



EMPLOYMENT TRIBUNALS

Claimant: The Estate of Mr Richard Pickard (deceased)

Respondent: Mr D Robson

HELD at Newcastle CFT

ON: 13 May 2022

14 and 15 June 2022 (in chambers)

BEFORE: Employment Judge Aspden

Members: Ms D Winter

Mr J Adams

APPEARANCES:

Permitted to participate under Rule 35: Ms G Hallam, represented by Mr R Ryan, Counsel

Respondent: In person

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that the respondent is ordered to pay to Mr Pickard the following sums:

1. Damages for breach of contract in the sum of £1,421.20.
2. The sum of £720.25, being the amount due to Mr Pickard under Regulation 14 of the Working Time Regulations 1998.
3. Compensation of £5,383 in respect of the respondent's contravention of Part 5 of the Equality Act 2010, made up as follows:
 - a. Compensation for personal injury: £2,383;
 - b. Compensation for injury to feelings (to the extent not compensated for by the award for personal injury): £3,000.
4. Interest on the award under the Equality Act of £831.67 awarded under Regulation 2 of the Employment Tribunals (Interests on Awards etc) Regulations 1996, calculated as follows:

- a. Interest on injury to feelings award (calculated at the prescribed rate of 8% per annum, from 24 December 2019 to the calculation date ie 15 June 2022): £595.07.
- b. Interest on compensation for personal injury (calculated from the mid-point from 24 December 2019 and the calculation date ie 15 June 2022 at 8% per annum): £236.60.

REASONS

Issues for determination

1. By a claim form received at the Tribunal in September 2019 Mr Pickard made a number of complaints against Mr Robson. The complaints included the following:
 - 1.1. Complaints that Mr Robson subjected him to direct age and sexual orientation discrimination by dismissing him.
 - 1.2. A complaint that Mr Robson had engaged in harassment related to sexual orientation or sexual harassment by making a particular comment to him in June 2019.
 - 1.3. Complaints that Mr Robson had engaged in age related harassment by making two comments about his appearance in June 2019.
 - 1.4. A complaint of breach of contract and/or for a sum due under a contract in respect of accrued but untaken flexi time hours.
 - 1.5. A complaint of breach of contract or for a sum due under a contract in respect of what was referred to as a 'go quietly' payment.
 - 1.6. A complaint of breach of contract or for a sum due under a contract in respect of the balance of a trial period.
 - 1.7. A complaint of breach of contract or for a sum due in respect of a contract in relation to travel expenses.
 - 1.8. A complaint that Mr Robson had failed to pay him an amount owing in respect of accrued but untaken annual leave.
 - 1.9. A complaint that Mr Robson had breached his contract of employment by terminating it without notice.
2. Mr Pickard was subsequently given permission to amend his claim to add a complaint of victimisation contrary to the Equality Act 2010. The allegation was that Mr Robson had victimised Mr Pickard on or around 24 December 2019 by fabricating evidence in the form of a letter bearing the date 1 July 2019.

3. In January 2021 we gave a Judgment upholding the complaint that Mr Robson victimised Mr Pickard by fabricating evidence for use at the Tribunal hearing in the form of a letter said to have been written on or around 1 July 2019. The Tribunal also upheld the complaint of breach of contract in relation to notice pay and the complaint in respect of accrued and untaken annual leave. None of the other complaints were well founded and all were dismissed.

4. Mr Pickard died before a remedy hearing could be arranged.

5. The Tribunal was notified of Mr Pickard's death by Ms Hallam. Ms Hallam explained that she believed that she would be the executor of Mr Pickard's estate. Ms Hallam had been present at the earlier hearing of Mr Pickard's claims. She had given evidence as a witness.

6. After a stay of proceedings at Ms Hallam's suggestion, there followed some correspondence between Mr Robson, Ms Hallam and the Tribunal on the subject of Ms Hallam's standing to represent the estate. Mr Robson accepted that Mr Pickard's right to remedies in these proceedings survives for the benefit of his estate by virtue of the Law Reform (Miscellaneous Provisions) Act 1934. He questioned, however, Ms Hallam's authority to represent the estate. In light of the contents of that correspondence Employment Judge Aspden directed that there be a preliminary hearing for case management on 21 January 2022. The purpose of that hearing was to consider and make directions as to the arrangements for a remedy hearing, to include considering whether the issue of Ms Hallam's authority to represent the estate needed to be determined conclusively and, if so, when and how. EJ Aspden permitted Ms Hallam to participate in that hearing under Rule 35 of the Employment Tribunal Rules. Mr Robson attended that hearing as did Ms Hallam. At that hearing, after a discussion about the issues, EJ Aspden decided that a remedy hearing should be arranged; Ms Hallam would be permitted to participate in the proceedings and that hearing under rule 35 on certain terms set out in the Orders; and the Tribunal would not determine the issue of whether or not Ms Hallam has standing to represent the estate. Neither Ms Hallam nor Mr Robson objected to matters being dealt with in that way.

7. At this remedy hearing Ms Hallam was represented by Mr Ryan. Mr Ryan asked this Tribunal to revisit the decision made at the case management hearing not to determine the issue of whether Ms Hallam has standing to represent the estate. We declined to do so. Mr Ryan subsequently requested written reasons for that decision. Those reasons will be provided separately.

8. At this remedy hearing Mr Robson agreed with Ms Hallam that the amount due to Mr Pickard's estate in respect of the breach of contract and holiday pay are as stated in the Judgment above. The only issue in dispute was the remedy for victimisation.

