EMPLOYMENT TRIBUNALS

Claimant: Mrs J R O'Day

Respondent: The Dominic Barberi Multi Academy Company

Heard at: Reading (by C.V.P.) **On:** 19 and 20 May 2022

Before: Employment Judge George;
Mrs C Carr;
Dr C Whitehouse (sitting remotely)

Appearances
For the claimant: Mr M Emery, solicitor
For the respondent: Mr S Peacock, solicitor

This has been a remote hearing not objected to by the parties. The form of remote hearing was V – Video, by CVP. Employment Judge George and Mrs Carr were sitting in Reading Employment Tribunal. Dr Whitehouse was sitting remotely.

RESERVED REMEDY JUDGMENT

The respondent shall pay to the claimant compensation for disability discrimination in the sum of £70,943.15 (subject to an additional sum by which that figure should be grossed up to take account of the incidence of tax) calculated as follows:

Injury to feelings		
Compensation for injury to feelings	21,000.00	
Interest on £21,000.00 @ 8% from 21.07.2018 (mid-point between 26.03.2018 and 13.11.2018) to 31.03.2023 (1715 days) @ £4.60 p.d.	7,893.70	
Total award for injury to feelings incl. interest	**28,893.70**	**28,893.70**

Past Financial Loss (calculated as at 31.03.2023)
Financial Loss 2018-19
Net Salary £473.10 p.w.
Gross Salary £673.23 p.w.
Employer's pension contribution £110.95 p.w.

Total £(473.10 + 110.95) = £584.05 p.w.		
01.10.2018 to 31.03.2019 (on ½ pay due to sickness absence) 26 weeks @ £292.03 p.w.	7,592.78	
01.04.2019 to 31.08.2019 22 weeks @ £584.05 p.w.	12,849.10	
Loss to 31.08.2019	20,441.88	20,441.88
LESS 30% for chance C would not have returned to work in Summer 2018		(6,132.56)
Adjusted Loss to 31.08.2019		**14,309.32**
Financial Loss 2019-2020 Net Salary £482.66 p.w. employer's pension contribution £113.17 p.w. Total = £595.83 52 weeks @ £595.83 p.w.	30,983.16	
Financial Loss 2020-2021 Net Salary £492.31 p.w. employer's pension contribution £115.43 p.w. Total = £607.74 52 weeks @ £607.74 p.w.	31,602.48	
Financial Loss 2021-2022 Net Salary £502.16 p.w. employer's pension contribution £117.74 p.w. Total = £619.90 52 weeks @ £619.90 p.w.	32,234.80	
Financial Loss 2022-2023 01.09.21 to 31.03.22 (taken as date of calculation for ease) Net Salary £512.20 p.w. employer's pension contribution Total = £632.30 p.w. £632.30 X 30.33 weeks	19,177.66	
Total Financial Loss 01.09.2019 to 31.03.2022	113,998.10	113,998.10
LESS 50% for chance of retirement aged 65 years at 31.08.2019		(56,999.05)
		56,999.05
LESS 70% of that for declining prospect of remaining in full time employment until aged 70 years		(39,899.34)
Adjusted loss 2019 – 31.03.2023		**17,099.71**
Adjusted loss to 31.08.2019 carried forward		**14,309.32**
Total adjusted financial loss to 31.03.2023		31,409.03

Interest on that @ 8% from 31.12.2020 (mid-point between 1.10.2018 and 31.03.2022) to 31.03.2022 (821 days @ £6.88 p.d.)		5,651.90	
Total adjusted financial loss 01.09.2023 to 31.03.2023 incl interest		**37,060.93**	**37,060.93**
Future Financial Loss 01.04.2023 to 31.03.2024			
5 months (21.66 weeks) @ £632.30 p.w. for year 2022-2023	13,695.62		
7 months (30.33 weeks) @ (£632.30 X 1.02) = £644.95 p.w. for year 2023-2024	19,561.21		
Total financial Loss 01.04.2023 to 31.03.2024	33,256.83	33,256.83	
LESS 50% for chance of retirement aged 65 years at 31.08.2019		(16,628.42)	
		16,628.41	
LESS 70% of that for declining prospect of remaining in full time employment until aged 70 years		(11,639.89)	
Adjusted loss 01.04.2023 to 31.03.2024		**4,988.52**	**4,988.52**
Total compensation subject to grossing up to take account of the incidence of income tax			**70,943.15**
Excess of total compensation over £30,000			40,943.15
Grossing up at an assumed marginal rate of tax in y/e 05.04.24 of XX% [parties to provide grossing up calculation]			
Total Sum Payable			XX.XX

REASONS

1. By a reserved liability judgment sent to the parties on 9 December 2021, the Tribunal dismissed the claim of direct disability discrimination but found that the respondent had been in breach of its duty to make reasonable adjustments and had discriminated against the claimant for a reason arising in connection with disability. The Tribunal made the following declaration:

1. The respondent was in breach of the duty to make reasonable adjustments to its practice of allocating subjects and lessons to teachers at short notice by

    a. failing to consult directly with the claimant about the changing provision;

    b. failing to consult about her subject strengths;

    c. failing to match the claimant to other subject options;

    d. giving more time for lesson preparation;

    e. providing the claimant with the opportunity to observe class lessons;

    f. providing mentoring, coaching and other assistance and support; or

    g. considering a reduction of hours.

2. The respondent was in breach of the duty to make reasonable adjustments to its requirement for a certain level of attendance at work in order not to be subject to a managing attendance sanction by failing to facilitate engagement with the claimant on conclusion of a disciplinary process specifically by facilitating a meeting with the Executive Head prior to starting the information stage of the formal sickness absence policy.

3. The respondent subjected the claimant to discrimination for a reason arising in connection with disability by

    a. starting a disciplinary investigation procedure to investigate an allegation of gross misconduct against her on 15 June 2018.

    b. writing to the claimant on 13 November 2018 to invite her to a stage 1 informal meeting under the formal sickness absence policy.

