THE EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms M Shirin	**v**	**1) Wilson Barca LLP** **2) Richard Barca** **3) Lily Raj**

Heard at: London Central

On: 18, 19, 20 December 2018, 5, February, 2019; 1, 4 March, in chambers

Before: Employment Judge Pearl

Members: Mrs HJ Bond
Mr J Carroll

Representation:
Claimant: Ms L Millin, Counsel
Respondent: Ms L Bone Counsel

JUDGMENT AS TO REMEDY

The unanimous Judgment of the Tribunal is as follows:

1 The Respondents shall pay to the Claimant for injury to feelings the sum of £46,908.38, inclusive of aggravated damages (£5,000) and interest.

2 All other claims fail.

REASONS

1. This was the Remedy Hearing, the decision on liability having been promulgated on 6 February 2018. It is important to note at the outset that the Second Respondent's behaviour towards the Claimant during the course of her employment, which lasted from 2 November 2015 to 10 June 2016, was in many respects offensive. However, the Tribunal upheld the claims of direct discrimination only in limited respects. Although the environment was offensive,

we accepted that the Second Respondent treated everyone in the office poorly, particularly if he considered that they had made a mistake: see paragraph 61 of our conclusions. We said that "… the essential question for all the harassment claims is whether the unwanted conduct related to a relevant protected characteristic. For the most part, it did not". The example that we immediately gave there was that calling the Claimant "fucking stupid" did not relate to her gender and; we accepted that anybody who Mr Barca thought had made some form of error would be subject to the same behaviour. As we observed, such abuse directed towards employees was "indefensible, grossly offensive, relevant to a claim for constructive unfair dismissal, but it is not harassment in law". (Paragraph 63). This is an important preliminary consideration and we will return to the detail of what we found to be actionable and tortious behaviour.

2. As to constructive dismissal, we had no difficulty in finding that the conduct complained of overall amounted to repudiatory conduct. We noted the gaps in the chronology between about 18 March 2016 and 24 April and also between then and 1 June 2016. We concluded that the final incident of swearing and shouting on 1 June was the reason why the Claimant resigned. In terms of constructive dismissal, we said that this was a classic Omilaju case and that there had been a long accumulation of abuse of the Claimant. During the course of that abuse some tortious acts could be identified in terms of harassment. We concluded that there was a breach of the implied term and that what happened on 1 June was a last straw that entitled the Claimant to resign. Nevertheless, we were unable to conclude that the resignation was the result of the tortious harassment or was otherwise because of the protected characteristic of gender. "The catalogue of abuse and swearing directed at the Claimant was substantial and relatively prolonged, over a period of some months. It was this that, in our view, finally ground the Claimant down. That there were acts of tortious harassment along the way does not mean that her resignation and constructive dismissal were because of gender (or age). These incidents and the protected characteristics were incidental to the real reason for which she resigned, which was the constant barrage of abuse, principally from Mr Barca, and most of which did not infringe the Equality Act. We would, accordingly, hold that the constructive dismissal was not an act of direct discrimination".

3. We omit making any further reference to the troubled and disputatious interlocutory correspondence between the parties that took place between the liability and the remedy hearings. There were at least five case management discussions and the correspondence with the Tribunal was voluminous. We can safely say little more about this because at the outset of this Remedy hearing the evidence was more or less in order, in that the Claimant had produced a witness statement; and there were two reports from the expert psychiatrists, one for each party. By the time the Claimant came to give evidence on the second day it was confirmed that neither party was seeking any further postponement.

4. It was explained to us that the Claimant had compiled her own witness statement for the Remedy hearing. In paragraph 3 she stated: "All my life, I was a very healthy and resilient person with the determination to achieve something big and live a life with dignity". She set out, justifiably, that she was proud to have qualified here as a barrister, having come to the UK in 1989. The Claimant refers

to degrading and humiliating comments from the Second and Third Respondents in a very short paragraph of one sentence. She then refers to a mental breakdown that occurred at about the time of and following her resignation. She states that her relationships with her family were affected and that both she and her daughter had been caused what she terms serious psychological damage. "Since I resigned I have spent most of my time in bed suffering from PTSD, vertigo, anxiety, depression and asthma". Elsewhere in this statement she refers to being the "punching bag" for Mr Barca, Lily and her colleague Martin. She says they "used their power, darkness, rage and rigidity to torment me to the point to a mental breakdown on 1 June 2016". She also refers to having suffered fear and stress for seven months, 24 hours a day. She cried every day and was terrified. Her current life is now "worse than death". Other aspects of the written statement will be referred to later on in these Reasons.

