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EMPLOYMENT TRIBUNALS

Claimant		*Respondent*
Mr R Davda	**AND**	**Institute and Faculty of Actuaries**

HELD AT: **London Central** **ON:** 17 June 2019 &
21 June & 9 August 2019
(In Chambers)

BEFORE: Employment Judge Brown

Members: Mr G W Bishop
Mr M Reuby

Representation:

For Claimant: Mr J Jupp, of Counsel

For Respondent: Ms A Del Priore, of Counsel

REMEDY JUDGMENT

T**he unanimous Judgment of the Tribunal is that:**

1. The Respondent shall pay the Claimant a total of £37,966.27 for race discrimination comprising:

1.1 £16,000 for injury to feelings, plus £11,520 interest at 8% for 9 years from 2010 (total £27,520).

1.2 £10,446.27 future economic loss.

REASONS

Preliminary

1. The Tribunal heard evidence from the Claimant and from Clifford Friend, Director of Education at the Respondent. Both parties made written and oral submissions. There were additional documents in the form of a Claimant's Bundle and a Respondent's Remedy Bundle.

2. The Claimant claimed compensation for injury to feelings, aggravated damages, exemplary damages and loss of earnings. The Claimant contended that, had he had double the opportunity to sit exams through which to qualify as a Fellow of the Respondent, he would have taken half the time to pass the relevant exams. The Claimant claimed loss of past and future earnings for the whole of his career, on the basis of what he said was the difference in pay of a qualified actuary, compared to his actual current and likely future pay without qualification as a Fellow of the Respondent.

3. The Respondent contended that the Claimant's claim could only be for loss of a chance and that his claim for loss of earnings should be assessed on that basis. The Respondent contended that, where the chance loss was speculative or negligible, the Tribunal was entitled to treat the value of the loss of a chance as 0%.

Findings of Fact

4. The Claimant did pass a number of the exams required to become a Fellow of the Respondent. The Claimant raised some doubts about the accuracy of the Respondent's record of the Claimant's exam entries and passes but, ultimately, the Claimant accepted that the Respondent's record was broadly correct. There was no dispute about the number and date of exams which the Claimant passed.

5. The Claimant joined the Respondent in 2001. He took his first exams in 2002.

6. On the Respondent's records, in April 2002, the Claimant took exams 107 and 108 and failed both. In September 2002, he took 102, 107 and 108; he passed 107 and failed 102 and 108. In September 2003, he took exam 108 and passed it. In April 2004, he entered for exam 104, but did not attend the exam and therefore failed. In September 2004, he entered exams 102, 106, 201 and CA3; he did not attend exam 106 and failed the other exams. In April 2005, he sat exam CT1 and passed it. In September 2005, he entered exam CT8 and failed it. In April 2006 he entered exam CT8 but did not attend and failed. In September 2008 he entered CT8, did not attend and failed. In April 2007 he entered CT8 and failed it. In September 2007 he entered CT8 and CT4; he failed CT8 and did not attend CT4. In April 2008 he entered CA1 and passed it. In September 2008, he entered CT8 and CT4 and failed both.

In December 2008 he entered CA2 and failed it. In April 2009, he entered CT8 and ST3 and failed both. In September 2009, he entered CT8 but did not attend for it; he entered ST3 and failed it. In April 2010, he entered ST7, ST8 and SA3 and failed all. In September 2010 he entered ST7 and SA3 and failed both. In April 2011 he entered ST7 and SA3; he passed ST7 but failed SA3. In September 2011 he entered ST8 and ST3 and failed both. In April 2012 he again entered ST8 and SA3 and failed both. In September 2012 he entered ST8 and failed it. In April 2013 he entered ST8 and passed. In September 2013 he entered SA3 and CT6 and failed them both. In April 2014 he entered SA3 and CT6; he passed SA3 and failed CT6. In 2015 in sat STC6 twice but failed in twice. In April 2016 he sat CT6 and failed it, however in September 2016 he re-sat CT6 and passed. In April 2017 he sat CT4 and failed with a mark of 39 when the pass mark was 56, in September 2017 he again sat CT4 and failed it with a mark of 38 and the pass mark was 58, in April 2018 he entered CT4 but did not attend and failed.

