EMPLOYMENT TRIBUNALS

Claimant: **Mrs UD Ale**

Respondents: **(R1) Mr Arjun Chugani,**
Mr Vijay Chugani,
Mrs Preeti Chugani

(R2) Secretary of State for Business, Energy and Industrial Strategy

Heard at: **Leicester**

On: **13 November 2017 – Hearing Day**
14 November 2017 – Reserved Judgment

Before: **Employment Judge Hutchinson**

Members: **Mrs B Tidd**
Mr C Bhogaita

Representation

Claimant: **Ms H Hill, Queens Counsel**

First Respondents: **Ms C Jennings, Counsel**

Second Respondents: **No appearance**

RESERVED JUDGMENT on REMEDY

The unanimous judgment of the Employment Tribunal is as follows:-

1. The First Respondents are ordered to pay compensation to the Claimant in respect of their failure to provide a statement of initial employment particulars in the sum of **£1,916.00**.

2. The Tribunal makes no award of compensation in respect of the failure to provide an itemised pay statement.

3. The First Respondents are ordered to pay to the Claimant compensation for unfair dismissal namely:-

Basic award	-	£950.00
Compensatory award	-	£34,491.60
Total award	-	**£35,441.60**

4. No award is made under the National Minimum Wage Act 1998 and the 1999 Regulations.

5. No award is made in respect of the breaches of the Working Time Regulations 1998.

6. The First Respondents are ordered to pay to the Claimant compensation for race discrimination as follows:-

Injury to feelings	-	£19,000.00
Personal Injury	-	£2,000.00
Aggravated damages	-	£7,500.00
Exemplary damages	-	£5,000.00
Financial loss	-	£66,420.00
Interest	-	£25,058.76
Total	-	**£124,978.76**

7. The Tribunal declined to gross up the awards at this stage but will review its decision if it is found that tax and national insurance is payable on the award.

REASONS

Background to this Hearing

1. At a hearing conducted by this Tribunal in July 2017 we made a determination on liability in this claim. At the time the Claimant was represented by Ms Price of Counsel and the Respondents were not professionally represented.

2. Throughout the proceedings the Claimant has been represented by Solicitors from the Anti Trafficking and Labour Exploitation Unit.

3. At the hearing we found most of the claims proved. There is a mistake in the judgment (not in the reasons) where we referred to the sex discrimination claims being successful. They were not and we agreed to deal with that matter by way of a correction. That correction will accompany this final decision.

4. It means that in the judgment; paragraph 6 will be amended to exclude the reference to sex discrimination and paragraphs 7 and 8 will be deleted entirely. Paragraph 7 is deleted because we did not make a finding that the Claimant had

suffered direct race discrimination as we felt that unnecessary in view of our findings in respect of harassment.

5. The judgment had been sent to the parties on 16 October. On 30 October 2017 Solicitors who were now instructed by the Respondents wrote with an application for reconsideration of the judgment. On 8 November 2017 the Tribunal wrote to the parties to inform them that I had considered the matters set out in the Representative's letter of 30 October 2017 and that I considered that there was no reasonable prospect of the original decision being varied or revoked.

6. I had not provided full reasons in respect of my decision but at the hearing I agreed that I would provide such reasons now.

7. The contention was that it was necessary and in the interests of justice to reconsider the judgment specifically the following:-

> 7.1 The finding that the Claimant was subject to harassment related to her sex.
>
> 7.2 The finding of harassment generally.
>
> 7.3 The finding that the Claimant worked 99 hours per week for the purposes of her wages claim.

8. I agree that the Tribunal did not make any finding that the Claimant was subject to harassment related to her sex. This is dealt with above and will be dealt with by way of a correction in the judgment.

9. The second ground of complaint related to the finding that the Claimant had been subjected to harassment on the grounds of and related to her national origin namely she was Nepalese.

10. It is acknowledged in the application that we found in paragraph 143 of our reasons that there were 6 categories of acts of harassment.

11. It was contended that the findings as to two of the allegations of conduct were unsafe. It was said that this was because;
(a) the Tribunal had omitted to consider and deal with fundamental evidence that was central to these issues; and
(b) matters were not appropriately put to the relevant witnesses under cross-examination.

