EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr I Tapping	AND	Ministry of Defence

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** 3 and 4 November 2022

EMPLOYMENT JUDGE J Bax

Representation

For the Claimant: Mr I Tapping (in person)
For the Respondent: Mrs S Hornblower (counsel)

JUDGMENT ON REMEDY

The Respondent shall pay the Claimant the following sums:

1. **£27,000 in respect of injury to feelings, which included an element for aggravated damages and psychiatric effects.**
2. **The claim for a separate award for personal injury is dismissed.**
3. **The claims for loss of earnings, pension contributions and medical expenses are dismissed.**
4. **An uplift of 10% for failing to comply with the ACAS code of practice of grievances, in the sum of £2,700.**
5. **Interest thereon in the sum of £11,886.51.**
6. **The Respondent must therefore pay the Claimant a total of £41, 586.51 in respect of compensation and interest.**

REASONS

1. In this case the Claimant, Mr Tapping, succeeded in five claims at a liability hearing between 4 and 27 October 2021, namely:
    a. that the Respondent had failed to make reasonable adjustments, between mid-October 2017 and the end of January 2018;
    b. in his claim of discrimination arising from disability, in relation to the e-mail sent on 16 March 2018;
    c. in his claim of harassment related to disability, on 14 September 2018;
    d. in his claim of direct age discrimination, on 18 September 2018;
    e. in his claims of victimisation, on 14 September 2018.

Background and issues

2. At the case management hearing on 17 March 2022, which listed the claim for the remedy hearing, the Claimant said that the cause of the resignation was that: (1) The investigation by the harassment investigation officer was slanted and selective in the production of evidence; (2) He was denied an appeal before the investigation was concluded; (3) Evidence was withheld in the form of Mr Bailey's notebook; (4) He considered it had a predetermined outcome; and (5) The investigation was lengthy and the pressure became too much to bear and he had no confidence in the Respondent left at that point.

3. The Claimant's schedule of loss was for loss of earnings and employer contributions to his pension from 13 March 2020 until 5 May 2023. He also claimed awards for injury to feelings, aggravated/exemplary damages, personal injury, consequential losses for personal injury and an uplift for breaching the ACAS code of practice. During closing submissions the Claimant withdrew his claim for exemplary damages.

4. At the start of the remedy hearing it was explained that because of the Claimant's family situation and in accordance with his wishes the evidence and submissions would be heard on the first day and that a written decision would be provided to the parties. It was also explained that the Tribunal could only compensate the Claimant for losses and injury which were caused by the proven allegations and not for the unproven matters.

5. During the course of cross-examination of the Claimant it became apparent that he had not seen the Respondent's skeleton argument, which had been e-mailed to him on 28 October 2022. An early lunch was taken and the Claimant considered it at that time. When the hearing resumed he confirmed he had read it and was content to continue. During the afternoon, the Claimant needed to take some medication and there was a break to enable him to do so and to recover, after which the Claimant confirmed he

was fit enough to continue. The Claimant also provided a written submission which was considered before he and the Respondent made closing submissions.

6. The case management order dated 17 March 2022, included provision for the instruction on an expert medical witness by the Claimant. The order stated that the report should address what injury was caused by the proven acts of discrimination, address any aggravation or exacerbation of a pre-existing injury and what the position would have been but for the subsequent and unproven events. A further explanation was given within the case management summary attached to it.

7. Dr Lyle produced a report dated 11 June 2022. There was then an issue in relation to disclosure of the letter of instruction and the Claimant was ordered to disclose it to the Respondent. It appeared that the liability judgment was not included as part of the instructions and the Claimant was directed to send it to Dr Lyle. Dr Lyle then produced a supplementary report dated 9 July 2022.

8. In early August 2022, the Respondent confirmed to the Claimant that it would not be asking Dr Lyle any questions and it would not obtain its own expert report. It stated the report had failed to address what injury was caused by the proven discrimination and what the prognosis would have been but for the subsequent events. The Claimant spoke to Dr Lyle, who then produced a second supplementary report dated 4 August 2022.

9. At a further case management hearing on 30 September 2022 discussion took place about what had been originally required. The Claimant was ordered to send Dr Lyle a copy of the order which specified the questions which needed to be addressed. Dr Lyle produced a further report dated 14 October 2022.

10. In the Claimant's Schedule of Loss he referred to a preparation costs claim and gave a figure. It was explained that such an application had not been put before the Tribunal and therefore it was not appropriate to consider it at the hearing.

<u>Salient matters from the reserved Judgment</u>

11. These reasons should be considered in conjunction with the Reserved Judgment dated 8 November 2021, however in order to assist the following matters are taken from that Judgment. The Claimant had brought claims of age and disability discrimination, detriment for making protected disclosures in his first claim. He brought a second claim of constructive dismissal. Before the start of the final hearing the Claimant withdrew the constructive dismissal claim.

12. In terms of claims of detriment for making protected disclosures the Claimant alleged that there were 12 detriments. 7 of which were between 15 March 2018 and 14 September 2018 and a further 5 which post-dated the last act of proven discrimination.

13. There were 5 allegations of harassment on the grounds of disability and 2 allegations of harassment on the grounds of age. There were 3 allegations of direct disability discrimination and 3 allegations of direct age discrimination. There were also 10 allegations of victimisation.

14. In terms of the constructive dismissal claim the Claimant relied upon 45 allegations of breach of the implied term of trust and confidence of which 27 post-dated the last allegation of proven discrimination. The final straw was said to be the dismissal of his grievance in December 2019.

15. For ease of reference the following facts were found in relation to the proven allegations of discrimination and the paragraph numbers are those in the liability Judgment:

> *47. In autumn 2017 the Claimant started suffering a flare from Fibromyalgia, which lasted until about March 2018.*
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> *48. On about 2 October 2017, the Claimant had a discussion with Mr Harrison. The Claimant's evidence was that he informed Mr Harrison that he had fibromyalgia, explained the condition and said he was becoming ill and needed to manage his workload. The Claimant was seeking an adjustment of his workload by reducing it to that of a normal person. Mr Harrison accepted that there might have been a meeting, but did not accept that the Claimant had referred to any adjustments by reference to a disability. On 10 April 2018, the Claimant sent an e-mail to Performance and Recognition within DBS and gave details of a conversation in October 2017 [p202]. The Claimant's version of events was more probable. He had been experiencing a flare of fibromyalgia, had been diagnosed in May 2017 and was concerned about his workload. I accepted that he had referred to fibromyalgia, explained the condition and said he was becoming ill and needed to reduce his workload.*
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> *49. The Claimant gave evidence that he had a discussion with Mr Harrison in November 2017 about fibromyalgia and needing adjustments. Mr Harrison denied such a conversation. The Claimant's e-mail, dated 10 April 2018, did not suggest that he had a discussion in November about disability related adjustments. The Claimant's evidence was that his subsequent e-mails on 7 December 2017 were part of an ongoing discussion. It was more likely that the*

Claimant referred to his workload being too high in November 2017, but that he did not refer to fibromyalgia, having previously referred to it in October.

