Appeal No. UKEAT/0005/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 14 June 2019

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

LANCASHIRE COUNTY COUNCIL APPELLANT

MR K MCGREGOR RESPONDENT

Transcript of Proceedings

JUDGMENT

© Copyright 2019

APPEARANCES

For the Appellant	MR KASHIF ALI MS RACHEL GREEN (of Counsel) Instructed by: Lancashire County Council County Hall Fishergate Preston Lancashire PR1 8XJ
For the Respondent	MS A NIAZ-DICKINSON MS SARAH O'BRIEN (of Counsel) Instructed by: BBS Law Ltd The Edge Clowes Street Manchester M3 5NA

SUMMARY

DISABILITY DISCRIMINATION

DISABILITY DISCRIMINATION - Compensation

The Employment Tribunal ("the ET") allowed the Claimant's claim for disability and awarded compensation, including compensation for injury to feelings. The Respondent below ("R") appealed. R argued that the ET had erred in law in finding that if R had made reasonable adjustments, there was a 30% chance that the claimant would have returned to work, and that the ET had erred in law in two respects in making its award for injury to feelings.

The Employment Appeal Tribunal ("the EAT") rejected those arguments. The EAT held that the ET was entitled to reach the decisions which it did in each of three relevant respects.

A

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

B

1. This is an appeal from a Judgment of the Employment Tribunal sitting in Manchester ("the ET"). The ET consisted of Employment Judge Sherratt ("the EJ") and members Mr M C Smith and Mr S Stott. The ET, in a Judgment given orally on 17 November 2017, dismissed most of the Claimant's claims. It upheld two claims that the Respondent had failed to make reasonable adjustments. Neither party asked for Written Reasons for that Judgment and none were given.

C

D

2. I was told in the Hearing today that the ET was unable to find the tape of the written Judgment with the result that the Judgment could only as it were, be pieced together from counsels' notes and the notes that the ET itself had kept.

E

3. The Remedy Hearing was on 6 and 7 September 2018. In a Judgment sent to the parties on 2 October 2018, the ET ordered the Respondent to pay the Claimant £2,983.81 plus interest of £119.35 in respect of past loss and £19,658.00 for injury for feelings.

F

4. I will refer to the parties as they were below. Paragraph references are to the ET's Decision on remedy unless I say otherwise.

G

5. The Respondent today has been represented by Mr Ali and the Claimant by Ms Niaz-Dickinson. I am grateful for both counsel for their excellent written and oral submissions. The same counsel represented the parties at the Remedy Hearing. Ms Niaz-Dickinson did not

H

A

represent the Claimant at the Substantive Hearing. Mr Ali however represented the Respondent at both Hearings.

B

The background

6. The Respondent employed the Claimant as a Health and Safety Officer. He had a disability. He brought claims for disability discrimination against the Respondent. The parties agreed at the Remedy Hearing that the ET had found in the Claimant's favour that the Respondent had failed to make reasonable adjustments on 5 January 2016, when it required the Claimant to work from its Marsh Lane office, and between 24 May 2016 and 30 November 2017, by failing to make a work station available for the Claimant at its Marsh Lane office.

C

D

7. There is a dispute on the pleadings about whether a specially adapted work station had been made available for the Claimant at Marsh Lane. The Respondent contended that it was available for use from 22 June 2016; see paragraph 47 of the ET3 and that the Claimant had refused to use it; see paragraph 48. It is clear from what we know of the Judgment at the Substantive Hearing that the ET must have resolved that dispute in the Claimant's favour.

E

F

8. The Claimant went off work because he was sick on 15 July 2016. He claimed that that was due to a work-related injury. He did not return to work after that, apart, it seems, from going to one or two meetings and assessments and going to a meeting on 3 January 2017, when, I think, he had been expecting to return to work, but was told, after a discussion about reasonable adjustments, to go home. He applied for retirement on medical grounds in May 2017. That application was granted in December 2017.

G

H

A

The ET's Judgment - loss of earnings claim

9. At paragraph 4, the ET said that the Claimant claimed loss of earnings for the period July to December 2017 when the Claimant was fit for work but prevented from working by the Respondent's failure to make reasonable adjustments. The ET said the Claimant was fit for work but absent due to the Respondent's failure to make reasonable adjustments. The Claimant, according to the schedule, the ET said, received full pay for the period of January 2017 to July 2017. After that he received the stated payments. The ET set out the full amount of the claim for loss of earnings, which was just under £10,000.

B

C

10. The ET said that in order to consider that claim properly they had to look at the period from 3 January 2017 because of the events of that day which led to the Claimant's absence from work. The ET considered those events in paragraphs 6 to 10. The ET said that it reviewed the evidence relating to the meeting between the Claimant and two of his managers.

D

E

11. They noted that the meeting dealt with recommendations made in November 2016. The work the Claimant was employed to do was discussed; the site which he had to visit to work was discussed, what might be needed, travel plans and so on. The ET recorded that there had been a discussion of recommendations for an Occupational Therapy report of 2 September 2016 and then that various issues had been raised about display screen equipment and the Claimant's ability to use a computer under the conditions set out in recommendations by Access to Work.