5. In the Claimant's schedule of loss, she claims five years future loss of earnings at £50,000 per year and a further ten years future loss at £60,000 and these sums total £850,000. She claims £40,000 for injury to feelings, aggravated damages in an unspecified sum and personal injury in the sum of a little over £88,000. Therefore, her claim before grossing up is in excess of a million pounds.

6. We begin by referring to the relevant evidence that was given by the Claimant in cross examination. She confirmed that after she started writing a journal, she often made entries on a weekly basis. She says that she started drinking in about December 2015 or January 2016. She did not drink every night. Once she got very drunk. Her consumption increased to two or three bottles a week plus some Strongbow. We accept this and consider that the reference in medical notes to two or three bottles a day is a clerical mistake.

7. She then confirmed that the Third Respondent, Lily, was often very friendly towards her and at the outset they got on well. It was the Second Respondent's behaviour that was putting her under stress. Even after November 2015, when Lily called her names, she still regarded her as a friend. She repeated something she had told us during the liability hearing, which was that she could not please both Lily and Mr Barca. We recall from that hearing that this was because in some instances the two of them had different notions about how things should be done. She also added that it was a very complex situation and "they all had hatred to each other".

8. We would at this point note that the dynamic within the office was in all respects stressful and that it is not simply a matter of the comments that were directed at the Claimant. They were not the only cause of stress. In our opinion, having heard all the witnesses, there were other tensions and rivalries and it all amounted to a picture that was, indeed, complex. For example, it is evident that Mr Barca and his assistant Lily were often at loggerheads. It is also clear that others within the office had their problems with Mr Barca and sometimes he with them. The Claimant was, therefore, caught up in an inherently unstable and stressful environment.

9. It also emerged in cross examination that the Claimant's relationship with Lily Raj was complex as they often seemed to get on well and enjoy each other's

company. Nevertheless there were incidents when the Claimant found her behaviour to be hostile. The Claimant at one point said to us "she was very nice but pushy". In any event, there were comments made to her by Lily which, as we have found and confirm, clearly caused the Claimant upset and distress. Mr Barca was a different proposition, in that she alleges that she was treated very badly on many other occasions than those that we said constituted harassment. For example, of the name calling, the Claimant stated that back in Bangladesh people do not even treat their maid servants in that manner. "I cried a lot and could not tell anyone. I felt so humiliated. Why was I treated worse that a maid servant?" It was also put to her that Mr Barca's behaviour had a cumulative impact upon her and she accepted this, saying that throughout the period he called her fucking stupid and that she found this very humiliating and insulting. The shouting was offensive as well. She said he even shouted in emails. He was patronising her and threatening her.

10. When it came to 1 June 2016 the Claimant agreed that she had a panic attack because of the general abuse that she was receiving and that this led to her resignation. When giving further evidence about this she confirmed that there was a lot of shouting and so forth that the Tribunal has said was not discriminatory. She said that "it all worked together … combined together I became sick. Stupid – he was calling me this every day. It crushed me. I was not the same person since 1 June. I could not take it anymore". When the Claimant resumed her evidence in February of this year, she said at one point: "This treatment, continuous treatment, was degrading and humiliating. I then broke down." We also note that in talking of this incident, which was the final rupture with the Respondent, the Claimant records a conversation with Lily in which the latter had been sympathetic towards her. This confirms our conclusion that she had a hot and cold relationship with her, whereas the relationship with Mr Barca was generally poor.

11. The Claimant was called to the Bar in July 2016 but she had made a decision before then to convert to being a solicitor. She thought this was a better course given her age; she also liked the way solicitors worked and she had been working in a solicitor's firm before she came to the Respondent. Mr Barca said that she may be taken on as a trainee if she had a successful year. This evidence conflicts with her written statement which records a promise by Mr Barca to offer a training contract. The Claimant's oral evidence was contradictory on this point and she seemed to be uncertain when she was giving her testimony in cross examination. We think it unlikely on the balance of probabilities that there was any form of promise. Nevertheless, her belief was that she would have qualified as a solicitor by 2019.

