EMPLOYMENT TRIBUNALS

Claimant: Ms F Alexandre

Respondent: Openreach Limited

Heard at: Manchester **On:** 15 December 2022 and 6 January 2023 (in chambers)

Before: Employment Judge Slater
Ms C Bowman
Ms H Sheard

Representation
Claimant: Ms S Aly, counsel
Respondent: Mr J Searle, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondent is ordered to pay to the claimant compensation of £17,251 plus interest of £3,713 for the complaints of harassment related to race upheld in the Tribunal's judgment on liability sent to the parties on 23 May 2022.

2. The Tribunal recommends that, within 2 weeks of the judgment being sent to the parties, a manager in the respondent organization, senior to David Brown and Shweta Taneja, should write to the claimant apologizing for the comments made by Craig Warner, which the Tribunal found to be harassment related to race, and apologizing for the poor way in which the parts of the grievance relating to these comments was dealt with.

REASONS

Introduction

1. This was a remedy hearing following a reserved judgment on liability sent to the parties on 23 May 2022. The Tribunal found that complaints of harassment related to race were well founded. The other claims were not upheld.

2. References to page numbers in these reasons are to pages in the Remedy Hearing bundle, unless otherwise stated.

3. References to "C(number)" are to paragraphs in the claimant's witness statement for this remedy hearing.

4. References to "LD(number)" are to paragraphs in our judgment and reasons on liability.

Issues

5. This hearing was to determine remedy for the successful complaints of harassment, which were as follows:

5.1. That, on 29 January 2020, Craig Warner stated he believed the absence of top-level black swimmers was *"because of class".*

5.2. That, in late 2019, Craig Warner made a joke about the claimant being deported whilst a visa application was ongoing.

6. There was an agreed list of issues for remedy (p. 61). These were as follows:

6.1. To what remedy is the claimant entitled?

6.2. What are the claimant's losses arising from any discriminatory acts?

6.3. What is the appropriate Vento band to apply in the circumstances?

6.4. Should the tribunal provide an award for aggravated damages?

6.5. Did the claimant suffer a personal injury as a result of the discriminatory treatment caused by the respondent? If so, what amount of damages is the claimant entitled to receive?

6.6. What, if any, declarations should the tribunal make?

6.7. What, if any, recommendations should the tribunal make?

6.8. Did the respondent breach the ACAS Code of Practice? If so, what uplift should be applied?

6.9. What, if any, interest should be awarded on any injury to feelings award?

7. In her fourth Schedule of Loss (pp.734-738) the claimant claimed financial losses relating to a reduction in pay and loss of pension benefit in May, June and August 2020 when she was on sick leave and an impact on pay in June 2021 because of having been on sick leave in the previous year. The claimant clarified in her witness statement that loss of pay in June 2021 related to receiving a lower bonus payment than would otherwise have been the case due to having been on sick leave.

8. The claimant also claimed compensation for personal injury, special damages relating to the cost of therapy and other medical costs, injury to feelings and aggravated damages. She claimed an uplift on compensation for failure to comply with the ACAS Code of Practice and interest on the awards.

9. In her witness statement (C73), the claimant asked for a public apology from the respondent for how she was treated and for the respondent to review their grievance and absence processes and procedures to prevent what happened to her from happening to someone else. In closing submissions, Ms Aly requested the Tribunal made a recommendation for an apology to be given to the claimant.

Evidence

10. We heard witness evidence from the claimant, the claimant's partner, Mr Hatham Rahman, and from Mr Stephen Tait, who had been the claimant's trade union representative. We had a remedy hearing bundle of more than a thousand pages. We read only the documents referred to in the witness statements or which the representatives invited us to read. It appeared to us that many of the documents included in the remedy bundle were not relevant to the remedy issues we needed to decide. There were also substantial parts of the claimant's 41 page witness statement which were not relevant to the remedy issues.

11. We had three medical reports. The first was from Dr Rastogi dated 6 November 2021. Dr Rastogi was instructed by the claimant to produce a report before the liability hearing and without first getting the permission of the Tribunal to call expert evidence. Permission was retrospectively given by Employment Judge Slater as set out in the Tribunal's letter to the parties dated 13 December 2022. The second was from Dr Pilgrim dated 22 September 2022. Dr Pilgrim was instructed by the respondent, in accordance with case management orders proposed by the parties, which Employment Judge Slater took as being accepted by the Tribunal. Dr Pilgrim had a consultation by video conference with the claimant, after the Tribunal had promulgated its decision on liability. The claimant had an opportunity to ask Dr Pilgrim questions in writing following his report and we saw the questions and answers. The third report was by Dr Okon-Rocha dated 14 December 2022. This report was obtained by the claimant without first obtaining the permission of the Tribunal. Dr Okon-Rocha was asked to provide her professional opinion regarding the methods and methodology used by Dr Pilgrim to generate the findings in his report. The respondent, after Mr Searle had an opportunity to read the report, did not object to the Tribunal considering this report. This report, and the letter of instruction, were added to the documents considered by the Tribunal.

12. We accept that all three doctors are appropriately qualified to give expert evidence on the matters they were asked to comment on and, on the basis of the declarations signed by them, understood that their overriding duty was to the Court.

