CASE NO: 2601319/2021

EMPLOYMENT TRIBUNALS
At a Remedy Hearing

Claimant: Mrs M Sisson

Respondents: (1) Nottinghamshire County Council
(2) The Governing body of the Banks Road Infants and Nursery School

Heard at: Midlands (East) Region
On: 23 April 2024, 24 April 2024 and deliberations 30 May 2024.
Before: Employment Judge R Broughton
Members: Ms L Lowe
Mr R Loynes

Representation
Claimant: Mr. Rudd: counsel
Respondent: Mr B. Frew: counsel

JUDGMENT

On a joint and several liability basis, the Respondents are ordered to pay the Claimant the total sum of **£111,108.27.**

The table set out below, provides a breakdown of the sum awarded, which includes interest and the amount to be paid to account for tax.

The Recoupment Provisions do not apply.

RESERVED REASONS

The Claim

1. The Claim Form was issued on 5 June 2021. At a Closed Preliminary Hearing for case management before Employment Judge Clark on 21 October 2021, it was agreed, by consent, that the claims against the individual named respondents were dismissed without prejudice to the claims continuing against Nottinghamshire County Council (**Council**). It was also agreed by consent that the Governing Body of the School, Banks Road Infants and Nursery School be added as a respondent (**Governing Body**). The Governing Body and the Council hereafter referred to as the Respondent or Respondents. Any award of compensation is awarded on a joint and several liability basis against the Respondents.

2. By a judgment on liability dated 23 August 2023, the Tribunal made the following findings in the claimant's favour:

   (1)The claimant's claim of unfair dismissal pursuant to section 94 and 98 Employment Rights Act 1996 (ERA) was well founded and succeeded.

   (2)The claim of discrimination for 'something arising' from the claimant's disability pursuant to section 15 Equality Act 2010 (EqA) was well founded and succeeded.

   (3) The claimant's second claim of a failure to make reasonable adjustments pursuant to section 20/21 EqA was well founded and succeeded.

Remedy Hearing

3. The parties were both represented at this remedy hearing by the same counsel who had represented them at the liability hearing.

Evidence and Documents

4. An agreed remedy bundle had been prepared. References in this judgment to numbers are to pages in the agreed remedy bundle unless prefixed by '**LB**' which is a reference to the liability bundle. The reference **'LJ'** for further ease of reference, is to the liability judgment. All findings are made on a balance of probabilities.

5. The Claimant produced a remedy witness statement. The Respondent agreed that the statement could be submitted into evidence and that it did not need to cross examine the Claimant under oath. The Claimant did not attend the hearing to give evidence.

6. The Respondent produced a remedy witness statement for Mrs Carole Clemens, she was likewise not required by the Claimant to attend the hearing to give evidence however, the Claimant had served her with written questions which she responded to and those, by agreement, have been accepted into evidence.

7. The parties have produced a joint medical expert report from Dr Briscoe, Consultant Psychiatrist. It appears in the agreed bundle at pages 138 to 199. The parties produced a joint document setting out further questions Dr Briscoe was required to address.

8. Due to the Claimant's health issues, Dr Briscoe was not in a position to meet and carry out an assessment in person of the Claimant in the preparation of his report. He was thus specifically unable to ask her about her mental state during the period 4 February 2020 to 10 November 2020 and there is a gap in the GP from December 2019 to October 2020. Dr Briscoe had not seen any medical records prior to 10 November 2011 when preparing the report.

9. Neither party challenged Dr Briscoe directly on the contents of his report in writing and he was not required by either party to attend the Tribunal for his evidence to be tested by, either party, under oath. His report was, by agreement, accepted into evidence.

Relevant Liability finding

Disability – substantial effects on normal day to day activities

10. It is important in the context of the remedy hearing, to set out briefly the relevant findings on disability. The Respondent did not dispute that the Claimant was disabled during the relevant period but disputed the pleaded effects. The relevant findings on the effects include the following (paras:514-524 LJ)

"The Tribunal accept, on the balance of probabilities, that the Claimant had experienced severe anxiety during her illness, and before attempting a return to work it was at times so severe she could not leave her home. The Tribunal accept that she continued following and throughout the time she was back at work, to experience a degree of social anxiety and avoided or reduced her social contact including with colleagues at work, as a consequence. This effect was not so extreme that it prevented her from going to work, working with colleagues and working with children but the Tribunal find that she found it difficult within larger groups of people to feel comfortable in a social context, which was substantially different to how she had been socially before her illness in 2018. There is no medical evidence dealing directly with what the effects of her condition would have been without the medication however, the Tribunal find that her ongoing medication more likely than not, ameliorated some of the symptoms

The Claimant continued the Tribunal accept, to take anti-depressant medication throughout the period when she returned to work, from October/November 2018.

The Tribunal also find that when the Claimant was feeling under stress, her anxiety levels increased and that she was, during her absence in 2018 and after her return to work, prone to scratching herself when stressed. The report on 22 November 2018 (page 582) states :"sometimes she scratches herself" and on 8 March 2019 (page 596) " …she has started scratching again." This was the Tribunal accept (as set out in her impact statement and confirmed by the medical records), so severe during her absence from work that she caused her face to bleed. The Tribunal find that when she experienced increased stress or anxiety, this effect, namely this type of self-harm, did and was likely to recur .

The Tribunal also accept the Claimant's evidence that she experienced disrupted sleep from April 2018 however, she does not detail the extent of this and whether and how this affected her over the relevant period.

The Tribunal also accept that during her illness when she was absent from work, she suffered with psychosis for which she received medication and that this was severe and substantial in its effects on her normal day to day activities, namely her interaction with people, that she became hysterical for example when a medical practitioner was not wearing the colour that she had expected, leading to the intervention of the crisis team. However, in terms of her return to work and the events thereafter, she describes not having experienced psychosis since that time. In terms of whether she would have but for the medication, she refers to being prescribed very strong medication and in particular Quetiapine, which is an anti- psychotic medical. However she was not prescribed this the Tribunal find during the time she was back at work from October 2018 . She also however refers to Mirtazapine being used to treat depression and Aripiprazole which is an anti-psychotic medication. However, from December 2019 (page 605) the Claimant was only prescribed Venlafaxine (75mg), which she does not allege is specifically used to treat psychosis.

In the Tribunal's judgment, there is insufficient evidence to find that the Claimant would have continued to experience psychosis after her return to work and certainly not from December 2019, but for any medication.

The Claimant complains that her decision making was impaired, a normal day to day activity, when experiencing increased anxiety following a deterioration in her mental health following the breakdown in her relationship with Ms James from around October/ November 2019 and specifically on the 31 January 2020 when dealing with Child X who was unfamiliar to her. In her evidence in chief (paragraph 27 w/s) she alleges that she was feeling anxious about Child X running out of the classroom, ***that her mental health was fragile*** *(paragraph 30) and refers to Dr Cyriac's advice in his report /letter of the 11 October 2022 which states: (page 1094)"*

"The Tribunal conclude that the adverse effects of the Claimant's disability on her normal day to day activities were as set out above and that cumulatively they were substantial at the relevant time. While the evidence does not really engage with the impact of the anti-depressant medication, it is reasonable to conclude and the Tribunal does conclude, that the effects would have been more significant without it. The Claimant continued the Tribunal conclude to have periods of heightened anxiety at times which impacted on her behaviours and is likely to have impaired her decision, effects which she tried to control with medication or relaxation

techniques". Tribunal stress

Unfair dismissal

Reason for dismissal

11. The Tribunal were satisfied that the reason for dismissal was misconduct for alleged offences which took place on 31 January 2020 and 3 February 2020, involving safeguarding concerns regarding Child X being left alone in a classroom for which the Claimant was suspended on 4 February 2020, pending a disciplinary investigation.

Reasonableness - section 98 (4) ERA

12. The Tribunal were not persuaded that the act of suspension on 4 February 2020, alone and of itself prevented the School from conducting a reasonable investigation however, it determined that there were a number of serious flaws in the investigation process (which are set out in the findings), which took the investigation outside the band of reasonable responses. The most serious failing in respect of the allegation on 31 January 2021 specifically, was the failure to obtain medical evidence from OH or the Claimant's psychiatrist to further understand the extent to which her mental health issues may have caused or contributed to the conduct.

13. The disciplinary panel did not apply their minds to whether or not as at the date of that disciplinary hearing, they had information (regardless of what may or may not, have been known by the School before) to alert them to the fact that there may be a possible link with the Claimant's mental health and/or judgment, during the relevant incidents.

14. The Tribunal reached a determination that on a balance of probabilities, that if there had only been the one incident on the 3 February 2020 (which had **not** resulted in Child X being *locked* alone in the classroom), it is more likely than not that the School would not have dismissed for that offence alone.

15. The Tribunal concluded that the substantive reason for dismissal, namely gross misconduct because of the two safeguarding incidents, and the procedure that was followed, was outside the band of reasonable responses and held that the dismissal was unfair.

Section 15 claim

16. For the reasons set out in the liability judgment, the Tribunal concluded on the balance of probabilities, that the Claimant's decision making with Child X was impaired, and that it was impaired because of her disability and that the decision to dismiss, was based on the Claimant having committed two offences,(including therefore her conduct on the 31 January which arose in consequence of her disability).The Tribunal concluded therefore that the claim under section 15 was well founded.

Second Reasonable Adjustment Claim

The second PCP: application of the disciplinary procedure – suspension to appeal

17. It was not in dispute between the parties that the disciplinary procedure constitutes a PCP and that it was applied to the Claimant from the date of suspension on **4 February 2020** up to the date the outcome of the appeal was communicated to the Claimant on **18 March 2021**.

18. The Tribunal concluded that the application of the disciplinary policy, from the date of suspension caused the claimant stress and anxiety which was evident from her

evidence and the medical evidence including the report on the 11 November 2020 (Page 614):

"*Marilyn mentioned that she has been having a difficult few months since when the lockdown started which is mainly due to experiencing some issues at work at the beginning of this year following which she got suspended from work.* ***Since then Marilyn reported that she has been experiencing a breakdown in her mental health and increasing stress****. She has been experiencing fainting attacks, scratching herself and nightmares like she was when she had her breakdown back in 2018…. I discussed with Marilyn her current medication and advised her to increase Venlafaxine to 150 mg in the morning/ 75 mg at night…" Tribunal's own stress.*

19. On the 2 March 2021 her medical notes record (page 662):"…*Mrs Sisson's mental health* as impacted ***greatly over the*** **recent** ***weeks and months triggered by the situation at work…"***

20. The Tribunal determined that:

"The Respondent was under an obligation to make reasonable enquiries after the incident on 31 January and 3 February and had it done so, it would have had knowledge of the disability and its effects, in particular the impact on her decision making and the substantial disadvantage, ***in or around the beginning of April 2020****." Para 672*

21. Objectively the Tribunal concluded however, that it was not a reasonable adjustment not to suspend and thus there was no requirement to allow the Claimant to remain at work until there had been an investigation into the incidents.

22. The Tribunal concluded that the Claimant however, continued to be subject to the disciplinary process on charges of gross misconduct and that on a balance of probabilities, this impacted on her mental health to a greater extent (given the nature of her illness) than a non-disabled employee in that situation.

23. If the School had taken steps to inform themselves about the Claimant's medical condition and obtained a medical report and carried out a risk assessment, the Tribunal concluded that there was a real prospect that this may well have resulted in a different outcome to the conduct proceedings and/or a change to the process from one of conduct to capability or at least a removal of the charge of gross misconduct. Those steps on a balance of probabilities, would have been a less stressful and damaging process for the Claimant.

24. The Tribunal concluded that it was clear from the medical records that the fact that the Claimant was charged with gross misconduct had a serious impact on her mental health which deteriorated as a consequence during the summer of 2020 and she was then as a result of her absence, subject to a final written warning under separate absence management proceedings.

25. The Tribunal concluded that the Respondents were under an obligation to make reasonable enquiries after the incident on 3 February, into the Claimant's health and had it done so, it would have had knowledge of the disability and the substantial disadvantage. The Tribunal concluded that there were reasonable steps the Respondent could and should have **taken from 20 April 2020**, namely making her aware that they were taking into account the possible effect of her illness on her decision making, carrying out a risk assessment to understand the substantial disadvantage caused by the disability and potentially invoke the capability proceedings or amend the charges from gross misconduct, at least in respect of the 31 January incident.

26. The claim that the Respondent failed to make a reasonable adjustment to the

disciplinary process was held to be well founded

Reductions including Polkey

27. The Claimant was absent on sick leave from February 2020 following the suspension At the time of the dismissal on 25 January 2021, the Claimant had not returned to work.

28. The Claimant had received a final written warning because of her long term absence, under the Attendance Management Policy, following a hearing on **25 November 2020,** upheld on **14 January 2021** (page 812). Neither party produced the Attendance Management Policy at the liability hearing or at this remedy hearing.

29. The OH report following that warning, on 18 January 2021 (page LB 814), advised that the Claimant was unlikely to make a sufficient recovery to return to work for the foreseeable future.

30. Evidence about the significant impact on the School budget was set out at the management of attendance meeting on 13 January 2021 (page LB 802) and again during the conduct disciplinary process.

31. A letter from the Erewash Health dated 15 December 2020 stated that the Claimant lacked motivation and felt anxious and on edge a lot of the time, with increased levels of panic.

32. A letter from Dr Cyriac (page LB800) dated 11 January 2021, stated that the Claimant's condition was: "*currently severe in that it was affecting her functioning socially, occupationally and at a personal level*"

33. Further submissions were invited at the remedy hearing on the prospects that the Claimant might have been dismissed in any event if the Respondent had acted fairly and for a non-discriminatory reason and whether the Tribunal should approach that on a percentage basis or with reference to a period of time, taking into account her sickness absence from February 2020 and its impact on the School and the prospect of dismissal under the absence management policy.

Contributory fault

34. In terms of contributary fault, the Tribunal invited submissions on whether it may be just and equitable to make a further reduction to the compensation to be awarded, to reflect the Claimant's conduct on 3 February 202. However, at this remedy hearing, counsel for the Respondents informed the Tribunal that it was not pursuing any argument of contributory fault and thus made no submissions on the point. The Tribunal agreed with the parties position that a reduction for contributory fault would not be appropriate in this case.