57. *Part of the P-AIC project involved an Architectural Design Review ("ADR"), which had been scheduled for mid February 2018. At about the end of November 2017, the Claimant agreed with the PSIT project leader that it was impossible to complete by 14 February 2018 and the time would be extended to April. On 4 December 2017, Mr Harrison had a discussion with the Claimant about whether the target date was achievable. The Claimant's evidence was that he was told that the original target date would be maintained, which he interpreted as that the project would fail if the work was not completed by then. The Claimant considered that he was being asked to complete 6 months work in half the time and that the workload in the period dictated was increased. Mr Harrison's evidence was that they would have had a discussion as to whether the target was achievable and he wanted to push the team to try and achieve it, his later oral evidence suggested that this was after the receipt of the Claimant's e-mails dated 7 December 2017. Mr Harrison said it was recognised that the ADR would not happen in February, so it was moved to April 2018. Mr Harrison's evidence was more consistent with him telling the Claimant that the ADR date would be maintained. It was more likely that, on 4 December 2017, the Claimant was told that the 14 February 2018 date would be maintained, and the date was not changed until after Mr Harrison received the Claimant's e-mails dated 7 December 2017.*

59. *On 7 December 2017, the Claimant e-mailed Mr Harrison at 0706 [p3511] and said "I am able to work today but weakened by many weeks of illness so I am working from home today. My latest problems was just a cold but while recovering from the last episode it left me incapacitated." He said that he hoped he could have a chat about his workload becoming unmanageable. Mr Harrison responded by saying he was available the next week and they could discuss his tasking and how they could prioritise it against the PSIT schedule. At 1206 the Claimant sent Mr Harrison a second e-mail attaching a workload analysis [p3512-3518]. In the e-mail he said, "… I want to see this project succeed but as it stands at the moment my overload is going to hit the critical path. … I must gain help or transfer most of my workload to others." He suggested that there were an additional 29 hours of work per week required as a result and an additional person, working a full time equivalent of 60%, was required. Mr Harrison interpreted the analysis as a request for an additional resource (person) to be provided to the Claimant. The analysis did not refer to reasonable adjustments or any disability.*

60. *Mr Harrison forwarded the e-mail to Gp Cpt Clouth and asked to speak about it and said, "there seems to be some logic to what he is saying, however what I find somewhat ironic is that for someone who is overworked he seems to find time for such a detailed analysis of the problem…"*

61. *I accepted that at about this time the Claimant was doing the work of about 1 ½ people and he was asking for the workload to be reduced. It was more likely that the date for the ADR was not moved until the end of January/early February 2018 when it became apparent that CGI would not be able to deliver the project without an add on and after the Claimant spoke to Mr Boyall on 18 January 2018. I also accepted that Mr Harrison asked PSIT to undertake some of the project legwork at about the same time the ADR date was moved.*

66. *On 18 January 2018 the Claimant met Mr Boyall. The Claimant's evidence was that he explained that the workload was excessive and that he was ill and was asking for the workload to be reduced to a normal level. Mr Boyall could not remember what was discussed, but accepted that it was clear from the e-mail traffic that the Claimant was concerned about his workload and it was plausible they discussed it. Mr Boyall did not recollect a request to make reasonable adjustments or a link to a health condition. I accepted Mr Boyall's evidence that if the Claimant had linked workload with health issues it would have rung alarm bells for him and he would have immediately e-mailed Mr Harrison and 'given him a rocket'. The Claimant also said that as a consequence Mr Boyall had e-mailed Mr Harrison and Mr Harrison had responded by saying that he was working with the Claimant. I rejected this evidence, the only e-mail I was referred to was in July 2017 and it was more probable that the Claimant had misremembered when this e-mail was sent. It was most likely that the Claimant had complained about his workload to Mr Boyall.*

88. *On 15 March 2018, the Claimant met Gp Cpt Clouth in the canteen. The Claimant was thanked for his hard work, and it was explained that there was concern about the Claimant's well being and that other parties had been upset. It was explained that the Claimant would be moved to the transformation role, for which he would be better suited. The Claimant agreed to the move. Following the meeting Gp Cpt Clouth sent an e-mail, into which the Claimant was copied, confirming the Claimant's move.*

89. *On 16 March 2018, the Claimant attended work and read Gp Cpt Clouth's e-mail. He collapsed and was unconscious for a time, the recollection of which is still particularly distressing for him.*

90. *At a similar time to when the Claimant was reading the e-mail from Gp Cpt Clouth, Mr Harrison sent an e-mail, without copying in the Claimant, to a large number of people involved in the PSIT project. In the e-mail he said, "In consultation with Intelligence Systems senior management, I have taken the decision to remove Ian Tapping from the PICASSO ASG AIC Assessment Phase Project Role; the decision has not been taken lightly and is not a reflection on Ian's performance; but we have become increasingly concerned for Ian's well-being and the impact managing the AIC Assessment phase is having on him; we have agreed that now was the time to take positive action in Ian's best interest." It was said he would move temporarily to support IntSys evolution activities.*

91. *Mr Harrison's evidence was that he considered an explanation focusing on the Claimant's wellbeing was more appropriate than publicising the principal reason for the move, namely the concerns about his management of the project and the deteriorating relationships within it. In oral evidence Mr Harrison accepted that the e-mail was clumsy, but that he thought it was unfair to expose the stakeholder concerns. Mr Harrison considered that the Claimant was working long hours and was concerned that they could be having a detrimental effect on him. The Respondent asserted it was a kinder way of explaining the move, rather than saying that the Claimant had fallen out with other parties in the project.*

92. *The Claimant did not know that the e-mail had been sent, until about September 2018 when he saw it at the bottom of on an e-mail from Mr Blockley. The Claimant took issue with the e-mail because it was not the true reason why he was leaving the project. The Claimant considered that it related to his disability because he had asked for reasonable adjustments and he was still having flares associated with fibromyalgia and was frail and prone to collapse. The Claimant considered that his disability was being used to misrepresent the position.*

124. *On 17 August 2018, the Claimant e-mailed Mr Harrison. He said that they had not communicated since April and, "I have been advised by HR that I should pursue formal grievance against you as my line manager for failing to assess reasonable adaptations for my disabilities." He suggested informal action with a written record and that he needed to be assessed by Occupational Health. He said if*

Mr Harrison was content he would write fully to set out the situation and provide evidence.

125. Mr Harrison forwarded the e-mail to Mr Bailey and said he was about to depart on a week's leave and intended to do nothing with "this ridiculous e-mail" until he returned. Mr Baileys' evidence was that he thought it was discourteous for the Claimant to send the e-mail just before Mr Harrison went on leave.

Meeting on 14 September 2018

132. On 14 September 2018 the Claimant e-mailed Mr Bailey and said that there was rumour he had been reassigned and neither Mr Harrison nor Mr Bollen were able to confirm his status and had he currently had no tasking. The Claimant asked for a meeting to discuss it. A meeting was arranged for the afternoon. Prior to the meeting the Claimant telephoned DC Quaite expressing concern that he could be threatened. I did not accept the Respondent's suggestion that the Claimant was trying to set up Mr Bailey.

133. The meeting took place in a glass walled room. It was common ground that Mr Bailey turned the latch on the door because it had a tendency to swing open. The contents of the conversation were fiercely disputed between the parties. Mr Bailey took a single page of bulleted notes during the meeting. The Claimant made notes of the conversation in his car, immediately after leaving the meeting and when the events were fresh in his mind. On 17 September 2018, he wrote a statement for DC Quaite and used his notes to do so. After the Claimant had raised his subsequent grievance, Mr Bailey prepared a statement in response on 25 January 2019. It was significant that the page of notes taken by Mr Bailey corresponded with the order in which the Claimant said the events occurred in his notes and statement to the police. The e-mail which Mr Bailey sent following the meeting referred to the need for health adaptions and that Mr Bailey would investigate why the SkySiren task had ended precipitously. He concluded by saying that other issues that the Claimant had significant and substantiated concerns about should be subject to formal written articulation to him or Jim Robinson for internal pursuit first. There were competing versions of events and although the Claimant's statement had large sections of quoted speech, what he said was contained in his handwritten note, albeit in a briefer form. I accepted that the Claimant made his note immediately after the meeting and it was more likely to be accurate than Mr Bailey's account 4 months later. The reference to significant and substantiated concerns

seemed likely to relate to the Claimant revealing he considered he had made protected disclosures. I preferred the Claimant's account of what happened as set out in his handwritten note and recorded in his statement on 17 September 2018. I made the following findings of fact as to what occurred in the meeting:

