



EMPLOYMENT TRIBUNALS

Claimant
CJ

Respondent
PC

Heard at: Leeds by CVP **On:** 16 and 19 June 2023
Before: Employment Judge Davies
Ms BR Hodgkinson
Mr J Howarth

Appearances

For the Claimant: Mr R Downey (counsel)
For the Respondent: Mr P Smith (counsel)

REMEDY JUDGMENT

1. The Respondent shall pay the Claimant the following sums in respect of the complaint of unfavourable treatment because of something arising in consequence of disability by reducing the Claimant's pay to half pay:
 - 1.1 Compensation for the difference in pay grossed up to allow for payment of tax at 20%: **£4,264.30**
 - 1.2 Interest: **£1,030.28.**
2. The Respondent shall pay the Claimant the following sums in respect of the complaint of victimisation by instigating the Trust and Confidence process:
 - 2.1 Compensation for loss of earnings between 9 January 2020 and 20 November 2020 grossed up to allow for payment of tax at 20%: **£20,793.81**
 - 2.2 Interest : **£2,289.71**
 - 2.3 Compensation for loss of earnings from termination of employment to date: **£3,586.93**
 - 2.4 Interest : **£368.71.**
3. In respect of both the unfavourable treatment and the victimisation complaints:
 - 3.1 Compensation for injury to feelings: **£35,000**
 - 3.2 Compensation for psychiatric injury: **£15,256**
 - 3.3 Interest : **£13,834.85.**

REASONS

Introduction

1. This was the hearing to determine the remedy to be awarded to the Claimant following the Tribunal's liability judgment dated 10 May 2022. This judgment should be read together with the liability judgment, the contents of which are not repeated. This remedy hearing has been delayed because the Tribunal gave the parties permission to obtain joint medical expert evidence and the process of doing so has been protracted. The Claimant was again represented by Mr R Downey, counsel, and the Respondent by Mr P Smith, counsel. The Claimant is also now represented by solicitors.
2. There were two additional files of documents: an agreed file of remedy documents and a further file of job adverts collated by the Respondent. The Tribunal heard evidence from the Claimant. We took regular breaks. The Respondent had produced a witness statement for Ms NS (Principal HR Advisor). However, that evidence was prepared in response to a section of the Claimant's witness statement that set out her evidence about the conduct of the Trust and Confidence process. In discussion at the outset of the hearing, it was agreed that it was neither necessary nor proportionate for the Tribunal to make findings about those matters, given that the upheld complaint of victimisation was about instigating the Trust and Confidence process, not about the subsequent conduct of that process. Ms NS therefore did not give oral evidence, and the Claimant was not cross-examined about those parts of her witness statement. The Respondent had also produced a witness statement from Mr AT, an Employee Benefits Advisor, but that only explained how the file of job adverts had been prepared and it was agreed that it was not necessary for Mr AT to give oral evidence or be cross-examined either.

The Issues

3. The parties agreed:
 - 3.1 The difference between the amount the Claimant was paid and the amount she should have been paid between 16 July 2019 and 17 September 2019 was £3,411.45 net.
 - 3.2 The interest payable on that sum is £1,030.28.
 - 3.3 The difference between the amount the Claimant was paid between 9 January 2020 and the termination of her employment on 20 November 2020, and the amount she would have been paid if she had been on full pay throughout that period, was £16,635.05.
4. The outstanding issues were:
 - 4.1 What financial losses were caused by the victimisation upheld by the Tribunal?
 - 4.1.1 In particular, did the victimisation cause the ill health that led to the termination of the Claimant's employment?
 - 4.1.2 Is there a chance the Claimant's employment would have terminated on ill health grounds in any event and, if so, when?
 - 4.1.3 Did the Claimant take reasonable steps to mitigate her losses?

- 4.2 What injury to feelings, if any, was caused by the found acts of discrimination/victimisation and what compensation should be awarded for that?
- 4.3 Did the found acts of discrimination/victimisation cause psychiatric injury and what compensation should be awarded for that?
- 4.4 What interest is payable?

Legal principles

5. An award of compensation in a discrimination case is designed to put the individual so far as money will allow in the position she would have been in but for the discrimination.
6. Awards for injury to feelings are compensatory, not punitive. The aim is to compensate the Claimant fully for the proven, unlawful discrimination for which the Respondent is liable. The crucial consideration is the effect of the unlawful discrimination on the Claimant. The Tribunal will have regard to the well-established bands of compensation for injury to feelings: see *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] IRLR 102, and to the relevant Presidential Guidance on Employment Tribunal Awards for Injury to Feelings. In this case, the 2019 Guidance applies. The applicable bands are:

Lower band (less serious cases): £900 - £8,800

Middle band (cases that do not merit an award in the upper band):

£8,800-£26,300

Upper band (the most serious cases): £26,300 - £44,000

Only in the most exceptional cases would the award be capable of exceeding £44,000.