F

G

12. Various questions about mobility and so on were raised. The workstation was discussed. The ET said that questions of adjustment were also discussed, in particular the issue of the so-called "perfect chair" which it was suggested was not appropriate. Questions were raised about a tablet to be supplied for the Claimant to use when he was making site visits.

H

A

13. At paragraph 8 the ET summarised the Respondent's conclusion which was that:

> **"Taking into account the demands of the role of health and safety officer and any practical reasonable adjustments (current and future) it is the opinion of HS & R Management Team that the required reasonable adjustments cannot be accommodated within the health and safety officer role."**

B

14. In paragraph 9, the ET recorded what the notes of the meeting said about the Claimant's position. He is recorded as having agreed with that view, and to have said that he needed a job role with managed risk, which he accepted could not be accommodated within the role of a health

C

and safety officer, and that he would like to look for other employment in the Respondent's organisation that better suited his needs.

15. In paragraph 10, the ET said that the result of that meeting was that the Claimant was told

D

to go home, and, although he remained nominally an employee of the Respondent, the Respondent "did not at that time seem to have any work for him."

E

16. In paragraph 11, the ET considered the medical evidence which was available about the period between 3 January 2017 and December 2017. The ET reviewed fit notes from the Claimant's GP. Those are in the bundle.

F

17. The fit note dated 12 January 2017 advises that the Claimant "may be fit for work taking account of the following advice". There is a box headed "If available, and with your employer's agreement you may benefit from". There are four small boxes which can be ticked; "a phased

G

return to work"; "altered hours"; "amended duties", which is struck out, and "workplace adaptations", against which a cross is placed. The GP's comment was "fit to return to work with reasonable adjustments."

H

A

18. The note dated 17 May 2017 again advises that the Claimant may be fit for work taking into account workplace adaptations. The fourth box again is ticked and the comment is "unable to return to work until reasonable adjustments are made". There is a further fit note dated 1 June 2017. Again the box that is ticked in the second box, that is "workplace adaptations". The comment is "fit to return with reasonable adjustments."

B

19. The final fit note in the sequence is dated 29 September 2017. In this fit note two of the boxes in the second box are ticked, that is "amended duties" and "workplace adaptations". The comment from the GP is "patient has a suprapubic catheter – please make reasonable adjustments."

C

D

20. There is also a letter from the Claimant's GP which was considered by the ET. This is a letter dated 14 July 2017. In that letter the GP responds to an enquiry from the patient medical advisor. The author of the letter said that the report contained only factual information obtained from the Claimant's records.

E

21. Paragraph 1 gives a diagnosis. Paragraph 2 said it detailed his symptoms and functional incapacity caused by them. Paragraph 2 said that the GP confirms that:

F

> **"…Mr McGregor has reported specific difficulties caused by his posture at work which impacts on the function of his suprapubic catheter causing it to leak and leading to frequent infections of his skin and urinary tract. Mr McGregor first reported these difficulties to his GP on 8 January 2016. These difficulties have been ongoing for some time. He reports that the posture he was expected to maintain at his work desk resulted in his catheter malfunctioning resulting in leakage, subsequent infection and significant embarrassment. The patient reports that the result in these difficulties affects his concentration and self-confidence in his work. I can confirm that in the last 12 months Mr McGregor has seen his GP with eight established infections of the urinary tract related to such difficulties at work. I been informed that Occupational Health have been involved in this matter and have advised a special adapted desk along with other reasonable adjustments, which Mr McGregor feels would solve his difficulties and allow him to continue to work which I am in agreement with."**

G

H

A

22. Paragraph 3 is headed "Details of his current treatments and response to it" and refers again to the Claimant having seen the GP with eight urinary tract infections in the last 12 months and that he required antibiotics to treat those symptoms. Those infections were said to have resulted in him taking time off work due to their systemic upsets. They were said to make him feel "unwell, nauseated" and to cause him to experience abdominal pain. They were said to cause him significant stress and anxiety due to the resultant dysfunction caused in his everyday life.

B

C

23. There is a slight puzzle about the chronology in this letter. It seems to me probable that when the GP referred to eight infections in the last 12 months, i.e. the 12 months preceding 14 July 2017, that must have been a mistake, and that he must have been referring to the 12 months preceding July 2016, because the Claimant gives the timings of the urinary tract infections in his witness statement. They were during the period when he was at work, whereas in the 12 months preceding the date of this letter, 14 July 2017, the Claimant was not at work.

D

E

24. The ET described in paragraph 12 the other medical evidence that it had seen, including a report from Occupational Health. It summarised the opinion of the Occupational Health Advisor. A report in February said that the Claimant was not fit to work because of immunodeficiency and fatigue. The Occupational Health Advisor had said that she was unable to advise on any reasonable adjustments which would support a sustained return to work.

