Case Numbers: 2208119/2016, 2200305/2018 & 3200680/2019

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EMPLOYMENT TRIBUNALS

Claimant: **Ms S Conduit**

Respondent: **Rosslyn Hill Unitarian Chapel**

Heard at: **East London Hearing Centre**

On: **Monday 27 January 2020**
& (in Chambers) Monday 10 February 2020

Before: **Employment Judge Ross**

Members: **Ms M Long**
Mr M Rowe

Representation

Claimant: Mr M Sprack (Counsel)

Respondent: Ms Millin (Counsel)

RESERVED REMEDY JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1. The Respondent shall pay the Claimant total compensation of £30,021.91 assessed as follows:

1.1. £28,652.91 in respect of compensation for injury to feelings for disability discrimination and loss of earnings, assessed as follows:

1.1.1. £2,000 for the breach of the duty to make reasonable adjustments between 1 June 2016 and 19 July 2016 plus interest of £453.26;

1.1.2. £12,500 for the victimisation on 27 September 2017 plus interest of £2,383.56;

1.1.3. £10,331.10 for loss of earnings, with interest of £984.99.

1.2. £1,369 for unlawful deduction from wages.

REASONS

Introduction & Remedy issues

1. After the Judgment on liability in these Claims was promulgated, a Preliminary Hearing took place on 18 June 2019. The issues for determination at this Remedy hearing were set out in the Case Management Summary as follows:

1.1. What compensation for disability discrimination is the Claimant entitled to? This includes:

1.1.1. What injury to feeling award is the Claimant entitled to;

1.1.2. Whether the Claimant has suffered any personal injury due to the acts of discrimination found proved;

1.1.3. what pecuniary loss has the Claimant suffered due the discrimination found proved;

1.1.4. what interest on the award of compensation is the Claimant entitled to?

1.2. What compensation is the Claimant entitled to for unlawful deduction from wages?

2. Given the disputes between the parties over the compensation which should be awarded for the two acts of disability discrimination, and in view of the legal argument about causation and whether the harm suffered by the Claimant was divisible or indivisible (with the Claimant's case being that the harm was indivisible and that she was unable to work again), we decided to reserve judgment. After the first day of the Remedy hearing (27 January 2020), the Tribunal met again in chambers at the first available opportunity on 10 February 2020 in order to reach its conclusions.

3. In arranging a further date to meet in chambers, having read the report of the single joint expert psychiatrist, we recognised that a delay by the Tribunal in reaching conclusions would be an obstacle in the recovery of Claimant. However, we considered that this short further delay was proportionate and compatible with the proper consideration of the issues, particularly in a case where the Claimant's Schedule of Loss argued for an award of about £260,000 and the Respondent's Counter-Schedule proposed an award of £6,249.

4. Reasonable adjustments were made for the Claimant at the outset of this hearing. No complaints were made by either party about the adjustments made.

Further Evidence

5. We read a further witness statement from the Claimant and heard oral evidence from her. The Respondent did not adduce any witness evidence.

6. There was an agreed Remedy Bundle (p1-57). Pages in this set out Reasons refer to pages in that Bundle.

7. In addition, the Claimant had served an updated Schedule of Loss, the contents of which it is not necessary to summarise. It should suffice to state that the Tribunal took into account each part of this Schedule and all the relevant evidence adduced by the Claimant.

8. The Respondent had prepared a much briefer Counter-Schedule of Loss.

The Expert Evidence: the joint expert's report

9. The parties jointly instructed Dr. Con Cullen, Consultant Psychiatrist. Having set out his instructions, the report sets out the Claimant's psychiatric and medical history taken from the Claimant: see section 3.

10. In Section 3, the report recorded that the Claimant said that her anxiety and depression had come on quickly after her accident (which was in 2015), and was a result of the accident and the resulting disability. She stated that her depression had escalated over time. The Claimant explained that she sees her Consultant Psychiatrist Dr Pryde every two months; and she had also started CBT this year and had three sessions. However, she was advised by Dr. Pryde to defer CBT until the current case was concluded.

11. We refer to relevant parts of the report in the course of this set of Reasons.

12. The report contains a detailed review of the GP records: see section 8. The Tribunal took that review and the GP records in the bundle (pp 15-35) into account. We have not repeated the content of those records, nor the content of the expert's report, in order to respect the Claimant's right to a private life. It is important for the parties to recognise that we took all the medical evidence into account, even though it is not repeated.

Expert Opinion

13. The conclusions on the questions asked were provided by the expert at section 10 of the report. We have considered all of those conclusions and taken them into account.

14. After receipt of the report, Dr. Cullen also answered questions put by the parties.

15. In answer to a question about paragraphs 9.1 to 9.4 of the report, Dr. Cullen stated that he was unable to attribute percentages to individual potential causes of the depressive illness: see response 2 to Claimant's questions [p141].

16. In addition, in answer to question 5 from the Claimant, he explained that she was not fit for work due to depression, and that she was unfit to work from April 2016 based on medical records, notwithstanding her physical health problems.

17. In Dr. Cullen's opinion, the Claimant was able to work full-time at the level she worked at prior to dismissal, if her depression resolved: see response 6 to Claimant's questions.

Additional findings of fact relevant to remedy

18. The Claimant had a first episode of depressive illness in about 1999.

19. The Tribunal found that the trigger for the Claimant's second episode of depressive illness, which began in 2015, was the result of the physical injury caused by the accident in 2015. The accident had led to major spinal surgery on 2 June 2015. This led to impaired mobility and the Claimant's resulting physical disability.

20. In cross-examination, it was put to the Claimant that the loss of mobility must have been depressing. The Claimant contended that it was challenging. We found, however, that her perception was not accurate, and that the life changing loss of mobility was the trigger for, and the main cause of, the current depressive illness suffered by the Claimant: see expert's report (para 8.3) and the GP notes for 17.8.15. This led the GP to refer her to a psychologist. We found that, as noted in the GP letter to the Advice Centre of 6 February 2017, the Claimant had depression secondary to the accident and the loss of mobility which followed from it.

21. As a result of the GP referral, the Claimant began seeing a Clinical Counsellor from September 2015. At the time, the Claimant was worried about her future, how she would be able to return to work at the Chapel, and worried about how she would cope with day to day living, given her limited mobility: see also letter from GP, 6 February 2017.

22. The Claimant had experienced a breakdown in her long-term relationship in 2012. In late 2015 and early 2016, she was dealing with division of the equity in a property following that breakdown. This was resolved in early 2016. We found that these events (the breakdown of the relationship and resolution of the property ownership matters) were likely to have caused some exacerbation of the Claimant's depression.

23. Despite seeing the Counsellor once per week, the Claimant's depressive symptoms increased up to May 2016: see the GP notes 7 April 2016 (para 8.6 report).

24. The inference from the GP notes extracted in the expert's report (paragraphs 8.6-8.9), and from the response of Dr. Cullen to the Claimant's question 5, is that the Claimant had such a degree of depression by April 2016 that this was causing the GP concern: see GP records for 7 April 2016. Dr. Cullen's opinion was that she was unfit to work due to depression by April 2016.

Effect on the breach of duty to make Reasonable Adjustments 1 June 2016 to 19 July 2016

25. The breach of the duty to make reasonable adjustments between 1 June and 19 July 2016 did injure the Claimant's feelings. The Claimant felt hurt, because she valued her work and had been told that she could not work from home any longer, despite the fact she had been doing this since September 2015. This added to her anxiety, because she was concerned that the Respondent might not support her to remain at work full-time nor support her as a disabled person.

26. However, on the face of the medical evidence taken as a whole, including the GP records, this breach had only a very minor detrimental effect on the Claimant's mental state. For example, the GP notes after 1 June 2016 do not refer to this breach as causing any additional or exacerbated symptoms: see for example the entry for 12 June 2016 and the letter from Dr. Bose to Dr. Jane Crispin on 16 June 2016, neither of which refer to this breach. Our finding as to the effect of this breach is supported by paragraph 9.8 of Mr. Cullen's report.

27. We found that the failure to make reasonable adjustments over the period 1 June to 19 July 2016 had no practical effect on the Claimant's ability to work nor to carry out daily activities.

28. The Claimant's mother suddenly passed away on 23 August 2016. This shocked the Claimant; in her statement, she explained that she felt very sad and processed the grief over 12 months. In cross-examination, she accepted that this was a stressful experience. Despite the Claimant's oral evidence, we found that this event, coming after the life changing loss of mobility and the breakdown of a long-term relationship and division of property, was likely to exacerbate her depression and inhibit any improvement in her symptoms of depression.

29. On the face of the medical notes, the Claimant was managing her physical impairment and her depressive symptoms up to around February 2017.

