EMPLOYMENT TRIBUNALS

Claimant: Ms Roha Dahir

Respondent: Wimbledon Mosque (acting by its Trustees, Mohammed Sajid Haq, Dr Talat Malik, Saleem Ullah Shaikh and Mohammad Arshad)

Heard at: London South Employment Tribunal (at Croydon) (via Video Hearing – CVP)

On: 15 April 2024 &
21 May 2024 (for deliberations, in chambers)

Before: Employment Judge McCann

Members: Ms K Turquoise & Mr J Hutchings

Representation

Claimant: In person (assisted by Mr Warsame, the claimant's father)
Respondent: Ms A Beech (Counsel)

REMEDY JUDGMENT

1. The respondent shall pay compensation to the claimant of **£25,954.50** made up as follows:

    a. A basic award for unfair dismissal of **£164.55**
    b. A compensatory award for unfair dismissal of **£550**
    c. Damages awarded for wrongful dismissal of **£362.01** (awarded on a gross basis)
    d. Compensation for unlawful discrimination, inclusive of interest, of **£24,877.94**

2. The recoupment provisions do not apply.

REASONS

Introduction and issues

1. In the tribunal's decision on liability, we found that the claimant was unfairly and wrongfully dismissed and that the respondent had, in dismissing her with two days' notice (taking effect on 29 May 2021) subjected her to direct race discrimination and direct sex discrimination.

2. The tribunal determined that there had been a potentially fair reason for dismissal (namely, redundancy) and that the claimant's dismissal was principally (but not only) for that reason (with the claimant's sex and her race both being effective causes, but not the main causes, of her dismissal).

3. The tribunal further decided that, if the respondent had followed a fair procedure, including meaningful consultation and the consideration of reasonable alternatives to avoid dismissal (as set out in our Written Reasons) and absent any race and sex discrimination, there was a very good chance that the claimant would not have been dismissed. However, the tribunal considered that it was appropriate to consider the precise percentage chance at the Remedy Hearing (Written Reasons, at paragraph 231).

4. For this hearing on remedy, we had a 6-page witness statement for the claimant and a 2-page statement for Mr Farrukh Ahmed (for the respondent) and we heard oral evidence from them both. There was a remedy hearing bundle produced on behalf of the respondent (of 275 pages), including a Schedule of Loss and an updated Schedule of Loss as well as a Counter-Schedule of Loss (and we were also provided with a revised Counter-Schedule of Loss).

5. The claimant produced written submissions which she spoke to; and Ms Beech (respondent's counsel) provided us with a short Note on relevant cases concerning awards for "injury to feelings" and made oral closing submissions. We are grateful to both parties for their assistance in the presentation of their cases.

6. The claimant was not seeking reinstatement or re-engagement, having secured permanent, full-time work (upon the conclusion of her university degree) in September 2023.

7. The claimant had not received any state benefits following her dismissal, so no issues of recoupment arise.

8. The issues to be decided on compensation are as follows:

    (1) What sum should be awarded in respect of the notice that the claimant should have been given?

(2) Should the tribunal award compensation for the claimant's losses arising from her dismissal as compensation for unfair dismissal or for discrimination?

(3) In respect of unfair dismissal, what is the basic award?

(4) Should any sum be awarded for loss of statutory rights?

(5) Would the claimant have been dismissed in any event (and, if so, when); or is there a chance that she would have been (and if so, what was that chance)? (See *Polkey v AE Dayton Services Ltd* [1988] ICR 142 (HL); and *Chagger v Abbey National plc* [2009] IRLR 86 (EAT); affirmed by the Court of Appeal, [2010] IRLR 47).

(6) Mitigation: What steps did the claimant take to replace her lost earnings and did these amount to reasonable mitigation of her losses?

(7) For what period of loss should the claimant be compensated?

(8) What other financial losses has the claimant been caused by her dismissal?

(9) Has the discrimination caused the claimant personal injury and, if so, how much compensation should be awarded for that?

(10) What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

(11) Should there be any award in respect of aggravated damages?

(12) Did the ACAS Code of Practice on Disciplinary and Grievance procedures apply?

(13) If so, did the respondent unreasonably fail to comply with it?

(14) If so, is it just and equitable to increase any award payable to the claimant? By what proportion, up to 25%?

(15) Should interest be awarded? If so, how much?

(16) Is it necessary to gross up any part of the award if it will be subject to tax?

THE LAW ON REMEDY

Unfair dismissal

9. An award of compensation is the most common result in unfair dismissal cases. It is assessed under two heads; the basic award and the compensatory award (section 118 of the Employment Rights Act 1996).

10. The provisions relating to the basic award are contained in sections 119 to 122 of the ERA 1996. The award is calculated according to a formula based on age, length of service and gross weekly pay. A week's pay is subject to a statutory maximum which, at the time of the Claimant's dismissal, stood at £544 (section 227 ERA 1996). As the claimant was aged 21 when she was dismissed, the relevant rate is half a week's gross pay, capped at £643, for each full year of service.

11. The provisions relating to the compensatory award are contained in sections 123, 124, 124A and 126 of the ERA 1996.

12. A compensatory award is intended to compensate for loss actually suffered and not to penalise the employer for its actions. Furthermore, where a loss of earnings would have been taxable in a claimant's hands, loss must be calculated net of tax and NI (*British Transport Commission v Gourley* [1956] AC 185). The relevant questions are: whether the loss was occasioned or caused by the dismissal; whether it is attributable to the conduct of the employer; and whether it is just and equitable to award compensation.

13. Permissible heads of loss include past and future loss of earnings; loss of pension and fringe benefits, expenses incurred in looking for other work, and compensation for loss of statutory rights (the latter reflects the fact that the claimant would have to work for 2 years in new employment to reacquire the right not to be unfairly dismissed). The award is generally for a conventional amount, at present in the region of £500, which is the amount claimed by the Claimant in her Schedule of Loss.

14. This is a case where it has been suggested by the Respondent that a deduction should be made under the principles set out in *Polkey* (as applied to discrimination claims, in *Chagger*) (both referenced above).

15. Under *Polkey* principles, the tribunal must, therefore, assess whether the evidence demonstrates – on the balance of probabilities – that a reasonable employer would have dismissed the claimant in any event (or, where we cannot be satisfied that it is more likely than not that the claimant would have been dismissed in any event, whether there is a percentage chance that her employment would have terminated).

16. In *Andrews v Software 2000 Ltd* [2007] IRLR 568, the EAT set out the following principles (from the relevant case law) as to the *Polkey* exercise:

    i) The task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case, that requires it to assess for how long the employee would have been employed but for the dismissal.

ii) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including from the employee.

iii) There will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

iv) Whether that is the position is a matter of impression and judgment for the tribunal; but in reaching that decision, the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

v) Even if a tribunal considers some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

vi) Having considered the evidence, the tribunal may determine that:

(a) if fair procedures had been complied with, the employer has satisfied it – the onus being firmly on the employer – that, on the balance of probabilities – the dismissal would have occurred when it did in any event,

(b) there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly,

(c) employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, or

(d) employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored.

17. An employee who has been unfairly dismissed must mitigate their loss by taking reasonable steps to reduce any losses to the lowest reasonable amount. This does not mean that the claimant has to take all possible steps; and the burden of proving a failure by a claimant to mitigate lies on the respondent.