7. The Tribunal also has the power to award compensation for personal injury, both physical and psychiatric, in addition to any award for injury to feelings: see *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481. The award is based on the statutory tort of discrimination and the Respondent is liable for injury caused directly by the discrimination. There is no “reasonable foreseeability” test; the damage must flow naturally and directly from the wrong: see *Essa v Laing* [2004] ICR 746, CA.
8. If the injury or harm is caused by multiple factors, the Respondent is only liable if its contribution has been material, and to the extent of its contribution, unless the harm is truly indivisible. The Tribunal is concerned with whether the harm is divisible, not the causative contribution. The Tribunal must identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer’s wrong and a part not so caused. The question is whether the Tribunal can identify, however broadly, a particular part of the suffering that is due to the harm, not whether it can assess the degree to which the wrong caused the harm: see *BAE Systems (Operations) Ltd v Konczak* [2018] ICR 1.
9. The Tribunal must take care not to double count, e.g. where there is psychiatric injury and injury to feelings.

10. The Tribunal applied the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803. The applicable rate of interest is 8%.

Pay discrimination complaint

11. As noted, the parties agreed the net sum owed **£3,411,45** and the interest payable on that **£1,030.28**.
12. Those sums will be taxable in the Claimant's hands and are therefore to be grossed up. The Tribunal applied the marginal tax rate of 20%.
13. The injury to feelings caused by this element of discrimination is dealt with below.

Factual findings about earnings and financial losses

14. The Claimant was certified as permanently unfit to work in any capacity by Dr GA, Occupational Health Physician and Independent Registered Medical Practitioner, on 21 September 2020. Dr GA's certification did not specify the nature of her ill-health. He certified the Claimant as "unlikely to be capable of undertaking any gainful employment before her normal retirement age". That entitled her to a Tier 1 pension. The certificate defines "gainful employment" as paid employment for not less than 30 hours per week for a period of not less than 12 months and makes clear that it does not have to be employment commensurate in terms of pay and conditions with the current employment. There was a separate certification, for HMRC purposes, that the Claimant was unlikely to be capable of doing any other paid work in any capacity, other than to an insignificant extent, before her state pension age. That related not to her entitlement to the Tier 1 pension, but to the annual allowance test under the Finance Act 2004. The Tribunal was told, and accepts, that the Claimant is able to undertake paid work of any amount without affecting her entitlement to a Tier 1 pension under the relevant Regulations. We therefore approach the calculation of her future losses on the basis that she can do paid work and continue to receive her ill-health retirement pension.
15. When the Claimant took ill-health retirement, she opted to take a lump sum and a reduced annual payment, rather than taking a higher annual payment without a lump sum. In her schedule of loss, she set out a calculation of the difference between the amount she would have earned had she remained in employment and the amount she would have earned if she had taken her full ill-health retirement pension, rather than taking a lump sum and reduced pension. Her counsel submitted at the outset of the case that it was appropriate to value her losses in that way, because she had chosen to take a reduced pension and a lump sum. The Respondent agreed and the hearing proceeded on that basis. The Claimant's counsel did not indicate any departure from that approach in his written or oral closing submissions. However, in reply to the Respondent's closing submissions he suggested for the first time that, if the Claimant had to give credit for other sums she has earned since her employment terminated, her losses should be calculated on the basis of the pension she actually received, not the pension she would have received if she had not taken a lump sum. It had

been clear throughout that the Respondent was contending that the Claimant should give credit for sums she has earned since termination of her employment. Nothing had changed and no explanation was provided for this change in position. No calculations were provided to show how the lump sum should be accounted for if the losses were calculated in a different way, nor were calculations of the loss on that basis provided. The Tribunal found that the appropriate way to calculate the loss arising from the difference between the Claimant's salary and her ill-health retirement pension was on the basis advanced by the Claimant in her schedule of loss and throughout the hearing.