Facts relevant to remedy

13. We rely on facts found in our judgment and reasons on liability.

14. We highlight some of those facts and also make additional findings of fact relevant to remedy as follows.

15. The claimant had taken anti-depressants for a period some time before 2015. She had another later period on anti-depressants, stopping in the summer of 2018. She did not take anti-depressants again until June 2020.

16. The claimant began working with Craig Warner as her manager on 1 August 2019.

17. The claimant was suffering from anxiety prior to the acts of harassment, which she attributes to conduct by Craig Warner which has not been found to be unlawful discrimination (see C6).

18. The first act of harassment (the visa "joke" about being deported) occurred in late 2019. We accept the evidence given by the claimant that she found this "joke" utterly humiliating and it made her feel deeply distressed. (C7). The visa process had already caused the claimant a great deal of stress and anxiety as everything she had built in the UK hung in the balance. She found it profoundly hurtful, humiliating and damaging to have this minimized and joked about by Craig Warner.

19. The second act of harassment (the comment relating to black people and swimming) occurred on 29 January 2020. We accept the evidence of the claimant in her witness statement as to how she felt when the comment was made (C12). She felt so shocked, hurt and upset that she did not know how to respond. She thought that, if Craig Warner thought the reason black people could not swim was because of class, he probably did not see her or her colleague, who was also black, as his equal. The claimant found Craig Warner's lack of acceptance that the comment was made more humiliating and upsetting. The comment was particularly hurtful because the topic of swimming in the black community, specifically in the US, is linked with a painful history of racism, where pools would be drained if a black person stepped foot in them. This was the first time in the claimant's career that she became aware that her skin tone could impact on how she was perceived in the workplace. It caused her to wonder, subsequently, when comments are made towards her in the workplace, whether it is because she is black. The claimant felt deeply hurt, humiliated and worthless as a result of the comment.

20. The claimant was sent a coaching plan by Craig Warner on 14 February 2020. The claimant declined to attend a meeting to discuss this and presented a grievance. The grievance included the allegations about the visa and swimming/class comments and a complaint about being put on a coaching plan.

21. The claimant began sick leave on 17 February 2020. She went to see her GP that day and was issued with a fit note, indicating that she was not fit for work for

the period until 2 March 2020 due to stress and anxiety (p.657). She recounted to her GP that there was a history of bullying and racial discrimination at work. She continued to be issued with fit notes covering her absences up to and including 11 August 2020 (p.650).

22. We accept the evidence given by the claimant in her witness statement as to how she was feeling when off work (C23). In the first few weeks of being off work, the claimant barely left the house. She spent whole days in bed, unable to find the motivation to do anything. She soon started developing suicidal ideations.

23. The grievance outcome was given on 22 April 2020 (LD62). We accept the claimant's evidence (C31) that her whole body started shaking uncontrollably when she read the conclusion that Craig Warner was not guilty of bullying and harassment.

24. The claimant began early conciliation with ACAS on the same day as the grievance outcome, 22 April 2020.

25. The claimant went onto half pay on 15 May 2020 (p.355). She was also on reduced pay in June and August 2020, but received full pay in July 2020.

26. The claimant concluded early conciliation on 2 June 2020 and presented her claim to the Tribunal on 11 June 2020.

27. We accept the claimant's evidence that her mental health deteriorated further after receiving the outcome of the grievance (C35). Her suicidal ideations got a lot worse. She had a nightmare about witnessing her own suicide. In June 2020, the claimant reluctantly began to take anti-depressants (p.627).

28. The claimant returned to work in August 2020.

29. The claimant reported to her GP on 24 September 2020 that she was feeling much better (p.628). The dose of anti-depressants was reduced.

30. The grievance appeal outcome was on 26 January 2021 (LD78) following an appeal hearing on 15 July 2020. We accept the claimant's evidence (C37) that the outcome of the grievance appeal had a further adverse effect on her mental health and made her lose trust in her employer.

31. The claimant received a lower bonus in June 2021 than she would have done had she not been on sick leave in 2020.

32. On 1 October 2021, the claimant moved to a different role in the BT Group.

33. On 18 April 2022, the claimant resigned from the BT Group.

34. The Tribunal hearing on liability took place beginning 19 April 2022 and a reserved judgment and reasons was sent to the parties on 23 May 2022. The claimant gave evidence, which we accept, that the findings of harassment helped her recovery tremendously (C70).

35. The Tribunal finds, based on the claimant's evidence, that the claimant was very distressed by what she considered to be disrespectful, bullying and humiliating conduct by her line manager, Craig Warner. This related to matters including the acts of unlawful harassment, but related to much other conduct not found to be unlawful discrimination. Examples of conduct which distressed the claimant but have not been found to be unlawful discrimination include: what the claimant considered to be Craig Warner's failure to defend her during a call against what she considered to be unacceptable treatment by another manager (C6); Craig Warner's conduct in relation to the claimant's preparation for a team presentation (C8); Craig Warner telling the claimant her confidence was of a "career level E and not D" (C9); the conversation about Nazis and positive intent (C13 and LD47); and the proposal to put the claimant on a coaching plan (C15-19).

36. The claimant was assessed by Dr Pilgrim in September 2022. The claimant is very unhappy about how the assessment was conducted, with Dr Pilgrim often interrupting her, and not allowing her to speak about things which he did not consider relevant to the questions he had been asked to address.

