EMPLOYMENT TRIBUNALS

Claimant: **Mr T B Caulcutt**

Respondent: **Department for Work and Pensions**

Heard at: **Wrexham** **On: 26th January 2018**

Before: **Employment Judge Howden-Evans**
Mr L J Boulton
Mrs A M McCall

Representation

Claimant: Mr Doughty (Representative)

Respondent: Mr Tinkler (Counsel)

JUDGMENT ON REMEDY

The unanimous decision of the Employment Tribunal is as follows:

1. The Claimant is awarded **£26,119** compensation for injury to feelings and interest thereon.

2. The Claimant is awarded **£543** in respect of his past losses and interest thereon.

3. In total, the Respondent is liable to pay the Claimant the sum of **£26,662**.

REASONS

Background

1. In the Reconsidered Judgment on Liability, the tribunal has made declarations that:

   1.1. the respondent has subjected the claimant to disability discrimination by failing to comply with its duty to make reasonable adjustments (Sections 20, 21(2), 25(2)(d), 39(2)(c) and 39(5) of the Equality Act 2010); and

   1.2. the respondent has treated the claimant unfavourably because of something arising in consequence of his disability (s15 Equality Act 2010).

2. The specific acts of discrimination were:

   2.1. issuing Mr Caulcutt with a First Written Warning in relation to his absences from work;

   2.2. failing to remove this warning when Mr Caulcutt appealed this decision;

   2.3. assessing Mr Caulcutt's performance as being Box 3 "must improve' (ie indicating his outcomes and/or behaviours had not achieved a satisfactory standard meaning Mr Caulcutt did not receive an annual bonus); and

   2.4. failing to fairly consider his grievance in relation to the Box 3 assessment and subsequently not correcting this discrimination through the grievance appeal.

3. On 26th January 2018, the tribunal heard evidence and closing submissions on remedy. Mr Caulcutt was represented by Mr Doughty; Mr Tinkler represented the Department of Work and Pensions. Mr Caulcutt gave evidence on oath. He had prepared a detailed impact statement, that the tribunal read as his evidence in chief, before he answered questions from Mr Tinkler, the tribunal and finally Mr Doughty. The tribunal also had the benefit of a Schedule of Loss, a Counter Schedule of Loss and a bundle of 79 pages which included occupational health reports and correspondence from Mr Caulcutt's medical practitioners. This was supplemented by additional occupational health reports that Mr Doughty provided at the hearing (Mr Tinkler raising no objection to these further documents being added to the bundle). Whilst the Tribunal were able to hear oral closing submissions from both parties and were able to conduct its chambers discussion on 26th January 2018, due to childcare arrangements, it was not possible for both parties to stay to hear an oral decision, so the tribunal has set out its decision and reasons in this Judgment.

The Issues

4. By closing submissions in the remedy hearing, the issues to be determined by the tribunal were:

4.1. Appropriate recommendations:

4.1.1. The claimant was seeking:

(a) an instruction for the respondent to treat the asthma attack on 4th March 2014 as an industrial injury and for injury leave to be awarded;
(b) an instruction for the respondent to approve the claimant's ill-health retirement application;
(c) alternatively, an instruction for the claimant to be provided with suitable back of house work, a phased return to work and protection from bullying;
(d) an instruction that the first written warning is erased from the claimant's attendance record; and
(e) an instruction that the Box 3 marking is replaced with a Box 2 assessment on the claimant's performance record.

4.1.2. The respondent accepts recommendations (d) and (e) are appropriate and made the following submissions upon the other suggested recommendations:

(a) a separate body determines whether an event is classified as an "industrial injury";
(b) only the pension provider can determine whether the claimant's ill health application is successful; and
(c) medical evidence indicates the claimant would be unable to return to work.

4.2. Whether there should be an award for personal injury:

4.2.1. The Claimant claims £30,000 for personal injury, stating the discrimination has caused an exacerbation and permanent deterioration to his health.

4.2.2. The Respondent states there should be no award for personal injury, submitting there is no evidence, from absences or medical evidence, of a deterioration in the claimant's health caused by the first written warning or box 3 marking.

4.3. The appropriate award for Injury to Feelings (including any aggravated damages).

4.3.1. The Claimant claims £42,000 (of which £8,000 is aggravated damages), the top award in the *Vento* top-band (for *"the most serious cases, such as where there has been a lengthy campaign of harassment"*, which was adjusted to £18,000 to £30,000 following the decision of *Da'Bell v NSPCC [2010] IRLR 19 and further adjusted to £25,200 to £42,000 in the Presidential Guidance dated 5th September 2017*).

