioner asked to speak to the claimant's husband who was then able to explain the background.

102. We find that in May 2023 claimant was suffering with serious ongoing depression and anxiety symptoms, and that although her medication had been changed and she was on a maximum dose of the new medication, she was not getting benefits from it. She was on the waiting list at that time

for psychological therapy but there were no other therapies planned and she had not at that point being referred to specialist psychiatrists via the NHS. She was seeing a psychiatrist privately.

103. Occupational Health recorded that Dr Sharma stated she had had no previous mental health problems and recorded that rather than the claimant having an underlying mental health condition impacting on her capacity for work, it was a situation where the workplace situation itself had the impact upon her mental health.

104. This is also the view expressed by the subsequent experts and we find as fact that this was the cause of her mental health impairment and her subsequent illness and disability.

105. The OH considered that psychiatric intervention may be helping to manage the psychological impact on her, and that it was unlikely that her health would improve until the workplace issue was resolved.

106. The OH practitioner also stated that it was her opinion that returning to the university would be detrimental to the claimant's health because it would be likely to further heighten her severe symptoms of anxiety and depression. The recommendation that *an agreement is reached regarding her future employment at the university* is repeated and it is stated that it is likely that the claimant would be covered by the Disability Discrimination Act (sic). The employment tribunal has no evidence before it of any steps that may have been taken to resolve matters in that way, but if any steps were taken, they were unsuccessful. The tribunal is aware that the respondent recognised its liability to the claimant was likely to be significant and has made an interim payment in respect of compensation to her prior to the remedies hearing.

107. The view expressed is in line with the expert opinions and we accept this evidence. We note and find that the claimant had returned to work for a period of time and found the experience to be extremely stressful.

The exit of Professor Rees from the organisation

108. In April 2023 the claimant had been copied into a series of emails about the informal leaving drinks organised for Professor Rees.

109. We find that the claimant found this extremely distressing and considered that the fact that an event was being organised showed that Mr Rees was leaving the organisation in a positive way despite the findings made by the employment tribunal.

110. The nature of the emails suggests that a number of staff were getting together to a celebrate or say farewell to him, and we understand why the claimant, who was off sick following findings of discrimination by an employment tribunal, would find the emails and the implications within them to be distressing.

111. However, we also observe that since the claimant remained employed it was not inappropriate for her to be copied into emails sent generally to a group. It might have been inappropriate, in fact, for her to have been removed from group emails.

112. In addition, we find that these emails were the result of actions by individual members of staff who wanted to organise to say farewell to Professor Rees rather than anything organised by the respondents on a corporate basis. The employment tribunal makes findings of fact about the respondent's actions in respect of Mr Rees which are set out below.

The expert Psychiatric reports

113. Following the promulgation of the employment tribunal judgment in November 2022 it was agreed between the parties that expert psychiatric evidence would be helpful to assist the tribunal in assessing damages and the parties agreed to instruct a joint expert.

114. The expert appointed was Dr Arvind Kumar Gupta a substantive consultant in psychiatry with the Coventry and Warwickshire partnership NHS Trust. He saw the claimant on the 28 January 2023 and on the 4 February 2023 and produced a report dated the 1 March 2023.

115. Doctor Gupta was asked to provide an opinion of the claimant's diagnosis and the claimant's prognosis and to explain the extent of her injury. If his diagnosis was that there was a personal psychiatric injury, he was asked to advise on whether the discriminatory treatment of the claimant by the respondent had caused any injuries.

116. He was asked to what extent the acts of the respondent were believed to be causative; whether there had been any intervening act and to review the claimant's medical records. He was asked

    116.1. to identify whether there was a pre-existing issue and
    116.2. whether discriminatory treatment may have exacerbated the claimants pre-existing issue issues.
    116.3. whether the claimant was displaying symptoms of burnout and
    116.4. whether the resolution of the dispute provided the claimants the opportunity to return to work.
    116.5. whether the time the claimant had off work had been reasonable and to advise when he considered the claimant would be able to return to work.
    116.6. what recommendations if any could be made to assist the claimant to return to work and
    116.7. whether if there was a psychiatric injury caused by the respondent, which made it likely that the claimant would suffer relapses in the future and if so to explain the likelihood of this occurring.
    116.8. to comment on medical treatment received, whether it was reasonable, whether their recommendations had been followed by the claimant and whether she required further treatment.
    116.9. how long further treatment would be required for and what the estimated cost of it might be;
    116.10. whether the claimant would make a full recovery
    116.11. whether she was likely to suffer ongoing mental health issues and if so for how long
    116.12. whether there was a likelihood of deterioration after the proceedings.

117. He was asked further questions about what the claimant might be able to do in the future; how her family relationships were likely to be affected and whether or not she would be considered to have a disability.

118. In his report Dr Gupta recited findings of the employment tribunal and then set out the claimant's psychiatric history. He reviewed her hospital records and noted chest pains due to work related stress following demotion from work in March 2021 and anxieties due to work on a number of occasions throughout the remainder of 2021 and 2022. In particular he noted she was very anxious facing her manager at the employment tribunal in October 2022 and that she was anxious about the tribunal outcome.

119. He set out the claimant's past psychiatric history and records that prior to these incidents the claimant stated that she had had no issues of concern.

120. Dr Gupta diagnosed the claimant as suffering from an adjustment disorder, a prolonged depressive reaction, post traumatic stress disorder, and complex problems relating to employment and as a result of her being the target of perceived adverse discrimination and persecution.

121. He stated that the impact of the trauma was severe and deep rooted. He said *due to the nature and complexity of the stressful events and its long term effects on her personal social and occupational functioning Dr. Sharma is unlikely to recover completely. It is not possible to indicate the recovery in mental health in concrete figures.*

122. He concludes that her mental ill health was directly due to the behaviour of the respondent.

123. He notes that there were no pre-existing issues and no pre-existing poor mental health. This is not in dispute between the parties.

124. In respect of dispute resolution, he records that Dr Sharma felt relieved that she had been heard, but still felt that injustice or justice had not been bestowed on her. He notes that *a justified resolution of the conflict is likely*

to provide relief to Dr. Sharma but states *it is unlikely that she will have a full recovery as the adverse events have affected her significantly have dented her confidence made her feel worthless and has taken her identity away from her.*

125. Regarding the return to work he comments that she would struggle to continue to work in the same environment if the respondent or other significant people continued to have influence.

126. He considered it was highly unlikely on balance of probabilities that Dr. Sharma would to return to work in the same or similar environment *as there will be numerous cues that will trigger anxiety and post traumatic symptoms* . He suggested that triggers might be in the form of university environment; classrooms; students; colleagues; a similar looking manager or even subject books for example.

127. He considered that the treatment she had received was reasonable and that the claimant had followed the strict treatment.

128. Regarding future treatment for the claimant, he did not consider that Dr. Sharma would be able to return to the same level of work for the foreseeable future. It was unlikely that she could return to university Portsmouth in any role, even with treatment.

129. Dr Gupta reported that the claimant had suffered adverse reactions two events at the university, and we have reminded ourselves of the findings which we have made as to liability. We remind ourselves that we made no findings of victimisation and dismissed those parts of the claimants claim. We remind ourselves that we are only concerned with injury and loss which flows from the acts of discrimination which we have found.

130. In this case we take particular note of the conclusions that the discrimination caused the claimant’s injuries and psychiatric illness. We find as fact that this is right, and there is no dispute between the parties about this. We also find that the claimant was further affected by

returning to a workplace in which Professor Rees was still employed. We understand that following the liability judgment Professor Rees did leave the university and we make findings in respect of that elsewhere in this judgment.

131. Dr Gupta thought she may struggle to work in academia as it would remind her of past problems, but that she may be capable of returning to part time paid employment at a lower scale in a couple of years. He considered there was a high possibility that she may never be able to return to the same level of work as she is in now.

132. He noted the claimant was not functioning in her activities of daily living, and that she was not looking after the needs of her children and her husband was working part time from March 2019 to provide periodic support needed by Dr Sharma. He does not identify what that support is, or express any opinion as to whether it was necessary, or a choice of a concerned husband.

133. In respect of post-traumatic stress disorder he sets out the international classification of mental and behavioural disorder ICD 10 as a delayed and or protected response to a stressful event or situation either short or long told term of an exceptionally threatening and catastrophic nature which is likely to cause pervasive desperate distress in almost anyone typical symptoms include repeated reliving of the trauma in intrusive memories, flashbacks and Dreams.

134. Following receipt of this report it was agreed by the ET that the respondent could instruct a second expert, as there were some exceptional circumstances. The reasons for that decision were communicated to the parties at the time and are not repeated here. The respondent instructed Dr Paul Mallett, a consultant psychiatrist.

135. The ET had borne in mind the different context in which the two reports are provided to the tribunal. That of Doctor Paul Mallett is produced

following instructions from the respondent alone, with no agreement about the questions to be asked.

136. Dr Mallet states in his report that he has been asked to examine Dr Sharma and comment on her diagnosis; causation; her prognosis and in what respects and circumstances she might be able to return to work.

137. He saw the claimant on the 22 May 2023 via a video link.

138. Doctor Mallett states that he did not have a full set of medical records.

139. His summary opinion was that the claimant had experienced an insidious onset of a severe depressive disorder since at least early 2023. He observed that currently it would prevent her from returning to work except in employment of a routine and repetitive nature. He also noted she had phobic anxiety about going out of the house and returning to her place of work. He suggested that absent the discriminatory events, she would not have developed any serious depressive disorder, although he suggests she might have developed a short term adjustment disorder in relation to her family events.

140. He says that her depression has been treatment resistant despite the ET findings and suggests that a comprehensive fresh start post resolution of the ET case with specialist psychiatric follow up and the provision of expert psychological treatment will be required. *If those things are done, he expects there to be substantial improvement in her psychological state and anticipates that she would be able to return to some form of academic post in tertiary education, although not at what she describes as her previous upward trajectory. He also accepts that she will be vulnerable to depression in the future and that there will be periods of time when she will not be able to work and function as previously.*

141. The relevant part of his conclusions are set out a paragraph 4 onwards in his report.

142. First he recognises that the claimant will need a comprehensive fresh start in different employment in order to enable her to enjoy a substantial recovery. He recommends some specialist psychiatric follow up and suggests a number of sessions may be required. He acknowledges that the claimant had not responded to first line psychological treatment and recommended the provision of broad based CBT delivered by an experienced psychologist.

