Case Number: 2207692/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS D OLULODE**
MR S SOSKIN

BETWEEN:

Ms LR

Claimant

AND

Workers Educational Association

Respondent

ON: **18 and 19 March 2019**

Appearances:
For the Claimant: **Mr R O'Keefe, law centre representative**
For the Respondent: **Mr C Ludlow, counsel**

JUDGMENT ON REMEDY

1. The unanimous Judgment of the Tribunal is that the respondent shall pay to the claimant the total sum of **£59,218.93.**
2. By consent it is payable within 21 days.

REASONS

1. This decision was delivered orally on 19 March 2019. The respondent requested written reasons. After we delivered our decision, the parties assisted us with the necessary mathematical calculations.

2. By a Reserved Judgment sent to the parties on 8 June 2019 the claimant Ms LR lost her claims for race discrimination save on one discrete issue, namely issue 4bb, which was that on 27 July 2017 after submitting an Expression of Interest for the role of Senior Press and Media Officer role

she was not shortlisted. This was the sole issue for consideration in relation to remedy. All other parts of her claim failed and were dismissed. She remains in the respondent's employment

The procedural background to the remedy hearing

3. The remedy hearing was listed to take place on 2 October 2018 and the full tribunal sat for that purpose.

4. At that hearing, the claimant produced a medical report. Prior to that hearing, leave had not been given for expert medical evidence. The claimant wanted to Skype the doctor's evidence into the hearing. This had not been dealt with in advance and the case was not properly prepared for the remedy hearing to proceed. The medical report did not specifically address the issue of whether and if so to what extent, the failure to shortlist the claimant for the role of Senior Press and Media Officer caused or exacerbated psychiatric injury, which was the issue we had to consider.

5. At the hearing on 2 October 2018 the claimant sought £97,796 by way of remedy. The respondent said they considered the claimant had approached the remedy hearing on the basis that she had succeeded on everything, including an unfair dismissal, even though she remained employed by the respondent. To date the claimant remains in the respondent's employment and is off sick.

6. We took the view that the tribunal would be best assisted by a jointly instructed expert with the questions determined by ourselves with the input of the parties and we made Orders accordingly.

7. Also on 2 October 2018, we dealt with a Rule 50 application by the claimant. We granted a limited order. The claimant went to the EAT on this and the EAT upheld this tribunal's original Order but told the claimant's representative that the claimant was entitled to seek a variation of the Order in the light of medical evidence that had since been produced.

8. On 13 March 2019 a Rule 50 hearing took place before Employment Judge Elliott sitting alone and the claimant was granted anonymity for the reasons set out in that Order, which are not replicated here.

9. The Judge made a concluding comment at the hearing on 19 March 2019, having been told that the Schedule of Loss had now reached nearly £150,000. The Judge said that it was noted that the claimant said in the submissions for that hearing (at paragraph 18) that she sought to recover compensation for "*the discrimination she complained of in the proceedings*" and that it was "*equally a disability case*". The claimant was again reminded, as she had been on 2 October 2018, that she could only recover compensation on the one matter upon which she had succeeded, not on all the matters she had complained of.

10. It was a claim for race discrimination, not a disability discrimination claim.

The single issue upon which the claimant succeeded was the failure to shortlist her for the role of Senior Media and PR Officer. There was no dismissal.

The issues

11. The issue for the tribunal was the amount of compensation due to the claimant for the act of direct race discrimination, being the failure to shortlist her for the role of Senior Media and PR Officer (referred to below as the SMPO role).

Witnesses and documents

12. The tribunal heard from the claimant and for the respondent we heard from Ms Margaret Johnson, Head of HR.

13. There was a remedy bundle of documents of around 500 pages.

14. The respondent sought leave to ask supplementary questions as to whether the claimant would have secured the SMPO role. The claimant objected. We took the view that this was a matter upon which we had to make a finding and that if the respondent did not ask the questions, we would need to ask such questions in any event. For this reason, we gave the respondent leave to ask the supplementary questions.

15. We had written submissions from the parties to which they spoke. All submissions, including authorities referred to, were fully considered even if not expressly referred to below.

Findings related to remedy

16. It is important in the context of this remedy hearing to make clear that the claimant remains in the respondent's employment. There has been no dismissal. She has been off sick since 10 August 2017, so by the date of this hearing she had been off sick for more than a year and a half.

