Sb RESERVED REASONS

EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr M Massamba	**AND**	IKB Travel & Tours Limited

Heard at: London Central **On**: 4 January & 26 February 2019
27 February 2019 (in Chambers)

Before: Employment Judge D A Pearl
Members: Ms P Breslin
Mr D Eggmore

Representation
For the Claimant: Ms C Rooney, of Counsel
For the Respondent: Ms P Hall, Consultant

JUDGMENT AS TO REMEDY

The unanimous Judgment of the Tribunal is that the Respondent shall pay to the Claimant the following sums:

Compensation for injury to feelings to the Claimant of **£22,250**.

Compensation for personal injury of **£15,250**.

Compensation of **£20,135** for loss of wages; and the further sum of **£1,500** for expenses.

£4,000 as aggravated damages.

£11,827 as the uplift under s. 207A.

Total interest of **£9,396.27**.

These sums total: **£84,358.27**

REASONS

1. This was the Remedy hearing, the Judgment with Reasons having been sent to the parties on 8 October 2018. These need to be read in full. A summary is that the Claimant succeeded in a claim of race discrimination in relation to a racist comment that was made to him by a co-employee on 28 September 2016. Further, the dismissal of 6 October 2016 was an act of race victimisation, as was the subsequent failure by the Respondent to communicate an appeal outcome to him. The Claimant was employed as Business Marketing Development Manager for the Respondent from 1 February 2016 to 6 October 2016.

2. On the first day of this Remedy hearing the Claimant gave evidence, there was a witness statement from him and he was cross examined. However, it became apparent to all concerned that there was a need to see his GP notes and the matter was adjourned to 26 February 2019. On this occasion he was further cross examined and gave evidence pursuant to a revised witness statement and the parties were able to make submissions on all matters except one. This exception related to the law concerning the possibility of an ACAS uplift and further email submissions were, by agreement, tendered during our Chambers day on 27 February.

3. In preliminary discussion with the parties on 26 February it became apparent to the Tribunal (as the representatives agreed) that it would be possible that day, after receiving submissions, to give an adjudication in relation to the appropriate awards for personal injury; injury to feelings; past losses; future losses and retraining costs. This we did at the conclusion of that day's hearing and we will return to the figures in our conclusions.

4. By way of summary, we note three features of this case. First, back in 2009 the Claimant experienced racism while working in a shop. As we will recount, he experienced depression and was on medication until early 2011. A second feature to note is that the Claimant's case is that after his dismissal in 2016 he felt unable to return to work in an office environment. He has since then been in employment for much of the period but that has been predominantly in manual work. A third point to note is that the first replacement employment after dismissal was with Dixons Carphone Warehouse and it was not successful. It was this experience that persuaded the Claimant, on his evidence, to work in an entirely different environment.

5. Turning to the more detailed evidence, the Claimant sets out in his witness statement what occurred in 2009 at an employment which was either his first or one of his first after graduating. There is no question that he experienced a serious racist incident at work, and he says that the work colleague involved was arrested by the police although never charged. The Claimant waited about ten months before going for medical treatment and in consequence he received counselling and also took a one-month course of anti-depressants. Consistent

with what he then did some seven years later, he decided to avoid working in a retail environment after the discrimination. He found employment as a kitchen porter and also in a post room as well as some office work. A significant document, page 405 dated 11 February 2011, indicates that depressive systems had subsided by that date. The medical notes for this same day also indicate that his mood by this point was stable and we are able therefore to conclude that the depressive episode ran from June 2009 to February 2011.

6. We accept the Claimant's evidence that at his first post-dismissal work with Dixons he was getting flash backs to the incidents we have described in our Judgment. We accept that he was suffering panic attacks and we suspect he is correct in saying that he went back to an office too soon. He accepts that he was unable to carry out his duties in that employment. He was dismissed.

