EMPLOYMENT TRIBUNALS

Claimant: Ms Hilary Melville

Respondent: Santander UK PLC

HELD AT: Liverpool **ON:** 28 November 2019

BEFORE: Employment Judge Shotter

Members: Mr MC Smith
Mrs JE Williams

REPRESENTATION:

Claimant: In person
Respondent: Mr French, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondent is ordered to pay damages for injury to feelings for unlawful disability discrimination for the period 20 November 2017 to 17 January 2018 in the sum of £4,500 (four thousand five hundred) plus interest of £720.00 (20 November 2017 to 28 November 2019 @ 8%) totalling **£5,220.00.**

2. The respondent is ordered to pay the claimant a 25% ACAS uplift for failure to deal with her grievance in the sum of £1305.00.

3. The claimant's claim for aggravated damages is dismissed upon withdrawal.

4. The claimant's application for a preparation time order is dismissed upon withdrawal.

REASONS

Preamble

1. This is a remedy hearing following promulgation of the judgment and reasons sent to the parties on 14 September 2019. Only one part of the claimant's claims was successful, namely the Tribunal's finding that the respondent had ignored the claimant's grievance between 20 November 2017 to 17 January 2018 and the claimant was treated unfavourably during her absence from work arising from her disability of fibromyalgia. It found the claimant's claim for unlawful disability discrimination brought under section 15 of the Equality Act 2010 was well-founded.

2. The claimant, who at the time was employed as a customer tele relations advisor in her probation period, from 4 September 2017 until her resignation during the probation period on 13 February 2018, brought claims of unfair dismissal, unlawful disability discrimination under sections 15 and 20 of the Equality Act 2010 ("EqA"), wrongful dismissal (notice pay) and holiday pay. All the other claims were dismissed, and when assessing the damages for injury to feelings the Tribunal took into account the likely effect of the other discrimination claims brought and any injury to feelings that may have been attributed to them ensuring the claimant was not compensated for unsuccessful claims.

3. At the outset of this remedy hearing the claimant confirmed she was seeking injury to feelings in the sum of £14,500, personal injuries of £16,000, aggravated damages of £7000 and loss of earnings of £3,801.64, an unspecified bonus payment and a 25% ACAS uplift on the damages.

4. The respondent indicated the injury to feelings compensation should be assessed at £3,500 to cover the 8-week period plus an ACAS uplift of £12.5%. It did not accept there was a personal injuries claim; the claimant had already been signed off before the period in question and there was no supporting medical evidence. It objected to the claimant claiming personal injuries having not pleaded this claim; the claim for aggravated damages was not objected to in theory, however, the respondent disputed the claimant was entitled to aggravated damages. No arguments were put forward as to why the Tribunal should not consider the personal injury claim, and Mr French made closing submissions on the claimant's arguments, a number of which have been referred to below. The Tribunal took the view that the claimant, a litigant in person, was entitled to make her claim for personal injuries given the respondent is in a position to deal with it. It is in the interests of justice and in accordance with the overriding objective not to delay this case, but take into account the parties arguments on the personal injuries claimed.

5. The Tribunal was provided with a bundle of documents by the claimant, it took into account the original lever arch file of evidence and it heard evidence under oath from the claimant, who acknowledged under cross-examination she had made no

reference to the grievance delay and its effect on her in the 11-page statement provided by the claimant to justify the damages she was seeking. The claimant in her oral evidence on cross-examination accepted she had not identified any effect on her health and well-being as a result of the manner in which the respondent had treated her grievance.

6. Taking into account the claimant's responses to the questions put to her, the Tribunal was satisfied on the balance of probabilities that the claimant's main concern was the financial pressure she was under as a result of being absent from work on the grounds of ill-heath. It did not accept the claimant's response to the effect that had the respondent dealt with her grievance and found against her on it, she would have returned to work immediately. This evidence was not credible. The Tribunal found as a fact following the liability hearing that the claimant had hid from the respondent she had possession of a medical report the respondent was waiting upon before meeting with the claimant to discuss the report, reasonable adjustments and a return to work and this is indicative of the fact the claimant was not interested in returning to work and carrying out her role. The Tribunal's conclusion in this regard is supported by the independent GP evidence to which it was taken during this remedy hearing. It is notable that as at October 2017 the GP notes record "moved to a different job as prev one was too stressful and busy but finding this new job also tough…" In November 2017 the GP recorded "Doesn't feel able to return to work is not up to coping w high pressure environment but can't leave as will not be eligible for benefits, expects her contract will be terminated, is going to seek advice DWP."

