Appeal No. UKEAT/0252/11/JOJ

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 November 2011 & 11 January 2012
Judgment handed down on 7 March 2012

**Before**

## HIS HONOUR JUDGE BIRTLES

**MS V BRANNEY**

**DR B V FITZGERALD MBE LLD FRSA**

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MR R NIEKRASH — APPELLANT

SOUTH LONDON HEALTHCARE NHS TRUST — RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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|---|---|
| For the Appellant | MR R NIEKRASH<br>(The Appellant in Person) |
| For the Respondent | MS SALLY COWEN<br>(of Counsel)<br>Instructed by:<br>Beachcroft LLP Solicitors<br>100 Fetter Lane<br>London<br>EC4A 1BN |

**SUMMARY**

**VICTIMISATION DISCRIMINATION – Whistleblowing**

Appeal on various grounds against the refusal of an Employment Tribunal to make an award of aggravated damages where the Appellant had been found to have suffered detriment in being excluded from his work as a hospital consultant urologist. Held (amongst other grounds of appeal rejected) that an Employment Tribunal is only required to consider such factors in support of the claim for aggravated damages as are argued before it and not trawl through the evidence to consider points not made to it in argument. In any event the Employment Tribunal had correctly applied **Commissioner of Police of the Metropolis v Shaw** UKEAT/0125/11/ZT, 29 November 2011.

**HIS HONOUR JUDGE BIRTLES**

**Introduction**

1. This is an appeal from the Judgment and Reasons of an Employment Tribunal sitting at London South on 13-14 and 27 May 2010. The Reserved Judgment and Reasons were sent to the parties on 6 July 2010. This was a remedies hearing. There had previously been a hearing on liability in September 2009, with discussions in chambers in November and December 2009. The liability Judgment, which runs to 50 pages, was sent to the parties on 29 January 2010. That liability hearing decided that the Claimant was subject to detriment by the Respondent on the ground of having made protected disclosures to the extent set out in the Reasons.

2. In the remedies Judgment and Reasons, which itself runs to 12 pages, the Tribunal made an award of £15,000 for non-pecuniary losses and £2,568 for loss of income, making a total of £17,568. The Appellant appealed against the award of compensation, but at a preliminary hearing before HHJ David Richardson, sitting alone on 6 June 2011, the only ground of appeal that was permitted to go forward to a full hearing was whether or not the Employment Tribunal was correct in law in refusing to award aggravated damages.

3. We heard the appeal on 1 November 2011 and 11 January 2012. At the conclusion of the hearing we reserved our Judgment.

4. Mr Ramon Niekrash appeared in person; the Respondent was represented by Miss Sally Cowen of counsel. We are grateful to both of them for their careful written and oral submissions.

**The material facts**

5. The Appellant was employed by the Queen Elizabeth Hospital NHS Trust ("the Trust") as a consultant urologist at the Queen Elizabeth Hospital in Woolwich. His employment commenced in January 2000. He remains employed by the successor Trust, the South London Healthcare NHS Trust, which is the Respondent in these proceedings. No criticism has ever been made of his professional skills and commitment. For some years he was the lead urologist for cancer services. He is widely described as an excellent clinician.

6. Between 2002 and 2008 the Appellant had cause to make various complaints and criticisms to the Trust's management, relating to the provision of urological services, in particular relating to cancer. The Tribunal said that he sometimes expressed himself in forceful language. These matters had to be dealt with by Dr Power and Ms Weichart, who respectively held the positions of Clinical Director for Surgery and General Manager for Surgery.

7. On 22 March 2008 Dr Power and Ms Weichart each wrote to the Trust's Chief Executive. They complained in trenchant terms about the Appellant. Dr Power said that he had destroyed their relationships with the rest of the urology team, and was utilising much energy on trying to do the same for the orthopaedic and general surgeons and anaesthetists. Ms Weichart made criticisms in broadly similar terms, saying that his language was offensive and his comments hurtful and damaging, to the extent that it had started to affect her private life. Neither Dr Power nor Ms Weichart had ever said to the Claimant that the number, the tone or the content of his letters was causing them any distress. Dr Power's letter is at EAT bundle pages 158-159.