a. *Mr Bailey changed positions in the room shortly after the start of the meeting so that he was sitting closer to the Claimant. Mr Bailey probably stretched his legs out at various times, but did not keep them stretched out, due to problems with his back.*
b. *The meeting lasted approximately 2 hours 20 minutes.*
c. *After some initial pleasantries Mr Bailey told the Claimant that he had to remove the threat of a grievance over Mr Harrison and suggested that it had come out of the blue.*
d. *It was repeated on a couple of occasions that Mr Harrison could not understand the grievance.*
e. *I accepted that Mr Bailey was seeking to persuade the Claimant to withdraw his grievance.*
f. *Mr Bailey asked the Claimant what started the situation and the Claimant said that he could not disclose it. Mr Bailey asked why he could not tell him, and the Claimant said that the subject matter was a protected disclosure. Mr Bailey questioned what a protected disclosure was, and the Claimant said it was protected by law and such things could not be disclosed during an investigation.*
g. *Mr Bailey asked the Claimant when he reported it and the Claimant said it was in March and he progressively disclosed it to Mr Cairns. 'Stephen Cairns' was the first note made by Mr Bailey.*
h. *After the Claimant suggested that he and Mr Harrison wanted to find a resolution, Mr Bailey said, 'so you're going to remove your allegation Ian', to which the Claimant did not answer.*
i. *Discussion then took place about the Claimant's medical condition. There was no reference in the notes or the statement to the police suggesting that Mr Bailey said 'there are people here with far worse disabilities than yours', and I did not accept that it was said. Mr Bailey did not mock the Claimant's disability. Mr Bailey queried whether the Claimant might be mentally unwell.*
j. *Mr Bailey then returned to the Claimant's report and asked who he had reported the matter to. The Claimant informed him that he had told the police.*
k. *Mr Bailey said to the Claimant that he should have told him, which he had not done and then this would have gone*

nowhere. He asked him, 'what do you think you're going to do when this goes nowhere with the police, what do you think your future is then.' When the Claimant said nothing in reply, Mr Bailey said, 'you need to be clear this is going nowhere'.

l. This was followed by Mr Bailey saying, 'I control all of the jobs in IntSys and after your next temporary assignment – and you had better make a good job of it – guess what, you won't have got a job.'

m. Discussion then took place about the P-AIC work and the Claimant said he had reported what was needed on 7 December 2017. Discussion took place about the Claimant's workload, and he estimated he was doing the work of 1 ½ people. Mr Bailey told the Claimant that he would not be able to offer him any work and there was no place for him in IntSys. He might be able to find temporary work on the transformation campaign, but it would last a maximum of three months and then the only way he could find work would be in Corsham. The Claimant told Mr Bailey that he could not travel to Corsham due to his illness.

n. The Claimant was upset on many occasions during the meeting, and I accepted his account that he found Mr Bailey threatening and intimidating.

o. I did not accept that during the meeting Mr Bailey made references to the Claimant being too old to learn, that he was not quite up to speed, set in his ways, not quick on the uptake, resistant to change or prone to forget.

134. On 19 September 2018, the claimant started a period of sick leave with a diagnosis of work related stress.

Involvement of Ms Singleton

135. On 13 September 2018, the Claimant telephoned DBS and spoke to Sandra Kay asking to speak with Mr Bottle, saying that the situation had escalated and he felt he needed to make a bullying and harassment complaint. The Claimant was sent a copy of JSP 763. The Claimant made further calls on 14 September and 17 September 2018 and provided some details of the allegations and on 17 September said he was looking at instigating a bullying and harassment complaint against the 1 (Mr Bailey).*

136. On 18 September 2018, the Claimant spoke to Mrs Singleton, whose office is in Cheshire. Mrs Singleton's witness statement did not refer to the conversation, but did refer to the agreement reached with the Claimant that she would be his point of contact in ES as

confirmed in the emails of the same date [p1419-1420]. The Claimant's witness statement referred to her asking questions to infer he was a reluctant worker and that she introduced a question as to when he was going to retire. In cross-examination the Claimant said that he was asked to create a list of options and to indicate when he planned to retire, to which he said he did not have a retirement plan. The Claimant's evidence was that he was upset by the comment and did not think a 35 year old would have been asked the question.

137. When the Claimant cross-examined Mrs Singleton he referred to his supplementary bundle with his records of meetings [s135] and in particular that on 20 September 2018 he had informed her that he had no retirement plan but had assumed it would be his 67th birthday. Mr Singleton's evidence was, that on 18 September 2018 she was not asking him to consider retiring but was asking him to consider his options including transfers, changes of location, changes of jobs, changes or hours and retirement. On the balance of probabilities, Mrs Singleton asked the Claimant to consider his options, including various job moves, she also specifically asked him to consider what his retirement intentions were. Mrs Singleton said that she was unaware of the Claimant's age, however I considered this unlikely. When asked if she would ask someone younger about retirement, her answer was that she would cover every option, however I considered this unlikely. Mrs Singleton accepted that the Claimant said that he did not want to go back to the same line management structure.

16. The Claimant returned to work in December 2019. On 24 January 2019 the Claimant informed Mr Bollen he had found a temporary transfer in DE&S, which started on 25 April 2019 (para 156).

17. A significant amount of evidence was given in relation to the grievance raised on 23 October 2018 and the subsequent investigation.

18. The DE&S role ended on 12 September 2019 (para 179).

19. On 30 October 2019 Mr Gallagher sent AVM Moore the final investigation report. It was accepted that Mr Gallagher had included anything relevant in the report and everything else was put in a separate bundle D for AVM Moore.

20. The Claimant was sent the outcome of the grievance on 16 December 2019 and was informed the allegations were not upheld (para 193).

21. It was concluded that the events on 14 September 2018 were a detriment for making a protected disclosure (para 340-341). The other allegations of detriment were either not detriments or the protected disclosures had no influence on them. It was concluded that the proven detriment was out of time and it had been reasonably practicable to have presented it in time (para 350-351) and the detriment claim was dismissed.

22. The provisions, criteria or practices relied upon for the purposes of the failure to make reasonable adjustments claim and which were accepted by the Respondent were as set out at paragraph 359:

"The Respondent accepted that it had the following provisions, criteria or practices: (1) It required employees to meet targets and deadlines, and (2) it required projects to be completed on time."

23. The conclusions as to whether the Respondent failed to make reasonable adjustments were

Did the Respondents take such steps as were reasonable to avoid the disadvantage?

> *362. The adjustment which the Claimant was seeking was to be given a workload which was equivalent to a normal person, rather than his workload of the equivalent to 1 ½ people, in other words to reduce his workload. I accepted that the Respondent extended the time for completing the phase of the project and that it requested PSIT to undertake some of the Claimant's tasks, however that did not occur until the end of January/beginning of February 2018, when it became clear that PSIT could not deliver the ADR phase by 14 February 2018.*
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> *363. At the end of November 2017, the Claimant and PSIT agreed that it was not possible to complete the ADR phase of the project by 14 February 2018. The Claimant had already expressed to Mr Harrison that his workload was too high on two occasions, when on 4 December 2017 the Claimant and PSIT were told that the ADR deadline of 14 February 2018 would be maintained. This had the effect that the Claimant would have to complete the equivalent of 6 months work in about half the time and in reality the Claimant's workload was increased. Mr Harrison wanted to push the team to try and achieve the deadline.*
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> *364. I was not satisfied that the Respondent could not have allocated a 50% full time equivalent person to assist the Claimant with his work from mid-October onwards. By the end*

of November 2017, it should have been obvious that the Claimant was going to have extreme difficulty in meeting the deadline, however he was required to complete it without any additional resources. It would have been a reasonable adjustment to have allocated a part time worker to assist with the project. Further at the end of November 2017 it would have been a reasonable adjustment to have requested PSIT to assist the Claimant with some of his tasks, as occurred at the end of January/beginning of February 2018. Further in the absence of allocating an additional resource to the Claimant, it would have been a reasonable adjustment to extend the date of the ADR, when it was clear to the Claimant and PSIT that it was unachievable. The measures were not put in place until end of January/beginning of February 2018. According there was a failure to make reasonable adjustments from mid October 2017 and the effect of that failure lasted until the end of January 2018.