143. His prognosis is that with treatment there could be unexpected and substantial improvement in Dr Sharma's psychological state. He points to the removal of significant ongoing psychological stresses which should improve her prognosis.

144. He considers that on balance of probability she should recover to the point where she will be able to return to some form of academic post in tertiary education although he does not consider it reasonable to expect her to return to employment with the respondent.

145. He accepts that at the point of his report she was not capable of meaningful employment beyond the mundane and low level and accepts that she will be vulnerable in the future.

146. He suggests that Dr Gupta 's language in describing the claimant's symptoms as *reliving the experience of the horrific trauma that she suffered at the hands of the respondent* as melodramatic and not supporting the characterization of his subsequent symptoms as suggested of suggestive of PTSD type symptoms

147. He does not agree that the claimant developed PTSD. He considered that the type of adverse employment situation as described by Dr Sharma and as found by the employment tribunal was not within the range of experience that would be considered to support a diagnosis of PTSD. In other words, he considers that the claimant does not meet the entry criteria for the disorder.

148. He also takes issue with the alternative view expressed by Dr Gupta that the claimant is unlikely to recover completely. He suggests that if the claimant is suffering from an adjustment disorder, the removal of the stressful circumstances, by resolution of the legal case for example and alternative employment, that this ought to be enough to remove the underlying psychological reaction.

149. He does not consider that the claimant has PTSD and therefore does not consider that she required EMDR treatment.

150. Following the provision of the two reports Dr Mallett and Dr Gupta produced a joint report setting out the areas of agreement. These are summarised as follows. They agreed that

150.1. the combination of depressive and anxiety symptoms would make it difficult for Dr Sharma to undertake regular employment and both saw little prospect of her returning to her previous employment unless there was significant improvement.

150.2. absent the index event, her other family difficulties would have resulted in a temporary adjustment disorder lasting no more than a year and not causing any significant disability. Both agreed that the best prospect for improvement in doctor Sharma's health was resolution of the legal case and a fresh start opportunity in relation to employment, coupled with some specialist psychiatric follow-up addressing her need for more complex drug treatment and some experts psychological help.

150.3. That Dr Sharma should improve substantially with that treatment, particularly once the case is resolved. Neither thought on balance of probability that she would return to her previous high level of functioning, but both agreed that she may be able to return to an academic post in an alternative university in the future. Both agreed that she would remain vulnerable to recurrent depression in the future and that episodes may have a temporary though

significant functional impact on her when they occurred. Both considered reasonable to estimate that she might experience such episodes every ten years or so.

151. We accept and adopt the joint findings as findings of fact.

152. We reject the contested conclusion of Dr Gupta that the claimant suffered from PTSD. We prefer the opinion of Dr Mallet in this respect. The reason for this, is that we find that Dr Gupta has given an opinion which is worst case scenario. Dr Mallet has given a much more optimistic prognosis. We all agree that despite this, the criticisms made by Dr Mallet of the diagnosis of PTSD are fair, and raise sufficient doubt.

153. We find that the symptoms are not really in dispute, but the future impact on the claimant is. We conclude that the claimant, whilst suffering from the symptoms described and agreed by the experts, is not properly diagnosed as suffering with PTSD. This is of particular relevance to the level of psychiatric award, and injury to feelings, as well as our assessment of future loss of earnings.

154. At its highest the evidence suggests this is a possible diagnosis. We conclude that the claimant has proved on balance of probabilities that this is the right diagnosis.

155. One particular matter which we have considered is whether or not there is any basis on which we can conclude that the claimant may suffer a relapse of mental health, as suggested by Dr Gupta, as a result of seeing text books or materials related to her previous work, or by being in an academic environment of any type.

156. We understand that this is a possibility, but find that it is at the extreme and we conclude that it is not a likely consequence but rather a possible one. We have therefore taken this into account when considering future employment, as a factor that may delay the claimant returning to a similar level of work, rather than one which would prevent it.

Relevant legal tests

157. If an employment tribunal decides to award compensation, then it must be calculated in the same way as damages in tort (or in proceedings for reparation in Scotland) — S.124(6) in combination with S.119(2)(a) and (3)(a) EQA. The aim, as the EAT put it in *Ministry of Defence v Cannock and ors* 1994 ICR 918, EAT (a sex discrimination case), is that 'as best as money can do it, the applicant must be put into the position she [or he] would have been in but for the unlawful conduct'

158. When assessing damages for discrimination this means that the tribunal must ask what position would the claimant have been in had the discrimination not happened.

159. This exercise inevitably involves the tribunal speculating about what might have happened and considering unpredictable factors.

160. We remind ourselves that the claimant is entitled to be compensated for losses or harm caused directly by the act of discrimination. See *Essa v Laing Ltd* 2004 ICR 746, CA,

161. We also bear in mind that the eggshell skull principle applies to losses arising from discrimination. This means that the discriminator takes the victim as they find them and that they will therefore be liable for damages even if the loss or damage suffered by a claimant in a particular case is significantly worse than loss or damage suffered by a claimant in other similar types of case. We also remind ourselves that there are no upper limits on the awards that unemployment tribunal can make. The principle is that we must compensate in full for the loss suffered. This means that we must assess what losses of earnings or injury to feeling can be set to flow from the discrimination rather than considering what it might be fair or just to award.

Injury to feelings

162. The concept of the injury to feeling award was summarised in *Vento v Chief Constable of West Yorkshire Police (No2)[2002] EWCA Civ 1871, [2003] IRLR 102*, as:

An injury to feelings award encompasses subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression.

163. In trying to understand the nature of what injury to feelings means, understanding the differences, similarities, overlap and boundaries with psychological injury can be helpful.

164. In *Essa v Laing* [2004] IRLR 313 CA, per Pill LJ, the Court of Appeal considered the relationship saying: -

41………..Injury to feelings will most frequently occur, of course, without there being a psychiatric illness but both may result from the conduct complained of. They are different, as stated by Stuart Smith LJ in Sheriff, but they are not, in my judgment, different kinds of damage in the sense contemplated in cases such as Hughes.

Loss of earnings

165. When considering future loss of earnings, the tribunal is likely to have to engage in an exercise of speculation based on the tribunal's assessment of the claimant, including her attitude and her abilities and the relevant job market. (see *Griffin v Plymouth Hospital NHS Trust* 2015 ICR 347, CA)

166. In *Atos Origin IT Services UK Ltd v Haddock* 2005 ICR 277, EAT, the EAT summarised the main principles governing the assessment of future loss. They are:

166.1. unless a future loss is certain to occur or a chance that it will not is so small that it can be disregarded, the chance that it will not occur must be allowed for;

166.2. as in personal injury cases, the ordinary contingencies of life must be allowed for;

166.3. credit must be given for acceleration of receipt;

166.4. compensation will be assessed on the footing that the claimant will take reasonable steps to mitigate his or her loss. The award will be abated by the amount by which the loss would be reduced if he or she were to do so;

166.5. subject to two well-established exceptions, the claimant is not entitled to compensation for a loss which will in fact be avoided. The exceptions are that payments resulting from the benevolence of third parties and from an insurance policy for which the claimant has paid or contributed to the premiums are not to be taken into account;

166.6. to the extent that it is uncertain that a loss will be avoided, the chance that it will be, must be estimated and appropriate credit given.

167. When assessing future loss of earnings, we remind ourselves that we must consider any benefits and bonuses that might relate to the relevant employment. In this case we are told that the claimant has suffered loss of earnings and pension loss. We are also told that there is an associated benefit for loss of employment which we address below.

168. In calculating future loss of earnings we must consider the chance that the claimant, but for the discrimination, would have continued in her employment until retirement . This requires the assessment of a chance based on the material which is available to the employment tribunal at the time. See for example in *Vento v Chief Constable of West Yorkshire Police (No.2) 2003 ICR 318, CA* since such an assessment of chance involves a forecast about the course of future events, it should not be approached as if the tribunal were making a finding of fact based on a balance of probabilities.

169. In *Wardle V Agricole Corporate and Investment Bank* 2001 ICR 1290, the Court of Appeal gave further guidance as to the approach to be adopted in assessing future loss of earnings.

170. In summary as set out in Harvey on industrial relations and employment law, division L 881.01 it states as follows:

170.1. Where it is at least possible to conclude that the employee will, in time, find an equivalently remunerated job (which will be so in the vast majority of cases), *loss should be assessed only up to the point where the employee would be likely to obtain an equivalent job*, (ET emphasis) rather than on a career-long basis, and awarding damages until the point when the tribunal is sure that the claimant would find an equivalent job is the wrong approach; This is a key point for our calculations and we have reminded ourselves of it when calculating future losses of earnings , as set out below.

170.2. In the rare cases where a career-long-loss approach is appropriate, an upwards-sliding scale of discounts ought to be applied to sequential future slices of time, to reflect the progressive increase in likelihood of the claimant securing an equivalent job as time went by;

170.3. Applying a discount to reflect the date by which the claimant would have left the respondent's employment anyway in the absence of discrimination was not appropriate in any case in which the claimant would only voluntarily have left her employment for an equivalent or better job;

170.4. In career-long-loss cases, some general reduction should be made, on a broad-brush basis (and not involving calculating any specific date by which the claimant would have ceased to be employed) for the vicissitudes of life such as the possibility that the claimant would have been fairly dismissed in any event or might have given up employment for other reasons.

171. In assessing future loss, a tribunal will have to make decisions about the chances that employment would have continued had the discrimination not

taken place. It is important that this is done by calculating the percentage probabilities, and *not* on a simple balance of probabilities. That approach was endorsed by the CA in *Vento v Chief Constable of West Yorkshire Police (No 2)* (see per Mummery LJ at [32]–[33]) ,

172. In this case we conclude that the claimant would have been highly likely to remain in employment with this employer for the remainder of her working life, at a 70% chance.