16. The Claimant's schedule of loss was based on an assumption about the pay increase she would have received in the current financial year. That has now been finalised. The Tribunal therefore calculated the losses for the current financial year more precisely. The Claimant's (notional) full pension this year is 10.1% higher than her previous year's (notional) full pension of £29,925.12. The Tribunal calculated this year's figure as £32,947.56. The Claimant's salary would have been £40,221 this financial year. The daily difference is therefore £19.92 and the total difference over 77 days is therefore £1,534.40. Adjusting the calculations in the Claimant's schedule of loss by substituting the precise calculation for this financial year in place of the estimate, the difference between the Claimant's earnings had she remained in her job, and her pension earnings (had she not taken a lump sum) from the termination of her employment to date is **£13,406.24** net.
17. The Claimant stopped working in her secondary employment at the local venue more than a year before the victimisation took place. Her income prior to termination of her employment did not include income from work at that venue.
18. The Claimant did have some earnings from other work that she did while still employed by the Respondent. She said in her oral evidence that this was work as a TV or film "extra", and also events work, distributing free samples to people. No documentary evidence was provided of work as a TV or film extra prior to the termination of her employment. In cross-examination, it was put to the Claimant that she could not have done such work while working full-time as an HR advisor for the Council, given that it mostly fell on weekdays, and given that, on her own evidence, it tended to arise at very short notice. She then referred to the fact that the events work tended to give more notice. The relevant documentary evidence related to events work prior to the termination of the Claimant's employment, not work as an extra. The Tribunal found on the evidence before us that the Claimant did some events work prior to the termination of her employment, but no significant work as a TV or film extra.
19. The Claimant had provided copies of invoices she had raised for work done. They amounted to £1,112.91 in the year 2017/2018 and £1,489.69 in the year 2018/2019. The Claimant said that these invoices might include sums to cover expenses, such as travel or parking. She also said that sometimes she paid commission. She did not provide any detailed evidence or calculations of those elements. Some of the invoices from after her employment ended included payments to cover expenses. Some of them included deductions of commission. The Tribunal accepted that in principle the Claimant may have incurred some expenses doing this work, such as travel or parking. The Claimant's earnings

from other work were nil in each of the two subsequent financial years 2019/2020 and 2020/2021. The Tribunal noted that she had her operation in March 2019. We also noted the impact of Covid from March 2020. Doing the best we could, the Tribunal found that the best representation of the level of the Claimant's earnings from other work prior to the termination of her employment was the 2018/2019 information. In the absence of evidence, we made a modest deduction for expenses, and concluded that the Claimant's gross income from work other than her job with the Respondent prior to termination of her employment was around **£1,400** per annum.

20. The Claimant started to receive her ill-health retirement pension with effect from 20 November 2020. She also received pay in lieu of two months' notice amounting to **£5,957.50** gross. That was in lieu of her remaining employed and being paid from 20 November 2020 to 20 January 2021.
21. Since the Claimant's employment ended, she has done voluntary work for two separate organisations in relation to food poverty. The Claimant collects food that would otherwise go to waste and makes it available for those who need it.
22. The Claimant has also done paid work as a film or TV extra and events work since her employment ended. The invoices and documentary evidence she supplied show total gross payments of:
 - 22.1 £3,115.48 for 2021/2022 (essentially covering a four-month period following termination of employment);
 - 22.2 £9,800.59 for 2022/2023; and
 - 22.3 £398 for the year 2023/2024 to date.
23. Again, the Tribunal accepted the Claimant's evidence that she would have incurred some expenses and paid some commission in respect of this work. We also noted that some of the invoices included deductions for commission, so that was already accounted for, and some of them included payments for expenses. In the absence of any detailed evidence or calculations from the Claimant, the Tribunal again decided that the best way to estimate the Claimant's actual gross income once expenses and other outgoings were accounted for was to reduce the figure invoiced by 10%. The total figure invoiced from the termination of the Claimant's employment to date, less 10%, is **£11,982.66**.
24. For the current financial year, the Claimant's oral evidence was that she had spent three months preparing for this remedy hearing, including writing an extremely lengthy witness statement. This has impacted her ability to undertake paid work. The Tribunal therefore considered that the most realistic representation of her likely future level of earnings from TV and film extra work and from events work should be based on the year 2022/2023, namely £9,800.59 gross. Applying the same 10% deduction, that figure is **£8,820.53**.
25. The Tribunal had the benefit of agreed joint expert reports and answers to follow-up questions from Dr Phillips (Consultant Neurologist with expertise in FND) and Dr Cullen (Consultant Psychiatrist). We return in more detail to their reports and answers below. At this stage, we focus on the parts of their reports that deal with the Claimant's likely ability to undertake paid work in future.

