



EMPLOYMENT TRIBUNALS

Claimant: Mrs D Dearing
Ms Y Javed
Mr S Panton

Respondent: Leeds Teaching Hospitals NHS Trust

Heard at: Leeds

On: 20 and 21 December 2018 and (deliberations only) 28 January 2019

Before: Employment Judge Maidment
Mrs L J Anderson-Coe
Mr G Corbett

Representation

Claimants: Mr D Brown, Counsel
Respondent: Mr J Boyd, Counsel

RESERVED REMEDY JUDGMENT

1. The Tribunal orders the Respondent to pay as compensation for its acts of victimisation:

1.1 to Mrs Dearing the total sum of £30,330.15, comprised of the sum of £25,700 as compensation for injury to feelings reflecting aggravating features in the Respondent's conduct and the sum of £3,600 as compensation of loss of financial entitlements to which is added the sum of £1030.15 in respect of interest thereon.

1.2 to Mrs Javed the total sum of £26,471.69, comprised of the sum of £25,700 as compensation for injury to feelings reflecting aggravating features in the Respondent's conduct and the sum of £600 as compensation of loss of financial entitlements to which is added the sum of £171.69 in respect of interest thereon.

1.3 to Mr Panton the total sum of £23,395.45, comprised of the sum of £20,000 as compensation for injury to feelings reflecting aggravating features in the Respondent's conduct and the sum of £2,640 as

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compensation of loss of financial entitlements to which is added the sum of £755.45 in respect of interest thereon.

2. The Tribunal therefore makes the recommendation as follows: *“The Respondent shall from the date this decision is sent to the parties give the Claimants equal consideration to those on the Respondent’s redeployment register for any future vacancies in switchboard subject to established working patterns and terms and conditions in switchboard at that point in time.”*

REASONS

Remedy issues

1. These reasons must be read in conjunction, in particular, with the Tribunal’s Reserved Judgment and Reasons dated 6 April 2016, its Judgment and Reasons on remission from the Employment Appeal Tribunal dated 3 August 2018 and its Reserved Judgment and Reasons in what, in fact, were the Claimants’ third set of Tribunal proceedings dated 3 August 2018.
2. The Tribunal is of course mindful that the Claimants did not succeed in all of their complaints. The Claimants’ first set of Employment Tribunal proceedings centred on a complaint of race discrimination in the Respondent’s alleged failure to deal with the behaviour of the Claimants’ colleague, Miss Lee, by whom they felt bullied and intimidated. That complaint did not succeed, but other complaints in the first set of proceedings were well-founded and the question of remedy in respect of Mrs Javed has been dealt with already. The Tribunal, in terms of this Remedy Hearing, is concerned with the Claimants’ second and third set of proceedings. In terms of the second set of proceedings, it is concerned with the Claimants’ success in respect of three separate complaints of victimisation. Firstly, it is concerned with the Claimants being told on 25 March 2015 that they could not return to their positions in switchboard, but must be redeployed and complete redeployment forms. Secondly, the Claimants were victimised arising out of the content of statements made by Mrs J Goodwin and Mrs B Adams as requested of them in respect of the management case in response to the Claimants’ grievance of 28 April 2015. Thirdly, the Respondent victimised the Claimants in its failure to inform them up to and including the grievance appeal hearing on 30 July 2015 that Miss Lee had been reinstated. The Tribunal notes that further and additional complaints of victimisation failed and therefore no question of any remedy in respect of such unsuccessful complaints arises.
3. The third set of Employment Tribunal proceedings also involved complaints of unlawful victimisation. The Claimants’ complaints succeeded to the extent that Mrs Adams referring to them on 12 May 2016 as “bastards” was a further act of victimisation. The Claimants’ remaining complaints of victimisation which centred on how the Respondent had dealt with the

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Claimants' complaints following their awareness of such comment by Mrs Adams, did not however succeed.

4. The Tribunal must ensure that it distinguishes between any loss flowing from the incidents which formed part of the Claimants' unsuccessful complaints and that any remedy is awarded in respect only of those complaints which succeeded.
5. The Claimants sought compensation for injury to feelings and aggravated damages. They did not pursue any claim for damages for personal injury. In terms of financial loss, they sought compensation for loss of enhancements which they had enjoyed when working on switchboard arising in particular out of their night shifts/unsociable and overtime hours and which they had lost arising out of the Respondent's failure to re-engage them in switchboard and in circumstances where the positions of employment they now held within the Respondent resulted in a loss of pay when compared to their switchboard earnings.
6. The parties in fact during the course of this hearing reached an agreement that the Claimants' losses arising out of them no longer working on switchboard were in the gross sums of £600 per month for Mrs Dearing, £440 per month in respect of Mr Panton and £100 per month in respect of Mrs Javed. The dispute remained as to the period of time over which those losses fell to be compensated for.