173. We remind ourselves that it is only appropriate to award career long loss if we consider that the claimant's chances of obtaining alternative employment in the future are slight or non-existent. We remind ourselves that career long losses can be awarded, but that cases in which they are awarded are likely to be exceptional. In *Wardle v Crédit Agricole Corporate and Investment Bank* 2011 ICR 1290, CA, Lord Justice Elias (who also sat in Chagger) held that future loss should only be assessed over a career lifetime in rare cases — where a tribunal considers that an employee has no prospect of ever finding an equivalent job. In most cases it will be fair to assess loss up to the point where an employee would be likely to obtain an equivalent job. In this case, we have assessed the claimant's chances of obtaining future employment at the equivalent to a grade 9 position as being highly likely after 10 years. We therefore conclude that her losses end at that point.

174. In *Abbey National plc and anor v Chagger* (above) emphasised that where, on the evidence, a tribunal is satisfied that there is some prospect that a non-discriminatory course would have led to the same outcome — for example, where it is likely that the claimant would have fairly been made redundant had he or she not been dismissed for discriminatory reasons — the tribunal must reflect that possibility by making an appropriate percentage reduction to the overall sum for future loss. There was no evidence before us that the claimants employment would have ended other than by retirement, had it not been for the discrimination. There was no evidence of any other health conditions or any other reasons why the claimant would not have continued working to retirement

and her evidence was that she would do so. We find that this was her in intention and that it was highly likely given her strong commitment to and enjoyment of her work.

175. In *Wardle v Crédit Agricole Corporate and Investment Bank* (above) the Court of Appeal held that a reduction from the overall award for future loss should also be applied to reflect the uncertainties and vicissitudes of life (such as the possibility that the claimant would have been fairly dismissed in any event or might have given up employment for other reasons). That is, however, a general reduction calculated on a broad-brush basis: it does not involve calculating any specific date by which the claimant would have ceased to be employed.

176. Where an award is made in respect of financial loss which results in an upfront and lump sum payment it is usual to apply a discount rate to take into account the benefit to the claimant of having received the sum of money early. This is based on the assumption that the money received will be invested and can be used to yield growth. This is referred to as accelerated receipt.

177. The question of what rate will be relevant has been considered by the EAT.

178. In *Benchmark Dental Laboratories Group Ltd v Perfitt* EAT 0304/04 the EAT considered the appropriate discount rate. The EAT pointed out that the rate prescribed for use in personal injury cases was set at that time by the Lord Chancellor pursuant to S.1 of the Damages Act 1996. The Damages (Personal Injury) Order 2001 SI 2001/2301 then prescribed 2.5 per cent as the assumed rate of return on investment of awards of personal injury damages. Although employment tribunals *were not bound by this discount*, (our observation) the EAT observed that it would be good practice for them to adopt it.

179. For the purposes of this case, the relevant provisions(the *Damages (Personal Injury) Order* 2019 11/26, set the discount rate at -0.25% from August 2021. This means that any award would in effect be increased. We observe that in a discrimination claim we should apply a discount rate appropriate to our jurisdiction and we also observe that we are not bound by this figure. We take this into account however and address the matter above and below in our findings of fact and conclusions.

Aggravated damages

180. The claimant has made a claim for aggravated damages and referred us to *HM Land Registry v Mcglue* 2013 EQLR 701.

181. In that case the court stated that the distress caused by an act of discrimination may be made worse by being done in an exceptionally upsetting way. The examples are of high handed, malicious, insulting or oppressive behaviour, or that which is motived by conduct based on prejudice, animosity spite or vindictiveness. Such behaviour is likely to cause more distress, provided the claimant is aware of the motive.

182. Conduct of a party at trial where a case is conducted in an unnecessarily offensive manner or a serious complaint is not taken seriously or there has been a failure to apologise the example might also be grounds for making an award of aggravated damages. (see for example *Prison Service v Johnson; HM Prison Service v Salmon* 2001 IRLR 425 and *British telecommunications v Reid* 2004 IRLR327.)

183. The court reminds us that the categories are not exhaustive and the emphasis is one of degree.

Pension loss

184. Guidance on calculating compensation for pension loss in employment tribunals, 'Employment tribunals — Principles for Compensating Pension Loss' (4th edition, 2017), was published, along with Presidential Guidance issued jointly by the President of Employment Tribunals (England and Wales) and the President of Employment Tribunals (Scotland). This edition was most recently revised in March 2021.

185. The addendum to the Presidential Guidance states that 'the Presidents expect that Employment Tribunals will have regard to the current version of the *Principles* when calculating compensation for pension loss.' However, although the original tribunal guidelines were generally approved by the EAT in *Benson v Dairy Crest Ltd* EAT 192/89 and guidance on assessing pension loss has been gratefully adopted by tribunals, it should be stressed that the guidance remains only guidelines and, as such, has no statutory force.

186. In *Bingham v Hobourn Engineering Ltd* 1992 IRLR 298, EAT, the Appeal Tribunal held that the tribunal did not commit an error of law when it failed to follow exactly the scheme recommended in the then extant guidelines. Mr Justice Knox said the booklet was a 'valuable guide' but added that the factors in each case should be evaluated to see what adjustment should be made or whether, in the circumstances, the guidelines were a safe guide at all. The Court of Appeal has since reiterated that 'it should not be assumed that [using the tribunal guidelines] will be the correct approach in every case' . (See *Griffin v Plymouth Hospital NHS Trust* (above).

187. In *Greenhoff v Barnsley Metropolitan Borough Council* 2006 ICR 1514, the EAT held that an employment tribunal had erred by failing to explain why it had adopted the approach it had, in preference to either of the approaches set out in the then guidelines. In so holding, the EAT suggested that tribunals could avoid many of the problems that arise in such cases by:
    187.1. Identifying all possible benefits that the employee could obtain under the pension scheme;
    187.2. Setting out the terms of the pension scheme relevant to each benefit;
    187.3. Considering in respect of each such possible benefit, first, the advantages and disadvantages of applying the respective approaches set out in what are now the tribunal Principles, and, secondly, any other approach that might be considered appropriate by the tribunal or the parties

187.4. Explaining why it adopted a particular approach and rejected any other possible approach; and

187.5. Setting out its conclusions and explaining the compensation arrived at in respect of each head of claim so that the parties and the EAT can then ascertain if it has made an error.

188. In this case as explained in the body of the judgement the tribunal have been provided with two very different actuarial reports in respect of pension loss and differing approaches to the calculation of future loss of earnings.

189. With regards pension loss we agree that our starting point should be the presidential guidance. The pension calculation in this case is not a simple calculation, it is properly characterised as complex. The reasons that the employment tribunal determines this are set out in the body of the judgement. We have therefore reminded ourselves of the seven steps model set out in the guidance and relevant to a complex case such as this one, where the pension losses derive from a final salary and a career average scheme.

Findings of fact and conclusions regarding heads of claim.

Injury to feeling

190. We have heard evidence from the claimant herself about how the discrimination has impacted upon her and we have heard evidence from the claimant 's husband Mr Sharma about the impact upon his wife and their family.

191. We have heard evidence of the impact that the discrimination has had on the claimant's health, from 2 experts as referred to earlier in this judgment, and we consider an award in respect of psychiatric injury separately to injury to feeling. The medical reports; the doctor's notes and the observations of occupational health all provide further evidence of how the

claimants feelings have been injured, which have assisted us in assessing the correct level of award in this case.

192. Prior to the discrimination, the claimant's expectation was that if she worked hard and treated people well, she could expect to succeed and to progress in her career. We find that this fundamental life view has been shattered, by her realisation, over a period of time and culminating with our judgment, that she could be held back and have career chances destroyed because of her race.

193. We find that her confidence about her place within her community and her pride in her work and her status have been severely affected. We accept the claimant's evidence and the evidence of Mr Sharma, and the evidence of medical advisors that one impact of discrimination in this case is that the claimant finds it very hard to leave the house because of her concern about meeting people she knows and having to explain again what has happened.

194. The claimant clearly loved her work and was rightly proud of her achievements. She wanted to progress further and we accept that she is upset at the loss, for now at least, of career opportunities. We also accept that this is not simply a concern about loss of income although that is part of it, but is about loss of status and loss of meaningful and satisfying work.

195. We also accept the evidence from the claimant and from Mr Sharma of her loss of enjoyment of her family, and her difficulty in assisting and contributing to family life.

196. Whilst the hurt that the claimant has experienced was not immediate, once she started to think that her race was a factor, she became very upset and has continued to feel extremely hurt throughout the internal grievance procedures and throughout the court proceedings.

197. Following the determination of liability and the findings that she had been discriminated against on grounds of race, we accept that the injury to her feelings has continued and have not improved since receipt of the

judgment on liability. We also conclude that separately, her health has been damaged.

198. We find that she has suffered hurt feelings from the point that she raised her initial grievance with the respondents up until at least the point of the remedies hearing. We anticipate that she is likely to continue experiencing feelings of hurt for a significant time to come and we anticipate that the effects of those hurt feelings, being related to the loss of enjoyment in family life and the loss of enjoyment of a career, are likely to last for some further time whilst the claimant receives more intensive medical help and support.

Aggravating factors and Aggravated damages

199. We have considered whether or not there are any aggravating factors should impact on the level of award we make for injury to feelings, or alternatively whether we should make any separate award for a prior to aggravated damages. We have considered this before determining what that award should be.

200. The claimant refers to matters which have occurred after our judgment was made in this case. We reminded both parties that these matters are not the subject of the judgment. They are not matters which flow from the discrimination and we have heard no evidence about them, because there is no claim before the ET in respect of them. These matters may well have upset the claimant, but we cannot make any finding about why things happened or whether the claimant was treated fairly unfairly or otherwise. These matters cannot be the foundation of a claim for aggravated damages.

