Zd RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms E Coglan		The Hideaways Club (UK) Ltd

Heard at: London Central **On**: 26 April 2017

Before: Employment Judge D A Pearl
Mr D Schofield
Dr H Donoghue

Representations
For the Claimant: Ms L Amartey (Counsel)
For the Respondent: Mr D Mitchell (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The Respondent shall pay compensation for injury to feelings to the Claimant in the sum of **£18,749.37** inclusive of interest.

2 The Respondent shall pay **£7,500.00** compensation to the Claimant for personal injury, to include the 10% Simmons v Castle enhancement and interest.

3 The Respondent shall further pay compensation of **£19,161.89** to the Claimant.

4 The Respondent shall pay to the Claimant the further sum of **£2,290.73** by way of interest.

5 The TOTAL SUM payable to the Claimant is **£47,701.99**

REASONS

1. This was the remedy hearing in this case pursuant to the Judgment with Reasons that was promulgated on 12 September 2016. In order to understand the detailed basis of our earlier judgment in this complex case, the full reasons ought to be read. What follows here is an abbreviated summary of our findings.

2. The Claimant commenced employment with the Respondent on 3 September 2013 and she was the office manager and PA to the CEO, Mrs Leach. She was diagnosed with Grade 3 invasive breast cancer on 4 December 2014 and required urgent treatment including chemotherapy. She was in the middle of that particular treatment in about mid-February 2015. A key date in the chronology is 3 March 2015 and our findings are set out in paragraphs 15-18. The purpose of the meeting is referred to in paragraph 13 of our Reasons and it was a decision by Mrs Leach to put the Claimant on sick leave and we described this as being at the heart of the case. In due course, as will be seen, Dr Tutting described this meeting as "the critical event".

3. The Tribunal found that the Respondent's requirements put to the Claimant at this meeting amounted to section 15 Disability Discrimination. In particular, paragraphs d(i), (ii) and (iii) were established. These were:

(i) removing the Claimant's adjusted working pattern on 3 March 2015 without any proper consultation or discussion with her;

(ii) requiring her to go on sick leave for three to four months from that date for which she would be paid SSP; and

(iii) requiring the Claimant to accept a different role and a reduced salary on that date. We have omitted other further wording from the list of issues at this point.

4. In the subsequent detailed chronology Mrs Leach made further demands on the Claimant in terms of requiring documentary proof of certain aspects of her treatment: see paragraph 24 of our Reasons.

5. We next note that there were four specific claims of section 15 discrimination which overlapped with claims of harassment and that they related to the matters at paragraph 3(d)(iv), (v), (vi) and (vii) in the list of issues. These captured further requirements that were made of the Claimant later on in March and they include the requirement about her providing medical documentation to prove that she was fit to work, when she had not been signed off as unfit. In reality, all of this was follow-on action by the Respondent after it had taken its decision in principle on or about 3 March. There were a further three claims of harassment that were made out and we would refer to our judgment for the detail. At this point, it is not necessary to set out these matters again. The remaining claims of direct discrimination, harassment, victimisation and also constructive dismissal failed. In relation to the alleged constructive dismissal reference needs to be made to our paragraphs

69-79 which deal with the detailed chronology leading up to the Claimant's resignation.

Overview

6. The Claimant seeks £33,000 as compensation for injury to feelings. In addition she claims a sum as damages for personal injury arising from the Respondent's tortious conduct. Third, she seeks financial loss arising from her resignation after 17 September 2015 through to October 2016. There are additionally other items of compensation sought and we will turn to these in due course. The Respondent contests each of these heads of claim. It is suggested that the appropriate compensation for injury to feelings would be £7,000. Personal injury is put in a lower bracket than the Claimant's assessment. Loss of earnings is said not to arise on the facts of the case because none of the successful claims were causative of any financial loss at all.

Facts

7. The Claimant has an extensive witness statement related to remedy. Part of this statement involves her rehearsing the chronology and as we have made extensive findings we say no more at this point. However, the Claimant has at each and every point stressed the extent of her hurt feelings. Paragraph 9 refers to the letter she received on 13 March 2015 (Reasons, paragraph 26) and states:

> "I found the tone of this letter to be extremely harsh and uncaring ... I found the words underlined and in bold … extremely hurtful … I also found it humiliating that Mrs Leach would not accept the information already provided … The tone of the letter … made me very anxious, stressed and fearful that weekend. Due to my stressed state, I felt physically sick and I started to experience a tightness in my chest and my stomach was in knots. The symptoms became worse over the subsequent weeks."