7. The Claimant gained exemptions for two of the Respondent's exams. He passed 8 out of the remaining 13, meaning that, in total, he had passed 10 out of the 15 exams required in order to obtain Fellowship of the Respondent. He still had to pass CT4, CT5, CT8, CA2 and CA3. Of these, he has sat CT4 twice, but his marks did not approve and he failed to attend on another occasion. He never sat CT5. He sat CT8 on 5 occasions and failed it on all 5 occasions; he entered but did not attend on 3 further occasions. The Claimant sat CA2 and CA3 on one occasion each.

8. In total, the Claimant entered 50 exams, sat 43, did not attend on 7 occasions and passed 8 of the exams.

9. Mr Friend told the Tribunal that the Respondent's exams have a 50% failure rate for all candidates. He said that many student members never pass all the exams and stop trying to do so. He estimated that the Respondent's student body has a dropout rate of 30-40%.

10. The Respondent produced a graph of the times taken by student members of the Respondent to obtain Fellowship. The graph was constructed using the data for 10,371 students. Mr Clifford accepted, however, that a number of student members would have taken equivalent actuarial exams at university, particularly in recent years following the Morris review of the actuarial profession, and, therefore, would have needed to take fewer of the Respondent's exams. He accepted that this would bring down the mean time for students to pass exams.

11. On the Respondent's data, the mode time, that is the most common time span for students to pass all the exams required for a Fellowship, was 4 years. The mean, or average, time for students to pass all the exams was 7 years.

12. The Claimant has been taking exams since 2002 and, therefore, for 16 years.

13. Mr Friend told the Tribunal that 90% of individuals qualify within 11 years and 95% in 13 years.

14. He told the Tribunal that 99% of students who were still taking exams are qualified by 16 years. He therefore told the Tribunal that the Claimant was in the 5% of the student group who struggle to pass because of ability, or poor exam preparation, or who have ceased to take exams but wish to retain formal association with the Respondent by retaining their student membership status.

15. Mr Friend also told the Tribunal that the Claimant had failed several exams by a significant margin. He had failed 19 exams by 6-15%, 9 exams by 15-25% and 3 exams by more than 25%.

16. Mr Friend told the Tribunal that, from the Claimant's student record, even at the start of the Claimant's studies, aged 23, fresh from university, the Claimant's progress was slow. He had very few exam registrations for multiple subjects in a single diet. His records showed systematic absences for exams and poor examination performance. Mr Friend said that the Claimant's progress was particularly slow for a person who would eventually qualify as an actuary, in that he had taken 9 years to pass the first 5 exams, from 2002-2011.

17. At all material times, the Respondent has made available on its website information about Mutual Recognition Agreements with other actuarial associations and the ability of student members from overseas to join the Respondent, bundle 2 pages 352-359.

18. The Claimant contended that it was a well-recognised route for current Indian students of the Indian Actuarial Institute to join the Respondent and, thereby, to increase the number of exams they could take. From the original Final Hearing Tribunal bundle, it appeared that advice is available on the internet, on actuarial forums and on actuarial advice websites, regarding this, and that Indian students choose to take advantage of both IAI membership and Respondent student membership, in order to take additional exams, bundle 11, pages 4233, 4241 and 4246. The Tribunal accepted that the Respondent's Indian nationality students are aware of, and take advantage of, the availability of membership of both IAI and the Respondent.

19. It is not in dispute that there is an exam centre in Britian for IAI members to take IAI exams here. It is a requirement, however, for entry to the IAI, that candidates take the ACET exam. ACET exam centres only exist in India.

20. The Claimant was asked, in evidence, whether he would go to India to sit the ACET exam, in order to become a member of the IAI. He told the Tribunal that, ideally, he would not do that, he would think twice about it and he was not considering going at the moment.

21. The Tribunal found, at paragraph 149 of its original judgment, that there was a real benefit to candidates in having two chances to sit the same exam

in close succession. Amongst other things, it would reduce the likelihood of external factors affecting exam performance.

22. The Claimant contended that he would have had double the opportunities to take the relevant exams and that he would have passed his exams in half the time. He also said that he had failed one exam on one occasion because he had accidentally brought the wrong calculator; the implication was that, if he had had the opportunity to sit the same exam one month later, that problem would have been eliminated.

23. The Claimant told the Tribunal that he would have to study for 30 days for each exam. He said that he was unable to take exams for the Respondent for a number of reasons. He told the Tribunal that his father was ill for many years and sadly died just after the Claimant started his actuarial exams and that the Claimant moved back home to live with his mother at that time. He also said he had issues with his employer in London because of his failure to pass exams and that he became depressed. He took a career break in 2006. After the break, he moved to Switzerland. Shortly after the move, however, he had serious car accident, resulting in a hospital stay for a month and rehabilitation for several months.