17. The claimant was on full pay to 9 February 2018 and half pay to 9 August 2018. She is now on nil pay.

18. Although the claimant expressed in evidence her concerns about returning to work for the respondent she has chosen to remain in their employment. Even if she had resigned, the termination of her employment is not in issue for this remedy hearing.

<u>The expert medical report</u>

19. Pursuant to the Order made on 2 October 2018 we had a psychiatric medical report from Dr Jonathan Ornstein dated 15 November 2018. Dr Ornstein is a consultant psychiatrist. He was asked to give his view on what psychiatric injury, if any, had been caused to the claimant and/or what

exacerbation of any existing conditional symptoms had taken place in the relation to the failure to shortlist her for the role of senior press and media officer in the summer of 2017. Dr Ornstein saw the claimant on 9 November 2018.

20. Dr Ornstein's report told the tribunal that the first mention of any psychiatric difficulty for the claimant as mentioned in her GP records, was on 27 April 2012 when it noted that she had been bullied at work. At that time she was said to be a receptionist for a TV company and presented as tearful and distressed. By 1 May 2012 she was prescribed citalopram which is an antidepressant, at a low dose of 10mg.

21. Difficulties were mentioned again from 11 August 2017 when her medical notes recorded that she had been made redundant and was very tearful and that also she feared being made homeless because of rent and landlord issues. It was that point that she was signed off sick for stress at work.

22. Her medical records showed that on 29 September 2017 she had raised a grievance against her employer and that she was also having problems with her housing. She was referred to a psychologist on 20 November 2017. Her medical notes also record on that date that she had moved out of her house after six years and was now in a shared rental.

23. Dr Ornstein said that there were ongoing entries showing that the claimant was suffering from stress at work, although we note that she was off sick from work.

24. Medical notes showed from 28 February 2018 that she was expecting her tribunal hearing in May. She consulted her GP on 16 July 2018 and the medical notes record that she had had her tribunal but was waiting for compensation and was having "*issues with the company appearing to try to get this reduced*". Dr Ornstein said that there were ongoing notes of stress at work to August 2018. Again we note that the claimant was not attending work and had not done so for a year.

25. Prior to these proceedings, the medical notes showed Dr Ornstein that historically the claimant had Cognitive Behavioural Therapy (CBT) and attended group therapy through to 2014. That continued until March 2014. Dr Ornstein saw a letter from a senior counsellor and psychotherapist dated 11 July 2018 which said that the claimant was first advised to self refer to their service in August 2012 and was successfully treated for depression later that year. They had no record of the claimant having mental health difficulties between 2012 and August 2017. She made use of services at the Maudsley Hospital in September 2017. This was a work related referral.

26. Our finding at paragraph 131 of the liability judgement was that the claimant submitted applications for the role of Senior Press and Media Officer on 27 July 2017 and that she raised with HR her concerns about the shortlisting on 10 August 2017 (paragraph 134).

27. Dr Ornstein also noted that the claimant saw Occupational Health in February 2018 and he set out information from the OH report.

28. At paragraph 122 of his report he said the claimant felt humiliated at not being shortlisted for the role. At paragraph 123 he said: "*her mood dipped severely and she feels that is has mostly been low since then although she has had some good, brief periods when she has felt a little better*". At paragraph 124 he said that she had felt consistently depressed since this point and had particularly bad periods, for example around Christmas 2017. He said she feels she has many more bad days than good and found the tribunal period between May and June 2018 extremely stressful.

29. The claimant told Dr Ornstein that the respondent provided six counselling sessions for her which she found useful. She told Dr Ornstein that her sleep was disturbed as is her appetite and that she had lost weight over time. She told Dr Ornstein that things at her workplace had broken down irrevocably and she could not envisage feeling comfortable or happy to return there in any capacity. Nevertheless, she remains employed by the respondent.

30. At paragraph 136 of his report Dr Ornstein said "*she feels strongly that the behaviour towards her at work has been the root cause of her difficulties. She feels things will only get worse if she ever went back*."

31. In his conclusions he said: "*it is my opinion on the balance of probabilities that without the events of August 2017 this episode of depression would not have developed*".

