# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr N Pasha**

**Respondent:** **Elaine Investment Management Ltd (1)**
**Elaine Zhang (2)**

**Heard at: London Central** **On: 6 September 2017**

**Before:**
**Employment Judge:** **Ms H Clark**
**Members:** **Ms K Dent**
**Ms E Champion**

**Representation**

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| **For the Claimant:** | **Mr C Davey** | **Counsel** |
| **For the Respondents:** | **Mr P Epstein QC** | **Leading Counsel** |

# JUDGMENT ON REMEDY

**The unanimous Judgment of the Tribunal is that:**

1. The Claimant is entitled to an injury to feelings award of £2,000 as against the Second Respondent.

2. The Claimant is entitled to an injury to feelings award of £8,400 as against the First Respondent.

3. The Claimant is entitled to £53,151,48 in compensation for loss of earnings.

4. The Claimant is entitled to the following sums by way of interest:

   4.1 On the injury to feelings award as against the First Respondent of £672.
   4.2 On the injury to feelings award as against the Second Respondent of £160
   4.3 On the Claimant's financial losses as against the First Respondent of £2,742.70.

5. All the above awards, including those for injury to feelings, should be grossed up by a percentage of 40% in so far as they exceed £30,000 to reflect their anticipated taxation in the Claimant's hands.

6. An award of aggravated damages is not appropriate and the Tribunal declines to uplift the Claimant's award pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

7. There is no order as to costs.

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Employment Judge Clark

Date: 27 September 2017

# REASONS

The Issues

1. The issues for determination by the Tribunal were as to remedy arising out of its finding that the First Respondent directly discriminated against the Claimant because of his race in dismissing him and that the Second Respondent racially harassed him. The parties reached a degree of agreement as to the loss of earnings and interest figures and the First Respondent accepted that the Claimant had taken adequate steps to mitigate his losses. There remained five issues for determination by the Tribunal as follows:

    1.1 As to the correct level of injury to feelings for racial harassment as against the Second Respondent.
    1.2 As to the correct level of injury to feelings for the act of dismissal against the First Respondent.
    1.3 As to the effects of taxation on the injury to feelings award and appropriate percentage to be applied.
    1.4 As to whether an award of aggravated damages should be made.
    1.5 As to whether an adjustment should be made to the award pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).

2. In its judgment dated 30th June 2017, the Tribunal found three allegations to be proven:

    2.1 In the first few days of the Claimant's employment that the CEO of the Second Respondent, Ms Zhang, said they could work together as "*Indian, Chinese and Pakistanis people – we are all a bit crooked.*"

2.2 On 7th September 2017 in the course of the last telephone conversation between the Claimant and Ms Zhang, the latter said: "*You Pakistanis are completely useless. You are wasting my money and wasting my time".*

2.3 The Claimant's dismissal on 7th September 2017 was an act of race discrimination.

3. For the purposes of this hearing, the Tribunal heard evidence from the Claimant and considered the contents of a bundle of documents related to remedy. The Tribunal was provided with an updated schedule of loss from the Claimant and a counter-schedule from the Respondents. The Tribunal is grateful for the oral submissions of both representatives.

The Law

4. The Tribunal's power to award a remedy to the Claimant is set out in section 124(2) of the Equality Act 2010, which provides:

> "*The tribunal may—*
>
> *(a)make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;*
>
> *(b)order the respondent to pay compensation to the complainant;*
>
> *(c)make an appropriate recommendation*."

5. Section 124(6) of the 2010 Act sets out that, "*The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119*". That is to say that compensation will be awarded under tortious principles, namely to put the Claimant in the position he would have been in but for the Respondents' unlawful conduct.