Remedy Hearing

35. The Claimant's schedule of loss amounts to £338,042.76. It is based on losses of 182 weeks loss to the remedy hearing and 52 weeks future loss of earnings thereafter and loss of pension until the age of 65 (on the grounds that it is unlikely that the Claimant will secure a role with a pension administered under a Defined Contributions Scheme) .

36. There was some initial discussion with the parties on the first day of the hearing about how to approach the issues.

37. Mr Frew for the Respondent, argued that it would assist the parties in their submissions

if the Tribunal were to first address the issue of whether a cut-off date should be applied to the losses on the grounds that the Claimant would have been dismissed in any event and that to address that first would enable the parties to focus their submissions more carefully on the sums to be awarded.

38. After hearing representations by both parties, the Tribunal decided to proceed in two stages; the first stage being to determine whether or not, but for the discriminatory dismissal on 25 January 2021, there were prospects of a non-discriminatory and fair dismissal and whether of so, any apportionment should be based on a specific date or apply a percentage deduction, and then at a second stage, to hear further submissions on the amounts to be awarded based on any apportionment the Tribunal may decide is appropriate.

Stage 1

39. The Tribunal on the first day of the hearing heard arguments and considered the evidence on the issue of the chance that the Claimant would have been dismissed in any event in a fair and non-discriminatory manner.

40. The Tribunal reminded itself that the prospects of a non-discriminatory and fair dismissal, can be recognised by ascertaining a date when this would have taken place or by making a proportionate reduction in compensation for future loss which would entail making an assessment of the percentage chance of such an event occurring and adjusting compensation accordingly.

41. The Tribunal gave its decision on appointment ex-tempore at the start of the second day of the hearing but nonetheless sets out here the decision it reached and the reasons for it, for completeness.

Legal Principles : Chance of future non-discriminatory resignation or dismissal

42. Pursuant to section 124(2) Equality Act 2010 the Tribunal in upholding a discrimination claim may award compensation and in an unfair dismissal claim, award compensation pursuant to sections as set out in section 118 Employment Rights Act 1996.

43. The burden of proof is on the Respondent when considering whether apportionment is appropriate and, if so, what level of apportionment should apply.

44. In ***Thornett v Scope [2007] ICR 236*** the Court of Appeal held that the Tribunal's task when assessing compensation for future loss of earnings will almost inevitably involve a consideration of uncertainties. Any assessment of future loss is by way of prediction and therefore involves a speculative element. A Tribunal's statutory duty may involve making such predictions and Tribunals cannot be expected, or even allowed, to opt out of that duty merely because their task is a difficult one and may involve speculation.

45. This Tribunal have also considered the guidance of Mr Justice Elias (as he then was) in ***Software 2000 Ltd v Andrews and others [2007]*** where he summarised the principles extracted from the case law and stated that there will be circumstances where the nature of the evidence for this purpose is so unreliable that the Tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. The Tribunal must recognise that it should have regard to any material and reliable evidence that may assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been a finding that the employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary,

i.e. that employment might have been terminated earlier, is so scant that it can effectively be ignored.

46. According to the Judgment and guidance of Elias, the question is not whether the Tribunal could predict with confidence all that would have occurred, rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened using its common sense, experience and sense of justice.

47. The Tribunal also had regard to the guidance of the EAT in ***Contract Bottling Ltd v Cave and another [2015]***. In that Mr Justice Langstaff emphasised that assessment of compensation and the appropriate amount of any ***Polkey*** reduction will necessarily involve a number of imponderables but it does not mean the Tribunal should not grapple with them. In assessing the chance that a fair dismissal would have occurred, the Tribunal should seek to identify the probability of a future event occurring. **The use of percentages for such an assessment has the advantage of transparency.** When adopting a particular percentage, the Tribunal should spell out as best it can what factors have influenced it.

48. The basic principles of assessing a chance of a lawful dismissal is well established in the context of unfair dismissal and we have been referred of course to ***Polkey v AE Dayton Services Ltd 1988 ICR 142, HL*** where the House of Lords established that where a dismissal is procedurally unfair but the employer could show that there was a significant chance that if it had followed a fair procedure it would have dismissed in any event and compensation should be reduced accordingly.

49. It was initially thought that ***Polkey*** was limited to the situation where the dismissal was unfair purely as a matter of procedural failings rather than of substance however, subsequent cases have widened the ***Polkey*** principle to the extent it can now be regarded as an application of the Tribunal's obligation to determine compensation for unfair dismissal by reference to what is just and equitable even where the employer's reason for dismissal is flawed. A party may therefore invoke ***Polkey*** to argue for a reduction in compensation on the basis that a fair dismissal was likely at some point in the future.

50. In ***Abbey National plc v Chagger [2010]***, a career loss claim, Lord Justice Elias giving the Judgment of the Court stated that if there was a chance that apart from the discrimination, the Claimant would have been dismissed in any event that possibility had to be factored into the measure of loss.

51. The EAT have given guidance that it is only open to a tribunal to decline to award any compensation for loss of earnings, or to limit compensation to a period (as opposed to making a percentage deduction) where the tribunal is 100 per cent confident that a non-discriminatory dismissal or resignation would have occurred either on the same date as the dismissal or an identified later date or period: ***Zebrowski v Concentric Birmingham Ltd EAT 0245/16*.**

52. The enquiry is directed at what the particular employer *would* have done, not what a hypothetical fair employer would have done: ***Hill v Governing Body of Great Tey Primary School 2013 ICR 691, EAT*.**

53. In ***Shittu v South London and Maudsley NHS Foundation Trust 2022 ICR D1, EAT*,** Mrs Justice Stacey confirmed that a 'loss of a chance' assessed in terms of percentages was the correct approach when assessing both unfair dismissal and discrimination compensation, as opposed to an all or nothing 'balance of probabilities' approach by which, based on the evidence before it, the tribunal determines whether or not an event would have occurred.

54. The Tribunal have also had regard to the authorities which have determined that if the employer was in any way responsible for the employee's illness that led to the dismissal, or for exacerbating such an illness, this may be a factor that is taken into account by a tribunal when deciding on the fairness of the dismissal: ***Royal Bank of Scotland v McAdie 2008 ICR 1087, CA*.** This may include putting up with a longer period of sickness absence.

55. The Tribunal have also had regard to the Court of Appeal's guidance in ***Iwuchukwu v City Hospitals Sunderland NHS Foundation Trust 2019 IRLR 1022, CA*** **;** *"…the previous history was potentially relevant, as one of the "circumstances" to which regard must be had when considering the reasonableness of the dismissal but it could not be dispositive. It certainly could not lead to the conclusion that an employer could never fairly dismiss an employee on grounds of capability because the employer itself had contributed to the lack of capability (for example because of an injury at work caused by the employer's negligence)."*

Claimant's submissions

56. The key points from Mr Rudd's submissions were that ***Polkey*** does not apply to the unfair dismissal claim for gross misconduct because it was not only procedurally but also substantively unfair. It is also submitted that if the Respondent had lifted the suspension in April 2020 and taken another route, then it is highly likely that they would not have got to the position of issuing the Claimant with a final written warning in November 2020 for her absence.

57. It is also submitted that there is no evidence that the Head Teacher, Ms Clemens should have given a final written warning rather than a first or an informal action and her action in giving a final written warning had in fact accelerated the process and invites us to take that into account.

58. Mr Rudd also referred to inconsistences in the report of Dr Briscoe, in that it refers to the Claimant not wanting to return to work but it is submitted that her view had changed from November 2020 and therefore submits that it cannot be said, based on the report from Dr Briscoe, that the Claimant would have been dismissed fairly for capability had she not been dismissed for gross misconduct.

59. In terms of a capability dismissal, Mr Rudd submits it is too simplistic an approach; it does not take into account the possibility that with a risk assessment which the Respondent should have carried out and other adjustments, (such as the Claimant being moved to the reception class), that she would not have been able to return to work. He submits that there is a likelihood that there would have been no final written warning in circumstances where they had made the appropriate adjustments.

Respondents' Submissions

60. Mr Frew referenced the LJ at paragraph 616, which includes reference to adjustments, including counselling and the evidence set out in Dr Briscoe's report that there was in fact counselling provided. He referred to this being information not put before the Employment Tribunal and invited the Tribunal to take that additional information into account, albeit he confirmed that he was not making a formal application for reconsideration.

61. Mr Frew also submitted that with respect to the Claimant's criticisms of the report of Dr Briscoe, the Tribunal should not take those into account because if the Claimant had wanted to challenge the agreed report of Dr Briscoe, there were ways in which she could and should have done so, including putting questions to Dr Briscoe but that this was not done. The report has been accepted by the parties and he therefore invites the Tribunal to make a finding that it cannot disregard elements of it.

62. In terms of the Claimant's intention to return to work, and indeed whether or not she would have returned to work, he made reference to the letter of 11 October 2022, (page /B -1091) confirming that the Claimant had no intention of returning to work. The Tribunal notes however the views had been expressed on 23 September 2022 in the context of the Employment Tribunal proceedings and what she wanted to achieve from it. The Claimant referred to wanting to clear her name and not wanting to return to work but this was after she had already been dismissed.

63. Mr Frew submitted, that the non-tortious suspension '*set the ball rolling'* for the Claimant not to return to work and that even if there had been no allegation of gross misconduct still live after April 2020, there would still have been an investigation and the Claimant would still have faced the embarrassment of that process,. He refers to the OH report obtained in January 2021, for the Absence Management process, which stated there was no likelihood of return.

64. Mr Frew submitted that by 8 February 2021, the Claimant's health was such that she could not have returned to work and refers to her perception about her management by Ms James and that those issues would have remained with any manager.

The Findings of Fact at stage 1

65. The Claimant had counselling sessions from 14 January 2020 and the records of those sessions report that as at that date (page 126):

"…client stated her present difficulty was work and with one colleague in particular. Since her assessment in July 2019 she was now back in work, but she feels this woman picks at her a lot and has stated that she feels she cannot work alongside the client due to her being unstable…"

66. Following the suspension on 4 February 2020, the counselling notes record the impact as follows (page 125):

"*She shared with me that she had been suspended form work that day and understandably, was shocked and tearful during the session. She kept hiding her face and said that she knew they would find the first thing she did wrong to suspend her and that she knew she needed to go,* ***but felt desperate that she may not to be able to get another job." Tribunal stress***

67. The Claimant in her impact statement at paragraph 16, states as follows:

"The disciplinary action during early 2020 caused a full relapse of my earlier symptoms."

68. The Claimant later during counselling sessions in March 2020 told the counsellor that she did not wish to return to work (page 123). In a session on 3 March 2020 it records:

"*The client was clearly distressed stating that she knew in her heart that she did not want or could not face going back to work".*

69. In a further session on 17 March 2020 it recorded:

"*She said that she had made a decision that she did not want to return to this job and that she knew it was somewhere she did not want to work, but would like to work somewhere else even it if was voluntary work."*

70. The Claimant in her remedy statement refers to her thoughts having been erratic during counselling at this stage and has to be seen in the context that at the time she did not want to do anything and that while she expressed the views about not wanting to return to work, those views had changed by November 2020. That her view later changed is supported by the counselling records of a session on 11 November 2020 (page 130):

"*Called client again and she answered. She advised me that her work situation had changed since her counselling, which ended in March 2020 …"*

71. Dr Briscoe in his report also confirms that her thoughts of a return to work had changed by November 2020 (para v. page 162);

"…*my interpretation of the counselling entries is that the suspension appears to have resulted in the Claimant forming a view that she did not want to continue working for the Respondent.* ***It appears evident that this view had changed*** *by November 2020 and, in the event the Claimant did not hand in her notice." Tribunal stress*

72. While initially of the view that she could not return to work, (while distressed after the suspension and early stages of the investigation), the Tribunal find that it is clear that by November 2020 her view had changed and she did not want to leave. The Tribunal do not find therefore that the Claimant would have resigned had she not been dismissed, or that she would have expressed the view that she did not want to return to work, at a further Attendance Management hearing and indeed this was not the view she expressed at the disciplinary hearing in January 2021.

73. Dr Briscoe in his report appears to indicate that the Claimant may not have been dismissed for incapability had her view changed about wanting to return to work; page 163 of the bundle paragraph b. iii:

"*If the Claimant's sentiments as expressed to her TMH counsellor in March 2020* ***remained,*** *then in my opinion, it is more likely than not that the Claimant would have been dismissed based on incapability as, in my opinion, the Claimant would have attributed her inability to return to work to an enduring psychiatric condition". Tribunal stress*

74. However, in response to the question of the likelihood in percentage terms, that any discrete impact caused by the **suspension alone**, would have led to dismissal for incapability, Dr Briscoe's opinion is as follows (page 163 c.i)

"*In my opinion although according to the counselling record, the Claimant's mental states appears to have improved associated with her apparent intention not to return to work, given the fluctuating nature of her condition and the concerns she expressed regarding her working environment, if she was not to hand in her notice and resign from her employment, it is more likely than not that her being suspended would have led to a sustained period of sickness and dismissal based on incapability i.e. a greater than 50% chance".*

75. When addressing the possibility that the Claimant may have been dismissed in any event, not due to a resignation but a dismissal under the Absence Management process, the Tribunal have had regard to the witness evidence of Ms Clemens, the Head Teacher of the School. The impact of the Claimant's absence on the School was also addressed during the Attendance Management process as recorded in the liability judgment and the investigation for the disciplinary hearing also commented on the impact (paragraph 257 LJ);

"The impact on the School's budget has been considerable. Whilst Marilyn has been suspended she has been on full pay….Furthermore, there has been a number of different agency staff who have covered in the nursery meaning the children have lost the consistency they need at such a young age…"

76. Ms Clemens in her remedy witness statement does not address further the impact of the absence, but her evidence is that (paragraph 13):

"If the Claimant had not been dismissed the capability procedure would have continued to the next stage where she would be invited to a further meeting to discuss her continuing ill – health. Based upon the medical information at the time, I have no hesitation in identifying that in my view, the Claimant would have been dismissed for ill-health capability reasons on 8 February

2021."

