Case number: 2600216/2017

RESERVED

EMPLOYMENT TRIBUNALS

BETWEEN:

S Cole		Derbyshire County Council
Claimant	and	**Respondent**

At a Final Hearing to Determine Remedy

Held at: Nottingham

On: 20 November 2018 followed by deliberations in chambers.

Before: Employment Judge R Clark
Mrs J Rawlins
Mr Z Sher

REPRESENTATION

For the claimant: Mr McCracken of Counsel
For the respondent: Mr Taft of Counsel

The Employment Tribunal gives unanimous judgment as follows:-

RESERVED REMEDY JUDGMENT

Upon the claim for race discrimination succeeding, the respondent shall pay to the claimant compensation in the total sum of **£33,659.77.**

REASONS

1 **Introduction**

1.1 In our liability judgment sent to the parties on 10 March 2018, we gave a majority judgment in favour of the claimant's claim for race discrimination in respect of two out of a number of allegations. The successful claims related to the decision not to appoint Miss Cole to the post of Senior Practitioner, Supporting Families ("SPSF") and in the subsequent handling of her grievance in not securing the interview records.

2 The Issues

2.1 The claimant seeks financial compensation over any other remedies available. To a large extent, the underlying arithmetic is agreed between the parties, subject to the tribunal determining the following issues of principal. Those issues are:-

a) The chance that she would have not been successful in her application irrespective of the unlawful discrimination as found.
b) The loss of earnings that flow, including the chance of any subsequent lost promotion opportunities, and when the respondent should no longer be responsible for those losses.
c) Injury to feelings.

2.2 A final matter is that of interest which is agreed is to be awarded in accordance with the 1996 regulations.

3 The Evidence

3.1 We received a further remedy bundle of documentation running to 212 pages. Any page references are to the remedy bundle unless otherwise stated. We also had before us the original bundles and witness statements used at the liability hearing.

3.2 Giving evidence for the respondent we heard from Mr Caley, a multi-agency team manager who gave evidence on matters relating to grades, internal recruitment and promotion opportunities.

3.3 For the claimant, we heard from Miss Cole herself.

3.4 We received both parties' submissions, Mr Taft speaking to a written submission.

3.5 The claimant prepared a schedule of loss [207] claiming compensation of around £120,000. There was a preliminary issue arising from the interpretation of our original liability hearing which Mr McCracken invited us to clarify publicly in open hearing. We did so and made clear that any losses suffered by the claimant flowed from the finding of discrimination with effect from the date of 1 October 2015, which we determined to be the start date of any promotion to the SPSF position. This was the respondent's interpretation. This was accepted and as a result the basic arithmetic of losses as broadly set out in the respondent's counter schedule of loss [209]

was agreed subject to some minor adjustments and the matters of principal we are to determine.

4 **Analysis and Conclusions on the issues**

Issue 1 - Loss of chance of appointment to SPSF

4.1 The principal of compensating by reference to a loss of chance arises from **Chagger v Abbey National (2010) IRLR 47** which concerned a discriminatory dismissal. We are required to compensate the Claimant on a tortious basis, putting the Claimant in the position she would have been in, insofar as that is possible in monetary compensation, had the discrimination not occurred. Compensation is awarded for loss arising from the act of discrimination, in this case, her treatment in the recruitment exercise for the SPSF posts.

4.2 Applying **Chagger** by analogy, the question for us is whether she would have been unsuccessful without the presence of unlawful discrimination and, similarly, whether we can make a similar assessment of the chance of subsequent promotion although we have decided that is better dealt with under the second issue. The chance must be factored in to the calculation of compensation by the application of one or more percentage adjustments. When we assess compensation, our task is to assess the loss flowing using our common sense, experience and sense of justice. Ultimately, this task is about compensating fairly and justly, reflecting the discrimination as found but compensating for the loss that flows from that discrimination.

4.3 The burden is on the employer to show the likely chance of an appointment not being made.

4.4 Adopting the approach in **Andrews v Software 2000,** so far as its propositions are relevant to this exercise in this jurisdiction, we must have regard to all the evidence when making that assessment, including any evidence from the employee herself. There will be circumstances where the nature of the evidence is so unreliable that we may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. Whether that is the position is a matter of impression and judgment for us but in reaching that decision we must direct ourselves properly and need to recognise and have regard to any material and reliable evidence which might assist us in fixing just compensation, even if there are limits to the extent to which we can confidently predict what might have been. We must appreciate that there is a degree of uncertainty with that exercise. The difficulty of the task is not a reason not to undertake it.

