EMPLOYMENT TRIBUNALS

Claimant: Mr J Andrews

Respondent: Greater Manchester Buses South Limited

Heard at: Manchester **On:** 20 June 2018

Before: Employment Judge Horne

REPRESENTATION:

Claimant: Ms R Levene, Counsel
Respondent: Ms R Wedderspoon, Counsel

Judgment having been sent to the parties on 25 September 2018 and the respondent having requested written reasons at the remedy hearing, the following reasons are provided:

REASONS FOR REMEDY JUDGMENT

Issues in relation to remedy

The liability judgment

1. By a judgment ("the liability judgment") sent to the parties on 19 January 2018, the tribunal concluded that:

   1.1. Neither respondent had directly discriminated against the claimant.

   1.2. The first respondent was liable for Mrs Ellis' harassment of the claimant on 10 December 2015.

   1.3. In all other respects the complaint of harassment was not well-founded.

   1.4. The first respondent did had not breached the duty to make adjustments by declining to appoint an independent investigator or mediator to deal with the claimant's grievance.

1.5. In all other alleged respects the respondents had breached the duty to make adjustments.

1.6. The first respondent had discriminated against the claimant arising from disability in the following respects:

1.6.1. Giving the claimant a formal warning for sickness absence on 21 September 2015;

1.6.2. On 10 December 2015 telling the claimant to speak to his doctor about changing his medication and warning him that his future employment was at risk is his attendance did not improve; and

1.6.3. Giving the claimant a final written warning for sickness absence on 13 January 2016.

1.7. In the other alleged respects the first respondent had not discriminated against the claimant arising from disability.

1.8. The first respondent had indirectly discriminated against the claimant in relation to his disability.

1.9. The claimant had been unfairly constructively dismissed.

1.10. The first respondent wrongfully constructively dismissed the claimant in breach of contract.

Damages for discrimination

2. In these reasons we consciously use the word "discrimination" as shorthand to include all the respondents' contraventions of the Equality Act 2010, including harassment, which does not come within the statutory definition of discrimination. In this respect we have opted for convenience over strict accuracy.

3. The claimant sought compensation for financial losses consequent upon the termination of his employment. His claim was limited to past loss of earnings: he did not seek compensation for future losses. His primary case was that his loss of earnings should be compensated by way of damages for discrimination. In the alternative, he argued that it should form part of the compensatory award for unfair dismissal.

4. In relation to financial losses as damages for discrimination, the tribunal had, first, to decide a legal question: in the absence of a finding that the constructive dismissal was itself discriminatory, can the claimant, as a matter of law, recover damages for losses caused by the termination of his employment?

5. There was an issue about whether the claimant had had the benefit of a bus pass in his employment with Selwyn's Coaches, but that point was conceded by the respondent in closing submissions.

6. It was both parties' view that the Employment Protection (Recoupment of Benefits) Regulations 1996 would not apply to compensation for loss of earnings if it was awarded as damages for discrimination.

7. The remaining disputes related to what would have happened had the respondents not discriminated against the claimant. In particular:

7.1. Would, or might, the claimant have resigned in any event?

7.2. If the claimant had remained in employment, how much sick leave would he have taken for non-HIV-related absences? (By the end of closing submissions,

neither party dissented from the proposition that the claimant would have received 30% less pay for a day's sick leave than for a day at work.)

8. Still under the heading of damages for discrimination, the tribunal had to assess the claimant's damages for injury to feelings and to decide whether or not to make a separate award of aggravated damages. There was no claim for damages for personal injuries.

9. Neither party sought to distinguish between the damages for which the first respondent is solely liable and those damages for which liability is joint and several between the two respondents. This may be no more than a reflection of the reality, which is that the first respondent will satisfy the entire award in any event. In the absence of any representation to the contrary, we assumed that the claimant did not seek to hold the second respondent personally liable for any component of the award. The liability judgment made clear that if our assumption was incorrect we would entertain an application for reconsideration.

