EMPLOYMENT TRIBUNALS

Claimants: (1) Mr MW Kelly
(2) Mrs J Kelly

Respondents: (1) 3L Care Limited
(2) The Executors of the Estate of Peter Stock
(3) Brian Higgins

HELD AT: Manchester **ON:** 28-30 January 2020

BEFORE: Employment Judge Franey
Ms L Atkinson
Ms B Hillon

REPRESENTATION:
Claimants: Mr D Northall (Counsel)
Respondents: Miss K Barry (Counsel)

REMEDY JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. By consent under rule 34 the executors of the estate of Peter Stock are substituted as second respondent in place of the late Peter Stock.

2. The following awards are made in relation to the first claimant **Mr MW Kelly**:

   (a) The first respondent is ordered to pay to Mr Kelly the gross sum unlawfully deducted from his pay by way of reimbursement of tax on director's loans, a sum agreed as being £**10,762.59**.

   (b) The first respondent is ordered to pay to Mr Kelly the sum of £**25,000.00** as damages for breach of contract relating to notice of termination of employment.

   (c) The first respondent is ordered to pay Mr Kelly compensation for unfair dismissal consisting of a basic award agreed as being £4,401.00 and a compensatory award agreed as being £75,000.00, making a total of £**79,401.00**. The recoupment regulations apply to this award. The prescribed period is between 13 October 2017 and 30 January 2020. The prescribed amount is £74,500.00. The total monetary award for

unfair dismissal is £79,401.00. The amount by which the total monetary award exceeds the prescribed amount is £4,901.00.

3. The following awards are made in relation to the second claimant **Mrs J Kelly**:

(a) The first respondent is ordered to pay to Mrs Kelly the sum of £**25,000.00** as damages for breach of contract relating to notice of termination of employment.

(b) The first respondent is ordered to pay Mrs Kelly compensation for unfair dismissal consisting of a basic award agreed as being £2,200.50 and a compensatory award agreed as being £75,000.00, making a total of £**77,200.50**. The recoupment regulations apply to this award. The prescribed period is between 13 October 2017 and 30 January 2020. The prescribed amount is £74,500.00. The total monetary award for unfair dismissal is £77,200.00. The amount by which the total monetary award exceeds the prescribed amount is £2,700.50.

(c) As compensation for a breach of the duty to make reasonable adjustments in relation to the investigation meeting in August 2017 the first respondent is ordered to pay Mrs Kelly the sum of £5,000 in respect of injury to her feelings, together with interest of £978.93, making a total award of £**5,978.93** against the first respondent only.

(d) As compensation for a breach of the duty to make reasonable adjustments in relation to the disciplinary hearing in October 2017 the first respondent and the third respondent Mr Higgins are jointly and severally ordered to pay Mrs Kelly

(1) the sum of £20,000 in respect of injury to her feelings, including an element for aggravation of that injury, together with interest of £3,674.82;

(2) the sum of £26,063.38 in respect of financial losses, together with interest of £2,393.55, and

(3) a further sum by way of grossing up to represent the tax Mrs Kelly will have to pay on this award, agreed as £27,304.00,

making a total award of £**79,435.75** for which the first and third respondents are jointly and severally liable.

REASONS

Introduction

1. Following a hearing in April and May 2019, on 9 July 2019 the Tribunal issued a unanimous Reserved Judgment and Reasons ("the Liability Judgment") in these combined cases[1].

2. Mr Kelly succeeded in complaints of "ordinary" unfair dismissal, breach of contract in relation to notice pay, and in a complaint of unlawful deductions from pay relating to the reimbursement of tax paid by him on director's loans. The parties were able to reach agreement on the appropriate awards. No remedy decision was required of this Tribunal.

3. Mrs Kelly also succeeded in complaints of "ordinary" unfair dismissal and breach of contract relating to notice pay. The appropriate awards were agreed.

4. However, the parties could not agree on the appropriate awards for the two successful complaints of disability discrimination by way of a breach of the duty to make reasonable adjustments.

