Appeal No. UKEAT/0243/13/DA
UKEAT/0277/13/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 January 2014

Before

HIS HONOUR JUDGE HAND QC

MR A HARRIS

MR T HAYWOOD

UKEAT/0243/13/DA

BAE SYSTEMS (OPERATIONS) LTD	APPELLANT
MARION KONCZAK	RESPONDENT

UKEAT/0277/13/DA

MARION KONCZAK	APPELLANT
BAE SYSTEMS (OPERATIONS) LTD	RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For BAE Systems (Operations) Ltd	MR PAUL GILROY (One of Her Majesty's Counsel) Instructed by: Eversheds Solicitors Eversheds House 70 Great Bridgewater Street Manchester M1 5ES
For Marion Konczak	MR TRISTAN JONES (of Counsel) Bar Pro Bono Unit

SUMMARY

SEX DISCRIMINATION – Other losses

UNFAIR DISMISSAL – Compensation

DISABILITY DISCRIMINATION – Compensation

The Employment Tribunal had erred by not considering whether the psychiatric illness, which resulted in the loss in this case, had divisible causes and whether, if it did, the award fell to be apportioned. In concluding that there had been a failure to mitigate commencing three years after the date of dismissal the Employment Tribunal had failed to give any comprehensible account as to why that date had been chosen. Both of these matters raised on the Employer's appeal were remitted for further consideration by the same Employment Tribunal on the evidence already heard and the facts already found

On the cross-appeal mathematical errors of calculation in the judgment were remitted to the Employment Tribunal for reconsideration, but although the cross-appeal was also allowed in relation to a decision made by the Employment Tribunal wrongly limiting the scope of the cross-examination of the Employer's psychiatric expert witness, no further order was made because the terms of the remission in relation to the appeal rendered the point academic.

HIS HONOUR JUDGE HAND QC

Introduction

1. This is an appeal and a cross-appeal against the Judgment of an Employment Tribunal, comprising Employment Judge Sherratt, Ms Jammeh, and Mr Anslow, sitting at Manchester over a variety of dates: 10-13 December 2012, 14 December 2012, 17 December 2012, with a day in chambers on 7 February 2013 ("the Sherratt Tribunal"). The reserved Judgment was sent to the parties on 18 February 2013. The outcome was that the Appellant, the Respondent below, who we will call "the Employer", was ordered to pay the employee, who we will call "the Claimant", the sum of £318,629.66 by way of compensation.

2. Today, the Claimant has been represented by Mr Tristan Jones of counsel under the auspices of the Bar Pro Bono Unit and the Employer has been represented by Mr Paul Gilroy QC. Both counsel appeared at the Sherratt Tribunal.

The Employer's case

3. Mr Gilroy takes three points on this appeal, firstly that the Employment Tribunal did not take proper account of other factors that contributed towards the depressive illness preventing the Claimant from working. Secondly, the Employment Tribunal failed to reach a proper conclusion when deciding that the Claimant's failure to take medication up until 24 July 2010 had been reasonable and after that date had been unreasonable. And thirdly, that the award made by the Employment Tribunal in favour of the Claimant in relation to pension loss had been made on the wrong basis.

4. The cross-appeal complains about errors of calculation in the way in which the Employment Tribunal arrived at various components of the award. It also raises a separate and

very specific point relating to a decision by the Employment Tribunal right at the outset of the cross-examination of the Employer's expert, Dr Jarman, by Mr Jones when the Employment Tribunal refused to allow Mr Jones to raise issues relating to the professional integrity and independence of that psychiatrist.

The background

5. The case has a very long history. The Claimant complained of bullying and sexual harassment, starting in January 2004. Ultimately, she was moved from one role to a different role, which she did not enjoy and she attempted to explain to her then manager her difficulties and why these could not be resolved by simply going back to her original role.

6. There were a number of allegations made by the Claimant about the period of 21 months leading up to a particular incident in April 2006. On 26 April 2006 the manager, to whom we have already referred, made a remark to the Claimant that the Employment Tribunal dealing with what has been called the liability hearing, namely the Employment Tribunal presided over by Employment Judge Cook ("the Cook Tribunal"), decided was an act of sex discrimination contrary to the **Sex Discrimination Act 1975**. The Claimant described this as "the last straw" and she went off work the following day, 27 April 2006. Just over a year later, she asked to return to work, but putting matters briefly, the Employer refused to allow her to do so and subsequently dismissed her on 23 July 2007. She complained to the Employment Tribunal and her complaints were heard by the Cook Tribunal, which found that her dismissal was because she had raised allegations of sex discrimination. It therefore amounted to victimisation contrary to section 2 of the **Sex Discrimination Act 1975**. It also held that the refusal to allow her to return to work without conducting any risk assessment and without making any reasonable adjustments to take account of her ill-health amounted to disability discrimination contrary to

the **Disability Discrimination Act 1995** and by its decision of 8 October 2008 the Cook Tribunal also held that, because the dismissal was sex and disability discrimination-related, it was an automatically unfair dismissal.

