Case Number: 2207611/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS D OLULODE**
MS L JONES

BETWEEN:

Ms S Khan

Claimant

AND

SN Estates Property Services Limited (1)
Mr M Miah (2)

Respondents

ON: **14 and 15 February 2019**

Appearances:

For the Claimant: **In person until submissions and then Mr S Khwaja, her partner**
For the Respondents: **Ms C Lord, counsel**

JUDGMENT ON REMEDY

The respondents shall pay to the claimant the sum of **£100,877.49.**

REASONS

1. This decision was given orally on 15 February 2019. The claimant requested written reasons.

2. The judgment and reasons on liability were delivered orally on 2 November 2018. Written reasons were sent to the parties on 12 November 2018 at the claimant's request.

3. The claim succeeded on issues 1, 2, 3, 5, 6, 10 and 14 on race related harassment and on issues 4 and 10 on gender related harassment. The claims on issues 7, 8, 9, 11, 12 and 13 failed.

4. The claims for notice pay and holiday pay succeeded and the amounts were agreed by consent and formed part of the liability judgment.

The issues for the remedy hearing

5. The issue for the remedy hearing is the amount of compensation due to the claimant for financial loss and injury to feelings and/or psychiatric injury arising from the acts of discrimination upon which she succeeded plus interest under the *Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.* The interest rate is 8% on judgment debts.

6. We confirmed with the parties at the outset, that the issues were: financial loss - from dismissal to date and any future loss, mitigation, injury to feelings, aggravated damages, psychiatric injury and pension loss.

7. At the outset counsel for the respondents said that they were not running a failure to mitigate argument so this was not in issue.

8. The respondents said that if the tribunal was minded to award the cost of medical treatment the figure was agreed at £5,000 but there was an issue as to causation.

9. The respondents also accept that the claimant was auto enrolled in a NEST pension and accepts that the claimant can recover the employer (not employee) pension contributions.

10. We explained to the claimant that the tribunal does not have the power to order or award a good reference from the respondents. She sought this in paragraph 73 of her remedy witness statement. On day 1 of this hearing the respondents offered this voluntarily and we told the claimant that she should discuss this with the respondents' counsel direct as it was not open to us to award this.

11. The claimant remains unrepresented, but she has very sensibly sought advice and help from the ELIPS Scheme at London Central ET in preparation for this remedy hearing.

Witnesses and documents

12. We heard from the claimant who had a remedy witness statement running to 107 paragraphs.

13. There was a jointly instructed medical report from Dr G Stein, a consultant psychiatrist.

14. We had a remedy bundle of over 1,000 pages. Much of the documentation related to the claimant's job searches.

Facts not in dispute or as previously found

15. The claimant's effective date of termination was 7 August 2017. She worked in administration and accounts. She did not have two years service so there was no claim for unfair dismissal. She had 5 months service with the first respondent, having started work for the company on 6 March 2017. The first respondent is an estate agency managing real estate and property in Camden, London NW1.

16. The claim for racial harassment succeeded on issues that they all involved comments about "*Pakis"* or made derogatory and offensive comments about those of Pakistani heritage. We found that the dismissal was an act of racial harassment directly related to the complaint about the second respondent's harassing conduct in using the offensive terms.

17. We found that the derogatory reference to "*Paki's"* was harassment related to race and that the second respondent knew this when he made the comments. Additionally we found that there had been harassment related to gender, on two issues, in calling the claimant a "*bitch*" or "*Kamini"* which we found meant the same.

18. The issues on which the claimant succeeded, in summary form were as follows. They succeed as race related harassment save for issue 4 which is gender related harassment. Issue 10 succeeded as both race and gender related harassment.

    1 - April 2017: Paki comments
    2 - April 2017: Paki comments about the claimant's fiancé
    3 - May 2017: comments about "stingy Paki's"
    4 - May 2017: Kamini comments – also relied upon as harassment related to sex
    5 - June 2017: threats etc – "when will you Paki's learn"
    6 - June 2017: small box of sweets episode
    10 - 5 August 2017: instruction to sack staff member, "Paki bitch" remark - also relied upon as harassment related to sex
    14 - 7 August 2017: constructive dismissal

19. The second respondent took a belligerent stance with the claimant and those who worked for him and his company. He took the view that even if he was wrong, he was still right (liability decision paragraph 31).

20. The second respondent was offensive and disparaging about the claimant's fiancé, Mr Khwaja, which amounted to racial harassment, he expressed the views that those from the claimant's racial background were stingy, we found that both the second respondent and Mr Ahmed called the claimant Kamini and they meant "*bitch*" as gender related harassment, that the second respondent made threatening racial comments to the claimant, that he again referred to "*stingy Pakis*" when the claimant brought in a box of sweets, that he called her a "*f***ing Paki bitch"* over the phone on 5 August 2017 in an angry and aggressive manner and suggested that she was

harassing him. The dismissal was an act of racial harassment. Calling the claimant a "*f***ing Paki bitch"* was harassment related to both race and gender.