201. Whilst we have ignored events which took place after the acts of discrimination we have found, we have considered whether or not there are any factors which might have had an aggravating impact on the Claimants injury to feeling. The claimant has referred to the way Mr Rees was treated by the university, for example.

202. We have heard evidence from Fiona Hnatow. She was appointed in April 2022 as Chief People Officer and gave evidence as to the steps that the university has taken and continues to take as a result of the issues raised by Dr Sharma and the lessons learned from the judgement. We accept her evidence as a true statement of actions taken by the university since the claimants claim, but do not accept that all of them were the result of the claimants claim to the RT. None the less we do accept that the Respondent has made a serious effort to address the criticisms and findings of the tribunal.

203. In her witness statement she says on behalf of the university *I would like to apologise for the conduct found to have been unlawful and for the impact this has had on D. Sharma and her family. There are no excuses for race discrimination at the university and we recognise and accept the strength of the tribunal's judgement.*

204. She confirms and we find as fact that Mr. Rees is no longer employed by the university. She states that whilst he was initially appointed to the head of school position in July 2022, as a direct result of the employment tribunal hearing and judgement he was asked to step down from a leadership role. He then left the university early in March 2023 with a confidential agreement. We find that this is what happened.

205. She also states and we accept, that whilst there were some steps taken to bid him farewell this was a matter for him and his friends and was not a university endorsed event.

206. She told the tribunal and we accept that following a restructure of the OSHRM subject group in the summer of 2022 there are now 4 associate head roles, including academic students; global and associate head and research and innovation.

207. We accept her evidence that training for managers who have responsibility for hiring staff has been improved and we also accept her evidence that

training in respect of unconscious bias commenced in the autumn of 2022 for staff. We also accept evidence but that all colleagues are being trained in something called positionality training, which looks at the experiences and beliefs and identities of others in order to tackle potential biases and shape how individuals understand and engage with other people,

208. We note and accept as fact the development of an inclusive leadership programme with a strong focus on equality and diversity and note that nearly 800 colleagues have already taken part in the programme, including all members of the university executive board. We accept that this started in 2022 and find that this is an important process.

209. Perhaps of key importance is the fact that use of the five year fixed term contract for heads of school and associate head positions has now ceased. When fixed term contracts which are still in existence come to an end, the roles will be recruited to on a permanent basis, following a robust, closely managed selection process. We accept that this is the intention of the Respondent. We also find that head of school roles must now be externally advertised.

210. We also find that the university has restructured the academic operating model, introducing more deputy roles into the structure.

211. We accept the evidence that voluntary diversity champions have been created to work across faculties and professional service departments and form part of all selection panels. The role is to promote equality across the institution and the remit is being reviewed by a newly appointed head of equality and diversity.

212. We accept the evidence that there has been a change in recruitment and selection with human resource is taking on a more hands on approach. We find that there has been a new equality and diversity team set up within human resources,

213. Whilst some of the matters described to us appear to be developments which the university would have pursued in any event, we accept that a significant amount of work has been done at the university of Portsmouth in order to address the shortcomings identified and raised by Dr. Sharma in this employment tribunal process.

214. Having considered the facts in this case and having considered the legal parameters in respect of aggravated damages, and the case law referred to particularly by Mr Sharma in his submissions, we all agree that this case is different in a number of key respects from the case law we have been referred to him.

215. First, the Respondent did take steps under its disciplinary process in respect of Professor Rees following the Decision of the ET.

216. Secondly an apology has been given, all be it in the course of the remedies hearing. It is an apology set out in a witness statement made on behalf of the university.

217. Thirdly the respondent clearly has taken significant steps to address issues of equality and diversity in the months following on from the claimant bringing her claim and the tribunal giving its decision.

218. The claimant in this case claims £15,000 for aggravated damages. We remind ourselves of the reason why aggravated damages can be awarded and also remind ourselves of the difference between aggravated damages, and costs for unreasonable conduct, and aggravated damages and the ACAS uplift.

219. In this case we are making an award in respect of ACAS uplift because of the conduct of the respondent in dealing with the claimant's complaints and grievances. The Respondent has agreed to make a payment in respect of costs on the basis that there was some unreasonable behaviour in the way that the case was dealt with.

220. We have made an award for the claimant's injury to feeling and for the psychiatric illness.

221. This is not a case where the behaviour of any party has been so unreasonable as to warrant an additional award for aggravated damages.

222. This is not to underplay the seriousness of the treatment of the claimant or its effect on her, but we all agree that the levels of award we are making made reflect the seriousness with which we view the treatment.

223. We make no award in respect of aggravated damages.

Value of an Injury to feeling

224. The respondent values the claimant's injury to feeling award at £30,000, being the top end of the middle band of the updated rates. The claimant asserts that injury to feeling should be awarded at the top end of the top band of the Vento guidance.

225. Focusing on the hurt feelings rather than the psychiatric illness, our findings are that the claimant was undermined and unsupported over number of years, whilst other white colleagues received support and mentoring from the same manager. This, coupled with the university's failure to respond properly to her complaints, or to challenge the outcomes of an internal recruitment process, and an unwillingness to accept the possibility of race discrimination, conscious or unconscious as an explanation for an unusual outcome, led the claimant to a realisation that she would not get anywhere and that the reason was her race. The point when she realised that it was nothing to do with her abilities, but her race, was really hurtful and shocking to her. We think that the failure by the university to ever challenge or even look at the reasons for Mr Rees not progressing the claimant, or asking why acted as he did was also hurtful to her.

226. She raised a legitimate concern, and despite all their policies and statements of intent regarding race discrimination, they failed to ever give

any real credit to her case. She had to struggle through a complex and difficult ET case, with no legal support, and a respondent who, we have found was, at times, uncooperative in respect of disclosure.

227. We also accept her evidence and that of her medical experts and the OH adviser, about the impact on her feelings about her work, and the hurt at the loss of a profession that rightly gave her pride and standing within her community. We accept the claimant's evidence that she has felt unable to leave the house because of concerns that she may have to explain the situation to somebody else and that she feels ashamed that she has not been able to deal with it.

228. We emphasis to the claimant that she is the victim of discrimination. She is not at fault in any way. The responsibility for her ill health and the injury to her feelings lies with others. However, we recognise and accept that her feeling of responsibility for pain and suffering to her family are genuine and understandable.

229. We accept the claimant’s evidence and the expert evidence from both medical experts and the OH, of serious and long lasting injuries to her feelings which are separate and different to the severe psychiatric injury which she has also suffered.

230. The injury to feeling award we make does not therefore take into account the psychiatric injury but addresses the hurt feelings and the immediate impact upon the claimant of not only the treatment by Mr Rees, but also his failure to knowledge or even question his own failings, even when confronted with them. Our award for injury to feelings also takes into account of the hurt to the claimant of the institution itself failing to recognise or acknowledge the possibility that a senior white academic may (and we find did) have behaved unfairly and in an unconsciously racist way towards a more junior Asian academic.

231. Whilst this was not overt or conscious discrimination Dr Sharma has lost important years of her academic and family life which she may never fully recover from.

232. The fact that the discrimination was not intentional or deliberate in this case, does not reduce the level of hurt experienced by the claimant. Unconscious bias is pernicious and destructive and the claimant was entitled to assume that Senior members of academic institutions would behave with scrupulous fairness and have an awareness of the possibility of their own potential biases.

233. Based on the findings of fact as set out above and having taken into account the legal principles set out in Vento and other case law as set out in the section on legal principles, we conclude that the correct level for this award is **£33,000.00.**

Psychiatric injury Award

234. The claimant also makes a claim for an award in respect of psychiatric illness. We have therefore considered the injury to her health and have also considered future prognosis as this is relevant both to the question of future loss of earnings and future pension loss.

Future prognosis for Health

235. Dr Sharma wants to recover but cannot see a way forward.

236. Dr Gupta says at 11.8 that Dr Sharma will not recover fully but accepts that the justified resolution of proceedings will provide relief.

237. He says once well she will struggle to work in the same environment, If the respondent and others continue to influence. All agree that she is not likely to be able to return to work at Portsmouth university, Mr Rees has now left the university, significant changes have been made to the structure and lessons, we are told have been learnt. She is likely to be disabled under the Equality act 20201 and adjustments would be required.

238. He says that his view is that she will be highly unlikely to return to work at Portsmouth even with reasonable adjustments as concerns about triggers.

He also considers chances of recurrence of her impairments and symptoms are high, and suggests triggers can be the university environment and the classroom, colleagues subjects, books. Says highly unlikely to work in a similar role or environment in the foreseeable future. We note that he wrote his report in March 2023, following an assessment in January 2023, and 4 Feb 2023.

239. We agree with the respondent and Dr Mallet, that at points Dr Gupta is florid in his language and descriptions, and we agree that he has reported on what appears to be a very worst-case scenario. We respect that this is a genuine medical opinion, but all agree that it appears without any real explanation to take the very worst view possible of outcomes for the claimant.

240. Dr Mallik in, contrast, appears to us to take a much more optimistic view of events. The claimant criticised him for being dismissive, and we find that this report gives a very best scenario. Again, we accept that this is a genuine medical opinion, but whilst Dr Gupta was overly pessimistic we consider Dr Mallett to have been overly optimistic .

241. We consider that the utility of the two reports, is that it shows us a wide range of possible future outcomes and progress and expectations for Dr Sharma.

242. The diversity between the two points underlines to us a very real difficulty in predicting with any degree of accuracy the possible outcomes in this case of the psychiatric illness.

243. The main finding that we take from the two medical reports is that whilst there is a degree of overlap and agreement when it comes to prognosis the outcome in the short to medium term could be anything from a near full recovery to no recovery at all.

244. In addition to the reports for the two experts we have also been referred to medical reports from the claimant’s treating psychiatrist.