Further evidence and findings

7. The Tribunal had before it an agreed bundle of documents (of 535 pages) including medical and sickness records for all of the Claimants. The Tribunal, having discussed the issues between the parties, took some time to privately read through the witness statements exchanged between them. It heard further evidence from all of the Claimants and from Christopher Carvey, Deputy Director of HR, who gave evidence on behalf of the Respondent.
8. Mrs Dearing described how the events surrounding the Tribunal proceedings and Miss Lee had come to dominate her life. She agreed that she had throughout been very affected by Miss Lee and agreed that those matters she had unsuccessfully complained of in the various Tribunal proceedings were still matters which had upset her. She had been looking forward to returning to normality and returning to her role on switchboard. She said that she had hoped to work there until she retired. Her role in switchboard, she said, gave her confidence and a strong sense of purpose. She had felt secure and happy there in the past and also had a deep sense of belonging to a team. The hours and the opportunity to work nights suited her and her family.
9. The treatment she received at the hands of Miss Lee had a profound effect on her and she said it was no exaggeration to say that she had come to be terrified of her to a point where she would cry and shake with anxiety before work. She had taken action over Miss Lee primarily because she'd wanted to stay in switchboard and didn't want to be driven out. She did not see the previous Tribunal complaint as being a personal attack on her managers and had found it shocking to see that her managers had taken it so personally. By 2015 she had battled through so much mentally that she felt

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in brighter place and ready to move on. She explained that she had been sleeping on the sofa since it all started because of having nightmares and disturbed sleep. She said that she is still sleeping on a sofa even now.

10. She thought everything would return to normality by January 2015. By this stage Miss Lee had gone as had Mr Innis. She understood that she would have to work with her managers again. However, she was disappointed when Mrs McGinnes stated that she had concerns about her returning to work and puzzled when she said that she was working through this with human resources. Talk of redeployment at this point was very upsetting. She said that she felt a horrible sense of not being wanted and a feeling that something very negative was going on. She found it intimidating.
11. When she was advised that she would not be returning to work on 25 March 2015, she was very shocked. She felt rejected and punished and that no one was listening to her. She said that, for her, the hurt she felt at this decision was very intense. She felt she had no control over anything and that not knowing what was going to happen next was very traumatic. It was very dehumanising that she and her colleagues could just be erased from their old jobs because their managers resented what they had done and were determined to make life hard for them. She had hoped to come off antidepressant medication, but the anxiety produced by this continuing situation meant she was unable to cope and she increased her medication.
12. When she saw the statements produced by Mrs Goodwin and Mrs Adams she was shocked and disappointed at how personal they were. She said that she thought this would not be able to happen and there would be some form of protection from revenge against this kind of behaviour. She found there to be a complete lack of empathy with her position. She felt that both the managers were saying that they would teach her a lesson and they had the full backing of those above them to do that.
13. Just when she felt things could not get any worse she described being faced with the most awful of experiences she had had to face when she learned that Miss Lee was still employed by the Respondent, her having been led to believe that Miss Lee had been dismissed. She had an extreme fear of bumping into Miss Lee and had flashbacks to when she had had to face her on shift which made her feel sick. It was devastating that people had known that Miss Lee was still in employment and had not cared enough or had the decency to tell her and her colleagues. She said that she sobbed uncontrollably when she received the email telling her that Miss Lee was still employed. She described the news as setting her back.
14. She described then having to increase the dose of her medication and having no motivation to do anything, feeling that she might be better off dead and having serious suicidal thoughts. She said that she didn't recognise the person she had become. She had no confidence, no job, no future and was knocked out by the antidepressants. She said that she had to have counselling to try to come to terms with what had happened.
15. Mrs Dearing described her mother as having died of cancer on 6 April 2016 and that this was a very hard time where she struggled tremendously.

