EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Jason Smith	Alpha Plus Group Limited

Heard at: London Central (by CVP)

Before: Employment Judge Lewis
Professor J Holgate
Ms R Rose

Dates: 12 – 13 August 2024
In chambers: 26 – 27 August 2024

Representation

For the Claimant: Ms F Smith, claimant's sister, together with the claimant

For the Respondent: Mr A. Leonhardt, Counsel

REMEDY JUDGMENT (RESERVED)

1. For the discrimination and unfair dismissal, we award a total of **£168,441.30**. This sum is a grossed up figure, allowing for the tax which the claimant is likely to have to pay. The full calculation of compensation is set out in the Reasons below.

2. The Recoupment Regulations do not apply as the award for loss of earnings was made under the Equality Act 2010.

3. We recommend as follows:

   'Within 14 days of this Judgment being sent to the parties, the respondent will provide the claimant with an electronic and hard copy of a reference on headed paper and duly signed by an appropriate person which states his dates of employment by the respondent; his role/job title and his key tasks and areas of responsibility.'

REASONS

4. By a judgment and reasons sent to the parties on 8 May 2024, the tribunal found that
    a. The claimant was unfairly dismissed.
    b. The claimant's dismissal was discrimination because of something arising from the claimant's disability contrary to section 15 of the Equality Act 2010.
    c. Refusal to postpone the capability hearing on 1 July 2022 at which the claimant was dismissed was a failure to make a reasonable adjustment.
    d. Failure to allow the claimant to bring a friend who was not a work colleague or trade union representative to the appeal hearing was a failure to make a reasonable adjustment.

5. The tribunal made this finding as part of its decision:

> 'We are envisaging what would have happened if the respondent had followed some form of structured Capability or Absence process, and also if the claimant had had the opportunity to talk through the 5 reasons with Mr Brereton. If the respondent had gone through an appropriate process including postponing the capability hearing at least once, our estimate is that the claimant would not have come to the point of dismissal for a further 6 months, ie until 1 January 2023.
>
> After that, we consider there would have been a 50% chance that he would still have been dismissed because his attendance or behaviour would not have sufficiently improved. The reason we think there was a 50-50 chance is because, on the one hand, the claimant was still unwell at the time of the appeal hearing with no obvious sign of improvement. On the other hand, by then he had been dismissed and matters had not been well handled by the respondent, which may well have caused or contributed to why he was still unwell. There is no evidence that the claimant had an underlying mental health condition affecting his ability to function prior to his relationship breakdown which is a specific event. The third OH report said that (by then) it was the ongoing stressors with the school which were impairing his recovery. We are estimating a 50% chance that proper handling by the school would have removed those stressors by that time.'

6. The claimant is not seeking re-instatement.

7. The issues for the remedy hearing were agreed at the case management preliminary hearing for remedy as follows:
    a. What should be the basic award for unfair dismissal.
    b. What award should be made for loss of statutory rights in respect of the unfair dismissal.

c. What award should be made for past loss of earnings.
d. What award should be made for future loss of earnings.
e. Was there a breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures by the respondent and if so, should there be a percentage uplift in compensation? (The claimant is to consider whether he wishes to argue this point, but it was in his original Claim form.)
f. What award should be made for pension loss.
g. What award should be made for interest.
h. What award should be made for injury to feelings / aggravated damages / personal injury.
i. Any necessary grossing up to allow for tax, so that the claimant receives in hand what the tribunal intends him to receive.
j. Whether to make any Recommendations.

8. During the course of this remedy hearing, Mr Leonhardt argued that the tribunal could not make an award for personal injury because it had not been pleaded in the Claim form. We do not agree that it is necessary to plead personal injury. It is not an independent cause of action in the employment tribunal. It is a head of damages to be considered if the claimant succeeds in his discrimination claim. Moreover, it was specifically agreed as an issue at point 'h' in the remedy preliminary hearing. We do not accept Mr Leonhardt's argument that the fact that 'personal injury' was listed on the same line as 'injury to feelings' and 'aggravated damages' meant 'personal injury in so far as it is part of injury to feelings'. We further add that there was discussion at the preliminary hearing regarding what kind of evidence might be required for heading 'h'. As in many cases, the line between injury to feelings and personal injury is fairly arbitrary, and we agree with Mr Leonhardt that the key point is that the tribunal makes no overlapping or double award.

Procedure

9. The claimant provided witness statements from five witnesses including himself: his brother, Guy Smith; his sister, Fiona Smith; Nina de Rosa and Gareth Ling. They all gave oral evidence to the tribunal except Mr Ling, who Mr Leonhardt said he did not need to cross-examine.

10. The oral witnesses were giving evidence from Australia. We fitted in Mr G. Smith and Ms de Rosa before it became too late in the evening for them. We checked several times with the claimant and Ms Smith that it was not too late for them, but they said they were prepared and comfortable to continue and complete the hearing.

11. There was an agreed trial bundle of 273 pages. During the hearing we were also provided with the respondent's written submissions and further written submissions on remedy (R1 and R3); a screenshot of Australian benefits (R4); sick pay figures (R2) and Account summary and transactions (C1).

12. We made similar adjustments to assist the claimant through the hearing as we did in the liability hearing. We took the pace slowly and had regular breaks. We were flexible regarding when the claimant wanted to contribute a piece of evidence, having been sworn in at an early stage. The tribunal was very grateful to Mr Leonhardt for his assistance and flexibility regarding these adjustments.

The law

Recommendations

13. Under s124(3) of the Equality Act 2010, a tribunal can make a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate on the complainant. The tribunal has a wide discretion in the recommendations which it may make.

Injury to feelings

14. A tribunal can make an award for injury to feelings. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, stress, depression etc and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise. Nevertheless, employment tribunals have to do the best they can on the available material to make a sensible assessment. In carrying out this exercise, they should have in mind the summary of the general principles on compensation for non-pecuniary loss by Smith J in (1) Armitage (2) Marsden (3) HM Prison Service v Johnson [1997] IRLR 162, EAT, which can be summarised as follows:
(1) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.
(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, as excessive awards could be seen as the way to untaxed riches.
(3) Awards should bear some broad general similarity to the range of awards in personal injury cases. This should be done by reference to the whole range of such awards, rather than to any particular type of award.
(4) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.
(5) Tribunals should bear in mind the need for public respect for the level of awards made.

15. Three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury, were suggested in the case of Vento v Chief Constable of West Yorkshire Police (No.2) [2003] IRLR 102, CA. The lowest Vento range for claims presented in the year starting 6 April 2022 was £990 - £9,900; the middle band was £9,900 - £29,600; the upper band was £29,600 - £49,300, with exceptional cases capable of exceeding that.

