Appeal No. UKEAT/0001/14/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 15 May 2014

Before

HER HONOUR JUDGE EADY QC

DR B V FITZGERALD MBE LLD FRSA

MRS L S TINSLEY

THE CADOGAN HOTEL PARTNERS LTD APPELLANT

MS J OZOG RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR MATTHEW BRADLEY (of Counsel) Penningtons Solicitors LLP Abacus House 33 Gutter Lane EC2V 8AR
For the Respondent	MISS JOANNA OZOG (The Respondent in Person)

SUMMARY

SEX DISCRIMINATION

Injury to feelings

Other Losses

Injury to feelings award of £10,000 manifestly too high. Award of £6,600 substituted.
Having found sexual harassment and direct sex discrimination, the Employment Tribunal had erred in assessing the level of award appropriate for compensating injury to feelings.

The focus of the Tribunal had been on the acts of discrimination and what it considered to be the Respondent's failure to respond to the Claimant's grievance. The Tribunal had not found the latter to be an act of discrimination and had rejected any claim for aggravated damages; in those circumstances it provided no basis for an award of compensation.

The Tribunal failed to focus on the actual injury suffered by the Claimant. Had it done so, it would have been bound – by its own findings of fact – to have categorised this case as falling within the lower of the **Vento** bands.

As no higher award would be possible on the Tribunal's findings of fact and as the Respondent was prepared to agree an award at the top end of that band (with a 10% uplift, following **Simmons v Castle** [2012] EWCA Civ 1039), the Court considered it was able to substitute an award of £6,600 for the original award of £10,000.

ACAS UPLIFT

The Employment Judge had given the Tribunal's Judgment on this issue orally at the end of the Hearing, when it was held that the Claimant had not made any written grievance such as to engage the provisions of the **Acas Code on Discipline and Grievance 2009**. That being so, it was not open to the Tribunal to subsequently change its substantive finding of fact in that regard in its written reasons, particularly as the parties had not been forewarned of this alteration or given the opportunity to make representations thereon. Given the apparent finding of fact in the Tribunal's oral Judgment, there was no basis for the 25% uplift and this part of the Tribunal's award would be quashed.

HER HONOUR JUDGE EADY QC

1. This appeal raises two main issues. First, as to the approach of an Employment Tribunal to the assessment and calculation of an injury to feelings award in a case of unlawful discrimination. Second, in relation to the giving of Written Reasons for a Judgment that differ in a substantive respect from the reasons given orally at the end of the hearing. This is the unanimous Judgment of this court, to which all members, appointed by statute for their diverse specialist experience, have contributed. We refer to the parties as the Claimant and the Respondent, as they were below.

2. Before turning to the substantive points raised by the appeal, we observe that this court is limited in its jurisdiction to addressing points of law. Where we find that an Employment Tribunal has erred in law, we have to correct that error. In some cases, correcting an error of law may require the matter to be remitted to an Employment Tribunal, whether the same Tribunal or a differently constituted Tribunal. Where, however, it is apparent that, on the Employment Tribunal's findings of fact only one outcome is possible, we must put that into effect in our Judgment. Whatever our sympathies, what we cannot do is seek to re-hear parts of the case or seek to improve on the reasoning of the Employment Tribunal in order to buttress conclusions that we would otherwise have to overturn.

Introduction

3. This is an appeal by the Respondent against a Judgment of the London (Central) Employment Tribunal under the chairmanship of Employment Judge Palca, sitting with members, on 18 and 19 February 2013 and on 15 July 2013. The Judgment was sent (with Reasons) to the parties on 1 August 2013. The Claimant there represented herself, as she has

done before us; the Respondent was represented by Mr Bradley, of Counsel, who also appears before us on this appeal.

4. The Claimant had lodged her ET1 on 17 September 2012, initially bringing claims of unfair dismissal, sex discrimination, discrimination based on religion or other belief and other claims. At a Preliminary Hearing, on 21 December 2012, the Claimant withdrew her religion and belief discrimination complaint and her unfair dismissal claim was dismissed for want of jurisdiction. She did not have a sufficient qualifying period to bring the claim.