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16. She described Mrs Adams "*bastards*" comment as the final kick in the teeth which she found particularly depressing in that this person continued to behave in a vindictive way after causing so much hurt and disruption. To her, this was a form of assault. She felt absolutely violated by the comment. It was then adding insult to injury to understand that Mrs Adams was unaware that she had ever been found guilty of victimisation in the first place and was never shown the Tribunal's earlier Judgment. This made her feel further that the Respondent did not care about her and regarded her and her colleagues as "*dirt*". She found it absolutely disgusting that Mrs Adams had never been disciplined or had her behaviour explained to her by the Respondent. She referred to no one having ever apologised. She described having another job now at the Chapel Allerton site as a clerical officer in Outpatients. However, she said it was not true to say that she was happy and settled.
17. Again, she was still sleeping on the sofa having nightmares about Miss Lee. She still takes antidepressants and says without them that she could not cope. Her state of health has affected her family relationships and prevented her from enjoying happy family times.
18. The Tribunal has reviewed Mrs Dearing's medical records including those dated 22 September 2015, 8 January, 19 February, 12 May, 30 August, 24 October and 19 December 2016 and 19 February and 25 June 2018. It has also revisited occupational health reports dated 20 March 2015, 27 April and 6 July 2016, 10 January, 2 August and 1 November 2017 and 17 May and 23 August 2018. These corroborate the feelings she has described to the Tribunal throughout the period, the Tribunal noting in particular a reference from September 2015 where she describes sleepless nights and anxiety, referring to her understanding that Miss Lee was still employed. On 30 August 2018 it is recorded: she "*wishes she was dead*" but is not suicidal. The Tribunal notes an occupational health report of 6 July 2016 referring to the depression having been made worse by her recent bereavement.
19. Mrs Javed described the "*horrendous*" problems she had had with Miss Lee and Mr Innis. Miss Lee had caused her to feel intimidated but in bringing her Tribunal proceedings she gained comfort from her belief that what she was doing was effectively "*protected*". She said that she had been unable to get away from the impact of Miss Lee, but said that her absence since February 2015 was mostly to do with everything else which was going on.
20. She too had previously loved her job and felt very comfortable in the switchboard environment. The job was a very important part of who she is and she loved her hours and the way they fitted in with her family life. She enjoyed the social aspects of work and the feeling of pulling together when dealing with emergencies. She had formed close bonds with many colleagues over the years.
21. However, due to Miss Lee she had been suffering from extreme anxiety and depression and had to be put on antidepressant medication.
22. However, after the Tribunal proceedings were over, she felt she could begin a journey back to normality and draw a line under things. With Mr Innis and Miss Lee no longer there, she could have a fresh start

23. She found Mrs McGinnes' decision not to allow her back into switchboard to be devastating. Being redeployed is the last thing she wanted. She felt she was no longer in control of anything. The treatment of her was humiliating and intimidating. The atmosphere towards her colleagues made her feel very vulnerable with a horrible feeling of dread.
24. Reading the statements of managers was very upsetting and still was. The level of hostility felt like a personal attack on her, leaving her feeling very down.
25. Her mental health worsened. She felt disconnected once again from life and her family and that she was slipping back into a very dark place.
26. She was firstly redeployed into a position at Leeds General Infirmary which was inconvenient for her in terms of the hours and necessary travel arrangements. She was then absent due to sickness and tried to recover, feeling very lost and confused about the position she had ended up in. She described returning to work in June 2017 at Seacroft Hospital and then at St James' but not being in the right frame of mind and having again to undertake a difficult journey to work. Her health suffered as a result of the new working arrangements. She was again off from April 2018 returning to work in November 2018.
27. She described the failure to tell her that Miss Lee was back as one of the biggest shocks she had had. How the situation was handled made her feel that no one "*cared a jot*" about her feelings. The news that Miss Lee was back made her feel physically sick with nerves saying: "*I was so shocked and felt very vulnerable and let down alarmed and so very frightened to think that she could have walked in at any time...*"
28. She felt strongly that if her managers had been challenged about that what they were doing they may not have felt able to get at her and her colleagues in the way they had. She was stunned that Mrs Adams had never read the Tribunal's previous Judgment and that she had not been disciplined for any victimisation that she had been involved in. She felt this encouraged a situation where further victimisation was more likely and certainly the "*bastards*" comment which was made by Mrs Adams upset her deeply and opened new wounds. The comment left her feeling very wounded with a deep sense of despair. She found the comment to be very offensive and provocative.
29. She described having nightmares about what had happened and having trouble sleeping. She has high blood pressure and has been unable to come off antidepressant medication. She didn't like meeting up with people socially anymore and felt that she had nothing good to talk about. She often just wanted to sleep and had little enthusiasm for anything. Her family had suffered very much. She despaired at times about what had happened to them as a family because of the victimisation she had suffered. She wondered if she should have ever spoken up in the first place as she had lost everything.
30. She referred to an email sent out by Chris Carvey to her and her colleagues on 17 December 2018 just a few days before the Tribunal's remedy hearing

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feeling that this kind of email should have been sent four years ago when the first Tribunal Judgment was received. She felt that this email had obviously been sent with the remedy hearing in mind. She was upset also that Mr Carvey was inaccurate regarding her current job situation, giving her no confidence that he was genuinely concerned and wanted to reach out to her.