7. A very considerable time elapsed before the issue of remedy could be addressed. The Cook Tribunal dealt with remedy in June 2011. Part of the reason for the delay was that there was an appeal to this Tribunal by the Employer in relation to the determinations on liability made by the Cook Tribunal. Our understanding, although we have seen very little material relating to that matter, is that appeal was unsuccessful. Unhappily, the determination as to remedy made by the Cook Tribunal did not satisfy the Claimant and she appealed to this Tribunal. That was, therefore, a second appeal to this Tribunal. On that appeal, the appeal was allowed in part and the issue of remedy was remitted, at least so far as the financial loss aspect of it was concerned, for a re-hearing before a differently constituted tribunal. The Tribunal hearing it was the Sherratt Tribunal, and it is that re-hearing Judgment which is the subject of this third appeal to this Tribunal and of the cross-appeal.

The Employment Tribunal decision

The Issues

8. At paragraph 20 of the Judgment, the Employment Tribunal set out the five issues which Mr Gilroy QC suggested should be decided by it. It is clear from the Judgment of the Sherratt Tribunal it accepted that Mr Gilroy's analysis should form the framework for its decision.

9. The issues were as follows:

(1) To what extent did events within the Claimant's workplace, as alleged by the Claimant, during the 26 months prior to her conversation with Mr Jeremy Dent, the manager to whom we have already referred, on 26 April 2006 cause or contribute to her current condition or mental state.

(2) Leaving aside the issue as to what the Claimant's condition was, had she made the deliberate decision not to address that condition by not pursuing therapeutic intervention and psychotropic medication until the Tribunal proceedings had been concluded?

(3) To what extent had other recent life events, including a cycling accident, other court cases and a reduction in family income played a part in her condition?

(4) To what extent, if at all, has the Claimant failed to mitigate losses by not seeking full-time or part-time work?

(5) As to the issue of prognosis, when should the Claimant have recovered generally and to the extent that she could re-enter the job market?

10. Although the appeal and cross-appeal touch on some aspects of those five issues, by no means all of them are live on this appeal. In particular, Mr Gilroy has been at pains to emphasise that he is no longer pursuing any account being taken of any possible contribution made by what might be described as "other life events" (paragraph (3) above).

The Outcome

11. The Employment Tribunal addressed each of the issues in the reserved Judgment and reached conclusions about them. Firstly, the Employment Tribunal concluded that the Claimant's illness originated in the workplace and was therefore the responsibility of the Employer (see paragraphs 23-27 of the Judgment). The Employment Tribunal's fundamental reasoning is set out at paragraph 27, where it said:

> **"...the claimant's condition was 'normal' prior to the end of July 2004. We have not received any evidence of any events outside the claimant's working life that in our judgment might have led to any change in her psychiatric health from July 2004 until the comment made by Mr Dent on 24 April 2006 and so we find that it was only matters arising in the workplace that caused any deterioration in the claimant's mental health. On the basis that these matters occurred in the workplace, they are the vicarious responsibility of the respondent and so in this particular case we do not find that there were any causes which were not the legal responsibility of the employer that led to any change in the claimant's mental state from July 2004 to April 2006."**

This is an important paragraph. As a result of hearing the submissions in this case, we understand it to be common ground that it does not correctly state the right approach.

12. The conclusion in relation to issue 3 appears at paragraph 77 in these terms:

> **"In our judgment, set out above when answering question 1, we have concluded that the claimant's life events outside the workplace did not cause or contribute to her current condition and so we reject the respondent's contention that the claimant's unfitness for work has been caused by an underlying medical recurrent condition and/or the claimant's past history of depression."**

As we have already said, that is not one of the matters that we need consider on this appeal.

13. As to the second issue, the Employment Tribunal devoted a considerable part of its Judgment, namely paragraphs 28-55 and 78-93, to a consideration of the various factors that bore on the reasonableness or unreasonableness of the Claimant's attitude to treatment and medication. At paragraphs 31 and 32 of the Judgment, the Employment Tribunal considered the fact that the Claimant had started and then not continued with cognitive behavioural therapy (CBT) in July 2010. It concluded there that she was reasonable to do so because CBT was unlikely to be effective whilst the proceedings were continuing. It took a different view in relation to medication. In relation to medication, although the Claimant had taken an anti-depressant for a three-week period in late December 2006 and early 2007, she had not persisted.

Indeed she had always been opposed to such medication and preferred herbal remedies. For some time she had taken St John's Wort, but the view of one of the medical experts was that she was not taking enough St John's Wort or taking it regularly enough or consistently enough for its recognised anti-depressant properties to be effective. She consistently expressed herself to be fearful that conventional medicine would worsen her condition and carry with it the risk of addiction.

