Appeal No. UKEAT/0013/16/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 October 2016

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

BARONESS DRAKE OF SHENE

MR D G SMITH

HAMPSHIRE COUNTY COUNCIL — APPELLANT

MRS C M WYATT — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SIMON PURKIS (of Counsel) Instructed by: Hampshire Legal Services EII Court South The Castle Winchester SO23 8UJ
For the Respondent	MS KAREN MOSS (of Counsel) Instructed by: Dutton Gregory Solicitors Trussell House 23 St Peter Street Winchester SO23 8BT

SUMMARY

DISABILITY DISCRIMINATION - Compensation

In a case where the Employment Tribunal found that the Claimant's suspension was not an unlawful act but was the most proximate cause of her depression and triggered that depression, the Respondent appealed against an award for personal injury on the basis that the Employment Tribunal was wrong to make such an award in the absence of expert medical evidence, which was necessary to establish both causation and quantum of this claim which are difficult issues to disentangle. The Respondent argued that in a low-value case, cost and proportionality issues may drive parties and tribunals to deal with such issues without medical evidence but in all other cases medical evidence must be obtained before such an award can be made. A similar point was argued in relation to pecuniary loss awards for unfair dismissal.

The Respondent also contended that the Employment Tribunal's starting point for the personal injury award was inflated and erroneously characterised the psychiatric injury as "moderately severe" (with a bracket of £15,000-£44,000) within the terms of the *Judicial College Guidelines*, 12th edition, rather than as "moderate" (with a bracket of £4,700-£15,400). This led to an award that overlapped with the injury to feelings award and was manifestly excessive.

These arguments were not accepted. Although it is advisable for claimants to obtain medical evidence (especially in cases involving psychiatric injury which can give rise to difficult questions of causation and quantification) and failure to produce medical evidence risks a lower award than might otherwise be made, or no award being made at all, the Employment Appeal Tribunal rejected the argument that a personal injury award cannot be made in the absence of expert medical evidence in every case bar those of low-value. There is no such principle of law. The same is true of pecuniary loss awards in unfair dismissal cases.

In this case in any event, although the Employment Tribunal found that suspension which was not unlawful triggered the depression, it also found that the suspension meeting was itself an act of unlawful discrimination because of the manner in which the suspension was communicated. These two events are inextricably linked. Had the meeting been handled lawfully, it may well be that the suspension itself would not have triggered the injury. In those circumstances, and given that the Respondent did not advance any argument that the depression was divisible as between lawful and non-lawful causes, or contend for an apportionment or a percentage reduction on that basis, the Employment Tribunal was entitled to find that the serious instances of unlawful action over a considerable period of time had a serious long-lasting impact on the Claimant and, in other words, caused or materially contributed to her depression so that the Respondent was liable for the full extent of it. There was ample evidence to support that conclusion in the Occupational Health reports and the evidence of the Claimant and her witness.

The Employment Appeal Tribunal could detect no error of principle or perversity in either award, and the appeal accordingly failed.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

Introduction

1. This is the unanimous Judgment of all three members of this Tribunal. The appeal is against a Remedy Judgment of the Southampton Employment Tribunal comprising Employment Judge Reed, Mr Bompas and Mr Crowe. Reasons were promulgated on 27 July 2015. Earlier in proceedings between these parties, and following a hearing in March 2015, the same Tribunal in a Judgment with Reasons sent to the parties on 13 May 2015 held that the Claimant was unfairly dismissed and unlawfully discriminated against on the grounds of disability. The Tribunal recorded a concession made by the Respondent that she was a disabled person both by reason of dyslexia and depression. So far as the depression is concerned, it was conceded that she was disabled by reason of depression with effect from 5 June 2013.

2. We refer to the parties as they were before the Tribunal for ease of reference. Before us Mr Simon Purkis appears for the Respondent, who appeals. The appeal is resisted on the Claimant's behalf by Ms Karen Moss. We are grateful to both counsel for their helpful submissions.