37. The claimant attended private therapy, at the cost of £40 per session from March 2020 up to the date of the hearing (p.803) and intends to carry on with therapy for a further six months. We note from the evidence of payments that sessions were sometimes weekly, but there were sometimes longer gaps between sessions.

38. The claimant incurred NHS prescription charges of £9.35 each time for her prescriptions for anti-depressants beginning in late June 2020 (p.810). From September 2021, the claimant began to make direct debit payment of £10.81 each month for ten months, for a 12 month prescription prepayment certificate (PPC) (pp810-811). At the time of the remedy hearing, the claimant informed us that she intended to taper off use of antidepressants over a further 6 month period.

39. In the claimant's witness statement, she claimed £1440 in doctor's costs (C76). However, she did not explain what this was for and we have not been able to find any supporting documentation relating to this expense in the remedy bundle.

Dr Rastogi's report (pp619-636)

40. Dr Rastogi was instructed by the claimant to provide a report prior to the hearing on liability. The doctor's instructions were to identify any psychological harms that were caused by and attributable to the claimant's work environment and to identify the likely duration of the psychological injuries together with any appropriate treatments that would be recommended. Since the report, dated 6 December 2021, was obtained prior to the decision on liability, it does not focus on harm caused by the acts of harassment only and gives an opinion based on what the claimant told Dr Rastogi about the work environment generally.

41. The claimant told Dr Rastogi about the two incidents of harassment as well as about a considerable number of other matters at work which had upset her.

42. In relation to the claimant's past psychiatric history, Dr Rastogi recorded that the claimant had past issues with anxiety relating to academics and schooling.

There was reference to traumatic life events and a turbulent period between 2015 to 2016. Dr Rastogi recorded that the claimant's medical records were broadly consistent with the claimant's own narrative. The claimant had been referred for cognitive behaviour therapy in November 2019 in relation to matters which did not appear to be work-related.

43. Dr Rastogi expressed the view that the claimant was presenting with mixed anxiety and depressive disorder. In answer to the request to identify any psychological harms that were caused by and are attributable to the claimant's work environment, they wrote (p.633) "it is my opinion that the alleged harassment has caused and/or materially contributed to the claimant sustaining a psychiatric injury in form of mixed anxiety and depressive disorder." It is the tribunal's view that the use of the word "harassment" in this context, given the width of the question and the fact that the report was being given prior to the tribunal's decision, was not intended to be limited to the two acts found later by the tribunal to be harassment but harassment is used in a wider sense relating to various matters at work about which the claimant had complained.

44. Dr Rastogi recorded that, during the claimant's period of sick leave, the claimant reported that her mood was persistently low. She was unable to enjoy her routine activities and felt isolated. She described feeling anxious and scared. She reported that her sleep also became poor. She had started comfort eating. She reported that she had felt hopeless and became more negative about herself and started blaming herself. She had felt suspicious of others. She stated that she started having nightmares and was constantly ruminating about her problems. She also had suicidal thoughts but denied making any attempts. Dr Rastogi recorded that, whilst there had been an improvement in her mental health with medications and therapy, she still continued to present with intermittently low mood and feeling anxious. The symptoms had affected the claimant self-confidence. She presented with intermittent depressive symptoms characterised by periods of low mood, disturbed sleep and having to motivate herself to do activities. She described feeling anxious particularly in work environment and reports feeling anxious about attending face-to-face meetings, managing negative events and constantly worried that she might be viewed as vulnerable. This affected her ability to trust others. She also experienced somatic symptoms in the form of lump in throat, palpitations and difficulty in focusing. Her symptoms were further aggravated by the stress of ongoing legal proceedings.

Dr Pilgrim's report (pp694-733) dated 22 September 2022

45. Dr Pilgrim was instructed after the tribunal's decision on liability and had the benefit of being able to read this. The questions put to Dr Pilgrim are set out in the report (pp697-700). These included the question: "In your view, did either or both of the proven discriminatory acts in this case (the two acts of harassment which the tribunal upheld) cause or contribute to the claimant's health to the extent that it caused her to suffer a personal injury?" If the answer to that question was yes, the doctor was asked to give further information in relation to that injury.

46. The summary of Dr Pilgrim's conclusions reads as follows (p.697):

> "Ms Alexandre had been suffering from a depressive episode that was mild in severity at the time of the reported incidents at her workplace. It is my opinion

> that these incidents led to an exacerbation of her depressive condition to the point that it became moderate to severe in severity and resulted in her being unable to continue working, as would be expected in a depressive episode at that level of severity, due to the likely impact on her motivation and her concentration. With treatment in the form of CBT and antidepressant/antianxiety medication (sertraline), her depressive episode largely resolved. She has very recently experienced a recurrence of a depressive episode in relation to her current employment, though this is likely to have been contributed to substantially by the incident she described in relation to her previous employment with BT Open Reach. It is my opinion that the two proven discriminatory acts contributed significantly to the worsening of her depression in the order of around 30% (in total)."

47. Dr Pilgrim's description of his interview with the claimant included that the claimant told him about Mr Warner making a comment about her being deported when she was going through the visa process and this made her really anxious. She told Dr Pilgrim that she felt like she was not able to stand up for herself and she was powerless, and he thought it was all right to say things like that and he even chuckled at the end of it. The claimant also told Dr Pilgrim about the swimming comment. She told Dr Pilgrim that Mr Warner said he thought that [black people not liking swimming] was due to class and she did not know what to say about that. The claimant also described various other concerns and things which made her anxious at work.