31. The medical evidence to which the Tribunal has been referred to in respect of Mrs Javed is also corroborative of her oral evidence, the Tribunal having been referred in particular to references in her records of 28 March and 14 September 2015, 22 June, 27 June and 13 September 2016, 24 March, 9 June and 12 July 2017 and 9 April and 30 October 2018.
32. Mr Panton said that he felt at times that this case will never end saying it was not easy for him to talk about his feelings. He felt very weary of the whole thing. He had thought, however, in 2015 that he could move on and get back to work on the switchboard. Yet still quite recently, Mrs Adams had announced to the Tribunal that she had no idea that she had been found guilty of victimisation and had not been aware of the Tribunal's Judgment.
33. He too said that he had loved his job and the Tribunal process had felt like a clearing out of things which needed to be aired. He was very upset at not being allowed to return to switchboard. He had been settled in his job and had got on with everyone, he said, apart from Miss Lee who he described as a very intimidating individual. The hours suited him well and he felt it was a job for life. He also had a good social life around the department.
34. He described his working life as having been turned upside down by the decision to redeploy him. He felt he was being punished for bringing Tribunal proceedings and was badly affected by the decision. He thought the situation was not good for his mental health. He was not his usual self and work issues had overtaken his life. He stopped going out and socialising with friends. He felt very negative and paranoid about what was going to happen next. He had lost confidence massively and had been unable to put matters behind him, becoming an emotional wreck. The fact that he and his colleagues were the last to know about Miss Lee's reinstatement was very hurtful. It reinforced a feeling of abandonment. He had become cynical and found it difficult to trust people. Whilst he worked as a pharmacy support worker now and likes those he works with as well as the job, he does not have the same opportunities to enhance his basic pay as he had before in switchboard.
35. He said he was ashamed to say that he had been very deeply affected by his treatment and felt that he was disposable and had no value.
36. He described Mrs Adams "*bastards*" comment as "*so hurtful and I really thought to myself when is this going to end.*" When he had learned of Mrs Adams "*bastards*" comment his reaction was that this was more of the same and typical of Mrs Adams. Nevertheless, he said he still found it very hurtful and didn't like being called a bastard.
37. Mr Panton had been absent from work due to sickness from 9 July 2013 to 8 February 2015. He agreed in cross-examination that this was a reaction to the treatment he had received from Miss Lee and that he had had no

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absences from work by reason of sickness since. He had not visited his GP in the period from February to November 2015. He had been cleared to return to work from a health point of view in April 2015 but had not started work until he commenced his pharmacy role from 6 January 2016 on a three-month trial. Whilst he accepted that some of the upset he felt had resulted from some aspects of his claims which had not succeeded, he maintained that he felt that he and his colleagues had won on their major points.

38. The Tribunal accepted the Claimants' expressions of their feelings and how they had been affected as entirely genuine. Mr Boyd did not seek to challenge how they felt but rather sought to explore and question the exact causes.
39. The Respondent has not provided any form of apology to the Claimants. It was noted after the first and second set of Tribunal proceedings that no one had sought to sit down and talk through the Claimants' situation with them and any lessons which might be learned. Certainly, Mrs Adams had not been advised about her use of language after the first set of Tribunal proceedings where adverse findings were made or after the second set of proceedings in which she was found to have victimised the Claimants. On the Tribunal's findings, she made the "*bastards*" comment in ignorance of the Tribunal's previous findings. As already alluded to, it is only very recently that the Respondent, through Mr Carvey, has sought to engage with the Claimants in terms of any potential closure they might obtain.

