JB1

EMPLOYMENT TRIBUNALS

Claimant: Mrs R S Kushimo

Respondents: (1) Union Bank (UK) Plc
(2) Union Bank of Nigeria Plc

Heard at: London Central **On:** 31 October 2017

Before: Employment Judge Auerbach

Members: Ms T Breslin
Ms L Jones

Representation

Claimant: Ms L Prince, Counsel

Respondent: Mr A Ohringer, Counsel

JUDGMENT

The unanimous judgement of the Tribunal is that compensation for the discrimination found to have occurred in this case is to be determined in accordance with the reasons for this decision.

REASONS

Introduction

1. At the conclusion of a full merits hearing in June 2017 the Tribunal gave an oral reasoned decision. Written reasons were subsequently promulgated on 2 August 2017. We refer to that first decision for the background to this matter.

2. In its first decision the Tribunal held that the Second Respondent ("the Bank") was liable to the Claimant in respect of two well-founded complaints of direct sex discrimination. These related to the following:

(a) On 10 July 2015 Mr Emuwa expressed his concern to Mr Ali that he could not see how the Claimant (then working in London on secondment to the First Respondent ("the UK Bank")) could cope with having acquired responsibility for five children in Nigeria, and this caused him to question whether her secondment should continue; and

(b) Mr Emuwa's decision to terminate the secondment and recall the Claimant to Nigeria, of which the Claimant was notified on 2 December 2015.

3. Our first decision addressed certain matters that were potentially pertinent to remedy. The matter then came back before the Tribunal for a further remedy hearing on 31 October 2017. We had a bundle of documents and heard oral evidence from the Claimant and, for the Bank, Miyen Swomen and Janet Ntuk. We had written submissions and heard oral argument from both counsel. We spent further time deliberating our reserved decision, which we now provide.

4. The parties had agreed a list of issues which fell potentially to be determined by us, although our decision on some points on that list might cause some other points to fall away.

Loss of Remuneration

5. The main focus of argument before us was on the question of compensation for loss of remuneration. We therefore start with this.

6. As set out in our first decision, on 2 December 2015 the Claimant was notified that her secondment was being terminated with effect on 31 December. Subsequently that date was put back to 4 March 2016 and the Claimant was instructed to report to work in Lagos on Monday 7 March. However, she did not do so. Then, on 31 March 2016, she resigned with immediate effect.

7. Against that background, the first issue for our consideration was formulated in the list of issues in the following way: "Did C's decision not to attend work in Nigeria and/or the decision to terminate her employment on 31 March 2016 break the chain of causation, disentitling her to compensation for loss of earnings beyond this date?" A footnote indicated that the Claimant did not agree to that formulation of this issue. It referred to paragraph 258 of the first decision, which identified an issue as to "how matters might have unfolded after 4 March

2016 or would have done", which it described as a *Polkey*-type issue[1], and different from a stand-alone causation issue.

8. As to that, we agree, as such, that the first issue identified in the list of issues is conceptually different from the issue identified in paragraph 258 of the first decision. However, in accordance with sections 119 and 124 **Equality Act 2010**, the approach to be taken to compensation for discrimination is, applying tortious principles, to assess (as best the Tribunal can) the true measure of loss that has been caused by the wrong. Within that context, *Polkey* questions invite the Tribunal to consider what would or might have happened, had there been no discrimination. That is because consideration of that counter-factual may throw light on the true measure of what has been lost. Causation issues engage with the underlying task in a different way, by inviting consideration of whether a given loss which was actually experienced, can be fairly viewed as having been *caused* by the treatment in question, as opposed to having a supervening or independent cause.

9. Just as we had (potentially) to engage with the *Polkey* issues thrown up by the facts of this case, so the Bank was entitled to raise its distinct argument that the Claimant's later actions in March 2016 broke the chain of causation, and to have that argument considered and adjudicated as well. The Claimant was fairly on notice of this point, and in fact engaged with it at the remedy hearing, including in Ms Prince's written and oral submissions. We therefore duly considered, and adjudicated, this causation issue.

10. The general approach to be taken in relation to such issues is the subject of a body of authority, which was discussed by the EAT (Underhill P, as he then was, and members) in **Ahsan v The Labour Party** (UKEAT/0211/10).