7. At this remedy hearing the claimant appeared to suggest she had resigned as a result of the way she had been treated in respect of her grievance, and the resignation letter can be interpreted in such a manner so as to attract a loss of earnings claim. In its findings of facts, the Tribunal referred to a case management discussion held on 18 May 2018 during which the claimant explained the constructive unfair dismissal complaint was brought on the basis that the dismissal was due to the assertion of a statutory right, namely, the right to itemised pay statements and the right in respect to entitlement to paid holidays. She also alleged the respondent had breached her contract by (a) not providing her with the respondent's 'Working Safely' booklet and 'Personal Health & Safety Statement' on her first day of employment, and (b) not giving her four weeks' notice of hours she was required to work in December 2017 to February 2018, including failing to give notice of weekend rotas. The claimant made no reference to her resignation being in response to acts of unlawful discrimination relating to the manner in which her grievance had been dealt with (or not as the case may be) despite the letter itself referring to protected characteristics. Following the liability hearing the Tribunal found these were the reasons given by the claimant for her resignation. It now notes that the GP medical records and communications sent to the respondent during the claimant's sickness absence reflected her concern over pay and holidays.

8. The claimant had paid one deposit of £25 related to the allegation of harassment set out in the agreed issues below, namely, Charlotte Brown of the Respondent emailing the Claimant regarding references on 17 November 2017, a claim which failed at liability. Other deposits have not been paid.

9. The Claimant at the liability hearing confirmed she relied upon the disability of fibromyalgia only in respect of her section 15 EqA claim relating to the grievance, and she did not rely on any perceived depression. However, at the remedy hearing the claimant relies upon depression, clarified at today's hearing that fibromyalgia could also include depression. There was no satisfactory evidence to the effect that the claimant had suffered depression during the relevant period, and without supporting medical evidence, the Tribunal was not prepared to accept the claimant's evidence having found her to have been a less than credible witness prone to exaggeration on a number of occasions.

10. The Tribunal has considered the claimant's and respondent's submissions, which the Tribunal does not intend to repeat and has attempted to incorporate the points made by the parties within the body of this judgment with reasons.

11. With reference to the promulgated judgement the facts set out below are relevant to this remedy hearing as the brief chronology puts into perspective the claimant's claim for damages:

11.1 The claimant confirmed she had a mental health condition of depression or work-related stress. These were not described by the claimant as a disability but a medical condition she had suffered from in the past. The claimant gave oral evidence at the liability hearing that she had not suffered from depression for a period of some 14-years, since 2003 and that was "reactive to life episode, redundancy." It is notable the claimant did not attend her GP complaining of depression, and there is no reference to this in any relevant records despite the GP confirming conversations with the claimant concerning her work and how it was affecting her.

11.2 On 4 October 2017 Claimant commenced sickness absence.

11.3 A MED3 was provided to the respondent for 21 days 9 October 2017 referred to "unwell, fatigue and pain."

11.4 At the 30 October 2017 meeting the claimant confirmed she had suffered from a "head injury," she described her fibromyalgia and the lowering of anti-depressant medication dosage. At the remedy hearing the claimant gave oral evidence to the effect that she had self-medicated by increasing the amount of anti-depressant medication taken to deal with her depression, and this act was without any reference to the GP. The claimant explained she had not consulted with her GP, which was why the GP records are silent on the claimant's depression. She believed from previous experience the GP would only have increased medication and referred her to counselling. On balance, even taking into account the fact the claimant had complained to her GP of the adverse effect on her of anti-depressant medication that resulted in the lower dosage, the Tribunal accepted the claimant's evidence that she had self-medicated when experiencing feelings of anxiety, stress and isolation because she was not in work, waiting in limbo for an investigation to be carried out. The ensuing delay when she expected something to happen according to the promises made by the respondent, reinforced the claimant's fears about her ability to carry out the work

and concerns over financial security, particularly mortgage arrears. The respondent's human recourses department ("HR") should have understood the claimant was complaining about some form of disability discrimination in her grievance, and it was reasonable for the claimant to be upset when this was ignored against the background of her disability and its effect on her.

11.5 . The claimant's GP provided a medical report dated 6 November 2017 which confirmed the claimant had a "background history of fibromyalgia" and an immune deficiency.