Applicable law

40. As regards injury to feelings arising out of the detriments as found to be proven, according to **Prison Service and others v Johnson [1997] ICR 275** the purpose of an award for injury to feelings is to compensate the Claimants for injuries suffered as a result of the discriminatory treatment, not to punish the wrongdoer. In accordance with **Ministry of Defence v Cannock [1994] ICR 918** the aim is to award a sum that, in so far as money can do so, puts the Claimants in the position he or she would have been had the discrimination not taken place. Pursuant to **Corus Hotels Plc v Woodward [2006] UK EAT/0536/05**, an Employment Tribunal should not allow its feelings of indignation at the employer's conduct to inflate the award made in favour of the Claimants.
41. Mr Brown has referred the Tribunal to the case of **British Telecommunications Plc v Reid IRLR 327** regarding the Tribunal's ability and requirement to compensate the Claimants for those matters which are a natural consequence of the incidents successfully complained of. Stress in coping with the aftermath of the discrimination is an element of an employee's injury.
42. The Tribunal was referred to the Vento guidelines (derived from **Vento v Chief Constable of West Yorkshire 2003 ICR 318**) and to the guidance given in that case where reference was made to three bands of awards. Sums within the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory treatment. The middle band was to be used for serious cases which did not merit an award in the highest band. Awards in the lower band were appropriate for less serious cases, such as where the act of discrimination

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is an isolated or one-off occurrence. Nevertheless, the Tribunal considers that the decisive factor is the effect of the unlawful discrimination on the Claimants.

43. The bands originally set out in **Vento** have increased in their value due to inflation and, a further uplift of 10% given to general damages pursuant to the case of **Simmons v Castle [2012] EWCA Civ 1039**. This had given rise to Presidential Guidance which re-drew the middle band for claims brought on or after 11 September 2017 as ranging from £8,400 at the lower end to £25,200 at the top end. That Guidance has since been revised and the sums uprated in respect of later claims. The Claimants' complaints were, however, brought respectively on 23 July 2015 and 23 October 2016 and the Guidance provides a formula which might be used to uprate the levels of the earlier bands. The parties' joint position, following discussion between Counsel, was that the Tribunal should apply the bands in the most recent Presidential Guidance dated 23 March 2018 on the basis that no award of interest on this head of compensation would be sought by the Claimants. This gives a middle band of £8,600 - £25,700 and a top band from £25,700 - £42,900. The Tribunal considered it appropriate and permissible to proceed on that agreed basis.
44. The parties' joint position was that they encouraged the Tribunal to make a global award including compensation for all 4 incidents of victimisation for which a remedy may be due. The "*bastards*" comment, it is said, must be seen in the context of the other 3 acts of victimisation and it would be artificial for the Tribunal to seek to divide them up. Again, the Tribunal is content to accede to the parties' suggested approach as indeed a legitimate approach to assessing injury to feelings in this type of case.
45. Mr Boyd's position was that the level of upset caused to the Claimants ought to be reflected as falling within the lower end of the middle band of **Vento**. The Claimants sought a figure which fell into the top band.
46. In the context of the potential to make an award for aggravated damages, the Tribunal refers, for the principles to be applied, to the decision of Underhill J in **Commissioner of Police of the Metropolis v Shaw [2012] ICR 464**.
47. Aggravated damages are not ordinary damages for injury to feelings in consequence of discriminatory acts – that would be mere duplication. They may be awarded in appropriate cases in respect of the manner in which the wrong was committed. In this regard a Tribunal might be looking to see whether there has been behaviour of "*a high-handed, malicious, insulting or oppressive manner*". Secondly the motive for the conduct of the employer may be relevant, if the employee was aware of it, in circumstances where spiteful, vindictive or deliberately wounding conduct is considered likely to cause more distress than conduct which results from ignorance or insensitivity. Under both these heads this Tribunal is mindful of the need to avoid duplication if indeed such factors are already compensated for within the award of injury to feelings.
48. The third head under which aggravated damages may be available is where an award is warranted by the Respondent's subsequent conduct after the discriminatory action. For instance, an award may be appropriate in the

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case of an employer who has deliberately refused to investigate a clear complaint of discrimination, failed to apologise when discrimination was patent or used his superior power and status to cause further distress. Conduct in the course of litigation may aggravate injury in a manner which can properly result in compensation, albeit Respondents are allowed to defend themselves and an adversarial approach to a Claimant's evidence is not in itself a ground for an aggravated award.