F

G

25. In paragraph 15, the ET noted that there was a request for ill-health retirement. That that had been raised by the Respondent. A further Occupational Health report in April described by the ET in paragraph 17 opined that the Claimant was unfit to work because of his health conditions which caused fatigue and limited his activity levels. The Claimant's GP had still not provided a report which was expected.

H

A

26. The Claimant was said to have immunodeficiency which was chronic. He would continue to need a catheter and a stoma which would cause pain and discomfort. The advisor concluded that the Claimant had been suffering from chronic immunodeficiency for about two years and that the symptoms had got worse in the past 18 months or so.

B

27. On the evidence the Claimant would be incapacitated for some time. It would be reasonable to make an application for ill-health retirement. It was up to the Respondent to decide whether or not to make that application.

C

28. The ET considered the ill-health retirement application form in paragraph 18. The Claimant signed that form on 6 May. He confirmed that he had read and understood the ill-health retirement fact sheet, that his manager had discussed it with him and that the information in the form was correct; see paragraph 18. The ET did not have the fact sheet but inferred that anyone applying for ill- health retirement must be stating that they were unfit to continue with their contracted duties; see paragraph 29.

D

E

29. In paragraph 20, the ET recorded that the Claimant's GP had been invited to give factual information and that he had provided that from the medical records without seeing the Claimant. The ET then summarised the letter to which I have already referred. The ET said that the GP's letter had described problems of a medical nature "personal to the Claimant. It is before the Tribunal in the medical report that it is not necessary for the information to be in this Judgment."

F

G

30. In paragraph 23, the ET went on to consider advice from an independent registered medical practitioner to the Local Government Pension Scheme dated 15 November 2017. The ET said that the doctor was based in Glasgow and it seemed that she had not seen the Claimant

H

A

before providing the opinion. She was asked whether the member (that is the member of the Pension Scheme) was "suffering from a condition that more likely than not rendered him permanently incapable of discharging efficiently the duties of [his] employment because of ill health or infirmity of mind or body?" The answer to that question was "Yes". The answer to the question "Is the member immediately capable of undertaking any gainful employment?" was "No".

B

C

31. The ET said that the author of the letter had gone on to explain those answers in a report. The ET quite deliberately did not go into detail about that. They recorded that the medical advisor had answered "Yes" to the question, "Is the member as a result of ill health or infirmity at tier 1 unlikely to be capable of undertaking gainful employment before normal pension age?"

D

32. The view of the doctor was that the Claimant was likely to be fit for occasional work for a few hours a week when he did not have a urinary infection. The ET said that the medical report therefore favoured ill-health retirement.

E

33. In paragraph 26, the ET said that they had to consider the Claimant's claim for lost earnings over the period July 2017 to December 2017 against that background that the GP fit note said, "fit for work with adjustments" and various other matters suggested that the position was not as clear as the Claimant and his GP were stating, but on the other hand "we know that it was the Respondent's decision that the claimant should not work. These matters followed the acts of discrimination that the Tribunal had found."

F

G

H

A

34. In paragraph 27, the ET said that they had heard submissions from both parties. One argument that had been put forward on behalf of the Claimant was that the ET might consider making a percentage award in respect of the Claimant's wage loss. The ET then said this:

B

> **"27. …. This is not, in our judgment, a scientific matter. It is for the Tribunal to do the best it can on the basis of the information available seeking to compensate the claimant appropriately, and in our judgment weighing up all of the factors we are of the view that the claimant should be awarded 30% of the sum claimed…"**

The ET then set out what the calculation was.

C

Injury to feelings

35. The ET said that this claim concerned the Claimant's attendance at an office on 5 January 2016 where:

D

> **"30. there had been no risk assessment, where he was required to work a full day. He found a PC in a conference room and worked, but says he developed medical difficulties. The claimant, we found, was put at a substantial disadvantage by being asked to work at a workstation on this date without there previously having been a workstation assessment and a risk assessment."**

E

36. In paragraph 31, the ET recorded that the Claimant's case was that he had been caused injury as sitting in this way had adversely affected his medical devices and how they were connected with him. The ET observed that the Claimant had not referred to that when he was

F

speaking to Occupational Health shortly afterwards, but that it had been mentioned in material from the Claimant's doctor dated around 8 January 2016. They said, "So it may well be that the claimant's physical condition was exacerbated by having to sit for that day doing the rotational duty in the office without proper assessment having been made of his ability to do so."

G

37. At paragraph 32, the ET considered the fifth item on the Claimant's list of issues, which was the:

H

> **"…failure to make reasonable adjustments in the form of failing to supply the whole of the display screen equipment or adapted work equipment recommended by Access to Work. The Access to Work report came at the end of February 2016. The final piece of general equipment was available around the end of May 2016. A laptop computer came later; the**

> **claimant never collected it, but in simple terms there was a failure to provide the claimant with a PC on the desk with the other pieces of equipment recommended by Access to Work until the end of November 2017 shortly after which this Tribunal had made its findings of the respondent's failure. These are the matters for which compensation is being awarded."**

38. The ET noted in paragraph 33 the Claimant's evidence of a personal nature as to how he was affected by matters "from May 2017 onwards". It seems to me likely that this is a typo for "May 2016 onwards", since there is no reason for the ET to have chosen the date in May 2017, given that the period of the failure to make reasonable adjustments for which they were compensating the Claimant began on 24 May 2016.