24. Mr Friend gave evidence that, at the Claimant's current rate of progress, it would take him another 9 years to qualify as a Fellow of the Respondent - a total of 26 years. The Claimant contended that, if he had had double the chances to take the exams, he would have halved the time to pass and, therefore, he would have taken 13 years, at most, rather than 26 (on the Respondent's calculations). In other words, the Claimant contended that he would have passed all his exams by 2015.

25. The Claimant further contended that, in fact, it would have taken him only until 2012 to pass all the Respondent's exams.

Relevant Law

Loss of a Chance

26. The general principal in assessing compensation is that, as far as possible, a Claimant should be put in the same position in which they would have been, but for the unlawful act, Ministry of Defence v Wheeler 1998 IRLR 23, CA.

27. In Timothy James Consulting v Wilton 2015 ICR 764 at paragraph 107 Mr Justice Singh said:

> "[107] … (2) Sometimes what the Claimant has lost was only ever an opportunity to obtain something else, for example the chance to take part in a competition or the opportunity to bring litigation. Such an opportunity is a valuable right in itself and what the Claimant proves (on the balance of probabilities) is that he has lost that right; the assessment of the value of the right then depends on the chances of success. As

> Patten LJ says in Vasiliou v Hajigeorgiou [2010] EWCA Civ 1475, at paragraph 21, this is because what has been lost is by definition the loss of a chance. It would obviously be wrong to value the right to take part in a competition as the value of the value of the prize that might be won as the Claimant never had a right to the prize, only the right to enter the competition …
>
> (3) what Patten LJ make clear … is that this is not quite the same type of case as Allied Maples. In an Allied Maples case the Claimant has not lost a valuable right but he has lost the opportunity of gaining a benefit, albeit one that depends on a third party acting in a particular way. In such a case the Claimant is not required to prove that the third party would have acted in that way, only that there was a real and substantial chance that he would. This is still a question of causation, not of quantification … but if the Claimant does establish that there was such a real and substantial chance, then when it comes to quantification his damages will be assessed not at 100% of the value of the benefit he would have obtained but at the appropriate percentage having regard to the chances of his obtaining it…
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> [109] … Stewart-Smith LJ continued his statement of the relevant principles as follows (in Allied v Maples Group Limited v Simmons and Simmons [1995] 1WLR 1602):
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> "In many cases the plaintiff's loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff as in this case, or independently of it. In such a case does the plaintiff have to prove on the balance of probability … that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages …".

28. A Claimant, therefore, must prove that there was a real and substantial chance of obtaining the benefit. If he does so, his damages will be assessed at the appropriate percentage of the value of the benefit, having regard to his chances of obtaining it. The Claimant must show that there was a real and substantial chance of obtaining the benefit, rather than a negligible or speculative one.

Injury to Feelings

29. The Tribunal is guided by principles set out in Prison Service v Johnson [1997] IRLR 162 in relation to assessing injury to feeling awards. 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. Awards that are too low would diminish respect for the policy underlying anti-discrimination legislation. However, excessive awards could also have the same effect. Awards need to command public respect. Society has

condemned discrimination because of a protected characteristic and awards must ensure that it is seen to be wrong.

30. Awards should bear some broad general similarity to the range of awards in personal injury cases. Tribunals should remind themselves of the value in everyday life of the sum they have in mind by reference to purchasing power.

31. It is helpful to consider the band into which the injury falls, Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102. In Vento the Court of Appeal said that the top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the grounds of race or sex. The middle band should be use for serious cases which do not merit an award in the highest band and the lower band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

32. Joint Presidential Guidance on Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury following Da Vinci Construction (UK) Limited [2017] EWCA Civ 879 was issued on 4 September 2017. It reviewed the effect of recent case law and inflation on the Vento Bands and said that, when awards are made by Tribunals, the Vento bands should have the appropriate inflation index applied to them, followed by a 10% uplift on account of Simmons v Castle [2012] EWCA Civ 1039 Simmons v Castle [2012] EWCA Civ 1288.