OH report – January 2021

77. In her remedy witness statement the Claimant states at paragraph 8 that if the Respondent had obtained OH advice during the summer of 2020 it would not have supported a dismissal;

"Had the Respondent considered terminating my employment under an absence management procedure they would have been obliged to obtain Occupational Health advice. Given that such advice was not obtained until January 2021, and given that this was after I had changed my view about leaving employment it's difficult to see how any dismissal would have been fair had it taken place during the summer of 2020. ***Even if the Respondent had obtained Occupational Health advice during the summer of 2020 I was recovering by this point and believe the advice would have been that I could return to work within a few months".*** Tribunal stress

78. The relevant findings in the LJ however, include the following:

"*para 299…the medical evidence shows that by 11 November 2020 (page 613) there had been a serious deterioration in her mental health.*

Para 300 The medical evidence records advise to increase the dosage of health, experiencing fainting attacks, scratching herself again , increased panic attacks and forgetting to take her medication … Marilyn's condition is serve enough currently to affect her functioning socially, occupationally and at a personal level".

79. In her response to written questions put to her by the Claimant representative, Ms Clemens gave evidence that if a further OH report been required prior to a final Absence Management meeting, it would have been obtained but refers to it being 'uncontroversial' that the Claimant was extremely unwell to the extent that she was incapable of returning to work (paragraph (a) page 5). In terms of whether had she not been dismissed, an adjustment would have been made that the Claimant not work with special needs children (on the basis that she had not been trained to work with children with special needs and had suffered anxiety when working with children with special needs in 2018 and 2020), Ms Clemens did not address why that adjustment could not have been made but gave evidence that she was being asked to speculate on an area that she does not feel she can answer but at the time the Claimant received a warning in relation to her ill health capability, it was her genuine belief that the warning would have developed into a dismissal (paragraph (g) page 3 to 4) .

80. The judgment of the Tribunal however (paragraph 615 -618 LJ)in respect of the section 15 EQA was as follows:

"615. There were alternatives to dismissal which would not have meant ending the career of the Claimant.

616. Those steps could have included counselling and a risk assessment to identify the stressors such as dealing with Child X or children with similar issues. It may have meant a permanent move to Reception class with older children and a larger team for support.

617.The April statement of Ms James refers to changes she made to the Claimant's work informally including the Claimant working one to one with a child because she was not managing the behaviour of small groups of children. An assessment and discussion with the Claimant could have identified those children she was able to work with (page 84).

618 In the Tribunal's judgment ***there was a prospect*** *of the substantial disadvantage being alleviated by further adjustments such that dismissal for the pleaded legitimate aims was not a proportionate response."*

81. In respect of the reasonable adjustment claims, the finding included the following (paragraph 688 LJ):

"*If the Respondent had taken steps to inform themselves about the Claimant's medical condition and obtained a medical report an carried out a risk assessment, there is however a real prospect that this may well have resulted in a different outcome to the conduct proceedings…"*

82. Mr Frew identifies that it is now apparent that the Claimant had undergone counselling while absent on sick leave, information which was not available at the liability hearing, however he does not seek reconsideration of the LJ. In any event, the Tribunal consider that counselling can take many forms and be focussed on different issues. The counselling the Tribunal was concerned with at the liability hearing was ongoing counselling to support a return to work. Indeed the Tribunal comments on what counselling could have focused on specifically in its liability judgment (Paragraph 607):

"*What of course was not provided was the provision of counselling to support the Claimant* ***build up her self-esteem and confidence in the classroom and which may have encouraged her to be more open when she was struggling or help identify triggers/ stressors".*** *Tribunal stress*

83. The Tribunal then turned to consider what the situation was as at the date of dismissal and whether had the Claimant not been dismissed for conduct she may nevertheless have been dismissed fairly and for a non-discriminatory reason on the grounds that she was too unwell to return to work and would be for the foreseeable future, either at that point or the chances of that happening at some point thereafter.

84. The Tribunal have made findings that the Claimant was suspended from 4 February 2020 and was then absent due to low mood and anxiety from 5 February 2020 (para 635 LJ). The medical notes of **11 November 2020** refer to the Claimant suffering with her mental health since the date of suspension and the Tribunal found that by **November 2020** she was reporting a deterioration in her mental health:

"Marilyn mentioned that she had been having a difficult few months when the lockdown started which is mainly due to experiencing some issues at work at the beginning of the year following which she got suspended from work. ***Since then Marilyn reported that she had been experiencing a breakdown in her mental health and increasing stress****…. I discussed with Marilyn about her current medication and advised her to increase Venlafaxine to 150mg in the morning/75mg at night…"* (para 215 LJ);

*A*nd;

"It is clear from the medical records that the fact that the Claimant was charged with gross misconduct had a serious impact on her mental health ***which deteriorated as a consequence during the summer 2020 a****nd she was then subject to final with warning under sperate absence management proceedings. (para 689 LJ)"*

85. There was a gap in the medical notes from December 2019 to October 2020. The Claimant in her impact statement referred to having a full relapse in early 2020 of her earlier symptoms and struggling to get GP appointment due to the pandemic and as result did not get in depth advice until **November 2020** (para 16).

86. The Claimant in her remedy statement states that she began to recover in the **summer of 2020** and believes that had OH advice been obtained them, the advice would have been that she could have returned in a few months

87. Dr Briscoe reports that he had been unable to ask the Claimant about her mental state during **February 2020 to 10 November 2020** (para 5) however he does on to state that by the end of the counselling sessions on 10 March 2020, the Claimant's symptoms

of adjustment disorder had largely resolved and according to the therapy records she had made a decision that she did not want to return to work (para 26) but that is not to say that the Claimant was not prone to fluctuations in her mental state and that ;

"In my opinion, ***the Claimant's condition worsened in November/ December 2020*** *with symptoms of anxiety and depression in keeping with a diagnosis of adjustment disorder" (para 31)"; And*

"In my opinion, there is no medical evidence arising out of direct assessment of the Claimant that supports a deterioration in the Claimant's mental health during the ***summer of 2020*** *. I note that it differs from the Tribunal as at paragraph* [689]"; And

" However, it is also evident that the Claimant did not seek to consult her GP on account of her mental health ***perhaps*** *indicating that her mental health was not significantly compromised between March and November 2020" (para 88). Tribunal stress*

88. However, Dr Briscoe goes on to accept that given the absence of medical records and that he had not been able to speak with the Claimant, it is not possible to state definitively how distressed she was (page 178 of the bundle in the 'comment' section).

89. The Tribunal had reached a finding at the liability hearing that the Claimants mental health deteriorated during the summer of 2020 and that she attended her GP in November 2020 reporting a deterioration with her GP prescribing an increase in her anti-depressant medication. The Tribunal reached that finding on a balance of probabilities, weighing up evidence, not all of which was available to Dr Briscoe in coming to his opinion. The Tribunal consider that its findings remain supported by the evidence namely that the Claimant's health deteriorated during the summer months of 2020.

90. Shortly before the disciplinary hearing on the 25 January 2021, the Respondent obtained an OH report (page 814 LB) dated 18 January 2021 for the purposes of the Attendance Management process. The OH adviser had conducted a consultation with the Claimant by telephone on 18 January 2021 and confirmed that the Claimant had given her permission for that report to be released to the Respondent. The report comments that the Claimant had been very tearful during the consultation and needed a lot of support from her husband and the employment specialist and:

"*She continues to suffer from low mood and lacks motivation to do anything.* ***In my opinion, she is unlikely to make sufficient recovery to return to work for the foreseeable future"…*** Tribunal stress

91. The Claimant was not well enough to attend the hearing on 13 January 2021 (page 809 /LB) dealing with her appeal against the final written warning issued in November 2020 under the Attendance Management procedure. The Claimant's representative informed the appeal hearing (as recorded in the minutes) that the Claimant had not been well for quite some time and was still not well enough to attend that meeting. Other similar comments were made during that meeting on behalf of the Claimant, which made it clear that the Claimant remained very unwell and there was no indication given by the Claimant's representative at that meeting that the Claimant would be well enough at some point in the foreseeable future to return to work.

92. A report of 11 January 2021 from the NHS Mental Health Service, (page 800 LB) also reported that the Claimant's condition was, at that time; '*currently severe'*.

93. The Claimant's representative submits that had there been adjustments put in place from **20 April 2020,** then there would have been a chance that the Claimant would not have been issued with a final written warning in November 2020.

94. The Tribunal found that the application of the **disciplinary policy**, from the date of suspension, caused the Claimant stress and anxiety (para 676 LJ). The Tribunal also found that had certain steps been taken by the Respondent, including removing the charge of gross misconduct, would have been a less stressful and damaging process for the Claimant (LJ para 688).

Attendance Management Procedure

95. Neither party produced a copy of the Attendance Management Procedure/Policy.

96. The Claimant received a final written warning in November 2020 for absence due to her ill health and was called to a review meeting on 8 February 2021 .

97. A copy of the letter inviting her to that review meeting is disclosed in the remedy bundle (page 200). It does not state in that letter that the review meeting may result in dismissal but it does say an invitation letter will follow. Ms Clemens in her witness statement for the remedy hearing does not state and was not asked, what that invitation letter would state or what the Attendance Management Policy provides about the review process. The letter of the 25 November 2020 does state:

"…*I am prepared to consider any reasonable steps, adjustments or support or facilitate your return to work if this is at all possible."*

98. In terms of whether the Respondent could have dismissed the Claimant at the review meeting on 8 February 2021, we note that the letter inviting the Claimant to the meeting on 3 November 2020, (LB page 741), used similar wording, describing that meeting as a review and enclosing a copy of the Attendance Management Policy (Policy). The Claimant does not make a positive case that the invitation to the meeting on 8 February 2021 could not have led to dismissal under the terms of the Policy.

99. The questions that were served on Ms Clemens in response to her remedy statement, by the Claimant, did not put to her that under the Attendance Management Policy the decision could not have been taken at the 8 February 2021 review meeting to dismiss or that she did not have the authority under the Policy to issue a final written warning.

100. The Tribunal therefore on balance, find that the Policy provided for dismissal at the review stage and the Claimant was aware of that, having been sent a copy of the Policy. It also finds, that Ms Clemens acted in accordance with its terms when issuing the warning.

101. However, just because the Policy warned the Claimant that she could be dismissed (by as a minimum providing her with the Policy) and Ms Clemens is adamant that she would have dismissed, that does not mean that dismissing on capability grounds would have been fair or non-discriminatory.

102. The Tribunal have considered whether the Claimant would have been dismissed had the Respondent carried out a risk assessment and the other adjustments (set out in the LJ) from 20 April 2020, acting in the knowledge that the Claimant was disabled.

103. The Tribunal in its liability findings, determined (paragraphs 553, 554, 617 and 616) that the dismissal was a breach of Section 15 in that there was a link between her disability and the first incident on 31 January 2020. It also found that there were adjustments that could have been made which had a prospect of removing the disadvantage.

104. The Tribunal take on board the evidence that there was counselling, however, as addressed above, the Tribunal had set out what sort of counselling may have been

helpful and with what aims. There were also other adjustments, including a permanent move to reception class and regardless of the comments of Ms Clemens, the Tribunal determined that this was a reasonable adjustment. Ms Clemens gave evidence, in the questions put to her in writing (in response to her statement), that in terms of her opinion as expressed, that the Claimant was incapable of working with any children, this was she stated, not based on medical evidence but was anecdotal and dealt with in evidence at the liability hearing. Ms Clemens did not consider, in her response, even with her experience of working with children, that she could speculate on this. Dr Briscoe did not comment on the Claimant's suitability for such work either (other than in terms of the risk to her own health).

105. The Tribunal (paragraph 69) in the LB set out the situation with regard to the claims under Sections 20 and 21 and adjustments which it may have been reasonable to alleviate the impact of stress and anxiety of a disciplinary process (paragraph 680).

106. The Claimant in her remedy statement (paragraph 15) refers to what Dr Briscoe says about it being difficult to separate the impact of the suspension from the impact of the disciplinary proceedings. The Claimant is of the view that it is impossible and gives evidence that the reason the suspension was daunting was because the School was saying that the seriousness of the allegations warranted suspension, with the suspension simply reinforcing the seriousness of the allegations.

107. Dr Briscoe in his report (paragraph 2(a) at page 154), when asked to what extent the symptoms experienced by the Claimant since April 2020 had been caused by not undertaking a risk assessment, he expresses his expert opinion as follows (at paragraph iv at page 156):

"In my opinion the suspension appears to have triggered an adjustment disorder according to the symptoms the Claimant described at a counselling session on the day she was suspended and at subsequent sessions";

*A*nd at paragraph vii:

"As such in my opinion, ***the significant deterioration in the Claimant's mental health occurred when she was suspended*** *rather than due to the lack of an assessment occurring 6 – 8 weeks later which may have influenced the disciplinary proceedings".*

108. Dr Briscoe then comments (vii page 156) that by March 2020 the counselling sessions appear to indicate that the Claimant felt better since her decision not to return to work for the Respondent. And page 156(ix)

"Thus it would appear that ***as at March 2020****, had the Respondent not proceeded with the disciplinary proceedings for whatever reason,* ***the Claimant had resolved not to return to her place of employment*** *with a consequent improvement in her mental health, albeit this improvement may have been temporary". Tribunal stress*

109. Dr Briscoe also comments on the Claimant's relationship with Ms James and how it appears to have been the main focus of her emotional distress (x page 157) and that in his opinion undertaking a **stress risk assessment 6 – 8 weeks** after the suspension would not materially influence the symptoms experienced after the suspension (page 157 (xiv))

"In my opinion on the balance of probabilities had the ***disciplinary procedure been abandoned following a stress assessment*** *and the capability procedure been followed, the Claimant would have remained off sick as happened in the event and she still would have been subject to that attendance management process".*

110. *Dr Briscoe also states that:*

"vi. In my opinion, with the benefit of hindsight if the Claimant had been reviewed by occupational health in or around April 2020 with or without a stress risk assessment, and had decided that she wished to return to work, one outcome of a capability process could have been for her not to have worked with Ms James. However, the evidence in March 2020 appears to suggest that the Claimant had decided she did not wish to return to work." And;

"vii. In the event, the disciplinary process continued and it would appear that on the balance of probabilities, the Claimant's receipt of the list of questions from Maria Holmes sent on 3 November 2020 resulted in an exacerbation of her emotional distress as referred to by Dr Cyriac when he assessed her on 10 November 2020."