26. Dr Phillips's view was that the Claimant was not fit to undertake any demanding employment, but was currently fit to perform one to three days of TV extra work and events, and two evenings per week distributing food as well as dealing with the administration of the Tribunal. The FND would not cause significant impediment to work, as in a more relaxed environment her speech improves, her eye has improved and the episodes of weakness and paralysis have significantly improved and only worsen when under stress relating to the Tribunal. The Claimant's FND is much better than it was. For a variety of reasons, on the balance of probabilities in Dr Phillips's opinion it will continue to improve. Dr Phillips estimates a 60-80% chance of almost complete remission. From an FND point of view, Dr Phillips therefore considers that there is a chance the Claimant will be fit for employment in the future. In her answers to follow-up questions, Dr Phillips estimated that, with treatment of the Claimant's mood and FND, there was a 10% chance of her returning to her former role, a 30% chance of her returning to another HR role, and a 60% chance of her returning to a similar occupation but not HR. Dr Phillips was of the view that it was possible that the Claimant could currently do 16 hours' paid work per week, and that she was more likely to be able to do so after the Tribunal proceedings have concluded. Her estimate for when the Claimant's FND might improve to the extent that she could undertake alternative work in a similar role to her HR role was 1-2 years.
27. Dr Cullen noted that the Claimant currently has three part-time employments of varying hours. From a psychiatric perspective he considered that she would not currently be fit to work further hours. However, when the Tribunal proceedings end, he would expect a gradual increase in mental resilience, coupled with an improvement in FND symptoms, to allow the Claimant to work for longer hours. This would need to be in a relatively stress-free environment.
28. In the light of the expert evidence, the Tribunal found that the Claimant remains fit to do the level of film and TV extra work, events work and voluntary work that she has been doing. Further, it is likely, particularly with the conclusion of these proceedings, that her mental health and FND will improve and that her ability to undertake paid work will increase.
29. If the Claimant had remained in employment, her salary this year would have been £40,221 gross and the Tribunal found that she would have earned around £1,400 from other work, a total of £41,621. If she had taken her full pension (rather than a lump sum and reduced pension) her pension this year would have been £32,947.56. The Tribunal finds that her likely annual level of future income from other sources will be, as a minimum, the level she earned in the financial year 2022/2023 (less 10% for expenses, commission etc), namely £8,820.53. The total of the full pension and likely future income from other sources is £41,768.09.

Findings about ill-health and injury to feelings

30. The Tribunal reviewed the expert reports of Dr Phillips and Dr Cullen, and their follow-up answers, carefully. It was clear that the Claimant had recounted to the experts much of her employment history as set out in her witness statement at the liability stage in these proceedings. As the liability judgment makes clear, most of the Claimant's discrimination complaints based on those events were

not upheld. That does not appear to have been reflected in what she told the doctors. Although they were provided with copies of the Tribunal's liability judgment, the doctors did not always distinguish clearly between the acts upheld by the Tribunal and the others. This was particularly so in Dr Phillips's case. She referred repeatedly in her original report to the "victimisation" experienced by the Claimant, including expressing views about the causative impact of that victimisation on events that followed. In her answers to the follow-up questions she confirmed that when she referred to "victimisation" she meant the Claimant's general sense of unhappiness at work, where the Claimant felt she was being victimised, including the initiation of the Trust and Confidence proceedings, and that this referred to adverse events the Claimant contended had happened to her from 2015 to date. The Tribunal read Dr Phillips's report in that context.

31. Based on the expert reports, the Tribunal made the following findings in relation to the Claimant's ill health and injury to feelings.
32. The Claimant has a long history of poor mental health, with a variety of causes, including childhood, family and personal issues. Her medical notes as far back as 1998 make reference to thoughts of self-harm and suicide, and as far back as 2000 make reference to stress at work. She had ongoing problems with mood, anxiety and stress at work, best diagnosed as a chronic and fluctuating recurrent mixed anxiety and depressive disorder. Her health deteriorated more from 2015 and she started experiencing panic attacks in 2015. Suicidal thoughts surfaced again in 2015. This episode largely resolved by 2017. The Claimant experienced another exacerbation of her historical recurrent mixed anxiety and depressive disorder as a result of issues at work, the diagnosis of her meningioma, and her friend's suicide in February 2019. She continued to experience anxiety and depression because of a variety of factors, including the effects of her FND, seizures, family stress, reported pressure from her employer and anxiety in contact with her employer. Issues in relation to her work had the most significant effect on her mental health at that time. She continued to experience anxiety and depression due to her experiences at work in relation to the Trust and Confidence process throughout 2020. Dr Cullen confirmed in answer to the follow up questions that this included the Claimant's description of her experiences in relation to the process, including at the meeting in March 2020. All these factors were contributory factors.
33. Dr Cullen's view, which the Tribunal accepts, was that the act of victimisation contributed to the Claimant's psychiatric injury from 2020. He was not able to state a percentage figure but described the impact as "very significant." Dr Cullen confirmed in answer to the follow-up questions that he was referring to a worsening over a period of time, not a single contributing event. Further, while it is likely that the Claimant would have experienced recurrences of anxiety and depression, Dr Cullen noted that in the past she had been able to continue working with relatively little time off. Dr Cullen therefore would not have expected the Claimant's employment to have terminated on ill health grounds in any event. Dr Cullen's view was that the Claimant's FND would have been "significantly exacerbated" by the act of victimisation through stress and anxiety.
34. Dr Cullen assessed the severity of the Claimant's injury, by reference to the Judicial College Guidelines, as being moderate. He did not go through those

guidelines in detail, but the Tribunal noted that the Claimant and the Respondent accepted Dr Cullen's report in full. The Claimant quoted this part in her own witness statement.