11.6 The GP confirmed the claimant on 9 October 2017 "had a exacerbation of her fibromyalgia which made her feel unable to attend work…her last attendance in the surgery was the 23 October when she presented having had an episode of fainting resulting in a head injury…" It is a matter of logic that the exacerbation confirmed by the GP could not have been causally connected to the manner in which the claimant's grievance had been dealt with by the respondent, and the claimant's evidence to this effect was not credible and unsupported by any contemporaneous documentation.

11.7 On 20 November 2017 Claimant submitted the grievance letter. It is noted by the Tribunal that the exacerbation of the claimant's medical condition was alleged to have been caused by the issues she raised in the grievance. The Tribunal accepted the claimant felt anxiety and stress when her grievance was not investigated.

11.8 Ten-days later on 30 November 2017 the respondent acknowledged the claimant's grievance letter, the claimant having made contact chasing the whereabouts of her grievance in emails sent 12.08 and 13.03. In the 12.08 email the claimant requested progress to be made and "**financial consideration for being placed on full pay during the investigations"** [the Tribunal's emphasis]. In the 13.03 email she wrote "Following your confirmation of receipt…I have yet to hear anything back…a full 10 calendars days later…" Referring the responded to her claim of indirect discrimination and harassment she wrote: "I do not know what time scale is considered reasonable but this delay against seems to demonstrate a lack of concern for my well-being. **Since my sick note expires at the beginning of next week I would request that I be put back on full pay for December but I can remain at home whilst the investigation into my complaint takes place**…" [Tribunal's emphasis]. There were two working days before the claimant indicated she would be returning to work, and she did not so.

11.9 The claimant was informed by Farah Jahangir of HR "I am currently in the process of sourcing an independent manager to investigate your concerns and will write to you again due course with the arrangements for a formal grievance meeting." Support was offered to her, and there was no reason at that stage for the claimant to think her grievance was not being dealt with. The claimant was not informed of any time-limits in which the grievance would be dealt with. Farah Jahangir provided her telephone number and email address inviting the claimant to contact her.

11.10 On the 5 December 2017 Statement of Fitness for Work the GP signed off the claimant citing fibromyalgia for a period of 4-weeks with no reasonable adjustments. The claimant's Statement of Fitness to Work had not changed, she was not well-enough to work or on the face of it, attend a grievance hearing and so the Tribunal found in its findings of facts. The claimant fully expected a grievance hearing to be convened in accordance with the respondent's Grievance Procedure and it was clear to the Tribunal the claimant was under the impression her grievance was continuing pending her return to work. The 12 January was an agreed date for her return.

11.11 A discussion took place between Sam Woods and the claimant on the 2 January. The claimant indicated she had a chest infection and cold and had been signed off for another two-weeks. In direct contrast to what the claimant was telling Sam Woods, the claimant's GP made no reference to chest infection or cold in the Statement of Fitness for Work that confirmed the claimant was to be absent to 16 January 2018 with fibromyalgia and no adjustments. Under cross-examination the claimant appeared to suggest she would have returned to work with the chest infection and cold had not her disability been exacerbated by the respondent's failure to deal with her grievance. The Tribunal, for the reasons already stated, did not find the claimant's evidence to be credible and concluded she never intended to return to the work for which she had received partial training, was still in the probation period and according to the GP, expected her contract to be terminated.

11.12 ACAS early conciliation ("ACAS EC") commenced in 14 December 2017. In her evidence under cross-examination the claimant downplayed ACAS EC in an attempt to persuade the Tribunal that her health was so poor she was housebound and unable to take any steps, even to the extent of no longer emailing the respondent. The claimant's evidence given at the remedy hearing under cross-examination was that she had not contacted ACAS to bring a claim against the respondent. The Tribunal did not accept the claimant's evidence, concluding she was an inaccurate historian in an attempt to increase the award of damages and claim personal injuries. The fact the claimant commenced ACAS EC contradicts this evidence, as did the claimant's oral evidence that by Christmas she was beginning to feel better. In short, the Tribunal was satisfied the claimant intended to litigate in December, she was not too ill to contact ACAS and then in January 2018 she issued proceedings.

11.13 In an email sent 11 January 2019 the claimant chased up her grievance stating, "the time lag is now unacceptable even allowing for the holiday season…" Reference was made to the 12 January 2017 absence and wellbeing meeting the claimant being of the view "the grievance needs sorting first." The Tribunal for the reasons set out below, accepted on balance the claimant's evidence that she was unhappy with the delay; she had raised a number of Equality Act allegations in her grievance and the respondent had taken no steps to investigate.

