THE EMPLOYMENT TRIBUNALS

Claimant **Ms J Rajput**

Respondent **Commerzbank AG**

HELD AT: **London Central**

ON: **3-4 October 2018**

EMPLOYMENT JUDGE: Mr J Tayler **Members: Mr G Harker**
Mr S Soskin

Appearances

For Claimant: **Ms E Banton, Counsel**
For Respondent: **Mr S Gorton, Queen's Counsel**

REASONS

1. By a Judgment sent to the parties on 5 October 2019 the Tribunal held that:

   1.1. The Claimant was awarded £137,435.19 gross for loss of earnings.

   1.2. The Claimant was awarded £10,684.19 gross interest on loss of earnings.

   1.3. The Claimant was awarded £30,000 for injury to feelings.

   1.4. The Clamant was awarded interest on injury to feelings in the sum of £7,600.00

   1.5. The Tribunal recommended that the Respondent take positive action to mentor and train the Claimant to be in a position to seek promotion. Such positive action is to commence not less than three months from the date upon which the recommendation takes effect, and last not less than one year.

   1.6. The total sum awarded to the Claimant was £185,719.38.

   1.7. The Remedy Judgment was stayed until 18 October 2018.

2. By a letter dated 10 October the Respondent sought written reasons for the Judgment.

3. The Claimant gave evidence.

4. The Respondent called Mr Lowther, the Claimant's current line manager.

The Law

5. Section 124 Equality Act 2010 ("EQA") provides:

> **124 Remedies: general**
>
> (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
>
> (2) The tribunal may--
>
> (*a*) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
> (*b*) order the respondent to pay compensation to the complainant;
> (*c*) make an appropriate recommendation.
>
> (3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate ....
>
> …
>
> (6) The amount of compensation which may be awarded under subsection (2)(*b*) corresponds to the amount which could be awarded by the county court or the sheriff under section 119.

6. So far as is possible the Claimant should be placed in the position she would have been in but for the unlawful act: **Ministry of Defence v Cannock** [1994] IRLR 509. In **Cannock** the EAT referred to the decision of **Mallet v McMonagle** [1970] A.C. 166:

> "In his speech Lord Morris of Borth-y-Gest said, at p. 173: "In cases such as that now considered it is inevitable that in assessing damages there must be elements of estimate and to some extent of conjecture. All the chances and the changes of the future must be assessed. They must be weighed not only with sympathy but with fairness for the interests of all concerned and at all times with a sense of proportion."
>
> Lord Diplock said this, at p. 176: "The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in

> the past the court decides upon a balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards."

7. In **Vento v Chief Constable of West Yorkshire Police (No. 2**) [2003] ICR 318, Mummery LJ held:

> "As Morison J pointed out, this hypothetical question requires careful thought before it is answered. It is a difficult area of the law. It is not like an issue of primary fact, as when a court has to decide which of two differing recollections of past events is the more reliable. The question requires a forecast to be made about the course of future events. It has to be answered on the basis of the best assessment that can be made on the relevant material available to the court."

8. In assessing compensation for unlawful discrimination the tribunal will often have to assess what would have happened absent any discrimination: **Abbey National plc and another v Chagger** [2010] ICR 397.

9. The burden of proving loss lies on the Claimant: **Newton Tool Co v Tewson** [1972] ICR 501. The burden of establishing any unreasonable failure to mitigate loss lies on the Respondent: **Wilding v British Telecom** [2002] ICR 1079. There is a difference between acting reasonably and not acting unreasonably: **Cooper Contracting v Lindsay** [2016] ICR D3.

10. Future loss of earnings should normally be assessed up to the point when the Tribunal estimates that the employee will obtain a job at an equivalent salary: **Wardle** Per Elias J at para 51:

> "…in my view the usual approach, assessing loss up to the point where the employee would be likely to obtain an equivalent job, does fairly assess the loss in cases – and they are likely to be the vast majority – where it is at least possible to conclude that the employee will in time find such a job."