This is representative of other passages in the Claimant's witness statement and also illustrates the inherent overlap in this case between the claims for personal injury and injury to feelings.

Medical Evidence

8. The Claimant's oncologist, Professor Stebbing, in a letter dated 16 March 2015 to the GP, noted the fractious relationship with "her boss at work" and his having to write another letter for her. He also noted that it was important to concentrate on curing the breast cancer and "not continuing all these discussions about her work environment ..." This letter mirrors our various factual findings. The Registrar in Medical Oncology wrote on 10 April 2015 that the Claimant was "still having issues with her workplace and she is trying to actively work through those."

9. Mr Al Mufti, Consultant Surgeon, wrote in a letter on 26 May 2015 that she had been subjected to psychological "trauma and torture by her line manager at work, and she has been quite tearful and depressed." He described

this as, in his view, a bad psychological trauma. On 1 June 2015 he also wrote separately to the GP and he made the same point. He had referred her by this point to the hospital's clinical psychologist for assessment and advice and this strongly suggests to the Tribunal that the signs of psychological trauma were such as to be affecting her physical treatment.

10. On 2 July in a questionnaire (page 76) the Claimant set out her own views and said that the campaign of bullying, harassment etc had been ongoing for seven weeks. There is no reason to doubt that this is an accurate description of what the Claimant felt at the time. There is a further questionnaire filled out on 6 July (page 729) which is evidence of the extent of her feelings.

11. There is nothing in the GP notes to contradict any of this. Thus, on 29 May 2015 her feelings of being bullied by the employer, and tearfulness, were referred to by the GP; she could not face her employer. On 25 June it was said that she was so upset and distressed she could not go back to work.

12. The next relevant medical report is dated 20 January 2016, some four months after the Claimant's resignation and after she had returned to London from Italy. (She had gone to Italy at some stage in October 2015 and we will turn to this again below). The GP said he felt that the Claimant had "moderately severe physciatric injury as a result of her experiences at her workplace and this prevented her from returning to her usual workplace." She was tearful and upset on this occasion and there was a specific reference to her having coped very well mentally with the diagnosis and distress of breast cancer. The GP noted that her distress seemed to be due to issues at work. He also said that returning to the usual workplace would exacerbate the distress and that she was not mentally fit to do so. Outside work she was able to cope very well and he gave as an example her charity work. "I feel she could resume a working life elsewhere without any long term mental or physical impairment."

13. Next, we note the medical report from Dr O'Leary, based in Cork, where the Claimant and her husband relocated in October 2015, so as to live with her parents. This also sets out a detailed chronology taken from the Claimant. There was no past history of psychiatric illness. In common with the other health professionals, he formed a view that she must have coped very well with the diagnosis of cancer. It was "extremely unpleasant treatment" by the Respondent that had caused anxiety and distress and resulted in her giving her notice. Dr O'Leary concluded that she had developed an adjustment disorder, namely a state of subjective distress and emotional disturbance which interferes with social functioning and performance. This had arisen during a period of adaptation to the stressful events at work. Such a disorder normally does not exceed six months unless it is prolonged. Psychotherapy was recommended and it was also noted that it was helpful to have taken the Tribunal case and that its resolution could assist with the disorder. In a further letter dated 19 February 2016, Dr O'Leary thought that the experience at work could prevent the Claimant from returning to comparable employment, but again she thought that the resolution of the Tribunal proceedings would bring about an improvement. She categorised the psychiatric damage as moderate.

14. Dr Molony, who had been the Claimant's GP since she was a child in Cork, reported on 7 March 2016. He also, consistent with other professionals, set out her feelings as she described them to him. In November 2015 when he saw her she was distraught and severely stressed and tearful. Since then he still found her to be traumatised by her experiences and he considered that the effects had been particularly severe. Inevitably, the doctor would have taken all of his information from the patient, but that does not lead us to doubt the accuracy of his opinion. The workplace trauma, as he called it, had affected her ability to cope with life and work, her trust in others and inter-personal relationships, she had become extremely vulnerable. He thought it would be "some considerable time" before she could return to the workplace.

