EMPLOYMENT TRIBUNALS

Claimant: Ms A

Respondent: Mr M Hill

Heard at: London Central
(Via Cloud Video Platform)

On: **10 and 11 March 2022 and 21 April 2022 (in chambers)**

Before: Employment Judge Joffe
Mr D Carter
Ms F Bond

Appearances
For the claimant: Ms McKie QC, counsel
For the respondent: Mr T Perry, counsel

RESERVED JUDGMENT ON REMEDY

1. The respondent must pay the claimant the following compensation for unlawful discrimination:
   a) Past and future loss of earnings and pension loss: £171,251.51
   b) Smith v Manchester award: £8,019
   c) Cost of treatment: £5,550
   d) Cost of floristry training: £8,500
   a) Injury to feelings award: £44,000
   b) Aggravated damages: £12,500
   c) Damages for personal injury pain, suffering and loss of amenity: £27,000
   d) Interest: £38,039.43

2. The total sum the respondent must pay to the claimant, allowing for the incidence of taxation on the above sums is: £434,435.39

3. The Tribunal made the following recommendations:
   a) The respondent must write to the claimant (or procure that Mrs Greig writes to the claimant) addressed 'To Whom It May Concern' setting out

the role which the claimant performed for the respondent and the dates of her employment.

b) The respondent must make enquiries with House of Commons HR within 28 days of the date this Remedy Judgment is sent to the parties as to what information House of Commons HR retains on former staff of MPs and whether they keep records of whether they are 'good leavers' or similar. He should request that the claimant be recorded as a good leaver and that a copy of the reference described at a) be placed on her file. He must inform the claimant via her solicitors as to the outcome of these enquiries, within 14 days of receiving a response from House of Commons HR.

c) The respondent must undertake training about sexual harassment in the workplace within six months of this Remedy Judgment being sent to the parties. The training should be from a reputable provider and may be online. The respondent will provide the claimant's solicitors with evidence of his attendance at such training within 14 days of the training being completed.

REASONS

Claims and issues

1. There were some matters which were not in dispute between the parties; these largely related to questions of computation. The issues the Tribunal had to decide were:
   - The claimant's past loss of earnings. Would her employment with the respondent have come to an end lawfully at some point between her dismissal and the date of the hearing, absent the unlawful discrimination we found had occurred?
   - The claimant's future loss of earnings. There were a number of sub issues:
     - How long would the claimant's employment have continued had the unlawful discrimination not occurred? This also involved consideration of how long the respondent would have remained a Member of Parliament;
     - Had the unlawful discrimination not occurred, what alternative employment would the claimant have obtained?
     - What alternative employment is the claimant now likely to obtain, assuming she takes appropriate steps to mitigate her loss?
   - Whether the claimant is entitled to a Smith v Manchester award;
   - Whether the claimant is entitled to the costs of psychiatric treatment;
   - Whether the claimant was entitled to a sum to cover the costs of floristry training;
   - What sum the claimant should be awarded for injury to feelings;
   - What if any sum the claimant should be awarded for aggravated damages;
   - What sum the claimant should be awarded for personal injury (pain, suffering and loss of amenity);

- Whether there should be an uplift for failure to follow the ACAS Code and if so in what amount;
- What recommendations the Tribunal should make.

2. We also had to decide whether to list a hearing to consider the claimant's application for wasted costs. That issue is dealt with in a separate case management summary.

Findings of Fact

3. We received a further witness statement and heard further oral evidence from the claimant. We had a remedies bundle running to 1964 pages. This bundle included the claimant's relevant medical records, some materials relevant to remedy and a great deal of the documentation from the original liability hearing. There was also the following expert evidence:
   - Report of Dr M J Tacchi, consultant psychiatrist instructed for the claimant, dated 18 September 2021;
   - Report of Professor Tom Burns, consultant psychiatrist instructed for the respondent dated 21 September 2021;
   - Joint medical report of Dr Tacchi and Professor Burns dated 14 October 2021.

4. Some of the findings of fact we made at the liability hearing are relevant and we refer to those so far as is necessary.

5. Some of the detail of the claimant's employment history was outlined in the psychiatric reports. The claimant left school at 16 and originally worked in hairdressing and beauty but did not enjoy that work. She then worked abroad in hotels and worked her way up to management. She travelled and worked abroad in Greece and Italy and achieved a degree in modern languages as a mature student.

6. The claimant later worked in her father's businesses until these were sold in 2008. She became a healthcare assistant first in the private sector then in the NHS where she spent a number of years. She brought a personal injury claim in 2015 after suffering from abuse from patients and achieved a settlement of that claim in 2017.

7. The claimant used some of the money from the settlement for floristry 'taster' courses (June / July 2017) and was interested in pursuing a career in that field prior to her job offer from the respondent.

8. The claimant suffered from PTSD and severe depression as a result of her experiences in the NHS and shortly before she commenced work for the respondent had undergone intensive CBT therapy. She was still experiencing low mood and had lost her father in June 2017.

9. The claimant's evidence to the Tribunal was that at the time she started work with the respondent, she was recovering from her issues which arose because of the NHS assaults. She was managing her PTSD symptoms, but she could not travel on public transport by herself and could not share a flat with people she did not know.

10. The claimant gave evidence to the Tribunal as to the extent to which the respondent's treatment of her set back her recovery. The damage to her self-esteem and confidence has been very significant.

11. The practical effects of the unlawful discrimination have been profound. Some of the effects on the claimant were set out in the Liability Judgment and are not repeated here. The claimant and her daughter had to move out of London. The claimant is effectively homeless, having given up her rental property in the North East to move to London to take up the post with the respondent. The claimant has been 'sofa surfing' - staying for periods with family and friends. There have been nights where she has had to sleep in her car. At the time of the hearing she was living with her daughter and new grandson. She finds that situation stressful and degrading. She has no security and worries about outstaying her welcome. In terms of her finances, the claimant has been living on benefits. Her belongings are in storage but she has been unable to pay the storage fees.

12. The claimant said that a number of family relationships have been severely strained and she has not been speaking with her mother or brothers. Her relationship with her daughter has been affected by the events.

13. The claimant rarely leaves the house unless she has to and only if accompanied. She does her shopping online. She told us that she had to have her daughter accompany her to a blood test and that this had been the first time she had left her house in three and a half months. She told us that she sleeps poorly and has terrible nightmares. Prior to her move to London her sleep had improved after her trauma focussed CBT.

14. The claimant has been unable to do any kind of work.

15. She does not feel she could return to a similar position to that she held with the respondent at any point as she finds it difficult to be around people. She has poor concentration and memory; previously she says her concentration and memory were very good. In any event, she could not return to London to do such a job. She will be 59 years old when she finishes the treatment recommended for her, even if that is commenced in the near future.

Psychiatric evidence

16. Professor Burns related that the claimant had a history of mood problems. These tended to be brief and stress related. They were usually treated by the claimant's GP with antidepressants and responded within a month or two. The claimant's notes indicated she had first been prescribed antidepressants in 2004.

17. He said:

7.33 She describes her first severe depressive disorder as developing when she was working at Roseberry Park Hospital. She had been subjected to a number of physical assaults (she worked for an extended period on PICU, mainly on night shifts). During this time her father had started to suffer from significant health problems which also put her under stress.

18. In terms of treatment:

7.37 In 2017 she was referred to Nina Welsh for CBT. She was diagnosed with depression and PTSD. It has been arranged to restart counselling with Nina Welsh again in October 2021.

7.38 She was referred for private psychotherapy funded by the Civil Servants Benevolent Fund in 2020. These were remote sessions conducted with a therapist called Alexandra Grove based in Birmingham. She was told that Alexandra Grove was an expert in "narcissistic abuse".

7.39 She found these sessions to be the most useful treatment she has had to date. From her descriptions of them they appear to be predominantly psychodynamic in style, focused on helping her get an understanding of herself and her responses.

7.41 She is currently on 200 mg of sertraline a day prescribed by her GP. She has been on sertraline for many years, but the dose was increased in the crisis in 2019. She doubts that it is very helpful.

19. Professor Burns' view as to the effects of the respondent's treatment was as follows:

9.8 She was functioning well until the abuse she received at the hands of the Respondent. I believe that she was making good progress and recovering from her earlier PTSD and depression. I note the recorded PHQ-9 and GAD-7 Scores reported by Nina Walsh but, given the severity reported (at the top of the scale) and her action in discharging her without referral to specialist services do not have much confidence in them. That she was still taking antidepressants is not surprising and common, best practice despite recovery. She was able to take up a new and challenging job and was feeling optimistic about her future. Absent the abuse from the Respondent I do not believe she would be unwell currently, and I believe that she would be able to hold down a responsible job.

20. In his initial report, Professor Burns' view was that the claimant would recover from her depression. She would then need to regain her self-confidence and

repair the relationships which formed her support system. He thought that she would be able to take up a responsible job 'at her pre-dismissal level' within two years of starting treatment but said a definitive prognosis would not be possible until treatment had started.