4. The above unlawful acts amount to an act continuing over a period lasting between 12 March 2018 and 22 November 2018.

5. The above claims were not presented within the time limit specified in s. 123(1)(a) of the Equality Act 2010 but they were presented within such other period as the Employment Tribunal thinks just and equitable within s.123(1)(b) of the Equality Act 2010. The Employment Tribunal has jurisdiction to consider the claims.

6. The claimant was not dismissed by the respondent.

2. The two day remedy hearing was scheduled at a preliminary hearing on 10 January 2022 when the issues for the hearing was agreed and case management orders made. In broad terms, the claimant claims compensation for injury to feelings and financial loss which she claims was caused by those acts which the Tribunal have found to be unlawful. Although the claimant did not succeed in her claims that her dismissal was unfair and/or discriminatory she alleges that her ill health was caused by those actions and that her loss of employment when she resigned was caused by the discriminatory acts. The Tribunal will need to consider whether the loss of her employment and, therefore, her loss of earnings were caused directly by the acts which were found to be discriminatory. This will require the Tribunal to decide what would have happened had the discriminatory treatment not taken place.

3. The parties had prepared a joint remedy bundle running to 122 pages which contained the documents set out in the index. Page numbers in that bundle are referred to as RB page 1 to 122. This contained the claimant's updated schedule of loss and her remedy witness statement dated 9 January 2022 as well as that of her supporting witness, Gosia Brudlo. The respondent relied upon witness statements of Fraser Long and Heather Pallier, both dated 5 January 2022. There was also a job vacancies bundle containing 82 pages and page numbers in that bundle are referred to in these reasons as VB page 1 to 82. Where it has been necessary to refer to pages in the liability bundle those are denoted by LB page 10 or as the case may be.

4. The claimant gave evidence and adopted her remedy statement in evidence. The respondent did not challenge the evidence of Ms Brudlo and the Tribunal indicated that, if a signed copy was provided then it would be taken as read. This was done. Both Mr Long and Mrs Pallier adopted their remedy statements in evidence and were cross-examined upon them.

5. Issues for the remedy hearing had been agreed at the preliminary hearing on 10 January 2022. However, on reflection, these did not seem to Judge George be as clear and logical as required. A draft revised list of issues was circulated in the morning on Day Two of the remedy hearing and time was given to the representatives for them to consider it. The revised list was agreed and is replicated below. The representatives had both provided skeleton arguments. These are referred to as the CSA and RSA and were supplemented by Mr Emery and Mr Peacock respectively in oral representations.

The issues relating to remedy

6. Has the claimant shown that the unlawful acts of discrimination were a material cause of:
    i. injury to feelings;
    ii. psychiatric injury?

7. If the claimant succeeds in showing that the unlawful acts of discrimination were a material cause of personal injury, are the following causally linked with that personal injury
    i. Absence from work from the start of the Summer term 2017/18 to her resignation?
    ii. C's claimed inability to work thereafter which she claims has caused a loss of income?

8. If the claimant succeeds in showing that the acts of discrimination were a material cause of financial loss (either through reduction of pay during sickness absence or through being too unwell to work) then what are the extent of those losses? This will require the Tribunal to decide what would have happened had the discriminatory treatment not taken place and may involve consideration of the following questions:

i. Had the respondent taken the steps set out in para.2 of the reserved judgment, would the claimant have returned to work after the Easter holiday 2018 on a revised timetable? If so, what hours would she have worked?

ii. Had the respondent taken the steps set out in para.2 of the reserved judgment would the claimant have had sustained attendance in what role/for what hours or would she have been unfit to work?

iii. Had the respondent not started a disciplinary investigation procedure on 15 June 2018 what are the prospects that the claimant would have been fit to work as a teacher and, if so, when and in what role/for what hours?

iv. Had the respondent taken the steps set out in para.3 of the reserved judgment what are the prospects that the claimant would have been fit to work as a teacher and, if so, when and in what role/for what hours?

v. Had the respondent not discriminated against the claimant, what are the prospects that they would have started a capability process against her and when?

vi. What are the prospects that, if the respondent had not discriminated against the claimant, she would have engaged with the capability process? The answer to this question is likely to be affected by the Tribunal's findings on the extent to which the claimant's state of health was adversely affected by each of the discriminatory acts.

vii. If the answer to question (v) is yes and the respondent would have started such a capability process and the claimant would have engaged with it, what are the prospects that she would have remained in employment with the respondent?

viii. If the claimant would not have remained in employment with the respondent how would that employment have ended and when?

The figures used by the claimant as the basis of her calculation of financial loss in her schedule of loss are agreed by the respondent to be the correct figures. Calculation of loss of earnings would be done on the basis of the net figures, subject to grossing up to take account of the incidence of tax on any award, if necessary.

9. Has the claimant mitigated her loss? What steps was it reasonable for the claimant to take to mitigate her loss, did she take them and if, not what would have happened if she had? If the claimant has failed to mitigate her loss then credit should be given for any income she would have received had she taken such steps as it would have been reasonable for her to take.

10. What award of compensation for injury to feelings and/or psychiatric injury should there be?

11. If the claimant succeeds in showing that the unlawful acts of discrimination were a material cause of psychiatric injury, was that psychiatric injury indivisible or is

there a rational basis for concluding that that the harm suffered can be divided into a part caused by the respondent's discrimination and a part not caused by the respondent's discrimination? If so, what proportion should the respondent bear?

12. Depending upon the Tribunal's findings on the causes of the claimant's sickness absence and the causes of her resignation, is there a rational basis on which to apportion responsibility for the financial losses flowing from those events as between those causes for which the respondent is responsible and those causes for which the respondent is not responsible? If so, what proportion of responsibility should the respondent bear?

13. In respect of the claim of aggravated damages, has the respondent been guilty of high-handed, oppressive, malicious or insulting conduct in discriminating against the claimant? If so, what was the additional impact upon the claimant's injury to feelings?

14. What interest is payable on any award?

15. Does s.207A TULR(C)A 1992 apply by which the Tribunal has a discretion to reduce the amount of any award by up to 25% where the employee has unreasonably failed to comply with the ACAS Code of Conduct on disciplinary and grievance procedures? The claimant argues that it is unreasonable to argue that the ACAS code of conduct applies in the present case.