32. For the purposes of the Judicial College Guidelines we noted at paragraph 169 of his report that in his opinion the claimant was currently suffering from "*a moderate depressive episode".*

33. Questions were asked of Dr Ornstein and his replies were at page 110 of the bundle in the form of a supplemental report. He was asked about PTSD. He said at paragraph 32 of the supplemental report:

> *…it is my opinion that without the employment difficulties she would have suffered from this episode of depression and therefore she should be seen as a vulnerable individual exposed to stressors rather than a person who was inevitably going to become unwell or who was experiencing pathological levels of PTSD or other psychiatric conditions at the time of the events.*

34. We also noted at paragraph 143 of his original report he said "*whilst she can find these memories troubling and distressing, they are not intrusive in a classical way of post traumatic stress disorder".* We conclude that Dr Ornstein says that the claimant is not suffering from PTSD but she has a vulnerability towards it. The claimant does not appear to contend that PTSD was caused by the discrimination and in any event the parties are agreed that we should award for Moderate depression.

35. Dr Ornstein set out his opinion on treatment. At paragraph 185 he said:

> *Specifically I believe she would benefit from ongoing cognitive behavioural therapy delivered by a Counselling or Clinical Psychologist for a minimum of 18 weekly sessions.*
>
> *Concurrently I believe she would need to be reviewed by a Consultant Psychiatrist to review her risk, ongoing mood and specifically the role of antidepressant medication. I note her resistance and difficult reaction to antidepressants in the past, but it is certainly my opinion that this is worth exploring further as there are many antidepressant options, many of which do not have the same side-effects that she has previously experienced.*
> *I believe in the absence of any social improvement that these two treatments will help improve the claimant's mood by a minimum of 50% within three to six months of commencement.*
>
> *I believe this would be enough for her moderate depression to reduce to mild or to subclinical levels.*

36. The claimant accepted that she saw this report in mid-November 2018 and she has not yet taken any steps to see a consultant psychiatrist. She saw her own treating clinical psychologist Dr Keyes in mid-November 2018, with a view to assessing her suitability for CBT. The claimant said she was waiting for CBT.

37. The claimant also said that notwithstanding Dr Ornstein's view, she was not keen to take an alternative antidepressant. She said this was because she has previously experienced difficulties with the side-effects from an antidepressant medication.

38. In his supplementary report (page 119), in answer to questions from the respondent, at paragraph 54, Dr Ornstein attributes other work-related issues to approximately 20% to 25% of her depression and anxiety symptoms and the remaining 75% to 80% of her symptoms being attributable to the discriminatory act.

39. In addition to the psychiatric effect upon the claimant we also find, based on her witness evidence, that the discrimination caused her to have disturbed and loss of sleep, loss of appetite and also made her tearful.

Mitigation of loss

40. The respondent referred us to their email of 21 February 2019 (page 56a) between the parties' representatives in which the respondent made an offer of £4,275 towards the claimant's treatment reducing it by 25% from the figure of £5,700.

41. This was the basis on which the respondent offered £4,275 taking account of the reduction for non-work related issues. The claimant accepted in submissions that Dr Ornstein's view on this was appropriate and the sum

of £4,275 was agreed. We find that as this figure was agreed, the claimant should have accepted it when it was offered on 21 February 2019 so she could have commenced her treatment at an earlier date. We find that given that the claimant would be paying privately it would not take long to arrange appointments and we find that this would reasonably take no more than two weeks and treatment could have commenced by 7 March 2019.

42. The respondent also took the claimant to the recommendation by Dr Ornstein and the OH report from a Consultant OH Physician Dr R Ledda, who both recommended an antidepressant (Dr Ornstein paragraph 185 at page 98). The claimant was not keen to take antidepressants. She took them in 2012 and experienced unpleasant side effects. Dr Ornstein said that this was worth exploring further as there are many antidepressant options many of which do not have the side effects she previously experienced.

43. The claimant said she was not keen to return to work until steps had been taken to address discrimination. Ms Johnson gave evidence (statement paragraph 8) as to the steps since taken by the respondent which included all the Senior Management Team and the HR team attending separate one day training sessions by an external provider, amending their Equality and Diversity Policy, rolling out mandatory training for all staff which is ongoing and putting in place diversity champions. The claimant accepted in submissions that these steps were "*really very extensive*" and we find that they were.

Would the claimant have secured the SMPO role?

44. We have considered whether, had there been no discrimination in the failure to shortlist, the claimant would have secured the SMPO role.