Compensation for unfair dismissal

10. It was not disputed that, as part of his compensatory award for unfair dismissal, the claimant should receive £500 for loss of statutory protection. The parties agreed the basic award in the sum of £3,141.60.

11. We had to decide whether or not it would be just and equitable to reduce the claimant's basic and/or compensatory awards be reduced to reflect the claimant's alleged contributory conduct.

Wrongful dismissal

12. The claimant asked for an award of damages for wrongful dismissal as well as discrimination. Where those two awards overlapped, the claimant recognised that he could not recover twice, but asked the tribunal to make such award as more favourable to him. When it was suggested by the employment judge that the tribunal could award interest on damages for lost earnings during the notice period, but not for damages for breach of contract, the claimant did not dissent from that proposition. It therefore appeared unnecessary to consider any separate wrongful dismissal award.

Evidence

13. We considered evidence in an agreed remedy bundle and in a separate chain of emails that was supplied to us on the first day of the hearing.

14. We heard further oral evidence from the claimant, who confirmed the truth of his written remedy witness statement and answered questions.

15. We also have regard to the helpful skeleton arguments and submissions in writing from counsel for both parties.

Facts

16. These findings of fact should be read alongside the more extensive narrative set out in the liability judgement.

17. Before the discrimination started the claimant was already taking antidepressant medication, originally because of the death of his father. In September 2015 the claimant already felt aggrieved at the conduct of Mr Roughley in the July meeting and at Ms Ellis's omission to do anything when he complained about it. Although he would have felt that way even if there had been no discrimination, those hurt

feelings would have eased eventually over time, especially if the claimant had managed to obtain reasonable adjustments to his working pattern.

18. The warning on 21 September 2015 added to the claimant's hurt feelings by causing him anxiety over the future of his employment. In his words, he felt like he was "fighting a losing battle".

19. The claimant suffered further hurt feelings whilst on sick leave in November to December 2015. Had reasonable adjustments been made, he would not have been kept occupied in work for every day during that period. He would, in any event, have had some feelings of frustration at being out of work and on sick pay. But it would have been much less than he actually felt having been effectively forced to take the whole period as sick leave. As it was, he felt, in his words, "completely beaten down".

20. As a result of the meeting with Ms Ellis in December 2015 the claimant felt belittled, upset and worthless. We have already recorded in the liability judgement the difficult conversation the claimant had with his consultant and his determination to change his medication at a time when he otherwise would not have tried to have it changed. We have also described the pressure under which the claimant felt at that time. The claimant in his remedy witness statement, which we accept, also explained to us how stressful that meeting with the consultant was. Had it not been for the 21 September 2015 warning, and the 10 December 2015 meeting, the claimant would not have sought to change his medication at that time.

21. Doing the best we can without medical evidence, we accept the claimant's oral evidence to us that his normal pattern of medication regime changed roughly every 5-7 years. We see no reason why, if it hadn't been for the discrimination in September and December, that the claimant would not have continued with his November medication for a further 5 years or more. He had only just changed his medication by November 2015 and had undergone approximately one month of intrusive side effects. These are side effects effectively wasted by the fact that he had to start all over again in December 2015. The additional side effects of a new medication regime were, therefore, caused directly by the discrimination. In addition, the claimant had to suffer the uncertainty and anxiety of not knowing whether the new medication regime would work. Each time he changed his medication he was not to know whether his body would reject it or not.

22. The claimant in his witness statement has described extra intrusion and pain suffering and loss of amenity caused at the 3-month stage following a medication change and the review would involve various tests for whether the medication had been rejected or not, with the possibility of having to change his medication if part of it was rejected. This 3-month review would have had to have occurred in any event. The change of medication was not responsible for an extra 3-month review, because the claimant had not reached the 3-month mark by the time he changed his medication in December 2015.

23. The final written warning imposed in January 2016 caused the claimant to feel totally disheartened. He felt that Stagecoach were "intent on beating him down". His feelings at this time were strong enough for him to seek help from a solicitor funded by his mother.