11.14 In a communication dated 16 January 2018 the claimant resigned on one month's contractual notice.

11.15 On the 16 January 2018 a Statement of Fitness for Work was issued and suggested for the first time the claimant may be fit considering a phased return to work and workplace adaptations. In short, the claimant had been confirmed unfit for work by her GP for the period before she had raised her grievance and after her resignation when there was no longer any requirement for the respondent to deal with it.

11.16 On 23 January 2018 the claimant's ET1 claim form was received.

11.17 The claimant wrote to the Employment Tribunal by email sent on 7 February 2018 "I have provided reasons why my unfair dismissal complaint might be considered, despite not having 2 years qualifying service…**as the reason for the alleged breach could remove this requirement**, as automatically unfair due to my trying to assert relevant statutory rights to holiday pay, plus no access to payslips and no statement of hours of work in advance either written or verbal" [the Tribunal's emphasis]." Reference was made to the claimant's contract of employment as follows: "No verbal or written statement of days of work, shifts or break patterns – indeed in extra breaks could be allowed as a reasonable adjustment…if I were to return to work in December 2017 or January 2018…My employer knew I refused to return to work after sickness, when had a fit note dated 16 January 2018 attached due to health and safety concerns, issues raised months before, but no reasonable adjustments offered" and the fact that the claimant had worked with the respondent in earlier 2003 was referred to. There was no reference to the claimant's resigning as a result of the respondent's failure to deal with her grievance, and no reference to any outstanding bonus payment.

11.18 Under the section 15(1) EqA head of claim the Claimant relied on the disability of fibromyalgia. The claimant went off sick on the 4 October 2017 from which she did not return. In her witness statement the claimant referred to "badly" failing a test on that date, because "she was in so much pain, really tired and could not concentrate." It is clear from the claimant's own evidence the exacerbation to her poor health cannot be solely attributed to the respondent's discriminatory actions and the Tribunal has taken this into account when arriving at a just and equitable figure for injury to feelings compensation.

Law: Injury to feelings

12. The Presidents of the Employment Tribunals in England and Wales and Scotland issued updated joint presidential guidance in relation to the "Vento bands" for compensation for injury to feelings in discrimination claims brought under the Equality Act 2010. The Vento bands were uprated for claims presented to employment tribunals in England or Wales on or after 6 April 2018 (before the claimant had presented her claim) and are: a lower band of £900 to £8,600 (less serious cases). a middle band of £8,600 to £25,700 (those cases that do not merit an award in the upper band).an upper band of £25,700 to £42,900 (the most serious cases), with the most exceptional cases capable of exceeding £42,900. It is these figures the Tribunal has taken into account of as they reflect an inflation upgrade and take into account Simmons v Castle and De Souza v Vinci Construction (UK) Limited.

13. In Vento v Chief Constable of West Yorkshire Police (No.2) [2003] ICR 318, CA, the Court of Appeal gave specific guidance on how employment tribunals should approach the issue. Lord Justice Mummery identified three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury. These comprised:

-a top band of between £15,000-25,000: to be applied only in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in very exceptional cases should an award of compensation for injury to feelings exceed £25,000

-a middle band of between £5,000-15,000: for serious cases that do not merit an award in the highest band, and

-a lower band of between £500-5,000: appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. The Court said that, in general, awards of less than £500 should be avoided, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

14. The Tribunal is aware that no medical evidence of injury to feelings is necessary. As Lord Justice Mummery held in Vento, injury to feelings is not a medical term: 'It is self-evident that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise… Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms." The Tribunal accepted from the evidence given by the claimant she was upset when the respondent promised to deal with her grievance and failed to do so.

Conclusion: applying the law to the facts

Injury to feelings

15. The employment tribunal has a discretion as to which band applies, and where in the band the appropriate award should fall; the claimant is claiming £14,500 which falls in the top of the middle band of Vento designed to cover serious cases. Injury to feelings damages is not a punishment for the respondent's failure to deal with the claimant's grievance when she was absent from work due to her ill-health disability and should reflect the injury to feelings experienced by the by the claimant. The sum of £14,500 is not accepted by the Tribunal as properly reflecting the injury to feelings the claimant suffered, differentiating all the other upset she felt at the respondent's behaviour found by the Tribunal not to have been discriminatory. It was a difficult task for the Tribunal to differentiate the impact of the successful part of the claim from the other unsuccessful claims over which the claimant perceived a great injustice and the exacerbation of disability.