4.3.2. The Respondent contends the Injury to Feelings award should be no more than £12,000 (the *Vento* middle band, for *"serious cases which do not merit an award in the highest band"*, which was £6,000 to £18,000, as adjusted by *Da'Bell v NSPCC [2010] IRLR 19*). In closing submissions, Mr Tinkler submitted that whilst he accepted the top of the middle band is £25,200 following the Presidential Guidance, the Respondent submits an appropriate Injury to Feelings award is less than £25,200. The Respondent submits there should be no aggravated damages award.

4.4. The Box 2 bonus that the Claimant did not receive

4.4.1. The claimant seeks £580 gross or £470 net. The respondent submits this should be £475 net with interest to be added.

4.5. Costs of travelling, stationery and printing

4.5.1. The claimant seeks £200 for costs; the respondent submits there is no basis for an award of costs.

4.6. Interest

4.6.1. The respondent submits it would be unfair for the tribunal to award interest during:

(a) the period the case was stayed due to the Claimant suffering from cancer; and

(b) the period of delay caused by the Claimant's unsuccessful application to amend the claim.

Findings of fact

5. By reason of his chronic asthma and severe eczema, Mr Caulcutt has been registered disabled for all his working life. His health had such a profound impact on his ability to attend school that he spent many of his teenage years living in a residential school for children with disabilities.

6. On 22 June 1981, at the age of 19, Mr Caulcutt started work with DWP as a clerical assistant, based in their Caernarfon office. Between 1981 and 2013 (ie for 32 years), he worked in a "back of house" role which meant he had no face-to-face contact with members of the public; he was based in the finance office, which was only shared with 1 or 2 colleagues. Happily this meant his asthma and eczema were well-managed and his attendance record was good. He had opportunities for promotion but chose not to pursue these as he was concerned about the impact different roles might have on his health.

7. In 1996 he was promoted to the role of finance officer and continued to work without contact with the public.

8. He praises the DWP for the reasonable adjustments and flexible working arrangements that supported him for the first 30 years of his employment and also enabled him to care for his disabled daughter.

9. By 2006, as Mr Caulcutt had such a good attendance record, by agreement, his disability related absence allowance had been reduced to 15 days, which meant reasonable sickness absence for Mr Caulcutt would be up to 23 days in any 12 month period.

10. In fact, in 2010, 2011 and 2012, Mr Caulcutt only lost 4 working days through ill health each year, of which 2 days were disability related. His line manager, Cheryl Jones, noted his attendance record was "exemplary".

11. Under the DWP's "People Performance Procedures", Mr Caulcutt had received Box 2 "Achieved" (his expected outcomes and behaviour standards) for 15 consecutive years, prior to the 2014 assessment.

12. The Reconsidered Judgment on Liability has set out the events leading up to the specific acts of discrimination.

Mr Caulcutt's condition immediately prior to 1st April 2014

13. The tribunal note that by 1st April 2014, the first act of unlawful discrimination (when the First Written Warning was issued), Mr Caulcutt was already experiencing difficulties with his asthma, severe eczema and anxiety:

    13.1. In February 2014, Mr Caulcutt was diagnosed as having General Anxiety Disorder and started a period of counselling.

13.2. The 26th February 2014 occupational health report noted: ,

"[Mr Caulcutt's] sickness absence has significantly increased over the last 12 months, having 47 days' absence on 7 occasions whereas the previous 12 month period had 5 days' absence on 3 occasions….In my opinion unless there is a change to Mr Caulcutt's working environment his physical health is likely to remain poor or worsen."

13.3. In February 2014 in a meeting with Ms Lewis, Mr Caulcutt noted he felt his health had been deteriorating for many months.

13.4. By March 2014, Mr Caulcutt was taking anti-depressants.

13.5. On 4th March 2014, whilst attending the training session that he had indicated he would not be able to attend due to his health, Mr Caulcutt experienced a panic attack which triggered a very severe asthma attack; the worst asthma attack he had experienced since childhood. He was admitted to hospital and described feeling in a state of shock for weeks afterwards.

13.6. By 23rd March 2014, Mr Caulcutt had 25.5 days' absence in the previous 12 months, so he had exceeded his Disabled Employee's Trigger Point of 23 days, 12.5 of these days stemmed from the severe asthma attack that he suffered attending the training session.

The Impact of the First Written Warning and Box 3 Marking upon Mr Caulcutt

14. It was against this backdrop that the First Written Warning was issued. During the meeting with Ms Lewis on 1st April 2014, Mr Caulcutt:

- explained his health was deteriorating and his anxiety was affecting his asthma which then made him more anxious;
- explained if he had a written warning with his health deteriorating he would not be able to take sick leave and would have to use his holidays;
- pointed out that he was a good employee who had never had a warning and it would be unfair to issue a warning if it may exacerbate his condition;
- was concerned that he would struggle in the new role and needed Ms Lewis to look at the reasonable adjustments to ensure they had all been exhausted;
- was told by Ms Lewis that he would be customer facing in the new role and "categorically" he would not be moving back to finance.