45. We considered the email of 21 July 2017 from Ms Parmar of HR to the claimant in relation to the vacancy (page 224), which said:

> *"You are also able to express an interest In [sic] be given preferential treatment where you meet the minimum skillset for the role(s). You will also go through the shortlisting process first and if successful at interview stage, you will be appointed prior to anyone else. After 3rd August, the roles will be available to all internal staff, priority will be given to those who are currently at risk and it will also be open to external candidates at that point."*

46. We found in our liability decision (paragraph 132) that the SMPO role was a promotion for the claimant, it was one grade higher than her current grade. Although the claimant in submissions sought to argue that it was not really a promoted role, such that we should find that she would have secured it, we do not revisit our original finding. The claimant submitted that we should go through the SMPO role and her existing role with a toothcomb and come to the conclusion that it was not a promoted role. Our existing finding stands. It was a promoted role.

47. As the claimant was not shortlisted, the respondent opened up the SMPO role to other internal candidates; none applied; and to external candidates. They had 9 applicants of whom three were shortlisted and we had the CV's of all three candidates. None of these individuals were "in the frame" before a decision was made not to shortlist the claimant.

48. The respondent made much of the qualifications of the shortlisted candidates and compared them to the claimant. Our finding is that these candidates only came into the frame once the respondent had dismissed the claimant for a discriminatory reason. Those candidates would not have been in the frame, absent the discrimination. We have therefore considered whether, had the claimant been shortlisted and interviewed, whether she would have secured the role, or the percentage chance that she would have secured the role.

49. We made a finding that the claimant was a good performer and had worked with the Chief Executive at a senior level on the issue of PR. The claimant did not have a demonstrated track record of leading a nationwide media and PR strategy and initiating, facilitating and leading a flow of high level proactive cross-channel PR activity (job description at page 392). There are aspects that no doubt the claimant could do well on the operational side, but she was on our finding a little weaker on the strategic side. We find that on a balance of probabilities and there is always an element of speculation, that the claimant had a 40% chance of securing the role.

Agreed matters

50. The figures for the claimant's net and gross pay are agreed at both her existing role and the SMPO role. The respondent agrees that the claimant should receive an award for loss of earnings but the period and amount is in dispute.

51. The mathematical figures as to pension loss on the SMPO role are agreed to the date of this hearing, should the tribunal find that the claimant would have secured that role.

52. The parties agree for personal injury that the Judicial College Guidelines Chapter 4 on Psychiatric and Psychological Damage, section (A) subsection (c), moderate psychological damage generally applies. They agree that the appropriate bracket is £5,130 to £16,720 including the *Simmons v Castle* uplift.

53. The principle that interest is due on the sum awarded under the 1996 Regulations referred to below, plus the rate of interest at 8% is agreed.

54. The amount offered for medical treatment of £4,275 was accepted by the claimant.

Matters for our determination

55. Whether the claimant would have secured the SMPO role if she had been shortlisted.

56. The period and amount of financial loss including any future loss of earnings.

57. The amount for injury to feelings. The claimant's case is that there should be an award at the middle of the middle Vento band, at £15,000. The respondent's case is that it should be a low award in the lower band at £3,000.

58. Whether there should be an award for aggravated damages which the claimant puts at £5,000. The respondent's case is that the threshold is not met for aggravated damages.

59. Whether there should be an uplift for an unreasonable failure to comply with the ACAS Code in relation to the grievance procedure. The claimant relies on an unreasonable failure to comply with paragraph 43 of the Code, which says "*The appeal should be dealt with impartially….".* The claimant relies on our finding that the appeal officer Ms Simpson was persuaded by HR to change her decision when it was not favourable to the respondent and to rely on the views of an HR officer rather than speaking to the relevant decision makers (liability judgment paragraph 137). The claimant seeks an uplift of the maximum of 25%.

60. Ms Johnson's evidence was and we find that she and her HR team are familiar with the ACAS Code on Disciplinary and Grievance Procedures. The grievance procedure was followed, so there was no failure to follow a grievance procedure or an appeal process. We found against the claimant on her claim that the notes of the appeal were falsified. What we found materially in relation to the appeal was at paragraph 210, that Ms Simpson was persuaded by HR to change her mind regarding the upholding of the grievance appeal point on the shortlisting issue.

