EMPLOYMENT TRIBUNALS

Claimant: Miss K Paczkowska

Respondent: R-Com Consulting Limited

Heard at: Manchester **On:** 13, 14 15, 17 and (in chambers) on 30 November 2023

Before: Regional Employment Judge Franey
Mr Q Colborn
Ms C Titherington

REPRESENTATION:

Claimant: In person
Respondent: Mr B Henry, Counsel

LIABILITY JUDGMENT

The unanimous judgment of the Tribunal on liability is as follows:

1. It is just and equitable to extend time for presenting a claim in respect of comments made at the job interview on 27 April 2016 to 3 December 2016, meaning that the Tribunal has jurisdiction over this complaint which has already been found to be harassment contravening section 26 Equality Act 2010.

2. The respondent is not entitled to withdraw its concession that it was vicariously liable for the email sent by Ms Dando on 29 June 2017.

3. In sending the email of 29 June 2017 Ms Dando subjected the claimant to harassment related to race and to sex, but not to disability, contrary to section 26 Equality Act 2010. The complaint that the email also constituted direct discrimination because of race, sex and/or disability contrary to section 13, and/or victimisation contrary to section 27, is dismissed.

4. The failure of the respondent to give the claimant a reference in October 2017, which has already been found to be victimisation contravening section 27 Equality Act 2010, did not also amount to direct disability discrimination contrary to section 13 Equality Act 2010.

RESERVED REMEDY JUDGMENT

Following deliberations in chambers on 30 November 2023 the unanimous judgment of the Tribunal on remedy is as follows:

5. In respect of the interview comments on 27 April 2016 the Tribunal awards the claimant £2,000.00 for injured feelings together with interest of £1,200 making a total of £**3,200.00**.

6. In respect of the Dando email on 29 June 2017 the Tribunal awards the claimant £7,000.00 for injured feelings, which includes £1,000.00 for aggravated damages, together with interest of £3,544.80 making a total of £**10,544.80**.

7. In respect of the failure to provide a reference in October 2017 the Tribunal awards the claimant £9,000.00 for injured feelings together with interest of £4,320, and £11,384.50 for financial losses together with interest of £2,732.28, making a total of £**27,436.78**.

8. No award is made for injury to health.

9. No award is adjusted for unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures.

10. No Preparation Time order is made.

11. The total amount payable by the respondent to the claimant under this judgment is £**41,181.58**.

12. As the judgment is promulgated shortly before the Christmas break, under rule 66 the date for the respondent to comply with this judgment by making payment to the claimant is extended from 14 days to 28 days from the date on which it is sent out to the parties.

REASONS

Contents

1. These Reasons are written at length and in great detail to avoid any misunderstanding about what the Tribunal decided, and why. They are structured as follows:

LIABILITY REASONS

Introduction and Issues

2. This hearing had been listed for five consecutive days from Monday 13 November 2023. Unfortunately, the Tribunal was unable to sit on the fourth day due to an urgent family health issue which meant that the Judge was unavailable. On the final day of the hearing the Tribunal gave an oral decision on the three remitted matters (paragraphs 1 - 4 of the Judgment above), with oral reasons, and then heard evidence and submissions on remedy and preparation time. However, the decisions on remedy were reserved due to there being insufficient time, and made in chambers on 30 November 2023.

3. The final hearing of this case had originally taken place before Employment Judge Sherratt, Mr Colborn and Ms Titherington ("the Sherratt Tribunal") between 3 and 5 September 2018, with a day of deliberation in chambers on 10 December 2017, and a further day of hearing on 11 July 2019. The written Judgment and Reasons was sent to the parties on 1 August 2019.

4. The Sherratt Tribunal decided 21 separate allegations. Following a partially successful appeal by the claimant, which included a decision by the Employment Appeal Tribunal ("EAT") in November 2021 and an application for permission to appeal to the Court of Appeal resolved in 2022, issues in relation to three of those allegations were remitted for consideration by the same Tribunal if practicable. As Employment Judge Sherratt had retired in 2020, Regional Employment Judge Franey replaced him on the panel.

5. In summary, the matters remitted were as follows:

- **Allegation 1** was a finding by the Sherratt Tribunal that the claimant had been subjected to harassment related to race and sex in a job interview on 27 April 2016, but that claim was found out of time because the claimant had provided no evidence as to whether it would be just and equitable to extend time. That was an error, as the claimant had put forward such material, and the question of whether there should be a just and equitable extension was remitted to this Tribunal. We will refer to this issue as the "**interview comments**".

- **Allegation 20** concerned an email sent by Susan Dando, an employee of a related company, D4Digital, to the claimant on 29 June 2017. The respondent conceded that it was vicariously liable for that email, if it contravened the Equality Act, at a case management hearing in March 2018, and in a subsequent email in December 2018, following which the claimant withdrew a separate claim against D4Digital, but the Sherratt Tribunal allowed the respondent to withdraw that concession and dismissed the allegation on the basis the respondent could not be vicariously liable for Ms Dando's actions. The matter was remitted to the Tribunal to decide whether the email contravened the Equality Act 2010, and if so whether the respondent was bound by its concession, and if not

whether the respondent was in any event vicariously liable.[1] If there was vicarious liability we would have to decide if the email contravened the Equality Act 2010. We will call this issue the "**Dando email**".

- **Allegation 21** was a finding that the respondent had victimised the claimant by failing to provide a reference in October 2017 when the claimant had applied for a job with a charity. That was found to be victimisation contrary to section 27 Equality Act 2010. However, the Sherratt Tribunal did not make any finding as to whether it also amounted to direct disability discrimination, and this issue was remitted to this Tribunal. We will call this the "**reference issue"**.

6. A List of Issues had been drawn up by Employment Judge Cookson following a case management hearing before her on 14 February 2023. Some minor amendments were made to that List of Issues at the start of the hearing. The respondent had conceded that the claimant was a disabled person at the material time by reason of anxiety and depression.

7. The List of Issues to be determined in this hearing was therefore as follows:

The Dando Email (Allegation 20) – Victimisation/Direct/Harassment; Vicarious Liability

1. Was there a contravention of the Equality Act 2010 ("EqA") in any of these respects?

1.1 **Victimisation s27 EqA**: Did Ms Dando's email of 29 June amount to victimisation contrary in that by sending the email Ms Dando subjected the claimant to a detriment because of her "protected act" in presenting the claim form in this case?

1.2 **Direct race/sex/disability** s13 of the Equality Act 2010:

1.2.1 Did Ms Dando's email of 29 June amount to less favourable treatment?

1.2.2 The claimant relies on a hypothetical comparator.

1.2.3 If so, was it because of race, sex and/or disability?

1.3 **Harassment** related to race/sex/disability s26 Equality Act 2010:

1.3.1 Was the email of 29 June unwanted conduct?

1.3.2 Did it relate to race/sex/disability?

1.3.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

[1] The claimant did not accept that this issue had been remitted in this way by the Court of Appeal, but her appeal against a decision to that effect by Employment Judge Cookson in February 2023 was rejected by the EAT at a rule 3(10) hearing on 1 November 2023.

1.3.4 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

1.4 **Vicarious Liability of Respondent**

1.4.1 If the tribunal finds that Ms Dando's conduct contravened the Equality Act as above, should the respondent be permitted to withdraw the concession made to EJ Warren having regard to the claimant having been permitted to add these complaints and the respondent having conceded vicarious liability at the preliminary hearing on 16 March 2018? If the respondent is not allowed to withdraw the concession it will be liable.

1.4.2 If it is allowed to withdraw that concession, is the respondent liable for Ms Dando's actions under s 109 of the EqA?

Reference – Allegation 21 – Direct Disability Discrimination

2. Did the failure to provide a reference contravene s13 Equality Act 2010?

2.1 Was the claimant (in being refused a reference in October 2017) treated less favourably than someone in the same material circumstances (without a disability) was or would have been treated (the claimant has not named a comparator and she relies on a hypothetical comparator).

2.2 If so, was that less favourable treatment because of the claimant's disability?

Interview Comments – Allegation 1 – Time Limits

3. The Tribunal has already decided that the claimant was subjected to harassment related to her race (Polish nationality) at a job interview on 27 April 2016. Was this complaint of harassment made within the time limit in section 123 Equality Act 2010, noting the following?

3.1 The claim was not made to the Tribunal within three months (allowing for any early conciliation extension) of the date of the harassment.

3.2 The harassment was not part of conduct extending over a period for the purposes of section 123(3)(a) EqA.

3.3 The Tribunal will therefore decide whether the complaint was brought within such period as the Tribunal thinks just and equitable for the purposes of section 123(1)(b) EqA.

Remedy Issues

4. The following remedy issues may arise (references to discrimination below include the complaints of harassment and victimisation):

4.1 What **financial losses** (if any) has the discrimination caused the claimant?

4.2 What **injury to feelings** has the discrimination caused the claimant and how much compensation should be awarded for that?

4.3 Has the discrimination caused the claimant **personal injury** and how much compensation should be awarded for that?

4.4 Did the **ACAS Code** of Practice on Disciplinary and Grievance Procedures 2015 apply?

4.4.1 Did the respondent or the claimant unreasonably fail to comply with it?

4.4.2 If so, is it just and equitable to increase or decrease any award payable to the claimant?

4.4.3 By what proportion, up to 25%?

4.5 Should **interest** be awarded? How much?

Preliminary Matters - Liability

8. Some preliminary matters were addressed which it is appropriate to record here.

Recording

9. As a litigant in person with a disability representing herself the claimant would find it very difficult to take full notes during the hearing. She was granted permission to make her own recording of the hearing on conditions which she accepted: the recording was audio only, it was not to be used for any other purpose or provided to any other person, and no transcript of it was to be relied upon as the hearing was being officially recorded and a transcript of that recording could be obtained using form EX107.

10. The official recording made by the Tribunal was done via the HMCTS “Cloud Video Platform”, even though the hearing was fully in person. A CVP hearing room was used in which only the clerk was present and the audio recording facility activated.

Other Reasonable Adjustments

11. The reasonable adjustments needed for the hearing had been considered at a case management hearing before Employment Judge Leach on 25 April 2023, and recorded in paragraphs 41-43 of his written Case Management Order sent to the parties on 12 May 2023.

12. The hearing was listed in a hearing room on the ground floor of Alexandra House because of the claimant's mobility issues. The claimant is currently a wheelchair user.

13. The hearing had been given a five day listing to ensure that additional breaks could be taken at the request of the claimant. At the claimant’s request the Tribunal did not sit on the afternoon of Tuesday 14 November to allow her a break before

giving her own evidence. Thursday 16 November was lost for the reason set out in paragraph 2 above.

14. Because of the claimant's mobility issues and difficulty with handling the four lever arch files of documents, it was agreed that the claimant could give evidence from her seat at the representatives' table and that in giving evidence she could refer to her own copy of the electronic hearing bundle rather than to the paper bundles on the witness table.

Amendment Application

15. At the start of the hearing the claimant applied for permission to amend her claim so as to introduce a complaint of detriment on the ground of a protected disclosure contrary to section 47B Employment Rights Act 1996. She said that the application was contained in paragraph 11 of her skeleton argument for this hearing. That paragraph asserted that there was new evidence related to a protected disclosure complaint, being that D4Digital and Ms Dando benefitted from fees and sales commissions when employees left the respondent and had to be replaced. The new evidence was in the form of bank statements between December 2016 and July 2017 which had been obtained from D4Digital pursuant to a third party disclosure order made by the Tribunal. Those bank payments had been disclosed with a view to showing what payments were made by D4Digital to Ms Dando, but had been inadequately redacted and also visible were payments made by the respondent to D4Digital.

16. An application to amend the claim so as to introduce a protected disclosure complaint had been considered by Employment Judge Leach and rejected for reasons set out at paragraph 34 of his written Case Management Order[2]. That was based upon a written application made by the claimant which appeared in the bundle of documents for this hearing at pages 290-291. The claimant confirmed orally to us that the disclosure on which she relied was that set out on page 290, being an email of 12 July 2016 in which she informed the respondent that:

> **"Because so many people left recently it has been really difficult as well to stay positive in this office environment, and Damian has been my friend."**

17. The application said that the detriment resulting from that protected disclosure was the Dando email of 29 June 2017. That was apparent from the following page of the written application. In her oral application to us the claimant said that the detriments also extended to how the respondent dealt with her grievance of September 2014, the failure to contact her about a return to work, and the circumstances surrounding her dismissal in April 2019. The last matter, however, was already the subject of a separate live claim.

18. Having heard from both sides the Tribunal decided that it had no power to permit this amendment as the same matter had already been decided by Employment Judge Leach at the preliminary hearing on 25 April 2023. A decision of one Tribunal can be varied by another only if it is necessary to do so in the interests of justice, which broadly means that there must have been a material change in

[2] The claimant's appeal against Employment Judge Leach's decision on that point was also rejected by the EAT at the rule 3(10) hearing on 1 November 2023.

circumstances or some other substantial reason: **Serco Limited v Wells UKEAT/330/15 [2016] ICR 768**. We did not accept that evidence of payments being made by the respondent to D4Digital amounted to a material change in circumstances to justify departing from the order of Employment Judge Leach. The reasons he gave in paragraph 34 of his written Case Management Order for rejecting the amendment application were unaffected by this new information. For those reasons the Tribunal made this Order:

> **ORDER: The claimant is not permitted to amend her claim so as to introduce a complaint of detriment on the ground of a protected disclosure contrary to section 47B Employment Rights Act 1996.**

19. Had this been a fresh application made for the first time, however, we would still have rejected it. The latest detriment was the Dando email in June 2017, and the application was therefore made more than six years outside the primary time limit. It was made on the first day of the remitted final hearing. We did not accept that the claimant had already raised a protected disclosure complaint by ticking box 10 of her original claim form, since the substantive narrative on that claim form made no reference to protected disclosures. That had plainly been the view of Employment Judge Leach in any event. The way in which the application was made was unsatisfactory: the written application in the skeleton argument did not clearly identify the protected disclosure or the alleged detriments. We had to go back to other documents in the bundle in order to clarify what they were. Overall, had we been taking this decision, we would have decided that the balance of prejudice favoured refusing permission to amend. If permission were to be granted the respondent would need further evidence which was not available at this hearing about the other alleged detriments, and it was likely this hearing would be derailed. In contrast, if permission were refused the claimant was simply losing the chance to pursue what appeared to be a very weak allegation, as on the face of it her email did not contain any information which she could reasonably believe tended to show that the health and safety of any person was likely to be endangered, and the proposed new claim was several years out of time in any event.

Sketch

20. At the start of the second day of the hearing the claimant asked if she could be allowed to draw a sketch of the hearing room, in lieu of a photograph, to show the number of people attending for the respondent, which she described as “an army of lawyers”. At the time there were two lawyers present for the respondent: Mr Henry, and Mr Cantz of Peninsula, who instructed him. She said she wanted this as evidence for the European Court of Human Rights. We said there was no objection to her drawing such a sketch.

Photographs

21. At the same time the claimant asked if the tribunal could view a set of photographs showing her at work for the respondent in 2016, apparently to demonstrate how different she is now to how she was then. We refused this application because it was not relevant to the three remitted issues, but we said that evidence of the effect on her of the unlawful treatment would be of relevance to remedy.

Evidence on Liability for this hearing

Documents

22. For this hearing the Tribunal had an agreed supplementary bundle of documents in three lever arch files which ran to 1273 pages. Any reference to page numbers in these Reasons is a reference to that bundle unless otherwise indicated.

23. In addition it was agreed the Tribunal should have access where appropriate to the bundle of documents from the original hearing. That was a bundle of approximately 430 pages, and any reference to page numbers in that bundle will be preceded by the letters "OB", meaning Original Bundle.

24. The claimant had also provided some additional documents which were:

- A copy of a witness statement about disability discrimination.
- An amended Schedule of Loss for the victimisation complaint upheld by the Sherratt Tribunal.
- A Schedule of Loss on the three remitted grounds.
- A written skeleton argument running to 16 pages with an appendix of a further seven pages.

25. At the start of the hearing the claimant asked if she could introduce a new document, which was a UK labour market survey conducted by a Government Department, but we refused this because it was not going to be relevant to the issues for this Tribunal to determine.

26. Finally, after the hearing on the second day the claimant submitted by email a copy of some pages from "LinkedIn" which related to the position of Mr Fuller with the respondent. Mr Henry did not object to these going into evidence and we attached them to the claimant's skeleton argument.

Witnesses

27. It was agreed that we would hear the respondent's evidence first. The respondent relied on only one witness, Michelle Halliwell. She had given evidence to the Sherratt Tribunal. The respondent had proposed to rely on a new witness statement for her, but following an objection from the claimant that application was withdrawn. Mrs Halliwell gave evidence pursuant to the witness statement she had prepared for the original hearing which was dated 19 April 2018.

28. The claimant gave evidence herself. We had her witness statement for the Sherratt Tribunal hearing and a supplementary witness statement running to 25 pages.

29. The claimant also called the respondent's proprietor, Mr Rathore, pursuant to a witness order issued by Employment Judge Leach in October 2023. Before Mr Rathore was called the Tribunal explained to the claimant that he was her witness and therefore she would only be able to ask him open questions in examination in

chief, and would not be able to ask him leading questions or cross examine him. The claimant confirmed that despite these restrictions she wanted him to give evidence. There was no written witness statement from Mr Rathore. The Tribunal asked him some general questions to establish his position in the respondent company and D4Digital before the claimant asked him further questions and he was then cross examined by Mr Henry for the respondent.

30. We will now address the three remitted allegations in chronological order.

Part 1: Allegation 1 – Interview Comments - Time Limits

31. The Sherratt Tribunal found that the claimant was subjected to harassment related to her race and her sex by comments made by Mr Rathore at interview on 27 April 2016 where he told the claimant that her English was "a little broken" and he asked her whether she had a Polish boyfriend. The Sherratt Tribunal rejected the contention that this formed part of a continuing act, as the only other contravention of the Equality Act which it found was the reference issue in October 2017. The claimant pursued an appeal against the continuing act decision but permission to appeal was refused by the EAT.

32. In refusing to extend time on a just and equitable basis the Sherratt Tribunal had overlooked the application made by the claimant for an extension of time which appeared at OB44-45.

33. The sole issue for us to determine, therefore, was whether the claimant could establish that it would be just and equitable to allow a longer period for her to bring this claim than the three months for which provision is made in the Equality Act 2010. That three month period would have expired on 26 July 2016, that being the last date on which the claimant could have initiated early conciliation to "stop the clock", but she did not initiate early conciliation until 18 October and her claim form was not presented until 3 December 2016. Early conciliation commenced outside the three month period does not "stop the clock" and therefore the claimant was seeking an extension of just over four months.

Relevant Legal Framework

34. The time limit for bringing a claim appears in section 123 Equality Act 2010 as follows:-

> **"(1) subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the Employment Tribunal thinks just and equitable.**

35. The case law on the application of the "just and equitable" extension (and its predecessor in the Race Relations Act 1976) includes **British Coal Corporation v Keeble [1997] IRLR 336**, in which the EAT confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980.

36. In **Robertson –v- Bexley Community Centre (T/A Leisure Link) 2003 [IRLR 434]** the Court of Appeal considered the extent of the discretion to extend time. The Employment Tribunal has a "wide ambit". At paragraph 25 of the judgment Auld LJ said:-

> **"it is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."**

37. Subsequently in **Chief Constable of Lincolnshire v Caston [2010] IRLR 327** the Court of Appeal in confirming the Robertson approach confirmed that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied.

38. However, the factors set out in **Keeble** are not an exhaustive list and the task of the Tribunal is to take account of all relevant factors, and leave out of account any which are not relevant: **Abertawe Bro Morgannwyg University Local Health Board v Morgan [2018] EWCA Civ 640**. Leggatt LJ said this at paragraphs 18-19:

> **"18. First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998: see Dunn v Parole Board [2008] EWCA Civ 374; [2009] 1 WLR 728, paras 30-32, 43, 48; and Rabone v Pennine Care NHS Trust [2012] UKSC 2; [2012] 2 AC 72, para 75.**
>
> **19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."**

Findings of Fact on Time Limits

39. Having heard oral evidence from the claimant, and having considered her original witness statement and supplementary witness statement, and the documents before us, the Tribunal made the following findings of fact relevant to this issue.

40. At the time the claimant attended the job interview in April 2016 she did not have any knowledge of Employment Tribunal procedures or time limits, other than a common sense appreciation that there was a remedy in the Employment Tribunal for treatment at work. She decided not to pursue her dissatisfaction at the comments that had been made. That was entirely understandable, since she wanted the job and wanted to be successful in it.

41. After the claimant started work on 10 May 2016, she gradually found the pressure increasing and became more unhappy at what was happening in the office. She made a number of informal complaints prior to her formal grievance on 14 September 2016. However, in none of those complaints did she mention the comments made at interview by Mr Rathore.

42. Nor was that comment mentioned in her grievance. Her grievance did mention the interview, but the point raised was about the identity of her line manager.

43. We accepted the claimant's evidence that the reason she did not raise the comments made by Mr Rathore in her grievance was because she still hoped to salvage her position with the respondent.

44. The claimant had remained at work until this point, save for one day of sick leave due to stress on 8 July 2016. Extracts from her General Practitioner and copies of the fit notes appeared in the third volume of the bundle for this hearing. Page 962 recorded a visit to her GP on 20 September 2016 where she was recorded with a diagnosis of stress at work, having said she was finding it difficult to cope at work and that the treatment was causing stress and anxiety. A fit note was issued in respect of “stress at work” (page 997), and that continued to be the position in the fit notes that followed during October and November and were current when she presented her claim raising this issue on 3 December 2016 (pages 997-1001).

45. When she first saw her doctor after going off sick in September 2016 the claimant was prescribed citalopram and propranolol (page 988). That prescription was renewed in October, November and early December.

46. There was no other medical evidence of the claimant's state of health in the period between the comments at interview on 27 April 2016 and the presentation of her claim on 3 December 2016.

47. It was in the course of the grievance process that the claimant undertook some internet research and gained an understanding of how to apply to an Employment Tribunal and of the requirement to undergo early conciliation with ACAS first. She started early conciliation on 18 October 2016. The four week conciliation period was extended by two weeks because Mr Rathore had passed the decision to someone else who was away. The early conciliation certificate was issued on 2 December 2016 and the claim form presented the following day. Receipt of the claim form was the first time that the allegation about comments at the interview was known to the respondent.

48. The respondent did not call Mr Rathore to give evidence before the Sherratt Tribunal in September 2018. The Sherratt Tribunal found that the comments had been made and that they amounted to harassment related to race.

Submissions

49. Mr Henry did not make a written submission on liability but made succinct oral submissions by reference to the List of Issues. In relation to time limits he invited us to decline to extend time. He said that there was no medical evidence that the claimant's health prevented her from bringing the claim until after she had gone off sick, so any significant health problems post-dated the expiry of the time limit in late July 2016. Most of the points made at OB44 did not help the claimant when that was taken into account. The real reason the claimant did not pursue the claim was that she took a conscious decision not to do it, and there was nothing preventing her bringing a claim. He accepted, however, that the delay between late July and the claim being presented on 3 December 2016 had not had any impact on the cogency of the evidence because the respondent had chosen not to call Mr Rathore in any event.

50. The claimant had helpfully produced a written version of her oral submissions which the Tribunal read as she spoke to them. She emphasised that this was an allegation that had already succeeded on the merits, and therefore there would be no prejudice to the respondent if time was extended. Correspondingly if time was not extended the claimant would lose her remedy for harassment which had been found to have occurred. She also emphasised that her focus when she started the job was to succeed in it, and later to salvage her job despite the problems which had arisen, and for her to have raised an allegation of harassment against Mr Rathore form the interview in April would have been contrary to those aims.

Discussion and Conclusions on Allegation 1

51. The issue for us to determine was Issue 3 in the List of Issues: whether it would be just and equitable to extend time to 3 December 2016 to enable the claimant to have a remedy for that harassment.

52. Extending time in that way is an exception to the general time limit principle. The burden is on the claimant to establish that it would be just and equitable, and the factors we considered included those identified in **British Coal Corporation v Keeble**.

53. The first factor we considered was the length of the delay. The interview comments were made on 27 April 2016 and the claim form was presented on 3 December 2016, over four months after the time limit had expired.

54. The second factor was the reason for the delay. We considered three different periods.

55. The first period was between the date of the interview on 27 April and the date the claimant put her grievance in and went off sick on 14 September 2016. We were satisfied that in this period the claimant made a conscious decision not to raise what had happened at the interview. That was entirely understandable. It was a new job

and she wanted to succeed in it. It would have been wholly counterproductive to have raised allegations of harassment by the proprietor of her new employer either before her employment began or shortly after it started on 10 May 2016. It was sensible for the claimant to seek to put that interview behind her and move on. We were satisfied that the claimant could have researched law and procedure in May, June or July, as she later did in September or October of that year, but she decided for good reason not to pursue the matter. We rejected the contention that the claimant's medical position affected her ability to pursue it within the primary time limit had she so wished. There was no medical evidence to that effect, and of course the claimant was at work in that period save for one day off on 8 July 2016.

56. The second period was between the grievance being lodged (and the claimant going off sick) on 14 September, and the commencement of early conciliation on 18 October. The claimant had the opportunity to raise this interview comments in her grievance but chose not to. In cross examination the claimant said she did not raise it in the grievance because the grievance was addressed to Mr Rathore and was about communication issues and the behaviour of Mr Jackson and others in the office. The claimant said she still wanted to salvage her job at that point and making that allegation against Mr Rathore would not have been conducive to that aim. We accepted that evidence as the reason she did not put it in the grievance.

57. The third period was between the commencement of early conciliation on 18 October and the presentation of the claim on 3 December 2016. Whilst early conciliation was ongoing the claimant could not pursue the matter in the Employment Tribunal. However, once the ACAS certificate was issued on 2 December the claimant moved swiftly to present her claim the following day. We inferred that once she got to that point her hopes of salvaging her job had been substantially eroded by her experience in the grievance process.

58. The third factor was the impact of the delay on the cogency of the evidence. Here Mr Henry sesnibly accepted that the respondent was not prejudiced by the delay between 26 July 2016, when the primary time limit expired, and 3 December 2016, when the claim was presented and the respondent became aware of the allegations. The respondent chose not to call Mr Rathore to give evidence to the Sherratt Tribunal hearing to contest the claimant's account of the interview comments. Despite the claimant's delay in pursuing the matter the respondent still had a fair opportunity to defend the allegation but chose not to do so.

59. We considered those factors in deciding whether it would be just and equitable to extend time. The claimant made a conscious decision not to pursue the matter at the time when she was capable of doing so, which ordinarily would make an extension of time unlikely. However, the claimant's reason for not pursuing it was perfectly understandable because she wanted to make a success of her new job. Once things had deteriorated and she went off sick she was still hoping that her grievance about Mr Jackson would be addressed by Mr Rathore and her role salvaged. Most importantly, there was no prejudice to the respondent resulting from the failure to bring the claim within the primary time limit.

60. In those circumstances we were satisfied that the claimant had established that it would be just and equitable to extend time for presenting a claim in respect of

the interview comments to 3 December 2016, and the Tribunal had jurisdiction over that matter.

Part 2: Allegation 20 – The Dando Email of 29 June 2017 – Withdrawal of Concession

Background

61. The Sherratt Tribunal had implicitly permitted the respondent to withdraw its concession that it was vicariously liable for that email if it contravened the Equality Act 2010, and the first matter we considered was issue 1.4.1: whether it would be appropriate for that concession to be withdrawn or whether the respondent should be held to it.

62. The concession was first made at a case management hearing before Employment Judge Warren on 16 March 2018. The written record of that hearing appeared at OB116-123. Although not reflected in the heading to the case management order, the hearing also encompassed case number 2423424/2017, a claim against D4Digital Limited which was presented on 1 November 2017 and which brought complaints of sex, race and disability discrimination in relation to Ms Dando's email of 29 June 2017. The respondent in this case and D4Digital in the 2017 case had the same representative, Peninsula, and Ms Halsall appeared for both parties at that case management hearing.

63. The upshot of the hearing was that:

- The respondent in this case accepted that it was vicariously liable if the Dando email contravened the Equality Act 2010.
- The claimant withdrew case number 2423424/2017 and it was subsequently dismissed on withdrawal.
- The current case was treated as amended by way of introduction of the allegation in relation to the Dando email. Employment Judge Warren recorded that the respondent wanted the amendment of these proceedings so it only had to face one claim and one hearing. Ms Dando was to give evidence in any event.
- The claimant applied for permission to add Ms Dando as a second respondent to this case, but the respondent confirmed it would not rely on the "reasonable steps" defence under section 109(4) Equality Act 2010 and would accept vicarious liability for her. The application to add her as a respondent was refused.

64. Following the final hearing in September 2018, the Sherratt Tribunal met for deliberations in December 2018. It was troubled by the basis on which the respondent could be said to be vicariously liable for the actions of Ms Dando, who was not an employee of the respondent. In December 2018 Employment Judge Sherratt caused a letter to be sent to the parties identifying two issues which needed to be discussed before deliberations could be concluded. That letter appeared at pages 632-633. The first of the two issues was the Dando email. The Tribunal set

out in its letter the preliminary view that as a matter of law there was nothing in the Equality Act 2010 that could place any liability upon the respondent for the actions of Ms Dando.

65. The respondent's then representative, Ms Halsall of Peninsula, responded by email of 21 December 2018 (pages 634-636). On the vicarious liability issue the email said the following:

> **"The respondent agrees with the panel's view on this. However, the Employment Judge who presided over the preliminary hearing took a different view and ruled that there was a sufficient connection between the companies and as such the claims were consolidated and D4Digital was removed as a respondent. No reconsideration or appeal of this judgment has been sought by either party. As D4Digital has been removed as a respondent, the respondent was asked to make the concession that they would not run the statutory defence. The respondent is content to accept liability for the actions of Ms Dando as an agent of R-Com as she recruited for them should any liability be found by the Tribunal."**

66. Although this email was incorrect in suggesting that there had been a ruling on the merits about vicarious liability by Employment Judge Warren, it plainly reiterated the acceptance of vicarious liability.

67. That led to a further hearing before the Sherratt Tribunal on 11 July 2019, following which the Judgment and Reasons were issued which simply confirmed that there was no vicarious liability. It was implicit that the Sherratt Tribunal had allowed the concession to be withdrawn. The decision on whether to permit that was remitted by the Court of Appeal to this Tribunal.

Law on withdrawal of concessions

68. The Employment Tribunal Rules of Procedure do not specifically address the question of withdrawal of a concession or admission made by a party during proceedings. It follows that this must fall within the general power of case management in rule 29, which must be exercised in accordance with the overriding objective in rule 2, which is to deal with the case fairly and justly.

69. The same was true of the 2004 Rules. In **Nowicka-Price v The Chief Constable of Gwent Constabulary [2009] UKEAT0268/09** the EAT said that in the absence of an express power it would be appropriate for a Tribunal to have regard to the Civil Procedure Rules, namely rule 14 and the accompanying Practice Direction. Also of assistance is the summary of the principles given by Sumner J in **Braybrook v Basildon & Thurrock University NHS Trust [2004] EWHC3436**.

70. In summary, in taking a decision in accordance with the overriding objective of dealing with a case fairly and justly, the Tribunal will take into account all relevant circumstances which will include:

(a) the reasons and justification for the application to withdraw the concession;

(b) the balance of prejudice to the parties;

(c) whether any party has been the author of any prejudice they may suffer;

(d) the prospect of success of any issue arising from the withdrawal of any admission;

(e) the public interest in avoiding satellite litigation, disproportionate use of court resources and the impact of strategic manoeuvring.

71. The observation was also made in **Braybrook** that the nearer an application is made to a final hearing the less chance of success it will have, even if the party making the application can establish clear prejudice if it is not withdrawn.

Submissions on withdrawal of concession

72. For the respondent Mr Henry submitted that whether the concession should be withdrawn was related to the question of whether there was in reality any legal basis for the respondent to be vicariously liable for the email sent by Ms Dando. On that point he invited us to conclude that there was no possibility of vicarious liability. Ms Dando was not an employee of the respondent. Her contract of employment was with D4Digital. The suggestion made by the claimant in her written skeleton argument that there were associated employers was a concept from the Employment Rights Act 1996, not found in the Equality Act 2010 save in relation to complaints of equal pay under section 79. It would not work in this context because the "reasonable steps" defence under section 109(4) could not work with associated employers.