8. On 9 April 2008 the Appellant was "excluded" under a procedure entitled "Maintaining High Professional Standards in the Modern NHS". A copy of that procedure is at EAT bundle pages 301-360. The section on "exclusion" is at EAT bundle pages 317-326.

9. An investigation was set up under Mrs Holt, an outside consultant. The "exclusion" was extended, but only until 5 June 2008. It is plain that the Appellant had widespread support among senior medical staff; indeed, he was elected deputy chair of the Medical Staff Committee in August 2008 by his professional colleagues. When Mrs Holt reported (apparently in July 2008), the only criticism in her report related to the amount and tone of his correspondence, which she said caused distress to both Dr Power and Ms Weichart. She pointed out that he had not been told that his correspondence was causing distress. She said that there were genuine concerns held by all the consultants that needed to be addressed by management. No disciplinary proceedings were brought against the Appellant.

**The Tribunal's Judgment on liability**

10. Before the Tribunal it was common ground that the Appellant had raised complaints and concerns that amounted to a series of protected disclosures for the purpose of the whistleblowing provisions of the **Employment Rights Act 1996**. It was common ground that the Appellant had acted in good faith in making these disclosures.

11. It was part of the Appellant's case that he had suffered detriment by reason of making these protected disclosures in various respects prior to his exclusion. The Tribunal rejected that part of his case. However, the Tribunal upheld his case that both the making of the complaints on 22 March 2008 and his subsequent exclusion were detriments imposed upon him by reason

of making protected disclosures. The Tribunal accepted in principle that he had suffered a loss of private practice income, loss of reputation, injury to feelings and to health.

**The Tribunal's Judgment on remedy**

12. The Claimant was represented by leading counsel at both the liability and remedies hearing. Claims were put forward for loss of private practice, loss of reputation, injury to feelings, injury to health, aggravated damages, and exemplary damages. As we have already indicated, the Employment Tribunal made an award of £15,000 for non-pecuniary losses and £2,568 for loss of private practice income, making a total of £17,568. The award of £15,000 covered injury to health and loss of reputation. The Tribunal rejected the claims for aggravated and exemplary damages. At the preliminary hearing before HHJ Richardson various grounds of appeal on compensation were rejected. The only ground permitted to go forward to a full hearing was the claim in respect of aggravated damages.

13. There has been some debate in this case about the meaning of what Judge Richardson has said and what his comments meant in the context of a full appeal. Before setting out what Judge Richardson said, it is important to set out what the Tribunal had to say about aggravated damages:

> **"35. Miss Eady sought an award for aggravated and exemplary damages. We will deal with each in turn. It is not in dispute that the Tribunal does have the jurisdiction to make such awards. We will deal first with aggravated damages. Miss Eady drew the attention of the Tribunal to the judgment of the Employment Appeal Tribunal in *Ministry of Justice v Fletcher* [2010] IRLR 25 and in particular to paragraphs 49 to 53 inclusive which contain guidance on the matter. We quote paragraph 49:**
>
> > **'49. As explained by Lord Devlin in *Rookes v Barnard* [[1964] UKHL 1] at p. 1221 and by Mrs Justice Smith in *Armitage* [*Marston and HM Prison Service v Johnson* [1997] IRLR 162], the manner of committing a wrong may warrant the award of aggravated damages.**
> >
> > **'[…] it is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives or conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity or pride.**

**These are matters which the jury can take into account in assessing the appropriate compensation.'**

**It is not necessary to establish that the conduct is malicious although malicious conduct may attract aggravated damages.'**

