EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4106122/2015; 4100137/2016; 4105282/2016; & 4100153/2017

Remedy Hearing in person held in public at Glasgow Employment Tribunal on 6, 7 and 9 March 2023; with Members' Meetings held in person in chambers on 11 April 2023, 17 May 2023, and 29 January 2024

Employment Judge: Ian McPherson
Tribunal Members : Peter O'Hagan
Jim Burnett

Mr Brian F Gourlay	**Claimant Represented by: Mr Simon John - Barrister [Instructed by Mr Giles Woolfson - Solicitor]**
West Dunbartonshire Council	**Respondents Represented by: Mr Stephen Miller - Solicitor Advocate [Instructed by Mr Nigel Ettles - Solicitor]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous, reserved Judgment of the Employment Tribunal is that: -

(1) The Tribunal finds that the claimant suffered psychiatric injury as a result of the unlawful victimisation by the respondents, as found by the Tribunal in its liability Judgment dated 17 September 2021, as varied by the reconsideration Judgment dated 9 May 2022, and awards **Thirty-five thousand pounds (£35,000)** in this respect. No separate award of interest is made in respect of that sum for psychiatric injury, as parties jointly agreed that the Judicial College Guideline figures are updated for inflation, and the claimant has sought no interest in accordance with the **Employment Tribunal (Interest of Awards in Discrimination Cases) Regulations 1996.**

(2) In respect of the respondents' victimisation of the claimant, as found by the Tribunal in its liability Judgment dated 17 September 2021, as varied by the reconsideration Judgment dated 9 May 2022, the Tribunal finds the claimant entitled to compensation for economic loss in the sum of **One hundred and twenty-four thousand, nine hundred and sixty pounds, sixty four pence** (**£124,960.64)** plus interest of **Forty one thousand, seven hundred and sixty seven pounds, sixty seven pence (£41,767.67),** calculated in accordance with the **Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996,** and a further sum of **Fifteen thousand pounds** (**£15,000)** plus interest of **Ten thousand and twenty seven pounds, forty pence (£10,027.40)** for injury to feelings in respect of that victimisation, calculated in accordance with the **Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996.**

(3) In respect of the respondents' failure to make reasonable adjustments for the claimant, as found by the Tribunal in its liability Judgment dated 17 September 2021, the Tribunal finds the claimant entitled to compensation for injury to feelings in the sum of **Eight thousand, five hundred pounds** (**£8,500)** plus interest of **Seven thousand and twenty seven pounds, forty pence (£7,085.04)**, calculated in accordance with the **Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996.** No separate award is made for economic loss as the Tribunal considers that this is fully covered by the award for economic loss for victimisation.

(4) In respect of his unfair dismissal by the respondents on 24 September 2015, as found by the Tribunal in its liability Judgment dated 17 September 2021, the Tribunal finds the claimant entitled to a basic award of compensation for unfair dismissal, calculated in terms of **Section 119 of the Employment Rights Act 1996,** in the agreed sum of **Four thousand, nine hundred and eighty-seven pounds, fifty pence** (**£4,987.50),** already paid to him by the respondents, as part of an interim payment of £20,000 made by the respondents on 20 December 2022, without any reduction, in terms of **Section 122 (2) of the Employment Rights Act 1996,** on the basis that any

conduct of the claimant before his dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent.

(5) No compensatory award is made, in terms of **Section 123 of the Employment Rights Act 1996,** for the claimant's unfair dismissal by the respondents, as the Tribunal considers that this is fully covered by the award for economic loss for victimisation.

(6) In respect of the claimant's complaint of the respondents' unreasonable failure to comply with the **ACAS Code of Practice on Disciplinary and Grievance Procedures 2015,** the claims (being complaints under **Section 111 of the Employment Rights Act 1996** (unfair dismissal) **and Section 120 of the Equality Act 2010** (discrimination etc in work cases) falling within the jurisdictions listed in **Schedule A2 to the Trade Union & Labour Relations (Consolidation) Act 1992,** and in terms of its powers under **Section 207A** of that Act, the Tribunal finds that the claim to which these proceedings relate concerns a matter to which a relevant Code of Practice applies.

(7) Further, the Tribunal finds that there was an unreasonable failure to comply by the respondents, in respect of **paragraphs 4, 5, 8, 12, 26 and 33 of the ACAS Code of Practice**, as detailed in the following Reasons, but, in respect of those failures, the Tribunal does not consider it is just and equitable in all the circumstances to increase the compensation payable to the claimant by any uplift of a further amount up to 25%. Accordingly, the Tribunal makes no uplift adjustment to any of the awards in terms of this Remedy Judgment.

(8) The respondents are ordered to pay to the claimant the total amount of the above awards, giving credit for the balance of **£15,012.50**, arising from the payment to account of **£20,000** made to the claimant on 20 December 2022. Subject to the paragraph below, payment of the above awards is sisted by the Tribunal, acting in terms of its powers under **Rule 66 of the Employment Tribunals Rules of Procedure 2013,** pending the outcome of parties' co-operation to agree the final (grossed-up) figure to be paid by the respondents to the claimant.

(9) In relation to the awards of compensation set out above, the Tribunal directs that parties' representatives shall co-operate and jointly agree, **within 14 days of issue of this Judgment**, a calculation showing how parties have agreed the final (grossed-up) total to offset any tax liability to the claimant, and notify the Tribunal of the agreed sums and invite the Tribunal to incorporate them into a Judgment by Consent in terms of **Rule 64 of the Employment Tribunals Rules of Procedure 2013.**

REASONS

Introduction

1. This case called again before us as a full panel for a Remedy Hearing. It has had a long and winding road back to us. Our liability Judgment dated 17 September 2021, and issued on that date, was followed by our Reconsideration Judgment dated 9 May 2022, and issued to parties on 10 May 2022.

2. A previous listing by the Employment Tribunal, on 15 June 2022, for a one-day Remedy Hearing on 27 September 2022 was postponed by the Tribunal. That postponement arose because, on 22 September 2022, the respondents' representative, Mr Miller from Clyde & Co, applied to postpone the listed Remedy Hearing on 27 September 2022.

3. Postponement was sought to allow the claimant to be medically examined on the respondents' behalf, the claimant having been medically examined, and a report dated 13 September 2022 obtained, from a consultant psychiatrist, Dr Kinniburgh, instructed on the claimant's behalf.

4. The claimant's representative, Mr Woolfson, from McGrade + Co, having no objection, the Tribunal, of consent of both parties, postponed that Remedy Hearing listed for 27 September 2022, and ordered it to be relisted on dates to be assigned by the Tribunal.

5. It was thereafter relisted for a public, in person Remedy Hearing, previously intimated to both parties' representatives by the Tribunal, on 2 November 2022, with 5 days allocated, being Monday 6 to Friday 10 March 2023. By

subsequent correspondence from the Tribunal, sent on 9 January 2023, this allocation was reduced to 4 days, excluding Friday, 10 March 2022. In the event, only 3 of the 4 allocated days were required for the Remedy Hearing.

6. In our liability Judgment, as varied on two matters on reconsideration, on the claimant's application, at paragraphs (2) and (4), but otherwise confirmed, we had previously found:

(1) unanimously that the respondents had failed to make reasonable adjustments for the claimant's MS disability, contrary to **Sections 20 and 21 of the Equality Act 2010**;

(2) unanimously that the respondents did not victimise the claimant, contrary to **Section 27 of the Equality Act 2010**, in relation to 3 specific matters;

(3) by majority, the Judge dissenting, that the respondents did not discriminate against the claimant on the grounds of his disability, contrary to **Section 15 of the Equality Act 2010,** by treating him unfavourably because of something arising in consequence of his MS disability;

(4) by majority, Mr Burnett dissenting, that the respondents did victimise the claimant, contrary to **Section 27 of the Equality Act 2010,** in relation to 3 other specific matters, namely his suspension, his dismissal, and rejection of his appeal against dismissal; and

(5) by majority, Mr Burnett dissenting, that the claimant was unfairly dismissed by the respondents, contrary to **Section 98 of the Employment Rights Act 1996.**

7. In advance of this Remedy Hearing, fixed to determine the amount of compensation to be paid by the respondents to the claimant for that unlawful disability discrimination (failure to make reasonable adjustments), victimisation, and unfair dismissal, the Judge had 3 separate Case Management Preliminary Hearings with parties' legal representatives on 9 August 2022, 27 September 2022, and 6 February 2023, as well as sundry interlocutory correspondence.

8. An appeal was pursued by the respondents, intimated to the Employment Appeal Tribunal ("EAT") on 23 January 2023, against a case management order made by the Judge, on 20 December 2022, requiring production of the respondents' expert medical report by 6 February 2023, being 4 weeks in advance of the start of this listed Remedy Hearing.

9. That appeal to the EAT was the subject of a **Rule 3(7)** decision by Mathew Gullick KC, the EAT sift Judge, on 7 February 2023. That sift decision was that, for the detailed reasons Judge Gullick then gave, he considered that the respondents' appeal had no reasonable prospect of success and that no further action would be taken on it, but the respondents could apply, under **Rule 3(10) of the Employment Appeal Tribunal Rules 1993** (as amended), to have the matter heard before an EAT Judge to make a direction as to whether any further action should be taken on the notice of appeal presented by the respondents.

10. Following upon a renewed application by the respondents to postpone this listed Remedy Hearing, which we refused, as detailed below, at paragraph **20** of these Reasons, the Employment Tribunal was advised by the Employment Appeal Tribunal Registrar, on 24 March 2023, that the respondents' appeal to the EAT had been withdrawn by the Council, and it was dismissed by the EAT.

Remedy Hearing before this Tribunal

11. When the case called again before us, as the full Tribunal, on the morning of Monday, 6 March 2023, as day 1 of 4 for the relisted Remedy Hearing, parties' legal representatives requested a short delay from the listed 10:00am start, while discussions between them continued.

12. The claimant, Mr Gourlay, was in attendance, accompanied by his solicitor, Mr Woolfson, and represented by his counsel, Mr John, barrister from the English bar. Mr Woolfson was not in attendance on day 2, but he was for closing submissions, as also the claimant's wife was in attendance too on that day, Thursday, 9 March 2023.

13. The respondents were, on that first day only, legally represented by Mr David Hay, counsel, advocate from the Scottish bar, instructed by Mr Miller, in turn instructed by the Council's in-house lawyer, Mr Ettles, who was also present.

14. Although a public hearing and advertised as such by the Tribunal using the CourtServe website, no members of the public attended, in person, nor remotely by CVP video conferencing.

15. On days 2 and 3, being Tuesday, 7 March 2023, and Thursday, 9 March 2023, for the Tribunal did not sit on Wednesday, 8 March 2023, evidence having concluded on day 2, Mr Miller acted as the respondents' legal representative, instructed by Mr Ettles.

16. On that first day, counsel Mr Hay explained that he was instructed by the respondents to renew an application to postpone the listed Remedy Hearing. In terms of **Rule 29**, he applied for set aside of the Judge's order of Friday, 3 March 2023 refusing Mr Miller's postponement application of that date, where Mr Miller had sought postponement, as he had applied that same day to the Employment Appeal Tribunal for a **Rule 3(10)** hearing, following upon the **Rule 3(7)** decision by the EAT sift Judge Gullick KC on 7 February 2023.

17. In particular, Mr Hay submitted that, looking at the 6 reasons given by Judge McPherson to refuse the postponement application on that Friday afternoon, when all of the relevant context and circumstances were taken into account, the full Tribunal should postpone this Remedy Hearing, rather than proceed with it.

18. The Tribunal then listened carefully to detailed oral submissions from Mr Hay, then Mr John, counsel for the claimant, before seeking certain clarifications, and adjourning for private deliberation. We do not record those oral submissions here, for it is unnecessary duplication to do so, they having been recorded in a written Note & Orders already issued to both parties by the Tribunal, as described below later in these Reasons, at paragraph 22 below.

Oral Ruling by the Tribunal: Respondents' renewed postponement application refused by the full Tribunal

19. Having heard counsel for both parties, the Tribunal adjourned, just before 1:00pm, for lunch, then private deliberation in chambers, stating it would resume at 3:00pm that afternoon, to give its oral decision on the respondents' renewed application for postponement of this Remedy Hearing.

20. When the full Tribunal resumed, in public Hearing, at 3:07pm, the Judge read out verbatim, from a ruling written in chambers, and agreed with both non-legal members of the Tribunal, as the full Tribunal's unanimous decision, and he stated as follows:

"The full Tribunal, having carefully reflected on the oral submissions from counsel for the respondents, and counsel for the claimant, made in this morning's session of the Remedy Hearing, has decided that the respondents have shown no material change in circumstances since their application to postpone, made on the morning of Friday, 3 March 2023, was refused by the Judge that afternoon, for the reasons then given.

As indicated earlier, written reasons for this our unanimous decision will follow in early course, as per Rule 62. The Tribunal declines to vary or set aside the Judge's decision to refuse postponement. As such, the Tribunal will proceed with the Remedy Hearing as from tomorrow morning, Tuesday, 7 March 2023.

As parties have not, despite previous order and direction by the Tribunal, agreed a List of Issues, and witness running order and indicative timetable, the Tribunal is conscious that, given the time now, being 15:09, that these matters need to be addressed this afternoon, taking into account that Mr Woolfson, the claimant's representative, advised the Tribunal that Dr Kinniburgh is only available tomorrow.

The Tribunal is concerned to know, this afternoon, how parties envisage the case being run, what witnesses are being led, and time for chief,

cross-examination, as well as closing submissions, in the now remaining 3 days out of the 4 days allocated.

The question of any expenses arising from today's renewed application to postpone is reserved for future determination by the Tribunal."

21. Neither party's counsel asked for any clarification of the Tribunal's oral ruling. Discussion thereafter ensued, and it was agreed that there should be an adjournment of 30 minutes to allow parties' representatives to liase and discuss matters arising for the good and orderly conduct of the remaining 3 days of the Remedy Hearing. The Hearing adjourned at 3:15pm for that purpose.

Written Reasons by the full Tribunal for refusing the Respondents' renewed application for postponement.

22. By a written PH Note & Orders dated 14 March 2023, signed by the Judge, after consultation with the non-legal members of the Tribunal, and sent to parties, and copied to the EAT Registrar, on 15 March 2023, we gave the full Tribunal's reserved reasons for refusing the respondents' renewed application for postponement of the Remedy Hearing.

23. In short, the full Tribunal was not satisfied that the respondents had shown any material change in circumstances since their application to postpone, made on the morning of Friday, 3 March 2023, was refused by the Judge that afternoon, for the reasons then given.

24. In our collective view, the factual matrix before us, on Monday, 6 March 2023, could not support the view that there had been a material change of circumstances, justifying us setting aside the Judge's refusal of the respondents' postponement application made the previous Friday. Further, and in any event, as a full Tribunal looking at all the relevant circumstances, we were unanimously of the same view, namely that the postponement application should be refused, and the Remedy Hearing proceed.

25. When proceedings resumed, at 3:50pm, on that Monday afternoon, Mr Hay was replaced by Mr Miller, representing the respondents. Counsel, Mr Hay, had been instructed only for the renewed postponement application, which the full Tribunal had refused.

26. Having heard thereafter from both parties' representatives and discussed case management issues relating to the drafting of an agreed List of Issues, and witness running order and indicative timetable, the Tribunal then, at 4:04pm, adjourned the Remedy Hearing to 10:00am on day 2, to then commence hearing evidence from the parties, on days 2 and 3, and closing submissions on day 4.

Issues before the Tribunal

27. The following List of Issues was provided to the full Tribunal as those jointly agreed by parties' representatives as being the factual and legal issues before the full Tribunal for our judicial determination, as follows:

1. ***Does the claimant have a psychiatric condition? If so, what?***

2. Has any such condition been caused by:

a. The failure to make adjustments? and / or

b. The unfair dismissal? and / or

c. The rejection of his appeal? and / or

d. Any other factor/s

3. Have all or any of the aforesaid matters in paragraph [2] rendered the claimant unfit for work and / or exacerbated any pre-morbid illness?

4. If so, when and for how long was the claimant so rendered unfit for work?

5. If he is held to be unfit for work as at the dates of the remedy hearing how long is the claimant likely to remain unfit for work?

6. When would the claimant have (a) left the respondent's employment or (b) retired had he not been dismissed?

7. What are the claimant's losses arising from any such unfitness to work? Are the losses too remote? If the losses are attributable to more than one harm are the harms divisible? Have any intervening acts or omissions contributed to the loss?

8. In particular, what should be awarded for:

a. the basic award?

b. past and future financial loss, plus interest?

c. pension loss?

d. injury to feelings, plus interest?

e. adjustment to reflect non-compliance with the ACAS Code of Practice?

f. personal injury?

and how should this be grossed up for tax purposes?

9. In any event, but for the dismissal would the claimant have been entitled to and would he have received, Ill Health Retirement benefits? What would those benefits have been?

10. Should there be any reduction in the compensatory award by reason of contributory fault and / or on Polkey grounds?

Evidence before the Tribunal

28. The Tribunal had been provided by the claimant's solicitor with a Joint Bundle of Documents for use at the Remedy Hearing, along with the claimant's own witness statement, in blue A4 size folders. Duly indexed and paginated, the Joint Bundle initially comprised 29 documents, extending to 219 pages.

29. We noted that document 23, at pages 166 / 174 of the Joint Bundle, described as "***Claimant's career history prior to joining Respondent***", appeared incomplete, due to the way it had been printed, but we were referred to the electronic version of the Bundle, where that problem did not manifest itself. In any event, document 23 was put to the claimant in cross-examination, and he clarified his career history for us.

30. On day 2, Tuesday, 7 March 2023, of consent of both parties' representatives, we added a new document 30, at pages 220-221, being an email of 7 March 2023 @ 08:51 from Victoria Rogers, the respondents' Chief Officer – People & Technology, to Mr Miller, entitled: ***"Compilation of G8 H&S retirement info".***

31. It explained how document 24 in the Joint Bundle, a G8 Retirement Report of 2 September 2022, produced at page 75 of the Bundle, had been compiled, and its acceptance into the Bundle, subject to closing submission points to be made by the claimant's counsel, Mr John, meant Mr Miller did not need to lead any Council witness to speak to it. In effect, the document was taken as read by the Tribunal.

32. In terms of previous case management orders made by the Judge, the full Tribunal had pre-read the claimant's witness statement (at our reading day, held on Friday, 3 March 2023), along with documents referred to therein, as included within the Joint Bundle.

33. While the claimant's witness statement referred to certain paragraphs in our liability Judgment of 17 September 2021, the Joint Bundle did not include a copy of that liability Judgment. At the Remedy Hearing, and in our subsequent private deliberations, we had access to that Judgment, the subsequent Reconsideration Judgment, and the Judge's various PH Notes, all as held on the Tribunal's casefile.

34. The claimant's witness statement, extending to 32 paragraphs, across 9 typewritten pages, was signed by him as being true and accurate in all respects, having been prepared by him, in the course of face-to-face meetings with his solicitor, during which he had been asked questions and provided

answers, and he had then duly revised the draft statement emailed to him by his solicitor, to produce the final, signed off version.

35. After being sworn by the Judge, on day 2, Tuesday, 7 March 2023, the claimant confirmed that he had re-read the witness statement, prior to giving evidence, and there were no amends required to make corrections for accuracy.

36. The witness statement dated 27 February 2023, was taken as read, as per **Rule 43**, although we allowed Mr John, the claimant's counsel, to ask a few questions by way of oral evidence in chief from the claimant, to address a point of clarification raised by the Judge about the claimant's receipt of State benefits, as per the figure of **£123.39 per fortnight**, shown in the claimant's schedule of loss (dated 20 February 2023) at pages 204 / 205 of the Joint Bundle.

37. The claimant gave very brief oral evidence in chief stating that he was in receipt of both Employment Support Allowance, and Disability Living Allowance, and that his wife had given the relevant information to Mr Woolfson for the purposes of preparing the schedule of loss.

38. Thereafter, on Thursday, 9 March 2023, when the case called before us for closing submissions, we allowed, of consent of both parties, the additional documents attached to Mr Woolfson's email of 17:28 the previous afternoon, these being:

- fit notes relating to the claimant from 21 August 2013, stated to be up to dismissal (some having been in the original Final Hearing Joint Bundle), but in fact covering dates up to 28 May 2015, as more fully detailed in our findings in fact later in these Reasons. These were in addition to those already produced in the Joint Bundle, as document 20, of various dates, at pages 142 to 147.

- an EMIS record for 15 August 2013 of a consultation with the claimant's GP, a Dr Priya Iyer, confirming that the claimant first consulted his GP

about stress on 15 August 2013, leading to the first fit note dated 21 August 2013.

- clarification about the claimant's receipt of State benefits.
- and a bank statement showing his fortnightly receipt of ESA from the DWP from 17 March 2022 to 2 March 2023 at rates from **£122.62** to **£123.36** fortnightly, rather than the figure of **£123.39** per fortnight, shown in the claimant's schedule of loss.

39. Given the late request for this information from the respondents, the day before by Mr Miller, Mr Woolson's email to the Tribunal stated that, as this information could have been requested prior to evidence at this Remedy Hearing starting, the claimant reserved his position in terms of relevance and admissibility.

40. For the purposes of clarity, when writing up this Judgment, we have referred to the various documents added in to the Joint Bundle on 9 March 2023 as being **document 31**.

41. It was agreed by both parties that there was no mitigation evidence produced in the Joint Bundle, as the claimant had not sought to obtain any new employment post termination of his employment with the Council on 24 September 2015, being the agreed effective date of termination of his employment with the respondents.

42. The claimant's conjoined paper apart to ET1, as referred to by Mr Miller, and put to the claimant in cross-examination, as regards paragraph 48, was referred to in our original liability Judgment. While the conjoined paper apart is not in the Bundle, the Tribunal had access to it, and it was the claimant's pled case at the time of the Final Hearing before the full Tribunal in 2020. As reproduced at paragraph 2.10 of Mr Miller's written closing submission, it is convenient to note and record here that that paragraph 48 from the claimant's conjoined paper apart to ET1 had stated as follows:

"48. Had not the Claimant been suspended and dismissed for a discriminatory reason, he would have almost certainly been

retired on the grounds of ill health. As it is, the Claimant has suffered significant financial loss in terms of his pension as a direct consequence of the discriminatory dismissal, and will seek compensation in respect of same."

43. Further, the Tribunal's earlier 31 October 2018 judgment, of consent of both parties in terms of **Rule 64**, and dismissing certain parts of certain claims, in terms of **Rule 52,** confirming the claimant's withdrawal of certain parts of his 4 combined claims, as referred to by Mr Miller, in his cross-examination of Mr Gourlay, was not in the Bundle, but it is in the Tribunal's casefile, and on the Gov.UK website. We accordingly had access to it too.

44. The Tribunal provided both parties with the hyperlink to that 2018 judgment and, at closing submissions on 9 March 2023, the Judge had obtained the Tribunal's casefile for claim **4100137/2016,** the claimant's unfair dismissal complaint, and the Judge read out the actual content of paragraphs 73-76 of the paper apart to that ET1, in section No 04 : entitled "***Psychiatric injury / stress / duty of care***.", for the information of both parties' representatives.

45. It had stated as follows:

"***No 04: Psychiatric injury / stress / duty of care***

73) The acts contained herein have acted / impacted on the claimants (sic) ***health.***

74) The stress risk assessment form, provided to the claimant, changed 'purpose' i.e. when the workplace moved to the Office of the Future pilot and test environment i.e. differing stressors.

75) The stress risk assessment form provided to the claimant has been inadequate for the task it had to do. The claimant advised OH Nurse on 27 September 2013 and the respondent of this. The claimant was concerned that the form used, initially provided in hard copy, involved much input from the employee whereas the HSE 35 'questionnaire' would provide a baseline on which to

measure; was consistent; and did not require an 'expert' to interpret.

76) The claimant's stress risk assessment has been dealt with by Stephen West i.e. an accountant with very little experience of dealing with stress issues never mind complex stress issues. Note: actions going uncompleted and unaudited etc."

Findings in Fact

46. We have not sought to set out every detail of evidence which we heard nor to resolve every difference between the parties, but only those which appear to us to be material. Our material findings, relevant to the issues before us for judicial determination, based on the balance of probability, are as set out below, in a way that it is proportionate to the complexity and importance of the relevant issues before the Tribunal.

47. We have made the following findings in fact, on the basis of the evidence heard from the two witnesses led before us, the claimant and Dr Kinniburgh, and the pension loss reports by Dr John Pollock as produced to us, the respondents having led no witness on their own behalf, but Mr Miller having cross-examined both the claimant and Dr Kinniburgh.

48. Our findings also have regard to the various documents in the Joint Bundle of Documents and the additional documents provided to us, so far as spoken to in evidence, and documents in the Tribunal's casefile, which though not included by parties in the Joint Bundle, are relevant and material to the issues before this Tribunal.

49. The Tribunal has found the following essential facts established:

Background

(1) The claimant, aged 60 as at the date of this Remedy Hearing, is a former employee of the respondents.

(2) The claimant's career history prior to joining the respondents' employment was set out across document 23 in the Joint Bundle provided to the Tribunal,

at pages 166 to 174. This includes the claimant's application form when he applied to work at the respondents.

(3) A chronology of the claimant's career, broadly summarised by the respondents, in their Counter Schedule, at pages 209 and 219 of the Joint Bundle, and accepted as a broadly accurate summary by the claimant, was set out as follows:

- Nov 07 – until he joined the respondent in April 08: self-employed H&S Adviser
- Nov 06 – Nov 07 : H&S Adviser, Meat Hygiene Service
- May 04 – Nov 06 : H&S Officer, Falkirk Council
- Jan 04 – May 04 : unemployed
- Aug 1989 – Jan 04 : Glasgow Herald, various roles until May 96 elected a TU H&S rep and then did H&S qualification
- Prior to 1989, many short term roles held some only 1 year, 2 years and max was 4 years.

(4) The claimant was previously employed by the respondents as a Corporate Health and Safety Officer based at their then HQ premises in Garshake Road, Dumbarton. That building has since been demolished, and their HQ relocated to premises at Church Street, Dumbarton.

(5) The respondents are a large local authority in the west of Scotland, employing around 6,500 staff at the time when the claimant was employed by them.

(6) As the Tribunal found, in its liability Judgment issued on 17 September 2021, at its findings in fact, at paragraph 28 (5), the claimant commenced employment with the respondents on 28 April 2008.

(7) He remained in their continuous employment until 24 September 2015, on which date he was summarily dismissed on grounds of misconduct, by Mr Stephen West, the respondents' Head of Finance & Resources.

(8) On 17 June 2015, the claimant was suspended from duty by Stephen West, due to an ongoing investigation into the claimant's conduct, as per our finding in facts, at paragraphs 28 (200) and (201) in our liability Judgment.

(9) The claimant's letter of suspension dated 17 June 2015, from Stephen West, as produced to the Tribunal at the liability Hearing, at pages 379 and 380 of the electronic core Bundle used at the continued Final Hearing, stated that the claimant's suspension was a precautionary measure, with no assumption of guilt, it did not constitute a disciplinary sanction, and the suspension was on full pay.