21. On issue 5 relating to the box of sweets, we found that the act of harassment involved racial offence towards the claimant's parents (liability judgment paragraphs 57 and 59).

22. Our findings were supported by the fact that the second respondent was convicted of the offence of malicious communication under section 127(1) of the Communications Act 2003. He was fined £350 and ordered to pay compensation of £100 to the claimant. He pleaded guilty at Highbury Corner Magistrates Court who found the offence to be racially aggravated.

23. We found that the second respondent's discriminatory conduct towards the claimant caused her to be off sick from 9 to 16 May 2017 with dizziness, tiredness and a fainting episode (liability decision paragraph 52).

Findings of fact related to remedy

24. The claimant's evidence was that the acts of discrimination had a huge impact on her life, mentally, socially, physically and emotionally. She said she became ill and it has affected her ability to find new employment. She says that she suffers from sleepless nights and anxiety and suffers from paranoia and agoraphobia. This was confirmed by the medical report referred to below and we find as a fact that the claimant's condition was as she described and as the medical expert stated.

25. As the claimant succeeded on issue 14, dismissal as an act of race and gender related harassment, she can seek the losses flowing from this discriminatory dismissal.

26. The claimant has previously worked in the beauty industry (statement paragraph 66). She worked in retail cosmetics, she has worked as a GP receptionist and in administration. She was a good sales person in retail cosmetics. She has worked for the Home Office in Lunar House in Croydon as secretary to the Chief Executive. She was a senior make up artist for a company known as Kikko. She joined the first respondent from Kikko. She has not succeeded in finding work since her dismissal from the first respondent. She has secured interviews but has interviewed poorly due to her state of mental health. The respondent takes no issue on mitigation.

27. The claimant's gross annual pay with the respondent was £24,000 and her net monthly take home pay was £1,621.30. Net weekly pay was £374.15.

28. The claimant gives credit for the State Benefit of Universal Credit which she has been receiving at the rate of £317.82 per month.

29. There is a claim for pension loss. We noted from the ET1 (box 6.4) that the claimant said she was in the first respondent's pension scheme. The

claimant was auto enrolled into the National Employers Savings Trust (NEST). It is based on an initial 1% contribution on each side. The pension loss is agreed by the respondent for employer contributions at the appropriate rate subject to our findings and our decision on causation.

Dr Stein's report

30. Dr G Stein is a jointly instructed psychiatric expert.

31. His report said that the claimant had worked consistently since the age of 17. She has not previously had difficulty in finding work. She was aged 34 at the date of dismissal.

32. The claimant has been taking an antidepressant, Amitriptyline, at 25mg, since August 2017 (we saw supporting evidence at page 93 of the liability bundle). Since October 2017 she has been taking Propranolol for anxiety at 10mg, (supporting evidence page 92 liability bundle) and from November 2017 she has been taking Sertraline, initially at 50mg with the dose increasing. This is also an antidepressant (supporting evidence pages 87 and 91 liability bundle).

33. The claimant saw her GP on 10 November 2017 for an anxiety problem related to the racially aggravated offence for which the second respondent was convicted (Dr Stein's report paragraph 22). She is frightened of being attacked.

34. Dr Stein's report says that the claimant's background is psychiatrically normal. He said that there were a number of consequences of the abusive comments from her manager:

    a. She fulfils the criteria for PTSD
    b. She fulfils criteria for depression of moderate severity
    c. She gets panic disorder
    d. She has developed agoraphobia
    e. She has been unable to find a job despite a good work record and relative ease of finding work previously.

35. Dr Stein said there was no evidence of PTSD prior to the events in question. He attributed causation at 100% to her period of employment. He categorised this as moderate severity. He said the same in relation to depression, attributing causation at 100% and of moderate severity.

36. The claimant has not interviewed well post-dismissal, which Dr Stein attributes to the events in question.

37. He recommended skilled treatment for depression and PTSD. He recommended private treatment because treatment on the NHS had not worked. He said that without treatment her mental ill health could possibly continue indefinitely.

38. Because of the claimant's anxiety at interview and failure to secure jobs, despite having applied for over 100, Dr Stein recommended treatment for depression and PTSD. He described this as the "*way out*" of the problem. He considered that she needed to see Consultant Psychiatrist and some different medication. He said that she definitely needed skilled treatment for her conditions.