16. The decision whether or not to award aggravated damages and, if so, in what amount must depend on the particular circumstances of the discrimination and on the way in which the complaint of discrimination has been handled. This includes where the respondent's conduct is based on animosity.

17. 'The circumstances attracting an award of aggravated damages fall into three categories:
(a) The manner in which the wrong was committed. The basic concept here is that the distress caused by an act of discrimination may be made worse by it being done in an exceptionally upsetting way. In this context the phrase "high-handed, malicious, insulting or oppressive" is often referred to – it gives a good general idea of the kind of behaviour which may justify an award, but should not be treated as an exhaustive definition. An award can be made in the case of any exceptional or contumelious conduct which has the effect of seriously increasing the claimant's distress.
(b) Motive. Discriminatory conduct which is evidently based on prejudice or animosity or which is spiteful or vindictive or intended to wound is, as a matter of common sense and common experience, likely to cause more distress than the same acts would cause if evidently done without such a motive – say, as a result of ignorance or insensitivity. That will, however, only of course be the case if the claimant is aware of the motive in question: otherwise it could not be effective to aggravate the injury. There is thus in practice a considerable overlap with (a).
(c) Subsequent conduct. This can cover cases including where: the defendant conducted his case at trial in an unnecessarily offensive manner; the employer rubs salt in the wound by plainly showing that he does not take the claimant's complaint of discrimination seriously; the employer fails to apologise; and the circumstances are such as those in *Bungay v Saini*.' (Commissioner of Police for Metropolis v Shaw)

18. Conduct in the course of litigation may be taken into account in assessing the degree to which a person has suffered aggravation of injury to feelings. See City of Bradford Metropolitan Council v Arora [1991] IRLR 165 CA; Zaiwalla & Co v Walia [2002] IRLR 697 EAT. On the other hand, respondents are allowed to defend themselves and mere aggressive advocacy is not a ground for an aggravated award.

19. Common sense requires that regard should also be had to the overall magnitude of the sum total of the awards of compensation for non-

pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage. In particular, double recovery should be avoided by taking appropriate account of the overlap between the individual heads of damage. The extent of overlap will depend on the facts of each particular case.

Personal injury

20. An employment tribunal has jurisdiction to award compensation by way of damages for personal injury, including both physical and psychiatric injury, caused by the statutory tort of unlawful discrimination. (Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] IRLR 481, CA)

21. Under the Judicial College Guidelines for the assessment of general damages in personal injuries cases (17th edition), when making an award for psychiatric damage, factors to take into account are: (i) the claimant's ability to cope with life and work; (ii) the effect on the claimant's relationships with family, friends and those with whom he comes into contact; (iii) the extent to which treatment would be successful; (iv) future vulnerability; (v) prognosis. A 'severe' case is where the injured person has marked problems with respect to factors (i) – (iv) and the prognosis is 'very poor'. A 'moderately severe' case is where there are significant problems associated with factors (i) – (iv), but the prognosis is much more optimistic than 'very poor' as in a severe case. Work-related stress resulting in a permanent or long-standing disability preventing a return to comparable employment would fall within this category. In the latest edition of the Guidelines, (17th) the range for moderately severe is £23,270 - £66,920. A 'moderate' case is where there have been marked improvements by the hearing with a good prognosis. For this, the range is £7,150 - £23,270. The above figures allow for some element for post traumatic stress disorder.

22. The Court of Appeal in BAE Systems (Operations) Ltd v Konczak [2017] EWCA Civ 1188 provides important guidance where factors other than the unlawful act have contributed to a claimant's mental ill-health. Psychiatric injury is single and indivisible if there is no rational basis for an objective apportionment of causative responsibility for the injury. An employer tribunal must try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part that was not so caused. That exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm. If the injury is truly indivisible, the claimant must be compensated for the whole of the injury. Having said that, if the claimant had a vulnerable personality, a discount might be required to take account of the chance that the claimant would have succumbed to a stress-related disorder in any event.

23. Guidance was also provided by Lady Justice Hale in Barber v Somerset CC [2002] EWCA Civ 76 (obiter) and Thaine v London School of Economics [2010] ICR 1422.

Loss of earnings

24. In assessing compensation for a discriminatory dismissal, it is necessary to ask what would have happened if there had been no unlawful discrimination. (Chagger v Abbey National PLC [2010] IRLR 47, CA.) This is similar to the Polkey question in unfair dismissal claims. If there is a chance that dismissal would have happened anyway at that point or at some time afterwards, the compensatory award should be adjusted accordingly.

ACAS Code

25. The ACAS Code of Practice on Disciplinary and Grievance Procedures (2009) is issued under s199 TULCRA 1992. The provisions regarding adjustment of compensation apply to unfair dismissal and discrimination claims (as well as certain other claims). Under s207A(2), if it appears to the employment tribunal that –
    (a) the claim 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%.

26. The ACAS Code does not apply to all cases of capability dismissal. It is only intended to apply to any situation where an employee faces a complaint or allegation that may lead to disciplinary action. The Code applies to all cases where an employee's alleged actions or omissions involve culpable conduct or performance that requires correction or punishment. Where poor performance is a consequence of genuine illness, it is difficult to see how culpability would be involved. The Code does not apply to ill-health dismissals unless there are conduct issues such as where the dismissal is for non-genuine illness or failure to follow ill-health procedures. In those cases, any disciplinary procedure invoked would be invoked to address the alleged culpable conduct by the employee rather than any lack of capability arising from ill-health. (Holmes v Qinetiq Ltd [2016] IRLR 664, EAT.)

Interest

27. A tribunal may award interest on its award and must consider whether to do so. The rate of interest is that fixed by section 17 of the Judgments Act 1838. Since July 2013, that has been 8%. On injury to feelings, interest runs from the date of the injury to the calculation date. For financial loss, interest runs from the midpoint between the discrimination and the calculation date. (Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.)

Facts

Overview of events prior to dismissal

28. The following is a short summary, primarily taken from our fact-findings in the liability decision. It is relevant because it shows that the claimant had significant mental health difficulties which were affecting his emotions and interfering with his ability to work prior to the events which the tribunal found were unlawful discrimination. Although we provide a summary here, we have in mind the totality of our fact-findings in the liability decision.

29. The claimant was employed by the school from September 2006. He had good appraisals in 2017 and 2018, the last two which were carried out. He had a good attendance record over the years. He was first absent with mental health issues in 2020. He believes the reason was a breakdown of his personal relationship in late 2019. The claimant was off sick intermittently from January – March 2020. The claimant is Australian and was visiting family in Australia in March 2020 when the Covid pandemic broke out more widely. He remained in Australia, working remotely for the school, until September 2020.

30. The Occupational Health report dated 8 December 2020 stated that the claimant had an underlying condition of anxiety and depression. He was suffering from very poor sleep. An adjustment to the trigger points for absence management was one of the suggestions.