(10) That suspension and the then ongoing investigations led to a disciplinary hearing, and the claimant's summary dismissal by Mr West, on 24 September 2015, as per our findings in fact at paragraph 28 (203) to (229), and the subsequent unsuccessful appeal against dismissal, to the respondents' Appeals Committee, as per our findings in fact at paragraph 28 (230) to (249), his appeal being finally rejected on 25 August 2016.

(11) The terms of the concluding, operative paragraph of the letter of dismissal from Mr West to the claimant, dated 24 September 2015, were set out by the Tribunal at paragraph 28 (225) of its liability Judgment, as follows:

"I have outlined my rationale in respect of each of the allegations and would conclude that cumulatively they are demonstrative of gross misconduct based upon serious insubordination, serious breaches of trust and confidence, and serious breaches of the Council's Code of Conduct for Employees. This has resulted in an irretrievable breakdown of trust and confidence in the employment relationship. As a result of this I feel that I have no option but to dismiss you from your position of Health and Safety Officer within Corporate Services at West Dunbartonshire Council."

(12) The claimant appealed the dismissal decision, and an appeal hearing took place over 6 days, being 18 February 2016, 24 May 2016, 27 May 2016, 20 July 2016, 21 July 2016, and 25 August 2016, before a panel of councillors, sitting as an Appeals Committee.

(13) The claimant's appeal, however, was unsuccessful. The claimant was advised orally that his appeal was not upheld, by Councillor Tommy Rainey, the Appeals Committee panel chair, and that appeal outcome was reiterated in writing in the course of a letter signed by the respondents' Mr Peter Hessett, Head of Legal, Democratic & Regulatory Services (Monitoring Officer) dated 26 August 2016.

(14) The material terms of that appeal outcome letter from Mr Hessett were set out by the Tribunal at paragraph 28(248) of its liability Judgment, as follows. It confirmed that:

"... ***the Appeals Committee decided that the grounds of appeal had not been substantiated and did not uphold the Appeal. Under the Council's Disciplinary Policy and Procedure, the decision of the Appeals Committee is final."***

(15) As the Tribunal found, in its liability Judgment, at its findings in fact, at paragraph 28 (10), but for his summary dismissal by Mr West, the claimant's disciplinary record with the respondents was clear of default during his 7-year period of continuous employment with them.

Claimant's Disability

(16) The claimant suffers from a number of serious medical conditions, chief amongst them Multiple Sclerosis ("MS"). He was first diagnosed with MS in January 1996. He also has type 2 diabetes, first diagnosed in May 2015, along with depression, first diagnosed in June 2015.

(17) MS is automatically deemed to be a disability under and in terms of Schedule 1, Part 1 of the Equality Act 2010, and the respondents do not dispute that the claimant suffers from MS, and that he suffered from MS throughout the period of his employment with the respondents, and that he therefore is, and was at all material times, a disabled person for the purposes of the Equality Act 2010.

(18) At this Remedy Hearing, as per the respondents' written closing submission, at paragraph 1, it was accepted that the claimant does have a psychiatric condition, namely ***"severe depressive episode",*** but, as per paragraph 2.1,

the respondents submit that the cause or causes of his condition cannot be identified with sufficient precision so as to attribute blame to any single event or combination of events.

(19) Further, as per paragraph 2.2, the respondents also submit that the most that can be said is that the combination of the claimant's physical health and workplace challenges contributed to the development of the psychiatric condition in ways and to degrees that cannot now – due to the passage of time and necessarily speculative nature of medical opinion – be disentangled.

Claimant's circumstances post-employment, and at close of Remedy Hearing

(20) The claimant's employment with the respondents ended on 24 September 2015 when he was dismissed on grounds of gross misconduct. His employment was not terminated on capability / ill-health grounds, and he was not granted early retirement on ill-health grounds.

(21) Further to a meeting with the respondents' Jean Mulvenna, HR, on 14 January 2015, and a discussion about figures for ill-health retirement, the claimant discovered, from a GDPR response from the Strathclyde Pension Fund Office ("SPFO"), on 22 November 2022, that retirement benefit calculations had been provided by SPFO to the respondents on 21 January 2015, but never provided to him by the respondents.

(22) Copy emails regarding these retirement calculations, and calculation figures, with estimated date of retirement at 31 March 2015, were provided to the Tribunal, as documents 16 to 18 in the Joint Bundle, at pages 101 to 135.

(23) During the first half of the financial year 2015 / 2016, the respondents released 16 employees through early retirement, or voluntary severance, and a further 11 through ill-health retirement, and copy of a report to the Council's Corporate Services Committee on 11 November 2015, was produced to the Tribunal as document 19, at pages 136 to 141 of the Joint Bundle.

(24) There was also produced to this Tribunal, as document 24, at page 175 of the Joint Bundle, a "***G8 retirement report***" dated 12 September 2022 prepared

by the respondents, and , as document 25, at page 176 to 178, a ***"historic vacancy report"***, similarly prepared by the respondents.

(25) The G8 retirement report was explained in the additional document, added to the Joint Bundle, as document 30, at pages 220 to 221, being the email of 7 March 2023 at 08:51 from the respondents' Victoria Rogers (Chief Officer – People and Technology) to their solicitors, Mr Miller and Mr Ettles, stating as follows:

"*In preparation for responding to the claimant's assertions about retirement, a report detailing average age of grade 8 employees including H&S officers as a separate category, retiring by financial year was compiled.*

To produce the report based on the above requirements, the Council's workforce management system (WMS) officer created a report on Chris 21 (the WMS) report designer but included employee number, name, post details, birthdate, post information, termination date and termination reason. A parameter was set on the report to only give employees at grade 8 and with a termination date in Chris 21.

Once the report was run, the report was reduced to include only those records where the termination reason was "Retiral - Age", "Retiral – Ill Health", "Retiral on Option (60+)", or "Retiral – Efficiency", as those referring to retirement. 3 columns were added at the end of the report to be able to pivot the data in the way required:

- *category to identify H&S officers from the rest of the grade 8;*
- *financial year; and*
- *age at retirement (this is calculated using a formula based on the retirement date less birthdate in years).*

The pivot function in MS Excel was used to display the average age over retirement by financial year in two tables (one for Grade 8 category and the other for "Health & Safety Officer") and then filtered them to only include the

following 3 retirement reasons as requested: "Retiral - Age", "Retiral – Ill Health", and "Retiral on Option (60+)".

Sample size was included on the table to display headcount of retiral terminations by financial year for each category and this is added as column F (as requested) and named "Sample Size". The same is provided for the second table but the "Sample Size" details were placed in column E instead."

(26) The "***G8 retirement report***" detailed average age at retirement over financial years 2009-2010 to 2022-2023. Of the sample size of 82, there were only 3 Health & Safety Officers.

(27) The Tribunal finds that this report, which was not spoken to in evidence by any witness from the respondents, was of no practical assistance to the Tribunal. It contains raw data, with no detail as to individuals. It was not put to the claimant, in cross-examination.

(28) The "***historic vacancy report***", running to 3 pages, had job titles only and in some, but not all cases, location outwith West Dunbartonshire), for 301 headcount jobs, but no other data was included as to where and when these vacancies had arisen, nor as to the nature and extent of the job, and salary placing, etc.

(29) Again, the Tribunal finds that this further report, which was also not spoken to in evidence by any witness from the respondents, was of no practical assistance to the Tribunal. It contains raw data, with no detail as to individual job vacancies. It was not put to the claimant, in cross-examination, that he unreasonably failed to mitigate his losses by failing to apply for any of these listed vacancies.

(30) It was a matter of concession by the claimant that he had not applied for any other jobs post-termination of his employment with the respondents on 24 September 2015.

(31) He has not been able to manage any paid or voluntary work since his dismissal by the respondents in September 2015.

(32) As at the date of the start of the Remedy Hearing, the claimant was unemployed, not in any new employment with a new employer post-termination of employment with the respondents, and in receipt of State benefits.

(33) In the circumstances of this case, the Tribunal finds that that the claimant did not unreasonably fail to mitigate his losses, by failing to try and secure new employment with another employer after the respondents dismissed him on 24 September 2015, as he was then certified not fit to work.

Medical certificates post-termination

(34) The claimant was unfit for work, and he had medical certificates from his GP to certify that, as per the Bundle at pages 142 to 147. The medical certificates produced there, running from 25 September 2015 to 24 June 2016, show as follows:

Bundle page reference	**Date of assessment / certificate**	**Condition stated as unfit for work**	**Date from**	**Date to**
142	09/12/2015	multiple sclerosis, stress related illness	25/09/2015	23/12/2015
143	23/12/2015	multiple sclerosis, stress related illness	23/12/2015	21/01/2016
144	28/01/2016	multiple sclerosis, stress related illness	21/01/2016	25/02/2016

145	25/02/2016	multiple sclerosis, stress related illness	25/02/2016	24/03/2016
146	24/03/2016	multiple sclerosis, stress related illness	24/03/2016	22/04/2016
147	10/05/2016	multiple sclerosis, stress related illness	24/04/2016	24/06/2016

Claimant's pension and State benefits

(35) There was also produced to this Tribunal, as document 26, at pages 179 to 203 of the Joint Bundle, a document dated 7 January 2022, described as "***Claimant's pension summary***", but rather than detailing his pension position as at the date of the Remedy Hearing, it was in fact a copy of the claimant's letter of that date to Glasgow ET.

(36) His letter was written in response to an order of the Tribunal, at the Reconsideration Hearing held on 14 December 2021, for a concise chronology of events and timeline for the decisions made in the claimant's various appeals / submissions to the Scottish Public Pensions Agency, the Pensions Regulator, and the Pensions Ombudsman, to do with his entitlements to local government pension, and when the ongoing references were likely to be determined by those bodies.

(37) In his letter of 7 January 2022, with appendices, the claimant detailed the 9 distinct phases so far in regard to him trying to progress and obtain his entitlements from the local government pension, describing it as ***"a very protracted, frustrating and stressful period of my life."***

(38) As at the close of this Remedy Hearing, on 9 March 2023, the claimant was unemployed, permanently unfit from work, and in receipt of local government pension, and State benefits, namely Employment Support Allowance ("ESA"), and Disability Living Allowance ("DLA").

(39) His circumstances were confirmed in an update email from his solicitor to the Tribunal on 22 August 2023, as part of parties' further written representations to the Tribunal post the Remedy Hearing.

(40) It was there confirmed that there has been no change to the claimant's circumstances since the Remedy Hearing, "***i.e. he is still unemployed, permanently unfit for work, and in receipt of pension, EESA*** [sic] ***and DLA".***

(41) As regards the claimant's receipt of a local government pension, and as confirmed to the Tribunal, in the claimant's solicitor's email of 2 June 2023, in post Remedy Hearing correspondence with parties' solicitors, there was produced to the Tribunal, and copied to the respondents' solicitor, a copy letter of 15 February 2018 from the Strathclyde Pension Fund Office to the claimant, not previously included in the Joint Bundle, showing his final pay with the respondents being **£35,349.44 pa**, and the claimant's receipt of a reduced pension of **£9,248.82 pa**, and an increased lump sum of **£61,658.75**, being deferred pension paid on the grounds of permanent ill-health backdated to 12 November 2016.

(42) There was also produced, in that same email, a document produced by the claimant showing pension payments (including backdating and interest from 12 November 2016) into his bank account from 2 May 2018 to 15 March 2023, at the appropriate pension payment monthly, currently **£838.01** per month, as at 15 March 2023.

(43) The claimant was in receipt of DLA, since 1997, and thus while employed by the respondents. He would have continued to receive that DLA benefit even if he had not been dismissed by the respondents. As such, DLA is not referred to in the claimant's Schedule of Loss, produced to the Tribunal at pages 204-205 of the Joint Bundle. The claimant has claimed ESA following termination

of his employment by the respondents on 24 September 2015. He was still in ongoing receipt of that State benefit at the time of this Remedy Hearing.

(44) Included within the Joint Bundle, at document 21, at page 148, was a copy text message to the claimant, from the Department for Work & Pensions, dated 9 April 2016, reading as follows: ***"We've received your Fit Note and details of your assessment. Your ESA payment will continue and you don't need to send us any more Fit Notes."***

(45) There was produced to the Tribunal, as additional document 31, added to the Joint Bundle, on 9 March 2023, a document showing the claimant's receipt of ESA payments, at rates from **£122.62** to **£123.36** fortnightly, rather than the figure of **£123.39** per fortnight, shown in the claimant's schedule of loss, from the Department of Work & Pensions ("DWP"), into his bank account, covering the period from 17 March 2022 to 2 March 2023.

(46) No other vouching documentation has been provided to the Tribunal, on the claimant's behalf, as regards his earlier receipt of ESA, or the date from which the claimant first received ESA from DWP.

(47) In the Schedule of Loss, prepared as at 20 February 2023, produced to the Tribunal at pages 204-205 of the Joint Bundle, it is stated that the claimant's **estimated** receipt of State benefits, based on current **£123.36** per fortnight, to the date of the Remedy Hearing, is **£24,445.38.**

(48) Only that figure has been provided to the Tribunal, with no note, or supporting vouching documentation, to explain how that total amount has been calculated, other than the claimant's brief oral evidence that it was based on information his wife gave to his solicitor.

Schedule of Loss, and Counter Schedule

(49) At an earlier stage in these Tribunal proceedings, the claimant's then solicitor, Ms Dalziel at McGrade + Co, intimated a provisional Schedule of Loss, dated 29 November 2018, and updated on 1 February 2019, seeking a total sum of **£230,032.24**, comprising basic award of **£4,987.50** (7 years x **£475pw capped** x 1.5) , compensatory award of **£12,995.84** (26 weeks loss of salary

from 25/9/15 to 24/3/16, at **£499.84 pw net** = £12,995.84), pension loss of **£181,840.00**, loss of statutory rights at **£500,** and injury to feelings, at **£30,000**, but not any sum for personal injury.

(50) At that stage, the claimant's gross weekly salary with the respondents, as at effective date of termination of employment, was stated to have been **£698.76** (subject to the then statutory week's pay cap of **£475**), and net weekly salary of **£499.84.**

(51) At this Remedy Hearing, the claimant has sought payment of compensation from the respondents, as per his Schedule of Loss, prepared as at 20 February 2023, in the total sum of **£882,058.13**, as per the copy produced to the Tribunal, as document 27, at pages 204-205 of the Joint Bundle.

(52) The calculation for past loss of salary includes **£13,495.68** for 26/09/2015 to 02/04/2016, shown as 27 weeks @ **£499.84 per week** (net), then assumed gross annual salaries for each following financial years, from 03/04/ 2017 to 10/03/2023, multiplied by 71.53% to give an assumed net loss of pay.

(53) Future loss of salary to retirement is calculated using an assumed annual gross salary, again multiplied by 71.53% to give an assumed net loss of pay, assuming a 2.3% annual increase on salary, based on an asserted average increase of the last 8 years' increase.

(54) That Schedule of Loss sought a basic award of **£4,987.50** (calculated as 7 x £475 x 1.5); past loss of salary @ **£181,214.10**, less State benefits of **£24,445.38**; interest of **£31,801.07;** future loss of salary to retirement of **£221,713.69**, less State benefits of **£21,469.86**; pension loss of **£197,430**; injury to feelings of **£40,000**, plus interest of **£30,400 ;** personal injury award of **£45,000;** ACAS uplift of 20% = **£149,511.77;** producing sub-total of **£902,058.13,** less interim payment of **£20,000.** No sum was sought for loss of statutory rights.

(55) That sum sued for by the claimant of **£882,058.13** takes into account an interim payment on account of **£20,000.00** paid to him by the respondents,

and received by the claimant on 20 December 2022, as shown in the copy Schedule of Loss, at page 205 of the Joint Bundle.

(56) The respondents provided a Counter Schedule dated 9 September 2022, per their representative, Mr Miller, a copy of which was produced to the Tribunal, as document 28, at pages 206 to 209 of the Joint Bundle. It adopted a narrative approach to respond to the claimant's updated Schedule of Loss intimated on 2 September 2023.

(57) An undated version of that Counter-Schedule, with comments in response by the claimant's solicitor, Mr Woolfson, in bold, with later comments in reply by Mr Miller in italics, was produced to the Tribunal, as document 29, at pages 210 to 219 of the Joint Bundle, setting forth the claimant's position in response, and the respondents' reply. Mr Woolfson's comments were intimated on 3 November 2022, and Mr Miller's reply on 17 November 2022. In particular, parties jointly agreed that as the claimant did not pursue alternative employment, post termination of employment with the respondents, he did not have to wait two years to re-acquire protection against unfair dismissal, and so he has no loss of statutory rights.

(58) By parties' further written representations, received on 13 March 2023, the Tribunal was further advised by the claimant's solicitor, Mr Woolfson, that the **£20,000** already paid by the respondents to the claimant represents settlement of the basic award **(£4,987.50**) with the balance being a payment on account towards injury to feelings.

Claimant's absences from work, Medical reports and medical certificates during employment

(59) At the Final Hearing, as we recorded at paragraph 28(9) of the findings in fact in our liability Judgment of 17 September 2021, the claimant's absence record during his employment with the respondents was as follows:

- 28 April 2008 to 31 March 2009: 0 days
- 1 April 2009 to 31 March 2010: 4 days

- 1 April 2010 to 31 March 2011: 0 days
- 1 April 2011 to 31 March 2012: 0 days
- 1 April 2012 to 31 March 2013: 0 days
- 1 April 2013 to 31 March 2014: 58 days
- 1 April 2014 to 31 March 2015: 166 days
- 1 April 2015 to 25 September 2015: 5 days

(60) As also recorded in our liability Judgment, during the course of his employment with the respondents, the claimant was subject to several Occupational Health assessments, attendance review meetings, and Access to Work assessment. We refer to our detailed findings in fact in that regard in our liability Judgment for ease of reference, but do not consider it appropriate or proportionate to repeat all the detail here.

(61) Suffice it to note and record here, for present purposes, and as per our finding in fact paragraph 28 (14) in our liability Judgment, that on 21 August 2013, the claimant, while still at work, submitted a fit note from his GP which advised that he required amended duties and physiotherapy, as a result of a stress related illness (cervicalgia) and fatigue combined with his heavy workload at the time, which included covering for a colleague who had retired.

(62) The respondents did not put in place amended duties or arrange physiotherapy, although they did refer the claimant to Occupational Health. He was then absent from work from 9 to 24 September 2013, as per our finding in fact paragraph 28 (16) in our liability Judgment.

(63) Further, per our finding in fact paragraph 28 (46) in our liability Judgment, the claimant was absent from work, for disability / MS related reasons, as per his GP's medically certified sickness certificates, from 23 April 2014 to 15 December 2014.

(64) Along with his solicitor's email of 9 March 2023, as narrated at paragraph 38 of these Reasons, there were produced to the Tribunal, as part of document

31, various copy fit notes relating to the claimant from 21 August 2013, stated to be up to dismissal (some having been in the original Final Hearing Joint Bundle), but in fact covering dates up to 28 May 2015, as follows:

Bundle page reference (where given)	**Date of assessment / certificate**	**Condition stated as unfit for work**	**Date from**	**Date to**
54	21/8/2013	stress related illness, shoulder pain	3 weeks	
63	12/09/2013	Cervicalgia, stress related illness	09/09/2013	23/09/2013
99	12/11/2013	Work related stress	4 weeks	
100	10/12/2013	Work related stress	4 weeks	
101	07/01/2014	Work related stress, MS related symptoms	07/01/2014	21/01/2014
102	21/01/2014	work related stress / flare up of MS	21/01/2014	22/01/204

	23/04/2014	right eye pain with MS	23/04/2014	07/05/2014
	06/05/2014	right eye pain with MS	06/05/2014	20/05/2014
	21/05/2014	optic neuritis, awaiting review in ophthalmology, flare up of MS	4 weeks	
	18/06/2014	optic neuritis, flare up of MS	18/06/2014	31/07/2014
	28/07/2014	MS flare up, falls and back pain	6 weeks	
	08/09/2014	multiple sclerosis with back pain, fatigue and episodes of urine incontinence	6 weeks	
	20/10/2014	multiple sclerosis, stress / fatigue and episodes of urine incontinence	6 weeks	
	01/12/2014	multiple sclerosis / urinary incontinence	01/12/2014	15/12/2014
311	15/12/2014	multiple sclerosis and urinary incontinence	15/12/2014	15/01/2015
	27/03/2015	multiple sclerosis	26/03/2015	04/05/2015

36	22/05/2015	tiredness ? diabetes, awaiting tests	22/05/2015	29/05/2015
	28/05/2015	tiredness ? diabetes,	27/05/2015	28/05/2015

(65) On 17 June 2015, the claimant was diagnosed by his GP as suffering from a depressive disorder, and a copy of the medical record showing that diagnosis was provided to the respondents, per Stephen West and HR, as per our finding in fact paragraph 28 (199) in our liability Judgment.

(66) In our liability Judgment, at paragraph 183 of our Reasons, we recorded that the respondents had accepted that the claimant was a disabled person in respect of his MS, but that related to his physical rather than mental health condition.

(67) While there was some evidence before us (at that Final Hearing) that the claimant was diagnosed with depression, we did not then make any specific finding that he had any specific psychological state, at that time, as we simply did not have the supporting evidence before us to make any such finding.

(68) For the purposes of this Remedy Hearing, the Tribunal was provided, by the claimant's solicitor, with the report of 13 September 2022, and supplementary report of 17 February 2023, by Dr Alisdair J Kinniburgh, consultant psychiatrist, as produced to the Tribunal as documents 5 and 6 in the Joint Bundle, at pages 15 to 23 inclusive.

Independent Psychiatric Reports on the Claimant

(69) At the request of the claimant's solicitor, Mr Woolfson, the claimant was examined at the Charleston Centre, Paisley, on 23 August 2022, by Dr Alisdair John Kinniburgh, MBChB, MRC Psych, and a copy of his report dated 13 September 2022 was produced to the Tribunal, as document 5 in the Joint Bundle, at pages 15 to 19. His report was given on Soul and Conscience.

(70) In preparing that report, Dr Kinniburgh had reviewed various documents provided to him, and a copy of these were produced to the Tribunal as documents 7 to 9 in the Joint Bundle, comprising (at document 7, pages 24 to 30) a medical report from Dr Walker to SPPA (Scottish Public Pensions Agency), indexed as undated, but from Dr Kinniburgh's report referenced as being dated 5 July 2019; a document 8 (various documents reviewed by Dr Walker, of various dates) at pages 31 to 64); and document 9 (additional documents reviewed by Dr Kinniburgh, of various dates, at pages 65 to 88).

(71) In his report of 13 September 2022, Dr Kinniburgh stated as follows:

*"At the request of Mr Giles Wolfson **[sic]** of McGrade & Co, Solicitors, Glasgow, I examined, the above named at The Charleston Centre, Paisley, on 23 August 2022 for the purpose of preparing an independent psychiatric report. This report is based on my interview with Mr. Gourlay and on his psychiatric records held on the Greater & Glasgow Clyde Electronic Medical Information Records (EMIS) system. I was also supplied with documents by Mr. Wolfson **[sic]** , including an Occupational Health report by Dr. Walker dated 5th July, 2019. Mr. Gourlay also provided me with background medical information, including Sickness Certificates from his General Practitioner, and information from various medical specialists, including Occupational Health Physicians, Consultant Neurologists and Consultant Ophthalmologists.*

I confirm that I am a fully registered medical practitioner (GMC No: 3257661) approved under Section 22 of the Mental Health (Care & Treatment) (Scotland) Act 2003 as having special expertise in the diagnosis and treatment of mental disorder.

I also confirm that there is no conflict of interest with regard to the preparation of this report. I have no pecuniary interest in the outcome of this case and I am not related to Mr. Gourlay.

Mr. Gourlay is currently involved in an ongoing Employment Tribunal, which stems from Mr. Gourlay having been dismissed from his job as a Corporate Health & Safety Officer with West Dunbartonshire Council in September 2015, after 7+ years of service. In September 2021 the Employment Tribunal judged

that he had been unfairly dismissed and also that his previous employer had failed to make reasonable adjustments in relation to his medical condition of multiple sclerosis.

Mr. Gourlay's issues at work started in September 2013 when his then employer instigated a managerial procedure referred to as "Office of the Future", which involved significant changes to Mr. Gourlay's physical working environment, which were not compatible with his type of disability. From August 2013 until May 2016, i.e. after his dismissal from West Dunbartonshire Council, Mr. Gourlay has a series of medical sickness certificates provided by his General Practitioners at Moodiesburn Medical Centre, all of which refer to "work related stress" as the reason for his absence. Over this time, Mr. Gourlay raised a number of issues and grievances with his employers. His records for this period also show that a number of allegations were made against Mr. Gourlay, resulting in his eventual dismissal in September 2015. Since then Mr. Gourlay has explored various mechanisms of appeal, eventually leading to the Tribunal decision of September 2021, referred to above. This process has been both lengthy and traumatic for Mr. Gourlay. Mr. Gourlay has invested a great of his time, energy and money in this matter since 2015 and there has also been an appreciable emotional cost.

Past Psychiatric History

1. *Documented work-related stress from 2013 to 2016 - this term in common usage by General Practitioners refers primarily to symptoms of depression and anxiety, whose origins are thought to be a direct result of employment. In Mr. Gourlay's case this was of sufficient severity to merit long periods of absence from work, rather than simply brief absences or amended duties.*

2. *Mr. Gourlay also suffered more severe psychiatric sequelae from his employment. In March 2018, Mr. Gourlay's General Practitioner referred him to his local Community Mental Health Team at Larkfield Centre, Kirkintilloch, because of worsening depression with suicidal ideation. The GP specifically mentioned dismissal from work and*

ongoing legal proceedings as causative factors in his illness. At this point he was on anti-depressant medication due to the workplace issues but the General Practitioner was seeking additional help and support. He received a number of sessions of counselling and psychological support and was discharged back to his General Practitioner in June 2020. He has had no further contact with. secondary care psychiatric services since then.

3. Mr. Gourlay has no history of problems with drugs or alcohol.

Past Medical History

1 Multiple sclerosis - diagnosed in September 1996 and followed up since then at Neurology and Ophthalmology out-patients. Mr. Gourlay originally had the common relapsing and remitting form of multiple sclerosis, where he would suffer acute exacerbations of his illness with increased neurological dysfunction, which would then improve, leaving varying degrees of residual disability. He has since been told by his neurologist that his multiple sclerosis has evolved into the secondary progressive variant. Mr. Gourlay has fared relatively well since 1996, in that he remains relatively well physically. He remains mobile, walking with the aid of only one stick. His eyesight is relatively preserved and he remains able to drive. There are no signs of cognitive impairment. He has had some continence issues, but is able to manage these.

1. 2014 - hiatus hernia.

2. 201 5 - Type II diabetes.

