EMPLOYMENT TRIBUNALS

Claimant: Miss L Michaels (formerly Ms K Oldfield)

Respondent: Birtenshaw

HELD AT: Manchester **ON:** 19 November 2018 and 21 December 2018 (in chambers)

BEFORE: Employment Judge Slater
Mr G Pennie
Ms J A Beards

REPRESENTATION:

Claimant: Mr B Henry, counsel
Respondent: Ms L Gould, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondent is ordered to pay to the claimant compensation for disability discrimination of £29,734.99 including a 15% uplift, pursuant to s.207A Trade Union and Labour Relations (Consolidation) Act 1992.

2. The respondent is ordered to pay to the claimant interest of £2944.25 on the award.

REASONS

Issues

1. This was a remedy hearing, following a judgment on liability given orally with reasons on 23 January 2018, written reasons being sent to the parties on 4 May 2018.

2. The claimant has, since the hearing on liability, changed her name by deed poll. We refer to her in this judgment by her new name.

3. The judgment of the tribunal on liability was that the complaint of disability discrimination was well founded. The complaint was one of discrimination arising from disability, the unfavourable treatment being the withdrawal of a job offer by the respondent.

4. At this remedy hearing, the tribunal had to consider the appropriate compensation for pecuniary and non-pecuniary losses. The claimant claimed compensation for personal injury in addition to injury to feelings.

5. Areas of dispute between the parties were:

5.1. The appropriate level of compensation for injury to feelings and personal injury and whether these were separate heads of loss or one and the same thing, for which only one award should be made.

5.2. Whether compensation for loss of earnings and pension loss should end when the claimant started working for a blind man at Media City on the basis that the chain of causation was broken at that point (as contended for by the respondent) or whether the loss continued beyond that point.

5.3. Whether the claimant should be awarded any compensation for the following additional heads of pecuniary loss:

5.3.1. NVQ expenses

5.3.2. The loss of a deposit on a holiday which the claimant had to cancel after losing her job.

5.4. What proportion of the award for personal injury the respondent should be ordered to pay (the divisibility/apportionment argument)?

5.5. Whether it is appropriate to apply that apportionment also to pecuniary losses (as contended for by the respondent) or only to general damages for personal injury (as contended for by the claimant).

5.6. Whether compensation should be uplifted for failure to comply with the ACAS Code of Practice on grievances under s.207 Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).

5.7. What rate of interest should be applied to the compensation.

5.8. Whether the tribunal could and should make a costs order against the respondent for the payment to the claimant of £24 of car parking expenses incurred for the attendance of the claimant as a witness at this remedy hearing.

Facts

6. These findings should be read in conjunction with the findings of fact contained in the written reasons for our judgment on liability, sent to the parties on 4 May 2018.

7. Particular findings of fact in that liability judgment, relevant to remedy, are that, when the respondent withdrew the offer of permanent employment, on 14 February 2017, they also terminated the work she had been doing for them through the 247 agency. The claimant had, by then, been working for the respondent, on an agency basis, for nearly 3 months.

8. The 247 agency informed the claimant by letter dated 15 March 2017 that they were unable to offer her any more work.

9. By a letter to the respondent dated 16 March 2017, the claimant wrote that she believed she had been discriminated against for reasons related to her disability and she asked Mr Reid to reconsider his decision to withdraw the offer of employment. There was no reply to that letter. Mr Reid, when questioned about the letter, at first did not recall when he had received it and then was not sure whether he had received it. (Paragraph 20 liability written reasons).

10. We make the following further findings of fact.

11. After the offer of permanent employment was withdrawn by letter dated 14 February 2017, the claimant immediately started looking for other work. She made a number of job applications on 15 February 2017. We have evidence of applications made up to mid March 2017.

12. The claimant registered with a number of agencies.

13. We accept the claimant's evidence that she had 8 or 9 interviews which were with agencies, apart from one. Either because of questions on the application forms, or in answer to questions at interview about why she left her last job, the claimant informed those interviewing her that she had had a job offer withdrawn. The claimant was unsuccessful in her applications. She suspects that the agencies and potential employers were reluctant to give her work because of having had a job offer withdrawn. The claimant had previously never been unsuccessful in a job application where she had got to the stage of an interview. She had worked continuously since she was 16.

14. In April 2017, the claimant had a breakdown. The claimant obtained a medical certificate that she was unfit for work for 28 days beginning on 12 April 2017. She started self-harming again. She went to stay with a friend on the Isle of Wight for about 6-8 weeks to recover. The claimant did not obtain a further medical certificate while on the Isle of Wight but we accept that the claimant was not well enough to apply for jobs during this period.

15. On her return to the North West, around the end of June 2017, the claimant eventually persuaded Brook Street employment agency to put her on their books. The claimant told them about her claim to the employment tribunal about the withdrawal of the job offer by the respondent. The initial reaction of the agency was

that they would not consider offering her work until after the tribunal outcome. The claimant spoke to the manager of the branch and persuaded the manager to offer her work.