14. At paragraph 35 of the Judgment, the following appears:

> **"Mrs Konczak did not, in her witness statement, bring to our attention paragraph 14.4 of the report of Dr Craig which says, 'Consistent with her views expressed in 1998, Mrs Konczak has been opposed to taking anti-depressants medication. She did take 10mg of citalopram (half the normal dose of the anti-depressant) for around three weeks, starting on 28 December 2006. She has not taken prescribed medication since then. She does take herbal remedies, including St John's Wort from time to time. St John's Wort does have some anti-depressant properties but she is not taking these regularly enough for them to have any likely benefit.' At 16.4 Dr Craig refers to items from the notes and in a Health and Social Needs Assessment completed by Keith Catlow, it was noted that the claimant had 'consistently refused medication to help with her mood. She has been reluctant to start medication as she feels this would only add to her problems'. In this same report, her concerns about medication, that she felt it would make her feel worse and her fears about addiction, are recorded."**

15. During the course of the hearing, Mr Gilroy, at the invitation of this Tribunal, ascertained that the Health and Social Needs Assessment report had been completed on 25 May 2007, but Mr Jones' instructions were that that could not be accepted as the proper date, it being its client's recollection that Mr Catlow, who is referred to in the document, had not come into the case until 2009.

16. Paragraph 35, which appeared to contain a clear finding that no anti-depressant medication had been taken since the beginning of 2007, does not appear entirely consistent with some findings made by the Employment Tribunal about the medical records. The Employment Tribunal thought that the medical records suggested that she had taken anti-

depressants later in 2007 and again in 2009. They set out their conclusions at paragraphs 53-55 in these terms:

> **"It is apparent from the evidence that the claimant may from time to time have taken the drugs prescribed for her but nowhere have we seen anything to the effect that the claimant has taken and completed a course of treatment such that a doctor has given a view [at] the end of that course of treatment that the claimant has or has not been improved as a result of taking the medication. Further, there is no evidence as to the nature of any side-effects suffered by the claimant other than 'brain fogs' or how such side-effects might have been countered by a change in the dosage or a change in the medication.**
>
> **54. The Tribunal takes the view that the claimant has made the deliberate decision not to address her condition by pursuing psychotropic medication until the Tribunal proceedings have been concluded.**
>
> **55. The Tribunal accepts that the claimant was reasonable in trying therapeutic intervention (CBT) but finding that it would work pending the resolution of the Employment Tribunal proceedings."**

That last paragraph, paragraph 55, is a reference to what happened in July 2010. The Employment Tribunal concluded that there had been no reasonable trial of the medication and that the Claimant had failed to mitigate her losses from 24 July 2010. At paragraph 89 the Employment Tribunal said this:

> **"Applying the principles to this case, we find that the claimant has failed in her duty to mitigate her loss on the basis that she has in the past unreasonably refused a number of offers of medical treatment in the form of drugs and our finding of the claimant's past unreasonableness is in our view supported by the fact that the claimant now claims to be taking the drugs that she has previously so steadfastly refused, other than on occasion, and in the absence of any proof of them having any harmful side-effects when by the claimant. We find that a reasonable person unaffected the prospect of compensation would have taken the steps prescribed by their doctors, including the taking of medication, with a view to making as speedy and as effective a recovery as possible."**

17. Then at paragraphs 91-93 the Employment Tribunal reached its specific conclusion in these terms:

> **"Having made these findings it falls to the Tribunal to consider a date when, in its view, the claimant's behaviour in failing to take the proffered medication became unreasonable and thus when she failed to mitigate her losses.**
>
> **92. The Tribunal has looked again at the report produced by Mr Gossall in August 2007, produced very shortly after the date of the claimant's dismissal. It was at that stage that Mr Gossall noted the claimant's distrust of psychotropic medication and he did not think that**

at that time anti-depressants were a vital part of her treatment package, although they did remain an option in the future if she were to display more obvious signs of depression or intractable anxiety symptoms.

93. We have formed the view that the claimant's condition has deteriorated since 2007 and that the deterioration was such that the claimant should have taken up offers of anti-depressants when her condition continued to deteriorate. It is difficult to find anything upon which to 'hang' a conclusion as to the date upon which the claimant should have started medication but, doing the best we can, our view is that the claimant should have started to take appropriate medication no later than July 2010 after the decision not to continue with the CBT as it did not appear to be of benefit at that time. Given that the date of termination was 23 July 2007, it is convention to use 24 July 2010 as the date when the claimant should have commenced the course of medication."

18. The Employment Tribunal then concluded that the Claimant would have recovered within two years of starting medication and within a further year would have been in position to earn 50% of the earnings she had enjoyed with the Respondent. Therefore she should be awarded compensation for loss of earnings less benefits on a total loss of earnings basis up to 24 July 2013 and thereafter on the basis of a 50% loss of her earning capacity but subject to the addition of a further 12.5%, that is to say 25% of 50%, representing the chance that she would not find employment. So future loss of earnings from 24 July 2013 to the date of her retirement on 6 July 2019 should be calculated at the rate of 62.5% of her net total net loss of earnings.