Current Medication

1. Tegretol - an epilepsy drug, also used in the treatment of muscular spasms.

2. Amantadine - used to counteract fatigue in multiple sclerosis.

3. Omeprazole ™ for peptic ulcer disease.

4. *Mirtazapine 45mg at night - an anti-depressant drug.*

5. *Metformin 1 0Omg twice daily - for diabetes*

6. *Gliclazide 80mg twice daily - for diabetes*

7. *Baclofen 10mg twice daily - MS related*

8. *Solifenacin 10mg one a day - urinary incontinence*

9. *Various for high blood pressure and cholesterol*

Family History

Mr. Gourlay is married and has a son and a daughter. He was not aware of any family psychiatric history.

Personal and Social History

Mr. Gourlay was not aware of any perinatal or developmental problems. He grew up in North Lanarkshire, Muirhead, then Moodiesburn. He attended primary and secondary schools in Coatbridge, leaving school at 16 with good O Grades. He has been involved in the world of work from an early age, starting as a farm labourer on his uncle's farm as a young teenager. After school he had a variety of jobs, including apprentice electrician and lorry driver before joining the newspaper industry in Glasgow at the age of 22 on the printing and production side. He gained qualifications in this industry remaining there until after his multiple sclerosis diagnosis. One of his early occupational health doctors suggested that as his physical health might fail due to multiple sclerosis that he should think more about "using his brain". Therefore, while in the printing industry he gained an HNC in computing from Coatbridge College and an HNC in Business Administration from Cumbernauld College. He won the SQA lifelong learning award in 1999 and as a result was invited to attend a lunch with the Queen in Stirling Castle. While working for Local Government and the civil service (initially Falkirk Council) he went on to complete a Master of Science Degree at Strathclyde University in 2007, with distinction. All studies took place whilst employed and were self-funded. At the time of the ending of his employment with West

Dunbartonshire Council, he was studying for a Ph.D. with Strathclyde University on Corporate Governance in a Modern Britain, though this was deferred in early 2014 due to workplace difficulties.

Mr. Gourlay has not worked since his dismissal from work in 2015. He also does not participate in any specific hobbies or interests.

Mental State Examination

Mr. Gourlay was well-presented, with no signs of self-neglect. His multiple sclerosis was only evident in his slightly slow gait and his use of one stick. He was able to participate well in a long interview and there were no problems with attention, concentration or memory. Mr.

Gourlay's mood appeared low but with some reactivity of affect. This was appropriate given the gravity of the matters we were discussing. There was no formal thought disorder or any evidence of psychosis. His thought content was entirely appropriate with no evidence of delusional material. He gave accurate and detailed answers to my questions and showed good insight into his problems over the years. I found that he broke down in tears at several points during the consultation, however, when discussing matters in relation to his treatment at work from 2013, his subsequent dismissal from work and the lengthy appeal process.

Summary and Recommendations

*Mr. Wolfson **[sic]** has four specific questions in relation to Mr. Gourlay's case, which I will now answer in turn.*

1. If the Council had made reasonable adjustments (or had made them in a timely manner) would Mr. Gourlay have been fit to remain at work, and, if so, for how long?

He had shown himself to be hardworking, resourceful and resilient. This is shown by his continued full-time work, his gaining of multiple qualifications and his ongoing research qualifications on top of full-time work, all after his diagnosis of multiple sclerosis. Fortunately his multiple sclerosis has not

caused more severe disability and Mr. Gourlay retains full cognitive function. Similarly his physical mobility and ability to drive mean that he could have remained in the workplace for significantly longer if reasonable adjustments had been made. In my opinion, if these adjustments had been made then he could still be working, now, and could reasonably have been expected to work until normal retirement age.

2. As a result of the failure to make reasonable adjustments, and/or the unfair and discriminatory dismissal, has Mr. Gourlay been unfit to work since September 2015 and, if so, to what extent?

As stated above, Mr. Gourlay has not been able to manage any paid or voluntary work since September 2015. In my opinion, this is due to the severity of the mental health sequelae of the events in 2013 - 2015 already considered by the Employment Tribunal, and the stress of subsequent legal action. As evidenced by his General Practitioner, Mr. Gourlay was already unfit to work because of work-related stress and depression from approximately 2013 onwards and this would not have been improved in any way by his unfair dismissal. He then underwent considerable physical, emotional and financial distress through a long appeals procedure, which resulted in him becoming very depressed and feeling that his life was not worth living from around 2017. He has not fully recovered yet from this problem and remains on anti-depressant treatment from his General Practitioner. He has not returned to normal activities of daily life, such as studying or hobbies. He remains traumatised by certain events and has marked intrusive memories, with associated emotional upset on an ongoing basis as I witnessed during my interview with Mr. Gourlay. These mental health sequelae, namely, depression, anxiety and traumatic symptoms have been of a severity, such that Mr. Gourlay has been completely unfit for work since September 2015.

3. If Mr. Gourlay continues to be unfit for work, for how long is that likely to be the case?

In my opinion given the severity of the events which precipitated his current illness, and the fact that his symptoms have not resolved over an approximate

seven year period of time, then his prognosis is concerning. I believe that Mr. Gourlay will remain unfit for work for the foreseeable future. It is unlikely that he will make any meaningful recovery which would allow him to return to employment.

4. Has Mr. Gourlay been caused any psychiatric medical condition as a result of the failure to make reasonable adjustments, and/or the unfair and discriminatory dismissal?

I believe that the failure to make reasonable adjustments at work in response to Mr. Gourlay's needs and requests has precipitated a significant depressive illness, which resulted in him being off work at various points from 2013 onwards. This depressive illness worsened over time, especially after his unfair dismissal and the rejection of his appeal. These events were extremely traumatic for Mr. Gourlay and he continues to have trauma symptoms in the form of intrusive memories to the present day. During Mr. Gourlay's darkest days from 2015 until 2018 there were lengthy periods where he felt his life was not worth living and his thought processes were extremely dark andnegative. He did not act on these thoughts, largely due to the support from his family and to a lesser extent from psychiatric services.

5. If Mr. Gourlay has been caused any psychiatric medical condition, to what extent is this case and for how long any such condition likely to last?

Mr. Gourlay has been living with depression and trauma symptoms related to his previous employment for almost 10 years now. This would now be seen as a chronic condition, likely to be long-term in nature. This condition may in a sense be permanent and may not resolve or improve during Mr. Gourlay's lifetime. I hope that there may be some, even slight improvement with the resolution of his unfair dismissal claim, but it remains to be seen whether this actually happens. If there is any improvement in symptoms after his legal proceedings are over, this is likely to be partial or even minimal and is unlikely to result in significant improvement with return to former levels of function as described above."

(72) On 10 February 2023, the claimant's solicitor, Mr Woolfson, wrote again to Dr Kinniburgh, seeking an additional report intended to address supplementary questions following on from the claimant's counsel's review of Dr Kinniburgh's original report of 13 September 2022.

(73) A copy of that supplementary report by Dr Kinniburgh, dated 17 February 2023, was produced to the Tribunal, as document 6 in the Joint Bundle, at pages 20 to 23. His report was given on Soul and Conscience.

(74) Dr Kinniburgh did not meet with the claimant again, as he had done in person at the first appointment, prior to preparing his original report. In his supplementary report, so far as material for present purposes, Dr Kinniburgh stated as follows:

"*At the request of Mr Giles Woolfson of McGrade & Co., Solicitors, Glasgow, I am writing to provide further information in relation to Mr. Gourlay's current Employment Tribunal. I provided an independent psychiatric report in relation to this matter, dated 13th September 2022, which was based on a psychiatric assessment of Mr. Gourlay, which took place on 23rd August, 2022, and on various documents listed in the first paragraph of the report. This additional report is intended to address supplementary questions following on from Mr. Gourlay's Counsel's review of my original report. Mr. Woolfson, Mr. Gourlay's solicitor, wrote to me on 10th February 2023, requesting this report to help Counsel prepare for the Remedy Hearing. Mr. Woolfson provided me with a list of six specific questions, which Counsel wished me to address. He also noted that Counsel believed that whilst this information could be gleaned from my existing report, he felt it would be helpful to the Tribunal if I addressed these specific questions. I propose to do so in the order suggested by Mr. Woolfson.*

…

1. Can you confirm a diagnosis?

In my original report I note that Mr. Gourlay was certified as being unfit for work for prolonged periods by his own General Practitioner, generally under

the term "work- related stress". I also noted that after his unfair dismissal Mr. Gourlay did have some limited contact with mental health professionals from his local NHS Community Mental Health Team. I also note, however, that prior to my meeting with Mr. Gourlay in September 2022 he had never been assessed by a psychiatrist and we therefore have no contemporaneous diagnosis made by a psychiatrist or equivalent mental health practitioner. I note that Mr. Gourlay was treated with anti-depressant medications, strongly suggesting that his General Practitioner felt that his illness was depressive in nature. In terms of making a retrospective diagnosis I would propose the following. I note that Mr. Gourlay had no history of mental health problems, or of problems with substance misuse prior to 2013, and that he had functioned well in terms of education, employment and relationships. I believe therefore that it is reasonable to presume that he had no pre-existing psychiatric conditions, and there is no family history to suggest a particular genetic predisposition to illnesses of this type.

I believe that his illness would have started initially as a type of adjustment disorder (International Classification of Disease, 10th Edition (ICD10 Code: F43.2)). These are defined as "states of subjective distress and emotional disturbance usually interfering with social functioning and performance and arising in the period of adaptation to significant life changes or to the consequences of a stressful life event". It is assumed that the condition would not have arisen without the stressor. The manifestations of this disorder include depressed mood, anxiety, difficulty coping and a degree of disability in the performance of daily routine. The onset of this disorder would usually be within a month of the stressful event, and generally do not usually exceed six months after the stressful event. I believe that in the final years of Mr. Gourlay's employment with West Dunbartonshire Council he experienced a prolonged period of stress, which doubtless included a series of unpleasant life events. In psychiatric practice it would not be normal to classify all of this as multiple ongoing adjustment disorders, rather after six months or so the diagnosis would usually be changed according to the dominant clinical presentation, which in Mr. Gourlay's case would have subsequently been characterised as a depressive episode

(ICD10 Code : F32). Mr. Gourlay has suffered from the cardinal symptoms of this disorder since 2013, namely, depressed mood and loss of interest/enjoyment in life. ICD10 divides depressive episodes into mild, moderate and severe. Differentiation between the degrees of severity depends on a complex clinical judgment. The diagnostic guidelines state that "the extent of ordinary social and work activities is often a useful general guide to the likely degree of severity of the episode". The guidelines further suggest that in a severe depressive episode it would be very unlikely that the "sufferer would be able to continue with social, work or domestic activities except to a very limited extent".

In summary, therefore, while at the very start of his illness Mr. Gourlay may have experienced an adjustment disorder. Once his illness had lasted more than six months or so his condition would have been more accurately classified as a severe depressive episode. Unfortunately this condition has become chronic with evidence of ongoing symptoms to the present day.

2. When did the condition manifest itself?

Mr. Gourlay's condition, as described above, is likely to have started and gradually worsened during 2013. The exact date of onset is not known, but we do know that his illness reached a degree of severity whereby Mr. Gourlay was no longer fit to work from August 2013.

3. What are the symptoms?

Mr. Gourlay has suffered symptoms consistent with "stress", especially in the early phase of his illness, including anxiety, nervousness, inability to switch off, depressed mood, loss of interest and enjoyment in life and feeling overwhelmed. Over time these symptoms persisted and evolved into those of a depressive episode, including depressed mood, anhedonia, problems with sleep and appetite, problems with concentration, reduced self-esteem, bleak and pessimistic views of the future and thoughts of life not being worth living (suicidal ideation).

4. What is the prognosis?

The prognosis or outcome of a severe depressive episode varies across individuals. In general terms a minority of patient recover fully, a somewhat larger proportion recover but go on to have one or more recurrent episodes and a significant proportion do not recover fully and go on to have a chronic depressive illness. There is also a significant risk of suicide. In Mr. Gourlay's case, I note that his previous high level of function, lack of genetic predisposition and absence of substance misuse and good compliance with treatment would generally be seen as positive prognostic factors. However, depression which arises in association with a particular precipitating event has an increased tendency towards becoming chronic in nature. As stated in my original report, the fact that Mr. Gourlay's depression has not resolved after approaching 10 years, strongly suggest that he will continue to follow a chronic and persistent course.

5. What treatments, if any, may facilitate the claimant being able to return to the workplace?

In my experience depression of the type and severity suffered by Mr. Gourlay is very difficult to treat, and I do not think any type of treatment would be able to facilitate return to the workplace at this stage. In my answer I have considered various types of non-pharmacological treatment, as well as medication and other technologies. I do not think that any specific psychological intervention, or combination of psychological interventions would result in significant recovery. In my experience this type of severe chronic depression I would not expect significant clinical improvement from cognitive behavioural or psycho-analytically based therapies. Mr. Gourlay is already prescribed an anti-depressant medication, namely, Mirtazapine, which is generally considered one of the most effective anti-depressants available. Again I would not expect clinically significant improvement if this were changed to any other alternative anti-depressant medication. There are other medications which can be used on their own, or combined with anti-depressants to improve the outcome in depression. I note that these medications are generally only used by psychiatrists and that they have the potential to cause significant harm with only a remote likelihood

of any improvement. I note that Mr. Gourlay has Type II diabetes. A number of medications which could be added to his anti-depressant treatment can worsen diabetic control or even damage his kidneys and in general terms the risks of adding these treatment would outweigh any potential benefits.

It is also possible to treat severe depression with physical treatment, such as electro- convulsive therapy or transcranial magnetic stimulation. Again, I would not expect these technologies to have a significant clinical effect on the type of depression suffered by Mr. Gourlay. In conclusion, therefore there are no safe and practical treatments which would be likely to facilitate Mr. Gourlay being able to return to work.

6. Are you able to specify the date on which Mr Gourlay became permanently unfit to work?

I do not believe that it is possible to specify the exact date on which Mr. Gourlay became "permanently" unfit to work. It is my view however that his mental health deteriorated significantly following his unfair dismissal. As stated in my original report, Mr. Gourlay's physical health in respect of his multiple sclerosis has thankfully so far not deteriorated to the point where he would be unable to work due to physical limitations. Although he now has the chronic progressive form of this disorder, as noted in my original report, he retains good mobility and cognition. At the time of his unfair dismissal it would not have been possible to predict the length of his depressive episode, or whether it would indeed become chronic in nature. With hindsight we can see that he did not recover from his depressive illness, which was always a possibility as discussed under prognosis above. I would agree that Mr. Gourlay is now to all intents and purposes "permanently unfit for work", but given the nature of the condition of depression it is not possible to pinpoint the exact date of permanent incapacity, as one would be able to in the case, for example, of a work- related accident."

(75) The documents reviewed by Dr Kinniburgh included Occupational Health reports from Dr Fraser Watt, consultant occupational physician, dated 21 December 2013, and 6 June 2014, procured by the respondents while the

claimant was still employed by them, and copies of which were in the Joint Bundle produced to the Tribunal, at pages 60 to 63, and pages 33 to 35 respectively.

(76) Further, Dr Kinniburgh also reviewed a further OH report by Dr Izabela Czekaj, dated 3 October 2014, a copy of which was in the Joint Bundle produced to the Tribunal, at pages 51 to 55. It reported that the responses provided to Dr Czekaj indicated to her (as recorded by her, and shown at page 51 of the Joint Bundle) that that the claimant had mild-to-moderate anxiety and moderate depressive symptoms.

(77) Dr Kinniburgh also reviewed a report dated 18 January 2019 from the claimant's GP, Dr Maddineni, a copy of which was produced to the Tribunal, at page 64 of the Joint Bundle, recording that ***"Mr Gourlay has Multiple Sclerosis (1996), depression (2015), diabetes mellitus (2015) and on multiple medication."*** He described that as "***the most contemporaneous information***" of all the medical evidence that he had reviewed, per his report to the Scottish Public Pensions Agency ("SPPA") at page 28 of the Joint Bundle.

(78) Dr Nick Walker, MRCP, MFOM, was a consultant occupational health physician, with Duradiamond Healthcare, Perth, instructed by the SPPA, Galashiels, as an appointed medical referee to consider Mr Gourlay's application for ill-health retirement under Internal Dispute Resolution Procedure (stage 2). At that time, the claimant, whose employment with the respondents had ended on 24 September 2015, was aged 56 years and his normal pension age was 67 years.

(79) Dr Walker, in his report to SPPA, had reported and advised them as follows:

"My opinion is that there is good evidence that Mr. Gourlay was suffering from a significant impairment due to the effects of Multiple Sclerosis in September 2015. He had suffered from this condition since 1996. This evidence was known to the council and would have been available to an IRMP should Mr. Gourlay have applied for ill-health retirement at that time. In my opinion there is no reasonable prospect of

Mr. Gourlay being able to obtain gainful employment before normal pension age, or his normal retirement age.

In summary, with regard to the evidence presented so far, I conclude on the balance of probabilities that the scheme definitions as outlined above are likely to be met, but that the criteria for HMRC (HM Revenue and Customs) Severe Ill Health Test are not met.

Concluding Advice

LGPS - Internal Dispute Resolution Procedure (IDRP) Stage 2 - accept Tier 1."

(80) By letter to the claimant from SPPA on 5 July 2019, copy produced to the Tribunal at pages 89 and 90 of the Joint Bundle, reporting on Dr Walker's report as the appointed medical referee under IDRP stage 2 appeal, the claimant was advised that it had been determined that he was unlikely to be capable of undertaking gainful employment before his normal pension age and therefore entitled to Tier 1 ill-health benefits.

(81) However, following a review, by subsequent letter to the claimant from SPPA on 19 July 2019, copy produced to the Tribunal at pages 91 to 93 of the Joint Bundle, the claimant was then advised that it was considered that he was not entitled to receive Tier 1 ill-health benefits, under **Regulation 34 of the Local Government Pension Scheme 2014,** as when he was dismissed, on 24 September 2015, he automatically became a deferred member of the Scheme, and deferred members are entitled to an ill-health pension under **Regulation 36,** and he was in receipt of that pension, backdated to 11 November 2016.

(82) To be entitled to Tier 1 benefits, under **Regulation 34**, an active Scheme member must retire on ill-health grounds, but as the claimant's employment was not terminated on such grounds, SPPA advised the claimant that this precluded him for entitlement to Tier 1 benefits.

(83) The claimant was further advised that his entitlement to a pension under **Regulation 34** might be open to review depending upon the outcome of his

Employment Tribunal case. There has been no such review, as these Tribunal proceedings are still ongoing, pending this Remedy Judgment being issued by the Tribunal.

Pension Loss

(84) There were produced to the Tribunal various pension loss reports, and associated correspondence, as per documents 1 to 4 of the Joint Bundle, at page 3 to 14.

(85) Firstly, there was a pension loss report by Dr John Pollock dated 21 January 2019, produced as document 1 in the Joint Bundle, at page 3 to 5. It quantified the claimant's pension loss at **£181,840**. It stated as follows:

MR BRIAN GOURLAY

PENSION LOSS

"I refer to your letter of 13 November 2018 instructing me to consider the pension loss which has been sustained by Mr Gourlay on leaving the employment of West Dunbartonshire Council.

Qualifications and Experience

I qualified as a Fellow of the Institute and Faculty of Actuaries in 1986 and have been involved in providing expert actuarial opinions on a range of legal matters for around 25 years. I have been the representative of the Institute and Faculty of Actuaries on the 'Ogden Working Party' since the publication of the 4th edition of the Actuarial Tables with explanatory notes for use in Personal Injury and Fatal Accident Cases in 2000. I have a PhD in Medical Statistics. I was involved in drafting the Actuarial Professional Standard X3: The Actuary as an Expert in Legal Proceedings. In 2015 I was appointed by the Ministry of Justice to assist the Lord Chancellor with his review of the discount rate to be used in cases of personal injury and fatal accident. I consider this matter to be within my range of expertise.

Background

Mr Gourlay was born on 25 November 1962. He was formerly employed by West Dunbartonshire Council but his employment ceased on 24 September 2015.

Whist at work with West Dunbartonshire Council Mr Gourlay was a member of the Local Government Pension Scheme, which offers benefits of high quality. Prior to his dismissal Mr Gourlay had been pursuing an application for retirement on grounds of ill-health. Had this been given I understand that he would have been awarded a pension of £13,636 p.a. together with a lump sum of £90,907.

Mr Gourlay was however awarded a deferred pension on 24 September 2015 but this came into payment on grounds of ill-health in February 2018, backdated to 12 November 2016. He was awarded a pension of £9,248 p.a. and a lump sum of £61,658.

Valuation Approach

New guidance has been issued by the Presidents of Employment Tribunals (England & Wales and Scotland) effective from 10th August 2017. I do not intend summarising the content of this extensive document in detail but note the main points of importance below, together with comments about any modifications or additional assumptions I have made.

1. *I assume that this is considered to be a 'complex case' where the Guidance suggests use of a multiplier approach based around the Ogden Tables.*

2. *A discount rate of -0.75% is to be used in the calculations.*

3. *The valuation is to be of the net income lost by the individual. The average rate of tax on the emerging benefits will be sensitive to the level of income, the proportion of pension exchanged for a lump sum and the level of tax allowances in retirement. I have assumed a marginal tax rate of 20% on the lost pension income*

4. *Members are to be treated as if they were two years younger to reflect better than average longevity in the population of occupational pension scheme members.*

5. *Any awards made are subject to 'grossing up'. I have not performed this calculation as it will be sensitive to the total size of the award and Mr Gourlay's other income in the tax year of receipt.*

6. *To simplify matters I have valued the benefits at the dates of the awards. Strictly speaking one should assess the past loss separately and calculate the future loss using a multiplier at the current date allowing for increases in pension in the interim period. I can consider this in due course of required.*

Calculations:

1. *Mr Gourlay was 52.83 years old on 24 September 2015. A multiplier for valuing income for life for a man who is 50.83 years old is 40.35 (Table 1, - 0.75% - note the two year reduction to age as directed by the Guidance)*

2. *The value of his benefits, had he been granted ill-health retirement, is then £90,907 + 0.8 x £13,636 x 40.35 = £531,070.*

3. *Mr Gourlay was 53.97 years old on 12 November 2016. A multiplier for valuing income for life for a man who is 51.97 years old is 38.87 (Table 1, - 0.75% - note the two year reduction to age as directed by the Guidance)*

4. *The value of the benefits actually awarded is then £61,658 + 0.8 x £9,248 x 38.87 = £349,230.*

Mr Gourlay's pension loss is then £531,070 - £349,230 = ***£181,840.***

I trust this is the information required but please do not hesitate to contact me if you require any further assistance.

This Report and the work involved falls within the scope of Technical Actuarial Standard TAS 100: Principles for Technical Actuarial Work, issued by the Financial Reporting Council. I confirm that this report complies with this Standard.

Thank you for instructing us in this matter."

Yours faithfully

Dr John Pollock

Fellow of the Institute and Faculty of Actuaries

(86) Secondly, there was a further pension loss report by Dr John Pollock dated 25 August 2022, produced as document 2 in the Joint Bundle, at pages 6 to 10, which quantified the claimant's pension loss at **£197,430**. It stated, so far as material for present purposes, as follows:

MR BRIAN GOURLAY

PENSION LOSS

"I refer to your email of 11 August 2022 instructing me to consider the pension loss which has been sustained by Mr Gourlay on leaving the employment of West Dunbartonshire Council.

Qualifications and Experience

I qualified as a Fellow of the Institute and Faculty of Actuaries in 1986 and have been involved in providing expert actuarial opinions on a range of legal matters for around 25 years…. I consider this matter to be within my range of expertise.

Background

Mr Gourlay was born on 25 November 1962. He was formerly employed by West Dunbartonshire Council but his employment ceased on 24 September 2015.

Whist at work with West Dunbartonshire Council Mr Gourlay was a member of the Local Government Pension Scheme, which offers benefits of high quality. Prior to 1 April 2009 he accrued a pension of 1/80th of final pay for each year of service together with a lump sum of three times the pension. From 1 April 2009 he accrued a pension of 1/60th of final pay for each year of service. These are the 'legacy' final salary-based schemes. After 1 April 2015 he accrued a pension of 1/49th of pay each year to be revalued to State pension age and payable at that time. This is the 'CARE' scheme. Mr Gourlay's State pension age is 67.

Background

Mr Gourlay was awarded a deferred pension when he left employment on 24 September 2015 based on his final salary and his completed service. This came into payment on grounds of ill-health in February 2018, backdated to 12 November 2016. He was awarded a pension of £9,248 p.a. and a lump sum of £61,658. The pension was neither reduced nor enhanced at that time, His final pay for pension purposes was £35,349 p.a. I understand that assuming a 5% award is agreed for 2022 his current pay would now be £42,340 p.a.

Please note the Government has recently announced changes to the public sector pension schemes following the McCloud judgment in the Court of Appeal and Mr Gourlay may be offered revised benefits of the greater of the legacy scheme and CARE scheme benefits for the period from transition to the CARE scheme to his date of leaving. He left service in 2015 however so this is unlikely to be of consequence. Similarly, had he not left employment his benefits on eventual retirement may have been modified for the period between 1 April 2015 and 31 March 2022. I have not considered this in any detail, not least as full details have yet to be published, but do not expect this to be an especially material consideration.

Valuation Approach

Guidance has been issued by the Presidents of Employment Tribunals (England & Wales and Scotland) effective from 10th August 2017. This

Guidance was revised in 2019 and again in 2021. I do not intend summarising the content of this extensive document in detail but note the main points of importance below, together with comments about any modifications or additional assumptions I have made.

1. *I assume that this is considered to be a 'complex case' where the Guidance suggests use of a multiplier approach based around the Ogden Tables.*

2. *In Scotland discount rate of -0.75% is to be used in the calculations.*

3. *The valuation is to be of the net income lost by the individual. The average rate of tax on the emerging benefits will be sensitive to the level of income, the proportion of pension exchanged for a lump sum and the level of tax allowances in retirement. I have assumed a marginal tax rate of 20% on the lost pension income. As Mr Gourlay commuted the maximum amount of pension when he was awarded his deferred pension early on ill-health grounds, I have assumed he would have acted similarly had he retired at age 67.*

4. *Members are to be treated as if they were two years younger to reflect better than average longevity in the population of occupational pension scheme members.*

5. *Any awards made are subject to 'grossing up'. I have not performed this calculation as it will be sensitive to the total size of the award and Mr Gourlay's other income in the tax year of receipt.*

6. *The Ogden Tables adjustments for 'other contingencies' are not to be used. The reduction to the loss for assumed withdrawal, ill-health etc. is to be made by the Tribunal. I have therefore made no adjustments in this regard.*

7. *I have not considered any losses in respect of ancillary benefits, death in service awards etc. I can consider this in due course if required.*

8. No allowance has been made for any pension rights Mr Gourlay has accrued in any replacement employments since leaving West Dunbartonshire Council. Details of these should be sourced.

9. I do not feel able to quantify the extent of the offset to losses for pension rights Mr Gourlay might accrue in alternative employments in future. What can be said is that unless these employments are in the public sector then the value of any future pension rights will be materially lower than those he enjoyed with West Dunbartonshire Council.