4.5 In our liability judgment, we concluded by operation of the shifting burden of proof that the claimant was subjected to less favourable treatment because of her race in her attempt to secure an SPSF post in 2015 and in the subsequent handling of her grievance, that is in securing the interview records. It has subsequently been characterised by the parties as subconscious discrimination. The former allegation gives rise to potential financial loss, the latter contributes to injury to feelings only. As stated, we find on balance the financial losses would commence from 1 October 2015.

4.6 That loss is the difference between the claimant's net salary in her grade 8 post and what her salary would have been if appointed to the grade 11 post and any subsequent posts.

4.7 Behind the finding of discrimination lies the possibility that the claimant may not have been successful in her application in any event. Both parties accept the principal but they disagree on the measure of chance of that happening. For the respondent, Mr Taft argues that there was evidence that the claimant was not even in the top three, there were four candidates and therefore a one in four chance gives her, at best, a 25% chance of success. The respondent says this should be reduced further as there are other aspects of the evidence that suggests she was not close to appointment. It says the reduction should, therefore, be at least 75%. He also argues that the very fact of her numerous unsuccessful subsequent applications should support the contention that her chances of obtaining the SPSF post were slim.

4.8 Inverting those percentages, Mr McCracken for the claimant argues that it was quite likely that, but for the subconscious discrimination, she would have been appointed to one of the posts. He says her chances should be in the region of 75% such that any reduction should be no more than 25%.

4.9 We have to arrive at a figure which is fair and just to both parties whilst recognising this is a broad assessment. We remind ourselves that the majority rejected the contentions concerning the claimant's position amongst the candidates and findings were made that she was both appointable and any criticisms of her interpersonal conduct was not such as to preclude her from appointment. We also remind ourselves that the recruitment exercise in question was to appoint to two posts, not one. Applying any ratio as a means of assessing chance has to reflect that and increases the claimant's prospect of appointment, effectively doubling the respondent's probability contention from 1 in 4 to 1 in 2.

4.10 Mr Caley's evidence for the respondent set out how he would not have been surprised if the claimant had obtained promotion to grade 11 if she met the requirements as he accepted she was the most experienced practitioner in South Derbyshire.

4.11 We have considered the extent to which if, as is the case, the claimant has not been successful in her subsequent applications, it may indicate she was less likely to secure the index job but in the absence of any detailed analysis of those subsequent applications, we do not accept this contention can be factored in and, to the extent that it should, that it nevertheless carries very little weight.

4.12 In our judgment, we cannot say the claimant would certainly have been appointed, nor that she would have certainly failed without the subconscious discrimination. On balance, we have concluded that the respondent has established the claimant's losses should be subject to a loss of chance reduction. We have decided the figure which is fair and just to both parties in the circumstances of this case is a 50% chance of appointment resulting in a 50% reduction in financial losses.

Issue 2 - Future Losses and Loss of Chance of Subsequent Promotion

4.13 Since the unsuccessful application, we find the claimant has made a number of applications for posts both within her field of experience (that is child services/education/youth welfare) and wider afield. We find she has applied for something in the order of over a dozen posts and that some of those would have been stretching her suitability at the grade they were at. A number of the applications did not result in interview. For example, although the claimant has past experience in HR, we found it more likely than not that some form of professional accreditation would be likely for HR posts at the level of grade 12 and above. On the other hand, the claimant was prepared to cast her net wide but still within reasonable bounds. Other posts which on the face of it may not have appeared suitable, arguably were worthy of application. For example, a legal assistant role may seem outside the claimant's experience but, of course, we remind ourselves of her law degree.

4.14 Overall, we were satisfied that the claimant has taken reasonable steps to mitigate her loss and this was not a point that the respondent sought to argue.