7. Over the next few months the Claimant held off going to the doctor. The medical notes show that shortly after the dismissal he saw the GP on 17 October 2016 and was referred for counselling. It is recorded that he felt stressed and feeling out of control. He was referred to the primary care mental health team. The Dixons job was from 13 December 2016 to 17 February 2017 and from February to the end of July 2017 the Claimant was unemployed, this being the longest period of unemployment in the overall period, October 2016 to January 2019. It is clear that he was experiencing depression, low mood, anxiety and insomnia. There is evidence of this in the GP notes at page 26 (for 6 June 2017, page 27 and also elsewhere). Nevertheless, either in June or July 2017 the Claimant after a period of training decided to take employment as a labourer. It seems to us that this would have coincided with some of the treatment or counselling that he was receiving.

8. As we have noted, this decision to go into a different field so as to avoid an environment in which he had experienced race discrimination is consistent with what happened some years earlier when he decided to leave the retail environment for the same reason. The Claimant in his witness statement then sets out ten separate employments that he undertook between mid 2017 and the end of the December 2018. In the period of approximately eighteen months there were only about eleven weeks unemployment.

9. For about a month in August and September 2017 the Claimant worked at Paramount. He states that he found it difficult to fit in with his peers and he was the only black person in the team. He was picked on. He had numerous panic attacks. His evidence as to what happened at Paramount is corroborated by an email dated 15 September 2017 at page 333. It was there that workers played a traditional building prank on him. The suggestion has emerged during the hearing that this alone has exacerbated his mental illness, but the Claimant in evidence seems to accept that it was a silly joke. The important point that we would make is that he gave firm evidence that, as stated in the email to which we have referred, he was let go by Paramount for reasons of cost alone. He has never alleged that this was a dismissal that was discriminatory and he accepts the reasons he was given at that time. He found replacement employment within two weeks.

10. In our view it is to the Claimant's credit that he continued working during 2017 and 2018 even though he was unwell. We accept his evidence that none of these jobs on building sites and similar were particularly congenial to him. The main period of unemployment is about three months from November 2017 to January 2018, but thereafter he worked fairly consistently. There was a two month break in the Autumn of 2018. He was working through an agency and it seems that these were short term employments with some breaks in between them. He also gives a list of dates that he missed working because either he was feeling unwell, or had a panic attack or for other reasons. There are seventeen days listed.

11. Turning to the medical evidence, the GP notes evidence the Claimant having attended counselling sessions from June to September 2017. There is a note of 8 November 2017 that reads: "He finds enclosed office environment and relationships difficult and he does not foresee that he would be comfortable again in that environment. He feels much less anxiety in the work he is now doing".

12. On 17 January 2018 the Claimant was referred to the primary care mental health team and there is at this point the first prescription of an anti-depressant, Mirtazapine. Consistent with other entries in the notes, on 29 January 2018 the Claimant was reporting to the GP feeling depressed with poor sleep and low mood. The background was the tribunal litigation. On 1 February 2018 one of the standard questionnaires was administered and the GP appears to have diagnosed a generalised anxiety disorder. It is also noted that the Claimant was feeling nervous, anxious or on edge nearly every day and was worrying. He was becoming easily annoyed or irritable and was restless. He had trouble relaxing. He was fearful. The medication at this stage is described as psychotropic. There is also in the GP notes a clear indication that the Claimant told his doctor that in November 2017 one of the Respondent's witnesses had threatened him at a tribunal hearing. On 15 February 2018 there is further reference to the Claimant being anxious since that event which affected him day to day. There is also reference to CBT as further treatment.

13. On 12 March 2018 there is a longer than usual recording of the Claimant's symptoms that he described to the GP.

> "Michael spoke about feeling low in mood, and suffering from anxiety since November, when he was dismissed from work. He feels he has anxiety particularly related to the work place. Fears being fired. Described feeling mild physical symptoms of anxiety with heart racing and feeling flushed, and then avoidance behaviours, wanting to escape. Michael could not identify his cognitions at times of anxiety. He describes feeling his mood changes at small things and then feels low again. His goal is to return to where he was prior to his difficulties at the work place. Finds office work difficult because he is concerned about crying in front of others, he says construction work is easier because people take on more individual roles. Michael said he has stopped seeing friends outside of work, has three to four close friends since college ..."