9. No claim has been made for financial loss. Claims were, however, made for compensation for personal injury, for injury to feelings and for aggravated damages.

Evidence and facts

10. We heard evidence from Ms Hallam. Ms Hallam had prepared a file of documents for this hearing.

11. At a case management hearing on 1 April 2020 Employment Judge Sweeney made directions for the final hearing. At that time he directed that the hearing was to include all issues on liability and remedy. He directed the parties to exchange witness statements containing all the evidence they and their witnesses intended to give at the final hearing by 18 September 2020. EJ Aspden subsequently directed that the Tribunal would not hear evidence or reach any decisions on matters relevant to remedy for breach of the Equality Act 2010 at the December hearing.

12. At some point between the liability decision in January 2021 and 20 March 2021 Mr Pickard prepared a draft witness statement for the remedy hearing. We took into account the contents of that draft statement. The fact that Mr Robson has not had an opportunity to question Mr Pickard on the content of that document affects the weight we are prepared to give it.

13. Mr Pickard wrote, in that draft statement, amongst other things the following:

13.1. 'This entire litigation has had a huge impact on me but the July letter was a key factor in this. I saw the letter at the time and attempt to cover up [Mr Robson's] wrong doing.'

13.2. 'My belief (set out in (a) above) was perpetuated by the July letter.' This appears to be a reference to Mr Pickard's belief that he had been treated, as he put it 'differently and unfavourably on unlawful/discriminatory grounds.'

13.3. 'My medical position deteriorated from December 2019.'

13.4. '...the respondent then tried to prevent me from bringing the claim of victimisation and objected to the amendment to my claim.'

13.5. Mr Robson had 'fabricated the 1 July letter to question my integrity, defame my good character and ruin my good reputation of 24 years in the industry and working in and out of Port Alcudia and Port Pollensa, Majorca ...'

13.6. 'Had [Mr Robson] been honest – and admitted he did not send any letter – and gone on to explain what his true reasons were for dismissing me, then I do not believe I would have my current mental health problems.'

14. In his draft statement Mr Pickard referred to other matters that also caused him distress including:

14.1. Mr Robson saying in a witness statement submitted on 20 January 2020 that Mr Pickard had left the boat unattended.

14.2. Mr Robson allegedly threatening him with a claim for damages.

14.3. Mr Robson contacting a friend of Mr Pickard during his employment about an alleged collision.

14.4. Ex-colleagues in Port Alcudia and Port Pollensa telling Mr Pickard that Mr Robson was 'creating a toxic environment with other boat captains and owners'.

14.5. A Mr Bloom allegedly reneging on an agreement to employ Mr Pickard as a captain because of things Mr Robson had said to Mr Bloom. Mr Pickard alleged that Mr Robson had 'ruined a good and honest career' and had 'corrupted Bloom into conspiring to ruin my job prospects in both Port Alcudia and Port Pollensa if not island wide.'

14.6. Difficulties finding employment, or potential difficulties finding employment, because of his age and qualifications.

15. In his ET1 claim form filed on 29 September 2019, three months after his dismissal and some three months before the victimisation with which we are concerned, Mr Pickard made it clear that he considered he had been 'duped' by Mr Robson into accepting employment. He accused Mr Pickard of having 'cast a shadow' over his reputation. He said 'I feel my hard earned reputation is being eroded by David Robson on a daily basis in Alcudia Marina'. He alleged that, on dismissing him, Mr Robson had threatened to make sure he would not work again if any of what had happened got back to the marina. He alleged that Mr Robson was abusive to him during his employment and that he had 'no future prospects of employment in Alcudia if Mr Robson's threats are to be taken seriously. I will not visit Alcudia Marina for fear that my friends and colleagues there will ask questions I cannot answer truthfully about my dismissal ... and for fear of Mr Robson's threats I will not work again as he will make sure of it.' He alleged that during his employment he had become increasingly fearful of losing his job at any time.

16. The documents to which we were referred included two reports written by Mr Pickard's GP, Dr Clarke. Both reports were prepared for these proceedings. The first, dated 16 November 2020, was prepared before the liability hearing in December 2020. The second was prepared after Mr Pickard's death at the request of Ms Hallam.

17. We make the following observations about the first report:

17.1. In a section headed 'reason for this report' Dr Clarke said 'Captain Pickard would like the Tribunal to understand the impact of this employment period on his health, as well as the possible implications on his ability to work at sea in the future.' Therefore, although the hearing was to deal with liability only, the report had been prepared with the express aim of identifying the effect on Mr Pickard of Mr Robson's treatment of him.

17.2. Dr Clarke said she had assessed Mr Pickard on a number of occasions. She said she included in that report 'a number of documents which I perceived pertinent to the deterioration of Captain Pickard's mental health.' There was then a list of documents which included the details of claim included with the ET1 claim form as well as Mr Robson's grounds of resistance and various other documents. Reference was made to Mr Pickard's response to Mr Robson's letter of 1 July.

17.3. Dr Clarke referred in that report to Mr Pickard having a history of anxiety and depression before he started work with Mr Robson but being fit to return to work on a part time basis by March 2016 and between March 2016 and July 2019 being 'happy, stable and productive on a maintenance dose [of Citalopram].'