18. The standard of what is reasonably expected should not be set too high (*Fyfe v Scientific Furnishings Ltd* [1989] ICR 648). The duty on an employee to mitigate their loss requires them to be reasonable and realistic in their job expectations and in their search for new employment. If the employee has not made reasonable efforts to find other work, their compensation will be reduced to reflect the tribunal's view of what would have happened if they had mitigated their loss.

19. By s124 of the ERA 1996, there is a cap on the compensatory award for unfair dismissal which, at the date of the claimant's dismissal, was the lower of 52 weeks' (gross) pay or £89,493.

Discrimination

20. Where a tribunal finds that an employer has discriminated against an employee, there are three types of remedy available (section 124 of the Equality Act 2010). The tribunal may:

    i) make a declaration as to the rights of the claimant and the respondent in relation to the matters to which the proceedings relate;

    ii) order the respondent to pay compensation to the claimant;

    iii) make a recommendation that the respondent take specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate on the claimant.

21. Each of these remedies is discretionary but it is unusual for a remedy not to be awarded. The tribunal has, in fact, already provided the claimant with a declaration that she has been discriminated against by the respondent in the liability judgment.

<u>Compensation for discrimination</u>

22. The aim of an award of compensation is to put the claimant in the position, so far as is reasonable, that she would have been in had the discrimination not occurred (*Ministry of Defence v Wheeler* [1998] IRLR 23; and *Chagger v Abbey National plc* [2010] IRLR 47 (CA)). The types of financial loss that are recoverable are, in general, the same as for an unfair dismissal compensatory award and include loss of earnings (past and future) and any loss of benefits. The same principles of mitigation apply.

23. There are a number of key differences:

i) There is no statutory cap on the amount of compensation;

ii) The tribunal does not award what it considers ‘just and equitable’ but must assess loss under the same principles as apply to tortious claims (see section 124(6), referring to section 119(2) of the Equality Act 2010);

iii) When assessing whether there is evidence that the claimant’s employment would have terminated in any event if there had been no discrimination, the tribunal carries out a similar exercise when calculating compensation for unfair dismissal but asks itself whether the actual respondent would have dismissed, rather than what a reasonable employer would have done (*Abbey National plc v Formoso* [1999] IRLR 222);

iv) The tribunal can award compensation for non-financial losses such as injury to feelings, aggravated damages and general damages for personal injury;

v) The Recoupment Regulations do not apply (and, in this case, recoupment does not arise in any event);

vi) The tribunal has power to and, generally, should award interest on past losses.

<u>Compensation for injury to feelings</u>

24. An award for injury to feelings is intended to compensate the claimant for the hurt, anger, distress and/or upset caused by the unlawful treatment she has received. It is compensatory, not punitive, but the focus is on the actual injury suffered by the claimant and not the severity of the conduct of the respondent (*Komeng v Creative Support Ltd* [2019] UKEAT/0275/18).

25. Tribunals have a broad discretion about what level of award to make. The matters compensated for encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (*Vento v Chief Constable of West Yorkshire Police (No. 2)* [2003] IRLR 102).

26. The general principles that apply in assessing an appropriate injury to feelings award were set out by the EAT in *Prison Service v Johnson* [1997] IRLR 162:

(1) Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator’s conduct should not be allowed to inflate the award;

(2) Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, and should bear some broad general similarity

to the range of awards in personal injury cases – not to any particular type of personal injury but to the whole range of such awards;

(3) Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings;

(4) Tribunals should bear in mind the need for public respect for the level of awards made.

27. The Court of Appeal in *Vento (No. 2)* identified three broad bands of compensation for injury to feelings. There is, within each band, considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case. Compensation must relate to the level of injury to feelings experienced by the particular claimant.

28. The *Vento* bands applicable to cases issued after April 2021 but before April 2022 were:

- Lower band of £900 to £9100 (less serious cases);
- Middle band of £9100 to £27,400 (cases that do not merit an award in the upper band); and
- Upper band of £27,400 to £45,600 (the most serious cases), with the most exceptional cases capable of exceedings £45,600.

<u>Aggravated damages</u>

29. Aggravated damages are an aspect of compensation for injury to feelings, and are awarded only on the basis, and to the extent that the aggravating features have increased the impact of the discriminatory conduct on the claimant and thus the injury to her feelings. They remain compensatory, not punitive.

30. Instances where an award of aggravated damages may be appropriate are where:

- an act is done in an exceptionally upsetting way,
- the discriminatory conduct is evidently based on prejudice or animosity or is spiteful or vindictive,
- There is similar subsequent conduct, such as conducting the hearing in an unnecessarily oppressive manner, failing to apologise, or failing to treat the complaint with the requisite seriousness.

See *HM Land Registry v McGlue* UKEAT/0435/11, referred to by the respondent in their submissions and Counter-Schedule of Loss.

31. A tribunal must consider whether the overall award of injury to feelings and aggravated damages is proportionate to the totality of the suffering caused to the claimant so as to avoid double recovery (see *Commissioner of Police of the Metropolis v Shaw* [2012] IRLR 291). The tribunal also needs to explain why the aggravating factor makes an ordinary award for injury to feelings insufficient to compensate the claimant and the extent to which the aggravating conduct has increased the impact of the discriminatory act on the claimant (see *Wilson Barca LLP and others v Shirin* [2020] UKEAT/0276/19).

General damages for physical or psychiatric injury ("personal injury")

32. A tribunal can award general damages for personal injury caused by any unlawful discrimination (see *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481 and *Virgo Fidelis Senior School v Boyle* [2004] IRLR 268). However, the tribunal must take care to avoid any double recovery by the claimant, particularly where the personal injury involves similar injuries as the injured feelings compensated for by any award for injury to feelings and/or aggravated damages.

33. There is no absolute requirement for medical evidence to establish a claim for personal injury in the employment tribunal, but obtaining such evidence is normally advisable, especially where claims are complex and there are issues over causation of injury.

34. In assessing general damages for personal injury, tribunals should adopt the same basis as the civil courts and will have regard to the Judicial College Guidelines on the assessment of general damages.

Interest on award of compensation for discrimination

35. A tribunal can, and usually will, award interest on compensation awards made in discrimination claims under section 124(2)(b) of the Equality Act 2010 and the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the 1996 Regulations"). Interest is limited to past loss – that is, loss to the date of the Remedy Hearing. The current rate of interest is 8%.

36. Interest is awarded on injury to feelings awards from the date of the act of discrimination complained of until the date on which the tribunal calculates the compensation (see Regulation 6(1)(a) of the 1996 Regulations). Interest is awarded on all sums other than compensation for injury to feelings from the mid-point date (Regulation 6(1)(b)). The mid-point date is the date halfway through the period between the date of the discrimination complained of and the date when the tribunal calculates the award (Regulation 4).

37. The tribunal has a discretion to award interest on a different basis if it considers that serious injustice would otherwise be caused.

Burden of proof

38. It is for a claimant to prove her loss and this will ordinarily include proof of the causal link between the unlawful treatment and the loss.

39. As noted above, the claimant is under an obligation to take reasonable steps to mitigate her loss, but it is for the respondent to prove with evidence that she has failed to do so.

