Appeal No. UKEAT/0280/13/BA
UKEAT/0427/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 & 8 October 2014
Judgment handed down on 25 February 2015

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

MS V BRANNEY

MR D G SMITH

MR P CHAWLA — APPELLANT

HEWLETT PACKARD LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ELAINE BANTON (of Counsel) Instructed by: Cubism Law 116-118 Chancery Lane London WC2A 1PP
For the Respondent	MR THOMAS CORDREY (of Counsel) Instructed by: Kingsley Napley LLP Knights Quarter 14 St John's Lane London EC1M 4AJ

SUMMARY

DISABILITY DISCRIMINATION - Reasonable adjustments

HARASSMENT - Purpose

DIABILITY DISCRIMINATION - Compensation

The Claimant was disabled. The Respondent had a provision criterion or practice of shutting down access to email and internet for employees on long-term sickness absence. The Employment Tribunal held that this substantially disadvantaged the Claimant in that he was not informed about important developments to his terms and conditions of employment and his benefits. They held that the Respondent had failed to make reasonable adjustments in order to communicate with the Claimant. The Employment Tribunal erred in failing to give reasons for making no award for injury to feelings for failing to make reasonable adjustments which would have enabled the Claimant to apply to join a Share Purchase Plan. Further, the Employment Tribunal erred in not including in the calculation of the personal injury award in respect of stress caused by the failure to make the reasonable adjustment of communicating information about the exercise of share options in good time, the period spent in hospital for stress. The Employment Appeal Tribunal increased the award.

Consideration of whether the Employment Tribunal erred in referring to the Respondent's motive when determining a harassment claim. **Richmond Pharmacology Ltd v Dhaliwal** [2009] IRLR 336 applied. Observations on the 10% uplift in **Simmons v Castle** [2013] 1 WLR 1239 not applying to claims for injury to feelings in Employment Tribunals.

THE HONOURABLE MRS JUSTICE SLADE

1. Mr Chawla ("the Claimant") appeals from the dismissal by an Employment Tribunal, Employment Judge Smail and members ("the ET") in a judgment sent to the parties on 11 February 2013 ("the Liability Judgment") of the majority of his disability discrimination and related claims. The ET held that the Claimant was subjected to disability discrimination by Hewlett Packard Ltd's ("the Respondent") failure to make reasonable adjustments in communicating with him. This led to the loss or potential loss in respect of applying to join or joining the Respondent's and Arcsight (UK) Ltd's share purchase plans or exercising share options. Direct disability discrimination was also found in respect of delay in joining the Respondent's Share Purchase Plan. By consent the ET also held that the Respondent had breached the information and consultation provisions of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE") on the transfer of the undertaking in which the Claimant was employed from Arcsight (UK) Ltd ("Arcsight") to the Respondent on 1 December 2010.

2. The ET held:

> **"2. The Claimant was subjected to disability discrimination by the Respondent's failure to make the reasonable adjustment of ensuring that the Claimant was informed of developments to his terms and conditions of employment in a timely fashion when off sick having by way of the application of a provision, criterion or practice, withdrawn his access to the corporate email and intranet systems for otherwise justifiable reasons. This failure to make a reasonable adjustment meant the Claimant suffered the following losses or potential losses:**
>
> > **(a) the right to apply to join the Arcsight Employee Share Purchase Plan from 20 February 2009;**
> >
> > **(b) a delay in joining the HP Employee Share Purchase Plan until April 2012;**
> >
> > **(c) the right to exercise share options between September 2008 and September 2009.**
>
> **3. The delay in joining the HP Employee Share Purchase Plan also amounts to discrimination arising from disability."**

3. The Claimant also appeals from the decision of the ET on remedy sent to the parties on 2 May 2013 ("the Remedy Judgment").

4. The Liability Hearing occupied 10 days, the Remedies Hearing 3 days. As before the Employment Appeal Tribunal ("EAT"), the Claimant was represented at the ET by Ms Banton and the Respondent by Mr Cordrey. The claims were made in four ET1's. They were considered by five different Employment Judges at case management discussions ("CMDs") before the case could be considered ready for trial. Mr Cordrey stated that there were over 4,000 pages of documents and 19 witnesses before the ET. The ET explained that the factual issues identified were set out in Appendix A and Appendix B attached to the Liability Judgment. They are titled respectively "List of factual issues to be determined by the Tribunal" and "List of 36 factual issues which THE CLAIMANT says were not addressed by the Respondent during the grievance process." These were described by the ET as "an agreed analysis of Employment Judge Mahoney's CMD dated 30 July 2012."

5. The Claimant started employment with Arcsight as an IT Technical Support worker on 24 October 2005. He was employed to resolve software problems of clients of Arcsight. The software used is a sophisticated product to detect and deal with cyber attacks. The clients with whom the Claimant dealt included governments and banks.

6. The Claimant was signed off work from stress on 31 May 2007, never to return. The Respondent acquired Arcsight on 1 December 2010 and the Claimant's employment transferred under TUPE to the Respondent. He has remained employed and receives payments under a PHI scheme.

7. The ET found that the Claimant was disabled and that Arcsight and then the Respondent knew that he was disabled within the meaning of the **Disability Discrimination Act 1995** ("DDA") from 7 January 2008. The ET observed that his claims overlapped the repeal of the **DDA** and the coming into force on 1 October 2010 of the **Equality Act 2010** ("EqA"). There was no material change to the law relevant to the claims before them of direct discrimination, failure to make reasonable adjustments, victimisation and harassment.

8. The ET held at paragraph 22:

> **"There was a provision, criterion or practice ('PCP') adopted by the Respondent of shutting down access to the email and intranet for the long-term sick. This did substantially disadvantage the Claimant because he was not informed of developments to his terms and conditions of employment in a timely fashion as discussed below, by way of example.**
>
> **… Whilst we understand and endorse the security implications of having long-term sick access their corporate email accounts and the company intranet, bearing in mind the sensitive nature of the software with which the Claimant and his colleagues were working, and the possibility that sensitive information could fall into the hands of hackers or third party competitors, there was a need to make a reasonable adjustment so that the Claimant could be kept informed in a timely manner of developments to his terms and conditions."**

9. In August 2009 the Claimant discovered that he would be able to exercise his share options. Other employees had been informed about this a year earlier. The Claimant exercised his share options and was informed he would incur a large tax liability. On 22 October 2009 Ms Mauga of the Respondent emailed him after making enquiries about the tax liability. She had been told that the exercise of the options could not be rescinded unless the Claimant lacked the mental capacity for the exercise. She so informed the Claimant giving him the choice of continuing with the exercise of the options or rescinding if he lacked mental capacity. He was originally told that tax could be paid by withholding sums from his pay. The Claimant thanked Ms Mauga for the explanation and chose Option 1, not rescinding the exercise of the option. After receiving further information the Claimant was told by email of 27 October 2009 that the

amount of tax must be paid in full in November 2009. If he was not in a position to pay, Arcsight would withhold the equivalent number of shares.

10. The Claimant suffered from the stress of having to find a large amount of money to pay the tax due in November 2009. He was admitted to the Cardinal Clinic. He was given treatment including ECT. On 13 January 2010 the Claimant was discharged from the Clinic.

11. The Claimant had lodged a grievance which was heard on 9 July 2008. He chased the outcome. On 10 August 2010 a second grievance meeting was held.

12. An 'All Hands Meeting' about a merger with the Respondent took place.

13. On 15 September 2010 the Claimant learned of an Arcsight Employee Share Purchase Plan ("ESPP") of which other employees had previously been informed and joined.