- 17.4. Dr Clarke said Mr Pickard had consulted her with a deterioration in his mental health status on 11 July 2019 (ie some five months before the victimisation), complaining of increasing symptoms of anxiety, tiredness, reduction in ability to concentrate, significant irritability and 'frank anger'. She said that on that occasion Mr Pickard was 'adamant that his deterioration was triggered by his significant difficulties concerning defamation of his character and reputation by his previous employer.'
- 17.5. Dr Clarke went on to say 'over the last months of 2019 and to date in 2020 I had numerous contacts with Captain Pickard. The deterioration in his mental health stability appear to progress with irritability and anger symptoms being directly attributable to his perceived ongoing slights and untruths from his previous employer. Further deterioration occurred following problems to secure part time employment during later 2019 and seasonal work for spring and summer 2020, which Captain Pickard feels strongly to be related to stigma in relation to his claim against his previous employer to the Employment Tribunal. Still more deterioration occurred over the Covid-19 pandemic with the associated isolation, health and employment concerns.'
- 17.6. Dr Clarke referred to a need for a gradually increasing (and finally significant) amount of support and counselling and then, on 15 August 2020, Mr Pickard's dose of anti-depressants being doubled with the addition of sleeping medication and other medication as required.
- 17.7. Dr Clarke said Mr Pickard 'remains under close supervision. I am concerned that his mental health status will deteriorate further as his anxiety levels escalate.' Dr Clarke said Mr Pickard was currently unfit to work at sea.
- 17.8. She referred to Tribunal proceedings taking up much of Mr Pickard's time and energy and expressed the opinion that Mr Pickard found the Tribunal 'all pervasive and consuming to the point it has almost taken over his life.' She added 'additionally, Captain Pickard remains extremely concerned that his name and reputation have been damaged to such a degree that this has and will cause additional difficulty in finding employment in the future. Both issues and concerns have caused additional psychological deterioration. The above has been compounded by the very strict initial Covid-19 Spanish lockdown which began on 14 March 2020 and still continues to varying degrees.'
- 17.9. Dr Clarke said that it was unknown how much Mr Pickard may deteriorate or how well he may recover.
18. On 2 March 2022, at Ms Hallam's request, Dr Clarke prepared a second report. We make the following observations about the report:
- 18.1. Dr Clarke said this report should be read in conjunction with the previous report and 'describes the direct correlation between his suicide and the actions and admissions of his previous employer.'
- 18.2. Dr Clarke said she had numerous consultations with the claimant, both face to face and by telephone.
- 18.3. She said that as the Tribunal progressed Mr Pickard's 'ruminating thoughts, feelings of hopelessness, frustration and anger mounted especially

in relation to his belief that his previous employer was falsifying information presented to the Tribunal.'

- 18.4. Dr Clarke described a deterioration in Mr Pickard's sleep from August 2020 to March 2021 despite medication. She said he described extreme lethargy and disinterest in every-day life but hyper focus on anything related to the Tribunal. She said that gradually Mr Pickard's focus on hygiene deteriorated and that he had admitted to a lack of motivation concerning anything except the 'false information' and 'lies' from Mr Robson. She said Mr Pickard was 'dogmatic and very decisive about Tribunal issues and what he wanted to achieve in the litigation.'
- 18.5. Dr Clarke referred to Mr Pickard having fits of anger and outbursts of venom and said that he became more socially isolated.
- 18.6. Dr Clarke said Mr Pickard became extremely tearful and his anxiety levels increased dramatically from January 2020 to his death in March 2021 which, she said, led to a vast increase in medications.
- 18.7. Dr Clarke said Mr Pickard was 'especially fixated on the 'Christmas Eve letter''. She said Mr Pickard telephoned her on Christmas Eve 2019 in a serious state of agitation and anger about that letter. She said Mr Pickard was 'exquisitely concerned that the Tribunal would believe the statements within it.' She described Mr Pickard's interpretation of the letter as being that he 'was ruined', his 'hard earned reputation was gone'. He 'would never work again' and finally 'what am I going to do'. She said those statements and questions almost became a mantra at every consultation throughout 2020.
- 18.8. Dr Clarke said that over the next months Mr Pickard concentrated almost exclusively and repeatedly on what he described as the 'fabrication, lies and defamation' of his 'personal and professional character' perpetrated by Mr Robson. She suggested that Mr Pickard believed that the 'inaccurate and misleading information provided by [Mr Robson] to the Tribunal could affect the understanding of the Tribunal and therefore the outcome of the case.' She also said that he believed that a 'personal and professional smear campaign would adversely affect his ability to obtain future employment.' She said this led him to be exceedingly concerned about his future. She said Mr Pickard experienced social isolation as a result of the widespread 'defamation' by Mr Robson. 'All his colleagues and contacts within Alcludia and Pollensa marinas.'
- 18.9. Dr Clarke said 'no doubt that Tribunal issues such as research, writing statements and collating evidence etc caused stress' but that working on the Tribunal issues gave Mr Pickard focus and motivation.
- 18.10. Dr Clarke said that in late 2020 she believed Mr Pickard was now suffering 'a much more significant depressive disorder such as bipolar disorder'.
- 18.11. Dr Clarke said that after the Judgment on 26 January 2021 Mr Pickard 'ruminated constantly over the areas he felt his previous employer had 'pulled the wool' over the eyes of the Tribunal. She said 'He truly believed that his concerns over the 'lies', 'defamation', 'smoke and mirrors' and 'smear

campaign' was the root cause of his not winning each and every area of his submissions. He was simply incapable of being happy, pleased or contented that he had won many issues. Instead, he concentrated [on] the negatives and his thoughts spiralled to the safety of his family and friends and what Mr Robson would do next.'