39. The respondents asked supplementary questions of Dr Stein and his answers were at page 877(i)-(iv). In the supplementary answers Dr Stein said: "*It is totally impossible or beyond the level of psychiatric knowledge to determine which type of remark was the most damaging or how much of the emotional damage was exclusively due to [the issues on which the claimant succeeded] and how much is due to the other items which the court did not uphold as [a]mounting to sexual harassment or racial abuse."* (page 877(i)-(ii)).

40. On Carpal Tunnel syndrome he was asked whether it was possible to attribute the claimant's Carpal Tunnel syndrome to the claims upheld in this tribunal. He answered: "*only minimally*". In his substantive report (paragraph 20) he said that carpal tunnel has many causes and stress may be one of them (our underlining). This was not sufficiently conclusive for us to find that the respondents' actions caused the claimant's carpal tunnel syndrome. We find that carpal tunnel was not caused by the acts of discrimination.

41. It was put to the claimant that because of non-discriminatory actions on the part of the second respondent, such as throwing papers at her, sending her on errands, criticising her over the time taken to deal with her mother's prescription and being threatening, impacted her health. The claimant said she could not answer this, it was some time ago and there was a medical report.

42. It was put to the claimant that the second respondent's unpleasant but non-discriminatory actions would have caused her to leave her employment in any event. She flatly denied this, saying that she would definitely have stayed because she had a wedding to plan and that this was why her now husband, telephoned the second respondent to ask for a grievance meeting (liability decision, paragraph 92).

43. We find that absent the discrimination the claimant would have stayed in the first respondent's employment. We find that she was focussed on her wedding plans, as referred to in our liability decision (for example paragraph 82) and this was not the time for her to be leaving a job she had only started relatively recently.

44. It was the very intimidating nature and unpleasantness of the race and sex discriminatory comments that on our finding led to her leaving the first respondent's employment. Threats included a threat to "*chop all your heads off, when will you Paki's learn"*, calling the claimant a "*F***ing Paki bitch"*, calling her "*Kamini"* which we found meant bitch, referring to her

parents as "*stingy Pakis*", and referring to her then fiancé as a "*Paki*" and an "*idiot*" and then dismissing her as an act of discriminatory harassment after her fiancé phoned asking for a grievance meeting. This was highly offensive, insulting and oppressive.

45. There were other actions on the part of the second respondent which the claimant accepted in evidence at this remedy hearing, that she found upsetting. This included the second respondent shouting at her, sending her on his errands and throwing papers at her.

46. The claimant's evidence was that it was the personal comments that we made findings on, that upset her the most. These were the discriminatory harassing comments.

47. It was put to the claimant that there were parts of the 5 August 2017 angry telephone call from the second respondent that upset her, but which were not discriminatory. We find that it is not possible to pull this conversation apart and extrapolate parts of it which were not racially offensive and parts of it which were. We found that the call was an act of sex and race harassment, for example calling her a "*F***ing Paki bitch*". He said: "*you can't even do your jobs properly you retards from all corners of the world*" and "*you are f***ing with me bitch".* It was outrageous and discriminatory conduct on the part of the second respondent and we find that he should not benefit from any part of that angry tirade which might have contained non-discriminatory words. It was a call that led to his conviction for a racially aggravated malicious communication.

The law

48. Section 124 of the Equality Act 2010 provides that where a tribunal finds that there has been a contravention of a relevant provision the tribunal may make a declaration as to the rights of the parties; an order requiring the payment of compensation and an appropriate recommendation.

49. In assessing financial loss the aim is to put the claimant in the position that he would have been in, but for the discriminatory act. Loss caused by anything other than the discrimination is not recoverable.

50. Awards for injury to feelings are compensatory. They should be just to both parties, fully compensating the claimant (without punishing the respondent) only for proven, unlawful discrimination for which the respondent is liable. Tribunals must remind themselves of the value in everyday life of the award by reference purchasing power or earnings.

51. There are three bands for award for injury to feelings following ***Vento Chief Constable of West Yorkshire Police 2003 IRLR 102 CA*** and uprated in ***Da'Bell v NSPCC 2010 IRLR 19 EAT*.**

52. The Court of Appeal confirmed in the case of ***De Souza v Vinci Construction UK Ltd 2017 EWCA Civ 879,*** having reviewed the EAT

authorities, that the proper level of general damages should be increased by 10% following ***Simmons v Castle 2012 EWCA Civ 1288.***

53. Presidential Guidance was issued on the ***Vento*** bands on 5 September 2017 taking account of ***Simmons v Castle***. In respect of claims presented on or after 11 September 2017 the ***Vento*** bands have been uprated. The lower band was **£800 to £8,400;** the middle band **£8,400 to £25,200** and the top band **£25,200 to £42,000**; with the most exceptional cases capable of exceeding **£42,000**. The claimant says this is an upper band case and the respondents say it is a middle band case.

54. There was an addendum to the Presidential Guidance with a further uprating of the Vento bands for claims presented on or after 6 April 2018, which does not apply to this case.