**36. The remaining paragraphs refer to the overlap of remedies and avoiding duplication. Miss Eady referred to the Kelly investigation and she compared it with the investigation of the complaints against the Claimant. She also referred to the lack of an apology. In that respect the Tribunal was referred to a letter of 16 April 2010 to the Claimant from the Chief Executive of the Respondent which enclosed a copy of a letter of the same day sent to the Claimant's solicitors. That letter contained an offer of settlement of the remedy. In the letter to the Claimant Dr Streather said that the Respondent accepted that there had been shortcomings in the manner in which the Respondent had dealt with the matter, and sincere apologies were offered. Miss Eady said that that was woefully inadequate.**

**37. Miss Cowen said that the Tribunal had to be satisfied that the Respondent had acted with malice or other bad intention. She said that there was no evidence to suggest that the exclusion was carried out maliciously. In our judgment, there was no malice present when Ms Weichart and Dr Power wrote the letters which resulted in the exclusion. Rather, the authors were seeking support. Further, we are unable to find that there was any malice involved in the decision to exclude the Claimant, but rather a misguided means of attempting to resolve the issues being faced by Ms Weichart in particular and also Dr Power.**

**38. Inserted above is a quotation from *Rookes v Barnard*. We have reminded ourselves that an award of aggravated damages is intended to form further compensation to the Claimant, and not be a penalty imposed on the Respondent. Another formulation of the requirement for such an award to be made is that the conduct of the Respondent must be high-handed, malicious, insulting or oppressive. We have clearly found that the exclusion of the Claimant was wholly inappropriate. That injured his feelings for which we have made an award above.**

**39. The Respondent could have made a much earlier and fuller apology to the Claimant for what had taken place. We do not accept that the lack of a prompt or more fulsome apology justifies an award of aggravated damages. Rather, if there had been an earlier recognition of the inappropriate conduct of the Respondent then there may have been a beneficial impact on the Claimant's feelings."**

14. At the preliminary hearing, when dealing with the issue of aggravated damages, HHJ Richardson said this:

**"28. The Tribunal dealt with this aspect of the claim in paragraphs 35-39 of its reasons.**

**29. Aggravated damages may be awarded where an unlawful act such as an act of discrimination was committed maliciously. The Tribunal expressly considered this matter in paragraph 37 of its reasons.**

**'37. Miss Cowen said that the Tribunal had to be satisfied that the Respondent had acted with malice or other bad intention. She said that there was no evidence to suggest that the exclusion was carried out maliciously. In our judgment, there was no malice present when Ms Weichart and Dr Power wrote the letters which resulted in the exclusion. Rather, the authors were seeking support. Further, we are unable to find that there was any malice involved in the decision to exclude the Claimant, but rather a misguided means of attempting to resolve the issues being faced by Ms Weichart in particular and also Dr Power.'**

**30. The Claimant certainly believes, as his submissions before me have made clear, that this exclusion was malicious. The Tribunal, however, did not find this; and it is for the Tribunal which sees and hears the witnesses to form conclusions on a matter of this kind.**

> **31. The Claimant also argues, however, that his exclusion can be described as high-handed, oppressive and insulting. He submits that the Tribunal did not address this part of the test for aggravated damages adequately. He has taken me through matters which he says would indicate this: the use of a totally inappropriate procedure; the circumstances in which he was notified of his exclusion (essentially taking him by surprise when he had declined to attend a meeting unrepresented); the refusal to await a meeting with representation; the particular severity of unjustified exclusion as a sanction for a person in the position of consultant; the impact on him personally, which was such that he could not at first tell his own family of the exclusion; persistence in the use of exclusion despite the Trust being informed of the inappropriateness of the procedure; the lack of any apology of any kind until April 2010 (and the Claimant would say that the apology is still inadequate).**
>
> **32. It is certainly arguable that aggravated damages are available not only where conduct is malicious but also where it is high-handed, oppressive or insulting: see *Alexander v The Home Office* [1999] IRLR 190 at para 14. In so far as the Tribunal address this question at all it is in paragraphs 38 and 39 of its reasons. I think it is arguable that the Tribunal, in paragraph 38 and 39, has not adequately dealt with this part of the case and has not set out adequate conclusions upon it. The argument which the Claimant has put forward, which I have just summarised, merits consideration by a full hearing with members."**

