Appeal No. UKEAT/0267/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 28 February 2019

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

BASE CHILDRENSWEAR LIMITED — APPELLANT

MISS N LOMANA OTSHUDI — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL MATOVU (of Counsel) Instructed by: Martin Serle Solicitors 9 Marlborough Place Brighton BN1 1UB
For the Respondent	MR CHANGEZ KHAN (of Counsel)

SUMMARY

RACE DISCRIMINATION - Injury to feelings

RACE DISCRIMINATION - Other losses

Race discrimination - injury to feelings and other (non-pecuniary) losses

The Claimant had pursued ET proceedings, complaining of various acts of harassment because of race in respect of six incidents during her employment and from the fact and manner of her dismissal. Finding that the claim in respect of matters arising during the course of the Claimant's employment had been brought out of time, the ET upheld the Claimant's complaint of racial harassment in respect of her dismissal. At the subsequent Remedies Hearing, the ET found that the Claimant's injury to feelings fell to be considered within the middle of the middle **Vento** band and made an award of £16,000 under this head. It separately considered her claim for aggravated damages, finding that the Respondent's failure to respond to the Claimant's grievance/appeal, its subsequent conduct of the ET litigation (its initial maintenance of the lie that she had been dismissed because of redundancy; its failure to respond to disclosure requests; its late alteration of its case to allege dismissal because of suspected theft) and its failure to apologise, had aggravated her injury to feelings, warranting an award of £5,000 under this head. Having found that the Claimant had suffered medical depression for three months, the ET also made an award for personal injury in the sum of £3,000. Standing back to consider the overall award made for non-pecuniary damages, the ET was satisfied that this was an appropriate sum. It then went on to make an uplift of 25% in respect of the Respondent's breach of the **ACAS Code** given its failure to respond to the Claimant's grievance/appeal.

The Respondent appealed, contending the awards made were manifestly excessive, the personal injury award failed to take into account the Claimant's other complaints of discrimination (for which the Respondent had not been found liable) and the ET had double-counted the factors taken into account and/or had taken into account irrelevant factors.

Held: *allowing the appeal in part*

Injury to feelings

The fact that the ET's finding of unlawful discrimination related to an isolated event - the Claimant's dismissal - did not mean it was required to assess the award for injury to feelings as falling within the lowest **Vento** bracket: the question was what effect had the discriminatory act had on the Claimant? On the ET's findings of fact in this case, it had permissibly concluded that this was a serious matter (something acknowledged by the Respondent) that gave rise to an injury to feelings award falling within the middle of the middle **Vento** bracket. Moreover, in reaching that decision, the ET had been careful not to double-count matters that it subsequently considered relevant to the question of aggravated damages, personal injury or any ACAS uplift. It had, further, not taken into account irrelevant factors when it referred to the Claimant's grievance, her notification to ACAS or the pursuit of her ET proceedings; these were potentially relevant matters to which the ET was entitled to refer when testing whether the Claimant had genuinely been aggrieved by the Respondent's discriminatory conduct. There was, therefore, no proper basis on which the EAT could interfere with the award made.

Aggravated damages

As for the aggravated damages award, other than a question as to whether this double-counted the Respondent's failure to respond to the grievance/appeal (given the ET's subsequent award of a 25% ACAS uplift), the ET's reasoning made clear that it had been careful to have regard only to matters occurring after the dismissal, which had not been taken into account in assessing the initial injury to feelings suffered by the Claimant or her personal injury.

Personal injury

Similarly, when considering the claim in respect of personal injury, the ET had been astute not to allow double-recovery for factors already taken into account under other heads. As for the evidence supporting its award in this regard, the ET had noted that there was no basis for thinking that the other matters of which the Claimant had complained (for which the Respondent had not

been held liable) had caused her to suffer depression; in the circumstances it had not erred in law in failing to apportion some element of the three-month period of medical depression to some other, earlier cause.

Totality

Standing back and considering the totality of the sums awarded, given the particular facts of this case (where the Claimant had, out of the blue, been summarily dismissed from a job in a career in which she had invested much in terms of time and money, for which she had worked hard and which she reasonably considered to be a long-term employment; where the reason for the dismissal had been an obvious lie; where the Claimant had faced managerial intimidation when she sought to contest the reason given for her dismissal), it could not be said that the award made was manifestly excessive such as to allow the EAT to interfere.