15. On 1st April 2014, Ms Lewis wrote to Mr Caulcutt confirming she was giving him a First Written Warning and that his attendance would be monitored for the next 6 months ("the Review Period"). She explained that if his attendance was

unacceptable at any time during the Review Period she may issue a Final Written Warning and if it continued to be unacceptable after this he could be dismissed. Sickness absence of 11.5 days or more in the 6 month Review Period would be unacceptable. She went on to explain that if his attendance was satisfactory in the Review Period, his attendance would be monitored for a further year. This meant if his absence exceeded 23 days in a rolling 12 month period in the next 18 months he would face a final written warning and even dismissal.

16. In his impact statement, Mr Caulcutt described feeling dumbfounded, shocked and upset when he received the First Written Warning. He felt he was being kicked when he was already down, having very recently experienced the life-threatening asthma attack. He felt it was very callous of his employer to issue a warning, when they knew how ill he had been on 4th March, when he was attending training that he had always said he would be unable to attend because of his health.

17. Mr Caulcutt was also being told that he was expected to move into a customer facing role in the next month or two, (after 32 years of non-customer facing work). There is no finding of discrimination related to this move; the Tribunal note that this change of work would have contributed to Mr Caulcutt's stress and anxiety, so the tribunal have to be careful to disregard stress and anxiety that would have occurred through this move, in any event, in any injury to feelings or personal injury compensation.

18. The unlawful First Written Warning did increase Mr Caulcutt's worry that working in a customer-facing role brought with it an increased risk of him picking up infections or experiencing stressful situations both of which could aggravate his asthma, eczema and/or anxiety; against this backdrop (and as his latest Occupational Health report stated "*his physical health is likely to remain poor or worsen")* being given this First Written Warning caused him tremendous anxiety.

19. On 7th April 2014, Mr Caulcutt started his Individual Training Plan (for front-line work); this envisaged him being fully working on the front line by 19th May 2014.

20. Mr Caulcutt was very anxious about working directly with the public especially as some of DWP's clients were having benefits sanctioned and were angry. He increased his medication and was having to take more painkillers as his eczema became worse. The tribunal are of the view that it was likely that Mr Caulcutt would have had to increase his medication in any event to cope with the change in work - he had increased his medication to attend training in previous month. However, it is more likely than not that the knowledge of the written warning was aggravating Mr Caulcutt's anxiety at this point in time and was materially contributing to his need to increase his medication.

21. By letter dated 7th April 2014, Mr Caulcutt appealed the written warning. His letter included comments that:
    - it had been distressing receiving the letter whilst off sick with anxiety and asthma; and
    - the written warning itself puts him at a substantial disadvantage given the physical and psychological nature of his disabilities and that his most recent OHS said his health is likely to remain poor or worsen.

22. On 1st May 2014, Alan Shenton heard Mr Caulcutt's appeal against the written warning. During the course this meeting, Mr Caulcutt mentioned that other colleagues had not received attendance letters when they were off work. He stated that his disability consideration point had only been breached by 2.5 days; he had taken advice from CCAS who had said it could have been waived due to the circumstances of the asthma attack at work that led to him exceeding the consideration point. Mr Caulcutt explained Ms Lewis was well aware his condition was deteriorating and that reasonable adjustments in the OHS report had not yet been made.

23. In his letter of 7th May 2014, Mr Shenton explained that Mr Caulcutt's appeal had been unsuccessful. In his impact statement, Mr Caulcutt explained that when he learnt his appeal had been unsuccessful, he felt afraid, anxious and upset as he believed, with his failing health and the new environment he would be working in, having had his appeal dismissed he had taken a huge step towards dismissal.

24. On 7th May 2014, Mr Caulcutt learnt for the first time of the Box 3 mark, when Ms Lewis told him she had provisionally given him this rating. Mr Caulcutt was shocked by this news as he had not previously been given any indication that Ms Lewis was unhappy with his work.

25. On 13th May 2014, Mr Shenton wrote a further email to Mr Caulcutt explaining " *If RAST suggest that more needs to be done to support you in the workplace then a decision will need to be taken on whether those measures were relevant to your attendance at the Claimant Commitment training. If they were, then my expectation would be that your First Written Warning will be rescinded."*

26. By email dated 15th May 2014 and addressed to Ms Lewis, Mr Caulcutt objected to the Box 3 marking: *"…As you know the box marking awarded at the end of the reporting year shouldn't come as a surprise and I'd had no indication that my work was not up to the required standard….If the matter can't be resolved then as discussed I would like you to accept this email as a request for a grievance."*

27. During a meeting on 20th May, Ms Lewis advised Mr Caulcutt that she needed more evidence to be able to change the mark to a Box 2. She explained that she saw his performance as coming into the "must improve" bracket overall.