14. Arcsight informed the Claimant that he was not eligible to join the Arcsight ESPP.

15. On 8 October 2010 the Claimant raised a grievance regarding the failure to include him in the Arcsight ESPP.

16. On 15 October 2010 Arcsight decided the first grievance, which was not upheld. On 25 October 2010 the Claimant asked Arcsight how to appeal. On 15 November he was informed that his employment was to be transferred to the Respondent under TUPE. On 23 November 2010 the Claimant was informed that the Respondent would handle his appeal after the transfer. The transfer took place on 1 December 2010.

17. On 13 February 2011 the Claimant lodged a second grievance. The second grievance was heard and the decision given on 1 April 2011. The Claimant's appeal from the dismissal of the grievance was heard and the decision not to uphold it given on 2 September 2011.

18. The appeal lodged on 25 October 2010 from the decision on the first grievance was heard on 26 October 2011.

19. On 7 December 2011 the Claimant raised a third grievance regarding the failure to include him in the Respondent's ESPP and to give him other benefits.

20. On 8 December 2011 a further hearing of the appeal from the decision on the first grievance took place. A decision was given on 30 January 2012.

21. On 2 March 2012 a decision was given on the appeal from the decision on the third grievance.

22. On 20 April 2012 the Respondent confirmed that the Claimant was allowed to join their ESPP scheme.

Liability Judgment

23. Ms Banton made submissions on Ground 3 after those on the other liability Grounds of Appeal.

Ground 1

Submissions

24. Ms Banton for the Claimant submitted that the ET erroneously failed to find that the failure to make reasonable adjustments in communicating with the Claimant extended to the Respondent's failure to assess his medical condition between June 2007 and 10 October 2011 and therefore prevented him from returning to work. It was said that steps to ameliorate his condition could have been addressed in a medical or occupational health report. Further, it was said that the failure to make reasonable adjustments in communicating with the Claimant also extended to the Respondent's failure to investigate the Claimant's grievances before July 2008.

25. Mr Cordrey for the Respondent submitted that the Claimant glossed over the rejection by the ET in paragraph 48 of

> **"… the contention that there was a policy of non or partial communication or, were that formulated as the issue (which it was not), that caused the Claimant's condition over that four and a half year period."**

and the finding of the fact that

> **"The Respondent did not prevent the Claimant from being treated medically."**

26. Mr Cordrey pointed out that, as can be seen from Appendix A, it had not been the Claimant's case that the failure to make reasonable adjustments in communicating with him led to a failure to investigate his grievances before July 2008. Counsel referred to paragraphs 26 to 31 of the Liability Judgment from which it can be seen that the delay in investigating grievances was not related in any way to any alleged failure to communicate with the Claimant. The delay was found to be due to the Claimant's requests for postponements and the need for the Respondent to be informed by him precisely what allegations they were being asked to investigate.

Discussion and Conclusion

27. In our judgment the findings of fact by the ET in paragraph 48 preclude any suggestion that partial or non-communication by the Respondent with the Claimant, whether it was a result of a policy or happenstance, was in any way related to a failure to assess the Claimant's medical condition. It was not submitted that there was any finding of fact which supported the suggestion that a failure by the Respondent to communicate with the Claimant resulted in his medical position not being assessed or that lack of communication prevented him from returning to work. The Claimant was being treated by a consultant psychiatrist from 5 October 2007.

28. The provision, criterion of practice ("PCP") relied upon by the Claimant and found by the ET in this case, the withdrawal of access to corporate email and internet systems for otherwise justifiable reasons, is different from that in **Fareham College Corporation v Walters** [2009] IRLR 991. In that case the Respondent refused to permit the Claimant to have a phased return to work. The judgment in **Walters** does not support the submission by Ms Banton that the ET erred in their approach to the Respondent's consideration of the PCP in the Claimant's case.

29. The ET considered carefully the facts and circumstances which led to the grievances not being investigated before July 2008. Those findings of fact included that on 16 October 2007 the Claimant was invited to a grievance meeting. He was then in hospital. After his discharge from hospital on 15 November 2007 the Claimant informed the Respondent that he would be able to update the Respondent after seeing his GP on 19 November. He later said he would revert regarding his availability for a grievance meeting. The Claimant did not revert with that information. It was Gail Boddy of the Respondent who on 5 May 2008 emailed him saying that they were waiting to hear from him regarding his availability for a grievance hearing. An initial

date was postponed at the request of the Claimant. A grievance meeting took place on 9 July 2008. Having set out their findings of the fact, the ET held at paragraph 31:

> **"The Respondent, we accept, could not meaningfully investigate until the Claimant's health improved and he could give a coherent account so that the Respondent knew precisely what they needed to investigate."**

In our judgment the contention that the ET erred in not holding that the Respondent not communicating with the Claimant led to a failure to investigate his grievances before July 2008 is not well founded.

30. Although reference was made in one sentence in Ground 1 of the Notice of Appeal to the policy of partial of non-communication also being applied to the Claimant's access to benefits, no such submission was developed in the skeleton argument or at the hearing before us until reference was made to it by Ms Banton in her reply. Further, in paragraph 46, the paragraph of the Liability Judgment referred to in the Notice of Appeal on this issue, the ET gave reasons for holding that the Claimant was not disadvantaged by his failure to attend the 'onboarding' session on 10 December 2010. They held that he was able to exercise his benefit choices in the same way as all other Arcsight employees.

Ground 2

Submissions

31. By Ground 3 of the Notice of Appeal it is contended that the ET erred in law or found perversely on the facts that the Claimant's **TUPE** claim was not an act of disability discrimination. It is said that the ET failed to give reasons for dismissing the claim that the breach of **TUPE** was also an act of disability discrimination.

32. Ms Banton contended that by holding in paragraphs 45 and 57 that all employees were treated similarly in respect of the admitted breach of **TUPE** and there was no discrimination, the ET failed to appreciate that the Claimant was referring to not being invited to the 'all hands' meeting on 13 September 2010 and to a transfer and communication meeting on 15 November 2010 as acts of discrimination. Counsel also contended that the ET erred in failing to decide that the reason the Claimant was not invited to the 'onboarding' session on 10 December 2010, the belief that he was aggressive, was an assumption made because of his mental health status and was therefore an act of disability discrimination.

33. Mr Cordrey pointed out that the concession of breach of **TUPE** was that the Respondent, in breach of Regulation 14, had failed to make arrangements for the election of employee representatives.

Discussion and Conclusion

34. There has been no information and consultation with representatives as required by **TUPE** Regulation 14 and therefore the claim made under Regulation 15 succeeded. As the ET rightly held, all employees were treated equally in this regard and no less favourable treatment of the Claimant was established. The ET did not err in rejecting the contention that the breach of **TUPE** was also an act of disability discrimination.

35. The submissions made on behalf of the Claimant regarding the belief that he was dangerous and should therefore not be invited to an 'onboarding' meeting on 10 December 2010, are relevant to Ground 4 of the Notice of Appeal. They do not relate to the admitted breach of **TUPE** which was of not making arrangements for the election of employee representatives.

Ground 4

Submissions

36. In Ground 4 of the Notice of Appeal it is asserted that findings by the ET in paragraph 46 that the Claimant has been considered "dangerous" as a result of some interactions with Arcsight staff and at paragraph 50 that Gail Boddy, HR Officer at Arcsight Inc, regarded the Claimant as a "danger to our workforce" were perverse as there was no evidence to substantiate that the Claimant had ever proved a danger to work colleagues. It was said that the only basis for stating that he was dangerous was the fact that the Claimant had a mental illness.