31. On 11 December 2020, the claimant had a severe cycle accident and required surgery in January 2021 for fractures to his face. On 19 March 2021, the claimant told a colleague that he had had some suicidal thoughts 5 days earlier. He felt better at that point and planned to come into work. His colleague was worried and told a member of the Senior Leadership Team. She said that the claimant had been crying on the phone and she was worried that he was getting worse. As a result, the school told the claimant that he should stay at home to recuperate and encouraged him to seek help. The claimant was and still is very upset about the handling of this incident, that his colleague broke his confidence, that he was told he had to stay at home and the way that was conveyed. However, this was not one of his claims, as opposed to background context, and so it is not one of the matters which we have found to be unlawful discrimination or on which we can award compensation.

32. The claimant's GP signed him off as not fit for work due to 'low mood' from 22 – 29 March 2021. There was then a school break. The claimant tried to come back at the start of the next term on 19 April 2021, but he was still very unwell and unable to sustain this. He was signed off sick again from 20 April 2021 – 7 May 2021 with 'anxiety and depression'. He remained signed off work until the end of the academic year in early July 2021.

33. The OH report dated 28 May 2021 said the claimant's anxiety levels had increased and he was not fit to return to work. The report said he had reported no specific work triggers and he felt it had been mainly personal issues over the previous 18 months that had caused him distress and affected his recovery.

34. The claimant tried to return to work at the start of the new school year on 1 September 2021, having signalled his intention in July 2021. He arrived 1 hour late. He was upset that no timetable had been prepared for him and no allocated desk space. The next day he did not go into work in the morning and had to be phoned and reassured. The claimant then worked until 15 September 2021, but he was tearful at school and his mood was up and down. The respondent's records show he was absent from 16 September 2021 – 7 October 2021.

35. Following a further OH report and discussion (a delayed process during which the claimant was not required to work), the claimant returned to work on a phased return with some adjustments on 17 January 2022. He was off sick with Covid from 22 February 2022, returning on 7 March 2022. He was off sick again on 10 and 11 March 2022. On 15 March 2022, the investigation meeting took place. On 25 March 2022, the last day of term, the claimant was off sick and wondering what was the point. School reopened on 19 April 2022. On 16 May 2022, Mr Brereton emailed the claimant, requiring him to attend a formal capability meeting. The claimant was signed off sick with work-related stress and mental health from 18 May 2022. He continued to be signed off until 11 July 2022. He was dismissed on 1 July 2022.

36. The claimant appealed on 18 July 2022. Ms Gajar's letter on 26 July 2022 did not address his request to bring a friend with him to the appeal hearing. The appeal hearing took place on 16 August 2022 and the outcome was notified on 26 August 2022.

<u>After the refusal to postpone and the dismissal</u>

37. The claimant's older brother, Guy Smith, visited the claimant fleetingly during 3 days in London starting 28 June 2022, as part of a wider European trip. He had last seen the claimant when he dropped him off at the airport to return to the UK from Australia in August 2020. We accept Mr G. Smith's evidence. Although he only saw the claimant for a few hours, that was in part because the claimant did not want to join in any outings. Mr G. Smith knew his brother well, as the latter had lived with him for some time during the Covid period. Mr G. Smith had also visited the claimant in London over the years when on international business trips, and that had included joining in some social gatherings. The claimant had been very proud of the school where he taught and even showed Mr G. Smith where it was.

38. We accept it does not take very long to assess the health of a close friend or relative when something is wrong. At this point, Mr G. Smith observed

that the claimant had lost weight since he last saw him. The claimant was isolated and reluctant to engage in social activities with his brother and family. The claimant joined Mr G. Smith in Italy about a month later, having been persuaded to come with great difficulty. The claimant had to ask a friend who was a policeman to help him get to the airport and walk him through the airport to help him get on the plane. He was unable to do it himself, and had had two failed attempts previously to board the plane. When he spent time with the claimant in Italy, Mr G. Smith realised that the claimant's problems were even worse than he had appreciated in London. The claimant was downbeat, not engaged and a shadow of his former self. He was taking heavy medication which was making him sleep all the time, including in the car when the family went sight-seeing, and during a significant sporting event involving one of the relatives which the family had gone to watch. Mr G. Smith describes the claimant as with the family physically but not mentally. Again, we accept Mr G. Smith's evidence. It is consistent with all the other evidence, and we were given sufficient detail to illustrate his description.

39. Mr G. Smith was very concerned about the claimant when they parted ways at the airport on 1 August 2022. He told their mother about his concern when he returned to Australia. She asked what they could do to help. Mr G. Smith replied, 'Send Fiona over and bring him home'. Fiona Smith is one of the claimant's sisters and has been helping and representing him at his tribunal hearing. She is an experienced Registered Nurse in Australia.

40. Ms Smith arrived in London on 5 October 2022. She found the claimant secluded in his bedroom, isolated, distant and malnourished. He appeared to be disillusioned and hopeless. Ms Smith kept in very close and regular contact after she returned to Australia.

41. The claimant moved to a new apartment in December 2022 after he had to move out of his previous property because the landlord wanted to upgrade and increase rent. The claimant had difficulty finding a new apartment because he was now having to live off his savings. He moved to a 2-bedroom property in December 2022 with the idea of letting out the 2nd bedroom to help him pay, but he was unable to do this because it had mould.

42. On 30 March 2023, the claimant telephoned his sister and was having difficulty breathing due to his stress and anxiety. He had fallen into severe financial hardship and his landlord was threatening to evict him for non-payment of rent.

43. There is a letter from the Lambeth Home Treatment Team dated 16 July 2024 which summarises a period when it provided support. Essentially, the claimant was referred by his GP to the Crisis Outreach Service in May 2023. The letter notes that the claimant's mental state had deteriorated at that point in the context of significant life stressors and he was felt to be at high risk of impulsive self-harm or suicide. The claimant identified to the

Team several major stressors, ie firstly loss of his job. Then, partly as a result, he was facing severe financial difficulties, and as a result of rent arrears, was at high risk of imminently becoming homeless. His previous relationship breakdown was also a factor.

44. Ms Smith and her sister came to London again on 23 August 2023 for 3 weeks because of their concerns. The claimant visited his GP with his sister. The GP records note that an American Express worker recently called an ambulance; 'mental health worsening over the last 2.5 years. Sisters have flown over from Australia to support. Stress escalating due to upcoming tribunal.' The American Express worker had been speaking to the claimant about his level of debt. The GP notes in November 2023 and February 2024 show anxiety about the forthcoming tribunal and anxiety around housing and the risk of eviction.

45. On 6 April 2024, Ms Smith flew out urgently, having received worrying messages from a friend of the claimant. Ms Smith helped the claimant through the tribunal liability hearing at that time. The original idea had been that the claimant would fly back to Australia on 4 April 2024 so he could be supported by his family through the tribunal hearing, but he was so anxious that he was unable to take the flight. The friend who was going to help take the claimant to the airport had found him curled up with anxiety on the floor of his home.

