EMPLOYMENT TRIBUNALS

Claimant: Mr S Knox

Respondent: Chief Constable of Merseyside Police

Heard at: Liverpool **On:** 10 May 2021

Before: Employment Judge Horne

Members: Mr G Pennie
Mr W K Partington

REPRESENTATION:

Claimant: In person
Respondent: Mr D Tinkler, Counsel

Judgment was sent to the parties on 18 May 2021. The claimant has requested written reasons in accordance with rule 62 of the Employment Tribunal Rules of Procedure 2013. Accordingly the following reasons are provided.

REASONS

Procedural history

1. The claimant is a serving police officer. He has been on sick leave since 23 February 2017.
2. By a claim form presented on 6 February 2018, the claimant raised over twenty complaints under the Equality Act 2010 ("EqA"). Eight different forms of prohibited conduct were alleged, engaging three different protected characteristics. Many of the allegations were withdrawn during the lifetime of the claim, but, even so, the tribunal had to adjudicate on eight factual allegations spanning nearly two years. Amongst the live allegations were:
   2.1. Discriminatory refusal of a flexible working application known as a PER50;
   2.2. Harassment in relation to sex from December 2016 to February 2017 whilst at work;

2.3. Harassment in relation to his disability on multiple occasions whilst on sick leave; and

2.4. Victimisation in the response to his data subject access requests (SARs).

3. Following a 12-day hearing in March 2019 ("the liability hearing"), the tribunal sent a written judgment to the parties on 13 June 2019. The judgment recorded the tribunal's unanimous decision that the respondent had unlawfully harassed the claimant on 26 October 2017. All but one of the other complaints were unanimously dismissed. A majority of the tribunal decided that the respondent had victimised the claimant in the way it responded to one of his SARs, but the majority's decision was overturned by the Employment Appeal Tribunal. As a result, the only part of the claim for which the tribunal could order any remedy was one act of harassment.

4. Following the EAT's judgment, which was handed down on 22 February 2021, the claim was listed for a hearing to determine the claimant's remedy. That hearing took place on 10 May 2021.

Remedy issues

5. On 5 May 2021, in preparation for the hearing, the claimant submitted an updated schedule of loss.

6. According to the schedule, the claimant sought the following awards of damages for his past losses:

Loss of salary	£80.552.71
Loss of Police Pension (14.25%)	£17,203.94
Loss of Police Pension (24.20%)	£21,478.68
Loss of purchasing Additional years pension	£4,829.61
Loss of Additional Voluntary Contributions (AVCs)	£2,285
Injury to feelings	£35,000
Aggravated damages	£10,000
Congenial loss	£10,000

Other related loss	£816

7. The schedule included a claim for damages for future losses. These were:

Loss of future earnings	£24,193.60
Loss of old pension contributions (14.25%)	£5,379.04
Loss of old pension contributions (24.20%)	£9,135.52
Loss of purchasing of additional years	£1,509.56
Loss of contributions of additional voluntary contributions (AVCs)	£780
Future Treatments	£8,011.80
Loss of Statutory Rights	£500

8. The schedule also contained applications for an adjustment to the award under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRA) and for a costs order and preparation time order. We did not make decisions about those applications, which are still ongoing.
9. The respondent's contention, in brief, was:
   9.1. That none of the claimed financial losses were recoverable as damages, because they had not been caused by the harassment;
   9.2. That the respondent had not caused the claimant any personal injury;
   9.3. That damages for injury to feelings should be awarded within the bottom *Vento* band; and
   9.4. This was not an appropriate case for an award of aggravated damages.
10. Had the first issue been determined in the claimant's favour, we would have had to calculate the claimant's damages for financial losses. Further issues may well have arisen in relation to that calculation. As it turned out, we did not need to determine those issues.

The remedy hearing

11. At the start of the remedy hearing we discussed what adjustments the tribunal would need to make in order to accommodate the claimant's mental health. The claimant's wife asked for one adjustment. She sought permission to make an audio recording of the hearing on her mobile phone. The tribunal gave her that permission, subject to two conditions that appear in a separate case management order.

12. Another question that arose at the start of the hearing was whether or not the employment judge should recuse himself from the remedy hearing. In correspondence prior to the remedy hearing, the claimant observed that the employment judge had previously represented the respondent. This observation was correct. Prior to his appointment as a salaried employment judge, he did represent the respondent as a barrister in independent practice. This fact was made known to the claimant's counsel prior to the liability hearing. The claimant's counsel indicated that he did not object. Once this was pointed out to the claimant, he indicated that he was not asking the employment judge to step down.

13. We read the claimant's witness statement, schedule of loss and skeleton argument. We also considered documents in an agreed bundle running to 468 pages.

14. The claimant gave oral evidence. He confirmed the truth of his statement and answered questions. He frequently became tearful during his evidence and we were sure that he was genuinely upset. It is beyond doubt that his mental health has been a struggle for him and that his experiences – in general – with his service with the respondent have contributed. There were, however, some respects in which his account was inconsistent with things he had told various professionals at earlier points in time. It was also hard for us to forget the features of his evidence during the liability hearing that had driven us to exercise caution in accepting his oral evidence at that time. These factors combined made it difficult for us to place much reliance on what he told us about the effects of the one act of harassment.