111. The questions which were issued to her in November 22020 (by which time she had had changed her mind about a return to work) were questions put to her as part of the disciplinary investigation into serious charges of gross misconduct. The questions may not have been put to her (and appear in his view to have been a trigger it seems for a further exacerbation of her illness) had the process been dealt with under the capability proceedings. They may have been put, or some of them (had the disciplinary proceedings continued into misconduct in respect of the one offence of the 3 February 2020), but not in the context of gross misconduct potentially .

112. The Tribunal, made a finding that the weight of the evidence supports a finding that by February 2021, the Claimant remained very unwell and the occupational health report on 18 January 2021 reports that there was no return for the foreseeable future.

113. However, Dr Briscoe's report does also indicate that whether she wanted to return to work would be a factor and the Tribunal have determined that had there been a risk assessment, some reassurance that her health was being taken into account, and some adjustments around her not working with children with special needs, there was a prospect nonetheless that she would have been able to return to the job she loved.

114. Dr Briscoe however, expressed the opinion that (page 165(v)):

"Regardless of whether she wanted to return the prospect of doing so is more likely than not to have triggered a relapse in her condition …"

Conclusions on Stage 1

115. On balance, taking into account all the evidence, the Tribunal determined that there should be an apportionment.

116. The Tribunal determined that the evidence supports a finding that there is a chance that even if the reasonable adjustments as set out in the liability judgment, had been made, it is more likely than not that the Claimant would have been dismissed on health grounds and even if she had attempted a return, she would have experienced a relapse leading to further proceedings under the Attendance Management Process and dismissed, for a non-discriminatory and fair reason at some stage after 8 February 2021.

Losses from EDT to 8 February 2021

117. In terms of the period between the date of dismissal of 25 January 2021 and the date of the proposed review under the Attendance Management Policy, namely the 8 February 2021, the Respondent is not putting forward a case that the Claimant would have been dismissed for ill health capability before 8 February 2021.

118. The Tribunal conclude that there was no realistic prospect of the Claimant being dismissed fairly and for a non-discriminatory reason (or of her resigning) prior to the 8 February 2021, that is not alleged by Ms Clemens and nor is this the Respondent's

case in their submission.

119. It is not just and equitable to make any reduction to compensation for that period on the basis of a prospect or a chance of a fair and non-discriminatory dismissal.

Losses from 8 February 2021 onwards

120. The Tribunal conclude that it would be just and equitable for there to be a reduction to reflect the percentage chance of a fair and non-discriminatory dismissal taking place on ill health capability grounds at some point after 8 February 2021.

121. Even if adjustments had been put in place and even if the post suspension acts of discrimination had not happened, the Claimant's health deteriorated during the summer of 2020 and ongoing from November 2020. The Tribunal accept Dr Briscoe's evidence that it is more likely than not, that given her description of her experience after she returned to work in 2018 and the resulting dissatisfaction with the School, a return to work is likely to have trigger a relapse in her condition (para. Page28), albeit he puts no time frame on that (para v page 165 of the bundle).

122. The issue is not simply whether the claimant would have remained off work on sick leave as of 8 February 2021 and what the likely prognosis would have been at that point, but whether any reasonable adjustments may have either prevented her absence or otherwise assisted with her return.

123. The Tribunal have considered what the position may have been had the Respondent made reasonable adjustments from 20 April 2020, and consider that there remains a prospect that the Claimant would still have remained off work sick as of 8 February 2021 and remained so for the reasonably foreseeable future. The suspension and charge of gross misconduct had a serious impact on the Claimant's mental health (paragraph 689 LJ).

124. It may have been unfair not to have delayed any review in order to obtain a further OH report (depending on her health as of 8 February 2021) and in light of knowledge about her disability, that OH report should have included questions around adjustments including a possible move to the Reception class in conjunction with some job specific counselling and risk assessment.

125. The Tribunal also take into account that it may have been unfair not to wait longer before dismissing than is usual under the Attendance Management Policy, given the impact on the Claimant's health caused or contributed to by the failure of the Respondent to make the reasonable adjustments from 20 April 2020, as found by the Tribunal.

126. Dr Briscoe in his report, expressed his opinion on the likelihood of the Claimant returning to work or being dismissed because of ongoing sick leave as follows (para . Page 28):

> "*In my opinion, as is borne out by the Claimant's progress to date, following the suspension on 4 February 2020, the Claimant was more likely than not to have recovered her health to a degree. However, despite the potential for the Claimant's symptoms to resolve, in my opinion,* ***on the balance of probabilities*** *, for the reasons explored above, the Claimant would not have recovered her health to the extent that she could return to work." Tribunal stress*

127. Taking into account all the evidence including that there are a number of imponderables that make this assessment difficult, the Tribunal reached a conclusion that the chance that the Claimant may have been dismissed fairly and for a non-discriminatory reason, because she would have remained too unwell to return or remain at work, at some

stage after 8 February 2021, is more than 50% and we place the likelihood at 60%. The Tribunal did not consider that this was a case where it could identify a specific date when it could say with any degree of certainly that the Claimant would have been dismissed fairly and for a non-discriminatory reason.

128. A 60% reduction in compensation will be applied for the financial loss the Claimant suffered for the period from 8 February 2021.

Stage 2

129. We now turn to Stage 2.

130. The Tribunal heard further submissions on the second day of the hearing, after delivering the ex-tempore judgment on Stage 1. The decision on stage 2 was reserved.

131. The Tribunal sets out below the parties submissions taking each head of claim at a time, under stage 2.

(1)Pension Loss

Claimants submissions

132. The Claimant while employed by the Respondent was a member of a Defined Contribution pension scheme (DC scheme).

Losses to date of remedy hearing

133. Mr Rudd explained that what the Claimant is claiming is the loss of the annual pension, namely what she would have received had she worked to retirement applying the Ogden tables on a career loss basis. He submits that the correct Ogden Table to apply is 26 and that this would produce a discount of 0.75 to age 65. The figure put forward for the loss to 65 is £41,684.47 discounted by 0.75 giving an annual pension figure of £1,925.24.

134. Mr Rudd submits that an alternative approach is to look at the employer contributions of £85.54 per week (22% gross pay) which equates to £4,408.08 per annum and to calculate the losses to 2024, effectively multiplying that figure by 4 to give the Claimant's losses to the remedy hearing of **£17,792.32** in contributions.

Future loss to retirement age

135. Mr Rudd submits that if the Tribunal chose to calculate future pension loss to age 65 based on contributions, the annual contributions can simply be multiplied by 11 years.

136. The Respondent asserts that the contribution figure went down in April 2024 to 20.5% but Mr Rudd submits that the claimant would have received pay increases and therefore it is not clear what the contributions would have been and therefore simply invites the Tribunal to apply the same contributions for each year (£85.54) going forward on the same basis.

137. Neither party produced evidence about the change in the employer contribution rate or pay increases for TA's during the relevant period.

138. Mr Rudd calculates that another 11 years loss of contributions equates to £4,408.08 per annum, then applying Ogden Table 10 (Multipliers for loss of earnings to pension age 65 (females) and a multiplier of 9.45 and discount rate of 2%, Mr Rudd submits the correct calculation for loss to retirement age 65 would be **£42,034. 36.** He was of the

view that there was little between that figure and simply multiplying the lost employer contributions by the same number of years.

139. Mr Rudd submits that in terms of whether the Claimant would find another job before retirement age with a DC scheme, Dr Briscoe's advice is that the Claimant could not return to work as a TA. The Claimant has no other qualifications and at least for the next 12 months could not work and when she does it is 'rare' to find jobs with a DC pension scheme at that level.

140. The Claimant seeks: £42,034.36 plus £17,792.32**: £59,826.67** less the 60 % reduction for the chance she would have been dismissed in any event, which Mr Rudd calculates the final sum to be **£23,930.67.**

141. Mr Rudd accepts that this figure is higher than the figure in the schedule of loss, this is because, he informs the Tribunal, he calculated it previously and incorrectly based on the approach for a Defined Benefit scheme. The revised calculations were not set out in a written revised schedule of loss showing the calculations and copies of the relevant Ogden tables were not produced. There were no pension documents produced.

142. The Respondent seeks an adjournment if the Tribunal decides to award pension loss up to retirement age however, Mr Rudd resists any adjournment on the grounds that it would put the Claimant to further expense and is not required.

Respondents' submissions

143. The Respondents' submission on pension loss were brief, no documents or evidence was presented with regards to the pension scheme or confirmation of the contribution rates. The Respondent' submit that the Claimant's pension loss for the period 2020 to 2021 should be calculated at 22 % of gross pay which equates to £85.54 per week.

144. Mr Frew expressed confusion over why the Claimant was seeking pension loss based on a projection of loss to 65, when her loss of salary claim was limited to 12 months future loss on the basis that this is the period she estimates she would have remained in the employment of the Respondent.

145. Mr Frew submits that if the Tribunal are to project pension loss to 65, he would want to obtain an actuarial report. It is submitted that the Claimant is 'guessing' at the NEST contributions and the 'rarity' of the Claimant obtaining a different contribution.

146. It is submitted that a maximum cut-off date of 1 year should be applied to future losses from date of dismissal with a 60% reduction.

147. Outside of the workplace, it is submitted that the Claimant had a significant breakdown in October 2023 relating to an issue with her family and that the Claimant would not have lasted in the employment of the Respondent beyond a period of 12 months (i.e. beyond October 2024) and her losses should be capped accordingly.

148. It is accepted that the Claimant would have been entitled to 9 week pay for her notice period in the event of a dismissal for incapacity .

149. Mr Frew's primary position remains that the Claimant would have been dismissed on 8 February 2021 or soon thereafter.

Injury to feelings

150. The claim was issued on 5 June 2021 and therefore it is agreed that the applicable Vento bands are as follows:

Lower band: £900 – £9,100.

Middle band: £9,100 – £27,400.

Upper band: £27,400 – £45,600.

Claimant's submissions

151. It is accepted that the act of suspension is not a tortious act and the Claimant was already suffering with her mental health before the discriminatory acts were committed, namely by 4 February 2020 and prior to 20 April 2020.

152. It is submitted that the Claimant's mental health may have deteriorated in March 2020 (after suspension but before the acts of discrimination) however it worsened over the summer of 2020 (albeit the Claimant's evidence is at odds with this submission).

153. It is submitted that the discrimination was not a one off act, it continued over a period of time. Dr Briscoe's report refers to how the claimant was affected by the suspension continuing and the impact of the treatment did not end after the dismissal in January 2021 because the Claimant appealed.

154. It is submitted that but for the discriminatory acts of the Respondent, the Claimant would not have faced charges of gross misconduct over a lengthy period of time. The reason for dismissal was because of something arising from her disability and was discriminatory.

155. Mr Rudd submits that that the treatment extended over a substantial period and that the claim falls within the upper middle band of the Vento Guidelines and more particularly puts the claim at **£25,000.**

Respondent's submissions

156. Mr Frew agrees with the submission of Mr Rudd that the injury to feelings award falls within the middle band of Vento.

157. Mr Frew accepts that the '*eggshell skull'* rule applies but that the dismissal '*was coming in any event'.* The Claimant was deeply affected it is submitted, by the act of suspension (which is not a tortious act) and the effects of her breakdown in 2018.

158. Mr Frew's primary submission is that there should not be a separate award for psychiatric injury, any impact should be dealt with under the personal injury award, and that it could be lifted from **£15,000 to £20,000** taking into consideration the personal injury element.

159. It is submitted that the Claimant would have been affected by the fact she was dismissed, whatever the reason for dismissal was, and even if it was for a non-discriminatory reason. Mr Frew did not however refer to any evidence, including anything within Dr Briscoe's report, to support that contention.

160. The figures proposed by the Claimant for injury to feelings and psychiatric injury would, he submits, be punitive.

161. It is submitted that the 60% chance reduction for the prospects of a non-discriminatory dismissal should be applied also to the non-pecuniary loss applying ***Hatton v Sutherland and other cases 2002 ICR 613, CA,*** paragraphs 15 and 16 of Lady Hale's judgment. It is submitted that the assessment should take into account the pre-existing vulnerability and the chance she would have succumbed to a stress disorder anyway.

162. Mr Frew submits that the appropriate reduction to non-pecuniary loss would be either 60% or potentially higher at 80 %, on the basis that the Claimant was vulnerable anyway and was going to be dismissed in any event. It is submitted that the Tribunal can take into a consideration what was going to happen and that it was not the discrimination which affected the Claimant. It is submitted that 'we know' it is the dismissal itself not the discrimination element of it, because "*she covers her face in counselling session – when she covers her face she is embarrassed by the incident"* i.e. by what she had done . The account of her conduct by Ms James it is submitted, also affected her health dramatically.

163. Mr Frew submits that if the Tribunal are not with him on a 80% reduction, it should reduce non-pecuniary losses by the same 60% reduction applied to the pecuniary loss.

164. Mr Frew refers to the medical expert Report at page 164; "…*it is more likely than not that her being suspended would have led to a sustained period of sickness absence and dismissal based on incapability [sic] – i.e. greater than 505 chance*.".

165. Mr Frew also referred to the comments of Dr Briscoe at age 184 of his report: *"It appears that the Claimant being informed of the failure of her appeal against dismissal did not cause a deterioration in her mental state".*

166. Mr Frew also referred to Dr Briscoe's comments at page 18 -186:

"Para 151:The Claimant was reviewed by Dr Cyriac on 22 May 2023, attending the appointment unaccompanied…"

"Para 152: Due to the Claimant's increased tiredness Cyriac advised an increase in the dose of Lamotrigine to 25 mg twice daily"

"It would appear that the Claimant's condition was largely in remission other than her fatigue which may have been due to poor diabetic control."

167. Mr Frew refers to Dr Briscoe's report indicating that the Claimant had an 'initial flare' up when the Claimant was informed of her dismissal which then settled. The Medical evidence is that the Claimant is susceptible to fluctuations and suffers flare ups unrelated to the acts of the Respondent.

168. Mr Frew invites the Tribunal, (if against him on global figure of £20,000 to cover all non-pecuniary losses), to award £15,000 for injury to feelings and, for psychiatric injury, an award at the bottom end of the of the Moderately Severe band of £23,0000 (less a reduction to both sums of a minimum of 60%).