10. In cases of personal injury where pension benefits have come into payment before the retirement age in the pre-accident scenario the pension awarded is only offset to the extent it is payable beyond the retirement age in the pre- accident scenario (following cases dating back to Parry –v- Cleaver). Further than this the pension income received before normal retirement age is not offset against earnings. Lump sums are apportioned over the period before and after normal retirement age following Longden –v- British Coal. I assume that the Tribunal will adopt a similar issue when considering pension loss in this case. If I am incorrect in this assumption then further calculations will be required. As Mr Gourlay's pension was neither enhanced nor reduced for early payment it is more straightforward to value the additional pension he would have accrued from leaving to age 67 rather than valuing the total pension he would have been awarded and deducting from this the value of the pension actually awarded to the extent it is payable after age 67. I can consider alternative more complex approaches if required.

11. I have used current pay in my calculations below as a proxy for using historic accruals of pension and adding revaluation. I do not expect this to be a material consideration.

Calculations

1. *There are 14.17 years from leaving to age 67.*

2. *The lost pension is then 14.17 x £42,340 ÷ 49 = £12,244 p.a.*

3. *Assuming maximum commutation this gives a lost pension of £7,872 p.a. and a lost lump sum of £52,464.*

4. *Mr Gourlay is 59.75 years old. A multiplier for valuing income from age 65 for a man who is 57.75 years old is 23.02 (Table 25, -0.75% - note the two year reduction to age and retirement age as directed by the Guidance). The corresponding lump sum multiplier is 1.00.*

5. *Mr Gourlay's pension loss is then 0.8 x £7,872 x 23.02 + £52,464 x 1.00 =* ***£197,430****.*

I trust this is the information required but please do not hesitate to contact me if you require any further assistance.

This Report and the work involved falls within the scope of Technical Actuarial Standard TAS 100: Principles for Technical Actuarial Work, issued by the Financial Reporting Council. I confirm that this report complies with this Standard.

Thank you for instructing us in this matter."

Yours faithfully

Dr John Pollock

Fellow of the Institute and Faculty of Actuaries

(87) Thirdly, there were supplementary answers from Dr John Pollock dated 26 October 2022, produced as document 3 in the Joint Bundle, at pages 11 and 12, which read as follows:

MR BRIAN GOURLAY

PENSION LOSS

"I refer to your email of 3 October 2022 instructing me to respond to certain questions arising from consideration of my report on Mr Gourlay's pension losses dated 25 August 2022. I have the following comments.

Question 1 - The pension valuation uses a generality for longevity projection (paragraph 4, page 3 of the Pollock Report dated 25 August 2022). The Claimant's circumstances, specifically his lengthy and continuing history of physical and mental ill health necessitated a departure from that approach.

It is correct that I used the average life expectancies that are contained in the Ogden Tables, which themselves are based on the latest projections made by the Office for National Statistics. In fact, the guidance for Employment Tribunals for pension loss that I referred to when producing my report suggests that members are treated as being two years younger than they actually are to account for the assumption that members of occupational pension schemes, being fit enough to be actively employed, can expect to live somewhat longer than the average member of the population at any given age. I am not aware of any specific evidence that Mr Gourlay's life expectancy is below average but if such evidence can be produced and is accepted by the Tribunal then I would be pleased to revise my figures for any given impairment to longevity. The basic pension amounts would be the same as are detailed on page 3 of my report, but the multiplier would decline if, as is argued, Mr Gourlay has impaired life expectancy.

Question 2 - It is not clear that credit has been given for the Claimant's saved pension contributions. They should be valued and deducted from his earnings claim.

There is no need to do this as I am assuming that any associated loss of earnings calculations, both past and future, are being based on Mr Gourlay's net earnings after deductions for tax, National Insurance, and pension contributions to the Local Government Pension Scheme. It should be confirmed that this is the approach that has been followed.

Question 3 - There should be a discount for early payment if any future loss figure is awarded.

There is no need for a further discount to be applied to my emerging loss result (subject to modification by the Tribunal) for early payment as this is dealt with through the use of the prescribed 'discount rate'. The discount for 'accelerated receipt' is an implicit part of the calculations."

(88) Fourthly, there were emails between the claimant's and respondents' solicitors, on 8 and 25 November 2022, produced as document 4 in the Joint Bundle, at pages 13 and 14, where Mr Miller, the respondents' solicitor, stated as follows, on 8 November 2022:

"1. Dr Pollock has indicated that he would change his actuarial prediction in the event he is presented with evidence of reduced life expectancy. The point is noted, with thanks.

2. Dr Pollock has essentially accepted the point being made about saved employee pension contributions. The claimant will have to amend his schedule of loss to include deduction of the pension contributions which he will not have to make.

3. Dr Pollock has informed us that he has already applied a discount rate and that, in turn, the discount rate accommodates a factor for accelerated payment. That is accepted."

(89) In his reply, on 25 November 2022, Mr Woolfson stated that:

"Further to your point 2 below, I confirm that the figures in the schedule of loss are based on net pay, i.e. after deductions for income tax, national insurance contributions, and employee pension contributions."

Impact of the Respondents' acts upon the Claimant

(90) At this Remedy Hearing, the claimant gave evidence in chief as per his written witness statement, where, so far as material for present purposes, he stated as follows, the text **in bold** being our emphasis, in writing up this Judgment,

of certain words and phrases used by the claimant in his evidence to the Tribunal, which evidence we accepted as credible and reliable:

1. *I would describe what happened to me during my employment with West Dunbartonshire Council (WDC) from around September 2013 onwards as being* ***an accumulation of devastation.*** *This encompassed the timeframe September 2013 through to my 24 September 2015 dismissal. Then the rejection, at 25 August 2016,of my appeal. Inaccurate and imprecise appeal minutes being eventually provided on 26 October 2018.* ***For me, each component part of what happened was catastrophic in itself.***

2. *The component parts which I am referring to are the failure to make reasonable adjustments, the 17 June 2015 suspension from work, the 24 September 2015 dismissal received by email at 00:41 on 25 September 2015, and the rejection of my appeal at appeal day 6 on 25 August 2016.* ***Each of these 'parts' had a damaging effect on me and my mental health****.*

3. *I was formally diagnosed by my GP as suffering from a depressive disorder on the morning of 17 June 2015, which is the same day I was suspended from work (see the judgment, page 81, paragraph (199)).I was prescribed the anti-depressant mirtazapine, though I was already on medication and I was taking diazepam, amongst others.* ***At this time, I was finding it extremely difficult to sleep at night and I was sweating heavily, such that I would often need to change my pyjamas and bed sheets and have a bath in the morning. This had been building up for quite some time.***

4. *In October 2014 occupational health had reported that I had been assessed as having "a mild-to-moderate of anxiety and moderate depressive symptoms "[sic](see the judgment, page 25, paragraph (35)).* ***I experienced very strong feelings of apathy and not caring about anything, which was very unlike me and very out of character.***

5. ***I was no longer upbeat and jovial. I used to be very laid back at work. This was my nature.*** *I was well known for this, and I recall during the Tribunal hearing that John Duffy acknowledged this when he was asked questions by Mr John. However, I lost this part of my personality.* ***I was feeling very low as a result of the concerns which I had raised about Office of the Future not being addressed and reasonable adjustments not being made. Instead of addressing my concerns and making adjustments, my employer used what I had said against me in a formal investigation, which resulted in my dismissal.*** *For many months I was extremely concerned about the way my employer was dealing with matters, and* ***I did not believe that they were acting in an honest manner. It felt to me like they had something personal against me, almost to the point of being vindictive…. This caused me to feel hopeless and worried, and led me to conclude that the whole process was a sham. It came as no surprise that I was dismissed, when it was clear to me that they would not even acknowledge the truth.***

6. ***By the time of my dismissal, I was exhausted. My whole mindset had been affected by everything that had happened, and my apathy had worsened, so I had no enthusiasm motivation****. I had been dismissed, after many months of investigation, and I now needed to prepare an appeal.* ***I was not fit to work,*** *and I refer to the fit notes which confirm this and which are in the bundle (pages 142 to 147). I was told that I no longer needed to submit fit notes (page 148****). I have remained unfit for work following my dismissal. As a result of everything that had happened, I lost trust that any other organisation or any other local authority would assist me with regard to reasonable adjustments and not undermine me. This has continued right up to today and is ongoing. I still take regular medication for depression and anxiety (amongst others). This has not eliminated my depression. The state of mind which I have had still persists, and this includes the***

lack of trust, the loss of enthusiasm and apathy in a very significant way.

7. I have been living with depression for some years. I met with a consultant psychiatrist, Dr Kinniburgh, in August 2022. His report is in the bundle (page 15). I have read the report, and it is accurate. I note the answers which he has given to specific questions, and at parts he describes how I have felt over a number of years and the effect on me as a result of suffering from depression, and everything he says is completely accurate. ***It is true, for example, that I have not returned to my normal daily activities or hobbies, and that I am traumatised by certain events, and that I have experienced extremely dark and negative thoughts. When I was dismissed, it felt like everything had imploded, like everything was collapsing****. … I had been working to better myself in my professional career, and had achieved a distinction in a Masters degree and had been working on a PhD (Corporate Governance in a Modern Britain), which I had deferred in February 2014 due to the difficulties with Office of the Future. My dismissal meant that I couldn't go back to the PhD.* ***I felt overwhelming tiredness, fatigue, apathy and indifference to life.*** *I now had a battle on my hands to prepare an appeal to encompass all of the untruths levelled against me. The appeal hearing itself did not commence until 18 February 2016 and took six days through to 26 August 2016 which is an extremely long time and increased my anguish and anxiety, only for my appeal to be rejected. I couldn't believe it when my appeal was rejected on the last day of the appeal, within an hour of the hearing concluding, and I felt like I could cry (and I only feel this way in very extreme situations****). All of this started in 2013, almost 10 years ago. I am now 60, which means that this has been ongoing for me for around one sixth of my life. This has made life very difficult for me. This has been in many ways all-consuming for years, and has even impacted on my personal and social interactions and relationships. I used to have a very wide circle of friends. This is no longer the case. I used to***

have a great deal of enthusiasm, and like I say above I was studying for a PhD up until 2014 when I had to stop this as a result of what was happening at work and I have never been able to return to my PhD.

8. As explained in my earlier witness statement, I had a very low absence record during my employment up until the year 2013/2014, which is the year the problems at work started. Between April 2008 and March 2013, I only had four days of absence. These four days were for a respiratory chest infection, and had nothing to do with my MS. My application for employment with WDC (page 166) also shows that I confirmed I had had zero absences in the 24 months prior to applying (and, in fact, I had not had any absences for some time prior to that 24 month period).

9. ***I thoroughly enjoyed my job at WDC.*** *I was the most qualified and experienced member of staff in the department. I achieved demonstrable buy-in from other departments when I was promoting health and safety. As such, I dealt with a broad range of undertakings across all activities of the Council. For example, through life experiences, abilities, knowledge and training I competently understand the H&S and risk management issues being encountered by, among others, WDC parks departments, WDC direct labour teams and WDC waste/refuse. I had good interpersonal skills, which helped my interactions with other Council departments namely WDC education and WDC social work.* ***For me, every day was a school day i.e. making the job interesting and worthwhile and giving me a great deal of job satisfaction and always learning****. Learning was important to me, and I received the SQA lifelong learning award for 2000, and was invited to attend a lunch with Her Majesty the Queen at Stirling Castle on 30 November 1999 (St Andrew's Day).****I had no other career ambitions and no intentions or plans of moving on from WDC.*** *Even though I had been diagnosed as having MS in 1996, this did not prevent me from*

effectively undertaking my job and continuing to enjoy my job. ***I was perfectly able to manage my MS and do my job at the same time. Importantly, I had a lot of autonomy in my role, and this made managing my MS significantly easier. This was a good job for me.***

10. ***This all changed when Office of the Future was implemented****. Within my earlier witness statement, and noted within the judgment of 17 September 2021,I have explained the various steps which I took to raise my concerns and have those concerns addressed, together with my various requests for reasonable adjustments. The judgment at page 17 paragraph (11) notes that* ***I started to suffer from stress and anxiety within a short timeframe of the move to the fourth floor at the end of September 2013.This continued right through to the end of my employment. My stress and anxiety worsened over time. Due to WDC management actions and inactions I became deeply suspicious of what was happening at work. I believed that my employer was playing mind games with me with, among other failings, evidence of WDC Policy non-compliance. I felt that my requests were continuing to fall on deaf ears and that my matters of concern were not being competently addressed….”***

…

25. ***If my employer had done what had been asked of them and which was required of them, from as early as around August/September 2013, then I would have had no reason to have been interested in the possibility of ill-health early retirement in January 2015.*** *That is because, I would have been fit enough to attend work. The only reason I explained in January 2015 that I was interested in the possibility of ill-health early retirement (only after I was asked) is because attending work was making me ill, and that in turn was because of the failings on the part of my employer.* ***Being asked about whether I had an interest in ill-health early retirement was in many***

ways like a weight being lifted off my shoulders and a relief, because of the way I was feeling.

26. The judgment narrates what happened with regard to possible application for ill-health early retirement, and concludes at page 39, paragraph (76), that decisions had taken place in my absence and without my knowledge, despite me having previously been involved. This is important because I have a letter from the Scottish Public Pensions Agency (SPPA), dated 5 July 2019 (page 89), which confirms that I should be accepted for Tier 1 ill-health early retirement benefits. This was subsequently retracted on the basis of a technicality, i.e. because I had been dismissed and was no longer in employment. I refer to the letter page 91.

27. My understanding is that I am now not able to claim Tier 1 ill-health early retirement benefits, and that is because I was not retired on ill-health grounds, and because of my dismissal I am no longer a member of the Local Government Pension Scheme (LGPS).

28. ***It is clear to me that if an ill-health early retirement application had been progressed by my employer at the time then it is very likely it would have been successful and that I would have been entitled to receive Tier 1 benefits****.*

29. A recent GDPR response from Strathclyde Pension Fund Office (SPFO), from 22 November 2022, has revealed that the retirement benefits calculations, which can be found from page 101, are dated 12 January 2015. At page 103 it can be seen that the date has been redacted. However, the same document can now be found at page 130, and the date is no longer redacted(page 132). The date is shown as 12 January 2015. In addition, the emails at pages 133 to 135 show that the retirement calculations were provided to the respondent on 21 January 2015.

30. Therefore, a matter of days after the attendance review meeting on 14 January 2015 the respondent had the available figures for ill-health

early retirement. However, they were never provided to me. This is contrary to the terms of the Retirement Information Sheet at page 129 which confirms that the calculations should have been passed to me as a matter of urgency.

31. ***I have never understood why my employer did not progress ill-health early retirement after they asked in January 2015 if I would be in interested in it.*** *This is part of my appeal to The Pensions Ombudsman in which I have raised concerns around what I believe to be maladministration on the part of WDC.* ***My endeavours to raise matters re ill-health early retirement fell upon deaf ears during the six days of my appeal against dismissal without notice.***

(91) In a summary, the claimant concluded his witness statement, at his paragraph 32, the text **in bold** again being our emphasis, stating that:

"Conclusion

32. In summary:

a. attending work was making me ill because of the WDC's actions and failure to make reasonable adjustments;

b. they asked me whether I would be interested in ill-health early retirement, and because of my health I said I was interested;

c. they said they would provide figures to me, however my ill-health early retirement application was unilaterally not progressed and decisions were taken without my knowledge;

d. had an ill-health early retirement application progressed, I believe I would have been granted Tier 1 benefits, given the medical evidence (report of Dr Walker and correspondence from the SPPA);

e. however, ***if WDC had acted differently in the first place, and not had a culture which caused me high levels of stress and anxiety, and had they made reasonable adjustments,***

and had they then not dismissed me, I believe I would have been capable of continuing to work until my normal retirement age."

Claimant's disability and unfitness for work, psychiatric injury, and injury to feelings

(92) On the basis of the evidence led before the Tribunal, the Tribunal finds that as at the date of this Remedy Hearing, the claimant was unfit for work, and he had been so since the date of his dismissal by the respondents, on 24 September 2015, and it seems likely that this will be a permanent state of affairs.

(93) While the claimant, in his evidence to the Tribunal, stated that he held a belief that he would have been capable of continuing to work until his normal retirement age, at age 67, the Tribunal is not so satisfied. The Tribunal has preferred the expert psychiatric evidence from Dr Kinniburgh, in his supplementary report, that the claimant is "***now to all intents and purposes permanently unfit for work."***

(94) On the basis of the expert psychiatric evidence available to this Tribunal, at this Remedy Hearing, from Dr Kinniburgh in his supplementary report, the Tribunal is also satisfied that there are no safe and practical treatments which would be likely to facilitate the claimant being able to return to work.

(95) It was not established in evidence before the Tribunal at this Remedy Hearing that the claimant's life expectancy was below average for a man of his age, nor that his mortality risk was affected by his impairments.

(96) In light of the claimant's ongoing physical and mental impairments, namely his MS, diabetes, and severe depressive episode, the latter being a psychiatric condition, the Tribunal is satisfied that the claimant is a disabled person within the meaning of **Section 6 of the Equality Act 2010**.

(97) Further, the Tribunal finds that had the claimant not been dismissed by the respondents for gross misconduct, on 24 September 2015, or had his internal appeal not been rejected by the respondents' Appeal Committee on 25

August 2016, the claimant would not more likely than not have continued in their employment until his normal retirement age at 67 on 25 November 2029.

(98) On the evidence available to the Tribunal, at this Remedy Hearing, the Tribunal finds that had the claimant not been dismissed by the respondents on 24 September 2015, or had his internal appeal been upheld by the Appeal Committee on 25 August 2016, and he had been reinstated to his post, then it is more likely than not that the claimant would not have continued in their employment after 31 March 2017.

(99) The Tribunal finds that, by no later than 31 March 2017, the claimant's employment with the respondents would more likely than not have terminated, either by dismissal by the respondents on the basis of an irretrievable breakdown in working relationships between the claimant and the respondents, or by a mutually agreed termination of employment on agreed terms.

(100) On the evidence available to the Tribunal, at this Remedy Hearing, the Tribunal is satisfied that the claimant suffered a psychiatric injury as a result of his unlawful victimisation by the respondents, and that he has suffered injury to his feelings in respect of that victimisation, and in respect of the respondents' failure to make reasonable adjustments.

Tribunal's Assessment of the Evidence led at the Remedy Hearing

50. In considering the evidence led before the Tribunal, we have had to carefully assess the whole evidence heard from the two witnesses led before us, and to consider the many documents produced to the Tribunal, which evidence and our assessment we now set out in the following paragraphs.

Brian F Gourlay: Claimant

51. The claimant was the first witness to be heard by the Tribunal, and we heard his evidence on the morning of day 2, being Tuesday, 7 March 2023. After he was sworn in by the Judge, he confirmed, as accurate, the terms of his witness statement, signed and dated on 27 February 2023, without any amendments.

52. After a very brief examination in chief by his counsel, Mr John, as detailed earlier in these Reasons, he was cross-examined by Mr Miller, solicitor for the respondents. That cross-examination, from around 10:15am, was limited in extent, and in duration, concluding at 11:57am, when the Tribunal adjourned, before resuming at 12:21pm for panel questions.

53. In his cross-examination, Mr Gourlay stated that when another member of staff, Struthers Symington, retired aged 65, his work was not divided among the Health & Safety officers, but it was put on him, which he found quite stressful. He recalled completing a stress assessment around December 2013, which was submitted to management, but he did not think they had dealt with it thoroughly or fully. He recalled a meeting about it, in April or May 2014, but he could not speak to his own line manager, John Duffy, as he was off with stress. When he complained about workload and stress, the claimant recalled being given a generic stress assessment form to complete.

54. Asked about the conjoined paper apart to the ET1 claim form, prepared around 2018, when Ms Dalziel was his solicitor, the claimant agreed with Mr Miller that he read through that document, and satisfied himself that its terms were accurate, but when asked if his then 4 claims were conjoined into on document, to pull things in tight, and some claims were withdrawn, the claimant stated that he had no recollection of that, and he would need to review the documentation.

55. Mr John, his counsel, stated that he did not have the documents being referred to by Mr Miller, and they were not in the Bundle, so he might need to take instructions. We refer to paragraph 42 of our Reasons above, for how this document was dealt with later on by the Tribunal, and parties.

56. The claimant agreed with Mr Miller that his MS diagnosis was in September 1996, and that his condition had deteriorated, with progressive, ongoing problems with his health, but that good autonomy in his job was helpful in managing his MS. He also agreed that, while he was under conduct investigation in May 2015, there was a diagnosis of type 2 diabetes.

57. When Mr Miller asked the claimant how the Council would be responsible for his MS or diabetes, the claimant replied saying they didn't help, as Mr Symington's departure had contributed to his heavy workload, and he had raised that with Colin McDougall in August 2013. Further, when, in September 2013, there was the move to the 4th floor, the claimant moved from having a 4-drawer filing cabinet and printer, on the 3rd floor, to a dovecot (not a locker) on the 4th floor, and no space to keep paperwork. While the Council bought rucksacks to carry things about in, the claimant stated that he could not carry it, so he then got a pilot's case, when he complained about the weight of the rucksack.

58. Mr Miller then took the claimant to Dr Kinniburgh's report of 13 September 2022 and asked him about some aspects of it. He agreed his past medical history, and clarified his current medication. He described his exercise regime as not good, as he does not go to a gym. Speaking of his mental health, the claimant agreed that he was diagnosed with depression, on 17 June 2015, then suspended, under investigation, since the start of March. He recalled being on medication for anxiety from 2014/15, including diazepam.

59. Asked about paragraph 10 of his witness statement, about fit notes, Mr Miller asked the claimant where he and Dr Kinniburgh got the references to all of his fit notes referring to "***work-related stress***". The claimant, having been referred to various productions, being fit notes from his GP, accepted that some say "***stress related illness",*** but added that, to his mind, it is work related stress.

60. When asked about his witness statement, and what he had said there about adjustments, the claimant stated that the Council had failed to make suitable adjustments for him, when he said they knew that he was struggling, and that the 4th floor was not helpful for somebody with MS. When Mr Miller asked him to accept, that with the January 2015 Access to Work recommendation, there should be some lead in time from recommendation to provision of waist high filing storage, the claimant accepted that waist high storage was put in on 28 April 2015, but without hanging files, so he had to kneel onto the floor to access his files, and use the filing cabinet as a way to pull himself up, and that

the requirement to kneel persisted from September 2013 and throughout his employment.

61. Asked about his dismissal from employment, the claimant stated that he was unhappy with the Council about many things, from its failures to make adjustments, multiple grievances and complaints, the disciplinary investigation, his suspension, then his dismissal, and the appeal "***is another story***". For whatever reason, he felt there were some individuals in Corporate Services who were not helping him, and not assisting him, and he described how he had lost faith in some of his colleagues, which is why, he said, CIPD told him to put in as grievance under the Council's Code of Conduct, but that had led to him being put on a conduct allegation, and his grievance never heard.

62. Mr Miller took the claimant though his career history, and then into his dismissal, and appeal against dismissal. After his appeal was unsuccessful, after a 6 month wait from start to finish, the claimant stated that he went to the Strathclyde Pension Fund Office on 5 October 2016, when he stated that he was not capable of work, to enquire about his pension. He spoke of the appeal process being "***very tiring***", and that he was "***overwhelmed by the time and effort***" to progress his appeal.

63. Describing himself previously as a "***completer / finisher***", the claimant added that he could not work when he was overwhelmed, he was "***absolutely done in, and didn't feel well",*** and it had been an "***uphill struggle"*** to get his pension.

64. After losing his appeal, the claimant added that the Council had "***kept me in the dark"*** about his pension entitlements, and he has complained to the Pensions Ombudsman about what he believes to be maladministration on the Council's part. While the Council had implied that he had asked for ill-health retirement, the claimant stated, for clarity, that he did not ask, but it was mentioned to him at a meeting in January 2015 if he would be interested.

65. Asked by Mr Miller about paragraph 48 of the conjoined paper apart to ET1, reading: "***Had not the Claimant been suspended and dismissed for a***

discriminatory reason, he would almost certainly been retired on the grounds of ill-health", the claimant's reply was to say that things have moved on since that statement of his case.

66. Following his cross-examination, the claimant was thereafter asked a question of clarification, by the Judge, about the chronology of events relating to his pension, as per documents at pages 179 to 202 of the Joint Bundle, but not any questions by other members of the Tribunal panel. Finally, he was re-examined by Mr John, his counsel, from 12:24pm, his evidence concluding, and the Tribunal and parties taking an early lunch break adjournment, at around 12:40pm, to resume with the next witness from 1:20pm.

67. In his re-examination, the claimant stated that he was not saying that the Council caused his MS, or diabetes, but, undeniably, in his view, the Council did not help him with difficulties for him arising from the Office of the Future, where it was difficult for him to do his job, and what was not getting done by way of adjustments, which he described as "***a farce***", and that was not favourable to his well-being.

68. Further, the claimant stated that his medical contact was with his own GP first and foremost, and he described the office floor moves as "***organised chaos"***, and the DSE questionnaire used by the Council, which he felt related to him, as it had a specific kneeling question, was not a duplicate of an HSE stress risk assessment.

69. As we found the claimant to be at the Final Hearing, he again came across to the Tribunal at this Remedy Hearing as a polite and respectful person, intelligent and articulate, but looking physically much frailer from when we all had last seen him, at the Final Hearing, and subsequent Reconsideration Hearing.

70. While very thorough, and with an almost razor-sharp, encyclopaedic instant recall of key dates and events, and documents, which was impressive, the claimant also came across to the Tribunal, at times, as pedantic. That said, we considered that he was truthful in what he said, in his witness statement,

which was subject to limited cross-examination by Mr Miller, and orally in answering questions, and that he had good clarity of recall of events.

71. We also felt that the claimant came across in evidence as very single minded, and he often spoke of things as he recalled them, or perhaps perceived them, after the passage of time many years ago now. While we did not believe the claimant was deliberately lying to the Tribunal, or attempting to mislead us, we were very alert to him, in giving his evidence, that he did so, very much as he saw matters from his own perspective.

72. In his witness statement, his use of certain words suggested to us that, with a liability Judgment in his favour, the claimant was upping the ante by referring to what happened to him being "***an accumulation of devastation***" and "***each component part of what happened was catastrophic in itself"*** – witness statement, paragraph 1; and "***Each of these 'parts' had a damaging effect on me and my mental health."*** – witness statement, paragraph 3.

73. The same arises from what the claimant said elsewhere in his witness statement , for example, "***It felt to me like they had something personal against me, almost to the point of being vindictive.",*** *and "****This caused me to feel hopeless and worried, and led me to conclude that the whole process was a sham",*** – witness statement, paragraph 5 ; and "…***.my dismissal had a very significant effect on my mental health as did my suspension from work and the rejection of my appeal after six days in an appeal hearing which spanned 10 months from submission of my appeal in October 2015 to conclusion of the appeal in August 2016. I would describe this as devastating."*** – witness statement, paragraph 12.