46. The claimant's family managed to persuade him to return to Australia on 9 May 2024 with his sister so that he could get his family's full support. The claimant has remained there since, with the intention of returning to the UK when he is well enough.

47. The claimant saw a new GP in Australia, Dr French, on 17 May 2024. Dr French completed a medical certificate which stated that the claimant was not fit for work. In the box for duration of functional impact, he selected '13 weeks up to 24 months' (as opposed to 'less than 13 weeks' or '24 months or more'). In the box asking how long incapacity to work, study or participate in activities would last, he put 'guarded prognosis, aim for 2025 at functional level'.

48. On 24 June 2024, Dr French referred the claimant to Koch-Thompson Partners ('KTP') because of his symptoms of depression, anxiety and fleeting suicidal ideation. Ms Kocak, a Registered Forensic Psychologist wrote a report dated 23 July 2024 which stated that the claimant presented with symptoms and behaviours consistent with the following DSM-5 diagnoses: (1) the principal diagnosis – a major depressive episode, severe with anxious distress; (2) Post Traumatic Stress Disorder; (3) borderline personality disorder. On (1), Ms Kocak said this was characterised by psychomotor agitation, fatigue or loss of energy nearly every day, feelings of worthlessness or excessive or inappropriate guilt, diminished ability to think or concentrate and recurrent thoughts of death or suicidal. On (2) PTSD characterised by intense or prolonged psychological distress at exposure to internal or external cues that

symbolise or resemble an aspect of the trauma of his job loss, marked physiological reactions to internal or external cues that symbolise of resemble an aspect of the event such as correspondence with lawyers and reliving the experience, persistent avoidance and persistent negative emotional state and irritable behaviour and angry outbursts (with little or no provocation)…' Ms Kocak said that the claimant's symptoms had and continued to cause clinically significant distress in his social and occupational functioning, Despite personality traits which may have caused him some problems throughout his life, until his recent experiences he had maintained consistent employment and functioned at a relatively high level. By comparison, currently he required significant social and practical support for basic tasks and had a range of symptoms which would mitigate him being able to return to work in a similar job.

49. We do not need to repeat here the full description of the claimant's symptoms in the report, but Ms Kocak refers to mood swings, crying and visibly shaking when discussing upsetting situations, periods of rapid breathing, agitation, thought form not always coherent, irritability, panic attacks, rumination, social withdrawal, avoidant strategies, and low motivation.

50. Ms Kocak recommended that the claimant continued with psychological and psychiatric treatment to monitor his symptoms. He would need a range of interventions to return him to a level of reasonable functioning and the legal process would need to be finalised so he can focus on his recovery.

51. On 19 July 2024, Dr French referred the claimant to a Psychiatrist, Dr Kim, for a review of his depression and anxiety management. At that time, at that time taking three psychotropic medications: Citalopram, Quetiapine and Diazepam. Dr Kim stated his impression that the claimant was undergoing a major depressive episode with features of anxiety and agitation, precipitated by multiple psychosocial stressors and losses.

52. Dr French wrote a 'to whom it may concern' letter dated 25 July 2024 stating that the claimant had been his patient since returning to Australia in May 2024. Dr French agreed with the psychologist's diagnosis of a 'major depressive disorder, severe with anxious distress' and 'PTSD, likely secondary to the trauma of his job loss'. He said the claimant was currently unable to perform gainful employment due to his symptoms. His treatment would continue for the foreseeable future. Dr French concluded, 'His prognosis is guarded and I do not expect that he will be able to work for the next 6 months and perhaps longer.'

53. Shortly before the tribunal hearing, the claimant was put onto new medication and admitted temporarily into hospital while the effect on him was checked to ensure a support mechanism was present.

54. The claimant has made an effort to take positive steps in Australia towards his recovery. On 3 July 2024, he entered a 20-day therapeutic residential

programme: 'Step up, step down'. He has applied for and obtained a 'Working with Vulnerable People' card, which is required in Australia to interact with, volunteer and teach children. He made contact with an employment adviser to help him write an updated resume. He is liaising with Canberra Institute of Technology to enrol on courses.

55. We heard evidence from Nina de Rosa, who has been a friend of the claimant for 25 years. She is now Assistant Principal at a Primary School in Canberra. We found her a straightforward and reliable witness and we accepted her evidence.

56. Ms de Rosa was in regular contact with the claimant and she first noticed a change in the way the claimant interacted with her after his bike accident in 2021. The claimant then deteriorated gradually through 2022 and 2023. He missed her birthdays in 2021 and 2022. He started to text rather than telephone, and his text messages became shorter, sometimes with unfinished sentences, or he would leave brief voicemail messages with long pauses. He stopped his social media presence. The claimant started to confide in Ms de Rosa mid 2023, but he did not at that time tell her he had been dismissed. He just said a lot was getting him down. On 4 April 2023, the day the claimant was supposed to be flying back to Australia, he had asked Ms de Rosa to phone him. She spoke to him for about 20 minutes during which he was crying, struggling to breathe, and could not complete a sentence at times. It was in that call that he told her he had not worked for 2 years and asked for volunteer work to try to regain his confidence.

57. On the claimant's return to Australia, Ms de Rosa arranged for him to volunteer at her school, which he did to varying degrees on three occasions. Ms de Rosa says that the claimant is a natural educator whose vocation is to be a successful teacher. She could see he still has the desire and passion to do this, but he is struggling and has badly lost confidence. When he talks about returning to work, she can see that he feels he cannot do the job.

Conclusions

<u>Recommendations</u>

58. The claimant requested two recommendations (1) that the respondent adopt a policy for how to deal with a situation when someone discloses suicidal thoughts; (2) that the respondent provide a statement of service stating the claimant's dates of employment, role(s), tasks and responsibilities.

59. We do not make the first recommendation because we believe it is outside the scope of what we have power to recommend. It does not relate to the claimant or the discrimination which we have found. The claimant accepted that such a recommendation would not help him with the

discrimination which he had suffered. However, Mr Leonhardt observed that the respondent's HR were present at the remedy hearing and would have heard the claimant's suggestion. Although we make no formal recommendation, we do think the respondent would itself find it helpful, should such a situation arise again, if there were guidelines for handling such matters, although of course no case is the same.

60. Regarding the second suggested recommendation, we think that is a reasonable one to make. It is not onerous for the respondent. It is purely factual. Indeed in our experience, it is extremely common these days for employers to provide references which simply state as a matter of fact, dates of employment, role and sometimes, by way of clarification, key tasks and areas of responsibility. An open reference for the claimant – in addition to any specific reference which the respondent will provide if approached by a future employer – will help the claimant look for employment and thus help reduce the effect of his discriminatory dismissal. We therefore recommend as follows:

    'Within 14 days of this Judgment being sent to the parties, the respondent will provide the claimant with an electronic and hard copy of a reference on headed paper and duly signed by an appropriate person which states his dates of employment by the respondent; his role/job title and his key tasks and areas of responsibility.'