Expert evidence

<u>Dr Friedman</u>

15. Our liability reasons already refer to the report of Dr Trevor Friedman, consultant psychiatrist, dated 2 March 2018. Neither party positively sought to rely on Dr Friedman's opinion. The respondent did, however, remind us of the findings of fact that we had already made about what the claimant told Dr Friedman during the consultation. (These findings are repeated below.)

16. The claimant asked us to revisit our findings. His position was that Dr Friedman's record of the claimant's history was not fair or accurate. As the claimant recalls the consultation, he tried to tell Dr Friedman about the causes of the deterioration in his health, but Dr Friedman would not listen. In particular, the claimant says, he tried to show Dr Friedman a document he had prepared, but Dr Friedman refused to read it. Unfortunately, the claimant did not keep that document. There is nothing particularly suspicious about the document going missing: the claimant's mental health was undoubtedly in a state of crisis at that time. What it did mean, though, was that we had no contemporaneous evidence of what the claimant told Dr Friedman other than the version set out in Dr Friedman's report.

We found that version more likely to be reliable than what the claimant is now telling us about the conversation three years later. As a result, we were satisfied that our original findings of fact should stand.

Professor Green

17. We were referred to a report from Professor Benjamin Green, consultant psychiatrist, instructed on the claimant's behalf by the Police Federation. The report was dated 12 March 2019. As with Dr Friedman, neither party expressly relied on Professor Green's opinion, but we found the report to be a useful record of what the claimant told Professor Green at the time of their consultation.

18. Professor Green summarised the claimant's perception of being bullied. He stated,

> "2.1… In [the claimant's] opinion, he had been bullied by the [respondent] and humiliated due to wanting to work on a fixed rota so that he could act as a carer to his mother and participate in the lives of his young children."

19. Part of the history recounted by Professor Green related to the claimant's poor sleep. Professor Green reported it this way:

> "3.4 … [The claimant's] sleep is … interrupted by psychiatric symptoms including waking up thinking he was being bullied by his employer. He also has various dreams, which include him being bullied in meetings and humiliated. He told me about a particular meeting where he had been bullied and belittled by two officers. The meeting had gone on for a considerable length of time, to his distress and against his wishes, and featured prominently in his dreams."

20. We are sure that the dream that the claimant was describing to Professor Green was about the meeting on 22 February 2017.

21. Describing his current state of health, the claimant told Professor Green that he felt "on edge" and that he got "anxious if he is reminded of the police", because "memories of being bullied come back". The claimant may possibly have told Professor Green for how long he had been feeling that way, but if he did, there is no mention of it in the report. The context suggested that the bullying that claimant was remembering was the perceived bullying that happened in the workplace, as opposed to the communications he had received whilst on sick leave.

22. The claimant also gave a history about his previous state of health. "Prior to the bullying, he told me that he had been calm and compliant at work."

23. Professor Green formed the following opinion about the aetiology of the claimant's medical condition:

> "I note that the challenge [the claimant] suffered over his fixed shift patterns and his perception of being bullied by the police were important features in triggering his depression with some other post-traumatic stress disorder features.

24. What this tells us is that, based on what the claimant told him, Professor Green thought that the claimant's depression and "PTSD features" were caused by events whilst the claimant was in work. There was no suggestion by Professor Green of any psychiatric condition caused or significantly contributed to by the October 2017 harassment.

Professor Elliott

25. The bundle also included a report from Professor Elliott, consultant psychiatrist, dated 26 September 2019. This report was commissioned privately by the claimant at a time when the tribunal had declared (correctly) that the claimant had been harassed and (incorrectly) that he had been victimised. The claimant asked us to accept Professor Elliott's conclusion.

26. Prior to the remedy hearing, the tribunal had not given any permission to the parties to rely on expert evidence. We nevertheless permitted the claimant to rely on Professor Elliott's report and allowed the parties the opportunity make submissions about the weight we should attach to his various opinions.

27. We were able to accept a number of opinions given by Professor Elliott. These included:

    27.1. Following the meeting on 22 February 2017, the claimant suffered a moderate depressive episode.

    27.2. That depressive state made the claimant vulnerable to further trauma.

    27.3. The claimant was, at the time of the report, unable to return to work as a police officer and would not be able to return to that role in the future without worsening his symptoms.

28. Professor Elliott's report also contained further significant opinions. These were:

    28.1. Prior to the October 2017 harassment, the claimant's state of health was such that, "without any further 'stressors', he would have had a good prognosis for recovery, and "would have been able to return to work over approximately a six- to twelve-month period".

    28.2. The claimant developed Post-traumatic Stress Disorder (PTSD) following the October 2017 harassment.

    28.3. Had it not been for the "incidents" (which we take to mean the October 2017 harassment and the alleged victimisation), the PTSD would not have occurred.

    28.4. Alternatively, following the October 2017 harassment, the claimant experienced a worsening of his depressive disorder, and "whatever the tribunal finds in terms of the nature of his disorder, in terms of the cause of his symptoms after October 2017, in my opinion this was due to [the claimant's experience of being bullied and harassed by his employers."