74. In cross examination by Mr Miller, the respondents' representative, we were satisfied that the claimant answered his questions openly, and that he answered to the best of his recollection, and as such we had no issues with his credibility or reliability. The claimant was not cross-examined in any great detail, line by line, on the specific terms of his witness statement, and the Tribunal recognised that he was giving what he felt to be an honest and forthright view of how the respondent's treatment of him had affected him. Mr

Miller did not take the claimant to the respondents' Counter Schedule to challenge the sums being sought as compensation in the claimant's Schedule of Loss, but he did deal with that matter in his closing submissions.

75. In coming to our decision, we have looked at matters objectively, and sought to consider all the evidence available to us. While the claimant's evidence in chief was not challenged, to any material extent, we have looked at it in context of the whole evidence available to the Tribunal, both from this Remedy Hearing, and from the findings made by us in our earlier liability Judgment.

76. Having that overview, the Tribunal does not see anything in the claimant's witness statement that is at odds with the claimant's evidence at the Final Hearing, and there is nothing in his witness statement which is inconsistent with what he said in evidence at the Final Hearing. His witness statement for this Remedy Hearing was far shorter, and more in focus, than his 139 page, 355 paragraphs, liability witness statement written in February 2020, for the Final Hearing.

77. At the Case Management PH held on 27 September 2022, it was stated to the Tribunal that the claimant's wife, Mrs Tracy Gourlay, was not being called as a witness on his behalf. This was recorded at paragraph 9(3), on page 5 of the Judge's PH Note & Orders issued on 29 September 2022.

78. As such, the only evidence that the Tribunal had, at this Remedy Hearing, on the nature and extent of the claimant's injury to feelings, and alleged personal injury, came from the claimant's own evidence, and what was stated by Dr Kinniburgh. We deal with these matters more fully, later in these Reasons, in our **Discussion and Deliberation.**

Dr Alisdair J Kinniburgh, MBChB, MRC Psych: Consultant Psychiatrist

79. Dr Kinniburgh, the claimant's expert medical witness, was the second, and final, witness to be heard by the Tribunal, and we heard his evidence on the afternoon of day 2, being Tuesday, 7 March 2023.

80. He had not been required to prepare a witness statement, and so, after he made the affirmation before the Judge, at 1:24pm, he was very briefly

examined in chief by the claimant's counsel, Mr John, to confirm his professional qualifications and experience, and confirm he was the author of the two psychiatric reports before the Tribunal, of 13 September 2022 and 17 February 2023.

81. Thereafter, Dr Kinniburgh was cross-examined by Mr Miller, solicitor for the respondents, from 1:27pm for one hour, 20 minutes, before a short re-examination by the claimant's counsel, Mr John. Dr Kinniburgh was not asked any questions of clarification by any member of the Tribunal panel. His professional qualifications and experience, as stated in his report, were not challenged by Mr Miller in cross-examination, but simply taken as read, and the respondents did not call any expert witness on their own behalf.

82. During his cross-examination by Mr Miller, Dr Kinniburgh stated that Mr Gourlay was well-prepared for the examination and interview conducted on 23 August 2022, and he recalled how the claimant had a "***well-curated folder***" of records from his GP. Dr Kinniburgh had accessed the claimant's psychiatric records held on the Greater Glasgow & Clyde Electronic Medical Information Records (EMIS) system, explaining that EMIS with a patient's CHI number gives access to the Health Board's medical records in its own area, but <u>not</u> access to GP records. He had also received other medical reports along with his letter of instruction from Mr Woolfson, as noted in his first report.

83. Asked about the GP record print out of 4 pages, produced in the Joint Bundle at pages 65 to 68, Dr Kinniburgh was not sure if he had seen that, but he reiterated that the claimant had prepared a well-curated set of papers, and that he (Dr Kinniburgh) did not get the claimant's medical records from his GP. He proceeded with what the claimant, and Mr Woolfson, had provided him, and he did not require the claimant to provide him with anything more.

84. In reviewing the evidence before us, it seems to us that Dr Kinniburgh probably had seen this referral letter because, in his first report, under past psychiatric history, second paragraph, he expressly refers to March 2018 when the GP referred the claimant to his local community mental health team because of worsening depression with suicidal ideation.

85. Asked about his statement, in that first report of 13 September 2022, that all medical certificates referred to "***work related stress***" as the reason for the claimant's absence, Dr Kinniburgh stated that he had previously been a GP, and medical certificates generally say depression and anxiety, and he readily conceded, after Mr Miller took him to some specific medical certificates in the Joint Bundle, that not all said "***work related stress***".

86. Dr Kinniburgh stated that it was an assumption on his part, as he did not interview the claimant's GP, but he had seen other certificates which did say that, although it appeared they were not in the Bundle. Further, he added, in interviewing Mr Gourlay, he did not disclose to him any other forms of stress.

87. When referred to his supplementary report of 17 February 2023, and asked about the phrase "***Unpleasant life events***", Dr Kinniburgh explained that that was his reference to the process of the claimant's employment being terminated, and the protracted issues around the lead up to his dismissal, which were more than normal events in the process of a work dispute.

88. Dr Kinniburgh stated that MS is a devastating diagnosis for a relatively young man, and it can be a background stressor if there is a severe prognosis, whereas diabetes is a more common ailment. He added that MS develops in different ways in different people, and the claimant's MS has developed into a secondary progressive variant, with symptoms of tiredness and fatigue, and mobility greatly affected.

89. He spoke of how, with somebody work and study oriented, as the claimant was previously, there can be an adjustment disorder in the short-term, and a trigger for a mental illness, and in the claimant's case, he had been to his GP, who prescribed anti-depressant medication, as the claimant was not enjoying life, and not sleeping, and this was something on top of low mood due to MS. The claimant's employment was the focus of his distress, and the March 2018 referral showed he was getting worse and suicidal.

90. Dr Kinniburgh stated that the claimant, having MS, wanted a career where he could work in what he called "***brainwork***", rather than a physical job, and how he had spoken, at length, with the claimant in interview (lasting just over 2

hours, he recalled) about the narrative to how his current situation had come about. He described the claimant's "***setbacks***" as not being random, but linked to his job, and challenged Mr Miller on his use of the word "***setback***", saying he preferred to say "***events"*** as a more neutral term.

91. Asked about the claimant being unfit for work, Dr Kinniburgh stated that how to classify a person's fitness for work is a complex judgment, as somebody could be temporarily unfit, or permanently unfit, and there is also a concept of partially fit for work, e.g. for "***light duties",*** or modified work. He described the interview with the claimant as "**a *good and thorough consultation***", and recalled that the claimant had a wealth of documents, and that he was very capable of answering his questions. At the mental state examination, he found that the claimant had signs and symptoms of depression, and trauma. He did not meet with him again for the supplementary report.

92. In further cross-examination, Dr Kinniburgh stated that an unfair dismissal is "***a very psychologically damaging thing***", and if the Council had made the reasonable adjustments sought at the time, then maybe the claimant would not have had the mental health *sequelae* that he has had. That said, Dr Kinniburgh acknowledged that he had not seen the claimant while he was employed by the Council.

93. When Mr Miller asked, with no objection by the claimant's counsel, about the claimant's pension loss, and life expectancy, Dr Kinniburgh was candid in his response that he was not prepared for such a question, and that he has no specific expertise in life expectancy for MS patients. He recalled that, when he was at University, from which he graduated in 1987, there was a 5 to 10 years gap in life expectancy between those with MS and others, but that gap has narrowed significantly, as science with MS has been getting better and better, so while severe MS patients are more vulnerable, the claimant with MS has mobility, and risks not the same for him, who he felt had average life expectancy.

94. Dr Kinniburgh described type 2 diabetes as a condition with many complications, where lifestyle issues are involved too, but stated that Mr

Gourlay is on treatment, not insulin, so he categorised it as the mild end of diabetes. As regards depression, Dr Kinniburgh stated that the claimant has average life expectancy, as with support of family, the claimant has no suicidal thoughts, and he does not smoke or drink, other lifestyle factors in his favour.

95. The Tribunal panel had no questions of clarification for Dr Kinniburgh. In re-examination, by Mr John, the claimant's counsel, Dr Kinniburgh stated that he considered it probable that the claimant could have continued to work if the adjustments had been made by the Council. However, with the subsequent events and dispute with the employer, leading to the claimant's dismissal and unsuccessful appeal, he stated anybody involved in such meetings and appeals would be very stressed and anxious, up to and including conclusion of the appeal process.

96. In his closing oral submissions for the claimant, his counsel, Mr John, stated that there was no contrary evidence to Dr Kinniburgh, so what he said should be accepted. He felt that the respondents were "***trying to muddy the waters***", that the claimant's move to the 4th floor was the "***stand out event***", and while MS is a progressive disease, there was evidence that flare ups in MS were due to work environment pressures, and that had stress attached to it. As pointed out by Dr Kinniburgh, there was a clear pattern of the claimant coping with MS at work from 1996, and in employment, and both Dr Kinniburgh and the claimant had said that the claimant benefitted from work, and that work was his focus, and a positive for him.

97. Further, counsel submitted that there was no probative evidence before the Tribunal that the claimant's MS was deteriorating before the move to the 4th floor, and no evidence that it has materially deteriorated since his dismissal. Dr Kinniburgh had described it as a mild progression of MS. If the respondents had wanted to suggest that the claimant's MS was more complicated, and progressing, then Mr John submitted that it was for them to establish that, and put evidence before the Tribunal, and they could have sought disclosure to show that the claimant's MS was material and naturally deteriorating. However, he submitted, the "***real blot***" on the claimant's life, and getting on

with work, was the mental health condition spoken of in Dr Kinniburgh's evidence, being a psychological condition.

98. Mr John submitted that Dr Kinniburgh is a reliable, independent expert, not arrogant, and not head-strong. He was a cautious witness, and showed a balanced approach, with careful, reasoned answers, and reasoned conclusions. He was not a partisan witness, nor defensive, but open-minded, and a thoughtful witness. He held to his original, reasoned opinion, and he was not shaken in his evidence, where he identified causative factors up to and including the end of the appeal process. Counsel spoke of Dr Kinniburgh having taken a careful and thorough approach, and looked at the whole picture

99. In his written and oral closing submissions, Mr Miller criticised Dr Kinniburgh's report as being biased, and not objective, because he had not had access to the entirety of the claimant's medical records, and his reference to all GP medical certificates speaking of work-related stress was not an error, but bias. We disagree, and record that we found Dr Kinniburgh to be a credible and reliable witness. Dr Kinniburgh is a specialist in mental health, and we had no issues with his evidence to the Tribunal. He was doing his best to assist the Tribunal, and we were satisfied as to his integrity, and objectivity. He gave his evidence to the Tribunal in a non-partisan, professional way, giving his expert evidence, and, in our collective view, his evidence withstood scrutiny when cross-examined by Mr Miller.

100. We note that in cross-examination Mr Miller did not take Dr Kinniburgh to any of the earlier OH reports included in the Bundle, but he did cross-examine him on the information that he had received from the claimant at his interview with Dr Kinniburgh. While Mr Woolfson's email of 8 March 2023, providing the GP EMIS record of 15 August 2013, was produced reserving the claimant's position about its relevance and admissibility, we note and record that it was received, of consent of both parties, at the Hearing on 9 March 2023, and the Tribunal considers it relevant and material evidence.

101. The fact that the respondents do not themselves appear to have sought access to the claimant's GP medical records is strange, given the Tribunal was previously advised by the respondents' representative, at an earlier Case Management Preliminary Hearing, that they were going to instruct their own expert medical witness, but no such witness was led on behalf of the respondents at this Remedy Hearing, Mr Miller simply cross-examining Dr Kinniburgh on his evidence as per his two written reports lodged with the Tribunal, and included in the Remedy Hearing Bundle.

Dr John Pollock, Fellow of the Institute and Faculty of Actuaries

102. While Dr Pollock was not led as a witness before us, we had his reports of 19 January 2019, and 25 August 2022, and his supplemental answers of 26 October 2022, as well as the emails between Mr Woolfson and Mr Miller of 8 and 25 November 2022.

103. Dr Pollock qualified as a Fellow of the Institute and Faculty of Actuaries in 1986 and he has been involved in providing expert actuarial opinions on a range of legal matters for around 25 years.

104. His supplementary report of 25 August 2022 refers to the fact that Guidance has been issued by the Presidents of Employment Tribunals (England & Wales and Scotland) effective from 10th August 2017, and that this Guidance was revised in 2019 and again in 2021.

105. The Tribunal notes and records that it is aware of the Presidential Guidance by Judges Brian Doyle and Shona Simon, the then ET Presidents, issued on 10 August 2017, and that the Tribunal should have regard to the Guidance although we are not bound by it.

106. We are also aware of the latest version of the "***Principles for Compensating Pension Loss***", revised from time to time by a working group of Employment Judges tasked by the Presidents, that being the fourth edition, third revision, March 2021, and the Third Addendum to the Presidential Guidance, issued on 12 March 2021, by Judges Barry Clarke and Shona Simon, the then ET Presidents.

107. Neither party's closing submissions to the Tribunal at this Remedy Hearing made any reference to the Presidential Guidance, or Principles.

Closing Submissions from Parties, and Further Written Representations

108. Written closing submissions were received from both parties. Mr John, counsel for the claimant, provided the Tribunal with a very detailed written submission dated 9 March 2023, running to some 19 numbered pages, with 87 separate paragraphs as his closing submissions on remedy.

109. Mr Miller, solicitor for the respondents, provided the Tribunal with his 6-page written submission dated 9 March 2023, running to some 10 numbered paragraphs. At this Remedy Hearing, we noted, in manuscript, the missing text from his paragraph 2.1 which, in full, reads : ***"The cause or causes of his condition cannot be identified with sufficient precision so as to attribute blame to any single event or combination of events."***

110. Despite case management orders made in the Judge's PH Note and Orders issued on 7 February 2023, and the reminder to both parties' solicitors in the Tribunal's letter of 8 March 2023, there was no jointly agreed list of case law authorities.

111. Further, the claimant's representative did not provide any list of case law authorities to be relied upon by the claimant, other than, at paragraph 68 of Mr. John's written submission (dealing with grossing up any award of compensation for tax purposes), when reference was made to the EAT judgment in **PA Finlay & Co Ltd V Finlay EAT 0260/14**.

112. Other than a reference to **Vento**, at paragraph 59 of his claimant's closing submission of 9 March 2023, no other case law was cited or relied upon by the claimant's counsel as regards the remedy issues before the Tribunal, in Mr John's original written submission.

113. When, at the Tribunal's invitation, Mr John provided supplementary closing submissions on remedy, intimated to the Tribunal, and copied to the respondents' representative, by Mr Woolfson's email of 13 March 2023, on injury to feelings, and specifically the Judge's reference to the EAT's judgment

in **Base Childrenswear Ltd v Otshudi [2019] UKEAT/0267/18**, counsel then referred us to the Court of Appeal's judgment in **Durrant v Chief Constable of Avon and Somerset Constabulary [2018] ICR D1**. We deal with **Durrant** later in these Reasons, at paragraphs 119 to 121 below, and in our later section on Discussion and Deliberation.

114. For the respondents, Mr Miller, referred us to the following, when forwarding his skeleton submission, on 9 March 2023, along with providing e-copies of the authorities relied upon by him, being :

- **BAE Systems (Operations) Ltd v Konczak [2017] IRLR 893**, per Underhill LJ at paras 61, 62, 71 & 72, and Irwin LJ at paras 92-3;
- **Al Jumard v Clwyd Leisure Ltd [2008] IRLR 345**, per Elias P at para 55;
- **Slade v Biggs [2022] IRLR 216,** per Griffiths J at para. 77; and
- **Chagger v Abbey National plc [2010] IRLR,** per Elias LJ at paras 56 – 67.

115. As a full copy of both of parties' written closing submissions are held on the Tribunal's casefile, and we had access to them during our private deliberations, it is not necessary to repeat here their full terms *verbatim*. That is neither appropriate, nor proportionate. We deal with salient points when discussing and deliberating on the specific, identified issues before us, in our later section on Discussion and Deliberation.

116. On 10 March 2023, Mr Woolfson, the claimant's solicitor, wrote to the Glasgow ET, with an extract from the Judicial College Guidelines, for the Tribunal's information, they having been referred to in counsel's written submissions for the claimant. We refer to those guidelines later in these Reasons in our later section on Discussion and Deliberation.

117. On 13 March 2023, Mr Miller, the respondents' solicitor, emailed Glasgow ET stating, quite succinctly, that, while grateful to have been offered the opportunity to make a submission on the unreported **Base Childrenswear**

judgment, having considered the judgment the respondents had nothing to add to the submissions made on 9 March 2023.

118. On 16 March 2023, the Tribunal wrote both parties' solicitors, noting that Mr John's supplemental closing submissions for the claimant had referred at paragraph 12 to the Court of Appeal's judgment in **Durrant v Chief Constable of Avon and Somerset Constabulary.** The Tribunal allowed Mr Miller, the respondents' solicitor, to make any final supplementary closing submission for the respondents, including any comments on the **Durrant** case cited by counsel for the claimant, as soon as possible, and certainly by no later than 23 March 2023.

119. On 17 March 2023, the Tribunal received an email from the respondents' solicitor, Mr Miller, responding to the claimant's counsel's supplementary written submissions, and stating as follows:

"*We have considered the supplementary closing submission lodged on behalf of the claimant and the **Durrant** case referred to and have the following comments to make*:

1. *At paragraph 12 of the supplementary closing submission the claimant makes reference to **Durrant** but does not draw the tribunal's attention to the fact that, in that case, the Court of Appeal expressly said that by using current Vento levels for the calculation of damages in relation to a historic event (or in our case events) takes into account the effect of interest. That being the case, the figure in the Schedule of Loss nominally for interest should be ignored."*

120. On 29 March 2023, the Tribunal received an email from the claimant's solicitor, Mr Woolfson, responding to Mr Miller's email of 17 March 2023, and stating as follows:

"1. I acknowledge what the Court of Appeal says and accept, therefore, that the figure of £40,000 in the schedule of loss should stand as the figure, without interest being added."

Reserved Judgment

121. On 9 March 2023, Judgment was reserved, after close of this Remedy Hearing, and the case was continued for private deliberation by the full Tribunal, in chambers, on Thursday, 11 April 2023, the earliest mutually convenient date for the full panel, with a further Members' Meeting held on 17 May 2023.

122. While the Judge had advised parties' representatives, via the Tribunal's letter of 19 May 2023, that he would progress to draft a written Judgment and Reasons to the two non-legal members of the Tribunal within the Tribunal administration's target of 4 weeks, and aim for final sign off by Friday, 30 June 2023, that target date did not happen, on account of other judicial business, and annual leave for the Judge in June and July 2023.

123. On the Judge's behalf, explanation for the delay was sent to both parties' representatives on 6 July 2023 under cover of a follow up email from the Tribunal, informing them that a draft Remedy Judgment was being progressed for issue to members, and an update would be provided in early course, as to when the Tribunal would anticipate the finalised Judgment and Reasons being ready for promulgation to both parties.

124. A further update letter was sent, on 15 August 2023, apologising to both parties, and expressing the Judge's sincere personal apology to both parties for the delay in issuing this Judgment, due to pressures of other judicial business, including several other large write ups, and his recent annual leave. Subject to the availability of the members for that final Members' Meeting, parties were informed that the Judge hoped that this whole process could be completed by a target date 29 September 2023 at latest.

125. In the event, there was further delay, in part due to my subsequent absence from the office, on sick leave, and so it has taken me, the Employment Judge, many months to complete the task of writing up this Judgment, and these Reasons. Whilst the Tribunal has kept both parties informed of progress, I accept that I have indicated a few false dawns. I do understand how anxious

the parties must have been. I am very sorry that they have had to wait. For that delay, I offer my sincere apology.

126. With the co-operation and assistance of the two non-legal members of the Tribunal, who bear no responsibility for the protracted delay in finalising this Judgment, the full Tribunal has now agreed the terms of this our finalised, unanimous Judgment, having had a further and final Members' Meeting held on 29 January 2024. It could not be held any earlier this month as one of the non-legal members of the panel was out of the country on an extended family holiday abroad, as explained to parties' representatives in the Tribunal's update letter of 10 January 2024.

127. This unanimous Judgment represents the final product from our private deliberations and reflects our unanimous views as the specialist judicial panel brought together as an industrial jury from our disparate experiences.

Relevant Law

128. While the Tribunal received written closing submissions from both parties' representatives, with some statutory provisions recited, and with some case law references, the Judge has required to give the Tribunal a fuller self-direction on the relevant law to cover all aspects of the case before this Tribunal relating to the claimant's remedy from the Tribunal.

129. The claim proceeded before the Tribunal as a complaint of unfair dismissal brought under **Section 111 of the Employment Rights Act 1996**, on the basis of the claimant having been "ordinarily" unfairly dismissed, contrary to **Sections 94 and 98 of the Employment Rights Act 1996**, and as a complaint of unlawful disability discrimination and victimisation, brought under **Section 120 of the Equality Act 2010,** and comprising specific complaints under **Section 15, 20 and 27**. The liability Judgment of 17 September 2021, as later reconsidered and varied by the Tribunal, has already made appropriate declarations and findings in those regards as regards the heads of claim brought by the claimant, and those upheld by the Tribunal.

130. In respect of the claimant's complaint of unfair dismissal, that head of claim was upheld by the Tribunal, which made a declaration to that effect, and so, at the remedy stage, the Tribunal may make an appropriate order for re-instatement, re-engagement, or award of compensation, as per the Tribunal's remedies powers under **Sections 112 to 124A of the Employment Rights Act 1996.** The claimant did not seek to be re-instated, nor re-engaged by the respondents, at this Remedy Hearing, seeking only an award of compensation from the respondents.

131. An award of compensation for unfair dismissal consists of a basic award, calculated in accordance with **Sections 119 to 122, and 126 of the Employment Rights Act 1996,** and a compensatory award calculated in accordance with **Sections 123, 124, 124A, and 126 of the Employment Rights Act 1996.**

132. **Section 124 of the Employment Rights Act 1996** deals with the limit on any compensatory award. In terms of **Section 124(1ZA),** it cannot exceed 52 weeks' pay. However, **Section 126** makes provision where compensation falls to be awarded in respect of any act both under the provisions of that Act relating to unfair dismissal, and the **Equality Act 2010**. A Tribunal shall not award compensation under either of those Acts in respect of any loss or other matter which is or has been taken into account under the other by the Tribunal.

133. While, in our liability Judgment of 17 September 2021, we found (by majority, Mr Burnett dissenting) that the claimant was unfairly dismissed by the respondents, contrary to **Section 98 of the Employment Rights Act 1996,** the claimant's losses, as per his Schedule of Loss, appear to relate to both that finding, and our separate findings, under the **Equality Act 2010**, unanimously that the respondents had failed to make reasonable adjustments for the claimant's disability, and (by majority, Mr Burnett dissenting) that the respondents had victimised the claimant by each of suspending him, dismissing him, and rejecting his appeal against dismissal, and so proceed on the basis that remedies (other than basic award for unfair dismissal) are being sought under the **Equality Act 2010**.

134. That being so, the Tribunal has looked at awarding compensation for the claimant's financial loss, and non-financial loss, under **Section 124 of the Equality Act 2010**, so no compensation award made by the Tribunal is subject to recoupment under the **Employment Protection (Recoupment of Benefits) Regulation 1996,** as amended, as would otherwise be the case, the claimant having been in receipt of Jobseekers' Allowance paid by the Department for Work and Pensions, if we had made any compensatory award for unfair dismissal, under **Section 123 of the Employment Rights Act 1996.**

135. Compensation (e.g., for loss of earnings) may overlap in the claims of unfair and discrimination. Double recovery must be avoided. **Section 126 of the Employment Rights Act 1996** prevents double recovery, but it does not specify when the award should be made as compensation for unfair dismissal or discrimination. In these circumstances, the Employment Appeal Tribunal has held, per Mr Justice Morison, then EAT President, that Employment Tribunals should award compensation under the discrimination legislation, thereby avoiding the cap on the unfair dismissal compensatory award : **D'Souza v London Borough of Lambeth [1997] IRLR 677**.

136. As regards the discrimination heads of claim, **Section 124 of the Equality Act 2010** provides as follows:

Remedies: general.

(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section120(1).

(2) The tribunal may- (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate: (b) order the respondent to pay compensation to the complainant: (c) make an appropriate recommendation.

(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.

(4) Subsection (5) applies if the tribunal (a) finds that a contravention is established by virtue of section 19, but (b) is satisfied that the provision criterion or practice was not applied with the intention of discriminating against the complainant.

(5) It must not make an order under section 2(b) unless it first considers whether to act under subsection(2)(a) or(c).

(6) The amount of compensation which may be awarded under subsection 2(b) corresponds to the amount which could be awarded by the county court under section 119.

(7) if a respondent fails without reasonable excuse, to comply with an appropriate recommendation the tribunal may- (a) if an order was made under subsection (2) (b) increase the amount of compensation to be paid. (b) if no such order was made, make one.

137. **Section 119** provides, so far as material for present purposes, applying to the sheriff court in Scotland, that:

Remedies

(1) This section applies if … the sheriff finds that there has been a contravention of a provision referred to in section 114(1).

(2) …

(3) The sheriff has power to make any order which could be made by the Court of Session—

(a) in proceedings for reparation;

(b) on a petition for judicial review.

(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

(5) …

(6) …

(7) …

138. In addition to these statutory provisions, we have also had regard to the relevant provisions of the **Equality & Human Rights Commission (EHRC) Code of Practice on Employment** in force since 6 April 2011 by the **Equality Act 2010 Codes of Practice (Services, Public Functions and Associations, Employment, and Equal Pay) Order 2011** (SI 2011/857).

139. **Chapter 15 of the Equality and Human Rights Commission Code of Practice on Employment 2011** provides guidance on the remedy provisions of the Equality Act 2010 (at paragraphs 15.40-15.54). So far as material, for present purposes, the EHRC Code provides that:

15.40: (ss 124(6) and 119)

An Employment Tribunal can award a claimant compensation for injury to feelings. An award for compensation may also include:

- *past loss of earnings or other financial loss;*
- *future loss of earnings which may include stigma or 'career damage' losses for bringing a claim;*
- *personal injury (physical or psychological) caused by the discrimination or harassment;*
- *aggravated damages (England and Wales only) which are awarded when the respondent has behaved in a high-handed, malicious, insulting or oppressive manner; and*
- *punitive or exemplary damages (England and Wales only) which are awarded for oppressive, arbitrary or unconstitutional action by servants of the government or where the respondent's conduct has been calculated to make a profit greater than the compensation payable to the claimant.*

15.41:

Compensation for loss of earnings must be based on the actual loss to the claimant. The aim is, so far as possible by an award of money, to put the claimant in the position they would have been in if they had not suffered the unlawful act.

***15.42**:*

Generally, compensation must be directly attributable to the unlawful act. This may be straightforward where the loss is, for example related to an unlawful discriminatory dismissal. However, subsequent losses including personal injury may be difficult to assess.