16. The claimant did some short periods of work – a day or two at a variety of locations – through Brook Street, during July and August 2017.

17. The claimant then received an offer through Brook Street to provide support work for a blind man working at Media City. The claimant's witness statement puts her start date for this work at 19 August 2017 but she put the start date in oral evidence as the end of July 2017. The hours each week spent on this work varied; some weeks it was 15 hours a week and some weeks there was no work. During a couple of periods when the client did not need her for substantial periods, the claimant looked for other work.

18. We were shown no documentary evidence of any job search after March 2017.

19. The work through Brook Street for this client ended on 16 October 2018. The claimant provided a quote to continue carrying out the role through Remploy. The claimant had not, as at the date of this hearing, had any response to the quote. The claimant did not make any further job applications when the work ended on 16 October 2018 because she was comfortable with the work for the client and hopeful that her bid would be accepted. Also, around the end of October 2018, the claimant lost her internet connection which we accept has made it more difficult to apply for jobs. She told us that she would have made applications had she had a connection. She told us she could not afford to travel to a job centre or library to make job applications online there. She was not questioned about how far away the nearest library was and whether she could have walked there.

20. Brook Street emails the claimant about vacancies. She is sometimes able to pick up her emails when visiting her boyfriend's parents. Brook Street also telephone the claimant.

21. The claimant does not have a full driving licence so can only work at locations she is able to get to by public transport. When working at Media City, the claimant travelled approximately two hours' each way by public transport.

22. The claimant attends therapy every Monday at 11 a.m. for an hour and Wednesday at 5 p.m. for two hours, in Bolton. She was able to work around these appointments when working at Media City. Attending these appointments could cause her difficulty if potential jobs did not offer the same flexibility.

23. The claimant's DBS certificate ran out on 7 November 2018 and she had not been able to afford the fee for a new certificate by the date of this hearing.

24. The claimant has some retail experience, working in a bookmaker's some years ago. She made an unsuccessful application for work with a bookmaker's a few months before the remedy hearing.

25. The claimant has fallen into arrears with her rent. She had to give up her animals because she could not afford to keep them. She believes that loss of her animals has had a negative impact on her mental state.

26. We accept the evidence of the claimant as to the way she felt when the job offer was withdrawn. She felt worthless. Her confidence was badly adversely affected. Her anxiety increased, to the extent that she sometimes found it difficult to make simple journeys which she had previously been able to do; she found it difficult sometimes even to leave the house. She began to question her ability to do her job for the first time in her working life, fearing work back in a care home setting.

27. The claimant had a history of self-harming in the past. After the job offer was withdrawn, she began self-harming again. She began to struggle with self-care. She began getting enraged very easily. She developed a severe eating disorder, losing a substantial amount of weight in the 18 months prior to this hearing.

28. We accept that, prior to the withdrawal of the job offer, the claimant had maintained a good level of mental health for a number of years, using coping methods and tools to keep her depression and anxiety under control. She was referred to counselling in 2016.

29. We were referred, by the respondent's counsel, in particular, to matters referred to in medical notes dated 5 September 2016 and 22 September 2016 (at page 235 of the remedy bundle) as matters in the claimant's life which may have contributed to the psychiatric injury suffered after the act of discrimination. Although the claimant has had some considerable difficulties in her life, including these matters and issues of a more historic nature, we note that they have not prevented her working, which she has done since the age of 16. The claimant had given reliable service to the respondent as an agency worker for nearly 3 months before the respondent withdrew the offer of permanent employment. We note that, as at 22 September 2016, the claimant was not taking medication for mental health issues. She was prescribed SSRIs in April 2017, some weeks after the act of discrimination.

30. We accept that the claimant feels she has backtracked a number of years in her recovery, following the withdrawal of the job offer.

31. The parties obtained a joint psychiatric report for the purposes of this remedy hearing. This indicates that the claimant has a history of mental health difficulties from her adolescence. She suffered from low mood, anxiety and deliberate self-harm. The doctor reported that the claimant stopped self-harming by the age of 20 (which would be around 2009). The claimant clarified in evidence that this referred to prolonged self-harming. She confirmed that there had been some occasional short term episodes of self-harming since age 20.

32. The consultant psychiatrist gave the view that, from 2007, the claimant had Recurrent Depressive Disorder. The doctor reported that, in the months leading to the relevant incident, the claimant's mental health was stable. She coped well with her job and was pleased with the job offer. The doctor wrote that the withdrawal of the job offer and subsequent rejections from prospective employment started to affect her mental health. She suffered from low mood and severe anxiety, tearfulness, poor sleep, anger, feeling worthless and lost her self-confidence. She

felt suicidal and she self-harmed. The doctor stated that it appears that the worsening of the mental health reached its peak in approximately April 2017. The doctor reported that she suffered a moderately severe relapse of recurrent depressive disorder. She had her antidepressant increased by her GP in September 2017. She was referred for psychological therapy. The doctor reported that the treatments had had a stabilising effect on her mental health. She still had residual symptoms of low mood and anxiety. Her confidence remained low. She was scared of working in the care sector. She was pessimistic of the future. The doctor stated that the current severity of her psychiatric symptoms was mild to moderate.