169. Mr Frew invites the Tribunal to consider a gradated award and calculate an award on the basis that the Claimant was 'deeply wounded' by the dismissal but thereafter taking into account that her mental health effectively stabilised and invites the Tribunal to award make award of £10,000 and reduce it to £5,000 for the period thereafter.

170. Mr Frew submits that the 'projected date' for which Injury to feelings and pension loss should be assessed to 8 February 2021 and if not that date, no further forward than 12 months from the date of dismissal.

Personal Injury

Claimant's submissions

171. Mr Rudd accepts the figures proposed by Mr Frew for the Moderate and Severe Moderate bands, pursuant to a copy of the Judicial College Guidelines (JCG) which

has been produced to the Tribunal. Mr Rudd places the appropriate level of award for personal injury, within the Moderately Severe end; £23,270 - £66,920 .

172. Mr Rudd submits that according to the report of Dr Briscoe the Claimant was suffering prior to suspension, from a Moderate psychiatric condition. The JCG attaches to Moderate the bracket of £7,150 to £23,270

173. It is submitted that the 'eggshell skull' rule applies, and the Respondent has to take the Claimant as they found her in that she was a vulnerable person in respect of her mental health.

174. Mr Rudd places the appropriate compensation for personal injury in the middle of the range, namely at £45,000

175. Moderately Severe is defined as:

"*In these cases there will be significant problems with factors i. to iv… but the prognosis will be much more optimistic than in (a) [severe] above. While there are awards which support both extremes of this bracket, the majority are somewhere near the middle of the 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"*

176. The factors i.to iv are;

(i) The injured person's ability to cope with life, education and work
(ii) The effect on the injured persons relationships with family, friends, and those with whom he or she come in into contact
(iii) The extent to which treatment would be successful
(iv) Future vulnerability
(v) prognosis

177. It is submitted that the Claimant has lost her career, which is why Mr Briscoe has assessed her as Moderately Severe at the point of dismissal.

178. Mr Rudd submits that he accepts that there is potentially some overlap with the personal injury she suffered an injury to her feelings and therefore invites the Tribunal to consider, if they are of the view that a total figure of £70,000 is too high, what the overall compensations should be to fairly compensate for both.

179. Mr Rudd refers to the case of **Ms Jhuti v Royal Mail Group Ltd case: 2200982/2015** where the Tribunal awarded "detriment compensation" of £67,265 comprising the awards for pain and suffering and loss of amenity of £55,000 and award of £40,000 for injury to feelings.

180. Mr Rudd submits that the claimant cannot pursue a personal injury elsewhere because she has issued her claim in this jurisdiction and that should be taken into account.

181. Mr Rudd submits that the injury to feelings is concerned with the impact at the time and the Tribunal should approach the award for personal injury on the basis that this is concerned with her future vulnerability, hence while there may be some overlap, there is "*no great cross over*".

Respondents' submissions

182. Mr Frew referred the Tribunal to the case of ***Wilson Barca LLP and ors v Shirin EAT 0276/19.*** In that case the tribunal rejected a claim for a substantial award for psychiatric injury in addition to an award for injury to feelings and aggravated damages. The tribunal found that, on the evidence, it **was inevitable** that the claimant would have

succumbed to the same degree of mental illness causing her to give up her employment had the harassment not occurred. Her vulnerability arose in part from her personal history. It was evident that she would have become mentally ill in **exactly the same way** if the discriminatory treatment was left out of account. This was not to say that the employer's actions had not made her ill because they plainly had, that treatment did not give rise to any separate remedy for the claimant's psychiatric illness.

Salary loss

Claimant's submissions

(5) a : Date of dismissal to the remedy hearing

183. It is submitted that given the Claimant's continuing ill health, she should be awarded **£60,642.20** to the date of the remedy hearing because she remains too unwell to work, less the 60% reduction.

(5) b : Future loss

184. Mr Rudd submits that in terms of future loss, the Claimant would have received an increase in salary in 2024 of £20,375.68 (a gross sum of £391.84 per week). The claim is for a further 52 weeks future loss, calculated to be £20,375.68 less the 60% reduction.

185. The Claimant was absent on sick leave from 4 February 2020, she remained on sick leave until the date of her dismissal but submits that but for the discriminatory treatment she would not have remained off work after the date of dismissal. The Tribunal have already factored in the percentage change that she would have remained off sick and been dismissed on ill health grounds when reaching the figure of 60%.

Respondents' submissions

186. It is submitted that the Claimant would have remained off sick after 8 February 2021 and has she had already received full pay and then half pay, she would have had no further entitlement to further sick pay

187. It is submitted that if the Claimant had not been dismissed in February 2021, she would have remained off sick and would not have been entitled to any pay. It is submitted that to say there is a 40% chance that she would have returned to work is '*pure speculation'* and Dr Briscoe gives a clear indication of the Claimant's ability to return to work.

Basic Award

Claimants submissions

188. Mr Rudd submits the correct figure is as per the calculation in the Respondent's counter schedule i.e. £5,216.27. This accords with the Tribunal's calculation based on 9 Years full service at the date of termination and the claimant being aged 50 at the termination date with weekly gross salary of £386.39.

189. The parties have not disclosed payslips or other evidence of salary. However, the Claimant asserted that her gross pay was £1674 per month in her claim form which was accepted by the Respondent. This equates on the Tribunal's own calculation to £386.31 gross which is consistent with the respondent's schedule of loss and if therefore the Tribunal find, on balance the correct gross figure. The parties agree in their schedules that the weekly net figure if £333.20 per week.

Interest

Claimant's submissions

190. The interest to be awarded, Mr Rudd submits, is to be calculated from **20 April 2020** which is the date of the first act. For injury to feelings and personal injury awards it is submitted that interest is to be added from April 2020 to date and interest in respect of pecuniary damages is from the mid-point.

Respondent's submissions

191. Mr Frew made no submissions on this point.

Tax

Claimant's submissions

192. Mr Rudd submits that in terms of grossing up the awards, the first £30,00 for injury to feelings and personal injury, is payable tax free The remaining payment should be gross up.

Respondent's submissions

193. Mr Frew agreed with Mr Rudd's submissions on how to gross up the awards.

Recoupment

Claimant's submissions

194. Mr Rudd submits that it is for the Tribunal to decide whether to apply the loss of earnings under the unfair dismissal or discriminatory regime and that it makes 'no difference' to the Claimant whether it is awarded under one head or the other.

195. If unfair dismissal, the Recoupment Provisions apply. If awarded under the discrimination regime, it is submitted that the apportionment should equally be applied to the benefits and that the only benefits which should be taken into account are those which are means tested and not the PIP payments.

Respondents submissions

196. Mr Frew agreed with the submissions of Mr Rudd on the application of the Recoupment Provisions as between the two regimes and made no submissions regarding Mr Rudd's submission about the PIP payments..

Loss of statutory rights

Claimant's submissions

197. The claimant seeks £500 as set out in it's in the schedule of loss

Respondent's submissions

198. Mr Frew made no submissions on the sum claimed.

Legal Principles

199. Section 123 (2)(b) EqA, provides that if a tribunal upholds a discrimination claim, it may

order the respondent to pay compensation to the complainant.

200. ***Ministry of Defence v Cannock and ors 1994 ICR 918, EAT***: 'as best as money can do it, the applicant must be put into the position she would have been in *but for* the unlawful conduct'.

Breaking the chain of causation.

201. Cases on the tort of negligence commonly refers to a 'novus actus interveniens' (i.e. a new intervening act).

202. ***Bullimore v Pothecary Witham Weld and anor (No.2) 2011 IRLR 18, EAT*****:** The applicable test is what is a direct and natural consequence of the unlawful act. This case suggests that another person's wrongful act (in this case, how the potential new employer reacted to the reference) will not necessarily break the chain of causation.

203. ***Prison Service v Beart (No.2) 2005 ICR 1206, CA*****:** authority for the proposition that the chain could only be broken by an 'intervening act' committed by either a third party or the claimant him or herself, not by the wrongdoer.

Mitigation

204. At common law, claimants are under a duty to mitigate their loss. In discrimination claims, compensation may be decreased if a claimant has reduced, or could reasonably have been expected to reduce, his losses.

205. It is for the employer to show that the claimant has failed to mitigate his loss: ***Ministry of Defence v Hunt and ors 1996 ICR 554, EAT***.

206. The question is not whether the employee has behaved reasonably in general terms but whether he or she has taken reasonable steps to mitigate.

Injury to feelings award

207. Every case is fact sensitive however, some guidance can be found in how tribunals have approached compensation for injury to feelings to in others similar cases.

208. ***Williams v Central Manchester University Hospitals NHS Trust ET Case No.2408486/10*****:** the employer made an offensive one off remark to an employee. The tribunal found that the remark was deeply offensive and vindictive. It awarded the claimant **£4,500** for injury to feelings.

Pension

209. Although no statutory guidance is given as to how the calculation of pension loss is to be made, the tribunals are assisted by guidelines prepared by a committee of employment judges entitled the 'Employment Tribunals: principles for compensating pension loss' (**Principles**).The Tribunal has had regard to the Principles.

210. The guidance provides that (para 4.17) where a successful claimant has, through dismissal, lost the benefit of membership of a Defined Contribution (DC) scheme, "*it is usually straightforward to calculate the resulting net loss of pension that is attributable to the employer and which flows from its unlawful conduct. The basis for calculation will be the employer's contributions for whatever period of loss the tribunal has identified. This is known as the "contributions method".*

211. The periods over which ordinary economic loss is incurred on the one hand, and

pension loss incurred on the other, are not necessarily coterminous: two different periods may be chosen: ***Bentwood Bros (Manchester) Ltd v Shepherd 2003 ICR 1000, CA*.**

Injury to feelings and Personal Injury

212. Guidance as to the approach to be taken in making such awards was provided by the Court of Appeal in **Vento v Chief Constable of West Yorkshire Police (Vento No 2) [2002] EWCA Civ 1871, [2003] IRLR 102**. The Court of Appeal in Vento recognised three bands of potential award. The figures were subsequently revised, to allow for inflation, in the case of **Da'Bell v NSPCC [2010] IRLR 19.**

213. Awards for injury to feelings should serve to compensate for that injury and should not be used as a means of punishing respondents or deterring them from particular courses of conduct: **Ministry of Defence v Cannock [1994] IRLR 509 at 524**.

214. Discriminators must take their victims as they find them and thus compensation should not be reduced because the victim was particularly sensitive.

215. As affirmed by the EAT in **Interaction Recruitment Plc v Ms Morris UKEAT/0090/141/BA** the question of compensation for injury to feelings will not, simply be a matter for submission. A claim for injury to feelings requires evidence as to that injury : **Esporta Health Clubs v Roget UKEAT/0591/12, [2013] EqLR 877 EAT**.

216. The principle that employment tribunals have jurisdiction to award compensation for personal injury caused by unlawful discrimination, whether physical or psychiatric, was confirmed by the Court of Appeal in ***Sheriff v Klyne Tugs (Lowestoft) Ltd 1999 ICR 1170, CA*.**

217. The claimant will need to demonstrate that the discriminatory acts actually caused the psychiatric damage in order to prove liability and claim compensation.

218. In ***Hatton v Sutherland and other cases 2002 ICR 613, CA*** (also known as *Barber v Somerset County Council* after one of the conjoined cases), Lady Justice Hale stated that, in any case where it is established that a 'constellation' of different symptoms suffered by the claimant stems from a number of different extrinsic causes, a sensible attempt should be made to apportion liability accordingly. She also set out 16 different 'practical propositions' relevant to determining whether an employer is liable for the personal or psychiatric injury suffered by the claimant. The last two of these propositions numbers 15 and 16, specifically addressed the position (i) where the causes of the harm are multifarious but some of which are not due to the wrongful act of the employer, and (ii) where a claimant is predisposed to injury by a condition that was not caused by the employer's wrongdoing.

The two relevant propositions were:

where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered that is attributable to its wrongdoing, unless the harm is truly indivisible. It is for the employer not the claimant to raise the question of apportionment ('proposition 15')

the assessment of any damages or compensation should 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 ('proposition 16').

219. **In *Thaine v London School of Economics 2010 ICR 1422, EAT***, the EAT expressly approved and applied Hale LJ's propositions 15 and 16. In that case, an employment

tribunal awarded compensation for psychiatric ill health as well as for injury to feelings and loss of earnings after upholding the claimant's complaint of sexual harassment. In light of Hale LJ's propositions, it discounted the overall compensation award by 60 per cent to reflect the fact that there had been a number of 'concurrent causes' for the claimant's ill health for which the employer was not liable.

220. In ***BAE Systems (Operations) Ltd v Konczak 2018 ICR 1, CA*****,** Lord Justice Underhill provided an analysis of Hale LJ's two propositions and explained that there was a conceptual distinction between them. Proposition 15 applied where the injury concerned had multiple causes, one or more of which were attributable to the employer's wrongful acts, but one or more of which were not. The proposition stipulated that in such a scenario the employer should only be required to pay compensation for personal injury for that proportion of the harm attributable to its wrongdoing, unless the harm was truly indivisible. Underhill LJ stressed that such apportionment 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 that is due to the wrong of the tortfeasor (discriminator); not whether it can assess the degree to which the wrong caused the harm. Underhill LJ recognised that this was less easy to apply in the case of psychiatric harm.

221. Proposition 16, on the other hand, stipulated that assessment of damages should take account of any pre-existing disorder or peculiar vulnerability, and of the chance that the claimant would have succumbed to a psychiatric disorder regardless of whether the tortious act had been committed. This proposition should be applied where the claimant had a pre-existing vulnerability which was not a cause of the injury in itself but which might have led to a similar injury even if the wrong had not been committed.

222. Underhill LJ held that there was medical evidence supporting the employment tribunal's conclusion that K had only developed a diagnosable illness after the manager's comment. In his view, that conclusion had not been perverse. It was not an affront to justice, when affixing BAES(O) Ltd with full liability for this, to ignore K's history of stress and problems at work for which the employer bore no responsibility or legal liability. The basic rule was that a wrongdoer had to take his victim as he found him. This was not inherently unjust, as the effects of that rule were mitigated by Hale LJ's propositions 15 and 16. However, proposition 15 required a finding that the injury in question was indeed divisible, and the tribunal was unable to make such a finding here. It had been unable to distinguish between tortious and non-tortious harms.