15.43:

A worker who is dismissed for a discriminatory reason is expected to take reasonable steps to mitigate their loss for example by looking for new work or applying for state benefits. Failure to take reasonable steps to mitigate loss may reduce compensation awarded by a tribunal. However, it is for the respondent to show that the claimant did not mitigate their loss.

140. A Tribunal can make a declaration instead of or as well as making an award of compensation or a recommendation. As the claimant is no longer in the respondents' employment, we were not invited to make any recommendation. Our focus has been on what amounts of compensation to award to the claimant.

141. Further, in terms of the Tribunal's powers, under **Section 124 (6) of the Equality Act 2010**, the amount of compensation which may be awarded under **Section 124 (2) (b)** corresponds to the amount which could be awarded by the Sheriff Court under **Section 119. Section 119 (4)** provides that an award of damages may include compensation for injured feelings, whether or not it includes compensation on any other basis.

Economic loss

142. The central aim is to put the claimant in the position, so far as is reasonable, that they would have been had the discrimination not occurred : **Ministry of Defence v Wheeler [1998] EWCA Civ 2647 ; [1998] ICR 242 ; [1998] IRLR 23,** and **Chagger v Abbey National plc [2009] EWCA Civ 1202 ; [2010] ICR 397 ; [2010 IRLR 47**.

143. In **Chagger**, at paragraphs 11 to 13, Lord Justice Elias, in the Court of Appeal, summarised a number of points regarding the fundamental approach to assessing compensation in discrimination cases.

a. Compensation for discrimination under the **Equality Act 2010** is to be assessed according to tortious principles. Compensation must be assessed so as to put the claimant in the position they would have been in had the tortfeasor not acted unlawfully.

b. Compensation may be awarded for losses that flow directly and naturally from the tort; there is no requirement that the loss should be reasonably foreseeable.

c. However, damages might be limited by the possibility of a break in the chain of causation, or the failure of the claimant to mitigate his loss.

144. Put into layman's language, a tort is an act or omission that gives rise to injury or harm to another and amounts to a civil wrong for which the courts impose liability. A tortfeasor is the person who commits the civil wrong. In Scots law, we speak of delictual principles, rather than tortious principles, and of delicts rather than torts.

145. The central matters the Tribunal will need to determine are the ‘old job’ facts and the ‘new job’ facts. It will need to compare the financial benefits had the claimant not been treated unlawfully with the financial benefits the claimant has been able to obtain or will be able to in the future.

146. Factors that will be considered include whether the employment would have terminated anyway, whether the individual would have been promoted or

received a pay rise, what employment has been or will be obtained, what the financial rewards will be and whether these will increase to meet the losses currently being suffered at some point in the future.

147. In exceptional cases, a Tribunal may be able to award whole career loss. Such cases are rare and only suitable where there is no real prospect of an employee ever obtaining an equivalent job. Otherwise, a Tribunal should stick to the usual approach, suitable for the vast majority of cases, of assessing when it is likely that an employee will get an equivalent job : per Lord Justice Elias, at paragraphs 50 to 53, in **Wardle v Credit Agricole Corporate and Investment Bank [2011] EWCA Civ 545 ; [2011] ICR 1290; [2011] IRLR 604.**

148. The statutory provisions for compensatory awards for unfair dismissal under the **Employment Rights Act 1996** are different. However, the cases on the principles for assessment of loss of earnings and failure to mitigate appear to draw no distinction between the two, and before us, neither party has suggested that the principles differ for present purposes as between unfair dismissal and discrimination cases.

Injury to feelings

149. The principles to be determined when assessing awards for injury to feelings for unlawful discrimination were summarised by the Employment Appeal Tribunal, per Mrs Justice Smith, in **Armitage, Marsden & H M Prison Service v Johnson [1997] ICR 275; [1997] IRLR 162**, where she held that:

> ***"(i) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award. (ii) Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use the phrase of Sir***

Thomas Bingham MR, be seen as the way to "untaxed riches". (iii) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think that this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards. (iv) In exercising that discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings. (v) Finally, tribunals should bear in mind Sir Thomas Bingham's reference for the need for public respect for the level of awards made. "

150. In **Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871 ; [2003] ICR 318; [2003] IRLR 102**, the Court of Appeal in England & Wales, approving Mrs Justice Smith's judgment in **Johnson,** per Lord Justice Mummery giving the judgment of the Court, held, at paragraph 50, that an award of injury to feelings is to compensate for "***subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on."***

151. Lord Justice Mummery said (when giving guidance in **Vento,** at paragraphs 50 to 52) that ***"the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise……. tribunals have to do their best that they can on the available material to make a sensible assessment." In carrying out this exercise, they should have in mind the summary of general principles of compensation for non pecuniary loss by given by Smith J in Armitage v Johnson***".

152. In **Vento**, the Court of Appeal, per Lord Justice Mummery at paragraph 65, went on to observe there to be three broad bands of compensation for injury to feelings (as distinct from compensation for psychiatric or similar personal injury). The top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award

of compensation for injury to feelings exceed the normal range of awards appropriate in the top band.

153. The middle band should be used for serious cases which do not merit an award in the highest band. The lowest band is appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence. At paragraph 66 in **Vento**, Lord Justice Mummery further stated that : "***There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case."***

154. The appropriate sum for each band has been up rated in cases subsequent to **Vento** to take account of inflation, see **Da'Bell v NSPCC [2010] IRLR 19** (EAT), and also to take account of the 10 per cent uplift for personal injury awards based on the Court of Appeal decision in **Simmons v Castle [2012] EWCA Civ 1039.**

155. Thereafter, in **De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879**, the Court of Appeal in England & Wales ruled that the 10% uplift provided for in **Simmons v Castle** should also apply to ET awards of compensation for injury to feelings, but it expressly recognised that it was not for it to consider the position as regards Scotland.

156. However, account was thereafter taken of the position in Scotland by Judge Shona Simon, the then Scottish ET President, when formulating Guidance published jointly with Judge Brian Doyle, then President of ET (England & Wales), issued on 5 September 2017, in respect of claims presented on or after 11 September 2017, and updated by annual addenda.

157. Until **ET Presidential Guidance** was issued, the amount appropriate for the lower band was then **£660 to £6,600** and the amount appropriate to the middle band was then **£6,600 to £19,800**. The amount appropriate for the top band was then **£19,800 to £33,000**.

158. For claims presented on or after 11 September 2017, when the first Presidential Guidance was issued, the **Vento** bands were prescribed as

follows: a lower band of **£800 to £8,400** (less serious cases); a middle band of **£8,400 to £25,200** (cases that do not merit an award in the upper band); and an upper band of **£25,200 to £42,000** (the most serious cases), with the most exceptional cases capable of exceeding **£42,000**.

159. The 2017 ET Presidential Guidance states as follows, at its paragraphs 11 and 12:

> *"11. Subject to what is said in paragraph 12, in respect of claims presented before 11 September 2017, an Employment Tribunal may uprate the bands for inflation by applying the formula x divided by y (178.5) multiplied by z and where x is the relevant boundary of the relevant band in the original Vento decision and z is the appropriate value from the RPI All Items Index for the month and year closest to the date of presentation of the claim (and, where the claim falls for consideration after 1 April 2013, then applying the Simmons v Castle 10% uplift).*
>
> *12. So far as claims determined by an Employment Tribunal in Scotland are concerned, if an Employment Tribunal determines that the Simmons v Castle 10% uplift does not apply then it should adjust the approach and figures set out above accordingly, but in so doing it should set out its reasons for reaching the conclusion that the uplift does not apply in Scotland."*

160. Paragraph 11 requires application of a formula for uprating the original **Vento** band figures in respect of claims presented before 11 September 2017, such as those in the present case, but in light of parties' agreed position on the matter, in light of the Court of Appeal's judgment in **Durrant v Chief Constable of Avon and Somerset Constabulary 2018 ICR D1 CA,** as detailed earlier in these Reasons, at paragraphs 118 to 120 above**,** we have not applied that formula.

161. Counsel for the claimant submitted that the relevant injury to feelings bands are those set out in the most recent addendum to the 2017 Presidential Guidance, as applying the recently updated band figures overcomes the issue of factoring in inflation. Mr John's view, in his written submissions of 16 March

2023, and Mr Miller's and Mr Woolfson's subsequent correspondence of 17 and 29 March 2023, agreed that the then current **Vento** levels should be used in relation to the historic events from 2013 to 2015. We refer to that email exchange of correspondence with parties' solicitors as set forth earlier in these Reasons, at paragraphs 116 to 118 above.

162. The then current, fifth addendum, issued jointly by then ET Presidents, Judge Shona Simon (Scotland) and Judge Barry Clarke (England & Wales), on 28 March 2022, in respect of all claims presented on or after 6 April 2022, provided that the **Vento** bands were then updated as follows: a lower band of **£990 to £9,900** (less serious cases); a middle band of **£9,900 to £29,600** (cases that do not merit an award in the upper band); and an upper band of **£29,600 to £49,300** (the most serious cases), with the most exceptional cases capable of exceeding **£49,300.** This is the addendum quoted by Mr John at paragraph 59 of his written closing submission.

163. The now current, sixth addendum, issued jointly by current ET Presidents, Judge Barry Clarke (England & Wales) and Judge Susan Walker (Scotland), on 24 March 2023, in respect of all claims presented on or after 6 April 2023, provides that the **Vento** bands are now as follows: a lower band of **£1,100 to £11,200** (less serious cases); a middle band of **£11,200 to £33,700** (cases that do not merit an award in the upper band); and an upper band of **£33,700 to £56,200** (the most serious cases), with the most exceptional cases capable of exceeding **£56,200.**

164. As per the Employment Appeal Tribunal judgment in **Base Childrenswear Ltd v Miss N Lomana Otshudi [2019] UKEAT/0267/18**, by the then Her Honour Judge Eady QC, now Mrs Justice Eady, a High Court judge in England and Wales, and the current EAT President, this Tribunal's focus must be on the impact of the respondents' acts on the claimant. We have taken particular account of the learned EAT Judge's guidance at paragraphs 18 to 22, and 36, reading as follows:

> *18. When making awards for non-pecuniary losses, it is trite law that an ET must keep in mind that the intention is to compensate, not punish.*

It must, therefore, be astute neither to conflate different types of awards nor to allow double recovery. The ET should, moreover, not allow its award to be inflated by any feeling of indignation or outrage towards the Respondent. On the other hand, awards should not be set too low as that would diminish respect for the policy of the anti-discrimination legislation. See, generally, the guidance set out by Smith J (as she then was) in ***Armitage Marsden and HM Prison Service v Johnson*** *[1997] ICR 275, approved by the Court of Appeal in* ***Vento****.*

19. In this case it is not said that the ET failed to properly direct itself to the ***Vento*** *guidance and bands (appropriately updated by reference to what were agreed to be the relevant sums, taking into account the* ***Simmons v Castle*** *uplift (see [2012] EWCA Civ 1039) and as set out in the Presidential Guidance on "ET awards for injury to feelings and psychiatric injury following* ***De Souza v Vinci Construction (UK) Ltd*** *[2017] EWCA Civ 879"). In* ***Vento****, the Court of Appeal laid down three levels of award: most serious, middle and lower. Specifically, at paragraph 65 of that Judgment, the Court of Appeal suggested that the top band should apply to the most serious cases, such as where there had been a lengthy campaign of discriminatory harassment on the prohibited ground; that the middle band should be used for serious cases which do not merit an award in the highest band; and the lower bad would be appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. It was accepted, however, that the precise level of award under any particular head would depend on the facts of the case, which, of course, will depend on the evidence before the ET.*

20. It is also important for me to keep in mind that an award of compensation for injury to feelings is best judged by the ET that has had the benefit of hearing and seeing the Claimant give evidence. Given the wide discretion afforded to ETs in the assessment of compensation under this head, a challenge will only lie to the

*Employment Appeal Tribunal ("the EAT") if the award made is manifestly excessive or wrong in principle. That might mean, for example, where the facts of the case taken overall mean that it should be categorised as falling within a lower **Vento** band (see per HHJ McMullen QC at paragraph 46 **Da'Bell v NSPCC** [2010] IRLR 19). If this is so then a manifestly excessive award for injury to feelings can be overturned.*

*21. As a matter of principle, aggravated damages are also available for an act of discrimination, albeit again, the award made must still be compensatory not punitive. As was explained by EAT in **Commissioner of Police of the Metropolis v Shaw** [2012] IRLR 291, Underhill J (as he then was) presiding, such damages are really an aspect of injury to feelings and ETs should have regard to the total award made (i.e. for injury to feelings and for the aggravation of that injury), to ensure that the overall sum is properly compensatory and not - as was held to have been the case in **Shaw** itself - excessive. Although ETs are not required to make only one global award, it is important that they have regard to the overall sum awarded and, specifically, to the risk of double recovery.*

*22. Finally, for present purposes, it is not uncommon for a victim of unlawful discrimination to suffer stress and anxiety. To the extent that a psychiatric and/or physical injury can be attributed to the unlawful act, it is again common ground that the ET has jurisdiction to award compensation, subject only to the requirements of causation being satisfied (see **Sheriff v Klyne Tugs (Lowestoft) Ltd** [1999] ICR 1170 CA).*

*36. Moving on to the ET's assessment of injury to feelings in this case, it is right to say that, in deciding whether the case should fall within the low or middle **Vento** bands, an ET might think it relevant to have regard to whether the discrimination in question formed part of a continuing course of conduct (perhaps a campaign of harassment over a long period) or whether it was only a one-off act. That said, each*

such assessment must be fact and case specific. It is, after all, not hard to think of cases involving one-off acts of discrimination that might well justify an award falling within the middle or higher ***Vento*** *brackets, or other cases involving a continuing course of conduct that are properly to be assessed as falling within the lower band. Simply describing discrimination as an isolated or one-off act may not provide the complete picture and I do not read the* ***Vento*** *guidance as placing a straightjacket on the ET such that it must only assess such cases as falling within the lower band. The question for the ET must always be, what was the particular effect on this individual complainant?*

165. In deciding this matter, we have also borne in mind the judicial guidance given by Her Honour Judge Stacey (as she then was, now Mrs Justice Stacey, a High Court judge in England and Wales) in the Employment Appeal Tribunal, in **Komeng v Creative Support Ltd [2019] UKEAT/0275/18**, that the Tribunal's focus should be on the actual injury to feelings suffered by the claimant and not the gravity of the acts of the respondent employer, in accordance with **Cadogan Hotel Partners Ltd v Ozog** [**2014] UKEAT0001/14** and **Essa v Laing [2004] IRLR 313**, also reported at **[2004] EWCA Civ 2 , and [2004] ICR 746,** per Lord Justice Pill.

166. As stated by HHJ Stacey, at paragraphs 15 and 16 in **Komeng**:

15. The right of this Tribunal to interfere with a Tribunal Decision in relation to assessment of compensation was helpfully summarised by HHJ Eady QC at paragraph 32 of the Cadogan Hotel Partners Limited v Ozog as follows:

"The decision as to the level of an award for injury to feelings is generally for an Employment Tribunal. It will have heard the evidence of the impact of the discriminatory act upon the Claimant and will be best placed to determine the appropriate level of compensation for such injury. It is rare that it will be appropriate for this court to intervene in terms of the level of such an award, but it would be right to do if satisfied that the Tribunal had wrongly, on the facts of the case,

categorised the injury within one of the Vento bands. So, if the EAT was satisfied that the Employment Tribunal had wrongly categorised a less serious case as falling within the higher category (or vice versa), the manifestly too high (or too low) award for injury to feelings may be overturned."

16. Essa v Lang [2004] IRLR 313 is a reminder of the importance of assessing the impact of the discrimination on the individual concerned. We are all different and the impact of discrimination is an individual experience and unlawful discriminatory behaviour may affect different individuals differently, which will be for the Tribunal to assess and analyse from the evidence before it.

Psychiatric injury

167. A victim of unlawful discrimination may suffer stress and anxiety to the extent that psychiatric and / or physical injury can be attributed to the unlawful act. In that situation it has been confirmed that the Employment Tribunal has jurisdiction to award compensation, subject to the requirements of causation being satisfied: **Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] EWCA Civ 1663; [1999] ICR 1170**; **[1999] IRLR 481,** per Lord Justice Stuart Smith.

168. When Tribunal finds that an employee's personal injury has been caused by a number of factors including discrimination for which the employer is liable, it should reduce compensation so that it reflects only the extent to which the unlawful discrimination contributed to the employee's ill health: **Thaine v London School of Economics UKEAT/0144/10,** and **BAE Systems (Operations) Ltd v Konczak [2017] EWCA Civ 1188; [2017] IRLR 893 ; [2018] ICR 1.**

169. In **Thaine,** Mr Justice Keith cited the decision of the Court of Appeal in **Allen and Others v British Rail Engineering Ltd and Another [2001] ICR 942** at paragraph 20 per Schiemann LJ*: "(iv) The court must do the best it can on the evidence to make the apportionment and should not be astute to deny the claimant relief on the basis that he cannot establish with demonstrable*

accuracy precisely what proportion of his injury is attributable to the defendant's tortious conduct."

170. In **Konczak**, Lord Justice Underhill, in the Court of Appeal, dealt with the question of divisibility and indivisibility, following a summary of the case law (in which he approved the decision in **Thaine**):

"71. What is therefore required in any case of this character is that the tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused. I would emphasise, because the distinction is easily overlooked, that the exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm. In other words, the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong; not whether it can assess the degree to which the wrong caused the harm.

72. That distinction is easy enough to apply in the case of a straightforward physical injury. A broken leg is "indivisible": if it was suffered as a result of two torts, each tortfeasor is liable for the whole, and any question of the relative degree of "causative potency" (or culpability) is relevant only to contribution under the 1978 Act. It is less easy in the case of psychiatric harm. The message of Hatton is that such harm may well be divisible. In Rahman the exercise was made easier by the fact (see para 57 above) that the medical evidence distinguished between different elements in the claimant's overall condition, and their causes, though even there it must be recognised that the attributions were both partial and approximate. In many, I suspect most, cases the tribunal will not have that degree of assistance. But it does not follow that no apportionment will be possible. It may, for example, be possible to conclude that a pre-existing illness, for which the employer is not responsible, has been materially aggravated by the wrong (in terms of severity of symptoms and/or duration), and to award compensation reflecting the extent of the aggravation. The most difficult type of case

is that posited by Smith LJ in her article, and which she indeed treats, rightly or wrongly, as the most typical: that is where "the claimant will have cracked up quite suddenly; tipped over from being under stress into being ill." On my understanding of Rahman and Hatton, even in that case the tribunal should seek to find a rational basis for distinguishing between a part of the illness which is due to the employer's wrong and a part which is due to other causes; but whether that is possible will depend on the facts and the evidence. If there is no such basis, then the injury will indeed be, in Hale LJ's words, "truly indivisible", and principle requires that the claimant is compensated for the whole of the injury—though, importantly, if (as Smith LJ says will be typically the case) the claimant has a vulnerable personality, a discount may be required in accordance with proposition 16."

171. As is referred to in **Konczak**, Lady Justice Hale's identified propositions relevant to stress at work cases in the case of **Hatton** (**Sutherland v Hatton [2002] IRLR 263 CA**) may be of assistance in discrimination cases. Of particular relevance are:

"(15) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment.

(16) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress-related disorder in any event."

Interest

172. The Tribunal is empowered to make an award of interest upon any sums awarded pursuant to the **Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.** (SI 1996 No.2803).

173. In terms of **Regulation 2**, the Tribunal may include interest on the sums awarded, and it shall consider whether to do so, without the need for any

application by a party in the proceedings. Nothing in **Regulation 2** shall prevent the Tribunal from making an award or decision, with regard to interest, in terms which have been agreed between the parties.

174. The rate of interest prescribed by **Regulation 3(2)** is the rate fixed for the time being, currently an amount of 8 *per cent per annum* in Scotland, terms of the rate fixed, for the time being, by **Section 9 of the Sheriff Courts (Scotland) Extracts Act 1892.**

175. By **Regulation 6**, in the case of any injury to feelings award, interest shall be for the period beginning on the date of the contravention or end of discrimination complained of and ending on the day of calculation. In the case of other sums for damages or compensation and arrears of remuneration, interest shall be for the period beginning with the mid-point date and ending on the day of calculation.

176. Where the Tribunal considers that in the circumstances, whether relating to the case as a whole or to a particular sum in an award, serious injustice would be caused if interest were to be awarded for the periods in **Regulation 6(1) and (2),** it may, under **Regulation 6(3),** calculate interest, or as the case may be interest on the particular sum, for such different period, or for such different periods in respect of various sums in the award, as it considers appropriate in the circumstances.

177. In terms of **Regulation 7,** the Tribunal shall give a written statement of reasons for its decision on the total amount of any interest awarded under **Regulation 2,** including any reasons for any decision not to award interest under **Regulation 2.**

Uplift for unreasonable failure to comply with ACAS Code of Practice

178. Because it is also relevant to remedy, we have also considered the specific terms of **Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.**

179. It provides that if, in the case of proceedings to which the statutory provision applies, which includes an unfair dismissal complaint under the **Employment**

Rights Act 1996, and a discrimination complaint under the **Equality Act 2010**, it appears to the Tribunal that the claim concerns a matter to which a relevant Code of Practice applies, and the employer or employee has unreasonably failed to comply with the Code in relation to that matter, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase, or decrease as the case may be, the compensatory award it makes to the employee by no more than a 25% uplift, or downlift.

180. The **ACAS Code of Practice on Disciplinary and Grievance Procedures** (2015) is a relevant Code of Practice. It came into effect on 11 March 2015 in accordance with the **Employment Code of Practice (Disciplinary and Grievance Procedures) Order 2015** (SI 2015 No. 649).

181. In **Slade & Hamilton v Biggs and others EA-2019-000687-VP/EA-2019-000722-VP**, the Employment Appeal Tribunal suggested that Tribunals apply the following four-stage test when assessing whether an ACAS uplift is appropriate:

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

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

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

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

Further Written Representations from Parties

182. On 18 May 2023, the Tribunal wrote to both parties' solicitors, seeking clarification on certain points, stating, so far as material for present purposes, as follows:

"In the claimant's Schedule of Loss, at page 205 of the Remedy Hearing Bundle, pension loss (as per Dr Pollock's report of 25 August 2022, at page 10 of the Bundle) is shown as £197,430.00.

In the background to that pension report (page 7 of the Bundle), Dr Pollock records that Mr Gourlay was awarded a deferred pension when he left employment on 24 September 2015 based on his final salary and his completed service. It is there stated that this came into payment on grounds of ill-health in February 2018, backdated to 12 November 2016, and that he was awarded a pension of £9,248pa and a lump sum of £61,658. His final pay for pension purposes is there stated as £35,349pa.

That information (other than final pay) was replicated in the background to Dr Pollock's original report of 21 January 2019, page 3 of the Bundle, which also stated that, had Mr Gourlay been awarded an ill-health pension, he would have been awarded a pension of £13,636pa, together with a lump sum of £90,907.

This detail is not provided in the claimant's witness statement signed on 27 February 2023. The Remedy Hearing Bundle contains no other supporting documents which can assist the Tribunal, although the Tribunal has noted, at page 109 of the Bundle, in a benefits options conversion information, reference to a reduced pension of £13,636.12, and an increased lump sum of £90,907.34. It may be that Dr Pollock's report has rounded those figures down to the nearest full £.

Mr Gourlay's witness statement (at paragraph 29, on page 8 of 9) refers to a GDPR response from Strathclyde Pension Fund Office (SPFO) from 22 November 2022 (not produced), and cross-refers to retirement calculations from January 2015 (calculated to 31 March 2015) produced at pages 101,

103, 130, and 133 / 135 of the Bundle. They show the claimant's final pensionable pay as £35,092.83, and not the £35,349pa quoted by Dr Pollock. As such, there is confusion as to which amount is the correct amount, and which amount should therefore be shown in the Tribunal's findings in fact.

The Tribunal has also noted, from the claimant's chronology of events (at pages 182 to 202 of the Bundle), that (at page 190) he refers to a letter of 15 February 2018 from SPFO, stating that his 18 October 2016 application for early payment of his deferred benefits on the grounds of permanent ill-health was approved. That letter has not been included in the Remedy Hearing Bundle, so the Tribunal cannot see where the 12 November 2016 backdating date, given by Dr Pollock, comes from.

Similarly, the Tribunal has received no vouching information to show what pension payments the claimant has in fact received, and no amount (even in global terms, rather than month by month breakdown) has been included in the Schedule of Loss. As Mr Miller stated at point 7.1 of his skeleton submission for the respondents: "No credit is given for the pension lump sum and pension income to date."

In these circumstances, the Tribunal requires the claimant's solicitor to clarify matters, and provide any supporting documentation to show the actual pension amounts paid to the claimant, for what purpose (monthly pension, or lump sum), and on what dates of payment.

Please provide the requested information as soon as possible, and certainly by no later than 4pm on Monday, 29 May 2023."

183. In his email to Glasgow ET, on 2 June 2023, the claimant's solicitor, Mr Woolfson, responded to the Tribunal's letter of 18 May 2023, as follows:

"1. With regard to final pensionable salary, the figure of £35,092.83, which can be found at page 102 of the bundle, is not the claimant's final salary. The figure in the document at page 102 was based at the time on an estimated date of retirement of 31 March 2015 (see page 101). The claimant's actual final salary, as at September 2015, was £35,349.

2. I attach the letter of 15 February 2018 from the Strathclyde Pension Fund. This is a document which I provided to Dr Pollock at the point of instructing him to produce his second report, from 2022. On the fifth page of this document, near the top of the page, there is a reference to the claimant's final pay being £35,349.44, so I assume this is what Dr Pollock based his figure on (and he appears to have rounded the figure down to the nearest £1).

3. The attached letter of 15 February 2018, on the third page, also confirms the reduced pension of £9248.82 and lump sum of £61,658.75 (again both figures having been rounded down by Dr Pollock).

4. The same letter, on the fifth page, confirms that deferred pension was being backdated to 12 November 2016 (though note that the figure on the fifth page of £12,311.48 is not the actual sum received, as the claimant took a lower annual pension and an increased lump sum, as per the third page).

5. The schedule of loss calculates past and future loss of salary, together with pension loss, and for these purposes it is the second report of Dr Pollock, from 2022, which is relevant (rather than the 2019 report).

6. In order to comply with the Tribunal's request, I attach a document prepared by the claimant which I believe provides the information requested with regard to pension received.

My understanding from the Tribunal's email is that, further to the submission of the respondent to the effect that credit should be given for the pension lump sum and pension income to date, the Tribunal may be considering off-setting pension received against the loss of earnings calculation.

However, if that is what is being considered, then I respectfully submit that this is not the approach which should be taken.

In this regard, I refer to the 2022 pension loss report at paragraph 10 (page 9 of the bundle), which I believe addresses this issue. Following my discussion

with counsel, I have also taken the opportunity to liaise further with Dr Pollock, and I attach a recent email exchange I have had with him. Dr Pollock further clarifies the basis of his calculation and explains why he does not believe receipt of pension income should be deducted from earnings. Dr Pollock explains that he has followed established case law (from the House of Lords), and I believe it would be appropriate for the Tribunal to adopt the same approach.