18.12. Dr Clarke referred to Mr Pickard spending large amounts of money unnecessarily and giving loans and money to other individuals which she described as a 'well-known symptom of mania/hypomania.' She said that as a result of that he became 'a victim of unscrupulous people' and that towards the end of February 2021 and early March 2021 his mood and recovery were affected by loss of finances and what she described as 'the self-centred action of acquaintances.'

18.13. Dr Clarke said her last consultation with Mr Pickard was on 28 March 2021 and lasted over two hours.

18.14. Dr Clarke described Mr Pickard as being 'devastated by the loss of his reputation and perceived inability to hold his head up high which he sincerely believed had been caused by [Mr Robson].' She added that 'the Christmas Eve letter was an especially difficult document for Captain Pickard to understand and I believe was intimately related to his suicide...'

19. We view those reports with some circumspection. Mr Pickard's GP did not give evidence so Mr Robson did not have an opportunity to test what is said in the reports through cross-examination. Nor have we seen the contemporaneous GP records from which, presumably, Mr Pickard's GP relied in preparing that report. Furthermore, we have not been shown or told what was said to Mr Pickard's GP when she was asked to prepare the reports. The second of the reports was prepared for this remedy hearing. Ms Hallam said in evidence she could not recall what she had said to Dr Clarke when asking her to prepare the report. We do not know therefore, to what extent Mr Pickard's GP was asked to focus on the letter. However, given that the report was prepared after the Judgment was given and that it was then known that the only relevant part of the claim to succeed was the victimisation complaint concerning that letter, we infer that Mr Pickard's GP was specifically asked to comment on the effect of that letter. It is significant that although Mr Pickard's GP focuses on that letter in the second report, she did not suggest in the November 2020 report that Mr Pickard was 'especially fixated on the 'Christmas Eve letter'.

20. Our findings of fact are set out below.

21. Mr Pickard had a history of psychological issues dating to before 2 November 2015. Mr Pickard continued to see his GP almost weekly for a number of months. His GP certified him as not fit for work at one point. Subsequently Mr Pickard's condition stabilised although did not recover completely and he remained on a what was described by his GP as a 'maintenance dose' of Citalopram. Mr Pickard's mental state was such that he was fit and able to work when he started work for Mr Robson in May 2019.

22. Mr Pickard was unhappy with the way he perceived Mr Robson treated him during his employment. As we found in our judgment on liability, their relationship deteriorated and Mr Robson summarily dismissed Mr Pickard on 29 June 2019.

23. By 11 July 2019 Mr Pickard's mental health had deteriorated significantly. On that date he consulted his GP. He complained then of increasing symptoms of anxiety, tiredness, reduction in ability to concentrate, significant irritability and anger.

24. We find that Mr Robson's mental health began to deteriorate whilst he was employed by Mr Robson, although not to the point that he was unable to work. After his dismissal Mr Pickard's mental health deteriorated further, and to a significant degree, before the act of victimisation with which we are concerned. A significant cause of that deterioration was the fact of the dismissal as well as what Mr Pickard thought Mr Robson was saying about him to others, particularly in the marina at Alcudia. Mr Pickard believed Mr Robson had been saying things to damage his professional reputation on which he depended for employment as well as his standing in the community. By the Summer of 2019 Mr Pickard was clinically depressed and was experiencing anxiety, tiredness, a reduction in his ability to concentrate, significant irritability and anger.

25. Upon receipt of the claim form Mr Robson filed a response in November 2020. In that response Mr Robson alleged that he had dismissed Mr Pickard for a number of reasons including that Mr Pickard had not had a mandatory firefighting qualification to carry out the job; that Mr Pickard had deceived him about having such a qualification; that Mr Pickard neglected his role; Mr Pickard undermined his authority; that he had discovered that Mr Pickard had had caused an accident between two vessels in a previous role as deck hand; that his conduct during employment was unacceptable; that Mr Pickard had disobeyed instructions and that he could not work with Mr Pickard. We find it more likely than not that the receipt of that ET3 contributed to a further deterioration in Mr Pickard's mental health.

26. Although Mr Pickard's mental health had deteriorated, he was still capable of work. It is clear from the schedule of loss filed at an earlier stage of these proceedings that Mr Pickard did some work in November 2019. Mr Pickard was also offered a job by a Mr Bloom, although Mr Bloom subsequently terminated the arrangement.

27. On 24 December 2009 Mr Pickard received the letter that was the subject matter of the victimisation claim. He received it as part of the disclosure exercise. On that day Mr Pickard messaged Ms Hallam drawing her attention to this letter.

28. Mr Pickard was agitated and angered by the appearance of this letter in the documents disclosed by the respondent's solicitors. He knew he had not received it previously and believed it had been fabricated. The letter repeated things that had already been said in the ET3 grounds of resistance. Mr Pickard already believed he was being traduced by Mr Robson. This letter reinforced that belief, although there is no evidence that Mr Pickard believed Mr Robson had shown the letter to anyone not involved in the litigation. The letter also introduced an additional concern for Mr Pickard as to how matters would be viewed by the Tribunal. Mr Pickard viewed the Employment Tribunal proceedings as a way of gaining vindication and repairing the damage he believed Mr Robson was doing to his reputation in the Ports of Alcudia and Pollensa. He was concerned that the letter might cause the Tribunal to believe Mr Robson's account of what had happened rather than his own account because, on the face of it, the letter was being presented as a piece of contemporaneous evidence. The matter was of sufficient concern and importance for Mr Pickard to apply to amend his claim. We accept that the letter added to Mr Pickard's upset. The fact that it was received on Christmas eve added to that sense of upset.