16. If so, was there an unreasonable failure on the part of the claimant to comply with the applicable code of conduct and if so, would it be just and equitable in all the circumstances to decrease any award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?

17. Should any award be grossed up to take account of the incidence of tax? If so what tax will be payable on any award and what additional award should be made to compensate the claimant for that?

18. Although it was argued on behalf of the claimant (see CSA paras.44 to 48) that there should be an award of costs in her favour, no written application for costs had otherwise been made. The respondent had not, therefore, had the opportunity to put in a written response to such an application. There was no costs schedule against which to judge the reasonableness of the claimed sum of £20,000. If so advised, the claimant has the usual right to make an application in the manner prescribed by rule 77 of the Employment Tribunals Rules of Procedure 2013. No doubt, when considering whether or not to do so, she will consider our findings on her claim for aggravated damages, which overlaps with the basis of her claim to be entitled to an order for costs.

Law applicable to the issues

19. The law in relation to injury to feelings is well established. We remind ourselves of the case of Armitage, Marsden and HM Prison Service v Johnson [1997] ICR 275 EAT where it was said, among other things, that the awards for injury to feeling should be compensatory rather than punitive and that, on the one hand,

they should not be so low as would diminish respect for the anti-discrimination legislation but on the other they should not be excessive. We should also remind ourselves of the purchasing power of the value of the award of everyday life and balance that with the need that awards for discrimination should command public respect.

20. The injury must be proved, our findings must be evidentially based and the injury for which compensation is claimed must result from the discrimination which has been proved: MOD v Cannock [1994] IRLR 509 and Alexander v The Home Office [1988] ICR 604.

21. The well-known case of Vento v. Chief Constable of West Yorkshire Police (No. 2) [2003] ICR 318 CA (followed in Da'Bell v. NSPCC [2010] IRLR 19 EAT) set out three bands or brackets into which it was said that awards of this kind could fall. Following the judgment in Da'Bell, which increased the levels of the bands to take into account inflation since the Vento decision, the lowest band was increased to £6,000, the middle band from £6,000 to £18,000 and the highest band, reserved for the most serious cases, £18,000 and above. In De Souza v Vinci Construction (UK) Ltd [2017] I.R.L.R. 844 CA, it was held that the 2012 Court of Appeal case which applied a general uplift to damages for pain, suffering, loss of amenity, physical inconvenience and discomfort of 10% should apply to awards of compensation for injury to feelings by the employment tribunal.

22. Previously decided cases should, in any event, not be regarded as particularly helpful as a guide to an award of damages because every case is fact specific. However, the ruling in the De Souza case means that that is particularly so in relation to reports of judgments which predate 1 April 2013 (because they predate the general uplift). Following the judgment in De Souza, the Presidents of the Employment Tribunals in England & Wales and Scotland have published Presidential Guidance by which the Vento bands are updated annually. The present claim was presented on 18 November 2019 and therefore the applicable bands are

    a. £26,300.00 and upwards for the most serious cases;

    b. Between £8,800.00 to £26,300.00 for serious cases not meriting an award in the highest band;

    c. Between £900.00 to £8,800.00 for less serious cases, such as an isolated or one-off act or discrimination.

23. The claimant argues that this is a suitable case for an award of aggravated damages. They are, in principle, available for an act of discrimination: HM Prison Service v Johnson. They are compensatory rather than punitive and are available when the respondent has behaved in a high-handed, malicious, insulting or oppressive manner when discriminating against the claimant. In Metropolitan Police Commissioner v Shaw [2012] I.C.R. 291 EAT, Underhill P, as he then was, cautioned against the risk that a separate award of aggravated damages can lead a tribunal, unconsciously to punish a respondent rather than compensate the victim. There is also a risk of duplication of compensation and

the tribunal must be satisfied that there is a causal connection between the exceptional or contumelious conduct and the aggravation of the injury. In many cases it will be appropriate rather to include in compensation for injury to feelings an element which reflects the way in which the victim was treated.

24. When considering the correct approach to the assessment of financial loss, the successful claimant is entitled to be compensated for the loss and damage which arises naturally and directly from the wrongful act: Essa v Laing Ltd [2004] IRLR 313, CA. As best as possible, the Tribunal must put the claimant into the position that they would have been in but for the unlawful conduct: Ministry of Defence v Cannock. It was also held in Essa v Laing that there is no need to show that the loss claimed was reasonably foreseeable, provided that a direct causal link between the act of discrimination and the loss can be made out. The discriminator must take their victim as they find them.

25. If it can be shown that psychiatric and/or physical injury can be attributed to the unlawful act then the employment tribunal had jurisdiction to award compensation: Sheriff v Klyne Tugs (Lowestoft) Ltd [1991] IRLR 481, CA. In assessing compensation, it is necessary to ask what would have occurred had there been no unlawful discrimination; if there were a chance that the losses would have occurred in any event then, in the normal way, that must be factored into the calculation of loss: Chagger v Abbey National plc [2010] IRLR 47, CA.

26. If the loss has been caused by a number of factors, in principle it is open to the Tribunal to reduce compensation so that it reflects only the extent to which the unlawful discrimination contributed to the employee's loss if there is a rational basis on which to apportion responsibility for those losses as between the different causes: Thaine v LSE U[20010] ICR 1422, EAT and Hatton v Sutherland [2002] ICR 613, CA and BAE Systems (Operations) Ltd v Konczak [2018] ICR 1, CA. The Tribunal must take care, however, where there is a pre-existing health condition or vulnerability and where separate awards for alleged psychiatric injury and injury to feelings are sought, to avoid double recovery because the aim is to award compensatory damages.

Finding and conclusions

27. The first issue requires the Tribunal to consider whether the claimant has shown that the unlawful acts of discrimination were a material cause of injury to feelings and psychiatric injury and, if so, what was the nature, extent and duration of that injury.