6. The Tribunal has the power to award damages for injury to feelings under section 119(4) of the 2010 Act; "*An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis)".* Guidance was given to Tribunals as to how to approach such awards in *Vento v Chief Constable of West Yorkshire Police No 2 [2003] ICR 318* as up-dated by *Da' Bell v National Society for Prevention of Cruelty to Children [2010] IRLR 19*: the lower band being £600 - £6,000, the middle band £6,000 - £18,000 and the top band £18,000 to £30,000. All awards are subject to a 10% increase pursuant to *Simmonds v Castle [2012] EWCA 1039 (De Souza v Vinci Construction (UK) Ltd [2017] EWCA 879).* The Vento band figures have recently been increased by Presidential Guidance, to a lower

band of £800 to £8,400; a middle band of £8,400 to £25,200; and an upper band of £25,200 to £42,000, with the most exceptional cases capable of exceeding £42,000. The Presidential Guidance figures relate to claims filed after 11th September 2017 and a formula is offered for cases which pre-date this.

7. The lower Vento band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. The middle band is for serious cases that do not merit awards in the highest band and the most serious in the top band where there has been a lengthy campaign of discriminatory harassment. The Tribunal should bear in mind the level of awards made in personal injury claims, pursuant to the Judicial College Guidelines. The guidelines for minor psychiatric damage (in the 14th Edition) provide a range of £1,350 to £5,130 and for moderate psychiatric damage of £5,130 to £16,720.

8. Aggravated damages can be awarded as an aspect of an injury to feelings award where a Respondent's conduct has aggravating features which have caused additional distress to a Claimant. Guidance as to the circumstances in which aggravated should be awarded was given by the Court of Appeal in *Alexander v Home Office [1988] IRC 685,* namely, where an employer has behaved in a "*high-handed, malicious, insulting or oppressive manner in committing the act of discrimination."* In *Commissioner of the Metropolis v Shaw* EAT 0125/11 the (then) President of the EAT, Mr Justice Underhill clarified that there are three types of case in which an award of aggravated damages would be appropriate: firstly, where the manner in which an act of discrimination occurred was particularly oppressive or upsetting, secondly, where there was a clear discriminatory motive (rather than inadvertent or ignorant discrimination) and, finally, where an employer's conduct after the act of discrimination adds to the offence, for instance, where an employer does not take a complaint of discrimination seriously or conducts any subsequent Tribunal proceedings in a dismissive or offensive manner. Aggravated damages are not punitive in nature, but are designed to compensate a Claimant for any additional distress caused by behaviour of the Respondent which adds to the hurt of the core act of discrimination.

9. The Claimant seeks an uplift to his compensation pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, which provides as follows:

> *(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*
>
> *(a)the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*

*(b)the employer has failed to comply with that Code in relation to that matter, and*

*(c)that failure was unreasonable,*

*the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.*

*(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*

*(a)the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*

*(b)the employee has failed to comply with that Code in relation to that matter, and*

*(c)that failure was unreasonable,*

*the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.*

The exercise of discretion is subject to the Tribunal's having regard to the overall size of the award (*Abbey National Plc v Chagger [2010] ICR 1290).*

10. The Tribunal has the power to award interest on compensation pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI. For injury to feelings, the relevant date starts on the date of the act discrimination and ends on the calculation date, for loss of income, it is from the mid-point date ending on the day of calculation. The interest rate is 8%. The parties in this case have agreed that an award of interest is appropriate and as to the method of calculation.

Relevant Facts

11. These findings should be read in conjunction with those made in the Tribunal's judgment and reasons dated 30th June 2017. The Claimant was born on 11th April 1955 and is, therefore, now aged 62. He was entitled to a salary of £125,000 with the First Respondent plus the potential to earn a profit-related bonus. However, the Claimant accepted the role on the 20th June 2016 on the basis of the written documentation, which made it clear (at section 11) that the bonus was discretionary and not payable after termination of employment. The Claimant started work on the 15th August 2016 and he was summarily dismissed on 7th September 2016.

12. The Claimant's employment was subject to a probationary period of 6 months and it was an express term of his contract that his employment could be terminated with immediate effect within the first month of employment with written notice (paragraph 14). Although he was promised one week's pay in lieu of notice, this did not materialise.