48. Dr Pilgrim asked the claimant what she considered to be the most stressful incidents when she was working with BT Open Reach. She said that it was the way he was attacking her in a personal way all the time. This included the incident when he spoke about her being deported, and the incident to do with black people swimming. She said that it was how she was treated like this infantile person, and, in particular, how she was treated when she reported him. She said that how the company treated her after that almost destroyed her.

49. The section on mental health history included that, in the autumn of 2019, the claimant had referred herself for counselling because of things that had happened in the past. When Dr Pilgrim asked her about what these things were, the claimant said she did not want to talk about those things because they were not relevant to the case, though they were very painful.

50. Dr Pilgrim expressed the opinion that the claimant's current depressive episode was at present at a mild to moderate degree of severity. That current episode had commenced around a month previously in relation to difficulties experienced in her current job. She had been free of depression for the previous 4 to 5 months.

51. Dr Pilgrim expressed the view that the tribunal proceedings had not had a substantial impact on the onset of the claimant's depressive episode or the maintenance of that depressive episode.

52. Dr Pilgrim recorded that, during the interview, the claimant was distressed and tearful at several points, though less so in relation to the two proven discriminatory acts than in relation to other events, such as on two separate occasions when she described how she was made to feel that she was not good enough for that job.

53. At paragraph 9.10 Dr Pilgrim wrote (pp725-726):

> "Ms Alexandre's depressive episode, which was initially present at a mild degree of severity, deteriorated further whilst in her employment at BT Open Reach to the point that it became present at a moderate to severe degree of severity when she stopped working due to her depression. During this time the unresolved past traumatic memories remained unresolved (until treated by counselling between April and June 2020), and it is likely therefore that the previous episode would have continued. The deterioration in her depressive episode to the point that it was present at a moderate to severe degree in severity is likely, in my opinion to have resulted from the situation in her workplace. This opinion is based on her presentation when she described those events, and when she presented to her GP. Ms Alexandre described numerous incidents at work that led to her feeling distressed and anxious, and it is likely that her long-standing negative sense of self and self-worth contributed to her being sensitized to these incidents. When I asked Ms Alexandre to outline what she considered to be the most stressful incidents whilst working with BT Open Reach, she specifically mentioned the incidents about her being deported and to do with black people swimming. She also said that it was how the company treated her after she had brought the grievance that "almost destroyed her". At interview, Ms Alexandre was distressed and tearful at points, though less so in relation to the two proven discriminatory acts than in relation to other events, such as on two separate occasions when she described how she was made to feel that she was not good enough for that job. Taking all of this into account, it is my opinion that the two proven discriminatory acts are likely to have contributed to the worsening of her depressive episode (from mild to moderately severe), and that this amounted to approximately 30% of the overall contribution from her work situation."

54. Dr Pilgrim wrote at paragraph 9.11 (p.726):

> "The personal injury caused, in my opinion, by the proven discriminatory acts contributed to the worsening of her depressive episode. Her pre-existing vulnerability, in particular her long-standing negative sense of self and self worth resulted in these two incidents having a greater impact in terms of worsening her depressive episode than would otherwise have been the case."

Dr Okon-Rocha's report (additional document added during hearing)

55. This report, dated 14 December 2022, was as a result of a paper-based assessment. Dr Okon-Rocha read the report of Dr Pilgrim and Dr Pilgrim's response to questions put by the claimant.

56. In the opinion section, Dr Okon-Rocha wrote at paragraphs 7.2 to 7.5:

> "7.2 I carefully reflected on this issue. I would equally consider several predisposing and co-existing risk factors for depression (i.e. psychiatric injury) in Ms Alexandre's presentation, as Dr Pilgrim has done. I believe that the predisposing factors include Ms Alexandre's self-reported low self worth, history of trauma, and previous history of mental disorders (i.e. anxiety and OCD) as stated in the medical documentation. The co-existing factors, in my view, include the breakup of her relationship, the impact of the Covid lockdown on Ms Alexandre's well-being or her uncertainty around the visa application. I would also take into account the possible impact of trauma therapy on Ms Alexandre's well-being. In my understanding trauma therapy took place during the time of the work harassment incidents. Based on my clinical experience, the majority of patients report a significant emotional impact when confronted with traumatic material.
>
> "7.3 Generally, in order to make a personal injury claim for a psychiatric injury, it must be proven that the psychiatric harm was a result of an accident or sudden shocking and traumatic event. When reviewing the content of Ms Alexandre's personal assessment with Dr Pilgrim, it is my view, that she has suffered a psychiatric injury at her workplace.
>
> "7.4 From my experience, it is always challenging to put an exact estimate because a psychiatric injury cannot be as objectively measured as other medical/physical injuries, i.e. a loss of cardiac function, etc. I usually take into consideration the client's estimate and judge this estimate against the clinical presentation.
>
> "7.5 Finally, it is possible, although not definite, that Dr Pilgrim's figure may reflect the accurate degree of psychiatric injury in this case."