19. The fourth issue, which related to the straightforward question of the Claimant's failure to mitigate by looking for either full or part-time work was concluded by the Employment Tribunal deciding that she had not taken any steps to find another job after she attended an interview on 2 July 2007 (see paragraph 62 of the Judgment). But that left unresolved the question as to whether she was reasonable or unreasonable not to do so. The answer to that was tied up with the Employment Tribunal's conclusion on the fifth issue, which was when had the Claimant recovered and when could she re-enter the job market? On these issues the Employment Tribunal issue preferred the expert evidence of Dr Craig to that of Dr Jarman, saying at paragraph 68 of the Judgment:

> **"In the light of the expert evidence, the Tribunal, having seen and heard from Mrs Konczak as well, prefers the view of Dr Craig that the claimant is likely to recover generally within the region of two years after the complete resolution of her Employment Tribunal claim and other outstanding cases. Obviously the Tribunal cannot know with any certainty when these cases will be concluded given the history of this case involving various appeals and our lack of knowledge of the claimant's other litigation.**

20. Then at paragraph 69 the Employment Tribunal reaches the conclusion set out as follows:

> **"With regard to when the claimant will recover to the extent that she will re-enter the job market, we take the view that she is unlikely to be ready to enter the job market until one year has elapsed from her general recovery to allow her in that period to continue to regain her self-confidence and/or take any necessary courses to update her skills and/or undertake a course of CBT."**

21. It seems to us that the answer to the fourth issue must be implicit in this latter conclusion, namely that the Claimant has never been well enough to look for other work.

The appeal

Ground 1

22. Mr Gilroy QC's starting point is really paragraph 1 of the Judgment of the Cook Tribunal where it says, ".all other allegations of direct sex discrimination in case number 2405642/06 fail and are dismissed" (see page 116 of the bundle). This statement covers 67 paragraphs of the witness statement of the Claimant presented to the Cook Tribunal and the 15 allegations of discrimination and harassment and bullying which Mr Gilroy helpfully set out at paragraph 13 of his skeleton argument and developed in the course of his oral submissions. His point was that none of these serious allegations have been sustained. All that has been found in relation to the period ending on 26 April 2006 is that the Employer had discriminated against the Claimant through its line manager, Mr Jeremy Dent, making a remark:

> **"Women take things more emotionally than men whilst men tend to forget things and move on."**

23. Mr Gilroy submitted that this was of a lesser order than the other 15 allegations that related to the 21-month period between 2004 and 2006. Indeed he had submitted to the Cook Tribunal that the remark was *de minimis* and he had repeated that submission in the appeal against the Cook Tribunal's liability decision. But the Cook Tribunal found that the remark was not *de minimis* and that it constituted sex discrimination, something with which this Tribunal had not interfered on appeal. So be it, said Mr Gilroy. But what must have happened in this case is that the Claimant's situation and her health have been affected by 15 allegations of discrimination, some of which have been dismissed by the Cook Tribunal, some of which have never formed part of any complaint and some of which have simply been ruled out of time.

24. The Sherratt Tribunal had fallen into a serious error at paragraph 27 of the Judgment, quoted above, by its analysis that the Claimant's condition had deteriorated from 2004 onwards as a result of what had happened at work and that these matters were the vicarious responsibility of the employer. What had gone wrong, submitted Mr Gilroy, was the acceptance of the causal connection by the Employment Tribunal, as exemplified by part of the last sentence at paragraph 27 that reads:

> **"....so in this particular case we do not find that there were any causes which were not the legal responsibility of the employer."**

25. The Employment Tribunal had accepted the position that a Judgment of this Tribunal, presided over by Keith J in the case of **Thaine v London School of Economics** [2010] ICR 1422 had reached the conclusion that an Employment Tribunal had acted properly and lawfully in apportioning compensation where an employee suffered from a psychiatric illness, namely

depression, but that depression might be said to have originated from a number of causes, only one of which was tortious conduct on the part of the employer. Therefore, submitted Mr Gilroy, the Employment Tribunal should have considered whether or not to apportion any part of the compensation on account of factors that the Tribunal ought to have found impacted upon the Claimant's state of health and must in part have been responsible for her illness in 2006.

26. What had happened instead in this case, however, was that the Employment Tribunal had reached the analysis at paragraph 27. This was neither consistent with Mr Gilroy's position nor with that adopted by Mr Jones. Before the Sherratt Tribunal Mr Jones had reserved his position that the **Thaine** case was wrongly decided. He had accepted that the Employment Tribunal was bound by it, but hoped to challenge it in this Tribunal or in any superior court. In his submissions, Mr Jones accepted that there was no discussion of apportionment in the Employment Tribunal's decision. He submitted that the reason for that was that the Employment Tribunal had accepted that this was a "final straw" case. In the Cook Tribunal, the Claimant had described Mr Dent's remark as the final straw. Mr Jones submitted that was a finding of fact binding on the Sherratt Tribunal and that they must have adopted the analysis that, even though some of the allegations, indeed perhaps all of the 15 allegations, did not raise any liability on the part of the employer, the last matter had tipped the Claimant over into a depressive illness and that was sufficient.

27. In any event, the causation of loss could be said to have been largely the refusal to allow the Claimant to work in the summer of 2007 and the subsequent dismissal, which had been held to be victimisation, sex discrimination, disability discrimination and unfair dismissal. Mr Jones accepted that there was only paragraph 27, however, as a clear analysis of how the

Employment Tribunal reached the conclusion that the previous allegations made no difference and had no impact on the question of compensation.