4.15 The issues are how long into the future should the respondent remain liable for the claimant's losses and whether there is evidence from which we can make a fair assessment of the prospect of subsequent promotion had the

claimant been appointed to SPSF. The claimant in her evidence argued not only that she would have obtained subsequent promotion to grade 12, but that by now she would also have obtained promotion on one or more subsequent occasions and now be on a salary in grade 14. She based this principally on her opinion that "once people got into management, they tend to fly up the scales". Mr McCracken was perhaps more realistic in his submissions.

4.16 Mr Caley's evidence for the respondent accepted promotion to grade 12 or beyond would be more likely if the claimant was already at grade 11 although he was aware of some who had progressed from grade 8 straight to grade 12. He explained how demonstrating experience at grade 11 was clearly likely to improve promotion opportunities as that provided the management or team leader responsibilities and not getting an SPSF job in 2015 undoubtedly restricted her opportunities. He did not accept that she would have progressed to grade 13 or beyond in her field as she was not social work qualified. He further explained the pyramid effect of the organisational structure which necessarily reduces the opportunities higher up the grades and did so by reference to his own promotion ambitions.

4.17 We found Mr Caley to be measured in his evidence and although overall there was not a great deal of difference in the evidence we heard on the significant points, where there was difference we preferred his assessment. We find that had the claimant been appointed to an SPSF post, there was a subsequent chance of further promotion to grade 12 but not beyond that, at least within the timeframe we are dealing with.

4.18 Mr Taft submitted that any further promotion is not made out but he accepts as a matter of logic it would be easier to obtain promotion to Grade 12 from a grade 11 post than it is from a grade 8 post. He argued that there came a point where assessing subsequent chances became de minimis and that, in any event, a percentage of a percentage would produce a negligible result.

4.19 We also have to take notice of the fact that the claimant's future losses are not, or ought not to be, limited to the opportunities arising within this employing authority, nor in the part in which she is currently employed. We find her geographic position in the south of the county means that there are neighbouring authorities in relatively close proximity which provide similar services and provide a wider opportunity for career progression. Similarly, the scale of Derbyshire as an employer provides opportunities away from the claimant's current team structures.

4.20 We accept there is some evidence before us, consistent with logic, that career opportunities contract as one progresses up the organisational

pyramid. We further recall from the liability hearing evidence of middle management positions merging as part of the overall drive for financial efficiency savings. This tends to suggest not only that opportunities for further promotion would be limited, but that those that do arise would attract greater quantity and quality of applications. In the current climate, it is also likely that such vacancies would attract applications from displaced individuals with certain advantageous or preferential status, such that the competition is likely to be greater for the claimant.

4.21 We note that the SPSF role amounted to the first step into a line management role for the claimant and we find, on balance, that a period of learning, growth and consolidation lasting for at least a further 2 years would have been needed before there could be any realistic expectation of promotion. Thereafter, however, the claimant would have been in a position to make realistic applications for promotion to grade 12. That exposure to people management responsibilities is, we find, the significant difference in applying for a grade 12 post from the position of grade 11 as opposed to grade 8 and is not simply about the scale of the difference between the grades. We have regard to her positive past experience as a practitioner and the experience in management she would by then have acquired. We do not accept there is evidence to realistically support the contention that the discriminatory act has meant she has lost the opportunity of promotion to grade 13 or 14 in the time frame we are dealing with or within the reasonably foreseeable future. We do not accept there is evidence to show that there was a realistic prospect of that being the state of the world had she been appointed to SPSF in 2015. We do not therefore find there is any chance of losses in that respect.

4.22 However, the level of chance that the claimant would have obtained a further promotion to grade 12 at some point after around 2 or 3 years is real, but precise quantification of it is difficult. That does not mean it should not be recognised in the award we make. We take the view that this is a matter of future loss only. The financial difference between grade 11 and grade 12 is at best around £4000 per annum. We do not accept the claimant's contention that if she was promoted she would have progressed to the equivalent spinal column point in grade 12 as she was then on in grade 11. We find it more likely that any promotion would progress to the bottom of the next grade and mean salary would increase by 2 or 3 spinal column points depending on where the claimant was within grade 11 at the time. That would equate to a salary difference in the region of £2000 to £3000 gross per annum (notionally, £1600 or £2400 net at marginal rates).