55. Aggravated damages are compensatory and not punitive. They can be awarded where the act is done in an exceptionally upsetting way – ***Commissioner of the Police of the Metropolis v Shaw EAT 0125/11*** when the conduct is "*high-handed, malicious, insulting or oppressive*". It can be awarded where the discriminatory conduct is based on prejudice or animosity or which is spiteful or vindictive. It can be awarded if the conduct at the trial is unnecessarily oppressive, failing to apologise or failing to treat the complaint with the requisite seriousness.

56. At the same time tribunals must be aware of the risk of double recovery and consider whether the overall award of injury to feelings and aggravated damages is proportionate to the totality of the suffering caused to the claimant. Aggravated damages should usually be formulated as a subheading of injury to feelings. On the current case law the sum of £20,000 is considered to be the top of the bracket for aggravated damages.

57. General Damages for Personal Injury are covered in the Judicial College Guidelines, currently in its 14th Edition. Psychiatric and Psychological Damage is at chapter 4 of the Guidelines and it includes the uplift for ***Simmons v Castle***. It also contains Notes on Multiple Injuries, noting that there can be difficulty in determining the extent to which there is overlap between injuries and how this should be reflected in the award. It is always necessary to stand back from the compilation of individual figures…to consider whether the award……should be greater than the sum of the parts…or should be smaller than the sum of the parts in order to remove an element of double counting. (See Court of Appeal in ***Sadler v Filipiak 2011 EWCA Civ 1728*** paragraph 34.).

58. We are obliged to consider whether to award interest on awards for discrimination. The basis of calculation is set out in the ***Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 2803*** (as amended). For injury to feelings interest is for the period beginning on the date of the act of discrimination and ending on the day the amount of interest is calculated. For financial loss interest commences at a mid-point.

59. Where there is more than one discriminator the usual award is that each such respondent is jointly and severally liable - see ***London Borough of Hackney v Sivanandan CA*, *2013 EWCA Civ 22*.**

60. In relation to taxation, the Court of Appeal in ***Moorthy v HMRC 2018 EWCA Civ 847*** held that awards for injury to feelings were to be treated as tax free, whether or not related to the termination of employment. This position changed from 6 April 2018 by an amendment to section 406 of the Income Tax (Earnings and Pensions) Act 2003 so that although "injury" in sub-section (1) includes psychiatric injury, it does not include injured feelings. This amendment has effect for the tax year 2018–19 and subsequent tax years. Section 406 which deals with tax exemption provides:

> *(1) This Chapter does not apply to a payment or other benefit provided—*
>
> *(a) in connection with the termination of employment by the death of an employee, or*
>
> *(b) on account of injury to, or disability of, an employee.*
>
> *(2) Although "injury" in subsection (1) includes psychiatric injury, it does not include injured feelings.*

61. This means that an award for psychiatric injury falls within the tax exemption, an award for injury to feelings does not. An award for injury to feelings is taxable to the extent that it exceeds £30,000. An award for psychiatric injury is tax exempt.

62. Grossing up: To avoid any disadvantage to the claimant we should gross up any award to her over £30,000. It requires us to estimate the tax she will have to pay on receipt of the award and add that sum back into the award, to cancel out the tax burden on the claimant. The purpose is to place in the claimant's hands the amount she would have received had she not been discriminated against.

63. On pension loss we have had regard to the Employment Tribunals Principles for Compensating Pension Loss Fourth Edition, issued in August 2017 ("the Principles").

64. The question of apportionment of damages for multiple causes has been the subject of some conflicting authority but has been resolved recently by the Court of Appeal in ***BAE Systems (Operations) Ltd v Konczak 2017 IRLR 893.*** The background case law sets out some relevant propositions or principles including:

> *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.*

65. The difficult task is looking at whether the harm is "truly indivisible". The tribunal has the task of avoiding over-compensation in what can be difficult

cases. A sensible approach should be made to apportion harm between what is and what is not attributable to the defendant or respondent's wrong (***Konczak*** paragraph 67).

66. Underhill LJ said in ***Konczak*** at paragraph 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.*

67. We must 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 be "*truly indivisible*", and the claimant will need to be compensated for the whole of the injury.

68. The relevant case law discusses claimants who have a relevant pre-existing injury which on the facts and the medical evidence, is not applicable to the case before us.

69. Employees are under a duty to mitigate loss. The burden of proving a failure to mitigate lies with the respondent. They must show any failure was unreasonable. We must consider what steps the claimant should have taken to mitigate her loss, whether it was unreasonable for her to have failed to take any such steps and if so, the date from which alternative income would have been received. The respondents told the tribunal at the outset of this remedy hearing that they did not take a point on failure to mitigate.

