EMPLOYMENT TRIBUNALS

Claimant:	**Dr E Michalak**		
First Respondent:	**The Mid Yorkshire Hospitals NHS Trust**		
Second Respondent:	**Mr David Dawson**		
Eighth Respondent:	**Mr Colin White**		
Twelfth Respondent:	**Mrs Dianne Nicholls**		
Heard at:	**Leeds**	**On:**	**14, 15, 16, 17 and 18 November 2011**
		Reserved:	**5, 6 and 7 December 2011**
Before:	**Employment Judge Burton**		
Members:	**Mrs A Steele** **Mr G H Hopwood**		

Representation

Claimant:	Ms J McNeill, QC
Respondents:	Mr T Linden, QC

RESERVED JUDGMENT ON REMEDY

1. The First Respondent shall pay to the Claimant, as compensation for unfair dismissal, the sum of £7,180.

2. The First Respondent (The Mid Yorkshire NHS Trust), the Sixth Respondent (Dr David Dawson), the Eight Respondent (Dr Colin White) and the Twelfth Respondent (Mrs Diane Nicholls) shall be jointly and severally liable to pay compensation to the Claimant for unlawful sex and race discrimination in the total sum of £4,452,206.60.

3. The First Respondent shall make a payment of £10,000 to the Claimant by way of a Preparation Time Order.

4. Credit be given to the First Respondents in relation to interim payments made by them to date totaling £300,000

REASONS

1. On 14 June 2010 this Tribunal sent a decision to the parties ("the first decision") whereby we concluded that the Claimant had been unfairly dismissed and had been the subject of unlawful sex and race discrimination. We also concluded that she had been subjected to a detriment by reason of having made a qualifying protected disclosure. The latter finding, however, adds nothing at all to the compensation that we are to award the Claimant in relation to the complaints of unfair dismissal and unlawful discrimination. The matter was initially listed for Remedy Hearing on the week commencing 22 November 2010. The Claimant, who had hitherto been represented by her husband, then retained her current solicitors to represent her in relation to the Remedy Hearing and at a Case Management Discussion that took place on 19 October 2010 both representatives confirmed that they were not ready for that Remedy Hearing and accordingly that Hearing was postponed until 28 March 2011. Shortly before that projected Hearing the Respondents made an application for the matter to be further postponed. This was, principally, because the Respondents wished to instruct their own medical expert to examine the Claimant and to report. That application was dealt with at a further Case Management Discussion that took place on 2 March 2011 the Remedy Hearing being further postponed ultimately to be relisted for the week commencing 14 November 2011.

2. At this Hearing the Claimant was represented by Ms Jane McNeill, QC, the Respondents by Mr Tom Linden, QC. In advance of that Remedy Hearing the Claimant had served a schedule of loss totaling in excess of £9,000,000. The Respondents had not served a detailed counter-schedule principally, we understand, because there were evidential issues that needed to be resolved before they could, themselves, formulate their views as to the value of the Claimant's claim.

3. The first day of the Hearing was, by agreement, spent by the Tribunal reading various statements, reports and documents, we heard evidence over 2 ½ days from Professor Stephen Hirsch, a Consultant Psychiatrist called on behalf of the Claimant, Dr Geoff Davies, a Specialist in Occupational Medicine, Dr Julian DeHavilland effectively gave evidence on behalf of Dr Michalak, from Mr Tomasz Gniadkiewicz (the brother-in-law of Dr Michalak), Ms Julia Squire, the Chief Executive of the Respondent Trust and Professor Tim Hendra, the current Medical Director. We were asked to consider advice given by Mr Anthony Carus, an Actuary, in his report of 17 February 2011. We then took submissions from both Counsel over the last 1 ½ days of Hearing. The Tribunal then convened for a Chambers Meeting on the 5th-7th December 2011.

4. In the course of this decision we will go through each of the heads of claim in turn setting out our relevant findings of fact, the law to which we have been referred, the parties' respective positions and our findings. There are however certain background events to which we should, initially, make reference.

The Claimant's Current Medical Condition

5. In our first decision we made reference to the Claimant's then state of mental health although we made no formal findings as those were not issues before us at that stage. There was, however, at that stage before the Tribunal a report of Professor Stephen Hirsch dated 28 August 2009 based upon an examination of the Claimant that took place on 23 June 2009. At that point Professor Hirsch was instructed jointly by the parties to these proceedings. After noting her social and general medical history he recorded the salient parts of the examination which he carried out on the Claimant. He interviewed and obtained further information from Dr DeHavilland. At Paragraph 126 of his report he concluded that if the events of which the Claimant complained (which had yet to be adjudicated upon by the Tribunal) were found to be true then those events caused the psychiatric condition from which she was suffering. He reported that the Claimant suffered from:-

> *"Insomnia, nightmares in which she relives the events with the Trust, repeated intrusive thoughts, persistent anxiety and psychosomatic symptoms with episodes of tightness and chest pain which have caused her to go to hospital on three occasions. She suffers from anhedonia, poor concentration, lack of interest, lack of libido, poor memory and strong suicidal ideation."*

6. He came to the following conclusion:-

> *"My diagnosis is chronic post-traumatic stress disorder, F43.1 in the International Classification of Disease. Alternative diagnoses are chronic anxiety and depression, of moderate to severe, ICD F43.2 because this captures the high degree of anxiety she has in addition to depression. Another possibility is adjustment disorder*."

7. At that time he set out his prognosis as follows:-

> *"Her condition is chronic and disabling. On the balance of probabilities if the case is completed, and if she is able to return to work, she will be relieved of her symptoms in the course of one to two years providing she has treatment. One is not able to ascertain at this point the likelihood that she will be able to function as a doctor, possibly as an assistant in a private setting, but I doubt that she will be able to function as Consultant level in a NHS organisation environment."*

8. He recommended that the Claimant undertook intense psychological treatment either by way of eye movement desensitisation reprogramming or trauma related cognitive behavioural therapy. She would in addition require intensive pharmacalogical treatment. He anticipated that that treatment would take six to twelve months to complete but that there was no point in her beginning that treatment until these legal issues had been resolved.

9. In preparation for this Remedy Hearing Professor Hirsch saw the Claimant

again on 24 August 2010 his report being dated 23 September. In that report he updated himself as to more recent events and he reviewed the Claimant's more recent medical records. He repeated his diagnosis of chronic post traumatic stress disorder or, in the alternative, chronic anxiety and depression of moderate to severe. He described there being:-

> "*Ample evidence that Dr Michalak suffers from a chronic disabling psychiatric condition which I believe is best understood as a form of chronic PTSD with chronic depression and anxiety."*

10. In terms of causation he concludes as follows:-

> *"Her condition arises from her experiences at the hands of her employer. Experiences as she described to me were found as facts by the Court. There is no other underlying cause in her medical history and no history of mental ill-health arising prior to her employment in Pontefract. The trauma she suffered went beyond upsetting situations of everyday life such as divorce, bereavement, failed examination, redundancy, etc. The lengthy campaign and the fact that the wellbeing of the complainant, her child and family was involved were of importance for the severity of the injury. Her self identity is connected to the quality of her work and her family responsibilities and the Trust's actions were perceived as an exceptionally threatening assault."*

11. In terms of prognosis he expresses the following view:-

> *"I believe that once the proceedings are concluded, including the action by the General Medical Council, which came solely as a consequence of the unfair dismissal that the Employment Tribunal has found is unjustified, Dr Michalak may be in a better position to respond to psychotherapeutic treatment most especially eye movement desensitisation reprogramming and if available trauma oriented cognitive behavioural therapy."*
>
> *"Dr Michalak's chances of any recovery will be considerably enhanced if she has inpatient treatment at a private psychiatric hospital, if she is willing to attend… Dr Michalak requires intensive inpatient treatment probably best achieved away from her home surroundings where she can have a combination of group and individual psychotherapies, EMDR and cognitive behavioural therapy. Effective treatment would probably require four to six weeks treatment in this setting."*

12. In terms of the future he says as follows:-

> *"Dr Michalak's prognosis remains guarded. I am confident she may show improvement with treatment gradually over the next one to three years and recover to the point that she may live a less dependent everyday life and may no longer require the support of a live in carer. I am less confident about her ability to return to professional work. On the balance of probabilities she will not be able to do so but I reserve some hope that this is possible."*

13. He then deals with some of the practical difficulties about her ultimately returning to a professional life including the acute sense of injustice that she feels, the feelings of inadequacy that she has and the fact that she has lost trust in medical professionals. Taking those matters into account he concludes:-

> *"On the balance of probabilities and taking into consideration all of the circumstances, I think it unlikely that Dr Michalak could return to work in a professional capacity."*

14. In preparation for this Hearing Professor Hirsch reviewed all the papers and the report that the Respondents had obtained from Dr Davies and on 30 October 2011 he wrote to the Claimant's solicitors with a view to revising his diagnosis. He explains how there can be an overlap of symptomatology between various psychological/psychiatric conditions which makes classification of illness a less than exact science. His letter then reads:-

> *"However, I now realise that Dr Michalak's symptoms have persisted for more than two years and as such she satisfies the criteria for the diagnosis of an* ***enduring personality change after a catastrophe (F62.0), or after a psychiatric illness (F62.1)****. She meets the criteria of having a change in her pattern of thinking about herself and the environment to which she relates. Permanent hostile, distressful attitude to others; social withdrawal; constant emphasis on her injury; accompanied by hopelessness, not present before, and an enduring feeling of being on edge, with significant interference with her function and no previous adult or developmental personality disorder. In fact she has no previous psychiatric history whatever. When these symptoms have been present for more than two years she meets the criteria of enduring personality change.*
>
> *It remains a matter of question, both in my mind and Dr Davies' mind, whether she can recover from this condition, but the Court should note that she has had psychotherapy with only a limited effect. I would have recommended that after the legal proceedings are complete that she may respond to the treatment recommended by NICE for PTSD, i.e. eye movement desensitisation reprogramming, accompanied by an intensive inpatient treatment programme with group therapy, and attempts with other antidepressant medication. These should be tried, but after eight years subjection to chronic repeated stress (see Dr DeHavilland's statement – I counted 22 instances and categories of incidents he listed), on the balance of probabilities, she will improve but it is unlikely that she will return to work as a doctor."*