14. His mother attended this appointment as she did again a week later on 19 March. The Claimant, perhaps understandably, expressed a concern that he had received no formal diagnosis. He also said that he thought he would be unable to do an office job in future. Mirtazapine was continued and it does not appear from the long entry dated 22 May 2018 that the Claimant's condition had improved. Alternative therapies and medication were discussed then. The doctor described the symptoms as being generalised anxiety and also mild depression and they were being exacerbated by the pending tribunal hearing. It is clear from the entry of 3 August 2018 that the Claimant did go for alternative therapy although he found it to be of little benefit. He was saying then that he felt his mood had improved and the anxiety had reduced. Although further therapy including CBT was recommended, his outlook appeared to be more optimistic. We also note that by mid-2018 the prescription for Mirtazapine had increased from 30mg to 45mg.

15. The Claimant's witness evidence that from early 2013 to October 2016 he had no issues whatsoever with mental health and experienced no symptoms is borne out by the medical evidence. The Claimant's assessment of this symptom-free period is, if anything, conservative, because the notes indicate that he might have been substantially free of symptoms in early 2011. In any event, his evidence has been supported by the production of the notes and we record that we adjourned this case precisely for that purpose. The causes of the documented anxiety, panic attacks and depression are referred to in the notes themselves. When taken with the Claimant's own evidence, they amply support the conclusion that this has all been consequent upon the episodes of discrimination that we recorded in our Judgment. Any suggestion that there is a residual cause going back to 2009 is unsustainable.

16. When asked questions by the Tribunal, the Claimant told us that his employment with the Respondent, which was a permanent job, was one that he had no intention of leaving. He was adamant that it was not stop gap employment. Further, he had not, before dismissal, thought of qualifying as a lawyer. It is in the process of litigation that he has come to the realisation that law may suit him and his is currently on the part-time conversion course for the Bar which began in January 2019. He still requires mental health support and assistance, but he has a clear ambition of helping others, possibly through the law, and if that happens in a self-employed capacity, the Claimant has no difficulty with that.

17. We accept the Claimant's evidence that before he was dismissed by the Respondent he had been looking around in a general sense at the possibility of moving to other employment. However, he was convincing when he told us this was nothing to do with any dissatisfaction with his wage rate. He records that a major prompt was seeing the Respondent hiring somebody for a similar position. In any event, comments the Claimant, his probation finished in July and he was still in employment in October. We accept that he was not contemplating moving to another job at the time when he was dismissed.

18. In terms of the quantum for wage loss and also expenses, we will turn to these matters in our conclusions.

Submissions

19. We are grateful to both representatives for their written and oral submissions. We will return to some of these in our conclusions below.

Conclusions

20. The general common law principals are well known. In compensating for statutory torts, the aim is to put the Claimant into the position they would have been in had the Respondent not acted unlawfully: **MOD v Cannock** [1994] ICR 918. Ms Rooney places reliance on **Thaine v London School of Economics** [2010] ICR 1422, **Olayemi v Athena** [2016] ICR 1074 and **BAE Systems v Konczak** [2018] ICR 1.

21. It is clear from the most recent Court of Appeal authority cited that the analysis of Keith J in Thaine is approved and is good law. The case was concerned with loss sustained by an employee that was caused by a combination of factors, some of which amounted to unlawful discrimination and others which were not the legal responsibility of the employer. At paragraph 17 he stated as follows: “The test for causation when more than one event causes the harm is to ask whether the conduct for which the defendant is liable materially contributed to the harm. In this case, the Tribunal found that it did and therefore the LSE was liable to the Claimant. But the extent of its liability is another matter entirely. It is liable only to the extent of that contribution. It may be difficult to quantify the extent of the contribution, but that is the task which the Tribunal is required to undertake”.

22. He also approved previous dicta from case law to the effect that even though a precise apportionment of impairment and disability may be impossible, a Respondent should not be judged liable to pay in full, when it is known that only part of the damage was their fault. This has all been approved as the correct approach.

23. We, therefore, have to decide whether, as a matter of fact, psychiatric damage damaged by the Claimant is divisible. Ms Hall in her written submission takes two points that are relevant to this issue. First, the previous mental difficulties suffered by the Claimant in 2009 to 2011 are said to be a “pre-disposition”. In ordinary circumstances, submits Ms Hall, the Claimant would have reacted differently to the racist comment made by Abdallah. Second, she submits that the panic attack of January 2018 should not be attributed to the Respondent. Although the arguments under these heads are not fully developed, we can infer, when taken with some of the questions she put to the Claimant, that she is making a submission here that the earlier mental problem or breakdown is a relevant cause of the Claimant’s illness after October 2016. Although Ms Hall does not say so in terms, this would be an argument for apportionment on the basis that the psychiatric damage is divisible.