11. In **Griffin v Plymouth Hospital NHS Trust** [2015] ICR 347 Underhill LJ explained the assessment at paragraph 9:

> "At the risk of spelling out the obvious, that is not a finding that it was more probable than not that the claimant would find a job after precisely one year. Rather, it is an estimate, made on the assumption that the claimant continued to make reasonable efforts to mitigate her loss, of the mid-point of probabilities"

12. In considering the award for injury to feelings we had regards to the Presidential Guidance Employment Tribunal awards for injury to feelings and

psychiatric injury following **De Souza v Vinci Construction (UK) Ltd** [2017] EWCA Civ 879 and the bands and cases referred to therein, together with the **Simmons v Castle** uplift.

13. The parties calculated interest in accordance with the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996.

Findings of fact and Determinations

14. We first considered whether the Claimant should be permitted to rely on a revised schedule of loss provided after the lunch break on the first day of the hearing. The revised schedule of loss makes significant alterations to the schedule served on 28 March 2018 shortly after the liability Judgment: the Claimant now seeks to claim her loss in respect of the possibility of appointment as Head of Markets Compliance from July 2015, as opposed to 28 March 2016, the date on which Mr Dyos was appointed to the role. In addition, the Claimant seeks to increase the claim for future loss from one to three years.

15. We canvassed with the parties the basis upon which the application should be considered, and whether the same approach should be adopted as to the alteration of a schedule of loss in the civil courts. There is a requirement under the CPR for a statement of case to have a schedule setting out the remedy claimed attached to it. However, the Respondent accepted that a schedule of loss, is not itself a statement of case; and so the full strictures in respect of amendment do not apply, although there may be some analogy.

16. It is of the nature of a schedule of loss that the sums claimed are likely to vary over time as the situation in which a Claimant finds herself changes. In particular, the claim will change as the extent to which the loss can be mitigated becomes more apparent. That being said we accept that the main alterations to the schedule of loss in this case are not as a result of a change of the Claimant’s situation since the original schedule of loss. The Claimant's representatives have appreciated that they made a mistake in choosing the start point for the loss. Perhaps understandably, they fixed it on the date of the actual appointment of Mr Dyos as Head of Markets Compliance, failing to take into account that the Claimant's case is that she would have been appointed as an internal candidate at an earlier date. The Claimant also seeks to increase the period of future loss.

17. We accept the Respondent's contention that in considering whether a schedule of loss should be amended we should have regard to the reason, if any, put forward for the change, have regard to the timing of the change; and, fundamentally, have regard to the overriding objective requiring us to deal with cases justly; which requires a balance of the prejudice that the Claimant would suffer if the alteration was not permitted as opposed to any prejudice to the Respondent of allowing the change.

18. We do not consider there is a “good” reason why the calculation the Claimant now seeks to rely on was not set out in the original schedule. We note that the variation is made a late date. However, we do not consider that there is anything to suggest that there has been any attempt by the Claimant to take a

procedural advantage or attempt to ambush the Respondent. We do not consider that the Respondent will suffer any significant prejudice in properly answering the claim if the Claimant is permitted to rely on the revised schedule of loss.

19. Assessing the period of loss is nearly always speculative to a significant degree. The schedule of loss sets out the Claimant's assessment, but it is for the Employment Tribunal to determine the period of loss. However, we did insist that the Claimant should set out her finalised position before we determined the application.

20. Despite the lack of a good reason for the delay, in the absence of any attempt by the Claimant to take a procedural advantage, we consider that the core issue is the balance of prejudice. It has not been suggested by the Respondent that any of the alterations would require them to call further evidence or significantly alter the way in which they put forward their defence to the claim. We consider that there would be a significant prejudice to the Claimant if she were not able to argue for the appropriate start date for the claim on the basis that there would have been an internal recruitment at an earlier date than the external appointment. While we accept there is some prejudice to the Respondent in facing a potentially larger claim because of the earlier start date and the longer period of loss claimed, the Respondent will have a proper opportunity to argue that the period claimed is longer than should be awarded. We consider the balance of prejudice favours the Claimant being permitted to rely on the revised schedule that is now advanced.