Loss of earnings

(i) When is the claimant likely to obtain new employment at the same level of pay

61. The respondent's unlawful behaviour in dismissing the claimant on 1 July 2022 caused loss of earnings. The claimant has not earned anything since his dismissal. He has received certain benefits, which we will refer to below.

62. We cannot read the future. We will make our best estimate based on the evidence available. We have to consider the claimant's health and then how long it is likely to take him to get a new job, bearing in mind also the fact that employers may become aware of his mental health, the fact that he had brought a tribunal claim, and the gap on his CV. The claimant's plan is to recover in Australia, including taking some volunteer steps towards employment, but ultimately to return to the UK to resume his life and career over here.

63. Mr Leonhardt says he does not pursue the novus actus point in his written submissions on understanding that the claimant has not permanently moved back to Australia.

64. We were not provided with any independent medical report specifically directed at the claimant's prognosis for the purpose of this hearing. We were however provided with a great deal of medical evidence. The

claimant's amended schedule of loss seeks future loss of earnings for 5 years at full pay and a further 5 years at half pay. The respondent says it does not ask us to go behind Dr French's recommendations (3 months – 24 months) and nor should the claimant ask us to do so.

65. We also bear in mind the advice of Ms Kocak that as a minimum the legal process would need to be finalised so he can focus on his recovery.

66. We note the positive steps which the claimant has started in Australia which we set out above, including working as a volunteer at Ms de Rosa's school for a few days.

67. On balance, we find that the claimant would be well enough to find and start a new job at a similar pay level on around 1 April 2025. We arrive at this date by considering when the tribunal proceedings are likely to be completed and Dr French's estimates. On 25 July 2024 he gave a 'guarded' prognosis of '6 months and perhaps longer'. We therefore think 1 April 2025 is a fair reflection of the contingency.

68. Having said that, the claimant would not walk into a job the next day. He would have to find a job and apply for it. We were given no evidence about the availability of jobs. Job-hunting does take a period of time because it is a competitive exercise. The claimant would, as we have said, face additional disadvantages. There was publicity regarding the outcome of his liability claim, eg in The Telegraph and in Personnel Today. The claimant had not sought this publicity: we are told there was a journalist at the hearing. The decision is also on the public register. In addition, there will be the gap in the claimant's CV when he was not working. On the other hand, the claimant has taken very tentative first steps by volunteering for intermittent days at Ms de Rosa's school. Also on the positive side, he clearly has many friends and contacts in the teaching world. He may be able to build up some CV content in Australia before returning to the UK. He is taking positive steps to get medical treatment and support, and he has a strong family network around him in Australia where he is at present. Also, certainly in the UK, there is a shortage of teachers and supply work may well be readily available. In our view, the issues such as gaps in CV and publicity are likely to be less of a problem in obtaining supply work.

69. All in all, and this inevitably involves speculation, we would say that the claimant will be earning the same level of pay by 1 January 2026. We believe this is a reasonable estimate based on the likelihood of lower and fluctuating pay levels from earlier dates but taking a while longer to obtain a steady job at the same pay level.

(ii) If the claimant would have been retained after 1 January 2023, would he have successfully remained in the respondent's employment for any length of time?

70. We have said in the liability judgment that there was a 50% chance that after going through the processes, the claimant would not have been dismissed (or not fairly and non-discriminatorily dismissed) on 1 January 2023. Mr Leonhardt argues that there is the further question regarding whether the claimant would have been able to sustain his employment after that date. He suggests a further and composite reduction of the award for loss of earnings to reflect a further 50% chance that the claimant would have been dismissed in July 2023 and a further 50% chance that he would have been dismissed in July 2024, so that he would have only a 1 in 8 chance of remaining in employment after July 2024.

71. We do not agree with this. The 50% chance of not being dismissed as at 1 January 2023 is based on the 50% chance that the claimant's mental health, sense of grievance, and attendance would have sufficiently improved and stabilised by that date not to warrant dismissal. It is the 50% chance of being dismissed which reflects the risk of ongoing mental health problems disrupting the claimant's attendance and work relations. Once the claimant would have reached a point of stability and acceptable attendance, there is therefore no further reason to consider he would be unable to sustain that. He had been successfully employed by the school since 2006, with the two most recent appraisals being positive, until his mental health started to deteriorate in late 2019 / 2020. Although the claimant had a depressive episode in his 20s, there is no evidence this was an ongoing problem. He had managed to work successfully for many years with his underlying personality disorder. The claimant loved his job and it was a job which he was good at. There has been substantial further deterioration since the claimant's dismissal, but that has been substantially caused by the dismissal and its consequences. It would be embarking on a sea of speculation to suggest that if the claimant was fairly kept on from 1 January 2023, he would then have relapsed and lost his job in the future.

(iii) What would the claimant have earned had he not been dismissed on 1 July 2022

72. The claimant was paid in full for July and August 2022 and he was also in August 2022 paid 13 weeks' pay in lieu of notice. For our calculation purposes, this means the claimant's loss of earnings started on 1 December 2022.

73. The following figures are agreed. The claimant's gross annual basic pay at the termination date was £51,500.00. Gross weekly pay was £990.38 and net weekly pay was £692.73. Salary would have increased by 3% each September.

74. The claimant was also provided with free breakfast and lunch when he was at school. The claimant values this as £52/week. We think that is a reasonable estimate, but it would not apply during school holidays. The claimant also would not be having his free meals when he was absent through sickness, but we will say that the £52 can encompass those days

as an average. We will take the number of school days per year as 190 (the minimum local authority maintained schools must open in England). That equates to 38 weeks. 38 x £52 ÷ 52 weeks = an average of £38/week across the whole year. We will take the value of this to increase by 3% each September.

75. Mr Leonhardt argues that the claimant would not have been paid full wages had he continued to work rather than not been dismissed, because he would have been off sick and because he had nearly used up his contractual sick pay. Mr Leonhardt says the claimant would have remained off sick for the remainder of any employment he had with the respondent, or in any event, for a period of time.

76. The claimant's contractual sick pay provided 3 months full pay (including SSP) and 3 months half pay plus SSP in a rolling 12 month period. Exactly how this works was not clear and in the experience of the tribunal lay members, is usually programmed into an employer's payroll systems. However, after some lengthy discussion, the parties were willing to agree that at the termination date, the claimant's balance of entitlement was 6.2 weeks' sick pay (the claimant and Ms Smith expressed this as 65 half days). That balance would be at the half pay + SSP rate. If we are wrong that the parties had agreed, we prefer the calculations which the respondent supplied, ie the 6.2 weeks, because these were carefully itemised and explained. The claimant could not clearly explain what was wrong with that calculation.