24. In February 2016 the claimant was prescribed Venlafaxine, an anti-depressant drug. We have seen the Venlafaxine prescription in the bundle. It looks like an original prescription and not a repeat. In the absence of the medical notes, and

doing the best we can to interpret the claimant's witness statement, we take this to have been the first time that this particular anti-depressant medication was prescribed. This suggests to us that, at the very least, the events that were taking place in the claimant's work had prompted the claimant to see his general practitioner and seek a review of his antidepressant medication. The claimant remains on Venlafaxine to this date.

25. In April 2016 the claimant experienced a brief period of elation following the meeting with Mr Stafford. As we have found, his temporary joy was quickly followed by his lowest ebb. He broke down in tears in the yard and had to be comforted by Mr Wilson. He promptly resigned and shortly afterwards he made an attempt to take his life.

26. The tribunal attempted to recreate an imaginary world in which there had been no discrimination or other breaches of EqA against the claimant. Unanimously we found that the claimant would still have harboured a sense of grievance in April 2016. We disagreed, however, about how strong that sense of grievance would have been.

27. On this contentious point, the majority consisted of the two lay members. They thought that the claimant would inevitably have continued in his employment with the first respondent. In their judgment, there were no circumstances in which the claimant's feelings of resentment could have been strong enough to persuade him to resign. The only scenario in which they could envisage the claimant leaving the first respondent was one in which the claimant found a better-paid job, in which case he would not have suffered any loss. Another way of expressing the majority's view would be to say that, had there been no discrimination, there was no quantifiable chance that the claimant would have left his employment to his detriment.

28. Here is how the majority reasoned:

    28.1. The claimant had worked for the respondent for a number of years. During that time he had had to manage the effects of his condition and he had undergone a number of disheartening attendance management procedures, yet he had not left.

    28.2. The rates of pay offered by the respondent were better than comparable rates of pay in the industry. It would not have made financial sense for him to leave.

    28.3. Had adjustments been put in place in November 2015 (that is, had the claimant been given non-driving duties as and when they were available), the claimant's sense of grievance about Mr Roughley would have dissipated. The making of adjustments would have enabled him to place renewed trust in Mr Roughley's understanding of his condition and medication.

29. The Employment Judge saw things differently. He thought that there was a 20% chance that the claimant would have left in any event. The Employment Judge's reasons are based partly on the communications with the respondent at the time he resigned and shortly afterwards. It was clear from those communications that it was important to the claimant not only to secure two continuous rest days at the end of any 5-day working period, but also that those rest days should be on Saturdays and Sundays. In other words, he wanted to work Monday to Friday. As the liability judgment makes clear, the respondents would not have made that concession to him and could not have been reasonably expected to do so. It was

also important to the claimant that he worked precisely 9-5 hours. He thought it was unfair that this fixed working pattern was not offered to him when (in his mistaken belief) trade union officials had that privilege. Again, even had there been no taint of discrimination, the respondents would still have refused to give him those precise hours. The Employment Judge's view was that the claimant's sense of grievance following his treatment in the summer, whilst less acute at the time by April 2016 nevertheless had been present in his mind and contributed substantially to his decision to resign at that time. This was consistent with the tribunal's findings in the liability judgment about the claimant's reasons for resigning. Doing the best he could, the Employment Judge thought that the chance of the claimant leaving in the absence of any unlawful discrimination was 20%.

30. On one point, however, all members of the tribunal were agreed. Whatever the claimant's feelings of resentment at non-discriminatory events in April 2016, and whether or not those feelings would have been sufficiently powerful to persuade the claimant to resign, his feelings would not have been nearly so badly hurt in the absence of discrimination as they actually were. He may have looked around for employment that was slightly worse paid, for example Selwyn's Coaches, but the circumstances in which he looked for that would not have been nearly as distressing to him as the circumstances in which he found himself.

31. The claimant's sense of anxiety about his health and his working pattern substantially lifted in September 2016 when he started working on his school bus duties for Selwyn's Coaches. That was when he got the working pattern he most wanted. However, that dissipation of the anxiety still left the considerable foreboding that the claimant felt about having to give evidence to an Employment Tribunal. That sense of anticipation and dread was most keenly felt on the morning of tribunal hearing itself. It was not helped, from his point of view, by a letter he received from the respondent warning him that he might have to pay the respondent's substantial legal costs if he continued with his claim. He was legally represented at the time of receiving the letter.