24. Ms Rooney makes contrary submissions. She first points out that it is settled in law that there are circumstances where the tortfeasor must take the Claimant as they find him or her. If authority is required, she cites the Olayemi case in the EAT, a decision of HHJ Richardson. In paragraph 19 he referred to the essential principals. "The Claimant must prove that the Respondent's wrong doing was a material cause of her psychiatric condition. If she does so the Respondent must take her as he finds her; it is no defence for him to say that she would not have suffered as she did but for a susceptibility or vulnerability to that kind of psychiatric condition. The Employment Tribunal will award compensation for the psychiatric condition, although it may discount the compensation to take account of any risk that she may in any event have suffered from the psychiatric condition to which she was vulnerable. That would depend on the chance that she would have suffered some other cause – presumably harassment or similar – to trigger her condition and also on the seriousness of that cause".

25. This last point is also echoed in the short decision of Irwin LJ in Konczak. He commented that he supported "… the proposition that it will often be appropriate to look closely, particularly in a case where psychiatric injury proves indivisible, to establish whether the preexisting state may not nevertheless demonstrate a high degree of vulnerability, and the probability of, future injury: if not today, then tomorrow".

26. As to the earlier incident in 2009/2010, it has been established with clarity in evidence that the Claimant was symptom-free by 2013, although he may very well have been substantially free of symptoms two years earlier. Whichever date is correct, he had made a complete recovery by the commencement of employment with the Respondent and there is nothing anywhere in the evidence to suggest that the earlier experience caused any of the psychiatric damage. It was suggested in cross examination that he had not "got over" the earlier incident, but we reject this as being an unreasonable characterisation of the evidence, overall.

27. The true position, as we find, is that the Claimant was a vulnerable individual. The earlier incident was an upsetting one and undoubtedly affected him psychiatrically and also led him to avoid the environment where the incident had occurred, namely in a shop. Whether his vulnerability was enhanced because of the incident is beside the point. If he was to experience race discrimination again, even though this would be unknown to the Respondent, his reaction was likely to be similar to that he had experienced in 2010.

28. In addition, there are no other causes of his psychiatric damage so far as these facts are concerned after October 2016. There is no evidence of anything in his personal life that would contribute to the illness and there are no non-tortious causes of distress or illness of which he complains. There is nothing in the medical evidence to suggest such an external cause. What occurred here is that the Claimant first heard a deeply offensive racist comment and that upset him. He then brought it to his employee's attention and as a result he was dismissed. When he appealed against the dismissal he was given no outcome. For the reasons that we have set out at some length, the dismissal and the decision on appeal were items of victimisation. There is, therefore, in this case a

short passage of factual circumstance which, from the original racist comment through to the appeal process, could be viewed as hanging together and to amount to a clear episode of discrimination/victimisation. The Claimant's evidence that it greatly impacted upon him is not only credible, but is supported by all of the medical notes. It is also consistent with his previous history. In addition, we have found the Claimant at the Remedy hearing also to be an accurate narrator of events and we do not consider that he has exaggerated any of his evidence. In these circumstances the question of divisibility or apportioning his loss to the acts of the Respondent and also other causes does not arise. This is a true case of a vulnerable individual being subject to a concerted course of discriminatory conduct and the Respondent must, indeed, take this Claimant as they now find him.

29. The next point that we therefore need to consider is the submission from Ms Hall that either (a) there was an intervening event which 'breaks the chain of causation'; or (b) there is a likelihood that such an event would have happened had the discrimination/victimisation not occurred. The first of these propositions relies upon the panic attack, as it is described, of January 2017 at Dixons. (Although Ms Hall refers to 2018, we consider that this is a clerical error.) This is consistent with her oral submission to us that the Claimant should have applied himself better to that well paid employment so that the Respondent is relieved from any liability to pay by way of compensation any sum representing financial loss after December 2016. Our factual finding here is that the Claimant was uncomfortable in this employment because of the after-effects of the discrimination and that he is likely to be correct in saying that he went back in to the working environment too early. There is nothing in the evidence overall that would lead us to conclude that the subsequent mental difficulties he experienced were not caused and occasioned by the Respondent's discriminatory conduct.