16. Mr French submitted given the claimant's injury to feelings spanned a limit of 8-weeks and the fact she was "frustrated" according to the claimant's witness statement, with the intolerable delay which angered her, the claim should fall in the lower band at £3,500 with no additional personal injury award on the basis that to award both would amount to a double recovery for the claimant, and she had failed to identify any actual personal injuries due to lack of relevant and useful medical evidence. The Tribunal agreed, recognising that it was difficult for the claimant to disentangle the fact that she had already been signed off from work from 4 October 2017 and medical evidence may have assisted the Tribunal identifying any link between the exacerbated condition claimed by the claimant and the 8-week delay.

17. When arriving at the quantification of £4,500 the Tribunal had in focus the need to compensate the claimant rather than punish to the respondent, and its assessment has been made difficult by the lack of credible evidence on the part of the claimant. The claimant's written statement sets out how she was feeling, but little is attributed to the grievance delay. There appear to be a multiple of factors which caused the claimant upset and an exacerbation of fibromyalgia. Nevertheless, it accepts on the balance of probabilities the claimant experienced feelings of hurt, distress and humiliation when her grievance alleging serious acts of discrimination was ignored at a time when she was alone at home, too ill to work in a job which she found too difficult for her to carry out according to the GP records.

18. The Tribunal has a discretion to award injury to feelings, and in the particular circumstances of the claimant's case it is just and equitable to award £4,500 taking into account the uprated Vento bands.

Personal injury claim

19. In oral submissions the claimant referred to the EAT's decision in Hampshire County Council v Wyatt EAT 0013/16 in which it was confirmed that an employment tribunal does not need to see medical evidence in order to make an award for personal injury. Although medical evidence will assist in determining whether the injury was caused by unlawful conduct, an award can be made in the absence of expert medical evidence. The EAT held it is advisable for claimants to obtain medical evidence — especially in cases involving psychiatric injury, which can give rise to difficult questions of causation and quantification — as a failure to produce such evidence risks a lower award than might otherwise be made, or even no award being made at all. However, in the instant case the employment tribunal had been entitled to award the claimant £10,000 in damages for personal injury even though no medical evidence had been produced in this regard. On the available evidence, the tribunal had been able to make a clear finding that the claimant had suffered a 'moderately severe' depressive illness, which was caused by the employer's unlawful treatment and which subsisted at the time of the remedies hearing.

20. In contrast to Wyatt this Tribunal was unable to reach such a conclusion on the claimant's evidence before it. There was a real issue as to whether the claimant suffered from depression, and if depression formed part of the fibromyalgia condition, as argued by the claimant, causation and prognosis are in question and for these to be resolved expert medical evidence is necessary.

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21. The claimant relies on a statement of Gary Mills, a retired psychiatric nurse employed at the high security unit in Ashworth Hospital until 2010, to substantiate her evidence that the fibromyalgia condition and mental health "got worse as a result of the 8-week delay in dealing with grievance."

22. The Tribunal heard oral evidence from Gary Mills which it accepted in the capacity it was given, namely as a friend to the claimant and not a medical expert. Gary Mills contradicts the evidence given by the claimant before this Tribunal, namely, he witnessed a "bout of depression in 2013" in contrast to the claimant who confirmed she had not suffered from depression since 2003. Gary Mills also gives evidence on the claimant's condition of fibromyalgia, and the claimant's vulnerability to depression and anxiety which is not reflected in the claimant's GP records. He then proceeded to relate information that he had clearly been told by the claimant, which reflects the claimant being unable to work 4-weeks into her new job as "she was suffering increasing pain and fatigue symptoms." As it pre-dated the grievance, the claimant's poor health had nothing to do with the grievance investigation. In relation to the grievance he records the claimant lodging it "by the beginning of the fourth week of November" and her mental distress at having heard nothing by the end of November, recording that the claimant was under "great stress" following a meeting at the end of October (which did not form part of the claimant's claim). and his view that it manifested into itself as "anxiety and depression from that time on."

23. Mr Mill's report of what he had been told by the claimant reflects information the claimant clearly had not given to her GP at the time, as the GP records are silent on any depression allegedly suffered by the claimant. Gary Mills also offers an opinion as to the claimant's PTSD condition caused by the way in which she was treated by the respondent, which was not part of the claimant's claim and there is no supporting evidence to this effect other than Gary Mills' belief. It is clear to the Tribunal Gary Mills has considerable sympathy for the claimant and he is concerned, trying to do his very best for her in this litigation. Given the complexities of the case and the credibility issues in claimant's evidence before this Tribunal, the evidence of Gary Mills does not answer the difficult questions of causation, quantification and whether the claimant had suffered from any depression and/or psychiatric injury causally linked to the act of unlawful discrimination.

24. In oral closing submissions Mr French reminded the Tribunal of the evidence given by Mr Mills relating to the claimant's "worry" about whether she would be paid the correct amount of statutory sick pay. He submitted there was no express reference to the effect the 8-week delay of the claimant's grievance within Mr Mill's statement. On a close reading of Gary Mills statement the Tribunal does not altogether agree with Mr French; Mr Mills refers to the respondent making no effort to support the claimant's grievance and this compounding "her stress and anxiety levels by adding worry about whether or not she's get her rightful statutory sick pay." The statement should be read in its entirely, and when the words are given their ordinary meaning the position of Mr Mills is unclear in respect of the 8-week delay as opposed to the lengthy time period covered in the statement. The problem with Mr Mills' evidence is his inability to provide clarity on the exacerbating of the fibromyalgia/depression given the fact that the

claimant was already absent and the condition exacerbated before the grievance as reflected in the MED3's.

25. Turning to the claimant's personal injury claim, for the reasons set out above, the Tribunal found there was no satisfactory evidence other than the claimant's say so, that she was depressed and this mental health condition had been brought on by the respondent's failure to deal with the grievance. In contrast to the injury to feelings claim the Tribunal, who are not medical experts, does require medical evidence. It has difficulty in attributing the claimant's mental health condition she asserts was caused by the respondent to the act of discrimination, and the total lack of any reference to depression in the medical records and medical report undermines the claimant's position. The anxiety and stress resulting in the claimant's absence from work on ill-health grounds occurred before she had raised the grievance, and the Tribunal has difficulty making a causal link between the alleged exacerbation of anxiety and stress into depression for a period of some 4-weeks into the respondent's act of unlawful disability discrimination even had the claimant satisfied it she was depressed, which she did not on the balance of probabilities.

26. In short, the Tribunal accepts the claimant was anxious and stressed as borne out in the GP records. It accepts the claimant was upset over the way in which her grievance was handled over a period of some 8-weeks. It does not accept the claimant had a separate personal injury claim and the damages awarded for the anxiety and stress she experienced have been subsumed in the £4,500 injury to feelings award. Any additional amount would result in a double recovery by the claimant. The claimant is not medically qualified, and the Tribunal does not accept her self-diagnosis of depression during the month of December, and neither the GP records nor the MED3 certificates support the claimant's self-diagnosis.

Aggravated damages

27. In oral closing submissions the claimant withdrew this claim. Nevertheless, it is a serious allegation made against the respondent and its legal representatives and the Tribunal was of the view that the points raised by the claimant should be dealt with as they reflect on her credibility and she is prepared to make a number of accusations that had no basis, even taking into account the fact the claimant is a litigant in person.

28. Compensation for non-financial loss may include aggravated damages in particularly serious cases of discrimination from the general principles applicable to the award of compensation for torts where the behaviour of the defendant may aggravate the injury caused to the plaintiff. In her written statement the claimant alleges the respondent had acted "unpleasantly" towards her when defending the claim. In support of this contention she relied on a number of factors which the Tribunal does not intend to repeat in full as the claimant relies on events irrelevant to this remedy hearing, for example, the reference to pre-placement details "business banking should have been aware of C's disabilities."

22.1 "Non-disclosure of the ET3"

22.2 Clarifying withdrawal of deposit claims only.

22.3 The respondent agreeing to reduce case to 1 day from 5.

22.4 Delay in bundle February 2015…more arriving later in March 2019 and April 2019, failed deadline in bundle, grievance not included in draft joint bundle that was not agreed but imposed and failing to follow a number of case management orders.

29. The claimant was invited by the Tribunal to clarify her aggravated damages claim which appeared to suggest the respondent's solicitors intentionally, at the instruction of the respondent, went out their way to cause her difficulties during the litigation process. The claimant confirmed documents had gone missing, "not intentionally, so many it seemed unlikely they could be errors when they had such a big firm of solicitors…I was chasing…after the preliminary hearing when the document still hadn't appeared in March, when agreed bundle was re-set for 28 March 2018 that email did appear and a dozen or so documents…that should attract aggravated damages…"

30. In a well-known case the Court of Appeal in Alexander v Home Office [1988] ICR 685, CA, held that aggravated damages can be awarded in a discrimination case where the defendants have behaved 'in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination'.