28. We were reminded by Mr Peacock that the calculation of compensation for discrimination should be based only on the loss directly attributable to the successful claims and not to those parts of the claim which were unsuccessful. The Tribunal's finding on the date of constructive knowledge of disability was 12 March 2018 and, he argued, it was reasonably clear that prior to that date the claimant's mental health was poor. He described the claimant as being at a tipping point, having started from the level of poor mental health. She was, he argued, disaffected with the school and the decision to close EAL teaching as a separate department. It would not have taken much to tip that into the situation

where, argues the respondent, nothing they did would have made any difference. Mr Peacock argued that, on balance, the claimant would not have remained in school with good attendance and would not have remained in employment in the longer term in any event (RSA para.26). He based this argument on a number of pieces of evidence (RSA para.24) and expanded on the following points in oral submissions:

a. The claimant's state of mind in the meeting of 12 March 2018 indicated extreme fragility;
b. The claimant in her impact statement describes hitting rock bottom at that point. This was, apparently, a reference to para.12 where she says "with Mr Tucker's letter and the subsequent letters of gross misconduct, I hit rock bottom".
c. The impact statement points to examples dating from March 2018 which make the point that she was starting from virtually no resilience so nothing would have made a difference and she would have remained on sickness absence.
d. The respondent made significant attempts to engage with the claimant which were unsuccessful and she would not have engaged with that process in any event.
e. The disciplinary investigation did not produce any material difference in the situation; it exacerbated her injury to feelings but not such as to affect her ability to engage.

29. The contrary argument put forward on behalf of the claimant was that, but for the unlawful acts, the claimant would have been able to adapt to changes in timetable, as she had in the past, if she had been engaged with and had training been available (CSA para.15). Mr Emery argued that the claimant was "a long-serving employee who needed to work for financial reasons, was not looking to leave the respondent before retirement, and loved the school" but was also a valued and competent colleague. He reminded the Tribunal of the eggshell skull principle and argued that the respondent must be liable for all harm and losses arising from its acts of discrimination even if other employees may not have become unfit to work as a result of those actions. It was further argued that the respondent's evidence that the claimant would have lost her job at some point in the future in any event was unsatisfactory and that there was no medical evidence to suggest that, had adjustments been made, the claimant's health would have deteriorated to the extent that she would not have been able to remain in employment (CSA para.21 to 23).

30. We start our discussion of this issue by referring back to our findings at the liability stage. The date of knowledge of disability was 12 March 2018 and the first discriminatory act is the failure to take various steps to consult with the claimant and be more flexible about her timetable rather than allocate it at short notice. She receiving the information about her timetable for the summer term 2018 in a meeting with Mrs Pallier to carry out a stress risk assessment on 26 March 2018. The steps should have been taken before that. It was when the claimant was informed about the timetable without the adjustments being made that the respondent did an act inconsistent with complying with the duty to make reasonable adjustments. Evidence about her state of health immediately before

that meeting is set out in para.50 of our liability judgment and also in her self-description in the stress risk assessment itself (para.56 of the liability judgment). We take that into account in full but do not repeat it here.

31. Our findings about the meeting at which the claimant was given the timetable is at para.62 of the liability judgment. It was stated that the timetable might change because it was "12 periods under load" and Mrs Pallier and the claimant discussed the claimant going part time.

32. Although it is argued on behalf of the claimant that the respondent has failed to put forward medical evidence that the claimant's health would have deteriorated to the extent that she would not have remained in employment, the primary burden is on the claimant to prove her loss. We need first to consider whether the claimant has shown that her health deteriorated because of the failure by the respondent to take the steps which it reasonably ought to have taken rather than give her notice of timetable changes at short notice. This involves us considering why the claimant did not come back to work.

33. There was no evidence that the 12 periods to which subjects/activities had not been allocated were going to be used to support the claimant in the teaching activities in other periods. In fact the claimant justifiably thought that she could, potentially, have been asked to teach anything (see paras.53 to 59 of the liability statement for the impact on the claimant of this). She describes the lack of explanation for not being allocated any EAL work (which was continuing by way of intervention during a pupil's main curriculum) as tipping her over the edge (liability statement para.59).

34. Our finding is that the failure to make reasonable adjustments was sufficient to tip the claimant from managing to get into work despite being very ill to not managing to get into work and being off sick. Her reaction to the 12 March 2018 letter was profound but the introduction of that timetable without consultation was enough to cause her state of health to change from being able to attend to being unfit to attend.

35. There were, it must be acknowledged, a number of causes of her ill health. She was very ill before the failure to make reasonable adjustments and the respondent is only responsible for that exacerbation however, we are persuaded that the unlawful act was the effective cause of her becoming until to attend work and therefore of the absence from work from the start of the Summer 2018 term.

36. The next act of discrimination chronologically was that of starting the disciplinary investigation procedure on 15 June 2018 by which she was alleged to have committed gross misconduct. We find that the impact of this disciplinary action was a step change in her mental health condition. It caused a profound deterioration of her state of health.

37. There are some findings about her state of health in this period in the liability judgment.

a. In the middle of April 2018 there was an OH report which is analysed in para.58 in which the OH nurse stated that the "perceived employee workplace stressors" needed to be addressed;
b. In early May (para.66) she told her union that she was not well enough to complete the Casework Assistance form because of the difficulty in thinking about the events which caused her distress;
c. Receipt of the recorded delivery letter initiating disciplinary action, we accept, triggered a profound anxiety about confronting post and handling correspondence (see para.72 of the liability judgment) – she consulted her GP and was prescribed citalopram.
d. On 18 June 2018 the claimant's GP advised her not to attend disciplinary meetings (LB page 269).

38. So, although the claimant was already finding it hard to think about what was happening at work without it making her ill, receipt of the recorded delivery letter did have an identifiable effect and caused a specific problem with correspondence. The claimant vividly described to us how upset she was at being regarded as a malingerer and because she was facing gross misconduct charges for a communication which she'd intended to be a cry for help. We accept that she felt outrage and a profound sense of injustice at being labelled with the words "gross misconduct". She considered the words to have a particularly serious connotation as a teacher whose role was to set standards. We accept that the respondent used in evidence against her within the disciplinary what were in fact the claimants attempts to get help with her workload and an attempt to explain that she was not coping.