11. In that case, Mr Ahsan was found to have been the victim of unlawful discrimination and/or victimisation when he was not selected as a candidate for safe Labour wards in Local Government elections in 1998, 1999 and 2000. He claimed compensation in respect of loss of the allowances which he would have enjoyed, had he been elected to office. From the start of 2004 he had stopped paying membership fees. In elections in 2004 he stood for another party. That had led to his expulsion. The party argued that this sequence of events broke the chain of causation. The EAT agreed. It referred to the judgment of Laws LJ in **Rahman v Arearose Limited** [2001] QB 351, which "emphasises the unsatisfactory nature of mechanistic tests of causation and the need to recognise that the ultimate question is what loss the tortfeasor should as a matter of justice be held responsible for." Further on, it said: "But the real point is that it is well-established that a "but for" connection – so-called "cause in fact" – is not necessarily enough to found liability for the consequences of a wrongful act: we will not set out here the wealth of recent case-law on the topic (though **Rahman** … is central)."

12. Further on, the EAT considered an argument which drew on the earlier case of **Prison Service v Beart (No 2)** [2005] ICR 1206, in the following way:

[1] **Polkey v AE Dayton Services Limited** [1988] 1 AC 344 is generally cited as shorthand for issues of this sort, when the Tribunal is considering a compensatory award for unfair dismissal. But **Abbey National v Chagger** [2010] ICR 697 (CA) establishes that the same approach should be applied when considering an award for lost remuneration arising from an act of unlawful discrimination.

31. Ms Reindorf sought to counter that last point by reference to **Beart** (above). In that case the Prison Service had unlawfully discriminated against Mrs Beart by failing to make reasonable adjustments for a depressive illness from which she was suffering (caused or contributed to by its own conduct); and had subsequently unfairly dismissed her. Its discriminatory treatment had made her illness worse and had rendered her unable, for the foreseeable future, to work and so to earn. The Prison Service sought to limit Mrs Beart's claim to compensation for loss of earnings as a result of the discrimination by praying in aid the fact that she had been dismissed: that, it was said, was a supervening act which broke the chain of causation. (She would of course recover compensation for the dismissal, but the importance of the point was that any such award would be subject to the statutory cap, unlike any award for the consequences of the discrimination.) The Court of Appeal rejected that contention: its reasoning appears in the leading judgment of Rix LJ at paras. 26-40 (pp. 1216-1221). Among other things, Rix LJ referred to the principle enunciated by Waller LJ in **Normans Bay Ltd v Coudert** [2004] EWCA Civ 215 (see para. 46) that a defendant may not rely on a wrong which he himself has committed in order to reduce the damages which would otherwise flow from his tort. Ms Reindorf argued that, like the Prison Service, the Respondent was seeking to rely on its own wrong, namely the discriminatory conduct which had led to the Claimant leaving the party; and he was entitled to have the case remitted to the Tribunal for that issue to be decided.

32. One difficulty about drawing an analogy between **Beart** and the present case is that the alleged supervening act in the former, namely Mrs Beart's dismissal, had been explicitly held by the tribunal to be unfair (and thus in the relevant sense wrongful), whereas here not only has no finding been made that the suspension and/or investigation constituted unlawful discrimination but the Tribunal had no jurisdiction to make such a finding, at least as the basis of an award. It could, however, be said that the Tribunal would be entitled to make a collateral finding to that effect if it was necessary to do so in order to resolve an issue of compensation which was properly before it. But even if that is so we do not think that the two cases are on all fours. There was no question that Mrs Beart had suffered a loss of earnings from the prior acts of discrimination: she had been rendered too ill to work. It is, with respect, entirely understandable that the Court of Appeal was not prepared to regard that loss as notionally trumped by her subsequent dismissal. But the Claimant's potential claim for the consequences of the loss of political capital, i.e. damage to his chances of being selected by his party as a candidate, is for a loss which never in fact eventuated.

13. An issue of this type also arose in **Osei-Adjei v RM Education Limited** (UKEAT/0461/12). In its review of the authorities, the EAT (HH Judge Serota QC and members) cited **Corr v IBC Vehicles** [2008] ICR 372 (HL), and, specifically, a passage (at paragraph 15) in which Lord Bingham of Cornhill said:

The rationale of the principle that a *novus actus interveniens* breaks the chain of causation is fairness. It is not fair to hold a tortfeasor liable, however gross his breach of duty may be, for damage caused to the claimant not by the tortfeasor's breach of duty but by some independent, supervening cause (which may or may not be tortious) for which the tortfeasor is not responsible. This is not the less so where the independent, supervening cause is a voluntary, informed decision taken by the victim as an adult of sound mind making and giving effect to a personal decision about his own future.

The EAT also considered **Beart** and **Ahsan**, describing the latter as "authority for the proposition that in appropriate circumstances resignation, as opposed to dismissal, from a post can break the chain of causation for future losses."

14. In **Osei-Adjei** there had been a failure to make reasonable adjustments for the disabled claimant, and, for a time thereafter, he was unfit for work. Later, he resigned, but by that time adjustments had been made and he was no longer unfit for work. His distinct claim of constructive unfair dismissal failed. The Tribunal below had, held the EAT, also been entitled, in light of all the facts found, to conclude that the resignation had broken the chain of causation of loss flowing from the earlier act of discrimination.

15. In light of these authorities, Ms Prince accepted that, as a matter of law, the Claimant's resignation *could* be viewed as breaking the chain, but stressed that we were not *bound* to so view it. It was a matter for our appreciation. She invited us to conclude that the Claimant's decision not to report for work in Nigeria in March 2016, and then her resignation, clearly flowed from the Bank's decision to terminate her secondment (and the discriminatory comment in July 2015). These actions were also, she submitted, repudiatory breaches of the implied duty of trust and confidence; and there was no basis to conclude that these later decisions on the part of the Claimant were taken for any other reason.

16. Mr Ohringer, however, argued that these were independent decisions by the Claimant, first to refuse to report to work, and then to resign. He stressed that there had been no finding that, when the Claimant resigned at the end of March 2016, she did so in circumstances amounting to constructive dismissal. Further, while the claim form in this case had originally included a complaint of constructive unfair dismissal against the Bank, the Tribunal had, at a Preliminary Hearing, determined that it lacked international jurisdiction in relation to any alleged events in the period 4 – 31 March 2016, as a result of which that complaint had been dismissed. He submitted that this meant that the Tribunal could not now engage with this question at all; but in any case, there would have been no sufficient basis for such a finding. In short, the Claimant could not claim in the Employment Tribunal for losses alleged to arise from the termination of her employment in March 2016. She must do so, if she so wished, in Nigeria.

17. We need at this point to say more about the sequence of events in the period from when the Claimant received notice of termination of her secondment, on 2 December 2015, drawing on the findings already made in our earlier decision, and the further evidence we had at the remedy hearing.

18. The Claimant was plainly upset by the decision to recall her. It came without warning, and the letter of recall offered no explanation for it. Nevertheless, she immediately set about arranging the return of herself and her belongings to Nigeria at the end of December 2015, and the winding up of her affairs in the UK. When she emailed Messrs Emuwa and Kasongo on 14 December, she expressed surprise and dismay at the decision, but also stated that she did not question the Bank's judgment. While she asked for financial support, in particular because of the position regarding the lease of her London home, that email did not indicate any objection to returning to Lagos, nor request any reconsideration of the recall decision, as such.

19. At the same time, as we have described in the first decision, the Claimant began to explore whether there was any way that she could obtain a continued right to work in the UK. But she had *not*, we found, already decided at this point that she was not going to return to work for the Bank in Nigeria, nor that she would be resigning altogether. Rather, the position at this point was that her

preference was to remain in the UK. On the assumption that the Bank would not relent on its decision to recall her as such, she therefore began to explore her options for remaining in the UK, engaged in some other remunerative activity, and, in particular, the position regarding the immigration status needed to do so.

20. The recall letter offered the Claimant assurances about her remuneration package and terms and conditions on her return to Nigeria. But it did not say anything on the question of the specific role or post to which she would be returning. As to this, building on the findings in our first decision, but now drawing also on the further light cast on this aspect by Mr Swomen's evidence at the remedy hearing, our further findings were these.

21. We accepted Mr Swomen's evidence that the usual approach of the Bank was that the decision to recall someone from secondment as such, and the process of deciding to what position they would return, were distinct processes. Once someone has been recalled, there would then follow a separate process, led by the Nigerian HR team, in conjunction with local management, of identifying a specific role for the individual to take up upon their return.

22. In this case, we found, in line with that approach, as at 2 December 2015, when the Claimant was notified of her recall, a specific position in Nigeria had not yet been identified for her. Nor had this been done by the time of the Claimant's communications with Mr Swomen on 23 December. We accepted the Claimant's evidence that when, in her email of that date, she wrote that the focus should be "on what portfolio to offer me when I return", she meant, by "portfolio" to refer to what specific position she would be given on her return.

23. We found that Mr Swomen initially envisaged that the Claimant would be put in charge of one or other of the Bank's branches, and assumed that this would not be a problem to organise. However, at some point in 2016 the Commercial Director indicated that she should be given the Group Head Commercial Ikeja2 role referred to in the 29 March email, which would have overseen a group of 15 branches. The Claimant's case, before us, was that this was not a genuine offer, as that post was already occupied by someone who had been relatively recently recruited. However, we accepted Mr Swomen's evidence that, while this recruit had initially been assigned to cover that post, the Claimant would have been put into that post as a substantive position, and the new recruit given another role, had she taken up the offer and returned to work in Lagos.

24. We found in our first decision that the Claimant was, in general terms, concerned in December 2015 that her future with the Bank in Nigeria was (in her view) uncertain and potentially insecure, and this was certainly part of why she began to explore her options for staying in the UK. However, the tenor of the Claimant's email of 23 December was that, rather than attempting to revisit the question of the *timing* of when she would return, Mr Swomen should instead now be focusing on what it was specifically proposed that she would do, *upon* her return. But that email did not suggest that she was already of the view that the Bank's conduct meant that a return was not (or might not be) a tenable option at all. Its premise was, still, that she *would* be returning to work in Nigeria.

25. Further, drawing also on the evidence presented at the remedy hearing, we find that the Claimant also had strong *personal* reasons for wanting to explore the option of remaining in the UK, if she could find a viable way to do so,

whatever might prove to be the role proposed for her upon returning to work for the Bank in Nigeria. In short, this was because it remained her ambition, if possible, to bring her children to the UK and to raise and educate them there (or, possibly – another option she looked into – in Canada), rather than in Nigeria.

26. As a matter of fact, the extension of the return date to March 2016 that the Claimant was given in the mid-December exchanges, as well as addressing her concern regarding financial exposure for termination of her London lease, also gave her more time and breathing space to further explore, and work on, possible avenues of activity by which she might be enabled to remain in the UK.

27. Then came the attempt by Mr Swomen, later in December, to reopen the recall date, and have the Claimant return at the end of that month after all, but from which he then backed down in the face of her adverse reaction. Although, in giving evidence to us at the remedy hearing, he sought to deny that this was what had happened in their exchanges on 23 December, that testimony did not persuade us to revisit our previous findings of fact about that.

28. As we have recorded in the first decision, that particular episode shook the Claimant badly, and led to her going off sick for a time. In evidence at the remedy hearing she told us that it was after this that she first sought legal advice.

29. However, she then returned to work in London around the end of the first week in January 2016; and there was then – strikingly – a period of six weeks or so during which the Claimant continued doing her job in London, and received her appraisal, but during which there were no significant communications regarding the prospective termination of her secondment and return to Nigeria.

30. What did continue in January and February 2016, was her pursuit of potential avenues by which she might acquire the immigration status to enable her to remain in the UK, and engage in some new form of remunerative activity. However, these efforts did not come to fruition.

31. Then came the Claimant's solicitors' letter of 25 February 2016 asserting, for the first time, her allegations of discriminatory treatment and breach of contract. Our first decision sets out some aspects of the content of that letter. But we note here also that its conclusion was to the effect that what the Claimant was seeking was to be allowed to *continue working* on secondment in London. But, we note, notwithstanding the strongly-worded allegations that the letter contained, what was *not* suggested, at this stage, was that the relationship was (or may have been) fatally undermined by the Bank's conduct, nor that she was contemplating resigning her employment with the Bank altogether.

32. Similarly, after the response from Mr Swomen of 1 March 2016 reiterated the instruction to return to Nigeria, and report for work on 7 March, the Claimant's reply of 3 March indicated that she should not have to return to Nigeria now, until the dispute was resolved.

33. Further, in evidence at the remedy hearing, the Claimant said that it was her belief that, once she had, through a solicitor, threatened litigation, it became untenable for her to return to work for the Bank in Nigeria, as she would, because of that, in due course be asked to go. Mr Swomen said in evidence that there was no reason for her to suppose that. But for immediate purposes the salient

point is that, on her account, her solicitors writing in February 2016, coupled with this belief on her part, was a significant step on the road to her decision to resign.

34. Following the Claimant not reporting to work in Nigeria on 7 March 2016, there were then further communications from the Bank's solicitors on 16 and 29 March. They maintained, in the first of these, that the Claimant should still report to work, and asserted that the recall had been prompted by performance concerns; and, in the second of these, they set out what they said was the specific role that had been earmarked for her. In between the two, her UK Visa was cancelled on 18 March.

35. In evidence at the remedy hearing, the Claimant said that the raising of alleged performance concerns in the 16 March letter shocked and distressed her; and that this made her feel that she would rather resign than have the Bank (as she put it) destroy her record. The Claimant also said in evidence, that her uncertainty about the particular role referred to in the 29 March email, reinforced her fears for the future if she were to return to work for the Bank

36. Then, on 31 March 2016, the Claimant, through her solicitors, resigned. That letter complained of a number of matters, including the decision to recall the Claimant in December, the subsequent calling into question of the Claimant's performance, and the unsatisfactory features of the particular role proposed on 29 March.

37. The Claimant returned to live in Nigeria and found and started a job with another bank based in Lagos on 16 July 2017.

38. Against that background, our further findings and conclusions on the break-in-causation issue were these.

39. First, this case is *not* on all fours, factually, with **Beart**. In particular, Ms Beart was found to have been unfairly dismissed. In the present case the Tribunal found that the Claimant's employer was, at all times, the (Nigerian) Bank, and that employment only ended when she resigned on 31 March 2016. The complaint that the termination of the secondment was itself an unfair dismissal, by the UK Bank, therefore fell away. There has also been no finding that the eventual termination of the Claimant's employment in March was a (constructive) unfair dismissal, by the (Nigerian) Bank, or indeed that it in any other way, in itself, amounted to unlawful treatment by it.

40. That said, we do not agree with Mr Ohringer that the lack of any finding that the termination of the Claimant's employment (at the end of March 2016) was unlawful, and/or the lack of international jurisdiction to consider the constructive unfair dismissal claim in its own right, *necessarily* precluded the Tribunal from giving any further consideration to this aspect of matters. That is because a matter may yet be considered by the Tribunal, if it is a *collateral* issue, forming an essential component of a complaint of which the Tribunal *is* seized, even if it would not have jurisdiction to adjudicate a complaint about it, in its own right. (The passage cited from **Ahsan** above alludes to such a possibility.)[2]

[2] **Ahsan** presented a conceptually parallel situation to the present case, in this respect. There had been no finding that Mr Ahsan left the party in circumstances that amounted to unlawful treatment of him by the

41. However, even if the Tribunal had had jurisdiction to consider the claim of unfair dismissal (in respect of the resignation at the end of March), and even had it found such claim to be well-founded, it does not necessarily follow that we would have been bound to conclude that there was an unbroken chain of causation flowing from the acts of discrimination found in this case, to the termination of the employment in March 2016. That is still a different legal question; and it must be borne in mind, in particular, for example, that a constructive dismissal could come about through a chain of later events.

42. So, we return to the legal question with which we were actually directly concerned: whether the chain of causation was broken, or whether it continued, uninterrupted, through to, and beyond, the resignation at the end of March 2016. Again, this case materially differed from **Beart**. In **Beart**, as the EAT in **Ahsan** observed, there was a clear basis for concluding that the ongoing loss of earnings claimed did flow through from the original discriminatory treatment: that treatment had made Ms Beart unfit for work, continuing right through the period covered by her claim. In the present case, Ms Prince argued that the recall (coming on top of the earlier discriminatory act in July 2015) naturally and directly caused the Claimant's decision to resign at the end of March 2016. However, that was not our view of the picture which emerged from our findings of fact.

43. The fact that, if the Bank had not decided to recall the Claimant as and when it did, the events leading to the Claimant's resignation would not have happened in the way that they did, is plainly not sufficient to her case: the test is not one of "but for" causation. What matters is the Tribunal's appreciation of the significance of what occurred between that decision and the resignation.

44. As to that, to recap: the Claimant's initial reaction was to comply with the recall, unhappy though she was. Subsequently she raised issues about its *implementation* and obtained an extension. Her spell off work from the end of December was triggered by a later development: Mr Swomen's threat to renege on the extension. She returned to work in early January and continued to work until the end of her secondment. Even after her lawyers tabled allegations of unlawful treatment, they and she sought for the secondment to continue. In the background she was considering other options, affected by personal considerations. Only after the secondment had actually ended, and the further correspondence in March, did the Claimant resign; and her own evidence was that various developments in February and March influenced that decision.

45. That was a significant chronology of unfolding developments, both in terms of the Bank's conduct, and the Claimant's conduct, and of shifts in the Claimant's own thinking and stance at various points along the way to her resignation. Our conclusion was that, by the time of the Claimant's decision to resign, and in her act of resignation, if not before, the chain of causation of losses flowing from the acts of discrimination found in this case had been broken. The Claimant may or may not have a claim in Nigeria (or elsewhere) arising from the termination of her employment; but, accordingly, she cannot recover losses after that date as a remedy for the earlier acts of discrimination found by this Tribunal.

---

party; and, for tortuous reasons explained by the EAT, there was no jurisdiction to entertain such a complaint in its own right

46. We turn to *Polkey/Chagger* scenarios. A number of these were identified in the list of issues for our consideration. Each invited us to consider the chance or likelihood that, absent any discrimination as found, a given contingency or scenario would have occurred, and, as appropriate, when.

47. The first such scenario was that, absent the discrimination found, the Claimant's secondment would still have been terminated, and she would still have been recalled to Nigeria, because of concerns over her conduct/performance.

48. In her submissions Ms Prince argued (inter alia) that there was, in fact, no sufficient basis for serious performance concerns, that the Claimant had had no prior warning that there were such concerns that might lead to the termination of her secondment, and that, had she been treated fairly, and given such a warning, and targets for improvement, the Claimant would have been able to make sufficient improvement. Further, she had a good relationship with the incoming MD, Mr Phido.

49. However, the issue we had to consider was not what fair treatment of the Claimant in relation to performance issues might have demanded, and what would or might have happened had there been such fair handling: we were not considering a *Polkey* question arising from a finding of unfair dismissal. Rather, our focus had to be, solely, on what would, or might, have happened, absent the element of *discrimination*, but with events otherwise replayed unaltered.

50. We addressed the question of Mr Emuwa's reasons for deciding to recall the Claimant in paragraphs 240 – 257 of our first decision. As we set out there, we accepted that, as a matter of fact, there were serious and considerable performance concerns which persisted over the whole course of the Claimant's secondment; and we concluded that such performance concerns were the main reason for the recall decision. But they were not the only reason, and the sexist attitude which influenced Mr Emuwa's remarks in July 2015 also materially contributed to his decision to recall her. Hence, we, ourselves, posed the *Polkey* issue, at paragraph 257, which we are now considering.

51. Ms Prince's submission did not persuade us that there was any sufficient basis to reopen or depart from our earlier findings in this regard, nor did any of the further evidence presented to us at the remedy hearing materially add to the picture on this point. In light of those earlier findings, we concluded that it was likely, though not certain, that, absent the influence of sexism, as found, the decision to recall the Claimant on performance grounds would still have been taken. It would also likely still have been implemented when it was, which, as we described in our earlier decision, appears to have been thought to be the opportune time to do so. However, it is not certain that the decision would have been the same, or taken at the same time. Doing the best we can, we put the chances of the same decision having been taken at the same time, at 70%.

52. The next scenario arises, in effect, from the flip side of the scenario just considered. It is this. If (in the absence of the influence of discrimination) the Claimant had *not* been recalled when she was (the chances of which we have now put at 30%) would she have remained on secondment in the UK following what the Tribunal described in its first decision as the changing of the guard at the start of 2016? As to that, Ms Prince correctly submitted that, while we had

found that the changing of the guard was regarded as the opportune time to recall the Claimant, we did not find that it was a contributory reason for her recall. We agreed with Ms Prince that we had no basis to find that she would or might have been removed specifically because of the changes at the top of the UK Bank. This did not, therefore, alter the assumption that, on this scenario, she would have remained seconded at least until the end of March 2016.[3]

53. Next, the list of issues noted that it was common ground between the parties, that, if not recalled sooner, the Claimant's secondment would have ended at the end of five years from when it first began. But, in view of our finding that the relevant cut off date for her losses is 31 March 2016, that point no longer has any bite.

54. Next, we were asked to consider whether, if *lawfully* recalled to Nigeria (when she was in fact recalled), the Claimant would have still committed the misconduct set out in paragraphs 269 and 271 of our first decision; and, if so, the possibility that she might have been dismissed for it. As to that, in light of all our findings, we consider that the Claimant's reaction to being notified of her recall, in terms of wanting to pursue potential avenues for remaining in the UK, and the immigration status issues, would have been the same. So, it is a fair assumption that this conduct would still have occurred. However, realistically, we do not think the Bank would have found out about it, still less, taken any action in relation to it, before 31 March 2016. So this point, too, has no impact.

55. In oral submissions Mr Ohringer postulated that, if lawfully recalled around the time that she was, the Claimant might well still have decided to resign her employment altogether at or around the time when she did. Strictly, because, in view of our conclusion on the causation point, we have found that her losses stop on the date of her actual resignation in any event, this point does not need to be considered. But we observe, in light of all our findings, that, even had she been recalled in December 2015 without the element of discrimination behind that decision, or the earlier discriminatory treatment, we think it likely that she would still have decided to resign when she in fact did, with a probability of 2/3.

56. Next, we were invited to consider the possibility that the Claimant would have returned to Nigeria for her own reasons, even had her secondment not been terminated when it was. As we have found, while the Claimant had not, in the second half of 2015, progressed her efforts to bring her children to the UK, she did, at the end of the year, and on into early 2016, remain strongly attached to that goal, if it could possibly be achieved. There was, it seemed to us, a question as to whether she would, ultimately have succeeded in getting them to the UK, or whether, if at some point she did, the arrangement would have proved sustainable, in view of what we heard about the potential difference between child care costs in the two countries. However, once again, our focus was now on the period down to 31 March 2016, and, given her enduring desire during that period to bring her children to the UK, we did not think it realistic to suppose that, had her secondment not ended, she would have returned to Nigeria during *that* period. This scenario should therefore also be discounted.

---

[3] We should note that we do not think it realistic to suppose that the performance concerns would have entirely melted away, but, if not thought sufficient to warrant her recall in December 2015 (which is the premise of this particular counter-factual scenario), we do not think they would have so built up such as to impinge on her continued secondment in the further period down to 31 March 2016.

57. The remaining scenarios postulated in the list of issues concerned the possibility that, following a lawful recall to Nigeria (and the Claimant in fact returning to work in Lagos pursuant thereto) either the Claimant or the Respondent would, for some other particular reason, have terminated her employment thereafter. However, no such specific scenario was postulated beyond those already considered. Having regard to that, and the cut off date of 31 March 2016, this also adds nothing further material to the task of assessment of loss of remuneration flowing from the discrimination.

58. Next, the list of issues raised the question of whether the Claimant made reasonable efforts to find other work. This added nothing material to the issues that we have considered in relation to the period down to 31 March 2016. In relation to the period thereafter, in light of our conclusion on causation, it fell away. But we record, briefly, that, on the basis of the witness and documentary evidence presented at our hearing, including in particular the evidence of the efforts she *did* make to look for work, we would not have been persuaded that there was an unreasonable failure of efforts to mitigate on her part.

<u>Particular Elements of Lost Remuneration</u>

59. We turn to a number of particular items of remuneration identified in the schedule of loss produced for the remedy hearing.

60. As part of her remuneration package on secondment the Claimant receive an ex-pat allowance of £24,000 per annum. Ms Prince argued that, in considering the scenario in which she might remain seconded instead of being recalled, this formed an element of her loss. Mr Ohringer disagreed, on the basis that it fell to be treated as covering an expense, and so was not a loss, if the expense to which it related was also not incurred. However, it appeared to us that this was a true allowance, in a fixed amount, taxed as such, and not correlated to any particular actual expense. Accordingly, the net value of it, did, in principle, form an element of the loss incurred on this particular scenario.

61. Private Medical Subsidy and Luncheon Vouchers were also, in principle, recoverable elements of loss on this scenario. Again, in this case, as the payslips show, both were actual benefits given to the Claimant, not referable to reimbursement of expenses actually incurred.[4]

62. Loss of Dental Plan also featured in the schedule of loss, but Ms Prince indicated in oral submissions that this was no longer pursued.

63. Loss of Christmas Bonus should also form part of the reckoning of loss on this scenario. It was fair to assume that this would have been received.

64. The Claimant gave evidence that she, ultimately, paid £1000 for her flight back to Nigeria. The Bank would have, in principle, covered the cost of her return flight upon recall – potentially, the email trails show, of a much higher amount. The actual amount that she incurred is therefore also potentially

[4] There is an erroneous element of double counting in the schedule of loss, though, as the figure given for net monthly pay, drawn from the payslips, includes allowances which the schedule also lists separately.

recoverable. Ms Prince indicated that a claim for cost of shipping her possessions back to Nigeria was not pursued.

65. Performance bonus for 2015 is not recoverable. The fact that this was not received, was not a result of the discrimination. We were also asked to consider whether the Claimant would, or might, have got an annual performance bonus in 2016, but this item fell away in view of the cut-off date of 31 March 2016.

Injury to Feelings

66. We turn to the question of compensation for injury for feelings.

67. Our task here was to assess, on the basis of evidence, and the factual conclusions we drew from it, the quality and degree of distress and upset experience experienced by the Claimant, attributable to the discriminatory treatment found. Hence, we had to decide where it sat in the so-called *Vento* bands, as valued in accordance with the latest decisions of the higher Courts and the Presidential Guidance of September 2017.[5]

68. The schedule of loss also claimed aggravated damages. As the EAT's decision in **Commissioner of Police of the Metropolis v Shaw** [2012] IRLR 291 explains, these are themselves compensatory, but are intended to reflect the additional measure of distress which may be caused by certain aggravating circumstances, if found to be a feature of the given case.

69. In the present case it was clear to us that the first act of discrimination did (when she got to hear of it) cause the Claimant some real concern and distress, but this was, in and of itself, limited in nature. It certainly sits in the bottom half of the lowest of the three *Vento* bands, and the figure we put on it is £2500.

70. As to the decision to recall the Claimant, this plainly, from her evidence, caused the Claimant significant and sustained distress, arising in particular from the fact that, while it was not a dismissal, it brought about a major, and unexpected upheaval in her life. In light of all our findings about her experience of it, we consider that the fair measure sits somewhere in the middle of the middle band.