Double-counting

The only point on which a question of double-counting arose related to the regard given to the Respondent's failure to respond to the Claimant's grievance/appeal. Having already considered this relevant to the award for aggravated damages, the ET subsequently returned to the point when deciding whether it was appropriate to make an uplift of 25% for the Respondent's breach of the **ACAS Code**. Although the Respondent had not appealed against the ACAS uplift, it had questioned the aggravated damages award in this respect. Given that the ET decided to make an ACAS uplift in respect of the grievance/appeal, the question whether this gave rise to double-recovery in relation to the aggravated damages award was a relevant matter that ought properly to have been considered by the ET. As the ET had failed to have regard to this issue, the appeal would be allowed to this limited extent.

The parties having consented to the EAT itself determining the question thus identified, further submissions were heard as to whether the ET's award for aggravated damages should be reduced. Although, as the Claimant contended, it might be considered that the other matters taken into account under this head justified the sum awarded, it was apparent that the ET had also had regard

to the failure to respond to the grievance/appeal and, as such, it was appropriate to reduce the award in this respect to avoid double-counting. Of the various factors that had led to the aggravated damages award, however, this was a relatively minor matter and the award would be reduced only by the sum of £1,000.

HER HONOUR JUDGE EADY QC

Introduction

1. The appeal in this matter concerns the approach to be adopted by an Employment Tribunal ("ET") when making awards for non-pecuniary damages in a discrimination case.

2. In this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's appeal from a Remedies Judgment of the ET sitting at East London (Employment Judge Hyde sitting with members, Mr Quinn and Mr Brown, on 21 March 2018) sent out on 11 June 2018. This Judgment followed the ET's earlier Liability Judgment reached after a six-day hearing in 2017, sent out to the parties on 21 December 2017, which had upheld one of seven claims of racial harassment brought by the Claimant. Representation before the ET at the Remedies Hearing was as it has been on this appeal.

The Relevant Factual Background and the ET's Decision and Reasoning

3. The Claimant was employed by the Respondent as an in-house photographer for a little over three months in the early part of 2016. Her dismissal took place on 19 May 2016.

4. In her ET claim, the Claimant had complained of six acts of racial harassment meted out by different work colleagues during the course of that employment. Those complaints were, however, dismissed by the ET on the basis that they had been brought out of time and there were no proper grounds on which it would be just and equitable to extend time. The ET had, however, upheld the Claimant's further complaint of racial harassment in respect of her dismissal.

5. The ET's findings in relation to the Claimant's dismissal are set out in some detail at paragraphs 125 to 163 of its Liability Judgment; what follows is a very truncated summary of those findings.

6. The decision to dismiss was taken and communicated by Mr Granditer, the Respondent's Managing Director, who told the Claimant that she was being made redundant. As the ET found, that was a lie - something Mr Granditer conceded some 15 months later, but which the Claimant was immediately able to see through.

7. When, however, the Claimant questioned why she was being dismissed and whether it was to do with her race, Mr Granditer - who was already accompanied by one of the Respondent's manager's (Mr Moore) - called in the Claimant's first line manager (Mr Potier) to support his statement. Surrounded by three of the most senior managers in the business, the Claimant began to cry. It seems that Mr Granditer challenged the Claimant to say that this was a discrimination case and told her to collect up her belongings and leave immediately.

8. By the time of the Full Merits Hearing before the ET, it was Mr Granditer's evidence that he had in fact believed that the Claimant was guilty of taking items from the Respondent's stock (essentially, that she was suspect of theft). For reasons explained in its Liability Judgment the ET viewed that evidence with some considerable scepticism. More generally, the ET was satisfied that the Claimant's dismissal amounted to unwanted conduct and the way the decision had been communicated was intimidatory and was further evidence of the violation of her dignity. Rejecting the "suspected theft" explanation for the Claimant's dismissal, the ET inferred there was a racial element that had caused, or contributed to, her dismissal. On that basis it upheld the Claimant's claim in this respect.