5. At a case management discussion on 7 January 2013, the Claimant's claims were clarified as limited to direct sex discrimination and/or harassment on grounds of sex and sexual orientation. Those claims were heard at a Full Merits Hearing on 18 and 19 February, and Judgment on Liability was given orally on 5 July 2013. There was then further evidence from the Claimant and further submissions from the parties on the question of remedy. Judgment on remedy was given orally by the Employment Judge at the conclusion of that hearing.

6. The Tribunal dismissed the Claimant's claim of discrimination on the ground of sexual orientation, but held that the Respondent was liable for sex discrimination and harassment and ordered that the Respondent pay an award of £13,749.50 in total. On 13 August 2013, the Claimant applied for a review of that decision; that was refused on 16 December 2013.

The appeal

7. Meanwhile, on 30 August 2013, the Respondent lodged its Notice of Appeal, concerned solely with the Judgment on quantum. Specifically, it is an appeal against, first, the award of

compensation of £10,000 for injury to feelings and, second, the full 25% uplift in compensation for failure to follow the **ACAS Code on Discipline and Grievance at Work 2009**.

8. Upon initial consideration of the appeal on the papers, HHJ Burke QC allowed that the Notice of Appeal demonstrated reasonable grounds on which it should proceed to a Full Hearing. Those grounds included questions of procedural impropriety on the part of the Employment Tribunal, which the learned Judge considered arguable. Directions were given for the Respondent to provide affidavit evidence in support of that challenge, which could then be considered and responded to by the Tribunal members and by the Claimant.

9. The Respondent duly provided two affidavits from members of the legal team who had attended the hearing with Counsel; the Solicitor with day-to-day conduct of the case (Ms Roberts) and a (then) trainee Solicitor (Ms Henry). The affidavits, along with the Notice of Appeal and a copy of the Tribunal's written Judgment and Reasons, were sent on to the Employment Judge and to the Tribunal members for comment, and copied to the Claimant.

10. In the first three paragraphs of her Response, the Employment Judge engages with the points raised by the Respondent's affidavits, largely agreeing with the record taken by the two Solicitors. We will return to that matter. There is then an additional paragraph, dealing with the question of the investigation carried out by the Respondent. That was not a matter going to the point raised by the relevant ground of appeal and we take no account of it.

11. As for the responses of the lay members, neither actually addresses the point raised by the relevant ground of appeal and we do not have regard to their comments, made more generally about the merits of the case, the reasoning and the appeal. We do, however, note one

observation made by Mr Grant, that he had not seen the Employment Tribunal's Written Reasons for the Judgment until they were sent to him as part of the appeal process.

12. For her part, the Claimant submitted a Respondent's Answer, largely relying on the reasons given by the Tribunal, but also, relevantly, observing that she had been genuinely distressed and upset at what had happened to her in this workplace and that one of the reasons for her upset was the fact that her complaints had not been treated seriously. She, quite fairly, observed that she was unable to recall the detail of the exchange between the Employment Judge and the Respondent's Counsel on the giving of Judgment on 5 July 2013, but she considered it permissible for the Employment Judge to amend the reasons provided in writing.

The background facts

13. The Respondent is a limited company, which runs the Cadogan Hotel in Central London. The Claimant was employed at the hotel as a waitress from 16 December 2011 until 6 July 2012. During the Tribunal hearing the Respondent adduced evidence, suggesting that there had been issues regarding the Claimant's performance. The Employment Tribunal rejected that evidence, finding that, until June 2012, there had been no serious issues regarding her performance and the Claimant had been happy with her job.

14. On 18 June 2012 a Mr Gabor Torok joined the Respondent as head waiter. The Tribunal found the following facts adverse to the Respondent regarding Mr Torok's conduct. First, that he touched the Claimant inappropriately at work by kissing her hand and touching her arms and back. Second, that he asked her whether she had a boyfriend and told her that the reason he asked her that question was because she was a woman. Third, on one evening in mid-June, when the Claimant and another female colleague were present, he took off his belt from his

trousers (one of the buttons of which were undone), bent his legs towards the Claimant and came near her, spreading his legs and hands, saying "Do you want this body? Come on, you are a woman. You should want this body." Fourth, that, between 26 June and 3 July 2012, he made threats to the Claimant and bullied her.