33. The Joint Presidential Guidance concluded as follows,"…as at 4 September 2017, that produces a lower band of £800 to £8,400 (less serious cases); a middle band of £8,400 to £25,000 (cases that did not merit an award in the upper band); and an upper band of £25,200 to £42,000 (the most serious cases), with the most exceptional cases capable of exceeding £42,000. … the Employment Tribunal retains its discretion as to which band applies and where in the band the appropriate award should fall."

Aggravated Damages

34. Aggravated damages are available for an act of discrimination (Armitage, Marsden and HM Prison Service v Johnson [1997] IRLR 162, [1997] ICR 275, EAT).

35. The award must still be compensatory and not punitive in nature, Commissioner of Police of the Metropolis v Shaw [2012] IRLR 291, EAT . In that case, a whistleblowing case, compensation was assessed on the same basis as awards in discrimination cases).

36. The EAT said that the circumstances attracting an award of aggravated damages fall into three categories:

(a) The manner in which the wrong was committed. The basic concept here is that the distress caused by an act of discrimination may be made worse by it

being done in an exceptionally upsetting way. In this context the phrase “high-handed, malicious, insulting or oppressive” is often referred to – it gives a good general idea of the kind of behaviour which may justify an award, but should not be treated as an exhaustive definition. An award can be made in the case of any exceptional or contumelious conduct which has the effect of seriously increasing the claimant's distress.

(b) Motive. Discriminatory conduct which is evidently based on prejudice or animosity or which is spiteful or vindictive or intended to wound is, as a matter of common sense and common experience, likely to cause more distress than the same acts would cause if evidently done without such a motive – say, as a result of ignorance or insensitivity. That will, however, only of course be the case if the claimant is aware of the motive in question: otherwise it could not be effective to aggravate the injury. There is thus in practice a considerable overlap with (a).

(c) Subsequent conduct. This can cover cases including where: the defendant conducted his case at trial in an unnecessarily offensive manner; the employer rubs salt in the wound by plainly showing that he does not take the claimant's complaint of discrimination seriously; the employer fails to apologise; and the circumstances are such as those in Bungay v Saini.

37. In HM Land Registry v McGlue UKEAT/0435/11, [2013] EqLR 701, EAT. The EAT said that aggravated damages 'have a proper place and role to fill', but that a tribunal should also 'be aware and be cautious not to award under the heading “injury to feelings” damages for the self-same conduct as it then compensates under the heading of “aggravated damages”'. Such damages are not intended to be punitive in nature.

38. Aggravated damages may also be awarded if a respondent has defended proceedings in a way that is wholly inappropriate and intimidatory: Zaiwalla & Co v Walia [2002] IRLR 697, EAT.

Exemplary Damages

39. In Rookes v Barnard and others 1964 AC1129, HL the House of Lords said, “.. cases in the second category are those in which the defendant’s conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff … where a defendant with a cynical disregard for a plaintiff’s rights has calculated that the money to be made out of his wrong doing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity …”.

40. Exemplary damages may, in principle, be awarded for acts of discrimination, Hackney BC v Sivanadan [2011] ICR 1374 at paragraph 31.

Discussion and Decision

41. The Tribunal decided that, on the facts, it is a requirement for IAI membership that students take the ACET test. That test can only be taken at

exam centres in India. On the Claimant's evidence, he is not keen to take the ACET test, which entails going to India. That would, in itself, take time and some study preparation.

42. There was little, or no, evidence that the Claimant would have been prepared to take this step, in order to obtain IAI membership in the early years when he was taking the Respondent's exams - rather than simply taking the Respondent's exams.

43. The Tribunal accepted Mr Friend's evidence that, even in the early years of undertaking the Respondent's exams, the Claimant did few exams and had an unusually slow rate of progress. As a result, the Tribunal concluded that, even if the Claimant had joined the IAI, it was highly unlikely that the Claimant would have sat double the number of exams that he sat for the Respondent. He did not enter for many exams on each occasion the Respondent's exams were available. He did not attend several of the exams which he did enter. Even if there was an efficiency in terms of study for a particular exam, by being able to sit that exam a second time one month later, rather than 6 months, later the Claimant would still have had to prepare for the second exam one month later, involving further study in evenings and at weekends. He would also have had to take time away from work, or during holidays, or weekends, to take the extra exams. The Claimant described the stress he experienced in taking exams. On all the evidence, the Tribunal concluded that it was very unlikely that the Claimant would have been diligently attending every IAI exam sitting available.

44. Furthermore, the Tribunal accepted Mr Friends evidence that the Claimant is in the bottom 5% of students who continue to be members of the Respondent; he is still a student member after 16 years. 30-40% of students stop taking exams and never pass.