9. Subsequently, turning to the question of remedy, the ET made awards for loss of earnings and interest - which are not the subject of any challenge - and then went on to consider the Claimant's claims for non-pecuniary losses. On the question of the Claimant's injury to feelings, the ET considered the following matters to be relevant:

> **"10. … The dismissal on 19 May 2016 came out of the blue. The Claimant at the time of the dismissal was given a patently false reason - that she was being made redundant - the veracity of which she challenged at the time. The Respondent's response at the time was to call into the meeting what we loosely refer to as 'Management reinforcement' against her. It was clear that the Claimant was very aware that she was the victim of wrongdoing, and that she was being put under pressure not to question it. She had to deal with the sudden loss of her job in a career which she had chosen and invested time and study in developing."**

10. The ET also took into account the fact that the Claimant promptly submitted a letter of grievance and appeal against her dismissal, but there had been no response from the Respondent. It further noted that, in responding to the Claimant's ET claim, the Respondent had repeated the false statement that she had been dismissed by reason of redundancy and had then failed to provide the evidence sought by the Claimant or provide any significant disclosure. The ET also had regard to the fact that, very belatedly - in August 2017, shortly before the relisted Full Merits Hearing of the Claimant's claims (the original hearing having been postponed on the Respondent's application) - the Respondent had submitted a substantially altered defence.

11. For the Respondent, although conceding that this was a serious matter, it was emphasised that this had been a one-off isolated incident. The ET acknowledged that was the case but considered it was bound to consider the effect on the Claimant. Allowing that generally an employee is likely to be more severely affected if they have worked for an employer for a number of years before being subjected to a discriminatory dismissal, the ET noted that the Claimant had been good at her job and had expected to remain in that employment for the foreseeable future. She had invested time and money into her career and her dismissal had come out of the blue. Although she had raised other allegations of race discrimination arising from early interactions

with work colleagues, the ET could not see that she had suffered any depression or disorders during the course of her employment. Looking solely at the question of the Claimant's injury to feelings arising from the dismissal, the ET considered this fell within the middle of the middle **Vento** band (see **Vento v Chief Constable of West Yorkshire Police (No 2)** [2003] ICR 318 CA) and made an award in the sum of £16,000 (the parties having agreed the applicable figures for the different **Vento** bands).

12. Turning to the question of aggravated damages, the ET made clear that it saw this as related to the Respondent's post-dismissal conduct; in particular, the failure to deal with the Claimant's grievance and appeal, and the Respondent's initial provision of a false and unsustainable defence. Having regard also to the belated change of case - alleging suspected theft by the Claimant as the reason for her dismissal, something that was put into a public forum and about which the Claimant had been cross-examined - and the lack of apology, the ET considered that an award of £5,000 was appropriate under this head.

13. Separately, the ET considered the Claimant's claim for damages for personal injury. The unchallenged medical evidence was that the Claimant had been medically depressed for a period conservatively estimated as three months after the termination of her employment. The medical evidence in question was provided by Dr Trevor Turner, Consultant Psychiatrist, who had provided a report prior to the Liability Hearing and had referred to the various allegations of detriment during the Claimant's employment as well as to the discriminatory dismissal concluding that the Claimant had suffered "*a depressive relapse in the context of work stress and in particular (in 2016) in the context of the loss of her job when faced with difficult working circumstances and her sense of significant racial harassment*" (report, paragraph 32). In any event, it was common ground that the injury suffered by the Claimant fell within the less severe

bracket under the Judicial College Guidelines and the ET considered that the appropriate award under this head was one of £3,000.

14. Standing back, the ET asked itself whether an overall award of £24,000 for non-pecuniary losses fairly reflected the appropriate level for the discrimination suffered by the Claimant. It was satisfied that it did. To that sum, the ET added interest of £3,520.

15. The ET then turned to consider whether there should be an uplift to the award under section 207A **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA") by reason of the Respondent's failure to comply with the provision of the **ACAS Code of Practice on Disciplinary and Grievance Procedures** ("the ACAS Code"). Specifically, the ET found that there had been a failure on the Respondent's part to comply with any proper process - either grievance or disciplinary - and that there had thus been unreasonable failures to comply with the ACAS Code. In this case, the ET considered it appropriate to apply a 25% increase, a sum of £6,880.

16. The Claimant had also made a claim for a Preparation Time Order in respect of the costs she had incurred arising from the Respondent's initial false defence to the claim. The ET agreed, making an award of £300 in this regard.

The Relevant Legal Principles

17. It was common ground that the ET was entitled to make awards for non-pecuniary losses under the headings of injury to feelings, aggravated damages and personal injury (albeit that it is possible to view aggravated damages as part and parcel of an injury to feelings award, given that the ET is compensating the complainant for the aggravation of that injury). It was also accepted

A that the ET was entitled to make an award in this case under section 207A **TULRCA**, in respect of the Respondent's failure to comply with the **ACAS Code**.

