EMPLOYMENT TRIBUNALS

Claimant: Ms J Rajput

Respondent: Commerzbank AG

Heard at: London Central
(by Cloud Video Platform)

On: 16 and 17 January 2023

Before: Employment Judge Joffe
Mr R Baber
Mr D Kendall

Appearances
For the claimant: Ms E Banton, counsel
For the respondent: Mr G Mansfield, King's Counsel

RESERVED JUDGMENT ON REMEDY

1. There was a 60% chance the claimant would have been appointed to the Head of Markets role had she not been subjected to unlawful discrimination.

2. Had she been appointed to the role of Head of Markets she would have been appointed around 1 October 2015.

3. Had she been appointed to the Head of Markets role, the claimant would have had the same salary and bonus as Mr Dyos and the pension arrangements she had accrued due to having been employed by the respondent in excess of two years.

4. The claimant is awarded £201,650. 55 for loss of salary, bonus and pension payments.

5. The claimant is awarded £25,000 for injury to feelings.

6. No award is made for aggravated damages.

7. No award is made for the costs of training or psychotherapy.

8. Interest is awarded on the losses at the Judgments Act rate in the sums of:

   a) On financial losses: £60,071.70;
   b) On injury to feelings: £13,962.50.

9. The total sum awarded to the claimant is £300,684.75.

REASONS

Claims and issues

1. The parties had agreed a list of remedy issues. The respondent had been maintaining that the claimant had failed to mitigate her loss but withdrew that argument after obtaining the report of an employment consultant.
   There are six findings in respect of which the Tribunal must determine remedy. They are:

   Tayler Tribunal

   1.1. The Claimant was discouraged from attending the quarterly Review Meeting because of assumptions made about what a woman should do while on maternity leave (Direct Maternity Discrimination); and

   1.2. Substantial parts of the Claimant's role were transferred to Ms Burch (Direct Maternity Discrimination).

   Joffe Tribunal

   1.3. Kevin Whittern was treated as the senior member of the team despite the claimant's position as Deputy Head of Markets Compliance (Direct Sex Discrimination);

   1.4. Kevin Whittern was appointed as point person / acting Head of Markets Compliance despite the Claimant's position as Deputy Head of Markets Compliance (Direct Sex Discrimination);

   1.5. the Claimant's application for the Head of Markets Compliance role was not fairly considered by Stephan Niermann (Direct Sex Discrimination); and

   1.6. there were repeated denials by Stephan Niermann to the claimant that Kevin Whittern had been elevated to point person / acting Head of Markets Compliance (Harassment).

B. FINANCIAL LOSS – HEAD OF MARKETS ROLE

2. What financial losses flow from the Respondent's discriminatory failure to fairly consider the Claimant for the Head of Markets Compliance role?

2.1. What is the percentage chance that the Claimant would have been promoted to the Head of Markets role had her application been fairly considered by Stephan Niermann absent sex discrimination?

2.2. Had the Claimant been successful in her application, on what date would the promotion have taken effect ("the start date")?

2.3. The Claimant claims losses to 31 March 2020 ("the end date"). The Respondent accepts that date, subject to the question of mitigation.

2.4. Had the Claimant been successful in her application, how much more would she have earned (by way of salary, bonus and pension) in the Head of Markets Compliance role than she earned in her actual role?

C. INJURY TO FEELINGS

4. What award should be made in respect of injury to feelings - what is the appropriate Vento band?

D. AGGRAVATED DAMAGES

5. Should an award of aggravated damages be made? If so, what is the appropriate sum?

E. TRAINING/MENTORING/PSYCHOTHERAPY

6. Is the Claimant entitled to pursue these losses, given that they have been pleaded as part of her second claim?

7. Do the losses claimed flow from the acts found to be unlawful?

8. Were the claimed sums incurred?

9. Were the costs reasonably incurred and reasonable in amount?

F. INTEREST

10. Should the Tribunal award interest on any sums awarded pursuant to r.2 Employment Tribunals (Interests on Awards in Discrimination Cases) Regs 1996?

11. If so, for what period or periods? Would awarding interest in accordance with r.6(1)-(2) cause a serious injustice? If so, for what alternative period or periods should interest be awarded?

G. TAX

12. The sums in the Schedule of Loss are claimed gross of tax. Before the Tribunal finalises any award, net figures will need to be calculated and the total figure will need to be grossed up in accordance with the principles in Shove v Downs Surgical plc [1984] ICR 532.

Findings of fact

The hearing

1. We were provided with the following documents:
   - A bundle of documents running to 1847 pages electronically. We were in fact referred to very few of these documents;
   - A witness statement bundle which included the statements from the liability hearing(s) and from the remedy hearing before the Tayler Tribunal, statements from the original remedy hearing and new statements from the claimant relating to remedy.

2. We read the claimant's witness statements and she confirmed the truth of the statements. The balance of the hearing time was taken up with Tribunal reading and oral submissions from the parties.

3. We asked the parties to revise their schedules so that we could see what was agreed and not agreed in terms of calculations and the parties provided further drafts after the oral submissions were concluded. After we had nearly finalised this Judgment, it appeared that there were some unresolved matters and we referred the schedules back to the parties, who were able to agree the underlying figures for loss of salary, pension and bonus to which we would apply our findings as to percentage chance of appointment. We are grateful for their ongoing assistance.

Facts in the claim

4. These Reasons should be read in conjunction with the Reasons for the liability judgment.

Evidence as to salary and bonus: Mr Dyos and the claimant

5. At the time of the appointment to the Head of Markets role, the claimant's annual salary was £97,251.

6. Her yearly bonus was a percentage of a figure up to £40,000 (her 'target').

7. We saw an internal email dated 9 December 2015 which put forward a proposal for Mr Dyos' salary package as Head of Markets. It set out various information considered relevant to that calculation. Mr Dyos' current salary at his role external to the respondent was £135,000. His last bonus in that employment was £22,500. His proposed salary and target bonus were £160,000 and £40,000 respectively.

8. The email set out the McLagan data, which we understood to be data about market rates for similar roles. They ranged from a lower quartile rate of £125,000 to an upper quartile rate of £154,800.

9. Three internal comparators were also set out. These were:

   Previous incumbent, Mr Jooma: salary £113,500, target bonus £51,500

   Mr Walsh: salary £136000, target bonus £70,000

   Mr D Keay: salary £145,000, target bonus £50,000.

10. The rationale provided in the email for Mr Dyos' salary (which was significantly higher than that paid to Mr Jooma) is that it was necessary to secure him in a 'tight' market to avoid having to run a further lengthy recruitment process.

11. Mr Dyos was appointed at the salary and target bonus contended for in this email.

Evidence as to the respondent's pension scheme

12. We saw some evidence about how pension entitlement was calculated for the respondent's employees.

13. The respondent's core contribution to pension was 10% of salary up to £100,000 annual salary. Over £100,00 the bank would pay a further 10% up to £150,000.

14. After two years' service, an employee could decide to make contributions to the pension of up to an extra 4% of salary. These would be matched by the bank, subject to a salary cap of £150,000.

Evidence on injury to feelings

15. The claimant told the Tribunal that the discrimination had caused her distress during the period when she had just given birth to her daughter and during the child's early years. The effects on her career at a period when she was

vulnerable due to having just given birth were very upsetting. She said that she had had what she described as a breakdown on 12 January 2018 although we did not hear more about that. She described the treatment as destroying her sense of confidence and self esteem.

16. We saw some medical evidence:

- A letter to the respondent from the claimant's GP dated 5 February 2018. This reported on the difficult relationship with a junior colleague causing the claimant 'significant anxiety and stress' as well as the claimant's feeling about having been overlooked for promotion. The colleague, Ms Burch, was the colleague the Tayler Tribunal found had largely taken over the claimant's role during her maternity leave.
- A letter from the claimant's GP to a consultant dated 19 February 2019 describing the claimant as having a mixed picture of low mood and anxiety triggered by s stressful situation at work. The claimant had recently started taking antidepressants and the GP recommended CBT.
- The claimant's GP notes. On 23 July 2018, the claimant was noted to have 'ongoing issues at work' and a lack of enjoyment of food. On 15 March 2019 she was said to have had ongoing stress at work for over a year. She was given a repeat prescription of antidepressants at a higher dosage. She had had counselling the previous year for three to four months but found it difficult to fit in.
- There were records which showed the claimant's worsening mental health in 2019 and 2020 onwards which include admissions to the Priory Hospital in September and October 2020 and August 2021. We are conscious that the claimant is claiming personal injury damages in her second set of proceedings arising from matters which occurred after the acts of discrimination we have to consider in these claims.

Medical evidence relevant to the claim for psychotherapy costs

17. As we have observed, there is no personal injury claim in these proceedings.

18. We saw a 'to whom it may concern' letter dated 28 October 2022 from a clinical psychotherapist, Ms K Dombrowicz. This said that the claimant had been under the writer's care from April 2021 with a diagnosis of ongoing depressive episode secondary to a psychosocial episode, generalised anxiety disorder, trauma and PTSD. The treatment had terminated in August 2022 as the claimant's insurance policy cover had run out. Ms Dombrowicz said that the claimant had continued to struggle with the symptoms of these disorders . She recommended that the claimant have a further 26 sessions at £250 per session.

Evidence relevant to the claim for training costs

19. We saw some brochures for the courses the claimant wished to attend. These were provided by the London Business School. One was called Women in Leadership. It involved about six days of teaching in person and remotely. We were not able to derive any good sense from the brochure of what exactly the claimant would learn. This course the claimant said costs £10,500. There was a brochure for a course called High Performance Skills for Leaders which would take place over a week and cost £8,900. The claimant said these courses were recommended to her after a discussion with some of the course providers at the London Business School.

20. There was no detailed information about the third course that the claimant wished to pursue and which she said had been recommended to her, the Accelerated Development Programme. That course costs £19,500.

Law

Compensation for Discrimination

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

Compensation for Financial Loss

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

Injury to feelings

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

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

25. As set out in Prison Service v Johnson [1997] IRLR 162:
- Awards should be compensatory and just to both parties;
- Awards should not be too low as this would diminish respect for the anti-discrimination legislation;

- Awards should bear some broad general similarity to the range of awards in personal injury cases;
- In exercising their discretion tribunals should remind themselves of the value in everyday life of the sum they had in mind by reference to purchasing power or earnings and should bear in mind need for public respect for the level of awards made.

26. Where there are separate claims giving rise to injury to feelings, the Tribunal should stand back and look at the overall magnitude of the global sum to ensure it is proportionate and that there is no double counting: Al Jumard v Clywd Leisure Ltd [2008] IRLR 345.

27. In determining the amount of the award, we are required to follow the *Vento* guidelines in place when the claim was presented. The bands were:

Lower band: £800 - £8400

Middle Band: £8400 - £25,200

Upper band £25,200 - £42,000

28. We can also gain some assistance from quantum reports in cases considered by other tribunals.

Aggravated damages

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

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

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

exhaustive definition of the kind of behaviour which may justify an award of aggravated damages. As the Law Commission makes clear an award can be made in the case of any exceptional (or contumelious) conduct which has the effect of seriously increasing the claimant's distress.

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

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

…

23 How to fix the amount of aggravated damages. As Mummery LJ said in Vento v Chief Constable of West Yorkshire Police [2003] ICR 318,331—332, paras 50—51,'translating hurt feelings into hard currency is bound to be an artificial exercise' Quoting from a decision of the Supreme Court of Canada, he said: 'The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. 'Since there is no sure measure for assessing injury to feelings, choosing the 'right' figure within that range cannot be a nicely calibrated exercise'. Those observations apply equally to the assessment of aggravated damages, inevitably so since, as we have sought to show, they are simply a particular aspect of the compensation awarded for injury to feelings; but the artificiality of the exercise is further increased by the difficulty, both conceptual and evidential, of distinguishing between the injury caused by the discriminatory act itself and the injury attributable to the aggravating elements. Because of that artificiality, the dividing line between the award for injury to feelings on the one hand and the award of aggravated damages on the other will always be very blurred, and tribunals must beware of the risk of unwittingly compensating claimants under both heads for what is in fact the same loss. The risk of double-counting of this kind was emphasised by

Mummery LJ in Vento; but the fact that his warnings not always heeded is illustrated by Fletcher. The ultimate question must be not so much whether the respective awards considered in isolation are acceptable but whether the overall award is proportionate to the totality of the suffering caused to the claimant.

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

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

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

Interest

31. Interest is payable on any compensation we award for discrimination pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (SI 1996/2803). It is ordinarily calculated in accordance with those regulations, although the Tribunal does have a degree of discretion with regard to the ability to calculate interest by reference to periods other than those set out in the regulations where serious injustice would otherwise be caused. For injury to feelings awards, the interest is calculated from the date of discrimination. For other awards, interest is calculated from the midpoint

between the date of discrimination and the date when compensation is calculated. The current applicable rate of interest is 8% per annum.

Tax

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

Submissions

33. We received written submissions and detailed oral submissions from both parties and we have considered these with care. We refer to them in our Conclusions only insofar as is necessary to explain our reasoning.

Conclusions

Issue: What is the percentage chance that the Claimant would have been promoted to the Head of Markets role had her application been fairly considered by Stephan Niermann absent sex discrimination?

34. The question for the Tribunal was what were the claimant's chances of being appointed to the Head of Markets role had she been fairly considered for it. The claimant was arguing that she had an 80% chance and the respondent that she had a 25% chance of appointment.

35. We had to carefully consider the findings of fact we made at the liability stage and the evidence we heard. We bore in mind also that the Tayler Tribunal had rejected the claimant's claim that she should automatically have been appointed to the Head of Market role.

36. The following paragraphs from the Reasons for the liability judgment were particularly relevant to our deliberations:
70. Between 12 and 31 May 2015, the head of markets role was advertised on the respondent's internal job board.

72. The requirements for the role were said to be:

- University degree or similar or adequate bank professional training

- Proven experience in Compliance and the Finance Industry

- Detailed knowledge and understanding of the local regulatory framework

- Understanding of regulatory frameworks within different jurisdictions (especially German) is an asset

- Broad knowledge and understanding of investment banking products

- Experience in dealing with regulators, an existing network is an asset

- Strong interpersonal and communication skills

- Experience of managing a team

73. Dr Niermann was leading the recruitment process. He said that the role was advertised internally and externally at what appeared to be the same time. He said the key criteria he was looking for from candidates were:

- strong leadership and management experience;

Sufficient experience across the different business areas to effectively manage the team.

74. Dr Niermann said that certainly by the time of the first round of interviews, he had come to the view that leadership and management skills were the most important criterion. This was because the team was divided and did not work well together. In part this appears to have been a function of the way the team was structured and organised and in part his perception that there were tensions between individuals in the team.

37. Elsewhere in the Reasons we made findings about Dr Niermann's perception about tensions in the team:

190. Dr Niermann also described Mr Whittern as 'innocuous' and the claimant and Ms von Pickartz as very divisive personalities. He said that was another reason why he appointed Mr Whittern. Did we accept that Dr Niermann genuinely believed the claimant was contributing to a toxic atmosphere in the team, that that view was untainted by sex and that it was the real reason for this and other decisions?

191. Part of this perception of Dr Niermann was said to have arisen from the claimant's relationship with Mr Jooma, as to which he seems to have primarily been aware of the appraisal issue. We note that Dr Niermann appears to have concluded that the issue with Mr Jooma arose from fault on the claimant's side. He had not investigated the issue at all. Similarly Ms von Pickartz is seen to be a problem, in circumstances where there was no investigation of the matters she had raised relating to Mr Jooma.

192. In isolation, we might have concluded that Dr Niermann had a tendency to believe the more senior person to be in the right (in this case Mr Jooma), but, taken together with other matters, we concluded that we were

not satisfied that the claimant and Ms von Pickartz's sex had not played a role in Dr Niermann's perception that they were the problem and not Mr Jooma.

193. These matters included the fact that once Mr Jooma was out of the way, even on Mr Whittern's evidence, there was not an ongoing issue in the team until Dr Niermann appointed Mr Whittern as point person. Also of significance to us was what we found to be the incorrect assertion by Dr Niermann in evidence that Ms von Pickartz and the claimant were lobbying Dr Niermann daily for the head of markets role.

…

207. It was clear to us that one of the reasons Dr Niermann looked externally was the perception about there being unfortunate politics within the team including a perception of the claimant as being a divisive personality. As time wore on, we concluded that there were tensions in the team created by the appointment of Mr Whittern as acting head and the obfuscation around that appointment. That appointment we have found to have been discriminatory.

208. The perception of the claimant as 'divisive' was created in part we have concluded because of a perception about the difficulties with Mr Jooma being her fault, which we have already concluded was tainted by sex.

209. The structural problems in the team were not created by the claimant or any other internal candidate and there was no evidence from Dr Niermann as to why an internal candidate could not have addressed those issues.

38. We did not accept that, after the departure of Mr Jooma, there was evidence of toxicity or division in the team other than that caused by Dr Niermann's discriminatory treatment of the claimant.

39. As to the process followed with the claimant and other internal candidates:

On 7 July 2015, the claimant had her interview with Dr Niermann for the head of markets role. No notes of the interview were produced nor was an interview assessment form. Asked about these documents, Dr Niermann said, 'I can't recall that now' , 'I can't recall and can't exclude them either'. We concluded that no notes were taken and the designated form was not used for this or any other interviews held by Dr Niermann for this position.

80. Dr Niermann said that in terms of how decisions were made about the internal candidates, he had discussions with Mr D Rock, who also interviewed the internal candidates, and they came to conclusions in those discussions.

81. In the absence of notes, it was not clear to us how Dr Niermann would have remembered much about the interviews he had held by the time he spoke with Mr Rock some months later.

82. The claimant said her interview with Dr Niermann lasted ten to fifteen minutes; Dr Niermann could not recall how long the interview as and we accepted the claimant's evidence.

83. Dr Niermann did not carry out any sort of assessment against criteria or any scoring. Although he said that the respondent's policies had been followed and there was close coordination with HR, it was clear he had not followed the respondent's recruitment policy, in particular in relation to the use of the form, which would have guided him to carry out a competency based assessment

40. The views of Mr Walsh, who interviewed and selected the external candidate appointed to the Head of Markets role, were relevant:

115. Mr Walsh had a discussion with Dr Niermann about the appointment to the head of markets role. Dr Niermann told Mr Walsh that all three of the vice presidents in the team had applied for the role. Mr Walsh had not been asked to interview any of the internal candidates but he gave Dr Niermann his views He said that he thought that the claimant was the best candidate of the three. The claimant communicated with him in a clear and direct style and she had a good grasp of compliance issues generally. He did not feel that Mr Whittern communicated as well and found him slightly nervous; he felt that Ms von Pickartz was a divisive personality. Dr Niermann told Mr Walsh that he did not think any of the three internal candidates was suitable.

116. Mr Walsh confirmed in cross examination that he felt that the claimant was appointable to the head of markets role and that if Dr Niermann had agreed with that view the claimant would have been appointed. However, he also said that Mr Dyos had more management experience than the claimant and was the 'the more suitable person to immediately take charge of the team and assert the 'London view' in a confident and competent way with senior external clients.'

41. We concluded that Mr Walsh would have had a good opportunity to assess the claimant's suitability. He had been in post for the entirety of the claimant's tenure with the respondent and had had good opportunities for observing her work. Dr Niermann himself clearly rated Mr Walsh's judgement since he ultimately accepted his recommendation for an external appointee to the Head of Markets role. Although Mr Walsh did not as a matter of fact assess the internal candidates, he did assess the external candidates for the role. It seemed likely to the Tribunal that had Dr Niermann been seriously and fairly considering the internal candidate, Mr Walsh would have been involved in assessing the internal candidates. The best evidence we have as to what impression he would have formed had he interviewed them was the impression he had of their performance on the job, which he shared with Dr Niermann and the Tribunal.

42. The respondent's own policies encouraged internal recruitment where possible. We concluded, that absent sex discrimination, Dr Niermann would

not have looked externally until the internal candidates had been properly considered. A fair process would have involved assessing each against the competences required for the role at interviews where performance was properly noted on the respondent's interview assessment forms. That process would likely have shown that the claimant (and possibly either or both of the other two candidates) were appointable, ie the chance that the claimant would not have been found to be appointable was so small we can properly disregard it. In those circumstances, and removing factors tainted by sex discrimination (such as the alleged toxicity in the team), we concluded that the chance that the respondent would have looked at external candidates is so small we can properly disregard it. We therefore did not have to consider what would have happened had the claimant been assessed against the external candidates.

43. We concluded, that had the internal candidates been considered prior to any external process commencing, the claimant would have been the favourite. The claimant was the longest serving of the three and she had been Mr Jooma's deputy. Mr Walsh thought most highly of her.

44. Mr Whittern was not favoured by either Mr Rock or Mr Walsh. Dr Niermann suggested to the Tribunal that Mr Whittern had more management experience than the other candidates but there was no evidence he had properly assessed management experience at the time. His assertions about management experience and its relative importance seemed to the Tribunal to be evidence essentially designed to justify the unfair selection process which we found to be discriminatory rather than evidence on which we could rely in looking at what would have happened had there been no discrimination.

45. We considered that there was some prospect that Ms von Pickartz would have been appointed. The claimant had described her in evidence as 'equally qualified' for the role. The talent grid assessment on Ms von Pickartz had rated Ms von Pickartz as slightly higher than the claimant. We did not feel able to rely on the talent grid for 2016 as we could not be at all confident it was not affected by the discriminatory acts we found to have occurred. Both the claimant and Ms von Pickartz were considered to be good candidates by Mr Rock.

46. We considered that the claimant's chances of being appointed to the Head of Markets role in the absence of sex discrimination were in the region of 60%. There was a 40% chance pf one of the other two internal candidates being appointed, with Ms von Pickartz more likely than Mr Whittern.

Issue: Had the Claimant been successful in her application, on what date would the promotion have taken effect ("the start date")?

47. The respondent suggested that the claimant would have been appointed to the role of Head of Markets, had she been appointed, from 6 November 2015, the date Mr Rock interviewed Mr Dyos. The reasoning was that the claimant was interviewed by Mr Rock in early October but external candidates were already being considered by that point and the respondent would not have halted those interviewed.

48. We have found that, absent discrimination, the respondent would not have progressed to considered the external candidates (or that the chance of that happening is so small that it can properly be disregarded) so we have to consider the situation on the basis of assessment of the internal candidates only.

49. The claimant was arguing for a date of 1 July 2015 but that date would have allowed almost no time for a fair process to have been conducted in respect of the internal candidates.

50. The claimant applied for the role in late June 2015. We have to consider what would have happened had there been fair interviews for all internal candidates which would have involved Dr Niermann and Mr Rock and/or Mr Walsh as well as someone from HR. Although in the circumstances which happened Mr Rock did not see the claimant until October 2015, those circumstances were that the respondent had already been looking at external candidates. Had Dr Niermann been seriously considering the internal candidates, we could see no reason why it would have taken so long for Mr Rock to interview them.

51. Allowing for two to three interviews to take place for all three internal candidates and the effect of the summer holiday period, our best estimate of when the decision would have been made, bearing in mind the various things which would have needed to happen to complete the process, was that it would have been taken in the course of September 2015 with an appointment date of 1 October 2015.

Issue Had the Claimant been successful in her application, how much more would she have earned (by way of salary, bonus and pension) in the Head of Markets Compliance role than she earned in her actual role?

52. The claimant's approach was to say that she would have been employed on the same salary as Mr Dyos but have been entitled to a more favourable bonus. The respondent argued that the claimant would have been on a similar but not a better package than that of Mr Dyos and for convenience they had used Mr Dyos' figures for salary and bonus.

53. The claimant said as to bonus that she had been entitled to a percentage of £40,000 in her existing role. This she said would have increased on promotion, and the figure she said it would have increased to was £57,000, which was the average of the target bonuses for L3 comparators set out in the 9 December 2015 email.

54. The respondent said in essence that its figures were based on the claimant receiving a comparable package to Mr Dyos. In fact it was unlikely that her basic salary would have been as high as £160,000, which would have been a significant increase on her own salary and that paid to Mr Jooma and would have been higher than those of the comparator employees. The 9 December 2015 email was evidence that the respondent had felt the need to offer a higher salary to secure Mr Dyos. That would not have been a factor in respect of an internal employee seeking a promotion. Looking at the comparators, it could be seen that the overall packages were comparable, with different weightings as between salary and bonus.

55. We accepted the package approach was appropriate. We considered that the claimant would have been on a similar package to that of Mr Dyos. We could see no reason why she would have been on a higher overall package than Mr Dyos or the L3 comparators. The respondent's approach of weighting the package as Mr Dyos' was, more towards salary than bonus, in fact worked in the claimant's favour because more of the package was certain.

56. The claimant accepted that the appropriate way to work out bonus payments was to look at the percentage of target achieved by Mr Dyos in each relevant year. Because we have concluded that the right approach to the target bonus is to assume the same target bonus as Mr Dyos had, the result is that we assess compensation on the basis that the claimant would have had the same bonus as Mr Dyos received in each relevant year.

57. The situation in respect of pension seemed to us to be different. In the email justifying the offer made to Mr Dyos, no reference was made as to the pension implications of each package. There was no suggestion, for example, that Mr Dyos should receive more salary and bonus than someone who had qualified for increased pension provision because of their longer service in the bank. The claimant would not of course have lost her entitlement to have pension benefits based on the more favourable options available to employees with more than two years' service. The respondent's argument was in effect that she should be credited with Mr Dyos' pension payments because she would have received a similar package to him, inclusive of pension entitlement.

58. We concluded that we should make an award based on the claimant's accrued entitlements to pension as applied to a salary and bonus package equivalent to that of Mr Dyos. There was no evidence that we could see to suggest that the respondent would have taken into account the claimant's pension position in determining her salary and target bonus had she been appointed to the Head of Markets role.

Issue: What award should be made in respect of injury to feelings - what is the appropriate Vento band?

59. We have to be very careful in this case to avoid double counting. The claimant's second set of proceedings, which have yet to be determined, concern claims from 2018 onwards culminating in the claimant's dismissal. It is clear that these events, whether unlawful or not, were significantly distressing to the claimant and that her mental health deteriorated during this latter period. Personal injury damages are claimed in those proceedings but not in these.

60. We therefore have to undertake the difficult task of assessing the extent to which it was the undoubtedly serious matters that we and the Tayler Tribunal have found proven which have had an ongoing and serious effect on the claimant as opposed to subsequent matters or the contemporaneous matters which were not found to amount to unlawful discrimination

61. We had regard in particular to the following features:

- The fact that the matters we found represented a very significant setback for the claimant in her career;
- The very significant detriment to a woman newly back from maternity leave of finding that much of her role had been handed over to a more junior employee and not returned to her;
- The compounding of the claimant's distress caused by the denials by Dr Niermann that Mr Whittern had been advantaged, which she described as 'gaslighting'.

62. The claimant said that the appropriate figure was at the top end of the top band of *Vento*. The respondent said that it was towards the top of the middle band.

63. We asked the parties to make any representation they wished on the quantum reports for injury to feelings for sex and maternity discrimination in *Harvey* and we sense checked our own impressions against those reports.

64. Awards in the top band tended to be made where there was significant ongoing psychological distress. In a number of the cases the discrimination had effectively been career-ending. Awards in the upper reaches of the middle band tended to be made where, as here, discrimination had gone on for a sustained period of time and had serious effects but not such far-reaching and devastating consequences as in cases in the upper band. We considered that the serious effects on the claimant both in relation to her career and her personal life, particularly as a new mother, put this firmly at the top of the middle band but the matters before us on their own did not take it into the upper band.

65. We concluded that the appropriate award for injury to feelings was £25,000.

Issue: Should an award of aggravated damages be made? If so, what is the appropriate sum?

66. We considered various features of the conduct of proceedings which the claimant said were aggravating, looking at the various types of aggravating feature set out in Shaw.

67. Were the acts of discrimination themselves committed in a 'high-handed, malicious, insulting or oppressive way'? Neither we nor the Tayler Tribunal made any findings which expressly suggested that this was the case and nor did we or the Tayler Tribunal find that the motive was 'evidently based on prejudice or animosity' or was 'spiteful, vindictive or intended to wound'.

68. Ms Banton's submissions under this head focused on the respondent's conduct of the proceedings and we considered carefully the various matters she raised.

69. She pointed to the fact that the respondent had applied to strike out the claimant's claims and for deposit orders. Some of the claims were withdrawn after those applications and an application for costs was made by the claimant and refused. That suggests that the Judge at that preliminary hearing did not consider that the application had been unreasonable in the required sense.

70. It was submitted by Ms Banton that Dr Niermann had been misleading at the hearing in front of us and that the respondent had continued to defend the claims in the face of contemporaneous documents which contradicted the respondent's case.

71. The situation was that the respondent had been successful on a number of grounds of appeal and the matter had been remitted to the Employment Tribunal.

72. Dr Niermann had explanations for discrepancies between his evidence and the documentary evidence. The Tribunal ultimately rejected those explanations but the case was not unarguable and we concluded it was not an aggravating feature that the respondent continued to defend the claims after its successful appeal. Something more than pursuing a runnable defence is required; there was nothing akin to the behaviour in Zaiwalla & Co v Walia.

73. The claimant also pointed to the appeal against the Tayler Tribunal's decision and the appeal against this Tribunal's decision on liability as aggravating features. The first appeal was of course successful and it is certainly not for this Tribunal to characterise an as yet undetermined appeal against our Judgment as unreasonable.

74. Ms Banton also pointed to the fact that the respondent had sought to argue that the claimant had failed to mitigate her loss by not seeking an equivalent role to that of Head of Markets outside of the respondent bank.

75. At a case management preliminary hearing, I had given the respondent leave to instruct an employment consultant to provide evidence relevant to this issue. Although I recognised the mitigation argument might have difficulties, it

did not seem to me to be unarguable, particularly in respect of the period after the Tayler Tribunal liability decision. In those circumstances, we cannot conclude that the argument or the commissioning of that report amount to aggravating conduct. The report and answers to questions posed to the employment consultant ultimately did not support the respondent's argument and the mitigation issue was not pursued. That was the reasonable course for the respondent to take in the circumstances and not an aggravating feature.

76. The claimant pointed to reports in the press which picked up aspects of the respondent's defence which criticised the claimant. We could not lay responsibility for the press reports at the respondent's door. If the defence itself was not an aggravating feature, nor was the mere repetition of aspects of the defence in the press.

77. The claimants also pointed to the respondent's failure to offer her an apology but this seemed to us to be simply a side effect of the fact that the claims continued to be defended rather than an aggravating feature.

78. We could find no aggravating features and did not make an award of aggravated damages.

Issues: TRAINING/MENTORING/PSYCHOTHERAPY

6. Is the Claimant entitled to pursue these losses, given that they have been pleaded as part of her second claim?

7. Do the losses claimed flow from the acts found to be unlawful?

8. Were the claimed sums incurred?

9. Were the costs reasonably incurred and reasonable in amount?

Psychotherapy

79. We had no expert evidence which tied the conditions which were said to necessitate this treatment to the acts of discrimination found by this Tribunal and the Tayler Tribunal as opposed to subsequent matters. At least as a matter of chronology, the claimant's mental health seems to have worsened considerably once the further acts of which she complained in the second set of proceedings had begun to occur. The claimant started being treated by a psychotherapist over a year after her dismissal and four to five years after the various acts of discrimination the subject of these proceedings.

80. We were accordingly not satisfied that the need for psychotherapy arose from the acts of discrimination in these proceedings and do not make any award under this head

Training / mentoring

81. The claimant in essence was arguing for sums to be paid for training in lieu of the recommendations made by the Tayler Tribunal for the claimant to receive mentoring and training from the respondent. Those were no longer recommendations which could sensibly be made since the clamant was no longer employed by the respondent.