The Facts

3. Before dealing with the remedy issues, it is helpful to summarise the facts shortly as follows. The Claimant worked as a carer for Hampshire County Council, the Respondent, from 1995 onwards; a total period of some 40 years. She worked at the same care home, Malmesbury Lawn, for almost 20 years. She was diagnosed as dyslexic in 2008. On 23 May 2013, serious allegations were made about her method of working. The Claimant was on holiday at the time but the following day she was called into a meeting with senior members of

staff and told there were serious allegations against her. She was given an example of what was alleged and replied, "Oh my god, this my job gone" [sic]. She asked to stop the meeting and informed the union. A safeguarding alert was raised by the Respondent as a consequence, and the Claimant was suspended pending an investigation, although the Respondent did not use that term. We shall refer to that meeting in which she was told in effect that she would be suspended as "the suspension meeting".

4. The Tribunal found that the gravity of the allegations made against the Claimant meant the Respondent had no option but to suspend her and this decision by itself was not an act of unlawful discrimination. The suspension itself was relatively short-lived. At a meeting on 10 June 2013, attended by the Claimant and her brother-in-law, Mr Pearl, who accompanied her, the suspension was lifted. However, the Claimant was told that an investigation would nevertheless take place and she would be invited to a disciplinary meeting to discuss the allegations. She was thereafter notified of specific allegations that were made against her in mid-June, and a hearing was arranged towards the end of June. Meanwhile, however, the Claimant had gone off sick with stress immediately following the suspension letter. She found herself unable to attend the disciplinary investigation meeting as a consequence, and this had to be rearranged. She was unable to return to work, and a series of Occupational Health reports obtained by the Respondent concluded that she was unwell and unfit to do either of those things in the months that followed.

5. Eventually, a meeting took place on 18 December. By that time the Respondent had discontinued the disciplinary procedure and was relying on a managing performance procedure looking at issues of capability rather than conduct. However, the Tribunal found that change in procedure was not communicated to the Claimant. She was not told that the disciplinary

process had been discontinued, and she suffered unnecessary stress and a substantial disadvantage by the failure to clarify that position. The involvement of a manager called Mrs Nother at the meeting on 18 December in particular led the Claimant to believe that dismissal was a possible sanction, and she was not disabused of that.

6. The Tribunal found that although the safeguarding allegations were discussed with the Claimant at the meeting on 18 December there was no immediate outcome. However, by letter dated 13 January 2014 the Claimant was told that the safeguarding investigation would be closed and that the outcome would be recorded as requiring training and support to be dealt with on an informal basis.

7. There was a further Occupational Health report produced on 14 January, which indicated that she should become fit for some duties over the next few weeks. The report made a number of suggestions for her return. In the event, that outcome did not materialise, and there was a further report, in February 2014.

8. Meanwhile, by letter dated 23 January 2014 she was called to a meeting to address her absence. The meeting had to be postponed because the Claimant was unwell and unfit to attend and eventually took place on 3 March following the production of a further Occupational Health report, which suggested she could re-engage with work in due course provided certain recommendations were adopted.

9. Finally, a further meeting took place on 14 April. No notes were kept, but its contents were summarised in a letter dated 15 April. Put shortly, the Tribunal found that the Claimant

was dismissed in that meeting, as confirmed in that letter, and given 12 weeks' notice. The letter noted, amongst other things, that the Claimant had:

> **"… confirmed that you did not feel you would be able to return to your role at Malmesbury Lawn or indeed to any other HCC place of work."**

10. The Claimant appealed against dismissal, specifically denying that she said she could never return and indicating rather that she could not return in the present circumstances. Her appeal against dismissal was rejected, and she brought proceedings in the Employment Tribunal for unlawful disability discrimination, relying on asserted failures to make reasonable adjustments, indirect disability discrimination and discrimination arising from disability together with victimisation and unfair dismissal, leading to the Judgments challenged on this appeal.

11. In her claim for disability discrimination the Claimant relied on a number of PCPs that she contended placed her at a substantial disadvantage and gave rise to obligations on the part of the Respondent to implement adjustments for her. Of the many PCPs relied on, the Tribunal accepted the following:

(i) it found that there was an unlawful failure to make reasonable adjustments at the suspension meeting in that the Respondent did not explain matters more carefully and slowly so that the Claimant did not understand what was happening to her at that meeting and thought she was losing her job because of her dyslexia;

(ii) there was a failure to make reasonable adjustments when by letter dated 2 December 2013 the Respondent failed to explain to the Claimant that it was now dealing with her under the capability procedure rather than the disciplinary procedure, and/or that disciplinary matters had been discontinued. The Tribunal found that the involvement of Ms Nother in the procedure led the Claimant to

believe that dismissal was a possible sanction, and that too was a practice adopted by the Respondent that was held to have been unlawfully not adjusted for the Claimant;

(iii) there was a failure to offer redeployment when relationships soured between the Claimant and her colleagues, which was a failure to make reasonable adjustments;

(iv) the Tribunal accepted that not dismissing the Claimant would have been a reasonable adjustment in the circumstances in light of its later findings.