Effect of events in 2017

30. On the face of the evidence within the GP records, the Claimant's symptoms were exacerbated by the fact that the judicial mediation (which was on 16 February 2017) did not lead to a resolution of her first Claim. The Claimant's perception was that the Respondent was not interested in resolving the issues raised by it: see GP notes of 20 February 2017 [p.28]; it appears that the Claimant was not coping, anxious that her mental state may deteriorate, and that she wanted to re-start anti-depressant medication.

31. The Tribunal found that this GP note supported the expert's opinion that, at the date that he examined the Claimant, these proceedings were causing the depression to continue. These proceedings were set to continue after judicial mediation, in circumstances in which the Claimant had had a life changing injury causing disability, her mother had passed away, and she had no long-term relationship. The Claimant

valued her work and the continuation of the proceedings fed her perception that she was being treated adversely by her employer.

32. By 4 September 2017, as evidenced by the letter from the Counsellor (set out at 8.22 of the report), the Claimant perceived that she was being regularly bullied or put under pressure by members of the Committee, although we found no evidence in fact to support this in our findings on liability (but we did, of course, make findings that the Respondent had breached the duty to make reasonable adjustments for one period and that it was guilty of one act of victimisation in September 2017 perpetrated by Mr. Fenton).

33. We found that the prospect of and the hearing of these Claims was a major cause of the continuation of the depressive illness for the Claimant. This fact is evidenced by the letter of the Counsellor of 4 September 2017 and supported in the expert opinion, including as to prognosis: see paragraphs 9.10 and 9.11 of the report; and was supported also in the GP notes for 20 February 2017.

34. We accepted the expert opinion evidence that the act of victimisation on 27 September 2017 had a very significant detrimental effect on the Claimant's mental health. This expert opinion was to some extent supported by the GP records for 28 September 2017 and later in 2017 and corroborated by the Claimant's oral evidence. However, the Claimant's oral evidence was that the comment of Mr. Fenton was the main reason that she could not come back to work and that it "*destroyed*" her; but, although we accepted that this is now her perception, we did not find that this was correct as a matter of fact. We noted that, over time, the Claimant's perception of events had distorted certain matters. For example, in her oral evidence she described absence meetings as being disciplinaries and that she was pressured at each such meeting to drop her Claim, although such an allegation did not form part of her case or our findings at the liability stage. Further, the Claimant stated in answer to a question from the Tribunal that on 27 September 2017, after the meeting, she had taken certain action against herself, but this was not supported in the GP records which made no mention of this, which the Tribunal found to be inconsistent.

35. The Claimant found the comments made by Mr. Fenton (which we found to be victimisation) to be very upsetting. In particular:

35.1. The comments put pressure on the Claimant to withdraw her Claim. The Claimant felt that pressure and it upset her.

35.2. As we explained in the Judgment on liability at paragraph 244.1, the comment that members of the Chapel congregation were scared of the Claimant was not true; it had the effect of intimidating her, because she had always had good relations with members of the Chapel and the congregation was so small that she would be likely to know each member to some degree.

35.3. This comment, combined with the assertion that she was doing herself "no favours" by continuing the claim, had the effect of causing anxiety to the Claimant, that she would be a target for disapproval. We emphasise

that there would be a certain intimacy in relationships where the congregation was so small.

35.4. The Claimant found that the comments were inappropriate, because she had attended the meeting on 27 September 2017 with Mr. Rahman, who had prepared a report in advance which explained that the Claimant was vulnerable due to her mental health. Mr. Fenton knew this. Despite this, and quite unexpectedly, Mr. Fenton made the comments complained of, which the Claimant had had no time to prepare for.

35.5. The Claimant's work was important to her, being a place that she felt that she could function and succeed. The comments provided pressure by suggesting that she may not be successful if she continued.

36. We examined how long the significant detrimental effect of the incident of 27 September 2017 continued and considered whether this effect went beyond the end of the Claimant's employment.

37. By 16 March 2018, when reviewed by Dr. Pryde (her treating psychiatrist), her condition was fairly similar to when he last met her. We incorporate his letter of that meeting. This letter stated that the Claimant's employment situation continued to drag on and she continued to ruminate on this and on her wish to get her old life back.

38. From the GP records, the inference is that Dr. Pryde last saw the Claimant in December 2017, which is consistent with the Claimant's account that she saw him every two months.

39. We found that this evidence demonstrated that the accident and spinal surgery which led to substantial loss of mobility were still the dominant cause of her depressive symptoms in September 2017. Our finding is supported by the GP's letter to the Legal Advice Centre of 27 November 2018, which sets out that the Claimant has not come to terms with her physical disability. Furthermore, our finding is supported by the report of Dr. Roxborough Clinical Psychologist, dated 6 June 2018.

40. In addition, the GP letter of 27 November 2018 describes the Claimant's mental health as fluctuating since the spinal operation, and as going into crisis from time to time, at which points she would be seen by the GP. We have no doubt that the victimisation of 27 September 2017 caused such a crisis.

41. Doing the best that we can on all the evidence before us, and taking a rough and ready approach, we consider that this victimisation caused an exacerbation of the depressive illness for a period of about six months.

42. Moreover, the medical records led the Tribunal to infer that the Claimant's childhood experiences were a further cause of exacerbation of her depression and anxiety: see GP records for 3 November 2017 and see [p23].

43. The Claimant is not currently fit for work. In her oral evidence, she stated that she did not think she would ever go back to work. Again, we found that in evidence her perception of the future was unduly negative, probably due to her low mood. For example, the GP notes record at 3 November 2017 that she was planning for the future, by updating her CV, and was very keen to find job after the employment tribunal over. Moreover, in oral evidence, the Claimant confirmed that she was now doing voluntary work, albeit only for one hour per week during term time; and the Claimant accepted that she could seek part-time work online but that she could not "guarantee" that if she found a job she could get up every day to get to it.

44. However, viewing all the medical and factual evidence, we found that before the Claimant could return to work, she was likely to need a period of recovery and a course of psychotherapy (whether CBT or otherwise). The expert opinion gave the Tribunal little assistance on how long recovery of the depressive illness would take.

45. Given the medical evidence as to her current mental health and given her evidence to us, we concluded that after this litigation she would not be fit enough to work for about 12 months.

46. It is necessary to address one argument by the Claimant, which was that the Tribunal should not, in effect, restrict her right to pursue enforcement of her civil rights by pursuing these Claims. There was no suggestion by the Respondent or the Tribunal that the Claimant was not entitled to bring these Claims in the Employment Tribunal, nor that she be restricted in any way from advancing her civil rights. Equally, there was no suggestion that the Respondent acted in such a way after the victimisation so as to extend these Tribunal proceedings. However, the medical evidence led us to conclude that the cause of her depressive illness continuing chronically was this litigation; it was not caused by the exacerbation of her depression caused by the victimisation in September 2017.

Relevant Law

Injury to feelings

47. The principles of law to be applied by the Tribunal when assessing injury to feelings are set out in *Armitage v Johnson* [1997] IRLR 162, paragraph 27, which we summarise as follows:

47.1. Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award;

47.2. Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches;

47.3. Awards should bear some broad general similarity to the range of awards in personal injury cases – not to any particular type of personal injury but to the whole range of such awards;

47.4. Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings;

47.5. Tribunals should bear in mind the need for public respect for the level of awards made.

48. The matters compensated for by an injury to feelings award encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (see *Vento v Chief Constable of West Yorkshire Police (No2)* [2003] IRLR 102).

49. Further, we took into account the Presidential Guidance on Employment Tribunal awards for injury to feeling and psychiatric injury issued on 5 September 2017. [Note that the Claim in respect of the failure to make a reasonable adjustment to permit working from home in 2016 was presented on 21 October 2016; the Claim in respect of the Fenton comment was presented on 30 January 2018. Therefore, the Addendums to the Presidential Guidance did not apply].

50. We reminded ourselves of, and applied, the following from the relevant Presidential Guidance:

> *10. 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: a lower band of **£800 to £8,400** (less serious cases); a middle band of **£8,400 to £25,200** (cases that do not merit an award in the upper band); and an upper band of **£25,200 to £42,000** (the most serious cases), with the most exceptional cases capable of exceeding £42,000.*
>
> *11. 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 x divided by y (178.5) multiplied by z and where x is the relevant boundary of the relevant band in the original Vento decision and z is the appropriate value from the RPI All Items Index for the month and year closest to the date of presentation of the claim (and, where the claim falls for consideration after 1 April 2013, then applying the Simmons v Castle 10% uplift).*

51. There was no suggestion that the Claimant was entitled to aggravated damages.

Personal injury & medical evidence

52. The assessment of damages for psychiatric injury is a question of fact to be determined by the Tribunal.

53. Injury to feelings and psychiatric injury are distinct. But in practice, they are not always separable, leading to a risk of double recovery; it may be impossible to say when the distress and humiliation becomes a psychiatric injury. Mr. Sprack explained that there was such an overlap between injury to feelings and psychiatric injury in this case no separate award for pain suffering and loss of amenity ("PSLA") was sought. He invited the Tribunal to make a global award of general damages which took into account the personal injury. We proceeded on this basis and made no separate award for PSLA.

54. Given the guidance in *Armitage* (that awards for injury to feelings should bear some broad general similarity to the range of awards in personal injury cases), the Tribunal also considered the Judicial College Guidelines for the Assessment of Damages in Personal Injury Cases, 14th Edition (i.e. not the 15th Edition published in 2019). These include:

> ***"Psychiatric Damage Generally***
>
> *The factors to be taken into account in valuing claims of this nature are as follows:*
>
> *(i) the injured person's ability to cope with life, education, and work;*
>
> *(ii) the effect on the injured person's relationships with family, friends, and those with whom he or she comes into contact;*
>
> *(iii) the extent to which treatment would be successful;*
>
> *(iv) future vulnerability;*
>
> *(v) prognosis;*
>
> *(vi) whether medical help has been sought;*
>
> *(vii) Claims relating to sexual and physical abuse usually include a significant aspect of psychiatric or psychological damage. ..."*

55. There are four categories of award (including the *Simmons v Castle* uplift):

1) Less Severe: between £1,350 and £5,130. Where the claimant has suffered temporary symptoms that have adversely affected daily activities;

2) Moderate: between £5,130 and £16,720. Where, while the claimant has suffered problems as a result of the discrimination, marked improvement has been made by the date of the hearing and the prognosis is good;

3) Moderately Severe: between £16,720 and £48,080. Moderately severe cases include those where there is work-related stress resulting in a

permanent or long-standing disability preventing a return to comparable employment. These are cases where there are problems with factors a) to d) above, but there is a much more optimistic prognosis than Severe;

4) Severe: between £48,080 and £101,470. Where the claimant has serious problems in relation to the factors at i) to iv) above, and the prognosis is poor.

Divisible and Indivisible Harm

56. The Tribunal considered whether the harm suffered by the Claimant in this case was 'divisible' or 'indivisible'.

57. The Tribunal directed itself that divisible harm is where different acts cause different damage, or quantifiable parts of the damage. In these cases, the tribunal must establish and award compensation only for that part of the harm for which the respondent is truly responsible. Indivisible harm is where multiple acts result in the same damage.

58. Mr. Sprack argued that, in this case, the harm was indivisible; but if the harm was divisible, the act of victimisation in particular was a substantial cause of the harm.

59. In *Olayemi v Athena Medical Centre & Anor* UKEAT/0140/15, paragraphs 23-25, the EAT (HHJ Richardson) provided the following guidance on the question of divisibility of harm:

> *23. ….It is helpful to cite a passage from Devlin LJ in Dingle v Associated Newspapers Ltd [1961] 2 QB 162 , 188–189:*
>
> *"This conclusion appears to me to be in accordance with, and indeed to exemplify, a fundamental principle in the law of damage. Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not. If four men, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings. If there were four distinct physical injuries, each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have given the loss of earnings is one injury caused in part by all four defendants. It is essential for this purpose that the loss should be one and indivisible; whether it is so or not is a matter of fact and not a matter of law. If, for example, a ship is damaged in two separate collisions by two wrongdoers and consequently is in dry dock for a month for repairs and claims for loss of*

earnings, it is usually possible to say how many days' detention is attributable to the damage done by each collision and divide the loss of earnings accordingly."

24. It is, therefore, clear in principle that when there are competing causes for an injury a court or tribunal must consider the question of divisibility: both whether the injury is divisible and how it may be divided between the causes. The two questions go together and are essential elements of the reasoning.

25. The passage which I have quoted from Dingle also seems to me to indicate a common sense approach to divisibility. It is more likely that an injury will be held to be indivisible if the competing causes are closely related to the injury and it is difficult to separate out their consequences. Each case will depend on the evidence; the principles are the same where the injury is psychiatric but such is the complexity of the human mind that it may, in practice, be difficult to separate out the impact of different causes."

60. In *BAE Systems (Operations) Ltd v Konczak* [2017] EWCA Civ. 1188, the Court of Appeal held:

60.1. Where the harm has more than one cause, a respondent should only pay for the proportion attributable to their wrongdoing unless the harm is truly indivisible.

60.2. Tribunals should try to "*identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong, and a part which is not so caused*." The Tribunal should see if it "*can identify, however broadly, a particular part of the suffering which is due to the wrong*".

60.3. Where such a 'rational basis' can be found, the Tribunal should apportion accordingly, even if the basis for doing so is '*rough and ready*'.

60.4. Any such assessment must consider any pre-existing disorder or vulnerability, and account for the chance that the claimant would have succumbed to the harm in any event, either at that point or in the future.

60.5. In cases of psychiatric injury, careful evidence should be obtained from experts, particularly in relation to the likelihood of suffering the harm in any event.

Principles of calculating pecuniary loss in discrimination cases

61. In *Chagger v Abbey National and Hopkins [2009] EWCA Civ. 1202*, *[2010] IRLR 47*, confirmed that the general rule in assessing compensation for the statutory tort of discrimination is that damages are to place the claimant into the position he or she would have been in if the wrong had not been sustained, i.e. the discrimination had not occurred: see paragraphs 56-60.

Submissions

62. Counsel provided written submissions, which they expanded upon orally at the hearing. It is neither proportionate nor practicable for all the submissions to be summarised in these Reasons. We emphasise that we took each submission into account even if we do not refer to each argument below.

63. At the outset of the hearing, Ms. Millin complained that personal injury had not been mentioned in any of the three claims presented, and could not be pursued now. We found that this was a weak argument in this case, not least because the time to make that challenge should have been at the Preliminary Hearing, rather than agreeing in principle to expert evidence from a psychiatrist, and because the damage that flows from the tort of discrimination and the degree of injury to feelings suffered may not be apparent at the time of issue. In any event, the Claimant did not seek a separate award for personal injury.

Conclusions

64. Applying the law set out above to the findings of fact made, and having applied the test for compensation in discrimination claims set out in *Chagger v Abbey National PLC (*especially at paragraphs 56-60), the Tribunal reached the following conclusions.

1) Unlawful deduction from wages 1.6.16 to 19.7.16

65. It was agreed that the Claimant was entitled to £1,369 in respect of unpaid wages.

2) Discrimination and Victimisation

Injury to feelings

66. Mr. Sprack contended that the Claimant had suffered injury to feelings which should be compensated by an award towards the upper end of the middle *Vento* band; the amended Schedule of Loss valued the victimisation by the Fenton comment at £25,700 and the failure to make reasonable adjustments at £8,600. The Respondent's case was that the award for each act of discrimination was in the lower *Vento* band and proposed a total award of £4,880, valuing the act of victimisation at £4,000.

67. The Claimant's case was that the victimisation by the Respondent on 27 September 2017 had substantially exacerbated her pre-existing psychiatric condition.

68. We have set out in our further findings of fact the injury to the Claimant's feelings that each act of discrimination produced: see paragraphs 25-26 and 34-35 above.

69. Applying the law set out above and the findings of fact made, we concluded as follows.

70. In respect of the failure to make reasonable adjustments, we concluded that this fell within the lower band of the *Vento* guidelines. We took into account the relevant findings of fact above and in the liability judgment including paragraph 54.

71. We recognised that although this discrimination had the effect of continuing over 7 weeks, there was no suggestion by the Claimant that the breach was part of a campaign. The Tribunal concluded that this discrimination was the product of an honestly held ignorance of the duty to make reasonable adjustments and of the terms of her contract.

72. Although the Claimant felt hurt and her anxiety increased for reasons set out in paragraph 30, the Respondent made the adjustment sought (of the Claimant working at home for two days per week) from 19 July 2016 after a letter from the Claimant's legal adviser.

73. We found that this discrimination fell within the lower band of Vento. We award £2,000 in respect of this discrimination. We found that this was in reality a relatively isolated, one-off incident. This discrimination had no real impact on the Claimant's mental health; and it was not identified at all in the GP notes. We considered whether an award in this sum had a broad similarity with personal injury awards; we concluded that it did particularly when viewed against the "Less Severe" category of awards for personal injury.

74. The interest due on this award is £2000 x 8% x 1304 days, which equates to £453.26.

75. In respect of the victimisation found proved, we accepted Mr. Sprack's submission that this had a more serious effect in causing injury to the Claimant's feelings. We concluded (as accepted in the Claimant's submissions) that there was no malice on the part of Mr. Fenton nor anyone else present. His words were (very) ill-judged.

76. We have explained above how and why the Claimant's feelings were injured.

77. In addition, we have set out in our findings of fact that this victimisation exacerbated the Claimant's depression, by causing her to go into crisis for about 6 months.

78. We accepted the Claimant's case that the award for this discrimination should fall within the middle band of *Vento* when the appropriate PSLA was factored in. However, we concluded that the appropriate award was £12,500. Taking a rough and ready approach, and if it were necessary to do so, this could be broken down broadly into £5,000 for injury to feelings and £7,500 for the psychiatric injury.

79. The interest on this award is calculated as follows: £12,500 x 8% x 870 days, which equates to £2383.56.

80. In reaching the figure of £12,500, we considered the following matters in particular:

80.1 Injury to feelings awards are compensatory. The size of this award provided adequate compensation. This was demonstrated when it was compared to the whole range of personal injury awards, particularly those for psychiatric injury. In this case, while the Claimant had suffered problems as a result of the discrimination, improvement had been made by the date of the hearing; and the prognosis would be improved by the conclusion of the litigation and some form of therapy.

80.2 This award was neither too low, nor too high. It was sufficient to mark the seriousness of the impact of the discrimination. It would ensure that public respect for the level of awards was upheld.

80.3 The Tribunal took into account the value in everyday life of this sum. We noted that it was roughly equivalent to 6 months net loss of earnings for the Claimant; and this was the period of time over which we found that her depression was exacerbated.

Pecuniary loss caused by the discrimination; conclusions on divisibility

81. Applying the guidance in *Olayemi* and *Konczak*, we found that the harm in this case was divisible.

82. The causes of the depressive illness in this case are not closely related in time or nature to the psychiatric injury which was triggered in 2015.

83. Having considered the Claimant's evidence and the medical evidence, we find that the spinal surgery, and the resulting life-changing impairment of the physical ability of the Claimant, were the trigger and the predominant cause of her current episode of depression and anxiety which had endured from 2015.

84. Additional causes of exacerbation of her symptoms of moderate to severe depressive illness over the duration of this episode of depression from 2015 were demonstrated in the evidence. We found that these included:

84.1 The effects of the ongoing chronic pain from the Claimant's physical disability;

84.2 The loss of the Claimant's mother;

84.3 The need to divide property after the earlier breakdown of a long-term relationship;

84.4 The Claimant's perception of *"adverse experiences at work"* (which included mainly non-discriminatory events which she perceived after the event to be bullying or harassment; and we found no such harassment or bullying occurred);

84.5 The victimisation comment by Mr. Fenton in September 2017;

84.6 This ongoing Employment Tribunal litigation.

85. We concluded, from all the evidence, that the breach of the duty to make reasonable adjustments in June – July 2016 had minimal effect on the Claimant's depression and that no pecuniary loss flowed from it.

86. We accepted Dr. Cullen's opinion that the depressive illness is moderate to severe. Dr. Cullen's opinion does not apportion to the individual causes of the moderate to severe depression any specific weight, in terms of awarding percentages to each cause. In effect, determining what apportionment should be awarded to each of the causes identified is the exercise that this Tribunal must perform.

87. The Tribunal consider that a rational basis for apportioning the harm caused by the victimisation is as follows:

87.1 In respect of paragraph 10.4 of the expert's report, Dr. Cullen provided no explanation in that paragraph of the meaning of his opinion that that the victimisation on 27 September 2017 had a "*very significant detrimental effect*" on the Claimant's mental health. When asked to elaborate on this paragraph in a question from the Claimant, Dr. Cullen responded: "*As described at our interview and in GP records*". In seeking to understand the expert opinion at 10.4, the Tribunal paid close attention to the GP records and the instructions provided by the Claimant in her interview with him. However, the Tribunal recognised that it had already made findings of fact on liability. These included, for example, that the Claimant was not dismissed for redundancy (but was dismissed fairly for the reasons set out in the liability Judgment), that the Respondent had not harassed or bullied the Claimant by any course of conduct, and that there were two acts of discrimination separated by more than one year and involving different people not acting in concert.

87.2 The Tribunal concluded that Dr. Cullen had chosen his words carefully. He identified different causes of exacerbation of the Claimant's depression, distinguishing those from the underlying or pre-existing cause namely the life changing physical consequences of the accident and spinal surgery.

87.3 This led the Tribunal to distinguish between the predominant cause of the depressive illness overall, which was the life changing injury and surgery in 2015, and the causal factors which exacerbated the Claimant's depression over certain periods.

87.4 Moreover, Dr. Cullen considered that the Claimant's "*adverse experiences*" at work had contributed to the exacerbation of her depression. However, he found that this litigation was causing the depressive illness to continue chronically; and that timely resolution of the case was very likely to bring about significant improvement in her mental health. The report does not contain expert opinion that the effect of the victimisation on 27 September 2017 is ongoing and causing the depression to continue.