15. This brings us to the two reports of Dr John Cutting, Consultant Psychiatrist and we have seen the joint letter of instruction. The first report is very detailed as to her personal history and also rehearsed the history of the employment dispute from the Claimant's point of view. He noted that the first psychological symptoms surfaced on 17 April 2015 and he considered at one point that she might have post-traumatic stress disorder. He then discounted this as a diagnosis. He referred to the contemporaneous medical information in some detail, making reference to some of the documents we have cited above. He noted that at interview the Claimant looked neither anxious or depressed nor irritable and was positive in her attitude.

16. He concluded that she had a psychiatric medical condition between mid-April 2015 and autumn 2016 which he categorised as general anxiety disorder, F41.1 in the ICD, version 10. Symptoms included characteristic somatic manifestations of anxiety. They had a deleterious effect on her everyday function from April 2015 until October 2016. It now required no more treatment, by way of either medication or psychological sessions. He described 3 March 2015 as the critical event and the other matters in respect of which the Tribunal made findings in the Claimant's favour he regarded as potentially exacerbations of that original event. He also noted that in general:

> "… an anxiety disorder has a life of its own and once the condition starts then it tends to continue from between six months and two years and therefore I would not consider any other event as anything other than possibly exacerbatory."

17. He then turned to other causes outside the allegations of discrimination and he discounted these. As to the impact of the condition on the Claimant's ability to work, he was impressed with the language school that the Claimant and her husband had been running abroad since October 2016. He recorded the Claimant's view that she could not work in any environment where she has an employer. Dr Cutting took a contrary view and saw no reason why she should not be able to find some other employment in another sphere. The anxiety state had passed by October 2016 and he saw no reason why it should recur and nor did he see any other likelihood of future psychiatric problems.

18. Dr Cutting was asked further questions by both parties. He confirmed that the condition affected the Claimant's ability to work for the Respondent

from 29 May 2015 to 17 September 2015. He also considered that until the autumn of 2016 she was unable to work for any employer. However, in cross-examination he accepted that this was a non-expert view and not based, as he put it, on psychological knowledge.

19. Another question, from the Respondent's side, was to try to seek a degree of clarity about the influence, if any, of the complaints of discrimination that were not upheld by the Tribunal. Dr Cutting noted in his response that psychiatry is not a very exact science and that to attribute causation to each of the 40 odd claims we were dealing with would be impossible. He emphasised that the 3 March meeting was a critical cause; and he had looked again at the various factors we had identified in our judgment. Those which were not discriminatory he thought generally dealt with matters to do with the Claimant's day-to-day job, questions about her financial situation, personal questions and generally restricting her freedom within the job. However she was most hurt in his view by "... what she saw as a carelessness towards her with regard to her illness and [she was] less hurt by all the restrictions about her job and questions about her finances." The illness overall remained within the bounds of what he would expect from a general anxiety disorder. He discounted the non-discriminatory factors that had been drawn to his attention.

20. The Claimant gave evidence to us and we note some aspects of what she said. She initially told us that she moved to Italy in August/September 2016 but swiftly amended this to May 2016. She returned from Italy in July and then went back again in August. Her husband moved there at the very end of July. She told us that she was preparing for the new business venture from late May. She said they started advertising in September although we have noted her blog (page 639) that informed readers that the school was due to open on 5 September 2016.

Submissions

21. We are grateful to both counsel for their written and oral submissions and we will refer to some of them below.

Conclusions

General principles

22. The general common law principles that we must apply are well known. To compensate for statutory torts the Tribunal aims to put the Claimant into the position she would have been in had the employer not acted unlawfully: **MOD -v- Cannock [1994] ICR 918.** Matters become more complicated if there are non-tortious causes of loss and damage and/or if a Claimant partly succeeds and partly fails in the claim.