B 18. When making awards for non-pecuniary losses, it is trite law that an ET must keep in mind that the intention is to compensate, not punish. It must, therefore, be astute neither to conflate different types of awards nor to allow double recovery. The ET should, moreover, not allow its award to be inflated by any feeling of indignation or outrage towards the Respondent. C On the other hand, awards should not be set too low as that would diminish respect for the policy of the anti-discrimination legislation. See, generally, the guidance set out by Smith J (as she then was) in **Armitage Marsden and HM Prison Service v Johnson** [1997] ICR 275, approved by D the Court of Appeal in **Vento**.

E 19. In this case it is not said that the ET failed to properly direct itself to the **Vento** guidance and bands (appropriately updated by reference to what were agreed to be the relevant sums, taking into account the **Simmons v Castle** uplift (see [2012] EWCA Civ 1039) and as set out in the Presidential Guidance on "ET awards for injury to feelings and psychiatric injury following **De Souza v Vinci Construction (UK) Ltd** [2017] EWCA Civ 879"). In **Vento**, the Court of Appeal F laid down three levels of award: most serious, middle and lower. Specifically, at paragraph 65 of that Judgment, the Court of Appeal suggested that the top band should apply to the most serious cases, such as where there had been a lengthy campaign of discriminatory harassment on the G prohibited ground; that the middle band should be used for serious cases which do not merit an award in the highest band; and the lower bad would be appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. It was accepted, however, H that the precise level of award under any particular head would depend on the facts of the case, which, of course, will depend on the evidence before the ET.

20. It is also important for me to keep in mind that an award of compensation for injury to feelings is best judged by the ET that has had the benefit of hearing and seeing the Claimant give evidence. Given the wide discretion afforded to ETs in the assessment of compensation under this head, a challenge will only lie to the Employment Appeal Tribunal ("the EAT") if the award made is manifestly excessive or wrong in principle. That might mean, for example, where the facts of the case taken overall mean that it should be categorised as falling within a lower **Vento** band (see per HHJ McMullen QC at paragraph 46 **Da'Bell v NSPCC** [2010] IRLR 19). If this is so then a manifestly excessive award for injury to feelings can be overturned.

21. As a matter of principle, aggravated damages are also available for an act of discrimination, albeit again, the award made must still be compensatory not punitive. As was explained by EAT in **Commissioner of Police of the Metropolis v Shaw** [2012] IRLR 291, Underhill J (as he then was) presiding, such damages are really an aspect of injury to feelings and ETs should have regard to the total award made (i.e. for injury to feelings and for the aggravation of that injury), to ensure that the overall sum is properly compensatory and not - as was held to have been the case in **Shaw** itself - excessive. Although ETs are not required to make only one global award, it is important that they have regard to the overall sum awarded and, specifically, to the risk of double recovery.

22. Finally, for present purposes, it is not uncommon for a victim of unlawful discrimination to suffer stress and anxiety. To the extent that a psychiatric and/or physical injury can be attributed to the unlawful act, it is again common ground that the ET has jurisdiction to award compensation, subject only to the requirements of causation being satisfied (see **Sheriff v Klyne Tugs (Lowestoft) Ltd** [1999] ICR 1170 CA).

The Appeal

23. The Respondent's appeal was pursued on five grounds:

(1) The ET had placed the injury to feelings award in the wrong **Vento** band.

(2) No account had been taken of the overlap between awards for non-pecuniary losses.

(3) Sums awarded for injury to feelings and aggravated damages included compensation for matters compensated by the ACAS uplift, such that the combined awards made under those heads contained an element of double- or even treble-counting.

(4) The total award for non-pecuniary losses was manifestly excessive.

(5) The ET had taken into account matters that were irrelevant, specifically the Claimant's pursuit of ET proceedings.

24. The Claimant resisted the appeal essentially relying on the reasoning of the ET.

The Parties' Submissions

The Respondent's Case

25. Accepting there is a degree of overlap between the five grounds of appeal, the Respondent reminds me that injury to feelings awards are intended to compensate for that injury, not to punish the Respondent; an ET's feelings of indignation and outrage should not be allowed to inflate an award. As for aggravated damages, whilst an award might be made to reflect the manner in which the act of discrimination was committed and other aspects of the conduct of the discriminator, that is properly to be seen as part of the injury to feelings award.