12. In addition, although, as we have indicated, the Tribunal rejected the claim that the suspension itself was an unlawful act of discrimination, it accepted that the Claimant's dismissal was related to her disability, namely depression, and concluded that dismissal was not a proportionate means of achieving a legitimate aim and that the Respondent did not act reasonably in treating capability as a reason that justified the Claimant's dismissal. So far as victimisation is concerned, one allegation was found to be established. This was the failure to deal adequately or at all with the disciplinary and grievance matters raised by the Claimant or in respect of her that continued over an unnecessarily protracted period of time.

13. Having reached those findings and conclusions the Tribunal held a Remedy Hearing on 12 June 2015 and dealt with compensation following that hearing in the following way. The Tribunal refused to award compensation for unlawful discrimination relating to the period immediately before the Claimant's dismissal at a time when she was absent from work due to sickness and only receiving half pay as a consequence. The reason for the Tribunal's refusal to do that was its conclusion that the Claimant's suspension that led to her depression and therefore her absence was not an unlawful act. The Tribunal therefore concluded that nothing

fell to be awarded under this head. There is no appeal from that decision, and we consider it no further.

14. The Tribunal made a compensatory award for pecuniary loss flowing from the unfair dismissal rather than the unlawful discrimination. It took account of the fact that the Claimant remained unemployed at the time of the hearing and had not applied for any alternative employment since her dismissal. The Tribunal found, regardless of whose fault it was that she became depressed in the first place, her depression meant that she was unable to work. There was no failure to mitigate, the Tribunal found, and it made a judgment that the Claimant's inability to find alternative work might reasonably be expected to continue for nine months beyond the hearing. It awarded compensation for future lost earnings on that basis. That conclusion is the subject of the final ground of appeal pursued by the Respondent.

15. So far as injury to feelings is concerned, the Tribunal made a global award in respect of all of the unlawful discrimination findings and the injury to feelings suffered as a consequence. The Tribunal recognised that the Claimant's depression was triggered by an act found not to be unlawful but concluded that there were a number of serious instances of unlawful treatment by the Respondent over a considerable period of time and that these had a serious, long-lasting impact on the Claimant and in the circumstances the Tribunal considered that an award of £15,000 was appropriate. The Tribunal rejected the Claimant's claim for an award of aggravated damages. The award for injury to feelings and the refusal to make an award of aggravated damages are not the subject of this appeal. Finally, in relation to personal injury compensation, the Tribunal awarded £10,000 for the reasons further discussed below.

The Appeal

16. The awards for personal injury and pecuniary loss flowing from unfair dismissal are challenged by the Respondent. There are five grounds of appeal pursued. The first four relate to the award for personal injury compensation; the fifth relates to the pecuniary loss award. The grounds are as follows. First, it is said that the award of £10,000 for personal injury is perverse and manifestly excessive in circumstances where no expert medical evidence to establish causation and/or the severity of and/or prognosis for the Claimant's asserted continuing depressive condition was adduced. Secondly, the Tribunal's finding that the Claimant suffered "moderately severe mental health difficulties" is challenged as in error in circumstances where the Tribunal found that the depression was not permanent and concluded that she would not be prevented from returning to comparable employment in the future. Thirdly, it is said that the Tribunal's conclusion that it could not be assisted by a medical report was an error. Fourthly, although the Tribunal said that it took into account the fact that an award in respect of injury to feelings had been made when determining the level of award for personal injury there is nothing to demonstrate that the Tribunal actually did so and the resulting total award is manifestly excessive. Finally, so far as post-dismissal and future loss is concerned, it is said that awarding loss of earnings for a period extending for nine months beyond the date of the Remedy Hearing resulted in a perverse and manifestly excessive award in the absence of medical evidence to establish causation of, severity of or prognosis for the asserted continuing depressive condition.