15. At some time between the belt incident and (probably) the end of June 2012, the Claimant orally informed Miss Pacuzska - the Food and Beverage Supervisor employed by the Respondent and someone with supervisory responsibilities - of this incident. Miss Pacuzska acknowledged this was a serious allegation, volunteering that it amounted to sexual harassment or serious abuse. In turn, she mentioned the matter to Miss Roduner - a senior employee of the Respondent, and the Claimant's manager - but Miss Roduner took matters no further, neither speaking to the Claimant nor to Mr Torok; although Miss Pacuzska spoke to the latter.

16. The Claimant was not at work on either 4 or 5 July but returned on 6 July, when she had a dispute about her work performance and was suspended. Before leaving that day, the Claimant met with Miss Roduner and a Ms Samantha Fitzgerald - the Respondent's then recently appointed Front of House Manager and the person with the day-to-day running of the hotel and HR responsibilities.

17. The Claimant complained, again orally, about the treatment leading to her suspension. She also reported the belt incident involving Mr Torok, and the latest incident of bullying by him. Having left work after that meeting, the Claimant reflected further on the position and sent in her resignation by e-mail later that afternoon, resigning with immediate effect. Her e-mailed resignation referred to various work issues, one of which related to the conduct of Mr Torok, which she described as sexual harassment. We have read the resignation letter and observe that

it does not read as if it was intended to constitute a written grievance. It describes itself as a resignation letter and, frankly, reads as such. We would, however, generally expect such an assessment to be a matter for the Employment Tribunal as industrial jury; that it is a point to which we return later in this Judgment.

The Employment Tribunal's conclusions

18. The Employment Tribunal concluded that touching the Claimant and kissing her hand was "a mild form of sexual harassment", which the Tribunal found had made the Claimant "uncomfortable" (see paragraph 39). The incident involving Mr Torok removing his belt was held to be an act of direct sex discrimination and harassment because of or related to sex, which made the Claimant "very uncomfortable".

19. The Tribunal did not consider Mr Torok's asking the Claimant whether she had a boyfriend amounted to sexual harassment, nor did it conclude that the bullying or threatening behaviour (whilst unpleasant) was because of, or related to, any protected characteristic.

20. Turning to the question of compensation, the Tribunal directed itself to its statutory power under section 119(4) of the **Equality Act 2010** to award compensation for injury to feelings. Having further directed itself to the guidance set out by the Court of Appeal in the case of **Vento v Chief Constable of West Yorkshire Police No 2** [2003] ICR 318, the Tribunal concluded that the fair award for injury to feelings was in the middle band just below the halfway mark. It considered the following matters as relevant to that assessment: (1) that discriminatory acts had been committed by Mr Torok on more than one occasion, albeit over a relatively short space of time; (2) the belt incident was a particularly unpleasant and serious act;

(3) the other incidents were relatively mild; (4) the fact that there was no evidence before the Tribunal that the Claimant's complaints were taken seriously or investigated in any way.

21. Having made an award for compensation for pecuniary losses of £999.60 - against which there is no appeal - the Tribunal went on to consider whether there should be any uplift for failure to comply with the ACAS Code. At paragraph 50 of its Judgment it stated this;

> **"...the Claimant had twice orally expressed a grievance to the Respondent, first to one of the supervisors employed by the Respondent, Miss Pacuzska, and second to her line manager and to the person within the Respondent responsible for HR. She very specifically complained about the belt incident, amongst other things. These complaints were clearly alluded to her by her in writing in her resignation letter of 6 July 2012, and the Tribunal therefore finds the Code to be engaged. Mr Bradley did not seek to argue to the contrary."**

22. That, however, is not how the Judgment of the Tribunal was given orally on the day. As recorded in the notes taken by the Solicitors for the Respondent, what the Employment Judge then said was as follows (reading from the affidavit of Ms Roberts):

> **"The ACAS Code on discipline and Grievance 2011 requires employees to raise grievances if they have them and such grievances cannot be resolved informally. This must be done in writing and set out notice of the grievance. Employers should then arrange a meeting with the employee. The Code goes on to describe investigating the grievance and holding meetings with the employees.**
>
> **In the current claim the Claimant had twice made/lodged a grievance with the Respondent. The first time was to her supervisor, Mrs Eva Pacuzska. The second time was to her line manager and Ms Fitzgerald..."**