15. Dr Davies examined Dr Michalak, accompanied by her husband, on 10 October 2011. His report was dated 18 October 2011. Dr Davies agreed that the appropriate diagnosis was one of depression and anxiety disorder suggesting that the diagnosis of PTSD was not necessarily made out. In

evidence before the Tribunal having heard the evidence of Professor Hirsch in relation to his amended diagnosis Dr Davies indicated that he would defer to Professor Hirsch's specialty. Dr Davies agreed that the cause of the Claimant's problems lay with the difficulties that she had experienced in the workplace. He agreed that she needed structured and ongoing psychotherapy that would take one to two years or even longer to complete. He believed that there were appropriate treatments available which on the balance of probabilities would be likely to have an impact and improve her symptoms. He agreed however that there was no point in beginning that work until all legal issues had been resolved. In terms of the outlook he commented:-

> *"The outlook with regard to the level of recovery following appropriate psychotherapy is very difficult to assess in any one specific case. This is because there are so many factors involved in the outlook. For example, an individual's personality, an individual's motivation to get better, the impact of the feelings of close family members. Also, whether or not an individual feels "satisfied" with the outcome of all the legal proceedings can be a factor in their level of response to treatment and further recovery."*

16. He concluded:-

> *"If Dr Michalak decides to co-operate fully and positively engage in treatment then the likelihood of improvement would be increased. In that case my opinion is that she would make some recovery and there is a reasonable chance that she would reach a level of fitness to be able to return to work as a doctor. If she did not engage positively then the chance of recovery is minimal*."

17. He then goes through a number of, what he sees to be, potentially relevant issues in relation to that matter. He describes Dr Michalak's personality. He describes her as having a rather pedantic personality and being somebody who pays attention to detail who likes thing done thoroughly and properly. She would find it difficult to take a pragmatic overview. Those are factors that led Dr Davies to conclude:-

> *"Dr Michalak is likely to find it difficult to be able to close off some of the difficult situations that she has been involved in. Therefore, even if she wins every legal argument and her financial claims against the Trust, it is likely that she will still retain a degree of strong feelings about the situation. Consequently, this may have an adverse effect on the potential benefits of psychotherapy."*

18. He deals with the feelings of anger which the Claimant retains in relation to the Trust and concludes:-

> *"I think these feelings are very powerful and it is going to be difficult for a Psychotherapist to help Dr Michalak to cope with this anger and thus to be able to put it to one side so that, she can move on to live the rest of her life as best she can."*

19. He describes the very strong feelings of anger that Dr DeHavilland exhibited

during the course of his session with Dr Michalak and concludes that:-

> *"Dr DeHavilland's feelings and behaviour are likely to have an impact on Dr Michalak's symptoms and recovery. For example, if Dr DeHavilland continues to hold such strong feelings, and to express them to his wife or to other people in front of his wife, then it is going to be more difficult for Dr Michalak to respond to psychotherapy."*

20. He refers to the desire of Dr Michalak and Dr DeHavilland to achieve retribution against those that have wronged Dr Michalak and comments:-

> *"Some individuals have a need for the other party to be seen to be punished for their actions and cannot move forward until that is done."*

21. He speaks of the issue of financial motivation and, recognising that the Claimant is going to recover significant compensation out of these proceedings he expresses the view:-

> *"If the financial solution to this case is such that Dr Michalak does not need to work for the rest of her life then in my opinion this may reduce her motivation to return to work then if the financial situation was less secure."*

22. He speaks about Dr Michalak's feelings towards their eight year old son. Both Dr Michalak and Dr DeHavilland feel that his welfare has suffered significantly by reason of the events in this case and the legal battle in which his parents have been enmeshed. He expresses the view:-

> *"If the financial settlement is such that Dr Michalak does not need to return to work for financial reasons, then she may decide to spend her time at home in order to give her son as much support and time as possible in order to rectify the difficult situation that has occurred over the past few years."*

23. He then explores the various steps that would need to be taken before she returned to work as a Medical Consultant and sets out what he perceives to be the critical requirements to enable that to happen namely that she needs to receive appropriate medical treatment resulting in a significant improvement in her symptoms, that the GMC would need to be satisfied that she was sufficiently recovered to be able to work, that she would need then to undergo a period of clinical retraining and, finally, that the Claimant would have to have a sufficiently strong motivation to return to work. He concluded that her motivation was poor. In his conclusions he expresses the following views:-

> *"My personal opinion, which is based on the cases I have seen in the past is that if Dr Michalak decides that she wants to try to get better and positively engage in the treatment there is a reasonable chance of there being an improvement in her symptoms…*
>
> *The specific level of improvement cannot be predicted accurately*.

However in my opinion the most likely scenario is that she would have some improvement but still have a degree of vulnerability to pressured situations in relation to an employer… In my opinion I consider that it is unlikely that Dr Michalak will make no progress at all. Also, in my opinion it is unlikely that she will recover such that she gets back to where she was before all these events occurred."

24. Helpfully the experts conferred with each other with a view to arriving at a joint statement. As will be apparent from previous summary of the experts' evidence, in reality there was very little in dispute between them.

25. The other events that need to be mentioned within this decision relate to the ongoing proceedings before the GMC. As a result of the Respondents' referral charges have been brought against Dr Michalak. When our first decision was promulgated a copy of this was sent to the GMC who, we understand, decided that it had no relevance to their deliberations. We understand that they have spent in excess of thirty days hearing evidence but that after the proceedings were adjourned part-heard one of the panel has become seriously ill and is not able to resume. We understand that the GMC then decided to start again before a fresh panel but that that decision was, successfully, the subject of a Judicial Review application brought on behalf of the Claimant that decision being quashed. We understand that, as a consequence, these proceedings are currently at an impasse. Dr DeHavilland believes that it is open to him to make an application to have the complaint struck out.

26. By reason of the findings that will appear later on in this decision, namely that it is highly unlikely that Dr Michalak will ever return to work as a doctor those ongoing GMC proceedings have little significance to the way in which we approach the issue of compensation save, they should be aware, that both medical experts giving evidence before this Tribunal shared the view that until those proceedings were concluded Dr Michalak cannot begin the treatment which will lead her to any form of improvement in her current, desperately unhappy, condition. It is hoped that the GMC will be made aware of that expert opinion which may provide some assistance to them in determining the future of these proceedings.

27. We now turn to the various heads of claim which we consider more or less in the order in which they appear within the Claimant's schedule of loss.

Unfair Dismissal

28. The parties are agreed that the Claimant is entitled to a Basic Award of £6,930 together with compensation for loss of her statutory rights in the conventional figure of £250. The parties agree therefore that the Claimant should be awarded the sum of **£7,180** for unfair dismissal.

Discrimination

29. We then turn to the compensation in relation to the discrimination claims. Section 65 of the Sex Discrimination Act 1975 says as follows:-

"(1) Where an employment tribunal finds that a complaint

presented to it under Section 63 is well founded the tribunal shall make such of the following as it considers just and equitable –

(a) an order declaring the rights of the complainant and the respondent in relation to the acts with which the complaint relates;

(b) an order requiring the respondent to pay to the complainant compensation of an amount corresponding to any damages he could have been ordered by a county court or by a sheriff court to pay to the complainant if the complaint had fallen under Section 66;

(c) a recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates"

30. Section 66(4) reads:-

> "For the avoidance of doubt it is hereby declared that the damages in respect of an unlawful act of discrimination may include compensation for injury to feelings whether or not they include compensation under any other head."

Similar provisions appear in Section 56 of the Race Relations Act 1976.

31. We also have in mind the basic principle set out in **Wells v. Wells** namely:-

> "The object of the award of damages for future expenditure is to place the injured party as nearly as possible in the same financial position as he or she would have been in but for the accident. The aim is to award such a sum of money as will amount to no more, and at the same time no less, then the net loss."

Non-Pecuniary Loss

32. The Claimant seeks compensation for injury to feelings, for personal injury that she has suffered, for aggravated damages, for loss of congenial employment, for stigma damages and for exemplary damages. Mr Linden accepts that the injury to feelings award must be towards the upper end of the top band set out in *Vento* as updated in **Da'Bell v. NSPCC** [2010] IRLR 19 which increased the higher band to between £18,000 and £30,000. We understand that Mr Linden does not really dispute that this claim was likely to come at the top of that band. Equally Mr Linden does not dispute that the Claimant is entitled to compensation for the psychiatric injury that she has suffered. The parties agree that, by reference to the current Judicial Studies Board Guidelines this is a claim that should be assessed as one where the Claimant has suffered severe psychiatric damage thus valuing the claim between £36,500 and £77,050. Ms McNeill values the claim at £57,000. Mr

Linden adjusted his initial view and valued it at £55,000. The parties will not be surprised that the Tribunal have elected to take the view that that claim is worth £56,000.

33. Mr Linden concedes that the facts of this case as set out in our first decision would justify an award of aggravated damages. Where, however, he disagrees with Ms McNeill is that he says that we should look at those three heads of claim as a whole and award a sum of money which represents the totality of the harm caused to the Claimant which he would suggest to be in the order of £65,000. Ms McNeill, however, contends that each head of damages should be separately assessed and the Claimant should be awarded the cumulative total.

34. We fully accept that the principle that we should apply is to ensure that the Claimant is properly and fully compensated for the harm that she has suffered without doubling up on the compensation that we award. The exercise is one of compensation not one of punishment.

35. We also accept that there are many cases, usually towards the lower end of the spectrum, where it is an entirely artificial exercise to separate compensation for injury to feelings from the compensation which the Claimant may be entitled for psychiatric injury. To take, as an example, a Claimant may suffer discrimination at work in the form of two or three acts of harassment and, as a consequence, the Claimant may suffer from an episode of anxiety and depression. She may visit her General Practitioner who may provide her with counselling and a course of antidepressive medication which would lead to the resolution of that depressive episode within a comparatively short period. It would be possible to award such a Claimant compensation both for her injury to feelings and for the psychiatric injury but in reality, in such a case, the psychiatric injury is simply an extension of the injury to feelings, being comparatively short lived in duration and it would make far more sense to compensate that Claimant by one award dealing with both aspects of her claim.

36. We perceive the facts in this case to be entirely different. This is a Claimant who was the subject of the initial plan created at the first secret meeting on 19 March 2003, who complained about discrimination in relation to the unjustified payments received by her colleagues in December 2003 and who then suffered unjustified complaints and criticism as part of the discriminatory plan designed to get rid of her all the way through to her suspension on 16 January 2006. She was then subjected to what we have found to be a lengthy and wholly unauthorised period of suspension until disciplinary action was finally commenced in May 2007 being finally concluded by her dismissal on 14 July 2008. As a consequence of that dismissal the Claimant has lost her role and status as a Hospital Consultant, as we will ultimately find she is never going to return to work as a doctor, a profession which she, in common with both of her parents, cherished together with all the status that that brings with it. In our view simply undergoing those experiences with all the unpleasantness, anxiety, worry and fear that it caused the Claimant amply justify an award for injury to feelings of **£30,000**.

37. Her psychiatric condition, however, should be viewed entirely separately. It

is true that that condition was caused by the Respondents' acts of discrimination but it is an illness that persists and endures such that Professor Hirsch now believes that the effects of it are likely, to a significant degree, to have effected a permanent change to her personality. That is an injury which should be compensated in its own right and, in our view, there is no overlap between the compensation that we award for injury to feelings and that compensation which we award for the psychiatric injury from which she now suffers. The nature of that injury is detailed within the reports of Professor Hirsch. In our view both Counsel accurately assess the value of that claim as between £55,000 and £57,000 and accordingly we award **£56,000**.

38. Turning to the claim for aggravated damages both Counsel agree that the circumstances described in our first decision justify the making of such an award. Ms McNeill contends that we should also take into account the Respondents' conduct subsequent to the issue of our first decision. There are, we think, two sources of complaint. The first is that there was an alleged breach of the Claimant's right of confidentiality. In short Professor Hendra wanted to consider whether, as a means of resolving or part resolving this dispute, the Respondent Trust could offer to reinstate the Claimant and return her to work for them in some capacity. In order to design a workable return to work plan he consulted with NCAS whose role it is to give advice in similar situations. At a time when Dr Michalak was no longer employed by the Trust he identified her to them. That is the breach of confidentiality alleged. That does not, in our view, give rise to a claim for aggravated damages. Perhaps Professor Hendra should have sought Dr Michalak's consent before discussing her case with NCAS. That error of judgment, if such there was, does not justify, in our view, a claim for aggravated damages.

39. The second basis upon which the claim is advanced is that the First Respondent has failed to take appropriate action against those of their employees criticised by us in our first decision. That is not, in reality, the case. Mandy Williamson has been disciplined but the sanction imposed was short of dismissal by reason, no doubt, that she was acting on instructions of the Medical Director. Dr Dawson is no longer in the employment of the First Respondent, Mrs Nicholls was subject to disciplinary action, she was given a written warning and demoted. We understand that she has since left the Trust. Dr White was the subject of disciplinary action but before any sanction could be imposed upon him he resigned. As far as we can tell the Trust could not have done very much more than that. It is suggested that the Trust could have made referrals of the Doctors involved to the GMC. Ms Squires however reached an agreement with the Strategic Health Authority that she would deal with those who were still in the Trusts employment and the SHA would deal with those who were not. At any event Dr DeHavilland has made referrals to the GMC himself.

40. Once again it is the contention of Mr Linden that although aggravated damages are justified they must be encompassed within the damages that we have already awarded for injury to feelings.

41. Since receiving Counsels' submissions in this case we have noted the decision of the President of the Employment Appeal Tribunal, Mr Justice

Underhill, in **Commissioner of Police of the Metropolis v. Mr H Shaw** UKEAT/0125/11. In that authoritative decision Mr Justice Underhill reviews the relevant authorities in relation to aggravated damages and he says as follows:-

> *"The starting point is that the only purpose of aggravated damages is compensatory. They should not be awarded in order to punish the Respondent for his conduct, however heinous: that is the province (known in a very limited class of case) of exemplary damages, which are a wholly different creature… This point needs to be made because the facts in cases which attract an award of aggravated damages will be likely to be such that the Tribunal is likely to be indignant, if not positively outraged, at the way the employer has behaved: but (save in a case properly attracting exemplary damages) the right vehicle for such indignation is in what it chooses to say about the employer's conduct rather than in a punitive award."*

42. He goes on in Paragraph 25 to say:-

> *"We are very doubtful whether the practice of awarding "aggravated damages" as a separate head of compensation is a good thing."*

43. He goes on to suggest that if we were starting from scratch they would abolish that concept. He concludes that it would not be appropriate at the Employment Appeal Tribunal level to seek to abolish such an established concept and he makes the following recommendation:-

> *"However, it would be a healthy reminder of the real nature of aggravated damages if any such awards were in future formulated as a sub-heading of "injury to feelings" – i.e. injury to feelings in the sum of £X, incorporating aggravated damages in the sum of £Y – rather than as a wholly distinct head: this may reduce the risk of the Tribunal being seduced into introducing a punitive element by the back door."*

44. It is right that in this case we are positively outraged at the way this employer has behaved. We expressed that outrage in our first decision. In the light of Mr Justice Underhill's comments we propose to make no further aggravated damages award.

45. We turn then to the claim for loss of congenial employment. Mr Linden makes a similar point that this is a part of the claim which is properly subsumed within the compensation awarded for injury to feelings. We agree that that is the appropriate course of action and make no further award in that regard.

46. In relation to the complaint of stigma damages as we will determine later on in this decision we do not conclude that the Claimant will ever again be seeking employment as a doctor and accordingly will not suffer the stigma that would justify such an award. We make no award accordingly.

47. In relation to the complaint of exemplary damages Mr Linden's submission is that, as a matter of law, these are not open to us in this case. He relies

principally upon the decision of the Employment Appeal Tribunal in **Virgo Fidelis Senior School v. Burrell** [2004] IRLR 268 and the references contained within that authority to the House of Lords decision of **Cassell and Co Limited v. Broome** [1972] 1 All ER 801. The first issue is whether the Respondents are of a type against whom an award of exemplary damages can be made. The Claimant would need to bring this NHS Trust within the first set of circumstances identified by the House of Lords in **Rooks v. Barnard** [1964] AC 1129 namely by identifying oppressive arbitrary or unconstitutional action by the servants of the Government. In **Cassell** Lord Hailsham said as follows:-

> *"I desire to say of the first (Rooks v. Barnard circumstance) that I would be surprised if it included only servants of the Government: in the strict sense of the word. It would, in my view, obviously apply to the Police, despite A G for New South Wales v. Perpetual Trustee Co Limited, and almost as certainly to local and other officials exercising improperly rights of search or arrest without warrant and it may be that in the future it will be held to include other abuses of power without warrant by persons purporting to exercise legal authority. What it will not include is the simple bully, not because the bully ought not to be punished in damages, for he manifestly ought, but because of an adequate award of compensatory damages by way of solatium will necessarily have punished him… I am not prepared to make an exhaustive list of the emanations of Government which might or might not be included. But I see no reason to extend it beyond this field, to simple outrage, malice or contumelious behaviour."*

48. In that case Lord Reed said as follows:-

> *"This distinction has been attacked on two grounds; firstly that it only includes Crown Servants and excludes others like the Police who exercise Governmental functions but are not Crown Servants and, secondly, that it is illogical since both the harm to the plaintiff and the blameworthiness of the defendant may be at least equally great where the offender is a powerful private individual. With regard to the first I think that the context shows that the category is never intended to be limited to Crown Servants. The contrast is between "the Government" and private individuals. Local Government is as much Government as national Government, and the Police and many other persons are exercising Governmental functions. It was unnecessary in Rooks v. Barnard to define the exact limits of the category. I should certainly read it as extending to all those who by common law or statute are exercising function of a Governmental character."*

49. In **Virgo** it was a complaint brought by a teacher against the Governors of the school whereby he successfully contended that he had been dismissed as a result of "whistleblowing". Ms McNeill takes us to, and relies upon the authority of **Bradford City Metropolitan Council v. Arora** [1990] ICR 226. This is where the Claimant failed in a job application by reason of unlawful

discrimination. That discrimination was committed by the interviewing panel and the Court of Appeal concluded that the interviewing of the applicant for a senior position in a college for which the Council had authority was properly to be regarded as an exercise of a public function by a public authority capable of attracting an award of exemplary damages for its abuse.

50. We conclude that in one narrow respect it is appropriate to award exemplary damages in this case. When the Respondents decided to suspend the Claimant they did so within the provisions of the MHPS which, we understand to be, a policy document prescribed by Government as to the way in which disciplinary action against medical staff should be pursued. The exercise of the power to suspend derives from that policy document and, to that extent, in exercising that power, we believe that that is analogous to an NHS Trust exercising Governmental functions. The whole purpose of the provisions relating to suspension is to ensure that taxpayers' money is not improperly wasted by paying doctors significant salaries for significant periods of time when they are not providing valuable work. That is why the safeguards exist requiring regular review of suspension, requiring consultation with NCAS and imposing a maximum period of six months except for cases involving criminal investigations (see Paragraphs 267-270 of our first decision).

51. These Respondents abused that power by failing to carry out proper reviews, by failing to allow the Claimant to return to work when, as a matter of fact, the suspension had lapsed, by not telling the truth to NCAS in order to obtain their endorsement of the Claimant's continuing suspension and by unlawfully continuing the extension beyond six months despite the fact that no criminal activity was suspected. The protection of appointing a designated Board Member (see Paragraph 275 of the first decision) was taken away when Mr Grasby retired and his successor wholly failed in her responsibilities. Finally when the Claimant sought to challenge that suspension in the High Court the Respondents opposed that application and relied upon the wholly untruthful evidence of Mrs Diane Nicholls. Those circumstances, it seems to us, properly amount to oppressive arbitrary or unconstitutional action by the Servants of the Government and justify, we find, an award of exemplary damages. We do think it appropriate within this decision to impose a level of punishment for the Respondents' conduct in that regard but would restrict that, in the light of the remaining award that we are making, to the sum of £4,000.

Loss of Earnings to date

52. We assume that this Judgment will be delivered by 31 December 2011 and loss of earnings will be awarded up to that date. There is, in reality, one contentious factual issue that we have to resolve which relates to the Clinical Excellence Awards that the Claimant could have hoped to have secured (and would hope to have secured in the future) were it not for the Respondents' discriminatory conduct.

53. The first part of that issue relates to what Clinical Excellence Award, if any, the Claimant should have received in the exercise that took place in 2006 relating to the year 2004/2005 (see Paragraph 297 onwards in our first decision). As that first decision makes clear Dr Dawson corrupted that

process in relation the Claimant's application so as to ensure that Dr Michalak, whilst under suspension, would not benefit from the additional pay. Clinical Excellence Awards involve a pay increase which carries on throughout a doctor's employment with the National Health Service and which is, in addition, pensionable. Were it not for the actions of Dr Dawson it is contended on behalf of the Claimant she would have received four Clinical Excellence Awards. Mr Linden concedes that she should have received one.

54. In support of the Claimant's contention Dr Michalak has undergone extensive and interesting statistical analysis which she believes leads to the conclusion that the contention for four points is justified. In support of the Respondent's position Mr Linden called Professor Hendra whose evidence, it has to be said, rapidly crumbled as to that issue. He purported to re-mark the Claimant so as to demonstrate the level of marks that she could have hoped to have achieved in that exercise so as to justify the single award, if any, that we should take into account. Under cross-examination however he had to accept firstly that he did not score the Claimant in accordance with the scheme, when he then carried out a rapid rescoring he could not explain how he arrived at his score, he could not explain which year's criteria he had applied and it appeared to the Tribunal that whichever criteria he had used he had still come to the wrong result in particular in relation to the criteria involving "training".

55. We find this issue to be a difficult one. The fact of the matter is that even when carried out in good faith the CEA scoring process is a random one as demonstrated by the wide range of marks given by the various scorers to each of the various candidates. Although this exercise was corrupted by Dr Dawson a number of the scorers had, no doubt, provided bona fide scores and yet the Claimant still scored 154 points when she needed to secure 164 points to achieve one point, 176 to achieve two, 185 to achieve three and 194 to achieve four.

56. The burden of proof is, of course, upon the Claimant to show that she has sustained loss. We therefore have to approach this speculative exercise with some caution. We conclude that without the malpractice that took place the Claimant's score would, inevitably, have improved but we do not believe, on the balance of probabilities, that it would have improved to such an extent as to add more than twenty points to her score. We therefore conclude that Mr Linden's concession is a reasonable one and would assume therefore that she would have got one Clinical Excellence Award in that round.

57. There is then an issue as to when it would have been paid. It is true that the overall policy document suggests that awards should be backdated to April in the year to which they relate. If so that would mean that this award be backdated to April 2004. The report prepared subsequent to that 2006 exercise however makes it clear that the award would be backdated to 1 April 2005. Ms McNeill suggests that that is a clear breach of the policy but whether it is or not that is, we assume, what happened and if the Claimant had not been discriminated against that is when her Clinical Excellence Award would have been backdated to. We therefore work on that basis.

58. Thereafter the parties agree that we should work on the assumption that she

would have received an additional Clinical Excellence Award every three years. Professor Hendra contends however that from 2011 the situation changed because, effectively, the Government has reduced the amount of funding available for these awards and on that basis Mr Linden contends that as from 2011 we should work on the basis that the Claimant should receive an award every five years. When faced with the logic of that proposition, in cross-examination, Dr DeHavilland could not really disagree that that was a logical approach which we, accordingly, adopt.

59. In relation to many of the calculations that we now have to make we are indebted to the detailed schedule of loss with attached calculations prepared on behalf of the Claimant. In many respects, as will become evident in the course of these reasons, we have adopted the methodology shown within those schedules.

60. The loss of earnings claim divides into two parts. The first relates to the period April 2005 when that Clinical Excellence Award should have been paid through to 14 July 2008 when the Claimant was dismissed. Those losses are simply reflected by the Clinical Excellence Awards the Claimant should have received. Thereafter of course the Claimant lost all of her pay.

61. For simplicity of calculation when looking at the year 2008-2009 we have assumed that the period 1 April 2008 to the date of dismissal, 14 July 2008 represents 25% of the year, the period 15 July 2008 to 31 March 2009 representing the remaining three quarters of the year. Similarly in calculating loss of earnings up to 31 December 2011 we have worked on the basis that 1 April 2011 to 31 December represents 75% of the year.

62. As shown on the schedule of past loss of earnings attached to this decision (see p36-40) we award a total of **£168,234.60**.

Past Care

63. We have already described the nature of the psychiatric illness from which the Claimant began to suffer. Dr DeHavilland tells us that the symptoms became more obvious in July 2006 by which time the Claimant's suspension had been in place for some six months. His witness statement graphically describes the problems that the Claimant began to have as follows:-

> *"Eva became unable to accomplish even the simplest of tasks without oversight and supervision. Eva began to leave the cooker on, the iron on, to leave the house without locking the door, to go shopping and come back with the wrong items, to go to bed without turning everything off, and she became sensitive to strangers."*
>
> *"Eva would not get up in the mornings, or would not get dressed all day. I was having to take (*my son*) to school and leave work early to get (*my son*) from school. I was working from home a lot. Eva had not a hope in Hell of coping with the Trust's process alone, and they knew that."*
>
> "*Eva's state of mind predictably deteriorated. Eva once went to Tesco by car and came back on foot – pushing the trolley nearly all*

the way to our home before realising she had driven to Tesco. Eva fell down the stairs at home. Eva was constantly crying and tearful."

64. It needs to be remembered that the Claimant was sharing the care of their son born in 2003 who was, therefore, a toddler and who needed care and supervision.

65. Dr DeHavilland was, at that time, working as a Research Scientist in Leeds. Fortunately his place of work was fairly close to his home. He also had fairly forgiving employers. His job enabled him, to some extent, to work from home. He told the Tribunal how, as his wife's problems became worse, he found working extremely difficult. He would often get to work only to receive anguished telephone calls from Dr Michalak such that he had to return home to calm her down. He never knew what was going to await him when he returned home. He constantly worried about the safety of his wife and his son.

66. At that time Dr DeHavilland was earning some £38,000 per annum. As with many Research Scientists he worked on fixed-term contracts. His contract was due to expire in October 2006. It is an everyday part of a Research Scientist's life to anticipate the expiry of one contract by seeking funding in order to justify a further contract and Dr DeHavilland was confident that, had he wished to do so, he would have been able to secure ongoing employment. He is a man with a substantial reputation within the field in which he works.

67. He decided, however, that he could not continue working under the conditions that then prevailed at home. He had little doubt that his employer's tolerant attitude could not go on forever and he was acutely aware that he was not "pulling his weight". Accordingly he spoke to his Professor and reached an agreement whereby he would be given an honorary contract to enable him to continue doing research work on an unpaid basis. That had the benefit that he could continue to supervise the students who were working on the project in which he was involved, he would keep up to date with that particular area of research and, he hoped, that when things improved at home he would be able to secure paid employment once again. As he was no longer being paid he could come and go as he wished and could focus upon the needs of Dr Michalak and his son.

68. At that time, of course, the family was still receiving Dr Michalak's substantial salary and so, although the loss of Dr DeHavilland's salary was not without significance they were, at least, able financially to survive.

69. The Claimant was dismissed in July 2008. As a consequence, of course, that substantial source of income came to an end. Dr Michalak went back to Poland, with her son, to stay with her family over the summer period and Dr DeHavilland sought other paid employment in order to financially support his family. He tells us that within a few days he had been offered a job in Singapore which he would have accepted save that he was then offered his present position in London.

70. Having to work in London he of course had to find accommodation there and

he has rented a flat. He stays in London returning home at the weekend. When Dr Michalak returned from Poland he had to give consideration to who was going to provide care for her whilst he was working away from home. Fortunately they have a close family network in Poland and two family friends took it in turns to come to Leeds in order to stay with her. A more permanent arrangement then came about when Dr Michalak's brother-in-law, Mr Gniadkiewicz, who had recently retired form military service, agreed to come to England on a more permanent basis in June 2009.

71. We have heard evidence from Mr Gniadkiewicz as to the sort of care that he has been required to provide. It involves ensuring that the Claimant's son gets up, is dressed, has breakfast and is taken to school. He does the shopping, he does the cleaning, he tends to the garden. He brings the child back from school and attends to his tea.

72. Most of all he is there to ensure that Dr Michalak, her son and the house are safe. He describes incidents where she leaves cooking pots on the hob until they burn. Dr Michalak is incapable of managing domestic routines like keeping on top of laundry. She is in a constant state of anxiety sometimes panicking simply because the postman comes to the door. She would be unable to ensure that her son went to school with the right equipment or clothing.

73. It is on that basis that the Claimant pursues a claim for the cost of care. This claim is advanced on two bases. Firstly to compensate for the loss of Dr DeHavilland's income in the period 7 October 2006 to 31 December 2008 and thereafter to compensate for the cost of care provided free of charge by Mr Gniadkiewicz and her other Polish friends and relatives.

74. We have been referred to a number of authorities perhaps the most helpful one being the Court of Appeal decision of **Evans v. Pontypridd Roofing Limited** [2001] EWCA 1657 a case which reviews various earlier authorities in relation to the issue of care. That Judgment quotes from an earlier decision of **Housecroft v. Burnett** [1986] 1 All ER 332 in which Lord Justice O'Connor said:-

> *"Further needs of an injured plaintiff are and will be supplied by a relative or friend out of love and affection (and, in cases of little children where the provider is parent, duty) freely and without regard to monetary reward, how should the court assess "the proper and reasonable cost"? There are two extreme solutions: (1) assess the full commercial cost for supplying the needs by employing to do what the relative does; (2) assess the cost at nil, just as it is assessed at nil where the plaintiff is cared for under the National Health scheme, but let me say at once that the defence in the present case has not contended for the second solution. It follows that in assessing the "proper and reasonable cost of supplying the needs" each case must be considered on its own facts, but it is not to be assessed regardless of whether it will be incurred.*
>
> *The earlier cases were mostly concerned with recovering earnings lost by the caring relative as a result of looking after the plaintiff. The more recent cases show that substantial sums have been assessed*

> *when the relative has not given up any employment. Very often we find rates being agreed and, as is shown by the approach of the Judge in the present case, regard is to be had to what it would cost to buy the services in the open market, but it is scaled down.*
>
> *I have found this a very difficult problem. Once it is understood that this is an element in an award to the plaintiff to provide for the reasonable and proper care of the plaintiff and that a capital sum is to be available for that purpose, the court should look at it as a whole and consider whether, on the facts of the case, it is sufficient to enable the plaintiff, among other things, to make reasonable recompense to the relative. So, in cases where the relative has given up gainful employment to look after the plaintiff, I would regard it as natural that the plaintiff would not wish the relative to be the loser and the court would award sufficient to enable the plaintiff to achieve that result. The ceiling would be the commercial rate."*

75. The Judge then went on to say in Paragraph 30 of the substantive decision:-

> "*Any determination of the services for which the court has to assess proper recompense will obviously depend on the circumstances of each case. There will be many cases in which the care services provided will be limited to a few hours each day. The services should not exceed those which are properly determined to be care services consequent upon the Claimant's injuries, but they do not, in my view, have to be limited in every case to a stopwatch calculation of actual nursing or physical assistance. Nor, as Mr Purchiss' submissions appear to suggest, must they be limited in every case to care which is the subject of medical prescription. Persons, who need physical assistance for everything they do, do not literally receive that assistance during every minute of the day but their condition may be so severe that the presence of a full-time carer really is necessary to provide whatever assistance is necessary at whatever time unpredictably it is required. It is obviously necessary for Judges to ensure that awards on this basis are properly justified on the facts, and not be misled into findings that a gratuitous carer is undertaking full-time care simply because they are for other reasons there all or most of the time."*

76. We have been helpfully referred to the Sweet and Maxwell publication known as "Facts and Figures" which provides schedules of appropriate rates of pay for carers from year to year depending upon whether that care is provided during the day, during the evening or at a weekend.

77. We have asked ourselves the question as to what level of care was necessary in order to safeguard the Claimant and her son. Clearly there needed to be somebody in the house first thing in the morning to make sure that nothing untoward had happened, to make sure that the son was up, dressed, breakfasted and taken to school. There would then be immediate tasks to attend to such as the laundry cleaning and shopping. The child would then need to be brought back from school, given his tea and there would, also, need to be a further visit in the evening to make sure that the house was secure and that everything was turned off before the Claimant

and her son went to bed.

78. In the first period, namely from 7 October 2006 to 1 December 2008 Dr DeHavilland, had he not given up his job, would have been there in the morning to make sure that everything was alright and to get his son to school and would have been there in the evening to provide natural parental care and supervision for the welfare of his son. We do not believe that Dr Michalak should, properly, be compensated in relation to that element of care which was not, in our view, "well beyond the ordinary call of duty". We do however believe that the tasks and supervision that needed to be carried out during the day, when otherwise Dr DeHavilland should have been at work, are properly compensatable. We would compensate for this care five days a week on the basis that Dr DeHavilland, had he been working, would in any event have been at home at the week-end and once again providing that care as a husband and father would do.

79. We assess that an appropriate level of care during that period was four hours a day for five days per week. Looking at the chart for the period 2006-2008 the rates vary between £6.43 per hour and £6.75 per hour for basic care. We fix at a figure of £6.60 per hour. We calculate that the period in question is one of 112 weeks and accordingly we award 112 weeks x 20 hours per week x £6.60 per hour totaling £14,784. As **Housecroft** and **Evans** make clear that sum then needs to be reduced by a discount to reflect the fact that the carers will not have to pay tax or national insurance on the damages. The accepted level of discount is 25% which accordingly reduces compensation for that element of care to £11,088. As that is a sum which is significantly less than Dr DeHavilland's loss of earnings we adopt that figure, being the commercial rate, as the appropriate measure of damages.

80. For the period 1 December 2008 to 31 December 2011 a greater level of care was required. Somebody needed to go to the house first thing in the morning, provide the care previously described during the day and then revisit the house in the evening to make sure that all was well. Accordingly we would award an increased level of care during that period which we would assess as seven hours per day for five days per week (Dr DeHavilland being at home during the weekend). That involves a mixture of basic care together with evening care the rates varying from £6.75 and £8.44 for the period 2008-2009 to £7.05 and £8.81 as from April 2010. We fix an average carer rate of £7.60 per hour.

81. Accordingly for that period, consisting of 161 weeks, we award 35 hours per week at £7.60 per hour totaling £48,826. We discount that figure by 25% to produce an award of £32,119.50.

82. That produces a total award in relation to past care of **£43,207.50**.

Interest

83. We are required by the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 to include interest on any sums awarded unless we consider there is good reason not to do so. Those Regulations prescribe the rate of interest and prescribe the method of

calculation. Helpfully Regulation 3(3) permits us to adopt an averaging approach if in the interests of simplicity it is appropriate to do so. It is clearly in the interests of justice that interest should be awarded in this case.

84. In relation to the compensation for injury to feelings we would begin interest running as from the date of the Claimant's suspension on 16 January 2006. We run that interest to 2 August 2010 when an interim payment of £100,000 was made to her.

85. In relation to the psychiatric injury we calculate interest from 1 July 2006, when Dr DeHavilland described her symptoms as becoming increasingly acute, and once again we run interest to 2 August 2010 to take that interim payment into account.

86. In relation to the past loss of earnings claim the position is slightly more complex. In relation to the loss of earnings between 2004 and 2006 the rate of 6% applied throughout, different sums were awarded in each year and so for the sake of simplicity we calculate interest on the total and simply divide that by two.

87. During the period of 2009-2011 there were many interest rate changes as outlined in the Claimant's schedule of loss. The majority of interest will be paid at the rate prevailing since 30 June 2009 which was at 0.5%. We take into account the balance of the interim payment made in August 2010 for which the Respondents are entitled to credit and take into account also the further interim payment of £100,000 made in May 2011. Taking all those factors into account we award interest between the period April 2009 to April 2011 at the rate of 1%.

88. In relation to care we do think it appropriate to award interest for that first period by reason of the fact that Dr DeHavilland was losing earnings during that period of time. There was therefore a financial loss and there is no reason why the Claimant should not receive interest on the compensation that we are providing for that loss.

89. We do not however think it appropriate to award interest in relation to the second period of care because, although we accept that Dr Michalak was providing housing and keep, no doubt, to the voluntary carers involved that care was effectively being provided gratuitously and we do not think it appropriate to award interest when no actual expense has been incurred.

90. We attach hereto a schedule setting out how those interest payments have been calculated (see p41) which, as will be noted, totals **£19,782.78**.

Future Loss

Future Loss of Earnings

91. In calculating the claim for future loss of earnings we have a number of issues to resolve. The first being at what age would the Claimant have retired had these events not occurred. The Claimant contends that she

would have worked until she was 75 years of age principally on the basis that this was a job that she loved, which was a vocation and that she would have needed to have worked to that age in order to achieve the maximum pension by reason of the fact that she was a late starter to the National Health Service Pension Scheme. The Respondents rely upon statistical evidence which shows that only a small percentage of Consultants work beyond the age of 60 particularly beyond the age of 65. We have been shown the relevant statistics both in relation to this Trust and nationally which show that to be the case. The Respondents also rely upon correspondence written by the Claimant shortly after the changed Consultants' contracts came about when she was seeking to argue for a higher rate of salary based upon a higher level of seniority than had previously been afforded her and, in part, justifying that assertion by stating that she wished to maximise her income by the retirement age of 60.

92. We are not persuaded by either of those submissions. In terms of the statistical evidence that of course relates to historical events, namely the cohort of doctors who joined the NHS perhaps thirty or forty years ago. Dr Michalak does not fit into that pattern and, it was contended on her behalf that the statistics in relation to future retirement ages is likely to demonstrate an increasingly aging group simply because more doctors are being appointed to Consultant status having previously practiced, for most of their time, outside the National Health Service, often abroad. Because those people will need to work longer in order to maximise their pension they are likely to do so. Neither do we see the correspondence referred to as any evidence at all of the Claimant's intention to retire at the age of 60, she was simply trying to justify a pay-rise.

93. In relation to the Claimant's contention we are reminded of something said by John Lennon namely:-

> "Life is what happens to you whilst you are busy making other plans."

94. The fact of the matter is, it seems to us, that prior to all these events coming about Dr Michalak was, effectively, in the early stages of her career. She would have had no reason to make positive plans as to the date upon which she would retire. Had she been working for the NHS for much longer she may well have done what many of her contemporaries do which is to retire as and when they have achieved the maximum pension. Those Consultants can sometimes then go on to carry out private work so that effectively for working part-time they can earn as much as they did before. The Claimant was never going to be in that position because she entered the scheme so late and also because, as we will subsequently find, her specialty was not one which gave rise to the probability of private practice. We have to say that if we had concluded that the Claimant would in due course have developed a private practice that would have persuaded us that she might have retired sooner. The fact that we conclude that she was not likely to develop such a practice means that she was more likely to work for that bit longer in order to rely upon her NHS salary and in order to increase her NHS pension.

95. Although the Claimant may have had a general belief that she was likely to work to the age of 75, in order to maximise her pension, such beliefs change with time and with events. It was possible, for example, that in due course the Claimant's health would have suffered and that she would no longer want to work full-time as a Consultant. Dr Michalak and Dr DeHavilland may have secured financial security in other ways. They might have benefited from a substantial inheritance or won the lottery. Dr DeHavilland's financial fortunes may have improved and he may have secured a more substantial income, with its own pension or benefits, that could have led the two of them to decide that Dr Michalak was able to retire sooner. Dr Michalak might have found her career going in a direction which she did not particularly enjoy, for example having to take on greater management and less clinical responsibilities. She may simply have woken up one day and decided that she had had enough of full-time work.

96. All those factors persuade us that it is not appropriate to compensate Dr Michalak on the basis that she would have worked to the age of 75. We do, however, believe that there are certain relevant factors which assist us in determining, on the balance of probabilities, that she would have worked beyond the age of 60. Her son was born in 2003 and he will, therefore, leave secondary education at the age of eighteen in 2021. He has two professional and highly educated parents, it is highly likely that he will then go onto university a three year degree course taking him to 2024. In our experience most worthwhile postgraduate employment requires further postgraduate education of at least two years. That would therefore take their son through further education until 2026. We have no doubt that these parents would want to financially support their child through his education and we think it highly probable that Dr Michalak would have continued working up until that date by which time Dr Michalak would have been 68 years of age. We calculate loss of future earnings on the assumption that she may have retired at that age.

97. The next issue that we have to determine, it being common ground that we should use the Ogden tables to calculate the Claimant's future loss of earnings, is what discount rate we should apply. Mr Linden refers us to the provisions of the **Damages Act 1996** reading as follows:-

> "(1) In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury the court shall, subject to and in accordance with rules of court made for the purposes of this section, take into account such rate of return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor.
>
> (2) Subsection (1) above shall not however prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question."

98. We are referred to the Damages (Personal Injury) Order 2001 whereby the rate of return was fixed by the Lord Chancellor at 2.5%. Mr Linden takes us

through a number of Employment Appeal Tribunal decisions, for example **Abbey National Plc v. Chagger** [2009] ICR 624 where reference is made to the use of a 2.5% discount rate (that being in 2009).

99. Our attention is however drawn to the Employment Appeal Tribunal decision of **Benchmark Dental Laboratories Group Limited v. Perfitt** [2005] AllER 33 where His Honour Judge Richardson says as follows:-

> "*The discount rate which the employment tribunal used in this case derived from personal injury law and practice. The discount rate prescribed for use in personal injury cases is set by the Lord Chancellor, pursuant to Section 1 of the Damages Act 1996. By the Damages (Personal Injury) Order 2001 the Lord Chancellor has set a rate of 2.5%. The legal background to the setting of this rate is helpfully described in a note to Section 1 of the 1996 Act, contained in Section 3(f) of Volume 2 of the Supreme Court Practice. An employment tribunal is not bound by this discount, but it is, in our judgment, good practice to adopt it."*

100. Accordingly Mr Linden submits that that is the rate we should apply on the basis that it is appropriate for tribunals to adopt that rate so as to provide the parties with greater certainty as to the way in which tribunals will approach whole career loss claims until such time as the Lord Chancellor reviews that discount rate.

101. Ms McNeill, however, contends for 1%. She points out both the terms of the Damages Act and the decision of **Benchmark Dental Laboratories** provides the Tribunal with discretion to use a different rate, if we consider it appropriate. Ms McNeill contends that we should adopt a discount rate of 1%, Mr Linden accepts that if we do not apply a 2.5% discount rate then 1% would be the appropriate rate.

102. Ms McNeill points to the fact that the current discount rate was fixed ten years ago. The economic conditions now are very different to those that prevailed in 2001. We are informed that the Lord Chancellor has announced an intention to conduct a review of that discount rate but as yet no such review has taken place. We are told that it is commonly accepted that as and when that review takes place the discount rate will be significantly reduced.

103. The Claimant has obtained a report from Mr Anthony Carus who is an Actuary. He has not attended to give evidence Mr Linden indicating he had no wish to cross-examine him. In his report Mr Carus reviews the current position in relation to the discount rate. He refers to the authority of **Wells v. Wells** and says:-

> *"The majority of the speeches in Wells v. Wells considered it appropriate to set a discount rate by taking a three year average of gross redemption yields on Index Linked Government Stock (ILGS) using an assumed inflation rate of 5% per annum. The Lord Chancellor reduced this inflation assumption to 3% per annum to reflect the then market expectations."*

104. He then applied his mind to the current economic circumstances. He reviewed current trends in relation to gross redemption yields on Index Linked Gilts. He reviewed trends and Bank of England projections in relation to inflation. He reviewed a decision of the Guernsey Royal Court known as **Helmot v. Simon** which suggested that a 1% discount rate was appropriate. All that information led Mr Carus to conclude that the appropriate discount rate should be 1% and not 2.5%.

105. In simple terms Mr Carus concludes that if we adopt a 2.5% discount rate taking current trends in relation to inflation and in relation to gilt yields into account the Claimant will be significantly undercompensated. A rough calculation we have carried out shows that it will make a difference of something in the order of £200,000. We have also considered Council Directive 2000/78/EC entitled **"Establishing a General Framework for Equal Treatment in Employment and Occupation**". Article 17 of that Directive reads:-

> *"Member states shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive*."

106. It is therefore incumbent upon us to provide an effective and a proportionate remedy to the Claimant.

107. It seems to us that the choices that we have are either to adopt Mr Linden's submissions and follow the good practice recommended by His Honour Judge Richardson in the **Benchmark** case and thereby knowingly under-compensate this Claimant for the future loss that she will sustain. Mr Linden contends that we are talking about a long period of time, that situations can change and that it is inappropriate to base our decision upon a snapshot as to the present economic situation. The answer to that, it seems to us, is that we can either follow his submission knowing that that is likely to lead to the wrong result or accede to Ms McNeill's submission which will give a greater chance, on the basis of Mr Carus' expert evidence, that the Claimant will be properly compensated. We prefer that latter course of action.

108. The next issue that we have to determine is to decide what discount we are going to apply to that multiplier to take contingencies into account. As the introduction to the Seventh Edition of the Ogden Tables makes clear the multipliers set out within their tables only make provision for mortality:-

> *"The tables do not take account of the other risks, vicissitudes of life, such as the possibility that the claimant would for periods have ceased to earn due to ill-health or loss of employment. Nor did they take account of the fact that many people ceased work for substantial periods to care for children or other dependants. Section B suggests way in which allowance may be made to the multipliers for loss of earnings, to allow for certain risks other than mortality."*

Section B deals at length with the issue of contingencies and suggests that,

as a starting point, in this case, we should refer to Table C which, adopting the Claimant's age at the date of trial of 54, would lead to a discount of 0.83.

109. Ms McNeill suggests that that would be too great a discount. She points to the fact that the Claimant was unlikely to have any more children. She points to the fact that Consultants are not very often made redundant (indeed Dr DeHavilland tells us that there has only ever been one Consultant made redundant). She points to the very secure nature of a Consultant's employment. She suggests that we should adopt a discount of 0.95% and we agree with that submission.

110. On the basis of those findings the parties agree that the relevant multipliers are found at Table 10/12 of the Ogden Tables.

111. We then turn to the issue of the correct multiplicand. There is attached to the Claimant's schedule of loss a detailed breakdown of the Claimant's expected pay from 2011/2012-2019/2020. Those figures, however, assume that the Claimant would have been awarded four Clinical Excellence Awards in 2004/05 and assume that she would continue to receive one award every three years, whereas we have found that she would have received such awards only every five years as from 2011.

112. We have therefore adjusted those earnings figures to take those changes into account which produced a result that the Claimant's net projected earnings would be as follows:-

2012/13	£67,531.02
2013/14	£73,627.18
2014/15	£73,627.18
2015/16	£73,627.18
2016/17	£73,627.18
2017/18	£73,627.18
2018/19 (one additional CEA)	£79,908.75

113. We then adopt a more rough and ready approach in relation to the Claimant's loss of earnings for the next six years (taking her up to the projected retirement age of 2026), we assume three further years at a net income of £79,908.75, we then assume a further CEA increasing her net annual income to £82,908.75.

114. We then add together those fourteen years' projected future annual earnings and divide the total by fourteen in order to achieve an average figure which produces a multiplicand of £77,424.06.

115. We then have to calculate the correct multiplier assuming the retiring age of 68. Assuming a retiring age 65 at a 1% discount Table 10 tells us that the appropriate multiplier is 11.06. Assuming a retiring age of 70 Table 12 tells

us that the appropriate multiplier is 15.09. The difference between those two figures is 4.03.

116. In order to achieve a multiplier for a projected retirement age of 68, therefore, we multiply 4.03 by 3/5 which produces a figure of 2.42.

117. By adding 2.42 to 11.06 that achieves a multiplier of a projected pension age of 68 of 13.48. We then discount that figure by 0.95 which achieves a multiplier of 12.81.

118. £77,424.06 x 12.81 achieves a future loss of earnings figure of £991,802.20.

119. We have then considered the issue of residual earning capacity. We have concluded that there are no prospects of the Claimant returning to work as a Medical Consultant. She is currently 53 years of age, if it takes the GMC another year to sort out their proceedings she will be 54. It will then take two or three years for her to undergo the medical treatment that she needs before any significant improvement on her state of health is achieved. That takes her to 57. She would then need to persuade an NHS Trust to employ her on the basis that she would have to undergo extensive retraining under the supervision of NCAS. The joint view of the medical experts is that she is not likely to affect a complete recovery from her current condition. She will in addition be extremely vulnerable to further attacks of depression. If we then throw into the equation all those factors that Dr Davies considered relating to her personality, her feelings towards the Trust and the medical profession as a whole and the impact that Dr DeHavilland's understandable feelings have upon that situation we have no difficulty in concluding that her career, as a doctor, has come to an end.

120. As Mr Linden submits however that we are compensating her for loss of earnings for a significant period of time. The Respondents, as will be mentioned hereafter, are agreeing to pay £50,000 towards her medical treatment. Such treatment is highly likely to have a beneficial effect upon her. She is a highly intelligent and talented woman with a high level of education. She has an extensive knowledge and skills base in relation to medical matters. We agree that we should not assume that Dr Michalak will never work again in any capacity whatsoever. We do however think that bearing in mind the Claimant's age when she will be in a position to look for any sort of work, bearing in mind the fact that such work is bound to be part-time or casual in its nature because of her requirements to care for her son her potential earning capacity is modest. Doing the best we can we assume that over the rest of her working life she would be able to earn £50,000 net. That reduces the future loss of earnings claim to **£941,802.20**.