She also told Mr Caulcutt that he could improve his mark by upskilling on front-line duties.

28. On 3rd June 2014, as he was finding it difficult to cope with frontline duties, Mr Caulcutt enquired about the possibility of moving to Bangor to a non-customer facing role. Working from Bangor would entail extra travel, and transport costs for Mr Caulcutt and presented difficulties caring for his daughter. Ms Borland passed on Mr Caulcutt's enquiries about reasonable adjustments that would be available at Bangor.

29. On 12th June 2014, Ms Lewis decided that Mr Caulcutt's evidence was insufficient to change the mark and told Mr Caulcutt that the Box 3 mark would not been changed. When he said that he had submitted lots of evidence as requested, she replied that his behaviour was pulling him down too. When he asked what she meant, Ms Lewis said that he had caused her lots of additional work due to HR matters. Mr Caulcutt explained that this was not fair as he was only exercising his rights as a disabled employee.

30. In evidence, Mr Caulcutt explained that he had never had his performance assessed as being unsatisfactory before, so the Box 3 marking decision "hurt me". Coming so quickly on the back of the First Written Warning, he described it as having a terrible impact on his health and self-esteem; he felt his world was collapsing.

31. In a chain of emails, it was clear that Mr Caulcutt's complaint about the Box 3 marking would not be resolved informally; the chain ended with Ms Lewis explaining Mr Caulcutt needed to complete a G1 form, which starts the formal grievance procedure.

32. On 1st July Mr Caulcutt emailed a formal grievance to Ms Lewis in an attempt to challenge the Box 3 marking. On 3rd July, Mr Caulcutt emailed his grievance to Ms Borland (who was his line manager during Ms Lewis's absence). Ms Borland requested information as to why the grievance was being presented out of time. Mr Caulcutt explained he had originally requested a grievance in his email of 15th May, but had been trying to resolve this informally with Ms Lewis since that point.

33. At Mr Caulcutt's request, Ms Borland was also progressing his request for a transfer to Bangor Service Centre. By letter of 7th July, Mr Caulcutt learnt his transfer request had been granted and he was due to commence work in Bangor on 29th September 2014.

34. On 9th July, Ms Borland considered a stress reduction plan with Mr Caulcutt.

35. On 15th July 2014, Mr Caulcutt's GP had wanted to sign him unfit for work, but Mr Caulcutt was concerned he would ultimately lose his job, so Mr Caulcutt's

GP wrote a fit note that required DWP to give Mr Caulcutt non confrontational work. Mr Caulcutt returned to work and was visibly distressed when meeting Cheryl Jones. He confirmed he was unable to do the "floor walking"; Ms Jones agreed he would not be expected to undertake floor walking for the next two weeks. The following day there was a further discussion as Ms Jones had made enquiries with Ms Lovatt who had suggested they could speak to the Bangor Service Centre to see if Mr Caulcutt could transfer sooner, if he was finding it difficult to cope. Mr Caulcutt declined this offer as he wanted to see whether the RAST team would be able to come up with any further adjustments.

36. On 24th July, Mr Caulcutt met Ms Borland and learnt that the RAST enquiry had only considered the air quality and was now being closed. Mr Caulcutt was upset and explained that both he and Mr Shenton had understood the RAST team would be undertaking a wider investigation.

37. Mr Caulcutt set out his concern (about the limited extent of the RAST enquiry) in an email of 31st July, which he asked Ms Borland to forward to Wendy Yeomans or another senior colleague for consideration. Ms Borland forwarded his concerns to Bev Lovatt.

38. This was followed by further emails in which Ms Borland was seeking confirmation that Mr Caulcutt still wanted to go ahead with the transfer to Bangor and Mr Caulcutt restated his position. By email of 29th August, Mr Caulcutt indicated he would be attending the training on 1st September, which meant he would be going ahead with the transfer to Bangor.

39. On 1st September Mr Caulcutt commenced his training in Llangefni for his new Bangor-based role.

40. By letter dated 2nd September 2014, Ms Borland invited Mr Caulcutt to a meeting on 15th September at which she would consider his grievance about the Box 3 marking. By email on 11th September, Bev Lovatt advised Mr Caulcutt that she would be hearing his grievance on 18th September 2014.

41. Bev Lovatt did hear Mr Caulcutt's grievance; at their meeting on 18th September, Mr Caulcutt explained that the End of Year Box 3 mark had come as a total surprise; Mr Caulcutt had no prior indication his performance had dipped. He also stressed that in September 2013 he was completing a new job role, in a new location with a new manager and he felt he was seen to be a nuisance because he sent emails about his reasonable adjustments.