15. The order approved by HHJ Richardson was sealed on 16 June 2011, and the material part says this:

> **"2. This appeal be set down for a full hearing on the question of whether the Tribunal erred in law by failing to consider and give proper reasons for rejecting the claim for aggravated damages on the basis that the Respondent's conduct was high-handed, oppressive and insulting. […]"**

## The Notice of Appeal

16. The section of the Notice of Appeal dealing with aggravated damages runs to nearly 13 pages. It is not broken down into numbered paragraphs, but the essence of it is that the Employment Tribunal failed to take account of a number of factors that, Mr Niekrash submits, it should have done. Because of the way in which this case has developed, Miss Cowen produced a schedule of the Appellant's allegations relating to aggravated damages, which we have found most helpful. It is attached as an appendix to this Judgment. What it shows is that there were a number of different ways in which the basis for the claim for aggravated damages has been made at different stages in the case.

17. Thus in the Schedule of Loss submitted with the claim form there are six factors relied on in support of the claim for aggravated damages. In the skeleton argument of leading counsel at the remedies hearing, only three factors are referred to, one of which overlaps with the Schedule of Loss. In the oral submissions made at the remedies hearing by leading counsel, only two factors were referred to, one of which overlaps with the Schedule of Loss.

18. By contrast, the grounds of appeal drafted by Mr Niekrash refer to eighteen factors relied on in support of the claim for aggravated damages. The Judgment of HHJ Richardson quoted above refers to six factors, of which only three were in the original Schedule of Loss.

19. We turn to the documents provided by Mr Niekrash for the hearing before the Employment Appeal Tribunal. His skeleton argument refers to twenty-two factors. That was produced for the first day of the two-day hearing. In between the two hearings Mr Niekrash produced two further schedules of subjects, called Part I and Part II. Part I refers to five factors, which are all contained in the Schedule of Loss. Part II refers to twenty-seven factors, of which four are contained in the Schedule of Loss.

20. We have set this out at the beginning of our Judgment because it is important to see the way Mr Niekrash's submissions have changed throughout the history of this case. At the heart of it there seems to us to be a fallacy in Mr Niekrash's submission that there is somehow an obligation on the Tribunal to identify every *potential* factor that could or might be a ground for making a finding that aggravated damages should be awarded in a particular case, rather than the Claimant putting forward those factors that were in evidence on which it relies in support of its claim for aggravated damages. Thus, putting Mr Niekrash's submission at its highest, he submits that what the Tribunal should have done was trawl through the whole of the Judgment

on liability and all the associated documents and identify each and every factor that could or might be relevant. We reject that submission. In our judgment, there is no such requirement in law for an Employment Tribunal to go beyond any Schedule of Loss and/or any written or oral submissions made to it before it gives judgement. Anything else would place an intolerable burden upon a Tribunal. If Mr Niekrash is correct, then the principle extends far beyond the narrow question in this case of aggravated damages, and must apply to every head of damages that it is open to a Tribunal to consider in a particular case. We therefore confine ourselves to the factors that were before the Tribunal: (a) the Schedule of Loss, (b) the Claimant's counsel's skeleton argument at the remedies hearing, and (c) the Claimant's counsel's submissions at the remedies hearing. We repeat that Mr Niekrash was represented by leading counsel. There is no question here of a negligent omission or a litigant in person.

**Ground 2: the rule 3(10) grounds**

21. We turn to consider the seven points identified by HHJ Richardson at the rule 3(10) hearing. Mr Niekrash represented himself; these were the grounds that he put forward in support of his submission on aggravated damages. We begin by noting that only three of the points raised by HHJ Richardson were contained within the original Schedule of Loss presented with the ET1. Only one of them, lack of apology/inadequate apology, was raised in the Schedule of Loss, the skeleton argument of leading counsel at the remedies hearing, and in leading counsel's oral submissions at the remedies hearing. With respect to Judge Richardson, it is therefore questionable whether other matters can be properly raised at all before us. However, we will deal with them as they were raised by HHJ Richardson.

