Case Numbers: 1400140/2015
1401795/2015

EMPLOYMENT TRIBUNALS

Claimant: **Miss R Waiyego**

Respondents: **1 First Greater Western Ltd**
2 Mr J Linley

Heard at: **Bristol** **On: 31 July 2017 and 1 August 2017**
2 August 2017 in Chambers

Before: **Employment Judge O Harper**
Mr C Harris
Ms G Mayo

Representation
Claimant: **Mr G Yagomba, Friend**
Respondents: **Mr Brown, Counsel**

RESERVED JUDGMENT ON REMEDY

1. The first respondent is ordered to pay to the claimant in respect of psychiatric injury in relation to claim 1400140/2015 the sum of £22,000 together with interest thereon in the sum of £2949.84.

2. The first respondent is ordered to pay to the claimant damages for injury to feelings in relation to claim 1400140/2015 the sum of £19,800 together with interest thereon in the sum of £5316.50.

3. The first respondent is ordered to pay to the claimant the sum of £26,766.34 less any sum received by the claimant by way of state benefits during the relevant period in respect of financial loss (loss of earnings). Further representations in writing will be sought from the party as to the final calculation of loss of earnings to include interest at 8% from the mid-point date.

4. The first respondent and the second respondent are jointly and severally ordered to pay to the claimant damages for injury to feelings the sum of £8,800 in relation to claim 1401795/2015 together with interest thereon in the sum of £1659.50.

5. The Tribunal makes no award for aggravated damages nor does it impose a financial penalty.

6. The Tribunal makes the following recommendation: Those individuals about whom the claimant has complained in relation to the successful allegations should have their attention drawn to the findings of the Liability Judgment and the Remedy Judgment.

REASONS

1. This is the Reserved Judgment together with Reasons on remedy. The liability Judgment was sent to the parties on 6 June 2016 following a lengthy hearing which took place in February and March 2016. The claimant presented three claim forms alleging sex discrimination, race discrimination and disability discrimination. The claimant alleged numerous individual acts of discrimination commencing in March 2005 and concluding with allegations relating to events occurring in the summer of 2015.

2. The majority of the claimant's allegations were dismissed. Two allegations succeeded. The first in relation to claim 1400140/2015 that the respondent had failed to make reasonable adjustments pursuant to Section 20 of the Equality Act 2010 in relation to the delay in organising funding for cognitive behavioural therapy. The second successful allegation in claim 1401795/2015 was that the respondents had unlawfully discriminated against the claimant for something arising in consequence of her disability by failing to consult with the claimant regarding the reorganisation of the claimant's team in April to June 2015. This Remedy Judgment should be read in conjunction with the Reserved Judgment on Liability. The relevant statutory provision providing for the remedies which may be awarded for successful discrimination claims is section 124 of the Equality Act 2010. Section 124(2)(b) provides that the Tribunal may order the respondent to pay compensation to the complainant and section 124(2)(b) provides that the Tribunal may make an appropriate recommendation.

3. At a Case Management Hearing on 3 October 2016 the issues to be determined at the Remedies' Hearing were agreed and remain as follows:

(1) Did the claimant sustain psychiatric injury as a result of the two acts of discrimination which succeeded?

(2) If so, what is the appropriate award for damages including any financial loss?

(3) What is the appropriate award for injury to feelings?

(4) Should the Tribunal make any of the recommendations sought?

4. Case management directions were given for the instruction of a joint medical expert. Pursuant to those directions Dr S Hashmi, Consultant Psychiatrist was instructed as a joint expert to prepare a report for the Remedy Hearing. The letter of instruction was agreed between the parties. Dr Hashmi was sent a list of questions. He examined the claimant on 18 November and 23 November 2016 and provided a report sent to the parties on or about 30 December 2016. Following receipt of the report the respondent had a series of questions on his conclusions. In response to those questions Dr Hashmi provided an addendum report dated 22 July 2017.