29. There were other events that, we find, affected Mr Pickard's mental health in 2020. They include the following:

29.1. Mr Pickard was upset by Mr Bloom's decision to terminate his work arrangement. Mr Pickard believed that Mr Robson had been involved in some way with the matter and that he and Mr Bloom had been colluding.

29.2. Mr Pickard was having difficulty securing work.

29.3. Mr Pickard felt more isolated for reasons related to the Covid-19 pandemic. The pandemic also added to the claimant's health and employment concerns.

29.4. The Employment Tribunal process added significantly to Mr Pickard's stresses, particularly as Mr Robson contested the Tribunal's jurisdiction to consider the claims. Mr Pickard found the Tribunal proceedings all consuming. We find that it is inevitable Mr Pickard would have felt that way about the Tribunal proceedings even if Mr Robson had not fabricated the July letter.

29.5. Mr Pickard believed Mr Robson might bring a claim against him for damages.

30. By August 2020 Mr Pickard's condition had deteriorated further. His sleep deteriorated, as did his focus on hygiene. He had angry outbursts and became socially isolated. He was lethargic and lacked motivation for or interest in things other than the Tribunal proceedings. He experienced feelings of hopelessness, frustration and anger and struggled to make decisions on day to day issues. His antidepressant medication was increased and he was prescribed medication to help him sleep and to manage his anxiety. He was unfit to work at sea.

31. Mr Pickard remained under the close supervision of Dr Clarke, who spoke to him regularly. By November 2020, Mr Pickard's mental health had worsened. His sleep had deteriorated despite the medication he had been prescribed. Dr Clarke was concerned that Mr Pickard's mental health could deteriorate further still. She said in her November report 'it is unknown how much Captain Pickard may deteriorate or how well he may recover.'

32. The liability hearing took place in December 2020.

33. In early January 2021 Mr Pickard's GP referred Mr Pickard to a consultant psychiatrist saying she thought Mr Pickard may have bipolar disorder.

34. The consultant psychiatrist saw Mr Pickard on 13 January 2021. On the following day the consultant psychiatrist wrote to Mr Pickard's GP. The psychiatrist said Mr Pickard 'currently suffers from a hypomanic episode (bipolar II). He is happy although irritable and with anger. He has an increased self-esteem, pressure of speech, more talkative, decreased sleep, poor appetite, racing thoughts, high energy, over activity and social disinhibition. ...It is not clear for how long he has been with these symptoms.' We find that, at this time, the claimant was experiencing a hypomanic episode and that this was a feature of his depressive disorder.

35. On 26 January 2021 Mr Pickard learned that most of the claims he had brought against Mr Robson had failed. His complaint of victimisation had succeeded, as had

the claims in respect of holiday pay and notice pay. In upholding the claim for notice pay (a claim of wrongful dismissal) we rejected Mr Robson's case that Mr Pickard had committed gross misconduct.

36. Between January and March 2021 Mr Pickard's levels of anxiety and agitation increased and he was extremely tearful when speaking with Dr Clarke. His mood was adversely affected by economic concerns. Dr Clarke noticed a particular deterioration in Mr Pickard's mood, symptoms, sleep and general outlook after the Tribunal gave its decision on liability. Mr Pickard was upset by the fact that the Tribunal had not upheld all of his claims. He believed the Tribunal proceedings had not resulted in the vindication he had hoped for.

37. On 28 March 2021 Mr Pickard had an appointment with Dr Clarke that lasted over two hours. In her report Dr Clarke does not give a full account of what was said during that appointment over the course of those two hours and nor have we been provided with any notes from that appointment. On 29 and 30 March 2021 Mr Pickard spoke to Dr Clarke by phone about his mental health.

38. On 31 March 2021 Mr Pickard took his own life.

39. Mr Pickard left a note for his parents. In the note Mr Pickard said, amongst other things, 'I have no quality of life and every day has been a struggle for almost two years now. The case got to eat my brain for too long, but the brain fog for longer than that. I feel my career and hard-earned reputation are gone and little if any prospects ahead for a miserable and insecure future. I see no hope to be happy.'

Relevant legal framework

40. Where an employment tribunal finds that there has been a contravention of part 5 of the Equality Act 2010 (as we have in this case), the tribunal may order the respondent to pay compensation to the complainant: Equality Act 2010 s124(2)(b).

41. The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court under section 119: Equality Act 2010 s124(6). This means that, where compensation is ordered, it is to be assessed in the same way as damages for a statutory tort: see *Hurley v Mustoe (No 2)* [1983] ICR 422, EAT and Equality Act s 119(2)(a).

42. The measure of tortious damages is such amount as will put the claimant in the position he or she would have been in but for the employer's unlawful conduct, as best as money can do so. The complainant is entitled to be compensated for the loss and damage which arises naturally and directly from the wrongful act; there is no requirement to show that the particular type of loss sustained was reasonably foreseeable: *Essa v Laing Ltd* [2004] IRLR 313, CA.

43. In his submissions Mr Ryan referred us to the House of Lords case of *Corr v IBC Vehicles Ltd* - [2008] 1 AC 884 and seemed to suggest that we must determine whether Mr Pickard's suicide was caused by Mr Robson's actions. If that is what Mr Ryan is contending, we disagree with him. *Corr* was concerned with whether loss attributable to the death of an employee by suicide was recoverable by his dependent widow under section 1 of the Fatal Accidents Act 1976 in an action against his former employer. The Act provides for a claim to be made for the benefit of the deceased's dependants against the person who, by any wrongful act, neglect or default, is

responsible for causing the death. We are not here dealing with such a claim. Rather, we are assessing compensation for pain, suffering and loss of amenity suffered by Mr Pickard in the fifteen months or so between injury and death. We are not determining whether Mr Pickard's suicide was caused by Mr Robson's actions. We acknowledge, however, that the fact that Mr Pickard committed suicide is a relevant factor in determining the state of his mental health and the nature and extent of any psychiatric injury.

44. In calculating compensation according to ordinary tortious principles the tribunal must take into account the chance that the claimant might have suffered the same damage even if the respondent had not contravened the Equality Act 2010. This means asking what would have happened if there had not been the discrimination or victimisation: *Abbey National plc and Hopkins v Chagger* [2009] IRLR 86, [2009] ICR 624, EAT.

45. Compensation for discrimination can include compensation for injured feelings and for personal injury, including psychiatric injury.

46. In *Vento v Chief Constable of West Yorkshire Police (No2)* [2003] IRLR 102, the Court of Appeal set out the following guidance:

'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.

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.'

47. We bear in mind, however, that notwithstanding references in *Vento* to the 'nature of the prohibited conduct', awards are to be compensatory in nature, not punitive. Furthermore, an isolated act may have severe consequences in some cases and if that is the case the individual is to be compensated for the whole of the injury. Therefore, there may be cases of injury caused by a single act that fall within the upper or middle band. It is the impact of the discriminatory act upon the claimant that determines the appropriate level of compensation.

48. The Vento bands now need to be uplifted to take account of inflation and the case of *Simmons v Castle* [2013] 1 All ER 334. The Presidents of Employment Tribunals for England and Wales and Scotland have published guidance on Employment Tribunal awards for injury to feelings and psychiatric injury in light of those developments. For claims made between 6 April 2020 and 5 April 2021 (the period in which the claim was amended to add the complaint of victimisation) the Presidential guidance says that the Vento bands shall be as follows: a lower band of £900 to £9,000 (less serious cases); a middle band of £9,000 to £27,000 (cases that do not merit an award in the upper band); and an upper band of £27,000 to £45,000 (the most serious cases), with the most exceptional cases capable of exceeding £45,000.

49. An employment tribunal may award compensation for personal injury provided the claimant proves that his injury was caused by the discriminatory acts: *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481, [1999] ICR 1170, CA.

50. In the case of *BAE Systems (Operations) Ltd v Konczak* [2017] IRLR 893 the Court of Appeal considered the proper approach to awarding compensation for injuries with more than one cause. As recorded in the headnote the Court of Appeal held as follows:

‘The tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused. The exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm. The question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong; not whether it can assess the degree to which the wrong caused the harm. That distinction is easier to apply in the case of a physical injury. It is less easy in the case of a psychiatric injury, but such harm may well be divisible. It may, for example, be possible to conclude that a pre-existing illness, for which the employer is not responsible, has been materially aggravated by the wrong (in terms of severity of symptoms and/or duration), and to award compensation reflecting the extent of that aggravation. Even in a case where the claimant tipped over from being under stress to being ill, the tribunal should seek to find a rational basis for distinguishing between a part of the illness that is due to the employer's wrong and a part that is due to other causes; but whether that is possible will depend on the facts and the evidence. If there is no such basis, the injury will be truly indivisible, and principle requires that the claimant is compensated for the whole of the injury (although if the claimant has a vulnerable personality, a discount may be required on that basis).’

51. In *HM Prison Service v Salmon* [2001] IRLR 425, the EAT observed that it is important for tribunals making awards where there are damages both for injury to feelings and psychiatric injury should make clear what sums are attributable to which, in order to avoid the danger of double counting, given that there is a considerable overlap in the effects that the two types of award are designed to compensate for.

52. The Judicial College has published guidance for the assessment of general damages in personal injury cases. The guidance provides for the following factors to be taken into account when valuing claims of psychiatric injury:

- a. the injured person's ability to cope with life and work;

- b. the effect on the injured person's relationships with family, friends and those with whom he comes into contact;
- c. the extent to which treatment would be successful;
- d. future vulnerability;
- e. prognosis;
- f. whether medical help has been sought.

53. The guidance outlines 4 categories of award as follows:

53.1. Less Severe: between £1,540 and £5,860. Where the claimant has suffered temporary symptoms that have adversely affected daily activities.

53.2. Moderate: between £5,860 and £19,070. Where, while the claimant has suffered problems, marked improvement has been made by the date of the hearing and the prognosis is good.

53.3. Moderately Severe: between £19,070 and £54,830. Moderately severe cases include those where there is work-related stress resulting in a permanent or long-standing disability preventing a return to comparable employment. These are cases where there are problems with factors outlined at a. to d. above but there is a much more optimistic prognosis than Severe.

53.4. Severe: between £54,830 and £115,730. Severe cases include those where the claimant has serious problems in relation to the factors at a. to d. above, and the prognosis is poor.