73. As for agency, he accepted that Ms Dando through D4 had acted as the agent of the respondent in the recruitment of the claimant, but that had ended more than a year before this email was sent. In any event he invited us to conclude that this email was sent by Ms Dando in her capacity as a friend of Mr Rathore, not in any official capacity. It was outside the scope of the relationship and therefore it could not be regarded as within section 108 because it neither arose out of the recruitment relationship nor was closely connected to it.

74. Mr Henry also invited us to conclude that there was no basis for any argument that Ms Dando was an agent of the respondent in a broader sense because of her role within the group of companies.

75. On that basis he said that the concession had been made in relation to something for which there was no legal basis, and therefore it should be allowed to be withdrawn. Although the claimant had lost the ability to pursue D4 by withdrawing her claim against that company in reliance on the concession, that was outweighed by the prejudice to the respondent if it were held to be vicariously liable on the basis of the concession when there was no legal basis for such liability.

76. The claimant's position was summarised in paragraph 11e of her written submission. She said it was fair and just to hold the respondent to the concession. It had been made twice (once to Judge Warren and once in correspondence), and to allow vicarious liability to be reopened now would be contrary to the overriding objective because the passage of time meant that some of the records which would show Ms Dando's role in the group and her relationship with the respondent were no longer available.

Discussion and conclusions on withdrawal of concession

77. In applying the law summarised above we took into account the following factors.

78. Firstly, we noted that this Tribunal had more information than the Sherratt Tribunal. We heard oral evidence from Mr Rathore on the way the group operated, and we had the benefit of the bank statements from D4Digital which had been inadequately redacted.

79. Secondly, the application to withdraw the concession, which must have been made during the hearing in July 2019, had been made very late indeed in these proceedings, as the final hearing had already taken place in September 2018.

80. Thirdly, the concession was not made by a litigant in person but by an employment law specialist from Peninsula.

81. Fourthly, the claimant relied on that concession in withdrawing case number 2423424/2017 against D4Digital. Had the concession not been made the claimant could have pursued that case under section 55 of the Equality Act 2010, which prohibits discrimination by employment service providers, which includes recruitment services. In reliance on the respondent's concession the claimant abandoned a potentially viable claim and the chance of a remedy for the Dando email.

82. Fifthly, we considered Mr Henry's argument that the concession was plainly wrong because there was no prospect of the respondent being vicariously liable for the Dando email under section 109 Equality Act 2010.

83. That appeared correct in relation to any suggested employment relationship. Although D4Digital and the respondent were plainly closely linked, Ms Dando was employed by D4Digital, not by R-Com.

84. But on the question of agency, we did not agree that the case for vicarious liability was hopeless. The claimant had some potentially viable arguments based on the fact that (as Mr Henry rightly accepted) at the time of her recruitment to the respondent, D4Digital - and therefore its employee, Ms Dando – had been acting as the agent of the respondent in the recruitment exercise.

- The first argument was that the agency relationship in the recruitment process had continued, because Ms Dando said in evidence to the Sherratt Tribunal that she did check up on how those she had placed were doing even after the employment had started.

- The second argument was that although the agency relationship during the recruitment process had ended, this was a case which fell within section 108 which prohibits discrimination after relationships have ended. If the email had been sent by Ms Dando whilst she was still in the recruitment process with the claimant, it would have contravened section 55 if found to be discriminatory. The email in June 2017 (the claimant could argue) arose out of that relationship and/or was closely connected to it, not least because the email specifically referred back to the recruitment of the claimant and the references that were obtained about her at that time.

- The third argument was that there was an agency relationship between Ms Dando and R-Com which was much broader than the recruitment exercise. The basis for such an argument was (for example) the email signature which showed Ms Dando as the Group Sales Director, not simply a Sales Director for D4Digital; the fact she worked in the same office as the claimant and her colleagues at R-Com; the fact she is seen in the photographs wearing an R-Com lanyard; and in the payments that were being made by R-Com to D4Digital in most months in the period for which bank statements have been disclosed.

85. Although we did not have to resolve those arguments, we were satisfied that they were tenable. The respondent had not conceded a point that was in truth hopeless.

86. We also rejected Mr Henry's argument that the only reasonable interpretation of the email was that it was sent in Ms Dando's capacity as a friend of Mr Rathore not a work capacity. The work email account was used, the email signature was the work signature, and it referred to events at work. It could reasonably be said to be sent in Ms Dando's work capacity, not in a purely personal capacity.

87. For those reasons we rejected the proposition from Mr Henry that vicarious liability was wrongly conceded as the respondent was never going to lose on that issue. The respondent was in truth at risk of a finding of vicariously liability had the concession not been made.

88. Sixthly, if the concession were allowed to be withdrawn there could be an attempt by the claimant to revive the action against D4Digital. That would not be straightforward for her. That claim was withdrawn and therefore came to an end under rule 51. It was dismissed under rule 52. Despite those obstacles, if the concession were to stand it would be the only way that the claimant could get a remedy. Allowing the respondent to withdraw the concession would create a risk of some further litigation.

89. Putting those factors together we decided unanimously that the balance of prejudice favoured holding the respondent to its concession. We therefore proceeded on the conceded basis that the respondent would be vicariously liable for the email sent by Ms Dando on 29 June 2017 if that email contravened the Equality Act 2010.

90. Because we held the respondent to its concession that it was vicariously liable it was not necessary for us to decide issue 1.4.2.

Part 3: Allegation 20 – The Dando Email of 29 June 2017 – Contravention of Equality Act 2010

91. As was apparent from the List of Issues paragraphs 1.1 to 1.3, the claimant put her case on this in three different ways. The first, which was by way of an amendment permitted by Employment Judge Leach, was that the email amounted to victimisation because it subjected the claimant to a detriment because of her admitted protected act of presenting the claim form in this case.

92. The second was that it amounted to less favourable treatment because of her race (Polish nationality), because of her sex, and/or because of her disability.

93. The third was that it amounted to harassment related to one of those three protected characteristics.

Relevant Legal Principles

94. Section 39(2)(d) prohibits discrimination against an employee by subjecting her to a detriment. Section 39(3) prohibits victimisation. Section 40(1)(a) prohibits harassment of an employee.

95. By section 212(1) conduct which constitutes harassment under section 26 cannot also constitute a "detriment", meaning that it cannot also be found to contravene section 13 or section 27.

96. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

97. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

98. In **Hewage v Grampian Health Board [2012] IRLR 870** the Supreme Court approved guidance previously given by the Court of Appeal on how the burden or proof provision should apply. That guidance appears in **Igen Limited v Wong [2005] ICR 931** and was supplemented in **Madarassy v Nomura International PLC [2007] ICR 867**. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

99. The definition of harassment appears in section 26, and so far as material reads as follows:

> **"(1) A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**

> **(b) the conduct has the purpose or effect of**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…**
>
> **(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -**
>
> **(a) the perception of B;**
>
> **(b) the other circumstances of the case;**
>
> **(c) whether it is reasonable for the conduct to have that effect.**

100. The definition of direct discrimination appears in section 13(1) as follows:

> **"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

101. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies:

> **"On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."**

102. Section 23(2) goes on to provide that if the protected characteristic is disability, the circumstances relating to a case include the person's abilities.

103. The effect of section 23 as a whole is to ensure that any comparison made, actual or hypothetical, must be between situations which are genuinely comparable. Further, as the EAT and appellate courts have emphasised in a number of cases, including **Amnesty International v Ahmed [2009] IRLR 884**, in most cases where the conduct in question is not overtly related to the protected characteristic, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.

104. The definition of victimisation appears in section 27:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because --**
>
> **(a) B does a protected act…."**

105. This provision does not require any form of comparison. If it is shown that a protected act has taken place and the claimant has been subjected to a detriment, it is essentially a question of the "reason why" as summarised in paragraph 103 above.

106. In interpreting these provisions we had regard, where relevant, to the Code of Practice on Employment issued by the Equality and Human Rights Commission.

Findings of Fact

107. Having gone off sick in September 2016 when she lodged her grievance, the claimant remained on sick leave when this claim was presented on 3 December 2016.

108. The email sent by Sue Dando at 11.15am on Thursday 29 June 2017 appeared in our bundle at page 234 and was quoted in full by the Sherratt Tribunal in paragraph 77 of its Judgment and Reasons. The email was sent by Sue Dando with the email signature "Group Sales Director" and the details of D4Digital, and it was sent to the claimant at her personal email address, reflecting Ms Dando's awareness that the claimant was not at work. That personal email address had been obtained by Ms Dando from the information available to her in the course of recruiting the claimant.

109. Although we will not reproduce the email here, the following are the salient points:

- The subject matter of the email was as follows: "DISGRACE".
- Ms Dando said she was "absolutely disgusted" to learn of the claimant's "ridiculous accusations against R-Com".
- It said that for the claimant to accuse R-Com of being racist was absurd, and to add sexual harassment to the "obvious quest for money" was even more absurd.
- The accusations made by the claimant were "obviously completely unfounded", ridiculous and the claimant was taking advantage of the system and happily getting paid for sitting at home making up these ridiculous claims.

110. The claimant responded to this email saying that its contents were not true, and in reply Ms Dando accused her of being delusional.

111. Ms Dando dealt with this email in her witness statement for the hearing before the Sherratt Tribunal in 2018. She said that she had been informed by Mrs Halliwell of the accusations the claimant was making, as some information was required for the Tribunal, and learning of that made her "totally shocked and angry". Her witness statement described the claimant as a "fantasist", and said:

> **"I was so wound up and upset by Ms Paczkowska's baseless allegations that I felt the need to email her, outlining my disgust at the situation."**

112. The claimant received this email whilst off sick at home and pursuing Tribunal proceedings in which she was representing herself. It was a month before a planned final hearing in her case. It came from a senior manager within the group connected with recruitment, who she feared might be able to "blacklist" her from future jobs. She formed the view that the email was sent to derail her claim and to make her drop

her discrimination complaints. She found it hostile, offensive and intimidating, as well as insulting in suggesting she was pursuing false allegations for financial gain.

Submissions

113. For the respondent Mr Henry reminded us that the amended grounds of resistance accepted that the presentation of the claim form in this case was a protected act and that the email subjected the claimant to a detriment. No formal concession was made in relation to causation. Mr Henry also submitted that there was no basis for finding it was direct discrimination, given the content of the email.

114. As to harassment, he accepted it was unwanted and related to race and sex but suggested it was not related to disability. On whether it had the proscribed effect he suggested that the references to protected characteristics in the email were limited although it was the effect of the email overall which would have to be taken into account. That was a matter he was content to leave to the Tribunal.

115. The claimant made no submissions as to whether the email from Ms Dando contravened the Equality Act. She too was happy to leave that to the Tribunal.

Discussion and Conclusions

116. Because of section 212 we had to consider harassment (issue 1.3) first of all.

117. The email from Ms Dando was plainly unwanted conduct, as Mr Henry rightly accepted.

118. We concluded that it was related to race because it took issue with the claimant's allegations of race discrimination which arose inextricably out of her Polish nationality.

119. We also concluded that it was related to sex because it took issue with her allegations of sexual harassment, which were made as a woman about treatment from Mr Jackson as a man.