49. The parties were in agreement with the Tribunal's suggested approach of reflecting any aggravating features in the award for injury to feelings rather than making a separate award for aggravated damages.
50. Awards of compensation in claims of discrimination are governed by section 124 of the Equality Act 2010 which gives to the Tribunal the same power to grant any remedy which could be granted in proceedings in tort before the civil courts. Compensation based on tortious principles aims to put the Claimant, so far as possible, into the position that he/she would have been in had the discrimination not occurred - see **Ministry of Defence v Cannock** above – essentially a “but for” test in causation when assessing damages flowing from discriminatory acts.
51. In terms of compensation for ongoing loss of entitlements/overtime, the Respondent's position was that there was a break in the chain of causation and there could be no claim to compensation after the breakdown in the mediation process. The appropriate period for compensation would therefore be from 25 March 2015 until 24 September 2015 when mediation broke down, a period of six months. In the alternative the Claimants had failed to mitigate their losses by seeking alternative or additional work with the Respondent or elsewhere.
52. The Claimants' position was that the Respondent was seeking to rely on the concept of an intervening act in the law of tort. Mr Brown referred the Tribunal to relevant passages in Clerk & Lindsell on Torts and to the authority of **Essa v Laing Ltd 2004 IRLR 313**. There was, he said, no natural event breaking a chain of causation. None of the Respondent's individual employees could be seen to be a third party. The mediator employed by ACAS might be seen as such, but it was the initial act of victimisation in Mrs McGinnes not allowing the Claimants to be re-engaged in switchboard which caused the financial loss. Equity demanded that the Respondent be answerable for the loss. If the Respondent was at fault and tried to fix its defect, if the fix was unsuccessful that did not mean that the original wrong did not cause the loss. The concept of an intervening act involved an adverse event which effectively takes over and it was absurd to say that Mr Welsh became the cause of the loss. Mr Brown urged the Tribunal to make a finding of fact that the mediation was unsuccessful because Mrs Adams and Mrs Goodwin wouldn't engage, there been ample evidence, he maintained, that they were entrenched in their position. The Welsh decision came after speaking to them.

Conclusions

53. In assessing the appropriate compensation for injured feelings, the Tribunal must consider each Claimant individually on the basis of the evidence of the actual injury suffered by each of them.

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54. The complaints of each Claimant which succeeded are identical. The primary complaint the Tribunal considers, in terms of the upset caused, was the notification by Mrs McGinnes to them on 25 March 2015 that they would not be returning to switchboard. The Claimants were, however, further upset by the statements produced by Mrs Goodwin and Mrs Adams when preparing the management case in respect of their grievances. The Tribunal accepts that there was significant insult in the wording of the statements, demonstrating a dismissive attitude towards the Claimants and a fundamental lack of trust – it rejects the contention that the Claimants' evidence was exaggerated. The Claimants clearly considered that they were regarded as having behaved without integrity in questioning their managers' decision making. The Claimants then suffered further detriment in learning on 30 July 2015 that Miss Lee was still in the Respondent's employment. The realisation of the Respondent's failure to tell them of that at an earlier stage went significantly to the already damaged level of trust the Claimants had in the Respondent and caused the Claimants' fears about Miss Lee to be reactivated. It is obvious from all of the Tribunal proceedings, the impact Miss Lee had on all of the Claimants. Hearing that Ms Adams had referred to the Claimants as "*bastards*" on 12 May 2016 might seem like a minor occurrence and, to an extent, the way Mrs Adams felt about the Claimants would hardly have come as a surprise. Nevertheless, the comment has to be put in its full context of the Claimants having effectively struggled for some very significant period of time arising out of their workplace problems, having been vindicated to an extent with the findings of unlawful victimisation and yet learning that in their eyes no one had learnt any lesson and nothing was going to change.
55. The number of incidents of discrimination and the period over which they occurred, as well as the enduring nature of the injury suffered by the Claimants, would suggest that an award for injured feelings in all of their cases ought to be assessed as falling firmly within the middle Vento band.
56. In the cases of Mrs Dearing and Mrs Javed, there is significant evidence of events in the workplace damaging their mental health and wellbeing. Whilst it is clear that the original and a continuing cause of this was Miss Lee's treatment of them, the Tribunal has no doubt that the acts of discrimination caused further upset, at times an exacerbation of their conditions and certainly the continuance of their feelings of depression and anxiety. On all the evidence, it is difficult in terms of the appropriate level of award to distinguish between Mrs Dearing and Mrs Javed and the Tribunal declines to make a distinction with no clear basis in evidence. In both their cases, the Tribunal considers the appropriate award for injury to feelings to be in the sum of £25,700 on the boundary between the middle and top Vento bands. This is on the basis of the further aggravating features in this case and, in particular, the Respondent's failure to take the findings of victimisation of the Claimants sufficiently seriously so as to think to engage with them or offer some form of apology or expression of regret. More significantly, the Claimants' injured feelings were aggravated by the Respondent failing to address Mrs Adams' faults with her, so that she understood the Tribunal's findings that she had victimised the Claimants and how she ought to treat them in the future. That total lack of appreciation on Mrs Adams part was due to the Respondent and whilst it constituted a betrayal of the Respondent's obligations towards Mrs Adams, more importantly it made it more likely that future victimisation might occur which