33. The doctor gave the following opinion:

> "On the balance of probability the disability discrimination found by the tribunal, has contributed to the deterioration in her mental health and her incapacity to work. However, it should be noted that she suffers from a psychiatric condition that is vulnerable to relapse.
>
> "In terms of relative contribution, I would award 65% to the disability discrimination and its aftermath and the remaining 35% to her constitutional vulnerability. I should stress to the court that the above figures cannot be supported by robust scientific data, they are based upon my clinical opinion must be seen as estimates to try and assist the court."

34. The doctor was hopeful that the claimant's mental health condition would continue to improve with the current treatment. The doctor stated that with the improvement in her mental health, she was likely to regain her confidence and manage her fear of working in the care sector. The doctor was hopeful that she would be able to gradually increase her working hours to full-time employment over a period of 12 months.

35. The claimant's schedule of loss included a claim for £2500 in respect of NVQ level 3. The item in the schedule of loss states that, in the event that the job offer had not been withdrawn, the respondent would have paid for the claimant to undertake NVQ level 3. However, the claimant's witness statement gives no evidence on this and the claimant could point to no evidence in the bundle of documents about the cost. The claimant said that the figure for the cost of the NVQ had come from her solicitor.

36. The claimant claimed £24 for parking for her attendance at this remedy hearing as a witness. Her boyfriend had driven her to the tribunal.

37. The claimant cancelled a pre-booked holiday to Malta after the withdrawal of the job offer because she could no longer afford to go. She had made the final payment on the holiday a week before losing her job. She had booked for two people. The cancellation charge was the loss of the full deposit, £200 for each person.

38. The figures for the claimant's pay with the respondent were agreed. The monthly gross wage was £1281.25. The monthly net wage was £1144.71. The weekly gross wage was £295.67. The weekly net wage was £264.16.

39. The claimant received employment and support allowance at the rate of £66.68 from 21 April 2017. She received employment and support allowance at the rate of £103 per week from 6 October 2017 until 16 November 2017.

40. The claimant's net earnings from part time work in the period until 31 March 2018 were £4,019.30. Her average net weekly earnings in the period 1 April 2018 to 16 October 2018 were £132.05.

41. The respondent did not take issue with the percentage contribution the claimant included in the schedule of loss for pension contributions the respondent would have made had the claimant not had the job offer withdrawn, but took issue with the period over which lost pension contributions were sought.

Submissions

42. Ms Gould, for the respondent, presented written submissions and made additional oral submissions. Mr Henry, for the claimant, made oral submissions. We summarise the main points made by each party in relation to the matters in dispute.

43. In relation to personal injury, both agreed that damages should be in the moderate bracket of the judicial College guidelines on psychiatric damage generally. The respondent gave the starting point as £10,000 and the claimant £15,000. The respondent averred that the claimant's injury was divisible. The respondent contended that an apportionment in excess of 35:65 in the respondent's favour ought to be applied to the claimant's injury and losses flowing therefrom. The respondent proposed that an apportionment of 50:50 would be appropriate. Ms Gould submitted that the experts report, proposing a 35% deduction, related only to proposition 16 from *Hatton* i.e. pre-existing vulnerability. She submitted that an additional deduction ought to be made for contributing non-work related factors demonstrated by the claimant's medical records which ought be viewed as distinct from her constitutional vulnerability. Mr Henry submitted for the claimant that the damages had to be apportioned because of underlying vulnerability. He said there was a report where questions had been jointly agreed on; if the respondent had disagreed with the report they had had an opportunity of disavowing it, instructing their own expert or putting questions to the doctor to ask whether the doctor had considered internal and external factors. The respondent had not done so. Mr Henry submitted that the respondent could not resile from something previously agreed.

44. Both parties agreed that the compensation for injury to feelings would fall in the middle Vento bracket. The respondent put this at £8800 and the claimant at £10,000.

45. Ms Gould submitted that there was essentially an entire overlap in the harm suffered to the claimant to be considered for personal injury and injury to feelings. She submitted that an appropriate approach would be to assess the claimant's personal injury losses, the pain suffering and loss of amenity, with that figure apportioned, and then consider whether an uplift in that compensation ought to be awarded to fully compensate the claimant for her injury to feelings. She proposed that the compensation for personal injury and injury to feelings together should be increased to £8800 to appropriately compensate the claimant for injury to feelings. Mr Henry accepted there was an overlap between the personal injury and injury to feelings and the combined figure should be reduced to reflect the overlap. He

submitted that the reduction should be to £16,000. He suggested that this was appropriate as being a figure on the border of moderate and moderately severe psychiatric damage in the judicial College guidelines.