42. By letter dated 3rd October 2014, Ms Lovatt confirmed she was not upholding Mr Caulcut's grievance against the Box 3 marking. In his impact statement, Mr Caulcutt described feeling disappointed, upset and frightened that his career

and livelihood were under threat, when he learnt of the outcome of his grievance. Mr Caulcutt appealed this decision.

43. Subsequently on 28th October 2014, Karen Brown considered Mr Caulcutt's appeal against the grievance outcome. By later dated 4th November 2014, Ms Brown confirmed that his appeal had been unsuccessful.

44. On 29th September 2014, Mr Caulcutt was transferred to the Bangor Processing Centre and commenced a non-public facing role.

45. As part of disclosure in the tribunal proceedings, Mr Caulcutt saw for the first time two offensive emails, both sent by Bev Lovatt to Ms Borland, in early September 2014, in which she said:

"Im sick of seeing Disabled, Reasonable adjustments in [Mr Caulcutt's] emails. I said I didn't think we should be lenient and hear his grievance as he didn't follow the correct procedure following his informal chat. It is his responsibility to find out how he puts forward a formal request not yours. As he is someone in guidance so often Im not too sure I believe he didn't know the process.

To my mind, scrap the meeting, let him winge like crap and raise it on his ET - he doesn't deserve us to be 'nice' to him"

and subsequently

"Email them over that's fine. I've just read through [Mr Caulcutt's] email again with a chuckle to myself - absolute bloody nonsense. Sharon Clamp as his TU rep…….ace [followed by an image of a smily face]*"*

46. In evidence, Mr Caulcutt described "feeling physically sick" when he read these emails. He found it upsetting seeing what his managers had thought of him.

47. The tribunal also considered the extent to which the First Written Warning and Box 3 marking had caused any sickness absence. Following the First Written Warning, in April 2014, Mr Caulcutt had only occasional absences from work (2nd July 2014 with hay fever followed by 3 days in November 2014 with asthma). The tribunal found that the discriminatory acts had not caused Mr Caulcutt to be absent from work with ill health. However, there was evidence that Mr Caulcutt was working whilst unwell and was reluctant to be signed off as he was anxious about the first written warning and further attendance management procedures. Clearly this reluctance to be signed off when unwell, was materially caused by the first written warning.

48. We noted, that Mr Caulcutt had started anti-depressants in early 2014, with the hope that he would only need them for a few months. Following the First Written Warning and Box 3 marking he continued to take anti-depressants. Mr Caulcutt continues to take anti-depressants to date.

49. By the end of 2014, Mr Caulcutt had exhausted the internal appeals procedures in relation to the First Written Warning and the Box 3 marking and had been, for a number of months working in a non-customer facing role in a different office.

50. By the end of 2014, Mr Caulcutt was experiencing symptoms of prostrate cancer. In the occupational health report of 18th December 2014, he was reported to be returning to work following investigations for symptoms which correlate with prostrate cancer and *"this potentially serious health condition has disturbed his management of anxiety recently"*. There is no reference to him experiencing anxiety as a result of the written warning, the box 3 marking or work at all. In March 2015 he underwent surgery for prostrate cancer, which in itself caused considerable stress and anxiety for Mr Caulcutt. He was unable to work from 9th March 2015 due to stress, anxiety, depression and prostrate cancer. Subsequently he had pneumonia. Whilst Mr Caulcutt had returned to work prior to the remedy hearing, his health meant he was struggling to work and had applied for ill health retirement.

The Law

Remedies under the Equality Act 2010

51. s124 and s119 Equality Act 2010,

- enable an employment tribunal to order the Respondent to pay the claimant compensation (ie any remedy that a High Court could grant in tort, including compensation for injured feelings); and
- enable an employment tribunal to make an appropriate recommendation.

52. It is well established that compensation is based on tortious principles. The aim is to put the claimant in the position he would have been in if the discrimination had not occurred. The award should compensate the claimant for his loss caused by the discrimination; it is not to punish the respondent.