5. The Tribunal has considered his report of December 2016 and his addendum report. In his report Dr Hashmi referred to various pieces of correspondence from Dr Indoe who had treated the claimant by providing cognitive behavioural therapy (CBT) and two reports from a Consultant Occupational Physician, Dr P Krishnan. He also makes reference to correspondence from the claimant's GP, Dr E Peace. We have considered all the various pieces of correspondence to which he has referred.

6. Case management directions were given for further witness statements to be produced on the matter of remedy. The Tribunal heard from three witnesses on behalf of the claimant Mr George Yagomba, a family friend of the claimant and her representative, Miss Monica Juma, a close friend of the claimant and Miss Jane Omondi another close friend of the claimant. Mr Yagomba was not challenged on his evidence. Miss Juma and Miss Omondi were asked a few questions in cross examination. They were able to give evidence on the claimant's mood and her appearance during the period late 2014 to the Spring of 2016. They gave evidence about assistance that they provided to her during the period when it appeared that her health was at the lowest point.

7. We heard further evidence from the claimant on remedy issues. She referred to earlier statements that she had made on the issue of disability and for the Liability Hearing.

8. We received in evidence a bundle of documents relating to remedy and we were referred to certain documents presented at the Liability Hearing, including a medical bundle.

9. We heard submissions from the parties. The claimant provided a detailed schedule of loss. In her schedule she puts injury to feelings in the sum of £30,000 in respect of each of the two successful allegations (the upper band indentified in the guidance in *Vento v Chief Constable of West Yorkshire Police (no.2) 2003 ICR 318*), damages for psychiatric injury in the range of £45,840 - £96,800 including a 10% uplift, financial loss in respect of expenses for care and assistance in the sum of £3,120 and loss of earnings during a period when the claimant was unable to work and no longer in receipt of full pay from September 2014 to March 2016. During the hearing the Tribunal was advised that if the claimant succeeded on this head of damage the figure for loss of earnings would amount to £25,766.34. The parties agreed the calculation. In her schedule the claimant listed

disbursements in the sum of £3,000. In submissions Mr Yagomba indicated that this claim was no longer pursued.

10. In addition to the above heads of damages the claimant also claims aggravated damages on the basis that she alleges that the respondents' ongoing conduct in relation to the successful allegations was oppressive and arbitrary and exacerbated the claimant's condition. Although uplift for breach of the ACAS Code was cited in her schedule of loss, the claimant was unable to identify any specific breach of any relevant Code. She therefore withdrew that argument. She submitted that the Tribunal should impose a financial penalty pursuant to Section 12A of the Employment Tribunals Act 1996. She also seeks three specific recommendations by way of remedy. Details of those recommendations sought will be expanded upon further in these Reasons.

11. The respondents have provided submissions by way of counter schedule of loss. They acknowledge that injury to feelings should be awarded in respect of the two successful complaints but contend that both awards fall within the lower band of the Vento range. They submit that the total award for injury to feelings for both successful allegations should not exceed £8,000. In relation to the claim for damages for pain and suffering and loss of amenity in respect of psychiatric injury the respondents' principal case is that the claimant has not proved that successful allegations caused psychiatric damage to her. They contend that the claimant was significantly unwell before either of the two successful causes of action occurred. They contend that the joint expert report does not distinguish between the well founded complaints and other incidents, explaining how the proven allegations affected the claimant's life. They contend that the claimant has not proved that it was more likely than not that the non-provision of CBT within a reasonable period of May to June 2014 caused any damage to her.

12. In oral submissions on behalf of the respondents it was contended that if the causation argument did not succeed, then it was not accepted that the claimant's psychiatric injury came within the category of severe injury. The Tribunal was referred to the Judicial College Guidelines for The Assessment of General Damages in Personal Injury Cases. Our attention was drawn to the sections on psychiatric damage generally and post traumatic stress disorder.

13. The respondents submitted that there was no evidence that the claimant required care and assistance and/or that she had paid for any care and assistance. The loss of earnings figure was agreed, although the respondent did not accept that the claimant had proved that her loss of earnings during the period when she was unable to work flowed from the successful allegations. If causation was proved, it submitted that the figure for loss of earnings should be reduced by a percentage (suggested at 50%) to reflect the probability that even if she had been provided with CBT earlier, she would have had sickness absence and/or that she would have been unable to work at full capacity and therefore would not have been in receipt of full pay. The respondents contend that the claimant failed to mitigate her loss as she did not secure CBT herself through either the NHS or privately.