46. In relation to pecuniary losses, the respondent submitted that any apportionment should apply to loss of earnings caused by the injury. Ms Gould submitted that the tribunal could find that, from 14th February until the sicknote of 12th of April 2017, the loss was only due to discrimination; the claimant was not so unwell as to be unfit for work. After that, she submitted that the claimant was off work due to ill-health, not all of which was due to the respondent. The respondent should only be responsible for 50% of the loss. Ms Gould submitted that, once in work with the man at Media City, there was no evidence of mitigation. She submitted that financial loss should end at the end of July 2017 or, if not, at the absolute latest at summer 2018, when the claimant said she was waiting for things to come off with the work for the man at Media City. Ms Gould submitted that there was no justification for future losses.

47. Mr Henry submitted for the claimant that the *Konczak* case did not apply to claims for pecuniary losses and apportionment should only be made to damages for personal injury if the reason the claimant was without employment was the discriminatory act; all losses flowing naturally from that are losses which are recoverable. He submitted that the tribunal could not divide up losses in relation to a period of time when the claimant was not well. Mr Henry submitted that it was reasonable for the claimant to accept part-time work which fitted in with counselling. He submitted that the claimant had continuing losses.

48. Ms Gould submitted that there was no evidence to support the claim for compensation for the NVQ.

49. In relation to the ACAS uplift, Ms Gould accepted that she had not noticed that the grievance had been raised previously. She suggested that Mr Reid’s correspondence with the trade union representative showed he was not ignoring the claimant. It was not unreasonable for him to not deal with the later grievance because of this correspondence. Mr Henry submitted that there was non-compliance with the ACAS code. The grievance was ignored. This was unreasonable. It was just and equitable to increase the compensation by 25%.

50. The judge raised during closing submissions the issue of whether the ACAS code of practice could apply to the situation where there was the withdrawal of an offer of employment. Neither party gave submissions in relation to the scope of the ACAS code.

51. Ms Gould submitted that a lower rate of interest than 8% should be applied. Mr Henry submitted that the current interest rate should be applied.

52. Ms Gould questioned whether the claimant could be awarded her car parking expenses and suggested that car parking could be obtained at a lower rate. She said the claimant was not here just as a witness. Mr Henry submitted that the tribunal could award this under rule 76.

The Law

53. Section 124(6) of the Equality Act 2010 provides that the amount of compensation which may be awarded for a breach of the Equality Act in relation to work is "the amount which could be awarded by a county court…under section 119". Section 119 provides that the county court has power to grant any remedy which could be granted by the High Court in proceedings in tort and section 119(4) provides: "an award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis)". The aim of damages in tort is to put the claimant in the position they would have been in, had the act of discrimination not occurred. Compensation (with the possible exception of exemplary damages which may be relevant in rare cases) is to compensate for loss caused by the act of discrimination. There is no limit on compensation for discrimination.

54. In relation to compensation for injury to feeling, we have regard to the guidelines in *Vento v Chief Constable of West Yorkshire Police (no.2) [2003] IRLR 102.* We note in particular the guidance that awards are compensatory and not punitive. *Vento* sets out the bands that we must consider. These were amended by the case of *Da'Bell v NSPCC [2010] IRLR 19*. The Court of Appeal in *Da Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879,* held that the 10% uplift provided for in *Simmons v Castle [2012] EWCA Civ 1039,* should also apply to employment tribunal awards of compensation for injury to feelings and psychiatric injury in England and Wales. The Court of Appeal invited the President of the Employment Tribunals to issue guidance adjusting the *Vento* figures for inflation and incorporating the *Simmons v Castle* uplift. The Presidents of the Employment Tribunals in England and Wales and Scotland issued joint guidance. The guidance provides that, in relation to cases presented after 11 September 2017 and before 6 April 2018, the Vento bands are as follows: lower band £800- £8,400 (less serious cases); middle band £8400 - £25,200 (cases that do not merit an award in the upper band); and upper band £25,200 - £42,000 (the most serious cases). In the most exceptional cases, the award can exceed £42,000.

55. Compensation may include compensation for personal injury caused by unlawful discrimination: *Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] IRLR 481.* The Judicial College Guidelines on Psychiatric and Psychological Damage give guidance on appropriate awards for general psychiatric damage.