24. The conclusions in relation to the e-mail sent on 16 March 2018 were set out at paragraphs 374 to 378 of the Judgment.

25. The conclusions in relation to harassment on the grounds of disability were set out at paragraphs 381 to 384 of the Judgment:

> *381. During the meeting on 14 September 2018, Mr Bailey told the Claimant that he had to remove the threat of his grievance over Mr Harrison. The grievance was in relation to a failure to make reasonable adjustments and Mr Bailey was seeking to get the Claimant to withdraw it. After discussing the Claimant's medical condition, Mr Bailey suggested that he thought that the Claimant could be mentally ill, the Claimant suffered from 'brain fog' and tiredness as a result of his fibromyalgia. Mr Bailey discussed the Claimant's workload and told him that he might be able to find him some temporary work and that after that he would not be able to offer him any work and there would be no place for him in IntSys. I accepted that the Claimant considered that it was unwanted conduct, and it was reasonable for him to have concluded that.*
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> *382. The incident occurred because the Claimant had complained about a failure to make reasonable adjustments and was seeking to raise a formal grievance. The Claimant's 'brain fog' and tiredness made it difficult for him to work and function properly and the suggestion that he might be mentally ill was something which could be related to the mental aspects of the disability. If the Claimant had not been seeking to raise the grievance it was unlikely that the meeting would have unfolded*

in the way that it did. The Claimant established primary facts which, without an explanation from the Respondent, tended to suggest that the reason for the behaviour was related to the Claimant's disability. Mr Bailey denied that the events occurred and did not proffer an alternative explanation. Mr Bailey was pressurising the Claimant to remove his grievance and suggested he could be mentally ill. In the circumstances the Respondent failed to demonstrate that the conduct was not related to disability and thereby failed to discharge its burden of proof. Accordingly, the conduct was unwanted and it related to disability.

383. Mr Bailey was seeking to pressurise the Claimant into withdrawing his grievance and the conduct had the purpose of creating an intimidating environment in which to do so. Further the Claimant found the incident intimidating , hostile and offensive. It caused him to break down on a number of occasions and he found the situation threatening. In the circumstances of seeking to raise a grievance it was reasonable for the conduct to have had that effect on the Claimant .

384. Mr Bailey harassed the Claimant on 14 September 2018 and that harassment was related to his disability.

26. The conclusions in relation to the successful claim of direct age discrimination were at paragraphs 392 to 396 of the Judgment.

27. The conclusions in relation to victimisation on 14 September 2018 were at paragraphs 400 to 403 of the Judgment:

400. During the meeting on 14 September 2018, Mr Bailey told the Claimant that he had to remove the threat of his grievance over Mr Harrison. He also said, when the Claimant wanted to seek a resolution, 'so are you going to remove the allegation.' The grievance was in relation to a failure to make reasonable adjustments and Mr Bailey was seeking to get the Claimant to withdraw it. Mr Bailey discussed the Claimant's workload and told him that he might be able to find him some temporary work and that after that he would not be able to offer him any work and there would be no place for him in IntSys. Mr Bailey also made references to, 'if the Claimant did not make a good job of his next assignment that he would not have a job'. The meeting lasted 2 hours 20 minutes, the Claimant broke down on many occasions and he found the meeting hostile and intimidating. What was said by Mr Bailey was a threat to the Claimant's future

career and was and an effective instruction to drop his grievance.

401. The Respondent submitted that the e-mail dated 17 August 2017 did not amount to a grievance on the basis that it was only an intent to raise a formal grievance. I rejected that submission. The Claimant informed Mr Harrison that he had been told to raise a grievance and was suggesting ways of trying to resolve it. Under the grievance policy employees are encouraged to try and resolve the grievance informally at first instance, which is what the Claimant was trying to do. He was raising a grievance with Mr Harrison that reasonable adjustments had not been made. Further the Claimant had said Mr Harrison had failed to make reasonable adjustments and as concluded earlier that in itself was a protected act, irrespective of whether it was a grievance. In any event the test under s. 27 is whether the person victimising the other person believes that they have done or may do a protected act. The Claimant at the very least clearly said that he was intending to raise a formal grievance. Following the meeting on 13 September 2018 Mr Harrison told Mr Bailey that the Claimant did not want to go down the informal line. On 14 September 2018 Mr Bailey told the Claimant to remove the threat of his grievance against Mr Harrison. The Claimant therefore adduced primary facts which tended to show that the Respondent considered that he might at the very least do a protected act. Mr Bailey denied that the event occurred, and the Respondent failed to discharge its burden of proof that the Claimant had not done a protected or that it did not believe he might do a protected act.

402. The specific reference to the grievance and the comments about the Claimant's future were primary facts from which it could be concluded that the threats and hostile behaviour occurred because the Claimant had done a protected act and the Claimant discharged the initial burden of proof. The Respondent denied that the alleged acts occurred. The instruction to remove the threat of grievance was powerful evidence against the Respondent. I was satisfied that Mr Bailey was trying to get the Claimant to withdraw his grievance and he was seeking to put pressure on him to do so.

403. The treatment occurred because the Claimant had told Mr Harrison that he was going to raise a formal grievance against him and that he was seeking to initially resolve his grievance that reasonable adjustments had not been provided. The

Claimant was victimised for having done a protected act and the claim succeeded.

28. Significant allegations which were either withdrawn or dismissed after the last proven allegation of discrimination included:
    a. That the HIO removed almost all of his evidence and framed the investigation report in an unfair manner and embroidered the evidence and that the outcome was predetermined.
    b. Not completing the grievance in a timely fashion.
    c. Failing to promptly execute a loan agreement for the role with DE&S in 2019.
    d. Dismissing his grievance.

29. It was also significant that in the meeting on 14 September 2018 that after the Claimant said he made a protected disclosure that threats were made to his employment. This was an allegation of detriment, however it was dismissed because it was presented out of time.

30. The Claimant resigned on 5 January 2020. He worked out his notice and his employment ended on 13 March 2020 (see the Judgment of EJ Cadney dated 14 June 2021)

The evidence

31. I heard from the claimant, and I was provided with bundles of documents from the parties.

32. The Claimant's witness statement and his oral evidence referred to harm he says he suffered which related to matters in addition to the proven allegations of discrimination and these predated the proven acts and there were also a significant number of matters referred to which post-dated the last act or were not proven allegations of discrimination.

The facts

33. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties. The headings below relate to the sections in the Claimant's witness statement.

34. It was agreed that the Claimant's gross annual pay, on termination of employment, was £43,485, which equated to £3,540 per month gross or £2574 net. It was agreed that the employer pension contributions were 2.3% of salary. The Respondent said the net weekly pay was £587.98 and the monthly pension contribution was £959.45 with which the Claimant agreed.

Failure to make reasonable adjustments

35. The Claimant considered that reasonable adjustments were not put in place until January 2019, however that was contrary to the finding following the liability hearing, that there was a failure to make reasonable adjustments until the end of January 2018.

36. I accepted the Claimant's evidence that as a result of the failure, he suffered from increased pain and tiredness, which he found very stressful.