4.23 We have come to the conclusion that the prospects of this subsequent promotion are no greater than that of obtaining the grade 11 post. That is

simply because her ability as a line manager is untested and there is likely to be competition in any such recruitment from other well qualified candidates. Equally, she would have been starting from a different position and her wider qualifications and experience are likely to have been to her credit. We therefore asses it at 50%. Having regard to the total net loss being somewhere between £1600 and £2400 per annum, we have arrived at a figure of loss of chance of second promotion of £1000 per annum. (c.£2000 x 50%)

4.24 Of course, that figure is itself premised on the loss of chance of getting the promotion to grade 11 in the first place and will itself need to be adjusted by that 50% figure in due course.

4.25 As to the ongoing losses, we take notice of the positive view of the claimant's skills and experience in her operational role, the wider opportunities available to her either through broadening her applications to neighbouring authorities or her broad past qualifications and experience which give some ability to expand her scope for new work. We have come to the conclusion that there remain ongoing losses which require compensating into the future but having considered the claimant's breadth of skills and the wider market they could reasonably be deployed in, we expect the claimant should be in a position to mitigate her losses within about a year. There clearly are internal posts that can be applied for despite the current economic climate for local authorities. Widening that search to neighbouring authorities only serves to increase the prospects of obtaining a suitable alternative vacancy in the relatively near future to fully mitigate her loss. We therefore assess the continuing liability of the respondent for those losses to extend for a further 12 months.

Issue 3 - Injury to Feelings

4.26 Compensation for injury to feelings is not self-proving but there is no dispute that an award in this case is appropriate. We accept the claimant's evidence of the impact on her emotional and mental wellbeing over a prolonged period of time. In assessing that award, we have regard to the principal that it is compensatory in nature and based on the guidelines established in **Vento v Chief Constable of West Yorkshire Police (No 2) [2002] EWCA Civ 1871** as are now to be modified by the Presidential Guidance of 5 September 2017. It is common ground that the date of the presentation of this claim, being prior to 11 September 2017, is such that the respective Vento bands are to be adjusted in accordance with paragraph 11 of the guidelines, the relevant multiplier being that for March 2017, namely 269.3. It is further agreed that the **Simmons v Castle** uplift will apply. The boundaries of the three Vento bands become subject to the

formula (original figure / 178.5 x 269.3) + 10% and result in the following bands:-

a) Lower = £830 – £8,298
b) Middle = £8,298 - £24,893
c) Upper = £24,893 - £41,489.

4.27 Mr McCracken argues the presence of aggravation to the injury to feelings in the history to this case arising from the claimant's previous grievances which were not investigated. He points to the fact that the claimant was said to be appointable to an SPSF post in the respondent's evidence before the tribunal but how that position had been denied within the internal grievance hearing and appeals. He also points to the prolonged period between suffering the discrimination and obtaining justice. Based principally on those factors, he submits that the claimant is justly compensated by an award towards the top of the middle band. That is, somewhere between around £16,000 and £24,893 as updated.

4.28 Mr Taft argues this is a one off event and should fall within the lower Vento band, that is up to £8,298. He suggests a figure of £5,000 does justice to the case. He sets out how the claimant made a large number of allegations of discrimination, the bulk of which were not made out. He argues therefore that her belief that those matters amounted to discrimination must have added to her sense of injury such that, when they are taken out of account, as they must be, the remaining injury to be compensated must be all the more reduced.

4.29 We agree that we are compensating only for the two matters that were found to amount to unlawful discrimination and not for the effect of the other matters not made out. We accept Mr McCracken's submissions save that we ignore any reference to the earlier grievances or the other allegations not proven as being discriminatory. We are concerned principally with the decision not to appoint her to SPSF. We take the view that the further discrimination found in securing the recruitment documentation does aggravate that. We are also satisfied that it is appropriate to have regard to how the respondent responded at the time to the claimant's concern that she had been subject to discrimination and that does not require a separate finding of discrimination to have an aggravating effect on the earlier discriminatory act. That is a different matter to that raised Mr Taft's submission that we should not compensate for the sense of injustice felt from those matters which were not found to be discriminatory. We agree with that, but that does not prevent other actions of an employer aggravating the discriminatory acts found. We are satisfied that there was a difference in response at the internal grievance to that put before the