40. As also noted above, if the respondent (as here) asserts that the claimant would have been dismissed in any event, then it must adduce sufficient evidence to demonstrate this on the balance of probabilities (or, alternatively to demonstrate that there was a percentage chance that the claimant would have been dismissed fairly, and without discrimination, in any event).

<u>Choice of basis for compensation</u>

41. In respect of compensation for financial losses (i.e. loss of earnings and benefits etc), it is a matter for the tribunal to decide whether to award compensation either under the Employment Rights Act 1996 or the Equality Act 2010 but it must avoid double recovery.

The relevance of Codes of Practice

42. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") provides:

"207A Effect of failure to comply with Code: adjustment of awards
(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.
(2) If, the case of proceedings to which this section applies, it appears to the employment tribunal that –
(a) the claimant to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) the employer has failed to comply with that Code in relation to that matter, and
(c) that failure was unreasonable,
the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.
(3) ….
(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes."

43. As such, under s207A of TULRCA, an award of compensation for certain claims (including unfair dismissal, wrongful dismissal and unauthorised deduction from wages) can be increased by up to 25% if the employer has unreasonably failed to comply with a relevant Code of Practice issued by ACAS or the Secretary of State (there is a corresponding power to reduce awards by up to 25% where an employee unreasonably failed to comply with a relevant Code). This power

to increase or reduce an award of compensation does not apply to a basic award for unfair dismissal (per ss118 and 124A of the ERA 1996).

44. The Claimant seeks an uplift for the Respondent's breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015). This Code does not apply to dismissals because of redundancy or 'some other substantial reason' unless, on the facts, the dismissal is one where disciplinary or similar formal proceedings (eg, for poor performance) are, or ought to be, invoked against the employee.

45. The ACAS Code, in addition, applies to grievances at work and, thus, where the claim arises out of a concern, problem or complaint that an employee raises (in writing) with his employer, any breach of the grievance provisions in the Code can be considered in determining whether there should be an uplift in any compensation awarded for that claim (*SPI Spirits (UK) Ltd v Zabelin* [2023] EAT 147).

46. It was argued on behalf of the respondent that the ACAS Code did not apply to post-employment grievances – that is, any grievance submitted by an employee after termination of their employment. It was submitted that the natural meaning of the word "grievance" is to something raised within the currency of employment. The respondent's argument was predicated, in part, on the fact that the ACAS Code refers in numerous places to the "employee", the "employer" and "employment" (not to the "former" or "previous" employee, employer or employment) (for example, in paragraph 32, "*If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance*").

47. The tribunal referred the parties to the EAT Judgment in *Base Childrenswear Limited v Otshudi* UKEAT/0267/18 (unreported, 28 February 2019) in which HHJ Eady QC (as she then was) proceeded on the apparent assumption that the grievance aspects of the ACAS Code would apply to a grievance submitted after the effective date of termination. In this case, the tribunal had made an uplift of 25% in respect of the respondent employer's breach of the ACAS Code in relation to its failure to respond to the claimant's grievance/appeal after her dismissal. Whilst the EAT allowed the employer's appeal in part, this was limited to a point on double-counting in respect of the award of aggravated damages and the uplift of 25% for breach of the Code. The EAT did not apparently consider that the tribunal had no power to award an uplift and, indeed, that award was left intact (the EAT substituting a smaller award for aggravated damages).

48. The respondent sought to dismiss the relevance of the *Otshudi* judgment on the basis that there was no point taken in the appeal in that case that the ACAS Code was not applicable to post-termination grievances. That is true – that point was not taken. However, the learned Judge clearly had in mind that the grievance was submitted in that case after the claimant's dismissal (see

paragraph 10) and yet did not appear to view this as an obstacle to the application of the ACAS Code.

49. The tribunal also notes that the definition of "employee" in TULRCA (section 295) provides that it means an individual "who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment". This is the same definition as used in section 230 of the Employment Rights Act 1996. In the tribunal's view, the reference to "employee", "employer" and "employment" in the ACAS Code is highly likely to be consistent with these definitions, such that these terms refer to both an employee during their employment and after it has terminated. Indeed, the right of appeal against dismissal (which clearly is required by the ACAS Code) can only apply post-termination.

50. Consequently, our concluded view is that the grievance aspects of the ACAS Code apply both during the course of employment and after employment has terminated and, accordingly, applied on the facts of this case.

51. The respondent referred the tribunal to the EAT's judgment in *Rentplus UK Limited v Coulson* [2022] EAT 81 (unreported, 27 May 2022). Here, HHJ James Tayler observed that, as is expressed in paragraph 1 of the ACAS Code, the 'disciplinary' aspects of the Code clearly include misconduct and/or poor performance but exclude redundancy and the expiry of a fixed term contract. Furthermore, where (as was the case on the facts of *Coulson*), the dismissal was found not to be by reason of redundancy – because this had been used as a pretext to conceal the real reason for dismissal (dissatisfaction with the claimant personally and/or how she was performing her role, as well as sex discrimination) – then the Code may well apply. Finally, HHJ James Tayler pointed out that both aspects of the Code might apply in any given case (i.e. both the disciplinary and the grievance aspects) and it was important for tribunals to be clear about which aspects were applicable and in what respects.

52. In *Coulson*, HHJ James Tayler gave valuable guidance on the approach to be adopted by tribunals when considering an ACAS uplift – namely:

    (1) Is the claim one which raises a matter to which the Acas Code applies?
    (2) Has there been a failure to comply with the Acas Code in relation to that matter?
    (3) Was the failure to comply with the Acas Code unreasonable?
    (4) Is it just and equitable to award an uplift because of the failure to comply with the Acas Code and, if so, by what percentage, up to 25%?

53. The assessment of any uplift for unreasonable failure to comply with the ACAS Code was considered by Griffiths J in *Sir Benjamin Slade v Biggs* [2022] IRLR 216, at paragraph 77. He advanced a four-stage test, as follows:

    "*i) Is the case such as to make it just and equitable to award any ACAS uplift?*

    ii) If so, what does the ET consider a just and equitable percentage, not exceeding although possibly equalling, 25%?

Any uplift must reflect "all the circumstances", including the seriousness and/or motivation for the breach, which the ET will be able to assess against the usual range of cases using its expertise and experience as a specialist tribunal. It is not necessary to apply, in addition to the question of seriousness, a test of exceptionality.

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

This question must and no doubt will be answered using the ET's common sense and good judgment having regard to the final outcome. It cannot, in the nature of things, be a mathematical exercise. The EAT must be reluctant to second guess the ET's decision either to adjust or not adjust the percentage in this respect, or the amount of any adjustment, because it is quintessentially an exercise of judgment on facts which can be as fully apparent on appeal as they were to the fact-finding tribunal. The EAT will certainly not substitute its own view for the judgment of the ET in the absence of an obvious error.

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

Whilst wholly disproportionate sums must be scaled down, the statutory question is the percentage uplift which is "just and equitable in all the circumstances", and those who pay large sums should not inevitably be given the benefit of a non-statutory ceiling which has no application to smaller claims. Nor should there be references to past cases in order to identify some numerical threshold beyond which the percentage has to be further modified. That would cramp the broad discretion given to the ET, undesirably complicate assessment of what is "just and equitable" by reference to caselaw, and introduce a new element of capping into the statute which Parliament has not suggested. Indeed, the reduction by Parliament in the range from 50% to 25%, after the decision in Wardle may be taken to be a reconsideration of what is proportionate in the most serious cases, and, therefore, a strong indication on that aspect."