39. Those matters were all set out in the Claimant's witness statement. There is an unsigned and undated copy of the witness statement in the bundle. I was told that that was the witness statement which formed the basis of the Claimant's evidence at the Remedy Hearing, and that he was cross-examined on it.

40. In paragraph 33 of the Judgment the ET again said that those matters were "personal to him that it is not appropriate for us to include in this Judgment…." The ET went onto say that the Claimant and Respondent were both fully aware of what those matters were. The ET then said, "The claimant is to be taken as he is found by the respondent and that is one of the matters that he claims relates to, or as a consequence of, the findings of the Tribunal."

41. I note that the material in the Claimant's witness statement includes paragraphs 10, 11 and 12, which deal with going to the office in January for one day. The period from May 2016 onwards is dealt with in paragraphs 21 to 24, 26, 27, 30 to 33, 36, 40, 41 and 43.

42. In paragraph 34 the ET said that the Claimant submitted that the award for injury to feelings should be in the top band of **Vento**.

A

43. The Respondent by contrast argued that the award should be in the lower band. The ET then said this:

> **"34. In our view we are not compensating for a lengthy campaign of discriminatory harassment; we are looking to award compensation to the claimant in respect of the two items which we have found in his favour. However, these two items, the first is on one day but the second goes over a lengthy period when the respondent failed to comply with Access to Work's recommendations. Had the respondent complied there may have been a totally different position because the claimant would have been in work, things would have been rather more positive, he may well have been getting on with things. The substantial delay caused the claimant in part not to be at work, but dividing his injury is a much more difficult question."**

B

C

44. For those reasons the ET took the view that this was appropriately in the middle band of a **<u>Vento</u>** award. They said that taking into account his "physical condition, his mental condition, how he was affected overall" they took the view that the appropriate point was in the middle band of the middle point of the **<u>Vento</u>** bands. The ET gave a figure for that. The ET said they were quite happy for either counsel to tell the ET that the ET was wrong. The appropriate figure would be substituted; and, of course, that there might well be interest due on that figure; see paragraph 35.

D

E

45. I am told by counsel that what happened was that the ET announced the point in the **<u>Vento</u>** bands which the ET considered to be appropriate and then asked the parties for their submissions about how the award should be calculated. In paragraph 36, the ET dismissed the claim for aggravated damages. In paragraph 38 the ET said this:

F

> **"38. Counsel did not agree upon the appropriate way of uplifting the figure for hurt feelings but Ms Niaz-Dickinson for the claimant told us that the way in which she had previously applied the formula set out in paragraph 11 of the "Presidential Guidance: Vento Bands" meant that the correct calculation was as follows…."**

G

46. The ET then set out the calculation. I need not recite that, other than to say that the first figure is £12,000 and the final figure is just short of £20,000. In paragraph 39 the ET said, "The Tribunal accepts that this is the appropriate method of calculation."

H

A

47. I asked counsel about what had happened about the calculations at the Hearing. They told me that they had calculated the correct figure to reflect the decision made by the ET, applying paragraph 11 of the "Presidential Guidance on the **Vento** bands" ("the Guidance"). So in other words, they calculated a figure as uplifted in accordance with paragraph 11 of the Guidance. That that was the figure ordered by the ET. It is apparent from paragraph 38 of the Decision that that figure depends on the starting point of £12,000.

B

C

48. I was also told that Mr Ali had submitted that that calculation, the correctness of which he did not challenge, produced an absurd and illogical result by comparison with the figure that was produced by paragraph 10 of the Guidance, which involves no calculation and which applies to claims which have been lodged later. His recollection is that he invited the ET to apply paragraph 10 of the Guidance because it would produce a better result for the Respondent, but that in any event, he did submit that the application of paragraph 11 resulted in an illogical result.

D

E

49. Ms Niaz-Dickinson told me that she is sure that Mr Ali did not make that submission. Her recollection is that the entire discussion related to paragraph 11 of the Guidance, she infers, because it was clear from its terms, that paragraph 10 did not apply to the Claimant's claim. She also said, and I think Mr Ali agrees, that Mr Ali did not provide the ET with his own calculation even though it was clear before the Hearing, she submits (from the Claimant's schedule of loss) that the approach that the Claimant was taking was to rely on paragraph 11 of the Guidance, an approach that was confirmed in the Claimant's written submissions that were produced either on the first, or more likely, the second, day of the Tribunal Hearing. No submissions were made by the Respondent about the appropriate uplift to the **Vento** award.