45. The Tribunal concluded that the Claimant is highly unusual in still taking exams despite his record of failure. Given that a very high proportion of candidates who take the Respondent's exams, that is 30-40%, give up and never pass because of repeated exam failures, the Tribunal concluded that the Claimant's pattern of exam success was more like the pattern of the 30-40% who drop out and never pass, than the pattern of students who gain the Fellowship qualification.

46. With regard to one of the exams which the Claimant sat, he sat the ET8 exam on 5 occasions - having entered it on 8 occasions - and never passed it, despite sitting that exam in consecutive sittings and in consecutive years.

47. The Tribunal accepted Mr Friend's description of the Claimant as being part of a very small group of students who have trouble passing exams.

48. On the other hand, the Claimant did eventually pass 10 out of 15 of the Respondent's exams, two thirds of the required exams, indicating that he had the ability to pass actuarial exams in the right circumstances. The Tribunal

has also decided that there would be a real benefit to candidates to have two chances to sit the same exam in close succession.

49. Seeing that the Claimant was able to pass two thirds of the relevant exams, and that his chances of passing would have been enhanced by the opportunity to sit the same exam twice within a few weeks, the Claimant did show that there was a real and substantial chance that the Claimant would have gained the Fellowship qualification if he had had more chances to pass the relevant exams by virtue of IAI membership. The opportunity to sit the same exam in close succession would have provided a more than negligible chance that he would have passed the relevant exams.

50. However, taking all the factors together:

a. That is it is unlikely that the Claimant would have joined the IAI, either in the early years, or at all;
b. That it is unlikely, given his record of exam sittings, that he would have taken significant advantage of increased exam availability;
c. That his rate of exam sitting and passes was unusually low;
d. That his pattern of exams success was not typical of someone who eventually gained the Respondent's Fellowship qualification;

the Tribunal concluded that the chance that the Claimant would have passed all the exams required in order to gain Fellowship was still very low. It assessed the likelihood at 5% by the end of 2018.

51. Accordingly, the Tribunal awarded the Claimant damages for financial loss flowing from the 5% chance that, after 2018, he would have obtained a higher paid job with the benefit of a Fellowship qualification.

52. However, the Tribunal also took into account the Claimant's duty to mitigate his loss. The Claimant is required to take all reasonable steps to mitigate his loss. The Tribunal concluded that, even if the Claimant is feeling demotivated at present, he is under a duty to continue to pursue his Fellowship qualification. When he does, on Mr Friend's evidence, he will gain his qualification in 9 years' time. At that point, he ought to be able to secure a job as a qualified actuary and his earnings should rapidly catch up with those of qualified actuaries, given his additional previous relevant experience. On the Claimant's own figures, qualified actuaries' earnings stagnate in the 10 years between the ages of 45 and 54. His earnings are likely to increase at a higher rate than such actuaries, as he develops his actuarial career.

53. The Claimant provided the Tribunal with earning figures for qualified actuaries in Switzerland. He extrapolated to provide earnings for qualified actuaries aged 22 – 57. The Tribunal used those as a working basis for its calculations.

54. The Tribunal considered that, if the Claimant had gained his actuarial qualification by the end of 2018, he would not have started earning the salary

of a 39 year old actuary, who had been qualified for many years. He would have attracted a lower salary. On the Claimant's figures (paragraph [65] of his witness statement), actuaries in the early years of their careers would not earn significantly more than the Claimant was earning in the early years of his career. On the other hand, the Claimant has many years of relevant experience, so an employer would not treat him as a normal newly qualified actuary. The Tribunal decided that the Claimant would have been likely, in 2019, to have attracted the salary specified by the Claimant for a 33 year old qualified actuary.

55. The Tribunal also considered that, when the Claimant does qualify in 9 years' time, his salary will not immediately jump to the level of a qualified actuary of a similar age. It awarded him an extra year's loss of earnings to compensate for this. The Tribunal therefore calculated the Claimant's future loss for 10 years, for the whole years 2019 to 2028.

56. The Tribunal did not award the Claimant more than 10 years' future loss of earnings. It did not accept that the Claimant would suffer a lifelong deficit in his earning potential. Such a loss was too speculative. The Tribunal did not have evidence showing that there would be such a continuing deficit after the Claimant gained Fellowship later in his career. The Claimant's career is atypical and figures are not available for comparison. In any event, on the Claimant's figures, qualified actuaries' earnings stagnate in the 10 years between the ages of 45 and 54 (paragraph [65] his witness statement). It is likely that the Claimant's income will increase much more quickly than typical actuaries whose earnings have begun to stagnate.