Conclusions on remedy

70. We found the respondents' submission that the second respondent's unpleasant actions would have caused the claimant to leave her employment in any event and that we should in some way extrapolate his discriminatory unpleasantness from his non-discriminatory unpleasantness a rather unattractive argument.

71. We have found the second respondent to be a discriminatory harasser. We do not pull apart the different elements for example of the telephone conversations in August 2017 when we have made clear findings that he unlawfully harassed the claimant in those conversations and we have an expert medical report that attributes causation by 100%.

72. Our finding of fact above is that absent the discrimination the claimant would not have left the first respondent's employment in any event. She was planning her wedding and weddings are usually costly. This was not the time for her to be changing her job.

73. We make further findings below as to they way in which we deal with the apportionment argument.

Injury to feelings – Vento bands

74. The claimant seeks the top Vento band. In her Schedule of Loss the claimant set out the band based on the addendum to the Presidential Guidance referred to above (top band of £25,700 to £42,900) but this applies to claims presented on or after 6 April 2018 and not to her claim which was presented on 4 November 2017. The top band applicable to this case is £25,200 to £42,000. This is not said with any criticism of the claimant who is a litigant in person.

75. The claimant asks the tribunal to add 10% to reflect ***Simmons v Castle.*** This is already reflected in the relevant Vento bands under the September 2017 Presidential Guidance.

76. The respondents submit that this is a middle band case. The respondents rely on this being a four month period of harassment (April to early August 2017) and they rely on what they submit are comparable reported cases from Harvey, paragraph 1025 onwards. We were taken to *Derradji v Peter Howarth Ltd 2013 EqLR 1211* where the General Manager of the respondent sent the claimant texts containing racist jokes over a 1 year period including references to "*Pakis"* and *"wogs*". This was found to be a lower middle band case and the award was £7,000 + the 10% uplift.

77. In *Simpson v BAA Airports Ltd Case no. 2703460/2009* the claimant worked in security at Heathrow Airport, she was subjected to offensive remarks about her colour over a 6 month period, which is not dissimilar from the 4 month period in the case before us. There were derogatory comments about black people and an inept investigation into her grievance. In the case before us there was no grievance, even though this was requested by the claimant's partner. *Simpson* was found to be a top middle band case.

78. In *Davies v Department for Work and Pensions, 2100847/2011* the claimant's life had not been completely ruined but the events did have an extremely serious effect upon her. The award in that case was top of the middle Vento band at £18,000. In the case before us, the claimant has suffered extremely serious consequences to her mental health and social, personal and professional life. She has not been able to work since her dismissal and Dr Stein recommends private medical treatment to bring about her recovery.

79. We find that the case before us is more serious than *Davies* and the other cases we have referred to and we find that it is a top band case. Although the period of discrimination was only four months, it was on our finding, extremely serious and went on throughout the remaining period of her employment. The effect upon the claimant has been devastating. Her evidence as to the effect upon her and the injury to her feelings is

corroborated by Dr Stein's report. We find for her on this.

80. The claimant was harassed because of her race and gender by being called a "*F***ing Paki bitch",* was told that all "*Pakis are stingy*" and a threat to chop off the heads of Pakis who would not learn (liability judgment paragraph 53) and a reference to those from her racial origin as "*retards*".

81. This case was not about sending jokes, it was offensive and insulting harassment directed at the claimant personally and towards members of her family and her fiancé. The second respondent did not direct his comments at the claimant in a joking manner, but in an aggressive and intimidatory manner. The discriminatory harassment was particularly serious, offensive, aggressive, threating and intimidating.

82. Based on the cases put before us, we find that this is a lower end top band case. We put it at the lower end of the top band because of the four-month period compared with other cases. We make an award for injury to feelings in the sum **£27,000.**

Psychiatric injury

83. Dr Stein in his report gave his professional view that the claimant fulfils the criteria for both PTSD and depression which he considered was caused by 100% to the claimant's period of employment with the respondents (his report paragraph 37.5 - 37.8). He also finds she gets panic disorder and has developed agoraphobia.

84. Both parties referred us to the Judicial College Guidelines, Chapter 4 dealing with Psychiatric and Psychological Damage. As to PTSD, Dr Stein said that in classification of severity of mild, moderate or severe, in his opinion she fell into the category of *""moderate severity" and "within the moderate severity range"* (page 39 remedy bundle paragraph 37.6). The categories in the Judicial College Guidelines are: Severe, Moderately Severe, Moderate and Less Severe. The respondent submitted that we should interpret this as Moderate. The claimant submits that we should regard it as Moderately Severe.