245. Doctor Chawla is the individual who has seen the claimant on the most regular basis and most recently. We accept that he is not an expert in the same way as the two experts that we have reports from, and of course he has not prepared an expert report or been asked the same questions that the two medical experts have been asked, nor has he given live evidence. What he has done is write notes on a contemporaneous basis, and we have found his recorded opinions helpful to our deliberations because there are points where his opinion fits well with the view of the two other experts. In effect his views are helpful as a counterpoint, or as a check, where our findings of fact are different either to that of the agreed expert or that of Dr Mallett. Where the two experts were in agreement, we have, as indicated earlier accepted their joint conclusions.

246. In summary in assessing the medical evidence before us, we have taken particular account of the joint report, and the areas of agreement. Where there is disagreement between the experts and where that disagreement is significant, we have taken into account the claimant 's own evidence and we have also taken into account other medical evidence we have in front of us including that of Dr Chawla the claimants treating psychiatrist.

247. On the basis of all the evidence we conclude as follows

248. No one thinks that the claimant can return to Portsmouth university at the moment or in the foreseeable future.

249. The reason for this is the discrimination she has suffered, and the consequential damage to her health, which has left her particularly sensitive to any issues involving the Respondents.

250. Further we observe that none of the claimant’s medical advisors consider that she could return to work at Portsmouth university unless there were significant and proper reasonable adjustments made for her.

251. We have asked ourselves whether or not the claimant would be able to return to work at Portsmouth university at some stage in the future with effective and appropriate treatment.

252. Both experts consider that with time the resolution of the proceedings and appropriate medical intervention the claimant has good prospects or a reasonable recovery. Both experts agree that the claimant will remain vulnerable to future episodes of psychiatric illness.

253. Whilst the difficulty of her returning was initially focussed on the presence of Mr Rees, the manner in which Mr Rees was perceived by the claimant to have exited the organisation and the distress caused to her by being included in correspondence about arrangements made to mark his leaving, and the claimant’s evidence about her distress and hurt regarding other people's progression within the department compared to her own, lead us to conclude that it is highly unlikely that the claimant will return to work at Portsmouth university at all. We have evidence before us that the claimant did attempt to return to work with reasonable adjustments, which was not successful and led to a further period of sickness absence Doctor Sharma has not returned to work since then.

254. Looking at all the evidence including the claimants own reaction, we conclude that it is highly unlikely that the claimant will be able to return to work at the respondents within the foreseeable future and we have therefore discounted that as a possibility.

255. Whilst she remains employed at the point of the hearing, she is receiving no pay from the respondent and whilst she could still return to work with the respondents with adjustments, in reality we do not consider that she will do so.

256. We do however consider that the claimant will be able to return to work at some point in the future, provided that she is able to access proper medical support once her claim to the employment tribunal and the damages she is entitled to in respect of discrimination are determined and

the matters finalised. We agree with all medical experts that until these proceedings are concluded the claimant will find it difficult to start to recover in any real way.

257. We consider that the diversity in the views of the experts as to the impact and future impact off medical support is indicative of one being overly optimistic and one being overly pessimistic.

258. We all consider that it likely, on the basis of the evidence, including her own view of her future abilities, that if the claimant is able to receive consistent and appropriate medical support over a reasonable period of time that she will be able to recover sufficiently to return not only to low grade work but to more meaningful better paid work, of the type that she was doing previously at Portsmouth university.

259. The reason for this is that the removal of the stress of the employment proceedings and the confirmation of the damages award will enable the claimant and her husband to focus on recovery rather than litigation in the first place.

260. Both experts have expressed the opinion that the different and more intensive medical intervention and treatment, over a period of time, will have a reasonable a chance of assisting the claimant to recover to some extent. Both agree that she will be able to return to work first on a part time and basis and in some non-challenging work, but longer term, into more challenging work. The level of work and the type of work, the time it will take and the type of medical support required varies significantly between the experts, but each agrees that these are the elements that the claimant required to have a chance of recovering sufficiently to be able to return to work

261. We have therefore looked at the recovery of her health and the ability to return to work.

262. We all agree that the Claimant will require significant and intensive support and treatment to recover. We note that the impairment she has is persistent and long term and to date , despite the claimant cooperating and wanting g to recover, it she has not recovered to any great extent. We all agree that it is likely to take more time than Dr Mallet predicts, and require more assistance and intervention than he predicts, and less time than Dr Gupta predicts and with a more hopeful outcome than he predicts.

263. In order to return to the workplace, she will have to apply for, be short listed and then selected for another job. Everyone who had given evidence has said that the academic work is competitive. At the level the claimant was working it is highly competitive. The claimant will go back into the employment market having had 3-5 years out of work, suffering with a serious condition which is likely to recur at some point, She has made a successful claim to the ET which has been widely reported. She is 41. If she is not able to return to the work place for another 2 years, she will face an inevitable disadvantage, having lost several years of impetus, knowledge and contempory learning. In reality she will face an uphill struggle even without the extra worry of her own health.

264. We recognise that the claimant will return to a workplace facing strong competition and that despite all her academic achievements, is likely to be disadvantaged in the long term because of the discrimination she has suffered.

265. Having said that, we conclude that there is a strong probability that the claimant's health is likely to improve post resolution of this case, and with the treatment that she is already receiving and that she will continue to receive. We set out the awards we make for the cost of that future treatment below. We all agree that the claimant should have as much opportunity to receive treatment as possible in the shorter term in order to assist her in recovering in the longer term.

266. We conclude that the rate of recovery will be somewhere between Dr Gupta's pessimistic predictions and the optimism of Dr Mallet.

267. We agree with Dr Gupta's analysis that the recovery is most likely to be partial, and we conclude the claimant will not be in any position to start looking for alternative work until she has had some intensive treatment following determination of these proceedings. We conclude that by the end of 2025, the treatment set out in the two reports and described by Dr Chawla, has a likelihood of success. That is, we all agree that over the course of two years, the claimant's health is likely to improve significantly, so that by the end of 2025, she is likely to be in a position to start looking for some work, albeit not at the academic level that she was at prior to these events.

268. We conclude that at that point, the claimant will first need to return to work on a part time basis only and we consider that she will need at least 18 months of part time working to be able to re familiarise herself with the workplace and rebuild her confidence.

269. During that period of time and for the foreseeable future, she is not likely to earn anything like the salary she was earning at the Portsmouth university.

270. We agree that the claimant may be able to earn a salary of FTE £25-30,000.00 on return to the workplace. This takes into account her skills and the likely increases in pay rates over the next few years, and also takes account of the minimum wage. We consider that her earnings would be, on balance of probabilities, in the region of £13,000 per annum net, on 1/2 time basis.

271. We consider that at the end of that period of time, with greater confidence derived from being able to return to the workplace in some capacity, with time and distance from these events and with the benefit of intensive medical intervention, it is likely that the claimant could return to the workplace in a post equivalent to a grade 8 post.

272. We think that she will either be able to return to work in a different academic institution or in a related field, using her skills and experience and expertise. We observe that the claimant has significant skill and expertise, and that in her previous working life she was clearly dedicated and tenacious. We all agree that with her skills and abilities she will be a desirable employee and that in the current economic climate that she would be able to find suitable work within a reasonable period of time.

273. We therefore conclude that following a period of time working at a lower rate of pay in less challenging work, she would be able to return to work with earning potential of the equivalent of a grade 8 post in a further two years, after 18 Months of part time lower level work. This means a return to work at about a grade 8 post or equivalent by the end of 2027.

274. The Claimant would, but for the discrimination, have been working at a grade 9 post and we have considered how likely it is that she could return to a grade 9 post or an equivalent at some point in the future.

275. We have also considered, the likelihood of the claimant being able to return and achieve similar career progression as she might have achieved had she remained working at Portsmouth university and absent any discrimination.

276. In the past the claimant continued to work at a senior level despite a number of challenging life events including the death of a parent and the serious illness of a child. Of course, we recognise that the claimant did not at that point have a psychiatric disability.

277. However, from the findings of fact we made in the liability judgement, the claimant retained and delivered a senior academic position despite not receiving support and being discriminated against by those who should have been supporting and encouraging her.

278. It seems likely that with proper support and encouragement the claimant could do extremely well. If she returns to work in the future with a

supportive management structure, there is every chance that she will not only gain career satisfaction but will also progress within her chosen career.

279. We all accept that this is to a great extent, an exercise in speculation. We are guided primarily by two medical experts who do not agree on the detail but who both agree that there will be a point in the future when the claimant is expected to have recovered sufficiently to be able to contemplate returning to similar employment.

280. We do not think that the claimant will progress as quickly as she has previously, but we do consider that the removal of the stress of the employment tribunal and the distance of time and with her academic background and her obvious abilities we conclude there is at least a 50% possibility that the claimant could return to a grade 9 post within 10 years.

281. Therefore our conclusion is that there is a 50% chance of the claimant returning to work at a grade 9 post on a full time basis, within 10 years, that is by 2035.

282. On that basis we find that the strong percentage chance is that the claimant will return to a grade 9 post by the end of 2035.

283. Taking into account the evidence of the medical evidence and the difficulties that we have already outlined, and the competitiveness of the academic field relied upon by the respondents, we find it highly unlikely that the claimant will now progress beyond a grade 9.

The claimants possible career trajectory absent discrimination.

284. The claimant asserts that had she remained in a grade 9 post at Portsmouth university she would have expected to progress to a grade 10 post, and it is submitted for her that we should therefore be granting loss of earnings and loss of pension loss on the basis that she would have obtained a grade 10 post within a short period of time.

285. The respondent asserts that whilst there is a chance that the claimant would have obtained a grade 10 post it must be a small chance because grade 10 posts are always highly sought after very competitive and come up rarely.

286. Mr Sharma asserts on behalf of his wife that it can be assumed that *doctor Sharma would have progressed at least two grades in her career of 26.67 remaining years before retirement. Doctor Sharma progressed 2 grades from lecturer to senior lecturer and then associate head in her six years of 10 year from 2010 to 2016.*

287. He has not drawn our attention to any figures or statistics showing either the availability of higher grade jobs in academic institutions in the area of Dr Sharma's work, but rather a basis his assessment on the fact but that she would continue to progress in the same way.