37. I accepted the Claimant's evidence that he thought he would have got over the issue, if the role he was transferred into was what he considered to be a genuine role. The Claimant was informed that he was being moved into the Transformation Role on 15 March 2018 and that there had been concern for his well-being and other parties had been upset. The Claimant's evidence was that this was the second harm event, The Claimant suggested that the role did not exist, however it was found that it did exist, it was important work and it was a genuine role. The Claimant said that as a result he collapsed on 16 March 2108. I found that he collapsed after reading the e-mail from Gp Cpt Clouth on 16 March 2018. I accepted the Claimant's evidence that he found the e-mail more shocking that being spoken to by Gp Cpt Clouth and that he still had to avoid material which read like a betrayal. The Claimant referred to conspiring to remove his role before the e-mail was sent and specifically that he had made an ethical challenge to Mr Harrison. This was an allegation of detriment for whistleblowing which was dismissed. I rejected the Claimant's evidence that he collapsed due to the lack of reasonable adjustments but accepted that it was caused by the contents of the e-mail and the move, however this was alleged to be a detriment for making a protected disclosure, which was dismissed, and not an allegation of discrimination.

e-mail dated 16 March 2018 from Mr Harrison

38. The Claimant did not discover that the e-mail had been sent until September 2018. The Claimant considered that the reference to leaving the project due to ill health was a lie and not the reason he had been given, namely that he had upset people. I accepted he felt disgust and betrayal on the basis that was not reason he had been given and he felt his disability was being used to misrepresent the position and that his illness had been broadcast to everyone.

39. The Claimant said in his witness statement that the collapse on that day was caused by discrimination, however the Claimant was unaware of the e-mail at the time of the e-mail and I rejected that evidence.

Compounding stress

40. The Claimant, in his witness statement, referred to compounding his stress and the Confidential Hotline's advice on 29 March and 4 April 2018 and being directed to address whistleblowing harm via the grievance process. He suggested this was misdirection and there was no process for dealing with the whistleblowing harm. This was not an allegation of discrimination and the Claimant did not succeed in a claim in this respect.

Destabilised employment

41. In his witness statement, the Claimant referred to his employment being destabilised after being removed from his role in March 2018. The removal was an allegation of whistleblowing detriment, which was dismissed, and the destabilisation was an allegation of breach of the implied term of trust and confidence and not of discrimination; the constructive dismissal claim was withdrawn. There was no proven allegation of discrimination in this respect. The Claimant's witness statement said that he considered that his employment became increasingly stressful and unstable and ultimately amounted to the cumulative stress which ultimately destroyed his career.

Severe Harm

42. In his witness statement, under section called 'Severe Harm', the Claimant referred to there being no remedy process for whistle blowing harm and that he considered the procedures had not been honoured and there was no method for dealing with complex cases. His whistleblowing harm had been pushed into the bullying and harassment/grievance process. Evidence had been concealed. The criminal investigation had been caused to fail and that the commercial investigation into his protected disclosures was a sham. He had not been given legal advice by the Respondent on 9 occasions. These were not allegations of discrimination, harassment or victimisation under the Equality Act 2010. These matters were either allegations of whistleblowing detriment which were dismissed or were allegations of breach for the purposes of the constructive dismissal claim, which was withdrawn.

43. The Claimant also referred to there being 41 procedural breaches in the final grievance process, however there were no such findings in the liability judgment. However, on examining the table provided by the Claimant, the matters alleged did not just relate to the final grievance process but various policies and events.

The events of 14 September 2018

44. The Claimant started his witness statement in relation to this section by saying that, 'Whistleblowing is a recognised brave act and safeguarding is

assured and in that respect he was betrayed'. Further that reasonable suspicion was all that was required and proof would be provided by investigators who both failed to act and deceived. He considered that Mr Bailey had abused his power. The Claimant set out the order of events as that he was harassed and victimised for raising the grievance about reasonable adjustments and then Mr Bailey discovered he was a whistle-blower via a sustained interrogation.

45. I accepted the Claimant's oral evidence that the whole event lasted about 2 hours and was absolute intimidation. The Claimant also confirmed that the first thing which was said was that he should remove the threat of the grievance against Mr Harrison. I accepted that the Claimant found this intimidating and distressing. When Mr Bailey asked the Claimant what had started it, the Claimant said it was a protected disclosure, the Claimant's witness statement to the police said at this stage it was beginning to feel very intimidating. Following that Mr Bailey questioned the Claimant about the protected disclosure. It was found that there was no mocking of the Claimant's disability. After the Claimant told Mr Bailey he had reported his concerns to the police, the threats were made about the Claimant's job and future. The Claimant accepted that the threats to his job were made after Mr Bailey discovered he had made a protected disclosure and the subject matter had been referred to the police. I concluded that the serious threats and greatest intimidatory behaviour arose when the protected disclosures were discovered.

46. I accepted that after this incident the Claimant had nightmares and regularly revisited the incident in his mind and was unable to sleep properly. The Claimant then had a 3 month period of sick leave and his medical notes for 29 September 2018 recorded, "Says has been intimidated by superiors, is a police case going on. Cannot go into work, fears for his own safety, feels will never be able to work again."

47. The medical records for 3 and 13 December 2018 referred to palpitations and a transient ischaemic attack.

48. The Claimant also referred to harm being caused by him returning to work under the control of Mr Bailey. This was not an allegation of discrimination and was an allegation of detriment for making a protected disclosure, however this allegation was not proven and was dismissed.

49. The Claimant also referred to after that time, that there was a "corporate consistency to harmfully battle me, the victim." This referred to what occurred with the investigation into his grievance and whistleblowing concerns, which were not alleged to be allegations of discrimination, but allegations of whistleblowing detriment which were not proven or were

allegations of breaching the implied term of trust and confidence for the purpose of the withdrawn constructive dismissal claim.

Age discrimination on 18 September 2018

50. The Claimant's witness statement referred to evidence tampering, withholding evidence and selective use and that his attempts to appeal the grievance in September and November 2018 were refused; however it was found that there had not been a grievance outcome until December 2018 and therefore there was nothing to appeal against. These matters post-dated the incident in question and were not alleged to constitute age discrimination. I accepted the Claimant's evidence that the reference to retirement felt like a betrayal and he thought that there would be a predetermination of his grievance.

Events leading to the Claimant's resignation

51. The Claimant, in his witness statement, referred to being misdirected to bring harm caused by whistle blowing via the grievance process. That the grievance process was grossly unfair and deeply hurtful and he had been denied legal advice, that evidence supporting his case had been erased, the outcome of the grievance was predetermined. These were not allegations pursued under the Equality Act 2010. The allegations were brought as detriments for making protected disclosures which were dismissed or as part of the constructive dismissal claim which was withdrawn. I accepted that the Claimant found these events very distressing and they affected his faith in the Respondent, however there was no allegation or finding that they were discriminatory.

52. I accepted the Claimant's oral evidence that when he received the grievance outcome he felt broken. He had received a promotion, but could not handle an appeal, Tribunal claim and a demanding job and so decided to resign. The Claimant accepted in cross-examination that he did not make a claim that he was so disabled that he could not work and he said that he had claimed he had bene returned to harasser until he reached a point he could not work. The Claimant work from December 2019 until his notice expired in March 2020. It was put to him in cross-examination what he said at the case management hearing on 17 March 2022, that the cause of the resignation was the investigation and predetermined outcome, and he responded by saying that was the fact of the matter and that is what happened.

53. I accepted that after the Claimant's employment ended he did not feel able to undertake significant work, but he found gardening work therapeutic. He has since looked for other jobs but is finding it difficult and he thinks it is in part due to his age. He also said that working on his claim has effectively

been a full time occupation. I accepted that the Claimant had intended to retire at the same time as his wife would retire on 5 May 2023.