FINDINGS AND CONCLUSIONS

54. The claimant was born on 29 April 2000 and was 21 years old when she was dismissed on 27 May 2021.

55. As was agreed by the parties, the claimant's gross weekly pay at the time she was dismissed in May 2021 was £109.70 (and 52 weeks' gross pay would have been £5704.40). Her pay was not taxable because it was at a level within her personal tax allowance. The tribunal has, therefore, used this gross figure to calculate all of her awards. As was also agreed by the parties, the claimant was

entitled to three weeks' notice of termination of her employment which she was not given. Her putative notice period would have ended on 17 June 2021, had she been given three weeks' notice.

Findings relevant to Polkey/Chagger

56. The tribunal recalls its findings in its liability decision as to what the respondent failed to do (but which it reasonably ought to have done) when faced with a return to on-site teaching after a long period of covid lockdown in May 2021.

57. For a *Polkey* assessment, in respect of compensation for financial losses for unfair dismissal, the question is what a reasonable employer would have done and whether this would have still led to a dismissal, on the balance of probabilities, or – if not – whether there was nevertheless a percentage chance (short of 50%) of a fair dismissal eventuating.

58. For the similar assessment in respect of claims for discriminatory dismissal (as per *Chagger*), the question is what this particular employer would have done. The tribunal has concluded that the answer is in fact the same whether viewed through the test in *Polkey* or in line with *Chagger*. In other words, absent the discrimination, the respondent would have acted fairly and would not have hastily decided to dismiss the claimant on 27 May 2021, without properly exploring alternatives.

59. The tribunal notes the respondent's assertion that pupil numbers have apparently reduced from May 2021 to April 2024, according to the witness statement of Farrukh Ahmed; and the respondent points out that it has not employed a new teacher since the claimant's dismissal. In his oral evidence, Farrukh Ahmed stated that Wimbledon was an increasingly expensive area to live in and that birth rates had dropped. The respondent seeks to argue that reducing pupil numbers made it inevitable that one teacher would have been made redundant.

60. However, the respondent has not provided the tribunal with pupil registers or attendance records/logs which would evidence this and, given that the burden of proof in respect of the *Polkey/Chagger* assessment lies on the respondent, we would have expected more cogent evidence. We, therefore, cannot place any real confidence in the numbers included in Mr Ahmed's statement. Likewise, Mr Ahmed's evidence about the expense of living in Wimbledon and/or reducing birth rates in that area was not something he had included in his witness statement and the respondent adduced no evidence that the numbers of parents attending the Mosque (and so the potential pool from which pupils would be drawn) had decreased. The tribunal, therefore, is not persuaded that it should properly have regard to the alleged cost of living and/or birth rates in Wimbledon.

61. In any event, the tribunal notes that the attendance numbers for both Faiza Najeeb and Mujihida Ahmed's classes have improved since the snapshot from the week commencing 7 May 2021 (indeed, Ms Ahmed's numbers have nearly doubled from 5 pupils per class in May 2021 to 9 per class nearly three years

later; and Ms Najeeb's have increased from 8 pupils per class to 10 per class). Moreover, the tribunal finds that there were pupils on the waiting list for September 2021 and the waiting list numbers would have been very likely to have increased. Imam Shoaib's evidence in the liability hearing was that, as at May 2021, there was already one child on the waiting list for the claimant's class; and Farrukh Ahmed confirmed in oral evidence (in cross-examination) that there would be waiting lists for each September, stating there were currently (at the time of the remedy hearing) 5 or 6 pupils on the waiting list for September 2024. Finally, the tribunal notes that the pupil numbers will have been depressed precisely because the claimant no longer teaches her classes. In other words, by not having a dedicated class teacher for the younger pupils (aged 5 to 7 years), the Madrasah has very likely caused some decline in pupil numbers by reason of that fact alone. It now only offers teaching to those aged 6 years old and above, according to Mr Ahmed's statement.

62. Farrukh Ahmed's oral evidence at the remedy hearing was contradictory; on the one hand, he said that many parents wanted on-line teaching because they did not want to have to travel to the Mosque to take their children to the Madrasah; but, on the other hand, he stated that parents wished to attend the Mosque for prayers and have their children taught in the Madrasah at the same time. Perhaps Mr Ahmed intended to say that some parents wanted online teaching whilst others did not. Either way, had the respondent consulted with the claimant and others at the time, as we find it would have done absent the unfair and discriminatory dismissal, it would have offered the solution of a hybrid teaching model, as we have detailed below, which would have suited both types of parental preference.

63. In short summary (developed further in our conclusions below), the tribunal finds that the respondent and/or a reasonable employer would have: taken professional advice (as it did, belatedly in June 2021, after the claimant's dismissal); consulted with the claimant and other interested parties (i.e. other teachers and parents); made use of the furlough scheme; offered a hybrid model of teaching provision (so that the claimant would have taught one hour "in person" and one hour on-line on each of her five teaching days); the claimant would have offered to undertake some initiatives to improve pupil numbers which offer the respondent would have acceded to (as well as writing itself to parents to drum up new pupils); pupils would have been moved around so that classes were more evenly spread (in particular, Imam Owais would have transferred some of his younger pupils to the claimant's class).

64. The respondent asserts that, if it had acted fairly and without discrimination, it would have made use of the furlough scheme until 30 September 2021, at which point it would have selected one teacher for redundancy from the pool of three female teachers; and that the claimant had a one in three chance of being selected (and possibly a higher probability than that because she was less qualified and experienced than the other two female teachers).

65. The tribunal agrees that – ***had*** the respondent decided that it needed to make one teacher redundant (which was only 30% likely, as we set out below) – it would have used a selection pool and that this would have consisted of the

three female teachers (since the two male teachers were both Imams so had religious duties as well as teaching). However, as regards the likelihood of the claimant being selected, the tribunal notes that the claimant was *Hafiz* (i.e she could recite the Koran from memory) whilst the tribunal has no evidence that either of the other female teachers were *Hafiz*. Being able to recite the Koran is the single most important qualification for teaching in the Madrasah. The respondent asserted that Ms Najeeb had a higher qualification (the level two Tajweed course). The tribunal has already made a finding about this in our decision on liability – namely, that neither Ms Najeeb nor Ms Baqi were more qualified than the claimant, albeit – by virtue of their length of service – they were more experienced. However, we consider that their relative length of service was balanced out by the claimant being *Hafiz* such that they each had an equal chance of being selected for redundancy (had the respondent needed to make anyone redundant which, we find, was unlikely) – namely, a one in three chance.

Findings relevant to mitigation

66. In the claimant's various roles, in the period between her dismissal and her permanent full-time employment starting on 1 September 2023, the claimant earned income totalling £2664.14.

67. The claimant worked for Little Garden Day Nurseries (her contract is dated 16 September 2021 and her first rostered shifts were in the week commencing 4 October 2021); and she then did some tutoring work via Tradewind Recruitment and Sanza Teaching Agency from January 2023. She secured a permanent full-time role as a learning support assistant with effect from 1 September 2023.