56. In *Hatton v Sutherland [2002] EWCA Civ 76,* Hale LJ gave guidance on principles for consideration in stress claims. Relevant principles for this case are principles (15) and (16) in paragraph 43 of the judgment:

> *"(15) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment (paras 36 and 39).*
>
> *(16) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress related disorder in any event (para 42)."*

57. The Court of Appeal in *BAE Systems (Operations) Ltd v Konczak [2017] EWCA Civ 1188,* considered issues of divisibility and apportionment, examining the previous case law, including *Sutherland, Rahman v Arearose Ltd [2001] QB 351 CA* and *Thaine v London School of Economics [2010] ICR 1422 EAT.*

58. At paragraphs 62-64 of *Konczak,* Underhill LJ wrote, referring to the principles in *Hatton*:

"(62) The distinction between propositions 15 and 16 needs to be appreciated. Proposition 15 is applicable to cases where the injury in question is regarded as having multiple causes, one or more of which are, or are attributable to, the wrongful acts of the employer but one or more of which are not. Proposition 16 applies where the claimant has a pre-existing vulnerability which is not treated as a cause in itself but which might have led to a similar injury (for which the employer would not have been responsible) even if the wrong had not been committed. At the level of deep theory the distinction between pre-existing vulnerability and concurrent cause may be debatable, and even if it is legitimate it may be difficult to apply in particular cases. There may also be cases where both propositions are in play. It may in many or most cases not be necessary for a court or tribunal to worry too much about where exactly to draw the line. Both propositions are tools which enable a tribunal to avoid over-compensation in these difficult cases. Nevertheless they are clearly treated as conceptually distinct.

"(63) The principles enunciated in Hatton as regards apportionment and quantification did not fall to be applied in any of the actual cases before the Court, since in all but one of them the claim was held to fail on liability, and in the other there was no challenge to the quantum of the damages awarded at first instance. The guidance is thus formally obiter.

"(64) Hatton – or, strictly speaking, one of the other cases heard with it – was appealed to the House of Lords: see Barber v Somerset County Council, [2004] UKHL 13, [2004] 1 WLR 1089. However no issue arose as to the principles discussed above. Lord Walker said, at para. 63 described this part of the judgment of the Court of Appeal generally as "a valuable contribution to the development of the law", but he said in terms that the House had heard no argument on the section dealing with apportionment and quantification of damage and that it was better to express no view on those topics (p. 1109B)."

59. Underhill LJ went on to consider subsequent case law and continued in paragraphs 70-72 as follows:

"(70) I too believe that, to the extent that there is a difference between the views expressed by Smith and Sedley LJJ in Dickins (and by Smith LJ in her article) and the propositions enunciated in Hatton, we should follow the latter; and I would therefore endorse what Keith J said in Thaine. Strictly, as Smith LJ pointed out, Hatton is not binding so far as concerns these issues. Nevertheless, it represents the considered, and fully reasoned, opinion of the Court in what was intended to be a decision giving guidance for the future in cases of psychiatric injury caused by the wrongdoing of an employer. Although the Court was concerned with common law causes of action rather than the statutory tort of discrimination, that difference has no bearing on the question of principle. I would therefore accept the propositions

relevant to this appeal unless I were satisfied that they were wrong. That is not the case. On the contrary, they seem to me consistent with principle and to follow the approach of the Court in Rahman, which is binding on us. Mr Jones did not in the end seek to argue otherwise.

"(71) What is therefore required in any case of this character is that the tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused. I would emphasise, because the distinction is easily overlooked, that the exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm. 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; not whether it can assess the degree to which the wrong caused the harm.

"(72) That distinction is easy enough to apply in the case of a straightforward physical injury. A broken leg is "indivisible": if it was suffered as a result of two torts, each tortfeasor is liable for the whole, and any question of the relative degree of "causative potency" (or culpability) is relevant only to contribution under the 1978 Act. It is less easy in the case of psychiatric harm. The message of Hatton is that such harm may well be divisible. In Rahman the exercise was made easier by the fact (see para. 57 above) that the medical evidence distinguished between different elements in the claimant's overall condition, and their causes, though even there it must be recognised that the attributions were both partial and approximate. In many, I suspect most, cases the tribunal will not have that degree of assistance. But it does not follow that no apportionment will be possible. It may, for example, be possible to conclude that a pre-existing illness, for which the employer is not responsible, has been materially aggravated by the wrong (in terms of severity of symptoms and/or duration), and to award compensation reflecting the extent of the aggravation. The most difficult type of case is that posited by Smith LJ in her article, and which she indeed treats, rightly or wrongly, as the most typical: that is where "the claimant will have cracked up quite suddenly, tipped over from being under stress into being ill". On my understanding of Rahman and Hatton, even in that case the tribunal should seek to find a rational basis for distinguishing between a part of the illness which is due to the employer's wrong and a part which is due to other causes; but whether that is possible will depend on the facts and the evidence. If there is no such basis, then the injury will indeed be, in Hale LJ's words, "truly indivisible", and principle requires that the claimant is compensated for the whole of the injury – though, importantly, if (as Smith LJ says will be typically the case) the claimant has a vulnerable personality, a discount may be required in accordance with proposition 16."

60. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that, in relation to jurisdictions listed in Schedule A2 to that Act, which includes discrimination claims, where an employer has failed to comply with a relevant Code of Practice, and that failure was unreasonable, the tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

61. Interest may be awarded on awards made in discrimination cases in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases)

Regulations 1996. The interest rate for claims presented on or after 29 July 2013 is 8%.

Conclusions

<u>Damages for personal injury</u>

62. We have considered the case law to which we have been referred. We apply the principles set out in the cases of *Sutherland v Hatton* [2002] IRLR 263 CA and *BAE Systems (Operations) Ltd v Konczak [2017]* IRLR 893 CA. The respondent has not satisfied us that the harm suffered by the claimant has more than one cause. We conclude that this is a case where the psychiatric injury suffered by the claimant is indivisible. However, we consider this is a case where the claimant had a pre-existing vulnerability and, therefore, in accordance with proposition 16 in the Hatton case, we should take account of that pre-existing vulnerability in the assessment of personal injury damages. Whilst the claimant had pre-existing mental health issues and had encountered various difficulties in her life prior to the act of discrimination, we note that the claimant had managed to work since the age of 16 without having time off because of mental health problems. We note that, with the use of coping strategies and counselling, the claimant was managing well, despite the issues in her personal life referred to in her GP's notes, prior to the act of discrimination.

63. We accept the apportionment suggested by the doctor in the joint report as being appropriate, given the claimant's pre-existing vulnerability. This is to reduce by 35% what we would otherwise award for personal injury. This takes account of the possibility that the claimant would, at some time, have suffered similar psychiatric injury due to some other trigger, given her existing vulnerability.

64. We note the suggestion at paragraph 62 in *BAE Systems*, that the distinction between pre-existing vulnerability and concurrent cause may be debatable and that it may not be necessary for a court or tribunal to worry too much about where exactly to draw the line. However, it does appear to us that there is a distinction to be made in this case for the reasons we have given.

65. If we are wrong that the harm of psychiatric injury is not divisible, we would have concluded that the apportionment should still result in a 35% reduction in what we would otherwise award for personal injury. We were not persuaded by Ms Gould's argument for the respondent that this reduction should be made because of pre-existing vulnerability and then an additional reduction should be made because of other causes of harm. Ms Gould argued that the doctor only dealt with principle 16 and not with contributing non-work related factors demonstrated by the claimant's medical records, which ought to be viewed as distinct from her constitutional vulnerability. The respondent did not take the opportunity to question the expert further about whether the doctor considered that should there should be any reduction for other factors. In these circumstances, we consider it appropriate to take the 35% reduction as being one appropriate having regard to both pre-existing vulnerability and other causes of harm.

66. We, therefore, turn to the issue of the appropriate amount of damages for personal injury. Both parties agree that this should fall in the moderate band of the Judicial College guidelines on psychiatric damage. Including the 10% uplift, the band

of damages for moderate psychiatric damage is £5,130-£16,720. The respondent argued that the starting point should be £10,000 and the claimant that the starting point should be £15,000. We note that there had been a marked improvement in the claimant's mental health by trial. At the time she was examined, she was on antidepressants and anti-anxiety medication and was attending EMD and was in group therapy. The doctor said that the treatments had had a stabilising effect on her mental health. However, she still had residual symptoms of low mood and anxiety. Confidence remained low. She was scared of working in the care sector and pessimistic of the future. We agree with parties that the psychiatric injury falls in the moderate bracket. We consider that the injury is appropriately placed in the upper half of the bracket but not of the most serious kind within the bracket. We consider that an award, prior to reduction, of £12,000 is appropriate. After a reduction of 35%, this leaves £7800 for personal injury.

67. After dealing with injury to feelings, we will return to the question of avoiding overcompensation and taking account of the overlap between personal injury and injury to feelings.

Compensation for injury to feelings

68. The parties agreed that injury to feelings in this case fell into the middle band in the *Vento* guidelines. The respondent suggested £8800 as an appropriate figure and the claimant £10,000. The guidance issued by the Employment Tribunal Presidents of Scotland and England and Wales on 5 September 2017 gave revised *Vento* bands, taking account of the uplift in *Simmons v Castle* and changes in the value of money over time. Although the guidance was expressed to apply to claims presented on or after 11 September 2017, we consider that the revised bands in that guidance give a reliable indication of appropriate levels we should consider, taking into account changes in the value of money. The claim was presented 30 June 2017. There would have been little change in RPI in the period from that date until 5 September 2017. In accordance with that guidance, the middle band is £8400-£25,200.