14. The claimant accepts that she would be required to give credit for Employment and Support allowance received during the period that she was unable to work. The respondents conceded that housing benefit received should not be taken into account.

15. The respondents in the counter schedule challenge the claim for disbursements. This matter was resolved during the hearing with the claimant withdrawing this head of damage. The respondents contend that this is not a case where an award for aggravated damages was appropriate. The respondents accept that interest would be recoverable on any award. The respondents dispute that a financial penalty was appropriate in the circumstances and challenge the recommendations sought by the claimant.

16. The Tribunal heard oral submissions which expanded upon the schedule of loss and counter schedule and which made reference to the medical evidence before the Tribunal.

17. The Tribunal was referred by the respondent to the following cases:

- *Thaine v London School of Economics [2010] ICR 1422*
- *AA Solicitors Ltd and Ali v Miss S Majid UKEAT/0217/15/JOJ*

18. The claimant referred to the following cases

- *Olayemi v Athena Medical Centre and Dr A C Okoreaffia UKEAT/0140/15/LA*
- *The Secretary of State For Work and Pensions v Ms S Jamil and Others UKEAT/0097/13/BA*

19. We took all the above into account reaching our conclusions.

20. We found all witnesses truthful and credible. In relation to Ms Waiyego's evidence in assessing injury to feelings we took into account that the claimant related in her up-to-date witness statement incidents which were not related to the successful allegations e.g paragraphs 15.1 and 15.3 of her statement dated 10 July 2017. We were careful to separate those matters from the successful heads of claim in assessing injury to feelings. We have focussed on the impact of the two successful allegations. We did not accept that the claimant had incurred expenses in the sum of £3,120 for care and assistance because the claimant's two witnesses we found convincing and credible. They gave evidence that they helped and supported the claimant but had not received payment for doing. There was no evidence presented of any payment made by the claimant for care and assistance for doing so or for reimbursing family members for flights to the UK to visit the claimant. We concluded that the claimant had not proved that she had sustained any losses in that regard.

21. The Tribunal has decided to follow the structure of the issues identified during the Case Management Hearing of 3 October 2016 namely, firstly determine whether the claimant sustained psychiatric injury as a result of the two acts of discrimination which succeeded and then deal with the

appropriate award for damages including any financial loss, followed by injury to feelings and finally dealing with recommendations.

Psychiatric Injury

22. **Did the claimant sustain psychiatric injury as a result of the two acts of discrimination which succeeded?** We have considered carefully the report of Dr Hashmi sent to the parties at the end of December 2016 and his addendum report of 22 July 2017. In that report he has referred to correspondence and reports from various medical practitioners and we have considered those as well. We have considered the claimant's evidence and the evidence of her witnesses and in particular, the evidence of Miss Juma and Miss Omondi both of whom visited the claimant during the period mid December 2014 until March 2016. They witnessed her ability to care for herself and interact with others. We find as follows:

23. The claimant had a past history of developing post traumatic stress disorder, depression and anxiety following aggravated assaults in the period 2005 – 2006. She underwent CBT and was prescribed psychiatric medication for some months before achieving almost full recovery (paragraph 9 of Dr Hashmi's report). From 13 July 2007 until 18 April 2013 no antidepressants were prescribed.

24. In mid 2013 the claimant developed an episode of mental disorder which she attributes to experiences with her line manager and the first respondent (these experiences predate the first act of discrimination). We bear this in mind in coming to our conclusions as to whether either or both of the acts of discrimination caused psychiatric damage.