39. The extent of the prescription changes in the 3rd and 4th week of June (see para.72 of the liability judgment) are a testament to the deterioration of her mental health which was caused by the initiation of the disciplinary process. We do not accept that an inability to engage with the disciplinary process means that she would not have been able to engage with a MAP process had one been commenced in June 2018 as recommended by the respondent's HR adviser. The extract from the claimant's oral evidence in para.79 of the liability judgment clearly articulated that, even once the disciplinary proceedings were dropped, the impact of them remained. Although she was communicating with her union to say how difficult it was to discuss the underlying issues before the disciplinary proceedings started, it was on receipt of them that she became unfit to attend disciplinary meetings.

40. We also note the oral evidence at the liability hearing quoted in para.85 of the liability judgment. We accept that this was not overstated and it provides good evidence of the injury to the claimant's feelings caused by receipt of the correspondence which preceded the decision to go down the disciplinary route. The claimant was upset at the implication that she was malingering and had the ability to be signed off by her GP at will.

41. The disciplinary process also involved what the claimant refers to as is the second gross misconduct letter (liability judgment para.77) which was an invitation to the rearranged meeting which, like the first, included the allegation that she then faced. The first overtures by Mrs Pallier overlapped with the

disciplinary procedure which was not discontinued until November 2018 and, in the oral evidence which we note at para.88 of the liability judgment, the claimant in effect explained that she would have been unable to engage with Mrs Pallier's invitation for an informal chat while the gross misconduct charge was hanging over her head. We find that she may well have been able to engage with the invitation had the gross misconduct charge never been hanging over her head.

42. The final unlawful act was, in effect, the same act found to be unlawful in two different ways: first it was a breach of the duty to make reasonable adjustments to start the formal MAP process without first attempting an informal conversation with Mr Long and second it was discrimination arising in consequence of disability to invite the claimant to the Stage 1 meeting by letter on 13 November 2018. The claimant did pin her hopes on a meeting with Mr Long because she saw him as above the day to day management in the school. She'd, reasonably, formed the view that, unless she went above the head teacher she was unlikely to achieve a change of heart.

43. She did not immediately read the invitation and we consider that her oral evidence set out in para.92 of the liability judgment shows that, at the time of the liability hearing, she was affronted and offended at the thought that the formal MAP process should immediately follow the discontinuance of the disciplinary process after merely two days and no attempt at bridge building. There was no acknowledgement at the time that there had been anything wrong in pursuing the disciplinary process. Mrs Pallier was unrealistic to think that simply sending a standard Stage 1 meeting invitation was appropriate, given what had gone before and that was taken into account in our finding that this was an act of discrimination. It was argued by the respondent that they would have had to go through the trade union in the first place and it is not a fair criticism of the claimant that Mrs Pallier should have telephoned her when the school had been asked not to contact her directly. Nevertheless, this was a missed opportunity to try to make things better by an informal approach, probably via the trade union in the first instance, to seek to set up an informal meeting. This action does not, in itself exacerbate or cause any psychological injury but does cause affront and offence which should be marked in the award of injury to feelings compensation.

44. To summarise our conclusions on the psychological injury, the claimant was tipped into being unfit to work by the original act although her ill health had other root causes. Those included that she was significantly unwell prior to the discrimination. She had experienced depression in the past and the condition amounts to her disability. There was strong evidence that she was struggling to cope at school because of the change of the method in which the school delivered its EAL provision to the immersive method. That is evident from the emails referred to by Mr Peacock at pages 193 & 195 dating from 13 and 14 March 2018. So there was in any event quite a significant underlying stress reaction to the way in which she was going to have to deliver teaching in the future which she regarded as not in the pupils' best interest. That and the underlying condition are both things which contributed to the causes of her ill health during 2018.

45. To the extent that it is argued that the claimant's upset and distress about the reduction to her pay because of the change in sick pay (para.96 of the liability

judgment) was a cause of ill health which should be taken into account we reject that. A reduction in pay because she was unfit for work which was a state of affairs caused by a discriminatory act would itself flow from that discriminatory act. Any injury to feelings cause by the reduction in pay would therefore fall to be compensated within the overall assessment of loss.

46. The claimant decided to resign and the loss of the job itself is not within the loss caused by the discriminatory acts. Her claim, until her oral evidence on 19 May 2022, was that she remained unfit to work: para.34 of the claimant's remedy statement. She was asked in cross-examination whether it was correct that there has been very little improvement in her mental health even since her employment ended. She referred to trigger points,

    "By and large in between, I'm O.K.. I still have some issues with post and I realise that because a recorded delivery letter came through and I phoned my daughter and she said 'Open it!'. It was Crufts tickets. It's very, very sad. I don't know how it came to this."

47. However, on the question of whether she remains unfit to work, she stated that she was not sure and the gist of her evidence was as a result of what happened her confidence was low and, being at "the older end of the spectrum" she didn't feel confident to go for jobs. She did refer to some struggles to read the documents before her when giving evidence which we took to mean a struggle to comprehend or concentrate rather than a vision difficulty. She also said that she had been going to do literacy tuition with primary school pupils but the coronavirus pandemic had intervened. She was 67 ½ years' old at the time of her statement, nearly 68 at the date of the remedy hearing and will be 70 years' old on 27 May 2024.

48. Her argument was that she would have worked until 70 years' of age. When it was put to her that there was a negligible chance of that happening she described herself as presently "fully compos mentis, not arthritic, not physically disabled … fit and well and walking 5 miles per day".

49. Taking into account that evidence, the fact that she was significantly unwell prior to the discriminatory acts and bearing in mind that there is often a difficulty in evaluating the degree to which a person had recovered psychologically and emotionally from particular events, we find that, in terms of mental health, she is back to the person she was before the discriminatory acts took place. She continues to have some mental health challenges in that she lacks confidence to put herself forward for jobs which is, in part, due to her perception of how her age will be viewed. She described some difficulties in grasping the written word and some triggers such as with certain types of post. However her evidence, which we accept, was that she was physically able to work and mentally able to work. There is no specific evidence about when she improved to that extent but we find that that is the position as at the remedy hearing. Therefore we find that the exacerbation of the claimant's mental health condition lasted approximately 4 years in total but varied in the seriousness of the effects over that time.