26. Here, the ET had determined the injury to feelings award before it considered the question of aggravated damages. In respect of the latter, the ET apparently considered that the full sum claimed (£5,000) should be awarded for the entirety of the Respondent's post-dismissal conduct,

which made it hard to see how the award for injury to feelings - in respect of what had happened on the day of the Claimant's dismissal - fell within the middle **Vento** bracket. Given that the act of discrimination, as found by the ET, was properly to be seen as a one-off or isolated act, the placing of the injury to feelings award in the middle bracket was also manifestly excessive. The EAT was entitled to interfere with this award, given its placing in the wrong **Vento** band.

27. As for the aggravated damages award itself, the ET had awarded the full sum claimed in the Claimant's schedule of loss, which had been predicated on the dismissal itself having been undertaken in an offensive manner - something the ET had already taken into account when making the injury to feelings award.

28. As for the award for personal injury, at £3,000: this was on the basis of Dr Turner's report but that had been drawn up before the Liability Judgment and took into account the other detriments allegedly suffered by the Claimant, in respect of which the ET had not found in her favour. There was no attempt by the ET to make any apportionment of the award under this head between the injury suffered as a result of any earlier (alleged) detriment and that suffered as a result of the dismissal.

29. More generally, it was the Respondent's submission that the ET had failed to take into account the overlap between the different awards for non-pecuniary loss. It had, moreover, had regard to the failure to deal with the Claimant's grievance and appeal (1) when considering injury to feelings, (2) when making an award for aggravated damages, and (3) in addressing the question of any ACAS uplift.

30. Stepping back and given the ET's finding of discrimination related only to the Claimant's dismissal, the total award for non-pecuniary losses was manifestly excessive.

31. The ET had, furthermore, apparently had regard to the very fact that the Claimant had pursued ACAS early conciliation and ET proceedings, which had to be irrelevant as these matters would obviously be present in any claim of discrimination before the ET.

The Claimant's Case

32. On behalf of the Claimant it is contended that this three-member ET, having seen and evaluated the evidence both at the earlier Liability Hearing and at the remedy stage, was entitled to make the awards it did, considering each head of loss both separately and together, expressly to avoid overlap or windfall.

33. As for the individual grounds of appeal, first, the ET had been entitled to place the injury to feelings award in this case within the middle **Vento** band; the Respondent had accepted that this was a serious incident, it could not be said that the award was manifestly excessive. Second, the ET made explicit that it had the question of overlap in mind when considering the question of aggravated damages and uplift for non-compliance with the ACAS Code alongside the injury to feelings award (see paragraph 9). It then stood back and expressly considered the overall level of award checking for windfall, but was satisfied this was the appropriate sum (paragraph 22). Specifically, the ET was careful not to double-count between injury to feelings and personal injury, confining the latter to the medical condition established by the evidence. Third, there was no double- or treble-counting of the failure to deal with the Claimant's grievance/appeal. In referring to the Claimant's raising of her grievance when considering injury to feelings, the ET was testing the degree of her injury and not, at that stage, whether it had been aggravated by the Respondent's conduct. Although the ET did have regard to the Respondent's failure to address

the grievance, both when assessing aggravated damages and in respect of the ACAS uplift, the extent of any overlap was minimal; this was one of only four factors going to the aggravated damages award, which also took into account the Respondent's provision for a false reason for the dismissal, the change of case to allege theft and the absence of apology. Those matters distinguished the injury to fittings award from the ACAS uplift and justified the sum awarded. Fourth, as for the suggestion that the total sum awarded for non-pecuniary losses was manifestly excessive, this was a bare assertion of the Respondent's view; an experienced and neutral three-member ET was entitled to reach a different conclusion. Fifth, the suggestion that the ET had taken account of irrelevant factors was a misreading of its reasoning: reference to the Claimant's pursuit of the ET proceedings was merely part of the history, it did not feed into any award.

Discussion and Conclusions

34. As the Respondent had acknowledged, the discrimination found by the ET in this case was serious. The Claimant had invested time and money studying for, and developing, her career. She had obtained a job in her chosen vocation and had worked hard and she justifiably expected to remain in her employment for the foreseeable future, with a reasonable prospect of a pay rise to reflect her hard work. The ET found that losing all this had a real impact on the Claimant. Her dismissal came out of the blue. At the meeting informing her of her dismissal, she was given a patently false reason for why her employment was being terminated. When she sought to challenge this reason, she was subjected to a degree of managerial intimidation that she manifestly found upsetting. Not only did she start to cry during the meeting, but she evidenced the strength of her feelings by her prompt submission of a letter of grievance and her subsequent approach to ACAS and pursuit of ET proceedings.