288. We observe that whilst this is no doubt a very fair assessment of Dr Sharma 's intentions the reality is that the more senior one becomes the more competitive the job market is.

289. We have considered the information we have about career progression within academic institutions in general and at Portsmouth university in the area the claimant worked in particular and we have considered the availability of posts at grade 10 and above.

290. The respondents argued before us that the claimant’s loss of earnings should be limited to 10 years.

291. The starting point for this is whether or not, absent discrimination, the claimant would have been reappointed to the seconded post.

292. We have borne in mind that the evidence before us at the full merits hearing indicated that in all cases where an individual had reapplied for an extension of a secondment it had been granted except in the claimant's

case. The claimant says that this must mean that she had 100% chance of being reappointed to the post absent discrimination.

293. The respondent's evidence before us in respect of the reappointment of secondment posts is sparse.

294. We have no evidence before us about the circumstances of the other extended secondments. We do not know for example, whether or not anybody else applied for the posts, whether there was a competitive interview process, and if so whether the individuals were appointed following such a process for reasons of merit alone.

295. We accept that the nature of the fixed term contract must mean that it was at least anticipated by everybody that there was the possibility of a competitive interview situation, and an appointment of somebody different at the end of that fixed term. The fact that it had not, on the evidence before us, happened previously does not mean that it would never happen. Further we find that although the statistics were helpful to us in respect of assessment of the shifting burden of proof in this case, they were a relatively small sample, and not determinative of discrimination.

296. We did not find that the decision to interview and have an open competition was its self discriminatory. It was not, on our findings discriminatory to advertise the opportunity at the end of the five years. Nor on their being applications from other individuals was it discriminatory to hold a competitive process.

297. In this case we have made findings of fact that the reason why the claimant was not appointed was because Mr Rees, who held what was in effect the casting vote, made a decisions which was discrimination on grounds of race.

298. The reason why the outcome was one which was tainted with race discrimination was because one person on the panel found racially discriminated against the claimant.

299. We agree with the Claimant that the statistics of what had happened in the past, suggest that there might be a high probability that she would have been re-appointed. However, the statistics of the past are not necessarily predictive of the future. Just because it had not happened before, did not been it could not happen at all. Of itself, it does not tell us what might happen, absent discrimination.

300. In this case, all the evidence before us in was that there was another strong candidate applying.

301. The two panel members against whom we make no finding of discrimination did not agree who should be appointed. One of them favoured the claimant and one of them favoured the other job applicant. There was, absent discrimination, a chance that the claimant would not be reappointed.

302. We have therefore considered the impact of a non-discriminatory third person having a casting vote.

303. On the evidence we have before us the most that we can say is that there was a 50/50 chance that the third person would prefer the claimant. We conclude therefore that the claimant had a 50% chance of being reappointed to the grade 9 post following a fair and non discriminatory interview.

304. We have then considered what might have happened to the claimant in the reorganisation that we now know has taken place.

305. We have considered the evidence of how other staff were treated, and how many of the grade 9 staff remained on grade 9. We find that nearly all staff who were on grade 9 and wanted to be retained on a grade 9 post were so retained. We all agree that claimants ambitions and her desire for progression mean that she would have wanted to be retained on a grade 9 post and would have been treated in the same way as other staff who

wanted to be retained on grade 9 and indeed were retained on grade 9. We conclude the claimant would therefore have been retained on a grade 9 post following any reorganisation.

306. If the claimant had not returned to the grade 9 post but had returned to her substantive grade 8 post, there is no doubt that she would have applied for one of the new grade 9 posts and given her previous experience we find a strong probability that in a fair process she would have obtained one of the posts.

307. We have borne in mind the evidence she has given about how other individuals within the organisation were treated during the course of the reorganisation and the evidence of the promotion of other individuals from other more junior positions and accept her evidence that there is no reason why she would not have performed as successfully as others

308. Mr Sharma asserts on behalf of his wife that it can be assumed that Dr Sharma would have progressed at least two grades in her career of 26.67 remaining years before retirement. Doctor Sharma progressed two grades from lecturer to senior lecturer and then associate head in her six years from 2010 to 2016.

309. We accept her evidence that her career trajectory until the events involving Professor Reese had been impressive. The question we must answer is what would have happened to the claimant given a non discriminatory set of circumstances once she obtained a permanent grade 9 post, as we find she would have done, in 2023. Would she have progressed further to a grade 10 post in the following years before 2035?

310. Put another way, what is the chance that she would have gained a grade 10 or a grade 11 post by 2035?

311. We accept that the claimant was ambitious and capable and we accept that her career trajectory had, up until the point of her illness, been impressive.

312. We accept the evidence of the respondent that grade 10 posts are highly sought after, not so common and that there is strong competition for them and therefore a lower probability that the claimant would have attained one of them. The probability of achieving a grade 11 is further decreased for the same reasons.

313. Mr Sharma pointed to the way that some of the claimants' colleagues, with less experience than her, and different qualifications had risen to grade 11 posts. We do not have any evidence of how many grade 9 staff applied and were failed to get grade 10 posts.

314. The Respondent says that the grade 8/9 is the career average for most academics. We accept that this is probably right. However, we also note there are outliers who rise quickly, and that the reasons for doing so is likely to be a combination of ability, qualifications; experiences but also support and mentoring from appropriate senior staff. The claimant was very ambitious, we have no doubt that she would have applied for any and every opportunity.

315. We conclude that she would have remained in grade 9 for 5 years, and that she would have started to apply for any available advertised grade 10 post after a 5 year period, that is from about 2026.

316. We have no evidence before us of how many posts might have been advertised , or when or if they may become available, but on the evidence of academic structure within the relevant respondent department in this case, we conclude that there were likely to be very few, if any, such posts advertised between 2025 and 2035. We were told of a handful in the claimant's faculty area.

317. We also find that the reason why posts would have become available were likely to be because of people retiring or other people moving upwards into other positions either at the respondents or at alternative universities or as a result perhaps of restructuring. Taking all the evidence we have before

us, we find that it is reasonable to have expected a relevant and appropriate opportunity to have arisen only every two years.

318. Would the claimant have succeeded in obtaining one of those Positions?

319. The claimant would have applied for such opportunities and would have competed on a level playing field with others they were also well qualified.

320. If there were 20 applications, and if we assume an equality between candidates then the claimant could reasonably be said to have had a one in 20 chance of being successful within 10 years of obtaining a grade 10 post.

321. We therefore calculate the loss of this chance as being 5% of the difference in salary between grade 9 and grade 10 for the 5 year period.

322. The claimant had aspirations to rise beyond grade 10 to Grade 11 and she may have done so. We recognise that she is ambitious and would have wanted to progress further. We all think that she would have made every effort to do so, and we all very much hope that she will recover sufficiently to be able to do so in the future.

323. The tribunal must decide cases on the basis of evidence before us and in this case it is not possible for us to speculate on the likelihood that the claimant would have achieved a grade 11 post. We cannot find that there was any real chance of the claimant achieving such a position. This is not any indication about our view of the claimant's ability. But we cannot speculate on what the percentage chance is of the claimant identifying a relevant post, being willing to apply for it and being successful.

324. The tribunal cannot award damages for future loss of earnings on the basis of such a speculative exercise and we do not do so in this case.

Calculation of future loss of earnings

Calculation of loss of earnings to date of trial.

325. The claimant claims loss of income from the 1st January 2021 to October 2023 as a net sum of **£36,160.15.**

326. The respondent asserts that loss of earnings until date of hearing is **£25,900.52.**

327. This is based on the loss of net salary when the claimant reverted to the role of senior lecture. The respondent has calculated the difference between band 9 salary and a band 8 salary and calculates that there is a net loss of £410.12 a month or £94.65 per week with net losses of 113 weeks amounting to £10,695.45. The respondent has not calculated the loss of a chance, which we have calculated as being 50%

328. For the period from 10 March 2023 until the 17 June 2023 the respondent rightly points out that the claimant suffered loss of half her salary because she was in receipt of sick pay and her salary reduced to 50%. She then lost all her salary until the date of hearing on the 25th of October 2023 which R calculates being 18 weeks and 3 (three) days.

329. We accept that these dates of the losses are correct and also that the assessment of the type of loss is correct, but we do not agree with the figures put forward by the respondent.

330. In this case there is no agreement between the parties as to the rate of loss during any of the periods of time. Mr. Smith has calculated the amount on a weekly basis, Mr Sharma has calculated it on a monthly basis. Mr. Smith has asserted a standardised figure which applies for each month throughout the period, whereas Mr Sharma has taken into account both spinal points and pay rises awarded between January 2021 in October 2023.

331. We have reminded ourselves that loss of earnings are calculated net of tax and National Insurance and that there is therefore a question of grossing up. in this case our determinations in respect of grossing up are addressed in other paragraphs.

332. Mr Sharma also appears to have taken into account the reduction in the claimants actual pay at grade 8 to take account of SSP. This means that the losses he has calculated as arising for the period from June 2023 to October 2023 are all net figures based on the actual salary that the claimant would have received had she been at work and in receipt of a grade 9 salary at that point in time. The monthly amount he relies on for August; September and October 2023 is net pay of £3524.87 per calendar month.

333. Mr. Smith asserts that the full loss of salary until date of hearing should be calculated at the amount of £756.20 per week, or for four weeks at. £3024.08.

334. We prefer the approach to the figures provided by Mr Sharma, because the amounts he has calculated take into account the way that the pay scale in the university operates, and the fact that there have been pay increases.

335. However neither he or Mr. Smith have taken into account the 50% reduction in the losses. Neither have provided a breakdown of their calculations and therefore we have calculated loss of earnings to date of hearing as follows.

336. Firstly, there is a loss of income throughout the entire period of 50% of the difference between the salary at grade 8 which the claimant received and the salary at grade 9 which, but for the discrimination, she had a 50% chance of receiving.

337. To calculate this amount, we have taken the net figures of each band from a midpoint in August 2022. The monthly salary for grade 8 is £2890.60 and the monthly net salary for grade 9 is £3341.63. The difference between those two figures is £451.03 per calendar month, and 50% of the difference each month is £225.52.