13. The First Respondent had a written disciplinary policy and procedure, which was incorporated into the Claimant's contract (and was provided to him prior to the commencement of his employment). Paragraph 8.1(2) of that policy provided, "*If your commencement date was on or after 6th April 2012, the Company reserves the right to discipline or dismiss you without following the Disciplinary Procedure if you have less than 24 months' continuous service."*

14. In his written witness statement, the Claimant described feeling shocked and embarrassed about his dismissal and that it took him a number of months to recover his self-esteem and dignity. The Claimant told the Tribunal at the full merits hearing that he had worried about telling his family that he had lost his job following their relocation from Dubai. The Tribunal accepts the Claimant's evidence in this regard.

15. It is clear from the contents of the bundle of document and the Claimant's own description of the number of applications he made, that he has taken reasonable steps to mitigate his losses. His efforts bore fruit in that he started a new job as a Chief Financial Officer on 2nd May 2017, initially at a lower salary than his employment with the First Respondent for a 3-month probationary period. From the start of August 2017, however, the Claimant's salary rose to £130,000 per annum, which provides an agreed cut- off date for his loss of earnings.

## Conclusions

### Injury to Feelings for Harassment

16. An injury to feelings award is made as against the Second Respondent in relation to the two incidents of racial harassment, firstly, at the start of the Claimant's employment. The Claimant told the Tribunal during the liability hearing that he had never suffered discrimination of this sort before (in his relatively long working life) and was upset at this characterisation. He regarded it as an attack on his professional integrity, however, took a pragmatic view and did not complain at the time. In his parting exchange with the Second Respondent immediately before his dismissal, the latter characterised the Claimant as "*completely useless*". The Tribunal accepts the Claimant's evidence in his witness statement to the effect that he had felt hurt and belittled by these comments, albeit it was the loss of his job which caused him the most distress. The Second Respondent has suggested a sum of £1,000 for these two incidents of harassment. That is close to a nominal sum and, in the Tribunal's view, trivialises what were racially very offensive comments. The Claimant's most recent schedule of loss suggests he should be awarded £3,000. Having regard to the award of injury to feelings made in relation to the Claimant's dismissal and recognising that there were two separate incidents of harassment, the Tribunal consider that £2,000 is the appropriate sum, representing £1,000 for each incident.

**Injury to Feelings for Dismissal**

17. The Tribunal agrees with the Respondents, that the Claimant's dismissal and his reaction to it fell somewhere on the cusp of the lower and middle Vento bands. The Tribunal was struck by the fact that the Claimant felt embarrassed to tell his family about his dismissal. He has had a long and apparently distinguished employment record, so to lose his job in circumstances which were tainted by race discrimination was humiliating for him. The Tribunal accepts that this affected his self-esteem and dignity but also takes into account that there is no medical evidence to suggest consequences which sufficiently affected the Claimant's health to require medical attention. In the context of personal injury awards for minor psychological damage being up to £5,130, it would be wrong, in the Tribunal's judgment, for the Claimant to be awarded more than twice that amount (£12,000), as the Claimant contents.

18. Contrary to Mr Davey's submissions, the Tribunal does not regard the Claimant's seniority as an aggravating factor, although the fact that the perpetrator of the discrimination was the CEO, the most powerful person in the Respondent Company does exacerbate the injury. However, the Claimant was in a precarious position contractually, he was in his probationary period and could have been dismissed at no or very short notice, so this was certainly not a case where there was a loss of congenial employment. The Claimant had not had the time to form bonds with his colleagues, and as was observed in submissions, there were aspects of the contractual terms and the way the Respondents operated, which fell very short of congenial. Although the Claimant had relocated with his family from Dubai for this role, he had wanted to move back to the UK prior to accepting the job, so the fact of his relocation does justify an increase in his injury to feelings award.

19. The Claimant's dismissal was by far the most significant incident of discrimination and was closely linked to the second incident of harassment, such that it was more in the nature of a single act of discrimination than a sustained campaign. The Claimant's original claim for injury to feelings was £6,000, including at the full merits hearing in June 2017, by which time the Claimant had obtained alternative employment and apparently largely recovered from the effects of his dismissal. Whilst the Claimant is entitled to amend his claim for injury to feelings, there is no obvious reason why his estimate of his claim has more than doubled in recent months.