23. Ms Roberts continues:

> **"... I do not have any recollection of Employment Judge Palca saying the words, or words to the effect, as set out in paragraph 50 of the Employment Judge's written Judgment, dated 1 August 2013. Nor is there in my manuscript notes anything which correlates to this paragraph. Further, contrary to paragraph 50 of the written judgment, I witnessed and noted Mr Bradley questioning the Tribunal about whether or not the Claimant had raised a grievance in writing.**
>
> **8. My notes show that after the judge had finished giving her judgment Mr Matthew Bradley, counsel for the Respondent, asked:**
>
> > **'Was your finding that the Claimant made grievance in writing under the Code?'**
>
> **My contemporaneous notes show that Employment Judge Palca responded:**
>
> > **'Although it states it should be in writing it is not an absolute requirement.'"**

24. Not dissimilarly, Ms Henry's affidavit incorporates the following from her note of Employment Judge Palca's oral Judgment:

> **"The ACAS code on disciplinary and grievance 2011 [sic] requires employees to raise grievances if they have them and they cannot be resolved informally, which should be done in writing. Employers should then arrange for a formal meeting without unreasonable delay. The Code goes on to describe the various steps which should be taken when investigating the grievance – allowing the employee to be accompanied etc."**
>
> **'The Claimant had twice lodged a grievance with the Respondent. Firstly to one of the supervisors, Eva Pacuzska and a second time to her line manager and the person within the Respondent responsible for human resources.**
>
> **...**
>
> **6. After Employment Judge Palca had finished handing down the judgment, Mr Matthew Bradley, counsel for the Appellant said that he had two observations...His second observation was as follows:**
>
> **'Was your finding that the Claimant made a grievance in writing?'**
>
> **Employment Judge Palca responded:**
>
> **'Didn't make a specific finding on that point – although a grievance should be in writing, it is not a requirement – in which case I'll make an amendment."**

25. Having, in its written Judgment, found the ACAS Code to have been engaged, the Tribunal concluded that no-one at the Respondent had made any attempt to investigate the matter or reach any conclusion regarding the grievance. In so concluding, the Tribunal did not accept the Respondent's argument that the Claimant's prompt departure from the Respondent – and, indeed, Mr Torok's departure soon after - did not leave it sufficient time to make an appropriate investigation. Having thus found, the Tribunal concluded that the maximum uplift of 25% should be awarded.

26. Having sent the affidavits to the Employment Judge and the Tribunal members as part of the appeal process, it is relevant to note that Employment Judge Palca responded as follows:

> **"I have read the affidavits of Sophie Mai Roberts and Anna Katherine Henry. The accounts set out in those affidavits of the text of the oral judgment are substantially correct.**
>
> **After the judgment was given the Respondent's Counsel raised a question on the ACAS Code. My response was intended to convey that I would review the matter. As I normally do, following a request for written reasons, I told those present in the Tribunal that that the contents of the written reasons might differ from those of the oral judgment, but it was the written reasons which would prevail. I see this is referred to in Ms Henry's contemporaneous notes of the hearing. ... It is also correct that the wording set out at paragraph 50 of the written judgment differs from that set out in the oral judgment."**

The relevant legal principles

Injury to Feelings

27. The power to award damages for injury to feelings is provided under section 119(4) of the **Equality Act 2010**.

28. In **Coleman v Skyrail Oceanic Ltd** [1981] IRLR 398 CA, it was held that damages in respect of an unlawful act of discrimination may indeed include compensation for injury to feelings. The point being that there must be an unlawful act of discrimination to which the award relates. Such an award cannot relate to acts that are not acts of unlawful discrimination.

29. As the EAT observed in **Ministry of Defence v Cannock & Ors** [1994] IRLR 509, awards for injury to feelings are compensatory and not punitive in nature. Tribunals can fall into error in over-inflating compensatory awards, while seeking to punish a Respondent rather than to compensate the Claimant, perhaps motivated, at least in part, by indignation at the employer's conduct. See also **Corus Hotels plc v Woodward and Anr** UKEAT/0563/05/LA.