28. Before turning to the submissions of Mr Jones in relation to **Thaine** Mr Jones submitted that the issue of divisibility was irrelevant because this was a thin skull case. We do not agree. This seems to us no more than an argument that the Claimant was a vulnerable personality. Perhaps so, but that does not, in our judgment, eliminate the need for a consideration as to whether, irrespective of a predisposition to suffering psychiatric injury, the injury is divisible. In our judgment, it does not automatically follow, because somebody is liable to suffer depression or another psychiatric injury, that the extent to which that might have been caused by non-tortious causes should necessarily be eliminated if it is possible to distinguish between the tortious cause and the non-tortious cause. In other words if it is possible to divide the cause of injury the issue of pre-disposition is not relevant.

29. Mr Jones raised a similar point in relation to disability discrimination. Given that there has been a finding of disability discrimination because compensation in relation to that cannot be apportioned, it follows that there can be no meaningful apportionment of any other compensation or, if there is, then it will have no practical effect because what is lost under other heads of compensation will have to be restored in connection with compensation for disability discrimination because you cannot divide disability; it is a unitary concept.

30. It does not seem to us that, powerful though Mr Jones' submission on disability discrimination is, it eliminates the need to consider whether other causes of action are capable of apportionment on the basis that there is a divisible injury. We do not accept Mr Jones' submission that in every circumstance where there is a component of disability and a finding of

disability, that means that the compensation that must flow from that finding and cannot be apportioned. Mr Jones' argument is that the disability is the injury. We accept that that is so, but that does not mean to say that the loss necessarily cannot be apportioned between that part of the actions of the employer that amounts to disability discrimination and that part which is not tortious conduct of any kind.

31. In our judgment, it is a matter that the Employment Tribunal must consider on remission. This is something which they have not addressed. If they come to the conclusion that all of the compensation flows from the disability discrimination, then that seems to us to be one thing. But it is still open to them to take the view that if they think there are other causes, and those causes are not disability discrimination, that the damages should be apportioned and that the disability discrimination damages are not inevitably going to be a complete answer to the whole of the damages in the case. The fact that the dismissal is automatically unfair as a result of the disability discrimination does not, in our judgment, mean that all the loss of earnings that follows is necessarily caused by the disability discrimination.

32. In those circumstances, we regard that as a matter that the Employment Tribunal must decide on the remission and it cannot be a complete answer to this case that, because there is a finding of disability discrimination, all of the damages that have resulted in this case cannot be the subject of any reduction.

33. Mr Jones argument on **Thaine** involved an analysis of a number of cases and indeed included a reference to a lecture given by, as she then was, Smith LJ, dealing with how one should approach the question of apportionment in cases where it could be said that the Claimant's condition was not capable of division. This essential distinction had been

recognised, he submitted, in **Hackney LBC v Sivanandan & Ors** [2011] ICR 1374 at page 16, and the relevant passage had been approved when the case went to the Court of Appeal, reported at [2013] ICR 672, at paragraph 59. Essentially the issue is whether psychiatric illness is or is not capable of division.

34. It is recognised by the authorities, and accepted by Mr Jones, that whether or not any particular state of health or injury is divisible or indivisible is a question of fact. It seems to us that he may well be right when he says that **Thaine v London School of Economics** takes an unacceptable short-cut, by apparently allowing an Employment Tribunal to consider whether or not something should be apportioned effectively on the basis of the factual material and on whether or not it appears to the Tribunal involved that it is appropriate to apportion or not. The error is that the analysis ignores the prior question as to whether or not the injury or state of health is capable of being divided. This is a problem well-known in personal injury litigation and there has been much debate about it in noise deafness cases, vibratory white finger cases, and asbestos-related disease cases. In the end it probably comes down to the views expressed by Dame Janet Smith in the lecture that she gave in Leeds on 17 November 2008, which was part of the series of annual Munkman lectures, with the title "Causation – the search for principle". She said, under the heading "Apportionment when not appropriate" in that lecture:

> **"I do not think that one can apportion damages to psychiatric injury. It seems that is *par excellence* an indivisible injury. As a rule the claimant will have cracked up quite suddenly; tipped over from being under stress into being ill. The claimant will almost always have a vulnerable personality. But the defendant must take the claimant as he finds him, eggshell skull or vulnerable personality included. So having a vulnerable personality should not result in any reduction in damages."**

35. That, in the public forum of a lecture, might be a precursor to the view that she expressed *obiter dictum*, in the case of **Dickens v O2 plc** [2008] EWCA Civ 1144. Dame Janet Smith

regards this as the antithesis of another *obiter dictum* statement, made by Hale LJ, as she then was, in **Hatton v Sutherland** [2002] ICR 613. At paragraph 36 of the Judgment, Hale LJ says:

> ***"Many stress-related illnesses are likely to have a complex aetiology with several different causes. In principle a wrongdoer should pay only for that proportion of the harm suffered for which he by his wrongdoing is responsible*: see e.g. *Thompson v Smiths Ship Repairers (North Shields) Ltd* [1984] QB 405** [a noise deafness case]**; *Holtby v Brigham & Cowan (Hull) Ltd* [2000] PIQR Q293** [a personal injury case]**; *Rahman v Arearose Ltd* [2001] QB 351 *[another personal injury case]*. *Thompson* and *Holtby* concerned respectively deafness and asbestosis developed over a long period of exposure; not only were different employers involved but in *Thompson* some of the exposure by the same employer was tortious and some was not. Apportionment was possible because the deterioration over particular periods of time could be measured, albeit in a somewhat rough and ready fashion.**