57. In the year 2019 the Claimant would have earned CHF 152,756 if he had qualified as a Fellow, but in fact will earn CHF 144,720, a difference of CHF 8,026. In the year 2020 he would have earned CHF160,712, but will earn CHF 147,687, a difference of CHF 17,955. In 2021 he would have earned 168,669 but will earn CHF 150,714, a difference on CHF 17,955. In 2022 he would have earned CHF 176,625, but will earn CHF 153,804, a difference on CHF 22,821. In 2023 he would have earned CHF 182,821, but he will earn CHF 156,957, a difference of CHF 25,864. In 2024 he would have earned CHF 189,017, but he will earn CHF 160,175, a difference of CHF 28,842. In 2025 he would have earned CHF 195,213, but will earn CHF 163,458, a difference of CHF 31,755. In 2026, he would have earned CHF 201,409, but will earn CHF 166,809, a difference of 34,600. In 2027 he would have earned CHF 207,605, but will earn CHF 170,229, a difference of CHF 37,376. In 2028 he would have earned CHF 216,685 but will earn CHF 173,713, a difference of CHF 42,972.

58. The Claimant's total loss over 10 years would be CHF 263,246. Applying the 5% chance that he would have gained the Fellowship qualification and suffered the loss, CHF 263,246 x 5% = CHF 13,162.30. Applying an exchange rate of 1.26 CHF = £1, as suggested by the Claimant, his economic loss is £10,446.27.

59. As that loss is future loss, it does not attract interest.

Injury to Feelings/Aggravated Damages/Exemplary Damages

60. The Claimant told the Tribunal that the Respondent's exams had ruined his life to the extent that his personal life and relationships have been damaged. He said that, had it not been for the discrimination, he would have completed his exams more quickly and got on with the rest of his life.

61. He told the Tribunal about the effect of the examinations on him; the requirement to study for weeks and months and the detrimental effect on his mental health of doing the exams. He said that his failures had made him feel demotivated and a failure.

62. On the Tribunal's finding that there was only a 5% chance that he would have passed the sufficient exams in order to obtain a Fellowship by the end of 2018, the Tribunal concluded that the Claimant is not entitled to recover damages for injury for feelings on the basis he put forward. If the discrimination had not happened, he still would have experienced the majority of the feelings that he described in relation to his exam failures.

63. The Respondent told the Tribunal, and the Tribunal accepted, that the Respondent has suspended all its Mutual Recognition Agreements while it benchmarks all other institutes' examinations against its own.

64. The Claimant told the Tribunal that he has lost the value of examinations he had passed, for example the CT6 exam. He said that he took the CT6 exam for 3 years and now has been told he must do it again. The Tribunal found that the change to curriculum 2019 did exacerbate the discrimination. The Claimant applied to the IAI for membership in 2017 but was refused. He did not thereafter have the additional chances to pass the outstanding CT4 exam, in order to retain the benefit of his CT6 exam.

65. The Claimant was aware in September 2017 that he was being discriminated against in this regard and it was distressing to him. The Claimant complained about the discrimination to the Respondent through its complaints mechanism, but his complaint was rejected. The Claimant told the Tribunal, and the Tribunal accepted, that the Claimant had a genuine sense of grievance about being subject to discrimination and that he felt disadvantaged. The Tribunal found that the Claimant felt indignant that he was being discriminated against because of his race. He has had to pursue redress through the Employment Tribunal in order to establish he has been discriminated against and to obtain changes to the Respondent's practices.

66. The Claimant told the Tribunal that the Respondent had adopted a high-handed approach to his litigation. He was cross examined about this. It was put to the Claimant that the Respondent's officers did engage with the Claimant in detailed correspondence, even if the Claimant did not like the answer. The Claimant responded, in cross examination, that the CEO of the Respondent had not engaged with him. He agreed that he had received two letters from Clifford Friend. The Tribunal decided that the Respondent had

engaged with the Claimant with regard to the litigation and his complaints, although it did not provide the redress that he sought.