12. The allegations were;

> 12.1 The Respondent had failed to permit the Claimant free movement and association. It was submitted that this finding was contrary to the evidence. I disagree with that contention. As we found in paragraphs 67 and 68 of our reasons we were satisfied with the Claimant's evidence that she was generally not allowed to leave the house and I am satisfied that there was ample evidence given by the Claimant to substantiate that allegation.

12.2 Only allowing the Claimant to see her husband for 2 hours per week. In respect of this we accepted the evidence of the Claimant that she was working 99 hours per week for the Respondents and as we found in paragraph 62 of our reasons that working 7 days a week meant that she had few breaks other than a 2 hour break on Saturday afternoon shows she could spend some time with her husband who was than "allowed" to visit her.

13. For these reasons I am satisfied that the application for reconsideration in respect of ground 2 has no reasonable prospect of success.

14. In respect of ground 3 the request is to reconsider the finding the Claimant worked 99 hours per week. Again I am satisfied that there was adequate evidence from the Claimant to justify our finding that she worked those 99 hours per week. The Claimant produced a schedule of the work she undertook for the Respondent. We accepted her evidence. I am satisfied that there was ample evidence to justify our findings that the Claimant worked the hours set out in her schedule.

15. I am satisfied that it is not in the interests of justice and in furtherance of the overriding objective to allow the application of a reconsideration of the judgment.

16. I would point out that the Tribunal heard this case over a number of days. There were three hearing days when we heard evidence. All of the First Respondents gave evidence on oath. We preferred the evidence of the Claimant and her witnesses and our findings of fact are final. There should be finality in proceedings and I am not prepared to allow the Respondents to relitigate the matter before this Tribunal.

The Nature of this Remedy Hearing

17. When I originally listed this matter for hearing I agreed with the parties that the hearing in July would decide on the facts whether the Deduction from Wages (Limitation) Regulations 2014 are in engaged i.e. whether there had been an unlawful deduction of wages. It was agreed that if so there would be a second merits hearing with the Secretary of State attending to consider the Claimant's contention that the regulations should be dis-applied. This was called the Limitation Regulations point.

18. As the Claimant was successful at the merits hearing in July it was anticipated that this second merits hearing would be conducted on 13 and 14 November 2017.

19. Subsequent to the judgment and reasons issued and sent to the parties on 16 October 2017 I received a further communication from the Claimant's solicitors on 26 October 2017.

20. I was informed that it was the Claimant's Solicitor's view that the two year point under the Limitation Regulations was no longer engaged. This was because the Claimant could recover full compensation for failure to pay the National Minimum Wage under the Equality Act 2010. This was because of our finding in Paragraph 143 of the judgment namely:

> "We are satisfied that the conduct of the Respondents amounted to harassment on the grounds of her race. The acts of harassment were: … failing to pay her the National Minimum Wage."

21. It was the Claimant's Solicitor's contention that the Claimant could recover under the Equality Act 2010 for this failure to pay from the start to the end of her employment. I was told that they would not seek a remedy under Section 13 of the Employment Rights Act as this would constitute double recovery.

22. They asked for the hearing of 12 and 13 November 2017 to be kept in the list and converted to a remedy hearing only. The Secretary of State (R2) would therefore not need to attend.

23. I also received a letter form the Government Legal Department on the same date supporting that contention. I wrote to the parties on 8 November confirming the position saying also that if it was determined at the hearing that the two year point was still engaged a case management Preliminary Hearing would be convened to give further directions.

The Hearing

24. At the hearing on 13 November the Claimant was represented now by Henrietta Hill QC and the Respondents were represented by Caroline Jennings of Counsel.

25. Ms Hill had produced a bundle of documents which comprised:-

25.1 The original judgment on liability.

25.2 An updated schedule of loss.

25.3 The liability statements of Mr and Mrs Ale.

25.4 New remedy statements for Mr and Mrs Ale.

25.5 Medical reports.

25.6 Addendum to those medical reports.

25.7 A letter from the immigration solicitor.

26. We were referred to the schedule of activities. We also heard evidence from Mr and Mrs Ale. The evidence given by Mr and Mrs Ale was not in dispute.

27. We then heard oral submissions both from Ms Hill and Ms Jennings who took us through their skeleton arguments and referred us to case law that was relevant to the issues that we had to determine.