F

G

H

A

The grounds of appeal

50. There are three grounds of appeal:

> **(1) The ET was wrong in law and perverse to find that if the Respondent had made the reasonable adjustment of providing the Claimant with a computer at his desk at Marsh Lane there was a 30% chance that the Claimant would have worked between July and December 2017.**
>
> **(2) The ET was wrong in law and perverse to award the Claimant damages at the mid-point of the second *Vento* band.**
>
> **(3) The ET was wrong in law and perverse to calculate the uplift in accordance with paragraph 11 of the Presidential Guidance ("the Guidance") as this led to an illogical and absurd result.**

B

C

51. Mr Ali submits that three parts of the factual context are relevant. First, in his skeleton argument he submitted that the Claimant was a homeworker. I think he accepted in his oral submissions that that did not mean that the Claimant worked exclusively from home. The Claimant also had to carry out site visits and did spend some time in the office. His point was that the Claimant only went to the Respondent's offices very occasionally.

D

E

52. The second point Mr Ali made was that when the Claimant went on long-term sick leave on 15 July 2016. He never effectively returned to work. The failure to provide a computer, Mr Ali submitted, only had a practical impact for a period of two months.

F

53. Third, the Claimant applied for ill-health retirement in May 2017 and that application was granted in December 2017. That application was made with the Claimant's consent but he was required to provide medical evidence in support of it. The premise of the application was that the Claimant was not fit for any work.

G

54. Ms Niaz-Dickinson challenged the suggestion that the Claimant was wholly a homeworker. It appears from page 136 of the bundle that the Respondent would not agree to his working from home 50% of the time in January 2017, and page 183 of the bundle suggests that

H

A

the Claimant could work from home part of the time. On any view, the documents do show that the Claimant was required to spend one day a fortnight doing duty cover in the Marsh Lane office and that he was also required to go there for monthly team meetings; see paragraphs 5, 15, 27 and 44 of the ET3. It was also the Respondent's contention in paragraph 27 of the ET3 that it could not support 50% homeworking for the Claimant.

B

Ground 1

C

55. The Respondent argues that the finding that there was a 30% chance that the Claimant could have returned to work was inconsistent with the Claimant's application for ill-health retirement. Mr Ali asked rhetorically whether the Claimant would have been granted medical retirement if with reasonable adjustments he could have returned to work. The reasonable adjustments were described as simply having a PC at his work office, which he attended a handful of times a month.

D

E

56. The Respondent also argued that there is no "credible" evidence to support the view that there was a 30% chance that the Claimant would have worked between July and December 2017. That was not the evidence given by anyone.

F

57. In his skeleton argument Mr Ali listed, and in his oral submissions he took me to, the various documents which he says show that the Claimant was not capable of doing his job during that period. For example, and Mr Ali relied very strongly on this point, the Respondent and the Claimant had reached the view at the meeting on 3 January 2017 that the Respondent could not support the reasonable adjustments which would have been required to enable the Claimant to return to work and submits Mr Ali, those reasonable adjustments did not merely consist of the reasonable adjustments which led to the ET's finding of a breach of the duty to make reasonable adjustments. They were far more extensive than that.

G

H

58. He pointed to the fact that the Claimant had strongly reiterated that in an email dated 10 January 2017 and even more forcefully in an email dated 6 February 2017. He submitted that the premise of the Claimant's application in May 2017 was that he was not fit for any work. He submitted that the ET acknowledged that but simply failed to grapple with the implications of that in paragraphs 18 to 19 of the Judgment.

59. Mr Ali showed me the medical evidence from the Respondent which suggested the Claimant was not fit for work, for example the view of Occupational Health in February 2017 that he was not fit and that no reasonable adjustments would help. He submitted that the GP fit note did not suggest what reasonable adjustments would enable the Claimant to return to work. They were too general to indicate that a return to work was likely or probable. The Claimant, he said, could have simply taken sick leave on the days when he was required to be in the office, if he was really fit to return to work, but in fact he had been off sick for the whole period.

60. As to ground 2, he submitted that there were two acts of discrimination. The first was having to work for one day at Marsh Lane. That might have made the Claimant's condition worse, but the ET had unclear evidence about that and made no concrete findings; see paragraph 31.

61. The second was a failure to provide a PC between 24 May and 15 July 2016. The Claimant was on long-term sick leave after that. He would only have had to have attended the office occasionally in that period.

62. The cause of the sick leave was not the failure to provide the PC. The ET were wrong to find that had that been provided "then they would have been in a totally different position because

A

the Claimant would have been in work." The ET failed to focus on how the failure to provide the PC affected the Claimant's feelings rather than on how other matters did.

B

63. The Respondent, he said, challenged the Claimant's witness statement, but paragraph 52 suggests that the injury to feelings post-dated the failure to make reasonable adjustments; see also paragraphs 53 and 55. Paragraph 35 of the Judgment, he submits, shows that the ET adopted the wrong approach.