22. The use of a totally inappropriate procedure: this is dealt with in the liability Judgment at paragraph 194 and in the remedy Judgment at paragraph 37. The Tribunal expressly excluded

malice in the use of the procedure. The Trust was entitled to use the procedure. This could not therefore be a factor that gave rise to aggravated damages. Mr Niekrash relies on the views of the BMA; they are irrelevant because of the express finding of no malice by the Tribunal.

23. The circumstances in which the Appellant was notified of his exclusion (essentially, taking him by surprise when he declined to attend a meeting unrepresented): the short answer to this is that Maintaining High Professional Standards in the Modern NHS document (EAT bundle pages 316-326) is not a disciplinary procedure; it is pre-disciplinary. It forms a separate section (part II) from part III, which deals with conduct hearings and disciplinary matters. There is no suggestion in this case that the Respondent failed to follow the procedure correctly. The Employment Tribunal did not criticise the Respondent about the use of this procedure. It cannot therefore be a factor in the award of aggravated damages.

24. The refusal to await a meeting with representation: the short answer to this is that the Trust followed the restriction of practice and exclusion from work procedure correctly. Furthermore, the Tribunal specifically awarded damages for injury to feelings for the exclusion, which, the Tribunal found, was a detriment. This factor cannot be a basis for an award of aggravated damages.

25. The particular severity of the unjustified exclusion as a sanction for a person in the position of a consultant: this was not raised before the Employment Tribunal. In any event the Appellant is in the same position as any other NHS employee. The restriction of practice and exclusion from work procedure applies to consultants as well as any other NHS employee.

26. The impact on the Appellant personally: this was not raised at the remedies hearing, but in our judgment is in any event dealt with by the award of damages for injury to feelings.

27. Persistence in the use of exclusion: the Employment Tribunal set out their factual findings in relation to the decision to exclude the Appellant and the decision to continue to exclude him (liability Judgment paragraphs 122-142). This includes reference to the fact that the Appellant's then representative, a Mr Edwards of the BMA, wrote to the Respondent giving his view that the procedure was inappropriate (liability Judgment paragraphs 137-138). There is no other evidence of the Respondent, "being informed of the inappropriateness of the procedure". The Employment Tribunal's findings in the liability Judgment at paragraphs 197-202 do not conclude that there was any inappropriate behaviour in the continuation of the exclusion. It cannot therefore be an aggravating factor if the Tribunal found that the continuation of the exclusion was not inappropriate.

28. The lack of any apology of any kind until April 2010 (and the Appellant would say that the apology is still inadequate): this point was raised at the Employment Tribunal and was addressed by both parties in closing submissions. In the remedy Judgment at paragraph 36 the Employment Tribunal referred to the apology letter and concluded at paragraph 39 that this did not amount to a reason to award aggravated damages. This decision comes after the mention of "high-handed, oppressive or insulting" as an alternative formulation, and therefore must include consideration by the Employment Tribunal on this ground. The Tribunal dismissed this as a feature that entitled the Appellant to aggravated damages.

29. In so far as the matters were raised before the Employment Tribunal, we can see no error in the approach taken by the Employment Tribunal to them.

**Ground 3: the other factors referred to by Mr Niekrash in support of his submissions**

30. For the reasons we have given under ground 1, we cannot accept Mr Niekrash's submission that the Employment Tribunal was under an obligation to look at and refer to every other factor listed by him (a) in his skeleton argument before us, (b) his schedule of subjects Part I or (c) his schedule of subjects Part II, when they were not raised before the Employment Tribunal in any shape or form.

**Ground 4: the correct test**

31. This is not a malice case (see the Employment Tribunal Judgment on remedies, paragraph 37, and the Judgment of HHJ Richardson at the preliminary hearing, paragraph 30).