338. From January 2021 until October 2023 is 34 months and therefore the loss of earnings attributable to the 50% chance of being employed at grade 9 is 34 x £225.25 which is **£7867.68.**

339. To this figure must be added the loss of earnings suffered by the claimant as a result of sickness absence.

340. We find that but for the discrimination there is no suggestion that the claimant would have been on long term sickness absence and therefore her pay would not have reduced. We therefore conclude that when she is on half pay and when she is on no pay, her loss is the difference between what she actually received whilst on sick pay and what she would have received had she not been on sick pay. This calculation is based on the grade 8 salary only.

341. The grade 8 monthly net salary figure which we are using is £2890.60. The claimant was on half pay for three months, or 12 weeks, and therefore the net loss is 50% of £2890.60 x 3 months = **£4335.90.**

342. For the 23 weeks when the claimant was on half pay, her loss is (£2890.6x 12 /52) x 23 weeks = **£15,342.42.**

343. The total amount of past loss to the date of the remedies hearing is therefore **£7867.68. + £4335.90 + £15,342.42 = £27,546.00**

344. We therefore award this amount for past loss of earnings to date of the remedies hearing.

Future Loss of earnings

345. In respect of future loss of earnings, we have found that it will take the claimant a further two years, that is until end of October 2025, before she is able to return to work. Her continuing loss for that period of time is therefore the salary she would have received at grade 8 plus 50% of the

salary she might have received had she been reappointed to the grade 9 post.

346. The claimant claims future loss of earnings based on two years of no work at all, then eight years of part time work earning in the region of £12,000 per annum and the remainder of her working life 16-17 years.

347. Again the parties do not agree as to the figure for the future loss of earnings but gross pay at grade 8 at date of hearing was in the region of £52,841 per annum, although there appears to have been an increase in salary in August 2023. Mr Sharma has given us the new rate for the band 9 which is £64,914 per annum but we do not have the up rated band 8 salary. On that basis we have used the old rate for the band 8 and the old rate for the band 9 on the assumption that any increase to a band 8 role and a band 9 role in terms of inflation, would likely to be a similar percentage increase and that therefore on the basis of the information we have, the best figure is the difference between the two rates.

348. We have first considered what the net salary for each post would be.

349. Using Mr Sharma's calculations, the net monthly pay at grade 9 on the old rate was **£3445.68** . The net pay on the grade eight was **£2931.46.** The difference between the net monthly amount of pay is therefore **£514.22** per calendar month or **£6170.64** per annum. The claimant would be entitled to 50% of that in addition to the net grade 8 salary of **£35,177.52**.

350. We estimate that it will take two years for the claimant to return to any form of work and therefore her losses for the next two years are 2 years x £35,177.52+ (£6170.64 x2 years)/2. This is **£41348.16** net loss for the next 2 years.

351. We have concluded that with medical assistance and the resolution of these proceedings, the claimant will be able to return to work in two years' time, and will probably need to work part time in a lower paid role. We consider that there is a real chance that she will return to work on a part

time or half time basis and will be able to earn therefore half of a notional salary of £26,000 net amounting to a salary of £13,000 per annum net.

352. We have found that after 18 months she will be in a position to return to a better paid job and have found that the likelihood is that after that period of time, which will be nearly four years from the date of hearing, she will be well equipped to return to work in her previous grade 8 position.

353. We conclude that it is highly probable that at some point in her future she will progress to a grade 9 post.

354. We have also found that but for the discrimination the claimant had a one in 20 chance every two years after 10 years of progressing to a grade 10 post.

355. We conclude on the basis of the medical evidence that this is now unlikely to happen.

356. The claimant’s future losses are therefore the difference between the pay that she would have achieved at grade 9 and the pay that she is now likely to achieve at grade 8 and the fractional chance of her having achieved a grade 10 at some point in the future.

357. Her loss of pension is the difference between the grade 8 and grade 9 post from the date of discrimination until the point at which we find she would have returned to a grade 9 post. Whilst we accept that there may have been a small loss of pension in respect of a grade 10 post at the latter stages of the claimant's career, we consider that loss to be too remote.

358. We also have to take into account the likelihood or possibility that she may have retired early in any event, or that other matters may have led to her not working until the state retirement age, or working part time. These factors are taken into account when calculations are done using the Ogden tables.

359. In respect of the initial period of 18 months, we assess the annual loss of earnings as £35,177.52+ 50% of £6170.64, but take into account the likely net earnings of £13,000.

360. For the first year the loss is therefore £35177.52 + £3085.32 =£35262.84-£13,000.00. This is a figure of **£22,262.84**. As this is 12 months, the remaining 8 months loss will be **£14841.89**.

361. We therefore award the claimant's losses for those 18 months, net of £**37104.73**

362. Following that period of time, we conclude that the claimant will be able to return to the equivalent of a grade 8 salary and that she ought to be able to return to the grade nine position within 10 years, that is within a further eight years.

363. We recognise that there will have been pay increases to both grades within that period of time but we have no evidence of what that might be, and we also have no evidence of whether the difference between the two grades would remain much as it is, or increase. We therefore conclude on the basis of the evidence we do have that on balance of probabilities, the difference in pay between the grades will remain more or less the same.

364. Further we must consider accelerated receipt. In this case we consider that the likelihood of pay increases over the next 10 years, which we cannot take into account because we cannot predict them, are likely to be similar to the amount that the claimant might expect to earn by way of interest, were she to invest 10 years' worth of earnings, over that period of time on the basis of diminishing returns.

365. On that basis we therefore award eight years loss, being 50% of the difference between grade 8 and grade 9 net salary which is **£3085.32** per annum net, or 8 x £3085.32 = **£24682.56.**

Psychiatric illness

366. Both parties agree that the illness is in the moderately severe category, and refer to the Rs skeleton, at para 42

367. In the schedule of loss the claimant appears to agree that the correct level is moderately severe. We agree that this is the correct level on the basis of the Judicial College guidelines and our findings of fact regarding the diagnosis, based on the expert reports. We accept the symptoms of PTSD but not the diagnosis, and conclude that the injury falls within this range.

368. R agrees a level at the top end of the moderately severe range, and we all agree that this is the appropriate level of award. We think that the claimant has made an error in adding up the various levels rather than selecting one appropriate level. We accept that the claimant is in reality, suggesting a much higher payment but find that this is based on the wrong approach to the assessment of the award.

369. We conclude that the correct level for the claimants psychiatric injury is moderately severe, and award **£50,000.00** for this head of loss.

Death in service benefit

370. The Claimant is entitled to a benefit if she dies whilst in service as a result of her contract, it is a valuable benefit. That benefit remains payable for 12 months after termination of her employment. At the point of the hearing, she remains employed and therefore she remains entitled to this benefit. Whilst it seems to all of us, that there is a real possibility of her employment terminating at some point in the future, that is a matter for the parties, and since no one has said anything to us at all about termination of employment, we find that there is no loss at present, associated with this head of claim. We therefore make no award in respect the death in Service benefit.

Loss of salary of Mr Sharma?

371. Dr Sharma has made a claim for £46,956.65, in respect of her husband's lost earnings incurred over the past 4 years, from March 2019 to 2023 and continuing up to 2025.

372. We understand and accept that Mr Sharma decided to reduce his working hours and to move from a full time to a part time contract in order to care for his wife Dr Sharma, and to take on more of the responsibilities of the family. The evidence we have does not tell us what care was required by Dr Sharma or the number of hours care required per week and what that might have cost if given by an independent carer for example.

373. Reading the medical reports, and from the evidence of Dr Sharma and Mr Sharma, we do not doubt that Mr Sharma is correct in the calculation of his loss of earnings and accept that there was a need for some additional support for the claimant. We have noted that she reported to her medical advisors that she had thoughts of self harm but that the presence of her husband meant that she did not ever act upon such thoughts.

374. However the claimant bears the burden of proving the heads of claim and loss flowing form the discrimination under those heads. Here we have no evidence that there was a need for professional care or for constant company for the claimant, and no evidence of how much care or what the costs of any such care might be. The fact that Mr Sharma decides to give up half his income, is not proven by the claimant to be a loss flowing directly from discrimination, just because Mr Sharma would not have done it but for the discrimination. We consider that Mister Sharma made a choice but do not consider that is a valid basis on which we can make an award of damages.

375. We reject this head of claim and make no award in respect of it.

Costs of medical treatment and expenses

376. The claimant claims future medical expenses of £30,875.00 based on the recommended treatment set out in Dr Gupta report. This loss flows from the discrimination and there is evidence of the cost.

377. The respondent states in the skeleton argument, that they concede (para 14) reasonable costs of treatment.

378. The medics do not agree on how much treatment will be needed.
Dr Gupta suggests 30-50 sessions of psychology and 15 psychiatry reviews for two years. That is 30 in all. The costs he estimates for all treatment will be between about £10,000 over two years and £20,000 over two years, excluding VAT.

379. Dr Mallet considers the claimant will need 6 sessions of psychiatric follow up and better use of anti-depressant. He estimates treatment costs of about £3200.00

380. There is thus a vast difference between or the two experts presumably flowing from their differing beliefs as to the outcomes for the claimant. Dr Gupta suggests the claimant will need weekly sessions. Dr Mallet once every 2 months.

381. Given the resistant nature of the impairment and the obvious need for treatment which is more than simple medication, we prefer the opinion of Dr Gupta, although we consider that in a he has had a n overly pessimistic view of the outcomes, we do consider that this is a case where early and intensive intervention is required by the claimant.

382. R suggests that figure of £13,024 should be awarded for future costs of medical treatment.

383. This is based on 44 weeks treatment at the cost set out in the respondent's schedule of loss and a return to work in September 2024.

384. From our findings and conclusions above, this period for possible treatment and recovery is too short. We also prefer the claimants' assertions on cost of sessions.