20. The new Presidential Guidance dated 5th September 2017 suggests that £8,400 is the appropriate figure for top of the lower band/bottom of the middle Vento band. The Presidential Guidance relates to claims presented after 11th September 2017, which puts the Claimant's award of injury to feelings for his dismissal in 2016 into the bottom of the middle Vento band. This properly reflects the effect on his mood and self-esteem of losing his job relatively late in his career, in circumstances where he was understandably worried about obtaining alternative employment in his 60's.

**Taxation**

21. The parties are agreed that the Claimant's loss of earnings should be grossed up to reflect the fact that any compensation awarded in excess of £30,000 will be taxable in his hands. An issue emerged at the hearing as to the appropriate percentage for the grossing up exercise. Although the Claimant originally invited the Tribunal to gross up at 20%, the Respondent very fairly pointed out that his annual earnings from his new employment will place the Claimant's earnings in the relevant tax year in the higher tax bracket, to the extent that a small proportion of his earnings and compensation will fall into the 50% band. On reflection, Mr Davey, submitted that the figures should be uplifted by 47%, to reflect the fact that had the Claimant been paid his salary in the tax year it was due, he would have obtained a tax benefit from the fact that he was working out of the country and not subject to UK tax on his income for the first few months of the tax year April 2016/2017 when he was employed by the First Respondent. There was no evidence before the Tribunal concerning the Claimant's tax affairs for the relevant year, however.

22. Deciding on the appropriate percentage is something of an artificial exercise, because who is to say whether the sum awarded by the Tribunal lies in the first £45,000 Claimant's income (which would then be liable to taxation at 20%) or whether it falls in the tranche of his income which would be taxed at 40 or 50%. The Respondent has ignored the 20% bracket in its suggested calculations. The Claimant now invites the Tribunal to gross up at 47%, even though, on any view, his compensation will not all be taxed at that level. Doing the best we can, we consider that 40% is a pragmatic and fair figure, as 47% would provide the Claimant with a windfall.

23. There are conflicting authorities as to whether an injury to feelings award is subject to taxation. The Tribunal was referred to a passage in Harvey on Industrial Relations and Employment Law on the tax treatment of injury to feelings awards, which set out the two EAT judgments which held that such awards are not taxable and, therefore, should not be grossed up (*Orthet Ltd v Vince-Cain [2005] ICR 374* and *Wilton v Timothy James Consulting Ltd [2015] IRLR 369 EAT*). However, there is a subsequent decision of the Upper Tribunal, (*Moorthy v Commrs for HMRC [2016] IRLR 258)*, which held that *Orthet* and *Timothy James* were both wrongly decided and that there is no tax-free element in part of a termination settlement which relates to injury to feelings. Harvey continues:

> "*The case law thus leaves parties and practitioners in a rather difficult position. If employment tribunals consider themselves bound by the EAT judgements (particularly that in Timothy James, which had regard to all the relevant authorities on the point), ET awards for injury to feelings will be made absent any grossing for tax. On the other hand, the view of the tax chamber of the first-tier Tribunal in Moorthy was that it was "not bound by a judgement of the EAT which purports to decide the scope of a taxing statute" and the Upper Tribunal has made clear that it considers that the EAT has simply got this point wrong. If that approach is followed by HMRC and upheld in future tax cases, Claimants will clearly lose out. This is a point that plainly needs to be resolved (and it is noted that the government is presently consulting on draft legislation will do so, making clear that payments to injury to feelings are subject to tax). In the meantime, the safer course would seem to be to assume that any sum of*

*injury to feelings arising from the termination of employment will be taxed and should, therefore, be grossed up. Alternatively, parties might wish to consider adopting the course followed by the employer in Timothy James, which was to indemnify the Claimant against any subsequent tax liability imposed by HMRC inconsistently with the EAT's judgement*."