The Personal Injury Award Challenge

17. The Tribunal dealt with the award for personal injury at paragraphs 17 to 19 as follows:

> **"17. Finally, we turn to damages for personal injury. We were bound to observe that the situation was somewhat unusual in that no medical report had been prepared specifically for the evaluation, as it usually would. Mr Purkiss [sic] suggested there was nothing for us to rely upon in relation to severity, causation or duration, but we did not agree. It was clear that the claimant had suffered moderately severe mental difficulties. It was a mater for us whether we considered that she was telling the truth when she ascribed them her unlawful treatment by**

the respondent. Similarly, we would have to take a view, principally on the basis of her evidence, as to how bad her condition was and how long it was likely to be until it was resolved. In respect of most of the relevant considerations, all any further medical report could tell us was that the claimant made certain claims and the maker of the report either believed them or did not.

18. We were referred to guidelines and authorities to assist us in the determination of the appropriate sum. We also took into account the fact that we had made an award in respect of injury to feelings.

19. We concluded that the claimant had suffered a moderately severe depressive illness as a consequence of her unlawful treatment by the respondent. Although we took into account the fact that her depression came on in the first place as a result of an act that was not unlawful, the impact of the actions of the respondent upon the claimant was serious and in our view merited an award of £10,000."

18. In summary, Mr Purkis submits that, this being a case where the Tribunal found that suspension was not an unlawful act but was the proximate cause of the Claimant's depression and triggered it, the Tribunal was wrong to make an award for personal injury in the absence of expert medical evidence. Such evidence was necessary to establish both causation and quantum of this claim. These are difficult issues to disentangle. Whilst he accepts that in a low-value case proportionality may drive the parties and the Tribunal to deal with such issues without medical evidence on a commonsense basis and to the best of the Tribunal's ability, in a case that is anything more than a low-value case medical evidence must be obtained in order for such an award to be made without error of law. The consequence of the absence of expert evidence is that the Tribunal failed properly, he submits, to direct itself that an analysis of issues of causation was required. This was particularly critical in relation to the claim for personal injury, and in the absence of any analysis of causation he submits the Tribunal was wrong to make this award. The Tribunal's erroneous approach is underlined, according to Mr Purkis, by its statement that any further medical report could not tell the Tribunal anything more than that the Claimant made certain claims and the maker of the report either believed them or did not.

19. Furthermore, and in any event, the Respondent submits that the Tribunal's starting point for personal injury was inflated. It erroneously characterised the psychiatric injury as "moderately severe" with a bracket of £15,000-£44,000 within the terms of the *Judicial College Guidelines*, 12th edition, rather than as "moderate" with a bracket of £4,700-£15,400. Mr Purkis submits that had the Tribunal properly characterised this injury within the moderate bracket (and given that the Tribunal found that the Claimant would become fit to work in a relatively short period after the hearing, this was inevitably the correct bracket) even if the Tribunal considered that the personal injury award should be at the top of that bracket - in other words, £15,000 - it would have had to have regard to the possibility of double recovery in relation to personal injury and injury to feelings compensation. Had it done that, bearing in mind that compensation for depression is not easily distinguishable from compensation for injury to feelings, the Tribunal would inevitably have concluded that there should be no separate award for personal injury once the injury to feelings award had been assessed at £15,000. In other words, the award is, he submits, manifestly excessive for that reason.

20. He also contends that although the Tribunal said it took account of the fact that it was making an award in respect of injury to feelings when making the award for personal injury, that demonstrates that what the Tribunal actually did is deal with injury to feelings in isolation and then reduce what would have been a higher award for personal injury to £10,000. That supports his submission that the personal injury award was manifestly excessive and outwith the appropriate bracket. He submits that, properly directed, the only possible conclusion that the Tribunal could have reached in the circumstances of this case and without medical evidence that was required is that there should be no award for personal injury separate from the award for injury to feelings.