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indeed it did in Mrs Adams referring to the Claimants as “*bastards*”. The Tribunal would assess the element of injury to feelings attributable to these aggravating features, but already included in the aforementioned global sum, in the amount of £3000.

57. Mr Panton suffered the same acts of victimisation as his colleagues and the Tribunal does not belittle the effect and significant upset they had on him also. However, his level of distress and upset was not at the same as that experienced by his colleagues and he was fortunate not to suffer the same adverse impact on his health. Nevertheless, the Tribunal considers an award for injured feelings in his case of £20,000 to be appropriate, which reflects/incorporates already the same aggravating features.
58. As agreed between the parties no interest is to be awarded on the sums, given that the Tribunal’s application of the most recently updated Vento band levels.
59. The Tribunal now turns to the issue of financial loss flowing from the reduction in the Claimants’ pay as a result of them not being re-engaged on switchboard. The Tribunal considers it necessary to look at the Claimant’s complaint as pleaded. This is set out at paragraph 1.2.5 of its Reasons sent to the parties on 6 April 2016. The complaint was: “*The Claimants being told on 25 March 2015 that they could not go back to their ordinary roles on the switchboard and had to seek redeployment in circumstances where occupational health in their reports of 20 March had stated the Claimants to be fit for a return to work on a phased basis, where re-deployment was not necessary but where instead the Respondent had insisted that the Claimants complete re-deployment forms.*”
60. Mr Brown encourages the Tribunal for the sake of fairness and justice to look at the issue of the failure to redeploy the Claimants broadly. Mr Boyd on behalf the Respondent reminds the Tribunal of the status of pleadings in Tribunal proceedings. He is right to do so. The allegation which was before the Tribunal and which it determined to be an act of victimisation was no broader than that set out above in the foregoing paragraph. The Tribunal was not determining a more general and perhaps more simply pleaded allegation that the Claimants had been victimised in their not having been allowed at any stage in a defined period of time to return to their switchboard roles.
61. The Tribunal has already had this matter remitted back to it by the Employment Appeal Tribunal on the basis that the EAT had not been entirely satisfied as to the Tribunal’s findings and that it had correctly focused on the mind of the decision-maker, Mrs McGinnes.
62. The Tribunal has clarified in its Judgment and Reasons on remission that it had sought to explore the conscious and unconscious motivations of Mrs McGinnes and that that was the crucial exercise it undertook in coming to a conclusion that she indeed had perpetrated an act of victimisation in the way she had treated the Claimants on 25 March 2015 and the reasons for doing so.
63. However, it is necessary for the Tribunal to look at the world as it then continued. The Tribunal must attempt to reconstruct the world as if the

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victimisation had never occurred to determine what would then have happened. The Tribunal clearly considered that Mrs McGinnes ought, to have avoided victimising the Claimants, to have been open-minded about and indeed to have pursued a mediation between the Claimants and their line managers in an effort to facilitate a possible return of them to switchboard. In its original Judgment in the second Tribunal proceedings, the Tribunal concluded that when Mr Thomas at the grievance appeal level got hold of the matter he redeployed the Claimants on a temporary basis pending a mediation process. The Tribunal was faced with that as a pleaded allegation of victimisation but determined that in his decision-making to redeploy the Claimants away from switchboard, he was genuinely seeking to achieve and focus on a practical resolution (untainted by victimisation) which might ultimately have got the Claimants back to work, possibly even back to their switchboard roles. The Claimants were willing to mediate with their managers at that stage and accepted the proposal to see if relationships could be repaired. The Tribunal found that Mr Thomas did not know what the likely outcome would be of mediation and indeed the Claimants entered the process with the hope and indeed expectation of success but, it must follow, without any guarantee. The Claimants stated, in terms of desired outcomes, that if the mediation did not work they would then accept redeployment away from switchboard.