36. She then goes on at paragraph 37 to say this:

> ***"It is different if the harm is truly indivisible*: a tortfeasor who has made a material contribution is liable for the whole, although he may be able to seek contribution from other joint or concurrent tortfeasors who have also contributed to the injury."**

37. She then says, at paragraph 41:

> **"Hence if it is established that the constellation of symptoms suffered by the claimant stems from a number of different extrinsic causes then in our view a sensible attempt should be made to apportion liability accordingly. There is no reason to distinguish these conditions from the chronological development of industrial diseases or disabilities. The analogy with the polluted stream is closer than the analogy with the single fire. Nor is there anything in *Bonnington Castings v Wardlaw* [1956] AC 613 or *McGhee v National Coal Board* [1973] 1 WLR 1 requiring a different approach."**

38. This is the passage that Dame Janet Smith locks horns with. Whether that is to be read as a rejection by Hale LJ of the proposition that indivisible injuries or states of health cannot be apportioned seems to us to be open to question. It seems possible that at paragraph 41 Hale LJ was simply developing what she had articulated at paragraph 36. Be that as it may, Mr Jones urged that this distinction had simply been ignored by the division of this Tribunal presided over by Keith J in the **Thaine** case. The case has been followed in **Osei-Adjei v RM Education** UKEAT/0461/12/JOJ, but that is perhaps distinguishable on its facts.

39. We do not think that it is necessary for the purposes of this appeal to say any more about the **Thaine** case than that in the ordinary case, and the instant appeal is such a case, it seems to us that any Employment Tribunal must first reach a conclusion in relation to an injury or a state of health that is said to be causing loss and itself to result from the tortious act of the employer, as to whether that injury or state of health is divisible or indivisible. In this case, it seems to us apparent that the Employment Tribunal did not do that. It opted instead for a causation analysis at paragraph 27 of the Judgment, which we think is unsustainable. The fact that something has happened in the workplace can be no more relevant than the fact that something has happened elsewhere. The only relevance of other acts is if they are the legal responsibility of the employer. The Cook Tribunal had found that these 15 acts were not the legal responsibility of the employer and in those circumstances, where they occurred did not, in our judgment, matter. The Sherratt Tribunal confused the concept of vicarious liability with the concept of causation in respect of damage or compensation. Nor did that Tribunal pay any attention at all to the question as to how those factors related to the dismissal and the tortious conduct that the Cook Tribunal found had resulted from the dismissal.

40. There is a controversy as to whether there was any significant medical evidence before the Sherratt Tribunal that enabled it to reach a conclusion as to whether or not the injury was in any sense indivisible. Dr Craig did not appear. He had appeared as a witness at the Cook Tribunal, but he was not present at the Sherratt Tribunal, although his reports were before that Tribunal. In his reports, apparently, he had ascribed a 10% contribution to the 15 factors. It seems implicit from that statement he was accepting that a psychiatric injury could be divisible. Dr Jarman, on the other hand, thought that precise attribution was impossible. Whether that amounts to him saying that a psychiatric injury is not divisible, we do not know.

Apparently at one of the Cook hearings, Dr Craig was cross-examined. Mr Gilroy QC contends that he accepted that the contribution could be of the order between 20% and 50%. Mr Jones firmly conveyed to us that statement is hotly disputed and contentious. The controversy is probably a facet of this case having the history that we have already outlined.

41. All these are difficulties, but it does seem to us that the Employment Tribunal has misdirected itself and that in a case such as this a Tribunal should consider whether evidence is available that any particular injury and above all a psychiatric injury is or is not divisible. The Sherratt Tribunal did not do that and, accordingly, on that ground, the appeal will succeed.

Ground 2

42. The second ground depends to an extent on an alleged inconsistency between paragraph 89 and paragraphs 91-93. What is really said is that there is no proper explanation in the Judgment as to why the Employment Tribunal came to the conclusion that it was on 24 July 2010 that the Claimant's position shifted from having been a reasonable one to an unreasonable one. Mr Jones pointed to paragraph 92. He submitted that the key to this was deterioration in the Claimant's condition. Mr Gossall is recorded at paragraph 92 as having taken a particular point of view in 2007, not long after the dismissal. His evidence, said Mr Jones, shows that then it was not unreasonable for the Claimant to refuse medication. It was not then a pressing problem; she was not then so unwell.