21. We next considered the prospect that had the Claimant not been subject to unlawful discrimination she would have been appointed to the Head of Markets Compliance role; and when that appointment would have taken place. We consider that the most significant discrimination that the Claimant suffered was because of the views held about her by Mr Niermann, because she is a woman. The Claimant and Ms von Pickartz were never seriously considered for the role of Head of Markets Compliance. The Respondent's policies at the time provided that the bank wished to encourage internal progression to support career development. Had the Claimant not been subject to discrimination, we consider that the overwhelming likelihood is that there would have been an internal recruitment without the consideration of external candidates. We consider that there would have been an appointment on 1 November 2015 (as opposed to the end of March 2016 when Mr Dyos was appointed), the role becoming available in July 2015, but there then being time to advertise internally, consider the applications and test the three candidates at first and second interviews, and for the appointment to take effect. We consider that the Claimant, Ms von Pickartz and Mr Whittern would have been properly considered. We consider that as Mr Whittern had a relatively short period of service it was highly unlikely that he would have been selected for the role. However, there was a significant likelihood of either Ms von Pickartz or the Claimant being appointed. We consider it is more likely that the Claimant would have been appointed as she was the functional deputy and had attended meetings in Mr Jooma's place in that role. That being said, both she and Ms von Pickartz were shown on their appraisals to be potentially suitable for appointment to the role within a relatively short period of time. This was despite the fact they had not yet had substantial management experience.

22. We have assessed the competing probabilities as best we can. There are a number of minor possibilities. There is some possibility of external recruitment. There is some possibility of Mr Whittern being appointed. There is a significant possibility of Ms von Pickartz being appointed. The greatest likelihood is of the Claimant being appointed. We concluded in overall terms, the likelihood of the Claimant being appointed was 45%; the chance of Ms von Pickartz being appointed was between 30 and 35%. The chance of Mr Whittern being appointed being between 15 and 20%. Any residual amount takes into account the small possibility of an external appointment. Our core finding is that we assess the Claimant's chance of appointment at 45% and that the appointment was on balance likely to take place on 1 November 2015; taking into account the possibility of earlier or later appointment.

23. We next considered whether to make a recommendation. We had regard to the provisions of section 123 EQA and considered whether we could make a recommendation that would set out specified steps, within a specified period, designed to obviate, or reduce the adverse effect the discriminatory treatment on the Claimant. The main discrimination was Mr Niermann's exclusion of the Claimant and Ms von Pickartz from consideration for the role of Head of Markets Compliance because of their gender. Thereafter, the Claimant has not worked fully as part of the team and her readiness for appointment to a management role has necessarily deteriorated.

24. The first recommendation sought by the Claimant, an external audit of the way in which the practices of the bank meets its stated policies, goes considerably further than being a recommendation that would obviate or reduce the adverse effect of the discrimination on the Claimant. We consider that the main discriminatory treatment was the exclusion of the Claimant from consideration for the role of Head of Markets Compliance by Mr Niermann, rather than an improper application of the Respondent's policies.

25. We have held that the Claimant had a rather less than 50% chance of appointment. We have been shown the Respondent's new policies which seek to adopt some positive action to improve representation of women at senior management levels. In these circumstances, we not consider it is appropriate to make a recommendation that the Respondent applies the provisions of section 159 EQA to the Claimant in circumstances in which they have not decided to apply the provisions to all employees. We do not consider that the Claimant alone should be given an advantage over other employees from underrepresented groups.

26. However, we do consider that the failure to properly consider the Claimant for the Head of Markets Compliance role has significantly disadvantaged her in the workplace. She lost a significant chance of appointment and thereafter her readiness for promotion has decreased as she has not been working fully in her substantive role. We consider that a recommendation that the Respondent take positive action to mentor and train the Claimant for promotion is a reasonable and appropriate way to seek to remedy that disadvantage. Such positive action is to commence not less than three months from the date upon which the recommendation takes effect and to be completed within a year.