50. Those are our findings on the issues set out in paragraph 6 above. The answers to the questions in paragraph 7 above, for reasons which are already explained, are that the claimant's absence from work from the start of the Summer term in the academic year 2017/2018 to the date of her resignation was causally linked with the psychiatric injury suffered in that she became unfit to work as a result of the failure to make reasonable adjustments and then the discriminatory act of instituting disciplinary proceedings and failing to attempt an informal approach before instituting MAP proceedings further exacerbated her ill health.

51. The claimant's inability to work up to 19 May 2022 therefore flows from the psychiatric injury. As from 19 May 2022 she is fit to work.

52. The next question (paragraph 8 above) requires the Tribunal to decide what would have happened had the discriminatory treatment not taken place. Had the respondent taken the steps set out in para.2 of the reserved judgment, would the claimant have returned to work after the Easter holiday 2018 on a revised timetable? If so, what hours would she have worked?

53. Mrs Pallier's evidence was that the steps which we held it would have been reasonable for the respondent to have to take in relation to introducing the timetable changes were things of a kind which the respondent would routinely have tried. The claimant's witness, Ms Brudlo, was employed by the respondent from 2007 to August 2019, including as a teacher and latterly was the school NASUWT representative. She gave unchallenged evidence to similar effect saying that planned changes would generally be discussed with staff towards the end of the academic year but also about the process when she was asked to change the subjects she would teach; the gist of what she said, particularly in her paragraph 10, was that there would usually be a discussion with the Head of Department and support plan put into place with extra time to prepare and induction training.

54. The claimant relies heavily in her arguments on her evidence that she coped with change in the past when she had the opportunity to consult, have preparation time or was provided with a coach or other support, for example. Mrs Pallier accepted that to be the case. We think it more likely than not that some resolution would have been achievable. Mrs Pallier's evidence was that it was likely to be done by enabling the claimant to do more one to one tuition and less whole class teaching. We bear in mind Mrs Pallier's evidence about the roles which were available. However, as at 26 March 2018 there was a proposed timetable for the claimant and we are considering the prospects of the claimant successfully returning on that timetable.

55. We reject the respondent's argument that this engagement or consulation would not have changed anything. That argument is predicated on the claimant's actual inability to engage after the discriminatory act of commencing disciplinary proceedings. However, since that inability on the part of the claimant to engage was *caused* by that discriminatory act, it should be disregarded in our assessment of what would have happened had no discrimination taken place.

56. However, the school had taken a decision open to it for reasons of financial need to cease the dedicated EAL provision. Furthermore, it was the senior leadership team of the school and the governing body which would decide the school's needs for particular subjects and what the timetable overall was to be. Our findings are that there should have been consultation and support, not that it would have been reasonable to offer a particular timetable to the claimant or that the respondent should not be able to require the claimant to teach particular subjects. It is necessary, therefore, to consider what subjects were on offer and the claimant's views on them. The question is whether the claimant would have successfully returned to work, on what hours and for how long, given the timetable that was available.

57. Her evidence at the remedy hearing was that she could have taught French, given the appropriate support. At the liability hearing, her evidence was that she had never told the respondent that she was not a French teach because she had had some French lessons on her existing timetable. However, she described in vivid detail the challenges that teaching French gave her and her lack of self-belief in that subject (see para.23 of the reserved liability judgment and the evidence cross-referred to there). It was part of her claim that to require her to teach French, in the circumstances that the requirement was put into effect, was a breach of the implied term of mutual trust and confidence. The substantial disadvantage relied on by the claimant for the purpose of her reasonable adjustments claim was an inability for reasons connected with her disability to teach Friday at the required level on the notice provided without it adversely affecting her health (see para.167 of the reserved liability judgment).

58. We have not been provided with specific evidence about what subjects other than those on the proposed timetable would have been available (LB page 204). Mrs Pallier's evidence for the remedy hearing (HP para.6) was that any teaching of EAL classes was very limited and not enough to occupy a full or part time role. Mrs Pallier has not been able to identify any more information than is on the proposed trimetable as from 16 April 2018.

59. On the other than we accept that the claimant had a genuine love of teaching the children at the school and give weight to her evidence that, despite disagreeing with the principle that EAL should be taught immersively, she thought it would be better for the children if she were at the school teaching in a way she thought wrong than if she were not there at all. Mrs Pallier's evidence was also to the effect that they would try to keep the claimant's skills. This increases the chances of finding a solution.

60. The suggestion is that taking account of the claimant's needs, illness and lack of confidence there is a real prospect that any solution would have included a reduction of hours. We do not have direct evidence of what those hours would be or for how long. We think that it would have taken time to put discussions into place, time for lesson shadowing and negotiations and for the claimant to recore her equanimity. Although we found that the absence was caused by the failure to consult with the claimant before Easter, realistically the 2 weeks remaining before the end of term would not have been sufficient and there is a real prospect that the claimant would have been unfit to work if no mutually acceptable solution

were found in any event. Doing the best we can, we think that by half term of the Summer term in academic year 2017/2018 it is probable that arrangements would be in place for the full time timetable that the claimant was willing to teach.

61. As we understand it, that would have been within the period of any sickness absence and would not, therefore, affect the claimant's pay. We accept that there are real prospects that the claimant would have become and remained unfit in any event, or that she would have worked on reduced hours (which it is not possible on the evidence before us to specify), or that she would have resigned because of disaffection with the new practices for teaching at the school. These mean that there should be a discount from the financial compensation awarded. There are a number of variables and to reflect all of them we consider that a 30% deduction would be appropriate. Put another way, we consider that there was a 70% prospect of a mutually acceptable solution being found which succeeded on a sustained basis. The claimant's love of her job, the fact that she was valued as a good teacher and her ability to be flexible in the past mean that the prospects of success are better than 50%.