120. However, we found the email was not related to disability. Although paragraph 4 of the email accused the claimant of "happily getting paid for sitting at home making up these ridiculous claims", that was (we concluded) a passing jibe unrelated to the main purpose of the email, which was to refute and denigrate the allegations being made of race and sex discrimination.

121. We then considered whether the email had the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We found that it did not have that purpose. There was no evidence of Ms Dando's purpose save what we had from the email itself, and her evidence in her witness statement. We accepted that Ms Dando genuinely felt that the allegations made by the claimant did not reflect her own experience of the office environment and she concluded that they were being falsely made.

122. However, the email could still constitute harassment if it had the effect of creating that environment for the claimant.

123. In deciding whether it had that effect we were required by section 26(4) to take into three matters in particular into account.

124. The first was the perception of the claimant. We accepted what the claimant said in paragraphs 29 and 30 of her witness statement, which was not challenged in cross examination. She found the email hostile, offensive and intimidating.

125. The second factor was the other circumstances of the case. We took into account that Ms Dando was far senior to the claimant in these intertwined companies. Her email signature was "Group Sales Director". She was clearly close to Mr Rathore, the ultimate proprietor of both businesses. The email had a subject line of the word "DISGRACE". It was very hostile in its tone. It accused the claimant of deliberate falsehoods. The claimant was in a vulnerable position. She was a relatively new employee having been employed for over a year but having been in work for only four months until September 2016. She was a Polish immigrant in an office where her only other Polish colleague (Damian) had left. She had been off sick since September 2016 with mental health issues. She had presented an Employment Tribunal claim in December which was coming up to a hearing, which was inherently very stressful for her.

126. The third factor was whether it was reasonable in those circumstances for the email to have the effect that it did on the claimant. We were satisfied that it was reasonable for it to have that effect, not least because of the imbalance in power between Ms Dando and the claimant. In reaching that conclusion we took into account that allegations 2-19 pursued by the claimant in these proceedings failed before the Sherratt Tribunal, but it was conceded that the claim form was a protected act not pursued in bad faith. So even though nearly every other allegation of discrimination or harassment failed in the Employment Tribunal proceedings, we were satisfied it was reasonable for the email from Ms Dando to have the proscribed effect on the claimant.

127. For those reasons we decided that the email sent by Ms Dando constituted harassment related to race and sex (but not to disability), contrary to section 26 Equality Act 2010.

128. As the email contravened section 26, section 212 means it cannot be regarded as victimisation contrary to section 27 or direct discrimination contrary to section 13. Had those been live issues we would have found that the email was victimisation. The primary reason for the email was the fact the claimant had pursued an Employment Tribunal claim, which was a protected act. It would not in our judgment have amounted to direct race, sex or disability discrimination.

Part 4: Allegation 21 – Failure to provide a reference

129. The failure to provide a reference for the claimant in October 2017 had already been found by the Sherratt Tribunal to amount to victimisation contrary to section 27, but the determination of remedy for that had been delayed pending the appeal. The question for this Tribunal to determine (issues 2.1 and 2.2) was whether it also amounted to direct disability discrimination contrary to section 13.

Relevant Legal Framework

130. The law in relation to direct discrimination contrary to section 13 Equality Act 2010 is summarised above.

131. It should be noted that section 13 contains no express provision relating to knowledge of disability by the decision maker. In that sense it can be contrasted with section 15, which provides that the respondent will be liable only if it knew or ought reasonably to have known that the claimant had a disability at the relevant time. However, because the comparison to be made under section 23 is one which is the same in all material circumstances, including the disabled person's abilities, save for the fact of having a disability under the Equality Act, and because in cases of this kind the Tribunal has to assess the mental processes of the decision maker, it is in practice not possible for a decision to be influenced by the fact that the claimant is a disabled person under the Equality Act unless the decision maker is aware of that. The concept of "constructive knowledge" – what the decision maker ought reasonably to have known – does not apply in section 13 cases.

Findings of Fact

132. Having been off sick for over 12 months the claimant applied for a part-time role with Independent Options, an organisation which supports people with disabilities. On 5 October 2017 the claimant was offered that role subject to references. On 19 October 2017 (page OB411) Independent Options emailed the respondent in an email headed "Urgent – Reference Request" enclosing a job description and a reference request form, and asking for it to be completed and returned. The email emphasised that the claimant might be shown the reference if she requested it. We did not see the job description or reference request form.

133. The email came to Ms Lyons of the respondent, and she passed the matter to Mrs Halliwell.

134. No reference was provided.

135. The charity sent another email on 27 October 2017 asking for the reference to be completed as soon as possible (page OB412), but again there was no reply.

136. On 14 November 2017 Independent Options wrote to the claimant saying that she would not be offered the post of Support Worker. The key paragraph read as follows:

> **"As you are aware the original offer was subject to receiving satisfactory references. I have tried to obtain a reference from the various different employers you provided me with. However, the reference requests were unsuccessful."**

137. The other employer from whom a reference was sought was the company which employed the claimant before she worked for the respondent. That company provided a factual reference. It was only the respondent that did not provide any reference.

138. Mrs Halliwell gave evidence about why no reference had been provided. Her witness statement for the hearing before the Sherratt Tribunal said that she was

surprised to receive the reference request because the claimant was still employed by the respondent but was sending in sick notes and saying that she was not fit to work. She did not want to say anything negative about the claimant and felt that anything that could have been said would have exacerbated the situation. Her statement said the thought of providing a factual reference did not cross her mind at all.

139. In her oral evidence to our hearing Mrs Halliwell confirmed that she did not get legal or HR advice. She felt that if she gave a reference she would have to disclose that the claimant had been at work for only four months out of her 18 months of employment.

140. As to her awareness of whether the claimant was a disabled person at the time, Mrs Halliwell had seen no medical information save some of the fit notes, which had been issued for more than a year and which made reference to low mood.

Submissions

141. Mr Henry invited us to conclude that this was not direct disability discrimination. The reason that no reference was provided was set out in paragraph 4 of Mrs Halliwell's witness statement and was because of the length of time the claimant had been off compared to the length of time she had been in work. The position would have been exactly the same for a non-disabled employee with the same sickness record.

142. The claimant invited us to conclude that it was direct disability discrimination because the circumstances and length of her absence, and the information available to the respondent, was such that there could have been no doubt that she was a disabled person. In effect the claimant argued that the fact she was on long-term sick leave was the same as being a disabled person and therefore that there was direct discrimination as well as the victimisation found by the Sherratt Tribunal.

Discussion and Conclusions

143. We considered whether the fact the claimant had been a disabled person in October 2017 had had any material influence (conscious or subconscious) on the mental processes of the decision maker, Mrs Halliwell. We bore in mind that the decision maker cannot be influenced by the fact that the claimant was a disabled person if she does not know that she is disabled.

144. The comparison required by section 13 is governed by section 23 which provides that there must be no material difference between the circumstances of the comparators apart from the protected characteristic. It followed that the hypothetical comparator on whom the claimant relied under section 13 would be a person:

- employed by the respondent from May 2016 and who had gone off sick in September 2016;
- who had submitted a grievance when going off sick, in which she made allegations of discrimination and harassment;
- who had submitted an Employment Tribunal claim form in December 2016;

- who had not returned to work and had submitted a series of fit notes which initially referred to stress at work and later referred to low mood and other terms;

- but who was not a disabled person under the Equality Act 2010, perhaps because whilst she could not return to work for the respondent, she had not experienced a substantial adverse effect on her day-to-day activities.

145. We accepted Mrs Halliwell's evidence to our hearing that she thought any reference would have to say that the claimant had been off for over 12 months having worked for only four months before going off sick, and that that was bound to be seen in a negative light by the prospective new employer. We found as a fact that Mrs Halliwell would have taken the same approach to a person in the same position who was not disabled under the Equality Act. She would have had exactly the same thought process for this hypothetical comparator and would have reached the same conclusion that any reference she could give would have been too negative.

146. So even if the burden of proof had shifted to the respondent, the respondent had shown that the fact that the claimant was a disabled person had no material influence on the mental processes of Mrs Halliwell because she did not know at that stage the claimant was covered by the Equality Act and her reason for not providing a reference had nothing to do with the claimant's status as a disabled person. The failure to give a reference did not amount to direct disability discrimination.

REMEDY REASONS

Preliminary Matters

147. Having delivered judgment on liability with oral reasons, the tribunal heard evidence from the claimant and submissions on remedy. There were three preliminary matters we had to resolve during the hearing on 17 November 2023.

Charity Job Application

148. The first issue concerned a job application in 2018 for a role with a charity. An Employment Tribunal complaint against that charity had been resolved by an agreement which included an obligation of confidentiality on the claimant. The claimant objected to the inclusion in the bundle of some material relating to this because it would put her in breach of that agreement. Upon enquiry it became clear that the agreement permitted her to disclose information "as required by law". The Tribunal was satisfied that the information about the charity role was relevant to the question of the determination of remedy, and we unanimously made this Order:

> **ORDER: The claimant must disclose to the Tribunal and to the respondent the documentation relating to her application for a charity role made in October 2018.**

149. In compliance with that the claimant produced a three-page witness statement, accompanied by relevant documents. We will refer to some of those documents below.

Hearing in private

150. The evidence about remedy was also going to include evidence of a sensitive personal nature about various medical conditions which have affected the claimant. The claimant wanted that part of the hearing to be conducted in private under rule 50. Mr Henry agreed that that would be appropriate, but that in itself did not mean that any such measure was justified. It is the role of the Tribunal to ensure that the common law principle of open justice, and the rights guaranteed by the European Convention on Human Rights in Article 6 (the right to a public hearing) and Article 10 (freedom of expression) are properly protected when balanced against the right under Article 8 to respect for home and private life.

151. We took evidence on oath from the claimant about the effect on her if personal medical information were to become available to the public as a consequence of that part of the hearing being in public, or of being recorded in detail in this Judgment.

152. Having heard that evidence we were satisfied that there if details of the medical position became public there would be a real risk to the claimant's recovery from the mental and physical conditions she has experienced since 2016. In our judgment the need to keep those details private outweighed the public interest in this small part of the case being heard in public. This Order was made unanimously:

> **ORDER: Under rule 50 the part of the hearing where the claimant gives oral evidence about her medical position will be conducted in private.**

153. Mrs Halliwell left the hearing room during that part of the hearing, meaning that the only people in attendance apart from the Tribunal were the claimant and Mr Henry. When that part of the oral evidence ended the hearing resumed as a public hearing, and Mrs Halliwell returned.

Agreement to provide a reference

154. In the course of submissions in relation to remedy Mr Henry asked whether the claimant was pursuing any recommendation from the Tribunal as she had ticked that box on her claim form. The claimant said she would like the respondent to provide a factual reference. Helpfully Mr Henry, on instruction from Mrs Halliwell, confirmed that that could be agreed. The Tribunal did not need to exercise its power to make recommendations.