32. After the claimant left his employment he believed that former work colleagues were ignoring him. His perception of being ignored continues to this day. As the claimant continues to work for other employers that feeling will gradually be less upsetting for him, although it will never full leave him.

33. The claimant has not told any of his new employers that he is HIV positive. We think that there is a causal connection between that fact and the discrimination he encountered. The connection may not necessarily be one with which the claimant himself actually agrees. We find that the failure to make adjustments and the harassment and the discrimination arising from disability made the claimant believe that he was being treated less favourably for the very reason that he had HIV. Our rejection of the direct discrimination complaint in the liability judgment indicates that we do not share his belief. But that does not mean that it was not genuinely held by him. We think that it is foreseeable that if an employer fails to make adjustments, discriminates arising from disability, and harasses the disabled employee, they may give that employee the mistaken impression that they are also directly discriminating against them and make them reluctant to disclose their HIV status to a future employer.

34. In January 2018 there was a substantial improvement in the claimant's state of mind when he learned of the liability judgment. When his solicitors told him that his claim had succeeded, he burst into tears of relief. Since that day he has felt

considerably better. We also have noted that the claimant has derived a lot of help and support from George's House Trust which had helped him to recover from the lowest ebb that he experienced shortly after leaving his employment with the respondent.

35. The claimant still harbours some residual anger and resentment towards the respondent. That was foreseeable at the time of the discrimination. These feelings only come to the surface on occasion. It tends to happen when something reminds him of his previous employment and the way in which he was treated. Here are two examples:

    35.1. The claimant became angry when he learned from a former colleague that Mr Wilson had reportedly made an offensive comment about him. We have not made a finding as to whether Mr Wilson made that comment or not. We do not think it would be fair to do so. The colleague has not given evidence to us, so it is hard to make a precise finding about what that colleague heard. More fundamentally, we have not heard from Mr Wilson and he has not had a fair opportunity to respond to the allegation. But we do not need to know what Mr Wilson *said* in order to find what the claimant believes he *heard.* We do not think that the claimant was making this part of his evidence up. Moreover, we think that the claimant's sense of anger was caused by the original discrimination. Had the claimant not been treated so badly, and had he not resigned, then it is unlikely that a colleague would have been reporting offensive remarks from his trade union representative. In our view it is foreseeable that discrimination will cause relations between the employee and employer to sour to the point where, after the termination of their employment the employee will learn about hurtful comments, whether accurately reported or not, that will cause them to relapse into their former sense of anger.

    35.2. Another brief relapse was triggered by the discovery that Ms Ellis had been promoted. It is unlikely that promotion of Ms Ellis was directly linked to the claimant's case at all. We do not believe that her promotion was intended as any kind of "slap in the face" to the claimant, or to send out any message that discrimination is considered in a dismissive manner by the respondent. But we do find that the claimant's anger on learning of Ms Ellis' promotion was a direct consequence of the original discrimination. The relapse was foreseeable. Where a manager harasses an employee and, following the employee's complaint of discrimination, that manager is then promoted, it is predictable that the employee might think that the employer was dismissive of their complaint.

36. Had the claimant remained in employment with the first respondent, he would have received gross earnings of £52,251.20 from 20 April 2016 to 21 June 2018. This amount is based on the average gross earnings of PCV drivers between during that period.

37. During the same period, the claimant actually earned gross pay of £38,277.47 from other employment.

38. The difference between what the claimant would have earned and what he has actually earned is £13,973.73 (gross).

39. The parties agree that, had the claimant received £13,973.73 extra income during this period then he would have paid tax and national insurance on that extra money

at an average rate of 25% of his gross earnings. These deductions reduce his losses to £10,480.30.