12. When the Claimant resumed her evidence on 5 February, the parties and the tribunal had the benefit of the further GP notes that had been ordered some 7 weeks earlier. The main point we note is that the Claimant was on anti-depressant medication for most of the period from August 2007 to March 2011. This means that she was on the medication for a total period of about 7 years up to that last date.

The psychiatric evidence

13. There is expert psychiatric evidence from both parties. It is voluminous, but there are limitations to the assistance that the psychiatrists have been able to provide. This is partly because they have said little about the principal issue of causation that we must deal with. Second, they have fallen into disagreement about the classification of the Claimant's condition. Dr Brow, called by the Claimant, diagnoses PTSD. Dr Mannan believes that the threshold for PTSD has not been met. Additionally, he doubts the Claimant's bona fides and has suggested she is malingering, within the meaning of that term when applied to PTSD cases in the literature. We can also detect a methodological difference, in that Dr Mannan is less willing to accept facts that have no objective corroboration. An illustration of their evidence can be seen when they discussed the Claimant's accounts of having hallucinatory experiences. Dr Mannan relies on her insight in understanding that they were not hallucinations and he therefore doubts that they qualify under diagnostic criteria. Dr Brow says that when they were first perceived, they seemed real and it is only as the Claimant examined them that she realised they did not exist. They are therefore hallucinations, in his view. The tribunal cannot adjudicate on this difference of expert opinion.

14. Dr Brow, in paragraph 15 of his report, recognised that the claim only succeeded "in relation to a number of specific incidents of harassment" and he set them out. He referred to the GP's note of 3 June 2016 that recorded her complaint that " … her boss … had intimidated her, shouting, bullying and abusing in her workplace … symptoms … subsequent to these experiences." He noted an employment advisor writing after 6 September 2016 of "past incidents of bullying and harassment" having an effect on the Claimant's life. Another employment advisor subsequently wrote of " … her previous employer whose behaviour towards her caused her to have a breakdown from the bullying and pressure he imposed on her."

15. The Claimant told Dr Brow that her biggest mistake was to work for the Respondent. Within three days of starting she had been shouted and sworn at. "She suffered verbal abuse and felt at the mercy of her boss and his assistant" (paragraph 233.)

16. Dr Brow's diagnosis was Comorbid Severe Depression with Psychotic Symptoms and Complex PTSD. When dealing with causation, he wrote that the Claimant was vulnerable to emerging PTSD and depression. He then briefly summarises the comments that we found constituted torts and said: " … on the balance of probabilities these abusive terms in the context of her moral and cultural background, the sexual abuse she suffered previously, and high anxiety due to the stress of the job, lowered her self-esteem and culminated in triggering latent PTSD from previous catastrophes in her life; this subsequently produced increasingly severe depression as she tried to fight and maintain her position. She saw Mr Barca as yet another abuser in her life." He also says that she felt targeted throughout her employment. Given the weight of allegations that were upheld, this is not a full analysis of the question of causation and is in somewhat sketchy terms.

17. In cross examination, Dr Brow to a considerable extent qualified his first report. He recalled the Claimant describing the workplace as feeling like a war zone. He acknowledged that the abuse, behaviour and treatment that we recounted, aside from the acts of sex or age harassment, "are very significant." He said: "Potentially, without [the torts] and with the other behaviour it seems possible" that the Claimant would have become ill. He hastily added, "I couldn't rule that out", but we have little doubt that his first response was more realistic. Earlier in his evidence he said that the illness "was precipitated by her interactions with Mr Barca and the environment." We regard that as accurate and we will return to this below.

18. Dr Mannan, called by the Respondents, does not believe that the Claimant's condition satisfies the diagnosis of PTSD or Complex PTSD. Possible diagnoses are Mixed Anxiety and Depressive Disorder or an adjustment disorder. However, in his first report he does not specifically address causation.

19. Dr Mannan is uncertain that the Claimant's illness is genuine and he has raised the possibility of 'malingering PTSD'. He seems to have abandoned this, judging by his oral evidence. He said the only difference between him and Dr Brow was the issue of whether the Claimant had psychosis. At another point he also said "It's the PTSD I disagree with". However, he accepted: "Of course she is ill. She suffers from something."