223. In ***Olayemi v Athena Medical Centre and anor 2016 ICR 1074, EAT*****,** held that The tribunal had not explained why it considered that the previous episode of PTSD was a **material cause** of the more recent episode, as opposed to merely rendering O vulnerable or susceptible to a further episode. If an employee has a predisposition to a psychiatric condition, that is not the same as having **caused** that condition.

Double recovery

224. As with aggravated damages and injury to feelings, employment tribunals may, but need not, make separate awards for injury to feelings and personal injury. Where separate awards are made, tribunals must be careful to avoid double recovery.

225. The danger of double counting was recognised by the EAT in ***HM Prison Service v Salmon 2001 IRLR 425, EAT***, where it acknowledged that, although the two awards are distinct in principle, they are not easily separable in practice because it is not always possible to identify when the distress and humiliation suffered as a result of unlawful discrimination becomes a recognised psychiatric illness.

'Eggshell skull' principle

226. The discriminator must take the victim as he or she finds him or her. This means that even if the victim is unusually sensitive or susceptible, and the level of damage or loss sustained is therefore worse than it would have been for another individual, the discriminator will be liable for the full extent of the damage, loss or injury, so long as it can be shown that this flowed from the act of discrimination.

227. Particular complexities can arise where the discrimination exacerbates or accelerates the effect of a pre-existing condition. In such cases, awards for injury to feelings and personal injury should reflect only the exacerbation or acceleration and this may require a complex process of isolating the harm caused by the discrimination in question from pre-existing damage to the claimant's health or livelihood or harms that may have been caused by entirely non-tortious actions on the respondent's part.

32. Reductions from awards for injury to feelings and psychiatric injury because of pre-existing conditions should not be confused with contingency reductions from awards for financial loss. Employment tribunals will also reduce that part of an award of compensation which is for financial loss by a percentage to reflect contingencies, such as the likelihood that the claimant would have succumbed to a stress-related disorder in any event.

Social security benefits

228. In cases of unfair dismissal, among others, the Employment Protection (Recoupment of Benefits) Regulations 1996 SI 1996/2349 ('the Recoupment Regulations') apply.

229. The Regulations do not apply to discrimination cases: Reg 3 and Schedule 1. Successful claimants ought to give credit for such payments in the normal way that is, the value of the payments is deducted when assessing the claimant's compensation.

230. According to the Government's own website the Tribunal has taken judicial notice of the explanation of what a PIP payment is, which is described as help with extra living costs if someone have both a long-term physical or mental health condition or disability and has difficulty doing certain everyday tasks or getting around because of your condition. PIP payments can be paid even if someone is working.

Order of Deductions

231. The Court of Appeal has held that the percentage deduction for the chance that an employee would not have continued in employment if it were not for the act of discrimination should be applied **after** mitigation has been taken into account: : ***Ministry of Defence v Wheeler and ors 1998 ICR 242, CA*.**

Interest

232. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 give employment tribunals the power to award interest on awards made in discrimination cases pursuant to the Equality Act 2010 (Commencement No.4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010 SI 2010/2317.

233. The parties can agree the amount of interest to be awarded under Regulation 2(2). If they do not agree, interest is calculated under the rules set out in Reg 3 i.e. interest is to be calculated as simple interest which accrues from day to day under Regulation 3(1). Under Regulation 3(2) the rate of interest is the rate fixed, for the time being, by

section 17 of the Judgments Act 1838, currently eight per cent.

234. The relevant date for injury to feelings awards, Regulation 6(1)(a) provides that the period of the award of interest starts on the date of the act of discrimination complained of and ends on the day on which the employment tribunal calculates the amount of interest (the 'day of calculation').

235. For all other awards, interest is awarded for the period beginning on the 'mid-point date' and ending on the day of calculation. The 'mid-point date' is the date halfway through the period beginning on the date of the act of unlawful discrimination and ending on the day of calculation under Regulation 4(2).

236. No award of interest can be made in relation to losses which will arise after the day of calculation, such as future loss of earnings or loss of pension under Regulation 5.

237. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 provide as follows:

> ***4.****—(1) In this regulation and regulations 5 and 6, "day of calculation" means the day on which the amount of interest is calculated by the tribunal.*
>
> *(2) In regulation 6, "mid-point date" means the day which falls half-way through the period mentioned in paragraph (3) or, where the number of days in that period is even, the first day of the second half of the period.*
>
> *(3) The period referred to in paragraph (2) is the period beginning on the date, in the case of an award under the 1970 Act, of the contravention and, in other cases, of the act of discrimination complained of, and ending on the day of calculation.*
>
> ***5. No interest shall be included in respect of any sum awarded for a loss or matter which will occur after the day of calculation*** *or in respect of any time before the contravention or act of discrimination complained of*
>
> ***6.****—(1) Subject to the following paragraphs of this regulation—*
>
> *(a)in the case of any sum for* ***injury to feelings****, interest shall be for the period beginning on the date of the contravention or act of discrimination complained of and ending on the day of calculation;*
>
> *(b)in the case of* ***all other sums*** *of damages or compensation (other than any sum referred to in regulation 5) and all arrears of remuneration, interest shall be for the period beginning on the mid-point date and ending on the day of calculation…*

238. It must be presumed that where discrimination extends over a period, the tribunal will be afforded some discretion to decide when the discrimination can be said to start. In ***Al Jumard v Clywd Leisure Ltd and ors 2008 IRLR 345, EAT*****.**

Other awards

239. For all other awards, **including psychiatric injury**, interest is awarded for the period beginning on the '**mid-point date'** and ending on the day of calculation Reg 6(1)(b).

Unfair dismissal

240. Section 118 ERA provides for payment of a basic award and a compensatory award. Section 124 sets the limit for compensatory award .

241. Section 126 ERA prevents ' double recovery' where there are acts which are both

unfair dismissal and discrimination.

(1)This section applies where compensation falls to be awarded in respect of any act both under—

(a)the provisions of this Act relating to unfair dismissal, and

(b)the Equality Act 2010.

(2)An employment 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 (or another employment tribunal) in awarding compensation on the same or another complaint in respect of that act.

Loss of statutory rights

242. An employee who has been unfairly dismissed will lose a number of statutory employment protection rights that are dependent on the employee having remained in employment for a qualifying period; the right not to be unfairly dismissed until she has accrued the necessary continuity of service and loss of rights to statutory notice can also be compensated and this should normally be compensated for.

Findings

243. All findings are based on a balance of probabilities.

Injury to feelings and personal injury

244. The Claimant suffered a previous serious mental health breakdown in 2018 which lead to a significant absence from work which began on 16 May 2018. The Claimant returned to work, on a phased return from 20 November 2018 and remained on anti- depressant medication throughout the time she was back at work.

245. Dr Cyriac's report of the 11 October 2022, (para 517 L/J) stated that the Claimant had a diagnosis of mixed anxiety and depressive disorder which was: "*fluctuant in nature, relapsing and remitting and can be impacted by external stressful social factors."* And while he reported that a recent review had shown her to be reasonably stable;

"*It is likely that her mental health can deteriorate and lead to relapse of illness if put under immense pressure that she is unable to cope with".*

246. The Respondent had accepted that the Claimant was disabled as at 31 January 2020 incident because of an anxiety and depressive disorder and the Tribunal had concluded in the L/J that a symptom or effect of that disability was impaired decision making when experiencing increased anxiety.

247. The opinion of Dr Briscoe, as set out in his report, is that the Claimant had developed an adjustment disorder (ICD-10 ,F43.2 in the Classification of Mental and Behavioural Disorders WHO 1992) which **had resolved by September 2019** (para 19) and that;

"*It is evident that the Claimant experienced fluctuations in her mood and levels of anxiety…seemingly in connection with a difficult relationship with Ms James."(para 20.)*

248. Dr Briscoe's reports that the Claimant sought counselling on 11 June 2019, on account of a lack of confidence in connection with a problematic relationship with Ms James, (para 21) and started this on 14 January 2020.

249. In the opinion of Dr Briscoe, the Claimant exhibited symptoms of an adjustment disorder

again after the **suspension** on 4 February 2020.

250. The Claimant, the Tribunal find was unusually sensitive or susceptible and as the parties both accept, on that basis the 'eggshell skull' rule applies. Further, the Tribunal find that it is clear that the Claimant's history (the health issues in 2018) left her more vulnerable to a mental health relapse.

251. As set out in the findings in the LJ, the Claimant was suspended on 4 February 2020 and then was absent on sick leave. The Tribunal determined however that the Respondent was under no obligation to make reasonable adjustments until **20 April 2020** and then from that point (paragraph 690 of the L/J) there were reasonable adjustments they could and should have taken.

252. The Respondent was not held to be liable for any tortious act prior to 20 April 2020.

Period 20 April 2020 to the date immediately before act of dismissal

253. By the time of the discriminatory acts of the 20 April 2020, the Claimant had already been suspended and the act of suspension had, according to the evidence of Dr Briscoe, a serious impact on her mental health.

254. Dr Briscoe in his report comments on the impact of the act of suspension:

[para 89.2.a.v page 19];

"*In my opinion, the suspension appears to have **triggered an adjustment disorder** according to the symptoms the Claimant described at a counselling session on the day she was suspended and at subsequent sessions."*

[para 25]

"In my opinion, immediately following her suspension, the Claimant once again exhibited symptoms *of adjustments disorder"; And*

[para 892.a.vi.]

"As such, in my opinion, the significant deterioration [in] the Claimant's mental health occurred when she was suspended rather than due to the lack of a risk assessment occurring 6- 8 weeks later …" Tribunal stress

33. The evidence in chief of the Claimant herself (liability witness statement para 87) is that her mental health had been very poor **since the suspension.**

255. The Claimant was then subject to an ongoing disciplinary investigation until a disciplinary hearing which took place almost a year later, on 25 January 2021.

256. The Respondent failed to make adjustments during the period 20 April 2020 to 25 January 2021, adjustments which the Tribunal have determined, had a prospect of alleviating the anxiety and distress the Claimant was experiencing.

257. The Claimant's health fluctuated during this period between 20 April 2020 and immediately before the act of dismissal on 25 January 2021.

258. The Tribunal however, take into consideration that in terms of the impact on her health during this period, there were two main courses; the initial shock of the suspension and then being subject to the ongoing disciplinary investigation.

259. During this period, Dr Briscoe assessed the Claimant's psychiatric injury as a result of

the suspension, (if the sanction of gross misconduct had been removed and a risk assessment carried out), as **Moderate** pursuant to the Judicial College Guidelines (JCG). Moderate is defined in the JCG as;

"*While there may have been the sort of problems associated with factors (i) to (iv) above there ill 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: £7,150 to £23,270."*

260. Page 23 of Dr Briscoe's medical report states (para 2.c.i):

*"**Had there been** a risk assessment in April 2020 that led to the disciplinary investigation taking into account the claimant's mental health at the time of the incidents and removing the sanction of dismissal for gross misconduct, in my opinion, bearing in mind the description of the Claimant's mental state at the completion of the counselling with TMH on 10 March 2020, **the psychiatric damage would have fallen within the category of moderate within the Judicial College guidelines".*** Tribunal stress

261. The Tribunal therefore understand from this assessment, that in Dr Briscoe's opinion, the act of suspension itself would have placed the Claimant in the Moderate bracket.

262. The Tribunal has therefore considered whether the acts of discrimination (from April 2020), exacerbated what was (because of the act of suspension), by February 2020 at least, a pre-existing condition which was Moderate in its *harm* to the Claimant. The Claimant was, according to the medical evidence, from that point now suffering from an adjustment disorder.

Before the act of dismissal, was the Claimant's condition exacerbated or was it prolonged by the failure to make reasonable adjustments, including removing the allegation of gross misconduct?

263. Dr Briscoe gives his opinion as follows:

"*In my opinion, the Respondent not undertaking a stress risk assessment 6 -8 weeks after the Claimant's suspension **did not materially influence the symptoms experienced by the Claimant following her suspension**" [para xi. Page 20] Tribunal stress*

264. However, Dr Briscoe in his report appears to indicate an improvement in the Claimant's health after suspension and before 20 April 2020 [para 89.a.vii and ix.)

"In my opinion, the counselling sessions dated 10 March 2020 and 17 March 2020, appear to indicate that the Claimant felt better in herself since deciding that she did not want to return to her place of work." And

*"Thus, it would appear that, as at March 2020, had the Respondent not proceeded with disciplinary proceedings for whatever reason, the Claimant had resolved not to return to her place of employment with **a consequent improvement in her mental health**, albeit that this improvement may only have been temporary." Tribunal stress*

Was there therefore any deterioration in her mental health after the act of suspension, which may have been as a result of the failure to make adjustments and the way the disciplinary investigation process was still being managed?

265. While Dr Briscoe goes on to state in his report as follows:

"In my opinion, on the balance of probabilities, had the disciplinary procedure been abandoned following a stress risk assessment and then capability procedures been followed instead, the Claimant would have remained off sick as happened in the event and she would still have been

subject the attendance management procedure" [xiv. Page 20]

266. Dr Briscoe seems to indicate that the Claimant would have remained off work sick if subject to the capability process however he also expresses an opinion that after suspension, her health had improved, (until further action under the investigation process in November 2020 and then the act of dismissal in January 2021):

"*In my opinion, the counselling sessions dated 10 March 2020 and 17 March 2020 appear to indicate that the Claimant felt better in herself since deciding that she did not want to return to her place of work" (para vii page 19); And*

"In my opinion, there was a lack of valid medical evidence identifying any significant mental distress between the final session of counselling on 17 March 2020 and the outpatient appointment with Dr Cyriac on 10 November 2020. That is not to say that the Claimant was not mentally unwell during this time but it is to say that her mental state was not assessed directly by her GP or other clinician" 9 para xii. Page 20)

267. Dr Briscoe provides an opinion on the JCG in terms of the psychological impact of the suspension (Moderate), and at the point of dismissal (Moderately Severe). He does not distinguish it appears between the impact of the suspension and the impact of the ongoing disciplinary investigation (para 1. And 11. Page 23)

268. While Dr Briscoe identifies in his report, that it is difficult to separate out the impact of the investigation from the initial act of suspension, what he does not say is that it made no difference, she may (in his opinion) have still remained off sick on a balance of probabilities, but he does not say that it did not have an impact on her mental health (para v. Page162).