32. In our judgement, there is no error of law in the Employment Tribunal separately analysing each of the other three categories of "high-handed, insulting or oppressive" behaviour. An Employment Tribunal may do so in fact, but not to do so is not an error of law (see **Chief Constable of the Thames Valley Police v Kellaway** [2000] IRLR 170 at paragraph 48, per Morison P, and **Commissioner of Police of the Metropolis v Shaw** UKEAT/0125/11/ZT, 29 November 2011, per Underhill P).

**Ground 5: the principles of aggravated damages**

33. At the beginning of the hearing of the appeal we referred the parties to the recent decision in **Shaw**, referred to above. At paragraphs 22-24 Underhill P said this:

> **"22. *Criteria.* The circumstances in attracting an award of aggravated damages fall into the three categories helpfully identified by the Law Commission: see para. 16 (2) above. Reviewing them briefly:**
>
> **(a) The manner in which the wrong was committed. The basic concept here is of course that the distress caused by an act of discrimination may be made worse by it being done in an**

**exceptionally upsetting way. In this context the phase 'high-handed, malicious, insulting or oppressive' is often referred to (as it was by the Tribunal in this case). It derives from the speech of Lord Reid in *Broome v Cassell & Co Ltd* [1972] AC 1027 (see at p. 1087G), although it has its roots in earlier authorities. It is there used to describe conduct which would justify a jury in a defamation case in making an award at 'the top of the bracket'. It came into the discrimination case-law by being referred to by May LJ in *Alexander* as an example of the kind of conduct which might attract an award of aggravated damages. It gives a good general idea of the territory we are in, but it should not be treated as an exhaustive definition of the kind of behaviour which may justify an award of aggravated damages. As the Law Commission makes clear (see paras. 1.4-6 of Part II, noting that the identical passage in its consultation paper was approved both by Dyson J in *Appleton v Garrett* [1996] PIQR 1 and by this Tribunal (Smith J presiding) in *Ministry of Defence v Meredith* [[1995] IRLR 539], at para. 29 (p. 542), an award can be made in the case of any exceptional (or contumelious) conduct which has the effect of seriously increasing the claimant's distress.**

**(b) <u>Motive</u>. It is unnecessary to say much about this. Discriminatory conduct which is evidently based on prejudice or animosity or which is spiteful or vindictive or intended to wound is, as a matter of common sense or common experience, likely to cause more distress than the same acts would cause if evidently done without such a motive - say, as a result of ignorance or insensitivity. That will, however, only of course be the case if the claimant is aware of the motive in question: otherwise it could not be effective to aggravate the injury - see [*Meredith*], at paras. 32-33 (p. 543). There is thus in practice a considerable overlap with head (a).**

**(c) <u>Subsequent conduct</u>. The practice of awarding aggravated damages for conduct subsequent to the actual act complained of originated, again, in the law of defamation, to cover cases where the defendant conducted his case at trial in an unnecessarily offensive manner. Such cases can arise in the discrimination context: see *Zaiwalla and Co v Walia* [2002] IRLR 697 (though N.B. Maurice Kay J's warning at para. 28 of his judgment (p. 702)); and *Fletcher* (above). But there can be other kinds of aggravating subsequent conduct, such as where the employer rubs salt in the wound by plainly showing that he does not take the claimant's complaint of discrimination seriously: examples of this kind can be found in *Armitage*, [*HM Prison Service* v] *Salmon* [[1997[ IRLR 162] and *British Telecommunications v Reid* [[2003] EWCA Civ 1675]. A failure to apologise may also come into this category; but whether it is in fact a significantly aggravating feature will depend on the circumstances of the particular case. (For another example, see the very recent decision of this Tribunal (Silber J presiding) in *Bungay v Saini* UKEAT/0331/10/CEA.) This basis of awarding aggravated damages is rather different from the other two in as much as it involves reliance on conduct by the defendant other than the acts complained of themselves or the behaviour immediately associated with them. A purist might object that subsequent acts of this kind should be treated as distinct wrongs, but the law has taken a more pragmatic approach. However, tribunals should be aware of the risks of awarding compensation in respect of conduct which has not been properly proved or examined in evidence, and of allowing the scope of the hearing to be disproportionately extended by considering distinct allegations of subsequent misconduct only on the basis that they are said to be relevant to a claim for aggravated damages.**