28. In respect of her unfair dismissal claim it was agreed that she was entitled to a basic award and loss of statutory rights of £450.00. The basic award was £950.00. The matters that were in contention that we had to determine were as follows:-

28.1 Could the Claimant recover lost earnings under her race discrimination claim?

28.2 What losses should she be compensated for in respect of her loss of wages?

28.3 What were her past losses?

28.4 What were her future losses?

28.5 What award should we make for injury to feelings?

28.6 What award should we make for personal injury?

28.7 Should we make an award for aggravated damages and if so how much?

28.8 Should we make an award for exemplary damages and if so how much?

The Facts Relevant to the Issues of Remedy

29. In our findings of fact in respect of the liability judgment we set out the circumstances of the Claimant up to her leaving the employment of the Respondents. They recount that the Claimant came from a very poor family in Nepal. It was a place where it was hard to make a living or indeed have enough to eat. Mr Ale had come to the UK first and we have already detailed the efforts that Mrs Ale made to join her husband.

30. The reason for them coming to the UK was to earn enough money which they could send back to Nepal and ensure that their son received a good education. This would enable him to obtain a good job. They did not want him to have to earn his living as a farmer and they quite understandably wanted a better future for him.

31. In Nepal the state only provides limited education. Mr and Mrs Ale wanted their son to go to university and so when Mrs Ale left Nepal they sent their son to boarding school in respect of which he had to pass an exam.

32. When Mrs Ale came to the UK it was the couple's wish that they could live together and support their son. It is clear that they love each other and it was important for them to be able to live together.

33. As described in our liability judgment Mrs Ale was stuck in India for four years where she lived in isolation and she was not paid at all. She was understandably relieved and happy to finally get to the UK expecting that she would be able to live with her husband.

34. We are satisfied that it was very upsetting for her to be separated from her husband again. She only received from the Chugani family £120.00 per month and whilst it can be seen that she sent the majority of this money home for her son it was not sufficient to send him to university. Mr and Mrs Ale were worried that their son had to stop studying whilst she was at the Chugani's house because she could not afford it and he could not go to university.

35. We do not agree with the contentions of the Chugani's that the Claimant appeared to be happy. We accept that she was unhappy and that her unhappiness got worse over time. She worried that she was not earning enough money and she could see no future for herself and her husband if they could not live together.

36. She suffered from lack of sleep, forgot things easily and could not concentrate. She would also wake up in the night and her sleep was interrupted. As a result she often felt tired during the day.

37. We are satisfied that she had a feeling of hopelessness and often cried because she was so upset with her position. She had planned to give herself, her husband and her son a better future but could see no way that this would be achieved.

38. Interestingly she says that if she had been treated properly by the Chugani's she would not have left. This would have been if:-

- They had paid her properly
- Let her live with her husband
- Let her have evenings and weekends off
- Allowed her holidays
- Made her work reasonable hours

39. We accept that if the Chugani's had treated the Claimant properly as described above she would have been happy and she would have remained in their employment.

40. Mrs Ale has been much helped by Kalayaan the charity who provide assistance to those who have been trafficked. They helped her to make an application as a victim of trafficking and she has received a first stage decision from the Home Office who have found that it was reasonable to believe that she was a victim of trafficking. She is awaiting a final decision. We have seen the letter from her immigration solicitor Julian Bild from the Anti Trafficking and Labour Exploitation Unit ("ATLEU"). He explained that the current position is that Mrs Ale has no leave to remain in the UK. Her only previous grant of leave expired on 22 June 2015. She has no right to remain in the UK. She is an "overstayer" and not entitled to work and it would be a criminal offence for her to work in these circumstances.

41. Mrs Ale is awaiting a final decision from the National Referral Mechanism ("NRM") for victims of trafficking. A final decision is known as a "conclusive grounds decision". It may be that she is granted a period of discretionary leave if that decision is positive, at which point she will be entitled to work. If she is unsuccessful the solicitor may apply on alternative grounds for Mrs Ale to stay in the UK and work here. Mr Ale has indefinite leave to remain in the UK and it may be possible to apply to stay and work on grounds of her family life. Mr Bild describes that there are "reasonable prospects of her being granted discretionary leave as a victim of trafficking and/or leave on the basis of her family life in the UK".

42. He describes how that it is not possible to establish the time frame for these applications and says that it is not unusual for the NRM Competent Authority to take up to two years to make a conclusive grounds decision.