35. As previously noted, the Claimant developed neurological symptoms after her brain surgery, referred to as FND. She had difficulties with her speech and stuttering. Her right eye was closed for a year, only opening in the dark. It has improved. She sometimes has right sided paralysis and pins and needles although less frequently now. Her stutter and eye are worse when talking about the Tribunal proceedings. Dr Phillips confirms that on the balance of probabilities, the surgery triggered the FND. Background factors may have predisposed the Claimant to developing the condition. Dr Phillips reported that it was likely that "the victimisation" produced heightened anxiety and significantly contributed to the development and maintenance of FND. Plainly, the specific victimisation upheld by the Tribunal took place in January 2020, ten months after the FND had developed, and cannot have caused it. Dr Phillips was asked about this in the parties' follow-up questions. She said in answer to a question from the Claimant that the Claimant's "sense of victimisation" "significantly contributed to the maintenance of her FND." In answer to questions from the Respondent, focussing specifically on the extent to which the instigation of the Trust and Confidence process was a factor that contributed to the maintenance of FND, Dr Phillips declined to express a view.
36. The Tribunal concludes that the Claimant's FND was caused by her surgery. Background factors may have pre-disposed her to developing it. Anything that produced heightened anxiety may have contributed to the maintenance of the FND. The instigation of Trust and Confidence proceedings was one such thing and was, in 2020 a relatively significant element. The manner in which those proceedings were conducted is disputed. Specific complaints were made and not found to be discriminatory or victimising. In assessing the impact on the Claimant's FND the Tribunal does not take into account the manner in which the Trust and Confidence proceedings were conducted. However, the instigation of the proceedings made it inevitable that a process would follow, and the Tribunal found that it was relevant to take into account that inevitable ongoing process as part of what contributed to the Claimant's heightened anxiety during 2020 prior to her dismissal.
37. As already noted above, Dr Cullen's opinion was that when the Tribunal proceedings end, he would expect a gradual increase in mental resilience, coupled with an improvement in FND symptoms, to allow the Claimant to work for longer hours. This would need to be in a relatively stress-free environment. Dr Phillips's opinion was that there is a 60-80% chance of a complete remission from FND, and a 60% chance of her returning to comparable work within 1 to 2 years.
38. The Claimant did not include evidence in her witness statement about the specific impact of the failure to pay her full pay from May 2019 to November 2019. The Tribunal accepted that this caused some impact. The Claimant had given evidence more generally about anticipating this problem arising, and her money concerns, and we found that undoubtedly this issue caused some injured feelings. In the absence of specific evidence from the Claimant on the issue, the

Tribunal considered that this element should be included within the Tribunal's assessment of the overall award for injury to feelings, rather than being the subject of a separate award.

39. The Claimant gave detailed evidence about the impact of the victimisation on her, which was not challenged. As noted above, the Tribunal was careful to separate the impact of the instigation of the Trust and Confidence proceedings and the inevitable process to which that led, from the manner in which the Trust and Confidence process was conducted. Injury to feelings caused by the instigation of the proceedings and by the process to which that inevitably led was properly compensatable. Injury to feelings caused by the manner in which the proceedings were conducted was not compensatable in the circumstances of these Tribunal claims.
40. The Claimant suffered significant, long-lasting and substantial injury to feelings caused by the victimisation. It persists to this day. She attended a preliminary hearing in these proceedings on 2 January 2020, attended by a number of managers, at which she was visibly distressed. The next day the Respondent sent her the email Instigating the Trust and Confidence process.
41. The letter caused her great shock and distress. She was told that Ms PH, Ms JB and Ms SS would be called as witnesses and that the meeting could result in her dismissal. The management case and 100 pages of documentation were attached. She was given a matter of days to provide any documentation to support her response, but she did not have access to her laptop to collate it. Her evidence was that she could "not adequately put into words the amount of stress, sadness, overwhelm, despair, anxiety and physical illness this evoked within" her. She felt shocked and violated that the documentation included reference to her prior grievances, and that witnesses involved in the Trust and Confidence process now had access to information about grievances that named them. She was upset that she was required to report to the very managers who were going to be witnesses against her. The contents of the letter revisited very challenging periods of her life, including the suicide of her friend and her own brain surgery. She was extremely upset that events from that time were being used as a reason for her potential dismissal. She was extremely upset to be accused of saying that she was unwilling to work with certain colleagues on her return. She kept hope that she would remain in employment, but being told in the Management Case that the management and employment relationship was now untenable caused her great distress and triggered her stress, anxiety and depression. She had to visit her GP.
42. The Claimant wrote in an email to Mr IB on 9 January 2020 that she was deeply embarrassed, distressed and humiliated, deeply upset and hurt, not fit to attend the meeting and under extreme distress. She had been under the care of the mental health teams for the past few days. She provided a letter from her clinical psychologist written in late 2019 indicating that her risk of acting on suicidal thoughts was likely to increase if her employment was terminated. The Claimant's GP made an entry on 9 January 2020 that the Claimant was very tearful, still having suicidal thoughts and getting help from the crisis team. She remained signed off work until 28 April 2020. The Claimant was seen by the OH advisor on 20 January 2020. She confirmed that the Claimant was highly