23. **Thaine -v- LSE [2010] ICR 1422** is a leading case and a binding authority of the EAT. The concurrent causes of the Claimant's ill-health included previous illness, her personal and relationship history and other allegations that she

believed amounted to claims of discrimination against LSE, but which failed. The point for discussion was summarised in this way by Keith J:

> **"**The principal issue which this appeal raises is whether the Tribunal erred in law in reducing the award to reflect the LSE's limited responsibility for the Claimant's ill-health. In short when a Tribunal finds that loss has been sustained by an employee caused by a combination of factors, some of which amounted to unlawful discrimination for which the employer is liable, but others which were not the legal responsibility of the employer, is it legally open to the Tribunal to discount the award by such percentage that reflected apportionment of that responsibility?"

24. Keith J considered earlier case law in which the Court of Appeal had held that the defendant was liable only to the extent that its "conduct made a material contribution to his disability." It was added that although quantification may be difficult the court has to do its best using common sense. Justice has to be achieved for all parties. **Thaine** is a detailed and persuasive analysis of case law and the propositions to be derived from the case are not disputed by either party in the case before us. An apportionment approach is supported by weight of authority and accords with a sense of fairness. It might be summarised by saying that employers should only have to pay for damage that is their fault: see **Thompson -v- Smiths [1984] ICR 236-274.**

25. We will refer again to case law when we come to the matter of financial loss.

Is this a case of apportionment?

26. Mr Mitchell's relatively short written skeleton argument does not stress the question in very great detail but it is clear from his submissions that he is somewhat critical of Dr Cutting's approach to other factors than the discriminatory acts found by the Tribunal. These are principally the claims that were made and which failed. Mr Mitchell has adopted a careful but mainly linguistic or semantic line of criticism and suggests that the doctor's evidence in this regard is insecure.

27. In dealing with this overall submission we need to disentangle a number of separate factors. The first, as is evident, are those claims of discrimination or harassment that failed. The second is the claim of constructive dismissal that also failed. There is a third area that might potentially have been relevant, namely the Claimant's response to her diagnosis of and treatment for cancer. As we have indicated above, all of the medical professionals have noted that she dealt well with this and there is no evidence before us of any sort that would enable us to say that this had any causative effect on her mental condition.

28. Our conclusion is that when we examine Dr Cutting's evidence overall, two main conclusions emerge. The first is that the 3 March discussion was a precipitating event of such significance that it alone can explain the psychiatric symptoms. As the doctor noted, the other items of discrimination may have exacerbated the effect of the symptoms, but in themselves they seem to us to be

regarded by him as secondary. We see no reason to disagree with this analysis which certainly falls within his expert field of psychiatry.

29. The second point that emerges clearly is that Dr Cutting, when he reviewed matters in order to answer questions in his second report, looked with some care at what the Tribunal found. He considered that the "non-discriminatory factors" dealt with aspects of the Claimant's job or financial situation or otherwise, whereas the originating and, it seems, precipitating discussion of 3 March was the first indication of an attitude by the Respondent that the Claimant regarded as callous. This was a callousness (in the Claimant's mind) with regard to her illness and it was a fundamental challenge to the way in which the Claimant wished to deal with her diagnosis and treatment, indeed she regarded it as a major affront. It hurt her considerably. The other matters were less significant in terms of the effect they had on the Claimant. Dr Cutting's considered view was that nothing other than that meeting was causal. The remaining factors that we said amounted to discriminatory might, at most, have exacerbated the effect on the Claimant, but even this is said to have only potentially resulted in a "slightly longer" period of illness. As we have noted, the illness was thought by the doctor to be within the general boundaries of this sort of anxiety disorder.

30. Because apportionment is always something that the Tribunal must be careful to assess, it does not follow that in all cases it is necessary to reduce awards in order to account for other factors. There needs to be a clear evidential basis for concluding that those other factors have contributed to an illness before an award can be reduced in this manner. Here, we are satisfied that there is no such basis for reducing the award and that the matters in respect of which the Claimant has failed to establish legal liability are broadly immaterial to the course of her illness that resulted from the discrimination, as well as the extent of her hurt feelings.