29. We will return in due course to what we made of those opinions.

Facts

Health and feelings prior to the harassment

30. Many of the relevant facts are already recorded in our written reasons.

31. Various passages of the reasons provide a useful baseline for how the claimant was feeling before the unlawful harassment happened. He had not given up on returning to work. Paragraph 81 of the reasons relates that, during a home visit on 24 July 2017, the claimant expressed an interest in returning to a role in various departments. Nevertheless, by the time of the harassment, the claimant's feelings were already badly hurt because of his perception of how he was being treated by the respondent. We also found that the claimant was

already unwell. For example, on 16 August 2017, the claimant felt "extremely anxious" about the reduction in his pay and "betrayed" by Chief Inspector Garvey-Jones not having supported his case for full pay (see paragraph 92). Prior to that, he had been observed during a home visit on 31 July 2017 to be "grey and gaunt" and clearly unwell (paragraph 84). It was in August 2017 that the claimant started making SARs with a view to bringing a claim against the respondent. His most recent GP fit note had been for two months (paragraph 94). The prospects of a return to work in the medium term were slim because the claimant was saying that he could only work for two hours per week (paragraph 95).

32. Having studied the claimant's GP records again, we noted the following relevant entries:

    32.1. On 22 March 2017 the claimant told his GP that he was anxious and getting short of breath.

    32.2. On 22 May 2017, the claimant was first prescribed the antidepressant, Mirtazapine.

    32.3. On 20 June 2017, the claimant reported to his GP that he had low mood, low energy and negative thinking. His Mirtazapine prescription was increased to 30 mg.

    32.4. On 3 July 2017 the claimant described workplace stressors that he would need to resolve.

    32.5. On 21 July 2017 the claimant spoke to his GP on the telephone from France. He said that he was still feeling low, but not as angry as before.

    32.6. On 1 September 2017, the claimant told his GP that he was still feeling "up and down", but had no thoughts of self-harm. He asked for a referral for psychological therapies.

    32.7. In June 2018, the Department for Work and Pensions assessed that the claimant had been 20% disabled continuously since 22 February 2017.

<u>Health and feelings following the harassment – previous findings</u>

33. The facts of the harassment itself, and the aftermath, are set out in paragraphs 98 onwards. Here are some of the relevant paragraphs of those reasons.

    (For ease of reference, "RTW" means "return to work" and "UPP" means "Unsatisfactory Performance Procedures".)

"

> 98. … What Sergeant McKenzie did send was an e-mail to the claimant dated 26 October 2017. The first two paragraphs of the e-mail dealt appropriately with the claimant's wish for representations to be made about the half pay issue and with the claimant's requests for further information. It is the third paragraph of the e-mail that has attracted the most criticism, and it is necessary to set it out almost in full. The bold type is ours.
>
> > "I have been in touch with Helen Coates from Wellbeing and also the Command Team here at Knowsley. The view is that **you were served with a return to work notice in September and therefore should have returned to work**. I have been tasked with completing a fresh return to work plan which you will

> be provided with tomorrow by [another Sergeant] – this will **instruct you to return to work** after your most recent fit note has expired; this being 31 October – therefore you would be required to return to work on 1 November 2017. It will state that you will have a four week phased return at either Huyton or Belle Vale Police Station (your choice) on four hour days, building up to eight hour days by the fourth week. You will of course be offered plenty of help and support during this period**. I must stress that if you don't return to work on 1 November 2017 then I have been instructed to instigate UPP procedures** which will basically involve a formal meeting and the possibility of more formalised action being taken. Obviously this isn't something that anyone wants to see happen if it can be avoided so I would definitely encourage you to reflect on this, talk it over with friends and family and anyone else you feel appropriate and consider if you can return to work on 1 November. I imagine you may well have questions or concerns and I'd definitely be happy to talk to you about these either via e-mail or phone – whichever suits you…"

99. The rest of the paragraph dealt, in a supportive manner, with contact details and availability for a face-to-face meeting.

100. When the claimant received this e-mail, he saw it as the "beginning of the end of my employment".

101. On 27 October 2017, the claimant was at home when he was visited by two sergeants who were relatively unknown to him. One of them gave him a written RTW plan and asked him to sign the sergeant's pocket notebook in order to acknowledge receipt. There was no attempt to discuss the contents of the RTW plan with him during that visit. The RTW plan followed the same format as the previous version that had been left for him on 31 July 2017. Its introductory paragraph read:

    "The purpose of this return to work plan is to facilitate a return to work for individuals who are off sick and/or to support an individual's return to full duties."

102. The first four paragraphs began with the words "You will" or "You must". These included paragraph 3, which read:

    "You will return to work on 1 November 2017 at the conclusion of your fit note."

103. Paragraph 9 began:

    "You will return to work at Huyton Police Station or Belle Vale Police Station (you may decide which) with a phased return for a period of four weeks."

104. At the foot of the document was a blank space next to the words “date issued” and two further spaces for the claimant and the “Issuing Officer” to sign.

105. Both Sergeant McKenzie’s e-mail and the return to work plan considerably upset the claimant. In an e-mail sent on 20 November 2017, the claimant described his reaction as “severe distress”.

106. On 30 October 2017, the claimant obtained a further GP fit note declaring him unfit to work until 18 December 2017 because of depression.