30. In the guideline authority of **Vento v Chief Constable of West Yorkshire Police (No 2)** [2003] ICR 318 CA, the Court of Appeal held that awards for injury to feelings of the most serious kind should normally lie between the range of £15,000-25,000. For less serious cases, the Court of Appeal stated that awards should fall within the range of £500-£5,000 at the lower end and £5,000-£15,000 in the middle. Subsequently, in the case of **Da'Bell v NSPCC** [2010] IRLR 19, the EAT (HHJ McMullen QC presiding) revisited **Vento**, noting that the levels of award needed to be increased to reflect inflation. The lower band would thus go up to £6,000.

31. In making an award for injury to feelings the task of an Employment Tribunal is to consider what degree of hurt feelings has been sustained and to award damages accordingly, **Murray v Powertech (Scotland) Ltd** [1992] IRLR 257 EAT). In deciding which of the **Vento** bands applies to a particular case, the Tribunal will wish to take account of relevant factors, such as whether the discrimination formed part of a campaign of harassment over a longer period, but also to what actual loss was attributable to the discrimination suffered. The appellate courts have also reminded Tribunals to have regard to the level of awards in personal injury cases, not least so that they keep a sense of perspective. As Mummery LJ observed in **Vento**, Tribunals will often find it helpful to have regard to the Judicial Studies Board guidelines (as they then were) for general damages covering pain, suffering and loss of amenity.

32. The decision as to the level of an award for injury to feelings is generally for an Employment Tribunal. It will have heard the evidence of the impact of the discriminatory act upon the Claimant and will be best placed to determine the appropriate level of compensation for such injury. It is rare that it will be appropriate for this court to intervene in terms of the level of such an award, but it would be right to do if satisfied that the Tribunal had wrongly, on the facts of the case, categorised the injury within one of the **Vento** bands. So, if the EAT was satisfied that the Employment Tribunal had wrongly categorised a less serious case as falling within the higher category (or vice versa), the manifestly too high (or too low) award for injury to feelings may be overturned.

33. For those cases in which an injury to feelings award was made after 1 April 2013, it is also right to note that there is a requirement to apply the 10% uplift laid down in **Simmons v Castle** [2012] EWCA Civ 1039. Here that should have been done by the Employment Tribunal and, although there is no cross-appeal to that effect, it is common ground

that this would necessarily fall to be done by this EAT if making an award for general damages in substitution for the award by the Tribunal.

The ACAS Uplift

34. The power to make a percentage increase award is provided by section 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992**:

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

35. The relevant code is the **ACAS Code of Practice on Discipline and Grievances at Work 2009** where, at paragraph 31, it states:

> **"If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance."**

Procedural Impropriety

36. As for the question of procedural impropriety, the issue raised in this appeal is as to the power of an Employment Tribunal to change, on a substantive matter, its written Judgment from that which was given orally on the day. There is no dispute that an Employment Tribunal has the power to review a Judgment under its rules and also a more general power to recall or reconsider a Judgment given orally but before it is finally perfected. Indeed, whilst every case

will depend on its own facts, it might be appropriate for a Tribunal to recall its Judgment, rather than formally reviewing it, where an obvious error or omission comes to light soon after the hearing but before the order was drawn up. Save for such unusual cases, the oral Judgment of the Tribunal must stand as its final Judgment. And, even where it would seem appropriate to exercise the power of recall, it will still be necessary to give the parties the opportunity to be heard on the point, see **Arthur Guinness and Son Co (GB) Ltd v Green** [1989] IRLR 288.

Submissions

37. For the Respondent, Mr Bradley submitted that the finding regarding the lack of investigation of the Claimant's complaint was an error of law and/or inconsistent with the Tribunal's findings as to what had actually taken place. Moreover the Respondent's response to the complaint was not identified as an act of discrimination and should not have led to any award (per **Coleman v Skyrail Oceanic**). The injury in question did not arise from the act of discrimination found (see **Essa v Laing Ltd** [2004] IRLR 313).

38. Further, the Tribunal's findings of fact simply did not justify the award of £10,000. The award was too high. The two acts of discrimination found by the Tribunal had made the Claimant feel "uncomfortable" and "very uncomfortable". If the EAT were to conclude that the award was in the wrong band and should be in the lower rather than the middle band, then the Respondent would accept that it would be at the top of the **Vento** lower band. That was a pragmatic concession on the part of the Respondent, accepting that (per **Jafri v Lincoln College** [2014] EWCA Civ 449), the EAT could only substitute a finding in this regard if there was only one outcome possible. If the EAT concluded that the only appropriate category for an award - on the Tribunal's findings of fact - was in the lower **Vento** band, then the top end of that bracket would be the best outcome the Claimant could hope for.