**23. *How to fix the amount of aggravated damages.* As Mummery LJ said in *Vento v Chief Constable of West Yorkshire Police (no. 2)* [2003] ICR 318, at paras. 50-51 (pp. 331-2), 'translating hurt feelings into hard currency is bound to be an artificial exercise'. Quoting from a decision of the Supreme Court of Canada, he said:**

> **'The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional.'**

**Since there is no sure measure for assessing injury to feelings, choosing the 'right' figure within that range cannot be a nicely calibrated exercise (practice is in our experience variable as to the extent to which claimants in discrimination cases give explicit evidence about the injury to their feelings. In principle they should certainly be asked to do so: it is wrong that tribunals should be asked to make assumptions. In *London Borough of Hackney v Adams* [UKEAT/1318/01] Elias P warned against assuming that in every kind of discrimination case a claimant will inevitably have suffered injury to feelings. But the fact remains that even when such evidence is given, it is often difficult to assess objectively because so much depends on the idiosyncrasies of the particular witness, including their articulacy and their levels of stoicism of self-awareness. Some degree of standardisation is realistically inevitable). Those observations apply equally to the assessment of aggravated damages - inevitably so since, as**

**we have sought to show, they are simply a particular aspect of the compensation awarded for injury to feelings; but the artificiality of the exercise is further increased by the difficulty, both conceptual and evidential, of distinguishing between the injury caused by the discriminatory act itself and the injury attributable to the aggravating elements. Because of that artificiality, the dividing line between the award for injury to feelings on the one hand and the award of aggravated damages on the other will always be very blurred, and tribunals must beware of the risk of unwittingly compensating claimants under both heads for what is in fact the same loss. The risk of double-counting of this kind was emphasised by Mummery LJ in *Vento*; but the fact that his warning is not always heeded is illustrated by *Fletcher* (above). The ultimate question must be not so much whether the respective awards considered in isolation are acceptable but whether the overall award is proportionate to the totality of the suffering caused to the claimant.**

**24. *Relationship between the seriousness of the conduct and the seriousness of the injury.* It is natural for a tribunal, faced with the difficulty of assessing the additional injury specifically attributable to the aggravating conduct, to focus instead on the quality of that conduct, which is inherently easier to assess. This approach is not necessarily illegitimate: as a matter of broad common sense, the more heinous the conduct the greater the impact is likely to have been on the claimant's feelings. Nevertheless it should be applied with caution, because a focus on the respondent's conduct can all too easily lead a tribunal into fixing compensation by reference to what it thinks is appropriate by way of punishment or in order to give vent to its indignation (we suspect that it is this kind of thinking that the Law Commission had in mind when making the observation in its consultation paper, which was picked up by Slade J in [*Fletcher*] (see paragraph 20 above), to the effect that awards of aggravated damages sometimes contain a punitive element). Tribunals should always bear in mind that the ultimate question is 'what additional distress was caused to this particular claimant, in the particular circumstances of this case, by the aggravating feature(s) in question?' even if in practice the approach to fixing compensation for that distress has to be to some extent 'arbitrary or conventional'."**

34. Although the decision in **Shaw** was given after the Employment Tribunal decision, we can see no conflict in the approach prescribed by Underhill P and the approach of the Employment Tribunal in this case. It follows that the Employment Tribunal were entitled to make a substantial award for injury to feelings but not make an award of aggravated damages.

## Ground 6: Meek compliance

35. The reference is to **Meek v City of Birmingham District Council** [1987] IRLR 250 (see also **English v Emery Reimbold and Strick** [2003] IRLR 710). In our judgement, paragraphs 35-39 of the Tribunal's Judgment on remedy is **Meek** compliant.