87.5 The GP recorded that the Claimant's depressive symptoms fluctuated; and that she sought medical support when in crisis. We have found that the victimisation on 27 September 2017 caused such a crisis.

87.6 The Tribunal concluded that the exacerbation of the depression due to the act of victimisation was sufficient to cause her to stop working for the period of 6 months from 27 September 2017. Therefore, the loss of earnings over that period was caused wholly by the act of victimisation.

Loss of earnings from last act of victimisation (27 September 2017)

88. Mr. Sprack's submission that it was not open to the Tribunal to determine that the Claimant would have stopped working for the Respondent or become unfit for work had she not been victimised had some, limited, persuasive effect. To begin with, the Tribunal had already found as a fact that the Claimant was fairly dismissed; we found that this was not caused or contributed to by the act of victimisation: see the conclusions at paragraphs 258-264 of the liability Judgment. It would be contrary to justice, if not principles of abuse of process (or *res judicata*), to allow the Claimant to advance a case now which sought to undermine the findings of fact made at the liability stage. Secondly, the expert evidence (in response to a question asked by the Claimant) was that the Claimant was unfit for work from April 2016 – some 18 months before the act of victimisation – albeit that she did not stop working until after 27 September 2017.

89. We concluded that the Claimant would have inevitably been dismissed, at the date when she was dismissed, irrespective of the two acts of discrimination found proved, including the Fenton comments on 27 September 2017.

90. However, we accepted the submission of Mr. Sprack that the fair dismissal did not mean that she had no loss of earnings. We reminded ourselves of the guidance in *Chagger*. Essentially, the Claimant should be put back in the position that she would have been in, but for the two acts of discrimination. The issue is whether the Claimant has suffered loss of earnings which flows from either of those two acts; and if so, what compensation for loss of earnings should be awarded.

91. The Claimant had loss of earnings for the 6 month period from 28 September 2017 onwards, during which she was only earning SSP of £89.35 per week; her net pay had been £486.70. Therefore, we conclude that the Claimant's loss of earnings was:

26 weeks x (486.70 – 89.35) = £10,331.10

Interest at 8% from midpoint between victimisation date and date of calculation (14.2.20) = 435 days = £984.99

92. Although not relevant given our conclusions above, we have gone on to consider what the Claimant's loss of earnings would be, if the Respondent was found to be responsible for all of them (that is, if we were wrong in law to find the depressive illness was exacerbated for only 6 months).

93. We concluded, doing the best we can, that the Claimant's health will substantially improve after the conclusion of this litigation. We concluded that the Claimant will be able to work again after 12 months from promulgation of this Judgment. This would, in the experience of the Tribunal, be long enough for the Claimant to complete a course of CBT and/or other therapy; and, on the medical evidence before us, this treatment would assist the Claimant to make such improvement. Moreover, this litigation has been identified by Dr. Con as the obstacle to the improvement of the Claimant's condition; and this Judgment could well bring this litigation to an end.

94. We concluded that after 12 months, the Claimant will be fit to return to some form of work which we found could be work for a similar number of hours and pay per week as she was working for and earning from the Respondent at the time of the act of victimisation (which is what she would have been earning at dismissal had she not been absent sick). In particular, we note that there is no evidence that the Claimant will not recover her mental health to the state she held prior to the discrimination.

95. As should be apparent from our findings of fact and our conclusions above, we rejected the Claimant's contention that she is entitled to compensation from now until a prospective retirement age of 67.

Mitigation of Loss

96. The Tribunal has considered the issue of mitigation of loss in case it should be found to have erred in law in reaching the conclusions set out above.

97. The burden of proof is on the Respondent to prove that the Claimant beached her duty to mitigate her loss: see *Ministry of Defence v Hunt* [1996] ICR 554.

98. On the face of the medical evidence taken with the evidence of the Claimant, so far as this was accepted, the Tribunal did not find that the Respondent had discharged the burden of proof.

99. It was apparent from Dr. Cullen's report that the Claimant was unfit to work. If, contrary to our findings and conclusions, the Respondent was liable for the Claimant being unable to work after her dismissal, we concluded that there had been no breach of the duty to mitigate by the Claimant. There was no evidence that the Claimant had acted unreasonably; the ongoing litigation meant that her depression had continued.

Employment Judge Ross

14 February 2020