Expert evidence

54. The expert report of Dr Lyle, consulting and chartered clinical psychologist, dated 11 June 2022 provided the following account by the Claimant:
    a. That when he had raised the issues about Mr Harrison receiving lavish entertainment there seemed to be a closing ranks;
    b. There had been a refusal of reasonable adjustments to reduce his workload to that which would be reasonable for a well person;
    c. From the day he made the challenge about Mr Harrison in November 2017 he felt undermined;
    d. He had collapsed after receiving the e-mail from Gp Cpt Clouth on 16 March 2018 which was about the move from the team;
    e. The new role he was promised was a sham and did not materialise;
    f. The incident with Mr Bailey on 14 September 2018 and that Mr Bailey had said: 'I am in total control', 'he would make sure he would fail', ordered him to withdraw the grievance. At times Mr Bailey was speaking loudly within inches of his face and spittle hit him. It was frightening and he had to go off sick;
    g. On his return to work he broke down;
    h. He then found a role in DE&S, which ended in August 2019;
    i. In November 2019 he found a promotional role in DE&S, however in December 2019 the grievance outcome was delivered which he considered was a whitewash and grossly unfair. On 6 January 2020 he decided he could not take any more and resigned.

55. Dr Lyle recorded that after the incidents with GP Cpt Clouth and Mr Bailey, psychological symptoms developed, which involved revisiting the events, which he could not put out of his mind. The memories could be triggered unexpectedly. He had nightmares, insomnia and early morning waking. He referred to a collapse after his return to work and having to work for extended hours because the contractor did not start work as expected. He felt uncomfortable his identify as a whistle-blower was disclosed. Spyware had been installed on his computer.

56. The Claimant had previously been a positive person, but no longer had a zest for life and felt he had been permanently damaged. He had undertaken a course with Wellspring Counselling.

57. Dr Lyle undertook assessments for the period March 2018 to January 2020 and recorded extremely high scores of depression and anxiety. He also undertook an assessment for the three months prior to the examination and both scores had improved but were still in the clinical range.

58. Dr Lyle concluded that the Claimant had a very tough time made worse by the behaviour of those on whom he reasonably hoped to rely. He had sustained a serious degree of ongoing post-traumatic stress disorder. It was appropriately described as complex because there were multiple incidents over a period of years and not just one event. The Claimant continued to have a high level of background anxiety and he could not contemplate returning to well paid career. It was recommended that he had 20 sessions of trauma re-processing therapy.

Dr Lyle's report dated 9 July 2022

59. Dr Lyle was sent the liability judgment. Dr Lyle said he had read the Judgment and nothing within it caused him to change his conclusions.

Dr Lyle's report dated 4 August 2022

60. After speaking to the Claimant, Dr Lyle produced a further report saying that he had been asked to provide an opinion on the causation of the Claimant's symptoms.

61. The opinion said:

> The Claimant is suffering from severe Post Traumatic Stress Disorder which sprang directly from traumatic incidents he suffered in the workplace, and in particular his mistreatment on 14 September 2018. There was escalating workplace stress from preceding events, that specific event and long term ensuing stress. The workplace stress was causative. The index events were such that one might reasonably expect them to be causative.

Dr Lyle's report dated 14 October 2022

62. After being sent the order dated 30 September 2022 Dr Lyle provided a short report.

63. In relation to causation and to what extent there was an injury attributable to proven discrimination and but for the later incidents what would the prognosis have been Dr Lyle said the following: "The later incidents occurred during the course of the investigation into the discrimination issue. Had the discrimination not occurred in the first place, there is no reason to believe that Mr Tapping would have sustained injury to his mental health. His mental health had been stable since 2006. I repeat that the timing of the onset of symptoms, and the content of the symptoms clearly implicated the discrimination and its sequalae of the subsequent investigation in the causation of Mr Tapping's ongoing mental health issues."

64. In relation to distinguishing between the proven discrimination and other events Dr Lyle said: “It is difficult to separate these two aspects because they all formed part of the same process. The discrimination continued to occur during the investigation process itself. As an employee, Mr Tapping might have reasonably expected separation from the staff members implicated, a remedy, appropriate treatment, and the opportunity to return to work in a safe place.”

The law

65. The remedies available to the tribunal are to be found in section 124 of the EqA. The tribunal may make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; may order the respondent to pay compensation to the complainant (on a tortious measure, including injury to feelings); and make an appropriate recommendation. In addition the tribunal may also award interest on any award pursuant to section 139 of the EqA.

66. The interest payable on discrimination awards is to be calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the Interest Regulations"). Under regulation 2 the tribunal shall consider whether to award interest, and if it chooses to do so then under regulation 3 the interest is to be calculated as simple interest accruing from day to day. Under regulation 6 the interest on an award for injury to feelings is to be from the period beginning on the date of the act of discrimination complained of and ending on the day of calculation. All other sums are to be calculated for a period beginning with a mid-point date between the act of discrimination and ending on the day of calculation. Following the Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 2013 the rate of interest payable is 8%.

67. I also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as “s. 207A(2)”) and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 (“the ACAS Code”).

68. I had to assess the injury to the Claimant's feelings. I considered the original bands of awards set by the case of Vento-v-Chief Constable of West Yorkshire Police [2003] IRLR 102 CA, as uplifted by the case of Da’Bell-v-NSPCC [2010] IRLR 19 EAT and then the further case of Simmons-v-Castle [2013] 1 WLR 1239 (an uplift on all awards of general damages of 10% which has been held to have applied to Tribunal litigation (see for example De Souza-v-Vinci Construction (UK) Ltd EWCA Civ 879). Since then, in the Presidential Guidance issued on 25 March 2019, the following bands were

said to applied in respect of claims issued on or after 6 April 2019; £900 to £8,800 in respect of less serious cases, £8,800 to £26,300 the cases which did not merit in awarding the upper band and £26,300 to £44,000 for the most serious cases, with the most exceptional cases capable of exceeding £44,000.

69. When reaching a figure for injury to feelings, I remained aware that the award had to be compensatory and just to both parties. It should have been neither too low nor too high, so as to avoid demeaning the respect for the policy underlying the anti-discriminatory legislation. I also tried to bear in mind the value in everyday life of the particular sum that I chose to award. I had an eye on the range of awards made in personal injury cases. I also took into account the guidance at paragraph 36 of the EAT's decision in Base Childrenswear Limited v Otshudi UKEAT/0267/18.

70. The Court of Appeal in Sheriff v Lyne Tugs (Lowestoft) Ltd [1999] IRLR 481 confirmed that Tribunals have the jurisdiction to award damages for personal injuries. The burden of proof in relation to causation of injury is on the Claimant (see Bonnington Castings Ltd v Wardlaw [1956] 1 All ER 615).

71. It is necessary to consider the effect of a number of causes of injury. Where the injury is indivisible a Respondent who as tortiously contributed to it will be liable in full. Where it is divisible the tortfeasor will only be liable in respect of the share they are responsible for (Sienkiewicz v Grief (UK) Ltd [2011] 2 AC 229). The essential feature of an indivisible injury is that there is no rational basis for an objective apportionment of causative responsibility for the injury (Rahman v Arearose Ltd [2001] QB 352).

72. Guidance was given by Underhill LJ in BAE Systems Operations Ltd v Konczak [2017] IRLR 893 summarised as follows:

    a. Psychiatric harm may be divisible, even if it takes the classic path of stress turning into injury
    b. In all cases the Tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employers wrong and a part which is not so caused [para 71]
    c. The exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm. In other words 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. [para 71] In other words the focus is on the division of the injury or harm and not the causative potency or culpability of the tortfeasor.
    d. That distinction is easy enough to apply in the case of a straightforward physical injury. A broken leg is 'indivisible': if it was suffered as a result of two torts, each tortfeasor is liable for the whole,

and any question of the relative degree of 'causative potency' (or culpability) is relevant only to contribution under the 1978 Act. It is less easy in the case of psychiatric harm. The message of *Hatton* is that such harm may well be divisible. In *Rahman* the exercise was made easier by the fact (see paragraph 57 above) that the medical evidence distinguished between different elements in the claimant's overall condition, and their causes, though even there it must be recognised that the attributions were both partial and approximate. In many, I suspect most, cases the tribunal will not have that degree of assistance. But it does not follow that no apportionment will be possible. It may, for example, be possible to conclude that a pre-existing illness, for which the employer is not responsible, has been materially aggravated by the wrong (in terms of severity of symptoms and/or duration), and to award compensation reflecting the extent of the aggravation. The most difficult type of case is that posited by Smith LJ in her article, and which she indeed treats, rightly or wrongly, as the most typical: that is where 'the claimant will have cracked up quite suddenly, tipped over from being under stress into being ill'. On my understanding of *Rahman* and *Hatton*, even in that case the tribunal should seek to find a rational basis for distinguishing between a part of the illness which is due to the employer's wrong and a part which is due to other causes; but whether that is possible will depend on the facts and the evidence. If there is no such basis, then the injury will indeed be, in Hale LJ's words, 'truly indivisible', and principle requires that the claimant is compensated for the whole of the injury – though, importantly, if (as Smith LJ says will be typically the case) the claimant has a vulnerable personality, a discount may be required in accordance with proposition 16. (para 72)

e. Whether there is a rational basis for divisibility depends on the facts and the evidence, including medical evidence and questions asked of any medical experts.

73. The references to points 15 and 16 in Hatton v Sutherland [2002] IRLR 263 are:

> "(15) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment (paras. 36 and 39).
> (16) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress-related disorder in any event (para. 42)."

74. Aggravated damages can be awarded when there are aggravating features which have increased the impact on the Claimant. Such an award is compensatory and not punitive and it can be made where a Respondent

fails to treat a complaint with requisite seriousness. Appropriate acts include:

(1) Where the act is done in an exceptionally upsetting way. In Commissioner of the Police of the Metropolis v Shaw UKEAT/0125/11/ZT the phrase, "*high-handed, malicious, insulting or oppressive"* behaviour was used.
(2) When the motivation for the conduct is based on prejudice or animosity or spiteful and vindictive rather than due to insensitivity or ignorance.
(3) Subsequent conduct, e.g. conducting a trial in an unnecessarily oppressive manner, failing to apologise or failing to treat the complaint with requisite seriousness (Bungay & Anor v Sani & Ors UKEAT/0331/10 and Zaiwalla & Co v Walia [2002] UKEAT/451/00).

75. In relation to a breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures, where there has been an unreasonable failure to comply with the code the Tribunal may if it considers it just and equitable increase an award by no more than 25%. This only applies when the failure to follow the code was unreasonable. The uplift should not be used to mark disapproval in respect of unrelated matters.

76. In Slade and anor v Biggs and ors 2022 IRLR 216, the EAT set out a four-stage test to assist in assessing an appropriate uplift:

a. is the case such as to make it just and equitable to award any Acas uplift?
b. if so, what does the tribunal consider a just and equitable percentage, not exceeding although possibly equalling, 25 per cent?
c. does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings in discrimination claims? If so, what in the tribunal's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?
d. applying a 'final sense-check', is the sum of money represented by the application of the percentage uplift arrived at by the tribunal disproportionate in absolute terms? If so, what further adjustment needs to be made?

The EAT further held that any uplift must reflect 'all the circumstances'', including the seriousness of and/or motivation for the breach.

Conclusions

77. The events proven as acts of discrimination were part of a chain of events, for which the majority had no finding of a legal wrong. Therefore the first issue was how to disentangle the proven discrimination from the events

which were not legal wrongs and whether those proven acts materially contributed to the alleged personal injury and injury to feelings. Secondly it was necessary to discount the effects of the events after September 2018, on the basis that no legal wrong was found, in order to determine whether the Claimant established causation for personal injury and/or injury to feelings. For the reasons set out below it was not possible to find that the proven allegations of discrimination caused the onset of the post-traumatic stress disorder and therefore it was not possible to make a specific award for personal injury. However I did accept that the proven discrimination did have some psychiatric effect and it was taken into account within the award for injury to feelings.

Personal injury claim

78. The Claimant sought a separate award for personal injury, namely post-traumatic stress disorder. This was not an easy decision to reach and the Claimant at both the Liability and Remedy Hearings has clearly been badly affected and he is still very unwell. In relation to causation and damage, the burden of proof is on the Claimant. The Claimant's written submissions said that the expert evidence had demonstrated that he had been damaged over more than a 5 year period. When giving the directions for the medical evidence it was explained that the Tribunal could only make an award in respect of the proven allegations and that it would be necessary to take out of the account the unproven elements. The Respondent submitted that causation has not been established. The Claimant said, when giving evidence, that Dr Lyle was an eminent practitioner and he could not be outranked by non-practitioners and his opinion should not be overthrown.

79. The Claimant brought many allegations against the Respondent and succeeded in respect of five of them. The Respondent submitted, and there was force in that submission, that the case had really been about detriment for whistleblowing. It was significant that the incident on 14 September 2018 included allegations of harassment and victimisation and detriment for whistleblowing. Despite the case management orders, on two occasions, stating that only the proven acts of discrimination could be compensated for and that there was a need to discount the unproven events, which included past, current and subsequent events, Dr Lyle's reports did not address whether it was the discriminatory conduct or the detriment for whistleblowing or both which was the material cause of the post-traumatic stress disorder. It was unfortunate that other than specifically referring to 14 September 2018 very little was said about the subsequent events. It was evident from the final report that Dr Lyle was operating on the basis that the discrimination continued to occur during the investigation up to the time the Claimant's grievance was dismissed. There was no finding that unlawful discrimination occurred after 18 September 2018. It is notable that the

assessment undertaken on the Claimant included the post discrimination period.

80. I found the reports of Dr Lyle were of limited assistance. They established that the Claimant had sustained post-traumatic stress disorder, however they were based on a false premise that there was proven discrimination from September 2018 until the Claimant decided to resign and no opinion was given in relation distinguishing the subsequent events other than to say it was difficult.

81. Further the threats to the Claimant on 14 September 2018 were made after it was discovered he had made protected disclosures and had reported the subject matter to the police. It was at this stage when Mr Bailey started threatening the Claimant and the greatest intimidatory behaviour occurred. The Claimant's witness statement to the police said that it was at this point it was beginning to feel very intimidating. Therefore it was most likely that the situation until that point was unpleasant and there was an element of intimidation but there was no threat to the Claimant. There has been no evidence in relation to what the situation would have been if the protected disclosure had not been raised. The vast majority of the hostility was directed at the protected disclosure and the investigation which had been started. This also accorded with the Claimant's witness statement for the remedy hearing in which he said that whistleblowing is a brave act, safeguarding is assured and he felt betrayed.

82. The burden of proof is on the claimant that the post-traumatic stress disorder was materially caused by the proven acts. The Claimant's evidence referred to the harm done by numerous other events which were not proven acts of discrimination and related to the investigation into his whistle-blowing concerns and the grievance he raised in respect of his treatment. The comments referred to by Dr Lyle in his report were in relation to the things said after Mr Bailey discovered that a protected disclosure had been made.

83. In the circumstances I was not satisfied that the Claimant had proved that the proven allegations materially caused the post-traumatic stress disorder. In the circumstances it was not possible to make a separate award for personal injury and this part of the claim was dismissed.

84. However I was satisfied that the proven allegations on 14 September 2018 would have had some psychological effect on the Claimant, albeit not post-traumatic stress disorder. However the medical evidence does not assist in relation to that. In the circumstances that effect is best compensated for as part of the award for injury to feelings.

85. In the event that causation had been established, the Respondent submitted that the appropriate part of the Judicial College Guidelines 16th Ed. would have been chapter 4 A in relation to psychiatric damage generally, rather than chapter 4B in relation to post-traumatic stress disorder on the basis that Chapter 4B related to a response of actual or threatened death, serious injury or sexual assault, which did not occur in the present case. the guidance for psychiatric damage generally was that moderately severe cases attract awards of £19,070 to £54,830 and moderate cases of £5,860 to £19,070. The same categories for PTSD were £23,150 to £59,860 and £8,180 to £23,150. The Respondent submitted that an award should be in the region of £12,000 to £13,000. The nature of the harm was divisible, there was a turning point when Mr Bailey realised that a protected disclosure had been made following which the Claimant was threatened. It was likely that caused the majority of the damage and is not something which can be compensated for. The events that followed, apart from the incident on 18 September 2018, were not proven acts. The proven discrimination would have been of a minor influence and the appropriate bracket would have been the moderate categories. Limited assistance was gained from the quantum cases provided by the Respondent. It was relevant that the Claimant returned to work after 3 months. The Claimant experienced feelings of intimidation and upset as a result of the proven acts. If a separate award had been made for post-traumatic stress disorder, it would have been for £14,000.