## Conclusion

36. For these reasons, the appeal is dismissed.

**APPENDIX**

## Niekrash v South London Healthcare NHS Trust
## Allegations of Aggravated Damages

| | Issue | Schedule of Loss | Cl skeleton at remedy | Cl subs at remedy | Grounds of appeal | Approved grounds 3(10) | Cl skeleton EAT | Cl schedule of subjects - Part 1 | Cl schedule of subjects - Part 2 |
|---|---|---|---|---|---|---|---|---|---|
| 1 | Wider conduct of R -way in which Kelly investigation carried out- different treatment of C's complaints to those of AW/SP | | ✔ | ✔ | ✔ | | ✔ | | |
| 2 | Suggestion by R that C put his interests before the patients | | ✔ | | | | | | |
| 3 | Lack of apology/inadequate apology | ✔ | ✔ | ✔ | ✔ | ✔ | ✔ | | ✔ |
| 4 | R's submission on tone of letters | ✔ | | X | | | | ✔ | |
| 5 | Letters were defamatory and calculated to cause damage/lead to dismissal | ✔ | | | ✔ | | ✔ | ✔ | ✔ |
| 6 | No letters internally or to GP to confirm no clinical issue | ✔ | | | ✔ | | ✔ | ✔ | ✔ |
| 7 | Breach of MHPS | ✔ | | | ✔ | ✔ | ✔ | ✔ | ✔ |
| 8 | Maintaining exclusion without good reason | ✔ | | | | ✔ | | ✔ | |
| 9 | Treated adversely in contractual obligations/bullying 2005-2007 | | | | | | | | ✔ |
| 10 | BMA criticism of Val Kelly report | | | | | | | | ✔ |
| 11 | Lynda Holt report refers to working culture | | | | | | ✔ | | ✔ |
| 12 | Suspension(exclusion) | | | | | ✔ | | | ✔ |

## Niekrash v South London Healthcare NHS Trust
## Allegations of Aggravated Damages

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 13 | Treatment prior to, during and following suspension | | | | | | | | ✔ |
| 14 | breach of internal policies on suspension | | | | ✔ | | ✔ | | ✔ |
| 15 | Breach of statutory rights | | | | ✔ | | ✔ | | ✔ |
| 16 | Following decision pathway | | | | ✔ | | ✔ | | ✔ |
| 17 | Trap set to suspend | | | | | | ✔ | | ✔ |
| 18 | Suspension pre-planned | | | | | ✔ | ✔ | | ✔ |
| 19 | Breach of DoH Code of Conduct/NHS Constitution | | | | ✔ | | ✔ | | ✔ |
| 20 | CI failed to address complaints in Nov 2007 | | | | ✔ | | ✔ | | ✔ |
| 21 | R intentionally misinformed NCAS | | | | ✔ | | ✔ | | ✔ |
| 22 | Locum found prior to suspension | | | | ✔ | | ✔ | | ✔ |
| 23 | Lady Jenkins did not respond to letter | | | | ✔ | | | | ✔ |
| 24 | CI was barred from premises | | | | ✔ | | ✔ | | ✔ |
| 25 | R blocked PC system access | | | | ✔ | | ✔ | | ✔ |
| 26 | Dr Whitlock report to MSC | | | | ✔ | | | | ✔ |
| 27 | Ms Holt remark about consultants | | | | | | ✔ | | ✔ |
| 28 | Dr Power comment | | | | ✔ | | ✔ | | ✔ |
| 29 | No transcripts of Holt interviews | | | | | | | | ✔ |
| 30 | Conflict of interest by Chairman of Trust | | | | ✔ | | ✔ | | ✔ |
| 31 | Emotional impact of suspension | | | | | ✔ | ✔ | | ✔ |
| 32 | R calling Dr Bailey as witness at remedy | | | | | | ✔ | | |