61. In relation to aggravated damages the claimant relied upon an email from HR dated 31 August 2018 (page 365) which was a follow up email from a welfare meeting. It said:

> *Following your Welfare Meeting you raised some issues which I said I would look into for you. You previously raised that your belief of unconscious bias as an issue in both your grievance, which was responded to in full, and at the Employment Tribunal; the Tribunal did not uphold any part of your claim in relation to unconscious bias and also dealt with shortlisting review and review of the grievance process. I would also like again to reassure you that the WEA does not consider any bias acceptable whether conscious or unconscious.*
> *Let me reassure you once more that you will be fully supported on your return to work.*

62. We find that this email did not acknowledge that there was a finding from this tribunal that there had been race discrimination and concentrated on what was not upheld. The respondent also took its time to let the claimant know about the steps it was taking to address the tribunal's findings, including the updating of the Equality and Diversity Policy which was reissued on 10 September 2018 and we find would have been almost complete by the date of the email on 31 August 2018. It would have been a easy matter to have let the claimant know about this to give additional reassurance.

The law

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

64. In assessing financial loss the aim is to put the claimant in the position that she would have been in, but for the discriminatory act - ***Ministry of Defence v Cannock 1994 IRLR 509, EAT*****.** Loss caused by anything other than the discrimination is not recoverable.

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

66. In ***HM Prison Service v Salmon 2001 IRLR 425***, the EAT observed that it is important for tribunals, making awards where there are damages both for injury to feelings and psychiatric injury, to make clear what sums are attributable to which, in order to avoid the danger of double counting.

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

68. The Court of Appeal confirmed in the case of ***De Souza v Vinci Construction UK Ltd 2017 EWCA Civ 879,*** having reviewed the EAT authorities, that the proper level of general damages should be increased by 10% following ***Simmons v Castle 2012 EWCA Civ 1288.***

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

70. There was an addendum to the Presidential Guidance with a further uprating of the Vento bands for claims presented on or after 6 April 2018, which does not apply to this case. The claim form in this case was presented on 14 November 2017.

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

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

73. General Damages for Personal Injury are covered in the Judicial College Guidelines, currently in its 14th Edition. Psychiatric and Psychological Damage is at chapter 4 of the Guidelines and it includes the uplift for ***Simmons v Castle***.

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

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

> *(1) This Chapter does not apply to a payment or other benefit provided—*
>
> *(a) in connection with the termination of employment by the death of an employee, or*
>
> *(b) on account of injury to, or disability of, an employee.*

> *(2) Although "injury" in subsection (1) includes psychiatric injury, it does not include injured feelings.*

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

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

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

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

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

> *Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment.*

81. The difficult task is looking at whether the harm is "truly indivisible". The tribunal has the task of avoiding over-compensation in what can be difficult cases. A sensible approach should be made to apportion harm between what is and what is not attributable to the defendant or respondent's wrong (***Konczak*** paragraph 67).

82. Underhill LJ said in ***Konczak*** at paragraph 71:

> *What is therefore required in any case of this character is that the tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused. I would emphasise, because the distinction is easily overlooked, that the exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm. In other words, the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong; not whether it can assess the degree to which the wrong caused the harm.*

83. We must seek to find a rational basis for distinguishing between a part of the illness which is due to the employer's wrong and a part which is due to other causes; but whether that is possible will depend on the facts and the evidence. If there is no such basis, then the injury will be "*truly indivisible*", and the claimant will need to be compensated for the whole of the injury.

84. In relation to the ACAS Code, section 207A Trade Union and Labour Relations (Consolidation) Act 1992 provides that for the jurisdictions listed in Schedule A2 of the Act, which includes discrimination claims, where an employer has failed to comply with a relevant Code of Practice, and that failure was unreasonable, the tribunal may, if it considers it just and equitable to do so, increase any award it makes to the employee by no more than 25%.

Conclusions

The period of financial loss

85. We have found above that there was a 40% chance of the claimant securing the SMPO role.

86. On future loss the claimant's submission (Schedule of Loss third page) was that the claimant expected to be fit to start seeking alternative employment once she had received six months specialist treatment and that she anticipated finding suitable alternative work six months thereafter in March 2020. The claimant is still employed with the respondent and we do not approach this as a termination of employment case. If the claimant no longer wishes to work for the respondent this is a matter within her own hands. We have not made a finding that goes to termination of employment and we confine our decision to the findings we have made and the one matter upon which the claimant succeeded.