57. In answer to the question as to whether they would have been able to assign a numerical value for the impact "unresolved issues from the past", because on the claimant's mental health, as described by Dr Pilgrim, Dr Okon-Rocha wrote, at paragraph 7.13, that they find it challenging to assign a numerical value in relation to this. Reasons given for this included that the claimant did not share the details with regard to her past with Dr Pilgrim and there were no other professional reports summarising the past issues/events and that she had not personally assessed the claimant.

Submissions

58. Mr Searle provided a written skeleton argument for the respondent. Both representatives made oral submissions.

59. We summarise the principal submissions as follows.

Claimant's submissions

60. Ms Aly submitted that the claimant would not have been off work for a lengthy period but for the harassment. The claimant had described to Dr Pilgrim the two most serious incidents as being the harassment. On that basis, the claimant claimed for the difference between total net pay received and projected net pay. The claim for pay relating to June 2021 was because June was the bonus month.

61. Ms Aly explained that no claim was made for loss of earnings in July 2020 because the claimant had received full pay for that month. The claimant had then reverted to half pay for August before returning to work.

62. In relation to personal injury, Ms Aly submitted that the harassment had a substantial impact on the claimant. It had an impact on her future working life. Ms Aly submitted, referring to the Judicial College Guidelines for the Assessment of General Damages in Personal Injury cases, that the injury should be assessed as being towards the top end of the moderate bracket of Psychiatric Damage. Ms Aly submitted that, at a minimum, the tribunal should take the contribution of harassment to personal injury as 30%, from Dr Pilgrim's report. She submitted that the tribunal should treat Dr Pilgrim's report with caution, given the manner in which the examination was conducted. The acts of harassment were the worst acts and there was an argument for saying the percentage should be higher.

63. In relation to injury to feelings, Ms Aly accepted that there was some overlap with personal injury and double recovery should be avoided. She submitted that the mid-band was the appropriate band. The claimant was suicidal and there were two incidents, not one. They had a long-term impact. She submitted that an award should be in the higher part of the mid-band.

64. In relation to special damages, the claimant had provided receipts for therapy and costs. The claimant remained on sertraline.

65. In relation to aggravated damages, Ms Aly submitted that an award would be appropriate because the claimant had tried to raise Mr Warner's conduct with him (although not the two incidents of harassment) but this was not addressed and the grievance and appeal were not appropriately addressed. The tribunal had been very critical of the handling of the grievance and appeal. The handling of the claimant's grievance was appalling. The respondent had done nothing to remedy the situation. They had not apologised to the claimant. Ms Aly acknowledged that there was a limited apology in Mr Searle's skeleton argument. There had been no apology made by the respondent after the judgment and no apology from Mr Warner.

66. In relation to a recommendation, Ms Aly acknowledged that she could not require the tribunal to make a recommendation to change policies since the claimant no longer works there. She requested that the tribunal make a recommendation for an apology.

67. In relation to an uplift for breach of the ACAS code, Ms Aly referred to paragraph 42 which the respondent had conceded had been broken in relation to the appeal not being heard without unreasonable delay. Ms Aly referred to

paragraph 43 but conceded that Miss Fletcher and Ms Taneja had not been directly involved in the case. She relied on Mr Tait's evidence about impartiality. They worked in the same part of the business. The respondent had substantial administrative resources. However, the respondent insisted that this particular individual hear the appeal. There was no credible reason for the delay in dealing with the appeal.

Respondent's submissions

68. In his skeleton argument, Mr Searle confirmed that the respondent was sorry that the two comments, although innocently made, caused the claimant upset.

69. The respondent submitted that injury to feeling should fall within the lower Vento bracket. Mr Searle provided summaries of tribunal decisions taken from Harvey in relation to awards made in the lower band and the middle band.

70. The respondent submitted that there were no grounds for an award of aggravated damages.

71. Mr Searle submitted that the 30% in Dr Pilgrim's report could be relied on for personal injury and also came into play for injury to feelings. The respondent accepted that the claimant had a right to something for personal injury additional to the injury to feelings award; there was some impact on the claimant's mental health. It was difficult to separate the two comments from everything else going on in the claimant's life. Mr Searle submitted that the personal injury maybe added £1000 or £1200 at most to the award.

72. The respondent contended that the claimant would have been receiving treatment in any event so the claim for special damages must fail. Further, the respondent questioned whether the losses solely related to the two comments the claimant was successful on or related to her pre-existing condition/issues or issues arising from being put on an informal coaching plan.

73. Mr Searle submitted that the claim for loss of earnings must fail given the tribunal's findings at paragraph 133. Further, the respondent suggested the medical evidence demonstrated a high probability that the claimant would have been absent in any event. Mr Searle submitted that there was no evidence of a link between the acts of discrimination and the loss of earnings. Mr Searle accepted in response to a question from the tribunal, that the tribunal could potentially order 30% of the loss of earnings, reading across from Dr Pilgrim's report. However, his reservation was the length of time between the second comment in January 2020 and the claimant going on sick leave and the number of other issues going on at the time.

74. The respondent submitted that there should be no compensation for loss of bonus since the claimant would have been absent in any event.

75. In relation to ACAS uplift, the respondent accepted that the appeal outcome letter took far too long. The respondent contended for an uplift figure of 10% given there had been genuine of efforts by the respondent to address the claimant's grievance.

76. The respondent accepted that interest would be due on any award.

Law

77. Section 124(6) of the Equality Act 2010 provides that the amount of compensation which may be awarded for a breach of the Equality Act in relation to work is "the amount which could be awarded by a county court…under section 119". Section 119 provides that the county court has power to grant any remedy which could be granted by the High Court in proceedings in tort and section 119(4) provides: "an award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis)". The aim of damages in tort is to put the claimant in the position they would have been in, had the act of discrimination not occurred. Compensation (with the possible exception of exemplary damages which may be relevant in rare cases) is to compensate for loss caused by the act of discrimination. There is no limit on compensation for discrimination.

78. In relation to compensation for injury to feeling, we have regard to the guidelines in **Vento v Chief Constable of West Yorkshire Police (no.2)** [2003] IRLR 102. We note, in particular, the guidance that awards are compensatory and not punitive. **Vento** sets out the bands that we must consider. The Presidents of the Employment Tribunals in England and Wales and Scotland issue joint guidance on the current applicable **Vento** bands, which has been updated on a number of occasions. The guidance provides that, in relation to cases presented after 6 April 2020, the **Vento** bands are as follows: lower band £900 to £9000 (less serious cases); middle band £9000 - £27,000 (cases that do not merit an award in the upper band); and upper band £27,000 - £45,000 (the most serious cases). In the most exceptional cases, the award can exceed £42,900.

79. Tribunals may make an award of aggravated damages in an appropriate case. Aggravated damages are still to compensate the claimant for injury suffered because of the act of discrimination rather than damages to penalize the respondent for its misconduct. The EAT in **Commissioner of Police of the Metropolis v Shaw** UKEAT/0125/11/ZT and also in **HM Land Registry v McGlue** UKEAT/0435/11 summarised the three gateway conditions engaging the power to make an award of aggravated damages which are: a) the manner in which the discrimination was committed; b) the motive of the discriminator; and c) the discriminator's subsequent conduct. The factors which may lead tribunal to make an award of aggravated damages could be factors which lead the tribunal to make a higher award for injury to feelings. Alternatively, a separate award of aggravated damages is a way of awarding full compensation for the additional injury that the surrounding circumstances have caused. Either approach is permissible. Double counting must be avoided; not compensating for the same injury twice.

80. The Tribunal has jurisdiction to award compensation for personal injury arising out of unlawful discrimination: **Sheriff v Klyne Tugs (Lowestoft) Limited** [1999] ICR 1170. The Judicial College issues Guidelines for Assessment of Damages in Personal Injury Cases which includes a chapter on Psychiatric and Psychological Damage. The 16th edition of these Guidelines includes suggested brackets for psychiatric damage generally which include £5,860 to £19,070 for moderate damage.

81. The Tribunal may make separate awards for injury to feelings and for personal injury, but the Tribunal must avoid double counting; not compensating for the same injury under two separate heads of damages.

82. Where there are a number of causes of psychiatric injury, the Tribunal should make a sensible attempt to identify the extent to which the discrimination caused the injury. The EAT, in **Thaine v London School of Economics** [2010] ICR 1422 held that an employer should not have to compensate a claimant for his or her injury in its entirety when the harm for which it was responsible was just one of many causes of the ill health. In so holding, the EAT had regard to obiter guidance on the issue of apportionment in psychiatric ill-health cases given in **Hatton v Sutherland and other cases** 2002 ICR 613, CA. There, Lady Justice Hale suggested (obiter) that where there are multiple causes of psychiatric illness, the court should make a sensible attempt at apportionment between them.

83. This apportionment of injury due to multiple causes is distinct from the principle that the wrongdoer must take the victim as they find them, or the "eggshell skull principle". It is no defence to say that a claimant would not have suffered as they did but for their susceptibility or vulnerability to a psychiatric condition. The respondent will be liable for the whole of the injury if it was caused by the discrimination but the injury was worse than would have been suffered by someone else because the claimant was vulnerable or pre-disposed to psychiatric injury. A discount could be applied to damages, however, on the basis that the claimant would have suffered injury even if the discrimination had not occurred.

84. Section 124(2)(c) EqA provides that a Tribunal may, as one of the remedies for unlawful discrimination, make an appropriate recommendation. Section 124(3) provides that an appropriate recommendation is "a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate."

85. Section 207A Trade Union & Labour Relations (Consolidation) Act 1992 allows the Tribunal to increase any award for discrimination (amongst other awards) by such amount up to 25%, if it considers it just and equitable to so in all the circumstances, where a relevant Code of Practice applies and the employer has failed to comply with the Code in relation to the relevant matter.

86. Interest may be awarded on awards made in discrimination cases in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The interest rate for claims presented on or after 29 July 2013 is 8%.

Conclusions

87. Our task, in relation to compensation, is to calculate the compensation that will, as far as it is possible to do so with money, put the claimant in the position she would have been in, had the acts of discrimination not occurred. We are calculating compensation for the acts of discrimination which we found to have occurred i.e. the two acts of harassment related to race.

88. We have not doubted the truthfulness of the claimant's evidence as to how she was feeling at various times. However, the way that she felt was not solely due to the acts of discrimination. It is clear from the claimant's witness statement and what she told Dr Rastogi and Dr Pilgrim, that she was badly affected by many things at work, not limited to the acts of harassment. In calculating the appropriate amount of compensation, we have to try to identify the loss caused by the discrimination.

89. Prior to the acts of discrimination, the medical reports show that the claimant was already suffering from a mild depressive episode. The claimant's previous history may have made her more vulnerable than someone else might have been to suffering personal injury and/or injury to feelings because of the acts of discrimination. The respondent must, however, take the claimant as it finds her, and we do not discount any compensation because of pre-existing vulnerability.

90. Where there is more than one cause of injury, the Tribunal must make a sensible attempt to identify the extent to which the discrimination caused the injury. We have the assistance of the report of Dr Pilgrim to help us do this. We do not consider that this report is undermined in any way by the claimant's unhappiness about the way Dr Pilgrim conducted the assessment. The report of Dr Okon-Rocha does not undermine the validity of Dr Pilgrim's opinion. Dr Pilgrim's opinion that 30% of the personal injury caused by work events exacerbating existing depression is attributable to the acts of discrimination is, of course, only an opinion. It is not possible to apportion causes of injury with any certainty. However, Dr Pilgrim is expressing an opinion informed by his expertise in this area. We see no good reason not to accept Dr Pilgrim's opinion and award 30% of compensation for injury caused by work events.

<u>Personal injury and special damages relating to personal injury</u>

91. We conclude, based on the evidence of the claimant and the information in the medical reports, that the claimant suffered psychiatric damage as a result of work events at the respondent. She went from having a mild depressive episode due to factors not relating to work with the respondent, to having a depressive episode of a moderate to severe degree of severity. The claimant was off work for about 6 months, from February to August 2020, lost motivation even to get out of bed in the early stages of being off work, and had suicidal thoughts. However, she did return to work in August 2020. She has had some ongoing problems, to which the problems at the respondent have contributed. Based on this, we agree with Ms Aly's submission that the injury falls in the Judicial College moderate category for psychiatric damage. We would place the injury towards the upper end of this category, at £15,000. This is the injury due to all work factors, including many which were not found to be acts of discrimination. As explained above, on the basis of Dr Pilgrim's opinion, we consider it appropriate to award damages for personal injury of 30% of this amount i.e. £4500.

92. The claim for special damages relates to the claim for personal injury. The claimant has incurred costs of therapy and prescription costs for anti-depressants. We consider it appropriate to compensate the claimant for 30% of these costs, on the basis that this is the proportion to be attributed to the acts of discrimination.

93. From the documentary evidence, we have seen that the claimant spent a total of £3600 on therapy in the period March 2020 to October 2022. The claimant had

continued to have therapy after this point and intends to continue for 6 months from the date of the remedy hearing. On the basis that session have not always been weekly, and there is likely to be some reduction in sessions as the claimant comes to the end of therapy, we have concluded the claimant is likely to pay for a further 15 sessions after October 2022. At £40 per session, this would be an additional £600. The total cost of therapy would be £4,200. 30% of this cost is £1260.

94. From the documentary evidence, the claimant spent £259.82 on prescription charges in the period June 2020 to September 2022. The claimant anticipated being on anti-depressants for a further 6 months. The cost of this would be approximately 6 x £10.81 = £64.86. The total cost of medication would be £324.68. 30% of this cost is £97.

95. The claimant claimed for doctor's costs of £1,440. As noted above, she did not explain what this was for and has provided no documentary evidence to show that such medical costs were incurred for treatment for personal injury (see paragraph 39 above). The claimant has not satisfied us that these expenses were incurred wholly or partly because of discrimination and we make no award in respect of these costs.

96. The total of special damages awarded is £1357 (£1260 + £97).

97. We will deal with the issues of an uplift to compensation for failure to comply with the ACAS Code of Practice on Discipline and Grievance and interest later in our conclusions.

Financial loss

98. The claimant claims for loss of earnings when on sick leave in May, June and August 2020 and for the reduction in bonus sustained in June 2021 because of this period of sick leave. She also claims for loss of pension contributions in May, June and August 2020.

99. We conclude that the acts of discrimination were a contributory factor to the claimant going on sick leave. However, these were not the only contributory factor. We conclude that it would be appropriate, and consistent with our approach to personal injury, to award 30% of the amount of financial loss incurred because of being on sick leave.

100. We accept the figures given in the claimant's schedule of loss for salary differential and loss of bonus, totalling £4,180.06. We award compensation of 30% of this amount i.e. £1254.

101. We accept that the claimant suffered a financial loss because employer's pension contributions were reduced in May, June and August 2020 by £241.04 in total. We award compensation of 30% of this amount i.e. £72.

102. We do not award anything for a reduction in employee's pension contributions. Employee's pension contributions would have come out of the claimant's pay for May, June and August 2020. We have made an award in relation to the shortfall in pay. If we made an award for a reduction in employee's pension

contributions, the claimant would be awarded compensation twice for the same loss.