5. Those complaints related to the failure of the respondent to postpone an investigatory meeting in August 2017 and a disciplinary hearing (which resulted in dismissal) in October 2017. The basis upon which Mrs Kelly succeeded was set out in paragraphs 443-462 of the Liability Judgment. The Tribunal found that Mrs Kelly was at the material time a disabled person by reason of anxiety, that the respondent could reasonably have known of this, that the duty to make reasonable adjustments in relation to the timing of the two meetings had arisen, that the respondents knew or ought reasonably to have known of the substantial disadvantage arising because she was unable to attend those meetings, and that the respondents failed in their duty to make the adjustment of postponing those meetings. The purpose of a postponement would have been to see whether Mrs Kelly became well enough to attend and/or to obtain medical evidence to help the respondent decide how long it should reasonably wait for that to occur.

6. At the remedy hearing we had the benefit of a bundle of documents prepared for that hearing. Any reference to page numbers in these Reasons is a reference to that bundle unless otherwise indicated. We also had a written witness statement from Mrs Kelly, who gave evidence in person.

7. We had the benefit of oral submissions from both advocates.

Relevant Legal Principles

<u>General</u>

8. The starting point is section 124 of the Equality Act 2010:

[1] The Liability Judgment used the claimants' former surname of Tarrant.

> **(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).**
>
> **(2) The tribunal may—**
>
> **(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;**
>
> **(b) order the respondent to pay compensation to the complainant;**
>
> **(c) make an appropriate recommendation.**
>
> **…….**
>
> **(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by a county court or the sheriff under section 119.**

9. The amount of compensation in cases of discrimination should be calculated in the same way as damages in tort: **Ministry of Defence -v- Cannock & Others [1994] ICR 918**. A Tribunal should determine what loss, financial and non-financial, has been caused by the discrimination in question. The EAT stated 'as best as money can do it, the applicant must be put into the position she would have been in but for the unlawful conduct'. The tribunal must therefore try to ascertain the position that the claimant would have been in had the discrimination not occurred.

Injury to Feelings

10. In relation to an award of compensation for injury to feelings, the onus is on the claimant to establish the nature and extent of the injury to feelings. The amount of the award under this head should be made taking into account the degree of hurt, distress and humiliation caused by the discrimination. In **Armitage Marsden & HM Prison Service -v- Johnson (1997) ICR 275** a number of principles were identified which can be summarised as follows:-

7.1 Awards for injury to feelings are compensatory not punitive.

7.2 Awards should not be too low, as that would diminish respect for the policy of anti-discrimination legislation (see **Alexander -v- The Home Office [1998] IRLR 190 CA)**. Nor should they be so excessive as to be viewed as "untaxed riches".

7.3 Awards should be broadly similar to the whole range of awards in personal injury cases.

7.4 Tribunals should remind themselves of the value in everyday life of the sum they have in mind.

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

11. In **Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102** the Court of Appeal gave guidance as follows in paragraphs 65-68:

> **65. Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.**

> **i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.**
>
> **ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.**
>
> **iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.**
>
> **66. There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.**
>
> **67. The decision whether or not to award aggravated damages and, if so, in what amount must depend on the particular circumstances of the discrimination and on the way in which the complaint of discrimination has been handled.**
>
> **68. Common sense requires that regard should also be had to the overall magnitude of the sum total of the awards of compensation for non-pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage. In particular, double recovery should be avoided by taking appropriate account of the overlap between the individual heads of damage. The extent of overlap will depend on the facts of each particular case."**

12. Subsequently in **Da'bell v NSPCC [2010] IRLR** in September 2009 the EAT said that in line with inflation the **Vento** bands should be increased so that the lowest band extended to £6,000 and the middle band to £18,000.

