EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr A G Bailie		(1) ADM Investor Services International Limited (2) Mr F Somerville-Cotton

Heard at: London Central Employment Tribunal

On: 25, 26, 27, 28 January 2021 (also 3 February 2021 in chambers)

Before: Employment Judge T Adkin
Mr G W Bishop

Representations

For the Claimant : Mr C Milsom (Counsel)
For the Respondent: Mr T Kibling (Counsel)

JUDGMENT

The judgment of the Tribunal is:

(i) The First Respondent shall pay an award for injury to feeling in the sum of **£25,000**.

(ii) The First Respondent shall pay an award for injury to feeling in the sum of **£20,000**.

(iii) There will be no award for aggravated damages.

(iv) Compensation for financial losses arising from discrimination will be calculated based on the following findings as to what would have occurred ***but for*** the Respondents' discriminatory action:

(v) Post restructure, in the period September 2018 to March 2020 the Claimant had a

a. 50% chance of working as a Co-Head of the Global Equities and Fixed Income Department, working 3 days a week (i.e. 60% of full

time), on a salary of £100,000 plus annual commission/bonus payments of £132,161.

b. 30% chance of working as a Broker, working 3 days a week (i.e. 60% of full time), on a salary of £100,000 plus annual commission/bonus payments of £44,700.

c. 20% chance of being too unwell to engage with the restructure and as a result not returning to the First Respondent's workplace.

(vi) Post market volatility March/April 2020, had he remained in employment following a restructure above, in the period April to November 2020 there was a

a. 50% chance of employment as Co-Head coming to an end in April 2020.

b. 25% chance of employment as a broker coming to an end in April 2020).

(vii) Post redundancy exercise, had the Claimant remained in employment following the market volatility above, in the period November 2020 to November 2026 there was a

a. 30% chance of employment as a Co-Head coming to an end in November 2020.

a. 15% chance of employment as a broker coming to an end in November 2020).

(viii) There is no loss beyond November 2026.

REASONS

The Issues

1. The parties agreed a list of issues relating to remedy as follows:

NON PECUNIARY LOSS

i. Whether an award for injury to feelings should be made (and if so, what award);

ii. Whether an award for personal injury should be made (and if so, what award);

iii. Whether an award should be made for aggravated damages (and if so, what award);

iv. The applicable rate of interest in relation to any awards made for non-pecuniary loss;

PECUNIARY LOSS

v. Is the C entitled to any award of compensation for loss of income (and if so, what award and in respect of what period)? To the extent that an Ogden approach is applicable as regards any future losses the parties agree that the appropriate multiplier is 3.65.

vi. If so, the appropriate calculation of such an award including commission per annum or for some other period after August 2018 and if that award including commission payments will need to be adjusted in the future.

vii. The ET to have regard to the causative effect of the proven discrimination on:

(a) The prospect (if any) of the C's being able to return to work as a Co-Head role and for how long,

(b) The prospect (if any) that the C might have remained employed in an alternative role with R1 and for how long,

(c) The estimated period of any continued active employment;

(d) The prospect (if any) that the C's employment would end either due to dismissal or other event including redundancies or reorganisations;

(e) The prospect (if any) of the Claimant voluntarily leaving employment.

GENERAL

viii. How any compensation figure should be grossed up;

ix. Interest on any award;

x. In the light of the findings made, whether any recommendations should be made, and if so what recommendations.

The Evidence

2. The Parties agreed a 338 page bundle to which some additional documents were inserted during the course of the hearing.

3. Reference was made to the bundle agreed for the liability hearing and also witness statements from that hearing as well as the following additional statements:

3.1. A further witness statement from the Claimant.

3.2. A witness statement from Julia Williams, Co-Head of the Global Equities and Fixed Income Department ("the Department"), of the First Respondent.

3.3. A witness statement from Stuart Jackson, Finance Director, of the First Respondent.

Procedural Matters

4. Much of the hearing was heard using Microsoft Teams as a result of technical difficulties experienced with the Cloud Video Platform (CVP) by one of the advocates. The requirement for a public hearing was satisfied by providing a link for any observers present to transfer across to Teams and provision of the relevant link to the member of the Tribunal administration responsible for providing access to public video hearings.

Submissions

5. Both Counsel produced detailed written submissions on fact and law, for which we are grateful.

6. These were supplemented by oral submissions.

Liability decision

7. The Claimant's claims of discrimination under section 13 & section 15 Equality Act 2010 succeeded in respect of

7.1. The removal of the Claimant's management responsibilities and/or appointment of Ms Williams as co-head of the Equities Desk.

7.2. The failure to consult with the Claimant as to the same.

8. All other claims failed.

9. Paragraph 29 of the written reasons on liability referred to 48 psychotherapy sessions psychotherapist Mr David Abrehart. The date given in the written reasons were based on a contemporaneous document. It seems that that document was wrong. We are happy to reconsider those reasons, at our own initiative, and correct our findings to reflect that these sessions ran from 13 January 2017 to 17 April 2018, i.e one year later than was originally found.

The Facts

10. The original findings of fact stretch from the Claimant's commencement of employment on 8 April 1996.

11. The material date as far as the act of discrimination we found is a restructure announcement on 3 August 2018, leading to a breakdown on the part of the Claimant, who did not ever return to work from that date, although he remains an employee even now.

12. The Claimant instructed solicitors and presented a grievance on 12 September 2018.

13. The hearing on liability commenced on 30 October 2019. Following a chambers decision-making day in November 2019, the decision was sent to the parties on 19 December 2019.

14. The Second Respondent sent a letter of apology to the Claimant on behalf of himself and the First Respondent employer in a letter dated 23 December 2019, suggesting mediation utilising a mediator or alternatively Occupational Health. The Claimant rejected this approach.