68. As regards the claimant's duty to mitigate her losses, the tribunal makes the following findings (not really disputed by the respondent:

    (i) the claimant had made more than 60 applications for new employment in the period from June to August 2021;

    (ii) the respondent was asked to provide a reference for the claimant but failed to do so (the tribunal made findings about this as part of its decision on liability);

    (iii) the claimant found part-time work on a zero hours contract at Little Garden Day Nursery (also known as Roehampton Day Nursery);

    (iv) the claimant worked between 13 and 15 hours per week at Little Garden Nursery until the second week in November 2021, when her hours dropped to 5 hours per week and her hours dropped off even more thereafter;

    (v) by early 2022, it was apparent to the claimant that Little Garden Nursery could not provide her with either suitable or regular hours;

(vi) in January 2022, the claimant realised that she had failed two modules which she would need to re-sit in the summer (i.e. July 2022); and that she needed to prioritise her education, although she still needed some paid work to support herself until she graduated the following year (i.e. summer of 2023);

(vii) the Remedy Bundle contained written applications showing that the claimant applied for jobs relevant to her possible career pathways (eg, an internship with McKinsey and similar opportunities at Kia and Clarksons) (in February and March 2022);

(viii) in June and July 2022, the claimant made a number of applications to tutoring agencies as she realised that tutoring work could fit more easily around her studies;

(ix) the claimant secured full-time employment as a learning support assistant with effect from 1 September 2023 (via Sanza Teaching Agency), in which role she earned a higher salary than during her employment with the respondent.

69. We conclude, therefore, that 1 September 2023 is the very latest end date for the period of loss in this case. The question is whether an earlier date should be used.

70. The respondent's case is that the claimant ought to have secured regular work, such as to fully mitigate her losses during the first half of 2022.

71. The claimant's case is that her teaching role at the Madrasah was especially suitable for balancing part-time work with her full-time university studies and that she was not easily able to replicate that elsewhere, although she made reasonable efforts to do so.

72. The respondent pointed out that, in the Remedy Bundle, there were no job applications evidenced between January and June 2022 (other than career-focussed ones, such as the internship with McKinsey), nor from August 2022 to August 2023. That is correct.

73. The claimant said that she had continued to apply for jobs throughout, including during these two periods, but that she needed to focus on jobs which fitted around her studies. She said that the Bundle only contained evidence of those applications where there were email confirmations or similar but that she had also applied for work via online portals which did not always generate an email of confirmation and she also searched for jobs in person (eg, by walking into shops etc). The claimant also explained that in late 2022, she had applied to Sanza Teaching Agency Ltd to work as a tutor and began to do some work via the agency from around January 2023 (after her DBS check had been completed). That is supported by the evidence from HMRC showing that she started to work via the agency in January 2023. The tribunal could not see a job application for this agency, nor Tradewind (another associated agency through which she ended up doing some tutoring work). This, therefore,

supported the claimant's oral evidence that not every application was evidenced in the Bundle.

74. The tribunal accepts that the Remedy Bundle does not contain documentation evidencing every single job application or enquiry actually made by the Claimant and we find that there were efforts made by her to seek work which could not be evidenced via documentation. This is common sense, accords with our experience of job searches and is consistent with the claimant's evidence. Nevertheless, the tribunal also finds that there were fewer applications made in the period January to June 2022 and from August 2022 to summer of 2023 because this is consistent with the evidence we heard about the pressure the claimant was under in relation to her university studies and the need for her to prioritise her studies over looking for employment. This was particularly acute in the period leading up to the claimant's re-sits in June/July 2022 and, then again. in her final year (from September 2022 to June 2023).

75. The tribunal agrees with the claimant's evidence that her working hours whilst teaching in the Madrasah were especially well suited to her studies (i.e. 5 to 7pm on Mondays to Fridays). Had the claimant not been dismissed, she could have carried on working in the Madrasah even when her university studies became more pressured (for example, due to re-sits or due to entering her final year). However, the working hours at the Mosque were not easily replicated in other employment settings – for example, the work at the nursery required the claimant to work during the day which was not easy and the hours were irregular and not always notified to the claimant with much advance notice.

76. The respondent asserted that the claimant could and ought to have found more tutoring work and it provided evidence of various online tutoring jobs. However, this evidence consists of downloads taken from various websites in March 2024, well after the relevant period and so tells the tribunal little if anything about the availability of suitable tutoring jobs from early 2022 to mid-2023.

77. In any event, the tribunal notes that, by the Autumn of 2022, the claimant was in her final year of her university studies and so, not unreasonably, she focussed on that rather than bolstering her income by looking for *ad hoc* tutoring work.

Findings relevant to injury to feelings / aggravated damages

78. The claimant gave evidence about the impact of the dismissal upon her and about matters which she asserted had served to aggravate her feelings of hurt and distress, much of which was challenged on behalf of the respondent.

79. The claimant asserted in her remedy statement that she and her family were banned from worshipping at the mosque unless she dropped her tribunal case; and that her father endured physical aggression from a member of the respondent's executive committee. This was disputed by the respondent. The tribunal notes that whilst the claimant had stated in her ET1/Details of Claim and in her evidence at the liability hearing that members of the respondent had made clear to her father that they were unhappy, had suggested that she should

not be complaining about her treatment, and had made her and her family feel unwelcome at the mosque such that they felt forced to leave and worship elsewhere, the claimant had not previously alleged that they had been banned nor that her father had been physically attacked. We cannot find, on the balance of probabilities, that the claimant was banned nor that her father was subjected to any physical attack.

80. As a general comment, the tribunal finds that the claimant's recollection of her dismissal, its impact on her and alleged aggravating features has been influenced by the long and stressful process of the litigation and this has caused her, albeit unconsciously, somewhat to exaggerate some aspects of her evidence.

81. However, the claimant's upset caused by the respondent's discriminatory treatment of her, in particular her sudden dismissal, was palpable both when she gave evidence, during her cross-examination of the respondent's witnesses and through her submissions.

82. We find that the sudden dismissal decision did impact the claimant's sense of identity and self-esteem and caused her worry, upset and hurt including some difficulty with sleeping. We accept her evidence that the fact of the dismissal decision not being communicated to her directly added insult to injury, as did the failure to invite her to the meeting on 14 June 2021 regarding the grievance (and the comment at that meeting that she was simply being "fed" by her father in respect of her complaint about discrimination). We recall that this dismissal was in respect of the claimant's first ever job, which she had commenced before she had even turned 18 years old and which she had carried out for nearly four years. We find that these circumstances increased the sense of hurt and rejection which she felt. This was further exacerbated by the respondent's failure to respond to at least one request for a reference from a potential new employer. We accept that the claimant's dismissal, which was completely unexpected, dented her confidence and led to a less trusting stance towards others and that this had an impact on her ability to forge new friendships, to socialise and to present herself confidently in job search situations.

83. However, the tribunal notes that the claimant was able to make applications for a number of jobs in the immediate weeks/months after he dismissal and that she continued with her studies. She was able to approach another mosque to see if they needed a Madrasah teacher. She was able to walk into local businesses in order to provide her CV in her effort to find work. She was able to find and start work at Little Garden Day Nursery in September 2021.

84. The tribunal does not accept that the discrimination inflicted deep wounds, resulting in profound impacts nor that it stifled the claimant's aspirations and ability to develop and evolve, as asserted by the claimant in her statement. Nor do we accept the claimant's evidence that the race discrimination instilled feelings of shame in her and hindered her ability to express her identity, including aspects of her cultural heritage.