64. There has been no complaint before the Tribunal in respect of the breakdown of the mediation process, indeed in the early stages of that process. Nor was there any complaint brought regarding a separate decision-making process which was then necessary within the Respondent to determine what should happen to the Claimants after the failed attempt to mediate.
65. If Mrs McGinnes had not victimised the Claimants, she would have had no closed mind, would have allowed a process of mediation to be pursued and there would then have been a decision to make regarding the Claimants' future employment. That is the decision making point which was reached after Mr Thomas' intervention where, in his intervention, no victimisation was found.
66. There is no evidence that Mrs Adams or Mrs Goodwin were responsible for blocking the mediation. It might be thought that they were likely to have been the block but any such conclusion would not be evidence based. There has been no claim brought before the Tribunal on such issue. The Tribunal has simply not heard any evidence as to what actually occurred. Their (victimising) statements given at management's request which expressed a loss of trust in the Claimants were made at an earlier point in time and in a different context. The Tribunal has an email from Mr Welsh to Ms Holland of the Respondent dated 24 September 2015 in which he states: *"I've reflected on the conversations and conclude that, in my experience it would not be appropriate to pursue mediation as a way of resolving the issues between the parties."* When pressed for more information regarding such conclusion, he responded to Ms Holland emphasising the importance of confidentiality in a mediation process. He stressed that although the parties might be willing to partake in a joint meeting, the final decision rested with him. He went on: *"I base my decision mainly around the idea "if you can't make it better don't make it worse". I'm responsible for the well-being of the parties during the mediation and have to make decisions around what*

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I think is best for all concerned and also taking into consideration my views on how entrenched the situation appears to me. Unfortunately it isn't an exact science and I err on the side of caution. In this instance I thought the risks outweigh the possible benefits."

67. The Tribunal considers therefore that the Claimants' compensation regarding loss of enhancements, the loss flowing from the act of victimisation alleged and found in the Claimants' favour, should be up to 24 September 2015 only, the date that Mr Welsh brought the mediation process to an end. In coming to this conclusion, the Tribunal places no reliance on the concept of an intervening act. The Tribunal does not consider that this was the legal doctrine being relied upon by Mr Boyd in this case. Rather, reliance was placed upon the necessity for a Tribunal to consider what the situation would have been had the act of discrimination not occurred.
68. The Tribunal does not consider that the subsequent victimisation arising out of the disclosure of Miss Lee's continued employment by the Respondent has any relevance to the issue of loss of enhancements before it. It did not, on any evidence before the Tribunal, scupper the chances of a successful mediation.
69. The Tribunal therefore calculates the appropriate levels of compensation on the basis of the figures agreed between the parties as to loss of enhancements. Mrs Dearing's figures on loss of enhancement gives a sum of £3600. The Tribunal applies interest at the rate of 8% from the midpoint of 30 June 2015 for a period therefore of 186 weeks up to the remedy hearing giving an additional sum due in respect of interest of £1030.15. This gives a total amount in respect of the loss of enhancements of £4630.15
70. The same periods of loss apply in the case of Mrs Javed and Mr Panton. In respect of Mrs Javed, loss over a period of 6 months is in the sum of £600 with an additional amount of interest calculated in the sum of £171.69. This gives a total respect of loss of enhancements of £771.69.
71. In the case of Mr Panton, the loss of enhancements is in the sum of £2640 with interest to be added in the sum of £755.45. This gives a total amount to be paid to him by the Respondent in compensation of £3395.45.
72. There were no mitigation arguments raised in respect of this early period. The Tribunal was referred to issues of mitigation in respect of later periods, including in circumstances where the Claimants' schedules of loss had projected a future loss continuing until they might ordinarily have retired, but these do not fall to be determined given the Tribunal's conclusion as to the more limited period of loss to be compensated.
73. The Tribunal raised of its own motion with the parties the possibility of it making a recommendation pursuant to Section 124(2)(c) of the Equality Act 2010, mindful of both the detrimental treatment received by the Claimants and their express continued wish to return to work in switchboard. This in circumstances where Miss Lee is no longer employed with the Respondent and the Claimants would not now return to switchboard under either the direct or indirect management of Mrs Goodwin or Mrs Adams. The Tribunal put forward a potential form of words for such recommendation and the

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Respondent had no objection to the Tribunal making a formal recommendation in such terms. The Tribunal therefore makes the recommendation as follows: *“The Respondent shall from the date this decision is sent to the parties give the Claimants equal consideration to those on the Respondent’s redeployment register for any future vacancies in switchboard subject to established working patterns and terms and conditions in switchboard at that point in time.”*

Employment Judge Maidment

Date 4 March 2019