Legal Framework for Remedy

Discrimination Remedy

155. The starting point is section 124 of the Equality Act 2010:

> **(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).**
>
> **(2) The tribunal may —**
>
> **(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;**
>
> **(b) order the respondent to pay compensation to the complainant;**
>
> **(c) make an appropriate recommendation.**
>
> **…….**
>
> **(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by a county court or the sheriff under section 119.**

156. The amount of compensation in cases of discrimination should be calculated in the same way as damages in tort: **Ministry of Defence v Cannock & Others [1994] ICR 918**. A Tribunal should determine what loss, financial and non-financial, has been caused by the discrimination in question. The EAT stated 'as best as money can do it, the applicant must be put into the position she would have been in but for the unlawful conduct'. The tribunal must ascertain the position that the claimant would have been in had the discrimination not occurred.

157. In relation to an award of compensation for injury to feelings, the onus is on the claimant to establish the nature and extent of the injury to feelings. The amount of the award under this head should be made taking into account the degree of hurt, distress and humiliation caused to the complainant by the discrimination. In **Armitage Marsden & HM Prison Service v Johnson (1997) ICR 275** a number of principles were identified which can be summarised as follows:-

162.1 Awards for injury to feelings are compensatory not punitive.

162.2 Awards should not be too low, as that would diminish respect for the policy of anti-discrimination legislation (see **Alexander v The Home Office [1998] IRLR 190 CA)**. Nor should they be so excessive as to be viewed as "untaxed riches".

162.3 Awards should be broadly similar to the whole range of awards in personal injury cases.

162.4 Tribunals should remind themselves of the value in every day life of the sum they have in mind.

162.5 Tribunals should bear in mind the need for public respect for the level of awards made.

158. In **Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102** the Court of Appeal gave guidance as follows in paragraphs 65-68:

> **65. Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.**

> **i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.**
>
> **ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.**
>
> **iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.**
>
> **66. There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.**
>
> **67. The decision whether or not to award aggravated damages and, if so, in what amount must depend on the particular circumstances of the discrimination and on the way in which the complaint of discrimination has been handled.**
>
> **68. Common sense requires that regard should also be had to the overall magnitude of the sum total of the awards of compensation for non-pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage. In particular, double recovery should be avoided by taking appropriate account of the overlap between the individual heads of damage. The extent of overlap will depend on the facts of each particular case."**

159. Subsequently in **Da'bell v NSPCC [2010] IRLR** in September 2009 the EAT said that in line with inflation the **Vento** bands should be increased so that the lowest band extended to £6,000 and the middle band to £18,000.

160. The Court of Appeal confirmed in **De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879** that the 10% uplift in personal injury awards required by **Simmons v Castle [2012] EWCA Civ 1288** should apply to awards for injury to feelings and injury to health in discrimination complaints.

161. On 5 September 2017, following a consultation exercise, the President of the Employment Tribunals in England and Wales published Presidential Guidance on the **Vento** bands which indicated that:

> **"in respect of claims presented on or after 11 September 2017, and taking account of *Simmons v Castle* and *De Souza v Vinci Construction (UK) Ltd*, the Vento bands shall be as follows: a lower band of £800 to £8,400 (less serious cases); a middle band of £8,400 to £25,200 (cases that do not merit an award in the upper band); and an upper band of £25,200 to £42,000 (the most serious cases), with the most exceptional cases capable of exceeding £42,000."**

162. This claim was presented in the year beginning in April 2016 in relation to the interview comments, and (by amendment) in the following year for the Dando email and the reference issue. We took the **Vento** bands as being as in the Presidential Guidance of September 2017 for the latter, and slightly lower for the former, but of course what matters is not the precise boundaries of each band but the sum the

Tribunal considers appropriate as compensation having regard to the effect on the claimant of the discrimination. In reaching the figures below we took account of the effect of inflation and the **Simmons v Castle** uplift**.**

163. The power to award compensation for injury to health, as distinct from injury to feelings, was confirmed by the Court of Appeal in **Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] IRLR 481**. It is for the claimant to prove that the unlawful treatment made her health worse. The Judicial College produces guidelines for assessing compensation for psychiatric injury.

164. Aggravated damages were considered by the EAT in **Commissioner of Police of the Metropolis v Shaw [2012] ICR 464**. The principles were set out in paragraphs 19-24 of that decision. If it is appropriate to award such damages, the amount should be compensation for the extent to which the injury to feelings of the claimant has been aggravated by the manner of the discrimination, the motive, or any subsequent conduct. Double compensation must be avoided so the EAT recommended that Tribunals should make an overall award for injury to feelings which incorporates a sum as aggravated damages.

165. Finally, interest on discrimination awards is governed by the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Where an award is made the Tribunal must consider awarding interest but has a discretion whether to make any award. For injury to feelings awards interest is in principle calculated over the period between the discriminatory act and the award (Regulation 6(1)(a)); for financial loss compensation the period is between the mid-point date and the award (Regulation 6(1)(b)). However, a different approach to the relevant periods can be used in order to avoid serious injustice (Regulation 6(3)). For cases where the claim form was presented on or after that date it is the rate prescribed by the Judgments Act 1838 (currently 8% per annum).

166. Where there has been an unreasonable failure to comply with the ACAS Code of Practice on Discipline and Grievance Procedures, the Tribunal has power under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 to increase or reduce compensation by up to 25%.

Findings of Fact on Remedy

167. Having heard further oral evidence from the claimant, and having considered relevant pages in the bundle of documents together with those of her statements that addressed remedy, the Tribunal made the following additional findings of fact relevant to remedy.

<u>Interview Comments April 2016</u>

168. The comments made by Mr Rathore in interview did concern the claimant, but she did not do anything about them at the time. She continued with her application for employment, started the job on 10 May 2016, and did not mention them to anyone, either informally or in her written grievance of 14 September 2016. There was no record of the claimant having mentioned this to her GP when she began seeing her GP from 20 September 2016 (page 962). The matter was raised for the first time in the claim form on 3 December 2016.

169. The claimant was ill by that stage. She had one day off work with stress on 8 July 2016, and went off sick on a self-certified basis on 14 September before putting in her grievance just after 5.00pm that day. She was unable to see her GP until 20 September when she was certified unfit for work because of stress at work for a period of one month. The GP entry at page 962 referred to her having been "happily settled" in her new job but recently starting problems with her line manager. At that consultation the claimant was prescribed citalopram, an antidepressant, and propranolol for anxiety. As indicated above, that prescription was renewed in the months that followed. In April 2017 the citalopram was replaced by sertraline, but the claimant stopped taking antidepressants in October 2017. She did so because they made her feel worse, partly because of "brain fog".

Dando Email June 2017

170. The claimant was still on anti-depressants when she received the email sent by Ms Dando on 29 June 2017. By that stage the claimant had been off work for approximately nine months. She had begun therapy in early 2017, having first been referred for therapy in the NHS at some point after September 2016.

171. The claimant gave evidence in her witness statement for the original hearing about how the email made her feel. We accepted her evidence that it was very hurtful, intimidating and offensive, coming as it did four weeks before the proposed final hearing in her case. We also accepted that the claimant regarded the Dando email as the "last straw" in the sense that it caused her to think that she had to look for work outside the respondent.

172. Apart from the injury to her feelings, however, there was no medical evidence of an impact on her health. She saw her GP on 6 July 2017 (page 961) but the GP entry simply recorded that a new fit note was issued for low mood. There was a reference in the history to some chest pains and other matters, but nothing mentioned about the email itself. The comments from the doctor that day also indicated that the claimant was going to attend A & E for further tests, and that she should call 999 if there were any worsening symptoms, but those comments appeared to relate to physical problems (presumably the chest pains) rather than any mental health issues.

Reference Issue October 2017

173. Looking for work elsewhere resulted in an offer of employment from Independent Options. It was a part-time role as a Community Support Worker for 25 hours per week paid at £8.21 per hour. The claimant was offered the role subject to references, and it was only the absence of a reference from the respondent which resulted in that job offer being withdrawn by letter of 14 November 2017.

174. We found as a fact that learning that she was not getting the job because of the absence of a reference came as a great blow to the claimant. In her witness statement for the final hearing in September 2018 she described enormous distress. This job was her way out of the respondent, and of great importance to her because once in employment she would be able to get a good reference from her new employer and find other better paid work in future. The claimant had put a significant amount of effort into getting the job, which she was able to do following therapy

sessions, work coaching and medical treatment. The recruitment process had included a 27 page application form, two interviews and several telephone conversations, and had been stressful for her. The news that the job offer was withdrawn caused her humiliation because she had told family and friends about the new job but now had to tell them that she had not got it. She also had to appeal against the withdrawal of her benefits at the time which exacerbated the feelings she had when the job was withdrawn. We found that her feelings were seriously injured by the failure to provide a reference.

175. The claimant also said that this caused a severe nervous breakdown and a relapse into depression. The claimant did go to A & E on 13 December 2017 in respect of a heart condition and chest pain symptoms, as recorded at page 959 but otherwise that was not reflected in the medical records available to us.

176. We found as a fact that the claimant was not re-prescribed any medication following the loss of the Independent Options job, and nor was there any reference in her medical notes to a nervous breakdown at that time. She continued with the therapy through the NHS and later on a privately funded basis.

Charity Role October/November 2018

177. The claimant continued from late 2017 in receipt of Employment Support Allowance, and had to undertake volunteering roles, some of them full-time, in an effort to try and build up organisations who would give her a reference. Her volunteering experiences were not entirely satisfactory. The pressure for her to find paid work resulted in her applying for a charity role as a part-time Polish Project Administration Worker. The closing date was at the end of October 2018.

178. The information provided (which was attached to the claimant's witness statement about this) gave a start date of 15 November 2018 on a six month fixed term contract working 16 hours a week at £8.75 per hour. However, it transpired that the role was not as billed. The claimant only realised this when she was sent by email a “freelance contractor agreement” which referred not to pay or salary, but to fees and expenses as per the schedule, which was blank. It was apparent to her that the role was quite different from what she had been led to believe. The claimant experienced what she described as a “nervous breakdown” and as a consequence the opportunity to do that work was denied to her.

Ongoing Effects

179. The claimant's experiences whilst working for the respondent during 2016 contributed to a situation where she suffers from a number of serious and long-lasting health issues. She does not think she will be able to return to full-time work ever again. She is now arranging to return to Poland. She has continued to experience significant health problems. These are in relation to a variety of matters, including a serious physical issue which arose in early 2019 and led to an operation in January. A second operation was meant to follow but has been delayed because of the pandemic and post Covid complications. The claimant is still waiting for it and is still getting therapy and taking propranolol.

Claimant's Submissions on Remedy

180. The claimant relied on her two Schedules of Loss and the contents of her written witness statements and skeleton argument. In her oral submissions she emphasised how hard she tried to get back to work, and invited us to conclude that if she had got back into work with Independent Options she would not have needed the therapy and the medication to continue until today. She would have been able to keep her car rather than having to sell it. She was having to leave the United Kingdom to return to Poland because she could not sustain herself on part-time work alone.