43. At this stage whilst there are "reasonable prospects" of the Claimant staying in the UK we cannot be certain. After all her efforts to be with her husband we are satisfied that it is the Claimants wish to remain in the UK. Mrs Ale is learning English at the moment and hopes to be able to work in a job such as cleaning if she is allowed to do so. Mr Ale is now working and earning a reasonable wage and they have now been able to afford to send their son to university where he is studying science. He hopes to study medical science if his grades are good enough and they can afford it.

44. We have seen the psychiatric report from Dr Chiedu Obuaya dated 9 November 2017 (pages 71-83). He describes how Mrs Ale has suffered from "nervous tension" for 3-4 years. He describes Mrs Ale as fulfilling the criteria for a mixed anxiety and depressive order. This was rated using a standard, well validated interview based psychiatric rating scale, the Beck Depression Inventory. The Claimant's score was 19 out of a possible 63 which was indicative of the presence of borderline symptoms of a depressive episode.

45. He has recommended a course of cognitive behaviour therapy and interpersonal therapy. He describes the Claimant's long term prognosis as likely to be very good.

The Law

Unfair Dismissal

46. In this case the Claimant does not apply for reinstatement or reengagement. She seeks compensation. She is entitled to:-

46.1 A basic award provided for under Section 119 Employment Rights Act 1996 (ERA) and;

46.2 A compensatory award under Section 123 ERA.

47. In this case it is not in dispute that the Claimant is entitled to a basic award of £950.00.

48. In respect of the compensatory award the Claimant is entitled to:-

48.1 Loss of statutory rights.

48.2 Past and future loss of earnings.

49. In respect of the compensatory award Section 123 provides:

"(1) Subject to the provisions of this section and sections 124, 124a and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequences of the dismissal insofar as that loss is attributable to action taken by the employer."

50. It is not suggested by the Respondents that the compensatory award should be reduced because of contributory conduct or in the off recited argument from the case of **Polkey v AE Dayton Services Limited 1988 ICR 142**.

51. Section 124 gives a statutory limit on the amount of any compensatory award and provides:

> "(1)(b) A compensatory award to a person calculated in accordance with Section 123, shall not exceed the amount specified in sub section 1ZA:-
>
> (1ZA) The amount specified in this subsection is the lower of:-
>
> (a) £78,962.00 and;
>
> (b) 52 multiplied by a week's pay of the person concerned."

52. In this case the compensatory award is therefore limited to 52 times her gross weekly pay.

53. In respect of those calculations we were referred by Ms Hill to the case of **Paggetti v Cobb** [2002] IRLR 861. She said that our approach should be that the losses should be calculated on the basis that the Claimant had been paid the National Minimum Wage at the relevant time. The case also tells us that where an applicant is provided with free accommodation the value of that accommodation up to the maximum provided under Regulation 36 of the National Minimum Wage Regulations should be taken into account in assessing the compensatory award.

Discrimination Awards

54. The failure to pay to the Claimant the National Minimum Wage has been held by us to be an act of race discrimination/harassment. As pointed out by Ms Hill this enables the Claimant to recover the disparity between her actual wage and the National Minimum Wage under that legislation. The Claimant accepts that she cannot "double recover".

55. Under the Equality Act the Claimant is therefore seeking financial compensation for:-

> 55.1 The disparity between her actual wage and the National Minimum Wage for the period of her employment.
>
> 55.2 The loss sustained between the end of her employment and the date of the hearing namely 13 November 2017.
>
> 55.3 Future loss that she will continue to suffer after the remedy hearing.

56. There are a number of other heads of claim that we have to deal with under the Equality Act and we will deal with these in turn. In this case it is claimed under Section 124 of the Equality Act 2010 (EQA). The Claimant is not seeking recommendations and the appropriate section is Section 124(6) which provides:

"The amount of compensation which may be awarded under sub section (2):-

> (b) corresponds to the amount which could be awarded by a County Court or the Sheriff under Section 119."

57. Under Section 119(4) an award of damages may include compensation for injury to feelings (whether or not it includes compensation on any other basis). As we know there is no upper limit on the amount of compensation that can be awarded for discrimination, unlike compensation for unfair dismissal.

58. Generally when assessing awards for compensation we should at the end of the exercise of assessing the award for injury to feelings and other compensation the stand back and have regard to the overall magnitude of the global sum to ensure that it is proportionate and that there is no double counting in the calculation (**Al Jumard v Clwyd Leisure Limited** [2008] IRLR 345.

We should now deal with the particular heads of the awards.