31. This leaves the question of the alleged constructive dismissal which was largely canvassed by Mr Mitchell in his oral submissions. His general point is that the financial losses as well as some of the injury to feelings and/or psychiatric damage come from the fact that the Claimant resigned and that the employment relationship ended in September 2015. The resignation was not established as a dismissal and therefore no claim of discrimination succeeded in respect of the resignation. In Mr Mitchell's submission this ought to deprive the Claimant of a measure of compensation at least insofar as that compensation concerns the consequences that follow the resignation.

32. We find ourselves unable to agree with Mr Mitchell's submission, given the facts of this case. Had the discrimination not occurred, there is no reason to think that the Claimant would not have remained in employment with the Respondent. Her entitlement to claim personal injury damages or injury to feelings compensation or financial loss does not, in our judgment, depend upon a finding that her resignation amounted to a constructive dismissal (or the further finding that such a constructive dismissal is discriminatory). Constructive dismissal is a concept that has its origin in the common law and can only be made out where there is a resignation in direct response, without undue delay, to

a repudiatory breach. As we commented in our liability judgment, and as is clear from authority, discrimination does not necessarily amount to a repudiatory breach by an employer. In any event, there may be barriers in the way to a Claimant making a case for constructive unfair dismissal or discriminatory constructive dismissal and this case is one such example. The Claimant delayed in resigning and that was one factor we considered to be material.

33. The correct approach, in our view, is, having identified the tortious conduct, to ask what measure of compensation will put the Claimant back in the pre-discrimination situation. The answer will necessarily require the Tribunal to assess the medical and other consequences for the Claimant following and attributable to the discrimination. What occurred in this case is that the Claimant experienced a severe reaction which in itself was capable of being diagnosed as a medical condition and it was evident as such to all the doctors who saw her. This was the first episode of mental illness that she had ever experienced. In causative terms it was brought about by the acts of the Respondent. Compensating her fairly and justly does not require her to establish the constructive dismissal.

34. Mr Mitchell has put some stress on conclusions we noted at paragraph 139 of our reasons, but it is clear to the Tribunal that we were, towards the end of that paragraph, reciting evidence from the Claimant we regarded as being something of an after-thought on her part, namely that she would have liked to have been offered another role. The reality, as we record in the same paragraph, is that the employment relationship was probably all but finished by mid-April 2015. The cause of that deterioration in the relationship was the discrimination. The Claimant was undoubtedly still quite ill by 17 September 2015 and we have no difficulty in concluding that she was in no position to go back to work for this Respondent; and was as a matter of evidence too ill to work for anyone. She resigned and that fact ought not to reduce the compensation that is due.

Injury to feelings

35. As Mummery LJ said in the leading case of **Vento [2002] EWCA Civ 1871:**

> "Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are nonetheless real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury … Striking the right balance between awarding too much and too little is obviously not easy."

36. As to the three bands, the top band should normally be reserved for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. The middle band should

be used for serious cases, which do not merit an award in the highest band. Our assessment is that this is where this case falls.

37. We also note the important citation from **HM Prison Service -v- Johnson [1997] ICR 275:**

> "(i) awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the torfeasor. Feelings of indignation at the torfeasor's conduct should not be allowed to inflate the award.
>
> (ii) Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use the phrase of Sir Thomas Bingham MR, be seen as the way to 'untaxed riches'.
>
> (iii) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think that this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards.
>
> (iv) In exercising their discretion in assessing a sum, the Tribunal should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.
>
> (v) Finally, the Tribunal should bear in mind Sir Thomas Bingham's reference to the need for public respect for the levels or awards made."

38. Ms Amartey submits that the Claimant's contemporaneous emails dealing with her feelings provide clear and credible evidence of the severe and long-standing nature of her injury to feelings. She has submitted that the period from 3 March 2015 to April 2015 appears on the medical evidence to precede the period of personal injury and that the Claimant's feelings were greatly injured during that period. Further, she submits that they continued to be injured after October 2016.

39. Mr Mitchell submits that the suggested figure of £33,000 is wholly unreaslistic, to use his term. He points out that a number of the claims fail. Applying our judgment and experience, we consider that this case falls well short of the top band of **Vento** which ought to be used in more serious cases. When we use the term "serious cases" we are not in any sense belittling the feelings of hurt experienced by this Claimant. It is evident that she did experience a very considerable degree of upset and hurt, outside the personal injury that she suffered, and this was largely brought about because of the uncaring attitude that her employer demonstrated towards her after her diagnosis. Nevertheless, the facts do not in our judgment qualify the case for inclusion in the top band. But it

is still a serious case and the middle band seems to us to be the correct place for it.