Whilst the Respondent might have wanted to argue for a lower sum, it was prepared to agree that was the right course in the circumstances.

39. Mr Bradley also accepted that the EAT would need to make a 10% uplift to any award it made, following **Simmons v Castle**.

40. On the question of the finding on the ACAS uplift, given the oral Judgment, that finding simply could not stand. There had been no cross-appeal, so there could not be a finding that there had been a grievance for the purposes of the ACAS Code 2009. In any event, looking at the resignation e-mail, the point could not go anywhere. Only one conclusion was possible: no grievance had been made. That was the Employment Tribunal's Judgment, given orally on the day. There was no power in the Employment Tribunal to substantively change its finding of fact in that regard, particularly where there was a question as to whether that change arose from a Judgment of the Employment Judge alone rather than the full Employment Tribunal.

41. For her part, the Claimant submitted that the Employment Tribunal had rightly listened to the entirety of her evidence and that the Respondent was simply picking out particular points and failing to have regard to the totality. She observed that when she had e-mailed her resignation, she was experiencing a very difficult time arising from her experiences at work and was very anxious. This was set out in her witness statement; although that mentioned other things going on at work as well, she had set out her position in her evidence to the Tribunal.

42. When she had said that the harassment had not traumatised her, she was trying to downplay the hurt to protect her position and was also mindful of the personal circumstances of the harasser. The evidence before the Tribunal, she reminded us, was not of the Respondent

taking her grievance seriously; the Respondent's managers had sought to suggest alternative explanations for the harasser. The Tribunal had regard to her feelings and her perception. It had not been easy to give evidence about her feelings. In the circumstances, the award was right.

43. In terms of the Tribunal's response to the affidavits, the Tribunal was entitled to respond on the context alluded to by the Solicitors in their evidence on the ACAS Code. After raising a question about the Tribunal's findings, the Respondent's Counsel had not made any further comment, and the Employment Judge had indicated that she would make an amendment to her Judgment, so she was entitled to do so.

44. On the question of a possible disposal of this appeal, she did not agree it was appropriate to substitute a lower award of damages. If the appeal was to be allowed, the appropriate course was to remit this matter on either or both points, preferably to the same Employment Tribunal, but otherwise to another Tribunal to consider.

Discussion and conclusions

45. First, we wish to give credit to the Claimant for the way in which she has conducted her response to this appeal. It is not easy for a litigant in person where there is an appeal solely on a point of law and where they are seeking to uphold the reasoning of the Employment Tribunal, particularly where difficult issues arise relating to the procedure followed below. We also have some sympathy for her position in that she plainly adduced evidence as to the impact of the discriminatory conduct on her and we can quite understand that she found it very difficult to express those points. We are not, however, charged with considering what award we ourselves would make on the basis of the evidence. We have to consider the award made by the

Employment Tribunal and the appropriateness of that award in the light of the Tribunal's findings of fact.

46. The first difficulty with the Tribunal's award of injury to feelings is that it takes into account a matter not complained of and not itself found to be an act of discrimination. That is the Respondent's response to the Claimant's raising of her concerns. Whilst that might have been a ground for an award for aggravated damages, the Employment Tribunal expressly did not make such a finding (see paragraph 48 of the Judgment).

47. The second point of disquiet arises from the fact that the focus of the Employment Tribunal's reasoning for the award was all about its view of the acts of discrimination, not the evidence of (or, what it had found to have been) the actual injury to feelings suffered by the Claimant.

48. It is not that the Tribunal did not make relevant findings as to the injury to feelings suffered by the Claimant. It stated that the mild sexual harassment (kissing the Claimant's hand and touching her arms and back) made her feel uncomfortable (paragraph 39). The belt incident made her feel very uncomfortable (paragraph 41). Those findings, however, would not, in our judgment, justify an award in the **Vento** middle band. Moreover, when the Tribunal recited the Claimant's evidence, it focussed on her statement that the discrimination had not particularly traumatised her. Thus, having regard to the findings of fact as to the hurt suffered by the Claimant, the Tribunal's findings in this case justified an award in the lower **Vento** bracket.