Injury to Feelings

59. We were reminded by Ms Jennings that awards for personal injury and injury to feelings must not overlap. As mentioned above we should look at the award as a whole and not conflate different types of awards.

60. Where personal injury or injury to feelings is caused by a number of factors, the award should only be for the injury caused by the unlawful acts of discrimination. The Tribunal should be cautious in assessing these awards and only have in its mind the treatment which has been found to amount to discrimination. The loss must be attributable to the specific act that has been held to constitute discrimination as per **Chapman v Simon** [1994] IRLR 124.

61. Ms Jennings went on to refer us to the well known cases of:-

- **Vento v Chief Constable of West Yorkshire Police (no 2)** [2003] IRLR 102
- **Da Bell v NSPCC** [2010] IRLR 19

62. In the case of **De Souza v Vinci Construction (UK) Limited** [2017] EWCA Civ 879 the Court of Appeal has ruled that the ten per cent uplift provided in the case of **Simmons v Castle** [2012] EWCA civ 1039 and 1288 should also apply to Employment Tribunal awards of compensation for injury to feelings and psychiatric injury in England and Wales.

63. As a result of this Presidential Guidance was issued by the President of the Employment Tribunals England and Wales and the President of the Employment Tribunals in Scotland on 5 September 2017. That guidance increases substantially the bands that were set out in Vento. In the guidance the lower band is £800 to £8,400, the middle band £8,400 to £25,200 and the upper band is £25,200 to £42,000.

64. It says in the guidance that this was in respect of claims presented on or after 11 September 2017 and that for claims presented before then we should uprate the bands for inflation.

Personal Injury Claims

65. The President also referred in his guidance to an increase in the awards for psychiatric injury. The Court of Appeal in the **De Souza** case observed that the Judicial College guidelines for the assessment of general damages in personal injury cases now incorporated the ten per cent uplift provided for in **Simmonds v Castle**. An Employment Tribunal should therefore rely upon the Judicial College guidelines in making an award for psychiatric injury and that this would comply with the above mentioned case law.

66. Ms Jennings pointed out that the Claimant had not originally made a claim for a separate award for personal injury. Ms Jennings referred us to the case of **BAE Systems (Operations) Limited v Konczak** [2017] IRLR 893. It said that where a Claimant's injury has multiple causes the Tribunal should make a sensible attempt to apportion liability accordingly based on the evidence before it. It was held in that case that apportionment is appropriate if the injury is divisible. Ms Jennings referred us to the words of Underhill LJ at paragraph 71 of the judgment which says:

> "In other words, the question is whether the Tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong."

67. Ms Jennings also referred us to the Judicial College Guidelines (14th Edition) which sets out the relevant guidance. Chapter 4, Psychiatric and Psychological damage, provides as follows:

> "(A) Psychiatric Damage Generally
>
> 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….
>
> (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 (£5,130 to £16,720).

(d) Less Severe

The level of the award will take into consideration the length of the period of disability and the extent to which daily activities and sleep were affected (£1,350 to £5,130)."

Ms Hill referred us to the same guidelines.

Aggravated Damages

68. Ms Jennings referred us to a number of cases:-

- **HM Land Registry v McGlue** (UK) EAT/0435/11
- **Commissioner of Police of the Metropolis v Shaw** [2012] IRLR 291
- **Brune v Cassell** [1971] 1 All ER 801

Ms Jennings pointed out that this was another new head of claim. The award should be compensatory in nature and not punitive. It should not be based on any "sense of outrage…as to the conduct that has occurred".

69. In the case of the **Commissioner of Police of the Metropolis v Shaw** Lord Justice Underhill identified 3 broad categories of case:-

- Where the manner in which the wrong was committed was particularly upsetting. This relates to acts done in a "high handed, malicious, insulting or oppressive manner"
- Where there was a discriminatory motive i.e. the conduct was evidently based on prejudice or animosity, or was spiteful, vindictive, or intended to wound
- Where subsequent conduct adds to the injury – for example where the employer conducts tribunal proceedings in an unnecessarily offensive manner or "rubs salt in the wound" by plainly showing that he does not take the Claimant's complaint of discrimination seriously

Exemplary Damages

70. Ms Jennings said again that this was another new head of claim and referred us to the case of **Kuddus v Chief Constable of Leicestershire Constabulary** [2002] 2 AC 122. She said to us that that case held that it is a remedy of last resort and should only "fill what otherwise would be a regrettable lacuna" as per Lord Mackay of Clashfern at paragraph 63.