37. The submission made in Ground 4 (and Ground 2) about paragraph 46 of the Liability Judgment refers to findings of the ET about reservations expressed by colleagues about the Claimant attending the 'onboarding' meeting of 10 December 2010. Employees were to hear about how benefits were to be dealt with on the transfer to the Respondent.

38. It was submitted by Ms Banton that the findings in relation to concerns about the Claimant attending the 10 December meeting, in paragraph 24, and in paragraph 50

> **"were used to justify the removal or non-provision of certain benefits to the Claimant such as his retention bonus."**

39. On the second day of the hearing before us, Ms Banton made the following written concession on behalf of the Claimant:

> **"There was evidence before the Employment Tribunal that some within the Respondent believed the Claimant was aggressive, violent or dangerous. There was never any evidence of physical violence incidents."**

40. Mr Cordrey pointed out that the list of Factual Issues to be determined by the Tribunal had been agreed and was set out in Appendix A to the Liability Judgment. Whether the

Claimant was dangerous or whether there was a factual basis for the Respondent's belief that the Claimant was dangerous were not issues for the ET to determine. In any event that some individuals within the Respondent believed that the Claimant was dangerous was now conceded. There was evidence before the ET which supported that belief. This included a letter from his treating psychiatrist, Dr Partovi-Tabar, to Gail Boddy on 24 December 2007 in which it was stated that the Claimant was suffering from a very severe depressive illness giving rise at times to angry outbursts.

41. The ET referred in paragraph 50 to an email from Gail Boddy dated 28 September 2011 regarding a retention bonus. They held that the email

> **"… reveals that she regarded the Claimant as a 'danger to our workforce'. That was because of the manner in which he had expressed himself on occasions to her and others."**

The ET held that of those employees at his grade, four including the Claimant did not receive a retention bonus and two did. Only key staff were to receive a retention bonus and the Claimant had not established that he was to be regarded as a key member of staff.

Discussion and Conclusion

42. Whether the Claimant was in fact a danger to co-workers was not an issue before the ET. It has been conceded that some people within the Respondent believed that he was. In any event that belief was found by the ET in paragraph 46 not to have affected his benefit choices. Further, having considered the evidence on the issue, the ET concluded in respect of the retention bonus that the Claimant's disability did not come into it. Such a conclusion was open to the ET, on the evidence and was not perverse.

Ground 5

Submissions

43. Ms Banton rightly described Ground 5 as the "**Meek**" ground of appeal (**Meek v Birmingham City Council** [1987] IRLR 250). It was submitted on behalf of the Claimant that the ET failed to make findings on some of his claims or that insufficient reasons were given for dismissing others. We will adopt the numbering used in Ground 5 of the Notice of Appeal.

44. In Ground 5(i) Ms Banton contended that the ET failed to rule on the Claimant's complaint that from September 2007 the Respondent handled his grievances through its legal department. It was said that forcing the Claimant to deal with their lawyers was discriminatory.

45. Mr Cordrey submitted that the ET considered the use the Respondent made of lawyers in handling the Claimant's grievances and made findings in paragraph 25. They made detailed findings of fact in paragraph 26 to 39 regarding the grievance process and rejected any allegation that the process was discriminatory.

Discussion and Conclusion

46. The ET answered the second question in the list of factual issues in Appendix A "Did the Respondent use its legal department to handle the Claimant's grievances from September 2007?" saying "In-house lawyers were consulted". In context this is to be read as an affirmative answer. In our judgment, there is no basis for the assertion in Ground 5(i) that "such treatment was discriminatory". The ET did not err in failing to find it to be so or that consulting lawyers was discriminatory.

Submissions

47. In Ground 5(iii) it was submitted on behalf of the Claimant that the ET failed to deal with part of issue 3 in the list of issues in Appendix A; whether the Respondent was responsible for the delay of one year in hearing the appeal from the dismissal of the Claimant's first grievance.

48. Mr Cordrey submitted that the ET did not fail to make findings on the delay in dealing with the Claimant's grievance appeal. These were given in paragraphs 36 and 37 of the Liability Judgment. Counsel summarised these in his skeleton argument as follows:

> **"a. The disruption caused by the TUPE transfer taking place shortly after submission of the appeal;**
>
> **b. The disruption over the Christmas period;**
>
> **c. The Claimant's failure to submit any grounds of appeal despite repeated requests from the Respondent for him to do so and;**
>
> **d. The rejection by the Claimant of the manager initially appointed to hear the appeal, and the appointment of a new manager."**

Discussion and Conclusion

49. The reasons for the delay in hearing the appeal from the decision on 15 October 2010 not to uphold the first grievance are clearly set out in paragraphs 36 and 37 of the Liability Judgment. There is no challenge to the findings of fact in those paragraphs. The ET cannot be said to have failed to rule on the delay in hearing the appeal from the grievance decision.

Submissions

50. The Claimant contended in Ground 5(ii) that the ET failed to rule on the Respondent's alleged "failure to deal with the Arcsight part of the Claimant's grievance and the appeal of his grievance of 11 February 2011". Reference was made in the Notice of Appeal to issues 3.1.2.3 and 7.27 listed by EJ Mahoney in his case management decision of 13 August 2013.

51. Mr Cordrey submitted that the ET did not fail to make findings on whether the Respondent dealt with the grievance appeal of 11 February 2011. The ET made such findings in paragraph 38.

52. As for the contention of failure to deal with the Arcsight part of the Claimant's grievance, Mr Cordrey pointed out that all factual issues identified in Appendix A and Appendix B were dealt with by the ET. Insofar as the allegation refers to matters not contained in the Appendixes it was not for the ET to determine.

Discussion and Conclusion

53. The ET dealt with the Claimant's appeal from the decision on 1 April 2011 on his grievance submitted on 13 February 2011. The ET made relevant findings of fact which are not challenged. They held:

> **"On 29 July 2011 the Claimant appealed against the grievance decision. The notice of appeal was 4 months late. Nevertheless the Respondent agreed to hear it and an appeal meeting took place less than a month after the appeal was submitted with the outcome being provided just a week later, on 2nd September."**

It cannot be said that the ET failed to deal with the appeal of the Claimant's grievance of 11 February 2011 "at all".

54. In Ground 5(iii) counsel for the Claimant referred to numbers 3.1.2.3 and 7.27 of the List of Issues dated 13 August 2012. This is a reference to a CMD of EJ Mahoney. EJ Mahoney referred to earlier CMDs before four different Employment Judges "at all of which the list of issues should have been determined". The parties were represented by the same counsel who appeared before us. Rightly EJ Mahoney observed "this case has now reached almost unmanageable proportions". He set out the issues which then appeared to be 55 in number.

55. Ms Banton referred in Ground 5 (iii) and (v) to the issues listed by EJ Mahoney and not those appended to the Liability Judgment. At paragraph 3 the ET explained the status of the list made by EJ Mahoney and the Appendixes to the Liability Judgment.

> **"<u>The Issues</u>**
>
> **There have been 5 interlocutory hearings to sort out the issues. The factual issues used for the benefit of the hearing were referred to as Appendix A and B and are attached to these reasons. They were an agreed analysis of Employment Judge Mahoney's CMD dated 30 July 2012."**

Discussion and Conclusion

56. It is not said by Ms Banton that Appendix A and Appendix B were not an agreed analysis of EJ Mahoney's CMDs given following the hearing on 30 July 2012. We agree with the submission by Mr Cordrey that the ET did not err if they did not deal with a factual issue which was not before them because it was not on Appendix A or Appendix B. There is no suggestion in Ground 5 (iii) that the ET did not deal with a relevant issue in one of the Appendixes. The ET did not err in not ruling on "the Arcsight part of the Claimant's grievance".