85. We find that in saying "*within the moderate severity range*" using the two words together, that Dr Stein means Moderately Severe. We find that if he had meant only Moderate, he would not have used the word "*severe*" or "*severity*" next to it and would have excluded the word "severity" from the inverted commas. In our experience, medical experts are familiar with the classifications and we cannot ignore his use of the two words together "*moderate severity*" and "*moderate severity range".* If he had meant Moderate, he could and we find on a balance of probabilities would, have used this word alone. He was not asked by the respondents to clarify this in the supplemental questions.

86. For depression, his report paragraph 37.8, he classified it as "*moderate severity*". Our findings as to this are the same as for PTSD and we find he

classifies it as Moderately Severe.

87. This means that for psychiatric damage generally the relevant band including the 10% uplift for depression is from £16,720 to £48,080 and for PTSD the relevant band including the 10% uplift is from £20,290 to £52,490. We are also mindful of our duty to stand back and consider the question of overlap.

88. Dr Stein at paragraph 37.6 said that in placing the claimant in the moderate severity range, he places her roughly in the middle of the range. We are guided by this expert view. The mid-range on each, being the halfway point between the two figures is for general psychiatric damage £32,400 and for PTSD is £36,390. The total is £68,790. The claimant also has panic disorder and agoraphobia which she did not have before her employment with the respondents.

89. The claimant in her schedule of loss sought PTSD as severe, but for the reasons we have given above, we find that the correct category is Moderately Severe. The claimant seeks the top for depression, being £48,080 and for PTSD £42,490.

90. We find that there is substantial overlap of which we must take account as there is a link between the conditions. The medical view puts the claimant in the middle of the range. We award **£34,000** because we take account of the prognosis which is positive, if the claimant receives the treatment recommended by Dr Stein. His view is that the claimant requires 10 sessions with a consultant psychiatrist and 12-15 sessions with a private CBT specialist. His view is that this is the "*way out*" of her depression and PTSD. Without this treatment his view is that the claimant's mental health ill health could be indefinite.

91. For these reasons we also award the cost of treatment at **£5,000** as this will have the effect of limiting ongoing loss. The sum was agreed by the respondents subject to our finding on causation on which we say more below.

Aggravated damages

92. The claimant submits that the respondents acted in a high-handed malicious insulting and oppressive manner. She claimed aggravated damages.

93. We find that this was conduct which was highly insulting not just to the claimant but to members of her family (the sweets issue) and to her then finance, now husband, Mr Khwaja describing him as *"the guy you're going to marry, the small little dude. He is an idiot, is he a Paki too?"* We found that the second respondent was offensive about the claimant's fiancé and this was upsetting and offensive to her.

94. We also heard the tone of the telephone conversation which we found was

loud, angry, aggressive, unpleasant, offensive and intimidating in tone (paragraph 79 liability judgment). The second respondent suggested that the claimant harassed him, yet there was no evidence to support it. This was also high-handed and insulting. It was not a case of a small incident of racial harassment when the second respondent was convicted of a racially aggravated malicious communication. This satisfies us that his conduct was malicious as well as high handed, insulting and oppressive and supports an award of aggravated damages.

95. We found that there was some similarity, from the cases put to us on behalf of the respondents, all of which we considered, and by way of example we refer to *Simpson v BAA Airports Ltd Case no. 2703460/2009* from Harvey paragraph 1234.

96. We find that this is a case which justifies an award of aggravated damages and we award **£10,000**.

Apportionment

97. The respondent submitted that this was a case in which we should apportion the award to the claimant for injury to feelings and psychiatric injury to take account of the second respondent's non-discriminatory conduct, as separate from his unlawful discriminatory conduct. We note first of all that this is not a case in which the claimant had any pre-existing condition which was exacerbated. In those circumstances we considered only whether the second respondent's actions and the causation of injury was truly divisible under ***Konczak***. What was unattractive about the respondents' submissions, whilst understanding why they were made, is that it focused on other unpleasant and offensive actions of the second respondent which did not amount to discriminatory harassment.

98. It was submitted for example that on those matters where the claimant failed, on issues 7, 8, 9, 11, 12 and 13, or on other actions of the second respondent such as throwing papers at her or sitting in her car when she did not want him to, that we should separate these matters and ensure that we made no award for them.

99. We are aware that we can compensate only for the loss or damage that arises from the discrimination and not otherwise. What is made more difficult is that Dr Stein refers to causation as 100% from "*her period of employment*" (report paragraph 37.6). He does not expressly state "from the acts of unlawful harassment" and has dealt with this in answers to supplementary questions as we have set out above.

100. We have considered the respondent's submission that we should apportion the damages to the claimant by distinguishing between any part of her illness which is due to the respondents' wrong and any part which is due to other causes. As we have said above, we found this argument unattractive on the facts of this case. Nevertheless, we can only make an award in respect of loss and damage arising from the discrimination.