21. Ultimately Professor Burns and Dr Tacchi were able to agree on most areas. They differed somewhat on the claimant's mental state prior to starting employment with the respondent:

Professor Burns considers that Ms A was fundamentally in recovery; she was then well. He considers the decision to take the new job and move to London as indicating a degree of motivation which is rarely found in depressed people. Dr Tacchi, on the other hand, considers that this decision could be taken to imply poor judgement as a consequence of her depression not being fully resolved.

22. The experts agreed that the claimant experienced a recurrence of her depressive disorder of moderate severity whilst working for the respondent. *'Professor Burns believes that she was not actively suffering from PTSD during this period whereas Dr Tacchi believes that she still met the criteria for PTSD'.* The claimant agreed with Dr Tachi although she also agreed that depression was the most prominent of her conditions and with Professor Burns' view that her current depression was severe. Dr Tacchi had assessed the claimant as experiencing a moderate depressive episode.

Both Professor Burns and Dr Tacchi agree that there was considerable overlap in the symptoms of these two disorders and that the dominant disorder was depressive.

23. As to the claimant's psychiatric condition had the discrimination not occurred, the experts agreed that claimant '*was at significant risk of further relapse of her depressive disorder at some time in the future. However, they also both agree that, absent the abuse, she would most likely have experienced a substantial period of good mental health over the ensuing months and possibly years.*' If a further episode occurred the claimant's ability to work was likely to be impaired for several months.

24. As to treatment, the experts agreed that the claimant needed a fresh comprehensive assessment of her antidepressant treatment by a consultant psychiatrist. There should be a review of her psychopharmacology and her the choice of psychotherapy.

25. The experts were more optimistic about prognosis than the claimant herself. They said the prognosis for recovery was good but recovery was likely to take at least a year and possibly up to eighteen months, on the assumption that the claimant had a thorough review of her treatment. Further episodes of depression were highly likely. Both Professor Burns and Dr Tacchi agreed that, when recovered, she should be able to return to work at a similar level.

26. The claimant did not agree with the experts that she would be able to return to a similar job in future. She considered that Professor Burns' initial estimate of two years for her to get accommodation, the correct treatment and rebuild her confidence was likely to be correct.

Claimant's career plans

27. Because of her condition and trust issues, the claimant told the Tribunal she would like to be her own boss and work on her own. She finds working with flowers therapeutic and would like to have a floristry studio where she could do floristry for events. She would need to set up a website for her floristry business.

28. The claimant said that if she had continued in her role with the respondent and he had kept his promises, she would have gained experience during the parliamentary recess doing freelance floristry for events. Because of the time which has elapsed since she has done floristry and the limited nature of her initial training, she believed she would need a four week intensive course in order to prepare for having her own business. She had investigated courses and found a course in London costing £6,500 and one in Bath costing £4850. She had estimated travel, subsistence and accommodation costs at £2825 and was not challenged on those figures by the respondent.

29. The claimant considered that in about two years' time she would be well enough to retrain and look into getting a floristry studio. She thought it would take about a year to get her business off the ground and that she would then be able to earn £18,200 per annum. That figure was not challenged by the respondent.

30. The claimant said that if she could not establish herself as a florist, she would have to work as a remote PA; she estimated that would bring in approximately £12,000 per annum.

Treatment

31. In October and November 2019, the claimant paid for two private CBT sessions; she had had CBT before for her PTSD.

32. In January 2020, the claimant's GP referred her to Alliance Care for mental health services. In February 2020, the claimant heard back from Adult Mental Health Services. She had an appointment with a practice nurse to review her medication and the nurse told her she would be referred for an appointment with a psychiatrist which would take several weeks.

33. The claimant's GP notes said that several attempts were made to contact the claimant to facilitate a review but she had not engaged.

34. The claimant told the Tribunal that she had had no phone calls or letters from the GP. We accepted that evidence. All of the other evidence we had suggested that the claimant was keen to obtain treatment. We had no evidence as to how contact had been attempted by the GP practice and why exactly it was unsuccessful.

35. Later in 2020, a charity for civil servants donated money for the claimant to have counselling; she paid £900 for sessions focussing on narcissistic abuse.

36. The claimant contacted her GP again in July 2021 to get a psychiatric referral. She has ended up on a waiting list for high-intensive CBT therapy. She was told on 3 November 2021 that she was still on the waiting list and it might take another year for her to be referred to a psychologist. The claimant is currently taking antidepressants.

37. Dr Tacchi recommended that the claimant have: 20 sessions of CBT and EMDR. She costed:

    £400 for an initial assessment by a psychiatrist;

    9 Further sessions at £150 each

    Clinical psychologist initial assessment: £250

    20 sessions thereafter at £170

<u>Our relevant findings about redundancy</u>

38. We note the following passages from our Judgment on liability which are relevant to the submission made by the respondent that the claimant might have been made redundant absent the unlawful discrimination which occurred:

    Mrs Greig said in oral evidence that they needed an extra pair of hands in the constituency because of the numbers of cold callers who attended the constituency office. There needed to be two people in the constituency office at all times to deal with visitors. She said that it was the analysis of what resources were needed where which led to the proposals.

    …

    513. Looking at the evidence in the round, it seemed to us that there was ample evidence from which we could reasonably conclude that the respondent had influenced the staffing review both directly and indirectly to arrive at a conclusion which deleted the claimant's post and ultimately left her with a choice between redundancy or the alternative post in Hartlepool. The respondent led Mrs Greig to the view that the claimant was not doing much of her role, was doing other aspects of it badly and that the role she was doing was in any event not required. There was also ample evidence from which we

could conclude that the respondent's reasons for influencing the outcome in that way were the culmination of his extended reaction to the claimant's rejection of his advances. When she did not comply, he ceased to honour his promises to her and made her job and her life in London increasingly difficult for her. When she did not simply leave of her own accord, he began to try to find ways she could be removed.

514. There may well have been good arguments for a review of the respondent's staffing structure and we accept that Mrs Greig was working in good faith with the information which the respondent was feeding her. However, when we look at the inconsistencies and evasions in the respondent's evidence and the ways in which he misled Mrs Greig, we cannot be satisfied with the respondent's explanation for the claimant's redundancy and, in particular, we are not satisfied that his influence over the process was not significantly motivated by the claimant's rejection of his advances.

39. We heard some evidence at the liability hearing about what staffing arrangement other MPs had:

241. Mr Bridgen provided some evidence about what staff other MPs had. He said that he had one colleague who was very hard working and employed no staff but did his own case work from parliament and the constituency. He himself had not had staff based in London but constituency staff travelled to London two days per week; he now had a part-time member of staff in London. He was not aware of any other MPs who had no support in parliament.

Our previous findings about the claimant's living situation

40. It was relevant for us to review our previous findings about the claimant's living situation:

We accepted that, once the possibility of IPSA support fell through, the respondent told the claimant that he would share a two bedroom flat with her. Both he and the claimant understood, we accept, that she could not realistically afford to rent a flat for herself in London

…

The claimant's explanations for staying in the situation were that she was unable to afford accommodation for herself in London. Because of her mental health issues, she could not move into a flat share with strangers and because of her difficulties taking public transport, she could not move to cheaper accommodation far from Westminster. She had given up her accommodation in the North East.

The claimant's net income whilst working for the respondent was approximately £2800 per calendar month. Her outgoings included £200 per

month for storage of the possessions which had been in her home in the North East and money spent supporting her daughter whilst she completed her education. She also gave money to her mother and to her son during a period when he had been made redundant.

350. In terms of whether she could have lived independently in London, the claimant told us that travelling on the underground was impossible for her because of her PTSD. She had looked at flats where she could commute by bus an hour and a half or two hours, Rental was just under £2000 pcm in those areas. She would also have had to pay for travel, bills and food. Because of her PTSD, she said that she could not have flat shared with strangers.

351. The respondent said that the claimant could travel independently by bus but accepted that the underground was difficult for her.

352. Neither party adduced any evidence of actual flat rental costs and we accepted the claimant's evidence, which was not out of step with our broad anecdotal impression of the London rental market.

Evidence about whether the respondent would have remained in his post

41. The respondent had resigned shortly before the liability hearing, provoking a byelection. A Conservative candidate was elected; Labour lost by 7000 votes.

42. The claimant pointed out that Hartlepool had always been a safe Labour seat. Absent the discrimination and the respondent's resignation, she says that there was no reason why Labour would not have retained the seat until the respondent retired. She says that the respondent told her he anticipated working as an MP as long as possible and at least until age 70. In the 2019 election, the respondent had an 18 point lead on the next best performing candidate. There was no reason why the respondent would have been deselected.

43. The respondent said that the respondent's 18 point lead in 2019 was 14.8% down from the 2017 election and indicative of the crumbling of the 'Red Wall'.

43. The claimant said that she had enjoyed the role with the respondent and felt she picked it up quickly. She was a 'chameleon' and could learn quickly; she speaks five languages.