tribunal which had the effect of aggravating the claimant's injury. We have come to the conclusion that not being recruited on grounds of race is a serious matter. Whilst it is clearly not as serious an act as dismissal, it is nonetheless a decision with potentially significant and long-lasting effects on the development of one's career. We are satisfied that the effect of the second act of discrimination which was itself directly related to the grievance alleging discrimination in the recruitment process together with the respondent's general stance does aggravate the claimant's stated injury to feelings. We have therefore come to the decision that it warrants an award within the middle band. We are not in agreement with Mr McCracken that it warrants compensation at the top of that band although that might have been the case if all the allegations alleged had been proved. We are satisfied that the seriousness of the matter is reflected in an award within the middle band but that having regard to the overall justice, and to the value of compensation generally, an award at the bottom of the middle band is appropriate. We set that at £10,000.

4.30 Injury to feelings is a different head of loss to personal injury. We note a figure of £5000 was claimed in respect of personal injury but we have received no evidence on what that entails and this was not developed further in submissions. We therefore decline to make any award in that regard.

5 **Summary of the Total calculation of Compensation**

5.1 The past financial net loss of salary between grades 8 and 11 from 1/10/2015 to 1/10/2018 is agreed in the sum of £20,973. That needs to be adjusted slightly to take account of the fact that today's remedy hearing takes place 50 days on from the date of the schedule of loss. That adds the sum of £979.73 (6 months net loss of £3,576 / 182.5 days x 50). The total past loss of salary amounts to £21,952.73. Applying the loss of chance of 50% reduces this to £10,976.37.

5.2 Past financial loss of pension contribution is calculated on a similar basis. The parties agree the past losses from 1/10/2015 to 1/10/2018 are arrived at based on the employer's notional contribution of 20% of gross pay in the sum of £6,169.40. The adjustment of the agreed figures to take account of the additional 50 days to today's date amounts to a further £288.27 (6 months loss at current rate of £1,052.20 / 182.5 days x 50) making the total past loss of pension £6,457.67. Applying the loss of chance of 50% reduces this to £3,228.84.

5.3 Net future loss of salary for 12 months is agreed in the sum of £7,025. To that, we must add in our assessment of compensation for the loss of

chance of further promotion in the sum of £1000. That figure already has factored into it the percentage loss of chance of ***that*** event, but that sum needs to be included now for it also to be made subject to the original loss of chance reduction which is yet to be applied. Future financial losses in respect of pay are therefore £7,025 + £1,000 = £8,025. Applying the loss of chance of 50% reduces this to £4,012.50.

5.4 Future pension loss is calculated on the same basis. The parties are agreed that 12 months future loss of pension contributions amounts to £2,080. To that we must add in the effect of the loss of chance promotion would have on pension loss. On the basis that that is agreed to be calculated at 20% of gross salary, we calculate that to be £250 (£1000 net grosses up at 20% marginal tax rate to £1,250, of which a 20% pension contribution equals £250) resulting in £2,330 in total. Applying the loss of chance of 50% reduces this to £1,165.

5.5 Total past and future financial losses are therefore £10,976.37 + £3,228.84 + £4,012.50 + £1,165 = £19,382.71.

5.6 Add award for injury to feelings of £10,000 making a total of £29,382.71.

5.7 We then calculate interest under regulations 6(1)(a) and (b) of the **Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996** in respect of injury to feelings and past financial loss respectively. Under these regulations the calculation date is 14 November 2018. The date of contravention is 1 October 2015. The prevailing rate of interest is 8%.

5.8 Past financial losses total £14,205.21 (£10,976.37 + £3,228.84). Interest on past financial losses is calculated in accordance with r.6(1)(b) from the midpoint. Simple interest from the midpoint amounts to £1,776.24. Interest on injury to feelings is calculated in accordance with r.6(1)(a) throughout the calculation period at the prevailing rate. On £10,000 this amounts to £2,500.82. The total interest to be added is therefore £4,277.06

5.9 The total award is therefore £33,659.77.

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Employment Judge R Clark
08/01/2019

RESERVED JUDGMENT AND REASONS

SENT TO THE PARTIES ON

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FOR THE SECRETARY OF THE TRIBUNALS