Other evidence

20. The most relevant point dealt with by Mr Barca is whether he would have offered the Claimant a training contract. He says that he would not have done so. This is consistent with his evidence at the liability hearing (eg paragraph 10 of his statement) as well as the evidence of Mr Hall, who dealt with the topic between paragraphs 23 and 38 of his statement.

Submissions

21. Counsel have engaged in two rounds of written submissions and we thank them for their industry. We will refer to these in detail below.

Conclusions

Legal principles

22. The general common law principles 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. What, however, is the position when a claimant partly succeeds and partly fails; or there are other non-tortious causes of loss and damage?

23. Thaine v LSE [2010] ICR 1422 (EAT) was a leading case and has been approved by the Court of Appeal in Konczak below. The concurrent causes of the claimant's ill health, as they were called in Thaine, included previous illness, her personal and relationship history and other allegations she believed amounted to

claims of discrimination against LSE, but which failed. Keith J summarised the point for decision thus:

> "The principal issue which this appeal raises is whether the tribunal erred in law in reducing the award to reflect the LSE's limited responsibility for the claimant's ill-health. In short, when a tribunal finds that loss has been sustained by an employee caused by a combination of factors, some of which amounted to unlawful discrimination for which the employer is liable, but others which were not the legal responsibility of the employer, is it legally open to the tribunal to discount the award by such percentage as would reflect its apportionment of that responsibility?"

24. Keith J referred to HM Prison Service v Salmon [2001] IRLR 425 in which Mr Recorder Underhill expressed, as an aside, doubts as to whether the conventional view concerning apportionment of damages in these circumstances was correct. In Thaine the Judge went on to consider Holtby v Brigham & Cowan (Hull) Ltd [2000] ICR 1086 in which the Court of Appeal held that the defendant was liable only to the extent that its "conduct made a material contribution to his disability". It was added that although quantification may be difficult the court has to do its best using common sense. Justice had to be achieved not only for the Claimant but also for the other party.

25. It was next noted by Keith J that the same approach was adopted in Allen v British Rail Engineering Ltd [2001] ICR 942. This was also an industrial disease case in which Schiemann LJ stated that:

> "... in principle the amount of the employer's liability will be limited to the extent of the contribution which his tortious conduct made to the employees disability." It was immediately added that the court must do its best on the evidence to make the apportionment "... and should not be astute to deny the claimant relief on the basis that he cannot establish with demonstrable accuracy precisely what proportion of his injury is attributable to the defendant's tortious conduct."

26. It is important, next, to note that an argument advanced by the Claimant in Thaine, which can be referred to as the material contribution argument, and was based on House of Lords authority from 1956 and 1973, was in this context rejected. Keith J held that reliance on these cases was misconceived and noted that it had not been argued that even if causation had been established there had to be a reduction in damages to reflect the distinction between negligent and non-negligent exposure: paragraph 17.

> "This passage neatly illustrates the critical distinction which the law makes. 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."

27. There is a detailed and persuasive analysis of case law that we do not repeat. In paragraph 23 the conclusion reached was that the apportionment approach (a) was supported by a weight of authority and (b) "accords with our sense of what fairness dictates." Mustill LJ was cited, from Thompson v Smiths [1984] ICR 236, 274:

> " … I see no reason why the present impossibility of making a precise apportionment of impairment and disability in terms of time, should in justice lead to the result that the defendants are adjudged liable to pay in full, when it is known that only part of the damage was their fault."

28. This brings us to BAE Systems (Operations) Ltd v Konczak [2014] IRLR 676. The claimant's 15 claims of discrimination/harassment, which all failed, pre-dated the actionable act of sex discrimination, which was a sexist remark. The EAT held (paragraph 30) that there is a need "to consider whether other causes of action [than disability discrimination] are capable of apportionment on the basis that there is a divisible injury." The Claimant's argument on appeal "… does not mean to say that the loss necessarily cannot be apportioned between that part of the actions of the employer that amounts to disability discrimination and that part which is not tortious conduct of any kind." It was also said that "in the ordinary case … it seems to us that any employment tribunal must first reach a conclusion in relation to an injury or a state of health that is said to be causing loss and itself to result from the tortious act of the employer, as to whether that injury or state of health is divisible or indivisible." (Paragraph 39.) This applies for psychiatric injury: paragraph 41.