62. Among the questions set out in paragraph 6 above was whether, had the respondent not started a disciplinary investigation procedure the claimant would have been fit to work as a teacher and, if so, when and in what role/for what hours and then what would have been the effect of taking the informal steps we found reasonable prior to any formal MAP procedure. As to the first of these, our conclusion is that this eventuality does not affect the 70% chance of a successful resolution of the question of what the claimant's timetable should be. It is more likely than not that the claimant would have been in work had the earlier breach of the duty to make reasonable adjustments not occurred so there is no need further to consider the question of whether she would have been been fit to work as a teacher had the failure to attempt an informal approach before the formal MAP not occurred.

63. There was a 30% chance that no mutually acceptable timetable could be achieved, or that the claimant would have become unfit to work on a long term basis because of the challenge of coping with the subjects she was required to teach on a long term basis in any event. Had that happened, we are satisfied that, ultimately, the respondent would have started a formal MAP. However, the chance that any such formal MAP would cause the claimant's employment to end with a fair, non-discriminatory capability dismissal is sufficiently covered by the existing 30% deduction. Furthermore, the inability to engage is so linked with the claimant's reaction to the unlawful disciplinary process that it would not be right to make any adjustment for the likelihood that she might not engage with a future, lawful and fair MAP process which, *ex hypothesi*¸ would not take place following previous, discriminatory disciplinary proceedings.

64. The claimant argues that she would have worked beyond her normal retirement age. She states that she has a comparatively low pension because she worked as a teaching assistant for a number of years and that that supports her contention that, absent the discriminatory acts, she would have remained in post beyond her normal retirement age. With a date of birth of 27 May 1954, her normal retirement age was 65 years' old.

65. As a matter of fact, the claimant resigned on 21 July 2019, after her 65th birthday on 27 May 2019 for reasons which we found in paragraph 108 of the reserved liability judgment. She had been thinking about resigning before that (see paragraph 98.f. of the reserved liability judgment). Our view is that there is very considerable doubt, given the degree of disaffection with the respondent school, the leadership and the approached to delivering ESL teaching, that the claimant would have stayed in full time employment for a further 5 years until she was 70 years' old – had the adjustments been made and had she returned to work. Given the recent past, we are also of the view that further changes to the timetable were more likely than not.

66. In the scenario that the claimant was supported with timetable changes and returned to work after the Summer 2018 half term holiday, she would have been approaching her normal retirement age in the following year. We take on board that, in general it is relatively rare for teachers to remain in employment beyond 65 years of age. On the other hand, the claimant gave unchallenged evidence that she expected a reduced pension because she had worked as a teaching assistant earlier in her career. Notwithstanding that, we think that there is a very significant prospect that she would have retired in her 65th year. We put that chance at 50%; there was a 50% chance that the claimant would have retired at the end of the academic year after her 65th birthday i.e. on 31 August 2019.

67. There was therefore a 70% change of the claimant successfully returning to work full time and from 31 August 2019 there was a 50% chance of her continuing in employment. Any other variables which might have affected her employment until 31 August 2019 (such as whether she would have worked reduced hours or whether she would have had sickness absence which caused the respondent to engage the sickness absence policy) are taken into account in those figures.

68. Mr Peacock confirmed that the figures used by the claimant as the basis of her calculation of financial loss in her schedule of loss are agreed by the respondent to be the correct figures. Calculation of loss of earnings would be done on the basis of the net figures, subject to grossing up to take account of the incidence of tax on any award, if necessary. However, we have noticed that the claimant, in calculating the loss of pension, has applied the rate of the employer's contributions (16.48% of gross salary – RB page 58) to the calculation of loss of earnings which was, correctly, based on the net weekly salary. We have therefore corrected this to ensure that the claimant is fully compensated for her loss of pension. The respondent's pay and pension information shows a monthly gross pay of £2,917.33 for 2018 – 2019 (RB page 54) or £673.23 per week. The weekly pension loss for 2018 – 2019 would therefore be £673.23 X 16.48% = £110.95. The claimant has claimed on the basis of an assumed 2% salary increase per annum thereafter.

69. The claimant's oral evidence at the remedy hearing that she is fit to work was, perhaps, not what the respondent expected (see RSA para.52 and the description on the updated schedule of loss). As at the date of the Tribunal discussion, we were about two years away from the end of the claimed period of loss although, given the delay in preparation of this judgment, the calculation date

is taken as at 31 March 2023. The claimant is seeking to persuade us that she would have remained in employment full time until 70 years of age but that she will not now earn any money in any capacity, despite being fit to work.

70. Starting with the counter-narrative of what might have happened had she stayed in employment beyond 31 August 2019, there was likely to be a continuing period of change for those working in a school which had been placed in special measures. We accept that there was a 50% chance that she would have remined in full time employment beyond her 65th birthday but there was a declining prospect that she would continue in full time employment for a further 5 year period without reducing her hours, becoming unfit to work for some other unconnected reason (given the need to adapt to change and the underlying health problems) or of her choosing to leave. We are of the view that there was a relatively small chance that she would have remained in employment for the whole of that period and, doing the best that we can, we assess that as 30%.

71. Therefore, the claimant will be awarded 30% of the one half of the losses claimed from 31 August 2019 onwards because there was a 50% chance that she would remain in employment after that date but there should be a 70% deduction from losses from that date to take account of the above variables. She would have given notice of retirement to end no later than the end of the Easter term 2024 which was the term end before her 70th birthday on 27 May 2024. Although we are not aware of the exact term dates, Good Friday in 2024 will be on 30 March and therefore we assess the loss until the end of March 2024. Since that is loss to be incurred over the next twelve months (taking 31 March 2023 as the date of calculation), it is not appropriate to make any reduction for early receipt.

72. The next question is whether the claimant has mitigated her loss. Although she is now fit to work, her loss is continuing because, due to her age, she is unlikely to be able to secure a permanent full time post. We accept the claimant's evidence that the job market for a former teacher aged 68 ½ years' old in the present claimant means that she is unlikely to be able fully to mitigate her loss. Indeed no argument has been put forward that she has failed to mitigate (RSA para.51).