Evidence about what would have happened about living accommodation

44. It was a peculiarity of this case that the claimant and respondent were sharing a flat. The claimant's daughter was also sharing the flat. By the time of the claimant's dismissal there were about 18 months left on the lease.

45. We explored with the claimant in evidence what would have happened had the flat sharing arrangement come to an end. The evidence was that the claimant was unable to afford a flat for herself and her daughter. Because of her mental health she could not flat share with strangers or travel alone on public transport. The claimant's daughter at the time was training in hair and makeup for film /TV and not earning.

46. The claimant said that the plan ultimately was for her and her daughter to share a flat 'two or three years down the road.' This would be when her daughter was earning enough to contribute to their accommodation and the claimant also hoped her PTSD would have improved so that she was able to travel on public transport.

Independent Expert Panel report

47. The respondent's behaviour was investigated by the parliamentary Independent Complaints and Grievance Scheme through an Independent Expert Panel (IEP). The IEP produced a report on 5 March 2021 in advance of the Tribunal hearing, making findings that the respondent had committed the acts of sexual harassment / assault that the Tribunal also found proven. The respondent saw the report before the liability hearing and did not appeal it.

The respondent's insurance policies

48. The respondent had two types of employer's liability insurance, we were told; a policy which would pay out up to £5 million but which was said not to cover sexual harassment or sexual abuse and something called an employment practice policy which only covered claims up to £250,000.

Law

Compensation for Discrimination

49. The tribunal's power to award a remedy in a discrimination case is governed by section 124 of the Equality Act 2010.

Compensation for Financial Loss

50. The measure of loss is tortious with the effect that a claimant must be put, so far as possible, into the position that she would have been in had the act of discrimination not occurred (Ministry of Defence v Cannock [1994] IRLR 509, De Souza v Vinci Construction UK Ltd [2017] EWCA Civ 879. Compensation for discrimination is uncapped.

51. Where the act complained of is a discriminatory dismissal, the tribunal will have to decide whether the complainant would have been dismissed in any event if there had been no discrimination (Abbey National plc v Chagger [2009] ICR 624).

52. The duty to mitigate loss applies.

Future loss

53. We were assisted by the summary of principles in Secretary of State for Justice v Plaistow UKEAT/0016/20/VP, per Eady J:

57. When considering compensation for loss of earnings, the ET is not making a determination of fact, as such; rather, it is required to make its best assessment as to what the position would have been, but for the unlawful conduct, having regard to all the material available (see Cannock at p 951). In Vento v Chief Constable of West Yorkshire Police (No. 2) [2003] ICR 318, the Court of Appeal explained the exercise thus to be undertaken by the ET, as follows:

"33. … this hypothetical question requires careful thought before it is answered. It is a difficult area of the law. It is not like an issue of primary fact, as when a court has to decide which of two differing recollections of past events is the more reliable.

The question requires a forecast to be made about the course of future events. It has to be answered on the basis of the best assessment that can be made on the relevant material available to the court. …

58. So, when assessing future losses, the ET is required to focus on the degree of chance; it is not engaged upon a determination on the balance of probabilities (see Abbey National plc v Chagger [2010] ICR 397, CA at paragraphs 76-78). In carrying out that assessment, the weight to be given to the material available will be for the ET, and will inevitably be case-specific. In Cannock, the EAT placed some emphasis on the statistical material available; in Vento (No.2), the Court of Appeal agreed such evidence could be relevant but also allowed that an ET might be "plainly and properly influenced by the impression gained by it in seeing [the Claimant] give evidence at the lengthy liability and remedies hearings" (paragraph 40, Vento (No.2)). In any event, where an ET properly undertakes the assessment required of it, its decision will not be susceptible to challenge unless it can be shown to be perverse: an appellate tribunal will not be entitled to interfere with the ET's conclusion simply on the basis that it would itself have reached a different conclusion on the same materials (see paragraph 38, Vento (No.2)).

60. Further guidance as to the approach to be adopted in assessing future loss of earnings was provided by the Court of Appeal in the case of Wardle v Credit Agricole Corporate and Investment Bank [2011] ICR 1290 (see the Judgment of Elias LJ, with whom the other members of the Court agreed). In

submissions in the present case, both parties have referred to the summary of that guidance as set out in Harvey on Industrial Relations and Employment Law Division L [881.01], as follows:

"(1) where it is at least possible to conclude that the employee will, in time, find an equivalently remunerated job (which will be so in the vast majority of cases), loss should be assessed only up to the point where the employee would be likely to obtain an equivalent job, rather than on a career-long basis, and awarding damages until the point when the tribunal is sure that the claimant would find an equivalent job is the wrong approach;

(2) in the rare cases where a career-long-loss approach is appropriate, an upwards-sliding scale of discounts ought to be applied to sequential future slices of time, to reflect the progressive increase in likelihood of the claimant securing an equivalent job as time went by;

(3) applying a discount to reflect the date by which the claimant would have left the respondent's employment anyway in the absence of discrimination was not appropriate in any case in which the claimant would only voluntarily have left his employment for an equivalent or better job; and

(4) in career-long-loss cases, some general reduction should be made, on a broad-brush basis (and not involving calculating any specific date by which the claimant would have ceased to be employed) for the vicissitudes of life such as the possibility that the claimant would have been fairly dismissed in any event or might have given up employment for other reasons."

61. Although Elias LJ in Wardle opined that career-long-loss cases would be "rare", he made clear that was not because "the exercise is in principle too speculative":

"50. … If an employee suffers career loss, it is incumbent on the Tribunal to do its best to calculate the loss, albeit that there is a considerable degree of speculation. It cannot lie in the mouth of the employer to contend that because the exercise is speculative, the employee should be left with smaller compensation than the loss he actually suffers. Furthermore, the courts have to carry out similar exercises every day of the week when looking at the consequences of career shattering personal injuries. Nor do I accept a floodgates argument. The job of the courts is to compensate for loss actually suffered; if in fact the court were to conclude that this required an approach which departed from that hitherto adopted, then we would have to be willing to take that step.

53. Exceptionally, a tribunal will be entitled to take the view on the evidence before it that there is no real prospect of the employee ever obtaining an equivalent job. In such a case, the tribunal necessarily has to assess the loss on the basis that it will continue for the course of the claimant's working life. Chagger is an example of such a case. By the time the tribunal came to

assess compensation in his case he had already been out of a job for some years. The evidence was that he had made every effort to obtain employment in his chosen field, having made countless applications for new employment. There was a suggestion that he had been stigmatised in the eyes of other employers as a result of the manner of his dismissal. He had taken reasonable steps to mitigate his loss by going into teaching. In these circumstances the Tribunal was entitled to conclude that he had suffered permanent career damage and should be compensated accordingly. Where such a loss is established, a tribunal has to undertake that task, however difficult and speculative it may be."

62. In Wardle, the ET had approached the question of future loss of earnings on a career-long-loss basis, but then reduced the overall sum that would otherwise have been due: first, to reflect its finding that there was an 80% chance that Mr Wardle would have left his employment after a further couple of years in any event; second, to reflect its finding that there was a 70% chance that Mr Wardle would have returned to equivalent employment after a further year. Given the latter finding, the Court of Appeal held that the ET had been wrong to approach compensation on a whole career basis but, even had it been entitled to calculate loss over Mr Wardle's whole career, observed that the ET would then:

"56. … have had to assess what the claimant would have been likely to earn over that period had he not been treated unlawfully compared with what he is now likely to earn. The difference would then be subject to reductions to reflect the vicissitudes of life (eg the possibility that he might have been fairly dismissed anyway or the risk that he would die or might have to retire early) …"

63. As Elias LJ concluded, that was not done by merely applying a reduction to reflect the ET's finding that there was a 70% chance of Mr Wardle's obtaining equivalent employment within three years: having recognised that Mr Wardle had a 70% chance of obtaining equivalent employment within three years, the ET's decision ought also to have allowed for the yet greater chance that he would mitigate his losses over the years that would then follow. On that basis, an ET would need to consider applying an upwards-sliding scale of discounts to sequential future slices of time, to reflect the progressive likelihood of securing an equivalent job over the years.

Smith v Manchester awards

54. An award under this head may be made where there is a loss of earning capacity due to residual disability.

55. The court or tribunal must make an assessment of the risk that claimant will be out of work before the end of working life. Is there a substantial or real

risk? Once out of work, how far would the claimant be disadvantaged by the disability? The court or Tribunal must assess and quantify the present value of the risk of financial damage which the claimant will suffer if the risk materialises. It is relevant to look at the duration of the claimant's remaining working life, her working history, age and qualifications, the severity of the disability and its significance in terms of the claimant's work: Moeliker v Reyrolle [1977] 1 All ER 9.

Injury to feelings

56. The tribunal has the power to award to compensation to an employee for injury to feelings resulting from an act of discrimination by virtue of sections 124(5) and 119(4) of the Equality Act 2010.

57. The purpose of the award is to compensate the complainant for the anger, upset and humiliation caused by the discrimination.

58. As set out in Prison Service v Johnson [1997] IRLR 162:
- Awards should be compensatory and just to both parties;
- Awards should not be too low as this would diminish respect for the anti-discrimination legislation;
- Awards should bear some broad general similarity to the range of awards in personal injury cases;
- In exercising their discretion tribunals should remind themselves of the value in everyday life of the sum they had in mind by reference to purchasing power or earnings and should bear in mind need for public respect for the level of awards made.

59. In determining the amount of the award, we are required to follow the *Vento* guidelines in place at the date of the discrimination. These were:

Lower band: £900 - £8,800

Middle Band: £8,800 - £26,300

Upper band £26,300 – £44,000.

60. We can also gain some assistance from quantum reports in cases considered by other tribunals. The claimant referred us to some reports including:

Miles v Gilbank [2006] EWCA Civ 543, — ITF £25,000

The claimant was a hair designer. When she became pregnant there was no attempt to adjust her working practices, or to undertake a risk assessment (despite her request), or to help in arranging breaks for meals or rest. She was not able to keep ante-natal appointments and was told that she was 'not

ill'. She was underpaid maternity pay. She was also subjected to unsympathetic remarks by other staff and to detrimental treatment by other managers. For example, when she suffered bleeding, which she took to be a symptom of a miscarriage, one of the managers told her to deal with a client and see if the bleeding occurred later. There was a catalogue of behaviour on the part of the manager and majority shareholder and the other managers, which went beyond malicious, and amounted to downright vicious. It was targeted, deliberate, repeated and consciously inflicted. The claimant was very shocked, felt degraded, demoralised and severely distressed. It affected her very substantially and was additionally serious because it involved the well-being of her unborn child.

S v Britannia Hotels Ltd (Leeds) (Case no: 1800507/14) (*18 February 2015, unreported*) ITF — £19,500

The claimant, a 22-year-old female with a history of mental ill-health, worked as a waitress / barmaid on a zero hours contract. Over a period of eight months her manager subjected her to sexual harassment – acts such as grinding against her simulating sexual intercourse, touching her bottom, kissing the back of her neck and asking about her sex life with her boyfriend. She reported the harassment and was effectively ignored. When she later told a more senior manager there was an inadequate investigation which, whilst finding there had been some inappropriate behaviour, did not consider it proper to discipline the perpetrator. Thereafter an HR officer undertook a second investigation which was fundamentally flawed, and did not uphold the claimant's complaints. An ineffective appeal followed and was dismissed.

In fixing the amount of the award the ET found that the harassment was not of the very worst kind, but that it was perpetrated by her manager, and he knew that she was a vulnerable person. Further, rather than considering a separate award for aggravated damages, the ET took into consideration the compounding of injury to feelings by the investigations and appeal, which took almost a year, and during which the claimant was persistently disbelieved. The claimant had stated that all she had wanted from the respondents was an apology – but none was forthcoming, and indeed the only representative of the respondent present in the ET to hear the judgment was counsel who had no instructions to apologise

Aggravated damages

61. We were much assisted by guidance in Commissioner of Police of the Metropolis v Shaw UKEAT/0125/11/ZT:

Criteria. The circumstances attracting an award of aggravated damages fall into the three categories helpfully identified by the Law Commission: see para 16(2) above. Reviewing them briefly:

(a) The manner in which the wrong was committed. The basic concept here is of course that the distress caused by an act of discrimination may be made worse by it being done in an exceptionally upsetting way. In this context the phrase "high-handed, malicious, insulting or oppressive" is often referred to (as it was by the tribunal in this case). It derives from the speech of Lord Reid in Broome v Cassell & Co Ltd [1972] AC 1027 (see at p 1087G), though it has its roots in earlier authorities. It is there used to describe conduct which would justify a jury in a defamation case in making an award at 'the top of the bracket'. It came into the discrimination case law by being referred to by May LJ in Alexander v Home Office [1988] ICR 685 as an example of the kind of conduct which might attract an award of aggravated damages. It gives a good general idea of the territory we are in, but it should not be treated as an exhaustive definition of the kind of behaviour which may justify an award of aggravated damages. As the Law Commission makes clear an award can be made in the case of any exceptional (or contumelious) conduct which has the effect of seriously increasing the claimant's distress.

(b) Motive. It is unnecessary to say much about this. Discriminatory conduct which is evidently based on prejudice or animosity or which is spiteful or vindictive or intended to wound is, as a matter of common sense and common experience, likely to cause more distress than the same acts would cause if evidently done without such a motive say, as a result of ignorance or insensitivity. That will, however, only of course be the case if the claimant is aware of the motive in question: otherwise it could not be effective to aggravate the injury: see Ministry of Defence v Meredith [1995]IRLR 539, 543, paras 32—33. There is thus in practice a considerable overlap with head (a).

c) Subsequent conduct. The practice of awarding aggravated damage for conduct subsequent to the actual act complained of originated, again, in the law of defamation, to cover cases where the defendant conducted his case at trial in an unnecessarily offensive manner. Such cases can arise in the discrimination context: see Zaiwalla & Co v Walia [2002] IRLR 697(though NB Maurice Kay J's warning at para 28 of his judgment (p 702)) and Fletcher [2010] IRLR 25. But there can be other kinds of aggravating subsequent conduct, such as where the employer rubs salt in the wound by plainly showing that he does not take the claimant's complaint of discrimination seriously: examples of this kind can be found in Armitage, Salmon and British Telecommunications plc v Reid [2004] IRLR 327.

…

23 How to fix the amount of aggravated damages. As Mummery LJ said in Vento v Chief Constable of West Yorkshire Police [2003] ICR 318,331—332, paras 50—51,'translating hurt feelings into hard currency is bound to be an artificial exercise' Quoting from a decision of the Supreme Court of Canada, he said: 'The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. 'Since there is no sure measure for assessing injury to feelings,

choosing the 'right' figure within that range cannot be a nicely calibrated exercise'. Those observations apply equally to the assessment of aggravated damages, inevitably so since, as we have sought to show, they are simply a particular aspect of the compensation awarded for injury to feelings; but the artificiality of the exercise is further increased by the difficulty, both conceptual and evidential, of distinguishing between the injury caused by the discriminatory act itself and the injury attributable to the aggravating elements. Because of that artificiality, the dividing line between the award for injury to feelings on the one hand and the award of aggravated damages on the other will always be very blurred, and tribunals must beware of the risk of unwittingly compensating claimants under both heads for what is in fact the same loss. The risk of double-counting of this kind was emphasised by Mummery LJ in Vento; but the fact that his warnings not always heeded is illustrated by Fletcher. The ultimate question must be not so much whether the respective awards considered in isolation are acceptable but whether the overall award is proportionate to the totality of the suffering caused to the claimant.

24 Relationship between the seriousness of the conduct and the seriousness of the injury. It is natural for a tribunal, faced with the difficulty of assessing the additional injury specifically attributable to the aggravating conduct, to focus instead on the quality of that conduct, which is inherently easier to assess. This approach is not necessarily illegitimate: as a matter of broad common sense, the more heinous the conduct the greater the impact is likely to have been on the claimant's feelings. Nevertheless it should be applied with caution, because a focus on the respondent's conduct can too easily lead a tribunal into fixing compensation by reference to what it thinks is appropriate by way of punishment or in order to give vent to its indignation Tribunals should always bear in mind that the ultimate question is what additional distress was caused to this particular claimant, in the particular circumstances of this case, by the aggravating feature(s) in question, even if in practice the approach to fixing compensation for that distress has to be to some extent arbitrary or conventional

62. In Zaiwalla & Co v Walia [2002] IRLR 697, the respondent's conduct of the defence attracted aggravated damages. The Tribunal had found:

When she took tribunal proceedings a monumental amount of effort was put into defending those proceedings. That exercise was of the most inappropriate kind, attacking the applicant in relation to her personal standards of professional conduct and holding a series of threats over her head which would be daunting to any individual, let alone to someone about to embark on a legal career having difficulty obtaining a training contract. The defence of these proceedings was deliberately designed by the respondents to be intimidatory and cause the maximum unease and distress to the applicant. There is no other way of describing it.

63. Again, we can also consider quantum reports in other first instance cases. The claimant referred us to a number of quantum reports, of which we found these of some assistance:

Shaw itself: £30,000 awarded for injury to feelings and aggravated damages, reduced from the Tribunal's separate awards pf £17,000 injury to feelings and £20,000 aggravated damages. The claimant was suspended on unfounded disciplinary charges after making a protected disclosure; there was collusion by a more senior officer.

Simpson v BAA Airports Limited (Reading) (Case No 2703460/2009) (*24 May 2010, unreported*) see ITF — race discrimination for case summary at AD £10,000

The fact that the claimant's manager made three separate racist remarks and the highly personal and offensive nature of them indicated that they were malicious and intended as such by him. When the claimant put in a grievance her work colleagues ganged up against her to try and discredit her by making malicious allegations. The defence of those allegations was designed to cause the maximum distress to the claimant. The respondent also failed to deal with the grievances appropriately.

Personal injury loss

64. A tribunal is able to award compensation for personal injury consisting of psychiatric illness where this has been caused by a discriminatory act (Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] IRLR 481). Such damages are recoverable for any harm caused by a discriminatory act and not simply harm which was reasonably foreseeable (Essa v Laing Ltd [2003] IRLR 346, [2003] ICR 1110, EAT).

65. Personal injury compensation potentially includes compensation for pecuniary losses arising from the injury and for the injury itself.

66. An award for personal injury may be made in addition to an award for injury to feelings (Hampshire CC v Wyatt (UKEAT/0013/16/DA) although a tribunal should be careful to guard against double recovery.

67. When more than one event contributes to the injury suffered by a claimant then, save where the injury in question can be said to be 'indivisible,' the extent of the respondent's liability is limited to the contribution to the injury made by its discriminatory conduct (Thaine v London School of Economics [2010] ICR 1422 EAT, Olayemi v Athena Medical Centre [2016] ICR 1074, BAE Systems (Operations) Ltd v Konczak [2017] EWCA Civ 1188, Blundell v Governing Body of St Andrew's Catholic Primary School [2011] EWCA Civ 427).

68. We may have regard to the Judicial College Guidelines, which for psychiatric injury at the relevant time are as follows:

The factors to be taken into account in valuing claims of this nature are as follows:
(i)the injured person's ability to cope with life, education, and work;
(ii)the effect on the injured person's relationships with family, friends, and those with whom he or she comes into contact;
(iii)the extent to which treatment would be successful;
(iv)future vulnerability;
(v)prognosis;
(vi)whether medical help has been sought.

(a) Severe

In these cases the injured person will have marked problems with respect to factors (i) to (iv) above and the prognosis will be very poor.

	With 10% uplift
£46,780 to£98,750	***£51,460 to £108,620***

(b) Moderately Severe

In these cases there will be significant problems associated with factors (i) to (iv) above but the prognosis will be much more optimistic than in (a) above. While there are awards which support both extremes of this bracket, the majority are somewhere near the middle of the bracket. Cases involving psychiatric injury following a negligent stillbirth or the traumatic birth of a child will often fall within this bracket. Cases of work-related stress resulting in a permanent or long-standing disability preventing a return to comparable employment would appear to come within this category.

	With 10% uplift
£16,270 to £46,780	***£17,900 to £51,460***

(c) Moderate

While there may have been the sort of problems associated with factors (i) to (iv) above there will have been marked improvement by trial and the prognosis will be good.
Cases of work-related stress may fall within this category if symptoms are not prolonged.

	With 10% uplift
£5,000 to £16,270	***£5,500 to £17,900***

(d) Less Severe

- *The level of the award will take into consideration the length of the period of disability and the extent to which daily activities and sleep were affected. Cases falling short of a specific phobia or disorder such as travel anxiety when associated with minor physical symptoms may be found in the Minor Injuries chapter.*

	With 10% uplift
£1,310 to £5,000	***£1,440 to £5,500***

69. Where separate awards are made for injury to feelings and psychiatric injury tribunals must be alert to the risks that what is essentially the same suffering may be compensated twice under different heads: HM Prison Service v Salmon [2001] IRLR 425.

70. Again we may look at quantum reports. A number were adduced by the claimant from civil cases. In the main they related to serious sexual assaults on children and we did not find them of great assistance. After we had started our deliberations it seemed to us that we would be better assisted by quantum reports in employment cases and we invited and we received further written submissions from the parties on the reports in *Harvey on Industrial Relations and Employment Law,* which concerned compensation for personal injury pain, suffering and loss of amenity in discrimination cases. Mr Perry kindly updated the awards to take account of inflation.

71. The following were the reports we ultimately considered merited closest scrutiny:

HM Prison Service v Salmon [2001] IRLR 425, EAT, — PI £11,250 ***[updates to £27,994.25]***

The claimant suffered from a major depressive disorder. This was categorised as moderately severe psychiatric damage and took medical retirement. She was unable to work or to pursue an ordinary social life; she left her house as little as possible, partly for fear of meeting people she knew; she suffered from tiredness and low energy and took no exercise; she had suffered a total loss of libido; and she had episodes of more extreme depression with thoughts of suicide. She was taking anti-depressants. At the time of the hearing she had been suffering from this condition for the best part of three years and although both experts believed that her condition ought to improve very substantially with more effective treatment, to the point where she should be fit to return to full-time employment, there was no guarantee that she would make an early, or complete, recovery. Compensation was assessed at £15,000 but reduced by 25% to reflect that the illness was only caused 75% by the acts of discrimination.

Nghiem v China Export Finance Ltd, Alomar & Cooke (London Central) (Case Nos 2200611/2008, 2201755/2008) (13 January 2010, unreported), PI £17,500 ***[Updates to £23,853.97]***

The victimisation of the claimant by the Chief Executive of the first respondent caused the claimant to have a psychiatric breakdown. At times during the victimisation she suffered strong migraines, belly ache and difficulties breathing. Since going off sick she had lost weight, was on anti-depressants and having psychotherapy, was unfit for work and had impulsive urges to harm herself. Regard was had to the Judicial Studies Board guidelines particularly 3(A)(a) and (b). The case came about one third the way up the moderately severe category of psychiatric damage or possibly a bit lower.

Taylor v BT Directories Ltd (Leeds) (Case No 1810480/2009) (22 March 2011, unreported),) — PI £20,000 ***[Updates to £27,583.92]***

The claimant suffered from a major depressive disorder characterised by depressed mood, diminished interest or pleasure, psychomotor agitation or retardation, fatigue, loss of energy, feelings of worthlessness, poor concentration and some suicidal thoughts. She also had symptoms of generalised anxiety and was being treated with antidepressant therapy. There were prospects of a good prognosis if she underwent cognitive behavioural therapy. This case fell within the moderately severe band of psychiatric damage in the Judicial Studies Board guidelines. The award would take into account: the claimant had been subject to sexual abuse which was also an abuse of power, the claimant could no longer cope with work and struggled to cope with life, she still had a fulfilling family life but would remain vulnerable in stressful working environments, medical help had been sought and the prognosis was good albeit with a 40% chance that it would be less than good, and there was a 60% chance that treatment would be successful.

X v Y and Z (London Central) (Case No 2202979/04) (28 March 2006, unreported) — PI £28,500 ***[Updates to £39,270.33]***

The claimant suffered a continuing moderately severe significant depressive disorder and post-traumatic stress symptoms (£25,000) resulting in irritable bowel syndrome and an anal fissure for which she was hospitalised for 10 days and had a surgical procedure (£3,500).

N.A.W.A. v Yasuf and Samalan (London Central) (Case No 2203852/2009 & 2204477/2009) (18 October 2010, unreported) — PI £15,000 ***[Updates to £20,687.94]***

The claimant was diagnosed with Post Traumatic Stress Disorder DSM IV 309.81 and Dysthymic Disorder ICD 10 F 34.1 (Depression) which had been materially contributed to by her treatment by the respondent family. The prognosis was good

Faithful v AXA PPP Healthcare Plc (Ashford) (Case No. 1100218/09) (16 December 2010 – unreported) PI £25,000 ***[Updates to £34,479.90]***

The claimant was diagnosed with a depressive episode of at least moderate severity, possibly in the severe range, accompanied by prominent somatic (physical) symptoms. She suffered from panic attacks and agoraphobia. In addition she had a number of symptoms of post-traumatic stress disorder. She had poor concentration, low energy, lack of motivation, fearfulness, lack of confidence, sensitivity to stress and was unable to undertake even minor household tasks. She was currently unable to work but with the right psychological help and an outcome that at least partially satisfied her she should be able to return to work within 18 months. However if the new workplace was too similar it was likely that she would be unable to cope and would go off sick quickly.

Aziz v Crown Prosecution Service (Leeds) (Case No 1808550/01) (1 September 2008— PI £25,000 ***[Updates to £42,128.83]***

The discrimination had a very serious impact on the claimant's health over a very prolonged period of time as she was diagnosed with post traumatic stress disorder and a major depressive order of moderate severity. The sum of £25,000 was agreed between the parties as compensation for the psychiatric injury, pain, suffering and loss of amenity suffered by the claimant. The tribunal approved this figure taking into account the overall impact of the awards and the need to distinguish the effects on her health from the injury to her feelings.

Combarel v Boots the Opticians Ltd (Exeter) (Case No 1700397/2005) (11 October 2006, unreported), PI £20,000 ***[Updates to £30,488.86]***

The claimant suffered moderately severe psychiatric damage, namely depression, over a period of four years preventing a return to comparable employment.

Michalak v Mid Yorkshire Hospitals NHS Trust and others (Leeds) (Case Nos 1808465/07, 1808887/08, 1810815/08) (15 December 2011, unreported) PI £56,000 ***[Updates to £79,528.74]***

The claimant suffered moderate to severe chronic post-traumatic stress disorder or anxiety and depression resulting in an enduring personality change. Her symptoms included nightmares in which she relived the events with the Trust, repeated intrusive thoughts, persistent anxiety and psychosomatic symptoms with episodes of tightness and chest pain which caused her to go to hospital on three occasions, anhedonia, poor concentration, lack of interest, lack of libido, poor memory and strong suicidal ideation. On the balance of probabilities with treatment she would show improvement gradually over one to three years but it was unlikely that she could return to work as a doctor.

Failure to follow 2009 ACAS Code of Practice 1 on Disciplinary and Grievance Procedures.

72. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, enables an employment tribunal to adjust the compensatory award for an unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance procedures. The award can be increased or decreased by up to 25% if it is just and equitable in all the circumstances.

Interest

73. Interest is payable on any compensation we award for discrimination pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases)

Regulations 1996 (SI 1996/2803). It is ordinarily calculated in accordance with those regulations, although the tribunal does have a degree of discretion with regard to the ability to calculate interest by reference to periods other than those set out in the regulations in exceptional cases. For injury to feelings awards, the interest is calculated from the date of discrimination. For other awards, interest is calculated from the midpoint between the date of discrimination and the date when compensation is calculated. The current applicable rate of interest is 8% per annum.

Tax

74. When making an award of compensation, the tribunal must take account of tax payable on the various elements of the award. It may therefore be necessary, in accordance with the principles in British Transport Commission v Gourley [1955] 3 All ER 796, once the amount of the award has been calculated using net figures for earnings and pension loss to 'gross up' the award so as to ensure that the claimant is not left out of pocket when any tax required to be paid on the award has been paid. Tax is not payable on general damages for personal injury or injury to feelings awards relating to pre-termination discrimination.

Recommendations

75. Section 124(3) of the Equality Act 2010 provides that:

An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.

Submissions

76. We ultimately had detailed written and oral submissions from the parties and then further written submissions on the personal injury award. We refer to those submissions below insofar as is necessary to explain our conclusions

Conclusions

Past and future financial loss

77. We had to look at a very complex picture and assess whether and for how long the claimant would have remained in the respondent's employment had

the discrimination not occurred. This involved a number of sub questions which we consider in turn.

Would the claimant have been made redundant?

78. The respondent sought to argue that there was a good chance the claimant would have been made redundant at the time she was dismissed even had there not been unlawful discrimination. There was a budget problem and a need for more casework to be done in the constituency. The claimant was expensive and not doing the full role.

79. We considered that argument was inconsistent with the findings we had already made which in essence were that the claimant's 'redundancy' happened at the point it did because the claimant had rejected the respondent's sexual advances.

80. However, we did have to consider whether there might have been a redundancy at some later point. We bore in mind that Mr Bridgen's evidence suggested that at least some MPs did not have full time support in Westminster, that the respondent himself was not in London two days per week, that there was a need for more casework in the constituency and that the claimant's salary was relatively high. The respondent had devised a staffing structure when he was a new MP and no doubt would have reviewed it over time.

81. We considered that there was a negligible chance that, absent discrimination, that review would have taken place before the 2019 general election but considered that as time went on there was a realistic chance that the respondent's staffing would have been reorganised such that the claimant's role no longer existed.

<u>The accommodation issue</u>

82. We considered that, had the respondent not discriminated against the claimant, he would at some point have realised that the flat sharing arrangement was inappropriate and liable to lead to unwanted publicity and rumour. We noted what had happened when Mrs Greig did find out about the arrangement. From paragraph 263 of our Judgment:
On 7 May 2019, Indiana Lamplough told Mrs Greig that the respondent and the claimant were sharing a flat. The respondent had told Mr Lamplough. Mrs Greig gave evidence that she told the respondent that the arrangements were ill-advised and put him at risk and that he should get out. She took over communications with the estate agents.

83. There were many unknown aspects as to what might have occurred. The expiry of the existing lease might have been a natural and fair point at which the claimant was asked to find her own accommodation. Whether she would have been in a position at that point to travel on public transport and whether her daughter would have been able to afford to pay her share of suitable accommodation are matters of uncertainty.

84. We also bore in mind what seemed to us to be a reasonable chance that the respondent would have fairly reorganised his staffing and no longer required the claimant's post full time in London and we also factored in other vicissitudes of life. Given the uncertainties, we concluded that our best estimate was that there was a 25% chance of the claimant remaining in her post between the 2019 election and May 2024. We could see no sensible basis on which we could carve up that period or taper the percentage chance over that period.

85. We then had to consider what would have happened at the May 2024 election. We had very limited evidence and we were conscious that we were being asked to speculate in an area in which we do not have expertise. We bore in mind that the respondent was in a historically safe seat which had not fallen with the loss of Red Wall seats in 2019 but we also bore in mind the complex political situation including Brexit and the pandemic. Doing our best, it seemed to us more likely than not that he would have retained his seat in 2024; we put the chance at 60%.

86. We considered that had the claimant remained in post until 2024, she would probably have continued. To have remained until 2024, she would have had to have transitioned successfully to her own accommodation. She would have been very experienced in the role by that point and, if she had not be restructured out by then, it seemed to us unlikely that she would have been restructured out later. To reflect her losses from that point, we therefore took 25% of 60%. The claimant's retirement age is 67 and we accepted her evidence that she would have worked until that age.

<u>What work would the claimant have performed had she left the respondent's employment absent discrimination</u>

87. It seemed to us that the claimant might have sought work in an administrative role but that was likely to have been in the North East where accommodation was much cheaper and she had her support network. Absent the discrimination, the need for the therapeutic effects of working in floristry would have been considerably less.

88. Doing our best, it seemed to us that there was a 2/3 chance the claimant would have done further administrative work in the North East at what the parties agreed would have been a salary of about £30,000 and a one third chance that she would have worked in floristry.

Earnings to set off

89. We did not accept the respondent's argument that the claimant could be expected to return to a similar role (which broadly could be characterised as higher level administrative / personal assistant work) to that which she had with the respondent. We had regard to her age, her ill health, her time out of employment and the area of the country in which she lives. Although the experts agreed that she would be psychologically able to do such work with treatment, it was not their role to comment on what seemed to us to be the many obstacles in the claimant's way in obtaining such work. She would have to seek out such work aged 59, with very little track record in that field. She would probably not be able to usefully rely on her period of employment with the respondent unless she wished to reveal the facts of this case to a prospective employer. It seemed to us unlikely that doing so would assist her in obtaining a role with many employers.

90. It seemed to us that the claimant would be mitigating her loss if she retrained as a florist once she has had appropriate therapy and recovered to the point where she is able to train. We bear in mind her need to recover her confidence, have somewhere stable to live and manage the practical aspects of setting up a business.

91. Allowing 18 months from the start of treatment and a further six months after that to train and set up the business, we accepted that the claimant reasonably projected that she could start earning two years after she commenced treatment.

Mitigation argument

92. The respondent argued that the claimant had not mitigated because she had not engaged with her medical advisers and had therefore delayed her therapy. We did not accept that that is what occurred. The evidence showed that the claimant had made significant efforts to obtain treatment, including by applying to a charity. There may have been miscommunication between the claimant and her GP; that was unclear to us, but equally there was no evidence on the basis of which we could find that the claimant had unreasonably failed to pursue treatment and that had she not done so she would have received treatment which would have enabled her to return to work earlier.

Smith v Manchester

93. We bore in mind that the claimant had a pre-existing depressive disorder and the joint expert opinion that further episodes of depression are highly likely, and that if they occur she might be out of work for several months. Given what the experts said about the uncertainty around prognosis, it appeared to us that the experts were saying that the risk of further episodes had been increased by the discrimination, although the joint report was not entirely clear.

94. Given that the claimant is planning to start her own floristry business and work for herself, she may have periods where she cannot take orders and carry out commissions. Doing our best, it seemed to us fair to allow for two depressive episodes over the remainder of the claimant's working life which would not have occurred had the discrimination not occurred and we award six months loss of earnings (at the rate for floristry work) under this head.

Cost of floristry course

95. The cost of retraining to mitigate loss is a recoverable head of loss. We make an award under this head at the midpoint between the costs of the two courses and at the rate claimed for subsistence, which was not challenged by the respondent.

Cost of treatment

96. Again, the experts agree that the treatment is necessary before the claimant will be in a position to mitigate her loss. It is also necessary to ameliorate the effects of the discrimination on the claimant's health. We make an award under this head in the sum set out by Dr Tacchi.

Injury to feelings

97. Given our findings on liability and the description of the effects of the discrimination on the claimant, the parties were in agreement that this was a top band of Vento case. The respondent said that it was at the bottom of the top band and the claimant said that it was at the top.

98. We considered the following features in particular:

- At the time of the unlawful discrimination, the claimant was very vulnerable: economically and in relation to her mental health, and her living accommodation. She gave up a secure home and moved away from her support networks to take the role;
- The claimant was abused by the respondent whilst in his power; she was dependent on him for her home and her livelihood and was also emotionally

dependent on him. He grossly abused her trust gained when he was her trade union representative;
- The timescale was prolonged. The events of the claim were for the claimant two years of increasing desperation;
- Some of the acts of discrimination were serious sexual assaults;
- The effects of the discrimination were devastating in relation to the claimant's economic, social and mental wellbeing.

99. We considered the quantum reports with which we had been provided and had no hesitation in concluding that this case was at the very top of the top band of Vento: £44,000.

Aggravated damages

100. The claimant submitted that there were aggravating features in all three categories: manner, motive and subsequent conduct.

101. We agreed that the respondent committed acts of discrimination in a particularly upsetting and oppressive manner. The breach of trust he committed as her former trade union representative and someone who had presented himself as a family friend and the exploitation of her known vulnerabilities were significantly aggravating features.

102. We also agreed that the respondent's motive was an aggravating feature. After the claimant rejected his advances, he behaved in way which retaliatory and vindictive and which showed a wholesale disregard for her welfare. This was evident for example in the threats to extend her probation or dismiss her and the manipulation of Mrs Greig.

103. We were urged to find that the claimant's complaints were not treated seriously or investigated properly. We are mindful of our findings on liability; we did not find that the grievance should have been handled in a different way, for example by the respondent appointing an independent person to investigate it. We do not find any aggravating feature in this respect.

104. We were also urged to find that the respondent had conducted the trial in an unnecessarily oppressive, intimidatory and offensive manner. It is true to say that the respondent defended the proceedings and continued to defend them after he was aware the IEP report was against him, however the issues before the IEP were not the same as the issues before the Tribunal and we of course would not have been bound by the IEP findings even if we had considered them. The case was a complex one and the respondent was not bound to conclude that his defence was hopeless. The proceedings before us were

conducted perfectly properly. Mr Perry did a difficult job with decency and grace.

105. It was suggested that the fact that the respondent had initially denied disability pending receipt of medical evidence was an aggravating feature, given that, as her former trade union representative, he was well aware of her impairment. We did not consider this was an aggravating feature. The personal injury proceedings which the respondent had been involved in on the claimant's behalf would not have involved consideration of the question of whether the claimant was disabled within the meaning of the Equality Act 2010. It would have been fairly standard practice and not unreasonable for those representing the respondent to advise that the medical evidence should be considered before disability was conceded.

106. We were urged to find that there was something aggravating about what occurred in relation to the respondent's employer's liability insurance. It was suggested that the respondent should have informed the claimant at a much earlier date of the limited cover available. We did not have sufficient information to reach any conclusion on this issue. We did not have clear evidence of when the claimant through her solicitors had first asked for this information. The claimant's concern was that much of the cover had been used up in costs. However the earliest correspondence we were provided with was from after the liability judgment at which point most of the costs ultimately incurred would have already been spent. We have no information about the terms of the policies or what the respondent was permitted by the policies to say about the cover. We were referred to no authorities on the issue of what parties are able to or should reveal about cover, if such authorities exist.

107. It was suggested that the problem with the more generous policy might have been a failure to alert the insurer in time but we had no information about that.

108. The figure urged on the claimant's behalf by reference to the quantum reports relied on was £20,000.

109. We bore in mind that we found some significant aggravating features but did not find such features which post-dated the acts of discrimination. Having regard to the quantum reports which were presented but bearing in mind that we had made an award which was at the top of the top Vento band, it seemed to us that an award of £12,500 was an award which reflected the aggravating features without representing double counting of matters we had already taken into account in respect of the injury to feelings award.

Personal injury: pain, suffering and loss of amenity

110. We were urged by the claimant to find that her injury fell into the 'severe' bracket of the Judicial College guidelines. We noted that that bracket is for cases with a very poor prognosis; thankfully that is not the claimant's case. We have to assume for these purposes that the claimant will receive the treatment in respect of which we have made an award. In that case her prognosis is good. Although Ms McKie seemed to suggest that we should award compensation on the basis that the claimant might not be able to enforce some or all of the award and therefore might not receive the sums she needed to facilitate a recovery, we could see no logic in that approach. We were shown no authority which suggested that the amount of compensation should be influenced by the likelihood of recovery and it would be futile to award a larger sum because a smaller sum may not be recoverable. In any event, we had no information before us as to the respondent's assets and it did not appear from what we were told that the whole of the sum covered by the insurance policy had been expended.

111. We preferred the evidence of the experts over the claimant's more pessimistic view of her own prognosis. It seemed to us entirely understandable and perhaps inevitable that someone in the midst of a depressive episode would have a bleaker view of the prognosis of their condition than was warranted.

112. The claimant has suffered from this episode of depression for over four years and it will be a further period of a year to eighteen months before she is anticipated to have made a recovery. The effects on the claimant's ability to work and live her life and on her relationships have undoubtedly been very significant. It appeared that she will have an enhanced vulnerability although she was already vulnerable to episodes of depression.

113. The choice of band was between the moderate and moderately severe brackets. We did not find the authorities on childhood sexual abuse referred to on the claimant's behalf helpful in determining which band was appropriate – there were too many material differences between those cases and the claimant's case.

114. It seemed to us that the personal injury quantum reports in *Harvey* did give us valuable assistance in determining both the bracket and where within the bracket the award should be:

- It seemed to us that the injury was at least as severe as that in N.A.W.A – that award updated to £20,000;
- Taylor had some similarities but a seemingly worse prognosis. That updated to £27,583.92
- Salmon had significant similarities and updated to £27,994.25
- Combarel also had similarities and updated to £30,448.86;
- The same was true of Faithful, which updated to £34,479.90.

115. We considered that the case of Michalak was an outlier; the award was very much higher than the other cases with resemblances to the claimant's case. This may have been because of the enduring personality change identified, the fact that the discrimination caused PTSD and the fact that the claimant in that case was unable to continue her career as a doctor. X v Y and Z involved the further condition of irritable bowel syndrome and in Aziz the discrimination was the cause of the claimant's PTSD. All of those cases were less helpful to us.

116. We felt satisfied that the resemblance to the cases set out at paragraph 114 pointed to the moderately severe bracket and to an award in the part of that bracket reflected by the awards in these cases. Ultimately we felt most able to rely on the award in Salmon which had the backing of the Employment Appeal Tribunal. The level of award which we felt best reflected the quantum reports and the Judicial College guidance and which did not involve double counting in respect of the matters we had already taken into account in respect of the injury to feelings award was £27,000.

Uplift for unreasonable failure to follow ACAS Code of Practice on Disciplinary and Grievance Procedures

117. It was argued on behalf of the claimant that, as the redundancy process was a sham, it should have been conducted as a disciplinary process and in accordance with the ACAS Code. We could not follow the logic of that submission. There should, on our findings, have been no dismissal and no process leading to dismissal. The ACAS Code does not apply to redundancy processes, sham or otherwise, and there was therefore no failure by the respondent to follow the Code in this respect.

118. The claimant's case in respect of the grievance process was that:

– Mrs Greig had made up her mind about the truth of the claimant's allegations without there having been an investigation but continued to 'oversee' the handing of the claimant's grievance;
- The respondent refused to appoint a third party to investigate the grievance;
- There was no grievance meeting; this was a breach of paragraph 33 of the ACAS Code;
- The respondent was dismissive and tried to 'palm off' the grievance on ISMA / the Cox Inquiry.

119. These submissions did not chime with the findings we made at the liability stage. Whether or not Mrs Greig had a view about the claimant's complaints,

she never proposed to hear the grievance herself. Someone had to facilitate the grievance being passed to someone who could consider the complaints. The options would appear to have been Mrs Greig or the respondent. We could see no breach of the ACAS Code in this respect.

120. So far as not appointing an independent third party to consider the grievance is concerned, our finding at paragraph 499 of our Liability Judgment was that: *In relation to this allegation, the Tribunal was very aware that small employers faced with grievances against the employer or the person highest up in an organisation face difficulties in how to hear those grievances. A small employer may well find it has no option but to appoint an external person. However in the context of MPs and their employees, there was a mechanism provided for complaints of the type the claimant was making to be independently investigated. It was put to the respondent that he wanted to go down the ISMA route because the ISMA process would be cloaked in parliamentary privilege. This was a suggestion made for the first time at the hearing and even if we had been persuaded it featured in the respondent's thinking, it would not logically have supported the claimant's case as to the respondent's motivation.*

500. It did not seem to us that there were facts from which we could reasonably conclude that the respondent and Mrs Greig suggested referring the complaint to ISMA rather than appointing an independent investigator because the claimant resisted the respondent's sexual advances. It seemed to us that Mrs Greig and the respondent took the action which the system in place prompted them to take rather than taking the counter-intuitive and no doubt expensive course of seeking to appoint an investigator.

121. We did not and do not find that referring the complaint to ISMA was unreasonable. So if it was a breach of the Code, it was not an unreasonable one. We note also that Ms Greig explained why the respondent was following that approach to the claimant's trade union representative, Mr Porter, at the time.

122. So far as the allegation that the respondent himself failed to hold a grievance meeting, we bear in mind that he was the accused and Mrs Greig was not neutral, as the claimant has said. If referring the matter to ISMA was a technical breach of the ACAS Code, it was not an unreasonable one.

123. We therefore did not award any uplift under this head.

Recommendations

124. The recommendations requested by the claimant are set out in Appendix 1 to this Judgment. Our findings on those requested recommendations are as follows:

2 a), b), c) and g)

125. These were all recommendations for apologies of one kind or another. We did not consider that it was appropriate to order these apologies. There were a number of reasons for this:
- A forced apology lacks sincerity. It was difficult to see how such an apology would obviate the effects of the discrimination;
- The respondent may still face criminal proceedings. We could not conclude that it was appropriate to order the respondent to do something which he might be legally advised not to do in order to preserve his position in those possible proceedings;
- The claimant believed that if the respondent apologised to her family, it might facilitate an improvement in her relationship with her family. She told us that they blamed her for trusting the respondent and involving him in her and their lives. We could not see how an ordered apology was likely to have the effect the claimant hoped if the Liability Judgment with its detailed findings about the respondent's behaviour had not had that effect ;
- Having seen Mrs Greig give evidence, we could see no likelihood that an ordered apology would alter the views she had expressed.

2 d) and e)

126. There was some discussion during the hearing about what could be done to assist the claimant in terms of future employment. Any reference or other information which linked the claimant with the respondent was likely to start a train of enquiry which would lead to the facts of this case. We understood that the claimant did not want to reveal these matters to potential employers and we also understood why that would be her position. In any event, her preferred course was to seek self-employment as a florist.

127. We were told that the respondent was content to provide the claimant with a standard 'vanilla' reference confirming her role and dates of employment either a reference coming from himself or from Mrs Greig.

128. It did not seem to us that we should order that any such reference should go further than that and characterise the claimant's work performance, particularly if it were to come from Mrs Greig. Although we did not find evidence of poor performance by the claimant, it was no part of our role or our findings to assess the claimant's performance over the course of her employment in the round. It would be wrong for us therefore to order that the respondent express a view on the claimant's performance. We are conscious that the provider of a reference may expose himself to legal liability in respect of the contents.

129. It seemed to us that the following varied recommendations were practicable and could help obviate the effects of the discrimination on the claimant:

i) The respondent will write to the claimant (or procure that Mrs Greig writes to the claimant) addressed 'To Whom it May Concern' setting out the role which the claimant performed for the respondent and the dates of her employment.

ii) *The respondent must make enquiries with House of Commons HR within 28 days of the date this Remedy Judgment is sent to the parties as to what information House of Commons HR retains on former staff of MPs and whether they keep records of whether they are 'good leavers' or similar. He should request that the claimant be recorded as a good leaver and that a copy of the reference described at i) be placed on her file. He must inform the claimant via her solicitors as to the outcome of these enquiries, within 14 days of receiving a response from House of Commons HR.*

2 f) and i)

130. We have no power to make recommendations that someone other than the respondent take particular actions.

2 h)

131. The claimant told the Tribunal that it would provide some comfort to her if the respondent undertook sexual harassment training as she would feel that she had helped someone else to avoid going through what she had gone through.

132. The evidence we heard did not suggest that the respondent had ever had any such training. It was clear from his evidence to the Tribunal and to the IEP that he was in denial that he had been guilty of sexual harassment.

133. It was argued on behalf of the respondent that he was unlikely to ever be an employer again and so would not be in a position to commit sexual harassment. We were not provided with any information as to what if any employment the respondent has undertaken since his resignation. It is of course not necessary that a person be an employer to commit sexual harassment; one colleague can harass another.

134. We considered that 'obviating' can cover a range of ways in which the effects of discrimination might be ameliorated. For some litigants, the desire to help others is part of what makes the anxiety and expense of proceedings worthwhile.

135. We therefore make the following recommendation:

iii) The respondent undertake training about sexual harassment in the workplace within six months of this Remedy Judgment being sent to the parties. The training should be from a reputable provider and may be online. The respondent will provide the claimant's solicitors with evidence of his attendance at such training within 14 days of the training being completed.

Appendix 2: calculations

Past and future loss of earnings and pension to May 2024

Gross salary: £50,000

Net figures: Yearly £37,640

Weekly £724

EDT: 2 September 2019

Period of full loss

EDT - 12 December 2019

14 weeks and 4 days

14.57 weeks x £724 = **£10,549.71**

Period of partial loss

12 December 2019 – 2 May 2024 (projected date for general election)

229.14 weeks x £724 = £165,699.43

@ 25% = **£41,474.86**

Total to 2 May 2024 in role with respondent**: £52,024.57**

Add: 25% prospect that worked as florist at annual £16,038 net = £307 per week

X 229.14 weeks = £70,482.30 @ 25% = **£17,620.58**

Add: 50% prospect would have worked in administrative role at £30,000 gross. Assuming that is £22,500 net = £431.53 net per week

X 229.14 weeks = £98,880.90 @ 50% = **£49,440.45**

Total loss of earnings to May 2024: £119,065.60

Past pension loss and future pension loss to 2 May 2024

Employer pension contribution at 10% of £52,024.57 = **£5202.46**

Divided between past and future for the purposes of calculating interest:

- As at 16 May 2022, there are 102.14 weeks left of the period. 102.14/229.14 = 44.6% is future loss. 55.4% = past loss.
    - 55.4% of £109,065.60 = £60,422.34 (past loss of earnings)
    - 55.4% x £5202.46 = £2882.16 (past pension loss)

    Total past loss component: £63,304.50

Future loss of earnings and pension from 2 May 2024

25% chance of remaining in role from May 2024 until retirement date

Yearly loss of £37,640 net @ 25% = £9410 pa

Factor in 50% chance of working in admin role at £22,500 net @ 50% = £11, 250 pa

25% chance of working as a florist: £4009.25 pa

Total pa = £24,669.25

Anticipated that will earn £16,038 net as a florist.

Yearly difference is £8631.25

Weekly loss is £165.54

Weeks between May 2024 and claimant's anticipated retirement date of 3 July 2032: 426.23 x £165.54 =£70,590.99

Loss of pension for that period

Loss of 25% of pension loss = 10% of £724 x 25% x 426.23 weeks = £7714.76

The sum for loss of earnings and pension is reduced by 40% to reflect the prospect that the respondent did not remain in his seat after 2024: £78,305.75 @60% = **£46,983.45**

Smith v Manchester award

Six months net loss as a florist = £16038 @ 50% = **£8,019**

Cost of therapy

£5,550

Cost of retraining as florist

Median point between costs of two courses plus subsistence costs.

£8,500

Injury to feelings

£44,000

Aggravated damages

£12,500

General damages for personal injury

£27,000

Interest

- Interest on past pecuniary loss: Midpoint between date of dismissal (the date of the act of discrimination causing financial loss) and today's date: from EDT

2 September 2019 – 16 May 2022, the midpoint is 988 days from today's date.
988/365 x 0.08 x £63,304.50 = £13,708.46

- Interest on personal injury award: 988/365 x 0.08 x £27,000 = £5846.79
- Interest on aggravated damages: 988/365 x 0.08 x £12,500 = £2706.85
- Interest on injury to feelings award: 1636 days from 22 September 2017 (first act of unlawful discrimination) until today's date: 1636/365 x 0.08 x £44,000 = £15,777.32

Total interest: **£38,039.43**

Total before tax

£314,859.94

Tax

Tax is not payable on the personal injury awards, half of the injury to feelings and aggravated damages awards (we have assessed half as relating to the dismissal and half to other acts of discrimination) and the payments for the costs of therapy and retraining.

The taxable sum is:

Sums on which tax is payable: £171,251.51 + (0.5 x £44,000) + (0.5 x £12,500) + interest on the loss of earnings and half the injury to feelings and aggravated damages awards= £208,693.49

First £30,000: no tax

£30,000 - £50,270 at 20%: £20,270/0.8 = £25,337.5 (grossed up sum) – £20,270 = £5067.50 (sum to allow for tax)

£50,271 - £150,000 at 40%: £99,729 / 0.6 = £166,215 (grossed up sum) - £99,729 = £66, 486 (sum to allow for tax)

£150,000 - £208,693.49 at 45%: £58,693.49/ 0.55 = £106,715.44 (grossed up sum) – £58,693.49 = £48,021.95 (sum to allow for tax)

Total tax:

£119,575.45

Grand total

£434,435.39

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Employment Judge Joffe
London Central Region
16 May 2022

Sent to the parties on:
18/05/2022

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For the Tribunals Office