25. We note from Dr Hashmi's report that during his examinations of the claimant on 18 November and 23 November 2016 the claimant broke down in tears, had to leave the room on numerous occasions and struggled to focus on the conversation. She was unable to go through the events related to the past incidents and work environment in a co-ordinated manner. She could only hold conversations for a brief period prior to going into another episode of acute anxiety leading onto breaking down in tears. He concluded that the claimant was suffering post traumatic stress disorder, mixed anxiety and depressive disorder and panic disorder (paragraph 13 of the report). He noted that she was prescribed Sertraline, Pregabalin and Propranolol the first being an antidepressant and anti-anxiety medication, the second medication for generalised anxiety disorder and the third medication prescribed to treat physical symptoms of anxiety. She was also prescribed medication for migraine headaches.

26. Dr Hashmi reviewed the notes in relation to the impact of CBT on the claimant's health by considering Dr Indoe's report. Dr Indoe is a Consultant Forensic Psychologist.

27. In May 2013 the findings of Dr Indoe concluded that the claimant presented at that point in time with severe symptoms of anxiety, depression and panic disorder with severe impact of events limiting her functional ability.

28. By 19 November 2015 following eight sessions of CBT Dr Indoe described the situation as improved.

29. By 16 March 2016 Dr Indoe concluded that the claimant was ready to begin a phased return to work with support.

30. By 2 June 2016 Dr Indoe concluded that the claimant had made considerable progress.

31. By 29 June 2016 the claimant's depression was assessed at the moderate range. Her scores for anxiety, panic and social phobia were below critical clinical levels. The report supported the idea of a phased return to work.

32. By reviewing these reports Dr Hashmi concluded that in the nine months of receiving formal CBT and after completing twelve sessions of this psychological intervention, the claimant was improved in her symptoms of mental illness to the extent of being able to return to work.

33. He concluded that her fitness to return to work was evident from mid March 2016 onwards. He also concluded that had the claimant been provided with CBT immediately following the recommendations made in April 2014, it would have been highly unlikely that the claimant would have gone off sick. He concluded that she would have maintained her commitment with full-time employment and would have shown recovery and would have continued in her role. His report does not specifically deal with any impact on the claimant's mental health as a result of the second act of discrimination (non consultation).

34. We are satisfied on the balance of probability from the conclusions reached by Dr Hashmi that the failure to progress the provision of CBT caused the claimant psychiatric injury resulting in a decline in her mental health as described by Dr Hashmi at paragraph 13 of his report. In coming to our conclusions we noted that a finding had been made by Dr Phoolchund on 16th April 2014 that the claimant was fit to return to work with minor restrictions provided she had access to CBT. On the balance of probability had she received CBT promptly the claimant would have returned to work and would not have gone on sick leave (paragraph 17.3.8). We are not satisfied that the failure to consult with the claimant (the second successful allegation) caused or exacerbated any further injury. The medical report makes no direct correlation between this allegation and an injury or deterioration in her mental health. We therefore find that only the successful allegation in claim 1400140/15 caused psychiatric injury.

35. **The effect of the injury.** We are satisfied from the evidence of Miss Juma, Miss Omondi and the claimant that during the period from mid December 2014 until early 2016 from time to time the claimant was feeling very low with suicidal thoughts, that she neglected herself, her home and her personal relationships. Miss Juma and Miss Omondi visited the claimant on a reasonably regular basis every several weeks or so and assisted the claimant with household tasks such as laundry, cooking, cleaning, preparing meals, shopping and general assistance. They also prompted her with her personal hygiene at which they perceived she had neglected, prompted her

to comb her hair, shower and brush her teeth. She was unable to work from August 2014.

36. In the light of the medical evidence we are satisfied that the severe impacts of the condition on her day-to-day activities lasted from around the summer of 2014 until 15 March 2016. The claimant at this stage (March 2016) was ready to return to work and in fact returned to work in November 2016. Although the onset of symptoms dates back to some time in mid 2013, we have focussed on the impact of the failure to organise CBT which arose on or about late April 2014. We are satisfied from the evidence that the first act of discrimination caused psychiatric and psychological damage to the extent that there was a decline in the claimant's mental health having been assessed as fit for work provided that CBT was undertaken as at April 2016. We consider that it is appropriate to assess that damage under the heading of Psychiatric Damage Generally (The Judicial College Guidelines). We note the factors to be taken into account in valuing claims of this nature are as follows:

(1) The injured person's ability to cope with life and work.