Injury to feelings and aggravated damages

103. We have found it difficult to isolate the injury suffered by the claimant as a result of the acts of harassment from hurt feelings suffered as a result of other things happening at work, including, but not limited to, the proposal to put the claimant on a coaching plan. We have recorded the evidence given by the claimant in relation to these particular incidents at paragraphs 18 and 19 above. We have also noted that the claimant made particular mention of these incidents when asked by Dr Pilgrim what she considered to be the most stressful incidents when she was working with the respondent (see paragraph 48 above). She also referred to other matters, including how she was treated like this infantile person, and, in particular, how she was treated when she reported Craig Warner. The two comments found to be harassment could not be regarded as being comments treating the claimant as infantile, so the reference to treating her as an infantile person must refer to other treatment by Craig Warner, not found to be discrimination. We conclude that the injury suffered by the claimant as a result of the acts of harassment had a continuing effect on the claimant, demonstrated by her distress as she recounted these in the hearing on liability. The acts of harassment contributed to the claimant's poor mental health, such that the claimant went on sick leave for approximately six months, and had suicidal thoughts. As we concluded when dealing with personal injury, the acts contributed to the exacerbation of her depressive episode to the extent of 30%.

104. Both comments found to be harassment seriously injured the claimant's feelings.

105. In attempting to arrive at an appropriate award of injury to feelings, we have approached this in two ways.

106. We have considered first what we would award for the injury suffered as result of the two incidents viewed in isolation. The injury was serious but did not cause the claimant, at that point, to cease to be able to work. It did, however, have a continuing impact. The visa comment was particularly hurtful since the claimant was already anxious about the visa situation and concerned about the impact on her life if the visa was not renewed. The comment about black people and swimming was even more hurtful, since it struck at the claimant's class status and because of the history of segregation in the US. We consider that the lower Vento band is the appropriate band of compensation, but that compensation should be towards the top of that band, which is £9000.

107. If we considered the injury to feelings suffered by the claimant because of all work events (including non-discriminatory acts), we would have considered the injury to fall towards the top of the middle Vento band which is £27,000, but would award 30% of that, which is £8,100.

108. Both approaches would lead us to make an award in the range of £8100 to £9000, leaving aside the matter of avoiding double counting with the personal injury award and aggravated damages.

109. We conclude that this would be an appropriate case to recognise additional injury caused because of the respondent's conduct after the acts of harassment. The claimant's feelings and mental health were further adversely affected by the very poor way in which the respondent dealt with the parts of the grievance relating to the comments made by Craig Warner. We refer to the parts of our liability decision which deal with the grievance and appeal (see LD 62 and 78). We have recorded the additional injury suffered by the claimant at the outcome of the grievance and its appeal in paragraphs 23, 27 and 30 above. We conclude that it would be appropriate to recognise the additional suffering caused to the claimant by the poor way the respondent dealt with these parts of the grievance and grievance appeal by awarding aggravated damages of £1000.

110. There is an overlap between injury compensated for as injury to feelings, aggravated damages and personal injury. Taking account of this, we consider that the injury to feelings award, including the award for aggravated damages, should be reduced to £8500. We consider that a combined award of £13,000 for injury to feelings (including aggravated damages) and personal injury is an appropriate amount of compensation for the injury to feelings and health sustained by the claimant as a result of the acts of discrimination and exacerbated by the respondent's deficiencies in dealing with the grievance and appeal relating to the comments found by the Tribunal to be harassment.

ACAS uplift

111. We conclude, and the respondent conceded, that the respondent breached the ACAS Code of Practice on Discipline and Grievance by not providing a timely outcome to the appeal. Paragraph 45 of the Code requires that the outcome of a grievance appeal should be communicated to the employee in writing without unreasonable delay. We were not persuaded by Ms Aly's submissions that there was any other breach of the Code. We do not agree that paragraph 43 of the Code was broken. Ms Taneja had not previously been involved in the case.

112. The respondent complied in other respects with the requirements of the Code. We agree with Mr Searle's suggestion that a 10% uplift to compensation would be appropriate in these circumstances.

Interest

113. There is no reason not to award interest at the rate of 8% on compensation awarded. On actual financial loss, for the purposes of which we include the special damages for personal injury, we consider that interest should run from the midpoint between the second act of discrimination – 29 January 2020 – and the calculation date – 6 January 2022. This is a period of 537 days. On the award of damages for injury to feelings and personal injury, interest is awarded from the date of the second act of discrimination until the calculation date, which is a period of 1074 days.

Recommendation

114. The Tribunal has power to make a recommendation that the respondent takes specified steps for the purpose of obviating or reducing the adverse effect of the discrimination on the complainant. We consider that an apology from someone in

a senior position at the respondent, not just from counsel with the agreement of those instructing him, would go some way to alleviating the claimant's hurt feelings. We, therefore, make a recommendation in the terms set out in our judgment.

Calculation of compensation with uplift

Financial losses

Salary differential	1254	
Employer pension contributions	72	
Special damages	1357	
Total financial loss before uplift	2683	
ACAS uplift of 10%	268	
Total financial loss after uplift		2,951

Injury to feelings and personal injury

Injury to feelings including aggravated damages	8500	
Personal injury	4500	
Total before uplift	13,000	
ACAS uplift of 10%	1,300	
Total after uplift		14,300
Total compensation excluding interest		£17,251

Calculation of interest

Interest on financial losses

537/365 x 8/100 x 2951 =	347

Interest on injury to feelings and personal injury

1074/365 x 8/100 x 14,300 =	3366
Total interest	£3713

Employment Judge Slater
Date: 9 January 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.10 January 2023

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990
ARTICLE 12

Case number: **2406301/2020**

Name of case: **Ms F Alexandre** v **Openreach Limited**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 10 January 2023

the calculation day in this case is: 11 January 2023

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.