40. Mr Mitchell has relied upon various of the case reports on quantum from **Harvey** but the two that he drew to our attention seem to us to be lesser cases than the one we are dealing with. We have looked at cases that are closer in our judgment to this in terms of the degree of hurt experienced by the Claimant. They include the two breast cancer cases of **Burke** and **Joseph**. These cases were assessed at £14,000 and £15,000 for injury to feelings some seven and nine years ago.

41. In our judgment, bearing in mind the clear evidence about the extent of the Claimant's hurt feelings, we consider that the case should be closer to the top end of the middle band of **Vento** and we would assess the correct figure at £16,000. We have to take a proportionate view of the combined awards for personal injury and for injury to feelings, but in this case we consider that the evidence to substantiate the award of £16,000 has been copious and is credible. We therefore consider that that sum ought to be secure and that any adjustment should be made in the personal injury award so as to achieve a combined sum that is fair to all parties.

Personal injury

42. We must have regard to the Judicial College guidelines and both counsel agree that we are dealing with the category of moderate psychiatric damage that lies within a band of £4,900 to £15,950, taking into account the 10% uplift that is now applicable. This was a personal injury which lasted for about 18 months and, looked at in isolation, we consider that it would probably qualify for an award of about £10,000. This would, however, amount to over-compensation of the Claimant in our view, not least because a great deal of the evidence relied upon for injury to feelings is also relied upon for personal injury. We consider that we are obliged to adjust the figure downwards so as to ensure that the two sums together are fair and proportionate. We would accordingly reduce the figure for personal injury to £7,500.

Financial loss

43. The principal issue between the parties is the point at which there should a cut-off. The Claimant contends that this is October 2016, although we have noted it may be that the language school opened a month earlier. The Respondent would suggest that there was no financial loss post-resignation for reasons that we have set out above and which we have rejected. Among the various other arguments addressed to us is the submission for the Claimant that, but for her replacing her income by her involvement in the language school, the Claimant would have suffered much longer losses and that she has been rendered incapable of working for an employer ever again. We consider this last contention to be unjustified and it is not supported by medical evidence either from Dr Cutting or elsewhere in the papers, where this point has been addressed in passing. Were the Claimant to be seeking to establish that the psychiatric damage and injury to feelings were such that she could never work in an

employed situation again, we would expect to see a much more cogent explanation of this in the medical material. It seems to us that such a conclusion is also unrealistic. The Claimant's considerable difficulties and injuries resulted from this particular response by the CEO to the serious diagnosis of cancer. It could not be reasonably anticipated that those circumstances would replicate themselves in other employment in the future. We need to say a little more about this in the light of the fact that the Claimant does not pursue the claim beyond October 2016.

44. Where we consider the Claimant's evidence to be weak is in relation to the months May to October 2016. Notwithstanding the detailed evidence she gives on many other matters, this part of her witness statement is rather skimpy. She did not volunteer, but readily told us in answer to questioning, that she was preparing the language course from May onwards. In our view, that is the correct cut-off date, namely 1 May 2016. At that point she was able to engage in another project and we consider that the reality is that she would have been able to go into employment had she chosen to do so at that time which, we note, immediately followed the Tribunal hearing on liability. We ought to observe in passing that we do not accept Mr Mitchell's point that she was fit to work earlier or that she was in fact devoting such time and energy to the Tribunal that she was precluding herself from entering the job market.

45. In coming to this judgment we have taken account of the guidance contained in **Wardle -v- Credit Agricole Corporate and Investment Bank [2011] IRLR 60.** The case is not directly in point because the guidance is for assessing future loss of earnings after a discriminatory dismissal, but the first principle is as follows:-

> "Where it is at least possible to conclude that the employee will, in time, find an equivalently remunerated job (which will be so in the vast majority of cases), loss should be assessed only up to the point where the employee would be likely to obtain an equivalent job ... and awarding damages until the point when the tribunal is sure that the Claimant would find an equivalent job is the wrong approach."