Private Practice

121. The Claimant contends that we should compensate her for such earnings as she could have been able to receive from private practice had it not been for these events. Dr Michalak's specialty was in nephrology. Dr DeHavilland concedes that that is not an area, by itself, which immediately attracts private work because patients with kidney problems are usually in a state of crisis which makes the facilities of the National Health Service immediately available. We have next to no evidence before us which could lead us to

conclude that such private work would have been available or what level of earnings the Claimant could have hoped to receive from such work. As we have already observed if we had assumed that the Claimant would have had the capacity to obtain private work we would have arrived at a retirement age lower than 68. We therefore make no further award in relation to that claim.

Life Insurance

122. It is agreed that that is a benefit which the Claimant has lost and that she should be awarded the sum of **£15,000**.

Pension Loss

123. There is an issue between the parties as to the way in which we should approach the loss of pension calculation. The Claimant contends that we should adopt the approach contended for in **Auty v. National Coal Board** [1985] WLR 784. The Respondents contend that we should adopt the approach set out in the booklet headed "**Compensation for Loss of Pension Rights Employment Tribunals**" the Third Edition.

124. We have decided to adopt the latter approach. Those guidelines have of course only comparatively recently become available. We find them much simpler to apply and they are the product of a recent review by the Government Actuary Department. This is clearly a case where we should adopt the substantial loss approach.

125. The parties agree that the value of the Claimant's accrued final salary pension rights to date of dismissal is £16,182.05 per annum.

126. We have to determine then the value of her prospective final salary pension rights up to her projected retirement age of 68 had she not been dismissed. The figures that we have adopted in relation to the future loss of earnings calculation have assumed that the Claimant's net income, by retirement age, will be £82,908.75. In order to calculate the pension figure, however, we need to use the gross salary. Fortunately we are, once again, assisted by the Claimant's schedule of loss. At Page 19 of that schedule for the year 2017/18 that shows a net earnings figure of £82,269 which is not a long way away from our projected final salary figure of £82,908. That net figure derives from a gross of £148,346.75 and, extrapolating those figures, we work on the assumption of a final gross salary figure of £149,308.

127. This is a one eightieth pension scheme and the Claimant has been a member of that scheme since 1994. Working up to 2026 she would have completed 32 years of pensionable employment.

128. We therefore calculate the pension loss to be used as Figure A at £149,308 x 32/80 = £59,723.20.

129. We then have to turn to the appropriate multiplier. In order to calculate the value A figure we need to use Table 6.4. Unfortunately those tables only adopt retirement ages of up to 65. We therefore need to extrapolate the figures in order to achieve the appropriate multiplier for a predicted retirement age of 68. Looking at the Claimant's age at dismissal, being 49,

Table 5.4 shows multipliers of 22.18, 19.08 and 15.98 for retirements ages of 55, 60 and 65 respectively. The difference between those three figures in each case is 3.1. If we therefore deduct from 15.98, three fifths of 3.1 that leads to a multiplier of 15.98 minus 1.86 being 14.12.

130. Similarly when we look at Table 6.4 in calculating the value of the Claimant's current deferred pension the respective figures are 20.46, 16.36 and 12.74. The difference between the first two figures is 4.1,and between the second two figures is 3.62. We therefore assume that if they were looking at a retirement age of seventy they would reduce the figure of 12.74 by three. We therefore deduct three fifths of three from the multiplier of 12.74. That means that the multiplier is calculated as 12.74 minus 1.8 = 10.94.

131. Adopting those multipliers Figure A is 14.12 x £59,723.20 = £843,291.58. Figure B = £16,182.05 x 10.94 = £177,031.62.

132. A-B = **£666,260**.

133. As we have already concluded the Claimant will never return to pensionable employment and accordingly there is no withdrawal factor to take into account.

Provision of Future Care

134. The parties agree that we should award the cost of future care for the next three years. We adopt the figure in relation to past care for the period from 1 December 2008. We therefore award three years at 35 hours per week x 52 weeks x £7.60, that is 3 x £13,832 totaling £41,496. We then deduct the 25% discount of £10,374 producing an award of **£31,122**.

Medical Treatment

135. This figure is agreed at **£50,000**.

Enhancement

136. At Paragraph 555 of the first decision we concluded that the Respondents had failed to comply with the statutory grievance procedure in relation to the grievance lodged by the Claimant on 1 June 2007. In Paragraph 556 we say as follows:-

> *"It should however be borne in mind that the Claimant was making incredibly grave and serious allegations within that grievance. Our findings show that those allegations were justified. If the Trust had followed procedures, both their own and the statutory procedures, they should have appointed an external investigator who may then have revealed precisely what was going on. By that time Dr DeHavilland had the evidence to produce. If that had happened events could have turned out very differently."*

137. Pursuant to Section 31(3) of the Employment Act 2002:-

> *"If, in the case of proceedings to which this section applies, it appears to the employment tribunal that:-*
>
> *(a) the claim to which the proceedings relate concerns a matter to which of the statutory procedures applies,*
>
> *(b) the statutory procedure was not completed before the proceedings were begun, and*
>
> *(c) The non-completion of the procedure was wholly or mainly due to failure by the employer to comply with a requirement of the procedure,*
>
> *it must, subject to subsection (4), increase any award which it makes to the employee by 10% and may, if it considers it just and equitable in all the circumstances to do so, increase by a further amount but not so as to make a total increase of more than 50%.*

138. Subsection (4) reads:-

> *"The duty under subsection (2) or (3) to make a reduction or increase of 10% does not apply if there are exceptional circumstances which would make a reduction or increase of that percentage unjust or inequitable, in which case the tribunal may make no reduction or increase or a deduction or increase of such lesser percentage as it considers just and equitable in all the circumstances."*

139. By reference to our first decision the Claimant submits that this was a grave and contumelious failure to comply with the statutory procedure justifying a 50% uplift. Mr Linden contends that the value of this award is such that there are exceptional circumstances which justify a nil uplift.

140. We have been taken through some authorities. **Abbey National Plc v. Chagger** confirms that the size of an award of compensation may be an exceptional circumstance to justify awarding nothing or less than 10%.

141. We are referred to **Wardle v. Credit Agricola Corporate and Investment Bank** [2011] IRLR 604 and [2011] IRLR 819 where Lord Justice Elias gives the following guidance, (adopting Mr Lindens summary in his written submissions):-

1. The award has a punitive element and degree of culpability is therefore relevant, but it is wrong to see the uplift in purely penal terms.

2. The ET should start with 10% and then consider whether it is just and equitable to award more and, if so, how much more. There needs to be positive reasons to go above 10% and the ET should not automatically do so even where the breach is more than technical.

3. An increase to 50% would be very rare indeed and reserved

for the most egregious of cases.

4. The ET should also consider the percentage uplift in terms of its financial value and having regard to the view which members of the public would have as to the amount of the award and the sorts of sums which are awarded for injury to feelings and for aggravated damages.

5. In any event the uplift must be applied to the loss which resulted from the act in respect of which there was a breach of procedure.

142. Were it not for the value of this award we would have no hesitation in concluding that a 50% uplift would have been appropriate. As our first decision makes clear the Respondents in this case embarked upon a campaign against the Claimant which was designed not only to get rid of her but, in the process, to isolate her and to prevent all the procedures which should have had the effect of subjecting their actions to external scrutiny from having that effect. One of those procedures was their own and the statutory grievance procedure. As our first decision makes clear if, as their own procedures dictated, they had appointed an external investigator who had approached this matter with an open mind in the light of the evidence that Dr DeHavilland had by then gathered there is a strong probability that these disciplinary proceedings would have been shown for what they were. It was dishonest in the extreme to tell her that these grievances would be dealt with during the course of the disciplinary process so as to distract her representative during the disciplinary hearing when in fact no such thing was going to happen. Where a large employer deliberately for their own purposes refuses to comply with the statutory grievance procedure, as then applied, those would be circumstances which would amount to exceptional circumstances justifying, in our view, that maximum uplift.

143. As Mr Linden however points out were we to impose such an uplift we would, when the tax grossing up calculation is taken into account, effectively be requiring the Respondents to pay an additional sum of about £3,000,000. We agree that that is wholly disproportionate and would not command public respect.

144. On the other hand Parliament directed that such uplifts should be awarded in circumstances such as these and although these statutory provisions are now obsolete we do not think it appropriate, at all, to adopt the Respondents' proposition and impose no penalty whatsoever for this failure. We do, therefore, have to arrive at a balanced view as to the appropriate point for this mark up. We do refer ourselves to the words of Lord Justice Elias in **Wardle (No 2)** where he says:-

> **"In our judgment, bearing in mind the considerations identified in the main judgment, and having regard to the fact that there were serious and cavalier breaches of the procedures, as the Tribunal properly found, we consider that an appropriate figure would be 15%."**

145. It is true that the award in that case was much smaller than the award in this

case but nonetheless we believe that the same principles apply and we conclude that 15% is an appropriate uplift in this case.

146. Attached hereto is a schedule (p42) showing what sums by way of compensation we have awarded so far. In summary we have made awards in relation to the discrimination claim totaling £2,075,409.00 to which we have added the 15% uplift of **£311,311.35** producing a total of £2,386,720.35 to which we add compensation for unfair dismissal of £7,180 producing a total of **£2,393,900.35.**

Taxation

147. We then have to apply our minds to the issue of taxation. The principles are clear and are not in dispute namely that the Claimant will be taxed upon those parts of this award which properly bear income tax within the year in which payment falls due. We therefore have to calculate what sum needs to be awarded to the Claimant so that after payment of such tax as falls due, she is left with the sum to which she is entitled pursuant to this award.