87. Dr Ornstein said that the treatment he recommended would help improve the claimant's mood by a minimum of 50% within three to six months of commencement and he believed this would be enough for her moderate depression to reduce to mild or to subclinical levels. We therefore find that upon commencement of treatment the claimant would be in a position to return to work in six months.

88. We have found above that treatment could have commenced by 7 March 2019 and therefore the period of six months runs from that date. On our finding the claimant could return to work by 6 September 2019. As this is a Friday, we put the return to work date as Monday 9 September 2019 and this is the date to which future loss runs.

89. We also award the sum of £4,275 being the agreed cost of the medical treatment.

The award for injury to feelings

90. On the award for injury to feelings the claimant submitted that the discrimination had a huge impact on her mental wellbeing, that it was a serious act of discrimination as it threatened her job security as part of the redundancy process, that the discrimination took place during a grievance process, that matters were aggravated by senior officers and that it was a "*sustained act of malice".*

91. The claimant's case is that there should be an award at the middle of the middle Vento band, at £15,000. The respondent's case is that it should be a low award in the lower band at £3,000.

92. The respondent submitted that it was a one-off act of discrimination and took us to ***Glasgow City Council v McNab 1996 IRLR 476*** in which the EAT held that an award of £2,000 was at the upper end of the appropriate range, in the case of religious discrimination where a teacher was not appointed because he was not a Roman Catholic. Taking account of inflation the respondent put the figure at £2,833.33 at today's value applying an RPI adjustment. This was a case in which the claimant was not even considered for interview because he was not of the relevant faith. He was an atheist. The EAT said: "*We accept that the figure of £2,000 is at the upper end of what could properly be regarded as the appropriate range of awards for the sort of discrimination which occurred in this case. We cannot, however, conclude that it lay outwith that range and it would not, accordingly, be appropriate for us to interfere with it."* (paragraph 63 of the judgment).

93. We do not accept the claimant's submission that this was a case of a "*sustained act of malice*". It was a one-off act, a decision not to shortlist and not a sustained act. We made no finding as to malice. It was not submitted at liability stage that it was an act of malice and we do not make that finding now. The claimant's job security was under threat in any event because of the restructure.

94. This is a comparable case to ***McNab*** in the failure to shortlist. We deal separately with the award for personal injury.

95. We find that the discrimination had a significant impact on the claimant in terms of her injury to feelinga. It was a one off act and not a series of acts or a malicious act. We find, having considered the effect upon the claimant and the relevant case law, including ***McNab*** that this is slightly above the middle of the lower band case and we award injury to feelings at £4,000.

96. So far as the claim for aggravated damages is concerned, whilst we are of the view that the respondent and HR in particular could have done more to reassure the claimant as to how they were addressing the tribunal's findings, it does not meet the test in ***Commissioner of the Police of the Metropolis v Shaw*** as to conduct which was "*high-handed, malicious, insulting or oppressive*". We decline to make an award for aggravated damages.

Damages for personal injury

97. On personal injury for the psychiatric injury, the parties are agreed on the relevant bracket in the Judicial College Guidelines as set out above, the bracket being £5,130 to £16,720. The respondent cautioned the tribunal against making an award that involved double recovery.

98. In support of its case that the award should be in the sum of £5,625, the respondent relied upon the following personal injury authorities:

Howarth v Green - £6,500 (RPI adjusted: £10,656.72)

Whitty v Hackney Borough Council - £4,500 (RPI adjusted: £12,800.80)

Wesley v Cobb (Deceased) - £8,500 (RPI adjusted: £14,571.43)

99. ***Howarth*** was a case of severe clinical depression with a duration of 21 months. ***Whitty*** was a case of severe nervous shock with recovery after about 2.5 years and ***Wesley*** was a case of a major depressive episode with a recovery period of 3 years, which was far more serious on the facts, than this present case. The claimant did not cite any personal injury authorities.

100. We have found above that the recovery period, with the appropriate recommended treatment is six months. The personal injury was caused in August 2017 and on our findings, that treatment should have commenced by 7 March 2019 will therefore have subsisted by 9 September 2019 is just over 2 years.

101. The claimant contends for £16,000 (submissions paragraph 16); the respondent contends for £7,500 discounted by 25% for the non-work related matters, making £5,625.