(2) The effect on the injured person's relationship's with family, friends and those with whom he or she comes into contact.

(3) The extent to which treatment would be successful.

(4) Future vulnerability.

(5) Prognosis.

37. The claimant puts her injury in the severe range. We note that the guidelines indicate that in these cases (the severe category) the injured person will have marked problems with respect to factors (1) – (5) above and the prognosis will be very poor. We note that in the moderately severe category there will be significant problems associated with factors (1) – (4) above but the prognosis will be much more optimistic than in severe cases. While there are awards which support both extremes of this, the majority are somewhere near the middle of the bracket. Cases of work related stress resulting in permanent or longstanding disability, prevent a return to comparable appointment would appear to come within this category. We note that in the moderate category there may have been the sort of problems associated with factors (1) - (4) but there would have been marked improvement by trial and the prognosis will be good.

38. The respondent directed us to the Judicial College Guidelines on Post Traumatic Stress Disorder. We noted that cases within this category are exclusively those where there is a specific diagnosis of a reactive psychiatric disorder in which characteristic symptoms are displayed following a psychologically distressing event which causes intense fear, helplessness and horror. It did not appear to us having read Dr Hashmi's report that the claimant's injury was exclusively post traumatic stress disorder and therefore we decided that the appropriate category in which to consider an award is for psychiatric damage generally.

39. In coming to our conclusions we are satisfied that the symptoms which the claimant suffered fall within the moderately severe category. There were significant problems with the claimant's ability to cope with life and work, she was certified unfit for work from August 2014 until 19 March 2016, she experienced significant problems with her ability to look after herself and manage her household duties and her personal affairs, her social interaction was compromised and her injury affected her relationships. However, treatment has been successful; she returned to work in November 2016 and continues to work. There is no indication of significant future vulnerability.

40. We conclude that the appropriate award in these circumstances is £20,000 which in accordance with the guidance in *Simmons v Castle [2012] EWCA Civ 1039 and De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879* is uplifted by 10%. The award for psychiatric injury is therefore £22,000. We find that the claimant did not fail to mitigate her loss. She attended group CBT provided through her GP. This was not helpful for her. The recommendation was for one to one CBT. The claimant did not seek to pay for CBT privately herself. However her means were not substantial. There was no failure to mitigate in this regard. We therefore make no reduction to the award for injury. The sum attracts interest at the rate of 8% from the mid-point date, which falls at the mid-point between the date of the act of discrimination and the calculation date (the date the Judgment on remedy is issued). We consider the start date in calculating the mid-point date should be 1st June 2014 accepting that it might have taken 6 weeks from the date that CBT was recommended to organisation. The daily rate is £4.82. From 1st June 2014 until the calculation date (12th October 2017) is 1225 days. The mid-point date is therefore day 613. Interest is therefore awarded for 612 days which equates to £2949.84 (£4.82 x 612).

41. **The appropriate award for financial loss.** The claimant was in receipt of full pay during her initial period of sick leave commencing on 19th August 2014. She commenced a period of sick leave on half pay in April 2015 and then a period on nil pay. The agreed net loss during her period of sickness absence amounts to £25,766.34. We are satisfied that on the balance of probability that had the claimant received CBT as recommended she would not have been absent through sickness and she would have remained at work at full capacity. See Dr Hashmi's conclusion at paragraph 17.3.11. We therefore make no percentage reduction in the award for loss of earnings.

42. The claimant must give credit for sums received by way of Employment and Support Allowance. The claimant's schedule of loss is unclear as to the total received in benefits. It refers to receipt of £73.10 per week from April 2015 and £109.30 plus £36.20 from 5th August 2015 but no total sum has been provided. The Tribunal has insufficient information to reach a final calculation. This figure must be deducted from the calculation for loss of earnings. The parties are encouraged to agree a calculation. If agreement cannot be reached the parties are to provide the Tribunal with written submissions on this matter within 28 days of receipt of the Judgment.

43. We make no further award for financial loss. We refer to our earlier findings that there is no evidence presented of expenses incurred by way of care and assistance.