Injury to feelings and aggravated damages

86. The Respondent submitted that injury to feelings should be in the middle of the middle updated Vento band. The Claimant submitted that he should be awarded the top of the top band. The top band is for the most serious cases, in which there had been a lengthy campaign of discrimination. The middle band should be used for cases which do not merit an award in the highest band.

87. Two of the proven allegations related to the same incident on 14 September 2018. The Claimant accepted that a single award should be made. The failure to make reasonable adjustments was for a limited period and it caused the claimant increased pain and tiredness. I accepted that the Claimant found this distressing and that he had clearly told the Respondent that he had been struggling. The e-mail dated 16 March 2018 was not discovered until later and I accepted that intensified the Claimant's feelings of betrayal. The incident involving Ms Singleton involved feelings of betrayal and suggested to the Claimant that rather than dealing with the concern she was considering whether the Claimant would be retiring in the near future. It was common ground that the significant incident was that on 14 September 2018. I agreed that a single composite award should be made. The Claimant had been told to withdraw his grievance and he found that

upsetting and intimidatory. The significant threats were made in relation to making the protected disclosure, which the Claimant found threatening and extremely upsetting. There were also significant incidents which followed which greatly upset the Claimant, however they were not proven allegations of discrimination.

88. There have been ongoing consequences for the Claimant, however they were caused by the treatment he received in respect of making protected disclosures and by how he felt the subsequent investigations were conducted, however they were not proven legal wrongs. Although it is difficult, it is possible to separate the harm done. The events after 18 September 2018 caused harm to the Claimant and the build-up led to his conclusion that he could no longer work for the Respondent. The proven allegations on 14 September 2018 was harm caused by the pressure to withdraw the grievance and caused the Claimant to feel upset and intimidated. The threats were made in response to the discovery about the protected disclosure; they made the Claimant feel threatened and extremely upset. It was possible to separate the harm which took place by considering the divisions in time. This has not been easy and I was hampered by the lack of assistance in the medical evidence and I have done the best I can on the basis of the available evidence.

89. The proven allegations caused the Claimant a high degree of distress and the proven allegations on 14 September caused feelings of hurt, intimidation and would have resulted in worry and distress. I took into account the number of proven allegations and that a significant part of the Claimant's upset was caused by the way in which the subsequent investigation and grievance was conducted, which needed to be discounted. I was satisfied that there was an ongoing minor effect which had been caused by the proven discrimination . This was not a case in which the proven legal wrongs were the most serious and therefore an award in the top band was not appropriate. However, there had been a serious effect on the Claimant and an award towards the top of the middle band was appropriate.

90. The Claimant argued that a separate award for aggravated damages should be made. I had to be mindful that there was a risk of double recovery and that the award had to be compensatory and not punitive. The incident on 14 September 2018 was an act of victimisation and Mr Bailey was in a position of responsibility and as a manager should not have been discouraging a grievance. I was satisfied that the pressurise and employee to withdraw a grievance is high handed and oppressive. However the effects are closely bound with the injury to feelings and I concluded that this was an aggravating feature but it should be included in the injury to feelings award, in order to avoid the risk of double recovery.

91. Account also needs to be taken of the psychological effect on the Claimant, whilst being conscious of double recovery. In the circumstances an

appropriate award for injury to feelings is £27,000, which after taking into account overlap, includes £3,000 aggravated damages and £6,000 for the psychological effects.

Loss of Earnings, Loss of Pension and medical expenses

92. The Claimant sought to claim loss of earnings and pension contributions from the date of the termination of his employment until the date on which he intended to retire. The Schedule of loss referred to this being for unreasonable and vexatious behaviour leading to the resignation for psychological injury and breach of trust and confidence. It was highly relevant that the Claimant said, at the case management hearing on 17 March 2022, that the cause was the investigation by the harassment investigation officer, the investigation was slanted and the outcome was predetermined. When he received the grievance outcome he felt broken. He also accepted that he had not been so disabled that he was unable to work, as demonstrated by the resignation not being given until more than a year after he returned to work, after the 3 months sick leave.

93. The Claimant worked for about 12 months after he returned from sick leave. During that time the investigations were ongoing. A significant part of the Claimant's case, in which he was unsuccessful, related to the investigation process and the outcome. The Claimant has always suggested that the final straw was the grievance outcome, which was not a proven allegation of discrimination. The length of time and the numerous complaints about the events which followed the last proven allegation meant it was extremely unlikely that the cause of the resignation was the proven discrimination. The reason was that the Claimant had lost faith in the Respondent due to the investigation process and grievance outcome, which was the cause of it rather than the discrimination. I was not satisfied that the proven discrimination materially contributed to the resignation.

94. Therefore the Claimant failed to establish the necessary causal link between the proven discrimination and his resignation. Accordingly, the claims for loss of earnings and loss of pension contributions were dismissed.

95. The Claimant also made a claim for £315 in respect of therapy from Wellspring Counselling. This was to treat the post-traumatic stress disorder, for which causation was not established in relation to the proven discrimination. Therefore this claim was dismissed.

Breach of the ACAS code of practice

96. The Claimant submitted that there was a breach of the disciplinary code by removing him from his role on 15 March 2018. It was found at the liability hearing that there was not a formal process for such moves and I accepted

Mr Bollen's evidence that it was normal for project managers to be transferred between postings and the determining factors were business need and the manager's skill set. There was no finding that this was a disciplinary matter or that the ACAS code of practice was engaged. In the circumstances I was not satisfied there was a breach.

97. The Claimant also submitted that there were breaches of the code of practice in relation to the grievance procedure which concluded in December 2019. Similarly at the liability hearing no findings were made that there had been breaches of the code. Further the Claimant was unsuccessful in this element of the case and in the circumstances it would not be just and equitable to award an uplift in respect of this grievance.

98. There was also the grievance which the Claimant raised on 17 August 2018 about reasonable adjustments. This was raised with Mr Harrison at first instance, against whom it was directed and it was sent to Mr Bailey. On 14 September 2018, Mr Bailey sought to persuade the Claimant to withdraw it. Under the code of practice employers should arrange a formal meeting to discuss it without unreasonable delay. In this case Mr Bailey tried to persuade the Claimant to withdraw his grievance rather than arrange a meeting. I was satisfied that this was contrary to the code of practice. The grievance was the cause of the victimisation and harassment which occurred and therefore it would be just and equitable to make an uplift.

99. I took into account that the Claimant ultimately raised a grievance that went through the process, albeit it was ultimately dismissed. It was also necessary to consider overlap with the award for injury to feelings and the risk of double counting. To take into account the risk of double counting, that the code had not been complied with and the Respondent was depriving the Claimant of his right to raise a grievance at that stage and having an eye on the total of the award it was just and equitable to uplift the award by 10%.

100. The Respondent is therefore ordered to pay the Claimant total compensation of £29,700.

Interest

101. It was common ground that the appropriate rate of interest is 8% from the date of the act of discrimination. The Respondent conceded this was from 15 October 2017 to the date of Judgment i.e. 1826 days.

102. Therefore interest is awarded on the sum of £29,700 in the sum of £11,886.51.

Employment Judge Bax
Date: 4 November 2022

Judgment sent to Parties: 11 November 2022

FOR THE TRIBUNAL OFFICE