Submission

57. In Ground 5(iv) it was submitted that the ET erred in not giving reasons why the failure by the Respondent to deal with factual issue 19 in Appendix B: "Removal of the Claimant from the performance of presentations to clients and the wider business" was not an act of discrimination.

58. Mr Cordrey submitted that the ET did not fail to make findings on why the Respondent's failure to address issue 19 in Appendix B in the grievance process was not an act of discrimination. The ET found in paragraph 41 that issue 19, a complaint by the Claimant that he had been removed from making a client presentation in 2006, was not an act of discrimination.

Discussion and Conclusion

59. In paragraph 41 the ET record that the Respondent admitted that factual issue 19 was not fully addressed in the grievance process. The ET held:

> **"There was an incident in or around 2006 when the Claimant was taken off a presentation with Allianz. However, the failure to deal fully with that allegation was not an act of disability discrimination. At worst it was an omission."**

So far from it not being clear, as alleged by Ms Banton, why the omission to deal with allegation 19 in the grievance was not an act of discrimination it is not clear to us why it should or could so be regarded.

Submissions

60. In Ground 5(v) it was said that the ET erred by failing to rule on the claim of harassment by failing to communicate with the Claimant by cutting off his email account and access to the intranet from mid July 2007 and informing colleagues to stop communicating with him from 14 August 2007. The Grounds of Appeal refer to paragraph 5.4.1 of the List of Issues dated 13 August 2012.

61. Mr Cordrey submitted that the ET did not fail to rule on the harassment allegation.

Discussion and Conclusion

62. We note that in paragraph 22 the ET held that a PCP was adopted by the Respondent of shutting down access to email and the intranet for the long-term sick. They held:

> **"Whilst we understand and endorse the security implications of having the long-term sick access their corporate email accounts and the company intranet, bearing in mind the sensitive nature of the software with which the Claimant and colleagues were working, and the possibility that sensitive information could fall into the hands of hackers or third party competitors, there was a need to make a reasonable adjustment so that the Claimant could be kept informed in a timely manner of developments to his terms and conditions."**

The ET further held that the directive on 15 August 2007 to his team not to communicate with the Claimant while they were at work was justifiable. Colleagues could communicate with him outside working hours. The Claimant was signed off sick. Until his return, communication should be with appropriate management.

63. In order to constitute harassment within the meaning of **EqA** section 26 a person must be shown to have engaged in unwanted conduct related to a relevant protected characteristic, in this case disability, which

> **"(1)(b) has the purpose or effect of –**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
>
> **(4) In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account –**
>
> **(a) the perception of B;**
>
> **(b) the other circumstances of the case;**
>
> **(c) whether it is reasonable for the conduct to have that effect."**

64. The ET made unchallenged findings that whilst a reasonable adjustment should have been made of ensuring that the Claimant was informed of developments to his terms and conditions of employment in a timely fashion when off sick, access to the corporate email and intranet systems was withdrawn for justifiable reasons. Further, the ET found that instructing work colleagues not to communicate with the Claimant while they were at work was justifiable. Although the ET did not expressly rule that these actions did not constitute harassment within the meaning of **EqA** section 26, a fair reading of the findings in paragraph 22 of the reasons and of paragraph 2 of the judgment, does not support the contention that the ET failed to rule on the claim. They examined the complaint of limitations placed on communications by and with the

Claimant and made findings as to the respects in which these put the Respondent in breach of the **EqA**. These did not include a breach of the harassment provision. This harassment claim was amongst those dismissed.

Ground 3

Submissions

65. Ms Banton contended that the ET erred in law or found perversely on the facts that the Claimant was required to prove motive in the context of his harassment claim decided in paragraph 56 of the Liability Judgment. The issue considered in paragraph 56 was whether emails sent to the Claimant by Auddrena Mauga, a Senior Corporate Paralegal, on 22 and 27 October 2009 questioning his mental capacity were acts of harassment within the meaning of **EqA**.

66. The ET held in paragraph 56:

> **"56. Auddrena Mauga, a Senior Corporate Paralegal, was considering the Claimant's potential extensive tax liability connected with the exercise of Arcsight Stock Options. As we know the Claimant had learned of the right to exercise these options late. The tax on the options, if then to be exercised, was £26,594.58 and Ms Mauga was concerned that the Claimant might not be able to pay this. It occurred to her that by reason of the Claimant's mental health disability, he might be able to use that to get out of the stock option exercise claiming lack of mental capacity. She was trying to be helpful. As it happened, the Claimant found the money to pay the tax liability and so went ahead with the exercise of the options, Ms Mauga was neither victimising nor harassing the Clamant [sic]. The Claimant may not reasonably regard these emails as harassment once Ms Mauga's motives are understood."**

67. It was submitted that the ET erred in failing to consider the effect of the emails on the Claimant and in failing to hold that it was reasonable that the repeated reference to his mental capacity had the effect referred to in **EqA** section26(1)(b).

68. Ms Banton referred to **Richmond Pharmacology Ltd. v. Dhaliwal** [2009] IRLR 336, in which Underhill J, as he then was, set out at paragraph 10 three necessary elements of liability

for harassment under the **Race Relations Act 1976**. These elements also apply to liability for harassment on grounds of disability.

> **"10 As a matter of formal analysis, it is not difficult to break down the necessary elements of liability under s. 3A. They can be expressed as threefold:**
>
> **(1) *The unwanted conduct* . Did the respondent engage in unwanted conduct?**
>
> **(2) *The purpose or effect of that conduct* . Did the conduct in question either :**
>
> **(a) have the *purpose* or**
>
> **(b) have the *effect***
>
> **of either (i) violating the claimant's dignity or (ii) creating an adverse environment for her? (We will refer to (i) and (ii) as "the proscribed consequences".)**
>
> **(3) *The grounds for the conduct* . Was that conduct on the grounds of the claimant's race (or ethnic or national origins)?"**

The EAT observed at paragraph 11 that it would be a healthy discipline for a tribunal to address in its reasons each of these elements. Ms Banton contended that the ET did not do so.

69. It was submitted that the ET erred in proceeding to the last step in the analysis: deciding that the Claimant could not reasonably regard the emails of 22 and 27 October 2009 as offensive without deciding the issues listed in **Richmond Pharmacology**. Further, it is said that the ET erred in deciding this claim on their view of Ms Mauga's motive in sending the emails. It was submitted that the motive of Ms Mauga was irrelevant. It had not been suggested by the Claimant that her purpose in making the observations in the emails was to harass the Claimant. He had relied on their effect on him. The Claimant's claim did not depend on the purpose of the unwanted conduct.

70. Further, Ms Banton contended that the ET erred in any event in deciding Ms Mauga's motive in wording the emails as she did on the basis of her written statement. She did not attend the hearing so that her evidence could be tested in cross-examination. This was to be contrasted with that of the Claimant who did attend and was cross-examined about the effect of

the emails on him. Referring to the text of the emails and that the Claimant gave evidence that he found them offensive, Ms Banton stated that the ET erred in finding that they could not reasonably be so regarded.

71. Mr Cordrey submitted that the reference by the ET to "motive" should be read in context. The emails were sent as the Claimant was seeking to exercise his Arcsight Stock Options. By email of 13 October 2009 the Claimant asked Ms Mauga to clarify why he was being asked to pay USD 45,524.48 in tax. Ms Mauga's email of 22 October explained that in the Claimant's particular circumstances it may be possible to rescind the exercise of the option because of lack of mental capacity and thus not be liable for the tax. The Claimant replied by email on 23 October that he now understood the shares issue better and would like to proceed with exercising his option on the basis that he had the mental capacity to do so. Ms Mauga emailed back on 27 October 2009 to say that Option 2 was modified as she had been told that tax was payable in November. The Second Option was to continue with the exercise of the option if he had the necessary mental capacity. This email exchange does not support a contention that the Claimant was upset by the reference to his mental capacity. Further, Mr Cordrey contended that the Claimant made scant reference in his witness statement to being upset by the emails. He merely said in paragraph 149 that he found the questioning of his mental capacity to exercise share options in the email of 22 October 2009 offensive.