54. A Tribunal may also award aggravated damages, in appropriate circumstances, for an act of discrimination. Such an award is compensatory and not punitive in nature. It is an aspect of injury to feelings compensation and tribunals should have regard to the total award made (ie for injury to feelings and for the aggravation of that injury) to ensure that the overall sum is properly compensatory and not excessive: *Commissioner of Police of the Metropolis v Shaw* [2012] IRLR 291, EAT. In *HM Land Registry v McGlue* UKEAT/0435/11, [2013] EqLR 701, the EAT said such awards might be appropriate where the sense of injustice and injured feelings have been aggravated (a) by being done in an exceptionally upsetting way, eg 'In a high-handed, malicious, insulting or oppressive way'; (b) by motive: conduct based on prejudice, animosity, spite or vindictiveness where the claimant is aware of the motive; (c) by subsequent conduct: eg where a case is conducted at a trial in an unnecessarily offensive manner, or a serious complaint is not taken seriously, or there has been a failure to apologise. An award of aggravated damages will not be appropriate, however, merely because an employer acts in a brusque and insensitive manner towards an employee or is evasive and dismissive in giving evidence: *Tameside Hospital NHS Foundation Trust v Mylott* UKEAT/0359/09 (11 March 2011, unreported).

55. The Court of Appeal in *Vento* held 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.'

56. When making an award under s124 of the Equality Act 2010, a tribunal may include interest on the sums awarded. Awards of interest in such cases are governed by the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996, which provide as follows:

- 56.1. A Tribunal is required to consider whether to award interest even if the claimant does not apply for it: reg 2.
- 56.2. Interest is to be calculated as simple interest, which accrues daily: reg 3(1).
- 56.3. For claims presented after 28 July 2013, the rate of interest to be applied shall be, in England and Wales, the rate fixed by section 17 of the Judgments Act 1838 (which is, and has been throughout these proceedings, 8%): reg 3(2).
- 56.4. No interest shall be included in respect of any sum awarded for a loss or matter which will occur after the on the day on which the amount of interest is calculated by the tribunal (or in respect of any time before the contravention or act of discrimination complained of): reg 5.
- 56.5. Subject to regs 6(2) and (3), in the case of any sum for injury to feelings, interest shall be for the period beginning on the date of the contravention or act of discrimination complained of and ending on the day on which the amount of interest is calculated by the tribunal: reg 6(1)(a).
- 56.6. Subject to regs 6(2) and (3), in the case of all other sums of damages or compensation (other than any sum referred to in regulation 5) and all arrears of remuneration, interest shall be for the period beginning halfway through the period that starts with the act of discrimination and ends with the day on which the amount of interest is calculated by the tribunal: reg 6(1)(b).
- 56.7. Where the tribunal considers that in the circumstances, whether relating to the case as a whole or to a particular sum in an award, serious injustice would be caused if interest were to be awarded in respect of the period or periods in paragraphs (1) or (2), it may— (a) calculate interest, or as the case may be interest on the particular sum, for such different period, or (b) calculate interest for such different periods in respect of various sums in the award, as it considers appropriate in the circumstances: reg 6(3).

Conclusions

Compensation for psychiatric injury

57. Before the act of victimisation with which we are concerned, Mr Pickard had a depressive disorder that was having a significant impact on him. His condition deteriorated between July and December 2019, before the act of victimisation. This is not a case in which an unlawful act tipped the claimant over from being under stress to being ill. He was already ill at the time of the unlawful act.

58. We have found that the claimant's depressive disorder worsened after the wrongful act. We have, therefore, considered whether the pre-existing illness, for which Mr Robson is not responsible, was materially aggravated by the act of victimisation.

59. In this regard, the fact that the claimant's condition deteriorated after the victimisation is not in itself sufficient evidence that the act of victimisation caused the deterioration. We have found that the claimant's mental health was already deteriorating before the victimisation. Furthermore, there were a number of other factors that could have caused the deterioration. We have found that there were other events in 2020 that affected Mr Pickard's mental health. They included:

59.1. Mr Bloom's decision to terminate Mr Pickard's work arrangement.

59.2. Mr Pickard's ongoing difficulty securing work.

59.3. The Covid-19 pandemic.

59.4. The Employment Tribunal process.

59.5. Mr Pickard's belief that Mr Robson might bring a claim against him for damages.

60. Furthermore, Mr Pickard believed that Mr Robson was saying things to contacts in the Ports of Alcludia and Pollensa to damage his reputation and thereby ruin his chances of finding alternative employment. That belief pre-dated the letter received in December 2019 and was independent of it. We have found that the letter reinforced that belief, but we also consider that it is inevitable that Mr Pickard would have believed the same of Mr Robson even if Mr Robson had not fabricated the July letter and relied on it in these proceedings.

61. Then, in January 2021, Mr Pickard discovered that the majority of his claims had failed. Notwithstanding the fact that Mr Pickard had proved that the July letter was a fabrication and his claim was upheld, and the fact that we had concluded that Mr Pickard had not committed gross misconduct and Mr Robson had not been entitled to terminate his contract without notice, Mr Pickard believed Mr Robson had pulled the wool over the Tribunal's eyes as far as the other claims are concerned.

62. We have found that, before the liability judgment was given, the fabricated letter added to Mr Pickard's upset and caused him additional concern that the letter might cause the Tribunal to believe Mr Robson's account of what had happened rather than his own account. That was a significant worry for Mr Pickard because he was hoping that success in his Tribunal claims would help repair the damage he believed Mr Robson was doing to his reputation. We consider it likely that the fabrication of the letter (and Mr Robson's continued reliance on it in the proceedings) contributed the aggravation of the claimant's depressive disorder.

63. Applying the guidance in the case of Konczak, we are satisfied that the suffering Mr Pickard experienced is divisible in the sense that, although Mr Robson was responsible to some extent for an aggravation of Mr Pickard's depressive illness, he was not responsible for causing Mr Pickard to have a depressive disorder in the first place.