31. Mr Justice Underhill, then President of the EAT in Commissioner of Police of the Metropolis v Shaw [2012] ICR 464, EAT, identified three broad categories of case:

• where the manner in which the wrong was committed was particularly upsetting. This is what the Court of Appeal in Alexander meant when referring to acts done in a 'high-handed, malicious, insulting or oppressive manner'

• where there was a discriminatory motive — i.e. the conduct was evidently based on prejudice or animosity, or was spiteful, vindictive or intended to wound. Where such motive is evident, the discrimination will be likely to cause more distress than the same acts would cause if done inadvertently; for example, through ignorance or insensitivity. However, this will only be the case if the claimant was aware of the motive in question — an unknown motive could not cause aggravation of the injury to feelings, and

• where subsequent conduct adds to the injury — for example, where the employer conducts tribunal proceedings in an unnecessarily offensive manner, or 'rubs salt in the wound' by plainly showing that it does not take the claimant's complaint of discrimination seriously.

32. The claimant is a litigant in person and the Tribunal understands how frustrating the litigation process can be, especially when there is no or little trust between the parties. The Tribunal recognised express findings of discriminatory motive are rare, and this is not one of those cases. Turning to the respondent, there was no evidence of any spiteful or malicious motive when HR failed to deal with the claimant's grievance in the belief that she was too unwell to attend a grievance meeting. The failure to act was incompetence, and not one of malice or spite and nor was the conduct high-

handed, insulting and oppressive as borne out by the communications between HR and the claimant and the inadequate attempts behind the scenes to arrange a manager to hear the grievance. For the sake of clarity, given the Tribunal's difficulty in fully understanding how the claimant puts this aspect of her claim, despite attempts at obtaining clarification, the Tribunal is satisfied there was a clear absence of motive when HR took the time it did to deal with the grievance and to award aggravated damages would not be in the interests of justice.

33. Turning to the manner in which the Tribunal proceedings was conducted by the respondent, there is no evidence of unnecessary aggression or retaliation against the claimant. The claimant is essentially criticising the litigation process, throughout which there is an ongoing requirement to disclose relevant documents up to and including the trial. The EAT in the well-known case of Zaiwalla and Co and anor v Walia [2002] IRLR 697, upheld an award of £7,500 for aggravated damages in a case where the employment tribunal found that the employer's solicitors had put a 'monumental amount of effort' into defending the proceedings to an 'inappropriate' extent. It further found that the defence of the proceedings was 'deliberately designed… to be intimidatory and cause the maximum unease and distress to the claimant'. The EAT took the view there was a very good public policy reason for allowing such a claim in an appropriate discrimination case, but its decision should not be taken as a 'green light' for claimants to claim aggravated damages in respect of the alleged misconduct of proceedings as a matter of course. Unlike the claimant's case in which there was no unnecessarily aggressive conduct and unobjectionable ways of conducting a defence, Zawalla was exceptional.

34. The fact that the respondent made and successfully obtained deposit orders against the claimant could not be considered oppressive.

Loss of earnings

35. During the claimant's absence due to ill-health between 4 October 2017 to 16 January 2018 when a Statement of Fitness for Work was issued on the same date the claimant resigned, the claimant was paid her contractual rate of statutory sick pay. The claimant argues that had the respondent dealt with her grievance she would have returned to work between 30 November and 17 January 2018, despite being signed off work with "exacerbation of the fibromyalgia" since 9 October 2017. On cross-examination the claimant gave different conflicting answers on when she would have returned to work, and the Tribunal noted during this period the claimant was in dialogue with her GP about her work situation.

36. The Tribunal found, preferring the oral submissions made by Mr French, the claimant would not have returned to work had the grievance been investigated, and given the Tribunal's findings in relation to all the other claims of unlawful discrimination that were unsuccessful, the claimant would not have returned to work had the grievance been found against her. The Tribunal, in arriving at this decision, also factored in the information provided by the claimant to her GP in October and November 2017 to the effect that the "new job was tough" and she "doesn't feel able to return to work is not up to coping w high pressure environment but can't leave as will not be eligible for benefits, expects her contract will be terminated, is going to seek

advice DWP." The GP records reflect the reality of the situation and the Tribunal finds the claimant, who had only undertaken part of her training, was still in her probation period and could not cope; she would not have returned to work on resolution of the grievance whether it had been in her favour or not.

37. In conclusion, the Tribunal finds the claimant had not suffered a loss of her earnings and her claim for loss of earnings is dismissed.

ACAS uplift

38. Section 207A(2) TULR(C)A provides that: 'if, in any proceedings to which this section applies, it appears to the employment tribunal that — (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.'