30. In case we are wrong about the date, we have also looked at the chronology for January 2018 to see if there is anything there that could support Ms Hall's submission. In our view there is no support for her. The Claimant at this point states that (by January 2018) he was unemployed and was experiencing depression, low mood, anxiety, insomnia, panic attacks and suicidal thoughts. He specifically said he had flashbacks to the discriminatory conduct experienced with the Respondent, along with his dismissal from Dixon Carphone Warehouse, in respect of which he makes no claim of discrimination at all. We would conclude that there is nothing here that can break the causative chain or constitute a chronological cut-off in terms of compensation.

31. Given that we have no rational basis for an apportionment this is, therefore, a case where the injury is 'truly indivisible' and, to cite Underhill LJ in the most recent case, at paragraph 72, "… principle requires that the Claimant is compensated for the whole of the injury". That said, the caveat is important and this is that if the Claimant has a vulnerable personality, a discount might be required.

32. This therefore leads us to the question of whether or not some form of damage or injury would have been suffered by the Claimant had the torts not occurred. The submission to this effect by Ms Hall has not been made in any

detail and, in our judgment, this is because there is no evidence in the case that could point a Tribunal towards the conclusion that the Claimant would have had some form of relapse or anxiety or setback such as to cause him to become ill. His strongest point is that for at least three years before starting employment with the Respondent there was no difficulty of this sort. A secondary observation is that there appears to be nothing in the facts of his employment with the Respondent that would suggest that such a trauma or crisis was coming down the line. There is no medical evidence of any sort that suggests that he was (in the normal course of work) unusually vulnerable to any form of breakdown and he had long been off medication. Even if his employment was not entirely secure with the Respondent, the likelihood is that he would have found in time a new position to move to. There is nothing to suggest that either in that process or otherwise he would have experienced the relatively serious mental problems that did occur. Accordingly, we find no basis to reduce compensation on the broad argument that there would have been some point in the relevant chronology when the Claimant's health would have either collapsed or deteriorated.

33. We therefore turn to injury to feelings. As Mummery LJ said in **Vento** [2002] EWCA Civ 1871:

> "Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury … Striking the right balance between awarding too much and too little is obviously not easy."

As to the 3 bands, the top band should normally reserved for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. The middle band should be used for serious cases, which do not merit an award in the highest band. We also note the important citation from H M Prison Service v Johnson [1997] ICR 275 as follows: "(i) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award. (ii) Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use the phrase of Sir Thomas Bingham MR, be seen as the way to 'untaxed riches'. (iii) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think that this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards. (iv) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.

(v) Finally, the tribunal should bear in mind Sir Thomas Bingham's reference to the need for public repect for the level of awards made."

34. As there will be an award also for personal injury, we have to bear in mind throughout that we must be astute, so far as we can, to avoid double recovery. This entails making a deduction from the total that would otherwise be appropriate if we were to treat each of these two heads separately. Starting therefore with injury to feelings, we are satisfied that this case falls in the mid band of the applicable figures applying at the time the proceedings were initiated and this band in the Vento guidelines is between £8,400 - £25,200. Our judgment is that this is a case which is close to the top of that band.

35. We conclude that this was a serious and in certain respects blatant course of conduct by the Respondent that involved two acts of race victimisation consequent upon the Claimant complaining about the initial act of race discrimination committed by a co-employee for whom the Respondent is vicariously liable. There are a number of features that demonstrate this to be the case. First, the dismissal was because the Claimant had done the protected act. Second, it involved his being confronted without notice with a false allegation of poor performance. Third, his appeal was in effect ignored because the Respondent's relevant manager considered the Claimant to be a liar and not worthy of any response to his appeal. The consequence of the victimisation was serious in that the Claimant lost a stable job at which he had performed satisfactorily. It was because he had done a protected act, but that protected act was to complain about an act of discrimination that undoubtedly took place. This is the background against which we judge his injury to feelings.