53. An Injury to Feelings award attempts to provide compensation for *"subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on"* caused by the discriminatory acts (per Lord Justice Mummery in ***Vento v Chief Constable of West Yorkshire Police*** *(No.2) [2003] IRLR 102, CA*)

54. In ***Armitage, Marsden and H M Prison Service v Johnson*** *[1997] IRLR 162, EAT*, Mrs Justice Smith gave the following oft-cited guidance:

> *"(1) 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.*
>
> *(2) 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 Lord Bingham's phrase, be seen as the way to untaxed riches.*
>
> *(3) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award; rather to the whole range of such awards.*
>
> *(4) 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.*
>
> *(5) Finally, tribunals should bear in mind Lord Bingham's reference to the need for public respect for the level of awards made."*

55. The starting point, when considering the amount to award for injury to feelings is the guidance given by Lord Justice Mummery in ***Vento v Chief Constable of West Yorkshire Police*** *(No 2) [2003] IRLR 102*. In ***Da'Bell v NSPCC*** *[2010] IRLR 19, EAT,* Judge McMullen QC confirmed the figures adopted in ***Vento*** should be adjusted to reflect inflation. The ***Vento*** guidelines (as adjusted) provide:

    55.1. The "Top band" award (appropriate in the most serious cases, such as where there has been a lengthy campaign of harassment) should normally be between £18,000 to £30,000. Only in the most exceptional case should this be exceeded.

    55.2. The "Middle band" award (appropriate for serious cases which do not merit an award in the highest band), should normally be between £6,000 and £18,000.

    55.3. The "Bottom band" award (appropriate for less serious cases such as an isolated or one-off occurrence), should normally be no higher than £6,000.

56. In the Presidential Guidance dated 5th September 2017, the President of the Employment Tribunals published guidance indicating that, in cases that have been issued after 11th September 2017, to reflect the Court of Appeal decisions in ***Simmons v Castle*** *[2012] EWCA Civ 1039* and **De Souza v Vinci Construction (UK) Ltd** *[2017] EWCA Civ 879,* the Tribunal should consider the middle Vento band as being £8,400 to £25,200. This guidance also provides a formula for cases that have been issued prior to 11th September 2017 (as this case was).

57. The Tribunal is aware of awards made in comparable injury to feelings cases and is also aware of amounts recommended in the Judicial Studies Board Guidelines for personal injury awards. However, the tribunal are also mindful of EAT guidance that *"a comparative exercise has to be treated with some caution"*, as the amount of injury to feelings will depend on the particular facts of each case.

58. Turning to aggravated damages, these can be awarded where an employment tribunal is satisfied the respondent has *"behaved in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination.*' (see ***Alexander v Home Office*** *[1988] IRLR 190, 193*, May LJ) '

59. The Law Commission Report 247, on Aggravated, Exemplary and Restitutionary Damages, attempted to define aggravated damages:

> *"the best view, in accordance with Lord Devlin's authoritative analysis in Rookes v Barnard [1964] AC 1129 , appears to be that they are damages awarded for a tort as compensation for the plaintiff's mental distress, where the manner in which the defendant has committed the tort, or his motives in so doing, or his conduct subsequent to the tort, or his motives in so doing, or his conduct subsequent to the tort, has upset or outraged the plaintiff. Such conduct or motive aggravates the injury done to the plaintiff, and therefore warrants a greater or additional compensatory sum."*.

60. In ***Commissioner of Police of the Metropolis v Mr H Shaw*** *UKEAT 0125 /11/ZT, EAT*, Mr Justice Underhill, emphasised that aggravated damages are compensatory; they should not be used to punish conduct. Mr Justice Underhill explained the features that can attract an award of aggravated damages can be classified under 3 heads:

    60.1.the manner in which the defendant has committed the tort;
    60.2.the motive for it; and
    60.3.the defendant's conduct subsequent to the tort, but in relation to it.

61. The features identified affect the award of compensation because they aggravate the distress caused by the actual wrongful act. Employment tribunals

should ask ***"what additional distress was caused to this particular claimant, in the particular circumstances of this case, by the aggravating feature(s) in question?"***

62. Aggravated damages are an aspect of injury to feelings and may be expressed as a separate award or as an element of the injury to feelings award.

"The ultimate question must be not so much whether the respective awards [injury to feelings and aggravated damages] considered in isolation are acceptable but whether the overall award is proportionate to the totality of the suffering caused to the claimant." ***Commissioner of Police of the Metropolis v Mr H Shaw*** *UKEAT 0125 /11/ZT, EAT*, Mr Justice Underhill.

63. An employment tribunal has jurisdiction to award compensation for personal injury, including both physical and psychiatric injury, caused by the statutory tort of unlawful discrimination. (see ***Sheriff v Klyne Tugs (Lowestoft) Ltd*** *[1991] ICR 1170)*.

64. In ***Hampshire County Council v Wyatt*** *UKEAT 0013/16/DA,* Mrs Justice Simler, President of the EAT, explained an employment tribunal may award compensation for personal injury, even where there has been no expert medical evidence on issues like causation and quantum. In that case, the Court of Appeal guidance in ***Essa v Laing Ltd*** *[2004] EWCA Civ 2* was repeated; it is for the claimant to establish by evidence on the balance of probabilities that the acts of unlawful discrimination caused or materially contributed to a physical or psychological injury or to an exacerbation of the claimant's existing condition.