C

64. He referred me to the Decision of this Tribunal in **AA Solicitors Ltd (T/A AA Solicitors) & Anor v Majid** [2016] UKEAT/0217/15 in which the Employment Appeal Tribunal had

D

considered a case in which an award of £40,000 for injury to feelings had been made in a sex discrimination case. The period which during the discrimination occurred was a period of about six weeks. The Claimant was an aspiring lawyer and had worked in the Respondent's offices for that short period.

E

65. She alleged that the second Respondent had committed 40 or more acts of sexual harassment against her; some verbal and some actions such as trying to her hug her, touching her

F

arms, squeezing and rubbing her hands, and shaking her hands; and making her feel uncomfortable by that type of behaviour. This Tribunal upheld the award in that case and in essence expressed the view that it would not intervene unless the ET's award was manifestly

G

excessive. Mr Ali suggested that the discrimination in this case was less serious than the discrimination in the **Majid** case and that the appropriate award in this case was one between £6,000 and £7,000.

H

A

Ground 3

66. The Respondent accepts in the skeleton argument that paragraph 11 of the Guidance applied to this case. The skeleton argument now suggests that what went wrong was that the Guidance was wrongly applied by the ET because the "X" figure at the beginning of the calculation; that is £12,000 to which I have referred, should in fact have been a figure of £10,000. That was an error that was made by the parties when they submitted the calculation to the ET and it was not spotted by either counsel or indeed by the ET.

B

C

67. The submission has to be that the application of the Guidance in this case apparently produced an irrational result. I say that because it is now known that the application of paragraph 11 of the Guidance does not produce an irrational result. It is suggested that because the application of paragraph 11 of the Guidance produced an apparently irrational result, the ET should not have applied the Guidance, which is the only relevant Guidance, but instead should have calculated the uplift in the different way, although it is not suggested how it should have been calculated nor was it, at least on Ms Niaz-Dickinson's recollection, suggested at the Tribunal how it should have been calculated at the Hearing.

D

E

F

68. The suggestion is that the outcome was apparently irrational because the application of paragraph 11 of the Guidance (based on the parties' mistaken figure "X") resulted in people who lodged claims before 11 September 2017 being compensated more generously than people who had lodged claims after that date. That argument is developed in paragraph 23 of the Respondent's skeleton argument, although in neither the skeleton nor the grounds of appeal has the Respondent advanced a different method of calculation.

G

H

A B C D E F G H

69. The Claimant reminds me of paragraph 65 of the Decision in **Vento v Chief Constable of West Yorkshire Police** [2002] EWCA Civ 1871; [2003] ICR 318. In paragraph 65, the Court of Appeal indicated that ETs and those practising in the ET might find it helpful if the Court of Appeal were to identify three broad bands of compensation for injury to feelings. The Court of Appeal then set out what the three broad bands were and what figures should be awarded within those bands.

70. Of the first, the top band, the Court of Appeal said, "Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race." The Court of Appeal said that the middle band should be used for "serious cases which do not merit an award in the highest band." The Court of Appeal said that third band was appropriate for "less serious cases, such as where the act of discrimination is an isolated or one-off occurrence."

71. The Claimant also draws my attention to the Decision of the Court of Appeal in **Pereira De Souza v Vinci Construction UK Limited** [2017] EWCA Civ 879; [2018] ICR 433. In paragraph 34 of that Decision the Court of Appeal decided that the **Simmons v Castle** [2012] EWCA Civ 1039 and 1288; [2013] 1 WLR 1239 uplift should be applied to awards for injury to feelings. They also noted that the **Vento** figures needed to be updated for inflation as was done in **Da'Bell v National Society for Prevention of Cruelty to Children** [2010] IRLR 19. The Court of Appeal said it would kill two birds with one stone if fresh guidance were issued which adjusted the **Vento** figures for inflation and so as to incorporate a **Simmons v Castle** uplift.

72. At the end of paragraph 34 the Court of Appeal said that pending the issue by guidance of the President of ETs, "Tribunals can of course do their own adjustment, which need not be

mathematically precise..." The Presidents of ETs (England and Wales) and the President of ETs (Scotland) took the hint and issued a document headed "Presidential Guidance" which is expressly issued pursuant to the Decision of the Court of Appeal which I have just mentioned.

73. Paragraph 10 of the Guidance says this:

> **"Subject to what is said in paragraph 12, in respect of claims presented on or after 11 September 2017, and taking account of *Simmons v Castle* and *De Souza v Vinci Construction (UK) Ltd*, the *Vento* bands shall be as follows..."**

Paragraph 10 then sets out what those bands are to be for claims presented after that date. Paragraph 11 says this, "Subject to what is said in paragraph 12, in respect of claims presented before 11 September 2017, an Employment Tribunal may uprate the bands for inflation by applying the formula... [which is then set out] (and, where the claim falls for consideration after 1 April 2013, then applying the **Simmons v Castle** 10% uplift)."