7. There was only one issue in the lead up to the remedy hearing which was potentially in dispute in relation to the pension loss report, and in this regard I refer to page 13 of the bundle. On this basis, Dr Pollock was not called as a witness to the hearing, and I sought to clarify this with the respondent's solicitor prior to the hearing commencing (please see the attached email exchange from 23, 24 and 27 February 2023).

8. Further, the schedule of loss which was provided in August 2022 was not challenged in this regard by the respondent at any point prior to submissions being presented at the end of the remedy hearing, and that is notwithstanding the respondent having been required to produce a counter schedule of loss and with both parties providing responsive comments. I recall that counsel for the claimant, in response to the respondent's submissions, made a similar point at the remedy hearing, to the effect that this had not been raised earlier. Therefore, I do not believe it would be in accordance with the overriding objective, particularly given the hearing has concluded and the need for finality of litigation, for this matter to be opened up now."

184. Thereafter, the respondents' solicitor, Mr Miller, emailed the Glasgow ET on 20 June 2023, in reply to Mr Woolfson's response, stating as follows:

"We are grateful to the tribunal for allowing the Respondent an opportunity to comment on the answers presented on behalf of the Claimant on 2 June 2023 (16:10) in response to the Employment Tribunal email of 18 May 2023 (11:57).

We are also grateful to the Claimant for clarifying the answers to the questions put by the tribunal.

The rule derived from the Parry v Cleaver case (which was followed in Longden v British Coal Corporation) is that a claimant need not give credit against earning loss for the ill health pension payments received in the period prior to the normal retirement date.

The reasoning for that rubric is that pensions are different in character from earnings and the first cannot offset the second for that reason. A proposition advanced on behalf of the Respondent in these claims was that it is open to the tribunal to conclude that the Claimant's unfair dismissal denied him the opportunity to achieve a more valuable ill-health retirement pension which he was likely destined to receive within months of the dismissal.

If the Employment Tribunal reaches that conclusion, compensation will be calculated using the higher pension payments he would have received. In that scenario the rule in Parry v Cleaver would not apply as the loss suffered would be a loss of pension (not earnings) and therefore the pension payments actually received would fall to be deducted.

We would be happy to provide further clarification should that be necessary.

We have copied this email to the Claimant's solicitor. We have complied with Rule 92."

185. Finally, on 4 July 2023, Mr Woolfson provided further closing comment, by email to Glasgow ET, stating as follows:

"I represent the claimant and refer to the email below.

I thank the Tribunal for the opportunity to provide further comments.

The schedule of loss is based on past loss and future loss, and for the reasons given in paragraph 6 of my email to the Tribunal of 2 June 2023 (which attached an email from Dr Pollock of 1 June 2023) pension receipts should not be offset against loss of earnings.

This is a position which I note is supported by the solicitor for the respondent in his email below, with reference to the relevant case law (notwithstanding paragraph 7.1 of the respondent's skeleton submission, referred to in the Tribunal's email of 18 May 2023). Parties are now therefore agreed on this.

As such, on the basis that the Tribunal is minded to award past and future loss with reference to the schedule of loss, there is no need to make any adjustment for pension payments or the lump sum already received.

The email below refers to a proposition advanced on behalf of the respondent. However, this does not relate to the schedule of loss and does not address the question asked by the Tribunal in its email of 18 May 2023, which is about the schedule of loss and whether pension receipts should be deducted.

I trust this now addresses the questions which the Tribunal has, though please let me know if I can be of any further assistance.

I have copied the solicitor for the respondent into this email."

186. The claimant's solicitor, Mr Woolfson, wrote to the Tribunal, by email on 22 August 2023, confirming that there has been no change to the claimant's circumstances since the Remedy Hearing, ***"i.e. he is still unemployed, permanently unfit for work, and in receipt of pension, EESA and DLA",*** clarifying the claimant's tax position, and providing an amended grossing up table, taking account of the new Scottish tax bands for 2023/24.

187. Thereafter, on 24 August 2023, on the Judge's instructions, the respondents' solicitor, Mr Miller, was asked for any written comments he might have to make on the content of Mr Woolfson's correspondence of 22 August 2023, and to reply within 7 days.

188. When no reply was received within that 7-day period, a reminder was sent by the Tribunal clerk, on 6 September 2023, producing a reply later that same day from Mr Ettles, the respondents' in-house solicitor, replying on behalf of Mr Miller, and apologising for the delay in replying, his fault, not Mr Miller's, and confirming that the respondents have no comments on the email dated 22 August 2023 from the claimant's representative.

189. The full Tribunal, at its final Members' Meeting held on 29 January 2024 has taken all of this follow-up correspondence from both parties' representatives into account when discussing and finalising this our unanimous Judgment.

Issues before the Tribunal

190. The case called before the full Tribunal for determination of an appropriate remedy for the claimant, further to the Tribunal's previous liability Judgment, as varied by the subsequent Reconsideration Judgment.

191. The issues for determination by the Tribunal were, as per the agreed List of Issues, as reproduced earlier in these Reasons at paragraph 27 above, and, in our discussion and deliberation, we have had regard to the various paragraphs of that agreed list, which we discuss later, in our Discussion and Deliberation, taking account of the written and oral submissions from Mr John for the claimant, and Mr Miller for the respondents.

Discussion and Deliberation

192. In coming to our final decision in this case, the Tribunal has carefully reviewed and analysed the whole evidence led before it, both orally in sworn / affirmed evidence, and within the various documents spoken to in evidence at the Remedy Hearing, and produced to us in the Joint Bundle, and additional documents.

193. Both parties made detailed written submissions which the Tribunal found to be informative, as also their subsequent written representations. The Tribunal has carefully considered both parties' written submissions and referred to the case law authorities cited by them, together with their subsequent written representations.

194. References are made to essential aspects of the closing submissions / written representations and the cited authorities with reference to the issues to be determined in this judgment, although the Tribunal has considered the totality of the closing submissions / further representations from both parties, both written submissions, and oral too, whether or not expressly mentioned in these Reasons.

Personal Injury

195. We start with considering the award sought by the claimant for personal injury as our decision on this issue impacts on other elements of the decision on remedy.

196. At paragraph 66 of his written closing submission, Mr John submitted that: ***"The relevant JC guideline bracket of moderately severe is £19,070 - £54,830. This case is submitted to be in the upper mid level, £40,000 is contended for."***

197. We note that the amount stated there at **£40,000** is different from the amount stated, on 20 February 2023, when the claimant's schedule of loss was intimated seeking **£45,000**, as shown on page 205 of the Joint Bundle.

198. In replying to the respondents' Counter Schedule, as shown on pages 216 and 217 of the Joint Bundle, the claimant's case was stated to be that **£45,000** would be reasonable and appropriate in the circumstances as compensation for personal injury.

199. In paragraph 14 of the claimant's supplementary closing submissions on remedy, intimated on 13 March 2023, counsel for the claimant stated as follows:

"The personal injuries award should compensate for the conditions themselves and their full impact upon the claimant, separate from the discriminatory elements that are covered by the injury to feelings award. The claimant contends for £35,000-£40,000 for personal injury, which is slightly reduced from the written closing submissions to avoid potential double counting. (As already submitted, earlier withdrawal of the stated psychiatric injury claim in the original ET1 should not be a bar to such a claim, bearing in mind the basis of the earlier claim which included 'breach of duty of care', a claim not competent in the ET.)"

200. We were referred to the Judicial College Guidelines, 16th edition, and provided with the relevant extract, reading as follows:

Judicial College Guidelines 16th Ed.

Mainwork

Chapter 4 - Psychiatric and Psychological Damage

Section (A) - Psychiatric Damage Generally

The factors to be taken into account in valuing claims of this nature are as follows:

- *(i) the injured person's ability to cope with life, education, and work;*
- *(ii) the effect on the injured person's relationships with family, friends, and those with whom he or she comes into contact;*
- *(iii) the extent to which treatment would be successful;*
- *(iv) future vulnerability;*
- *(v) prognosis;*
- *(vi) whether medical help has been sought.*

(a) Severe

In these cases the injured person will have marked problems with respect to factors (i) to (iv) above and the prognosis will be very poor.

£54,830 to £115,730

(b) Moderately Severe

In these cases there will be significant problems associated with factors (i) to (iv) above but the prognosis will be much more optimistic than in (a) above. While there are awards which support both extremes of this bracket, the majority are somewhere near the middle of the bracket. Cases involving psychiatric injury following a negligent stillbirth or the traumatic birth of a child will often fall within this bracket. Cases of work-related stress resulting in a permanent or long-standing disability preventing a return to comparable employment would appear to come within this category.

£19,070 to £54,830

(c) Moderate

While there may have been the sort of problems associated with factors (i) to (iv) above there will have been marked improvement by trial and the prognosis will be good.

Cases of work-related stress may fall within this category if symptoms are not prolonged.

£5,860 to £19,070

(d) Less Severe

The level of the award will take into consideration the length of the period of disability and the extent to which daily activities and sleep were affected. Cases falling short of a specific phobia or disorder such as travel anxiety when associated with minor physical symptoms may be found in the Minor Injuries chapter.

£1,540 to £5,860

201. We have carefully considered the evidence that was presented to us. We were particularly influenced by Dr Kinniburgh's evidence that the failure to make reasonable adjustments at work precipitated a significant depressive illness and that this worsened over time especially after the dismissal and appeal rejection, becoming a chronic condition.

202. We took account of Dr Kinniburgh's findings that the claimant had no history of mental health problems, or of problems with substance misuse prior to 2013, and that he had functioned well in terms of education, employment and relationships and that it was reasonable to presume that he had no pre-existing psychiatric conditions, and there is no family history to suggest a particular genetic predisposition to illnesses of this type.

203. 24 Fit Notes were produced to the Tribunal that covered the period from 21 August 2013 to 10 May 2016. In the first eighteen (those that pre-dated the

dismissal) MS and related symptoms predominate. ***"Work-related stress***" appears only four times between 12 November 2013 and 21 January 2014 and on the last two occasions appears alongside a reference to MS.

204. While it is true, as Mr Miller points out, that the Fit Notes provided to the Tribunal indicate absences from a variety of causes, we consider it is clear that work related stress from 2013-2015 has been a significant part of lengthy absences and this coincides with the period when there was a failure by the respondent to make reasonable adjustments.

205. We also take account of the other evidence in the Joint Bundle to which we were directed by Mr John in submissions, specifically:

(a) At pages 24,25 and 28, the report by the OH physician Dr Walker (July 2019) confirms several long spells of absence up to August 2015 due to MS and stress and that his condition further deteriorated in 2015 possibly due to the effects of ongoing stress and that it was likely that his symptoms were aggravated by stress in 2014 and 2015.

(b) At page 37, MS Nurse Coutts noted on 14 January 2016 that this had been a "***stressful few years for claimant at work"*** **and** ***"no doubt stress has definitely impacted on his symptoms***". Further on 27 November 2013 she notes "***work stress having huge impact on MS and relapse".***

(c) At pages 44-47, Momentum Needs Assessment Report (6 Jan 2015) notes that the claimant "***struggles at work with physical symptoms***" and "***needs homeworking after stress issues***" . It further notes that "***difficulties increased***" after the move to 4th floor and that this was "***due to stress disclosed refer to Mental Health***".

(d) At page 51, the Optima Health Report of 3 October 2014 considers that the claimant's absence since March 2014 indicated "***mild-moderate anxiety and moderate depressive symptoms.*"**

(e) At page 65, the GP referred the claimant to mental health services.

(f) At pages 83 and 84, the mental health assessment of the claimant by his GP (Dr Ibekwe) on 9 August 2019 was of "***low mood, anxiety and stress related to his employment being terminated and subsequent legal battles against employer, pension provider and his trade union",*** and the mental health practitioner's assessment refers to workplace difficulties, and reference to OH services with anxiety and depression, and how claimant "***feels like he is on his knees"***; and ***"said he would like to die, feels like he is in an uphill struggle."***

206. In addition to Dr Kinniburgh's report, we also take account of our own factual findings in our liability judgment that we consider to be relevant, including:

(a) Para 28 (9): The claimant's absence record demonstrates that prior to the year of the move to the 4th floor, the claimant had a near perfect attendance record.

(b) Para 28 (11): Within a short timeframe of the move to the 4th floor the claimant's physical condition/symptoms deteriorated and he started to suffer stress and anxiety.

(c) paras 28 (14) onwards, and which sets out the raising of workload and stress and MS conditions being exacerbated when stressed;

(d) Para 28 (37-38): OH Assessment confirming claimant has '***mild to moderate anxiety and moderate depressive symptoms'.***

(e) Para 28(44): Attendance review meeting 13 November 2014 and further attendance review on 15 December 2014 where claimant explained that physical issues with work on 4th floor were stressful to him.

207. We have carefully considered Mr Miller's submission that that the cause or causes of the claimant's psychiatric condition cannot be identified with sufficient precision so as to attribute blame to any single event or combination of events. We have also considered his submission that even if the respondents' unlawful acts were partially a cause of the psychiatric condition,

we have no evidence on which to assess the divisibility of the causes. Mr Miller submitted that the most that can be said is that the combination of his physical health and workplace challenges contributed to the development of the condition in ways and to degrees that cannot now – due to the passage of time and necessarily speculative nature of medical opinion – be disentangled.

208. We considered whether there were factors (other than those found to be unlawful acts of the respondents) that could be responsible for the claimant's adjustment disorder and subsequent depressive condition. However, there was no counter expert evidence presented on behalf of the respondents to displace Dr Kinniburgh's expert opinion. It was put to Dr Kinniburgh in cross-examination that the natural course of MS could have caused the depressive disorder. Dr Kinniburgh discounted that as he noted that the claimant was someone who was very work and study oriented and the trigger for depression and unfitness was what happened at work.

209. Dr Kinniburgh also commented that the claimant had been coping well with his MS at work prior to the changes at work environment in 2013. The effect of the MS was not severe and the claimant was still able to mobilise and drive and had good cognitive functioning. Having examined the claimant, he concluded that it was events at work with the move to the 4th floor, then significantly impacted by the subsequent dismissal and drawn-out failure to overturn it on appeal, which put him into his chronic depressive state and not any deterioration in his MS.

210. We agree with Mr John that the respondents have not been able to identify a credible alternative cause for the depressive condition nor have they caused us to doubt the evidence given by Dr Kinniburgh. Dr Kinniburgh's evidence is also consistent with our own findings in the liability Judgment and contemporaneous medical documentary evidence.

211. We were alert to the fact that the claimant did not succeed on all his complaints about reasonable adjustments, particularly in relation to the move to the 4th floor. Therefore, we considered carefully whether the cause related

to the claimant's frustration about issues that went beyond the scope of the specific failures that we have found to be unlawful. However, although the move to the 4th floor and the difficulties this caused for the claimant was the start of the claimant's condition, the key causal factor identified by Dr Kinniburgh that escalated the depression to a psychiatric condition was the dismissal and drawn-out appeal process. These have been found by us to be unlawful acts of victimisation.

212. We therefore conclude that the operating cause of the claimant's psychiatric condition was the respondents' victimisation, taken cumulatively. We accept Mr John's assessment that this is in the moderately severe category and, adopting a broad-brush approach, we consider that **£35,000** is an appropriate award, which amount avoids the potential of double counting, given the separate claims for injury to feelings, which we deal with later in these Reasons.

213. No separate award of interest is made in respect of this sum for psychiatric injury, as parties jointly agreed that the Judicial College Guideline figures are updated for inflation, and the claimant has sought no interest in accordance with the **Employment Tribunal (Interest of Awards in Discrimination Cases) Regulations 1996.**

Economic Loss – Discrimination Complaints

214. We turn next to consider the claimant's economic loss under the **Equality Act 2010** in respect of the successful complaints of failure to make reasonable adjustments and victimisation.

215. The Tribunal has found that the claimant is permanently incapacitated and unfit for work and he has been so since he was dismissed. We understand that this is accepted by the respondents (although the cause is not). In order to quantify economic loss, the Tribunal has to assess what would have happened if the respondents had not breached the **Equality Act 2010** and compare that with the economic position that the claimant finds himself in.

216. The Tribunal took account of the medical evidence. Dr Kinniburgh gave evidence that in his opinion it was probable that the claimant could have continued to work for the respondent if the adjustments had been made by the respondents that the claimant had requested and he had not been subjected to victimisation in relation to his dismissal.

217. Dr Kinniburgh provided his opinion in clear terms. He said ***"I believe that the failure to make reasonable adjustments at work in response to Mr. Gourlay's needs and requests has precipitated a significant depressive illness, which resulted in him being off work at various points from 2013 onwards. This depressive illness worsened over time, especially after his unfair dismissal and the rejection of his appeal. These events were extremely traumatic for Mr. Gourlay and he continues to have trauma symptoms in the form of intrusive memories to the present day."***

218. The Tribunal noted that, as pointed out by Mr John, there was no probative evidence before the Tribunal that the claimant's MS was deteriorating before the move to the 4th floor, and no evidence that it has materially deteriorated since his dismissal. The Tribunal also noted that Dr Kinniburgh had described it as a mild progression of MS and that he considered the reason for the claimant's unfitness squarely as the claimant's mental condition. He stated in his report that "***These mental health sequelae, namely, depression, anxiety and traumatic symptoms have been of a severity, such that Mr. Gourlay has been completely unfit for work since September 2015."***

219. However, the Tribunal considered that the impact of the claimant's combined health conditions meant that there was a significant chance that he would not have worked until normal retirement age. The claimant has MS. By the time of his dismissal, it had become secondary progressive, and the claimant accepted in evidence that he had ongoing problems with his health (although he considered good autonomy in his job was helpful in managing his MS). He had also been diagnosed with type 2 diabetes in May 2015. While everyone would hope that the progression of both diseases would be slow, the Tribunal considered that it was unlikely that, setting aside the unlawful acts, the claimant would have remained fit for work to the age of 67.

220. The Tribunal was supported in this assessment by the fact that the respondents had been making enquiries about the possibility of ill health retirement prior to 2015. We note from our factual findings in our liability judgment (para 49) that, at a meeting on 14 January 2015, the claimant indicated that he would be interested in the possibility of ill health early retirement as he was mindful of the deterioration of his health. This was before the claimant was dismissed when his mental health significantly deteriorated.

221. The Tribunal considered it possible that this option could have been offered to the claimant and he could have applied for it at some point before retirement age. The Tribunal also notes that the claimant himself said at paragraph 48 of the conjoined paper apart to ET1 that "***Had not the Claimant been suspended and dismissed for a discriminatory reason, he would almost certainly been retired on the grounds of ill-health*".** Although when that was put to the claimant he said that things had moved on, the Tribunal considered that such a statement was an indication that ill health retirement was a likely outcome if the discriminatory dismissal had not happened. As such, the Tribunal does not see how the claimant can argue now that he would have remained fit for work to the age of 67.

222. While the claimant, in his evidence to the Tribunal, stated that he held a belief that he would have been capable of continuing to work until his normal retirement age, at age 67, the Tribunal is not so satisfied that he would have so continued. The Tribunal has preferred the expert psychiatric evidence from Dr Kinniburgh, in his supplementary report, that the claimant is "***now to all intents and purposes permanently unfit for work."***

223. Further, the Tribunal considers that the deterioration of the claimant's relationship with his senior managers made it likely that, even if the claimant did not apply for early ill health retirement, his employment would have been lawfully terminated before his normal retirement age.

224. We refer to our findings in fact at paragraph 49(92) to (100) above, earlier in these Reasons. On the evidence available to us, we find that had the claimant not been dismissed by the respondents on 24 September 2015, or had his

internal appeal been upheld by the Appeal Committee on 25 August 2016, and he had been reinstated to his post, then it is more likely than not that the claimant would not have continued in their employment after 31 March 2017.

225. We find that, by no later than 31 March 2017, the claimant's employment with the respondents would more likely than not have terminated, either by dismissal by the respondents on the basis of an irretrievable breakdown in working relationships between the claimant and the respondents, or by a mutually agreed termination of employment on agreed terms.

226. We noted at paragraph 196 of the liability judgment that *"**Mutual trust and confidence between employer and employee, which is an essential ingredient to any employment relationship, was gone, and not likely to be restored in a situation where the claimant continued to feel aggrieved, and he felt that there was some sort of conspiracy to get rid of him from the Council's employment."***

227. It is worth stressing here that the Tribunal considers that the claimant bore some responsibility for this breakdown in relations due to his own conduct. Although we found the dismissal to be unfair, that was not because the claimant's conduct was not deserving of some sanction. For example, we commented in the liability judgment (page 103-104, at paragraph 29 i. f) that it seemed to us**,** in respect of his relationships with other colleagues within the Council, that if a person did not agree with the claimant, then he saw them as being in the wrong, and he did not appear to be able to accept that there could be a different view held by others. We consider there is a strong possibility that had the claimant not been dismissed unlawfully, his employment may well have been terminated fairly because of this breakdown in relationships with colleagues.

228. Indeed, as we recorded at paragraph 28(225) of our liability judgement, at page 89, Mr West's dismissal letter to the claimant, dated 24 September 2015, referred to "***an irretrievable breakdown of trust and confidence in the employment relationship".*** We also recall how, as we recorded at paragraph 196 of our liability judgement, at pages 192 and 193, that this was

a conduct related dismissal, and the respondents did not argue otherwise before us, at the Final Hearing, by, for example, suggesting if not conduct, then there was some other substantial reason for dismissing the claimant.

229. We note that Mr Miller invites us to make a firm finding that the claimant would have retired on grounds of ill health and the date on which that would have occurred. At paragraph 6.1 of his skeleton submission for the respondents, Mr. Miller stated that: ***"Had he not been dismissed the Claimant would successfully have applied for ill-health early retirement at some point between 1 April 2016 and 31 March 2017."***

230. At paragraph 9 of his skeleton submission for the respondents, when Mr Miller then suggests we invite parties to assess the loss of pension accordingly, he stated as follows:

"The Employment Tribunal is invited to draw on the evidence and its combined industrial experience and make a finding about the date when the Claimant, but for the dismissal, would have been retired on ill-health grounds and therefore access Tier 1 benefits. Parties should thereafter be allowed the opportunity to assess the consequential compensation due. This is consistent with the ratiocination in Chagger v Abbey National plc [2010] IRLR 47, Elias LJ delivering the combined judgment of the Court of Appeal."

231. We do not consider that we are in a position to make such firm findings, especially so long after the event. In any event, the claimant has, since his dismissal by the respondents, secured a deferred pension on the grounds of ill-health from the Local Government Pension Scheme backdated to 12 November 2016. With backdating and interest, and as vouched by the document from the claimant, lodged with the Tribunal, on 2 June 2023, by Mr Woolfson, the claimant has been in receipt of pension payments and lump sum, since 2 May 2018.

232. We consider that a percentage reduction is a more appropriate and fair way to reflect what we consider to be a strong possibility that the claimant may have either retired early by way of ill health retirement or that his employment

may have been lawfully terminated due to a breakdown in relationships. We accept this is inevitably a broad-brush assessment and may over or under-compensate the claimant for economic loss but that is the nature of such determinations.

233. The Tribunal has assessed the chance that the claimant's employment would have come to an end before the age of 67 (his normal retirement age) at **80 %** and so any award for loss of earnings or pension loss should be reduced by this amount.

Calculation of economic loss

234. The calculation for past loss of earnings, as per the claimant's schedule of loss, includes **£13,495.68** for 26/09/2015 to 02/04/2016, shown as 27 weeks @ **£499.84 per week** (net), then assumed gross annual salaries for each following financial years, from 03/04/ 2017 to 10/03/2023, multiplied by 71.53% to give an assumed net loss of pay.

235. Future loss of earnings to retirement is calculated using an assumed annual gross salary, again multiplied by 71.53% to give an assumed net loss of pay, assuming a 2.3% annual increase on salary, based on an asserted average increase of the last 8 years' increase.

236. Although not shown as a sub-total on the schedule of loss, at pages 204 and 205 of the Joint Bundle, the total of the 8 past loss of earnings entries to 10 March 2023 is actually **£205,659.49**, and not the stated net loss of earnings to date of hearing shown in column 5 as **£181,214.10.** That is the net loss, after deduction of estimated State benefits of **£24,445.38,** shown in column 4.

237. Turning then to the claimed future loss of earnings to retirement of **£221,713.69,** that is the total of the 8 future loss of earnings entries to 25 November 2029, his 67th birthday. From that falls to be deducted the estimated amount of state benefits received over that period being **£21,469.86.**

238. Those amounts (£205,659.49 plus £221,713.69), leave a total figure for loss of earnings (past and future) of **£427,373.18,** less total of **£45,915.24**

(deduction for State benefits of £24,445.38 plus £21,469.86**)** and before any reduction or interest.

239. Pension loss, as per Dr Pollock's report, is **£197,430**. While we note that the respondent questions the accuracy of aspects of the report in submissions, in the absence of detailed questioning of Dr Pollock (we understand by agreement) we consider the report should be accepted as a reasonably accurate assessment of the claimant's pension loss resulting from his dismissal.

240. The total of **£624, 803.18** (£427,373.18 plus £197,430) for economic loss then has to be reduced by **80%**. That provides a figure for economic loss, before interest, of **£124,960.64**.

241. Applying interest to that sum at **8%** from 27 November 2019 (being the **midpoint** of the 3050 days between 24 September 2015 to 29 January 2024, the date of calculation) gives **£41,767.67** (being £124,960.64 x 0.08% x 3050/365/2 days). The total award for economic loss is therefore **£166,728.31.**

242. The Tribunal considers that this award also encompasses the economic loss that would be attributable to the respondents' failure to make reasonable adjustments and the compensatory award for unfair dismissal and so no additional award is made in respect of these elements of the claim.

243. The reduction of 80% takes account of the contributory conduct of the claimant as noted above to the breakdown of relations and the principles of ***Polkey***. See our further discussion and deliberation later in these Reasons, under **Compensation for Unfair Dismissal.**

Injury to Feelings

244. On the claimant's behalf, Mr John has sought an award for injury to feelings.

245. We have heard evidence from the claimant, and in considering this matter, we have reminded ourselves of the unreported EAT judgment of His Honour Judge David Richardson, in **Esporta Health Clubs & Anor v Roget [2013]**

UKEAT 0591/12, which makes it clear that a Tribunal has to have some material evidence on the question of injury to feelings.

246. Here, we have the claimant's own evidence, but no partner, or friend's supporting testimony, nor any evidence from any other person outwith his workplace with knowledge of the precise nature and extent of the claimant's injured feelings, so it has been difficult for us to differentiate between any stressors caused by the respondents, any other non-work related stressors, and any other or additional stressors caused by the claimant's decision to prosecute this claim before the Tribunal, a feature common to all litigants.