> 29. The case went to the Court of Appeal where Underhill LJ stated as follows:
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> "The message of *Hatton* is that [mental/psychiatric injury] may well be divisible. In *Rahman* the exercise was made easier by the fact … that the medical evidence distinguished between different elements in the claimant's overall condition, and their causes, though even there it must be recognised that the attributions were both partial and approximate. In many, I suspect most, cases the tribunal will not have that degree of assistance. But it does not follow that no apportionment will be possible. It may, for example, be possible to conclude that a pre-existing illness, for which the employer is not responsible, has been materially aggravated by the wrong (in terms of severity of symptoms and/or duration), and to award compensation reflecting the extent of the aggravation. The most difficult type of case is that posited by Smith LJ in her article, and which she indeed treats, rightly or wrongly, as the most typical: that is where "the claimant will have cracked up quite suddenly, tipped over from being under stress into being ill". On my understanding of *Rahman* and *Hatton*, even in that case the tribunal should 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 indeed be, in Hale LJ's words, "truly indivisible", and principle requires that the claimant is compensated for the whole of the injury – though, importantly, if (as Smith LJ says will be typically the case) the claimant has a vulnerable personality, a discount may be required in accordance with proposition 16."

30. Proposition 16 from the Hatton case is: "The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress related disorder in any event."

31. Irwin LJ added in short comments the following.

> "I wish to add a few words of my own, given the importance of the analysis contained in the judgment of Underhill LJ. I agree with him that if and insofar as there is a difference between the propositions set out in *Hatton,* and the views expressed by Smith and Sedley LJJ in *Dickins*, then we should follow the approach laid down in *Hatton*, and by Keith J in *Thaine*. As a matter of principle, and supporting the fundamental approach that compensation should never become windfall, where an injury is divisible, even if on a rough and ready approach to the division, recompense must be limited to the

> consequences of identified injury attributable to the tort in question. I further support the proposition that it will often be appropriate to look closely, particularly in a case where psychiatric injury proves indivisible, to establish whether the pre-existing state may not nevertheless demonstrate a high degree of vulnerability to, and the probability of, future injury: if not today, then tomorrow."

Extension of time

32. Ms Bone is correct to observe that the tribunal neglected to deal with the question of jurisdiction that is consequent on our decision that the resignation/dismissal of 10 June 2016 was not discriminatory. The last act of age harassment was on 1 March 2016 and the last act of sex harassment was 25 April 2016. The Claimant applied for the ACAS certificate on 12 August 2016 and was already out of time (although she would not have been aware that her dismissal claims under the Equality Act would fail.) She is between about 10 weeks (sex) and four months (age) out of time.

33. Jurisdiction is a matter for the tribunal. We are in no doubt that in these circumstances it would have been wholly inequitable to deny the Claimant any remedy or judgement on the basis that because her dismissal claims failed as matters of discrimination law, she was out of time. She had been subject to a continuing barrage of abuse and the extension of time to validate the harassment claims have caused (and could have caused) no prejudice of any sort to the Respondents, who have been able to defend the claims robustly and, in relation to dismissal, have succeeded. We have no hesitation in formally extending time, the parties having asked us to deal with this point. Our failure to do so earlier was an oversight.

Causation: the central issue

34. Starting with the Claimant's first written submission, a prime argument made by Ms Millin is that "it is clear [from the chronology she sets out] that the behaviour of [the Second and Third Respondents] caused the Claimant's psychological illness." She adds that the tortious acts were six in number and have to be set against 21 alleged acts of harassment in the list of issues. Ms Bone makes contrary submissions: paragraphs 33 of her first submission and paragraph 2(i) of the second. Her contention is that "it defies credibility" that the six comments which were found to be unlawful caused the Claimant's ill-health.

35. We first remind ourselves of our Judgement and Reasons on liability. We discussed the general problems arising from Mr Barca's temper and we refer to paragraph 22. We also referred to the Claimant's Journal. That document was summarised in the table that ran to 86 pages. This contains numerous complaints, mainly directed at Mr Barca, which were not legal issues in the claim. To give one example, between issue number 2 (5 November 2015) and number 3 (12 November 2015) are about six allegations of bad behaviour. These are not trivial, for example against 6 November the Claimant said she felt sad, cried all afternoon, and was distressed and frightened.