82. In principle we could not see why in an appropriate case a claimant who has not been able to develop and/or maintain particular skills could not be compensated by training which would remedy the deficit. That is a separate and distinct type of loss from the financial loss sustained as a result of not being appointed to the role in which the experience / skills would have been gained.

83. However, in this case we received no specific evidence from the claimant as to what skills she did not obtain or develop as a result of not being appointed to the Head of Markets role or why the courses she was seeking to pursue would be suitable to address that skills gap. We accept in general terms that a person appointed to a managerial role will gain some managerial experience and skills but we concluded that more was required to identify particular skills and evidence how those would be addressed by particular training courses. The burden of course is on the claimant to establish the loss and to demonstrate why the courses would compensate for that loss and we concluded that she had not satisfied us on those points.

Issues 10. Should the Tribunal award interest on any sums awarded pursuant to r.2 Employment Tribunals (Interests on Awards in Discrimination Cases) Regs 1996?

11. If so, for what period or periods? Would awarding interest in accordance with r.6(1)-(2) cause a serious injustice? If so, for what alternative period or periods should interest be awarded?

84. The respondent sought to argue that either no interest or a reduced rate of interest should be awarded on two bases:

a) the Judgments Act rate of 8% was uncommercial given that the base rate had been below 1% from the dates of breach until May 2022. The claimant would be over-compensated for being kept out of her money at such a rate,

b) The claimant would receive a windfall because of the significant period between contravention and calculation, during some of which the respondent was successfully appealing to the EAT, during some of which the claimant was unsuccessfully appealing to the Court of Appeal and during some of which the claimant allegedly was not taking steps to progress the claim.

85. As to the last period, which is part coincided with the commencement of the pandemic, the claimant said that she had been unsuccessfully contacting the Tribunal to progress the claim. There was no evidence before us to gainsay that account.

86. It seemed to us that the respondent's argument that the Judgments Act rate is better than the rate of return the claimant would have received in an interest bearing account could apply in any case. We did not consider that this was the correct way to look at the matter. There are any number of ways in which a person might use or invest money which would have different rates of return. Conversely a person who does not have money they otherwise should have may have costs including interest on loans or overdrafts they would not otherwise have. The adoption of the Judgments Act rate seems to us to recognise those underlying differences without requiring a Tribunal to investigate and decide in any individual case whether a claimant would have pursued more favourable investments or has in fact lost further money on loans.

87. It did not seem to us that the discretion as to the period during which interest may be awarded was intended to be used in lieu of any discretion to change the rate or that it could properly be so used.

88. It also did not seem to us that it was appropriate to leave out of account periods when appeals were underway. It was not the claimant's fault that the Tayler Tribunal erred in law in determining her ultimately successful claims. The net result of those errors was she was kept out of her money for a further period.

89. We accordingly could find no good reason not to award interest on the financial losses from the mid point between 1 October 2015 and the date of calculation.

89. We took into account however in looking at the appropriate period for interest to be awarded on injury to feelings the point made by the respondent that the matters which caused the injured feelings occurred over an extended period of time with the claimant's maternity leave intervening between the earlier and later acts. It seemed to us that we could fairly reflect that fact by taking a mid point between the date when the claimant might have been appointed to the Head of Markets role on our findings (1 October 2015) and the date when she returned from maternity leave (5 September 2016) and began to experience the significant detriment in relation to her role found by the Tayler Tribunal.

Grossing up

90. The figures in the Schedules are gross figures and the parties agreed that no further grossing up was required to take account of tax to be paid by the claimant on the figures.

Calculations

91. The parties' agreed figure for total financial losses on the basis of a 1 October 2015 start date and the findings we have made as to the salary, bonus and pension the claimant would have received had she been appointed to the head of Markets Role was £336,082.24.

92. The financial loss the claimant sustained is therefore 60% x £336,082.24 = £201,650.55.

93. Interest is awarded on those financial losses from the mid point between 1 October 2015 and 10 March 2023 (20 June 2019) at the rate of 8% per annum. Interest is awarded for 1359 days / 365 x 8 % = 29.79%. Interest on £201,650.55 = £60,071.70.

94. Interest on the injury to feelings award runs from the midpoint between 1 October 2016 and 5 September 2016 which is 18 March 2016. Interested is awarded for 2548 days / 365 x 8% = 55.85%.

95. Interest on £25,000 is £13,962.50.

96. The total award is £201,650.55 + £60,071.70 + £25,000 + £13,962.50 = £300, 684.75.

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Employment Judge Joffe
London Central Region
10/03/2023

Sent to the parties on:
10/03/2023

For the Tribunals Office