64. Ascertaining the extent to which the act of victimisation was responsible for aggravating the depressive disorder is not a straightforward matter, given the other matters that were having an adverse effect on the claimant's mental health at the same time.

65. If Mr Robson had been responsible for the entirety of Mr Pickard's depressive disorder, rather than an aggravation of an existing depressive disorder, it seems to us that that an appropriate award for the psychiatric injury would fall somewhere around the boundary between the categories described in the Judicial College guidance as 'moderate' and 'moderately severe'. The guidance suggests an award of £19,070 is appropriate for cases at the bottom end of the 'moderately severe' category and those at the top end of the 'severe' category. Such an award would take into account the impact on matters such as the claimant's mood (including his low mood, his episode of hypomania, his feelings of hopelessness, frustration, anger, anxiety and agitation), his sleep, his lethargy and lack of interest in, and difficulty focussing on, matters other than the Tribunal and his social withdrawal. However, Mr Robson was not responsible for the entirety of Mr Pickard's depressive disorder. Nor was the act of victimisation the sole cause of the aggravation of Mr Pickard's depressive disorder.

66. We consider that, had Mr Robson not fabricated a letter purporting to set out reasons for dismissal (and relied on the letter in the proceedings) it is almost inevitable that the claimant's mental ill health would have followed the same trajectory in terms of the severity and duration of symptoms. We cannot say with certainty that the state of his health would have been exactly the same had he not been victimised in the way he was (save that know that he would inevitably have suffered from a depressive disorder, because that had already occurred before the victimisation happened). However, we think the chances that that would have happened are very high indeed. We estimate the likelihood that the claimant's mental ill health would have followed the same trajectory in terms of the severity and duration of symptoms, had Mr Robson not victimised him, to be somewhere between 85% and 90%.

67. In the circumstances, we think an appropriate award to reflect the extent to which Mr Pickard's depressive disorder was materially aggravated by the act of victimisation is £2,383 (which is 12.5% of £19,070).

Injured feelings

68. There is a significant degree of overlap between the claimant's depressive disorder and the injury to his feelings. It was the hurt and upset he felt that led to the aggravation of his depressive disorder. Nevertheless, we accept that a separate award for the claimant's hurt feelings is warranted.

69. Although the act of victimisation was a single act, the injury to the claimant's feelings was not short-lived. Mr Robson continued to rely on the July letter throughout the proceedings. The claimant's hurt feelings persisted for the 13 months between the date he received a copy of the letter and the date of the liability judgment in January 2021, when the Tribunal upheld the allegation that the letter had been fabricated. We find that that decision is likely to have eased Mr Pickard's sense of hurt and upset about the letter somewhat (as distinct from his psychiatric injury), although we consider Mr Pickard was probably left with a lingering sense of grievance about the letter (and the fact that Mr Pickard relied on it throughout the proceedings) over the following two months until he died at the end of March.

70. The award for psychiatric injury compensates Mr Pickard for his low mood, his episode of hypomania, his feelings of hopelessness, frustration, anger, anxiety and agitation, his sleep, his lethargy and lack of interest in, and difficulty focussing on, matters other than the Tribunal and his social withdrawal. We consider that, to the extent that the claimant's injured feelings have not been compensated for by that award, an appropriate award falls squarely in the lower third of the lower Vento band. In our judgement, an appropriate amount to compensate the claimant (bearing in mind the award for psychiatric injury) is £3000.

Aggravated damages

71. We do not consider that any of factors (a) to (c) set out in *HM Land Registry v McGlue* apply so as to justify an award of aggravated damages.

72. As regards (a), we do not consider that the act of fabricating the July letter was done in an exceptionally upsetting way, eg 'In a high-handed, malicious, insulting or oppressive way'. Mr Pickard was particularly upset that he received the letter on Christmas eve. We do not find, however, that that was deliberately timed to spoil Christmas for the claimant as seems to have been suggested and to the extent that the timing of the disclosure caused additional upset it is compensated for in the other awards above. The fabrication of the letter was, of course, dishonest, as was Mr Robson's continued reliance on it throughout the proceedings. However, those are matters that the claimant is adequately compensated for in the awards above.

73. As to (b), we have not found, and do not find, that Mr Robson was motivated by prejudice, animosity, spite or vindictiveness in fabricating this letter. Far more likely is that he was attempting to bolster his defence to the claimant's complaints. The distress, stress and upset this knowledge caused Mr Pickard is compensated for in the awards outlined above.

74. As for (c), Mr Robson's subsequent conduct, we accept that his relying on this letter throughout the proceedings had an effect on Mr Pickard but that is reflected in the awards referred to above. Aside from relying on the letter, we do not consider that Mr Robson conducted his case in an unnecessarily offensive manner. He was entitled to defend the claims brought against him. Insofar as the claimant's submissions concern Mr Robson's conduct of the proceedings since Mr Pickard's death, Mr Robson was entitled to question Ms Hallam's standing to represent the estate: that is an issue in which Mr Robson has a legitimate interest. In any event, we doubt that an award of aggravated damages can be made in respect of conduct that post-dates Mr Pickard's death and which, therefore, cannot be said to have caused him an aggravation of the injury he sustained. We do not need to reach a concluded view on that point, however, given that we have not found that Mr Robson's conduct of the proceedings warrants an additional award.

Interest

75. We have decided that it is appropriate to award interest under the Employment Tribunals (Interests on Awards etc) Regulations 1996. The rate of interest is currently fixed by law at 8% per annum.

Employment Judge Aspden
8 August 2022