27. We next considered the period of loss. We first considered the period to the date of the remedy hearing. As set out above, we consider that it commenced on 1 November 2015. The Respondent contended that there has been a failure to mitigate loss by the Claimant not seeking roles external to Respondent. The duty on the Claimant is to take reasonable steps to mitigate loss. The burden lies on the Respondent to establish that there has been a failure to do so during that period. The Claimant returned from maternity leave to the Respondent. She has been seeking throughout the period to this hearing to resolve her differences with the Respondent and seeking to pursue her career by promotion within the Respondent bank. We do not consider that is unreasonable. It was not suggested that there were appropriate roles at the Respondent that the Claimant has failed to apply for. We do not consider that the Claimant has failed to mitigate her loss to the date of the remedy hearing by failing to look for work external to the bank.

28. In the period after this remedy hearing we consider the Claimant will have to consider her position with some care, and look at all options available to progress her career. That will be assisted by the training and mentoring provided for in our recommendation. If the Claimant had been properly considered for the Head of Markets Compliance role in competition with her colleagues, the Claimant would have been applying for a role that involved significant career progression. That is something more easily obtained internally as part of an internal recruitment process than externally on appointment with a promotion into a new role. There are a limited number of such opportunities internally. Obtaining such a position externally is likely to be challenging. We consider that if the Claimant takes all reasonable steps to take advantage of the training and mentoring we have recommended the Claimant should be in a position to mitigate her loss within the period of 18 months from the date of this hearing; and that is the period of loss we fix. This take into account the chance that the period might be shorter or could be longer. The promotion may be internal or external.

29. We next considered the issue of injury to feelings and aggravated damages. One matter that was said to aggravate the damages was the manner in which the proceedings have been conducted, including the fact that an application was made to strike out the claim or for a deposit order. We do not consider that this was an aggravating factor. Certain of the claims were withdrawn after the application. At the end of the Preliminary Hearing dealing with the matter an application for costs was made and refused. Had the Respondent been acting in an inappropriate and oppressive manner we consider it is likely that they would have been found liable for costs. We also do not consider the fact that the Respondent has raised the possibility of the Claimant considering employment outside of the Respondent should give rise to an award of aggravated damages. It is no more than a suggestion of a possible alternative means of mitigation. The Respondent is not saying that the Claimant should leave the Respondent; but that if the Claimant wishes to claim ongoing loss of earnings there is a stage at which she must consider the possibility of mitigating that loss by seeking employment elsewhere.

30. There is potentially an overlap between the treatment that we have found to be discriminatory and that which is said to have aggravated the loss. The purpose of aggravated damages is to compensate for any additional injury to feeling caused by the manner in which the act was done. The tribunal could either include it as part of the award of injury to feeling or analyse it is a separate figure. We accept that the Claimant has suffered very significant injury to her feeling because she was not properly considered for a promotion opportunity of great significance because she was improperly considered to be a "divisive" woman. That caused significant injury to her feeling. The Claimant was not given the opportunity that was given to Mr Whittern to be point person, and then to be acting head. That also caused significant injury. Even more significantly, when the Claimant raised the matter, it was suggested that Mr Whittern had obtained no significant advantage. It is particularly hurtful when there is a significant difference of treatment for an employee to be told that she is wrong and that there was equality of treatment. That is a matter we accept caused significant injury to feeling; whether one looks at it purely as part of the injury feeling or as an aggravating factor. We consider it very significant that on the Claimant's return from maternity leave, rather than being slotted back into her job, very significant elements of her job duties had been passed to Ms Burch. That caused significant injury to feeling. We accept that this led the Claimant to question her abilities, particularly because it was suggested to the Claimant that she had misunderstood the situation and that she had not been subjected to any difference treatment. We accept the evidence in the Claimant's witness statement, which was not challenged, that she has felt profoundly and deeply hurt and that her feelings about her treatment have overshadowed the first years of her daughter's life. The Claimant's injury has been exacerbated by the Respondent's continued insistence that she had not been treated unfavourably. We consider that the injury to feeling might be analysed in one of two ways; either as injury towards the top of the middle band together with an aggravated damages award: £25,000 for injury to feeling and £5,000 aggravated damages; or as an overall figure towards the bottom of the top band. On both analyses, we consider that the appropriate sum to award is a total of £30,000.

31. Once was had given our Judgment on these above matters of principle the parties were able to agree the calculations of the sums due to the Claimant.

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Employment Judge Tayler
23 January 2019

Sent to parties – 25 Jan. 2019