anxious and tearful, at risk of self-harm and under close monitoring with the mental health crisis team. The OH advisor concluded that the Claimant was not fit to attend any meeting with any adjustments because of the increased risk of self harm should the outcome be dismissal. The Claimant continued to see her GP regularly because of her mental health.

43. A Trust and Confidence meeting eventually took place on 11 March 2020. Regardless of how the meeting was conducted, it was in any event extremely stressful for the Claimant because of the risk of losing her job. The meeting did not conclude. It should have continued on 25 March 2020 but the first coronavirus lockdown prevented that.
44. The Claimant felt anxious and worried about whether she would receive correspondence from the Respondent about the Trust and Confidence process, especially about receiving it on a Friday when she would not be able to contact First Response for support.
45. There were further Trust and Confidence meetings on 20, 21 and 26 August 2020. The Claimant found the build up to them extremely stressful. She struggled to communicate with Mr AL by telephone and she had long days and nights with little sleep trying to get everything ready. FND was hindering her ability to function, and anxiety was making her FND worse. The Claimant found the meetings themselves very distressing. She was tearful during them. She made plans to take her own life on the Respondent's premises. The meetings had to be adjourned so that the Claimant could contact the First Response team on 26 August 2020. After that, the First Response team were in daily contact with her.
46. During the period of the Trust and Confidence process, the Claimant experienced panic attacks and her sleep was affected. She isolated herself from her religious community and stopped seeing and communicating with her friends. She would have arguments with her family and parents.
47. The Claimant's distress about the Trust and Confidence process being started persists.

What financial losses did the victimisation cause?

What interest is payable on those losses?

48. The Tribunal concluded that Claimant's ill-health absence from work between March 2020 and November 2020 and the termination of her employment were caused by the instigation and continuation of the Trust and Confidence proceedings. There is no rational basis for dividing that harm by reference to different causes. There is no chance that the Claimant's employment would have been terminated on ill-health grounds in any event. The Respondent is therefore liable for the financial losses arising from the Claimant's reduction in pay between March and November 2020 and (subject to questions of mitigation and the like) for the financial losses caused by the termination of her employment.
49. In reaching that view, the Tribunal noted that the Claimant had been certified as fit to return to work following her recovery from surgery the previous autumn. As

explained in the liability judgment, OH recommended adjustments and the Claimant did all she could to return to work, but the Respondent did not enable her to do so. She was on special leave with full pay until 9 January 2020, when she was signed off sick again. In the light of the evidence, that was plainly as a direct consequence of the initiation of the Trust and Confidence proceedings. The Tribunal placed weight on Dr Cullen's view that she continued to experience anxiety and depression throughout 2020 in relation to the Trust and Confidence proceedings, and that issues at work were the "most significant" factor in relation to her mental health at that time. The Trust and Confidence proceedings remained unresolved and the Claimant remained signed off until her employment was terminated on ill-health grounds. Further, the Tribunal placed weight on Dr Cullen's view, based on past history, that the Claimant's employment would not have been terminated on ill-health grounds in any event.