101. The claimant acknowledged in her evidence that there were actions on the part of the second respondent, in respect of which we found there was no discrimination and which actions also upset her. We repeat our finding that the claimant would have stayed in the first respondent's employment but for the discrimination. Thus, we find that the discriminatory harassment was the primary and substantive cause of her injured feelings and psychiatric harm. There was no pre-existing condition, as Dr Stein made clear.

102. We find that the non-discriminatory actions of the respondents played a minimal part in the claimant's ill-health and injured feelings because the damage was caused primarily and substantively by the discrimination. We acknowledge that there were some actions that caused upset and Dr Stein did not make any apportionment himself. We have to do the best that we can on a broad-brush approach. Our finding is that there were non-discriminatory reasons causing upset, that this was minimal and for those reasons we find that there should be a low level reduction of 15% to reflect this.

Financial loss

103. The claimant seeks her financial losses. We have found that the dismissal was an act of both race and gender harassment (liability judgment paragraph 96) thus the claimant can recover her loss of earnings flowing from the discriminatory dismissal.

104. As a result of the discrimination and based on Dr Stein's report and the claimant's own evidence, she has been unable to work since dismissal. No failure to mitigate argument was advanced. In order to recover her health and return to work, the claimant requires the treatment recommended by Dr Stein. We find that she is entitled to recover her loss of earnings to date and for a period of future loss. Dr Stein's view is that the claimant requires 10 sessions with a consultant psychiatrist and 12-15 sessions with a private CBT specialist. We consider that in order to allow this treatment to take place the claimant should recover future loss for a further period of nine months from the date of this hearing.

105. The claimant's net monthly loss is £1,621.30. The period of loss is from 7 August 2017 until 15 November 2019. To 7 August 2019 is two years, and to 15 November 2019 is 100 days. The annual loss is £19,455.60 x 2 = £38,911.20. For 100 days the loss is £5,330.39. The total financial loss, not including pension and interest, is **£44,241.59.**

Pension loss

106. We categorise this case as a "simple" case under the Principles 4th Edition. The basis for calculation used is to calculate the employer's contributions for the period of loss we have identified. This is known as the "contributions method" (see the Principles referred to above at paragraph 4.17). We do not award employee contributions as it is a matter for the claimant to decide

whether she wants to make pension contributions from the loss of earnings figure we award (Principles paragraph 4.19). Neither side had enquired about a short service refund covering the period of employment.

107. As pension loss is a form of future loss which arises only upon retirement, interest is not payable on compensation for this (Principles paragraph 2.12). It is nevertheless taxable.

108. The respondent agrees the amount for pension loss is based on gross earnings at £2,000 per month. For the tax year 2017/2018 is at 1% on earnings over £5,876 makes an annual employer pension contribution of £181.24. The claimant received pension contributions to 7 August 2017. Therefore, the award is from 7 August 2017 to 5 April 2018 – seven months being £105.72. From 6 April 2018 to 5 April 2018 is a full year at 2% of earnings over £6,032 is an annual loss of £359.36. From 6 April 2019 to 15 November 2019 is seven months, at 3% of earnings over £6,136, annual £535.92 and for seven months is £312.62.

109. The total sum for pension loss is the total of £105.72 + £359.36 + £312.62 = £777.70. We reduce this by 15% on our apportionment of £116.65 making a final total of **£661.05.**

ACAS Code

110. The claimant in submissions sought an uplift for failure to follow the ACAS Code but was not clear upon the basis for this claim. It had not been quantified in her Schedule of Loss and we are aware that the claimant received help with this from ELIPS.

111. In the Case Management Order (paragraph 16), the tribunal said that no sum should be left "TBC" in the Schedule of Loss and it must be properly calculated. The respondent was not able to answer it in the Counter Schedule of Loss and invited us not to allow any uplift.

112. We are persuaded by this argument as despite a very detailed and comprehensive Schedule of Loss, with the benefit of some legal assistance and including reference to the Judicial College Guidelines, no such sum was claimed and the basis for it was not set out. We decline to award any uplift for any alleged unreasonable failure to comply with the ACAS Code.

113. In her Schedule of Loss the claimant sought £225,805.24 plus other sums which were not quantified.

Universal Credit

114. The claimant gives credit for Universal Credit. This is received at the rate of £317.82 per month. We therefore reduce the award by the amount of Universal Credit for two years and three months, therefore 27 months at £317.82 = **£8,581.14.**

Apportionment

115. Based on our finding above there is a reduction of 15% under ***Konczak*** which applies to the awards for injury to feelings and psychiatric injury. This is therefore a reduction on the respective sums of £37,000 and £34,000, total of £71,000 to be reduced by £10,650 = **£60,350.**

116. Dealing with the items individually, the sum of £37,000 for injury to feelings including aggravated damages is £5,550 is reduced to **£31,450** and the sum of £34,000 for psychiatric injury is reduced to **£28,900**.