21. Before we analyse those arguments, we summarise briefly our understanding of the applicable legal principles which are not in dispute in this case. In **Sheriff v Klyne Tugs (Lowestoft) Ltd** [1999] IRLR 481 the Court of Appeal held that a claimant can recover compensation for physical or physiological injury caused by the statutory tort of discrimination. Compensation for discrimination is assessed in the same way as damages for any other tort, the object of such compensation being to put a claimant in the position as closely as is possible that he or she would have been in but for the unlawful conduct.

22. Following the approach of the Court of Appeal in **Essa v Laing Ltd** [2004] EWCA Civ 2 which is not challenged on this appeal, provided a direct causal link between the act of discrimination and the loss is made out, there is no need to show that the injury in respect of which the claim was made was reasonably foreseeable. So far as causation is concerned, physical and psychological injury are treated in the same way. It is for a claimant to establish by evidence on the balance of probabilities that the act or acts of unlawful discrimination found proved caused or materially contributed to a physical or psychological injury or to an exacerbation of the claimant's existing condition. The evidence should address as best as reasonably possible the effects of the injury or exacerbation and how long they have and will last. What evidence is likely to be sufficient to discharge that burden will inevitably vary with and depend on the facts of the particular case.

23. Depending on those facts, the question of causation might be relatively straightforward. In a case where a claimant proves that the respondent's statutory tort was at least a material cause of any psychiatric injury suffered by the claimant, the respondent must take the claimant as it finds him or her. It is no defence in such a case to say that the claimant would have suffered the same injury because of his or her character or psychological temperament or, in

other words, his or her eggshell personality. Tribunals may nevertheless have regard to that possibility when quantifying the compensation and may do so by discounting such compensation to take account of the possibility that the psychiatric condition might have been triggered even in the absence of unlawful discrimination.

24. As the EAT explained in **Gbaja-Biamila v DHL International (UK) Ltd** [2000] ICR 730 at paragraph 43, albeit in the context of injury to feelings awards, but we regard the point as equally applicable to personal injury awards, a tribunal may have to address the question whether the injury complained of is simultaneous with the first discriminatory act found proved. It may have to consider whether the injury persisted during intervals between discriminatory acts and whether each separate act added to the injury suffered, but

> **"… How far a tribunal deals with each question must depend, at least in part, on how far they were separately addressed in the evidence and argument laid before the tribunal. …"**

Where the evidence and argument is general, tribunals cannot be criticised for a rather general response to it.

25. Where a respondent establishes or the evidence shows that the psychiatric injury had one or more separate material causes in addition to the respondent's unlawful act or breach of duty, then, provided the resultant harm suffered by the claimant is truly divisible, a tribunal assessing compensation will have to conduct an analysis to estimate and award compensation for that part of the harm only for which the respondent is responsible. The objective in a case where the harm or injury is truly divisible is to identify the harm for which the respondent is responsible and award compensation for that harm and avoid awarding compensation for any harm that would have occurred in any event as a result of some separate material cause. Where notwithstanding the fact that there are competing causes for an injury the injury is indivisible, a

respondent whose act was the proximate cause of the injury is required to compensate for the whole of that injury.

26. For these reasons, it is likely to be important in a case where there are competing causes for a tribunal to address the question whether the injury or harm suffered is divisible or is indivisible. Whether or not any particular harm, state of health or injury is divisible or indivisible is a question of fact. In **Olayemi v Athena Medical Centre and Anor** [2016] UKEAT/0140/15 HHJ David Richardson held at paragraphs 23 to 25 as follows:

> **"23. I think what I have said above is basic principle. In the light of Miss Gumb's argument I will add a little more on the question of divisibility. It is helpful to cite a passage from Devlin LJ in *Dingle* [*v Associated Newspapers Ltd* [1961] QB 162] at pages 188 to 189:**
>
> > **"This conclusion appears to me to be in accordance with, and indeed to exemplify, a fundamental principle in the law of damage. Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not. If four mean, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings. If there were four distinct physical injuries, each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have given the loss of earnings is one injury caused in part by all four defendants. It is essential for this purpose that the loss should be one and indivisible; whether it is so or not is a matter of fact and not a matter of law. If, for example, a ship is damaged in two separate collisions by two wrongdoers and consequently is in dry dock for a month for repairs and claims for loss of earnings, it is usually possible to say how many days' detention is attributable to the damage done by each collision and divide the loss of earnings accordingly."**
>
> **24. It is, therefore, clear in principle that when there are competing causes for an injury a Court or Tribunal must consider the question of divisibility: both whether the injury is divisible and how it may be divided between the causes. The two questions go together and are essential elements of the reasoning.**
>
> **25. The passage which I have quoted from *Dingle* also seems to me to indicate a common sense approach to divisibility. It is more likely that an injury will be held to be indivisible if the competing causes are closely related to the injury and it is difficult to separate out their consequences. Each case will depend on the evidence; the principles are the same where the injury is psychiatric but such is the complexity of the human mind that it may, in practice, be difficult to separate out the impact of different causes. This is why the application of the principles to psychiatric injury may not be straightforward: see the discussion in [*BAE Systems (Operations) Ltd v*] *Konczak* [[2014] IRLR 676] at paragraphs 34 to 39. But in each individual case the exercise must be undertaken, as [HHJ] Hand QC observed in that case."**

A

27. With those observations we respectfully agree. There may be real difficulties for a tribunal trying to disentangle these issues in order to assess the extent to which a respondent should be held liable for compensation. This is particularly so in a case involving psychological or psychiatric injury. Medical (and indeed legal) views differ as to whether psychiatric injury is divisible or indivisible, and much may depend on the particular facts and circumstances of the case in which this question arises. In our judgment, in cases where the issue of divisibility is raised in relation to psychological or psychiatric injury particular care should be taken by tribunals. In such a case all of the evidence, including any medical evidence, will have to be carefully considered to determine these questions.

B

C

D

28. Medical evidence in particular, is likely to assist in identifying whether (i) all the injury or harm suffered by a claimant can be attributed to the unlawful conduct and (ii) that injury or harm is divisible. It may assist in determining the extent to which any treatment a claimant has undergone has been successful. It may also assist in dealing with questions of prognosis. In those circumstances, we do not agree with the Tribunal's statement that all a further medical report can do is say that the Claimant made certain claims and express a view as to whether the maker of the report believes them or not. We consider that in cases where there are issues as to the cause or divisibility of psychiatric or psychological harm suffered by a claimant, it is advisable for medical evidence to be obtained. Moreover, there is a real risk that failure to produce such medical evidence might lead to a lower award or to no award being made.

E

F

G

29. However, we do not accept the Respondent's argument that medical evidence is an absolute requirement or that an award cannot be made in the absence of expert medical evidence in every such case bar those of low-value without error of law. We would be concerned to see such a principle established, bearing in mind in particular the financial cost

H

involved in obtaining expert medical evidence. We also consider that there are potential practical difficulties that may arise. In this case, by way of example, we understand from Ms Moss that the Remedy Hearing was listed at the end of the Liability Hearing in March 2015 for a date some three months in the future. However, the Tribunal's Liability Judgment was not promulgated until a month before the Remedy Hearing. At that point, the Claimant took steps to obtain independent medical evidence, but the report was only forthcoming on the day before the hearing. The Claimant was therefore unable to disclose the report to the Respondent in good time before the Remedy Hearing, and an adjournment was regarded as necessary if she wished to rely on that evidence. Faced with the prospect of an adjournment, she felt unable to cope with further delay and chose to proceed without it. We understand that position and do not criticise her for her approach. It identifies the sort of practical difficulties that might arise were the Respondent to be correct in its submission that as a matter of law in every case medical evidence is required.

30. In any event, we anticipate that in a case where concurrent causes for injury or harm in respect of which compensation is sought or relied on by the respondent to a claim, or established by the evidence, it will be in the respondent's interests as much as the claimant's to obtain expert medical evidence. We would expect parties to co-operate in those circumstances and to endeavour where possible to instruct a medical expert on a joint basis.

31. Against that background we turn to consider the issues raised by the challenge to the personal injury award. This Tribunal acknowledged that the case was unusual in that no medical report had been provided specifically for use in evaluating the claim for compensation for personal injury. However, having acknowledged that, the Tribunal nevertheless felt able to reach a conclusion that the Claimant's condition and in particular her depressive illness, albeit

triggered by the suspension that was not unlawful, was nevertheless caused by a course of treatment that was unlawful and that involved a number of serious instances of unlawful action over a considerable period of time. Persuasively as Mr Purkis' arguments were advanced that this conclusion was not open to the Tribunal in the absence of a medical report prepared specifically for that purpose, we do not accept his arguments. Our reasons are as follows.