269. The Tribunal reached a finding at the liability hearing, with regard to the period between 17 March 2020 and 10 November 2020, that the Claimant's health had deteriorated during this period. As Dr Briscoe points out, he did not have access to the medical records during this period and had not met with the Claimant. The Tribunal had the benefit of hearing live oral evidence and reached a conclusion that:

"It is clear from the medical records the fact that the Claimant was charged with gross misconduct had a serious impact on her mental health which deteriorated as a consequence ***during the summer of 2020****…*" (para 689). Tribunal stress

270. The Tribunal therefore found that her ill health deteriorated after the act of suspension. Neither party challenged that finding of the Tribunal on appeal or by way of an application for reconsideration.

271. Dr Briscoe also comments on the impact later, on 3 November 2020 of the Claimant receiving a list of questions as part of the disciplinary investigation, and the emotional distress this caused (para vii. Page 159):

"In the event, the disciplinary process continued and it would appear that on the balance of probabilities, the Claimant's receipt of the list of questions from Maria Holmes sent on 3 November 2020 resulted in an ***exacerbation of her emotional distress*** *as referred to by Dr Cyriac when he assessed her on 10 November 2020*." Tribunal stress

272. Dy Cyriac in his report (page 1095) of the LB reported that the Claimant had been reviewed in the psychiatric outpatient clinic on 10 November 2020 and that:

"*Mrs Sisson stated that she had experienced "breakdown in her mental health and increasing stress. She was experiencing fainting attacks, scratching herself and nightmares which was similar to when she was experiencing a breakdown in 2019 …She mentioned receiving various letters from school and attending meetings with the school but felt that she was going into a "*

meltdown"… Mrs Sisson had ongoing worries about losing her job due to ongoing investigation …"

273. In terms of the requirement to attend meetings during the investigation process Dr Cyriac's report states (page 1095):

"Over the course of the following weeks, Mrs Sissons continued to receive support from IPS Employment as well as a Union Representative to support her through the meetings that she had with the school, however she gelt that she was unable to attend these meetings even virtual ones ***which was escalating her anxiety symptoms and causing significant distress*** *in her mental health…"*Tribunal stress

Conclusion

274. The Tribunal conclude, that on the evidence, the damage to the Claimant's psychiatric health following the suspension was in the Moderate range, it improved in around March 2020 (shortly after the act of suspension), but that due to the ongoing investigation (and failure to make adjustments) it deteriorated and remained within the Moderate range with fluctuations, including a significant deterioration in November 2020 when she was sent a list of questions as part of the ongoing disciplinary investigation.

275. The Tribunal conclude, on balance, that had the adjustments been made, while there was a prospect that the Claimant would have continued to remain off work sick, her health was exacerbated by the acts of discrimination (the failure to make adjustments) and she was subject to the ongoing stress of the disciplinary investigation and remained within the Moderate range in terms of the harm to her psychiatric health.

276. The Respondent have raised the question of apportionment and the Tribunal consider that it is appropriate to take into account that by the time of the discrimination (from 20 April 2020), the Claimant was already suffering with an adjustment disorder and that that the harm she suffered during this period had therefore more than one cause.

277. The Tribunal has made an assessment on the information available to it, taking into account the Claimant's pre-existing illness, of the appropriate sum to award for personal injury for the harm the Claimant suffered during this period. This is a difficult exercise, however, the Tribunal consider that the Respondent should only be required to pay compensation for that proportion of the **harm** attributable to its wrongdoing. The Tribunal has identified in broad terms that the Claimant continued to suffer ongoing Moderate harm largely due to the ongoing disciplinary investigation, and that but for that ongoing process, the harm from the suspension would have continued to settle and she would have continued to get 'better in herself' (para vii. Page 156 of Dr Briscoe's report) but that it deteriorated (as set out in the findings from the liability hearing) during the summer of 2020.

278. The Tribunal consider that the appropriate award for this period, during the summer 2020 and up to the act of dismissal in January 2021, should be calculated based on the difference between a figure at the top end of the Moderate range **of £23,270** less the low end of Moderate, representing (as best as the Tribunal can determine) the contribution or exacerbation of harm over and above the ongoing harm caused by the act of suspension.

279. The figure of £23,270 less £7,150 equates to **£16,120.**

280. As found by the Tribunal at the liability hearing, the impact on the Claimant's health during the period in summer 2020, the impact on her family, life, work and relationship was significant (para 215 L/J).

281. While it may be argued that it is not divisible, the suspension was the Tribunal consider, a contributing factor and the trigger and it is only just and equitable to reflect that it played a significant part in the ongoing psychological damage the Claimant suffered during this period from 20 April 2020 to the date immediately before the act of dismissal. The Tribunal appreciate that this is a broad assessment however, it is a difficult exercise in cases of psychiatric harm with more than one contributing factor or cause.

Injury to feelings

282. The Tribunal have regard to the fact that from 20 April 2020 no adjustments were made and the Claimant had to continue to be subject to the humiliation of facing charges of gross misconduct which may result in her summary dismissal and prevent her from working in education again, and in a job she had clearly been committed to, and as set out in the liability judgment, had been so eager to return to.

283. The Tribunal take into account the hurt and embarrassment of going through that process over many months, during which the Respondent continued to fail to make the adjustments identified. However, the Tribunal also take into account the risk of double counting and in this case, the Tribunal consider that during this period, it is not possible to separate out an award for the distress and humiliation suffered as a result of the unlawful discrimination because there was no time during this period, when the injury to the Claimant's feelings had not already (as a result of the impact of the suspension) progressed into a recognised psychiatric illness.

284. The Tribunal consider that the award for psychiatric damage is sufficient to recognise and cover, the impact of the humiliation and distress the disciplinary process caused the Claimant and make no separate award for this period.

Period: From Act of dismissal

285. The Tribunal have then gone on to consider the impact of the dismissal.

286. As Dr Briscoe points out in his report, the act of dismissal had a significant impact on her psychiatric health, escalating the impact from Moderate to Moderately Severe harm.

287. The act of dismissal (25 January 2021) predates the date when the Respondent alleges the Claimant could have been dismissed for a non-discriminatory reason and in terms of its impact, the Tribunal do not consider that the fact that there is a chance she could have been dismissed at later stage is relevant to the impact on her health of a dismissal for gross misconduct and the distress and potential impact on her career and personal legacy of that decision (which was a breach of section 15 EqA).

288. There is a material difference between dismissing someone on health grounds and dismissing someone who works with children for gross misconduct in relation to safeguarding matters.

289. The Tribunal do not consider that it is appropriate to reduce the compensation by 60% to reflect the prospect that she would have been dismissed in any event at some point thereafter and that she would have suffered in any event psychiatric harm from a fair and non-discriminatory dismissal, that would be an injustice to the Claimant.

290. The Tribunal have considered whether it is possible to try and assess the degree, if any, to which there may have been an exacerbation of her symptoms had the Claimant been dismissed on notice because of her ill health, however, there is no evidence to assist the Tribunal in making that assessment. There is no evidence to suggest that a dismissal for that reason, would have similarly caused a material deterioration in her

condition and the Tribunal consider that such an exercise would be far too speculative.

291. The Tribunal take into account the difference between the sums suggested for the Moderate range and the Moderate Severe. The difference the Tribunal consider is wholly as a result of the discriminatory dismissal. The Claimant was vulnerable applying the 'eggshell skull' rule but the cause of the deterioration was the discriminatory dismissal. Dr Briscoe sets out in his report, the impact on her health of being charged with these offences:

"The impact upon the Claimant of being told of the outcome of the disciplinary hearing is described on 27 January 2021 with the Claimant's emotional distress being manifested in scratching on her neck, tearfulness, sleep disturbed by nightmares and a fixation that she had done something wrong and that she was a bad person with dementia." para iii. Page 159)."; *And*

*"**In my opinion, these symptoms were caused by the Claimant's dismissal** by the Respondent. **Put it another way, had the Claimant not been dismissed the Claimant would not have experienced the same level of symptoms of anxiety and depression at that time."** (para vi. Page 159) Tribunal stress*

292. The Tribunal take into account that by September 2022, Dr Briscoe considered that the symptoms were in remission (para 32 page 145) . By January 2023 (para 33), in his opinion, the symptoms were markedly improved and by October 2023 (para 34) he considers that the symptoms were resolved (subject to a further relapse).

293. The Tribunal find on a balance of probabilities, that the Respondent was responsible; for the deterioration in her health from 25 January 2021 and that to varying degrees the impact continued to at least until October 2023 (see below).

Period 25 January 2021 to September 2022

294. Dr Briscoe commented on the improvement over time in her mental health:

"*In my opinion, the outpatient record from September 2021 indicates a fluctuation in the Claimant's mental state in keeping with a diagnosis of adjustment disorder **maintained by the stress relating to the Tribunal proceedings**. In my opinion, by September 2022, the Claimant's symptoms were in remission" (para 32 page8)*

"In my opinion, according to the evidence in the records of Dr Cyriac, in January 2023, the Claimant's condition had markedly improved, Dr Cyriac describes the Claimant as having a euthymic mood with no evidence of anhedonia, sleep or appetite disturbances, no psychotic ideas or self- harm thoughts". (para 34 page 8)

295. It is not an issue raised in submissions, but for completeness the Tribunal have considered the extent to the which the Tribunal Proceedings maintained the adjustment disorder and whether it is appropriate to treat that as an intervening act. However, the Tribunal determine that the tribunal proceedings were caused by and were consequent upon the treatment by the Respondent which brought about the Claimant's mental health condition. The litigation is something that has arisen because of the Respondent's treatment of the Claimant and should not be considered to break the chain of causation, it is a direct and natural consequence of the discrimination .

Conclusion

Personal Injury

296. For the period 25 January 2021 (from the act of dismissal) to September 2022 the Tribunal consider that the appropriate sum, to reflect the exacerbation of the Claimant's

psychiatric health as a result of the dismissal, is the difference between the middle Moderate Severe band of £45,095 less the Moderate sum which has been determined to reflect the level of harm caused by the ongoing discrimination of £23,270 (the sum actually to be paid being £16,200) which is a difference of **£21,825.**

Injury to feelings

297. This sum also takes into account the impact on the Claimant's injury to feelings in respect of the ongoing impact of a dismissal for gross misconduct over the months which followed and the impact this had on the continuation of her condition.

298. Aside from the ongoing hurt of the dismissal, the Tribunal also accept that there was additionally, the immediate shock, humiliation and hurt of the dismissal and that this immediate impact was considerable. The Tribunal consider, to prevent double recovery, that is appropriate to award separately an amount for injury to feelings within the lower Vento band to reflect, not the whole period of the resulting harm but the immediate distress and humiliation of the dismissal and the hurt from the loss of a job and possibly her career in education. The Tribunal, taking into account the risk of double recovery, puts this figure around the middle of the lower Vento band at: **£5,000.**

299. The Tribunal do not consider it appropriate to make any deductions to these awards to reflect the chance that the Claimant would have been dismissed in any event on health grounds. A dismissal for gross misconduct can be career ending, it does not carry the same stigma, humiliation and impact and there is no evidence to support a finding that a dismissal on health grounds would have exacerbated her psychiatric condition and certainly not materially.

Period September 2022 to April 2025.

a)Period September 2022 to October 2023

300. The Claimant's condition appears to have improved such that by September 2023 she reported that her mood and mental health had improved significantly over the recent months and expressed some confidence about being fit enough to attend the remedy hearing (para 149 page 48 Dr Briscoe's report).

301. The Tribunal find that during the period September 2022 to October 2023 the Claimant continued to experience some impact, however, there were clear signs that she was improving as set out in Dr Briscoe's report (para 150 page 48) .

b) Period from October 2023

302. The Claimant however, had a relapse in her condition in October 2023.

303. The Claimant is seeking a further 12 months loss of salary from the date of the remedy hearing because of her recent admission to hospital and the opinion of Dr Briscoe that it is very unlikely that the Claimant will be able to resume employment within the next 12 months.

304. Dr Briscoe comments as follows:

"*In my opinion, the Claimant's adjustment disorder had therefore resolved and remained in remission until October 2023. When the Claimant became acutely mentally unwell. In my opinion, the trigger for this deterioration appear to have been a combination of arguments between the Claimant's husband and their son whilst they were on holiday* ***in the context of the ongoing litigation****."(para 34. Page 145) Tribunal stress*

305. The Claimant's witness statement provides little detail as to the cause of this relapse:

> "*The expert notes that my symptoms were in remission for a period of time during 2022 and 2023 (see page 165 of the bundle). Although I was getting better at this time I was certainly not fully recovered and remained vulnerable to a further breakdown as occurred in October 2023*" (para 16 w/s)

306. While the Claimant provides little detail, further detail is set out in Dr Briscoe's report (paras 153 – 183). While there are a number of factors at play, including the family dynamic, it is clear from Dr Briscoe's report, that the ongoing litigation, has had a significant impact on her ongoing ill health. The relapse in October 2023 was following the judgment on liability and before the remedy hearing;

> *"Dr Worwood's impression was that the Claimant was experiencing a moderate depressive disorder with prominent anxiety and at times dissociative type symptomology. This has been precipitated and is perpetuated by the stress of her ongoing Employment Tribunal along with the loss of role and purpose created by being unable to work."..(para 173 page 53)*

307. The Tribunal find that while the Claimant was vulnerable to a further relapse, the ongoing litigation was clearly a significant factor in the deterioration and relapse she suffered.

308. Reference is made in Dr Briscoe's report to the litigation being a "*major contribution to Marilyn's distress and upset"* and of her taking an overdose Diazepam on 2 November 2023: "*This was not an attempt to take her own life more of a triggered responses from a solicitors email that she had received today*".(para 169 page 52)

Conclusion

309. The Tribunal conclude that the Claimant's condition had improved significantly since September 2022 until the relapse in October 2023. While there were other factors including family issues, the Tribunal conclude from the evidence that on a balance of probabilities the litigation arising from the findings into the Respondent's conduct, was a significant and it appears, the main trigger for that relapse. The impact was significant and this does not break the chain of causation, it arises *''directly and naturally'* from the act of discrimination and the consequences of it for the Claimant.