36. As an objective matter of evidence his feelings were very considerably injured. The entirety of his evidence at the Remedy hearing demonstrates that and he also experienced panic attacks and flashbacks to the initiating discrimination act for a considerable period of time. His confidence was so affected that he was unable to work in an office environment, a decision he took that is not only reasonable but also consistent with what had happened some years previously. The medical evidence could not be clearer that the Claimant was so affected as to merit a separate award for personal injury, but that evidence also supports a realistic sum for an award for injury to feelings. We do not break down the acts into three separate elements, but take them all together and the figure that we consider to be appropriate for injury to feelings, in its own right is **£22,250**.

37. Turning to personal injury, our task was made a little easier because there is a convergence in the submissions of the parties. Ms Rooney suggests that the correct figure would be £20,000 and although Ms Hall has not approached the matter in the same direct way, various submissions that she made to us indicated that she had that figure in mind also as a starting point. Having regard to the Judicial College guidelines for assessment of general damages in personal injury cases, we are satisfied that the case falls within moderately severe category which is the third of four categories in ascending seriousness. There was work related stress resulting in a long-standing disability. It affected the Claimant's ability to cope with life and work. It affected his relationships with family and

friends as he has described. We consider that he will make a recovery but that it will take some time and involve some further CBT. Given the history, it is necessarily the case that there will be some future vulnerability. However, having concluded that the matter falls beyond the second, moderate, category, we will be cautious in placing this particular case too far up the scale in the third class labelled moderately severe. That bracket runs from £16,720 to £48,080. We assess the correct figure on it to be £20,000 and that coincidentally concurs with the submissions of the parties but it one that we make independently of those submissions. These two figures for injury to feelings and personal injury total £42,250 and in our view, there is an element of double recovery. We are obliged to reflect this by making some adjustment and therefore we do so by reducing that figure to **£37,500**.

38. The Claimant claims aggravated damages. In Commissioner of Police for Metropolis v Shaw UKEAT/0125/11, [2012] IRLR 291 a summary in the judgment derived from Rookes v Barnard can be usefully cited: “(1) Aggravated damages are compensatory in nature and not punitive. (2) The features that may attract an award of aggravated damages can be classified under three heads - (a) the manner in which the defendant has committed the tort; (b) the motive for it; and (c) the defendant’s conduct subsequent to the tort but in relation to it. (3) The features enumerated at (2) above affect the award of compensation because they aggravate the distress caused by the actual wrongful act.” An employer who has shown a high degree of insensitivity*,* who has failed to apologise or who used his superior power and status to cause further distress, will have behaved in a manner which might not actually be discrimination, but which, if proved to have made the injury identifiably greater, will be suitable for an award of aggravated damages.

39. Ms Rooney very realistically only bases this additional award on the events of November 2017 at the Employment Tribunal when Mr Burhan, in effect, threatened the Claimant by telling him to watch his back. This has been the subject of a full determination by Employment Judge Grewal. This was a scandalous way for a party to approach a litigant in a discrimination case. It comfortably falls within the category of malicious or intimidatory conduct and it merits an additional award of **£4,000**.

40. The next head of claim is for lost wages and we reiterate that there is no basis upon which the period of loss can be brought to an end before 4 January 2019. The Respondent has submitted that for reasons we have already covered, events occurred during that period that break the chain of causation and in effect should produce a cut-off point, but we have rejected all of these submissions. In other words, it is our firm conclusion that all of the financial loss up to 4 January 2019 is wholly attributable to the discriminatory acts.

41. However, we decline to extend the period of loss beyond that date. The Claimant has asked us to do so, but it was in January 2019 that he undertook a complete change of direction by beginning his studies for the Bar on a part time basis while still looking for and undertaking work. He claims not only retraining costs but also loss of income during this period, but we regard the decision to read for the Bar as a career change of such significance that the Respondent

ought not to be made liable to compensate the Claimant, either for the costs or for the notional lost income. The short point is that such loss is in our judgment too remote from the acts of discrimination. Ms Rooney says that they are linked to those acts, and that is certainly true. However, that the Claimant might not have read for the Bar but for the acts of discrimination and victimisation does not satisfy the correct test. There will be many reasons in his thinking and his life experiences that will have led him to take this course and we consider that it is unrealistic to say that these are steps that were caused by the discriminatory acts. In other words, had none of these tortious acts occurred, we think it is perfectly feasible and possible that the Claimant would have chosen to start a new career and that could have been a legal career. We therefore impose a cut off point of 4 January 2019 on all financial loss.