72. Mr Cordrey referred to the Respondent's Answer to the Notice of Appeal. He said that the ET correctly set out the law on harassment in paragraph 11 of their judgment and correctly applied the test in rejecting the Claimant's claim. The ET did take into account the effect of the emails on the Claimant as they considered whether he "could reasonably regard them as harassment". Counsel contended that if the ET had not accepted that the effect of the emails on

the Claimant fell within section 26 they would not have gone on to consider their objective effect. Further, or alternatively if, as was suggested was the situation in the Claimant's case, an objective assessment of the emails reveals that they could not reasonably be considered to have the effect of harassing the Claimant, there is no need for the ET to consider the subjective effect of that conduct. It was submitted that the ET did not require the Claimant to prove "motive". The ET found as a fact that the motive for raising the Claimant's mental state in the emails was to assist him if he wished to rescind the exercise of his share options. This was relevant to the statutory objective assessment of the reasonableness of the alleged effect of the emails on the Claimant. Although Ms Mauga did not give oral evidence, her witness statement was before the ET. They were entitled to determine her motive from the witness statement and the contemporaneous emails.

Mr Cordrey drew attention to the observation by Underhill J in **Richmond Pharmacology** that "the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt." Underhill J explained that if the Claimant had experienced feelings specified in what is now **EqA** section 26 (1), the ET is required to decide whether it was reasonable for him to do so. Mr Cordrey submitted that the ET came to a decision which was open to them on the evidence and in respect of which they did not err in law.

Discussion and Conclusion

73. The ET set out their findings of fact on the emails of 22 and 27 October 2009 in paragraph 56 of the Liability Judgment. Those findings relate principally to the reason why Ms Mauga referred to lack of mental capacity in writing to the Claimant. Although Ms Mauga did not attend the hearings, her witness statement was in evidence before the ET as were the contemporaneous emails. The statement by Ms Mauga set out her evidence of the background

to the emails of 22 and 27 October. The Claimant was concerned about the substantial sum of tax payable soon after the exercise of the share options. In paragraphs 10 to 18 of the statement, over 10 pages Ms Mauga set out the enquiries made in the exchanges of emails she had within Arcsight regarding this issue. The two emails explain the options available to the Claimant. In his reply of 23 October 2009 to that of 22 October 2009 he thanks Ms Mauga for clarifying the situation.

74. The ET did not err in deciding that the motive of Ms Mauga in sending the emails of 22 and 27 October 2009 was not to harass the Claimant on grounds of his disability.

75. As was submitted by Ms Banton, the ET did not expressly consider each of the three steps identified in **Richmond Pharmacology**. Although, there are some differences between **Race Relations Act 1976** ("RRA") section 3A considered in that case and **EqA** section 26, these differences are not relevant to this appeal. Underhill J included "reasonableness" as a necessary element of issue (2) although it was not expressly included in **RRA** section 3A(2). Consideration of whether the perception of the Claimant is reasonable is now a mandatory element of the decision under **EqA** section 26(4) whether the unwanted conduct has the effect referred to in section 26(1)(b). Underhill J held at paragraph 15 that:

> **"Overall the criterion is objective because what the tribunal is required to consider is whether, if the Claimant has experienced those feelings or perceptions, it was reasonable for her to do so**
>
> **…**
>
> **Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question."**

76. One of the elements referred to by Underhill J in the context of whether it was reasonable for the conduct complained of to have the proscribed effect was "whether the conduct was, or

was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended that if it was evidently intended to hurt …". Underhill J considered that where they are not apparent, the grounds for an act have to be sought by considering the Respondent's motivation (not motive).

77. Whilst the perception of the Claimant, the first element in section 26(4), requires an objective finding of the Claimant's subjective feelings about the act complained of, the elements in section 26(4)(b) and (c) require an objective assessment by the ET. Having examined the evidence, the ET found that Ms Mauga was "trying to be helpful" to the Claimant. On a fair reading of paragraph 56 and in context, the word motive is used in the sense of intention. As Underhill J held in **Richmond Pharmacology**, the context of the conduct and whether the conduct, in this case the emails, was intended to produce the proscribed consequences are material to the decision of the ET whether it was reasonable for the conduct complained of to have the effect relied upon.

78. We accept the submission of Mr Cordrey that the ET would not have considered whether the effect on him alleged by the Claimant was reasonable unless they had accepted that he had established the prior steps in the application of section 26 including that the conduct of which complaint is made has the effect alleged. Reasonableness under section 26(4) is only considered in deciding whether conduct has the effect alleged. Consideration of the subsection would be otiose if the statutory effect had not been established. We reject the submission on behalf of the Claimant that the ET erred by requiring the Claimant to prove motive. They did not. The intention or motive of Ms Mauga in including the passages to which objection was later taken was a relevant factor which the ET were entitled to take into account in making a

decision under section 26(4). Whilst the ET did not express their conclusions under section 26(1)(b), their conclusions are to be taken as accepting the assertions of the Claimant that he found the emails to constitute conduct falling within section 26(1)(b) which had the proscribed effect on him. The determinative decision was that by reason of the decision under section 26(4)(c) that it was not reasonable for the conduct to do so the conduct complained of did not have the effect referred to in subsection 26(1)(b). The ET did not err in so concluding in dismissing the claim of harassment under **EqA**.

Disposal of the Liability Appeal

79. All Grounds of Appeal fail. The appeal from the Liability Judgment is dismissed.

Remedy Judgment

80. The ET decided on remedy for the following omissions of the Respondent found in the Liability Judgment to be breaches of **EqA**:

> **"1 …**
>
> **The Claimant was subjected to disability discrimination by the Respondent's failure to make the reasonable adjustment of ensuring that the Claimant was informed of developments to his terms and conditions of employment in a timely fashion when off sick having by way of the application of a provision, criterion or practice, withdrawn his access to the corporate email and intranet systems for otherwise justifiable reasons. This failure to make a reasonable adjustment meant the Claimant suffered the following losses or potential losses:**
>
> > **(a) the right to apply to join the Arcsight Employee Share Purchase Plan from 20 February 2009;**
> >
> > **(b) a delay in joining the HP Employee Share Purchase Plan until April 2012;**
> >
> > **(c) The right to exercise share options between September 2008 and September 2009."**
>
> **2. The delay in joining the HP Employee Share Purchase Plan also amounted to discrimination arising from disability. A delay in joining the HP scheme involved no financial losses. Injury to feelings could be claimed however."**

Ground 1(a)

Submissions

81. Ms Banton submitted that having found that the Respondent's acts of discrimination in respect of the right to apply to join the Arcsight Employee Share Purchase Plan from 20 February 2009 caused the Claimant to suffer hospitalisation between 30 November 2009 and 31 December 2009 involving 20 electric shock treatments (not 8 as stated in the decision), the ET erred in law and/or came to a perverse conclusion in making an award of £5,000 which was in the bottom category of **Vento v Chief Constable of West Yorkshire Police (No2)** [2003] ICR 318. Ms Banton submitted that an award for injury to feelings at least in the middle band of Vento, £5,000 to £15,000 should have been made.