40. Had the claimant remained in employment with the first respondent, he would have had some absences from his employment for reasons entirely unconnected with his disability. On those occasions he would not have received full pay. Rather, he would have received 70% of his full pay by way of occupational sickness pay. We do not think that it would be more than few days per year. The substantial absences that took place during the years prior to his constructive dismissal were either as a result of his HIV or as a result of family bereavements that were unlikely to repeat themselves.

41. Whilst employed by the first respondent, the claimant had the benefit of a free Stagecoach bus pass. Its value has been agreed. Had the claimant remained in the first respondent's employment, he would have continued to receive that benefit. There is no equivalent perk from any of his subsequent employments.

42. It was the common position of the parties that the claimant will not be liable to pay income tax or national insurance on any of his award.

Relevant law

43. Before setting out the relevant legal principles in detail, the must first acknowledge the considerable assistance that we have received from counsel for both parties, in both their written and oral submissions.

Compensation in discrimination cases

44. The starting point is section 124 of the Equality Act 2010:

> (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
>
> (2) The tribunal may—
>
> (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
>
> (b) order the respondent to pay compensation to the complainant;
>
> …….
>
> (6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by a county court … under section 119.

Damages for injury to feelings

45. It is well established that compensation is not limited to financial losses but can include an award for injury to feelings. In *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102 the Court of Appeal gave guidance as follows in paragraphs 65-68:

> 65. Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.

> i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
>
> ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.
>
> iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.
>
> 66. There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.
>
> 67. The decision whether or not to award aggravated damages and, if so, in what amount must depend on the particular circumstances of the discrimination and on the way in which the complaint of discrimination has been handled.
>
> 68. Common sense requires that regard should also be had to the overall magnitude of the sum total of the awards of compensation for non-pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage. In particular, double recovery should be avoided by taking appropriate account of the overlap between the individual heads of damage. The extent of overlap will depend on the facts of each particular case."

46. Subsequently in *Da'Bell v NSPCC* [2010] IRLR in September 2009 the EAT said that in line with inflation the Vento bands should be increased so that the lowest band extended to £6,000 and the middle band to £18,000. However, a Tribunal is not bound to consider the effect of inflation solely pursuant to *Da'Bell*. In *Bullimore v Pothecary Witham Weld Solicitors and another* [2011] IRLR 18 the EAT chaired by Underhill P said in paragraph 31

> "As a matter of principle, employment tribunals ought to assess the quantum of compensation for non-pecuniary loss in "today's money"; and it follows that an award in 2009 should – on the basis that there has been significant inflation in the meantime – be higher than it would have been had the case been decided in 2002. But this point of principle does not require tribunals explicitly to perform an uprating exercise when referring to previous decided cases or to guidelines such as those enunciated in Vento. The assessment of compensation for non-pecuniary loss is simply too subjective (which is not a dirty word in this context) and too imprecise for any such exercise to be worthwhile. Guideline cases do no more than give guidance, and any figures or brackets recommended are necessarily soft-edged. "Uprating"

such as occurred in *Da'Bell* is a valuable reminder to tribunals to take inflation into account when considering awards in previous cases; but it does not mean that any recent previous decision referring to such a case which has not itself expressly included an uprating was wrong."

47. Paragraph 11 of *Presidential Guidance - Employment Tribunal awards for injury to feelings and psychiatric injury following De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879* states:

> "…in respect of claims presented before 11 September 2017, an Employment Tribunal may uprate the bands for inflation by applying the formula *x* divided by *y* (178.5) multiplied by *z* and where *x* is the relevant boundary of the relevant band in the original *Vento* decision and *z* is the appropriate value from the RPI All Items Index for the month and year closest to the date of presentation of the claim (and, where the claim falls for consideration after 1 April 2013, then applying the *Simmons v Castle* 10% uplift)."

48. There is one aspect of the *Guidance* that requires some qualification. It seems to us that awards of damages based on previous cases should be uprated for inflation, not just to the date on which the claim was presented, but all the way to the date on which the damages are assessed. That is not to say that the *Guidance* is wrong. There is nothing objectionable about uprating the *Vento* bands in line with the above formula, provided that the tribunal can then make further adjustments to the award to reflect the decrease in the value of money between the date of presentation and the date of assessment. In practice, this can be achieved by taking the value of "z" to be the RPI All Items Index for the month of the remedy hearing.

49. Where compensation is ordered, it is to be assessed in the same way as damages for a statutory tort (*Hurley v Mustoe (No 2)* [1983] ICR 422*,* EAT). it is on the basis that as best as money can do it, the claimant must be put into the position he would have been in but for the unlawful conduct of his employer (*Ministry of Defence v Cannock* [1994] IRLR 509*,* per Morison J at 517, [1994] ICR 918*, EAT*).

50. We have borne in mind some further general principles, for which we do not cite authority as we believe them to be uncontroversial:

    50.1. Damages for discrimination are compensatory, not punitive.

    50.2. The purpose of damages should be to restore the claimant to the position she would have been in had the discrimination not occurred.

    50.3. Tribunals should not allow any feelings of indignation at the respondent's conduct to inflate the award.

    50.4. Awards for injury to feelings should bear similarity to the range of awards made in personal injury cases. Tribunals should keep awards in perspective and not make them unduly low or high.

    50.5. In assessing the correct sum, tribunals should remind themselves of the value of the award in everyday life.

    50.6. The discriminator must take the employee as it finds him. This is sometimes known as the "eggshell skull" principle.

51. We have had regard to the *Judicial College Guidelines for the Assessment of Damages in Personal Injury cases, 14th Edition.* We considered the guidelines for psychiatric injuries to be of particular relevance. The reproduced version below omits the reference to the 10% uplift, which will be considered later.

> The factors to be taken into account in valuing claims of this nature are as follows:
>
> (i) the injured person's ability to cope with life, education and work;
>
> (ii) the effect on the injured person's relationships with family, friends and those with whom he or she comes into contact;
>
> (iii) the extent to which treatment would be successful;
>
> (iv) future vulnerability;
>
> (v) prognosis;
>
> (vi) whether medical help has been sought…
>
> **…(b) Moderately Severe** £15,200 to £43,710
>
> In these cases there will be significant problems associated with factors (i) to (iv) above but the prognosis will be much more optimistic than in (a) above. While there are awards which support both extremes of this bracket, the majority are somewhere near the middle of the bracket. Cases of work-related stress resulting in a permanent or long-standing disability preventing a return to comparable employment would appear to come within this category.

(c)	**Moderate** While there may have been the sort of problems associated with factors (i) to (iv) above there will have been marked improvement by trial and the prognosis will be good.	£4,670 to £15,200

52. Two points about the *Guidelines* are worth noting. One is that they related to diagnosed psychiatric injuries and compensate for something more than hurt feelings. On the other hand, they do not recognise, as the *Vento* brackets do, the additional and very real upset that follows from discrimination based on a person's inherent characteristics.

53. We have also borne in mind a number of examples of previous awards made by employment tribunals in earlier cases, to which Miss Levene drew our attention in her skeleton argument. We have no reason whatsoever to criticise Miss Levene's choice of examples. Nevertheless it is only natural for a representative to put forward examples that assist their client's case. We thought it prudent, therefore, to consider Miss Levene's examples alongside those to be found in *Harvey on Industrial Relations and Employment Law* (Section L, paragraphs 1050 to 1053).

54. When assessing awards for injury to feelings when more than one form of discrimination is involved, tribunal should have regard to the guidance set out in *Jumard v. Clwyd Leisure Ltd and others* [2008] IRLR 345, EAT. This states that were different forms of discrimination arising from the same discriminatory acts, it is appropriate for the tribunal to assess the effect of injury to feelings on a composite basis. However, where different forms of discrimination arising out of different discriminatory acts, the tribunal must assess the impact to injury to feelings separately with regards to those although also have regards to the global sum to ensure that it is proportionate.

Damages for post-termination losses

55. Where discrimination has resulted in the termination of employment, the employee may recover damages to compensate him for losses consequent on the termination. This is so even if the termination was not itself an act of discrimination: *CLFIS (UK) Ltd v. Reynolds* [2015] EWCA Civ 439 at paragraph 43.

56. Just as with other statutory torts, the claimant will not be awarded damages for a loss if that loss would have occurred in any event even if the discrimination had not occurred. Where, in the absence of discrimination, the claimant's employment might have terminated legitimately in any event, the tribunal may reduce damages accordingly: *Chagger v. Abbey National plc* [2009] ICR 624, EAT.

Aggravated damages

57. Aggravated damages are additional to any amount the tribunal may award by way of compensation for injury to feelings. There are various categories of case in which a tribunal may permissibly award aggravated damages. One of these is where the respondent has acted in a "high-handed, malicious, insulting or oppressive manner": *Broome v. Cassell & Co Ltd* [1972] AC 1027. It is important to the tribunal not to focus on the respondent's conduct and motive; it is the aggravating effect on

the claimant's injury to feelings but is important: *Rookes v. Barnard* [1964] AC 1129.

58. It may be appropriate to award aggravated damages in respect of the employer's post-dismissal conduct. Examples of such conduct include defending the discrimination claim in a particularly upsetting manner (*Zaiwalla & Co v. Walia* UKEAT 451/00), or making unfounded and malicious complaints about the claimant (*Bungay v. Saini* UKEAT 0331/10).

Contributory fault in unfair dismissal cases

59. Where the tribunal considers that the conduct of an unfairly dismissed employee, before the dismissal, was such that it would be just and equitable to reduce the basic award of compensation to any extent, section 122(2) of ERA requires the tribunal to reduce the basic award accordingly.

60. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, section 123(6) of ERA requires the tribunal to reduce the compensatory award by such amount as is just and equitable having regard to that finding.

61. To justify a reduction in the basic or compensatory awards, contributory conduct must be culpable or blameworthy and must have caused or contributed to the dismissal: *Nelson v. BBC No.2* [1980] ICR 110, CA. The tribunal must in addition be satisfied that it is just and equitable to reduce the award.

62. In deciding upon a contributory fault reduction, the tribunal must consider only the conduct of the employee and not that of the employer.

63. The amount of a reduction is a matter of discretion for the tribunal. Guidance as to the exercise of such discretion was given in *Hollier v. Plysu Ltd* [1983] IRLR 260. Contribution should be assessed broadly. Without fettering the tribunal's discretion, the EAT suggested the following categories: wholly to blame (100%), largely to blame (75%), equally to blame (50%) and slightly to blame (25%).

64. Where the unfair dismissal has been constructive, as opposed to a direct dismissal by the employer, it is not impossible for a tribunal to make a contributory fault reduction, although such cases are likely to be rare: *Shipperley v. Nucleus Information Systems Ltd* UKEAT 0340/06.

Conclusions

Discrimination: damages for financial losses

65. We are satisfied that the claimant's resignation was caused by the earlier acts of discrimination. Losses consequent upon the resignation can therefore be recovered.

66. Our majority decided that, but for the discrimination, the claimant would inevitably have remained in the first respondent's employment. He would have earned £52,251.20 and, as a consequence of the discrimination, has earned £13,973.73 less than that. Allowing for tax, his net loss is £10,480.30.

67. We make a further modest reduction to reflect our finding that the claimant would have had some sick leave on reduced pay if he had remained in the first respondent's employment. He would have had two years of a few days per year receiving 30% less pay. In our view, our finding is adequately reflected in a

deduction of £150.00 from the claimant's damages. We therefore subtract £150 from the sum of £10,480.30, producing a total of £10,330.30.

68. Our calculation of loss of earnings includes lost income during the period during which the claimant would have been working his notice had his employment been lawfully terminated.

69. To compensation for loss of earnings must be added the agreed sum of £3,069.08 to reflect the value of the claimant's lost Stagecoach bus pass.

70. The claimant's total damages for financial losses are therefore £13,399.38.

71. We calculate the mid-point of the claimant's period of loss to be 56.5 weeks before date of the remedy hearing. Applying a rate of 8% x 56.5 divided by 52 multiplied by £13,399.98 gives a figure of £1,164.72. That will be the award of interest on damages for financial losses.

Injury to feelings

72. The tribunal's first step was to work out what the *Vento* bands would be worth at today's prices. The middle band originally began at £5,000. In June 2018 the RPI All Items Index was 281.5 whereas at the time of *Vento* it was 178.5. After uprating for inflation, the lower limit of the middle band would now be: 281.5/178.5 x £5,000 = £7,885. Applying the same formula, the upper limit would be £23,655.

73. In our view, the claimant's injury to feelings fell within the middle band. It was triggered by a series of events spanning several months and its effects have lasted for over two years.

74. Essentially, we are compensating the claimant for:

    74.1. a period of approximately 2 months, that is September and October 2015, in which the claimant would have had hurt feelings in any event but as a result of the discrimination his hurt feelings were worse;

    74.2. a period of 5 months in which the claimant's hurt feelings gradually deteriorated to the point where, about 7 months after the discrimination started, the claimant broke down in tears in the yard, resigned, and shortly afterwards tried to take his own life;

    74.3. a period of gradual recovery with a marked milestone approximately at the anniversary of the start of the discrimination;

    74.4. a much greater improvement when the claimant gave his evidence two years after the start of the discrimination and a few months later felt vindicated by the tribunal's judgment.

    74.5. residual anger, surfacing occasionally, from which he may not ever entirely recover.

75. We have borne *Jumard* in mind and considered whether it would be appropriate to make a series of separate awards for the different acts of discrimination. Our conclusion was that a composite award would better meet the justice of the case. Whilst we found that different forms of prohibited conduct had occurred, they all related to the same protected characteristic. All of the acts of discrimination contributed to an overall sense of anxiety, worthlessness, and the sense that his employer was out to get him. It was already described as a continuing discriminatory state of affairs in our liability judgment for limitation purposes. In

our view it would be artificial to try and break down the damages into separate awards under separate headings.

76. In our view the *Judicial College Guidelines* serve as a useful comparison. It is hard to say that that the claimant has suffered a hurt of sufficient seriousness to justify an award in the middle of bracket (b) for psychiatric injuries. The claimant is largely recovered, with only residual hurt feelings which are not disabling. He has not been prevented from returning to comparable employment. Bracket (c) appears more fitting, but the award must reflect the claimant's extremely low ebb and long duration of residual effects.

77. Taking the *Vento* bands together with the *Guidelines* and previous decided cases, we think that the appropriate award of damages is £16,500.

78. The award must be increased by 10% following *D'Souza* and the *Presidential Guidance.* That produces a figure of £18,150.

79. The interest on the damages for injury to feelings is 8% multiplied by 1,005 days, divided by 365, multiplied by £18,150, making a total of £3,997.97. We did consider whether to calculate interest separately from different acts of discrimination at different times. For the same reasons as for our decision to make a composite award of damages, we thought that separate interest calculations would be artificial.

Aggravated damages

80. In our view this is not an appropriate case for aggravated damages. We were unable to make a finding about whether or not Mr Wilson had made the alleged remark. The promotion of Ms Ellis was not, on our findings, done deliberately to mock the claimant or to send out any message that discrimination would go unpunished. The relapses in the claimant's hurt feelings caused by the claimant learning of these events have already been taken into account when assessing damages for injury to feelings. The respondent's costs warning letter did not, in our view, stray outside the normal range of legitimate tactics in litigation, especially bearing in mind that the claimant was legally represented at the time.

Unfair dismissal

81. We did not think that it would be just and equitable to reduce the claimant's basic or compensatory award for constructive unfair dismissal. The claimant was entitled to resign. Whilst part of his reasons were based on an unrealistic expectation of a particular working pattern, our majority found that he would not have resigned if it had not been for the discrimination. The claimant did not conduct himself in any culpable or blameworthy fashion prior to the respondent fundamentally breaching the contract.

Employment Judge Horne

Date: 24 October 2018

JUDGMENT SENT TO THE PARTIES ON

15th November 2018

FOR THE TRIBUNAL OFFICE

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