148. We have to determine what parts of this award will bear income tax. Tax is not payable because Her Majesty's Revenue and Customs believe that it should be but it is payable only if statute provides for such payments to be taxable. Statutory authority is contained within the **Income Tax (Earnings and Pensions) Act 2003**. Of relevance to these proceedings tax is payable on employment income (Section 1) which includes earnings (Section 7), defined in Section 62 as:-

> *"Any salary, wages, fee, gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or anything else that constitutes and emolument of the employment."*

149. Of greater relevance to this claim income tax is payable pursuant to Section 401 which provides that:-

> *"(1) This chapter applies to payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with –*
>
> *(a) the termination of a person's employment,*
>
> *(b) a change in the duties of a person's employment,*
>
> *(c) a change in the earnings from a person's employment.*
>
> *(2) This chapter does not apply to any payment or other benefit chargeable to income tax apart from this chapter."*

150. Finally Section 403(1) makes provision for the £30,000 exemption of which we are all familiar.

151. We therefore have to determine what heads of damages set out in the attached schedule will attract income tax. In our view the following heads of

award neither amount to earnings nor amount to payments or benefits received directly or indirectly in consideration or in consequence of or otherwise in connection with the termination of the Claimant's employment:-

Injury to feelings
Psychiatric injury
Care
Interest on all but earnings
Future care
Medical treatment

To our calculation those sums total £226,641.77. We add to that figure the 15% markup as to those items which totals £33,996.26 producing, to our calculation, a non-taxable element of £260,638.03. If we deduct that figure from the total award of £2,393,900.35 that produces an element which, in our view, is liable to taxation of £2,133,262.30 from which we deduct the £30,000 exemption producing a taxable award of £2,103,262.30.

152. We then have to carry out a calculation which produces a sum of money which, after payment of tax, will produce that figure. It is many years since this Tribunal studied mathematical equations. We are indebted, once again, to the Claimant's representatives for the methodology attached to the schedule of loss to show how that grossed up figure should be calculated. We have to admit that we do not understand it but we accept that it works. We attach hereto a copy of our grossing up calculation (see p43). As it will be seen we calculate that in order to provide the Claimant with a sum of £2,103,262.31 she needs to receive £4,161,564.60.

153. We then have to pull together those figures as set out also in the attached summary of claim (see p43). It seems to us that there are four component parts to that calculation, the initial taxable award, the tax payable thereon, the tax free element of the award and finally the £30,000 exemption which we had deducted from the calculation. As will be seen that produces a total award of **£4,452,202.60.**

154. We have little doubt that there is ample scope for error within these calculations. If either party identifies substantial error they are invited to make application to the Tribunal to review this decision which, hopefully, can be done with agreement of the other side to avoid further expense being incurred.

155. The Claimant's schedule of loss invites us to make various awards against each of the various Respondents against whom liability has been established. We admit that had we felt free to do so we would have been tempted to make specific awards against the individual Respondents on the basis that we would have wished them to bear some small part of the compensation payable to this Claimant by reason of their conduct so as to relieve, in some small part, the public purse. We have however been referred to the Employment Appeal Tribunal decision of **London Borough of Hackney v. Sivanandan** [2011] IRLR 740 in which Mr Justice Underhill specifically disapproves of that practice on the basis that the liability for discrimination should be joint and several as between all the Respondents against whom findings have been made. We make that award accordingly.

156. Ms McNeill tells us that it had been her intention to ask us to make a recommendation that the Trust should write to the GMC in terms designed to persuade them not to proceed further against the Claimant. We understand, however, that the terms of such a letter has been agreed and that the Trust have agreed to send it without the need of such an order.

157. Finally there is before the Tribunal an application for a Preparation Time Order pursuant to Rules 42, 43 and 44 of the Tribunals Rules of Procedure. Mr Linden concedes that such an Order is appropriate the dispute between the parties being whether this Tribunal should make one Order of £10,000 (being the maximum Order that can be made) or, as the Claimant contends, two Orders one in the sum of £10,000 the second in the sum of £5,000. The basis of that dispute is that there were in fact before the Tribunal two claims the first being lodged in relation to the Clinical Excellence Award issue, that matter was listed to be heard three days after the Claimant was dismissed, that Hearing did not, accordingly, take place as the second claim was then to be issued and this Judge believed it appropriate for all issues to be dealt with together.

158. Rule 42(1) states:-

> *"A tribunal or employment judge may make an order ("a preparation time order") that a party ("the paying party") make a payment in respect of the preparation time of another party ("the receiving party")."*

159. Rule 42(5) reads:-

> *"A party may apply to the tribunal for a preparation time order to be made at any time during the proceedings. An application may be made at the end of a hearing…"*

160. It seems to this Tribunal clear that that Rule refers to making an Order in the singular. We do not think that it would be right to encourage parties to issue a multiplicity of Claim Forms dealing with each head of claim instead of incorporating each head on one Claim Form in order that, if successful, they can apply for a Preparation Time Order in relation to each of those claims.

161. At any event we note that in relation to the Clinical Excellence Award issue essentially, although not only, that was a complaint of indirect discrimination, that claim effectively was unsuccessful.

162. In those circumstances we do make a Preparation Time Order in the sum of £10,000.

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Employment Judge Burton

RESERVED JUDGMENT SENT TO THE PARTIES ON

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.....
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

Schedule of Past Loss of Earnings

		2005/06
		£
Value of CEA		2,789.00
Less pension @ 6%		167.34
Less Higher Rate NIC @ 1%		27.89
Less Higher Rate tax @ 40%		1,037.51
	Net value	1,556.26
		2006/07
		£
Value of CEA		2,830.00
Less pension		169.80
Less NIC		28.30
Less tax		1,052.76
	Net value	1,579.14
		2007/08
		£
Value of CEA (a second being awarded)		5,743.00
Less pension		344.58
Less NIC		57.43
Less tax		2,136.39
	Net value	3,204.60
		2008/09
		1/4/08-14/7/08
		£
Value of CEA		5,826.00
Less pension		495.21
Less NIC		58.26
Less tax		2,109.01
	Net value	3,163.52
	Reduce to 25%	790.88

	15/7/08-31/3/09
	£
Basic pay	88,049.00
Additional PA	17,609.80
On call payment	4,402.45
Telephone allowance	138.00
CEA	5,826.00
	116,025.25
Reduce to 75%	87,018.94
Less pension @ 8.5%	7,396.61
Less NIC @ 9.4% on £40,440	3,763.76
Less NIC @ 1% on £46,978.94	469.79
	75,388.75
Less personal allowance	5,190.00
	70,198.78
Tax @ 20% on (75% x 37,400)	5,610.00
Tax @ 40% on balance	16,859.12
Net pay	47,729.66

	2009/10
	£
Basic	89,370.00
Additional PA	17,874.00
On call payment	4,468.50
Telephone	138.00
CEA	5,870.00
Gross	117,720.50
Less pension @ 8.5%	10,006.24
Less Basic Rate NIC	4,124.25
Less Higher Rate NIC	738.45
	102,851.56
Less personal allowance	7,360.00
	95,491.56
Tax @ 20%	7,480.00
Tax @ 40%	23,236.62
Net pay	64,774.94

	2010/11
	£
Basic	89,370.00
Additional PA	17,844.00
On call payment	4,468.50
Telephone	138.00
CEA	5,914.00
	117,764.50
Less pension @ 8.5%	10,009.98
Less Basic Rate NI	4,124.25
Less Higher Rate NI	738.89
	102,891.38
Less personal allowance	7,360.00
	95,531.38
Less tax @ 20%	7,480.00
Less tax @ 40%	23,252.55
Net	64,798.83
x 75%	48,599.12

Summary

	£
2005/06	1,556.26
2006/07	1,579.14
2007/08	3,204.60
2009/09 (1)	790.88
2008/09 (2)	47,729.66
2009/10	64,774.94
2010/11	48.599.12
Total	168.234.60

Schedule of Interest

1. For Injury to Feelings - £30,000

	£	£
16/1/06-1/2/09 x 30,000 x 6% = 158 weeks @ £34.61	5,468.38	
2/2/09-1/6/09 x 30,000 x 3% - 17 weeks @ £17.34	294.27	
2/6/09=30/6/09 x 30,000 x 1.5% = 4 weeks @ 8.65	34.60	
1/7/09-2/8/10 x 30,000 x 0.5% = 56 weeks @ £2.88	161.28	
		5958.53

2. For Psychiatric Damage - £56,000

1/7/06-1/2/09 x 56,000 x 6% = 135 weeks @ £64.61	8,722.35	
2/2/09-1/6/09 x 56,000 x 3% = 17 weeks @ 32.31	549.27	
2/6/09-30/6/09 x 56,000 x 1.5% = 4 weeks @ £16.15	64.60	
1/7/09-2/8/10 x 56,000 x 0.5% = 56 weeks @ £5.38	301.28	
		9,637.50

3. For Loss of Earnings

2004-2008 @ 6% = £7,847.27 x 6% = £470.86 Divide by 2	235.43	
2009-11 @ 1% £161,745.28 x 6% x 2 years = 2 x £1,617.54	3,235.08	
		3,470.51

4. For care

56 weeks x £11,088 x 6% = 56 x £12.79 =	716.24
Total interest	19,782.78

Schedule of Compensation prior to Grossing Up for Tax

Discrimination

		£
Injury to Feelings		30,000.00
Psychiatric Injury		56,000.00
Exemplary Damages		4,000.00
Past Loss of Earnings		168,234.60
Care		43,207.50
Interest		19,782.78
Future Loss of Earnings		991,802.20
Life Insurance		15,000.00
Loss of Pension		666,260.00
Future Care		31,122.00
Medical Treatment		50,000.00
	Total	2,075,409.00
	Add 15%	311,311.35
	Total	2,386,720.35
For Unfair Dismissal		7,180.00
		£2,393,900.35

Grossing Up Calculation

	£	£
Initial Taxable Award	2,103,262.30	
x 2	4,206,524.60	
Less	44,960.00	
Grossed Up Award =		4,161,564.60
Less ITA		2,103,262.30
Grossed Up Tax Award		£2,058,302.30

Summary of Claim

	£
Initial Taxable Award	2,103,262.30
Add Tax	2,058,302.30
Add tax free element	260,638.03
Add back tax exempt sum	30,000.00
Being a total of	4,452,202.60