Future income

15. The Claimant is currently 49 years old. He is in receipt of Income Protection payments being made by an insurer, in the sum of £118,462.32 per annum subject to annual increases.

16. The claim has been put forward at this hearing on the basis that the Claimant will remain an employee, but be unable to return to work as a result of his ill health and that this payment will continue until he is 65 years old. Making our own assessment of the medical evidence and the low likelihood of the Claimant returning to work for the First Respondent, we have accepted that this is the position. Even if the Claimant does at a later stage return to work, he is highly unlikely to earn more than the figure that he is currently receiving.

Medical evidence

Experts & joint report

17. The Tribunal has had the benefit of written and live evidence from two consultant psychiatrists: Dr Michael Isaac for the Claimant and Dr Paul Mallett for the Respondents.

18. An initial attempt by the parties to instruct a joint expert unfortunately failed. In a claim of this potential value, the Tribunal entirely accepts that it is appropriate and proportionate to have separately instructed experts.

19. The experts produced a joint statement dated 11 September 2020, which contains the following:

> 5. Drs Isaac and Mallett agree that the Claimant developed a serious major depressive disorder, that this began in 2017 and was to a significant extent resistant to first line treatment. Dr Mallett considers that judged by the metric of his suicidality, it was at its 'worst at that earlier stage.

6. We agree that by the time of his proposed return to work in August 2018 the Claimant had attained partial remission but remained symptomatic and therefore vulnerable to further relapse. Dr Mallett considers that this improvement was already very fragile and unlikely to be sustained given that the previous work difficulties were unresolved and his description of his 'meltdown' at work shortly before going on annual leave.

7. Drs Isaac and Mallett agree that the psychiatric treatment that the Claimant has received since January 2019 has been appropriate and within the confines of mainstream psychiatric practice.

8. Drs Isaac and Mallett disagree on the decisive point of how the events of early August 2019 affected the Claimant.

9. In a nutshell, Dr Isaac considers that the events of early August 2018, covered in some detail in both his and Dr Mallett's report, served to derail the Claimant's early recovery, so that he subsequently deteriorated and required, for the first time, specialist psychiatric attention. His condition later deteriorated further, and he required a period of more intensive management at the Priory Hospital. He considers that the Claimant was at his worst during 2019, having deteriorated from August 2018 before referral to a psychiatrist. His antidepressant dose was increased in November 2018 and combination (medication) treatment was begun in early 2019 with a second antidepressant.

10. Dr Mallett considers that the Claimant's clinical trajectory would have been the same anyway, whether the events of early August 2018 happened or not. This reflects, in his view, the severity of the Claimant's pre-existing depression, it's evident treatment resistance and the fact that the Claimant had already decompensated progressively in the face of perceived work difficulties in early 2018, following which he started drinking heavily and was off sick for a prolonged period.

Dr Isaac (Claimant's expert)

20. In his written report Dr Isaac said as follows:

"72. But for the deterioration after 3 Aug 2018, I doubt there would have been any need for psychiatric intervention

73.Though his progress had been till then satisfactory, it is important to realise that Mr Bailie was symptomatic at the beginning of August. His psychological resilience in the face of adverse events remained low, and his recovery remained fragile, especially as he had been away from work, on sick leave and holiday, and was thus ill-equipped to deal with the announced restructuring, when he was (Tribunal Judgment paragraph 308)

> presented with a fait accompli. He had, however, been well enough to return to work on a phased basis, and had he done so as he had planned, there is no reason to suppose that his condition would have been exacerbated in a similar manner.
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> 74. My impression is that restructure in itself, had it been a process in which Mr Bailie could have felt involved, with meaningful input into the tempo of the process, would not have had the same strongly adverse effect on his mental state that 3 Aug 2018 did. Indeed, it could have allowed him time to prepare for a changed role, as well as reinforced his autonomy in being part of the restructuring process. It might even have been a relief to move away from the high pressure role he had occupied when he first became ill.
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> …
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> 77. Had the events of 3 August 2018 not occurred, there would have been a 100% likelihood that Mr Bailie would have returned to work with the Respondent. This likelihood has been reduced to about 20%, because, I suggest, of the derailment of Mr Bailie's expected clinical trajectory"

21. In his oral evidence Dr Isaac qualified his opinion about a 100% likelihood of returning to work. In essence what he meant was that the Claimant would return to the workplace as he was supposed to following his holiday on 6 August 2018. He accepted that, even absent the discriminatory acts of 3 August 2018, the Claimant could not have returned full time to the role of sole Head of the Department. He suggested that, any return to work would be to a change of role or alternatively to a part-time version of the Co-Head role. Had he been advising the Claimant at the time Dr Isaac would have advised him to make changes in his role.

22. Dr Isaac drew the attention of the Tribunal to the NICE guidance on long-term sickness, which he summarised as being that there was a one in five chance of an employee returning to work after 6 months and that after 2 years away an employee is more likely to retire or die than return to work. He confirmed that being at work is therapeutic.

Dr Mallett (Respondents' expert)

23. In his written report Dr Mallett wrote:

> "4.7.1 From his account, the Index Events compounded his difficulties but it is clear that even absent these, he was already struggling to function in his former role. He had been off sick on a number of occasions and indeed, the final time he went off sick was triggered by an uncharacteristic outburst on his part that was indicative of his markedly lowered stress resilience.

> 4.7.2. The question arises as to whether absent the Index Events, Mr Bailie would have recovered. In my opinion, he would not have simply returned to his previous level of functioning.
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> …
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> 4.7.3. Mr Bailie also had a myriad of serious concerns about his work environment, raised as part of his grievance and during the ET process of which the Index Events were a very small part …
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> …
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> 4.7.4. Mr Bailie defaulted from any positive contact with his employers in September 2018 making it unlikely from a psychiatric perspective that he was open to any constructive internal solution to his difficulties at that point. Overall, therefore, it is unlikely that he would have been able to continue in his previous role for more than another few months
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> …
>
> 10.1 … It would appear that much of his beliefs about himself and his self-esteem centred around work performance rather than in other areas of his life.

Apportionment/divisibility

24. Both experts were asked questions from the Tribunal about whether it was possible to "apportion" the extent of the illness suffered by the Claimant on a percentage basis. Neither expert considered that they could do this.

The Law

25. Pecuniary and non-pecuniary losses which flow "directly and naturally" from discrimination are properly recoverable under "but for" causation principles: *Corr v IBC Vehicles Ltd* [2008] 1 AC 884. Such losses are recoverable even if the loss was not reasonably foreseeable: per Pill LJ at [37] in Essa v Laing Ltd [2004] ICR 746.

26. The 'eggshell skull' principle of the law of tort (delict) also applies in cases of unlawful discrimination: a discriminator must take their victim as they are: *Olayemi v Athena Medical Centre* [2016] ICR 1074.

27. Where it is satisfied that there is some prospect that a non-discriminatory course would have led to the same outcome an ET must reduce damages accordingly: *Abbey National plc and Hopkins v Chagger* [2009] ICR 624. A Tribunal must avoid incorporating another guise of unlawful and/or discriminatory conduct in the *Chagger* exercise. On the other hand any hypothetical exercise relating to future employment in the absence of discrimination must relate to the actual respondent

employer not a "reasonable employer" (*Abbey National Plc v Formoso* [1999] IRLR 222.

28. A victim of unlawful discrimination may suffer stress and anxiety to the extent that psychiatric and/or physical injury can be attributed to the unlawful act. In that situation it has been confirmed that the employment tribunal has jurisdiction to award compensation, subject to the requirements of causation being satisfied, see *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481, [1999] ICR 1170, CA.

Apportionment

29. An ET should consider whether a particular part of suffering can be apportioned to the unlawful conduct: *BAE Systems (Operations) Ltd v Konczak* [2017] IRLR 893: This may include an award to reflect exacerbation or aggravation of a pre-existing injury. An ET is nonetheless entitled to include that discrimination which renders a vulnerable individual ill is truly indivisible (*Konczak*). The question of divisibility is a question of fact.

30. The claimant *Konczak* was awarded compensation over £360,000 for a single act of discrimination, a single comment, in the context of 15 other heads of claim which were dismissed. The ET found that this comment was a last straw causing a psychiatric injury and for the Claimant never to return to work. The EAT and the Court of Appeal upheld the decision of the ET that in the circumstances of that case the injury was indivisible. Underhill LJ dealt with the question of apportionment, following a summary of the case law:

> 71. What is therefore required in any case of this character is that the tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused. I would emphasise, because the distinction is easily overlooked, that the exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm. In other words, the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong; not whether it can assess the degree to which the wrong caused the harm.
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> 72. That distinction is easy enough to apply in the case of a straightforward physical injury. A broken leg is "indivisible": if it was suffered as a result of two torts, each tortfeasor is liable for the whole, and any question of the relative degree of "causative potency" (or culpability) is relevant only to contribution under the 1978 Act. It is less easy in the case of psychiatric harm. The message of Hatton is that such harm may well be divisible. In Rahman the exercise was made easier by the fact (see para 57 above) that the medical evidence distinguished between different elements in the claimant's overall condition, and their causes, though even there it must be recognised that the attributions were both partial and approximate. In many, I suspect most, cases the tribunal will not have that degree of assistance. But it does not

> follow that no apportionment will be possible. It may, for example, be possible to conclude that a pre-existing illness, for which the employer is not responsible, has been materially aggravated by the wrong (in terms of severity of symptoms and/or duration), and to award compensation reflecting the extent of the aggravation. The most difficult type of case is that posited by Smith LJ in her article, and which she indeed treats, rightly or wrongly, as the most typical: that is where "the claimant will have cracked up quite suddenly; tipped over from being under stress into being ill." On my understanding of Rahman and Hatton , even in that case the tribunal should seek to find a rational basis for distinguishing between a part of the illness which is due to the employer's wrong and a part which is due to other causes; but whether that is possible will depend on the facts and the evidence. If there is no such basis, then the injury will indeed be, in Hale LJ's words, "truly indivisible", and principle requires that the claimant is compensated for the whole of the injury—though, importantly, if (as Smith LJ says will be typically the case) the claimant has a vulnerable personality, a discount may be required in accordance with proposition 16.

31. As is referred to, Hale LJ's identified propositions relevant to stress at work cases in the case of Hatton (*Sutherland v Hatton* [2002] IRLR 263 CA). Of particular relevance are:

> ""(15) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment.
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> (16) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress-related disorder in any event."

CONCLUSIONS

NON PECUNIARY LOSS

Injury to feelings

32. [**Issue i**] Whether an award for injury to feelings should be made (and if so, what award)

33. The Tribunal considers that an injury to feeling award should be made in this case. Given that the discriminatory act was essentially a single act, we do not consider that this is comparable to a sustained campaign of discriminatory harassment as

might suggest an award in the upper band. On the other hand the act was of great significance to the Claimant, it went to the core of his role as a manager, and left him feeling undermined and side-lined in respect of the restructure consultation which he had been given to expect would continue but did not. This was a non-trivial act of discrimination and had a significant impact on the Claimant. The motivation of the Second Respondent is not a material consideration.

34. In making an award, the Tribunal has stood back and considered the quantum of the injury to health award also being made and adjusted to take account of overlap. We consider that the appropriate award is **£25,000**.

Personal injury

35. [**Issue ii**] Whether an award for personal injury should be made (and if so, what award);

36. Regarding the nature of the condition Dr Isaac diagnosed "major depressive disorder, single episode, moderate, without psychotic features, in partial remission (DSM5 296.25; ICD10 equivalent F32.4)", consistent with treating the Claimant's psychiatrist. In his opinion, but for the deterioration after 3 August, he doubts that there would have been need for psychiatric intervention.

37. Dr Mallett similarly opined "major depressive disorder by around the latter half of 2017", "has remained to all intents and purposes, significantly depressed". He suggested that the exacerbation caused by the material event was for a few months from August 2018 (150-151). In oral evidence he minimised this to "some weeks". Dr Mallett suggests that the subsequent grievance and employment Tribunal procedures produced stress that superseded the stress caused by 3 August 2018.

38. We have concluded based on medical evidence that the discriminatory action of 3 August 2018 caused an aggravation of a pre-existing condition.

39. If the grievance and tribunal proceedings were unrelated to the discriminatory event of 3 August 2018, we would be minded to accept Dr Mallett's view that the events of the restructure viewed in the overall medical history could not realistically be considered to have aggravated the Claimant's condition for more than a few months.

40. Our finding however is that the 3 August 2018 discrimination changed the course of events in a way which perpetuated the Claimant ill health. But for the discrimination on 3 August 2018 the Claimant would have remained at work and the grievance would not have been submitted in September 2018. Although we acknowledge that the grievance contains a history of other complaints, it is clear that the discrimination of 3 August was the precipitating event. One of the core elements of the grievance is a concern that the Claimant has been discriminated against because of his disability. The grievance flows naturally from the discrimination (Essa v Laing). The stress caused by the grievance is a natural consequence of the discrimination that led to the grievance. Similarly the Tribunal proceedings followed on from the outcome of the grievance. It is plain that the effect of being away from the workplace as a result of the discrimination on 3

August has perpetuated the Claimant's ill health, or at least significantly hindered his recovery. The timing and immediate effect of the discrimination on 3 August caused a fracture in the employment relationship at a critical stage, and perpetuated a cause of stress and hinder chances of recovery.

41. Before considering the question of apportionment, we consider that the Claimant's condition corresponds to Judicial College Guidelines, 15th edition psychiatric injury category (3) Moderately Severe: between £17,900 and £51,460. Moderately severe cases include those where there is work-related stress resulting in a permanent or long-standing disability preventing a return to comparable employment. The Claimant's condition does not fall into the category below, namely (2) Moderate, since that reflects a positive prognosis which does not apply in this case.

42. Both experts declined to apportion on a percentage basis. We have considered whether we could or should attempt to do so on a rough and ready basis.

43. We have not apportioned on a percentage basis. In making our assessment however, there is a clear distinction between the Claimant's disability and illness in the period up to 3 August 2018 and afterward. It is clear from the content of the grievance that the Claimant attributed difficulties with his mental-health to events from 2016 onward. The workplace, the Claimant's role and events at work caused very significant stress in the two years leading up to August 2018. We are not assessing compensation for this.

44. Had we been making an assessment for the entirety of the Claimant's condition, it would be likely to be something in the middle of the range £17,900-£51,460. The mid-point of the range is £34,750. That would overcompensate the Claimant for the injury, given that the Tribunal is only concerned with the discriminatory action of 3 August 2018. In the terms of Konczak, we should only award compensation for the extent of the aggravation. A lesser figure is therefore appropriate.

45. We have also stood back to take account of the fact that there is an injury to feeling award also being made. In our judgment the appropriate award is at the lowest end of the range proposed by the Claimant's counsel in submissions, namely **£20,000**.

Aggravated damages

46. [**Issue iii**] Whether an award should be made for aggravated damages (and if so, what award).

47. An award for aggravated damages may be made when a respondent has acted in a high handed, malicious, insulting or oppressive" manner.

48. We do not consider that the Respondents' conduct, in the circumstances of the discriminatory act on 3 August 2018, nor in the aftermath in the grievance, nor in the conduct of the litigation could be characterised in this way.

49. We do not consider that this is an appropriate case in which to make an award for aggravated damages.

Interest

50. We find it would be just to award interest in this case. The Claimant has been kept out of his money.

51. The appropriate rate of interest on awards for discrimination is 8%.

52. Interest is awarded on injury to feelings awards from the date of the act of discrimination complained of until the date on which the tribunal calculates the compensation (see Reg 6(1)(a) Industrial Tribunals (Interests on Awards in Discrimination Cases) Regulations 1996).

53. Interest is awarded on all sums other than injury to feelings awards (i.e. in this case award for psychiatric injury and past pecuniary loss) from the mid-point of the date of the act of discrimination complained of and the date the tribunal calculates the award (Reg 6(1)(b) IT(IADC) Regs 1996). The mid-point date is the date half way through the period between the date of the discrimination complained of and the date the tribunal calculates the award (Reg 4 IT(IADC) Regs 1996).

54. We invite the parties to agree the calculation of this element.

PECUNIARY LOSS

55. In cases of this nature the Tribunal must inevitably carry out a speculative exercise as to what would have occurred in the future. The interplay between the state of the Claimant's health, future changes in the First Respondent business and market volatility are simply impossible to predict with certainty. We have had to grapple with the question of the Claimant's career in the First Respondent's employment absent discrimination. We have attempted to do the best that we can to reflect different likelihoods and possibilities at three different stages, namely the pending restructure taking effect in September 2018 after the Claimant's return to work, the effect of market volatility in the pandemic in March/April 2020 and the redundancy exercise in the fourth quarter of 2020.

56. Inevitably this is not a precise scientific exercise. The Tribunal has had the benefit of the written and oral evidence of two consultant psychiatrists, who offered different views on the trajectory of the Claimant's recovery had there not been the discriminatory event of 3 August 2018. We have had the benefit of written and oral evidence from the Claimant, his wife and a variety of witnesses at both the liability and remedy hearing on behalf of the Claimant and the Respondents. There is the contemporaneous medical evidence and the contemporaneous evidence contained in the liability bundle and the remedy bundle.

57. To reiterate this is not a scientific exercise, but based on our impressions based on the entirety of this evidence and the arguments put forward to us.

58. [**Issue v**] Is the C entitled to any award of compensation for loss of income (and if so, what award and in respect of what period)? To the extent that an Ogden

approach is applicable as regards any future losses the parties agree that the appropriate multiplier is 3.65.

Apportionment

59. We again carefully considered under this head of loss whether an element of apportionment should apply to reflect the fragile state that the Claimant was in before the discriminatory treatment of 3 August 2018.

60. It is submitted on behalf of the Claimant that this is a straightforward "but for" case of causation i.e. had the Claimant not suffered the discomfort treatment of 3 August 2018, he would not have suffered the breakdown in his health that he did and would not have needed to submit the grievance or the claim to the employment tribunal.

61. The Respondents' position is the contrary i.e. discriminatory event of 3 August 2018 was only a small element of the grievance which would have been submitted anyway.

62. Ultimately we accept Mr Milsom's submission. The immediate effect of the restructure on the Claimant's health was dramatic. Within a fortnight of the event the Claimant consulted his GP, a psychiatrist, a neurologist and an eye specialist. His medication was also increased via the introduction of sertraline and latterly agomelatine, zopiclone and quetiapine (an anti-psychotic).

63. We accept Dr Isaac's opinion that had the event of 3 August not occurred psychiatric intervention would likely not have been required. The effect on the employment relationship was decisive. The Claimant did not return to the workplace. We accept he otherwise would have done. He instructed solicitors.

64. We accepted the evidence of Mrs Bailie about the effect of 3 August 2018.

65. It is quite clear that the index event was the precipitating event which led the Claimant to submit a grievance, albeit that that grievance did contain something of a history that stretched further back. As we have considered above, the stress of the grievance and Tribunal proceedings, together with the Claimant's absence from the workplace have perpetuated his poor mental state.

66. We do not find, in the terms of Konczak, that the harm to the Claimant's employment relationship with the First Respondent, was divisible.

67. We have concluded that the effect on the Claimant's employment did flow "directly and naturally" from the discrimination. We do not consider that there are any supervening events to break the chain of causation.

Conclusion from medical evidence

68. Although some emphasis has been put on distinctions between the experts in submissions, we find that on the crucial point of causation there is also some overlap between the position of the two experts. In short, they agree that even absent the discrimination the Claimant could not have returned to his former role.

He was ill and had been in a fragile state for some time. There were a variety of other problems in the workplace which had caused him a high level of stress.

69. We consider that the extent of the history of the matters set out in the grievance submitted in September 2018 lends weight to this conclusion.

70. The point of distinction between the two experts appears to be on the trajectory of recovery or likely further recovery at the date of the index event on 3 August 2018 but for the discriminatory event.

71. Our conclusion, based on the medical evidence is that even had there been no discrimination the Claimant would not have returned to a sole and full time Head of Department role. We do however accept Dr Isaac's opinion that there would have been a return to work.

August 2018 return to work & restructure

72. At the point of the Claimant's return to work in August 2018, a discussion about a restructure was still pending. Ultimately we have found that the First Respondent was entitled to restructure, provided that this was done in a non-discriminatory way [see paragraph 227 of the liability judgment]. The Claimant himself had been protesting that he was overworked and trying to cover too many management responsibilities. A non-discriminatory restructure would have required further consultation as had to promised rather than presenting the Claimant with a *fait accompli* which was communicated to him by worried loyal colleagues. It would have required adjustments to be made for the Claimant's illness.

73. In line with the evidence of both psychiatric experts, we find that the Claimant could not have returned to a full-time sole Head of Department role.

74. A consultation with the Claimant with the goal of him taking a reduced role would not have been straightforward. There are a large number of possible ways that such a consultation might have played out, and a variety of possible outcomes. Doing the best we can, in our assessment this consultation, carried out properly and in a non-discriminatory way, would probably but not definitely have resulted in a successful outcome. The Claimant had been complaining about being overworked and was plainly unwell due to stress. He ought to have accepted a reduction in the scope of his role.

75. The consequence of proposition 16 of Hale LJ's guidance in Hatton requires the Tribunal to factor in the chance that the Claimant would have succumbed to ill-health in any event, irrespective of the discrimination.

76. We find that there was a **20%** chance that the Claimant's state of health, in particular the low psychological resilience in the face of adverse events and fragile recovery identified by Dr Isaac, meant that even a sensitively handled and non-discriminatory attempt to restructure and reduce the Claimant's role would have resulted in him suffering a relapse and being unable to continue working for the First Respondent.

77. The two most likely outcomes, we consider follow on from a successful consultation. We find that by September 2018 the Claimant would either have accepted a Co-Head role, albeit part-time, or that he would have taken a step down from a management role to an execution based role as a broker, again on a part-time basis. Our impression is that the former possibility was somewhat more likely than the latter. We consider, as a matter of impression that there was a **50%** chance of the former and a **30%** chance of the latter.

Base salary

78. Given the Claimant's seniority and experience, as well as the requirement for the First Respondent to make reasonable adjustments, our finding is that the Claimant would have retained a base salary of £100,000 in either role had the consultation and restructure been successful. We do not find that this base salary element would have been reduced to reflect part-time working.

Ogden tables

79. We have considered whether or not to use an Ogden table multiplier approach. The Claimant puts this forward as an approach to use in the alternative, but not as his primary position. The parties have agreed an Ogden multiplier to be used if that is the right approach.

80. The EAT has suggested that the Ogden approach is appropriate only where it is established that a claimant is likely to suffer a career-long future loss of earnings. (*Kingston Upon Hull City Council v Dunnachie (No.3) and another* [2004] ICR 227 and *Birmingham City Council v Jaddoo* (EAT0448/04)). For reasons we have given below, we do not consider that this is the situation.

81. Additionally, the Ogden approach discounts future income for disability, based on statistical information for the population as a whole. In the present case, where we accept the Claimant's case that he will be receiving essentially a guaranteed income for the remainder of his career, the approach of discounting for disability in the "new job" facts would be inappropriate.

82. For these reasons we consider that the Ogden approach is not appropriate in this case.

83. [**Issue vi**] If so, the appropriate calculation of such an award including commission per annum or for some other period after August 2018 and if that award including commission payments will need to be adjusted in the future.

84. It is our understanding that the figures below are **gross** figures. If that is right, it will be for the parties in carrying out their calculations to calculate future loss on the basis of net loss of earnings (i.e. net earnings but for the discrimination less net earnings from the income protection insurance), to which the grossing up calculation should take place.

Income as Co-Head

85. The Schedule of Loss posits an annual average bonus as £300,000 p.a. on top of base salary of £100,000 p.a. Continuing for 16 years, until retirement at the age

of 65 years. It is said there is no reason to suppose that the Claimant would have left his employment, subject to his medical capacity to remain in employment. In written submissions Mr Milsom referred to a figure of £250,000 and in oral submissions suggested that the relevant range might go down as far as £225,000.

86. The Respondents say that the claim put forward in the schedule is fanciful and opportunistic. In the Counter-schedule the Respondents note an annual average bonus of £217,250 based on the last four years. The Counter-schedule says "given the impact on the C's clients following the February 2018 market incident and the volatile state of the markets since his absence, as well as the likelihood that he would have had further absences and/or phased returns to work unrelated to the discriminatory acts found by the ET, the Rs contend that it would have been substantially less than that". In submissions it is suggested that the average for 2015 to 2018 is £220,268.75. Some discrepancies in the figures we have considered are explained by the difference between bonuses allocated for a particular year and bonuses actually received and gone through payroll.

87. It is clear from some of the annual data provided for commission/bonus payments for the Claimant and some of his colleagues that there is a significant variation in income from year to year. For this reason, as a starting point for assessing the Claimant's future income, we consider it is appropriate to take an average of four years, namely 2015 – 2018. We agree with the calculation of the average in Mr Kibling's submission, namely an average of £220,269. We prefer the data on this page as this represents the sums actually paid through payroll in these four years.

88. The position adopted by the Respondents in their evidence is that, by comparison with his co-head Julia Williams, the Claimant did not have a particular strength in winning new work or bringing in new clients. It is submitted that this would inevitably have led to Ms Williams being paid significantly more than the Claimant in dividing the 'pot' of commission from the department that might be presumed to be shared between the managers. This is compounded, the Respondents argue, by the fact that a number of the "Claimant's clients" left after the market instability of 5-6 February 2018. The Claimant's position is that these were clients of the desk more generally.

89. We have not accepted the Respondents' position for several reasons.

90. First, the evidence of the Second Respondent at the liability hearing:

> 95. … We calculate P&L for the whole area on a quarterly basis and then it is allocated across the team, recognising everyone's contribution. So, as an example, if the department earns £1 million in a quarter and half of that comes from Mr Bailie's accounts, **he would not necessarily get half of the revenue because we recognise that other people in the team also service those accounts and that work**. When considering the Desk Head's proposals for individual's allocation, the Remuneration Committee raises questions with the Desk Head as to how the numbers were reached and assesses whether the proposed allocation would reflect the active contribution to earnings generated on the desk.

> Conduct during the period is also a factor in the Remuneration Committee determination
>
> 96. … What Mr Bailie's **(commission) share would not have been lower than it would have been previously**, just by virtue of Ms Williams acting as co-head and he would still have been directly involved in the exact allocation decision as desk head, His share was also not reduced as a result of his reduced hours and duties during May to July.
>
> …
>
> 98. Ms Williams' basic salary was increased to the same level as Mr Bailie's to reflect her added management responsibilities as co-head, since she is covering Mr Bailie's role in his absence but **Mr Bailie's salary has not been reduced to make up for that and nor is there any intention of that**. If Mr Bailie had returned as originally anticipated, there would have been discussion with Mr Bailie and Ms Williams as co-heads and then with the Remuneration Committee, as to how we would equitably have reflected the respective contributions at that time, both in terms of management and client revenue, as well as active performance. For example, **if a full-time employee reduced to a 3 day week, they would expect their commission payment to be pro-rated to reflect that**.
>
> [**emphasis added**]

91. Second, although Ms Williams gave evidence putting forward a view that the Claimant's commission would have been reduced to reflect that there were a few of "his" clients lost, she also gave evidence about the approach of the First Respondent to move away from a "silo" model whereby brokers would have their own clients and not contribute to the good of the Department as a whole. She described a goal of trying to encourage a team rather than individual approach to clients. These two things seem to us to be in contradiction.