39. A respondent's failure to follow the Code in respect of a grievance raised by an employee is likely to lead to a compensation adjustment under S.207A only if the employer's failure to comply with the provisions of the Code is 'unreasonable'. Her Honour Judge Eady in Kuehne and Nagel Ltd v Cosgrove EAT 0165/13, observed an employment tribunal may only consider adjusting the compensatory award once it has made an express finding that a failure to follow the Code was unreasonable. For the avoidance of doubt, the respondent's failure to follow the Code in respect of Ms Melville was unreasonable and there were no mitigating factors.

40. The Tribunal recognises an employer's failure to follow its own internal procedures will not necessarily lead to a finding of a breach of the ACAS Code. Mr French submitted the uplift should be 12.5% on the basis that the Tribunal found the respondent considered the grievance had been put on hold pending the claimant's return to fitness and work., the claimant did not make any effort to chase it up and resigned before it could be dealt with. The Tribunal did not agree, it had found there was no basis for the respondent to take a view the claimant had agreed to wait until she was feeling well enough for the grievance to be heard, and the evidence was that the claimant was chasing up the grievance and this galvanised the respondent into responding but then it went no further. The facts do not support Mr French's submission that once Mr Johnston had been appointed the grievance would have been dealt with after the 8-week delay. It is possible, given the respondent's history of delay, that it would not have. In short, there was no evidence a grievance hearing was imminent and would have taken place had the claimant not resigned.

41. Where there has been an unreasonable failure to comply with the Code, the tribunal may increase or reduce the award if it 'considers it just and equitable in all the circumstances to do so'. In Lawless v Print Plus EAT 0333/09 Mr Justice Underhill, then President of the EAT, pointed out that although the phrase 'just and equitable in all the circumstances' connoted a broad discretion, the relevant circumstances were confined to those which were related in some way to the failure to comply with the statutory procedures. Underhill J acknowledged that the relevant circumstances to be

taken into account by tribunals when considering uplifts would vary from case to case but should always include the following:

- whether the procedures were applied to some extent or were ignored altogether
- whether the failure to comply with the procedures was deliberate or inadvertent, and
- whether there were circumstances that mitigated the blameworthiness of the failure to comply.

42. The substantial size and resources of the respondent are capable of amounting to a relevant factor in the tribunal's consideration of whether an uplift was appropriate and, if so, how much. In the claimant's written statement, she referred to HR being aware that she had a disability, and when the grievance was raised they were in the words of the claimant "contemptuous to disregard and not acknowledge promptly."

43. The Tribunal found there was a high degree of culpability on the part of the respondent when there had been a wholesale failure on the part of HR to comply with the statutory grievance procedure, aggravated by HR's deliberate attempt to try and argue the clamant had agreed to put her grievance on hold whilst she was off work ill when the evidence points to the contrary as found by the Tribunal following the liability hearing.

44. The starting point for the tribunal's consideration of the appropriate uplift is 25% and the degree of culpability on the employer's part is such that this should not be reduced given the fact HR had, in the words of Mr French during closing oral submissions, "failed to meet its own standards and the delay was unacceptable and lack of sensitivity can cause injury to feelings." This was not a case where the reason for the respondent's failure to complete the statutory grievance procedure was ignorance, it was deliberate disregard incorporating half-hearted attempts to arrange a hearing after indications to that effect had been given to the claimant. The Tribunal, in arriving at its decision that the respondent's failure to complete the statutory procedure was unreasonable, used its discretion in the claimant's favour and found it was just and equitable to penalise the respondent by a further 25% in the proportionate sum of £1305 taking into account the total size of the claimant's award against the backdrop of this one successful claim.

45. In conclusion, the respondent is ordered to pay damages for injury to feelings for unlawful disability discrimination for the period 20 November 2017 to 17 January 2018 in the sum of £4,500 (four thousand five hundred) plus interest of £720.00 (20 November 2017 to 28 November 2019 @ 8%) totalling **£5220.00.**

46. The respondent is ordered to pay the claimant a 25% ACAS uplift for failure to deal with her grievance in the sum of £1305.00.

47. The claimant's claim for aggravated damages is dismissed upon withdrawal.

48. The claimant's application for a preparation time order is dismissed upon withdrawal.

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Employment Judge Shotter

13.12.2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

20 December 2019

FOR THE SECRETARY OF THE TRIBUNALS

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2403284/2018**

Name of case: **Ms H Melville** v **Santander UK Plc**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **20 December 2019**

"the calculation day" is: **21 December 2019**

"the stipulated rate of interest" is: **8%**

For the Employment Tribunal Office