69. We accepted the claimant evidence as to the way she felt when the job offer was withdrawn. She felt worthless; her confidence was badly and adversely affected. Her anxiety increased. She found it difficult sometimes even to leave the house. She began to question her ability to do her job for the first time in her working life. She began self-harming again and began to struggle with self-care. She began getting enraged very easily. She developed an eating disorder. Her mental health suffered. We consider that such serious injury to feelings merits an award higher than the bottom of the middle *Vento* band. We accept the suggestion for the claimant that £10,000 would be an appropriate award. This is subject to any adjustment which must be made so the claimant is not overcompensated by compensating her twice for the same loss under different heads of loss.

Overlap between personal injury and injury to feelings

70. There is clearly a substantial overlap between the factors giving rise to the award of damages for personal injury and the compensation for injury to feelings. However, we do not agree with the respondent that there is a total overlap. Even if the claimant had not suffered psychiatric damage, she would have suffered injury to feelings. We

consider it appropriate, therefore, that the overall award for personal injury and injury to feelings combined should be higher than the amount which would be awarded for injury to feelings only. A total of the two amounts we have considered appropriate for the individual awards would be £17,800. Because of the considerable, but not total, overlap between the two heads of loss, we consider that £14,000 is an appropriate amount of compensation for a combined award for personal injury and injury to feelings.

<u>Loss of earnings</u>

71. We are satisfied that the claimant took reasonable steps to mitigate her loss until the end of her work supporting the blind man at Media City in October 2018. Upon having the job offer withdrawn by the respondent, the claimant immediately set about applying for other jobs. She was not successful and suspected that this was because she told the prospective employers that she had had a job offer withdrawn. The claimant then suffered a breakdown in April 2017.

72. We conclude that the claimant should be awarded full loss of earnings in the period February 2017 to 12 April 2017, when the claimant was given a medical certificate certifying her as unfit to work. The loss of earnings in this period is wholly attributable to the act of discrimination.

73. From 12 April 2017, the claimant was unfit to work because she had suffered a breakdown in her mental health. We conclude that the financial loss suffered in this period of ill health is not divisible between different causes. Respondent's counsel suggested that the acts of employers who refused her employment, which the claimant suspected to be because she had to disclose that she had had an offer of employment withdrawn, were intervening acts which broke the chain of causation. We disagree. We do not consider that suspected acts, which may or may not be acts of discrimination by other employers, break the chain of causation. We conclude that loss of earnings in this period is still wholly attributable to the act of discrimination. The claimant would not have been on the job market but for the act of discrimination of the respondent. The failure of other employers to offer work does not stop the loss of earnings being attributable to the act of discrimination.

74. Although we considered that the loss of earnings is not divisible between different causes, we do consider that the claimant had an underlying vulnerability and, for the same reasons as we decide to discount the personal injury award by a reduction of 35%, we consider it right to reduce the loss of earnings for the period 12 April to 30 June 2017 by this percentage.

75. The claimant returned from the Isle of Wight around the end of June 2017 and resumed her job hunt. We conclude that from this time on, her lack of work was not due to unfitness to work due to psychiatric injury but wholly attributable to the act of discrimination, subject to the claimant's duty to mitigate her loss.

76. We conclude that, from 16 October 2018, when the claimant's work with the blind man at Media City ended, the claimant has not taken reasonable steps to mitigate her loss. It appears she decided to pin her hopes on obtaining a contract from Remploy to resume supporting the blind man at Media City. She did little, if anything, to obtain any other work after this date. We accept that the problems with her

Internet connection have made it more difficult for her to look for work. However, she had around two weeks after the ending of her contract on 16 October 2018 before her Internet connection ceased. She presumably knew that the contract was coming to an end but did not do anything to obtain other work in anticipation of the end of the contract, other than the proposal to Remploy. Once her Internet connection was lost, we accept it was more difficult for her to seek other work. However, we are not satisfied that she was unable to make any efforts. For example, she may have been able to use her boyfriend's parents' Internet connection to check on job opportunities and make applications. We consider it doubtful that she could not have got to anywhere, such as a local library, where she could use an Internet connection for free, without incurring travel costs.

77. The calculation of loss of earnings is set out in the schedule.

Other pecuniary loss

78. In the claimant's schedule of loss, she sought compensation of £2500 for an amount which the schedule asserts the respondent would have paid the claimant to undertake NVQ level 3. The claimant gave no evidence about this. When asked about the amount, she said she had been told this by her solicitor. We conclude that the claimant has not provided the evidence to support any award for this head of loss. We, therefore, conclude that no award should be made for the loss of support to undertake NVQ level 3.

79. The claimant gave evidence that she had lost a holiday deposit because of the act of discrimination. We conclude that this was a loss suffered because of the act of discrimination. However, as conceded by her counsel, we consider that the claimant should only be compensated for the deposit in respect of her own place on holiday, rather than for both places. This is £200.

80. Because of our conclusions in relation to mitigation of loss, we conclude that the claimant should be compensated for loss of employer pension contributions in the period 19th every 2017 to 16 October 2018. Details of the calculation are included in the schedule.