36. Further graphic examples of the more general catalogue of abuse and the Claimant's reaction to it can be found in paragraphs 35 and 36 of our Reasons on

liability. These deal with the first two weeks of December 2015. The allegations include Mr Barca shouting at the Claimant every day.

37. It would, therefore, be erroneous, in our judgement, to characterise the findings by saying that 6 acts of harassment were upheld of the 21 factual claims and that, for that reason, these six acts materially cause the Claimant's illness. When put against the totality of the evidence, it is clear that the entirety of Mr Barca's behaviour was substantially greater than the upheld acts of harassment. Moreover, the Claimant says as much. In paragraphs 5 and 10 above we have noted examples of what the Claimant said in her Remedy statement and also in evidence. This indicates a sad and probably daily chronology of upset concerning and within the working environment. Ms Bone makes similar points and illustrates the argument in paragraph 33 of her first submission. Here she looks at some of the legal/factual issues that failed and she notes their severe impact on the Claimant, according to the Claimant's account. She also notes that the upheld acts of harassment did not lead to the first resignation and were not referred to in her letter of 2 June 2016. For the first resignation we would refer specifically to paragraph 34 of our earlier Reasons and for the 2 June 2016 letter we refer to paragraph 53.

38. The conclusion we reach is that the evidence overall positively establishes that the Claimant's illness after June 2016 was caused by the entirety of the behaviour that she describes and her reaction to it. There is no evidence that connects the age or sex harassment to her breakdown in June.

39. The psychiatric evidence for the Claimant is of little assistance. Dr Brow was specifically asked for an opinion on the cause of the Claimant's current medical condition and was asked to "address in detail the impact" of the acts that the tribunal found to be harassment. He said, in the three sentences that constitute paragraphs 259 and 260, that the Claimant was vulnerable to "emerging PTSD and depression from past experiences and the predisposing factors." The "abusive terms" (in the harassment findings) on balance of probabilities and in the context of her background and also "high anxiety due to the stress of the job … culminated in triggering PTSD."

40. Even before he gave oral evidence, this is a tendentious conclusion, in our view. First, when summarising the harassment in paragraph 259 he casually includes the fact that Mr Barca "habitually swore and verbally abused her." This habitual swearing and abuse is precisely the behaviour that lies outside the acts of harassment found by the tribunal. By putting the matter in these terms Dr Brow qualifies his conclusion and does not appear to recognise that it may, indeed, contradict that conclusion.

41. Second, in paragraph 260, in setting out his opinion, he does so in the light of high anxiety due to the stress of the job. That anxiety embraces the non-tortious but objectionable conduct. In our view it also includes job stress resulting from (a) Mr Barca's exacting standards and (b) the tensions in the office that we have referred to above. In other words, these are non-tortious and additional factors that are being relied upon for his conclusion. This is not satisfactory.

42. Third, in paragraph 262 he says in terms that the Claimant "felt targeted throughout her experience at Wilson Barca LLP and understandably blames [the Second and Third Respondents]." He says, further, that her first resignation threat should have been taken more seriously. Again, this confirms the conclusion that the non-tortious factors here are highly significant.

43. Fourth, he also blames "the loss of her dream job" as a cause of stress and suffering. It will be recalled that the constructive dismissal was not tortious.

44. Ms Bone makes various criticisms of Dr Brow's report and we do not agree with some of them. We do not doubt his integrity as she has. Nevertheless, we agree that his initial report was not compiled with sight of the full GP notes and also that there was confusion in the hearing as to what he had and had not seen. Furthermore, we tend to agree that the diagnosis of latent PTSD has not been fully explained. It only emerged in mid-2017. However, these are not issues that we need to resolve and they are lower in significance that the point Ms Bone makes in paragraph 44. This is that the impact of the generalised behaviour and the impact of the tortious behaviour have not properly been addressed or distinguished. This was reflected in the responses in cross-examination that Dr Brow gave and to which we have referred above.