43. This is an attractive argument, but it does not seem to us to answer the conundrum as to why it is that on 24 July 2010 the position became one of a failure to mitigate, whereas before it had been a reasonable stance to take (i.e. that the Claimant did not want to take psychotropic medication). In the end, we have come to the conclusion that, whilst it is clear that the Tribunal

adopted an analysis that the Claimant's state of health was deteriorating, that analysis does not seem to us to explain anything about why it was that before July 2010 her position was a reasonable one and after that it was unreasonable. Mr Jones submitted that the failure of CBT was a pivotal matter. We have some difficulty in understanding why the failure of one form of treatment would make it unreasonable for her to take another form of treatment. There is nothing in the evidence that shows that before July 2010 she was suggesting that she should have CBT, and there is a paucity of factual analysis, although we suspect that the material was there for the Tribunal to reach conclusions. In short, we do not think that the employer can tell why it is has lost on the issue of the failure to mitigate up until 2010 but succeeded thereafter. Although we can understand why the Employment Tribunal thought that a three-year period was a useful period for the purposes of calculation, matters of mitigation should not be decided simply because it is mathematically convenient to adopt a particular date. There needs to be a much more cogent analysis as to why the failure to mitigate took place at that stage.

Ground 3

44. Turning to the third ground, this is a submission by Mr Gilroy that the Employment Tribunal have simply adopted the wrong approach to pension loss. It is quite clear from paragraphs 105-113 of the Judgment that the Employment Tribunal realised that it must choose either the substantial or the simplified approach, as recommended by the Guidance. It is submitted by Mr Gilroy that the Employment Tribunal have not properly explained why they have adopted the substantial approach, which they clearly do in paragraph 113 and 114 of the Judgment. Mr Jones submitted that it was all perfectly clear from that part of the Judgment why that conclusion had been arrived at. We agree with his submission. It seems to us that the stable nature of the Claimant's employment was found as a fact at paragraph 112 of the Judgment. The substantial approach can be adopted where there is stable employment. The

Employment Tribunal, having found that there was stable employment, therefore was fully entitled to adopt it.

The cross-appeal

Dr Jarman

45. We turn then to the cross-appeal. This comprises two matters. We will deal with the second matter, Dr Jarman, first. It is clear from the history of this case that the Claimant has no respect for, and a great deal of suspicion of, Dr Jarman. If an illustration of that were needed, it can be found in the fact that, at the first examination, she tape-recorded what transpired. Although that does not nowadays raise the same disquiet that it would have raised some years ago, when such clandestine recordings were regarded very much askance, nevertheless it is an indication of the strong feelings that have been generated. What happened in this case, over a series of hearings, is that a number of ways of suggesting that Dr Jarman was not independent and acted improperly and unprofessionally have been adopted by the Claimant. In this case when Mr Jones started to cross-examine Dr Jarman, Mr Gilroy QC objected. The result is to be seen at paragraph 22 of the Tribunal's Judgment. The Tribunal would not allow the matter to be pursued.

46. Mr Jones complains that a challenge to the independence of an expert or as to the professional competence or propriety of an expert is a routine matter. We think that somewhat overstates the case. Experience of litigation shows that in most cases where expert witnesses are called there is no such challenge either to independence or propriety. Nevertheless such matters are not unknown. A considerable number of years ago now, this was all identified by Cresswell J in the shipping case **The Ikarian Reefer** [1993] 2 Lloyd's Rep 68. For a number of years the legal principle as enunciated by him in relation to expert witnesses appeared in

every textbook and monograph on the subject. It is probably the case that it has since been overtaken by passages of the Civil Procedure Rules. It is, however, clear that it is open to challenge an expert, whether on the principles enunciated by Cresswell J in **The Ikarian Reefer** or under more modern reiterations of the same thing, about their independence and indeed about their competence or propriety.

47. Although, as was noted by Mr Haywood during the course of argument before us, something like this issue had been dealt with by the Cook Tribunal, we are quite satisfied by Mr Jones's submission that those were different aspects, albeit perhaps of the same broad principles, and that the fact that the Cook Tribunal refused to allow certain matters to be pursued could not bind the Sherratt Tribunal when a somewhat different matter was raised by Mr Gilroy QC.

48. We accept Mr Jones's submission that the Employment Tribunal did err by not allowing this matter to be ventilated. We can entirely understand why they took the position that they did. They were faced with what proved to be a long hearing. It was the latest iteration of a series of hearings, and we can imagine that the Employment Tribunal felt that this was going to be cul-de-sac that was not going to be particularly helpful to them. Whilst that is all perfectly understandable, it rather begs the question or jumps the gun and we take the view that, notwithstanding the fact that it would undoubtedly have added to the length of the hearing, it was a matter that should have been allowed to be pursued. It was not, however, on our reading of the Employment Tribunal Judgment anything that resulted in any disadvantage whatsoever to the Claimant. We can see no aspect of the Judgment that results in any finding based upon Dr Jarman's evidence that could possibly have been altered by the pursuit of these allegations. Indeed, whilst we do not discount the possibility that somewhere lurking in some part of the

Judgment is something that owes its origin to a part of Dr Jarman's report or some part of his evidence, we are bound to say that we have not found it. In those circumstances, although there was clearly an error of law, we see no point in any aspect of that matter being remitted to the Tribunal.

Calculation Errors

49. Finally, a number of errors have been pointed out by Mr Jones in terms of the calculation. It is very unfortunate that a letter written on behalf of the Claimant dealing with these errors and pointing them out to the Employment Tribunal, has not been dealt with. We cannot understand why that should be so. These are essentially, with the exception of interest, which rests on legal principle, mathematical matters. We deal with them in turn.