35. The Respondent contends that having regard to the Claimant's approach to ACAS and subsequent pursuit of ET proceedings meant that the ET had regard to irrelevant matters: as Mr Matovu observes, these will be features present in any complaint of discrimination - an ET would not be considering making an award for injury to feelings if a complainant had not brought ET proceedings, which would inevitably have required them to initially approach ACAS. To see the ET's references to these matters in this way would, however, not be doing justice to its reasoning. The ET had regard to the approach to ACAS and the commencement of proceedings as evidencing how the Claimant responded to the discriminatory treatment in question; these were not irrelevant factors in assessing the impact of the discriminatory conduct on the Claimant.

36. Moving on to the ET's assessment of injury to feelings in this case, it is right to say that, in deciding whether the case should fall within the low or middle **Vento** bands, an ET might think it relevant to have regard to whether the discrimination in question formed part of a continuing course of conduct (perhaps a campaign of harassment over a long period) or whether it was only a one-off act. That said, each such assessment must be fact and case specific. It is, after all, not hard to think of cases involving one-off acts of discrimination that might well justify an award falling within the middle or higher **Vento** brackets, or other cases involving a continuing course of conduct that are properly to be assessed as falling within the lower band. Simply describing discrimination as an isolated or one-off act may not provide the complete picture and I do not read the **Vento** guidance as placing a straightjacket on the ET such that it must only assess such cases as falling within the lower band. The question for the ET must always be, what was the particular effect on this individual complainant?

37. In the present case, the ET properly reminded itself that, in making an assessment of the extent of the injury to feelings, it must have regard to the effect on the complainant. It made no

A error in its approach. The only question for me is, therefore, whether, having regard to the particular facts found by the ET and the effect suffered by this Claimant, it can properly be said that the award made for injury to feelings was manifestly excessive.

B

38. As well as being astute to remind itself that it was to have regard to the effect on this individual Claimant and not make generalised assumptions, the ET was also careful to separate out those elements - essentially what happened after the dismissal - that were properly to be taken C into account under other heads of loss (specifically, aggravated damages and damages for personal injury). Doing so, it had regard to the matters I have set out in the opening paragraph in this section of my Judgment, and concluded that this was a case that properly fell to be considered D within the middle **Vento** band.

39. As is apparent from the written reasons, the ET had regard to post-dismissal events - the E issuing of the grievance/appeal, the contact with ACAS and the pursuit of ET proceedings - only in a limited sense, as a way of testing what was claimed to have been the impact on the Claimant. As I have already observed, that was a permissible approach. Otherwise, taking into account the fact that the discriminatory act in question was the Claimant's dismissal from a job that obviously F meant a lot to her in terms of her career aspirations, and given the manner of that dismissal, I am unable to say the ET erred in determining that this was a case falling within the middle **Vento** bracket. To the extent the Judgment is challenged in this respect (grounds 1 and 5), the appeal G fails.

40. I then turn to consider the award of aggravated damages. In making an award under this H head, the ET was considering the extent to which the Claimant had suffered an aggravation of her injury to feelings and its reasoning makes plain that it was careful not to fall into the error of

double-counting those matters to which had already had regard when making the injury to feelings award itself, looking instead at what had happened *after* the Claimant's dismissal. The ET thus took into account the fact that, in its initial response to the Claimant's ET claim, the Respondent continued the lie that she had been dismissed for redundancy. It was satisfied that the initial injury to feelings the Claimant had suffered when told this lie at the dismissal meeting was aggravated by the Respondent's continuation of the falsehood in its initial defence to the ET proceedings. That injury was, on the ET's findings, further aggravated by the way in which the Respondent failed to respond to the Claimant's grievance/appeal - the ET at this stage having regard to the way in which the Respondent's conduct aggravated the injury, rather than looking at these matters as evidence corroborating the Claimant's initial injury to feelings. The ET also permissibly had regard to the way in which the Respondent then conducted the litigation - failing to respond to the Claimant's representatives' request for disclosure and then belatedly changing its case to allege attempted theft by the Claimant as the real reason for her dismissal - and also by the failure to make any apology.

41. The Respondent objects that the award made by the ET was in the same amount as that claimed in the Claimant's schedule of loss, which had itself been based on matters already taken into account by the ET and its assessment of the injury to feelings award. More specifically, it contends that having regard to the failure to respond to the Claimant's grievance meant there was an element of overlap with the ET's subsequent award for failure to comply with the **ACAS Code**.