73. We next consider what award there should be of compensation for injury to feelings. As explained above, our finding is that the discrimination caused the claimant to experience exacerbation of her mental health condition which lasted approximately 4 years in total but varied in seriousness over that period. We take all of our findings about the impact of the series of events on the claimant into account but do not repeat them all.

74. Initially, she became unable to work but, following the unlawful disciplinary action, she because unable to cope with opening post or engaging with the various processes which were in train. Against the background of poor mental health prior to the acts in question, we decline to award a separate sum for a specific psychiatric injury but our factual findings about the extent of the exacerbation of her mental health condition are reflected in the award for injury to feelings.

75. The injury to feelings include the outrage she felt at being accused of gross misconduct for having made a "cry for help" and that subsisted and was evident in her oral evidence. As a dedicated teacher, she considered it a particular afront to be accused of that and her almost revulsion of receiving that accusation came across clearly to the panel. She was also particularly affected by the disparity she perceived between the aspirations that a faith school should have about living up to its values and her treatment.

76. The three events which were found to be unlawful extended from late March 2018 to November 2018: about 6 months. However the consequences to the claimant lasted longer because she remained unfit to work. She remained upset that the school had not made an informal approach before moving from one formal process to another. We are not including in the assessment any feelings of grief or loss from the loss of the job itself. We conclude that the claimant's better health is a sign that the favourable liability judgment has provided her with some reconciliation to the events and that she will now be able to move on. Nevertheless, that means that the impact on her, albeit declining, persisted until at least until May 2022. She continues to be upset and regretful at the treatment she received.

77. The series of acts and the fact that the psychological impact lasted for 4 years means that this award should clearly fall within the middle Vento bracket. For this case that means an award between £8,800 and £26,300 is appropriate – indeed we are agreed that an award in the higher end of that middle band is appropriate. We need to bear in mind the real life value of any award and have decided that an award of £21,000 is appropriate. To that should be added interest calculated as set out in the judgment above.

78. It is convenient to take the questions about whether the injury should be apportioned as between different causes next (paragraphs 11 and 12 above). Those questions are

    a. If the claimant succeeds in showing that the unlawful acts of discrimination were a material cause of psychiatric injury, was that psychiatric injury indivisible or is there a rational basis for concluding that that the harm suffered can be divided into a part caused by the respondent's discrimination and a part not caused by the respondent's discrimination? If so, what proportion should the respondent bear?

    b. Depending upon the Tribunal's findings on the causes of the claimant's sickness absence and the causes of her resignation, is there a rational basis on which to apportion responsibility for the financial losses flowing from those events as between those causes for which the respondent is responsible and those causes for which the respondent is not responsible? If so, what proportion of responsibility should the respondent bear?

79. Our conclusion on this is that there is no rational basis for a further division of the causes of financial loss or injury to feelings because the claimant went from a woman who had a disability but who was sustaining attendance to one who was not sustaining regular attendance. There is no rational basis for attempting to

divide the loss of earnings between different causes of her ill health because it was the acts of discrimination which were entirely responsible for the unfitness to work. As to the injury to feelings, we decline to award a separate sum for a specific psychiatric injury but have made factual findings about the extent of the exacerbation of her mental health condition which should be compensated as part of the award for injury to feelings. In those circumstances, it is not appropriate to divide that award either.

80. The claimant argues that she should be awarded aggravated damages because of the way the respondent has defended the claim. In her schedule of loss she specifically refers to the original denial that she was disabled, the arguments that the disciplinary action was justified and that the respondent's apology was made only through Mr Long's statement. In CSA para.41, it was argued on her behalf that that apology should be discounted because the evidence given by Mr Long that he may not have met with the claimant and that there were no jobs at all that she could have done was contrary to any reasonable view of what may have happened. It is also argued that that statement, that Mr Long may not have met with the claimant, has aggravated the harm to the claimant.

81. We reject the allegation that Mr Long is, in effect, giving evidence that he would have behaved unlawfully (CSA para.42). That is not what he says in his statement. He does not go so far as to say that he would have refused to meet with her. He states that it would not have been normal process for him to do so in his role as Executive Head (see FL statement para.17). We do not think it highhanded, oppressive, malicious or insulting conduct for him to try to give hypothetical evidence about what he was likely to have been able to achieve. It is not unusual for an apology to be given following the liability stage; one sent earlier by letter might have had a better chance of actually having impact on the claimant's injury to feelings but the fact that it was instead offered through the witness statement is not highhanded behaviour. We do not think there is sufficient reason to conclude that it was not genuine. There is no evidence that this matter has had a specific impact on the claimant for which she needs to be separately compensated.

82. As to the argument that it was high-handed, oppressive, malicious or insulting conduct to fail to concede disability within the litigation, the concession of both the fact and knowledge of disability was made on basis of the date of receipt of the 24 July 2018 occupational health report. This was not a straightforward case and our view is that it was not unreasonable for the respondent to wait until the claimant set out her case in her impact statement before pinpointing the date from which disability was conceded – even if it was clear that she had substantial adverse effects of a mental health condition later in the year. It was not unreasonable for the respondent to wait to see the evidence about disability within the context of the specific issues in the case.

83. The argument that an award of aggravated damages should be made because of the respondent's decision to continue to defend the disciplinary proceedings fails. There is no evidence of a specific additional impact on the claimant's injury to feelings beyond that which has been compensated for in our award for injury to feelings caused by the unlawful act itself. In this case, we have included within

our assessment of loss the claimant's affront at having to pursue the claim to Tribunal as well as suffering the indignity of the disciplinary action in the first place. To make a separate award of aggravated damages would involve double countin.

84. The respondent argues that there was an unreasonable failure on the part of the claimant to comply with the applicable code of conduct on grievance procedures and therefore that, under s.207A TULR(C)A 1992, there should be a deduction from compensation. In the light of the claimant's state of health at the relevant time, her difficulty in engaging with the processes which the respondent was pursuing, there was no unreasonable failure on the part of the claimant by not bringing a grievance. The discretion under s.207A TULR(C)A does not arise.

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Employment Judge George

Date:…24 April 2023 ……

Sent to the parties on:

24 April 2023

For the Tribunal: