EMPLOYMENT TRIBUNALS

Claimant **Ms Wan Kit May Leung**

Respondent **Oriental Merchant (Europe) Ltd**

REMEDY AND COSTS JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at North Shields **On 28 and 29 September 2020**

Employment Judge T.M. Garnon **Members: Ms S Don and Mr S Moules**

JUDGMENT

Our unanimous judgment is:

1. We award compensation of **£ 45526** and interest of **£6785**, broken down into separate elements in paragraph 5.11 below.

2. We make a costs order that the respondent pay to the claimant **£3182.40.**

Reasons

1 Introduction and Issues

1.1. The claimant, born on 8 July 1970, was employed by the respondent from 9 October 2017 until her dismissal on 13 July 2018. After a 4 day hearing in October 2019, at which Ms Ephraim of North East Law Centre (NELC) represented the claimant and Mr Howson of Peninsula the respondent, we unanimously held her dismissal, and subjection to some pre-dismissal detriments, amounted to direct discrimination because of age. We also found pre-dismissal harassment on two occasions related to her religious belief and one occasion related to race. Claims of victimisation, disability discrimination and automatically unfair dismissal failed. As before to avoid confusion , we refer to many people by first names: Ms Venus Teng ("Venus"); Ms Fei Li Toh ("Fei"); Mr Clement Lee ("Clement"); and Mr Cyril Cheang ("Cyril"). With consent of both parties we are deciding remedy on documents sent electronically, written statements and submissions, all of which are excellent. For the remedy stage, Mr Heslop of NELC has taken over from Ms Ephraim.

1.2. The issues agreed by the representatives are good but we set them out in what appears to us a more helpful order and one which may have consequences for tax purposes

Injury to Feelings

What effects did

(a) Venus' harassment pre-dismissal

(b) the respondent's age discrimination (pre-dismissal and by dismissal)

have on the claimant considering (i) her personal characteristics (ii) any medical conditions she had (iii) any effect on her career (iv) the manner in which the respondent dealt with her informal grievance.

Financial Loss

What losses flow from the unlawful acts?

What, if any, chance is there she would have been dismissed for a non-discriminatory reason at (a) the time of her actual dismissal or (b) a later definable date?

What, if any, chance is there the respondent would have given her unpaid compassionate leave from December 2018 to April 2019 or re-employed her on return from caring for her mother in Hong Kong?

Taking into account the impact of the discrimination, has she taken reasonable steps to mitigate her loss?

Aggravated Damages

Was the respondent's following conduct high-handed, malicious, insulting or oppressive
(a) failure to investigate her complaints seriously
(b) non-disclosure of documents (described in the judgment as '*deliberate suppression'*)
(c) tendency to accuse her of fabricating allegations which had a basis in truth; and/or itself giving evidence that '*fell far short of the truth, the whole truth and nothing but the truth' ?*
If so, did this conduct cause her additional distress?

ACAS Uplift

Does the ACAS Code of Practice on Disciplinary and Grievance Procedures ("the ACAS Code") apply? If so, has there been an unreasonable failure to comply? If so, is it just and equitable to apply any percentage uplift to the compensation awarded?

Interest

Should interest be awarded for (a) Injury to feelings (including aggravated damages) from **24 April 2018** up to the remedy judgment and (b) financial loss from **13 July 2018** up to the judgment?

Costs

Are we satisfied one of the circumstances the Employment Tribunal Rules of Procedure 2013 (the Rules) exists for making a costs or preparation time order? If so, **t**he "discretion issues" are

(a) whether it is proper to exercise our discretion to make a costs order
(b) should it be for all or a specified part of the costs incurred
(c) how much was properly incurred?

2. Relevant Extracts from the Liability Judgment

2.1. We set these out as far as possible in the same order as the issues listed above but there is overlap in that some paragraphs are relevant to more than one issue. Paragraph numbers beginning with 2 are from our findings of fact.Those beginning with 4 are from our conclusions.

2.2. **Pre Dismissal harassment and discrimination**

2.19. About this time, Venus shouted at the claimant, 'you are Christian - you don't tell a lie and you are unsuitable for this work'. Venus' strenuously denies stating this to the claimant. Venus is Christian but not, to use a word put to her by Ms Ephraim, as "pious" as the claimant . This is the first of two examples of conduct related to religion being used by Venus to ***mock*** *the claimant and thus create a humiliating environment for her. We find Venus probably had the purpose of harassing her, but, if she did not, her conduct had that effect and it is reasonable it would have.*

2.32. Venus' timescale makes no sense. Why wait 3 days to speak to the claimant about what she says is blatent insubordrination? Probably on this day, Venus asked the claimant to resign and let Fei become full time as part of her work placement. The claimant said she would not resign, since, as a SAA, answering questions from an SR was justified. She begged Venus to stop the shouting. A few minutes later Venus said sorry in a strained tone, but in a few minutes, started shouting again: 'you are Christian - don't say swear words? Don't fight back? Only patient?!' Venus denies saying this but we do not accept her evidence.Again she was mocking the claimant as a "pious" Christian.The claimant's statement says: "This was all very intimidating. I felt she was making threats about my job security without a good reason and was trying to verbally humiliate me. The only thing I could do was be patient, and not talk back. I kept telling myself the company was paying me to do my job and so, ***since I needed to keep the job****,* (emphasis added)*I had to do everything well." We find Venus probably had the purpose of intimidating and humiliating her, but, even if she did not, her conduct had that effect and it is reasonable it would have.*

2.34. At 4pm, Freeman called with some queries. The claimant asked Venus for instructions and , as requested, handed the call over. This, save for the date, matches Venus own evidence "A few days later Mr Hung phoned the office back. The Claimant asked what she should do. I asked her to pass Mr Hung through to me which is what happened". However Venus shouted at the claimant for not knowing how to answer people's queries, then called a meeting between just the two of them at which she said 'I knew you are Hong Konger and Freeman is Hong Konger as well. You Hong Kong people like to help Hong Kong people'. Venus denies this but we believe it was said. Venus husband is from Hong Kong and Clement's current sales team comprises five Hong Kongers and one Chinese. As we explain later, harassment can occur even if the reason for the conduct is not the protected characteristic. We do not find this had the purpose of harassing her but in all the circumstances it would reasonably have that effect because Venus was dismissing the claimant's reason for answering Freeman, which was that it was part of her job, and attributing her actions as due to her and Freeman both being from Hong Kong . This is the only claim of harassment related to race.

2.38. Clement's statement does not mention Venus threatened to resign and was later invited to go to Melbourne but that was his oral evidence on Day 3. He could not remember the date, said he had received an email from Venus but had not disclosed or mentioned it due to a connection with her having health problems. Overnight that email was "found". It was from Venus to Clement, he being in Australia at the time, sent on 13 June (UK time) but we do not have the time of sending. In her resignation letter Venus says her reason for leaving is " I'm unable to perform my current job role and my personality problem affects atmosphere in the office. The serious point is I found out, when I am impulsive or if I lose my temper I could say"bad words" which is unacceptable in working environment". She does not mention ill health.

4.4. The acts referred to in paragraphs 2.19, 2.32. and 2.34 were unwanted conduct related in the first two to the protected characteristic of religious belief and in the last to national origin which is part of the protected characteristic of race. It had either the purpose or, reasonably, the effect of creating an intimidating and/or humiliating environment for her. That constitutes harassment. However, we conclude none of the respondent's witnesses treated the claimant less favourably than they would

have treated an employee of Malaysian or Singaporean origin or a non-Christian employee in similar circumstances. It is improbable having regard to their own race or religion they were motivated to dismiss or subject her to other detriment for those reasons. More importantly, having regard to the case law in paragraphs 3.13-3.18 above despite the respondent's lack of truthfulness in its explanations, there is an obvious link,as the claimant accepted in evidence, between the less favourable treatment and her ***age****. In our view the principle in paragraph 3.16 applies not only where there is an obvious non-discriminatory reason but also where the reason is obviously because of a different protected characteristic.*

2.3. **Discriminatory Dismissal**

2.18. That apart, the respondent's version makes no sense. How can there have been an investigation no-one realised was taking place and which produced no paper trail at all? Clement's oral evidence was Venus told him while he was driving a car in which Venus was a passenger the claimant was too hard on Fei and he just accepted that. We find the truth of the matter is the claimant was not acting in as subservient a manner as Venus would have liked, and whatever Venus said as regards which of the claimant or Fei was in the wrong was accepted by Clement, and later Cyril. In short, they believed the person in charge is always right and her subordinates should do whatever she says. ..The problem for the respondent is that the thought processes of Venus, Clement and/or Cyril may have included a subconscious preference for the younger person and bias against the older person for expressing a view of her own and using initiatve, both of which Venus viewed as challenging her authority.

2.20. At the end of April 2018, in a meeting with Christine and the claimant, Clement stated the direction of the company ***was now*** *to hire young people since they were more driven. All office staff were to follow Venus' instructions because she was young and driven. He said younger people would be more able to obey Venus and a fresh graduate is like a ' white paper', willing to obey and follow instructions. Clement accepts he did state Venus was in charge of the office and the claimant should follow her instructions but denies saying younger employees were more likely to do so or are like "white paper". The phrase was spoken in Cantonese, The English idiom is "like a blank sheet of paper". We find Clement did say something like that as this is a level of detail it is improbable the claimant would invent. In oral evidence Clement accepted younger people with less experience bring to any new job less "baggage" from past employments so can be more easily schooled in the respondent's preferred ways. As a result of what he said, the claimant felt her job was insecure. She brought in references from previous employers, certificates of qualifications and offered to be re-interviewed. Clement accepts she did so and could give no reason why she would if she were not trying to prove her worth and that her age and experience were an asset not a hindrance.*

2.41. This is not an unfair dismissal case but the claimant's argument is that the reason for her being dismissed rather than Fei, even if there was a redundancy situation, was at least in part due to a protected characteristic. Therefore, we needed to have all the facts about who decided what and when to assess their thought processes. The respondent's approach was only to tell the claimant, ***and us,*** *what suited its case. It was not the claimant's case there was no reduction in the requirement of the respondent for employees to do certain kinds of work, rather that her selection was due to a desire to keep Fei and not her. The question to be answered was why?*

2.42. A non-discriminatory reason would be they only needed one part time worker. Fei's statement says "Since May's dismissal my hours have been adjusted again. As I remain at University I work around 16 hours per week over two or three days per week during term time. These hours can

increase outside of term time if my employer needs me to work more hours." This is plainly misleading. In our view, Fei was, in late 2018, not only invited to write a complaint about the claimant, but told what the respondent wanted her to put in her statement.

2.43. Cyril said a further reduction in manpower to one part timer was needed after the dismissal of Christine but what he said did not explain Fei's evidence she went full-time in mid-July. Cyril said he had checked the records and she did not go full-time until mid-August, which does not make the respondent's arguments much better, but those records had not been disclosed either. When our Employment Judge said he could not understand why Cyril thought any of the undisclosed material was irrelevant, Cyril said it was "negligence on my part" not to send it to Mr Howson. In our view it was not negligence but deliberate suppression of documents which undermined its case.

2.54. Cyril denies saying Venus had a harder role or that the claimant should resign for the sake of her health. Read as a whole the transcript shows him repeatedly suggesting the claimant, if she was too mentally weak to take the pressure from Venus,would be better off resigning. Towards the end he used some biblical versus to convey to her there is a season for everything and this is Venus's season not hers.The claimant said during her evidence the culture in Chinese companies is no subordinate must ask questions or complain but must obey all orders.We need not find whether that is a culture specific to Chinese companies because there is no doubt from the content of this transcript it was exactly what Cyril expected. The major vulnerability for the respondent is there is no evidential basis for Cyril's assertions the claimant was "insubordinate" other than what he was told by Venus. The possibility therefore looms large one or all of Venus,Clement and Cyril made the stereotypical assumption, the claimant would be questioning of orders because she was older than Venus, whereas Fei would be blindly obedient because she was younger. In short, this transcript seriously undermines the respondent's pleaded case and witness statements.

4.5. We accept that by 17 May a redundancy situation existed. Clement said he wanted to retain, in order of preference, the claimant, then Christine then Fei. Christine could not do the hours needed so she went. If further reduction in SAA's was needed logically the next to go would be Fei. Why did it change? The short answer is because that is what Venus wanted. Venus levelled no criticisms at Fei whereas she found fault with everything the claimant did. Venus' assertion, adopted by Clement and Cyril, that the claimant challenged her management and at worst defied instruction is not born out by the evidence. We conclude she, as well as Clement and Cyril, made the stereotypical assumption referred to by Clement in the meeting in late April (paragraph 2.20 above) that young people are easier to command.Venus preferred Fei, at least in part, because she perceived her comparative youth would make her compliant whereas the claimant's greater age and experience meant she would always be a problem to her. The claimant has done more than enough to raise a prima facie case the reason for preferring Fei was her age.

4.6. We are not considering fairness or reasonableness, but a choice was made and it calls for an explanation…

4.7. The claimant had more qualifications than Venus but Fei would too in the near future. Venus own insecurities may explain why she preferred Fei to the more mature claimant but she did not tender that as her explanation. The respondent's case is not that Venus shouted at everyone but that she shouted at no-one, which is inconsistent with Venus' resignation letter. In this respondent senior managers Clement and Cyril accepted the view of a junior manager, Venus, unquestioningly the claimant was insubordinate without investigation. Their case was there was an investigation which produced no paperwork. In that and other respects their evidence fell far short of "the truth, the whole truth and

nothing but the truth". Unlike the dismissing officer in Reynolds. Clement and Cyril cannot show they did not make stereotypical assumptions that the claimant, ***as an older woman*** *would be disobedient by showing she actually was. We therefore conclude the respondent did treat the claimant less favourably than it treated Fei by dismissing her on the basis all three of them made the decision to pick the claimant not Fei. Cyril claims to have been the sole decision maker. Even if he simply did the bidding of Venus, who briefed against the claimant because of her age, as explained in Reynolds, this is undoubtedly a discriminatory subjection to detriment*

2.4. **Aggravated Damages**

2.11. A recurring feature in this case is the respondent's witnesses in their statements and initially in oral evidence, saying something which is best improbable, at worst shown to be false, and accusing the claimant of lying about events which they could have said simply represented the claimant misunderstanding something. They chose to deny nearly all her allegations rather than accepting them in part and tendering an explanation.

2.39. Ms Ephraim applied to recall Clement who said he believed he had sent a copy of this (Venus' resignation email) *to Cyril but could not say when. Cyril's evidence had started at the end of day 3 and on day 4 he said it had not been sent to him until August. That still did not explain why he had not disclosed it earlier. Our Employment Judge put to him it appeared documents had been suppressed, probably by him, because if he had sent them to Mr Howson he would certainly have disclosed them. He admitted he had not sent them but denied he had suppressed them . As the morning of day 4 wore on, it became obvious this non-disclosure was the tip of an iceberg in that when asked whether he had taken any notes of the critical meeting held by Skype on 10 July he said he had, but did not disclose them because they were his "working notes". Moreover, he said he had written a report to Mr Yiu, the CEO, and to Clement but that had not been disclosed either.*

2.40. Ms Ephraim made an application to strike out the response on the basis of this material non-disclosure which we refused but the non-disclosure spoke volumes about credibility. It may be relevant to costs and aggravated damages too. Cyril then said there was no reason for him not to disclose documents which ***helped*** *the respondent by showing it had been found in an "investigation" the claimant made a mistake and had tried to blame Fei. That had been suggested by Clement but he had no documents to evidence any investigation.*

3 Relevant Law

3.1. The main statutory provision of the Equality Act 2010 (EqA) as far as relevant is in section 124
(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.
(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate
(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.

3.2. Section 119 includes *(2) The county court has power to grant any remedy which could be granted by the High Court— (a) in proceedings in tort;* Compensation on tortious principles means we must try

to assess what the position would have been but for the unlawful discrimination and compensate the claimant by attempting to restore her to that position Abbey National plc-v-Chagger 2010 ICR 397. For loss to be compensable, it must flow'***directly and naturally'*** from the unlawful discrimination, but there is no requirement of foreseeability (Essa-v-Laing Ltd 2004 ICR 746). We need to compare the financial benefits had she not been treated unlawfully with those she has had, and will be able to have in future.

3.3. We need to consider whether there could have been a non-discriminatory dismissal at the same, or some definable point in the future, O'Donoghue-v-Redcar and Cleveland Borough Council 2001 IRLR 615 and Chagger, where Lord Justice Elias said if there was a chance that, apart from the discrimination, the claimant would have been dismissed that possibility had to be factored into the measure of loss. In assessing the chance of a future event if it is very high, or very low, the tribunal may treat the chance as 100% or 0% (Timothy James Consulting Ltd-v-Wilton UKEAT/0082/14).

3.4. Compensation for injured feelings is not meant to punish. What matters is the effect on the claimant. The summary of the principles by the EAT in Prison Service-v-Johnson is invaluable

a "Awards for injury to feelings are compensatory. They should be just to both parties. ***They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.***
b 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 it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use the phrase of Sir Thomas Bingham M.R., be seen as the way to "untaxed riches."
c Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards.
d In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.
e Finally, tribunals should bear in mind Sir Thomas Bingham's reference to the need for public respect for the level of awards made"

3.5. Tribunals put awards into bands. For claims presented on or after 11 September 2017, and taking account of Simmons-v-Castle and De Souza-v-Vinci Construction (UK) Ltd, the bands were: 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 only most exceptional cases capable of exceeding £42,000.

3.6. Commissioners of the Metropolitan Police-v-Shaw summarised earlier authority The EAT found the Employment Tribunal(ET) erred by focusing entirely on the seriousness of the respondent's conduct rather than the impact on the claimant and thus in practice introducing a punitive element. The reason ET's sometimes **appear** to focus on the respondent's conduct is best explained thus. In a book like "Kemp and Kemp on Damages for Personal Injury" if a person has been injured in a car accident, one does not read a report about how bad the defendant's driving was but about clinical findings, X rays and MRI scans of the injury. Feelings cannot be scanned. If one watches a boxing match and sees a punch landing, one can imagine how much it hurts by drawing on experiences one has had of being struck. One can convey that to a person who has not seen it, by describing the blow. However, then one must remind oneself the person being struck is a professional boxer with a higher pain threshold than a frail person who would be hurt more by the same punch. We **start** by describing the

conduct and asking "*how would we feel if that happened to us*?". **Then** we ask "*Is this claimant more or less likely than us to feel hurt having regard to all we know about her*?". **Just** to listen to, and record, how a witness says she has been hurt, risks giving greater compensation to better actors.

3.7. Aggravated damages are also compensatory only. They should be considered where the conduct has been high handed or malicious. Zaiwalla-v-Walia & Co establishes conduct of the proceedings may lead to aggravated damages. In this case the non disclosure of documents and the tendency to accuse the claimant of fabricating allegations which had a basis in truth may trigger such an award and is the basis of a costs application. Some EAT decisions have questioned whether the current practice of separate awards for injury to feelings and aggravated damages is desirable and suggested the better course would be to include the aggravating features without separate quantification in the overall award. However, it has been acknowledged the practice is too well-established to be changed.

3.8. Section 207A (2) Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) includes

If, in the case of 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) that 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%.

The ACAS Code on Discipline at Work does not apply to redundancy dismissals but we see how the Code on Grievances could apply to parts of this case

3.9. Interest runs from the acts of discrimination in respect of injury to feelings, see Reg 6 of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. When the acts causing injury themselves span a period injustice may be done to the respondent by taking the earliest date and to the claimant by taking the latest date. Reg 6(3) gives us discretion as to **from when** to calculate interest. For financial loss spanning a period we use the mid point date of the period. Reg 3 says Interest **"shall be calculated as simple interest"** at a rate presently prescribed at 8%.

3.10. Financial loss is calculated net of tax but some kinds of award, including loss of earnings consequent on dismissal, are taxable under s.401 of the Income Tax (Earnings and Pensions) Act 2003 (IT(EP)A in so far as they exceed £30,000. When this happens, tribunals 'gross up' the award, by working out what tax would be likely to be levied on the net amount and adding it to the award. Whether awards in respect of injury to feelings require grossing up is difficult. Orthet-v-Vince-Cain held all such awards are exempt from taxation. In a later decision, Yorkshire Housing Ltd-v-Cuerden the EAT did not think it was clear-cut. The particular appeal related to compensation for disability discrimination in respect of the employer's failure to make reasonable adjustments during the currency of the employment relationship. The EAT held awards for pre-termination discrimination, at least, were not subject to tax, and decided the case on this basis. The Court of Appeal in Moorthy-v-Revenue and Customs Commissioners 2018 ICR 1326 agreed with the reasoning in Vince-Cain. In its view s406 IT(EP)A exempts payments on account of any injury recognised by Parliament as providing a basis for the payment of compensation. However, s 406 was amended with effect from 6 April 2018 to say '**injury**' includes psychiatric injury but not injury to feelings so, from the 2018/19 tax year onwards, HMRC will treat awards for injury caused by discriminatory **dismissal** as taxable. We believe injury to feelings awards in respect of pre-termination discrimination are still not taxable and should not be

grossed up. We think the same may apply to aggravated damages and all interest. If the elements we believe will be taxed exceed £30000, we will gross up. If HMRC take a different view to us , the parties may ask for a reconsideration.

3.11. In this case we have a very unusual difficulty because the loss and injury flowing from the initial statutory tort was followed by arguably more serious injury caused by what happened at the liabiilty hearing. The respondent subjected her to detriment by trying to escape liability by telling untruths, at best half truths, and not disclosing documents which undermined their version. Depending on why they did so, it **may** amount to victimisation, but no such claim has been made and would now be out of time.

3.12. In personal injury claims the effects of a supervening event are usually easy to separate from the earlier events. In Heil-v-Rankin the Court of Appeal resolved eight test cases by creating a formula for increasing damages for pain, suffering and loss of amenity where a second act by a different tortfeasor caused exacerbation of a pre-existing condition by apportioning liability for underlying cause and exacerbating cause. At risk of over-simplification if no additional damage is caused by the second tort, only the first defendant will be liable to compensate for all the loss and damage flowing from the first tort, but if additional damage is caused by the second tort, the liability to pay for the cumulative loss and damage is shared between the parties The first defendant remains liable for the loss and damage directly flowing from the first breach of duty, ignoring the second tort. The second defendant pays only for the additional loss and damage flowing from the second tort. The claimant receives full compensation divided between the defendants in the proportions the court assesses. However, in such cases the Court is dealing with both claims against both tortfeasors**.** Chapman-v-Simon 1994 IRLR 124 held an ET must not decide issues which are not before it. Peter Gibson LJ said '*..the complainant is entitled to complain to the Tribunal a person has committed an unlawful act of discrimination, but it is the act of which complaint is made* ***and no other*** *the Tribunal must consider and rule upon. If it finds the complaint is well founded, the remedies which it can give the complainant ..are specifically directed to the act to which the complaint relates. If the act of which complaint is made is found to be not proven, it is not for the Tribunal to find another act of racial discrimination of which complaint has not been made to give a remedy in respect of that other act*.'

3.13. Section 212 says if conduct constitutes harassment it cannot also be a detriment within section 39, so if acts or omissions falling within s13 subject an employee to **detriment, short of dismissal,** but also constitute harassment, section 40, not 39, is infringed. At the liability stage in deciding whether it is reasonable for conduct to have the proscribed effect the test has subjective and objective elements. The subjective part involves looking at the effect the conduct had on the particular claimant. The objective part requires the tribunal to ask whether it was reasonable for the conduct to have had that effect **on her**. Richmond Pharmacology-v-Dhaliwal 2009 ICR 724 and Pemberton-v-Inwood 2018 ICR 1291 noted different people have different tolerance levels. Conduct shrugged off by one might be found offensive or intimidating by another. The EHRC Employment Code notes relevant circumstances can include those of the claimant. In Reed-v-Stedman1999 IRLR 299 the EAT said '*it is for each individual to determine what they find unwelcome or offensive, there may be cases where there is a gap between what the tribunal would regard as acceptable and what the individual in question was prepared to tolerate. It does not follow because the tribunal would not have regarded the acts complained of as unacceptable, the complaint must be dismissed.* It is relevant to consider any remark **in context**, Heafield-v-Times Newspapers Ltd EAT/1305/12. In this *case,* as set out in our findings of fact below, the claimant had very specific reasons for needing to keep a job in the UK.

3.14. Comments by learned Judges on the liability test are also relevant to the degree of injury to the particular claimant. The concept in personal injury cases of an injured party having an "eggshell skull" is equally important in harassment and discrimination cases. In HM Land Registry-v-Grant 2011 ICR

1390 Elias LJ said '*When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect.* The EAT in Reed-v-Stedman counselled against carving up a case into a series of specific incidents and trying to measure the caused by each. Instead, it endorsed a cumulative approach quoting from a USA Federal Appeal Court decision: '*The trier of fact must keep in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes*' (USA-v-Gail Knapp 1992 955 Federal Reporter). This was approved by the EAT in Driskel-v-Peninsula Business Services Ltd and, although both cases were decided before the EqA, the same approach should apply.

4. Findings of Fact and Some Conclusions on Financial Loss

4.1. The claimant earned £300.40 net per week but the respondent in addition contributed 2 % to her pension. Having regard to her short service the fairest way of allowing for that is to treat her true loss as £306.40 per week. She was dismissed on **13 July 2018** with a goodwill payment of £1,384.61**.** She secured new part time employment from 15 October 2018 – 17 December 2018 at £50 per week. She then returned to Hong Kong to care for her sick mother. Over the 22 weeks she would have earned £306.40 x 22 = £6740.80. She earned £450 which along with the ex gratia payment must be deducted. Thus, the loss to 17 December **£4,906**

4.2. Cyril's evidence, which we accepted, was the respondent has a culture of being compassionate. We find it would given unpaid leave of absence until she returned from Hong Kong. There is no chance the claimant would have considered leaving her job. She was, but for the harassment, happy in her role, competent and had very good reasons to stay with her employer, (see later). Neither would the respondent have dismissed her for a non- discriminatory reason. In any genuine redundancy situation, Clement said management had an order of preference. Had the claimant not been dismissed in preference to Fei due to age discrimination, she would have resumed work in April 2019 and her job would have lasted indefinitely.

4.3. A dismissed employee has a duty to take reasonable steps to mitigate her loss. As Mr Heslop says it is for the respondent to prove she has not and the standard of what is reasonably required should not be set too high (Fyfe-v-Scientific Furnishing Limited 1989 IRLR 331 and Kelly-v-University of Southampton EAT / 0139 / 10) At the time of her dismissal the claimant was off work on sick leave with stress and anxiety. She sought and found employment twice during the pre-hearing period and has in our view mitigated reasonably.

4.4. On **15 February 2019** Venus left for personal reasons. Mr Heslop submits the claimant may have been given Venus' job in charge of the office because she was well qualified and in appraisals her performance was noted as "*constantly exceeding expectations*" or "*exceeding most expectations*". We disagree. First, she was relatively new to the respondent and second she was not there to take up the role as she stayed in Hong Kong until late April 2019. Mr Heslop says she may have returned earlier had she still been employed but we do not accept that was likely as the health of her mother dictated the length of her time in Hong Kong. There is no loss of earnings during this period. However, on her return her pay would probably have increased to about £315 including pension contributions.

4.5. She secured further employment at £150.92 per week from 26 August 2019 with Liberty Living Student Accommodation. In the 18 weeks until then she lost 18x £315 = **£5670**. The respondent

submits this, or shortly after, is when the period of loss should end. Her employment with Liberty Living was 16 hours per week. Mr Howson submits she did not apply for Working Time Credits to "top up" her wage or look for an additional part time or full time position. We disagree. She may well not have known how, or been embarrassed, to apply for state benefits. She comes from a non-welfare state background. We believe a respondent should pay the full loss to someone just as in unfair dismissal where many benefits paid would be "recouped " by the State. Part time and full time jobs were not at the time easy to find and she had cause to hang on to the one she had found. H**er loss from 26 August continued at about £165 per week**. The question of for how long it should have is so bound up with the issues of injury to feeling it is better to turn to that now and return to financial loss.

4.6. It was plain at the hearing Venus found the claimant difficult to deal with. They were very different personalities and we see why some things the claimant did irritated Venus who "lashed out "verbally. Unlawful harassment occurred because she did so in a way which related to protected characteristics. The occasions upon which she referred to the claimant's national origin in Hong Kong, while satisfying the test for harassment, were not very serious and, had they stood alone, would not have caused much injury to feelings. In contrast, the claimant is a very devout Christian who lives her life according to Christian values and beliefs. Her treatment by Venus was deeply offensive to her religious values in deriding her religion to the point she was unable to face work. The claimant's personal circumstances at the time included not having the support of her family as her daughters and her husband were away which added to her isolation. She felt fear and stress. She had insomnia and had to take sick leave. Had the harassment relating to religion been directed to any devout Christian it would merit an award on the cusp of the lower and middle bands of about £8000**.** However, those remarks were accompanied by a clear desire on the part of Venus to get rid of the claimant because she viewed her age as being a reason for her being a challenge to Venus authority.

4.7. As explained in our law section the claimant's personal circumstances are very relevant. Mr Heslop submits she came to the United Kingdom believing in a fair, reasonable and tolerant society with equal rights, employment rights in which she could freely practice her religion. She wanted her husband to join her from Hong Kong. Although she is a UK citizen he could not unless she had a UK job to provide the income they would need.These facts caused highly increased vulnerability. **She had to endure months of being put in fear of losing her job and in our view the pre-dismissal injury to feelings was greater than the injury resulting from the dismissal itself. We value it as £14000.**

4.8. The respondent, having been unable to "persuade" her to resign, purported to make her redundant whilst she was on sick leave and did so via e mail. This was not the true reason for dismissal. Venus wanted rid of her as she found her, unlike Fei, challenging to her authority. No matter how well the claimant did her job, the stereotypical assumption was made by Venus, Clement and Cyril that her age made her a problem employee.The dismissive handling of her informal grievance making no attempt to investigate and the direct age discrimination against her was very hurtful as it made her feel valueless and very vulnerable .

4.9. That said, at the liability hearing, the claimant came across as getting her career back on track. After being dismissed she did secure some work in October 2018 and on her return from Hong Kong she obtained more secure part time employment. Then came the hearing and the claimant's supplementary statement for the remedy hearing includes significant passages. Speaking of the untruths told by the respondent's witnesses she says "*They did this under the very same oath, which I myself was under. As a devout Christian, I found this deeply hurtful and painful as they (claiming to uphold the same Christian values I uphold), did not represent these".*

4.10. On Saturday 12 October 2019 she began to have panic attacks. On Sunday she met with Reverend Sue Greenwood and her friend, Ms Ying Chee (Kim) Tsang. The claimant writes "*It angered me that the defendant's witnesses would lie and it triggered bad memories from the past employment and caused me much stress and anxiety".* She had an episode where her chest hurt and she would scream (in Cantonese) about the respondent's witnesses *"God is angry , God is really angry! God let me to see him. God is angry. God said I am his loyal servant. I was treated unjustly".* She stayed with Ms Tsang from Sunday night until Thursday in Middlesbrough. She had panic attacks, delusions and auditory hallucinations with no more than 2 hours of sleep per night, She believed the voice she heard was the Holy Spirit. Ms Tsang took a video to show the doctor. She would regularly clutch her Bible and could not shake the delusions. Ms. Tsang took her to the Newcastle RVI hospital on Monday 14th for a routine appointment but whilst there she became very ill so Ms.Tsang took her to A&E where they diagnosed panic attacks.. On Tuesday she saw a GP at the Grove Medical Group in Gosforth and was prescribed Diazepam.

4.11. At 2am on Wednesday morning, she was awake and much worse than the night before. That day Ms.Tsang was so concerned she called the mental health Crisis Team which responded quickly and prescribed sleeping pills. After taking these, she was able to sleep for 4-5 hours. Her older daughter took her back home to Newcastle on Thursday night. She had been absent from her job for two weeks, presumably on planned leave for the hearing, and due to her mental health felt unable to work, **so resigned**. The vast majority of people would have taken sick, or more annual, leave.

4.12.She still had bad dreams and woke up several times at night. Her older daughter worked in Reading, her younger one was at Lancaster University and her husband was in Hong Kong. After a family discussion, they believed it was not good for her to be alone. Her GP agreed she should go to Hong Kong to be with her husband. She flew there on **22 October**. Whilst there the family GP, Dr Yeung, and Psychiatrist, Dr Chen prescribed anxiety and sleeping medication, at a cost to her.

4.13.She travelled back to Newcastle on 14 December and met with the Early Intervention in Psychosis team who were to arrange Psychiatry appointments. On 7 January 2020 she travelled to Hong Kong due to further ill health returning 29 January 2020. By about 10 March she was able to begin searching for new employment. Ms Tsang's statement, as well as documents produced, fully corroborates this evidence.

4.14. Had it not been for the claimant's extreme reaction to what happened at the hearing, she would not have gone to Hong Kong on 22 October 2019. We believe she would either have remained at Liberty Living and secured more hours there or found another full time job eradicating her loss by about March 2020. From 26 August 2019 until then is about 30 weeks x £165 = **£ 4950.**

5. Submissions. Discussion and Conclusions

5.1. Mr Heslop submits her experience at Tribunal directly resulted in a worsening of her health. He submits the total award for injury to feelings should be at the upper end of the middle band. He very fairly concedes the duration of the unlawful treatment was not lengthy enough to justify a higher band award. Mr Howson agrees for harassment, discrimination short of dismissal and a discriminatory dismissal the middle band is appropriate but submits the total award should be £15,000. In our view, had discriminatory dismissal stood alone it would merit an award into the middle band of about **£10000.** The hurt of actually being dismissed due to age from a job she had not held for long was less than the worry of losing her job and the harassment, which had been a constant source of stress for her for months. As a UK citizen she could remain here and work. Her husband's plans to join her were

not ruined, just "put on hold" while she found another job. However, added to the pre dismissal harassment and discrimination, the total injury to feelings award should be **£24000.**

5.2. What Cyril said during the Skype call (quoted at paragraph 2.54. on page 5 above) was high-handed. Mr Heslop citing Zaiwella-v-Walia and Bungay-v-Saini UKEAT/0331/10) says *deliberate suppression'* of documents and giving misleading evidence was conduct meriting aggravated damages. We agree it was insulting and oppressive. The word aggravated means "made worse" and in so far as we can compensate for what we adjudicated upon, we accept we should. Mr Heslop accepts aggravated damages are to compensate the claimant not punish the respondent but contends £9,000 is not an unreasonable amount given the respondent's behaviour particularly in its management of the case, Mr Howson acknowledges our findings in respect of the non-disclosure of documents and the evidence given at the Tribunal merits an award of aggravated damages but contends the amount must be proportionate to its wrong-doing so suggests £3000. We think **£6000** (one quarter of the injury to feelings award) is a reasonable amount to award for the extent to which her already injured feelings were made worse before,during and after the hearing.That too will figure in our costs decision

5.3. However, we are being asked to do more than that. As we said in our law section for loss to be compensable, it must flow 'directly and naturally' from the unlawful discrimination, but there is no requirement of foreseeability (Essa-v-Laing). On the other hand, as we say in paragraph 4.11 above, so extreme were the claimant's reactions to what happened at the hearing, upon which we have never been asked to adjudicate as a "second tort" in itself, that it calls into question whether the losses arising from her resignation and departure for Hong Kong did flow 'directly and naturally' from the unlawful discrimination. We have no doubt the claimant and Ms Tsang's description of what happened and why in genuine and not exaggerated.

5.4. The claimant at the liability hearing was well on the way to getting her life and career in the UK back on track until the trial itself caused her such a severe reaction she gave up her job and returned to Hong Kong. On 30 October 2019 we gave judgment in her favour In the course of which we made several findings about the respondent's conduct of the case because they went to credibility of their evidence on the matters before us. Neither we, nor any other Tribunal or Court, have been asked to decide **why** the respondent took the line it did.

5.5. Mr Howson argues the claimant has stated she left this employment following the stress she experienced at the Tribunal hearing and submits the respondent should not be liable for any losses incurred as a result of her **voluntarily** leaving her employment. Her medical records show her suffering from mental health issues at the end of October 2019 due to the nature and experience of the Tribunal hearing. He says her full loss of earnings is not attributable to the respondent's discriminatory treatment in 2018 upon which we adjudicated. In our view that is right. We would not chose the word "voluntarily" but her resignation from Liberty Living was not only unforeseeable but unnecessary in that she could have, as she had before, gone sick.

5.6. Mr Heslop is asking us to treat what happened at the hearing as if it were a statutory tort in itself for which we can compensate by awarding her entire loss of earnings after 12 October 2019 and her medical expenses in Hong Kong. We do not think we can do that.To illustrate the point, suppose we had finished evidence and submissions by the end of Day 3 (as we might but for the respondent's conduct of the case) we would have deliberated, given judgment and dealt then with remedy. We would have recognised the aggravation to injury to feelings caused under the Zaiwalla principle and projected future loss on the basis the claimant would keep her job at Liberty Living and either obtain more hours there or found another job to eradicate her future loss in about six months . That would

have ended the case. Her breakdown and its consequences would only have been known if the claimant had brought a claim of victimisation which would then have been decided on its merits after hearing more evidence and submissions probably by a different Tribunal.

5.7. As for an uplift for non compliance with the ACAS Code, we accept an informal grievance was raised and the respondent failed to investigate the claimant's complaints about Venus properly. Mr Howson accepts an uplift of 10% for failure to follow the ACAS Code as regards the informal grievance **may** be appropriate. Matters were being handled mainly by Cyril from Melbourne who probably did not know of, still less consider following, ACAS guidelines which apply only in the UK. The statutory provisions enabling ET's to uplift awards have proved useful in claims where we are otherwise confined to making awards which cannot reflect the manner in which the respondent, for example, unfairly dismisses or unlawfully deducts wages. Although we believe we could in law uplift, we have in this case already reflected this element in our award of aggravated damages, and will be awarding costs. We do not find it is just and equitable to uplift under this provision as well.

5.8. Interest must be awarded . The Injury to feelings spanned a period from October 2017 until her dismissal on 13 July 2018 If we award interest from the end of February 2018 to this judgment. that is 31 months at 8% pa on £24000 = **£ 4960**. With respect to aggravated damages, October 2019 to now, 12 months seems fair £6000 at 8% = **£480** . For financial loss starting 13 July 2018 up to this judgment the mid point date would be about the start of September 2019 and an award of 13 months seems fair.Total financial loss is £4906+££5670 + £4950 = £15526 on which interest is **£1345.**

5.9. As for grossing up Mr Heslop says (i) the first £30,000 of any award will be tax free (ITEPA 2003 s402A (2)) (ii) injury to feelings is not subject to tax (iii) the Tribunal should "gross up" those heads of compensation (earnings) that may attract HMRC taxation. He recognises this area is somewhat unclear following recent HMRC Guidelines of January 2020 which appear to suggest tax may or may not be payable until April 2021. We agree the extent to which HMRC will apply taxation to these awards is not clear but we think elements (i) (ii) (iii) **and (vii)** below will be taxed. They total £25526 which being less than £30000 will be within the tax free allowance so no grossing up is needed.

5.10. We made the declaration in the liability judgment and are not asked to make any recommendation. The calculation of compensation net of tax is
(i) Loss to 14 July to 17 December 2018 **£4,906**.
(ii) Loss 23 April - 25 August 2019 18 weeks at £315 = **£5670**
(iii) Loss 26 August to about March 2020 30 weeks at £165 = **£ 4950**
(iv) Total financial Loss **£ 15526**
(v) Interest from mid point date 13 months at 8% =**£1345**

(vi) Injury to feelings pre-dismissal **£14000**
(vii) Injury to feelings arising from dismissal **£10000**
(viii) Interest from mid point of employment (end February 2018) to now 31 months at 8% =**£4960**
(ix) Aggravated damages **£ 6000**
(x) Interest from liability hearing to now 12 months @ 8% = **£ 480**

5.12. This is an unusual case. In many discrimination cases, we find those who have discriminated to be unsympathetic, selfish and/or ruthless people. In this case none of the witnesses appeared to be so but held stereotypical views which caused the claimant great harm. Determined to win at all costs, the respondent ran its case, denying matters it would have been better to admit and apologise for, and in the process calling the claimant's integrity into question. It is reminiscent of the words of Lord Justice

Neill in King-v-Great Britain China Centre 1991 IRLR 513 that many people are unwilling to admit discrimination **even to themselves**. Some victims of discrimination exaggerate the severity of the treatment they experienced. This claimant did not. Matters many victims would find only moderately hurtful and which would not cause them to become ill had a much greater effect on this claimant. In personal injury claims this truly would be an "eggshell skull "case.

6. Costs

6.1. The Rules include:

74.—*(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing).*
(2) "Legally represented" means ***having the assistance of*** *a person (including where that person is the receiving party's employee) who—*
(a) has a ***right of audience*** *in relation to any class of proceedings in any part of the Senior Courts of England and Wales,* ***or all proceedings in county courts or magistrates' courts;***
(3) "Represented by a lay representative" means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings.

Costs orders and preparation time orders

75.—*(1) A costs order is an order that a party ("the paying party") make a payment to—*
(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;

(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

When a costs order or a preparation time order may or shall be made

76.—*(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
(a) a party (or that party's representative) has acted vexatiously, abusively, ***disruptively or otherwise unreasonably in*** *either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
(b) any claim or response had no reasonable prospect of success.
(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

6.2. The Court of Appeal and EAT have said costs orders in the Employment Tribunal:

(a) are rare and exceptional.
(b) whether the Tribunal has the right to make a costs order is separate and distinct from whether it should exercise its discretion to do so
(c) the paying party's conduct as a whole needs to be considered, per Mummery LJ in Barnsley MBC v. Yerrakalva 2011 EWCA 1255 at para. 41:"*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had*."

(d) there is no rule/presumption that a costs order is appropriate because the paying party lied or failed to prove a central allegation of their case, see HCA International Ltd-v- May-Bheemul 10/5/2011 EAT.
(e) even if there has been unreasonable conduct making it appropriate to make a costs order, it does not follow the paying party should pay the receiving party's entire cost of the proceedings. Yerrakalva at para. 53.

6.3. On the questions of Costs Order or Preparation Time Order, Mr Heslop says the claimant has been represented throughout by the North East Law Centre (NELC) which provides a free employment law service through a paralegal **supervised by NELC's Senior Solicitor** the latter having a right of audience under **Rule 74 (2)(a**), funded by the Litigants in Person Support Strategy (from September 2018) and (from April 2019) by Newcastle City Council. General running costs, e.g. photocopying, are covered by NELC's wider budget (from grants, donations etc.). Conduct of the case and representation has been provided by a paralegal., first Ms Ephraim and then Mr Heslop. This is no different from a private solicitors practice where the qualified solicitor delegates tasks to a paralegal, For this reason, we agree this application should be considered as an application for a costs order.

6.4. Under **Rule 74** *'"costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party'*. "*On behalf of"* includes the provision of free services. Any costs or expenses incurred by NELC in presenting the claimant's case are no different in principle from costs incurred by her personally, Taiwo-v-Olaigbe, 2013 WL 617439 (2013).

6.5. The unreasonable conduct in our view was

6.5.1.up until the final day of the hearing, failure to disclose the 'resignation' email from Venus which supported the claimant's version of events in respect of Venus's behaviour.

6.5.2. failure to disclose even the existence of other documents, which at no stage were disclosed: (i) Fei's employment records (ii) Cyril's notes of the 10 July 2018 Skype meeting (iii) a written report sent to Bernard Yiu.There was no paperwork to evidence the April 2018 investigation but that is probably because there was nothing which could sensibly be called an investigation .

6.5.3. the witnesses' evidence that Fei continued to work part-time, but flexibly, but her clear oral evidence that from mid July 2018 to October 2019 she worked 40 hours per week.

6.5.4. Cyril maintaining in written and oral evidence the version of a Skype call presented in the ET3 was true and accurate, yet the claimant's audio recording directly contradicting his version. As we noted '*He now had to say all that was in the first 15 minutes because there is nothing of it in the recorded part*'. This not the only attempt to mislead We found there had been '*deliberate suppression of documents which undermined [the respondent's] case*' This conduct defied the disclosure order so falls in Rule 76 (2) but was also unreasonable behaviour under Rule 76 (1)(a).

6.5.5.deadlines were missed by the respondent and it became necessary for the claimant to apply for an unless order. A strike out warning was issued instead with the witness statements then being provided by the deadline for response. This conduct also falls under Rule 76 (1)(a) and (2).

6.6. The conduct had the effect of prolonging the hearing and overall preparation time required The claimant's representative and the Tribunal had to devote time to ascertaining the existence of relevant documents and elicit evidence that should have been given freely.

6.7. Mr Heslop submits the totality of the conduct outlined supports a claim for all of the costs incurred. In the alternative he submits we should order such proportion of an attached schedule as we considers just and equitable. In considering the respondent's ability to pay he notes it is a large multi-

national company, with a net profit of over £1,492,783 in 2018 Mr Howson accepts the hearing was prolonged by the respondent's unreasonable conduct of the proceedings but only by one day

6.8. The costs claimed in the schedule are at a very modest rate and for a very reasonable number of hours. They total £ 5428.80**.** The first nine items were work that would have to be done anyway. They total £1540.50**.** So would items 11 and 12 totalling £171.60**.** Item 10 -Application for unless order and advice to client would have been wholly avoidable but for the unreasonable behaviour **£ 74.10**. Items 15 and 16 totalling **£1482** would have been avoided completely but for the unreasonable behaviour.

6.9. Item 13 is "final preparations and pre-hearing advice to client" **£ 1092.00** and Item 14 "attend Tribunal (3 ½ days), including client advice and travel time" £1068.60. Assessing costs is not a precise science and when we say in respect of earlier items they would have to have been done anyway, they would not then have to have been re-visited had it not been for late delivery of witness statements and the "selective discovery. The hearing would have been much reduced in length. Of the sub total of these two items, £ 2160.60, we award the whole of item 13 and item 14 reduced by half to **£534.30.**

6.10. We order total costs of the emboldened items **£3182.40**

Employment Judge T.M. Garnon

Judgment authorised by the Employment Judge on 29 September 2020