102. All the authorities put to us were more serious than the claimant's condition. We consider that with a recovery period of around 2 years and taking account of the need to avoid double-counting, we award £6,000 for psychiatric injury. We then reduce this by 25% to reflect the non-work related issues making a total award for psychiatric injury of £4,500.

ACAS Code

103. We have considered whether under section 207A of the 1992 Act, there was an unreasonable failure to follow the ACAS Code and if so, whether it is just and equitable to increase the amount of compensation payable to the claimant.

104. The ACAS Code at paragraph 43 of the Code, says in relation to a grievance appeal: "*The appeal should be dealt with impartially….".* Our finding was that the appeal officer Ms Simpson was persuaded by HR to change her decision when it was not favourable to the respondent and to rely on the views of an HR officer rather than speaking to the relevant decision makers. We find that this completely lacks impartiality and it was

unreasonable. HR imposed their desired decision on the appeal officer. This can only be regarded as unreasonable and justifies an uplift of the award to the claimant.

105. We have to consider what is just and equitable in terms of the amount of that uplift. We award it at 10% as being not at the very top of the amount we could award, but to reflect our view of the seriousness of the failure to comply with the Code.

The award

106. The claimant was on full pay at her existing role from 10 August 2017 to 9 February 2018. Her loss runs at half the difference between her existing role and the SMPO role. Her existing net monthly pay was £2,034.38 and the SMPO role was £2,305.01. The monthly difference is £270.63 reduced by 60% to reflect the chance of appointment at 40% is a monthly loss of £108.25. Therefore the loss from 10 August 2017 to 9 February 2018 is £649.51.

107. For the period from 10 February 2018 to 9 August 2018 the claimant was on half pay at £1,017.19 so her monthly loss was £1,017.19 plus the £108.25 as set out above. This makes a monthly loss of £1,125.44 over six months makes a total of £6,752.64.

108. From 10 August 2018 to 9 September 2019 is an ongoing loss of £2,034.38 + £108.25 = £2,142.63 x 13 months = £27,854.19 + £649.51 + £6,752.64 = £35,256.34.

109. To this we add the cost of medical treatment awarded at £4,275. The sub-total for financial loss is £39,531.34 to which we add the loss of pension. As the amount of the employer contribution increased from 2% to 3% as at October 2017 there was a minimal amount at 2%, the respondent consented to the award being at 3% across the period, to assist with the figure work. The pension figure was agreed at £1,350.

110. The total financial award was therefore the total of the figures set out above in the sum of £40,881.34.

111. The period of interest on financial loss is agreed at 293 days, from 10 August 2017 to 19 March 2019. Interest is not awarded on future loss from 19 March 2019 to 9 September 2019, the parties agreed that this could be rounded to 6 months, £12,855.78. This means that interest is awarded on the sum of £28,025.56 which was £1,799.78.

112. With interest, the total financial loss is **£42,681.12.**

General damages

113. The award for injury to feelings is £4,000 and for personal injury is £4,500 makes a total of £8,500.

114. Interest on the award for injury to feelings is calculated from 10 August 2017. The number of days is 586. The award of interest is agreed at £1,091.73.

115. The total award with interest is **£9,591.73.**

Uplift

116. The combined award of financial loss and non-financial loss is We uplift this award by 10% on the total of £42,681.12 + £9,591.73 = **£52,272.85.** The uplift if £5,227.28 making a total of £57,500.14.

The tax position

117. What is tax exempt is the award for psychiatric injury and the cost medical treatment. The total of those two sums is £8,775.00. We deducted £8,775 from £57,500.14 making £48,725.14.

118. We have then deducted the £30,000 tax free allowance, leaving £18,725.14 and we then deduct the personal allowance of £11,850, leaves a balance of £6,875.14.

119. This is the amount we gross up, at 20%. The claimant could not say if she was a basic rate tax payer but we considered it was a reasonable assumption to based on her salary. On £6,875.14 we have divided it by 0.8 making £8,593.93 taking off £6,875.14 = £1,718.79 to be added to £57,500.14.

120. The respondent shall pay to the claimant the total sum of **£59,218.93.** By consent it is payable within 21 days.

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Employment Judge Elliott
Date: 19 March 2019

Judgment sent to the parties and entered in the Register on: 22:3:19 .
_____ for the Tribunals