82. Ms Banton contended that the ET failed to take into account the ongoing effects of the failure to inform the Claimant of his right to exercise his share options. Because he was not given timely notice of that right he was put under pressure to find a substantial sum of money to pay the tax due on their exercise. It was said that it was not clear why the ET held that these matters only cause a time-limited 2-3 month exacerbation of a pre-existing condition of depression. As was explained in **HM Prison Service v Beart** [2005] IRLR 568 a pre-existing medical condition does not exculpate the Respondent. Ms Banton contented that the award for injury to feelings should in any event be up rated by 10% to reflect the decision in **Simmons v Castle** [2013] 1 WLR 1239.

83. Mr Cordrey submitted that the EAT should be slow to interfere with the decision of an ET on quantification of compensation and particularly so with the decision of an ET on injury to feelings. He contended that there was no basis for doing so in this case. The ET recognised in paragraph 12 that an episode of ill-health in the period between September and November

2009 was contributed to by pressures caused in particular by the need swiftly to raise money to pay tax on the exercise of the Arcsight Share Options. The ET emphasised that this financial matter only contributed to existing severe mental illness by way of a time limited 2-3 month exacerbation. It was submitted that an award of £5,000 in respect of injury to feelings caused by the delay in giving information about the exercise of Arcsight Share Options was not perversely low.

84. Mr Cordrey pointed out that the submission that the sum of £5,000 should be increased by 10% to reflect the judgment of the Court of Appeal in Simmons v Castle had not been made before the ET and was not in the Notice of Appeal. There is no justification for relying on it now to seek to increase the award by £500.

Mr Cordrey submitted that the ET did not err in law or reach a perverse conclusion in their award of £5,000 for injury to feelings.

Discussion and Conclusion

85. Ground 1(a) is a challenge to the award of £5,000 in respect of injury to feelings for failure to make reasonable adjustments of providing timely information about the exercise of Arcsight Share Options. A separate award was made in respect of personal injury caused by the default in failing to provide timely information about the exercise of the options.

86. Mummery LJ, giving the judgment of the Court in **Vento** introduced guidance on three broad bands of compensation for injury to feelings by stating at paragraph 65 that injury to feelings is distinct from compensation for psychiatric or similar personal injury. All three sections of Ground I, 1(a), 1(b) and 1(c) are challenges to the decisions by the ET on awards for

injury to feelings. The Court of Appeal in **Vento** gave the following guidance on compensation for injury to feelings:

> **"65**
>
> **…**
>
> **(i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000. (ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band. (iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings."**

87. The award challenged in Ground 1(a) was for injury to feelings for delay in communicating the right to exercise Arcsight Share Options. The award of £5,000 is consistent with the **Vento** guidelines.

88. The ET were well aware that a Claimant does not have to establish that the act of a Respondent has to have caused rather than contributed to the injury to feelings or personal injury for an award of compensation to be made. Their awards challenged in Ground 1 were made on that basis. The principle for which Ms Banton relied upon **Beart**, that the fact that the Claimant had a pre-existing medical condition does not exculpate the Respondent, was applied. The amount of the award for injury to feelings in **Beart** does not assist. It was not the subject of an appeal and no point of principle is to be derived from the award of £10,000 for injury to feelings on the facts of that case.

89. Mr Cordrey rightly pointed out that no reference was made in the Notice of Appeal to the **Simmons v Castle** up rating. However, the Notice of Appeal refers to the sums in **Vento** being updated by **Da'Bell v National Society for Prevention of Cruelty to Children** UKEAT/

0227/09. **Da'Bell** was considered in **Bullimore v. Pothecary Witham Weld (No. 2)** [2011] IRLR 18 in which Underhill J held:

> **"31. As a matter of principle, employment tribunals ought to assess the quantum of compensation for non-pecuniary loss in "today's money"; and it follows that an award in 2009 should – on the basis that there has been significant inflation in the meantime – be higher than it would have been had the case been decided in 2002. But this point of principle does not require tribunals explicitly to perform an up rating exercise when referring to previous decided cases or to guidelines such as those enunciated in Vento. The assessment of compensation for non-pecuniary loss is simply too subjective (which is not a dirty word in this context) and too imprecise for any such exercise to be worthwhile. Guideline cases do no more than give guidance, and any figures or brackets recommended are necessarily soft-edged. "Up rating" such as occurred in Da'Bell is a valuable reminder to tribunals to take inflation into account when considering awards in previous cases; but it does not mean that any recent previous decision referring to such a case which has not itself expressly included an up rating was wrong."**

90. The "uprating" of awards for injury to feelings in discrimination cases referred to in **Da'Bell** and **Bullimore** is undertaken where it is necessary to do so to reflect the current value of money. It may be necessary, therefore, for that reason to increase the amounts of awarded in previous guideline cases. The increase in guideline figures by 10% decided by the Court of Appeal in **Simmons v Castle** was to be made for a different reason for cases in which the then existing costs regime was to be changed by the implementation of the reforms recommended in the Review of Civil Litigation Costs by Sir Rupert Jackson. Lord Judge Lord Chief Justice, giving the judgment of the Court in **Simmons** held:

> **"15. Thirdly the increase we are laying down… is attributable to the forthcoming change in the civil costs regime initiated by Sir Rupert as an integral part of his proposed reforms which were unconditionally endorsed and supported as such by the judiciary publicly, and it was plainly on the basis that the 10% increase would be formally adopted by the judiciary that the 2012 Act was introduced and enacted."**

91. As was recognised in Chapter 34 paragraph 3.5 of Sir Rupert Jackson's report, there is a no costs regime in ETs and the EAT. ET claims are not included on the list of specific types of litigation dealt with in the report. The rationale for the uplift explained by the Court of Appeal in **Simmons v Castle** does not apply to litigation in the ET. Accordingly the 10% uplift decided upon in that case does not apply to increase guidelines in cases on injury to feelings in

discrimination cases in ET's. The principle to be applied by ET's in making such awards is that in **Da'Bell** and **Bullimore** to assess the quantum for non-pecuniary loss in "today's money". We respectfully prefer the decision of HHJ Serota QC in **Ms Pereira de Souza v Vinci Construction UK Ltd** UKEAT/0328/14 that the 10% uplift to general damages which applies in the civil court does not apply to ET awards to the contrary decision reached by other divisions of the EAT in **The Cadogan Hotel Partners Ltd v Mr Ozog** UKEAT/0-001/14 and **The Sash Window Workshop Ltd. v King** UKEAT/0058/14.

92. Even if the matter had been raised before them or in the Notice of Appeal we would not have found that the ET erred by not applying a 10% uplift to the **Vento** guidelines.

93. The ET did not attribute their award of £5,000 to a particular band in **Vento** nor were they bound to. In fact it was on the cusp between the low and middle bands. As in **Bullimore** we see no sign that the award by the ET for injury to feelings, or indeed personal injury was not made by reference to the current value of money.

94. The assessment of compensation for injury to feelings is for the ET to decide having heard the evidence. An appellate body will not interfere with that fact sensitive decision unless the decision was made in error of law or was perverse. It was neither in this case.

95. In her skeleton argument in Ground 1(a) Ms Banton referred to the evidence of the Claimant's psychiatrist Dr Partovi-Tabar. Rightly in the Notice of Appeal this evidence was referred to under Ground 2 not Ground 1(a). The submission on that evidence will be considered under Ground 2.

Ground 1(b)

96. The ET held in paragraph 42 of the Liability Judgment that the Claimant suffered disadvantage by not being notified timeously so that he could have argued his entitlement to join the Arcsight ESPP.