24. The Respondents were not willing to offer any indemnity to the Claimant in this case, so the Tribunal was required to decide the point. The Tribunal is clearly not bound to follow the advice of the learned Editor of Harvey, but the Tribunal considers it to be correct. HMRC is bound by the decision of the Upper Tribunal in *Moorthy* to the effect that injury to feelings awards are taxable, at least in so far as they are part of compensation for loss of office. Following basic tortious principles the Claimant is entitled to such compensation as will put him in the position he would have been had the wrong not been committed. The Tribunal considers it highly likely that any award it makes for injury to feelings will be taxable in the Claimant's hands, not only because HMRC is bound by the decision of the Upper Tribunal, but also because it appears that the government is likely to clarify that the sum is taxable in any event. Since the tax will not be due for another 18 months or so, either way it seems that the Claimant is likely to have to pay tax on his injury to feelings award. The EAT decision to the contrary predates the Upper Tribunal's decision in *Moorthy*. For these reasons, the Tribunal does not regard itself bound by the decision of Mr Justice Singh in *Timothy John.* The Claimant's injury to feelings award should, therefore, be grossed up by 40%.

25. The parties are agreed that interest is payable on the awards of compensation and that, therefore, the First Respondent's total liability to the Claimant, including interest and grossing up is £88,276.67.

**Aggravated Damages**

26. The Claimant has been compensated in the injury to feelings award for any hurt caused by his harassment and dismissal. The Tribunal accepts (and accepted in its liability judgement) that the First Respondent had genuine concerns about the Claimant's performance (albeit some of them were trivial to say the least). Aggravated damages are not designed to punish a Respondent to compensate for offence over and above that which is recognised by an injury to feelings award. This was not a case where there was a clear discriminatory or spiteful motive. The Second Respondent appeared genuinely puzzled at the suggestion that she or the First Respondent might have discriminated against the Claimant given the diverse nature of the workforce and the fact that the Claimant had been employed in the full knowledge of his (assumed) ethnicity/national origins. The Second Respondent clearly had a very unsophisticated understanding of diversity issues, but the Tribunal accepts she did not set out to deliberately discriminate against the Claimant. Whilst that is no defence to a discrimination claim, it is relevant to an assessment of aggravated damages.

27. Mr Davey's alternative submission that the Respondent's failure to offer an indemnity in relation to any taxation which might fall due to the Claimant on his injury to feelings award does not come close to conduct which might justify an award of aggravated damages. The Respondents like the Claimant are

entitled to a decision on a particular legal issue from the Tribunal, with the opportunity to appeal and clarify anything which is unclear or erroneous.

**Section 207A Uplift**

28. The ACAS Code of Conduct on Grievance and Disciplinary Procedures applied to the Claimant's dismissal and there was a breach of those procedures by the First Respondent, most notably the failure to hold a formal meeting with the Claimant prior to his dismissal and to put any allegations of poor performance to him. The requirements of section 207A(2)(a) and (b) are, therefore, met. Although the First Respondent dismissed the Claimant with minimal process, we accept Mr Epstein's submission, that in circumstances where a right to a disciplinary procedure (akin to that in the ACAS Code) is expressly excluded in an employee's contract and the Claimant agreed to that exclusion, it was a not unreasonable for the First Respondent to dismiss with minimal process for the purposes of section 207A(2)(c). Having a contractual disciplinary procedure does not disapply the provisions of the ACAS Code. However, the Claimant was still in the first month of his employment and in his probationary period with a small employer. Whilst it is recognised that there is generally inequality of bargaining power between employee and employer in relation to the negotiation of terms and conditions, this Claimant was an experienced and senior employee, such that he can be expected to have read and understood the terms of his employment and challenged any with which he did not agree. In circumstances where the Claimant was at least offered an appeal chaired by someone who was not involved in the decision to dismiss, and where the Claimant's contract could be terminated lawfully with minimal notice and without cause (subject to the provisions of the Equality Act 2010), the Tribunal considers it was not unreasonable of the First Respondent to terminate the Claimant's employment without full compliance with the relevant ACAS Code.