42. For the reasons that emerged during the course of submissions in this case, the correct net figure (which we do not understand the Claimant to dispute), is **£20,135**. Ms Hall abandoned the mitigation arguments.

43. A claim has been made for loss of statutory rights and in principle such a claim can be made. We decline to make any award for a combination of reasons. First, the Claimant had not acquired the statutory rights that require two years of employment. Second, there will be no loss of statutory rights if the Claimant does become self-employed as a barrister.

44. There is a relatively high claim of over £5,000 for expenses and this includes a notional amount for the income lost when the Claimant made no less than fifty-eight visits to advice agencies of one sort or the other during the course of the litigation. In may well be that this fact alone is reflective of his general level of anxiety, but there are two difficulties with this claim. First, only reasonable expenses can be awarded and in our view this number of trips is excessive and unreasonable. Second, the claim has been formulated in the schedule by the Claimant on the basis that every time he went he lost £75 in earnings. During the course of his evidence on the first day of this hearing the Claimant readily accepted that this was not always the case. In all of the circumstances having regard to the various items under this head we consider that a reasonable sum cannot exceed £1,500.

45. There is no dispute that the Respondent was in breach of the ACAS code when it summarily dismissed the Claimant without any procedure and also in failing to give him the conclusion on the appeal. Both of these breaches are in procedural terms serious, but the seriousness is magnified when we note that they both are connected with and motivated by discrimination. It goes without saying that this was an unreasonable failure by the employer and it seems to us impossible to say that it will be just and equitable in all of the relevant circumstances not to increase the award. Ms Hall maintains that this small family firm was ignorant of correct procedures, but there is limited force in this submission given that the predominant motive was to remove the Claimant from the business forthwith and without any justification for doing so. It might be thought that 25% is the obvious just and equitable increase to make in the circumstances.

46. We understand the Tribunal to be obliged to have regard to the overall effect and consequence of increasing an award in a case of discrimination. There has been some confusion during the course of submissions as to what element of the award could be increased and both parties were inclined, before researching the matter, to take the view that only the part of the award referable to the dismissal (or notionally the appeal) could be increased which would be the figure for loss of earnings of £20,135. This is incorrect and in an exchange of emails that we invited before adjudicating upon the matter in Chambers, Ms Rooney has drawn attention to the wording of s.207A which says that any award can be increased. Further, we have had regard to **De Souza v Da Vinci,** a decision in the Court of Appeal. Leaving aside the transposition of two numbers towards the end of the judgment, which may be a straightforward clerical mistake, it seems clear that Underhill LJ was directing the remitted Tribunal to consider whether there should be an uplift under the section to an award that had already been made for psychiatric injury and also injury to feelings. Therefore, the whole of the award falls to be increased in this case, although we would decline to increase the aggravated damages. We calculate the sum of £59,135 to be capable of enhancement. We do not apply it to the aggravated damages sum, that sum being a discrete sum we award in its own right, and bearing in mind all the other heads of compensation. In our view having regard to the overall figures involved in this case, the just and equitable increase would be 20% and when we apply that to the sum of £59,135 the additional element is **£11,827**.

47. Accordingly, the award before interest is £74,962 made up as follows: £22,250 for injury to feelings; £15,250 for personal injury (these two elements totaling £37,500, paragraph 37 above); £20,135 for net wage loss; £1,500 expenses; £11,827 as s 207A uplift; £4,000 for aggravated damages.

48. Interest is 8% for injury to feelings, from 28 September 2016 to the calculation date, 27 February 2019. This is 882 days and produces **£4,301.26**

49. For all other calculations interest is calculated from the mid-point (441 days). These sums total £52,712. Interest is **£5,095.01**

50. Accordingly, total interest is **£9,396.27**.

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Employment Judge Pearl

Dated: 15 March 2019

Judgment and Reasons sent to the parties on:

18 March 2019

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For the Tribunal Office