71. We referred ourselves to **Rookes v Barnard** [1964] AC 1129. In that case the House of Lords confirmed that exemplary damages were justified in 3 categories of cases:-

- Conduct by servants of Government that is oppressive, arbitrary or unconstitutional

- Conduct of a Respondent designed to be self profiting
- Damages specifically authorised by statute

72. Neither the first or third head apply in this case so we need to be satisfied that the conduct of the Respondent was designed to be self profiting. We also considered the guidance of the EAT in **Ministry of Defence v Fletcher** 2010 IRLR 25. There is a high threshold for the award of exemplary damages. It held that such damages are only justified in cases where the amount of compensatory and aggravated damages was insufficient to show disapproval of the perpetrator's conduct.

Failure to give statement of employment particulars

73. The appropriate section is Section 38 of the Employment Act 2002 which provides:

> "(3) If in the case of proceedings to which this section applies:-
>
> (a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and
>
> (b) when the proceedings were begun the employer was in breach of his duty to the employee under Section 1(1) or 4(1) of the Employment Rights Act 1996 (duty to give a written statement of initial employment particulars or of particulars of change) …
>
> the tribunal must, subject to subsection (5) make an award of the minimum amount to be paid by the employer to the employee and may if it considers it just and equitable in all the circumstances, award the higher amount instead.
>
> (4) In subsections (2) and (3)…
>
> (a) references to the minimum amount are to an amount equal to two weeks' pay and;
>
> (b) references to the higher amount are to an amount equal to four weeks' pay.

Working Time Regulations 1998

74. This relates to the Claimant's claim that:-

- She has not been provided with appropriate rest breaks
- She has not had the benefit of paid leave

Regulation 30

75. This provides:

> "(3) Where an employment tribunal finds a complaint under paragraph (1)(a) well founded, the Tribunal:-

(a) shall make a declaration to that effect;

(b) may make an award of compensation to be paid by the employer to the worker.

(4) The amount of compensation shall be such as the Tribunal considers just and equitable in all the circumstances having regard to:-

(a) the employer's default in refusing to permit the worker to exercise his rights and;

(b) any loss sustained by the worker which is attributable to the matters complained of.

Our Conclusions

Unfair Dismissal

76. It was agreed in this case that the correct figure for the basic award is **£950.00.**

The compensatory award should comprise the following elements:-

Loss of statutory rights

77. We are satisfied this should be **£450.00**

Financial Loss

78. We are satisfied that this should be calculated from the date of resignation on 20 February 2016 until the date of the hearing i.e. 13 November 2017. That is a period of 90 weeks.

79. We are satisfied that if she had not been unfairly dismissed she would have worked for the Respondent a total of 50 hours per week. She is earning nothing at all at the present time and cannot work. We have broken down the payments that she would have received if she had not been constructively dismissed into 3 periods because of changes in the National Minimum Wage. The 3 periods are:-

79.1 20 February 2016 to 30 September 2016 when the minimum wage was £6.70 per hour.

79.2 1 October 2016 to 30 September 2017 when the minimum wage was £7.20 per hour.

79.3 1 October 2017 to 13 November 2017 when the minimum wage was £7.50 per hour.

80. The gross weekly amounts that the Claimant would have received during these 3 periods are respectively £335.00, £360.00 and £375.00

81. From this amount we have to deduct the amounts she would have paid in respect of tax and national insurance. This will provide us with the net payments that she could have expected to receive during these periods.

82. The net pay that the Claimant would have therefore received for the periods is as follows:-

- 20 February 2016 to 30 September 2016,
  Gross weekly pay = £335.00

  Net weekly pay = £288.71

  32 weeks x £288.71 = **£9,238.72**

- 1 October 2016 to 30 September 2017,
  Gross weekly pay = £360.00

  Net weekly pay = £308.04

  52weeks x £308.04 = **£16,018.08**

- 1 October 2017 to date,
  Gross weekly pay = £333.00

  Net weekly pay = £318.24

  6 weeks x £318.24 = **£1,909.44**

- Total loss to the hearing of net pay **£27,166.24**

83. The losses are calculated not taking into account any accommodation cost. The reason for this is that we are satisfied that if she had been engaged by the Respondents on a contract of 50 hours per week working weekdays only she would not have been provided with accommodation. She would have been living with her husband.

84. We are satisfied that we should award future losses for 6 months and no more. As at November 2017 the Claimant has been waiting for 18 months for the outcome of her application before the National Referral Mechanism for Victims of Trafficking. It is quite possible that she could be waiting for more than a further 6 months but doing the best that we can we think an appropriate period of 6 months future loss is the correct amount. This is calculated on the basis of 26 weeks at £318.24 per week which amounts to **£8,274.24.**

85. Summarising the compensatory award therefore is as follows:-

- Loss of statutory rights £450.00
- Loss to hearing £27,166.24
- Future loss £8,274.24
- Total loss **£35,890.48**

86. We have calculated the statutory cap in respect of this case as being 52 weeks at her gross weekly pay of £663.30. (£6.70 x 99). This is on the basis of her hourly rate being the national minimum wage rate of £6.70 and her hours worked per week her actual hours of 99. The statutory cap applicable in this case is therefore **£34,491.60**. That reduces the amount of the compensatory award in this case.

Failure to Provide a Statement of Terms and Particulars of Employment

87. We are satisfied that a conscious decision was made by the Respondents not to treat her as an employee and to provide her with a statement of particulars. This is not an issue of a person who has been employed for a short period of time. She worked for the Respondents for over 2 years.

We are satisfied that it is appropriate in this case to make an award for 4 weeks' pay which is subject to the statutory cap of £479.00 per week. The amount of compensation for this amounts to **£1,916.00**.

Awards under the Equality Act 2010

Pecuniary losses

The only loss pursued is the failure to pay the Claimant the National Minimum Wage during her employment with the Respondents. It is the net figure that she should have received taking into account the payments she did receive. This figure was not in dispute. The figure is the net amount after deduction of tax and national insurance that she would have paid if she had been working legally for the Chugani family. It amounts to **£66,420.00**.

Injury to Feelings

88. In deciding on the level of injury to feelings we have taken into account the following matters which are linked to her discriminatory treatment. These are:-

- A deliberate decision by the Respondents not to pay her the National Minimum Wage
- The long hours that she was expected to work
- The lack of any breaks
- The lack of paid holiday
- Being kept from her husband
- Having her passport removed and feeling isolated

89. We did make a strong judgment in favour of the Claimant in this case. We agree that the Claimant was not ill treated by the Respondents. She was though controlled and isolated by the Respondents. We base our findings on the discriminatory treatment by the Respondents only and not her treatment by others. In all the circumstances we are satisfied that this compensation should be towards the top of the middle band and we agreed that a figure of **£19,000** is appropriate.

Personal Injury

90. We have seen from the report from Dr Obuaya that the Claimant has suffered mixed anxiety and depressive disorder and that "at least 50%" of this has been caused by the Respondents discriminatory treatment of her as found by ourselves. The supplementary report says;

"1. It is likely that the uncertainty surrounding the Claimants status is implicated in the perpetuation of her….. disorder.

2. It is not possible to apportion this accurately, but it would in my view be less likely to do so than the two factors mentioned in the report i.e. the working conditions in India and with the Cuganis. Therefore I would suggest that less than 20% could be apportioned to this factor as with this factor in isolation she is unlikely to have reached the diagnostic threshold of mixed anxiety and depressive disorder."

We have applied the Judicial College guidelines on Psychiatric and Psychological Damage (14th edition). In respect of those matters we are satisfied that this is a less severe case falling in the band of £1,350 to £5,130.

This is because:-

- There has been only a moderate effect on the Claimant's ability to cope with life, education and work
- Whilst the Claimant was separated from her family and particularly her husband, this has now been remedied
- The doctor's report indicates that treatment is going to be successful. The Claimant is making a full recovery.
- There is no future vulnerability
- The prognosis is good

91. Taking all these factors into account we are satisfied that an award should fall in the upper range of this band. A sum of £5,000 would have been appropriate which should be reduced by 60% giving personal injury compensation of **£2,000.00**

Aggravated Damages

92. We have considered the case of **Alexander v Home Office** [1988] ICL 685. We have also considered the case of the **Commissioner of Police of the Metropolis v Shaw** [2012] ICL 464. This case falls into all 3 categories namely:-

92.1 That the manner in which the wrong was committed was particularly upsetting.

92.2 The conduct was evidently based on prejudice or animosity.

92.3 The subsequent conduct adds to the injury in respect of the conduct of the Tribunal proceedings.

93. In this case as outlined in our findings it involved cynical and deliberate fabrication to the authorities in the UK about the circumstances of the Claimant. She was persuaded to obtain a false passport and then brought to this country under false pretences.

94. We are satisfied that their conduct towards the Claimant was because she comes from Nepal and hence their belief that their behaviour was acceptable. . It was not. We are satisfied that they would not have treated her in the way they did if she had come from any other country.

95. During these proceedings they have again shown a complete disregard for the Claimant, accusing her of lying when she has not and repeatedly seeking to have the claim struck out when there was no basis for it. The Claimant has

sought a sum of £15,000. We do not think this is a sensible sum bearing in mind our other awards and we therefore are satisfied that a sum of **£7,500.00** is appropriate.

Exemplary Damages

96. The Respondents in this case are an intelligent and wealthy family. They knew that what they did was unlawful and were involved in employing the Claimant when they knew that they should not have done so. There are no circumstances under which they could possibly have thought that this was appropriate behaviour. Engaging a person they did not know with a false passport and false papers and then expecting her to work long hours with no breaks and no holidays for a sum of £120.00 per month is not acceptable in this country. We acknowledge that exemplary damages are the exception not the norm. We are satisfied that exemplary damages should be awarded in this case. The Respondents conduct was calculated to make a profit and the Respondents had chosen to act as they did in a way that was manifestly inappropriate. They took steps to conceal their conduct and knew they were calculated actions. The Claimant has sought exemplary damages in the sum of £20,000-£30,000. We do not think that this is a sensible figure. Bearing in mind the other awards that we have made we make an award of **£5,000.00**

Interest

97. We are required to consider whether to award interest. We are satisfied that in the circumstances of this case we should exercise our power to award interest. Interest is calculated at the rate of 8%. Two separate calculations need to be made. The first calculation is in respect of the Claimant's pecuniary loss. Interest should be calculated from the "mid-point date" and end on the day of calculation referred to in Regulation 4(2) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. As described in those regulations it means "the day which falls half-way through the period mentioned in paragraph (3). In determining the date of commencement we need to examine the circumstances of the discrimination. We are satisfied that the date when the discrimination commenced by these Respondents is 6 March 2013. We calculate that 1714 days have passed to the calculation day which is 14 November 2017. The Claimant is entitled to 857 days interest at 8% on £66,420.00. That amounts to a daily rate of £14.56. The interest on the pecuniary award is therefore **£12,477.92**.

98. In respect of the other awards made under the Equality Act 2010 interest is calculated in accordance with Regulation 6 of those regulations. That says," interest shall be for the period beginning with the date of the contravention or act of discrimination complained of and ending on the day of calculation". In this case we are satisfied that the date of the act of discrimination was 6 March 2013 when the Claimant commenced her employment with the Chuganis. The Claimant is therefore entitled to 1714 days interest. The total amount of the non pecuniary losses is as follows;

- Injury to feelings £19,000.00
- Personal injury £2,000.00
- Aggravated damages £7,500.00
- Exemplary damages £5,000.00
- Total **£33,500.00**

99. Interest on the non pecuniary losses accrues at a daily rate of £7.34. The amount of interest on these losses amounts therefore to **£12,580.76**.

This means the total amount of interest payable by the Respondents to the Claimant is **£25,058.68**

Grossing Up

100. At the hearing today neither party was in a position to assist us on the issue of grossing up. We have considered the circumstances in this case as to whether we should gross up the award to take into account tax that might be payable. The difficulty in this case is that it is entirely unsure what the Claimant's position will be. She is not able to work in the UK at the present time and may yet be forced to return to Nepal. It will take a considerable period of time before she will know the position.

101. As at the date of the hearing bearing in mind the uncertainty that's involved and whether or not the Claimant will be a tax payer in this country or even a resident here we are not minded to make an award that grosses up the damages payable to the Claimant at this stage.

102. We have in mind the principle set out in the case of **British Transport Commission v Gourley** 1955 UKHL 4. It is our intention that the damages we award the Claimant should put her in the same position as she would have been if she had not suffered the unlawful conduct. We therefore reserve the right to review the decision if a determination is made that tax and national insurance is payable on this award. If it is, we will recalculate the award to ensure that the Claimant is fully compensated.

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Employment Judge Hutchinson

Date; 01 February 2018

REASONS SENT TO THE PARTIES ON

05 February 2018

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FOR THE TRIBUNAL OFFICE