EMPLOYMENT TRIBUNALS

Claimant: Miss A Tariq

Respondents: 1. …
2. Mr Mojahid Hussain
3. Ms K

Heard at: Manchester **On:** 27 September 2023 (CVP)
28 September 2023 (in person)

Before: Employment Judge Horne
Ms V Worthington
Mr D Mockford

REPRESENTATION:

Claimant: In person
Respondents: Each in person

JUDGMENT having been sent to the parties on 9 October 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues for decision

1. In order to understand the issues we had to decide at this hearing, it is necessary to refer back to our reserved judgment sent to the parties on 19 May 2023. That judgment was accompanied by written reasons, to which we now refer as the "Liability Reasons" or "LR".
2. The hearing on 27 and 28 September 2023 was for three broad purposes:
   2.1. To reconsider the majority's finding that the claimant was not disabled at the relevant time;
   2.2. To determine whether or not Ms K harassed the claimant in relation to the protected characteristic of disability; and

2.3. To determine the claimant's remedy for victimisation and (if it arose) harassment.

Reconsideration grounds

3. On the first day of the hearing, the claimant outlined her grounds for reconsidering the majority decision on the claimant's disability. We summarise them here as follows:

Ground 1 – college attendance

3.1. The majority found (LR paragraph 179) that the claimant's poor college attendance was not the adverse effect of an impairment, in part because the claimant had other reasons for not going to college, such as going to work (LR paragraph 179.2), and her feeling that she could not be bothered (LR paragraph 179.6). The claimant asked us to reconsider that finding because her oral evidence had been (a) that there were only a few occasions when that was the reason for not going to college and (b) that the majority of occasions of missed attendance had been issues with her mental health, anxiety attacks and the stress of how she was being treated at the New Yorker Diner.

Ground 2 – mental impairment in 2017

3.2. The claimant saw her GP in 2017 when she was 15 years old. Our majority did not think that the record of this visit was evidence of a mental impairment at that time, at any rate, not one that had a substantial adverse effect on normal day-to-day activities (LR paragraph 179.3). The claimant argued that this finding gave insufficient weight to the history that she had given to the GP at that visit. She had told the doctor that she had felt low for many years.

Ground 3 - medication

3.3. The majority decision was based, in part, on the fact that the claimant was not prescribed any medication during the relevant period (LR paragraph 179.8). At the reconsideration hearing the claimant made the point that she had in fact been prescribed fluoxetine in January 2020, which was only shortly after the relevant period had ended. She invited us to infer from that prescription that she had needed fluoxetine in 2019.

Ground 4 – Incident Book

3.4. The next reconsideration ground engaged with the unanimous finding (LR paragraph 66) that the respondents' Incident Book was genuine. The relevance of this point was that our majority relied on that finding to make a further controversial finding about the claimant's self-harming activity. It was common ground that the claimant had told Ms K that she had self-harmed. Our majority, however, did not believe that the claimant had actually harmed herself. Their view, recorded in LR paragraph 179.4, was that the claimant "might, for example, have mentioned self-harm in order to deflect attention from poor performance at work". The claimant now argues that we should have found that the Incident Book was fabricated. The finding that the Incident Book was genuine is inconsistent, she says, with the finding (LR paragraph 85) that the Manager's Report Book was fabricated. If the Incident Book is now held to have been a concoction, the example on which the

majority relied would fall away. Therefore, says the claimant, the tribunal should now find, as our employment judge did, that the claimant's tendency to self-harm was real.

Ground 5 – training new starters

3.5. This reconsideration ground mounted a further challenge to the majority's finding of poor performance (at LR paragraph 179.4) as a possible motivation for the claimant to tell Ms K about self-harming behaviour. If she had done the things recorded in the Incident Book, why, asks the claimant rhetorically, would Ms K have given the claimant the responsibility for training new employees?

Ground 6 – missed appointments

3.6. Our majority considered (LR paragraph 179.5) that the claimant's missed Healthy Minds appointments suggested that she was actually well enough to go to college. The claimant, at this hearing, explained why she had not gone to those appointments. She also made the point that if her mental health was not affecting her normal day-to-day activities substantially in June 2013, the Mind counsellor would not have found it necessary to email the GP and share the record of that conversation.

Ground 7 – failed exams

3.7. The claimant asked us, as a further reconsideration ground, to bear in mind that she had failed her A-level examinations in June 2019.

Ground 8 - oversleeping

3.8. The majority members of the tribunal did not find it remarkable that the claimant, a teenager, had been regularly oversleeping (paragraph 179.7). The claimant's submission here was that the majority had missed the point. The history that the GP was recording was that, despite oversleeping, the claimant was still tired. It was a sufficient concern for her to go and see her doctor about it.