117. We initially did not reduce the financial losses by 15% because we took the view that this flowed from the discriminatory dismissal. Counsel for the respondent made the point that the reason the claimant cannot work is because of psychiatric injury and we decided of our own volition to reconsider this part of our decision and we apply the 15% reduction to the financial losses. The sum of £44,241.59 is reduced by 15% (£6,636,24) making a sum of **£37,605.35.**

Interest

118. On injury to feelings the interest is from the date of the act of discrimination until the date of calculation which is 15 February 2019. We had a discussion about the date upon which to begin the calculation. The claimant asked for April and the respondent suggested 1 June 2017. We noted that on the matters on which the claimant succeeded, four incidents were in April and May 2017 and four were in June and August. We agreed with the respondent that 1 June 2017 was the appropriate date.

119. The period of calculation is approximately 1 year and 7.5 month therefore 624 days. The sum upon which we calculate is £31,450. The rate is 8% per annum. The daily rate is £6.89 x 624 = **£4,299.36.**

120. Interest on past financial losses is from 7 August 2017 to 15 February 2019 is 557 days (or 18 months and 8 days). The financial losses to 15 February 2019 is at a daily rate of £53.30 for 557 days is £29,688.10. To this we apply the 15% apportioned reduction is £45.31. Interest on this sum at 8% is from a mid-point therefore for 279 days at a daily rate of £5.53 makes a total interest award of **£1,542.87.**

121. The total award of interest is therefore **£5,842.23.**

Tax

122. The first £30,000 is tax exempt. The claimant has a personal allowance of £11,850 for this tax year. The damages for psychiatric injury is not taxable. The cost of medical treatment which attaches to the psychiatric injury is also not taxable.

123. The loss of earnings + interest is taxable less a deduction for Universal

Credit. Loss of earnings is £37,605.35 + interest of £1,542.87 = £39,148.22 less Universal Credit £8581.14 = £30,567.08. We add to this pension loss of £661.05 makes a taxable total of £31,228.13,

124. Tax is not payable on the award for psychiatric injury. The award for this is tax exempt, being £34,000 less 15% making £5,100 leaving a tax-exempt figure of £28,900.

125. We have taken account of the amendment made with the Finance Act 2017 means that if there is an award for injury to feelings which does not relate to termination of employment it is not taxable. If it relates to termination it is taxable. The amendment applies for the tax year 2018/2019. We therefore default to the ***Moorthy*** position that awards for injury to feelings are to be treated as tax free, whether or not they relate to the termination of employment. As yet there is no case law to confirm this but this is our decision on the law as we currently understand it. If HMRC take a different view on this we give the claimant leave to seek a reconsideration.

126. We therefore treat the injury to feelings as tax exempt.

127. As the taxable amount is £31,228.13, the tax exempt amount is £30,000 and the balance of £1,228.13 is covered by the personal allowance, our finding is that no tax is payable and there is therefore no need for us to gross up.

Conclusions

128. The total award to the claimant is the sum of **£100,877.49** made up as to injury to feelings £35,749.36 (injury to feelings + aggravated damages + interest less 15% reduction); psychiatric injury less 15% reduction (no interest as this is not an award for injury to feelings and the *Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996* do not apply) £28,900; financial loss including interest plus pension less 15% £31,228.13; cost of treatment £5,000.

129. The respondents applied for the payment to be staggered under Rule 66 which provides that a party shall comply with a judgement for payment within 14 days of the date of the judgment unless the judgment specifies a different date for compliance.

130. It was submitted for the respondents that the first respondent has recently made a financial loss and does not have the funds to pay within 14 days, the company is in a negative balance with roughly £20,000 in the bank at any one time. The second respondent was said to be in receipt of working tax credit, housing allowance and child tax credit. There was no evidence to support that. Although the respondent's counsel had papers to hand, nothing had been submitted in advance, the second respondent had chosen not to be present on day 2 and we had no evidence from him to support this. He was said not to own property and to receive housing tax credit.

131. We were told that anything more than £5,000 per quarter was "*going to be difficult"* given the level of outgoings of the business.

132. The claimant said he did not make other payments due to her on time. The claimant's said he drives a Porsche with a personalised number plate. Again this was not put in evidence. The claimant said she thought he had a number of accounts. The claimant said it should all be paid at once.

133. As the second respondent chose not to attend the final day of this hearing and has not taken the trouble to prepare a statement or submit any evidence in advance and left it to his counsel to seek to produce papers after 4:30pm on the last day of the hearing we unanimously refused that application. The sum is payable under Rule 66 within 14 days.

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Employment Judge Elliott
Date: 15 February 2019

Judgment sent to the parties and entered in the Register on: 18 Feb. 19 .
_____ for the Tribunals