Submissions

97. Ms Banton submitted that having found that the Respondent's acts of discrimination in respect of the failure to notify the Claimant of the Arcsight ESPP between 20 February 2009 and 15 September 2010 caused the Claimant financial loss and having made awards for injury to feelings in respect of other similar failures to make reasonable adjustments, the ET erred in failing to make an award for injury to feelings or to give reasons for not doing so in respect of the Arcsight ESPP.

98. Mr Cordrey submitted that the ET was entitled to award the Claimant a total of £6,000 for injury to feelings without making any specific award above that relating to the financial loss arising from the default in giving the Claimant information about the Arcsight ESPP.

Discussion and Conclusion

99. We accept the contention of Ms Banton that the decision of the ET on the remedy to be awarded in respect of the default in timely communication of information about the Arcsight ESPP failed to give reasons for making no award for injury to feelings in respect of this matter. It may be that the ET considered that injury to feelings had not been established but the judgment does not show that the matter was considered. The decision was not **Meek** compliant in this respect.

Ground 1(c)

Submissions

100. Ms Banton contended that the ET erred in basing their award for injury to feelings in respect of delay in joining the HP ESPP on the period from November to December 2011 when in fact the delay began in September 2010 and continued until April 2012. In the circumstances it was submitted that a higher award than £1,000 should have been made for injury to feelings.

101. Mr Cordrey submitted that the ET found that whilst the Respondent failed to notify the Claimant of the HP ESPP from December 2010 he did not become aware of this until 9 November 2011. The Respondent confirmed on 13 December 2011 that the Claimant was eligible for the scheme and would suffer no financial loss from the delay. It was open to the ET to find, as it did, that for the purposes of assessing injury to feelings the only period to be taken into account was the two months when the Claimant had knowledge of a "short-lived uncertainty as to entitlement". It was said that an award of £1,000 was well within the Tribunal's discretion.

Conclusion

102. We accept the submissions made by Mr Cordrey. The ET did not come to a perverse decision in awarding £1,000 for injury to feelings in respect of the default in giving the Claimant timely notification of the HP ESPP.

Ground 2

Submissions

103. Following the failure to make the reasonable adjustment of notifying the Claimant in good time about his right to exercise his share options the Claimant suffered stress. Ms Banton

contended that the ET erred in law or found perversely that the personal injury element of the award of compensation for the stress was £5,000 notwithstanding the Claimant's lengthy hospital admission from November 2009 to mid January 2010 during which he had 20 ECT treatments. The ET based their award on a 2-3 month exacerbation of the Claimant's existing mental condition by the Respondent's default. That period ended immediately before he was admitted to hospital. It was submitted that the ET erred by excluding from the period of exacerbation the time which the Claimant spent in hospital.

104. Ms Banton submitted that the only medical evidence before the ET was the medical report from Dr Partovi-Tabar and his own evidence. It is stated in the Grounds of Appeal that the evidence:

> **"was consistent with there being a significant impact in respect of injury to health in keeping with a psychiatric hospital admission of a duration from 30 November 2009 to 13 January 2010, 20 ECT treatments and medication."**

It was said that the award of £5,000 was inconsistent with the Judicial Studies Board Guidelines. Reliance was also placed on **Beart** in which the Claimant was awarded £22,000 in 2005 for personal injuries in a case of exacerbation of a pre-existing depression by failing to make reasonable adjustments. Accordingly it is said that the award to the Claimant in this case should have been substantially higher than £5,000.

105. Mr Cordrey submitted that the award of £5,000 for personal injury was open to the ET in the circumstances. These were the limited consequences of the acts in respect of which the Respondent had been found liable and the limited period during which it could be said that the Respondent's default had exacerbated the Claimant's condition. This was at most from late August 2009 when he first learned of the stock option issue and the end of December 2009, his

discharge from hospital. Mr Cordrey submitted that the ET considered in paragraph 12 the extent to which the matters in respect of which the Respondent had been found to be at fault caused or contributed to the Claimant's ill-health and his long-term inability to return to work.

106. Mr Cordrey submitted that the report of Dr Parviz Partovi-Tabar does not clearly tie the more substantial mental illness from which the Claimant was suffering to the limited matters in respect of which the ET found the Respondent to be at fault. Counsel observed that there is a mismatch between the findings of the ET and the conclusion of Dr Partovi-Tabar. For example at page 5 of his report, Dr Partovi-Tabar attributed exacerbation of the Claimant's condition to failure to deal with a grievance presented in September 2010. However, the ET had dismissed all the Claimant's claims in respect of his grievances. Mr Cordrey made a similar point in respect of page 6 of the report in which the doctor attributed deterioration of the Claimant's mental condition and health to the alleged delay in dealing with his grievance. The ET rightly identified the relevant period in which the discrimination surrounding the entitlement to share-related benefits impacted his health as being between September 2009 to November 2009. This was the period which related to the Arcsight shares, and was the relevant period for the purposes of the personal injury claim. The ET were right to read the Doctor's report alongside their findings in the Liability Judgment. There is no section of the report which identifies how and in what respects the acts for which the Respondent was found liable caused or aggravated the Claimant's mental condition.

107. Mr Cordrey contended that the award of £5,000 for personal injury for the Arcsight shares matter is not perversely low or made in error of law.

Discussion and Conclusion

108. No reason was given by the ET for why the "time-limited" aggravation caused by the failure to make reasonable adjustments in giving information about the exercise of the Arcsight share options was held to give rise to an award for personal injury in respect of the period immediately before the Claimant's admission to hospital but not for the period spent in hospital. Whilst the ET held that

> **"Nothing after discharge from hospital following that exacerbation in terms of personal injury is down to these financial matters"**

they gave no reason why damages for personal injury should not be awarded in respect of the stay in hospital which resulted from the exacerbation of the Claimant's condition.

109. The ET was not bound to accept the Report of Dr Parviz Partovi-Tabar. The Doctor attributes the worsening of the Claimant's mental condition to the various alleged acts of the Respondent notwithstanding that the ET had found that the Claimant's claims in respect of those acts had not been made out. The ET rightly based their award on the omission for which they had found the Respondent to be liable.

110. The ET explained in paragraph 12 why no damages for personal injury were awarded in respect of the period after 2009. The same reasons apply to the rejection of the future loss of earnings claim. The ET held that the matter for which the Respondent had been held liable gave rise to a short-lived contribution to a severe mental illness which had already been established as a disability. Further, the matter for which the Respondent was held liable formed a very small part of the many actions which the Claimant claimed caused the deterioration of his mental condition and his long-term inability to work.

111. Save for failing to make an award for personal injury in respect of the period spent in hospital from 30 November 2009 to 13 January 2010, the ET did not err in law or reach a perverse conclusion in the amount of the award of damages for personal injury.

Ground 3

Submissions

112. It was contended on behalf of the Claimant that the ET erred in law by failing to make findings or an award for aggravated damages and uplift "under breach of ACAS Guidelines". It was said that the decision was not **Meek** compliant in this regard.

113. Ms Banton referred to the Employment Judge's response to Questions on Remedy from the EAT. The Employment Judge stated that the ET found no relevant failure on the part of the Respondent regarding grievances. Therefore they did not award an uplift under the ACAS Guide.

114. Ms Banton contended that the ET erred by failing to make findings or an award for aggravated damages. Although not set out in the Grounds of Appeal, it is suggested in the skeleton argument that the basis of the claim was that the Respondent's reaction to the Claimant's taking out grievances was to question his visa status. He only discovered this during the disclosure process. It was submitted that aggravated damages may be awarded for the way in which a party conducts their defence to proceedings and that these facts emerged in the defending proceedings.