92. Third it was accepted by the First Respondent's witnesses that the Claimant had particular skills relating to execution and management skills. The 2017 appraisal reflects this. Winning new clients is only one of the areas which would contribute to profitability of the department. Servicing existing clients is plainly extremely important. Mr Bailie's skills in this area were not in question as his appraisal confirmed.

93. We find that the First Respondent did not operate a policy of paying bonus or commission proportionate to the number of new clients brought in to the business. Even if the First Respondent is right that the Claimant struggled to win new clients (which we are not in a position to entirely accept), he had a financially lucrative career based on the skills that he did have.

94. Fourth, we accept the submission that with another experienced manager on the desk the pot of commission itself would very likely have been larger. To treat the amount of commission as fixed irrespective of whether the Claimant was working ignores the benefit that sharing management responsibility would have freed up Ms Williams to do more client development and that the Claimant himself plainly had strong relationships with clients as was reflected in his 2017 appraisal.

95. Fifth, we accept that there is something in Mr Milsom's submission "presence is power". If the Claimant was in position as Co-Head of the Department, he would have had influence over the allocation of commission. He would also have management influence about deciding who serviced which clients.

96. Sixth, the Claimant had a good working relationship with Ms Williams. We consider it likely that they would have reached an amicable and equitable division of commission. It seems unlikely that her commission/bonus would have outstripped the Claimant's to the extent that has been suggested by the Respondents

97. Finally, the version presented by the Respondents in this respect is an unfair comparison. Ms Williams it seems has managing the Department successfully at a time of market volatility and also managed to win or develop new client relationships. The Claimant was unwell during 2017 and 2018 and absent from the Summer of 2018 onward. Had he remained at work we have no doubt, based on his prior history, that he would have thrown himself into appropriate management activity, whether that was developing Mr Gainsley's clients, winning new work himself and/or directing members of the team to achieve this.

Effect of ill-health on future earnings

98. We have been more persuaded by the argument that the Claimant's health is the principle reason why he could not have continued to work (and earn) at the level that he had been doing in the years leading up to 2018.

99. We find that the Claimant would have retained his gross basic salary of £100,000. We do not find that there would have been any reduction for part-time working in the sum.

100. In respect of commission however, we accept the opinions of the expert psychiatrists that the Claimant simply could not have returned on a full-time basis. Our finding is that he would have returned to work three days a week for the remainder of his time in this role. We accept the Second Respondent's evidence that there was no intention to reduce the Claimant's basic salary, but that he would expect commission to be reduce on a pro rata basis to someone working part-time.

101. Our finding is that the Claimant would have returned to work three days a week, or 60% of a full-time role.

102. The simplest approximation to what is commission payments would be is to say that he would have received 60% of the average for the previous four years. 60% of £220,269 = **£132,161.40**.

Income as Broker

103. The alternative scenario is that the Claimant stepped down to a broker role. In recognition of his historic seniority, the fact that we find that this would have been arrived at as a process of negotiation and because the First Respondent was in any event under a duty to make reasonable adjustments, we find that there would have been an element of salary protection and again the Claimant would have continued to receive a gross basic salary of £100,000. We do not find that there would have been any reduction for part-time working in the basic salary element.

104. In respect of commission, we accept in this scenario that the Claimant would have a less senior position, and less influence over the way that the bonus was allocated. He would no longer be taking credit for an element of "team" performance. We consider that the best model is employee "C", as suggested in the witness statement of Julia Williams. Employee "C" received an average commission payment of £74,500 for the four years 2017-2020 [241a].

105. Again, in line with the expert psychiatric evidence, we find that that this would again be on a part-time basis. Our finding is that he would have returned to work three days a week.

106. The simplest approximation to what is commission payments would be is to say that he would have initially received 60% of the average for the previous four years. 60% of £74,500 = **£44,700**.

SUBSEQUENT EVENTS

Market crash March-April 2020

107. The Tribunal accepts the evidence of Ms Williams that the effect of the onset of Covid-19 pandemic was to create extraordinary turmoil and market pressures for a period of 6 weeks in the period March-April 2020. She describes arriving at work at 5-6am, working till late and staying in a hotel because there wasn't time to go home in between. She describes working in the office pretty much every weekend. She describes it as a massive strain says that there was a significant emotional toll.

108. We accept the Respondents' case that this period of extraordinary turmoil and stress had a real risk of causing the Claimant difficulty given his fragility and given his reaction to the much shorter period of instability 5-6 February 2018.

109. On the one hand we accept that the nature of the two crises were different and accept the point put forward on behalf of the Claimant that as a Co-Head he would have had more support, and one of the particularly stressful elements of the 5 – 6 February 2018 was the lack of support that the Claimant felt he had, in particular from the risk department. So we accept that the particularly acute stress in the February 2018 market volatility may not have been replicated had the Claimant been working in March – April 2020.

110. On the other hand we cannot ignore the evidence of Ms Williams. This plainly was an extremely stressful, pressurised and difficult time to be managing this

department. We are find that this would have had an effect on the Claimant had he been working. We find that there was a chance of it precipitating the end of his employment with the First Respondent.

111. In our assessment, had he been in the Co-Head role during March-April 2020, given his vulnerability, we find that there was a **50%** chance that he would have been unable to continue working.

112. We find that in a broker role, the pressure on the Claimant would have been somewhat less and for this reason assess the prospect of him no longer being able to work was **25%** (i.e. there was a 75% likelihood of him continuing to work).

Redundancy, Q4 2020

113. In Q4, 2020 the First Respondent carried out a redundancy exercise. We accept that low interest rates, the impact of Brexit and the pandemic are factors that have meant that the First Respondent felt the need to reduce its cost base.

114. Twelve people were made redundant across the whole of the First Respondent's business, including one member of the Claimant's department.

115. Had the Claimant managed to find a role following consultation in a non-discriminatory restructure in September 2018, and also managed to weather the March/April 2020 volatility and remain employed, we find on balance he would probably not have been made redundant. We have borne in mind the Claimant's correct submission about not incorporating discrimination under another guise as part of the *Chagger* exercise.

116. We accept that there was some chance however of being made redundant or otherwise leaving as part of this redundancy. He might have sought voluntary redundancy at this time.

117. We consider it more likely that a departure would have occurred at this point had he been Co-Head of a department than as a broker, since the expense represented by Co-Heads of a department is the sort of cost that a redundancy exercise might to expected to attempt to rationalise or reduce.

118. In our assessment, had he been employed by the First Respondent as Co-Head going into the fourth quarter of 2020, there was a **30%** chance of him fairly being made redundant at this stage, on a voluntary basis or otherwise. Had he been a broker, there was a **15%** chance of him fairly being made redundant. We have taken November 2020 as the point at which this redundant would have taken effect had it occurred.

Prospect of Claimant voluntarily leaving after November 2020

119. The Claimant's counsel suggests it is "fanciful" that the Claimant would voluntarily have left employment.

120. Julia Williams' witness statement contains the following:

> "43. … Even aside from the difficult conditions of 2020, based on my direct knowledge of him, I think Mr Bailie may have ended up deciding to leave the firm regardless of the incidents in August 2018. He had talked to me a little while before his absence, about setting up his own micro-brewery as an alternative option to this role or working in the City in general, particularly when his wife's training was complete. I recall that he had even ordered a refrigeration unit from eBay as a tentative step."

121. The evidence about the micro-brewery, which Ms Williams reiterated in her oral evidence "rang true" to the Tribunal. It did not appear to be disputed by the Claimant. We do not necessarily interpret this that the Claimant was definitely about to leave imminently to set up another business. What we do however accept from Ms Williams' evidence is that the Claimant had told her that he was mulling over his options and contemplating leaving work in the broking business.

122. Taking account of this, and the agreed position of the expert psychiatrists as to Mr Bailie's health even in the absence of discrimination, we do not find that by the Summer of 2018 the Claimant had an intention to work to 65 years nor do we find that this was likely. Our finding is that the Claimant, in common with many (though not all) people who work for a sustained period in a high pressure, highly paid role, would have chosen to leave significantly earlier than 65. Our finding is that he would have voluntarily left at the age of 55 years old, i.e. November 2026. This may have been for "lifestyle" reasons or for reasons of ill-health or a combination of the two. Given the inevitably somewhat speculative nature of an exercise that the Tribunal as to carry out we have not tried to delineate between these two aspects which may plainly to some extent be interrelated.

123. There is the possibility that the Claimant would have chosen to move to a less pressurised or demanding role in his mid-fifties. In our assessment this would be highly unlikely to be paid more than the income he is presently receiving from the income protection insurer. In other words it is our finding that from the age of 55 onward the Claimant will suffer no ongoing loss attributable to the 3 August 2018 restructure.

124. Ultimately for these reasons, we do not consider that the approach in Wardle v Credit Agricole Corporate and Investment Bank [2011] EWCA Civ 545 [2011] IRLR 604 nor an Ogden table approach is the correct one. The Wardle approach is suitable for a career long loss to a 'conventional' retirement age where there was not a likelihood of claimant voluntarily leaving. We do not consider this is such a case for the reasons given above.

125. [**Issue vii**] The ET to have regard to the causative effect of the proven discrimination on:

126. [**Issue vii(a)**] The prospect (if any) of the C's being able to return to work as a Co-Head role and for how long.

127. This is dealt with above.

128. [**Issue vii(a)**] The prospect (if any) that the C might have remained employed in an alternative role with R1 and for how long,

129. This is dealt with above.

130. [**Issues 1(vii)(d)**] The prospect (if any) that the C's employment would end either due to dismissal or other event including redundancies or reorganisations;

131. This is dealt with above.

132. [**Issues 1(vii)(e)**] The prospect (if any) of the Claimant voluntarily leaving employment.

133. This is dealt with above.

GENERAL

134. [**Issue viii**] How any compensation figure should be grossed up

135. [**Issue ix**] Interest on any award

136. By agreement during the course of the hearing, the parties' representatives are to calculate and agree a figures for grossing up and for interest at 8%. As noted above, the parties will need to calculate the differential between net losses but for and following the discrimination.

137. [**Issue x**] In the light of the findings made, whether any recommendations should be made, and if so what recommendations.

138. A tribunal which finds discrimination proved may make: 'an appropriate recommendation' which 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' (s124(2) and (3)) EqA 2010."

139. Although the Claimant is expected to remain an employee of the First Respondent, the Claimant's case, which we accept, is that he will not return to the workplace. In those circumstances we cannot see that the recommendations suggested in the Schedule of Loss would realistically obviate or reduce an adverse effect of any matter to which the proceedings relate. The remedy of recommendation has not been pursued with any real vigour.

We do not consider in the circumstances of the case that a recommendation is appropriate.

ORDER

1. By **5 March 2021**, the Claimant will provide to the Respondents a draft calculation of the award, taking account of net income, grossing up and interest.

2. By **19 March 2021** the parties will notify the Tribunal whether the matter has settled, or alternatively of the agreed figures for an award if one is required or in the event that any point remains in dispute, the basis for dispute, setting out each side's position in brief and an indication of whether the parties are content for this point to be resolved on the papers.

_____

Employment Judge Adkin

Date 17 February 2021

WRITTEN REASONS SENT TO THE PARTIES ON

19 February 2021

FOR THE TRIBUNAL OFFICE

Notes

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.