77. We accept there is a possibility that the claimant would have had some time off sick in the period up to 1 January 2023 had he not been dismissed on 1 July 2022. We cannot estimate how much time with any precision, because it is hard to know the effect had there been a properly structured meeting and constructive discussion, but on the other hand, being put onto a 30-day or 60-day programme. It is also difficult to anticipate the effect of the pending school holidays. The claimant had been signed off until 11 July 2022, but that appears to have been precipitated by the invitation to the capability hearing and to last while it was outstanding.

78. We take as our starting point our estimate of a 50% chance of significant improvement by 1 January 2023, such that he would not then have been dismissed. However, that does not mean that the claimant's attendance would necessarily have been 100% if he improved to the extent that he would and should have been retained. On the other hand, the 50% chance of not improving sufficiently, does not necessarily mean he would have been 100% absent. Doing the best we can and bearing in mind the lengthy school holidays in the 6 month period, we will deduct on the basis that the claimant would have had a further 6.2 weeks' sick leave and that these would have been paid at half pay plus SSP.

79. SSP at the time was £99.35/week gross. We cannot work out from the payslips what tax rate would have been applied to the SSP element. Applying as an approximation 40% tax to the SSP, this would be £59.61

net/week. Net weekly pay in full was £692.73. Half pay would have been £346,36. The net amount not paid because of sickness absence would therefore be the other half ie £346 less the £59.61 SSP also paid = £286.39 x 6.2 weeks = £1,775,62. We do not have sufficient information to be sure which tax band would have applied to the SSP element, and that was not explained to us, but we take a broad brush approach.

80. We do not consider that it is appropriate to make any deductions for the period after 1 January 2023. That is sufficiently covered by the 50% contingency that the claimant would not continue to be employed. If on the other hand, he had improved to the extent that he would have continued to be employed, then we do not think it is appropriate to build in any deductions for any further sick leave which might have occurred at a time when it would have been unpaid because of the rolling12 month rule.

Earnings and benefits since dismissal

81. The claimant has not received any paid earnings since his dismissal.

82. It is agreed that the claimant has received a total of £8051.26 in social security benefits in the UK between his dismissal and 12 August 2024.

83. The claimant has received social security benefits in Australia from 20 June 2024. This is at the rate of AUS$778.30/fortnight and a total of AUS$4,280.65 at the date of the remedy hearing. Applying the exchange rate at 13 August 2024 of £0.52 to the Australian dollar, the claimant has received £2,225.94 to date at a rate of £404.72/fortnight or £202.36/week.

Pension loss

84. The respondent's weekly pension contributions as at the termination date were £163.22. These would also have increased by 3% every September. It was agreed that the value of loss of pension would be calculated by the contributions method, ie adding the value of the employer's weekly contribution to the weekly net pay.

Injury to feelings

85. There is no doubt that the claimant was already experiencing distress and negative effects on his mental health as a result of a number of factors prior to his dismissal and the unlawful matters we have upheld. Some of the causes were entirely outside the respondent's control, ie his relationship breakdown in 2019; his social isolation during Covid and his serious bike accident and injury in December 2020 / January 2021. By the time of his dismissal, the claimant had already spent large amounts of time off or coming in late because of anxiety and depression, and he had already experienced – albeit on only 1 occasion – suicidal thoughts.

86. There were then some experiences at work which compounded the claimant's mental health issues. He lost a great deal of confidence in the

school in March 2021 over the handling of the information that he had felt suicidal and being told to stay at home; the failure of Mr Brereton to phone him over the 2021 summer holidays as promised, and the lack of a prepared timetable for him on 1 September 2021 which he took as an indication of not wanting him back. None of these matters were claimed as independent acts of discrimination and we made no findings on them as such. We therefore cannot award injury to feelings for such matters.

87. There is however considerable evidence that the claimant had additional and specific injury to feelings arising from his dismissal, including the connected matters which we found unlawful (ie not postponing the capability hearing and not letting him bring a friend to the appeal). As well as his distress at losing his job, was his extra frustration, distress and sense of isolation at not being in a position to present his case orally and fully.

88. The claimant's dismissal hit him hard and caused a great deal of injury to his feelings specifically for that reason. Teaching is the claimant's vocation. He was good at it. He loved his job at the school, which he had held for 15 years. He proudly showed his brother the school on one of the latter's visits to London. Dismissal has deprived the claimant of that job satisfaction and sense of purpose and worth. It has severely damaged his confidence, which was very visible to Ms de Rosa when he volunteered at her school. The claimant was so ashamed of his dismissal that he did not tell Ms de Rosa, who was a close friend, until some time afterwards. He initially hid it from his parents when he spoke to them on the phone. He was ashamed and embarrassed and felt he had failed. He found it hard because he had been successful and that had come to an end. He subsequently felt guilty at having hidden it from them. These feelings of shame strained his relationships with his family. The claimant became reluctant to leave the house because he was afraid of seeing people and them asking how he was and how work was. For the same reason, he withdrew from social media platforms. All this increased his sense of isolation, anxiety and depression. The loss of confidence and sense of worth have remained with the claimant, as has his guilt over hiding his dismissal from his family, and regarding the degree of emotional and financial support they have had to provide him.

89. Because of the long-lasting damage to the claimant's sense of self and personal worth as well as his feelings of humiliation that he could not hold down his job, we consider that the upper end of the middle band of Vento applies. In making this award, we have been careful not to add in injury to feelings caused by matters on which we have not made any finding of unlawful discrimination. We have also been mindful of our award for personal injury. There is inevitably overlap between the two awards and the important thing is not to award twice for the same injury. We are not including under this heading any award for the suicidal ideation. We therefore award £29,000 for injury to feelings for the dismissal, the failure to further postpone the capability hearing and the failure to allow him to bring a friend to the appeal.

Aggravated damages

90. We make no award for aggravated damages. The distress caused to the claimant by the respondent, including Mr Brereton's attitude in dismissing him, which the claimant considers off-hand and disrespectful, is fully compensated within our award for injury to feelings. We know that the claimant experienced his treatment as oppressive. Mistakes were made, but we would not go as far as to say that the respondent's conduct in the matters which we have found to be discrimination was spiteful, vindictive, high-handed, malicious or insulting.

Personal injury

91. Notwithstanding the issue of whether personal injury needed to be pleaded, Mr Leonhardt said his main point was that the tribunal should award what was fair overall, bearing in mind that there were several contributing factors to the personal injury.

92. We apply the general category in the Guidelines, which incorporates an element for PTSD. We do not think it appropriate to apply the stand alone category for PTSD in this case.