45. We conclude with a high degree of confidence that if the tortious acts had never occurred, the Claimant would have become ill at the same point in time and to the same extent. We disagree with Ms Millin that the 24 January 2016 offensive and tortious insult from Mr Barca triggered psychiatric damage. The reference in the Claimant's Journal to hearing voices is quite different to the voices she later reported to psychiatrists on 24 January; on this day there were such voices and they were in the street. She was, in our judgement, nervous and on edge and expected to be shouted at by Mr Barca for the slightest thing. Nor do we accept that it is helpful to ask whether the Claimant's illness would have occurred if she had not been employed by Mr Barca. That is not the test. If it were the correct test, we would be imposing liability on the Respondents for all the behaviour complained of. Ms Bone picks this point up in her rejoinder submission at paragraph 2(i). We agree with her. She also describes the submission that the acts of harassment caused the Claimant to resign as factually incorrect. We agree with that observation as well and the evidence in our view is the very opposite, namely that the Claimant resigned because of her treatment over a number of weeks, culminating in her resignation after an argument: see paragraphs 52 to 53 of our earlier Reasons.

46. On the issue of 'causation', i.e. whether the acts of harassment caused the Claimant subsequent illness, we conclude that they did not. The formulae applied by the Claimant in submissions are too wide and do not reflect the case law. We consider that Ms Bone's submissions are more realistic because they match the evidence, which points against these acts of harassment having any causative function in terms of the subsequent illness.

47. We should comment briefly on the case law that Ms Millin has drawn to our attention. In paragraph 26 of her first submission she relies upon the case of Olayemi v Athena [2016] ICR 1074 and Ms Millin cites an extract from paragraph

19 and paragraph 26. This, however, is an incomplete citation and paragraphs 19 to 21 follow Thaine and are consistent with the subsequent case of Konczuk. HH J Richardson referred to the essential principles not being in doubt.

> "The claimant must prove that the respondent's wrongdoing 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 will 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.
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> 20 It is open to the respondent to show that there was another material cause for the claimant's psychiatric condition - that is a cause going beyond mere vulnerability or susceptibility. Even so it is not a defence for the Respondent to say that there was another material cause her psychiatric condition unless the resultant harm is truly divisible. If, however, the resultant harm is truly divisible the tribunal concerned must estimate and award compensation for that part of the harmful which the Respondent is responsible. In so doing it will apply the tortious measure of damage: it will identify the harmful which the Respondent is responsible and award compensation for that harm, as opposed to the harm which would have occurred in any event. These propositions - including the propositions concerning divisibility - are not unique to claims arising out of a psychiatric condition."

48. To repeat our conclusion, this is a case where the psychiatric illness is properly divisible and where the cause of that illness is the overall level of abuse suffered by a vulnerable employee. The tortious acts of harassment give rise to injury to feelings, but did not cause the illness. They were incidental.

The alternative consideration: the chance of succumbing to the disorder

49. This is the chance that the Claimant would have succumbed, in any event, i.e. without the acts of harassment. It is inescapable, given our view of the evidence as set out above, that she would have done so. Her vulnerability arises in part from her personal history going back to earlier years in Bangladesh and also to the history of psychiatric illness after coming to the UK. This latter includes a number of years, approximately 7, when she was on antidepressant medication, up to 2011. It is evident to the tribunal that the Claimant, unfortunately, would have become ill in the same way if the acts of age and sex harassment are left out of account. It is not commonsensical or consistent with any of the evidence to conclude otherwise. There is no medical opinion or data that could support that view. This conclusion, in reality, goes hand-in-hand with what we have set out above. We are not saying that the Respondent's behaviour did not make the Claimant ill: it did. But any remedy for the psychiatric illness lies outside the jurisdiction of this tribunal.

Injury to feelings

50. The Claimant claims £40,000 in the upper Vento band. The Respondent places compensation in the lower band. It is said by the Respondent: (a) that the non-tortious acts more greatly injured her feelings; (b) she took the acts of harassment in her stride at the time; (c) the Claimant often got on with Lily; (d) she

could stand up to Mr Barca and even demanded payment if she were to receive future abuse.

51. We do not find these arguments convincing. Just because there was a catalogue of abusive conduct does not mean that the Claimant was either not hurt in her feelings, or not substantially hurt, by the acts of harassment. The fact that she had carried on working at the time of harassment does not dilute this. Nor does the fact that she often got on with Lily mean that the discriminatory comments did not upset her. The last point made by the Respondent, concerning the Claimant's suggestion of a tariff of compensation, is especially weak, since the letter is a little bizarre and, if anything, points to the extent of the her hurt feelings.

52. The date of the ET1 is 1 October 2016 and this means that we start with the original Vento figures. As Mummery LJ said in that case [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."