85. To be clear, the tribunal does not conclude that the claimant has deliberately created a false narrative in her witness statement. Much of the underlying thread is, we find, accurate and we accept that, in the heat of this litigation, the claimant has come to believe her account but we consider that there has been some elaboration. The tribunal must make findings about the actual impacts of the discriminatory dismissal, untouched by the dynamics of the tribunal proceedings which process can, in our experience, serve to intensify the sense of hurt, distress and injured feelings really felt.

Findings in respect of personal injury

86. The claimant was diagnosed in June 2021 with vasovagal episodes. She stated that this condition was caused or exacerbated by the respondent's discriminatory conduct (that is, the dismissal on 27 May 2021). She provided very little evidence about her condition. The tribunal notes that, in her remedy witness statement, the claimant stated that the distress of the dismissal caused her to feel dizzy more often and experience fainting spells more frequently than usual. This indicates, in the tribunal's view, that the claimant's condition pre-existed the termination of her employment and was so not caused by it. It was also apparent, as a result of answers to questions in cross-examination, that the claimant suffered from these symptoms before her dismissal since she confirmed that the assessment/investigation process, leading to a diagnosis, took many months during the course of 2021. Since her diagnosis was made in June 2021, the onset of the condition must have been much earlier in 2021. The claimant had secured a letter from her GP on 26 March 2024 for the purposes of the Remedy Hearing. The letter did say that the episodes can be exacerbated by stress and standing for long hours but it did not assert nor even suggest that the vasovagal episodes were caused by the claimant's dismissal. Finally, the tribunal notes that, in the claimant's original Schedule of Loss dated 23 December 2022, there was no reference to any personal injury and nor was compensation for personal injury something that was included as a specific issue in the issues identified by EJ Self at the preliminary hearing on 7 December 2022.

87. The tribunal finds that the claimant had pre-existing vasovagal episodes and that, whilst the stress of the dismissal and searching for new employment may have increased the frequency of those episodes, this was not so notable that it was recorded by the claimant's GP.

Findings relevant to ACAS Code

88. The tribunal has concluded that the disciplinary aspects of the ACAS Code on Disciplinary and Grievances (2015) do not apply to the circumstances of the claimant's dismissal since the principal reason for her dismissal was redundancy and the Code expressly does not apply to redundancy dismissals.

89. However, the tribunal has also concluded that the grievance aspects of the ACAS Code do apply to post-employment written grievances, such as the claimant's for the reasons set out in the section on the law above.

90. The claimant submitted her complaint shortly after her dismissal by letter dated 4 June 2021, complaining that the dismissal was unreasonable, unfair and discriminatory. These are the very complaints which formed the basis of the claimant's tribunal claims. This was clearly a written grievance and the claimant clearly set out the nature of her grievance (per paragraph 34 of the ACAS Code). The claimant should have been invited to a meeting at which she should have been given a right to be accompanied. Following that meeting, the respondent should have communicated its decision to the claimant in writing and she should have been afforded a right of appeal (with an appeal hearing and a written appeal outcome). None of these steps were taken by the respondent.

Conclusions

Issue (1) – what sum should be award in respect of the respondent's failure to give the claimant proper notice of her dismissal?

91. The claimant was dismissed on 27 May 2021. She is, therefore, owed the equivalent of her pay in respect of 3 weeks' notice which the tribunal shall award on a gross basis. This amounts to £329.10. As set out below, this will be subject to an uplift of 10% in respect of the respondent's unreasonable breaches of the grievance aspects of the ACAS Code of Practice; making a total of £362.01.

Issue (2) – should the tribunal award compensation for financial losses under the ERA 1996 or the EqA 2010?

92. Apart from those awards that can only be made under the Employment Rights Act 1996, namely a basic award for unfair dismissal and compensation for loss of statutory rights, we have decided to assess the claimant's losses under the Equality Act 2010.

93. This is because the actual loss of earnings calculation is the same, including by reference to mitigation and consideration of what would have happened in any event – that is, absent any unfairness (*Polkey*) and absent any discrimination (*Chagger*). Furthermore, the tribunal notes that there is no statutory cap to be applied to an award of compensation for financial losses in respect of the discriminatory dismissal (unlike for a compensatory award for unfair dismissal); and interest can be awarded (which is not possible in respect of unfair dismissal compensation).

94. The tribunal concludes that awarding compensation for financial losses under the Equality Act 2010 more properly compensates the claimant and is in the interests of justice, since it reflects her actual losses and enables her to secure an award for interest.

Issues (3) & (4) – The basic award and compensation for loss of statutory rights.

95. Having regard to the claimant's length of service and age at dismissal, we award 1.5 weeks' gross pay (0.5 week's pay for the three completed years of

service). The claimant's gross pay was £109.70 per week; making a total basic award of <u>£164.55</u>.

96. The tribunal awards £500 for loss of statutory rights, plus an uplift of 10% for the unreasonable breaches of the ACAS Code (as set out below); making a total award of <u>£550</u>.

<u>Issues (5) to (7) – what loss of earnings should be awarded?</u>

<u>Would the claimant have been dismissed in any event? If so, when</u>?

97. The respondent's case is that the claimant would have been dismissed fairly and without discrimination in any event, such that – having calculated out the claimant's actual financial losses – the tribunal should make a reduction to reflect this likelihood.

98. Its case shifted somewhat on this issue but, by the end of the remedy hearing, the respondent's position was that, by 30 September 2021 – when the furlough scheme came to end – on the balance of probabilities (i.e. more than 50%), one of the three female teachers in the Madrasah would have been dismissed. The respondent submitted that, at the very most, there was a one in three chance that the claimant would have been selected for redundancy at this point.

99. The respondent further asserted via its counter-schedule of loss that this meant that there should be a two-thirds reduction (66.66%) from any loss of earnings which would otherwise fall to be awarded to the claimant for any period after 30 September 2021. The tribunal notes, however, that this cannot be correct: in order to reflect the respondent's case that there was a one in three chance of the claimant being dismissed for redundancy (and, therefore, a two in three chance she would be retained), the reduction to any calculated losses would need to be in the order of one-third (i.e 33.33%) not two-thirds (i.e. 66.66%) as asserted by the respondent.

100. The tribunal agrees with the respondent that a reasonable employer acting fairly and, indeed, this particular respondent would have waited before deciding whether it needed to dismiss any teacher. At the very least, as accepted by Ms Beech for the respondent, the respondent would have made use of the furlough scheme which continued until 30 September 2021.

101. The tribunal has, therefore, concluded that the claimant is entitled to be compensated for her full loss of earnings from the day after her putative notice period ended (i.e. 18 June 2021) until 30 September 2021. The claimant received no income during this period as her job at Little Garden Day Nursery did not commence until the week commencing 4 October 2021, as per the rotas in the Bundle.

102. The tribunal also agrees with the respondent that, in the lead up to 30 September 2021, a reasonable employer acting fairly and, indeed, this particular employer, would have considered whether to make one of the three female teachers redundant. We, therefore, disagree with the claimant's

assertion that it was 100% certain that her employment would have continued with the respondent until the end of her university studies and the start of her permanent full-time employment as a learning support assistant on 1 September 2023.