107. On 3 November 2017, the claimant attended an Occupational Health appointment with Dr Sujay Roy. In the opinion of Dr Roy, the claimant was “too unwell to resume work”. Summarising what was no doubt a much more detailed discussion, Dr Roy observed:

> “He remains very angry and upset over the issues caused by his PER50 not being enforced and feels that no consideration has been given as to his home difficulties and personal circumstances across the last several years and the difficulties that maintaining a varied shift pattern was having upon his ability to balance his home and work commitments.”

108. Dr Roy recommended onward referral to a Consultant Psychiatrist.

109. In late 2017, Mrs Gibson, who was continuing to correspond with the claimant in relation to a number of issues, saw an opportunity to help the claimant improve his mental health. The respondent had recently engaged a specialist external provider of Mental Health Support Services. Their intervention with other police officers had had very positive results. Seeing that the claimant was a suitable candidate, she made arrangements for the claimant to undergo a programme of therapy with that provider. Sessions began on 24 January 2018 and, as at 28 November 2018, the claimant had attended 22 further sessions. The claimant found them beneficial.

110. …

111. On 2 March 2018, as a result of Dr Roy’s referral, the claimant saw a consultant psychiatrist called Dr Trevor Friedman. They had a wide-ranging discussion, which included his upbringing, family circumstances, home life and current state of health. At this stage it is not necessary to record all that the claimant told Dr Friedman about his health at that time. It is sufficient to note that, later that day, Dr Friedman contacted the claimant's General Practitioner and asked for him to be referred to the Psychiatric Crisis Team the same day. One aspect of the claimant’s health that was very much in evidence was his lack of trust in the Police Force as a whole. He had initially been concerned about seeing even Dr Friedman without a witness or recording the consultation.

112. The claimant and Dr Friedman discussed the events at work that had led to him taking his extended period of sick leave. The claimant

mentioned the difficulties he encountered in obtaining changes to his working hours so that he could care for his mother and father. He mentioned that he had been offered a job with fixed hours, but that "this was immediately rescinded". He told Dr Friedman that he felt that this had led to him leaving work. There was some discussion of events during the claimant's sick leave. Dr Friedman's report did not make any mention of the RTW plans or being threatened with UPP procedures. Our finding is that, if the claimant told Dr Friedman about these events at all, it cannot have been in such a way as to make Dr Friedman think that it was a significant cause of his deterioration in health.

113. In Dr Friedman's opinion, it was unlikely that the claimant would ever return to work as a police officer."

Health and feelings following the harassment - further findings

34. The claimant's original witness statement, dated 22 February 2019, sets out how the claimant felt in when he received the 26 October 2017 e-mail. We accept that description. The claimant was agitated, upset, concerned and shocked at the tone of the e-mail. He felt that it had come "out of the blue" and perceived it as "threatening".

35. The claimant also described how he felt when the two sergeants visited him on 27 October 2017 and asked him to sign the notebook to acknowledge the RTW plan. According to his evidence, which we accept:

> "it felt very official, oppressive and an aggressive tactic".

36. The claimant's 2019 witness statement did not describe any particular effect on his health caused by the October 2017 harassment. In his oral evidence to us, the claimant sought to explain this omission by telling us that his statement was a "timeline of events rather than the consequences of those events". But at other points in his statement, for example, when describing the aftermath of the 22 February 2017 meeting, the claimant did describe the consequences for his health, saying, "I went home and just broke down. This was the final straw and I could not take any more." The statement then described how he was diagnosed with depression the next day. This suggests to us that, at the time of writing his original witness statement, the claimant was thinking about the effect on his health of the various incidents that had happened. If, at that time, he believed that the October 2017 harassment was a particularly significant cause of the deterioration in his mental health, we would have expected him to have said so.

37. On 30 October 2017, during the same visit on which he was given his fit note, the claimant's medication was changed to Fluoxetine. He told his GP that he was struggling with motivation, his self-care was not great and that he was sleeping all the time, but he did not at that time have any suicidal thoughts. He asked the doctor for advice about what to do about his RTW plan. The doctor suspected that he might have fibromyalgia.

38. On 3 November 2017, Dr Roy observed that the claimant's health appeared to have "plateaued". There was no suggestion of a recent sudden deterioration.

39. On 27 November 2017, the claimant visited his GP and said that work worried him all the time.

40. On 11 December 2017, the claimant told his GP that he felt "agitated by lots of things" and disappointed with the way in which he had been treated by work. His medication was changed from Fluoxetine to Citalopram.

41. The new medication initially had little effect. On 21 December 2017, the claimant said that his mood had not changed. He was still having very poor sleep, but no suicidal thoughts.

42. The claimant had another GP consultation on 8 January 2018. On that day he told the GP that he felt as if "all doors are closed for him" and he expected that his employment would be terminated. His Citalopram dose was increased.

43. By 16 January 2018, the claimant felt "less grumpy" on his higher dose of medication. He described a "lightbulb" moment during one of his talking therapies: he could walk out of a room if he felt an encounter was too stressful for him.

44. On 7 February 2018, the claimant denied having suicidal plans, but admitted to his GP that he was "thinking about death a lot".

45. The claimant also denied suicidal thoughts on 26 February 2018. He and his GP discussed the possible benefits of exercise.

46. On 2 March 2018 (straight after his appointment with Dr Friedman), the claimant informed his GP that he was at his "lowest point ever".

47. During 2018, the claimant underwent psychotherapy sessions which were documented. Neither we nor Professor Elliott were provided with the notes of those sessions. A summary was provided to Professor Elliott. According to him, there was no mention in that summary of any of the "diagnostic cluster" symptoms of PTSD. There is no record of him having told the psychotherapist about re-experiencing of the October 2017 harassment, avoidance behaviour or heightened arousal.

48. In fact, no UPP procedures were ever commenced. The Police Federation intervened on his behalf and he was allowed to remain on unpaid sick leave. He still has not returned to work.

Relevant law

Damages for injury to feelings

49. The starting point for assessing damages for injury to feelings is section 124 of the Equality Act 2010:

> (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
>
> (2) The tribunal may—
>
> (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
>
> (b) order the respondent to pay compensation to the complainant;
>
> …….
>
> (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 … under section 119.

50. It is well established that compensation is not limited to financial losses but can include an award for injury to feelings. In *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102 the Court of Appeal gave guidance as follows in paragraphs 65-68:

> 65. Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.
>
> i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
>
> ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.
>
> iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.
>
> 66. There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.
>
> 67. The decision whether or not to award aggravated damages and, if so, in what amount must depend on the particular circumstances of the discrimination and on the way in which the complaint of discrimination has been handled.
>
> 68. Common sense requires that regard should also be had to the overall magnitude of the sum total of the awards of compensation for non-pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage. In particular, double recovery should be avoided by taking appropriate account of the overlap between the individual heads of damage. The extent of overlap will depend on the facts of each particular case."

51. Subsequently in *Da'Bell v NSPCC* [2010] IRLR in September 2009 the EAT said that in line with inflation the Vento bands should be increased so that the lowest band extended to £6,000 and the middle band to £18,000. However, a Tribunal is not bound to consider the effect of inflation solely pursuant to *Da'Bell*. In *Bullimore v Pothecary Witham Weld Solicitors and another* [2011] IRLR 18 the EAT chaired by Underhill P said in paragraph 31

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

52. Paragraph 10 of the *Presidential Guidance - Employment Tribunal awards for injury to feelings and psychiatric injury following De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879* states:

> "…in respect of claims presented on or after 11 September 2017, and taking account of *Simmons v. Castle* and *De Souza v Vinci Construction (UK) Ltd,* the Vento bands shall be as follows: 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)…"

53. The Presidential Guidance has since been updated, but only in respect of claims presented after this claim was presented.

54. Where compensation is ordered, it is to be assessed in the same way as damages for a statutory tort (*Hurley v Mustoe (No 2)* [1983] ICR 422*, EAT*). it is on the basis that as best as money can do it, the claimant must be put into the position he would have been in but for the unlawful conduct of his employer (*Ministry of Defence v Cannock* [1994] IRLR 509*,* per Morison J at 517, [1994] ICR 918*, EAT*).

55. We have borne in mind some further general principles, for which we do not cite authority as we believe them to be uncontroversial:

    55.1. Damages for discrimination are compensatory, not punitive.

    55.2. The purpose of damages should be to restore the claimant to the position he would have been in had the discrimination not occurred.

    55.3. Tribunals should not allow any feelings of indignation at the respondent's conduct to inflate the award.

    55.4. Awards for injury to feelings should bear similarity to the range of awards made in personal injury cases. Tribunals should keep awards in perspective and not make them unduly low or high.

    55.5. In assessing the correct sum, tribunals should remind themselves of the value of the award in everyday life.

55.6. The discriminator must take the employee as it finds him. This is sometimes known as the "eggshell skull" principle.

56. It is for the claimant to show that the loss arose naturally and directly from the contravention. It is not necessary for the claimant to show, additionally, that the loss was reasonably foreseeable: *Essa v. Laing Ltd* [2004] ICR 746.

General damages for personal injuries

57. Where a contravention of EqA has caused harm to the claimant's health, the compensation may include a separate award of damages for pain, suffering and loss of amenity: *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481, [1999] ICR 1170.

58. During the hearing there was some discussion of the test for establishing whether or not the claimant's psychiatric illness was caused by the October 2017 harassment. The same point arose when considering the causation test for the claimant's medical inability to work.

59. The claimant's position was that the correct test was whether or not the October 2017 harassment had made a material contribution to the illness. If it had, the claimant argued, the respondent would be liable for the entirety of the illness, even if other non-tortious events had also contributed. In an effort to make the proposition good, the claimant relied on *Bailey v. Ministry of Defence* [2007] EWHC 2913 (QB).

60. The respondent disputed this formulation of the test. According to the respondent, the correct test is whether or not, "but for" the October 2017 harassment, the claimant would in any event have had a psychiatric illness. If he would in any event have been ill, the measure of damages could only be for the additional injury that was caused by the October 2017 harassment. The same test should govern the question of whether or not the October 2017 harassment caused the claimant to become too unwell to work.

61. In our view, the key to unlocking this dispute is the question of whether or not the injury is divisible or indivisible. *Bailey* concerned a single indivisible injury (a cardiac arrest) to which the defendant's clinical negligence had contributed. There was also a non-negligent factor (pancreatitis) that had also contributed. It was not possible to quantify the extent of the contribution attributable to each factor. There is, however, no room for the "material contribution" test where it is possible to assess the respective contributions made to a person's ill health from the competing causes.

62. The issue of divisibility of harm was considered by the Court of Appeal in *BAE Systems (Operations) Ltd v Konczak* [2017] EWCA Civ 1188. The case confirmed the following propositions:

> 1) Where the harm has more than one cause, a respondent should only pay for the proportion attributable to their wrongdoing unless the harm is truly indivisible.
> 2) The burden is on the employer to raise the issue of apportionment.
> 3) Tribunals should try to '*identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong,*

and a part which is not so caused.' The Tribunal should see if it '*can identify, however broadly, a particular part of the suffering which is due to the wrong*'.
4) Where such a '*rational basis*' can be found, the Tribunal should apportion accordingly, even if the basis for doing so is '*rough and ready*'.
5) Any such assessment must consider any pre-existing disorder or vulnerability, and account for the chance that the claimant would have succumbed to the harm in any event, either at that point or in the future.
6) In cases of psychiatric injury, careful evidence should be obtained from experts, particularly in relation to the likelihood of suffering the harm in any event.

Damages for financial losses

63. In assessing a claimant's losses, tribunals should not ignore the possibility that the contravention may not be the only factor: *Chagger v. Abbey National* [2009] EWCA Civ 1202. The tribunal will need to evaluate the chance that the claimant may have suffered the loss in any event.

"Stigma" damages

64. Employees who have suffered a stigma on the labour market as a result of having brought a discrimination complaint against a former employer should be compensated for this loss. Whilst this would not usually give rise to a separate head of loss, it was something that could properly be taken into account in determining future losses in terms of assessing how long it would take the complainant to obtain another job: see *Chagger v. Abbey National,* cited above.

Aggravated damages

65. Aggravated damages are additional to any amount the tribunal may award by way of compensation for injury to feelings. There are various categories of case in which a tribunal may permissibly award aggravated damages. One of these is where the respondent has acted in a "high-handed, malicious, insulting or oppressive manner": *Broome v. Cassell & Co Ltd* [1972] AC 1027. It is important to the tribunal not to focus on the respondent's conduct and motive; it is the aggravating effect on the claimant's injury to feelings that is important: *Rookes v. Barnard* [1964] AC 1129.

Evaluation of expert evidence

66. Civil courts are not constrained to accept expert evidence, but if they reject it they must explain why they have done so: *Smith v. Southampton University Hospitals NHS Trust* [2007] EWCA Civ 387. A judge is entitled to prefer the evidence of a witness of fact over the opinion of an expert, provided reasons are given: *Armstrong v. First York* [2005] EWCA Civ 227. We see no reason why these principles should not also apply in the employment tribunals. We also consider that, in the light of *Armstrong,* it is open to us to prefer a claimant's own contemporaneous description of the effect of an incident on his health over the subsequent opinion of an expert on whose report the same claimant relies.

Professor Elliott's opinions revisited

67. We now return to the four opinions given by Professor Elliott that the claimant invited us to accept. We deal with each in turn.

68. We start by observing that we had no reason to doubt Professor Elliott's expertise. Nor was it suggested that Professor Elliott had failed to comply with his duties as an expert.

Prognosis for return to work as at October 2017

69. Professor Elliott did not state in terms that the claimant would have been able to return to work had it not been for the October 2017 harassment. What he said was that, prior to the harassment, "without any further 'stressors', at that time it was likely that [the claimant] would have been able to return to work over approximately a six- to twelve-month period." In other words, the claimant would have recovered his ability to work if the October 2017 harassment had not happened, *and no other equivalent stressors had happened either.*

70. Even when qualified in this way, we find ourselves unable to accept this particular opinion. It was based on incorrect facts. We do not seek to blame Professor Elliott for this mistake. The history provided to Professor Elliott appeared to have been adapted by the claimant, possibly unwittingly, with the benefit of his knowledge of which parts of his claim had succeeded. We do not go as far as to say that the claimant was deliberately misrepresenting the facts in order to optimise his remedy for the successful part of his claim. But it had the effect of misleading Professor Elliott into thinking that, prior to the October 2017 harassment, the claimant was on a better path to recovery than he actually was.

71. We highlight two examples of information on which Professor Elliott expressly relied in reaching his opinion:

    71.1. The claimant told Professor Elliott that, over the months between February and October 2017, "there was some improvement in some of his symptoms". This assertion was inconsistent with the evidence that the claimant gave whilst his complaints about the pre-October events were still live. In his witness statement dated 20 February 2019, the claimant stated, "At no time in approaching 2 years since … 23 February 2017 has there been an improvement in my mental and physical health."

    71.2. When describing the same pre-October 2017 period, claimant also told Professor Elliott that "over this time he felt relatively supported by his employers". But that is not how the claimant actually felt about the level of support he was receiving at the time. He told us that when his pay was reduced to half pay in August 2017 he felt "betrayed". As our reasons record, his complaints under the Equality Act included harassment during a home visit on 29 July 2017, harassment by Chief Inspector Garvey-Jones' lack of support for his pay review, and harassment by the respondent's Occupational Health providers "allowing the claimant to fall out of the system in July 2017." At the time of writing his witness statement in 2019, the claimant described these events as "a course of conduct over months that caused me distress and amounted to harassment".

The diagnosis of PTSD following October 2017

72. Professor Elliott's diagnosis of PTSD, and his opinion about the date of onset, were also undermined by the inaccurate history given to him by the claimant.

The soundness of Professor Elliott's opinion depended on the claimant telling him accurately about his own thoughts and feelings. Professor Elliott expressly contrasted the claimant's account with the lack of contemporaneous evidence of PTSD symptoms in the records. He expressly chose to base his opinion on the claimant's "self-report", and added that his opinion was subject to the proviso that "the Court finds [the claimant's] self-report to be true".

73. The claimant's self-report was inaccurate. He was not re-experiencing the October 2017 harassment in any significant way, at least not when compared to his re-living of the perceived bullying whilst at work. That much is clear to us from Professor Green's report. The bad dreams on which Professor Elliott relied can only have been a reference to what the claimant told Professor Green on 12 March 2019. It will be remembered that, when the claimant spoke to Professor Green, the bad dream he specifically referenced was about the meeting on 22 February 2017, not any communication in October 2017. In other words, the only example of a re-lived experience was something that was unrelated to the event that supposedly caused his PTSD.

74. We also think that Professor Elliott mistakenly believed that the claimant had started to have bad dreams, and to feel anxious about the police, soon after the October 2017 harassment. There was no contemporaneous evidence at all to suggest that this is what had happened. Professor Green's report would not provide any such evidence, because it was describing the claimant's current state of health in March 2019, without any indication of how long the claimant had been feeling that way.

PTSD would not have occurred "but for" the harassment and victimisation

75. We did not think that the diagnosis of PTSD was reliable for the reasons we have given, and it follows that we do not accept his opinion about what caused it.

Alternative view – worsening of depression caused by the perception of bullying and harassment

76. We read Professor Elliott's report as saying that it was the October 2017 harassment that caused the claimant's worsened depressive symptoms. We cannot accept this opinion either.

77. Our first reason is, as with the claimant's ability to work, Professor Elliott was given an incorrect history of the claimant's baseline symptoms. He had been led to believe that the claimant's depression had improved prior to October 2017 when it had not.

78. Second, Professor Elliott's opinion about the claimant's symptoms after October 2017 was also largely reliant on the tribunal accepting the claimant's history as accurate. This is evident to us when we consider Professor Elliott's list of what the symptoms were. According to his report, these symptoms were "re-experiencing, avoidance, negative cognitions and mood, and arousal." Of these, as Professor Elliott himself observed, only the "depressive symptoms" were noted in any contemporaneous records. We looked at those depressive symptoms in the GP notes. During October 2017 to March 2018, the claimant did complain of lack of sleep, low mood and anxiety, but he had also mentioned these symptoms before October 2017. There was, of course, a serious development in February and March 2018 when he had thoughts of death and then of taking his life. But he did not mention those thoughts as being anything to do with the October 2017 harassment.

79. Without an accurate history, we do not think that the contemporaneous material could have supported any finding beyond that the October 2017 harassment caused some exacerbation of symptoms of a pre-existing depressive illness. We do not actually make that finding for ourselves: we merely recognise it as a possibility.

Conclusions

Past financial losses and loss of congenial employment

80. The claimant's claimed financial losses have all resulted from his being medically unable to work. So has his loss of congenial employment. For our purposes it is convenient to deal with them all together.

81. We have concluded that, even if the October 2017 harassment had not happened, the claimant would inevitably have remained too unwell to return to work. This is because:

    81.1. We were unable to accept Professor Elliott's more optimistic "but for" prognosis for the reasons already stated.

    81.2. If our conclusion about that is wrong, and we are constrained to accept Professor Elliott's opinion, we would qualify it in the way that we have already set out. In that event, we would have to assess the likelihood that, had the October 2017 harassment not occurred, an equivalent "stressor" would have befallen the claimant such as to damage his chances of returning to work within the predicted six- to twelve-month period. In our view, it is inevitable that such a stressor would have happened. Further stressors actually did occur between October 2017 and March 2018. In particular, as our liability reasons record, the claimant experienced a number of disappointments in the respondent's response to his SARs, causing him to submit a formal grievance against the DAU on 26 January 2018 and to complain about them (unsuccessfully) as victimisation. He also experienced a reduction to zero pay in February 2018, despite his arguments that he had suffered a psychiatric injury whilst on duty.

    81.3. Until the tribunal's judgment was sent to the parties in June 2019, the events that were most significant in the claimant's mind as being harmful to his health were those that had taken place up to and including February 2017. These events featured in the history given to Dr Roy, Dr Friedman and Professor Green. He did not mention the October 2017 harassment to any of them; at any rate, not in such a way as to suggest to any of them that it had caused a significant deterioration in his health.

    81.4. Professor Green formed the opinion that the claimant could not return to work as a police officer, even in the long term. Although the October 2017 harassment had happened by the time he reached that view, there was nothing in his report to suggest that the October 2017 harassment had caused or contributed to his permanent incapacity.

    81.5. By the time of the October 2017 harassment, the claimant's mental health had not improved for approximately 8 months. Contrary to what the claimant told Professor Elliott, his symptoms had not improved and he did not feel supported by the respondent. His latest fit note had been for a further two months' absence.

81.6. The claimant's GP records do not suggest a sudden deterioration in his health following the October 2017 harassment. Rather, the records paint a picture of gradual decline, until his health reached crisis point in March 2018.

81.7. The specific anxiety caused by the 26 October 2017 e-mail, and the subsequent RTW plan, was an apprehension on his part that he was being forced to return to work whilst he was ill, or the respondent would terminate his employment. Once the Police Federation intervened, that danger was lifted. There was no need to worry about RTW plans, UPP procedures or termination of employment. But the claimant still remained too unwell to return to any duties. This suggests to us that it was not the October 2017 harassment, or the thought of UPP procedures, that stopped him from being able to work.

82. In the light of these findings, the claimant cannot prove that his financial losses were caused by the harassment. He would have lost all that money in any event. These heads of compensation cannot be recovered.

Future financial losses

83. In our view, the claimant's future financial losses also depend, for their recoverability, on the claimant establishing that the October 2017 harassment caused the claimant's inability to return to work. In particular, the stigma of having brought a claim would only cause him to be financially worse off if he were out of a job. He remains a serving constable. If his office is terminated, it will be because he is too unwell to work.

84. For the same reasons we have given in relation to past losses, we do not think that the claimant can show that his future inability to work has been caused by the harassment. He would in any event be too unwell, even if that harassment had not occurred.

Damages for pain, suffering and loss of amenity

85. In this case, we do not think it is appropriate to make a separate award of damages for pain, suffering and loss of amenity. Whilst the harassment may have caused some identifiable anxiety and distress, it did not cause the claimant a separate psychiatric injury.

86. We have already explained why we did not accept Professor Elliott's opinion that the claimant had developed PTSD.

87. We have also considered Professor Elliott's opinion that the claimant's symptoms of depression became worse following the October 2017 harassment. As a pure statement of the timeline that is correct: there was a gradual decline in the claimant's depressive symptoms from October 2017 to March 2018, becoming more pronounced in January and February 2018. Where we differed from Professor Elliott was on the question of whether or not the October 2017 harassment had *caused* that decline.

88. We asked ourselves, first, whether or not the claimant's more severe depression was a divisible or indivisible injury. It appeared to us that it was divisible. That is to say, it was possible to separate out those depressive symptoms that were caused by the October 2017 harassment from those which were not. This could be done by looking at the contemporaneous records.

89. We recognised that there might be some overlap between anxiety and distress (on the one hand), and exacerbated symptoms of depressive illness (on the other). We also took into account that the claimant, because of his pre-existing depression, would be vulnerable to increased anxiety and distress from the harassment. In our view, the proper course is to reflect those facts in our award for injury to feelings.

90. We have considered the possibility that our analysis of divisibility may be found to be wrong. It might be held that the decline in the claimant's mental health after October 2017 has to be looked at as a whole. In that event, we would need to apply the "material contribution" test.

91. In that event, we would conclude that the October 2017 harassment did not materially contribute to the severe depressive symptoms that the claimant was experiencing in February and March 2018. Had the incident contributed significantly, we would have expected the claimant to have mentioned it to Dr Friedman or Professor Green.

Damages for injury to feelings

92. The claimant's award of compensation for injury to feelings should, in our view, reflect the following features:

    92.1. Prior to the harassment, the claimant already felt betrayed and unsupported.

    92.2. The claimant was vulnerable due to his depressive illness.

    92.3. He suffered a single act of harassment.

    92.4. His immediate reaction was one of shock, agitation, concern and a feeling of being threatened and oppressed. He thought of it as "the beginning of the end" of his employment.

    92.5. The claimant was sufficiently concerned about the letter to seek prompt advice from his GP. He was anxious about being forced to go back to work when he was too ill to return. He was still worried about work all the time one month later. At around the same time he told the respondent about his "severe distress" at receiving the e-mail. On 8 January 2018, at least partly because of the harassment, he was worried that his employment would be terminated and felt that "all doors were closed to him".

    92.6. The harassment did not cause him to be unable to work. He would not have been able to work in any event.

    92.7. By the time the claimant's mental health reached crisis point in March 2018, his most prominent negative feelings and memories were not about the October 2017 harassment. His predominant negative experiences of the respondent, as relayed to Dr Friedman, were about how he had been treated whilst actually at work.

93. In our view, despite there being only one act of harassment, because of the claimant's vulnerability, and the effects having lasted several weeks, we consider this to be suitable for an award in the middle *Vento* band. This band is very broad. In our view, the claimant's case falls towards the lower end of that band, which would be £8,400.

94. Taking account of the possibility of overlap with exacerbated symptoms of depression, we assess the claimant's damages for injury to feelings at £10,000.

Aggravated damages

95. In our view, the respondent cannot fairly be described as having acted in a "high-handed, malicious, insulting or oppressive manner". The 26 October 2017 e-mail and RTW plan, though inappropriate, were not conduct that, viewed objectively, would be such as to cause particularly serious hurt or upset justifying an award of aggravated damages. In particular, we remind ourselves that parts of the e-mail were obviously intended to be supportive. The claimant thought that the e-mail was oppressive, owing to his pre-existing vulnerability, but that fact has already been recognised in the award of damages for injury to feelings. We therefore make no separate award of aggravated damages.

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Employment Judge Horne

Date: 18 August 2021

SENT TO THE PARTIES ON

4 November 2021

FOR THE TRIBUNAL OFFICE