53. 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. Our assessment is that is where this case falls.

54. 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."

55. In our judgement the harassment was serious and cannot be described as 'less serious' so as to justify the lower band. We would assess the correct figure

at £10,000 for each of the episodes of sex and age harassment, taking all instances under each head together. This would make a total of £20,000. However in order to uprate this figure from 2002 levels, and in accordance with the Presidential Direction, we divide this figure by 178.5 and multiply by the appropriate figure to be found in the RPI tables compiled by the ONS for the period ending 1 October 2016, namely 264.8. This produces £29,669.47 and has to be further multiplied by 1.1 to reflect the Simmons enhancement. This produces **£32,636.42**.

Future loss

56. The Claimant's first submission simply refers to the schedule of loss. This claims £15,444 for loss to the date of the tribunal hearing and £850,000 thereafter. The Respondent's first argument is that there is no financial loss at all caused by these acts of harassment. Second, it is said that the claim is exaggerated. This is because it is unrealistic to say that, but for the harassment, the Claimant would have qualified as a solicitor.

57. In resolving this major dispute, the tribunal considers that it has been established that Mr Barca, and also Mr Hall and Lily, thought that the Claimant's performance was lacking. Whether this is right or wrong, the belief was genuinely held and quite strongly by Mr Barca. The likelihood of the Claimant being given a training contract is very low in our estimation and it should be discounted. At some point, if she wished to qualify as a solicitor, she would have had to move on.

58. We derive limited assistance from the submissions. In the first round of exchange Ms Bone, in effect, invited the Claimant to expand on the argument, saying in paragraph 49 that the Respondent would make a further response when it was known how the Claimant was putting her case on the period of loss. The Claimant's submission does not accept that invitation. In neither submission does the Claimant explain, expand upon or give details for the career loss that the schedule claims. In two places in the first submission Ms Millin refers to "general financial loss" as well as the schedule. In our view, no proper claim for career loss has been explained and such a claim has not been made out.

59. The most likely course of events, but for these acts of harassment, is that the Claimant would have resigned at the same point in time and would have been at that stage equally ill. Financial loss does not arise. If we were wrong in that principal conclusion, then we would conclude in the alternative that she would have left a relatively short time thereafter, either because she was ill; or because she realised that she was not going to be given a training contract. We doubt that she would have stayed beyond a year, i.e. 1 November 2016.

Aggravated damages

60. We find it difficult to put Lily's behaviour into the category of conduct that merits aggravated damages. The comments were made at various times and were in the context of other more supportive remarks, at different times, that were directed towards the Claimant. To apply the case law to Lily so as to justify aggravated damages strikes the tribunal as unrealistic. The facts fall into none of

the categories set out in HM Land Registry v McGlue, EAT, 2013. We see no proper way of equating the facts with any other case in which aggravated damages have been awarded: see also Ziawalla v Walia [2002] IRLR 693. Nor has any argument been advanced by the Claimant as to why aggravated damages should be awarded for the age harassment.

61. We take a different view of Mr Barca's two comments, which were not only grossly insulting but also oppressive and we consider that the threshold has been reached for awarding an extra sum by way of aggravated damages. We estimate this at £5,000. This takes the total award for injury to feelings to **£37,636.42**.

Other claims

62. The Claimant's first submission claims £19,937.50 for Dr Brow's fees as well as that £31,000 for future inpatient care at a private hospital. Again, there is no reasoning set out in the submissions. In the light of our findings, the future care costs must fail. As to the doctor's fees, such disbursements are plainly a matter of costs (see rule 74) and not a claimable item of special damage.

63. As to costs generally, any application should be made with full grounds after the promulgation of this decision and in accordance with the rules.

64. Turning to interest, pursuant to the 1996 Order we have a duty to set out the figure for interest. We take the calculation date to be 4 March 2019. Bearing in mind these particular facts, we calculate interest from mid-way through the period of harassment, as found, (19 November to 25 April) which is 3 February 2016. Interest on injury to feelings is calculated at 1124 days at 8% pa, which amounts to £9,271.96. This produces a grand total of **£46,908.38**.

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Employment Judge Pearl

Dated: 6 March 2019

Judgment and Reasons sent to the parties on:

6 March 2019
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For the Tribunal Office