65. In ***HM Prison Service v Salmon*** *[2001] All ER (D) 154, EAT*, Mr Recorder Underhill QC explained a tribunal can either make separate awards for Injury to Feelings and for Psychiatric Injury, or it can make an award for Injury to Feelings that includes compensation for the psychiatric injury suffered.

66. A tribunal must ensure that it does not accidentally compensate the same suffering twice (i.e. once under the Injury to Feelings award and again under the Psychiatric Injury award) as this would amount to a double recovery and would be an error of law. (see also ***Commissioner of Police of the Metropolis v Mr H Shaw*** *UKEAT/0125/11/ZT, EAT*).

Conclusions

Recommendations

67. The tribunal considered recommendations that would obviate or reduce the adverse effects of the discrimination on Mr Caulcutt.

68. As both parties accept there should be a recommendation that the First Written Warning is erased from Mr Caulcutt's record, the respondent should write to Mr Caulcutt within 14 days of receipt of this judgment, confirming that this action has been taken.

69. As both parties accept there should be a recommendation that the Box 3 marking is replaced with a Box 2 marking on Mr Caulcutt's record, the respondent should write to Mr Caulcutt within 14 days of receipt of this judgment, confirming that this action has been taken.

70. The tribunal accepts that it cannot make a recommendation requiring the respondent to declare the incident on 4th March 2014 to be an industrial injury nor can it require the respondent to approve Mr Caulcutt's ill-health retirement, as both of these require a decision by a third party, not a decision by the respondent.

71. The tribunal declines to make a recommendation in relation to the type of work Mr Caulcutt should be provided or for a phased return to work, as given Mr Caulcutt's current health prognosis this might be impractical for Mr Caulcutt and the respondent. A phased return to work and a return to different duties is something that Mr Caulcutt's medical advisers and/or occupational health advisers would be able to recommend.

72. Instead, the tribunal is minded to makes a recommendation that the respondent's managers and HR advisers undertake disability awareness training. It was apparent to the tribunal that the respondent had carefully drafted, well-considered policies, but individual managers and HR advisers departed from these policies, and were not adequately aware of the impact of having a disability and the importance of properly considering reasonable adjustments. The tribunal invite the respondent to suggest the wording of an appropriate recommendation; this suggested wording should be provided to the claimant and respondent within 14 days of receipt of this judgment.

Injury to Feelings (including compensation for personal injury and an award for aggravated damages)

73. Whilst there is no medical report, the tribunal are satisfied that from the evidence before it, it can properly consider causation in relation to both an award for injury to feelings and an award for personal injury.

74. The tribunal are tasked with fully compensating Mr Caulcutt for his loss (injury to feelings and pain, suffering and loss of amenity associated with a personal injury) that has been caused by the unlawfully discriminatory acts, ie the First Written Warning and the Box 3 marking and the internal grievance / appeals that followed those.

75. The tribunal note it is for the claimant to establish by evidence on the balance of probabilities that the acts of unlawful discrimination caused or materially contributed to a physical or psychological injury or to an exacerbation of the claimant's existing condition. The tribunal are satisfied that the acts of unlawful discrimination did materially contribute to the aggravation of Mr Caulcutt's ongoing anxiety - he had started anti-depressants and counselling in early 2014 and following the first written warning and Box 3 marking he had to increase his medication. Whilst this was partly due to a change in his workplace (becoming customer-facing) the tribunal are satisfied that the first written warning materially contributed to his anxiety and his need to increase his medication at this time. However, the tribunal are satisfied that by the end of 2014, other events had intervened, such as Mr Caulcutt's cancer investingations, such that the tribunal cannot say that the first written warning or box 3 marking were materially contributing to his ongoing health condition by that point in time.

76. The tribunal has considered very carefully whether it is possible to separate the pain, suffering and loss of amenity associated with the aggravation of Mr Caulcutt's anxiety from the pain and suffering that is captured by the Injury to Feelings award. The Tribunal has concluded that to avoid the risk of double compensating, it is fairer to make a single award for Injury to Feelings, which includes compensation for the pain, suffering and loss of amenity caused by the personal injury.

77. The Tribunal also considered whether it is possible to separate the Injury to Feelings caused by each of the acts of discrimination - it is difficult and artificial to separate the Injury to Feeling caused by each different act of discrimination. Instead, the tribunal has had in mind all of the acts of discrimination and the impact that they collectively had upon Mr Caulcutt throughout the period.