74. That Guidance was published pursuant to Rule 7 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. That provides that ETs must have regard to such guidance but are not bound by it. Ms Niaz-Dickinson submits that the implication of the **Da Souza** Judgment is that once the Guidance is issued ETs should follow it. That also follows from Rule 7, to which I have just referred.

75. Ms Niaz-Dickinson submits that on the facts of this case paragraph 11 of the Guidance applied because the claim was lodged before 11 September 2017. The Claimant set out his calculation, albeit based on the top **Vento** band in his schedule of loss and the Guidance calculation was also referred in the Claimant's submissions to the ET, which in turn cross-referred to the Claimant's schedule of loss. She submits that given the date on which the claim was lodged

A

in this case the only up-rate method recommended by the Guidance was that set out in paragraph 11 and that that was the course that the ET adopted.

B

76. She submits that the ET was concerned only with compensating the Claimant and not with the wider issues about the relationship between compensation between two groups of Claimants to whom paragraph 10 and 11 respectively applied. She submits that the Respondent did not suggest any other method of calculation. The Respondent's submission were silent on that topic.

C

77. She accepts that Mr Ali argued once the calculation had been done that the result was illogical and absurd, but says that he did not give an alternative method. She submits that as no

D

alternative was put before the ET it had little option but to apply paragraph 11 of the Guidance as the implication of **De Souza** is that an uplift of some sort is required.

E

78. She further submits that to apply paragraph 10 would be inconsistent with the Guidance and would lead to inconsistencies between Claimants in the groups to whom respectively paragraphs 10 and 11 of the Guidance apply. Most significantly however she says the Respondent did not advance this argument at the ET.

F

79. In conclusion, she argued that it was not perverse of the ET to use the calculation which the parties agreed was the calculation that flowed if paragraph 11 of the Guidance was applied.

G

Nor did the ET err in law in following paragraph 11 of the Guidance because no concrete alternative had been suggested to it.

H

A

Discussion

80. The Claimant reminds me (see Ms Niaz-Dickinson's skeleton argument) that the EAT should not read an ET's Decision in an over critical way and should be cautious before deciding that an ET's Decision was perverse and should therefore be interfered with.

B

81. I have not found ground 1 altogether straightforward. It seems to me that there is considerable force in the points made by Mr Ali, in particular in points that he relies on first of all in the medical evidence, which suggested that the Claimant was not fit to return to work in a relevant period, and in relation to the Respondent's position at the meeting in January 2017 from which it was clear that the Respondent's view was that the adjustment which were required to enable the Claimant to return to work were greater than the reasonable adjustments, the failure to make which led to the ET's finding that the Respondent had discriminated against the Claimant.

C

D

E

82. He drew attention to the fact that the letter from the GP, while it might give some content to the observations in the fit note about reasonable adjustments, was still ambiguous in the sense that the "other reasonable adjustments, which [the Claimant] feels would solve his difficulties and allow him to continue to work," it is simply not clear what those reasonable adjustments would be, but it is clear that they go further than simply a specially adapted desk. On the other hand, there was evidence before the Tribunal in the shape of the GP's fit note, which came from the doctor who wrote the letter to which I have just referred, which suggested that the Claimant was or might be fit to return to work with reasonable adjustments.

F

G

83. I shall deal first of all with Mr Ali's suggestion that the ET was not entitled to give any weight at all to the evidence from the GP. I consider that the ET was entitled to give some weight to the evidence from the GP, and it seems to me to follow that once it is accepted that the ET was

H

A

entitled to give some weight to the evidence from the GP, the question of the weight which it should give to that evidence was the question for it, subject to irrationality.

B

84. I also consider that if one takes into account the reasoning in paragraph 34, which is expressly addressing the **Vento** part of the claim, but which in my judgement is also relevant to this ground of appeal, the position that ET appears to have arrived at is that they accepted that they could not decide that the Claimant would have returned to work had the reasonable

C

adjustments been made, but that they did consider that the position was sufficiently uncertain such that there was a chance that he might have returned to work if the reasonable adjustments had been made.

D

85. While I do consider that what occurred at the meeting in January 2017 is an obstacle in the way of such a conclusion, the ET did take that into account. It seems to me, that notwithstanding, that their view was that it was the Respondent's decision that the Claimant

E

should not return to work and that there was a chance, which they had said had been a 30% chance, that he could have returned to work had the reasonable adjustments been made.

F

86. For those reasons therefore and not without some hesitation, I conclude that it was open to the ET to reach the decision they did on the loss of earnings claim. I bear in mind the argument about medical retirement, but that, as indeed all the other arguments that Mr Ali relies on today,

G

was an argument which he advanced to the ET and which they must therefore have taken into account. The Claimant's view, that he wanted medical retirement, was first of all not a medical opinion. As Ms Niaz-Dickinson submits, it was also based on the Claimant's view that the Respondent was not willing to provide the reasonable adjustments that the Claimant considered

H

he needed.