93. Mr Leonhardt accepted that if we were to use the Judicial College Guidelines, it would be the 17th edition and that the claimant's situation would fall within the 'moderately severe' category. We agree.

94. Ms Kocak diagnosed the claimant in July 2024 as having symptoms and behaviours consistent with 'a major depressive episode, severe with anxious distress' and Post Traumatic Stress Disorder. Ms Kocak said that the claimant's symptoms had and continued to cause clinically significant distress in his social and occupational functioning, She said that until his recent experiences he had maintained consistent employment and functioned at a relatively high level. By comparison, he now required significant social and practical support for basic tasks and had a range of symptoms which would mitigate him being able to return to work in a similar job. Ms Kocak said the claimant would need a range of interventions to return him to a level of reasonable functioning and the legal process would need to be finalised. Dr Kim confirmed that the claimant was undergoing a major depressive episode with features of anxiety and agitation. He said this was precipitated by multiple psychosocial stressors and losses. Dr French agreed with the psychologist's diagnosis of a major depressive disorder and PTSD, likely secondary to the trauma of his job loss.

95. The medical advice which we have is therefore that these symptoms were caused by multiple factors including, to a large degree, the trauma of job loss.

96. Regarding the Judicial College Guidelines' factors to be taken into account for psychiatric injury, the claimant has been struggling to cope with both life and work. His illness has put some strain on his relationship with family and friends, although these relationships do appear to be strong.

97. The medical evidence suggests that treatment will be successful at some point. In terms of prognosis, as discussed in relation to our findings on future loss of earnings, the claimant is likely to be fit to work from about 1 April 2025. Although the claimant has had and still has marked problems with life and work, the medical evidence does not suggest the prognosis is 'very poor' as in a severe case and it does not suggest that he will be permanently unable to return to comparable employment. The claimant has improved to some extent since going to Australia, and the end of tribunal proceedings, which it is suggested are a block to recovery, should be soon. Dr French's estimate was 'guarded'. We would not go as far as saying that at this stage there has been 'marked improvement' by the hearing with a 'good prognosis' (which would be the 'moderate' category), but we would not say the prognosis is 'very poor' either. We therefore agree with Mr Leonhardt that 'moderately severe' is the correct category in the Judicial College Guidelines.

98. We would place the claimant at the lower end of 'moderately severe', although not at its very lowest end, because the prognosis – while not yet 'good' – is not 'poor'. Dr French is guardedly optimistic in his assessment of time-scale. For the totality of the claimant's personal injury, regardless of the cause, we would therefore place the appropriate figure as £30,000.

99. However, that is not the end of our consideration. The claimant's mental ill-health has been caused by a variety of factors, not just his dismissal and the unlawful actions. The dismissal is clearly a major factor, for the reasons we describe in relation to our award for injury to feelings, and also because we can see the claimant's health deteriorated even further following the dismissal, due to the dismissal itself and to factors caused by the financial consequences of that dismissal. The letter from the Lambeth Home Treatment Team dated 16 July 2024 notes that the claimant's mental state had deteriorated in the context of significant life stressors and he was felt to be at high risk of impulsive self-harm or suicide. The claimant identified to the Team several major stressors, ie 'firstly' loss of his job. Then partly as a result, he was facing severe financial difficulties and as a result of rent arrears, was at high risk of imminently becoming homeless. His previous relationship breakdown was also said to be a factor.

100. The question is whether we can identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part caused by other factors, such as the previous relationship breakdown and aspects of the employer's conduct long before the dismissal. We think that we can identify an element of additional harm which is specifically attributable to the dismissal. This is partly by comparing the symptoms before and after dismissal, and also

noting the diagnosis of PTSD which referred in part to 'psychological distress at exposure to internal or external cues that symbolise or resemble an aspect of the trauma of his job loss'.

101. Prior to dismissal, the claimant was already having days unable to get out of bed or up on time and feeling hopeless. He had already had 1 occasion of suicidal thoughts and had a private referral to a psychiatrist. He was already disengaging to some extent from friends, eg as to the nature of his communications with Ms De Rosa.

102. However, following dismissal there were far more crisis incidents and interactions with his GP than previously. In particular, there were more prolonged and frequent incidents of suicidal ideation. On 19 May 2023, the claimant's GP referred him to the Lambeth Crisis Team. The claimant was having suicidal thoughts and this continued for a while. The Team identified multiple stressors causing the claimant's deterioration, ie firstly his loss of job, and then the resulting severe financial difficulties and in turn, the risk of homelessness; all this on top of the previous relationship breakdown.

103. Prior to his dismissal, but in the period when he was suffering from depression and anxiety, the claimant was still able to travel to see his family at the start of the Covid pandemic and return some time afterwards. Following his dismissal, he needed a friend to take him to the airport and walk him through when going to Italy to meet with his brother in July 2022. It had taken two previous attempts when the claimant could not get on the plane due to anxiety. Then in April 2024, even when he knew he needed intensive support through the tribunal hearing, the claimant was unable to leave for the airport to go home to Australia and his sister had had to fly to the UK to be with the claimant during the tribunal hearing instead. When the claimant did go back on 9 May 2024, he was accompanied by his sister.

104. Subsequent to the dismissal and as time went on, the claimant's sister had to make several visits to the UK to support her brother and remotely arrange for medical and psychiatric support.

105. In so far as post dismissal psychiatric harm was caused by factors other than dismissal, we cannot rationally divide that harm. In any event, we would say that harm caused by social isolation following termination; by the stresses of the litigation process when he had to relive his dismissal; by severe financial difficulties and consequent housing difficulties because he was unable to afford his rent, were all a reasonably foreseeable direct consequence of the dismissal. In so far as the claimant's previous relationship breakdown was still a factor in his mental health, we cannot rationally divide that harm.

106. Taking everything into account, we consider that, in so far as we can rationally divide the harm, the respondent was responsible for 30% of the £30,000, ie £9000.

107. In arriving at this figure, we have also been careful not to duplicate elements in our award for injury to feelings.

ACAS Code

108. The claimant seeks an uplift of compensation for breach of the following paragraphs of the ACAS Code of Practice on Disciplinary and Grievance Procedures: 4, 13, 15, 16, 19, 21, 28 and 44. Paragraph 44 is about the procedure when the claimant has raised a grievance so it does not apply.

109. The respondent says the Code does not apply in this case because the claimant was not dismissed for misconduct, he was dismissed for capability, which did not involve culpable conduct as required by the guidelines in Qinteiq.

110. We agree that the claimant was dismissed for capability which did not involve culpable conduct.

111. The reason for dismissal was the claimant's absence record together with four matters of conduct arising from the claimant's disability, ie

I. The claimant's repeated failure to follow the absence reporting procedures.
II. The claimant's unpredictable temperament.
III. The claimant's overly strict classroom management resulting in complaints from parents and pupils.
IV. Sleeping at work.