310. The Tribunal determine that the appropriate award in relation to this period, should take into effect that the Claimant's continuing ill health was largely in remission and while vulnerable or susceptible to a further episode of adjustment disorder, the trigger or cause of this relapse, was the litigation arising from the discrimination claim.

311. The impact on her psychiatric health of this relapse was significant and Dr Worwood was of the opinion that it again fell with the category of a Moderate Depressive disorder. The Tribunal consider an appropriate award would be a further payment as compensation for personal injury within the Moderate JCG range but taking into account a number of factors when assessing the appropriate sum.

312. The Tribunal take into account that there is more than one cause, taking into account that the Claimant has a pre-existing disorder or vulnerability (arising in part from the 2018 episode and arising from the suspension in 2020) and of the chance that the Claimant may have succumbed to a stress-related disorder in any event. Taking those factors into account and the gravity of the impact including that Dr Briscoe considers that the Claimant will not be well enough now to work until April 2025, the appropriate compensation is a further £18,000 subject to a 25% reduction to take those other factors into account which equates to: **£13,500.** A reduction of less than £7,200 is made on the basis that by the time of the relapse (largely caused by the stress of the ongoing

litigation process), the Claimant's condition had settled and had been in remission. The Tribunal consider that this sum adequately compensates for injury to feelings and that it is not possible to separate out the impact from the symptoms of the psychological condition.

313. This graded approach (which was suggested by counsel for the Respondent as a possible approach) aims to acknowledge the fluctuating nature of the psychiatric harm over the relevant period and seeks to do justice to both parties.

Loss of Salary

314. We now turn to the claimant's loss of earnings claim.

315. The Claimant claims loss of salary from the date of dismissal, **26 January 2021** to the date of the remedy hearing **plus a further 12 months loss of earnings.**

316. The Tribunal accept that the Claimant was not well enough to return to work up to October 2023.

317. The Tribunal also accept that the Claimant, based on the Claimant's witness evidence and the evidence of Dr Briscoe, will not be well enough to find other employment for 12 months from April 2024 and that she should be compensated for that period because this is a direct consequence of the impact of the discriminatory conduct including the relapse In October 2023.

318. It is not submitted by the Respondent that the Claimant was well enough to find other work during this period, only that she would have been dismissed in any event on the grounds of incapability. The Tribunal for reasons already set out above, have however determined that it is appropriate to deal with that possibility by applying a 60% reduction to the overall financial award.

Conclusions

319. The Tribunal determine that the following sums should be awarded to the Claimant for loss of salary:

(a) 26 January 2021 to 8 February 2021: 2 weeks x £333.20 (net) (no deduction) = £666.40

(b) 9 February 2021 to 23 April 2024 : 167 weeks x £333.20 (net) = £55,644.40

(c) Future loss: 52 weeks x £391.84 (April 2024 to April 2025) = £20,375.68

Total: £55,644.40 plus £666.40 plus £20,375.68 **= £76,686.48** (net**)**

Benefits received

320. Had the financial loss been awarded under the unfair dismissal regime, only the Employment and Support Allowance element would be recouped from immediate losses (up to the EDT) however, the losses would be subject to the statutory cap and there would be no provision for interest.

321. The Claimant's counsel submits that if the awards are made under the discrimination regime, only the Employment and Support Allowance payments should be taken into account and not the payments for Personal Independence Payments, the latter being benefits which are not being means tested and payments which it is submitted, the Claimant would be entitled to receive in any event. Counsel for the Respondent did not

seek to argue otherwise.

322. The payments for Employment and Support Allowance equate to £129 per week which for 168 weeks (the uncontested figure in the Claimant's schedule of loss for the period from March when the Claimant received the benefits and including a further 12 months from the remedy hearing) equates to **£21,672**.

323. The Tribunal do not accept that the benefit sum to be reduced should be reduced to 60%. The duty is to account for actual amounts received which reduce the loss the Claimant has suffered after applying the reduction for loss of chance. Counsel did not refer the Tribunal to any authorities which would indicate otherwise.

324. The sum of £76,019.68 minus £21,672 equates to £54,347.68.

325. The sum of £54,347.68 must then be reduced by 60% (**after mitigation**) which gives a discounted figure of **£21,739.**

326. (The portion of that sum representing 52 weeks future loss, less deductions and 60% =£5,467.10)

Loss of Pension

327. The Claimant had the benefit while employed by the Respondent of a DC pension scheme.

Conclusion

328. The Tribunal conclude that the Claimant is entitled to her loss of pension contributions from dismissal to the date of the remedy hearing subject to the 60% deduction.

a) Loss of pension 26 January 2021 to 23 April 2024.

329. Applying the same calculation to the period of loss for pension, the Tribunal award the following pension loss figure applying the amount of £85.54 per week :

- 2 weeks x £85.54 (26 January 2021 to 8 February 2021) **=£171.08 (no 60% deduction)**

- 9 February to 23 April 2024: 167 weeks x £85.54 which equates to £14,285.18 **less 60%** deduction provides a sum of **£5,714.00**

  Subtotal= **£5,885.08**

b)Future loss of pension from 23 April 2024

330. In terms of losses from the date of the remedy hearing, the Claimant seeks losses up to the age of 65 on the grounds that it is unlikely that the Claimant will secure new employment with a DC scheme.

331. Neither party produced any expert evidence or statistics to assist the Tribunal in assessing the prospects of the Claimant securing alternative employment with a DC pension.

332. The Tribunal take into account that there are roles which offer such pensions throughout the public sector.

333. The Tribunal take into account the contribution an employer would be required to make under The National Employment Savings Trust (NEST) scheme under which an employer pays in 3% of gross salary.

334. In the circumstances, the Tribunal are not persuaded that the Claimant has no prospect of obtaining new employment with an equivalent pension scheme up to retirement but could focus her job search accordingly on jobs within the public sector which offer for example a similar type of pension. While it may take a longer to secure new employment with an equivalent pension, the Tribunal consider that it should take no more than circa a further 6 months from when she is likely to be fit to return to work to do so. This is a broad assessment given the absence of any statistics or witness evidence to assist the Tribunal further and applying common sense.

335. The period of future loss being no more than 18 months, the Tribunal consider that it is appropriate to calculate the pension by calculating the lost contributions.

336. The Claimant seeks a loss of salary for 12 months from the date of the remedy hearing. On the assumption therefore that this is when the Claimant estimates she will manage to find new employment, the Tribunal consider it appropriate to take into account, for the period of pension loss from April 2025 to October 2025, the payments the Claimant would receive from a new employer under a basic NEST scheme:

337. The Tribunal consider that the compensation should be calculated as follows:

- 18 months loss of future pension contributions (from the date of the remedy hearing 23 April 2024 to 23 October 2025)= 78 weeks x £85.54 = **£6,672.12**

- less 3% contribution a new employer would make under a NEST scheme assuming the same salary as the Claimant received from the Respondent and applying this to the 6 month period following the end of the 12 month period from the date of the remedy hearing:

- 3% from a gross salary of £391.84 x 3% = £11.75 x 26 weeks **=£305.50**

- Subtotal is: £6,366.62 less 60% deduction **:£2,546.65**

338. The total pension loss is therefore: £2,546.65 plus £5,885.08 = **£8,432.00** net (rounded up)

Interest

Injury to feelings

339. The relevant date for injury to feelings awards, Regulation 6(1)(a) provides that the period of the award of interest starts on the date of the act of discrimination, which in this case is **20 April 2020** complained of and ends on the day on which the employment tribunal calculates the amount of interest (the '**day of calculation'**) which is **5 July 2024.**

340. The number of days between the date of discrimination and the calculation date is: **1537 days**

341. The sum is 8% per annum (the daily rate is the amount of the award divided by 365 and multiply 8%).

342. Injury to feelings: £5,000

343. Interest is £5,000 x 8%= £400 annual

344. £400 divide by 365 x 1537 = **£1,684.00**

All other awards

345. For all other awards, (the loss of salary, pension and personal injury), the period is the beginning on the 'mid-point date' and ending on the day of calculation. The 'mid-point date' is the date halfway through the period beginning on the date of the act of unlawful discrimination and ending on the day of calculation under Regulation 4(2) which in this case is: midpoint date is **28 May 2022.**

346. No award of interest can be made in relation to losses which will arise after the day of calculation, such as future loss of earnings or loss of pension under Regulation 5.

Personal Injury: losses up to 5 July 2024 (calculation date):

(a) **£16,120**
(b) **£21,825**
(c) September 2022 to April 2025 : £13,500 less sum for the period from 5 July 2024 (1 Sept 2022 to 1 April 2025 is 943 days. From 5 July 2024 to 1 April 2025 it is 270 days. £13,500 divided by 943 x 673 days = **£9,635**)

Subtotal: £47,580

Loss of salary: up to 5 July 2024

347. Losses EDT up to remedy hearing: **£16,271.90**

plus a further **£1,081** for the period from remedy hearing to the calculation date (£5,467.10 are the losses from the remedy hearing for a further 52 weeks less employment benefits and after 60% deduction. Dates 24 April 2024 to calculation is 72 days which equates to £1,081 of the future loss sum of £5,467.10)

Subtotal: £17,352.90

Pension loss

348. Losses EDT to calculation date:

£5,885.08 (up to remedy hearing) plus further 72 days loss of £336 up to the calculation date (£2,546.65 is the loss for 18 months/546 days from the remedy hearing)

Subtotal:£6,221

Total Interest on heads of personal injury, loss of salary and pension up to calculation date:

349. The sum which attracts interest on the three above heads of damages: **£71,154**

350. Interest is £71,154 x 8% = **£5,692 annual**

351. £5,692 divided by 365 days = £15.60 (rounded) [daily rate]

352. 28 May 2022 to 5 July 2024 = 769 days

353. Interest payable is £15.60 x 769 days = **£11,996**

Compensation for unfair dismissal

Basic Award

354. The figure is as per the calculation in the Respondent's counter schedule of **£5,216.27** accords with the Tribunal's calculation, based on 9 Years full service at the date of termination and the claimant being aged 50 at the termination date with weekly gross salary of £386.39.

355. The parties have not disclosed payslips or other evidence of salary. However, the Claimant asserted that her gross pay was £1674 per month in her claim form which was accepted by the Respondent. This equates, on the Tribunal's own calculations, to **£386.31** gross which is consistent with the respondent's schedule of loss and if therefore the Tribunal find, on balance the correct gross figure. The parties agree in their schedules that the weekly net figure if **£333.20** per week.

Statutory award

356. The claimant proposes £500 and the Respondent made no submission on the point. The Tribunal considers it appropriate, taking into account the claimant's length of service, to award an amount of **£500.**

Grossing

34. Any grossing up of the sums, will apply after interest has been calculated.

357. The Tribunal have calculated the grossing up figures according to the guidance set out in the HMRC Enquiry Manual. The parties made general submissions that the payments are to be grossed up applying to 20% and 40% tax rates as applicable.

358. The applicable tax bands for April 2024/2025 are as follows:

372.1 Personal allowance: up to £12,570 = 0%

372.2 Basic rate : £12,571 to £50,270 =20%

372.3 Higher rate: £50,271 to £125,140 = 40%

Application of s401 ITEPA 2003

359. Awards for injury may be exempt from tax under section 406 ITEPA in certain circumstances. The Tribunal is invited to treat the payments for injury to feelings and personal injury as taxable subject to the first £30,000 exemption under section 401 and gross up the awards accordingly. The parties did not make submissions on whether section 406 ITEPA applies, however the Tribunal has made an award for personal injury connected with the act of termination and considers that this sum is exempt from tax pursuant to section 406 ITEPA. That is the sum of **£21,825**.

Loss of future earnings

360. If compensation for discrimination represents loss of future earnings (after termination of the employment) then that compensation is clearly connected with the termination and section 401 of the Income tax (Earnings and pensions) Act 2003 will apply. This is the case even where discrimination has led to the termination of the employment, or where the termination itself was discriminatory; there is the necessary connection to the termination for s401 to apply.

361. On the other hand, if the payment is for a "historic" loss, then there is no connection to the termination of employment and s401 will not apply (but section 62 ITEPA might).

362. All the payments for pension and salary loss relate to the period from the date of termination and therefore section 401 ITEPA applies.

363. **What is taxable:**

(i) Injury to feelings and personal injury awards: £56,445 less £21,825 (injury connected to the termination) plus £5,000= £39,620

(ii) Loss of salary and pension from the date of termination: £30,171.00 (rounded)

(iii) Compensatory sum for loss of statutory rights: £500

(iv) Basic Award: £5,216.27 gross

(v) Interest: £11,996 less £3,678 interest on the exempt portion of PI award =£8,318

(vi) Total sum: £78,609 (without basic award)

(vii) Tax free element : £30,000

(viii) Amount of compensation up to the £30 tax free element = £30,000 - £5216.27(basic award) = £24,784.

(ix) Amount of award that should be taxed: £78,609 - £24,784 =**£53,825.00**

364. The grossing up calculation is set out below (figures rounded up).

Tax Rates	Gross	Tax	Net
Personal allowance: 0% to £12,570 = 0%	12,570	0	12,570
Basic rate : £12,571 to £50,270 =20%	45,239	7,540	37,699
Higher rate: £50,271 to £125,140 = 40%	4,978	1,422	3,556

365. **The total award to the claimant is calculated as set out below:**

		Tax	Interest
a. Injury to feelings	£5,000		£1,684
b. Personal injury	(i)£47,580 net		
	(ii)*(£21,825 tax exempt as psychiatric injury connected to termination: section*	0	

	406 ITEPA)		
c. Loss of Salary	£21,739 net		
d. Loss of Pension	£8,432 net		
e. Loss of statutory rights	£500 net		
f. Basic Award	£5,216.27 gross		
g. Amount to gross up tax payable on a .b.(i), c,d,e.		£8,962	
Interest on b.c.d up to calculation date			£11,995
Total sum	**£111,108.27**		

Employment Judge R Broughton

Date: 5 July 2024

JUDGMENT SENT TO THE PARTIES ON

....15 July 2024.....

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FOR THE TRIBUNAL OFFICE

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