71. As to aggravated damages, Ms Prince submitted that the Bank had been high-handed in so far as it had (a) stated in the recall letter that discussions had been held regarding the Claimant's return to UBN, when they had not, (b) failed to inform her in that letter what role she would return to (and falsely stated on 29 March that the role had previously been notified); and (c) failed to provide any evidence of performance concerns until the day of the liability hearing.

72. As to (a) this was, it appeared to us, a by-product of a standard form or recall letter being used (indeed, as we have found, the one used for the Claimant's predecessor appears to have been recycled), and not a deliberate act. The fact that it came without warning was part of what upset the Claimant. As to

[5] Respective counsel's number-crunching used slightly different RPI figures. Ms Prince reckoned that, in this case, the middle band is from £7705.88 to £23,117. Mr Ohringer's bottom end figure was actually slightly higher: £8054.34. The difference is not material.

(b) this was a by-product of the usual way in which the Respondent approached decisions to end a secondment, with consideration of the next role coming after. As to (c) it would have been better (unpalatable to the Claimant though it would have been) to have given some indication of the reasons for her recall, and the absence of these for some time did contribute to her distress.

73. In all three cases, while we concluded that there were features here that did contribute to the Claimant's distress, we were inclined to think that none was such as to be properly categorised as attracting a separate award of aggravated damages. But, given they did contribute something, in any event, we record that, in their absence, we would have set damages for injury to feelings flowing from this act of discrimination at £14,000; but, taking account of them, we set the figure at £16,000[6], and make no award of aggravated damages. Had we thought they amounted, in law, to aggravating features, we would have made an injury to feelings award of £14,000 and an aggravated damages award of £2000.

ACAS Code Adjustment

74. Section 207A **Trade Union and Labour Relations (Consolidation) Act 1992** provides for a possible adjustment of awards, in relation to certain types of complaint (including under the 2010 Act). This arises if a relevant Code of Practice applies, and the Tribunal finds that the employer or employee, as the case may be, has unreasonably failed to comply with some provision of it. If so, the Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase or decrease (as the case may be) the relevant award by up to 25%.

75. In the present case, counsel on both sides argued that the ACAS Code of Practice on Disciplinary Procedures applied in relation to the decision to recall the Claimant from her secondment. Mr Ohringer submitted that the Claimant had failed to comply with it, because she could and should have raised her concerns about the decision to recall her by way of a formal grievance. The Code covers performance as well as disciplinary matters, and Ms Prince submitted that the Bank had failed to comply with it, by not taking the Claimant through some form of compliant performance procedure before deciding on her recall.

76. We agreed that the Code did have some potential application in relation to both aspects. However, we were not shown any specific internal grievance procedure that was available to the Claimant, and her concerns *were*, albeit only in February 2016, raised by her lawyers on her behalf, with an invitation to try to resolve them short of litigation. We were, in these circumstances, not persuaded that there was an unreasonable failure to comply with the Code on her part. We did think that the Respondent should have raised the performance issue with the Claimant in *some* way before implementing her recall on account of it, and this *was* an unreasonable failure to comply on its part. That said, we were considering here compensation for the discriminatory aspect, not unfair treatment as such. In all the circumstances we considered that it would be just and equitable for final compensation for lost remuneration and injury to feelings flowing from the decision to recall the Claimant, to each be uplifted by 10%.

[6] We do not make the actual award, as yet, because, as explained below, we may be asked to do so in a different currency.

Other Matters and Way Forward

77. At the hearing before us, it was agreed that, once provided with the present decision addressing the underlying issues of principle, the representatives were likely to able to come to an agreement regarding the actual figures for lost earnings and other remuneration resulting from the application of our decision, as to which currency our final award should be expressed in (and, if in Nigerian naira, the conversion rate), and as to any necessary grossing up calculation for tax purposes.

78. Counsel both agreed that interest will apply to our awards at the rate of 8%. In respect of awards to injury to feelings, it applies at the full rate from each date of treatment to the date of award. The representatives should also be able to agree the correct approach in relation to calculation of interest on the loss of remuneration award to be made in this case.

79. We have therefore refrained from giving a partial financial remedy judgment at this stage.

80. It may be that the parties will now be able to deal with all elements of final remedy by way of a settlement agreement. Alternatively, it may be that the Tribunal could be invited to give a final written remedy judgment by consent, and without the need for any further hearing, under rule 64.

81. Further directions will be given when this decision is promulgated.

Employment Judge Auerbach on 18 December 2017