32. First, we are satisfied that on the particular facts of this case although the Tribunal found that suspension, which was not unlawful, triggered the depression it also found that the suspension meeting was itself an act of unlawful discrimination because of the manner in which the suspension was communicated. These are inextricably linked. Had the meeting been handled lawfully, it may well be that the suspension would not have triggered the injury.

33. Secondly, we are satisfied that this is not a case where the Respondent argued that the depression was divisible as between lawful and non-lawful causes, nor did it contend for an apportionment or a percentage reduction on that basis.

34. Thirdly and significantly, the Tribunal made express findings about the number of serious instances of unlawful action over a considerable period of time that had a serious, long-lasting impact on the Claimant. It expressly recognised the fact that it had found that suspension was not an unlawful act and reminded itself of its obligation to compensate only for losses flowing from unlawful action on the Respondent's part. In other words, the Tribunal was alive to the question that it had to address and assessed compensation on the basis of the impact on the Claimant that was caused or materially contributed to by the Respondent's acts.

35. Fourthly, the Tribunal had medical evidence in the form of Occupational Health reports. We were taken to these in the course of the hearing. There are reports dating from July, August, September and October 2013 and January and February 2014. The earlier reports describe the Claimant as being quite ill and on antidepressants. Subsequent reports describe an increase in medication being required, with severe symptoms of depression that were not improving or settling. While the January 2014 report describes some improvement, it is clear from it that the Claimant continued to have symptoms, and although it referred to the prospect of the Claimant becoming fit over the following weeks it did so in the context of an anticipation that the Respondent would take certain steps to enable that to occur. None of those steps were taken, and the failures were subsequently held to be acts of unlawful discrimination. The February report describes the Claimant as being still on antidepressants, having had ten counselling sessions, it refers to her use of an inhaler because anxiety had exacerbated her asthma, and her symptoms are described as similar to how they were before but worse after contact with work. Again, although it suggests she might be able to re-engage with work in due course, recommendations made to achieve that were not adopted by the Respondent.

36. Finally, the Tribunal had evidence from the Claimant and her brother-in-law Mr Pearl. That evidence, taken together, reveals a picture before the events in question of an independent woman committed to her work, having loyally worked for 40 years, who enjoyed social- and family-based activities and who was proud of her achievements. The change in her is described by Mr Pearl she sees herself as somebody with nothing to look forward to in the future and who remained depressed and distressed at the time of the Remedy Hearing. She had difficulty with sleeping on the occasions she stayed at his house, her distress was not eased by antidepressants, her concentration remained poor, she showed symptoms of hypervigilance when going to places for fear she would bump into people she knew, she suffered pressure headaches,

nightmares and was left with a feeling of emptiness. She lost interest in things she normally enjoyed, spoke of feeling isolated and described feelings of hopelessness. Mr Pearl explains that up to the point of the Claimant's dismissal she could be helped to some extent by thinking positively but that once dismissal occurred that option was no longer available. He described the position after her dismissal as the Claimant having lost interest in everything. He said that her antidepressants were increased again, she felt she had no purpose in life and any sense of self-worth had to be provided by her family. She herself describes her confidence as remaining low after the dismissal and as feeling overwhelmed and unable to cope with day-to-day things even after the Liability Hearing.

37. This was all evidence, taken together, that entitled the Tribunal to conclude that the Claimant was somebody who even at the date of the Remedy Hearing was simply not able to cope. She had suffered a depressive illness that continued up to that point. The Tribunal found that she was not exaggerating her condition in any way. The evidence entitled the Tribunal to conclude in effect that this was not a divisible injury. The point was not expressly addressed by the Tribunal, no doubt because it was not faced with any express argument to that effect advanced by the Respondent. We are entirely satisfied, however, that this is a case where the Tribunal was entitled to conclude that the Claimant had shown on balance of probabilities that the acts of unlawful discrimination found proved, from the manner in which the suspension meeting was conducted to the dismissal itself, caused or materially contributed to her depressive illness. That meant, in the absence of any evidence or argument to the contrary, that the Respondent was liable for the full extent of that harm or injury.