81. The claimant sought £24 in respect of car parking so she could attend as a witness at this hearing. We do not consider that we can award this as part of compensation for pecuniary loss. It is, rather, an application for an award of costs under rule 76. We do not award this as part of compensation. However, the claimant may make an application for costs in respect of this amount if she wishes to do so, following promulgation of this decision.

Uplift for failure to comply with ACAS Code of Practice on Discipline and Grievance

82. The claimant made an application for any compensation to be increased by up to 25% because of the respondent's failure to respond to her grievance. Ms Gould, for the respondent, made written submissions about this not having been raised at the liability stage, which Ms Gould acknowledged in oral submissions were incorrect; she had overlooked that this had been addressed before.

83. The judge raised, during closing submissions, the issue of whether the ACAS Code of Practice on Discipline and Grievance covered this situation, where someone who was not already an employee, was seeking to raise a grievance about having a conditional offer of employment withdrawn. However, since both parties had proceeded on the basis that the Code of Practice did apply and neither party made submissions about the scope of the Code, the tribunal decided it should proceed on the basis that the Code did apply.

84. The claimant's grievance dated 16 March 2017 raised for the first time an allegation of discrimination related to disability. Whilst it is correct that Mr Reid had provided some information about his reasons for withdrawing the job offer, in correspondence with the claimant's trade union, he had not addressed this allegation, which had not been made in the union's letter. He failed to respond in any way to the claimant's written grievance. We consider it just and equitable that an increase in the award be made under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 because of the respondent's failure to deal with the grievance in any way. Since Mr Reid had addressed some of the matters raised, although not the allegation of discrimination, in his prior correspondence with the trade union, we do not consider that an increase of 25% is appropriate. However, due to the seriousness of the default, we consider an uplift of 15% to be appropriate.

Interest on award

85. We do not see any good reason to depart from the standard rate of interest applicable to discrimination awards, which is 8%. For injury to feelings, this runs from the date of discrimination i.e. the withdrawal of the job offer on 14 February 2017. For financial loss, it runs from the midpoint from the act of discrimination and the date of calculation. The calculation of interest is set out in the Schedule.

SCHEDULE
Calculation of compensation

Loss of earnings

19 Feb – 12 April 2017 (7.5 weeks)

7.5 x 264.16 =		1981.20

12 April 2017 – 30 June 2017 (11 weeks)

11 x 264.16 =	2905.76	
Less ESA 21 April 2017 – 30 June 2017 (10 weeks) 10 x 66.68 =	666.80	
	2238.96	

Less 35% for pre-existing vulnerability		783.64		
				1455.32
1 July 2017 – 15 Oct 2018 (67.5 weeks)				
67.5 x 264.16 =			17830.80	
Less:				
ESA				
21 April – 5 Oct 2017				
(24 weeks)				
24 x 66.68 =	1600.32			
6 Oct – 16 Nov 2017				
(6 weeks)				
6 x 103 =	618.00			
		2218.32		
Earnings				
3 July 2017 – 31 March 2018		4019.30		
1 April 2018 – 16 Oct 2018				
(28 weeks)				
28 x 132.05 =		3697.40		
			9935.02	
				7895.78
Total loss of earnings				**11,332.30**
Other pecuniary loss				
Holiday deposit			200.00	
Pension contributions				
19 Feb 2017 – 5 April 2018				
(58.5 weeks)				
58.5 x 295.67 x 1% =		172.97		
6 April 2018 – 15 Oct 2018				
(27.5 weeks)				
27.5 x 295.67 x 2% =		162.62		
		335.59		
Less 35% deduction				
for period 12 April 2017 – 30 June 2017				
(11 weeks)				
Pre-existing vulnerability				
35/100 x 11 x 295.67 x 1% =		11.38		
			324.21	

Total of other pecuniary losses	524.21
Total pecuniary loss	**11,856.51**
Injury to feelings and personal injury award	**14,000.00**
Total award (before uplift)	**25,856.51**
15% uplift (s.207A TULRCA 1992)	**3,878.48**
Total award including uplift	**29,734.99**

Interest

Interest on injury to feelings/personal injury

8% on £14,000 for period 19 Feb 2017 to 21 December 2018 (96 weeks)

96/52 x 8/100 x 14000 = 2067.69

Interest on financial loss from midpoint (48 weeks)

8% on £11, 856.51 for 48 weeks

48/52 x 8/100 x 11856.51 = 875.56

Total interest **2944.25**

Employment Judge Slater

Date: 3 January 2019

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

9 January 2019

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2403412/2017**

Name of case(s): **Ms K Oldfield** v **Birtenshaw**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **07 January 2019**

"the calculation day" is: **08 January 2019**

"the stipulated rate of interest" is: **8%**

MRS L WHITE
For the Employment Tribunal Office