A

87. Moreover, while I note that the LGPS medical advisor's opinion to which I was referred was not expressed as a view on the balance of probabilities, I reject the submission that it was not open to the ET to make a finding of a 30% in the absence of medical evidence giving a percentage chance of a return to work. This is not a scientific matter and in my judgement the ET was entitled using its own judgement to make a broad assessment of the percentage chances of the Claimant going back to work.

B

C

Ground 2

88. I consider that there are four flaws in the Respondent's argument on this ground. First, it tends to assume that the fact that the Claimant was not often required to be in the office must mean that a failure to make reasonable adjustments in relation his work station at the office could have had little compensable impact on him.

D

E

89. Second, it assumes that because the Claimant was not at work after July 2016 the ET was only entitled to compensate the Claimant for a two-month period. Third, it assumes that all that was missing was a computer, which I think in his oral submissions Mr Ali accepted was not an entirely fair way of putting the position since the absence of a computer did mean that the Claimant was not able to use the adapted workstation.

F

G

90. The fourth flaw in my judgement is the suggestion that this was even arguably a case that was appropriately placed in the lower band having regard to the description of the lower band given in the **Vento** case. I have already referred to the relevant passages in the Claimant's witness statement or at least identified the relevant paragraphs. In my judgement that showed that the effect of the relatively rare attendances in the office in circumstances where the reasonable adjustments to accommodate his medical difficulties have not been made was significant.

H

91. However, with the ET, I do not consider it necessary to elaborate on these. I do consider that they were matters that the ET were entitled to take into account in deciding where in which **Vento** band this case fell.

92. The Claimant felt that when he went off sick in July 2016 that had been caused by having to spend the day in the office with no reasonable adjustments having been made. The detail in his witness statement is disturbing. Moreover, as his witness statement shows, this was not a case where the Claimant had no contact with the Respondent after July 2016, and as the witness statement shows the contact that he did have indicated to him that the reasonable adjustments had still not been made. Indeed, they were not made until November 2017.

93. I reject the submission that this case is less serious than the **Majid** case. First of all, it seems to me very difficult to compare this case with the **Majid** since the discrimination in the two cases is so very different. However, the discrimination in this case produced painful and difficult injuries and affected the Claimant's health significantly.

94. One can only begin to imagine how demoralising, upsetting and humiliating it must have been for him to attend the office between May and July 2016, albeit on not very many occasions, with no reasonable adjustments in place and how upsetting it must have been for him to continue to realise that the reasonable adjustments had not been made. This is not just a case, as I say, of just a computer missing and as I have indicated I think Mr Ali did accept that in his oral submissions.

95. The failure was a failure to provide an adapted work station which had been recommended in the Access to Work report. Without that adapted work-station working in the office for any

A long period exposed the Claimant to the risk of damage to his catheter, consequential injury and consequential urinary tract infections. That risk materialised more than once. In those circumstances I do not consider that the ET erred in law in placing this in the middle **Vento** band.

B

96. Once it is accepted that this is a middle band case, the right position in that band is a matter for the ET, again subject to irrationality. I do not consider that the ET was irrational in placing this case in the middle of the **Vento** band, nor do I consider that the ET's award was manifestly excessive.

C

Ground 3

D

97. It is important to bear in mind that the third ground of appeal is not that the ET misapplied paragraph 11 of the Guidance. It is rather that the ET acted perversely in applying paragraph11 of the Guidance or that it erred in law in doing so. I consider that the practical effect of **De Souza** was that the ET was bound at least to consider whether or not to uplift the appropriate award.

E

98. The ET was bound to have regard to the Guidance but was not bound to follow it. By analogy with the position in public law I consider that that means that the ET was bound to follow the Guidance unless it had a good reason from departing from the Guidance and articulated that reason; see **R v Islington London Borough Council, ex p Rixon** [1997 to 8] 1 CCLR 119.

F

G

99. In this case the ET was faced with a situation where both counsel agreed that the effect of applying paragraph 11 of the Guidance was the figure which the ET ended up awarding. It was clear from its own terms that paragraph 11 applied to the claim and that paragraph 10 did not. It does not appear to me that the Respondent argued with any great conviction that paragraph 10 should be applied instead of paragraph 11. In addition, the only foundation for such an argument

H

A

was that a comparison between the figures which flowed from the application of the two paragraphs suggested that something odd was going on since paragraph 11 resulted in a higher figure.

B

100. I consider that in the face of the Respondent's submission that the application of paragraph 11 led to an absurd and illogical result in circumstances where the Respondent agreed that it was the result produced by the application of paragraph 11 to the facts of the case, the reluctance of

C

the ET to depart from the Guidance was entirely understandable and lawful. As it transpires the ET's instinct, that it should not depart from the Guidance simply because the calculation appeared to reach an odd result, was quite correct, as the anomaly was the product not of the Guidance but

D

of the parties' mistaken application of the Guidance.

101. In those circumstances I do not consider that the ET either acted perversely or unlawfully

E

in accepting the Claimant's submission that it should follow paragraph 11 of the Guidance. For those reasons, I dismiss the appeal.

F

G

H