103. We have reached this conclusion because we have decided that a reasonable employer, and this particular respondent, would have spent more time considering all alternative options to avoid dismissal. We have concluded that the following is most likely to have happened, if the respondent had acted without discrimination and fairly. We also conclude that this is what a reasonable employer would have done:

i) The respondent would have consulted with the claimant and the other teachers as well as parents;

ii) The respondent would have taken some professional advice (as it belatedly did after the claimant's dismissal);

iii) The claimant would have offered to do some marketing to drum up further interest and new pupils and this offer would have been acceded to;

iv) The respondent would itself have written to parents to remind them about the Madrasah and its teaching provision;

v) The claimant would have offered to teach in accordance with a hybrid model (where she would have taught one hour "in person" in the Madrasah, for example between 5pm and 6pm; and then taught one hour from her laptop via Zoom, between 6pm and 7pm). She would have done this from her classroom in the Madrasah so that she would have done two hours of teaching between 5 and 7pm as usual; and the respondent would have acceded to this offer;

vi) Pupils would have been spread around more evenly between the classes and it is very likely that Imam Owais (whose classes were very full) would have transferred a few of his younger pupils from his junior boys group to the claimant. The tribunal recalls that there were apparently enough junior boys for Sajid Haq (the Chair of Wimbledon Mosque) to suggest that there may be a teaching job for Mahammed Dahir, the claimant's brother;

vii) The tribunal also notes that the claimant's employment was in a religious setting. As such, the Mosque had an interest in enhancing religious knowledge and spreading its religious teachings. Accordingly, it would have positively welcomed ways of increasing its pupil numbers;

viii) Furthermore, there were in any event children on the waiting list for September 2021;

ix) All of the above would have had the effect of, at the very least, stabilising and probably increasing pupil numbers.

104. As such, the tribunal concludes that there would only have been a 30% chance of a reasonable employer, and this particular respondent, deciding that any teacher needed to be made redundant. Consequently, there was a 70% chance, as from 30 September 2021 of no teacher being dismissed at all (with that remaining the case for the next two years, for the same reasons).

105. However, the tribunal recognises there was a possibility (30% chance) of one teacher being dismissed for redundancy at the end of September 2021 (with that possibility continuing for the next two years).

106. If there had been a decision taken to make one teacher redundant (in respect of which we conclude there was only a 30% likelihood), then the tribunal agrees that there was a one in three chance that the claimant would have been selected (that is, an equal chance as compared with the other two female teachers). This means that the claimant is entitled to 90% of her losses after 30 September 2021 onwards, as follows:

i) There was a 70% chance of no redundancies being made at all (but a 30% chance of one teacher being made redundant);

ii) However, even in this scenario, the claimant had a two in three chance of being retained after 30 September 2021 (and, therefore, a one in three chance of being dismissed by reason of redundancy);

iii) The tribunal must, therefore, aggregate the 70% chance of no redundancies at all being necessary with the two in three chance of the claimant being retained (that is, two-thirds of 30% - namely, 20%) (70 + 20 = 90%).

iv) This means that, as from 30 September 2021, the claimant overall had a 10% chance of dismissal (and, concomitantly, a 90% chance of continuing her employment).

107. As such, the tribunal concludes that, once it calculates the claimant's actual losses from 30 September 2021 onwards, and after having had regard to the issue of mitigation to decide the appropriate period of loss, there should be a 10% deduction to compensation otherwise to be awarded in order to reflect the chance of dismissal (per *Polkey/Chagger*).

Has the claimant mitigated her losses?

108. The tribunal concludes that – given the claimant's circumstances as a full-time university student (both during her employment with the respondent and thereafter, until the summer of 2023) and the pressure she faced from early 2022 onwards in relation to her studies – she did make reasonable efforts to search for alternative employment. Indeed, the claimant succeeded in finding a

new job at Little Garden Nursery in September 2021 and, when the hours were too irregular, she found some tutoring work via the two teaching agencies.

109. Bearing in mind that the burden of proving that the claimant has unreasonably failed to mitigate her losses is borne by the respondent, the tribunal concludes that it has not discharged that burden. In any event, we consider that the claimant's evidence more than demonstrates that she made reasonable efforts to replace her lost income, given her situation as a full-time student as set out above.

For what period of loss should the claimant be compensated?

110. Accordingly, the tribunal concludes that the claimant is entitled to be compensated for her financial losses from the end of her putative notice period (18 June 2021) until 1 September 2023 (when she took up permanent full-time employment and so fully replaced her lost income).

How much is the compensation for financial losses?

111. By reason of our conclusion in respect of a deduction by application of the principles in *Polkey/Chagger*, the claimant is entitled to her full losses (i.e. 100%) from 18 June 2021 until 30 September 2021; and, thereafter, to 90% of her losses (until 1 September 2023).

112. The tribunal, therefore, awards compensation as follows:

    i) For past loss of earnings from 18 June 2021 to 30 September 2021 (15 weeks at £109.70 per week); making a total of £1645;

    ii) For past loss of earnings (per *Polkey/Chagger*), from 1 October 2021 to 1 September 2023 (99 weeks at £109.70, so £10,860.30) less income received of £2664.14; making a total of £8196.16, less 10% reduction (*Polkey/Chagger*); making a total £7376.55

    iii) Plus a 10% uplift on past loss of earnings award for unreasonable breaches of the ACAS Code (as set out below) of £902.15

    Total awarded by the tribunal (including 10% uplift) for compensation for financial losses of £9923.70.

Issue (8) – other financial losses

113. No other financial losses were claimed by the claimant, so no award is made under this head.

Issue (9) – personal injury

114. The tribunal has found that the onset of the claimant's vasovagal condition was prior to her dismissal. Therefore, the discrimination did not cause her condition. The tribunal has also found that the stress of the termination of her employment

(and of then needing to seek new employment) may well have increased the frequency of the vasovagal episodes for a period of time. However, there is no evidence that this had the effect of actually exacerbating the severity of the underlying condition, such as to amount to a personal injury which falls to be compensated.

115. Accordingly, we conclude that the discrimination did not cause the claimant a personal injury (whether by way of a new condition nor exacerbation of a pre-existing condition).

Issues (10) & (11) – injury to feelings & aggravated damages

116. The tribunal has made clear findings about the injury caused to the claimant's feelings. The dismissal evidently caused her hurt, worry and distress and dented her confidence, affecting her social and work relationships and causing some sleeplessness.

117. The respondent pointed out in its closing submissions that the claimant was able to cross-examine some of the respondent's witnesses (although the tribunal notes that her father assisted her with this). The respondent relied on this as demonstrating that the claimant was not badly affected by the respondent's treatment of her. We do not fully agree with this submission. The claimant showed fortitude and courage in facing the respondent's witnesses and we find that she wished to face them in order to get closure. Her anger and upset at her treatment was palpable. Whilst the claimant was not cowed nor diminished by the respondent's treatment of her, she was clearly distressed and upset by it. We, therefore, do not consider that this aspect of the respondent's submissions had much merit.

118. The tribunal has had regard to the guidance in the seminal case of *Vento* and to the exemplar cases contained in the Note on Injury to Feelings cases produced by Respondent's Counsel. We are grateful for this guidance but this is a highly fact sensitive assessment and we are focussed on the impacts of the discriminatory conduct on *this* claimant. Other cases are not, therefore, especially helpful.