50. Firstly, it is asserted that there has been too large a deduction on account of incapacity benefit in the period 24 July 2007 to 31 March 2007. This is because the Employment Tribunal has included an amount relating to the period from 6 April 2007 to 23 July 2007 as a deduction against the figures for the later period. This is because the whole of one year's incapacity benefit in the sum of £4,189.63 has been taken into account. Mr Jones points to the Claimant's schedule and to the letter sent to the Tribunal and asserts that the correct figure was £2981.08. This means that the losses should have been £92,386.26 and not £91,177.71 under this head. This all seems mathematically correct to us. However, because we are going to remit the matter to the Employment Tribunal, we content ourselves with saying that a mathematical error appears to have occurred. The figures seem to us to be correct, but it is the responsibility of the Employment Tribunal to recalculate the figure, checking that the contentions put forward are correct. That will be included in the terms of our remission.

51. Secondly, in relation to future loss, from 25 July 2013 to 6 July 2019 the Employment Tribunal has made the elementary mathematical, if not almost typographical error, of subtracting 49 weeks instead of adding it. It is quite clear from the face of the Judgment that the Employment Tribunal intended to add it. It is equally clear from the total that results from the calculation that instead it has been subtracted. The figure amounts, as we understand it, when the sum is added rather than subtracted, to £85,430.56 and not £58,336.62. We take the same approach. It seems to us obvious an error has occurred. The Tribunal must put it right. It must check the figures. We will remit that matter.

52. Thirdly, there has been an error, submits Mr Jones, in relation to the calculation of interest. Interest is awarded by the Employment Tribunal as a result of a statutory instrument, **The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996**. The power to award interest is clearly to be seen in Regulation 2. The rate at which interest should be awarded is set out in Regulation 3. The Tribunal has dealt with this at paragraph 100. It has done so by awarding interest in relation to what in a personal injury action would be called "special damage", which is in the Tribunal "loss of earnings to the date of the hearing". Mr Jones submits that using the figure of 0.5% is entirely wrong. It does not comply with Regulation 3 of the 1996 Regulations. Under sub-paragraph 2 the rate of interest is to be the rate of interest for the time being prescribed for the special investment account under rule 27(1) of the Court Funds Rules, although that is subject to paragraph 3(3) namely that where the rate of interest varies during the period for which interest is to be calculated, if it so desires, the Employment Tribunal may "in the interests of simplicity apply such median or average of those rates as seems to it appropriate". Mr Gilroy submits that this opens to the door to the Employment Tribunal being able to select what rate it thinks is just in the circumstances.

53. The basic and special account interest rate charges since 1 October 1965 provide in tabular form a list of the relevant rates. In this case, they are 6% up until February 2009, 3% between February and June 2009, 1.5% from June to July 2009 and 0.5% from 1 July 2009 to date. This, submits Mr Jones, whether one looks at the prism of subparagraph 2 of Regulation 3 or the prism of subparagraph (3) of Regulation 3, is very likely to produce the same or more or less the same figure mathematically, but it will certainly not be 0.5%. He submits that subparagraph (2) means that one should, over the period, apply the rate of interest that relates to the particular period of loss. Alternatively, and this the Tribunal did not do, it can apply a median or average. The figures may be much the same.

Conclusions

54. We do not accept Mr Gilroy's submission that, as a matter of interpretation, the Employment Tribunal is able to pick whatever figure it likes out of the table. In our judgment, the Employment Tribunal erred by picking 0.5%. The matter of interest must be remitted to the Employment Tribunal for it to decide, in accordance with the terms of Regulation 3 of the 1996 Regulations, what is the appropriate rate of interest. It has the ability to decide whether it will adopt the rate provided by subparagraph (2) or whether it will adopt the rate provided by subparagraph (3). Accordingly, these aspects of the appeal will be allowed, and the matter will be remitted to the Employment Tribunal.

55. The issue arises as to what is to be the constitution of the Employment Tribunal. Mr Gilroy submits that unhappily this case should go back to a differently constituted Employment Tribunal to deal with the issues upon which he has succeeded, namely the first and second grounds of appeal, hearing the matter anew. Mr Jones submits that the matter can be dealt with by a much more limited approach. We bear in mind the guidance that this Tribunal

has been given by the division of this Tribunal presided over by the former President, Burton J in **Sinclair Roche and Temperley v Heard** [2004] IRLR 763. This is a case where there has been much delay, where there have been many hearings. On the other hand, to remit it to the same Tribunal might be thought to be allowing a second bite at the cherry, as it is colourfully put.

56. On balance, we have come to the conclusion that this is a professional Tribunal, quite able to look at this matter for a second time. We do not think, in the circumstances, it is justified to have a third Tribunal looking at this matter. The terms of the remission are in fact limited. The Employment Tribunal must consider, on the evidence that it has already heard, and on submissions from counsel, whether the psychiatric injury is divisible and, if it is divisible, whether it will make an apportionment. It must also reconsider its Judgment as to the date of mitigation and explain, on the evidence and having heard submissions from counsel, why it has arrived at that conclusion and whether it wishes to stand by that conclusion, having reconsidered the evidence. It must also reconsider the calculations along the lines that we have indicated.