115. Mr Cordrey submitted that the ET made no finding of fact which could found a claim that there had been a breach of paragraph 32 of the ACAS Code which was relied upon by the

Claimant so as to engage the discretion to award an uplift under **Trade Union and Labour Relations (Consolidation) Act 1992** section 207A.

116. Mr Cordrey submitted that the findings of fact made by the ET in the Liability Judgment could not sustain an award of aggravated damages. This case did not involve any of the features which would be necessary for an award of aggravated damages such as high-handed, humiliating, insulting, offensive, arrogant, spiteful, malicious or oppressive conduct. The questioning of the Claimant's visa status was not one of the factual issues before the ET. The ET did not err as alleged.

Discussion and Conclusion

117. The ET had dismissed the Claimant's claims related to the handling of his grievances. The remedy hearing was concerned with remedies for the claims found to be established. None of these engaged Paragraph 32 of the ACAS Grievance Code which refers to employers arranging a formal meeting without unreasonable delay after a grievance is received. The ET did not err in failing to refer to the "ACAS uplift" in their Remedy Judgment.

118. In **Prison Service and others v Johnson** [1997] ICR 275, an authority relied upon by Ms Banton in her skeleton argument, the EAT, Smith J (as she then was) and members held of the statutory tort of discrimination page 287:

> **"… Damages are at large and, at least so far as direct discrimination is concerned, the torts may be sufficiently intentional as to enable the plaintiff to rely upon malice, or the defendant's manner of committing the tort, or other conduct, as aggravating the injury to feelings."**

119. The aggravating factor relied upon on behalf of the Claimant is not an aspect of the failure to make a reasonable adjustment in respect of which the Respondent was found liable. It

was said that questioning of his visa status was a response to the Claimant's raising grievances. In his answer to questions from the EAT EJ Smail wrote on 14 October 2013:

> **"There were references in the bundle to the respondent querying the Claimant's immigration status on 29 October 2009, 23 November 2009 and 13 July 2010. These were internal enquiries not addressed to the Claimant. He only found out about them following disclosure. Those enquiries were not put forward as liability issues …"**

120. The conduct which is said to found a claim for aggravated damages, the visa enquires, is said to be a response to lodging grievances. The Respondent was not found liable in respect of the way in which they dealt with the Claimant's grievances. Accordingly it cannot be said that aggravated damages should have been awarded under the principle in **Johnson** "the way in which tort is committed."

121. In **Zaiwalla & Co v Walia** [2002] IRLR 697 the EAT, Maurice Kay J (as he then was) and members, held that aggravated damages can be awarded for the way in which discrimination proceedings are defended. The EAT contrasted a Respondent misconducting himself in the defence of a discrimination case which could attract an aggravated damages award and non-intentional torts which would not.

122. Giving proper disclosure of documents cannot be described as misconduct of a party in defending proceedings. A party is obliged to give disclosure. The contention in paragraph 55 of the skeleton argument that:

> **"Aggravated damages may be properly awarded by way of the [sic] conducts defence to proceedings which properly includes such references [to visa status]"**

is not understood. There is no basis upon which it can be said that the Respondent's internal enquiries about the Claimant's visa status were part of the defence of proceedings, which in any

event in respect of the 2009 enquires, had not yet been issued.

123. In our judgment the ET did not err in dismissing the claims for ACAS uplift and aggravated damages. The ET did not err in failing to make such awards.

Ground 4

Submissions

124. Ms Banton contended that the ET failed to give any or any adequate reasons for failing to make an award for loss of earnings. Further, it was submitted that by holding in paragraph 14:

> **"had the liability matters caused the lion['s] share of the Claimant's mental illness those figures would have been serious figures. As it was, the liability matters represented time-limited matters of exacerbation only. We reject the submission that they had any ongoing effect"**

the ET erred by finding that the issue of ongoing effect depended on the Claimant's illness being caused by the Respondent's acts of discrimination rather than exacerbated by it. Further it was said that the Claimant's medical and other evidence showed a serious ongoing effect. The Respondent adduced no evidence to contradict this. On the basis of the opinion expressed in the medical report by Dr Parviz Partovi-Tabar that:

> **"his condition quickly deteriorated due to irresponsible behaviour on part of the employer which set back his recovery"**

and

> **"…I do not see him recovering for another 10 years".**

Ms Banton submitted, in answer to a question from the EAT, that an award for 10 years future loss of earnings from the date of the medical report, 27 March 2013, should have been made. Further Ms Banton contended that the ET failed to give reasons for not making an award for

loss of earnings. Counsel submitted that the decision on this potential head of compensation was not **Meek** compliant.

125. Mr Cordrey submitted that the ET gave clear reasons in paragraphs 10 and 12 for not making an award for loss of earnings. In summary, in circumstances where the Claimant was seriously ill and off work as a result of factors unconnected with the failure to make reasonable adjustments for which the Respondent was found liable, his loss of earnings could not be attributed to the found failure to make reasonable adjustments.

Discussion and Conclusion

126. In our judgment paragraphs 10 and 12 of the Remedy Judgment make it clear why no award for loss of earnings was made. The ET stated that the liability issues which had been established and for which a remedy was to be given

> **"only had a fractional influence on the injury to feelings and mental ill health suffered by the Claimant as a whole in this case."**

The Claimant had a pre-existing disability of a very severe depressive illness.

127. We do not accept the submission on behalf of the Claimant that the ET found that the ongoing effect resulting from the failure to make reasonable adjustments could only be established if that failure caused his illness rather than exacerbated it. Paragraph 12 of the Remedy Judgment shows this not to be the case. A remedy was given for the Respondent's default which exacerbated but did not cause the Claimant's mental illness. It was because the exacerbation was held to be time-limited that the ET held that no personal injury was thereafter attributable to the Respondent's default.

128. The ET were not bound to accept the opinion expressed in Dr Partovi-Tabar's report. The doctor's opinion was predicated on all the Claimant's allegations of discrimination against the Respondent being accepted when only a limited number succeeded. The injurious effect attributable to one breach of **EqA** which caused personal injury which was held to be time-limited, is bound to be less than a large number of other allegations if they had been established as well as the breach found to have occurred. The ET rightly read Dr Partovi-Tabar's report alongside their findings on liability. The ET did not err in rejecting Dr Partovi-Tabar's report.

129. It is for a Claimant who seeks compensation or damages for an act of discrimination to prove that the loss claimed was caused or contributed to by the act which has been found by the ET to be a breach of the **EqA**. The ET did not accept the evidence on which the Claimant based his claim for loss of earnings. They were entitled so to do. The challenge to the conclusion of the ET to make no award for loss of earnings is one of perversity. The ET heard all the evidence and submissions. They made a finding of fact that the exacerbation of the Claimant's condition caused by the Respondent's failure to make reasonable adjustments found to be in breach of the **EqA** ceased after his discharge from hospital. The Claimant has failed to surmount the high hurdle of establishing that failing to make an award for loss of earnings was perverse.

Disposal

The Liablity Appeal

130. The Liability Appeal is dismissed

The Remedy Appeal

131. Ground 1(b) succeeds. The ET failed to give reasons for making no award for injury to feelings for failing to make a reasonable adjustment in relation to communication about the Arcsight ESPP or failed to consider making such an award.

132. Ground 2 succeeds. The ET erred in failing to take into account the period of time the Claimant spent in hospital in deciding the amount of the personal injury award. Having regard to the award of £5000 for 2-3 months we increase the personal injury award to £8000 to take into account the period spent in hospital from 30 November 2009 to 12 January 2010.

133. All other grounds of appeal are dismissed.

134. We would urge the parties to reach agreement on the disposal of Ground 1(b) in order to avoid the expense and delay of remission of the issue to the Employment Tribunal.