29. Even if the Tribunal is wrong in that conclusion, as was made clear in the liability judgment, the Claimant did have the opportunity to appeal against his dismissal to Mr Hussain, but he did not see this through. The Claimant has re-iterated in his witness statement that he believes an appeal would have proved fruitless and, in any event, he wanted to move on from the matter. In effect, he had lost confidence in the Respondents' ability to deal fairly with him. However, as he did not see through his appeal, it is unclear to what extent this view was justified, particularly in circumstances where the opportunity to appeal was provided. By the same token, the Respondents had lost confidence in the Claimant's ability to do the job which was required of him and the Claimant was denied the opportunity to defend himself against the Second Respondent's concerns. The Claimant did not raise a grievance following his dismissal concerning his allegation of race discrimination. Whilst the Tribunal perfectly well understands why the Claimant would not have raised a grievance concerning the Second Respondent's racial harassment in the first week of his employment, the only aspect of his dismissal which he challenged related to his notice pay. He raised no grievance relating to race discrimination and as he did not pursue his appeal, there was no opportunity for the Respondents to consider the Claimant's allegations of race discrimination. In circumstances where neither party has fully complied with the provisions of the same ACAS Code and where the Claimant has been awarded loss of earnings for the full period from his dismissal to the time

where he is now earning in excess of his income with the Respondent, the Tribunal considers it is just and equitable to make no uplift award against the First Respondent.

## Costs

30. By a written application apparently sent to the Tribunal prior to the hearing (but which has not made its way to the file), the Claimant invited the Tribunal to make a costs order against the Respondents either because the defence of his claim had no reasonable prospects of success or by reason of their unreasonable conduct of the proceedings. The Respondents had prior notice of the application. The Claimant's schedule of costs amounted to £13,220 inclusive of VAT. The Respondents (sensibly) do not challenge the reasonableness of the amount claimed, which covers both preparation and representation at two hearings. The parties were agreed that any request for recoupment of the Claimant's Tribunal fees should be made against the Government rather than the Respondents.

31. The Issues for decision by the Tribunal in relation to costs, were as follows:

    31.1 Whether the Respondents acted unreasonably in the conduct of the proceedings or whether their defence of the proceedings had no reasonable prospects of success.

    31.2 In light of the above, whether the Tribunal should exercise its discretion and make a costs order, and, if so, in what amount.

32. The relevant costs provisions are contained in rules 74 to 84 of the Employment Tribunal (Constitution etc.) Regulations 2013.

    Rule 76(1) sets out the circumstances in which a costs or expenses order may be made, namely,

    *"a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably, in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;*
    *Or (b) any claim or response had no reasonable prospect of success."*

    Rule 78 deals with the amount of a costs or expenses order, which can either be restricted to £20,000, agreed between the parties or be assessed by the County Court. Rule 84 provides: "*The Tribunal may have regard to the paying party's ability to pay*" when deciding whether to make a costs or order and, if so, in what amount.

    Costs orders are the exception rather the rule in the Employment Tribunal and the purpose of an award of costs is to compensate not punish (Lodwick v Southward LBC [2004] IRLR 554).

33. Mr Davey submitted that the Tribunal's liability findings make it clear that the Second Respondent lied in the course of her evidence. Given the Second Respondent was the moving mind of the First Respondent, she must have been aware that the Claimant's claim was bound to succeed, as what she said to the Claimant immediately before she dismissed him was within her knowledge. In circumstances where the Second Respondent knew she had called the Claimant "*crooked*" and that the Claimant, as a "Pakistani" had been "*wasting her time*" and was "*completely useless*," she would have realised that the Respondents' defence of the Claimants' claims had no reasonable prospects of success. Mr Epstein disputed Mr Davey's characterisation of the Tribunal's findings. The Tribunal made no finding that the Second Respondent had lied in her evidence and accepted that the Second Respondent had genuine concerns about the Claimant's performance. As such, there was clearly an issue between the parties which could have been decided either way.