Injury to feelings

44. In coming to our conclusions to the appropriate award we bear in mind the general principles set out in *Prison Service and Others v Johnson [1997] ICR 275 EAT* Namely:

- Awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party.
- An award should not be inflated by feelings of indignation at the guilty party's conduct.
- An award should not be so low as to diminish respect for the policy of the discrimination legislation on the other hand, an award should not be so excessive that they might be regarded as untaxed riches.
- An award should be broadly similar to the range of awards in personal injury cases.
- The Tribunal should bear in mind the value in everyday life of the sum they are contemplating.
- The Tribunal should bear in mind the need for public respect for the level of the awards made.

45. We note that in applying these principles guidance has been given in the case of *Vento v The Chief Constable of West Yorkshire Police (2) [2003] ICR 318*. The Court of Appeal set down three bands indicating the range of award that it is appropriate depending on the seriousness of the discrimination in question.

46. We note that top band (£19,800 - £33,000) should apply only to the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in very exceptional cases should an award of compensation for injury to feelings exceed the top of the top band.

47. A middle band (£6,600 - £19,800). This should be used for serious cases that do not merit an award in the highest band.

48. A lower band (£660 - £6,600). This is 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 £660 (the bottom of the lower band should be avoided) as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

49. Dealing firstly with the successful complaint in relation to the delay in providing CBT. In summary, the claimant puts this at the top of the top band. The respondent contends that it should fall within the lower half of the middle band. Our conclusions are as follows:

50. We place the award for injury to feelings at the top of the middle band in respect of this successful head of claim. Our reasons for doing so are that there was a serious failure by the respondent (to progress the provision of CBT) because it had been recommended by its own Occupational Health Advisor. Both the claimant and the Occupational Health Advisor chased the respondent on this point. The claimant undoubtedly felt upset and isolated. She was ready to return to work but on 16 April 2014. Dr Phoolchund confirmed to the respondent that the claimant was fit for work with restrictions and recommended that she would benefit from CBT, requested that the respondent's were advised if this could be authorised so that appropriate arrangements could be made. There was thereafter some confusion as to how CBT should be provided whether through the claimant's GP or otherwise and then some delay during Ms Hagon's absence due to serious illness. There was thereafter, an unexplained delay in progressing the referral for CBT until Ms Davenport organised this in May 2015.

51. It was not one of those most serious cases. We find that there was no lengthy campaign of discriminatory harassment. We have not found that it was in any way malicious or in any way designed to cause the claimant distress. CBT was eventually provided. This resulted in a significant improvement to the claimant's condition which as a result enabled her to return to work in November 2016. She remains an employee of the respondent and has not lost her future career. We place it at the top of the middle band because there were significant efforts by the claimant and Dr Phoolchund to alert the respondent to the need to progress the referral to CBT throughout the relevant period. We accept that the claimant's feelings would have been significantly injured by the fact that despite her chasing emails and letters and that of the Occupational Health Practitioner the issue was not resolved until May 2015. We therefore conclude that the appropriate award is £18,000. In accordance with the principle in Simmons v Castle this sum is uplifted by 10%. The award is therefore £19,800. This award attracts interest at the rate of 8% from the act of discrimination (1st June 2014) until the calculation date. The daily rate is therefore £4.34. The number of days between the date of the act of discrimination to the calculation date (12th October 2017) is 1225. The award of interest is therefore £5316.50.

52. Turning now to the second successful allegation - the lack of consultation on changes to the claimant's team and role. This relates to the actions of the second respondent Mr Lindley (see the Tribunal's Judgment on Liability). We conclude that the appropriate award for injury to feelings is towards the bottom of the middle band. We come to this conclusion for the following reasons. We find that the lack of consultation would have added to the claimant's sense of isolation. However, this was a one off incident, the claimant was reassured within a short period of time that she would not be losing her job and would be slotted into the new role after a non-competitive interview. The process for re-engagement in the restructured team was explained to her in writing and was done so pretty swiftly after the letter advising her of the restructure and the impact on her role. The claimant has since returned to work within six months of that act of discrimination.

53. We accept that the correspondence would have come as a shock to the claimant and caused her hurt and distress and some feelings of worthlessness. However, we do not accept her contention that she was severely hurt as a result. So whilst this was a serious act of discrimination it was not the most serious. We find that it was not a deliberate action by Mr Lindley to humiliate, cause distress to the claimant but rather a decision which he took to delegate that task to the Trade Union representative Mr White. We have found that the reason that Mr Lindley did not approach the claimant directly was because he did not feel comfortable in contacting her. (See paragraph 160 of the Liability Judgment). We found that Mr Lindley made no proper steps to ensure that Mr White had made contact with the claimant that he could be satisfied that she had an opportunity to make representations on the reorganisation. We found that the action was likely to have worried the claimant and caused her anxiety.

54. We also concluded that the claimant was not at risk of dismissal, although the failure to inform her of the reorganisation was unfavourable treatment to her disadvantage the disadvantage being not having the opportunity to take part in the consultation process. We consider that an award of £8,000 properly reflects the award for injury to feelings in respect of this successful head of claim. In accordance with the principle in Simmons v Castle the award is uplifted by 10% to £8,800. The award attracts interest at the rate of 8% from the date of the act of discrimination (we identify this date as 4th July 2015, when the claimant was informed in writing of the restructure) to the calculation date (12th October 2017). The daily rate is £1.93. The number of days from the date of the act of discrimination to the calculation date is 860. The award for interest is therefore £1659.80 (860 x £1.93).

55. The claim for an award for aggravated damages

In considering whether an award for aggravated damages is merited we bear in mind the guidance in *Alexander v Home Office [1988] ICR 685, CA.* We note that aggravated damages may be awarded in a discrimination case where the defendants have behaved "in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination".

Further guidance was given by Underhill J in the case of *Commissioner of Police of the Metropolis v Shaw EAT 0125/11.* Three broad categories of case were identified. These were, in summary, firstly, where the manner in which the wrong was committed was particularly upsetting. Secondly, where there was a discriminatory motive. Thirdly, where subsequent conduct adds to the injury e.g where the employer conducts tribunal proceedings in an unnecessarily offensive manner.

56. We conclude that an award for aggravated damages is not merited because we do not find that the respondents acted in a high-handed, malicious, insulting or oppressive manner in relation to the two successful heads of claim. We refer to our conclusions set out at paragraphs 50 to 54 explaining our reasons for the awards for injury to feelings. We repeat those conclusions in relation to the claim for aggravated damages.

57. Financial penalty pursuant to section 12A of the Employment Tribunals Act 1996

Section 12A provides:

Financial Penalty
(1) Where an employment tribunal determining a claim involving an employer and a worker –
(a) concludes that the employer has breached any of the worker's rights to which the claim relates, and
(b) is of the opinion that the breach has one or more aggravating features,
The tribunal may order the employer to pay a penalty to the Secretary of State….

58. The claimant contends that there are aggravating features in the circumstances of the successful complaints and urges the Tribunal to order the first respondent to pay a financial penalty of £5000. She contends that the aggravating features are that the first respondent is a large organisation with dedicated HR support, the duration of the failure to rectify the unlawful discrimination despite reminders, the repetition of the breaches of employment rights and the deliberate, malicious and/or negligent behaviour on the part of the first respondent.

59. The respondent submits that the circumstances do not warrant a financial penalty being ordered. We note that section 12A of the ETA does not prescribe the features which employment tribunals should take into consideration when determining whether a breach had aggravating features; this is for the employment tribunal to decide, taking into account any factors which it considers relevant, including the circumstances of the case and the employer's particular circumstances. The employment tribunal should only take into account information of which it has become aware during its consideration of the claim. A non-exhaustive list of factors which an employment tribunal may consider in deciding whether to impose a financial penalty under this section could include the size of the employer; the duration of the breach of the employment right; or the behaviour of the employer and of the employee. Whether the respondent had a dedicated HR function may be a relevant feature.

60. We have considered both parties' submissions. We have found no deliberate, malicious or negligent behaviour on the part of the respondents. There were 2 separate acts of discrimination but these do not amount to repeated breaches of employment rights. We suspect that the claimant in making reference to repeated breaches of employment rights has in her mind matters, which were not found to be acts of discrimination (the heads of claim which were dismissed). We note that the first respondent is a large organization with a dedicated HR function. We note that there was a delay in rectifying the unlawful discrimination in relation to the claim of a failure to make reasonable adjustments (the provision of CBT). However we do not consider that these factors amount to aggravating features warranting a financial penalty. The circumstances of the successful heads of claim are in no way extraordinary.

61. Recommendations
Section 124(1)(c) provides that if the tribunal finds that there has been unlawful discrimination it may make an appropriate recommendation.

Section 124(3) provides:

An appropriate recommendation is a recommendation that within a specified period, the respondent takes specific steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.

62. The claimant invites the Tribunal to make the following recommendations indentified in her schedule of loss:

a) That by 17th December 2017, all members of the first respondent's HR function who provide guidance to managers dealing with long term sickness procedures, all managers at Mr Linley's level of management, and all employees who interact on a daily basis with, or in the same team as the claimant, to undergo training in disability discrimination matters, specifically issues related to mental health:

b) That the first respondent re-drafts its policies to include all forms of discrimination related to disability as well as implement a clear policy on long term sickness absence to cover pay and employee update/welfare check up documented, as well as draft a clear policy on reorganisation/changes to employee roles and structures as they relate and affect employees on long term absence due to sickness:

c) That the first Respondent provide Data Protection Act 1998 training especially on confidentiality of health, history and mental health condition and how it is shared within its organisation. First respondent to draft a policy requiring Head of Occupational Health and Well Being Managers to liaise with employees' Medical Experts only with their consent, in order to understand employees' health condition and support that needs to be put in place especially on mental health issues.

63. On behalf of the respondent it is submitted that recommendations are not appropriate in the circumstances of this case. It is contended by the first respondent that in any event it is not appropriate to make a recommendation regarding its obligations under the Data Protection Act 1998. We agree. We made no finding of any breach of data protection and there was no such head of claim before the Tribunal. The suggested recommendation at paragraph 62(c) above is not an appropriate recommendation. We make no such recommendation.

64. The recommendation which the claimant seeks at paragraph 62(a) above is in the Tribunal's view too wide ranging and impractical to make in view of the size of the first respondent's organisation. The organisation is a national one with thousands of employees. We have not been given figures as to the number of employees within the organisation's HR function or the number of managers at Mr Linley's level, however we assume that there would be a significant number of individuals at this level, many of whom would have no contact whatsoever with the claimant. Further it is likely because of the nature of the organisation and the claimant's role that she would come into contact on a regular basis with many individuals. The first respondent in any event has equal opportunity policies and training is put in place as appropriate. We decline to make the recommendation sought.

65. The tribunal declines to make the recommendation sought referred to in paragraph 62(b) above. The Tribunal has made no criticisms of the first respondent's relevant policies. The successful claim in relation to the failure to make a reasonable adjustment related to a failure to implement a recommendation to implement treatment (CBT). This was a one off failure not a failure in policy adherence. We do not consider it an appropriate recommendation to specify how the respondent should redraft its policies.

66. We conclude that a recommendation is appropriate to ensure that those individuals about whom the claimant has complained should be made aware of how the claimant has been affected both physically and emotionally by the acts of discrimination which we have found occurred. Such a recommendation would reduce or obviate the adverse effect on the complainant of the acts of discrimination by giving those individuals involved an insight into the impact on the claimant and should assist them with their interaction with the claimant. We propose the following recommendation: By 30th November 2017 the first respondent takes steps to draw to the attention of those individuals about whom the claimant has complained in relation to the successful allegations the findings in the Liability Judgment and Remedy Judgment in these proceedings. As we have not heard representations from the parties on this proposed recommendation any objection or comment on this should be notified to the Tribunal by 31st October 2017.

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Acting Regional Employment Judge O Harper

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Date: 12th October 2017