50. The Tribunal found that but for the victimisation, the Claimant would not have been absent on sick leave, but would have been either attending work on full pay or on special leave on full pay. The Respondent is liable for her lost earnings during that period. Tax will be payable at the 20% rate in respect of that element of compensation and it must therefore be grossed up. The amount payable is **£20,793.81** (£16,635.05 grossed up).
51. The act of victimisation took place on 3 January 2020. The day of calculation for interest is 19 June 2023. The total number of days in the calculation period is 1256. Interest is payable from the mid-point, i.e. for a period of 628 days, at 8%. The interest payable on £16,635.05 is **£2,289.71**.
52. No argument was advanced by the Respondent that the Claimant had failed to take reasonable steps to mitigate her losses.
53. The submission was made on the Claimant's behalf that she should not have to give credit for her earnings from other work as an extra or doing events when the Tribunal was calculating the financial losses caused by the termination of her employment. It was suggested that because she was in receipt of an ill-health retirement pension, predicated on the basis that she was not fit to work, she was not under a duty to mitigate her losses and, to the extent that she had secured other income, she should not therefore have to give credit for it. No authority in support of that proposition was advanced.
54. The Tribunal noted that the aim of compensation for discrimination is to put the person, as best as money can, in the position they would have been in but for the discrimination. Were the Claimant's submission correct, she would be left in a better financial position. Further, the duty to mitigate losses ordinarily applies and the fact that somebody is in receipt of an ill-health retirement pension does not on the face of it give rise to a reason in principle why the duty should be disapplied. That is particularly so given that the certification giving rise to entitlement to the Tier 1 ill-health pension falls far short of concluding that the individual will never be fit to work again. Rather, it is that on the balance of probabilities they will not be fit to do more than 30 hours' paid work per week for 12 months. Added to that, the Tribunal accepted that the individual remains entitled to the pension, regardless of what they subsequently earn. In principle, therefore, an individual in receipt of such an ill-health retirement pension might

make a full recovery and return to paid work, without loss of pension benefits. If the Claimant's submission were right, they would be entitled to full compensation from their former employer calculated as though they were earning nothing. Such a position seemed to the Tribunal inconsistent with the basic principles underlying compensation for discrimination, unfair and unsupported by authority. We concluded that the Claimant was required to give credit for sums she had earned in other work since the termination of her employment and that she remained under a duty to mitigate her losses. However, we recognised that she had earned a certain level of income from such secondary employment while she was still employed by the Respondent. As explained above, we found that this was about £1,400 per year gross. We therefore concluded that she should give credit for her earnings from other work since her employment ended, to the extent that they exceeded £1,400 per year gross.

55. For the avoidance of doubt, as explained above, the Claimant's work at the local venue had ceased substantially before the act of victimisation and the Tribunal found that the financial losses caused by the victimisation did not include the loss of that income.
56. The net difference between the Claimant's salary from November 2020 to date and her (full) pension is **£13,406.24**, based on the calculations in her schedule of loss as explained above.
57. The Claimant's gross earnings from other employment during that period, reduced by 10% as explained above, were **£11,982.66**. She would have earned around £1,400 per year from such work anyway. That would have been around **£3,500** during the two and a half year period from the termination of her employment to date. She must therefore give credit for $£11,982.66 - £3,500 =$ **£8482.66** gross. The Claimant also received pay in lieu of notice. That payment related to the period of these losses and the Tribunal considered that she should therefore give full credit for it. She received **£5,957.50** gross. The total gross income for which she must give credit is therefore **£14,440.16**. The net equivalent (reducing by 32% for tax and National Insurance) is **£9,819.31**.
58. The Claimant's net loss of earnings from the termination of her employment to date is therefore $£13,406.24 - £9,819.31 =$ **£3,586.93**. This is compensation in connection with the termination of her employment and the first £30,000 of such compensation is not taxable. This figure is therefore not required to be grossed up.
59. Having regard to Regulation 6 of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, the Tribunal considered that these losses clearly flowed from the termination of the Claimant's employment, which it found was caused by the prior act of victimisation. We considered that serious injustice would be caused by awarding interest on this sum from the date of the act of victimisation, because the losses did not start until the employment was terminated. We concluded that the appropriate starting date for the calculation of interest on this sum was the date of termination of the Claimant's employment. We therefore awarded interest for half of the period from 20 November 2020 to 19 June 2023, i.e. 469 days. The interest payable is therefore **£368.71**.

60. The Tribunal turned next to the question of future financial losses. We concluded that no compensation should be awarded for future financial losses. As explained above, if the Claimant had remained in employment, her salary this year would have been £40,221 gross and she would have earned around £1,400 from other work, a total of £41,621. If she had taken her full pension (rather than a lump sum and reduced pension) her pension this year would have been £32,947.56. The Tribunal found that her likely annual level of future income from other sources will be, as a minimum, the level she earned in the financial year 2022/2023 (less 10% for expenses, commission etc), namely £8,820.53. The total of the full pension and likely future income from other sources is £41,768.09. That means there is no future loss, even on the current basis.
61. That seemed to the Tribunal to be the most pessimistic scenario and, on the expert evidence, an unlikely one. Both experts were of the clear view that the Claimant's mental health and FND will improve, particularly with the resolution of these proceedings. With that, her earning capacity will also improve. On Dr Phillips's appraisal, she has a 60% chance of returning to equivalent work within two years. Because of the receipt of her ill-health retirement pension, the Claimant may well end up in a better financial position within a couple of years.
62. The Claimant invited the Tribunal to award her a sum to compensate her for the loss of opportunity of earning a higher pension on retirement than her ill-health retirement pension. A figure of £10,000 was suggested, but with no clear basis. No evidence was put forward to support the making of such an award, e.g. to demonstrate that the Claimant was likely to have secured a promotion, leading to an increased pension, had she remained in employment. In the absence of any evidence, calculation or clear rationale for making such an award, the Tribunal decided that no such award was appropriate. This was mere speculation.