38. So far as concerns the question whether the Tribunal fell into error by characterising the Claimant's personal injury as "moderately severe" rather than "moderate" again we do not

accept the Respondent's argument that the Tribunal fell into this error. First, the guidelines provided by the Judicial College, helpful as they indeed are, are guidelines and not tramlines. They identify factors to be taken into account, but all cases do not fit neatly into a particular bracket. Each case requires individual judgment and an assessment as to the importance of a particular factor in the context of the particular circumstances of the case under consideration. Secondly, we are satisfied that this is not a case where the Claimant demonstrated any "marked improvement by trial", rather the reverse, as the Tribunal held. Thirdly, we have set out the evidence available to the Tribunal. It dealt with the Claimant's ability to cope with life and work. It dealt with the effect on her personal relationships and family relationships. It dealt with the extent to which treatment had been successful. Reports indicated that she had continued to use antidepressants throughout with an increasing dose over a substantial period, and that she had had counselling sessions as well but nevertheless remained symptomatic and unable to cope.

39. Mr Purkis relies in particular in this regard on the Tribunal's finding that the Claimant would be able to return to work within a period of a further nine months as demonstrating that this was not a permanent or long-lasting depression and as dictating that this injury fell within the moderate, rather than the moderately severe, bracket. We disagree. We accept Ms Moss' submission that a return to work is not the same as a return to comparable employment. Here, the Tribunal found that the Claimant was likely to return to work but not that she was likely to regain comparable employment. Her own evidence was that she contemplated obtaining low-level work as a cleaner but did not have the confidence to even contemplate a return to work as a carer. We regard that as a significant difference on the facts of this case.

40. The assessment of general damages for personal injury is not a science. It is a matter of fact to be determined by a tribunal and not susceptible to a successful appeal unless the Employment Tribunal is shown to have made an error of principle or to have arrived at a figure that is manifestly too high or too low so as to be capable of being treated as perverse. Once it is accepted, as we do, that the Tribunal was entitled to characterise this injury as moderately severe with a bracket of £15,000-£44,000, we can see no error of law or principle in the Tribunal's figure of £10,000 for personal injury, particularly when taken together with the injury to feelings award, producing, in effect, a total general damages award of £25,000. This falls squarely within that bracket. Having regard to the comparable awards to which Ms Moss has taken us and which were relied on by the Tribunal below, we consider that the award is entirely within the range of possible awards for a depressive illness of the severity and duration suffered by the Claimant. Indeed, we go further. On its own we consider that the award of £10,000 is on the low side. However, we are satisfied that is because the Tribunal also made an award for injury to feelings and was conscious of the potential for overlap and double recovery.

41. For all these reasons, we have concluded that there is no error of law in the Tribunal's award for personal injury in this case, and the appeal in that regard accordingly fails.

The Pecuniary Loss Award Challenge

42. The final ground of appeal and second challenge is as to the pecuniary loss award made by the Tribunal for unfair dismissal. Here too the Respondent contends that it is an error of law to make an assessment of future working prospects of a claimant in an unfair dismissal case without medical evidence, save only in low-level award cases where proportionality might drive parties and tribunals to address this point without medical evidence. For the reasons we have just given in relation to discrimination compensation awards, we do not accept this

argument. Tribunals are expected to deal with compensation for unfair dismissal in a rough and ready way, applying common sense and their best judgment to what is just and equitable in the particular case. The task involves an inevitable degree of speculation. A tribunal must make a best assessment of the stage at which an individual will regain suitable alternative employment. Common sense comes into play, and tribunals can be expected to make an assessment of realistic chances in such cases. They do so on the basis of all the evidence available and do not require medical evidence to make that assessment. Provided a tribunal takes account of all relevant evidence as to the realistic prospects of an individual's chances of obtaining alternative employment in the future having regard to the vagaries of life, it will apply the law correctly. Provided it does so, it is not for the Employment Appeal Tribunal to interfere. Here, we have no doubt that the Tribunal made its assessment on the basis of the evidence available and did so on a realistic and permissible basis. No error of law is accordingly disclosed. This ground of appeal too fails.

Conclusion

43. For all those reasons, the appeal fails and is dismissed.