42. Whether or not the Claimant's schedule had included an element of double-counting, it is clear to me that - save in one respect - that the ET's award under this head did not. Not only did the expressly separate out its assessment under each head, but its reasoning makes clear that -

save possibly in respect of the failure to comply with the ACAS Code in respect of the Claimant's grievance/appeal (a point to which I will return below) - there was no double-counting in the factors taken into account. As for the level of award made under this head, given the aggravation of the Claimant's injury in the ways specified, I am unable to say this was excessive.

43. At this stage it is right to look at the overall sum awarded for injury to feelings and aggravated damages (£21,000 in total) and ask whether, given the particular facts found by the ET, this was manifestly excessive and/or included an element of double-counting. I have already addressed the latter concern: I am satisfied, on the basis of the ET's very careful approach and the clear reasoning provided, there was no double-counting. As for the overall amount, I do not consider I can say that it was a manifestly excessive award. At the risk of repetition, this was an employee in the early stages of her career in a job that she plainly considered a vocation and she had worked hard in what she saw as a long-term employment opportunity. Both the fact and manner of her dismissal was such as to reasonably cause significant injury to feelings. That injury was then aggravated by the Respondent's response to the Claimant's entirely legitimate attempts to seek recourse, both through the Respondent's internal processes and by means of litigation in the ET. The lies told to the Claimant and the way in which the Respondent chose to run its defence before the ET were serious matters. The ET was entitled to see this as a case initially falling firmly within the middle of the **Vento** middle band and then taken towards the upper end of that band because of the aggravation of the Claimant's injury. On the particular facts of this case I see no proper basis on which I can interfere with the awards made.

44. Similarly, when approaching the claim for damages for personal injury - a claim in respect of the medical depression suffered by the Claimant, lasting (on a conservative assessment) for a three-month period - the ET was again careful not to double-count those factors that it had already

taken into consideration under other heads. On this part of the award, however, the Respondent says that the sum awarded by the ET was based on Dr Turner's report which had included consideration of the various detriments claimed by the Claimant but which had been dismissed by the ET at the earlier liability stage.

45. Although it is right that Dr Turner's report had referred to those other complaints, it is also apparent that his assessment of the personal injury suffered by the Claimant was focused on her dismissal, albeit that this had taken place in the context of the Claimant having experienced difficult working circumstances and having a perception of past racial harassment. In any event, the ET was careful to remind itself that the only discriminatory act for which it was awarding compensation was the dismissal (see paragraph 9) and that it had dismissed her other claims of racial harassment (see paragraph 14). It expressly considered whether it might be said that the Claimant had suffered any depression or other disorder as a result of those earlier incidents - allowing that the incidents might have occurred but giving rise to no liability on the Respondent's part – but found that there was no evidence of that (again, see paragraph 14). In the circumstances, the ET permissibly considered that it should make an award for the personal injury found to have been suffered by the Claimant, assessing the appropriate sum in this regard as £3,000. On the evidence before it and specifically the lack of any basis for thinking that it should attribute part of the Claimant's depression to any earlier act, I consider the ET was entitled to make the award it did.

46. Again, at this stage I step back to consider the overall compensation awarded for non-pecuniary losses suffered by the Claimant. In total the ET awarded £24,000 in damages. Given not just the injury to feelings and aggravation of that injury but the medical depression suffered

by the Claimant for - as conservatively assessed - a period of some three months, I am unable to say that this was manifestly excessive.

47. Finally, I return to the point I highlighted when dealing with the arguments on the aggravated damages award and the possible overlap in terms of the ACAS uplift. Both awards took into account the Respondent's failure to respond to the Claimant's grievance, albeit that in the case of the aggravated damages award that was one of four factors that had led the ET to make the award it did. In considering whether to make an uplift under section 207A **TULRCA**, the question for the ET was whether it was just and equitable to do so. It was plainly entitled to consider that it was and indeed there has been no appeal against the uplift that it made. The difficulty that arises, however, is the ACAS uplift made was in respect of a failure to respond to a grievance and the ET had already separately taken that into account when making its award of aggravated damages. For the Claimant it is said that this does not matter: the awards serve different purposes and the ACAS uplift is not intended to be purely compensatory, such an award is intended to impose a sanction upon an employer. For the Respondent, it is said that this gives rise to a double-counting in terms of compensation.