112. Those additional four matters of conduct were not misconduct or culpable behavour. They were behavioural matters which arose from the claimant's disability of anxiety and depression as Mr Brereton recognised

113. The general tenor of the Investigation report on which Mr Brereton relied, also linked the behavioural matters to the health concerns. The investigation report said that there was a case to answer in relation to falling asleep and not following the protocol when being absent from work. It said that these should be considered as part of a wider assessment of the claimant's capability to do his role rather than as disciplinary matters. As managers of the school, they felt they had exhausted all reasonable options to try to support the claimant. It was felt there was a need to review and assess the claimant's capability to carry out his role and recommended it was done at a formal meeting. Mr Brereton's invitation to the claimant to attend the capability meeting, then stated he needed to consider whether the claimant was capable of fulfilling his role and make a decision regarding his continued employment or whether additional support could be provided.

114. We therefore find that the ACAS Code on disciplinary and Grievance Procedures did not apply and we make no uplift for any breach of the Code.

115. That is the end of the matter on the Code, though we mention in passing that the references to the right to be accompanied in the Code are to the specific statutory right to be accompanied under the Employment Relations Act, which is a right to be accompanied by a work colleague or trade union representative, not a right to be accompanied by a friend outside the employing organisation. The basis for our finding of discrimination was a failure to make reasonable adjustments under the Equality Act 2010, which is a different matter.

Interest on discrimination awards

116. It is appropriate to order interest on our award. The calculation is below.

Unfair dismissal

117. The basic award for unfair dismissal is agreed at £10,278.00. The award for loss of statutory rights is agreed at £500.

118. We have made our award for loss of earnings under the heading of discrimination. We cannot award the same sum twice, so we do not award it under the heading of unfair dismissal and recoupment will not apply.

Grossing up

119. Our total award will be grossed up to allow for the likely tax which the claimant will have to pay on the award, so that he receives in his hand what we intend him to receive. The claimant may well be in Australia at the time he receives the award but the parties agreed that grossing up should be calculated on the basis of taxation applicable in England. The calculation is below.

Calculation

120. We have used 12 August 2024 as the calculation date dividing past and future loss, since that is when we were given the most precise evidence regarding the position on earnings and benefits.

Unfair dismissal

Basic award	**£10,278**
Loss of statutory rights	**£500**

Discrimination

General damages

Injury to feelings	£29,000
Personal injury	£ 9.000
Sub-total	£38,000

Interest at 8% pa on £38,000 from 1 July 2022 (discrimination date) to 12 August 2024 (773 days) = £6,438.14

Total compensation for injury to feelings, personal injury and interest = **£44,438.14**

Past loss of earnings, meal benefits and pension 1 July 2022 to 12 August 2024

(i) Initial 6 month period up to 31 December 2022

1 – 31 December 2022 (ie after the payments in July/August and for notice):
4 weeks 2 days @ £893.95 (basic net pay (£692.73) + pension (163.22) + £38 (breakfast/lunch value)) = £3,831.21

Less:
£1,775,62 (earnings which would not have been paid due to absence on reduced sick pay at some stages in the 6 month period)

Sub-total past loss of earnings in initial 6 month period = £2,055.59 (£3,831.21 - £1,775.62)

(ii) 1 January 2023 to 12 August 2024 (past loss after the initial 6 month period)

From 1 January 2023 to 31 August 2023 (34 weeks 5 days) @ £893.95 (basic net pay (£692.73) + pension (163.22) + £38 (breakfast/lunch value)) = £31,042.84

From 1 September 2023 to 12 August 2024 (49 weeks 4 days) @ £920.77 (3% increase in weekly rate) = £45,578.12

Sub-total past loss 1 January 2023 – 12 August 2024 = £ 76,620.96 (£31,042.84 + £45,578.12)

Less:
- UK benefits up to 12/8/24 - £8,051.26
- Australian benefits up to 20/7/24 - £2,225.94
- Australian benefits from 21/7/24 to 12/8/24 (3 weeks) at the rate of £202.36/week = £607.08
- Sub-total of deductions = £10,884,28

Sub-total past loss after the 6 month period less deductions = £65,736.68 (£76,620.96 minus £10,884.28)

Apply 50% deduction = £32,868.34

Sub-total past loss of earning since dismissal - £32,868.34 + £2,055.59 = £34,923.93

Interest at 8% on £34,923.93 from the midpoint of 1 July 2024 (discrimination date) to 12 August 2024 (773 ÷ 2 = 386.5 days) = £2,958.49 (£34,923.93 x 8% = £2,793.91 p.a.; divide by 365, x 386.5)

Past loss of earnings including interest = £34,923.93 + £2,958.49 = **£37,882.42**

Future loss of earnings, meal benefits and pension

Loss of earnings from 13 August 2024 until 31 December 2025

Weekly rates:
From 1/9/23 (3% increase) = £920.77
From 1/9/24 (3% increase) = £948.39
From 1/9/25 (3% increase) = £976.84

13 August 2024 – 31 August 2024 = 2 weeks 5 days @ £920.77/week = £2,499.23
1 September 2024 – 31 August 2025 = 52 weeks @ £948.39/week = £49,316.28
1 September 2025 – 31 December 2025 = 17 weeks 3 days @ £976.84/week = £17,024.92
Sub-total future loss of earnings= £68,840.43

Apply 50% deduction = **£34,420.22**

TOTAL
Basic award = £10,278
Loss of statutory rights = £500
Injury to feelings, personal injury + interest = £44,438.14
Past loss of earnings, pension, meal benefits (50% deduction having been applied after 1st 6 months), with interest = £37,882.42
Future loss of earnings (50% deduction having been applied) - £34,420.22

Sub-total = £127,518.78

Grossing-up

The parties agreed to apply UK tax rates. Our calculation is as follows.

£30,000 tax free, leaving balance of £97,518.78 (£127,518.78 - £30,000)

The award will be paid in tax year starting 1 April 2024. In that year, the basic rate is 20% up to and including £50,270. Then the higher 40% rate applies. There is an additional rate of 45% on sums over £125,140. There is a personal allowance of £12,570.

The first £12,570 will be tax free. The next (£50,270 - £12,570) £37,700 will be taxed at 20%. The balance of £47,247.78 (£97,518.78 – £50,271) will be 40%

£37,700 divided by 0.8 = £47,125
£47,247.78 divided by 0.6 = £78,746.30
£12,570 untaxed
Sub-total grossed up elements = 138,441.30

Grossed up balance of £97,518.78 = £138,441.30

Add back the £30,000 tax free element = **£168,441.30**

Employment Judge Lewis

Dated: 29 August 2024

Judgment and Reasons sent to the parties on:

30 August 2024
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For the Tribunal Office