**Conclusion**

34. Whilst the Tribunal preferred the evidence of the Claimant in relation to the contents of the final telephone conversation between him and the Second Respondent, in particular the latter's reference to "you Pakistanis", it does not follow that the Tribunal was satisfied that the Second Respondent deliberately lied about that conversation. It was clear from the latter's evidence concerning her characterisation of Pakistani and Chinese people as being "crooked", that the Second Respondent, was prone to racial stereotyping, including of herself. The first time that the Claimant alleged he had suffered race discrimination or harassment was in the course of these proceedings – some months after the Second Respondent's offending remarks. It is conceivable, therefore, that the Second Respondent would have forgotten a comment which she would have regarded as wholly insignificant (albeit wrongly so).

35. There is more force in Mr Davey's submissions in relation to the Second Respondent's comments about Pakistanis being "crooked", given that the latter admitted for the first time in oral evidence that she had made a comment along those lines (albeit she put a positive spin on what she had said, claiming she had used the word "flexible"). The fact that the Second Respondent might have wrongly concluded that using as a racial stereotype was acceptable was irrelevant to her prospects of successfully defending a claim. However, this comment was a relatively small element in the Claimant's overall case, which primarily related to the reasons for his dismissal. The First Respondent had an arguable defence to this claim, either on the basis that the second racially offensive remark was not made or that it did not infect the Claimant's dismissal, given the Second Respondent had genuine concerns about the Claimant's performance, was entitled to dismiss the Claimant without cause and was seeking to avoid paying an Agency fee for the Claimant's services.

36. Complaint is also made about the dilatory manner in which the Respondents approach the preparation of the case, including exchange of witness statements; the fact that they applied for an adjournment on the day prior to the hearing because their Solicitors ceased to act; the fact that they have not

engaged in settlement discussions with the Claimant, even after the liability decision and due to their failure to offer an indemnity to the Claimant in relation to any potential tax liability on his compensation for injury to feelings.

37. The Claimant has provided a short bundle of correspondence between the parties concerning the preparation of the trial bundle and exchange of witness statements, from which it can be seen that the Claimant offered the Respondent appropriate advice about how the bundle should be arranged. There followed some slightly testy exchanges between representatives about the relevance of certain documents in the bundle, but a bundle was prepared and put before the Tribunal. Exchange of witness statements was slightly delayed, but not such as would amount to unreasonable conduct of the proceedings. In the Tribunal's view, the closest the Respondents conduct got to unreasonable conduct was the failure to include an admission in the Second Respondent's witness statement that she had said something along the lines of "Pakistanis are like Chinese people – a little bit flexible". Given the additional challenges of taking evidence through a translator, however, the Tribunal is not satisfied that this poor preparation was such as to amount to unreasonable conduct of the proceedings.

38. Whilst a very late application was made by the Respondents to postpone the full merits hearing, it was not granted. Ms Chute, who represented the Claimant at the full merits hearing on a direct access basis, explained that she had only been briefed the day before the hearing, which was consistent with the Respondents' assertion that their Solicitor had ceased to act immediately prior to the hearing. The Tribunal accepts that the application for a postponement was made for genuine reasons, albeit those reasons were insufficient to justify a postponement in all the circumstances.

39. A refusal to engage with settlement negotiations can be frustrating, however, parties to litigation are generally entitled to have their legal rights and responsibilities determined in a public forum. Had the Claimant made a written, "without prejudice save as to costs" offer to the Respondents at a level lower than he achieved following the hearing, the Tribunal might well have awarded him costs in these circumstances. However, no written offers of settlement were made by the Claimant to the Respondents and there is nothing in the correspondence provided to the Tribunal which suggests that the Respondents were obstructing the proper preparation of the case. For all these reasons, the Tribunal does not consider that the threshold for making a costs order against the Respondents has been reached. The Tribunal, therefore, refuses the Claimant's application for costs.

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