48. It seems to me that the point made by the Respondent might be a valid objection to take at the time an ET is considering whether it is just and equitable to award an uplift under section 207A **TULRCA** and, if so, in what amount. There is a difficulty here, however, because the Respondent is objecting to what it has said is an element of double-counting in this regard, but has not appealed against the ACAS uplift itself but the earlier award for aggravated damages. That said, I do consider that the Respondent is right to say that this is something to which the ET ought properly to have had regard in again considering the overall award made: it was a potentially relevant factor that it failed to take into account. On any case, the double-counting in

question is not great: it is simply the fact that the ET considered the Respondent's failure to respond to the Claimant's grievance under the head of aggravated damages - it being one of four elements taken into account under that head - *and* as justifying an ACAS uplift. It was, however, a relevant matter to which the ET apparently failed to have regard when considering the overall award of compensation made for non-pecuniary losses. Therefore, and to that limited extent, I allow the appeal in this regard.

Disposal

49. Having given my Judgment in this matter, allowing the Respondent's appeal on the limited question whether account should have been taken of the apparent double-counting of the failure to respond to the Claimant's grievance under the heading of aggravated damages when it had also formed the basis of the ACAS uplift, I allowed the parties time to consider their respective positions and address me on the question of disposal. Having had that opportunity, both counsel indicated that they would be content with me going on to reconsider the ET's award myself rather than remit this question to the ET. In stating the Respondent's position in that regard, as Mr Matovu made clear, that was without prejudice to the Respondent's right to seek permission to appeal the other aspects of my Judgment adverse to his client. That, of course, must be right. On that agreed basis, I duly heard further submissions from the parties on the question of what should be then the effect of my Judgment in terms of the ET award.

50. For the Respondent, it is said that it would be wrong to make no reduction to the aggravated damages award and that the reduction should be a not-insignificant sum, given that at paragraph 16 of its Judgment the ET had referred to the focus at this stage being on the failure to deal with the Claimant's appeal/grievance letter. Moreover, given that a full 25% uplift had been made for the failure to deal with the grievance, the reduction to the aggravated damages award

should be in the sum of at least £3,000. The entirety of that sum should be discounted from the aggravated damages award, although the Respondent says that regard, in fact, should be had to the overall award made, including the ACAS uplift, such that that might potentially lead to an even higher reduction.

51. For the Claimant, it is said that taking this element of double-counting into account should actually make no real difference to the award made in respect of aggravated damages. The other factors taken into account by the ET related to the way in which the Respondent had resisted the ET proceedings, in particular the allegations made against the Claimant of suspected theft. Those were serious factors that in themselves justified an aggravated damages award of £5,000.

52. As I stated in giving my Judgment, as I understood the grounds of appeal and arguments developed in that regard, the Respondent's challenge in this respect was to the ET's awards for injury to feelings and aggravated damages. It contended that the ET had erred by taking into account the Respondent's failure to respond to the Claimant's grievance given the subsequent award of an ACAS uplift also in respect of the same matter (it being the Respondent's case that this had therefore led to triple-counting). In considering that submission, neither I nor, it has to be said, counsel for the Claimant had understood there was a separate challenge to the ACAS uplift itself.

53. As for the injury to feelings award, I did not find that there was any double-counting in respect of the grievance under this head. The reference made to the lodging of the grievance/appeal was limited to seeing that as relevant evidence of the Claimant's injury to feelings; at that stage, the ET was not considering the question of the Respondent's response (or lack of response) as aggravating that injury.

54. I did, however, allow that there was an element of double-counting in terms of the aggravated damages award, because the ET had gone on to consider this factor in making the ACAS uplift. What then should be the result if that was revisited in the light of the subsequent uplift?

55. As the Claimant has submitted, there is a strong argument that the award made for aggravated damages should still be in the sum of £5,000. Certainly, the other factors referenced by the ET could be seen to entirely justify an award of that amount. That said, the ET obviously did take into account the failure to respond to the grievance when making this award and I cannot ignore that fact. Moreover, I agree with the Respondent that, given that the ET went on to consider that this failure on the Respondent's part was a matter that justified a 25% uplift for failure to comply with the ACAS Code, the ET ought properly to have returned to the aggravated damages award and removed that factor from its consideration under that head, and adjusted the award made accordingly. Undertaking that task, it seems to me, however, that this was a relatively small aspect of the ET's aggravated damages award and, in my Judgment, on the ET's findings in this case, I consider that the appropriate reduction would be one of £1,000. That would therefore reduce the aggravated damages award to £4,000 in total.

56. That reduction will impact, on the further awards made by the ET, both for interest and for the ACAS uplift. Those are sums which it will be relatively simple for the parties to recalculate and agree.