13. However, a Tribunal is not bound to consider the effect of inflation solely pursuant to **Da'Bell.** In **Bullimore v Pothecary Witham Weld Solicitors and another [2011] IRLR 18** the EAT chaired by Underhill P said in paragraph 31:

> "**As a matter of principle, employment tribunals ought to assess the quantum of compensation for non-pecuniary loss in "today's money"; and it follows that an award in 2009 should – on the basis that there has been significant inflation in the meantime – be higher than it would have been had the case been decided in 2002. But this point of principle does not require tribunals explicitly to perform an uprating exercise when referring to previous decided cases or to guidelines such as those enunciated in Vento. The assessment of compensation for non-pecuniary loss is simply too subjective (which is not a dirty word in this context) and too imprecise for any such exercise to be worthwhile. Guideline cases do no more than give guidance, and any figures or brackets recommended are necessarily soft-edged. "Uprating" such as occurred in Da'Bell is a valuable reminder to tribunals to take inflation into account when considering awards in previous cases; but it does not mean that any recent previous decision referring to such a case which has not itself expressly included an uprating was wrong."**

14. The Court of Appeal confirmed in **De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879** that the 10% uplift in personal injury awards (derived from **Simmons v Castle [2012] EWCA Civ 1288**) should apply to awards for injury to feelings and injury to health in discrimination complaints.

15. On 5 September 2017, following a consultation exercise, the President of the Employment Tribunals in England and Wales published Presidential Guidance on the **Vento** bands which indicated that

> **"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."**

16. That guidance was subsequently updated and the bands uprated in March 2018 and March 2019 for claims presented on or after 6 April in each of those years.

Aggravated Damages

17. Although the Equality Act 2010 makes no mention of aggravated damages, it is well established that they are available in discrimination cases (see, for example, **Johnson**). They remain compensatory rather than punitive, and there is a conflict in authority as to whether they should form a separate award or whether the overall award for injury to feelings should be increased to recognise the effect of the aggravating factors on the claimant. In line with the views of the then President of the Employment Appeal Tribunal, Underhill P, in **Commissioner of Police of the Metropolis v Shaw [2012] ICR 464**, an advantage of treating the award as part of the overall injury to feelings award is to minimise the risk of double compensation. However, whether an award is made as a separate award or as part of injury to feelings, the ultimate question is whether the overall award is proportionate to the totality of the claimant's suffering. Aggravated damages compensate for additional distress caused by the aggravating features in question.

18. It is also generally recognised that there are three broad categories of case in which aggravated damages might be appropriate. They have been identified by the EAT in **Shaw**, and also in **HM Land Registry v McGlue UKEAT/0435/11/RN**. Those categories can be summarised as follows:

(a) Where the manner in which the wrong was committed was particularly upsetting, for example if it was done in a high-handed, malicious, insulting or oppressive way;

(b) Where there is a discriminatory motive, because conduct based on prejudice, animosity, spite or vindictiveness is likely to cause more distress than discrimination which occurs inadvertently, at least if the claimant is aware of that motive and

(c) By subsequent conduct, such as the manner in which a case is conducted at trial.

Interest

19. Finally, interest on discrimination awards is governed by the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Where an award is made the Tribunal must consider awarding interest but has a discretion whether to make any award.

20. For injury to feelings awards interest is in principle calculated over the period between the discriminatory act and the award (Regulation 6(1)(a)); for financial loss compensation the period is between the mid-point date and the award (Regulation 6(1)(b)). However, a different approach to the relevant periods can be used in order to avoid serious injustice (Regulation 6(3)).

21. The rate of interest is that prescribed by the Judgments Act 1838 (currently 8% per annum).

Relevant Facts

22. The primary facts derived from our Liability Judgment can be summarised as follows.

23. Mrs Kelly was suspended by an email sent on 16 August 2017 which invited her to an investigation meeting with Mrs Collister on 18 August 2017. Having learnt of her suspension Mrs Kelly saw her GP and was certified unfit for work to 31 August 2017 on account of anxiety. She informed Mr Higgins that she would not be attending the meeting. The meeting was not delayed but instead work was put into identifying some questions for her. Those questions were sent to Mrs Kelly by a letter of 21 August 2017. The letter said that as she was currently off sick she would not be invited to an investigation meeting, but that the investigation could not be halted because of the seriousness of the allegations. She was given until 29 August to respond. The letter said that Mr Higgins had been informed that the absence with anxiety was unrelated to work.

24. In a grievance of 24 August 2017 Mrs Kelly explained that her absence was very much work related and her ill health had been exacerbated by the suspension.

25. On 4 September Mrs Collister wrote to Mrs Kelly addressing the allegations to which written responses had been provided, but raising five additional matters. Mrs Kelly responded on 5 September saying again that she was not well enough to deal with an investigation. Her letter said she could not provide answers to the allegations until well enough to do so and once she had received all the relevant information.

26. Mrs Kelly was not aware at the time that Mr Higgins had expressed doubts about the genuineness of her illness in an email of 6 September. His email said:

> **"Personally, I see this as a direct and tactical response to her suspension, rather like the grievance letter. Again, rather than try to clear their names they are just trying to create cost and difficulty for the company that they had fiduciary duties for. If they do not come to a settlement we should consider a specialist to review [**Mrs Kelly's**] condition."**

27. Without having had an investigation meeting with Mrs Kelly, Mrs Collister finalised her investigation report on 27 September 2017. By a letter of 2 October 2017 Mrs Kelly was invited to a disciplinary hearing on 5 October. The letter said it was open to her to respond in writing rather than attend.

28. On 4 October Mrs Kelly's solicitors requested an adjournment of the hearing on the basis of health. That request was refused that same evening by the company's lawyers. That email made the point that the allegations were serious and that there was no fit note saying Mrs Kelly was not well enough to attend a disciplinary hearing, as opposed to a fit note about her ability to attend work. Following further comments from her solicitors, however, Mrs Kelly's disciplinary hearing was delayed to 12 October.

29. There was no change in the medical position and shortly before 7.00am that morning Mr Higgins was informed by email that Mrs Kelly was too ill to attend. The hearing was not postponed. The dismissal letter was issued by email on the afternoon of the same day.

30. Our findings of fact about how Mrs Kelly was affected by these matters will be set out in our discussion and conclusions section below.

Submissions

31. After the evidence we heard submissions from both sides on the three matters in dispute, namely whether the breach of the duty to make reasonable adjustments caused any financial loss, the appropriate award for injury to feelings, and whether there should be any award in respect of aggravated damages. We will summarise the position taken by each side below.

Discussion and Conclusions – Financial Loss

32. The claimant's case was that financial loss had arisen because if the two hearings had been delayed to see whether she was to become able to attend, which may have included getting medical evidence, then it would have taken at least six months to get to the point where she could have been dismissed without any discrimination. In contrast, the respondent's position was that there was no significant financial loss, if indeed any at all, because the Tribunal found as a fact that the real reason for dismissal was Mr Stock's desire to get rid of Mrs Kelly once her husband ceased to be employed. That would have happened at the same time come what may.

33. The Tribunal unanimously rejected the respondent's argument as to the effect of the failure to make reasonable adjustments. As made clear by the Employment Appeal Tribunal in **Abbey National plc v Chagger [2000] IRLR 86** (see paragraph 88, a point not disturbed on appeal), the question for the Tribunal is what would have happened had the respondent behaved in a manner not involving any unlawful discrimination. We found that the duty to make a reasonable adjustment by delaying the disciplinary hearing had arisen. We had to assess compensation to put the claimant in the position she would have been in had that adjustment been made and the hearing delayed for medical reasons.

34. Although getting medical advice is not itself a reasonable adjustment, it is an obvious and sensible step to take for an employer considering an adjustment, particularly an employer holding the reservations voiced by Mr Higgins behind the scenes in his email of 6 September 2017. Indeed, in that very email Mr Higgins said that if the matter was not resolved the next step would be to get specialist advice. We were satisfied in the circumstances of this case that the respondent could not have complied with its duty to make reasonable adjustments without seeking further medical advice on Mrs Kelly's state of health and her ability to attend a disciplinary meeting which might result in dismissal.

35. If that process had begun in late September or early October 2017, it would have been necessary for an appropriate specialist to have been identified and instructed, for the relevant medical records to have been obtained and supplied, for that specialist to have examined Mrs Kelly and thereafter to have produced a report. In our judgment that process would have taken about three months.

36. What would have happened thereafter would have depended upon what the report said. If the report had said that Mrs Kelly would never be fit to attend an investigatory or disciplinary hearing, the respondent might have proceeded to bring matters swiftly to a close. On the other hand, if the report had said that Mrs Kelly was not fit at that time but the matter should be reviewed in three months, then it is much more likely that, absent discrimination, the procedure would have taken longer. It is a matter of speculation what such a report would have said.

37. We acknowledged Miss Barry's argument that the respondent was keen to proceed with the dismissal of Mrs Kelly once her husband was no longer in the business. However, during this period Mrs Kelly would not have been in work: she had been suspended and would not be playing any part in the running of the business.

38. Putting those matters together we concluded that if the respondent had acted in a non-discriminatory way in relation to the postponement of the dismissal hearing and obtained medical evidence and then acted in accordance with that medical advice, it would most likely have taken a further six months (to April 2018) before Mrs Kelly would have been dismissed.

39. In that period she would have remained on full pay.

40. For those reasons we concluded unanimously that there was financial loss resulting from the failure to postpone the disciplinary hearing, and we awarded Mrs Kelly 26 weeks of loss at her net weekly figure of £1,002.63, which is a total award for financial losses of £26,068.38.

41. We were satisfied, as Mr Northall submitted, that had this happened there would still have been a maximum award in relation to the unfair dismissal and breach of contract which would have ensued in April 2018, so those awards are not affected by this award.

Discussion and Conclusions – Injury to Feelings and Aggravated Damages

Self-Direction

42. In considering injury to feelings we reminded ourselves of the guidance given in **Vento** and the subsequent uprating in cases such as **Da'Bell**. We also took account of the Presidential Guidance first issued in September 2017 and subsequently updated. This claim was presented in January 2018, broadly at the midway point between the September 2017 guidance (where the middle band was £8,400 to £25,200) and the April 2018 first addendum (where the middle band was £8,600 to £25,700). Taking account of the effect of inflation and movements in the Retail Prices Index, we treated the middle band as running from £8,500 to about £25,500.

43. Of course, the real issue is not where the band boundaries lie but rather what amount is appropriate to compensate the claimant for the injury to her feelings resulting from the discriminatory acts. On that point we took account of the guidance in **Prison Service v Johnson** that Tribunal awards should not be too low because that will reduce respect for the discrimination legislation, but nor should they be excessive and perceived as a windfall, and that the Tribunal should have regard to the value of the award in everyday terms.

44. In reaching our decision on the appropriate level of award we also took account of the 10% uplift pursuant to **Simmons v Castle.**

45. Finally, we focussed on not the characterisation of the seriousness of the respondent's conduct but rather the impact on the claimant of the discriminatory treatment.

Additional Findings of Fact

46. The refusal to delay the investigatory meeting and the disciplinary meeting occurred after the claimant had already been seriously affected by the shock of being suspended in mid-August 2017. She was certified unfit for work due to anxiety before the investigation meeting was due to take place. A letter from her GP Dr Studds of 14 January 2020 made clear that the suspension was the cause of the ongoing inability to work in the period prior to dismissal. However, Dr Studds also said that the issues around these two meetings caused the claimant a great deal of anxiety and stress and resulted in additional medication.

47. We accepted the following oral evidence from Mrs Kelly as to how she felt about the refusal to postpone the investigatory and disciplinary meetings until she was well enough to attend. When the meetings were not postponed she panicked, and felt she was being asked to do something she could not do (namely attend a meeting with the respondent). It was a particular concern that she was being painted as a thief and a wrongdoer but was unable to defend herself. Mrs Kelly felt she was failing herself, her husband and her children at a time when her livelihood was on the line. We accepted the assertion in her witness statement for this hearing (paragraph 12) to the effect that she was shocked by the lack of regard for her health shown by Mr Higgins (without knowing at that stage that he had reservations about whether it was genuine).

48. There was also a feeling that the way she was being treated was contrary to the ethos that she and her husband had worked so hard to establish within their company. Mrs Kelly felt that she would not have treated people in this way.

49. The feelings in question did not reduce after dismissal. They continued up to and during the employment tribunal liability hearing. The respondents continued to dispute that she had been a disabled person or that they had breached the Equality Act. Mrs Kelly explained in paragraph 19 of her witness statement that because the whole dispute continued her ability to recover has been put back. Although that statement referred expressly to the effect of the dismissal, we found that the continuation of the battle over whether the meetings should have been postponed had extended the period over which her feelings were injured by that unlawful discrimination.

Submissions

50. The respondents argued in summary that the claimant was not in truth seriously affected by these breaches of the Equality Act because she rightly perceived that she was bound to be dismissed due to the fact that her husband was going to be dismissed and the writing was on the wall. Therefore, the failure to postpone the two meetings could not have had a significant impact because the claimant knew deep down the decision was predetermined. She had been certified unfit for work due to anxiety following her suspension but before the investigation meeting had been due to happen. Miss Barry invited us to make an award in the lowest of the **Vento** bands.

51. In contrast Mr Northall submitted that although the suspension did affect the claimant deeply, she was nevertheless facing very serious allegations relating to her honesty and integrity. The respondents were effectively accusing her of theft. The consequence of the breach of the Equality Act was that she was denied the chance to defend herself and that this contributed to an injury to feelings which fell within the middle **Vento** band. Mr Northall also relied on the fact that the effect of being shut out of the disciplinary process which put her livelihood in jeopardy ran from the investigation meeting in mid August through at the earliest to the dismissal in mid-October, if not the conclusion of the appeal in November 2017.

Conclusions

52. In our deliberations we considered what evidence was available to us as to the impact on Mrs Kelly's feelings of the breaches of the Equality Act 2010. In her original witness statement for the liability hearing a brief mention was made of this in paragraph 116. Miss Barry pointed out in cross examination that the disability witness statement prepared at an earlier point in the case did not mention the refusal to postpone these meetings, but we accepted Mr Northall's point that that statement was prepared for an entirely different purpose. It was not concerned with issues of causation.

53. We took account of Dr Studds' letter of 14 January 2020 which said that the issues around these two meetings caused the claimant a great deal of anxiety and stress and resulted in additional medication.

54. In addition the Tribunal took account of the oral evidence we had from Mrs Kelly summarised in our findings of fact above.

55. We considered the significance of the fact that the news of suspension had already had a significant impact on Mrs Kelly prior to any discriminatory act. It helped the respondent in the sense that the Tribunal must consider only any additional injury to feelings resulting from the refusal to delay the two meetings, but it helped the claimant because the respondent must take the claimant as it found her. She was ill and vulnerable, and her feelings had already been affected by the way she was treated. In our judgment there was still a substantial additional injury to her feelings. Although news of suspension and a disciplinary investigation came as a great blow, there was significant additional hurt caused by the realisation that the process would continue in her absence, denying her the chance to defend herself against serious allegations of dishonesty. The injury to her feelings caused by that was not transient or short-lived: it continued until and beyond our liability hearing. That warranted an award in the middle band.

56. Before deciding on the appropriate level of award we considered the question of aggravated damages. In line with the guidance given by the Employment Appeal Tribunal in **Metropolitan Police Commissioner v Shaw**, we decided to minimise the risk of double recovery by not making a separate award of aggravated damages by taking account of the aggravating features in deciding the appropriate level of the overall award for injury to feelings.

57. There were two aggravating factors. Firstly, the respondents did not take any steps at all in recognition of the medical position at the disciplinary hearing stage, save for a short postponement of only a week between 5 and 12 October. Secondly, in the course of these proceedings the claimant became aware that Mr Higgins had expressed the view behind the scenes that her fit note was a tactic. These matters aggravated the injury to feelings resulting from the discriminatory acts.

58. Taking account of all those factors, including the boundaries of the middle band, according to the Presidential Guidance, and the **Simmons v Castle** uplift, we decided to make an award overall of £25,000 allocated as follows:

(1) For injury to feelings resulting from the failure to delay the investigatory meeting we awarded £5,000.

(2) For injury to feelings resulting from the decision not to delay the disciplinary meeting at which the claimant was dismissed we awarded £20,000, of which £5,000 reflected the impact on Mrs Kelly of the aggravating factors.

Interest

59. The Tribunal considered it appropriate to award interest on the discrimination compensation. The delay between the discriminatory acts and this award is due to the respondents' unsuccessful defence of these claims.

60. The applicable rate is 8% per annum. In relation to financial loss resulting from the failure to postpone the disciplinary hearing, the period in question is

between 12 October 2017 and 29 January 2020. That is a period of 839 days, meaning that the mid-point date represents a period of 419 days. The annual rate of interest at 8% is £2,085.07, which when divided by 365 and multiplied by 419 produces a figure of £2,393.55.

61. Interest on the injury to feelings award runs from the date of the discriminatory act. The award in respect of injury to feelings for the failure to postpone the investigatory meeting on 18 August 2017 covers a period of 894 days. At 8% per annum the annual rate on £5,000 is £400, and when divided by 365 and multiplied by 894 this produces a figure of £978.93.

62. In relation to the failure to postpone the disciplinary hearing, this is a period of 839 days between 12 October 2017 and 29 January 2020. Interest at 8% on the award of £20,000 is £1,600 per annum, and when divided by 365 and multiplied by 839 that produces a figure of £3,674.82.

63. These figures were proposed by the Tribunal and not disputed by the parties.

Grossing Up

64. The Tribunal made the maximum awards for unfair dismissal and breach of contract in both cases. Mr Kelly's unlawful deductions award was made gross. There was no scope for grossing up these awards.

65. The awards for injury to feelings to Mrs Kelly for disability discrimination will not be subject to tax because they were not awards in respect of termination. The award for financial loss (and interest on that loss) will be subject to tax. It should be grossed up to ensure that after tax she would receive the net amount. After considering draft workings provided by the Tribunal, the parties agreed that the appropriate figure to be added to that award by way of grossing up was £27,304.00.

Liability of Each Respondent

66. The first respondent is liable for all the awards made.

67. The Executors of the late Mr Stock are not liable for any award. He did not employ the claimants personally. He was not found liable for any discriminatory acts.

68. Mr Higgins is not liable for the unfair dismissal and breach of contract awards, nor for the unlawful deductions from Mr Kelly's pay. Nor is he liable for the award of injury to feelings and interest in respect of the failure to postpone the investigatory meeting in August 2017. He is, however, jointly and severally liable with the company for the award made for the decision not to delay the disciplinary meeting in October 2017. That includes the award for injury to feelings (as aggravated), the award for financial losses, interest on both awards, and the grossing up of the financial loss award.

_____

Employment Judge Franey

14 February 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
21 February 2020

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case numbers: **1300128/2018 & 1300132/2018**

Name of cases: **Mr MW Kelly** v **3L Care Limited**
Mrs J Kelly

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: 21 February 2020

"the calculation day" is: 22 February 2020

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

MR S ARTINGSTALL
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at **www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426**

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.

Claimants **Mr MW Kelly & Mrs J Kelly**

Respondent **3L Care Limited**

ANNEX TO THE JUDGMENT (MONETARY AWARDS)

Recoupment of Benefits

The following particulars are given pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349.

The Tribunal has awarded compensation to the claimant, but not all of it should be paid immediately. This is because the Secretary of State has the right to recover (recoup) any jobseeker's allowance, income-related employment and support allowance, universal credit or income support paid to the claimant after dismissal. This will be done by way of a Recoupment Notice, which will be sent to the respondent usually within 21 days after the Tribunal's judgment was sent to the parties.

The Tribunal's judgment states: (a) the total monetary award made to the claimant; (b) an amount called the prescribed element, if any; (c) the dates of the period to which the prescribed element is attributable; and (d) the amount, if any, by which the monetary award exceeds the prescribed element. Only the prescribed element is affected by the Recoupment Notice and that part of the Tribunal's award should not be paid until the Recoupment Notice has been received.

The difference between the monetary award and the prescribed element is payable by the respondent to the claimant immediately.

When the Secretary of State sends the Recoupment Notice, the respondent must pay the amount specified in the Recoupment Notice to the Secretary of State. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the respondent must pay the balance to the claimant. If the Secretary of State informs the respondent that it is not intended to issue a Recoupment Notice, the respondent must immediately pay the whole of the prescribed element to the claimant.

The claimant will receive a copy of the Recoupment Notice from the Secretary of State. If the claimant disputes the amount in the Recoupment Notice, the claimant must inform the Secretary of State in writing within 21 days. The Tribunal has no power to resolve such disputes, which must be resolved directly between the claimant and the Secretary of State.