67. The Tribunal concluded that it was not appropriate to award aggravated damages in this case. The Respondent's conduct did not come within the categories identified in either Alexander v Home Office or Commissioner of Police of the Metropolis v Shaw. The Respondent did engage with the Claimant on his complaint and claim, albeit that it did not give him the redress that he sought. The Tribunal did not find that the manner in which the discrimination was committed was particularly upsetting.

68. The Claimant contended that the Respondent had been profiting from its agreement with the IAI for two decades, receiving examination fees, exemption fees and membership fees from Indian students. He claimed exemplary damages on this basis. Exemplary damages are damages which are aimed at punishing the wrongdoer, rather than compensating the victim. The Claimant relied on the second category of exemplary damages in the case of Rookes v Barnard and others 1964 AC1129, HL.

69. In its original decision at paragraphs [65] and [73], the Tribunal accepted Mr Watkins' evidence that the reason that there was an understanding between the Respondent and the IAI not to admit the Respondent's student members was the provision of ACTED study materials to the IAI. It accepted his evidence that ACTED had provided study materials to help the IAI in circumstances where there were lots of students in India and very few qualified actuaries.

70. The Tribunal found that the Respondent's intention, in coming to the agreement, was not to increase the numbers of its own Indian student members at that time, but to help the IAI and to increase qualification levels in India. The discrimination was not motivated by a desire to profit from increased student numbers.

71. It was therefore not appropriate to award exemplary damages in this case.

Injury to Feelings

72. Mr Friend told the Tribunal that the largest nationality group of non UK nationalities in the Respondent's student body are Indian students. From the evidence of actuarial advice websites and online articles, and the evidence of the large numbers of Indian student members of the Respondent, it is clear that dual membership and the opportunity to take double the number of exams is viewed by many Indian students as a valuable benefit.

73. The Claimant has been denied that benefit throughout his membership of the Respondent, even if he was only aware that he was being denied it from 2017.

74. He was therefore subject therefore to a lengthy period of discrimination. When he became aware of it, the Claimant was indignant and generally distressed by it. He told the Tribunal, at the liability hearing, that he felt unable to continue exams because his energy had been devoted to the Employment Tribunal proceedings and the complaint process. He is very distressed about the loss of the benefit of his CT6 pass. The Tribunal considered that the loss of the CT6 pass was a considerable loss to the Claimant.

75. The Tribunal found that the Claimant has been subjected to a long period of discrimination and he is distressed and indignant about the denial of a benefit, which is widely seen as valuable, to him. His distress is real and continuing. He has also become demotivated by the loss of his CT6 pass. The stress of the Tribunal proceedings has been significant for the Claimant.

76. The Tribunal decided that, given the length of the period of discrimination, the distress and indignation caused by the loss of his CT6 exam qualification, the demotivation as a result, the denial of what is seen as a valuable opportunity by many people to sit exams, combined with the small loss of a chance that he could have qualified as an actuary by the end of 2018, puts this case in the middle band of Vento.

77. The Respondent contended that the appropriate award was £16,000. That figure is in the middle of the middle band of Vento.

78. The Tribunal considered that that was the appropriate figure for injury to feelings, fully compensating the Claimant. It would not be appropriate to award him a higher amount because any additional injury to feelings has not, in fact been caused by the Respondent. The Claimant's loss of a chance of gaining his fellowship qualification is very low and so does not attract a significant injury to feelings award. His most significant, genuine injury to feelings has been caused recently by the loss of his CT6 exam qualification and when he became aware that Indian students have had additional chances to pass exams which have not been available to him.

79. The Tribunal awarded the Claimant £16,000 for injury to feelings plus interest at 8%.

80. Interest is awarded from the date when the injury to feelings is suffered. In this case, injuries to feelings have been suffered at different times. The preferential treatment of Indian students has existed throughout the Claimant's student membership of the Respondent, since 2001, but there was only a 5% chance that he would have qualified by 2018, had he had the same benefit. He only became aware that he could not attain IAI membership, and could not have extra chances to sit relevant exams, in 2017. He became aware that he could lose his CT6 qualification around the same time.

81. Doing the best that it could, being fair to both parties, the Tribunal concluded that it should award interest on the injury to feelings award from 2010, for 9 years. £16,000 x 8% x 9 = £11,520. £16,000 + £11,520 = £27,520.

82. The total award to the Claimant was £37,966.27.

Employment Judge Brown

Dated: 05/09/2019

Judgment and Reasons sent to the parties on:

05/09/2019

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For the Tribunal Office