385. We find that the claimant will need significant medical intervention over the next two years if she is to make the improvements that our assessment of future loss is based upon . Weekly sessions costing in the region of £150 per (£180 incl Vat) per session for one year is, we think reasonable and necessary based on the medical assessments we have seen, and we accept that there would then be a tapering off of treatment, with a further 25 sessions (once a fortnight).

386. We therefore award damages for the cost of 77 treatment sessions at £180 per session , which is - **£13,860.**

387. The Claimants prescription charges are £9.35 per month. We award a further 4 years on prescription costs, on basis that she is likely to require meds whilst she tries to return to work.

388. We award losses in respect of future prescription charges of 48 months x £9.95 = **£477.60.**

389. The claimant has already incurred medical costs of **£1,686.64.** The Respondent accepts these costs and we award them in full.

Pension

390. The variety of approaches to the calculation of pension loss is set out in the actuarial report prepared by CM Atkin for the claimant the report starts *there are innumerable approaches that could be taken to the assessment of the pension loss and a wide range of actuarial assumptions could legitimately be adopted. In this note I have however adopted A simplified approach based broadly on the principles for compensating pension loss 4th edition 2021 and the tables included in the paper setting up those principles.*

391. We accept that this actuarial report sets out the basis on which the teachers pension scheme was operating in 2021 being a final salary basis under which pension benefits accrued at 160th of final pensionable earnings however we also accept that from the 1st of April 2015 the basis for calculating pensions was changed for service from that date to a career average approach under which pensions would build up at the rate of

157th of each year's salary. Benefits accrued on that basis would be revalued each year in line with inflation plus an additional 1.6 per annum where the member was an active member.

392. We have heard no evidence about the pension itself but it is it is asserted in the claimants actuarial report that as a result of the *McCloud* judgement, that some members including Dr Sharma would have a choice of either the career average revalued earnings or a final salary benefits pension, full service up until the 31st of March 2022. Since the claimant suffered no loss of pension up until that point, we have not needed to address the matter.

393. We find that for all purposes the relevant pension is therefore the career average revalued earnings approach. That is that the pension builds up from the 1st of April 2015 at the rate of 157th of each year's salary.

394. We remind ourselves that when considering loss of pension what we are seeking to calculate is the amount the claimant will lose on an annual basis after retirement. We are therefore considering what the impact of a period of 10 years of reduced earnings would be on her pension assuming that she retires at age 65.

395. The calculation of what her retirement pension might have been had she returned to work achieved a grade 9 or 10 level requires an assessment of what her pension under the CARE scheme would have been, since this is the part of the pension that will be affected. We remind ourselves that 1st of April 2022 until the 26th of October 2023 is the period of loss from the date of discrimination until the date of the hearing and the period for which that we must assess the CARE benefits and we note that Atkin reports the reduction of the accrual of pension by £272. 58 For each year of retirement.

396. This case includes a complex pension loss which is not career long loss but is for a period of some years.

397. The seven steps which the tribunal and the parties need to follow, or are recommended to follow, when calculating loss of a defined benefits pension such as the one that the claimant would have received as a university lecturer , rely on the use of the Ogden tables. Those steps are as follows:

   397.1. identify what the claimants net pension income would have been at their retirement age if the dismissal had not occurred.
   397.2. identify what the claimants net pension income will be at their retirement age in the light of their dismissal.
   397.3. deduct the result of step two from the result of step one which produces a figure for net annual loss of pension benefits this is the multiplicand.
   397.4. identify the period over which that net annual loss is to be awarded using tables 26 to 33. This will provide a multiplier. The table will depend on the sex of the individual the discount rate and whether the two year adjustment applies it is also then necessary to identify the age of the claimant at the date of the remedy hearing and the claimant's retirement age in order to use these tables.
   397.5. Multiply the multiplicand and the multiplier to obtain the capitalised value of the lost pension subject to any further adjustment the tribunal considers appropriate.
   397.6. Check the lump sum position and perform a separate calculation if required.
   397.7. taking account of the other sums awarded by the tribunal, gross up the compensation awarded.

398. Our relevant findings are therefore as follows

399. We find that the claimant would have retired on a grade nine salary with a one in 20 chance that she would have retired on a grade 10 salary.

400. The claimant asserts that she would have continued to work until she reached the age of 67. At the point of hearing she is 41 years old and has therefore a further 26 years before state retirement age.

401. We take judicial notice of the fact that there are varied approaches to retirement but that the increase in the retirement age, and therefore the age at which the full pension can be drawn has tended to lead to an increase in the age at which people retire.

402. We have taken into account that there are many factors which might impact upon whether an individual works to a full retirement age and also there are many factors which may lead to an individual choosing to reduce their hours or reduce from full time to a fractional contract.

403. Taking into account the vicissitudes of life and recognising that in doing so we are essentially making an educated guess, we all agree that a retirement date of 64 is the most likely, meaning that the claimant had a further 24 years work during which she could accrue her pension.

404. We have found that the claimant will suffer loss of earnings until 2035.

405. What will the claimant's pension now be? From our findings we conclude that there is a period of time from the claimant moving to no pay when she will be making no pension contributions and until point time when she might be expected to return to a grade 8 grade 9 position which we find is 2035, after which no further pension loss will occur.

406. The Atkin report sets out a number of scenarios looking at pension loss from the 26th of October 2023.

407. As indicated earlier none of the scenarios reflect the facts now fined by the employment tribunal.

408. However the Atkins scenario one is based on an assumption that Dr. Sharma received no salary for two years then receives pay of about £12,000 net for a period of a further 8years and thereafter up until the age of 6 is able to earn in the region of £25,000 per annum in an academic institution.

409. On that scenario Atkin calculates the value of the claimant's future pension as £221,841 per annum. This is the scenario the claimant suggests as most likely and is the starting point for her calculation of pension loss contained within the schedule of loss.

410. The claimant also asserts that the Atkins scenario 6 is what would have happened but for discrimination. That is, that Dr Sharma would work at grade 9 for four years and then progress to grade 10 in the 5th year and progress to grade 11 in the 12th year. This means that any pension drawn at age 68 would have the value of £916,020.

411. On that basis the claimant assesses pension loss at around £710,000.00.

412. Atkin has also identified a third scenario based on the assumption that Dr. Sharma was paid as an assistant head from the 26 October up until age 68, which would have given a final pension pot of £748,998.00.

413. If the claimant had returned to work in October 2023 on a grade 10 the estimated pension pot on retirement at 68 would be £908,178.00

414. The difference between the claimant returning to work after eight years on a salary of £25,000 and the claimant being paid as an assistant head from the 26 October 2023 up until age 68 is in the region of £520,000.00

415. Looking at the Atkin calculations the difference between the claimant returning to work in 10 years on a grade 9 contract and the claimant having been paid on a grade 9 or grade 10 contract throughout the period from the discrimination, the amount of difference and therefore the pension loss is somewhere between £350,000 and £450,000.

416. The Barnett Waddingham calculations, are based on the claimant returning to work at an earlier stage, and on pension loss being capped after 10 year period with a discount rate of 0.2%. An assumption that the claimant remains in grade 8 until retirement 10 years pension loss with the discount rate of -0.25% is calculated as being £193,349.

417. However the BW figure for whole career pension loss is based on a scenario that the claimant would have returned to grade 9 and progressed to a grade 10 in or about 2031, compared to her returning to work and remaining on a grade 8 until her retirement, is a loss of £406,895 . This figure also takes into account accelerated receipt of -0.25%.

418. Having read the two reports very carefully we are inclined to agree with the number of comments made by BW about the Atkin report and accept that a number of the observations made, mean that the Atkins report figures are likely to be slightly inflated. However, having analysed the figures carefully, it does not appear to us that there is likely to be a particularly large difference between the figures produced by either actuary, were they to use the factual findings made by the employment tribunal and were they to agree the rate of pay and various other matters.

419. The tribunal had found that this is not a career loss case; that basis of calculation of loss is an assumption that the claimant would return to work after four years in a part time low paid basis but that she would return to work in 10 years at grade 9 and that her losses would cease at that point.

420. The pension loss figure is therefore going to be significantly lower than that put forward by the claimant but higher than that put forward by the respondent.

421. We conclude that the final figure for pension loss will fall somewhere in the range between £200,000 and £500,000.

422. It is not possible for the employment tribunal to carry out the calculation necessary to determine pension loss in this case because the parties have not provided the necessary figures in respect of pension.

423. We do not have evidence before us as to what the claimant's pension would now be, given the facts that we have found, nor do we have figures

for what the claimants pension would have been, absent discrimination, given the facts that we have found.

424. As set out at the beginning of the judgment, the parties are therefore invited to consider the following options

424.1. The parties may decide to agree a notional figure between them in respect of pension loss, taking into account the facts found by the employment tribunal. The Tribunal would then give judgment for that amount if so required.

424.2. Alternatively, the parties may write back to the employment tribunal within 28 days seeking a further hearing at which they may provide further verbal evidence and the ET will then make an assessment based on the evidence before us at that point.

424.3. The parties may consider whether or not to agree to instruct a joint actuary to determine the figure, and agree to be bound by that figure. In this case further directions must be proposed and agreed with the Tribunal.

424.4. In the event of no agreement as to a way forward, the parties must write back to the ET after 28 days and request a listing for a 1 day Case management hearing, to consider how to resolve this matter and the question of grossing up and the outstanding costs figure (if not agreed).

Costs

425. The claimant has made an application for an award of costs and the respondent has indicated in their skeleton argument and in the submissions before the tribunal that they accept that it costs order in this case would be appropriate.

426. The respondent council indicated that there was an agreement to pay costs in a certain amount but the amount is not set out either in the skeleton argument or in the counter schedule of loss.

427. The parties may now agree a figure between themselves but in the event that there is no agreement the parties most right back to the employment tribunal within 28 days and the panel will reconvene to determine the amount on the basis of the submissions provided already and on the basis of any further short written submissions either party may wish to provide by that date.

Employment Judge Rayner
Date 24 January 2024

Judgment & Reasons sent to the Parties:
25 January 2024

FOR THE TRIBUNAL OFFICE