181. The Tribunal asked the claimant how it was to deal with the question of identifying the effect of these three incidents compared to the eighteen which were unsuccessful and her overall experience with the respondent. In reply the claimant said that the propranolol and the therapy had both started in September 2016 and were continuing to this day, and were attributable to the respondent's actions. She also submitted that the recovery she was making through therapy was set back by the Dando email and then by the failure to give a reference. The Dando email had been the "last straw".

182. The claimant invited us to conclude that the GP entries were not a complete record of what she told the GP, and often were compiled during very brief ten minute consultations in any event. She would only mention the most important things rather than everything which was affecting her.

183. In relation to aggravated damages the claimant reiterated the contents of her Schedule of Loss which set out in detail why she considered that the way the respondent had conducted the case had aggravated the injury to feelings. It included a postponement for which a genuine reason was not given, issues about the termination of her employment in 2018/2019, and the attitude of the respondent's representative towards her personally.

184. The claimant submitted that the fact she did not take up the charity role in 2018 was entirely reasonable and should not be viewed as any end point for compensation.

185. The claimant stood by the amounts set out in her Schedule of Loss for injury to feelings and injury to health. She said that the award for injury to feelings for all three matters taken together should be £18,000.

186. Finally, the claimant submitted that there was a breach of the ACAS Code by the respondent because her allegations of race discrimination in the grievance had not been properly answered and she opposed any reduction in compensation because by the time of the Dando email and the failure to provide a reference the Tribunal proceedings were well under way and it was reasonable not to pursue a grievance about such matters but simply to incorporate them into the case.

Respondent's Submissions on Remedy

187. Mr Henry made oral rather than written submissions. He emphasised that there were no entries in the medical records available to the Tribunal about these

three matters, which meant that no award for injury to health was appropriate. He said that could also be taken into account in assessing the appropriate award for injury to feelings.

188. There had been no effort to pursue the interview harassment matter until the ET1 was presented, and it had not even been referred to in the grievance. The Dando email was undoubtedly upsetting but was not mentioned in the GP consultation about a week later on page 961. The same was true of the reference issue: there were no medical entries. The withdrawal of the job offer by Independent Options occurred just after the claimant had come off antidepressants and she did not go back on them.

189. This might be a case, he submitted, where the Tribunal made separate awards of injury to feelings and he suggested £2,000, £4,000 and £2,000 respectively for the interview, the Dando email and the reference issue. Alternatively, an award for all three which was at the bottom of the middle band under **Vento** would be appropriate.

190. On injury to health he submitted in addition that there were plenty of health issues unrelated to these three incidents, in particular some which resulted from personal factors.

191. As for aggravated damages, he submitted that the claimant had not made out that the way the proceedings were conducted had aggravated the injury to her feelings. This was effectively no more than litigation.

192. On financial loss he accepted that the failure to provide a reference caused the Independent Options job offer to be withdrawn, but he suggested that any loss from that should he restricted. Firstly, credit would have to be given (as the claimant acknowledged) for ESA income in that period, and secondly it should be regarded as ending at the point where the claimant did not pursue the charity role. It would be wrong for the respondent to be liable for any loss after that period.

193. Failing that, the claimant had herself provided evidence that she had an important health issue in early 2019 which would have ended her income from Independent Options in any event. He suggested that an award of one year would be appropriate.

194. On the ACAS Code Mr Henry submitted that no increase in compensation was appropriate because the grievance procedure had been followed, but the compensation should be reduced by 10% because the claimant had not lodged a grievance about any of these three incidents.

195. In relation to interest he invited us to conclude that applying the normal rule would amount to serious injustice to the respondent because the length of time would result in significant awards of interest of 50% or more in relation to the injury to feelings awards. He therefore invited the Tribunal to take a different view as to the period over which interest should be awarded.

Discussion and Conclusions on Remedy

Interview Comments

196. The first matter the Tribunal considered in deliberations in chambers on 30 November 2023 was the appropriate award for injury to feelings and injury to health in relation to the comments made at the job interview on 27 April 2016. The claimant submitted that the award for injury to feelings for all three matters taken together should be £18,000, whereas Mr Henry submitted that the award for this matter in isolation should be £2,000.

197. We noted that there was no evidence of any significant impact on the claimant of this comment. She did not mention it to anyone until she presented her Tribunal complaint in December 2016. She accepted the job offer, and indeed the first part of her employment was successful and settled. When she saw her General Practitioner about a week after going off sick on 20 September 2016 the GP recorded that problems had started "recently". It was clear to us that an award in the lowest of the **Vento** bands was appropriate.

198. We noted, however, that it was a comment made by the person in a position of power over the claimant, being the proprietor of the respondent and the person who had the right to decide whether she was offered the job or not. In those circumstances it was understandable that the claimant might not mention her concerns, being keen to find employment and make a success of it. We found that this was why there was no mention made of the comment at the time, not because it had had no impact.

199. Putting those matters together we were satisfied that a comment made at the job interview of this kind, which amounted to harassment contrary to the Equality Act, did cause injury to feelings sufficient to warrant an award of £**2,000**.

200. There was no evidence, however, that this caused any injury to the claimant's health at that time. The claimant was off sick for one day in July 2016 before her long-term sickness commenced at the time she filed her grievance about other matters in September 2016. The claimant had not proved that the interview comments caused any injury to her health and no award was made.

Dando Email

201. The second matter we considered was the appropriate award in respect of the Dando email of 29 June 2017.

202. That email was written in hurtful and intimidatory terms. The heading of the email and the content would plainly have a significant impact on the feelings of the recipient. We noted as well that at this stage the claimant was in a vulnerable position. She had been off work and on antidepressants for nine months, and she was about four weeks away from her Employment Tribunal hearing. We found as a fact that receipt of an email in those terms from a senior manager in the group of companies had a significant effect on her feelings.

203. Mr Henry submitted that the appropriate award for this item would be £4,000. We disagreed with Mr Henry and concluded that an award of £**6,000** was appropriate

given the terms of the email, its timing and the claimant's vulnerable position at the time she received it. For reasons set out in paragraphs 222 – 223 below, we increased this by a further £1,000 by way of aggravated damages.

204. We considered carefully whether any award for injury to health was appropriate as well. We noted that there was no reference to this in the GP visit on 6 July 2017, although we recognised the claimant's explanation that the GP visits were essentially not detailed discussions of the current position but intended to get an extension to the fit note. However, there was nothing in the medical records to suggest any link between the receipt of this email and the chest pains which were mentioned in the history and comments section. Further, the timing of the visit appeared to be dictated by the fact that the fit note issued on 8 May was expiring the following day, and we inferred that this was not a visit to the GP triggered by receipt of the Dando email. Indeed, we noted that in May the fit note had been issued for two months but at the visit on 6 July the fit note was issued only for a further month, which was not consistent with any deterioration in health; if anything, it suggested the opposite.

205. We therefore concluded that the claimant had failed to prove that this email had any detrimental impact on her health, as opposed to on her feelings, and therefore no separate award was made.

Reference Issue

206. The third matter we considered was the appropriate award for injury to feelings and injury to health in relation to the failure to give a reference, which amounted to victimisation.

207. The claimant had decided that she had to find another job following the Dando email, and this was particularly important to her. Firstly, it was a way out of her employment with the respondent which had caused her such distress and had affected her health for over a year. Secondly, it would enable her to get a new reference from the Independent Options role which would make her much better placed to find full-time employment at a higher rate of pay in the future. It was therefore very important to the claimant that she got this role, and we were satisfied that receipt of the letter withdrawing the role because of the absence of a reference came as a huge blow to her feelings. We took into account that she was still a vulnerable person at that stage because of her long-term health absence and the fact she was suing her employer in the Employment Tribunal, and we were satisfied that in all the circumstances it was appropriate for an award to be made in the middle **Vento** band.

208. We also considered whether an award for injury to health would be appropriate. We noted the oral evidence the claimant gave about the effect on her, which she described as a severe nervous breakdown and a relapse into depression, but her assertion on those points was not supported by medical evidence about causation. The visit to A & E about a month later was attributed to the heart condition (page 959), and the claimant was not re-prescribed the antidepressant medication which she had ceased taking in October 2017. We concluded therefore that it was not appropriate for us to make any separate award for injury to health, but rather to make an award for injury to feelings which took account of the fact that the

claimant's feelings were more injured than they would have been had she been a person in good health at the time.

209. Putting those matters together we rejected Mr Henry's submission that an award of £2,000 was appropriate for this matter and decided that an award of £**9,000** was the appropriate figure for injury to feelings.

Financial Losses

210. The claimant in her Schedule of Loss on the three remitted grounds claimed financial loss compensation running from 14 September 2016 when she first went off sick and submitted her grievance, but we unanimously decided that no financial loss compensation of that kind was appropriate. The events which caused the claimant to become ill and to go off sick in September 2016 did not include the comments made at the interview in April 2016, but rather the later events which the Sherratt Tribunal found not to be discriminatory. The interview comments did not affect the claimant's health in any way: she was able to start the job about three weeks later and make a success of it in the early days. As for the Dando email, we were satisfied that even if it had never been sent the claimant would have remained on sick leave continuously throughout the rest of 2017 and 2018, as she had already been off sick for nine months by the end of June 2017. No award in respect of financial loss was appropriate for those two matters.

211. However, we did assess compensation for financial losses resulting from the failure to give a reference. We found as a fact that it was only the respondent that was asked for a reference and therefore the failure to give a reference was the sole cause of the claimant not having the job offer confirmed. We did not see the reference request form which was attached to the email from Independent Options of 19 October 2017 at page OB411, but we noted that the email itself asked the respondent to indicate in what capacity and for how long they had known the claimant. If Mrs Halliwell had acted in a way that did not amount to victimisation, a short factual reference confirming the claimant's job role and start date of employment would have been provided, and that this would have resulted in the job offer being confirmed.

212. At that stage the claimant was on sick leave and not in receipt of any pay and we found that if the reference had been provided promptly the claimant would have been able to have taken up the role with Independent Options on 1 November 2017.

213. The claimant claimed loss in respect of the value of the employer's national insurance contributions which Independent Options would have made, but we were satisfied that there was no loss there because the amount of employer contributions made is not material to whether the national insurance contributions record is complete for any relevant period. The claimant remained in employment and in receipt of ESA and therefore our understanding was that she would have received credits for that period. In addition, we made no separate award for loss of holiday entitlement from Independent Options because that would have been paid annual leave covered by lost wages. Our calculations were based on the net loss of earnings only.

214. We considered how long the income from that job would have continued. Mr Henry did not seek to pursue any argument that the claimant would not have been able to carry on in that job and make a success of it. He did not invite us to limit the period of loss by reference to any "withdrawal factor" of that kind. We were satisfied that the claimant had the skills and capabilities to make a success of this role.

215. However, Mr Henry did submit that the period of loss should end in mid-November 2018 when the claimant decided not to pursue the charity role. In effect he invited us to conclude that the claimant had failed to mitigate her losses by not taking up that opportunity. We rejected that argument. It was clear that the claimant was very disconcerted by the fact that the charity role turned out to be a freelance self-employed role rather than the employed role with a fixed hourly rate which she had been led to believe. The freelance contractor agreement itself provided at clause 3.1 (page 9 of the attachments to the claimant's witness statement about this) that the services specified in the schedule (which was blank) would only be required at such times as the charity and the claimant would agree from time to time. It was effectively a "zero hours contract". Given the claimant's state of health, and given her evidence about the effect on her of the reality of this opportunity that we set out above, we were satisfied that the claimant acted reasonably in not taking this up. We rejected the argument that her period of loss should end in mid-November 2018.