119. As regards aggravated damages, the tribunal has found that the following conduct merits a modest uplift to the award of injury to feelings by way of aggravated damages: the failure to communicate the dismissal decision to the claimant (instead telling her father that she was being dismissed); the failure to invite the claimant to the grievance meeting and the respondent's suggestion that the claimant's complaint of discrimination must have been "fed" to her by her father; and the refusal by the respondent to provide a reference. All of this conduct meant that the dismissal was especially upsetting and the failure properly to deal with the claimant's grievance and the reference request displayed a lack of consideration for the claimant and an element of vindictiveness which the tribunal concludes should be marked by an award of aggravated damages.

120. The tribunal has concluded that an award for injury to feelings at the cusp of the lower and middle *Vento* band is merited, with a further £1000 for aggravated damages. A total of £10,100 is awarded for injury to feelings (including aggravated damages) with a further uplift of 10% for unreasonable failure to comply with the ACAS Code, as set out below; making a total of £11,110.

Issues (12) to (14) – ACAS adjustment

121. The tribunal has concluded that the grievance aspects of the ACAS Code of Practice applied to the circumstances of the claimant's written complaint (of 4 June 2021) about her dismissal and about discrimination. It has found that the respondent breached each step outlined in the grievance section of the Code.

122. The tribunal is mindful of the fact that the respondent is a small employer and that it adopted a fairly casual approach to its obligations as an employer. However, the Executive Committee included professionals, who had access to information about employment best practice and the tribunal notes that Mr Ziah Khan and Mr Farrukh Ahmed were able to seek some professional advice from accountants and an HR professional (albeit after the claimant's dismissal). Given the wholesale breaches of the grievance aspects of the ACAS Code, we have no hesitation in concluding that this was unreasonable. This could attract an uplift to any relevant award up to 25%, depending on what is just and equitable.

123. We have decided to award a modest uplift of 10% to all the relevant awards (i.e., all the awards except for the basic award, since that does not attract the uplift), since these awards all concern claims about the termination of the claimant's employment which was the very subject of her grievance. We consider that 10% is just and equitable having regard to all the circumstances including the size of the employer, its lack of sophistication but also to the fact that it did not completely ignore the claimant's complaint and did convene a meeting (albeit inviting only the claimant's father and not providing a written grievance outcome). Furthermore, the tribunal has had regard to the need to avoid any double-counting in respect of the award of aggravated damages (since the failure properly to deal with the claimant's grievance is one of the aggravating features meriting the award of £1000 as aggravated damages). Finally, the tribunal has also decided on 10% uplifts to each of the relevant awards by reference to the overall compensation which the tribunal is awarding and how much the 10% uplift represents to the claimant in real terms (namely £1995.06, which represents approximately four months' pay when the claimant was employed by the respondent). The tribunal concludes that all of these factors dictate a more modest percentage uplift than might otherwise be merited for the unreasonable breaches of the ACAS Code.

Issue (15) – interest

124. In respect of interest on the award of compensation for financial losses regarding the discriminatory dismissal, the tribunal awards 8% per annum from the halfway point between the date of discrimination (27 May 2021) and the date of the decision on remedy (that is, the chambers deliberation day on 21

May 2024). That date is 26 November 2022 and so 546 days' interest at 8% is to be awarded in relation to the award of compensation of £9923.70 (the figure for total financial losses including the 10% uplift); a total interest award of £1187.58.

125. In respect of interest on the award for injury to feelings and aggravated damages, the tribunal awards 8% per annum from the date of the discrimination (the parties have agreed 1055 days between date of dismissal and date of remedy hearing (15 April 2024) plus a further 36 days to the date of the tribunal's decision on remedy at its chambers deliberation day (i.e. 21 May 2024). That makes a total of 1091 days' interest at 8% to be awarded on the total award for injury to feelings and aggravated damages of £11,110 (which includes the 10% uplift); a total interest award of £2656.66.

Issue 16 – grossing up

126. The total of all the tribunal's awards in connection with the claimant's unfair and discriminatory dismissal is **£25,954.50**. This is below the £30,000 threshold and so the principle of grossing up is not applicable. In any event, the claimant's gross pay was used by the tribunal to calculate her losses since her income was not, in fact, taxable.

Calculation

	AWARD FOR UNFAIR DISMISSAL		
(1)	Basic award for unfair dismissal	£164.55	
(2)	Compensatory award for unfair dismissal (loss of statutory rights)	£500	
(3)	10% uplift on (2) under TULRCA	£50	

	Total (1) to (3):		£714.55
	AWARD FOR WRONGFUL DISMISSAL		
(4)	Damages for wrongful dismissal	£329.10 (gross)	
(5)	10% uplift on (4) under TULRCA	£32.91	

	Total (4) + (5):		£362.01
	AWARDS FOR DISCRIMINATION		
(6)	Past loss of earnings		
	18 June 2021 to 30 September 2021 (15 weeks) (at 100%)		
	15 x £109.70	£1645	
	1 October 2021 to 1 September 2023 (99 weeks) (at 90%)		
	99 x £109.70 = £10,860.30		

	LESS income received of £2664.14 = £8196.16 LESS 10% reduction (*Polkey / Chagger*): 8196.16 x 0.1 = £819.61	£7376.55	
(7)	10% uplift on (6) under TULRCA	£902.15 -------------	
	Total (6) + (7):		£9923.70
(8)	Interest on past loss of earnings (from mid-point) at 8%		
	£9923.70 x (546/365) x 0.08		£1187.58
(9)	Injury to feelings & aggravated damages	£10,100	
(10)	10% uplift on (9) under TULRCA	£1010 -------------	
	Total (9) + (10):		£11,110
(11)	Interest on injury to feelings and aggravated damages (from date of dismissal) at 8%		
	£11,110 x (1091/365) x 0.08		£2656.66
	TOTAL	=	**£25,954.50**

Preparation time order

127. In the claimant's Schedule of Loss, she had claimed for "time spent on tribunal". This was removed from her revised Schedule of Loss but, at the remedy hearing on 15 April 2024, the claimant asked for a preparation time order. The claimant had not given any advance notice to the respondent that she was seeking to make an application for a preparation time order and, in any event, there was only just time to consider evidence and submissions at the hearing on 15 April 2024 and the tribunal had to adjourn for a further day for its deliberations (in chambers). The claimant was advised by the tribunal at the end of the remedy hearing on 15 April 2024 that, if she wished to pursue an application for a preparation time order, she needed to put that in writing and by reference to the statutory framework in the Employment Tribunals Rules of Procedure 2013.

128. On 29 April 2024, the claimant emailed the tribunal with a document which she referred to as "a corrected version of my preparation time schedule". However, the claimant did not set out a formal written application by reference to the statutory test. As such, the tribunal has written to the parties (on 21 May 2024) directing the claimant to make any application formally in writing, by reference

to the legal test in Rule 76 of the Rules of Procedure 2013 (and stating whether she would wish to have any application considered on the papers or at a hearing). In this correspondence (into which the respondent was copied), the tribunal directed the respondent to respond to any formal written application for a preparation time order from the claimant within 14 days. At the date of promulgating this Judgment and Reasons, there has been no further correspondence and so, at this time, no further action has been nor can be taken by the tribunal.

Employment Judge McCann

Date: 5 June 2024

Judgment sent to parties on:
20th June 2024

For the Tribunal Office

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/