What injury to feelings or psychiatric injury did the discrimination and victimisation cause?

What compensation should be awarded?

What interest is payable?

63. The Tribunal's findings of fact about injury to feelings and psychiatric damage are set out above. We first considered what the appropriate award of compensation was for injury to feelings. The Claimant sought an award at the top of the top *Vento* bracket. The Respondent conceded that an award in the top bracket was appropriate, but suggested an award somewhat below the top of the bracket.
64. The Tribunal agreed that an award in the top bracket was appropriate. We reminded ourselves that this is an award of compensation based on the injured feelings experienced by the Claimant, not on the severity of the employer's conduct as such. Clearly, as set out in detail above, the act of victimisation has caused very substantial and long-lasting distress that persists to this day. However, the Tribunal noted that in her original schedule of loss the Claimant sought an award at the top of the top bracket in respect of all the acts of discrimination about which she complained, going back over a longer period. All but two of those claims did not succeed. The Claimant continues, for example in

her discussions with the medical experts and in her remedy witness statement, to refer to acts that were not found by the Tribunal to be discrimination or victimisation and to the distress they caused her. It seemed to the Tribunal that some part of the Claimant's distress and injured feelings was and remains attributable to those other matters, not to the act of discrimination and victimisation upheld by the Tribunal. For that reason, the Tribunal agreed with the Respondent that an award somewhat lower than the top of the top bracket was appropriate. Taking into account the need to include an element of compensation for the injured feelings arising from the pay discrimination as well as the victimisation, we concluded that the appropriate figure was £35,000.

65. The Tribunal turned next to the question of psychiatric injury. The Claimant suffered a psychiatric injury in the form of a recurrence of her chronic and fluctuating recurrent mixed anxiety and depressive disorder. The background is, of course, that she had that long-standing history. The Tribunal was concerned with this particular episode only.
66. Dr Cullen's expert assessment, accepted and adopted by the Claimant, was that this fell within the moderate category in the Judicial College Guidelines. The Tribunal agreed. The Claimant did have problems associated with her ability to cope with life and work and an impact on her relationships with family and friends. Treatment is likely to be successful, as it has been in the past. The Claimant no doubt remains vulnerable to a further recurrence, but that is in the context of her long-standing history of poor mental health, not simply this specific episode. Some of the Claimant's difficulties in coping with life and work, and in her relationships with people at this time, were no doubt also linked to her FND as a result of her surgery. While the act of victimisation and the fact of the ongoing Trust and Confidence process contributed to the maintenance of that condition, they did not cause it, and they were not the sole factor. There has been a marked improvement in the Claimant's condition and the experts confirm that the prognosis is good. Whilst the injury did fall within the moderate bracket, the Tribunal agreed with the Respondent that it fell at the top of that bracket (£19,070).
67. The Tribunal noted the evidence about the factors contributing to the Claimant's episode of depression and anxiety following the instigation of the Trust and Confidence process. We considered that this aspect of harm was properly divisible. Dr Cullen identified that the act of victimisation and its aftermath had a "very significant impact" on the development of this episode and gave rise to a "significant exacerbation" of the Claimant's FND. But other factors were identified that also played a part. The Tribunal concluded that 80% of this aspect of the harm was attributable to the act of victimisation. The amount of compensation for psychiatric damage properly payable by the Respondent was therefore **£15,256**.
68. The Tribunal noted that its award of £35,000 for injury to feelings was designed to compensate the Claimant fully for the significant and long-standing distress and injured feelings. The award for psychiatric damage was to compensate for the additional element of psychiatric injury beyond those injured feelings for which the Respondent was responsible. The Tribunal was satisfied that a combination of an award of £35,000 for injury to feelings plus £15,256 for

psychiatric damage fully compensated the Claimant for the totality of the injured feelings and psychiatric injury, but did not compensate her twice for the same thing.

69. These elements of compensation are in relation to victimisation prior to the termination of the Claimant's employment. As such, they are not taxable and do not need to be grossed up.
70. Interest on those sums is payable for the whole of the calculation period of 1256 days at 8%. That gives interest of **£9,635.06** and **£4,199.79**, totalling **£13,834.85**.

Employment Judge Davies
30 June 2023