216. However, it is a matter of record that the claimant experienced serious health problems of a physical nature in early 2019 and underwent an operation in January of that year. We concluded that this would have left her unable to continue in her role with Independent Options, had that role not been withdrawn in the absence of a reference, either because that role would then have ended or because she would have been on long-term sick leave. Although we have not seen the terms and conditions attaching to that role, bearing in mind the nature of the organisation and of the role, we cannot conclude that there would have been entitlement to ongoing occupational sick pay beyond statutory sick pay, from which the Employment Support Allowance ("ESA") actually received would have to be deducted. We therefore concluded that the period of loss for which we should compensate the claimant relating to earnings from the lost Independent Options role should end on 31 January 2019.

217. That role came with a rate of pay of £8.21 per hour for 25 hours per week. Those figures came from the job advert which appeared at page 9 of the claimant's Schedule of Loss for the victimisation claim. That job advert also indicated that the person appointed would be able to become part of the weekend away service where the worker would be paid £377.92 for each weekend spent accompanying young adults to a variety of UK destinations. The claimant said in her Schedule of Loss that she would have worked one in five weekends on this basis, and this was not challenged by Mr Henry.

218. We calculated the loss sustained by the claimant through not getting this role in the period between 1 November 2017 to 31 January 2019. The period as a whole was 65 weeks, and working 25 hours per week at £8.21 per hour would mean a weekly loss of £205.25 gross. Over the period this equated to £13,341.25. To that we added 13 working weekends at £377.92 each, making a further £4,912.96. That meant that the gross income the claimant lost in the period was £18,254.21.

219. From that we had to deduct the gross amounts the claimant had received by way of ESA. The figures in her Schedule of Loss were not challenged by Mr Henry.

220. The period of loss with which we were concerned covered two different tax years and we calculated the net losses separately.

- In the tax year 2017-2018 we were concerned with a period of 21.5 weeks from 1 November 2017 to the end of March 2018. On a pro-rata basis the figure for 65 weeks of gross income of £18,254.21 reduced to £6,037.93 (21.5 weeks of the 65). We did not make any deduction for tax and national insurance because that was below the personal allowance. For the period the claimant received 21.5 weeks of ESA at £73.10 per week, making a total of £1,571.65. This left a net loss in that first tax year of £6,037.93 - £1,571.65 = £4,466.28.

- In the new tax year from April 2018 to 31 January 2019 (43.5 weeks) the claimant would have received gross payments from Independent Options of £12,216.28 (43.5 weeks of the 65). That only just exceeded the personal allowance for that tax year, and we were satisfied that the appropriate figure to use in net terms would be £11,688 once tax and national insurance were taken into account. Between 1 April 2018 and 31 January 2019 she received ESA of £109.65 for 43.5 weeks totalling £4,769.78. This left a net loss in that second tax year of £12,216.28 - £4,769.78 = £6,918.22.

221. Adding these two net losses together made £**11,384.50**, which we awarded as compensation for financial losses resulting from the failure to give the claimant a reference in October 2017.

Aggravated Damages

222. We then considered the question of aggravated damages. We took into account the case law which shows that it is wise to include any compensation for the aggravation of injury to feelings as part of the overall injury to feelings award. The claimant's case on aggravated damages was set out on pages 1-5 of the schedule prepared for the victimisation complaint alone, but the claim was reiterated in the schedule for our hearing. The amount identified in the first schedule was £13,300 as aggravated damages.

223. Much of what the claimant relied upon, however, was part of the litigation in these proceedings generally. We had to take into account that the claimant was unsuccessful on 18 out of her 21 allegations. The litigation was bound to be stressful for her, as a disabled litigant in person, and much of what she raised as aggravating features were just part of an adversarial litigation process. However, we were satisfied that there was some aggravation to the injury to her feelings resulting from the Dando email by the approach the respondent took to bad faith in relation to whether the claim form was a protected act. The claimant had been accused of making false accusations in the Dando email itself, and made clear in her case on aggravated damages that she was also greatly upset at the hearing before the Sherratt in July 2019 that the claim form had been lodged in bad faith as well. That argument was rejected by the Sherratt Tribunal. In those circumstances we concluded that it was appropriate to increase the award for injury to feelings for the

Dando email by £**1,000** to reflect these specific aggravating features, but we otherwise rejected the complaint seeking aggravated damages on a more general basis. That meant that the award for injury to feelings for the Dando email, including the aggravating features, was increased to £**7,000**.

ACAS Code Adjustments

224. The next matter we considered was whether to award the claimant any increase in compensation because of an unreasonable failure by the respondent to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures. The immediate difficulty was that the claimant did not lodge a grievance about any of the three matters for which we were awarding remedy. On that basis alone we concluded no uplift was appropriate. However, we would not have awarded any uplift in any event on the basis for which the claimant contended. In procedural terms the grievance procedure was followed. The claimant's grievance of 14 September 2016 was acknowledged promptly, a meeting arranged which she was unable to attend, and an outcome provided. Her appeal was considered by a more senior person, a non-executive director, and again the claimant was unable to attend the meeting before the appeal outcome. The claimant's case was based upon the proposition that her allegations of race discrimination had not been properly addressed in the grievance, but none of those allegations of race discrimination were upheld by the Sherratt Tribunal in any event. No uplift was awarded.

225. The respondent argued that there should be a reduction in compensation of 10% because the claimant had unreasonably failed to pursue a grievance in relation to the three matters with which we were concerned at the remedy stage.

226. In relation to the harassment comments at interview, we were satisfied that the claimant had not unreasonably failed to comply with the ACAS Code of Practice. It was reasonable of her not to lodge a grievance at the time, because she was starting employment and wanted to make a success of it, and it was also reasonable, we concluded, for her to make no mention of this in her grievance of 14 September 2016 because that was a grievance about her line manager made to Mr Rathore, and raising a grievance about Mr Rathore would have been counterproductive. She wanted Mr Rathore to intervene and put matters right so that she could return to work.

227. As for the Dando email and the failure to give a reference, we were satisfied that the claimant did not act unreasonably in not pursuing grievances about these matters. Matters had gone well beyond that by then. She had been off sick for nine months, was still on antidepressants, and realised upon receipt of the Dando email that her time with the company would be coming to an end. In deciding to pursue these matters by way of amendment to her claim (or lodging an alternative new claim against D4Digital in the former case), rather than pursuing a grievance internally first, the claimant acted reasonably. No reduction in compensation was appropriate.

Interest

228. We next considered whether to award interest. We were satisfied that this was a case where it was appropriate to award interest, and Mr Henry did not argue otherwise. However, he invited us to conclude that applying the relevant regulations

mechanically would lead to serious injustice to the respondent because of the length of time which had passed since the discriminatory actions and the fact that the interest awarded would approach or even exceed half of the substantive sum.

229. We considered that submission carefully. This was an exceptional case in that in principle we would be awarding interest for events as long ago as April 2016, and at the latest November 2017. However, it could not be said that that delay was attributable to the claimant alone. The delay before the case came to a final hearing in 2018, and the fact that the Sherratt Tribunal was not able to reconvene and issue its written decision until August 2019, was not something for which the claimant bore responsibility. Her appeal was partly successful, albeit on a minority of points.

230. Importantly, we noted that the respondent continued to contest whether any compensation should be awarded at all for the interview comment (relying on time limits) and for the Dando email (relying on the withdrawal of its concession about vicarious liability), and that it had chosen not to make any interim payment in relation to the reference even once the decision of the Sherratt Tribunal that this amounted to victimisation was available in August 2019. The Tribunal had specifically referred to the possibility of making an interim payment to stop interest accruing in a letter to the respondent in December 2020, but no payment had been made.

231. Finally, we noted that the respondent has had the benefit of retaining the sums awarded for the whole of this period.

232. Putting those matters together we decided that applying the principles set out in the regulations would not lead to serious injustice.

233. The interview comment was made in late April 2016 and the date on which the Tribunal reached this judgment in chambers was 30 November 2023. We decided to award interest for a period of 7.5 years at the rate of 8% per annum on £2,000, which made interest of £**1,200**.

234. For the Dando email, the email was sent on 29 June 2017 and we treated that as a period of 6.33 years to this judgment. At 8% per annum on £7,000 that was a total figure for interest of £**3,544.80**.

235. For the failure to give a reference in October 2017 we had to consider interest on both awards. For injury to feelings we took that as a period of six years which at 8% per annum on £9,000 made a total figure for interest of £**4,320**. For the award in respect of financial loss which began on 1 November 2017 the regulations required us to award interest from the mid-point date between the date that loss arises and the date of our judgment. That equated to a period of three years rather than six years. At interest of 8% per annum for three years on £11,384.50 the total awarded was £**2,732.28**.

Grossing up For Tax

236. Neither side raised this and we decided that it was not appropriate to gross up any of the figures awarded. As the awards relate to compensation for losses which are not lost earnings from the respondent, nor resulting from the termination of

employment, it is our understanding that they will not be subject to tax as they fall outside section 401 of the Income Tax (Earnings and Pensions) Act 2003.

Preparation Time Order

237. The final matter we considered was the claimant's application for a preparation time order. Such an order can be made under rule 76 where the other party has acted unreasonably in the conduct of the proceedings. It requires the other party to pay something in respect of time spent preparing for hearings by a litigant without legal representation.

238. This was mentioned in passing in the Schedule of Loss prepared for the victimisation remedy, and it appeared as one line after a lengthy passage about aggravated damages and injury to feelings. It appeared in the section of that schedule where the claimant calculated the financial losses through not getting the Independent Options job. It seemed to us that in that schedule the claimant was actually seeking compensation for the time she spent preparing for the job interview, which as indicated in paragraph 174 above was extensive. However, that point had been factored into deciding the appropriate award for injury to her feelings.

239. When asked about this in her oral submissions the claimant said she did want preparation time under the Rules of Procedure for time spent preparing for a hearing which was wasted because of unreasonable conduct by the respondent, but she did not identify what unreasonable conduct there had been, or indeed which hearing and how much time had been wasted.

240. We concluded that this application reflected her general dissatisfaction with the litigation process, and we did not have any specifics of the time spent and why she maintained that there had been unreasonable conduct of the case in relation to any specific hours spent preparing for hearings. In those circumstances we concluded that no preparation time order was appropriate.

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Regional Employment Judge Franey

15 December 2023

JUDGMENT AND REASONS
SENT TO THE PARTIES ON

20 December 2023

FOR THE TRIBUNAL OFFICE

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.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2405428/2016**

Name of case: **Miss K Paczkowska** v **R-Com Consulting 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: 20 December 2023

the calculation day in this case is: 21 December 2023

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

For the Employment Tribunal Office