78. In considering whether to make an award for aggravated damages, the Tribunal considered the 3 heads identified by Mr Justice Underhill in ***Commissioner of Police of the Metropolis v Mr H Shaw*** (the manner, the motive and the defendant's conduct subsequent to the tort, but in relation to it) and identified the following aggravating feature:

    78.1. Whilst the emails from Bev Lovatt were not intended for Mr Caulcutt to see, they were insulting and they did cause him additional distress and hurt feelings. These emails were sent to a fellow manager, in response to Mr Caulcutt's attempt to challenge the Box 3 marking. Ms Lovatt then went on to determine Mr Caulcutt's grievance against the Box 3 marking, so the emails do relate to the manner in which the respondent unlawfully failed to fairly consider his grievance.

79. The Tribunal reminded itself that aggravated damages must be compensatory in nature; in relation to this aggravating feature the Tribunal must ask "what

additional distress did they cause to this particular claimant?" The tribunal accepts Mr Caulcutt's evidence that reading these emails made him feel physically sick and hurt that his managers had viewed him like this. The award for aggravated damages is compensating Mr Caulcutt for this additional distress.

80. The Tribunal turned to consider the distress and anguish that the First Written Warning and Box 3 marking caused Mr Caulcutt to suffer.
    80.1. Whilst this distress was most acute during the period 1st April 2014 to end of 2014, Mr Caulcutt would have been worried about the impact of the First Written Warning for 18 months following the warning, as his attendance would be closely monitored for that period.
    80.2. The tribunal have taken into account the fact that Mr Caulcutt was already suffering with ill health and anxiety and have taken into account the fact that the change in role would also have caused him worry and anxiety during this period; the discriminatory acts did not cause this distress.
    80.3. For the additional distress and anguish that Mr Caulcutt suffered as a result of the First Written Warning and Box Mark 3 and the aggravation it caused to his ongoing anxiety, the appropriate award for injury to feelings and personal injury is £20,000 (of which £1,000 is for aggravated damages, to reflect the additional distress he suffered as a result of knowing that someone who could have helped him had spoken about him in the manner she did). This award is towards the top of the middle Vento band, as adjusted by Da Bell and the Presidential guidance.

The Box 2 bonus

81. The respondent has accepted this should be £475 net.

Costs of travelling, stationery and printing

82. The usual order in tribunal proceedings is that there shall be no order as to costs. None of the circumstances described in s76 Employment Tribunal Rules 2013 apply in this case, so the tribunal declines to make an order for costs.

Tribunal Fees

83. The claimant has paid fees in connection with this claim. In R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51 the Supreme Court decided that it was unlawful for Her Majesty's Courts and Tribunals Service (HMCTS) to charge fees of this nature. HMCTS has undertaken to repay such fees. In these circumstances the tribunal shall draw to the attention of HMCTS that this is a case in which fees have been paid and are therefore to

be refunded to the claimant. The details of the repayment scheme are a matter for HMCTS.

Interest

84. Parties accept the tribunal has a discretion to award interest on the injury to feelings award at 8% per annum from the act of discrimination, ie 1st April 2014. Reg 6 Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 explains this should be calculated up to the day of calculation. The tribunal has calculated interest up to 26th January 2018. This amounts to 1,396 days (inclusive).

85. The respondent has submitted the tribunal should not award interest for the period that proceedings were stayed due to Mr Caulcutt's treatment for cancer and for an additional period, following Mr Caulcutt's application to amend his claim. Reg 6 (3) of the 1996 Regulations explains a tribunal can decide not to award interest for a particular period, when it considers "serious injustice would be caused". The tribunal does not find serious injustice would be caused by it awarding interest for the whole 1,396 days; the stay as a result of Mr Caulcutt's cancer treatment and indeed a large part of the delay following his application to amend the claim, were matters that were out of the control of Mr Caulcutt.

86. Interest on the Box 2 bonus is a past loss and has been calculated from a midpoint between 13th June 2014 and 26th January 2018 and amounts to 655 days.

Calculations

Injury to Feelings Award
(including personal injury and aggravated damages)

Injury to Feelings Award	£20,000
plus interest	

£20,000 x 8% per annum x 1,396 days	=	
£20,000 x 0.08 /365 x 1,396	=	£6,119
		<u>£26,119</u>

Past Loss		£475
plus interest		
£475 x 8% per annum x 655	=	
£475 x 0.08 / 365 x 655	=	£68
		<u>£543</u>

Grand total	***<u>£26,662</u>***

If the full amount of this award is paid before 7th March 2018, no additional interest will be payable. If the award is not paid before 7th March 2018, additional interest at a rate of 5.8p per day will be payable from 7th March 2018 until payment. (see the Employment Tribunal (Interest) Order 1990).

Judgment posted to the parties on

24 March 2018

EMPLOYMENT JUDGE HOWDEN-EVANS

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Dated: 20th February 2018

For Secretary of the Tribunals