247. As recorded earlier in these Reasons, at our findings in fact, we recall that in his letter of 7 January 2022 to the Tribunal, about pension matters, the claimant detailed the 9 distinct phases so far in regard to him trying to progress and obtain his entitlements from the local government pension, describing it as ***"a very protracted, frustrating and stressful period of my life."***

248. Further, we recognise that people can be externally calm in demeanour and appearance, when giving evidence, yet internally in turmoil, and so we recognise that claimants may not show their true feelings in a public Hearing, and indeed not everybody has the personality to express their true feelings in front of a Tribunal. The claimant's statements, in his witness statement, written with time for reflection, were, we felt, at points a little melodramatic, but nonetheless genuinely expressed by him.

249. At paragraph 54 of his written closing submission, Mr John submitted that***: "The respondent accepts that the failure to make reasonable adjustments and victimisation merit separate awards. The pleaded counter offer is £10,000 for this head (page 209 para 2.5)."***

250. As per Mr Miller's Counter Schedule, at paragraph 1.7, reproduced at page 208 of the Joint Bundle, the respondents accept that the claimant is entitled to separate awards for the failure to make reasonable adjustments and for the victimisation.

251. In deciding upon an appropriate amount for each award, we first of all have had to address the appropriate band as per **Vento**.

252. At paragraph 60 of his written closing submission, Mr John submitted that***: "The impact of failure to make reasonable adjustments merits an award in the region of £20,000-£25,000 and the discriminatory disciplinary aspects around £20,000. Alternatively a £40,000 award combined is reasonable."***

253. It is our judgment that, for the failure to make reasonable adjustments, this is a case that appropriately falls into the low band, and around the upper quartile of that band. Mr Miller's proposal is that we award **£10,000** (as per his Counter Schedule, at paragraph 2.5, reproduced at page 209 of the Joint Bundle). Doing the best we can, to put things against a monetary value, and taking account of failures over a two-year period, from September 2013 to September 2015, we assess the claimant's injured feelings, arising from the respondents' failure to make reasonable adjustments, at **£8,500**. To that has to be added interest at 8% from the date of the failure, being from, say 1 September 2013.

254. Applying interest to that sum of **£8,500** at **8%** from 1 September 2013 to 29 January 2024, the date of calculation, gives **£7,085.04** (being £8,500 x 0.08% = £680pa x 3803/365 days), so a total award for injury to feelings for failure to make reasonable adjustments of **£15,585.04.**

255. For the victimisation aspects, covering the claimant's suspension, summary dismissal, and unsuccessful appeal, these are individual, discrete acts, but they build up over time, and we can readily acknowledge that they have had continuing consequences for the claimant, where his dismissal reinforced and exacerbated the claimant's feelings consequent upon the suspension, and it did not simply extinguish it.

256. Put another way, his upset because of the earlier suspension was not simply rubbed out by the greater upset caused by the later treatment of his dismissal. Likewise, as we see it, with his later appeal, that exacerbated the claimant's feelings consequent upon his dismissal, and it did not simply extinguish it.

257. In this case, we are not satisfied that there was any concerted campaign against the claimant, although we recognise that that was his perception, but equally these were not isolated incidents, as there were various issues in the way the claimant was treated throughout the last 6 months or so of his employment with the respondents, particularly in what happened with his suspension, and dismissal, and thereafter with the subsequent appeal process.

258. Mr Miller's proposal that we award **£3,000** for the victimisation claims (as per his Counter Schedule, at paragraph 2.6, reproduced at page 209 of the Joint Bundle) is rejected by us, as being too low. He states that sum is the appropriate figure as it ***"reflects the marginal aspect of the victimisation when combined with the other substantive reasons."***

259. The claimant's reply to that paragraph 2.6, as reproduced at page 219 of the Joint Bundle, stated that: "***We do not agree that the victimisation can reasonably be stated as being a "marginal aspect" of the victimisation, given that it involved not only the claimant being suspended from work, but also being dismissed (and having his appeal rejected)."***

260. We agree with the claimant's reply, and it is our judgment that, for the victimisation, this is a case that appropriately falls into the middle band, but around the first quartile of that band. Doing the best we can, to put these things against a monetary value, and taking account of all of the victimisation, we assess the claimant's injured feelings, arising from the victimisation, at a global figure of **£15,000**.

261. As these awards of injury to feelings are awards made in a discrimination case, the interest provisions of the **Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996**, SI 1996 No. 2803, apply, as the claimant's discrimination complaints against the respondents are brought under applicable provisions of the **Equality Act 2010**.

262. At paragraph 54 of his written closing submissions, Mr John submitted that: "***The claimant pleads an injury to feelings award of £40,000 plus interest at 8% from September 2013 (date of reasonable adjustments failures).***"

263. We do not believe that date range to be appropriate, as we are making separate awards for injury to feelings arising from failure to make reasonable adjustments, and discrete acts of victimisation.

264. Accordingly, while we have awarded interest from September 2013 to the injury to feelings award arising from failure to make reasonable adjustments, the Tribunal has decided that interest for the award arising from victimisation should be calculated from the date of dismissal being the most significant element of the victimisation.

265. By way of apportionment, and applying a broad-brush approach, from that global award of **£15,000**, we would allocate **£2,500** for the suspension, **£7,500** for the dismissal, and **£5,000** for the rejected appeal.

266. Applying interest to that global sum of **£15,000** at **8%** for the 3050 days between 24 September 2015 to 29 January 2024, the date of calculation, gives **£10,027.40** (being £15,000 x 0.08% = £1,200 pa x 3050/365), so a total award for injury to feelings for victimisation of **£25,027.40.**

Compensation for Unfair Dismissal

267. The claimant's basic award for unfair dismissal is agreed between the parties as arithmetically correct, as per Mr Miller's Counter Schedule, at paragraph 1.15, reproduced at page 208 of the Joint Bundle, and it was paid as part of the interim payment made by the respondents to the claimant on 20 December 2022.

268. In his oral submissions to the Tribunal, when asked by the Judge to clarify what had been stated in paragraph 10 of his written submission, Mr Miller clarified that in asking the Tribunal to reduce the basic unfair dismissal award for the claimant's contributory conduct, the respondents were asking for a reduction to the compensatory award only for unfair dismissal, and not the basic award.

269. The Tribunal therefore awards **£4987.50** as a basic award for unfair dismissal (calculated as 7 x £475 x 1.5) .

270. Looking then at a compensatory award for unfair dismissal, from date of dismissal (24 September 2015) to close of Remedy Hearing (9 March 2023) is **389 weeks**. If proceeding only under compensation for "ordinary" unfair dismissal, calculated in terms of **Section 123 of the Employment Rights Act 1996**, the statutory cap of 52 weeks would amount to **£25,991.68**, being **£499.84** per week net, multiplied by 52.

271. However, the claimant's Schedule of Loss sought an amount far in excess of the statutory cap, and sought compensation for financial loss in terms of **Sections 119 and 124 of the Equality Act 2010,** comprising past loss of salary, future loss of salary, and pension loss.

272. As regards loss of statutory rights, which often forms a component part of any compensatory award for unfair dismissal, the claimant's response to the respondents' Counter-Schedule, at paragraph 1.16, reproduced at page 215 of the Joint Bundle, stated that: "***As the Claimant did not pursue alternative employment he did not have to wait two years to re-acquire protection against unfair dismissal and so he has no loss under this head."*** This submission was agreed by Mr Miller when replying on behalf of the respondents. As such, this Tribunal makes no award for loss of statutory rights.

273. As stated above, at paragraphs 242 and 243 of these Reasons, the Tribunal considers that its award of compensation for economic loss for the discrimination complaints also encompasses the economic loss that would be attributable to the respondents' failure to make reasonable adjustments and the compensatory award for unfair dismissal and so no additional award is made in respect of these elements of the claim. The reduction of **80%** takes account of the contributory conduct of the claimant as noted above to the breakdown of relations and the principles of ***Polkey.***

274. There were also before us questions on uplifts and deductions argued for by the respondents as set out in the agreed List of Issues, namely what should

be awarded for adjustment to reflect non-compliance with the ACAS Code of Practice (issue 8 (e) in the agreed List of Issues) and should there be any reduction in the compensatory award by reason of contributory fault and / or on **Polkey** grounds (issue 10).

275. In respect of that unfair dismissal by the respondents, the Tribunal finds that the claimant did not unreasonably fail to mitigate his losses, by failing to try and secure new employment with another employer after the respondents dismissed him on 24 September 2015, and up to and including 25 August 2016, when his internal Appeal against dismissal was rejected by the respondents' Appeal Committee, as he was certified not fit to work, and he continued after 25 August 2016 to be certified not fit to work. We have made that finding in our findings in fact, earlier in these Reasons, at paragraph 49(32) above.

276. In the respondents' counter schedule of loss, at paragraph 1.3, at pages 210 and 211 of the Joint Bundle, Mr Miller stated that: "***Had he been able to search for work he would have found it within at least six months of his dismissal. In local government alone the West of Scotland has over ten councils with large health and safety departments within a reasonable commuting distance of the Claimant's home."***

277. That was an assertion made by the respondents, but no evidence was led before us to attempt to prove that as a fact.

278. In the claimant's reply to the respondents' counter schedule, at paragraph 1.1, it was stated that: "***It is the claimant's position that he is currently unfit to work, and has been unfit to work since September 2015. Reference is made to the report of Dr Kinniburgh, and in particular the answer to question 2. Therefore, the duty to mitigate does not arise."***

279. Further, in answer to the respondents' paragraph 1.3, it was stated on behalf of the claimant that: "***Please see the response above to 1.1. In any event, it is not agreed that the claimant would have found new employment within six months (bearing in mind his appeal process took 11 months), and the above has no regard to the claimant being a disabled person and***

having been dismissed for alleged gross misconduct. However, this is academic given the response above to 1.1."

280. While this matter of mitigation of loss was not expressly covered in parties' closing submissions, given the EAT authority of **Cooper Contracting Limited v Lindsey [2015] UKEAT/0184/15, [2016] ICR D3,** on mitigation of loss, the Tribunal notes and records that, on the respondents' behalf, no evidence had been led of other jobs that the claimant could have applied for, other than the respondents lodging the "***historic vacancy report"***, as document 25, at pages 176 to 178 of the Joint Bundle.

281. **Cooper,** a judgment of the then EAT President, Mr Justice Langstaff, holds that the burden of proof is on the alleged wrongdoer, the respondents, and that the respondents have to prove that the claimant acted unreasonably; a claimant does not have to prove that he has mitigated loss. The test may be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate.

282. We have made a finding in fact, earlier in these Reasons, at paragraph 49(27) above, that that "***historic vacancy report***", running to 3 pages, had job titles only and in some, but not all cases, location outwith West Dunbartonshire), for 301 headcount jobs, but no other data was included as to where and when these vacancies had arisen, nor as to the nature and extent of the job, and salary placing, etc.

283. Further, we have made a separate finding in fact, earlier in these Reasons, at paragraph 49(28) above, that this report, which was also not spoken to in evidence by any witness from the respondents, was of no practical assistance to the Tribunal. It contains raw data, with no detail as to individual job vacancies. It was not put to the claimant, in cross-examination, that he unreasonably failed to mitigate his losses by failing to apply for any of these listed vacancies.

284. In these circumstances, the respondents have not satisfied this Tribunal that the claimant unreasonably failed to mitigate his losses, post termination of employment with the respondents.

285. Further, in respect of that unfair dismissal by the respondents, the respondents invited the Tribunal to find that the dismissal was to an extent caused or contributed to by the actions of the claimant, and so it would be appropriate to reduce the amount of any compensatory award by a proportion of up to **25%** as the Tribunal might consider just and equitable, having regard to any such finding, in terms of **Section 123 (6) of the Employment Rights Act 1996.**

286. We had competing submissions on this matter from both Mr John for the claimant, and Mr Miller for the respondents. In his written skeleton submission for the respondents, Mr Miller submitted, at his paragraph 10, that the Tribunal should reduce the unfair dismissal award to reflect the claimants' contributory conduct. He referred, in particular, back to the terms of his paragraph 6.3, which we reproduce here, along with the following paragraphs 6.4 and 6.5, reading as follows:

> ***6.3. There was conflict at every turn with every conflict generating complaints and / or grievances and /or claims and a further terminal deterioration in relationships was therefore the most likely outcome had employment continued. Even at ET he enjoyed mixed success. His section 15 application failed as did three of his six allegations of victimisation. His earlier public interest disclosure claims (S/4100134/2014 and S/4102906/2014) were dismissed in their entirety after a 21-day hearing, with ten of those dates occurring before his dismissal. The Claimant bears a great deal of responsibility himself for the deterioration in working relationships. As early as 2014 when presenting an amendment application he directed unfounded allegations of untruthfulness against the Respondent.***
>
> ***6.4. As ET noted, at the appeal it was expressly acknowledged by the Claimant's representative that his conduct had left him "worthy of sanction" (ETJ para165 p183) and the decisive majority of ET as part of its reasoning said that the Respondent "should have imposed a lesser sanction" (ETJ para195 p192).***

6.5. Most significantly, the full tribunal could see why the Appeals Committee appeared to have formed the view that the working relationship had "broken irretrievably" (ETJ para 196 p192).

287. For the claimant, Mr John's written closing submissions, at his paragraphs 80 to 83, stated that:

"81. Is the Claimant's conduct blameworthy in the circumstances? No. Context is important. The Claimant was operating against the aforesaid, evidenced, background of suffering physically and mentally because of physical changes at work, and his pleas for a proper assessment of which were being ignored. His MS was flaring and he was stressed. This was caused by the respondent's failures. His grievances were being shut down and not resolved. He also took issue with how his conduct was being unfairly categorised in the disciplinary process. There was never an investigation into what he had said or the context of it, to see whether it was 'unfounded criticism' as alleged. The claimant said that there was significant context and mitigation for his comments. He was frustrated and had no resolution. He was known to be disabled and the respondent knew that he was suffering.

82. The claimant had never been abusive. His position was reasoned. S. West accepted that it was legitimate for the claimant to raise the twitter submission as part of his case.

83. In the liability judgment the ET found (p.188 para 181) that the respondent should have sat the claimant down formally in order to find out why he was behaving as he was and how they could assist and that they could have brought his attention to the appropriate standards in the code of conduct.

84. Further, the respondent made no challenge to this point and called no witnesses and put no conduct to the claimant in XX at the remedies hearing."

288. The Tribunal regards both parties as having contributed to the situation where the claimant was dismissed, and relationships breaking down, and the respondents were as much at the heart of that breakdown in relationships, and mutual trust and confidence, as was the claimant.

ACAS Uplift

289. In the claimant's schedule of loss, as at 20 February 2023, reproduced at pages 204 and 205 of the Joint Bundle, an ACAS uplift was sought between 20% to 25%, and using the figures in that schedule of loss, the uplift, assumed at **20%**, was calculated as being **£149,511.77.**

290. We have, in this Judgment, awarded the claimant considerably less than the "bottom line" sought of **£882,058.13**, taking account of the interim payment of £20,000 already paid to the claimant, as shown in his schedule of loss at pages 204 and 205 of the Joint Bundle.

291. In the respondents' original Counter Schedule, dated 9 September 2022, at paragraph 1.19, as reproduced at page 208 of the Joint Bundle, Mr Miller had stated that:

"Nothing is due under this heading as the ACAS Code was not breached. Esto the tribunal holds that the Code was breached the value claim [sic] ***is a patently and wholly disproportionate measure of the breach."***

292. When the claimant replied to that paragraph 1.19, as reproduced at pages 217 and 218 of the Joint Bundle, it was stated that:

"In summary there was:

(a) a failure to consider documents provided by the claimant to Annabel Travers on 26 May 2015 (breach of paragraph 5 of the Code);

(b) a failure to have regard to a recording and transcript provided by the claimant (breach of paragraph 5 of the Code);

(c) a failure to investigate three of the disciplinary allegations (breach of paragraph 5 of the Code),

(d) a failure to ensure the suspension was as brief as possible and kept under review (breach of paragraph 8 of the Code);

(e) a failure to allow the claimant to call witnesses (breach of paragraph 12 of the Code),

(f) a failure to hear the claimant's appeal without unreasonable delay (breach of paragraph 26 of the Code),

(g) a failure to investigate the claimant's grievances (breach of paragraph 4 of the Code); and

(h) a failure to hear the claimant's grievances which had been raised prior to the disciplinary allegations being made (breach of paragraph 33 of the Code).

In our submission it was unreasonable for the respondent to have failed to comply with the Code.

With regard to the amount of the percentage uplift, it is the claimant's position that the breaches of the Code were unreasonable, numerous and significant and that an uplift in the region of 20% to 25% would be warranted, having regard to proportionality and the amount of the underlying award."

293. When thereafter, Mr Miller finally responded on behalf of the respondents, as reproduced at page 218 of the Joint Bundle, he submitted that:

"The Code breaches are disputed. If the Claimant succeeds to the full extent of his Schedule of Loss then applying the percentage which he seeks would be "manifestly too high", the description used by the EAT (Langstaff, P presiding) in Bethnal Green & Shoreditch Education Trust v Dippenaar [2015] UKEAT/0064/15."

294. In his closing submissions for the claimant, his counsel, Mr John set forth his position in the claimant's written closing submissions on remedy, at paragraphs 61 to 63, in answer to issue 8(e) in the agreed List of Issues, as follows:

> "***61***. ***The claimant sets out the 8 examples of breach of the ACAS Code in the counter-schedule with consolidated replies (p.217) along with the paragraphs of the Code breached.***
>
> ***62. The failures were numerous and are reflected in the judgment on liability. The core failure to investigate the claimant's grievances in advance of any misconduct process, or to investigate them at all in this case, to reduce the scope of the investigation are fundamental failures, indicative of a closed mind and denial of the claimant's right to be properly heard and to defend himself. Limiting the scope of the investigation even in the face of the investigating officer's recommendations to investigate the claimant's claims of defence/mitigation in respect of the alleged misconduct is an aggravating aspect worthy of a significant uplift.***
>
> ***63. Subject to the tribunal's discretion to consider the proportion of the value compared to the measure of breach, the claimant would contend for more than halfway up the 25% limit, and will expand in oral submissions."***

295. Mr Miller, the respondents' solicitor, in his written skeleton submission, dealt with this matter very briefly at his paragraph 8.5, reading as follows:

> ***"8.5. There has been no breach of the ACAS Code. Esto the tribunal concludes otherwise see the four-stage approach suggested by the EAT (Griffiths, J) in Slade v Biggs [2022] IRLR 216 at paragraph 77."***

296. In paragraphs 15 and 16 of the claimant's supplementary closing submissions on remedy, intimated on 13 March 2023, counsel for the claimant further stated as follows:

> ***"15. The ACAS uplift, can consider, (separately and distinctly), the nature of the Code breaches (as previously submitted upon) and can serve as both a punitive measure and a measure to encourage fair process compliance. The claimant contends for 20% uplift to reflect the nature of the procedural flaws as found in the main judgment, in terms of a fair investigation and a fair consideration of the claimant's grievances.***
>
> ***16. Although ultimately it is a matter for the tribunal, the claimant contends that the totality of award is reflective of the circa 2 years of failures to make reasonable adjustments between around September 2013 – September 2015 dismissal and the obviously damaging effects of those failures plus the dismissal, upon the Claimant in a now chronic and significantly impacting mental health disorder."***

297. We have carefully considered both parties' submissions to us, as also the EAT judgment in **Dippenaar**, as also the EAT judgment in **Slade & Hamilton v Biggs and others,** as mentioned by us earlier under **Relevant Law.** In his PH Note dated 28 September 2022, following the Case Management PH held the previous day, the Judge had referred both parties' solicitors to **Dippenaar**, and **Slade**, as also **Allma Construction Limited v Laing [2012] UKEATS/0041/11**.

298. In all the circumstances, the Tribunal has decided that while there were breaches of the Code and these were unreasonable, to award an uplift in this case would not be just, bearing in mind that many of the breaches themselves have been founded on successfully for other complaints. We also consider that given the sums that the Tribunal has awarded, an uplift would be disproportionate in all the circumstances. We consider that it would be "***manifestly too high***" as per the EAT in **Dippenaar**.

299. We therefore refuse to award any uplift in the region of 20% to 25%, as sought on the claimant's behalf. Indeed, in the circumstances of this case, the Tribunal makes no uplift adjustment to any of the awards under **Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.**

300. On this point, we make further comment regarding two of the listed breaches, (d) and (f). As regards "***(d) a failure to ensure the suspension was as brief as possible and kept under review (breach of paragraph 8 of the Code)",*** the Tribunal recalls, from its finding in fact, at paragraph 28(200) of the original liability judgment, that Stephen West's letter of 17 June 2015 to the claimant, confirming his suspension, advised him that the period of paid removal from duty was a temporary measure which would not be recorded on his personal record, it was not an assumption of guilt, and it was not considered a disciplinary sanction.

301. There was no evidence presented to us at the Final Hearing, or at this Remedy Hearing, to show that the claimant's suspension was kept under review by any senior officer of the Council nor, if it was reviewed, who by, when, and on what basis.

302. As regards ***"(f) a failure to hear the claimant's appeal without unreasonable delay (breach of paragraph 26 of the Code)",*** the Tribunal recalls, from its finding in fact, at paragraph 28(233) of the original liability judgment, at page 91, that claimant's internal appeal hearing took place over six days between 18 February 2016 and 25 August 2016. From the appeal being lodged by the claimant, on 8 October 2015 (as per our finding in fact, at paragraph 28(230) of the liability judgment, at page 90, to it being concluded, on 25 August 2016, was a period of **323 days** (or 10 months, 18 days). From first day of the appeal to the last was a period of **190 days** (or 6 months, 8 days).

303. Further, as we recorded at paragraphs 156 to 158 of our liability judgement, at page 180, while, in our collective experience, a 6-day internal appeal is quite exceptional, the fact that it took place over a six month period needs to be viewed in context, in that the appeal hearing was constituted to be held on

set dates, agreed between the parties, where the claimant enjoyed the benefit of trade union representation, through the GMB, and on account of the need to adjourn, and relist for additional dates.

304. The delay was not, of itself, evidence of any procedural or substantive unfairness to the claimant, as he was provided with the opportunity to appeal, and he did so, submitting detailed grounds of appeal, he and his union representative were heard, and the Tribunal was satisfied that it was a fair and impartial process, not simply a rubber stamping of Mr West's decision to summarily dismiss the claimant.

305. Further, as we recorded at paragraph 204 of our liability judgement, at page 195, a 6-day appeal hearing, where the claimant had trade union representation, cannot be construed as being a mere formality or rubber-stamping exercise, and the fact that the claimant perceived that that is what it does not make it a reality.

306. We went on to say, at paragraph 205, there was no credible evidence before this Tribunal to demonstrate that the Appeals Committee had acted other than independently and impartially, and while their reasoning was not explained, their decision was clear and unequivocal.

307. It was the lack of a reasoned decision from the Appeals Committee that made it impossible for this Tribunal to come to view on whether any procedural unfairness in the investigation and / or disciplinary hearing stages of the claimant's case were cured on appeal, as no appeal decision maker (i.e. no elected councillor) gave evidence to the Tribunal, at the Final Hearing, and there was no decision with the reasons for us to consider.

Grossing Up

308. In Mr Woolfson's email of 22 August 2023, he updated the Tribunal on the claimant's tax position, stating that, with regard to personal allowance, it may be helpful for the Tribunal to know that the claimant's expected earnings for this tax year 2023/24 are **£14,732.24**. Therefore, it was confirmed that the claimant will again use up the annual personal allowance, as he did in the last

tax year, though this is subject to the level of the Tribunal award. He submitted a revised grossing up table.

309. The Tribunal does not consider it appropriate that it proceed, on its own, to compute a grossed-up figure for compensation. Accordingly, we have ordered that payment of the awards we have made in the claimant's favour, giving credit for the balance of **£15,012.50**, arising from the payment to account of **£20,000** made to the claimant on 20 December 2022, is sisted by the Tribunal, acting in terms of its powers under **Rule 66 of the Employment Tribunals Rules of Procedure 2013,** pending the outcome of parties' co-operation to agree the final (grossed-up) figure to be paid by the respondents to the claimant.

310. A separate calculation will also be required to be agreed between them to take account of the **£20,000** interim payment already paid in advance to the claimant.

311. In relation to the awards of compensation set out by the Tribunal, in our Judgment above, we have also decided that it is appropriate to direct the parties' representatives to co-operate and jointly agree, within 14 days of issue of this Judgment, a calculation showing how parties have agreed the final (grossed-up) total to offset any tax liability to the claimant, and notify the Tribunal of the agreed sums and invite the Tribunal to incorporate them into a Judgment by Consent in terms of **Rule 64 of the Employment Tribunals Rules of Procedure 2013**.

Closing Remarks : Financial Penalty and Expenses

312. In writing up this our reserved judgment, the Tribunal has had cause to reflect, in our final private deliberation, upon whether or not this is an appropriate case to consider making a financial penalty order against the respondents, in terms of **Section 12A of the Employment Tribunals Act 1996**, as amended by the **Enterprise and Regulatory Reform Act 2013, Section 16.**

313. A financial penalty order can be made by a Tribunal, in circumstances where, in determining a claim involving an employer and a worker, the Tribunal

concludes that the employer has breached any of the worker's rights, and the Tribunal is of the opinion that the breach has one or more "***aggravating features***".

314. Our liability Judgment of 17 September 2021 found that the respondents had breached the rights of the claimant, in several respects, and, in these circumstances, we note and record that the claimant's Schedule of Loss never flagged up such an application being sought by the claimant, nor did his counsel in his closing submissions to this Remedy Hearing invite us to consider any financial penalty order against the respondents.

315. In these circumstances, we have not considered it appropriate that we should consider the matter, acting on our own initiative. We considered, but in the end discounted, the possibility of inviting written representations on financial penalty from both parties, but we decided not to do so, as it could have been raised on the claimant's behalf at a much earlier stage, and it would simply add further delay and expense if it were to be raised at this late stage.

316. While, as detailed earlier in these Reasons, at paragraph 20 above, the question of any expenses arising from day 1's renewed application by the respondents' counsel to postpone the Remedy Hearing was reserved for future determination by the Tribunal, no application for expenses was advanced by the claimant's counsel in his closing submissions to the Tribunal.

317. In these circumstances, in terms of **Rule 77 of the Employment Tribunal Rules of Procedure 2013**, if any such application is to be made on the claimant's behalf, then it should be intimated by written application made to the Tribunal, and copied to the respondents' representative, <u>within no more than 28 days from of issue of this Judgment.</u>

318. In that event, if there is to be any expenses application by the claimant, then the respondents will be afforded a reasonable opportunity to make written representations in response to the application, within <u>no more than 14 days after any such intimation from the claimant's solicitor.</u>

319. Subject to the views of both parties, to be thereafter sought by the Tribunal, in the event of any opposed expenses application, the Tribunal would propose to make a reserved decision, on the papers only, and do so without the need for any attended Expenses Hearing, unless either party, on good cause shown, requested to be heard at an oral Hearing.

G. Ian McPherson
_____
Employment Judge

30 January 2024
_____
Date

Date sent to parties **_____30 January 2024_____**