49. In so saying, we recognise that it is possible that - focussing on the hurt suffered by a particular employee - might lead to an award in the **Vento** middle bracket in the case of one

employee but, in relation to the same act of discrimination, to an award in the lower bracket for another. The question is all about the impact on the employee; what injury they have suffered as a result of the unlawful act. Here, the Employment Tribunal's findings of fact (and the evidence that appears to have held sway with the Tribunal) on the question of the Claimant's injury to feelings, puts this case in the lower bracket.

50. If the Tribunal had properly approached its task, this court would not interfere with the award unless manifestly excessive or too low. Here, however, we do not consider that the proper approach was adopted and, because of that, the case was placed in the wrong bracket. That is not because of any view we have taken of the evidence - that is not the question - but on the Tribunal's own findings of fact. We think that the Employment Tribunal's error is disclosed in its reasoning. Its focus was on the acts of discrimination and on its disapproval of the Respondent's response. Awards for injury to feelings should be compensatory; it is wrong for such awards to be used as a means for punishing or deterring employers from particular courses of conduct (see **Ministry of Defence v Cannock**). We fear that, in truth, that this is what happened here.

51. Having so concluded, we recognise that a difficulty would arise if we were simply being asked to substitute our own award, to fall somewhere in the **Vento** lower bracket. Here, however, the Respondent has conceded that it would be appropriate to make the award at the top end. That being so, in our judgement, there is only one possible outcome, that is that the award for injury to feelings must be of £6,000. We could not say that an Employment Tribunal, on the findings of fact that have been made and properly directing itself as to the law, could make any higher award. We therefore quash the existing award for injury to feelings and

substitute it with one of £6,000. Given that we are substituting an award of general damages made after 1 April 2013, we also make a 10% uplift, giving an award of £6,600.

52. We turn then to the ACAS uplift point. First, we should say we do read the ACAS Code as requiring grievances to be in writing. It is true that the word "should" is used - which can import some ambiguity - but we consider the intent to be plain. Employers need to understand that a grievance has been raised; hence the general requirement that it should be in writing. It would otherwise be too easy for confusion to arise. In any event, that is indeed what the Tribunal concluded the position to be and there is no cross-appeal on that.

53. The question then is whether the Claimant had raised a grievance in writing in this case or, rather, whether the Employment Tribunal so found. We conclude that it did not. The oral Judgment represents the Tribunal's decision in this regard. First, because no opportunity for the parties to address the Tribunal on a question of recall or review was provided. Second, because we cannot be sure - given the response of Mr Grant - that the full Employment Tribunal saw or was aware of the changed Written Reasons. Third, because a substantive change of reasoning and the introduction of a new finding of fact would not be an appropriate matter for a recall of a Judgment.

54. Here, the oral Judgment was clear: the Claimant had raised a grievance orally in conversation with her line manager, Miss Pacuzska, and at her meeting with Miss Fitzgerald. That is why, when asked by the Respondent's Counsel, the Employment Judge stated that there was not an absolute requirement for a grievance to be in writing and that the Tribunal had not made a finding that the Claimant had made a written grievance.

55. On the basis of the evidence before the Employment Tribunal, given the content of the letter of resignation, we would, moreover, have expected the Tribunal's reasoning to have been clear if it had found that the resignation itself had constituted a written grievance. The oral Judgment included no such finding. We conclude that this was an addition by the Employment Judge, made when perfecting the Written Reasons. That was not a permissible course and we cannot uphold it.

56. In those circumstances, we agree with Mr Bradley that the appropriate course has to be that we must quash the 25% uplift. The finding of fact of the Tribunal was that the Claimant had raised her concerns orally, not in writing. On the Employment Tribunal's own Judgment, the ACAS Code was not engaged. Given the finding of fact set out in the oral Judgment, and the absence of cross-appeal or alternative grounds on which to uphold the decision, we do not have the option to remit on this point. The Judgment on the 25% uplift must therefore be quashed.

57. We therefore allow the appeal and quash the Judgment on the 25% uplift and, for the reasons we have already stated, substitute an award of £6,600 for injury to feelings.