46. Our judgment is that the Claimant would on the balance of probabilities have been able to work in May 2016 after the first part of the Tribunal hearing had finished. It is true that Dr Cutting says that she was ill until October 2016, but we here depart from his view and prefer to make our own assessment. Dr Cutting left the Tribunal after he gave evidence and he did not hear the responses in cross-examination given by the Claimant about this part of the chronology. We consider that she cannot merely rely upon Dr Cutting's report for any entitlement to financial compensation after 1 May 2016. It follows that the Claimant is entitled to £49.64 claimed in her schedule for the period 16 March 2015. Second, she has made good her claim of £5,955.81 for the period 29 May to 17 September 2015. The third element is the loss of basic salary from 17 September 2015 to 1 May 2016. This is 32 weeks x £554 net (rounding up the pence) and this is £17,728.

Other expenses

47. We would award the cost of counselling sessions of £310. The five further psychological sessions at £347.26 and also the cost of the move back to Ireland being £521.59. There is a direct causal relationship between the acts of discrimination and the move back to Ireland because the Claimant was unable to work after the discrimination and, as she correctly foretold on 3 March, she had to give up her London accommodation and she and her husband acted reasonably in moving back to her parents' home in Cork.

48. We take a different view of the claimed cost of little over a £1,000 involved in moving to Sicily and further "flights to arrange franchising". These sums are claimed on the basis that the Claimant was mitigating loss after 1 May 2016 and the costs flow directly from the tortious behaviour. We disagree. By this point our judgment is that the Claimant was able to entertain either other forms of self-employment (which she has referred to in passing in her witness statement); or she was in a fit state to embark upon some employment and with a view to replacing her income in due course. Moreover, the decision to open what may have proven to be a profitable business in Sicily represents the sort of significant decision that a couple may make aside from any earlier discrimination by the Respondent. It involved a substantial investment in time and money and we do not consider that it can properly be said to be an attempt to mitigate loss on the basis that it was the only reasonable course to adopt. In our view it is not an expense to which the Respondent ought to be exposed as torfeasor and we are not satisfied that the causative chain remains intact. We take the same view about the nearly £12,000 costs claimed for setting up the business in Sicily. This was an entrepreneurial business venture which the Claimant and her husband were entitled to engage in but the cost of doing so was not occasioned by or caused by the tortious behaviour. It is part of the chronology and the setting for the events that led the Claimant in 2016 to be in Ireland and contemplating a business venture in Sicily. However, it is outside the category of foreseeable causative financial loss for which this Respondent is obliged to pay compensation.

49. The sums we have awarded in paragraphs 46 and 47 total £24,912.30. The Claimant gives allowance for £5,750.41 disability allowance received. The net loss is therefore £19,161.89.

50. The remaining matter of compensation sought relates to the loss of a week's holiday in one of the Respondent's luxury villas, which is claimed at the value of £9,459 a year for a period of two years. This figure is therefore £18,918. The first observation to make is that there was no "right" to spend a week in the villa and it was not provided for in any contractual document. The Claimant during her approximately two years of employment had the one week in September 2014 in the villa although, unfortunately, it appears that some difficulty arose at least in the mind of Mrs Leach and that led to a disagreement after she returned. It may well be that that disagreement was smoothed over, but there is no certainty that the Claimant would have been granted another week and she neither sought a week in the villa in 2015 nor was she offered it. Where a benefit of this award is wholly contingent on the employer exercising discretion and, of course, subject to availability of the villa in question, it seems to us that

the benefit is in principle not claimable as tortious damages. We agree with Mr Mitchell that the most that can be said is that the Claimant has lost the chance of being able to stay in such a villa but we do not consider that this is sufficient to merit an award of additional compensation.

51. Pursuant to the 1996 Order we have a duty to set out the figure for interest. The applicable rate of interest is 8%. We take the calculation date to be 26 April 2017 and the contravention date 3 March 2015. Interest on injury to feelings is calculated at 784 days at 8% on the figure of £16,000. The remainder of the award attracting interest is calculated on a mid-point after 392 days at 8%.

Employment Judge Pearl
24 May 2017