Harassment

4. If we confirmed the majority's decision that the claimant was not disabled, we still had to determine whether or not Ms Khan harassed the claimant. This is because unwanted conduct may be related to disability even if the person affected by it was not disabled within the statutory meaning. At LR paragraph 191 we formulated the outstanding issue in this way:

> "Was Ms K's letter of 2 December 2019 related to disability in circumstances where the claimant has been found not to have had the protected characteristic of disability?"

Remedy issues

5. On the second day of the hearing, the parties clarified the issues that we would have to decide in order to determine the claimant's remedy.

6. There was a considerable amount of common ground. It was agreed that the claimant should be compensated for loss of earnings for a period of 9.3 weeks following the termination of her employment. Had she continued in employment,

she would have been entitled to the National Minimum Wage which, in her case, was £4.30 per hour.

7. The claimant claimed a total of £25.00 for job-hunting expenses and for the value of her hat which Ms K had retained.

8. Our employment judge asked a number of questions of the respondents aimed at teasing out any issue about what would have happened if they had not victimised the claimant. Often, in a case such as this, a respondent will argue that, had there been no contravention of EqA, the claimant would (or might) have been dismissed in any event. Sometimes they argue that they would have resigned without another job to go to. The respondents did not say anything to suggest that they were pursuing either argument.

9. The issues were:

Remedy Issue 1 – weekly hours

9.1. How many hours per week would the claimant have worked if she had not been victimised? (The respondent contended that the claimant would have worked 10 hours per week; the claimant's case was that it would have been 25-30 hours per week.)

Remedy Issue 2 – personal injury damages

9.2. Should the tribunal award the claimant damages for psychiatric injury?

9.3. If so, how much should it award?

Remedy Issue 3 – injury to feelings

9.4. What award of damages should we make for the hurt to the claimant's feelings caused by the victimisation?

Remedy Issue 4 – aggravated damages

9.5. Should the damages for injury to feelings include an element of aggravated damages to reflect the respondents' post-dismissal conduct?

9.6. If so, how much should the aggravated damages element be?

Remedy Issue 5 – ACAS Code uplift

9.7. Does section 207A of the Trade Union and Labour Relations Act 1992 enable the tribunal to adjust an award against an individual who was not the claimant's employer on the ground that the employer failed to comply with the Code?

9.8. Did ACAS *Code of Practice 1 – Disciplinary and Grievance Procedures* apply to the allegations of sexual harassment against PX?

9.9. Did SNYDL fail to comply with Code in relation to those allegations? Was the failure unreasonable?

9.10. Did the Code apply to the claimant's dismissal?

9.11. Was SNYDL's failure to follow the Code in relation to that dismissal unreasonable?

(The claimant did not contend that SNYDL had unreasonably failed to comply with the Code in relation to her 10 November 2019 grievance.)

9.12. Is it just and equitable to increase the claimant's award for any of these failures?

9.13. If so, by how much?

Remedy Issue 6 – section 38 increase

9.14. Does Section 38 of the Employment Act 2002 enable the tribunal to increase an award by two (or four) weeks' pay where the award is against an individual who was not the claimant's employer?

9.15. What was a week's pay?

9.16. Should the claimant's award be gross or net?

Remedy Issue 7 – interest

8.17 How much interest should the tribunal award on the claimant's damages?

Evidence

10. The claimant gave oral evidence in support of her reconsideration application and again in relation to her remedy. She confirmed the truth of her written statement and answered questions.

11. Ms K also gave oral evidence in the same way.

12. We relied on the same documents as we had used for the liability hearing. Additionally, we considered:

12.1. the claimant's 123-page remedy bundle;

12.2. the claimant's e-mails dated 28 and 30 August 2023 in which she explained why she was not relying on expert medical evidence;

12.3. the respondents' 53-page remedy bundle;

12.4. a 5-page .pdf that the claimant e-mailed to the tribunal on 28 September 2023; and

12.5. the claimant's P45 from Zouk Restaurant Services Ltd, which she e-mailed separately on 28 September 2023.

13. Also on 28 September 2023 the claimant e-mailed a further .pdf file containing historic information about Ms K. We did not consider that information as it appeared to be irrelevant to any of the issues that we had to decide. Likewise we excluded as irrelevant some videos that the respondent had sent, purportedly showing an arson attack.

14. There was no expert medical evidence.

The hearing

15. The first day of the hearing was conducted on a remote video platform. This was because the security staff at the hearing venue were on strike. This was unfortunate, not least because the liability hearing had also been disrupted by other industrial action. As a result, we were only able to make limited progress that day. We heard the parties' oral submissions in relation to the claimant's reconsideration application and spent the rest of the day reading.

16. We were able to complete the hearing on the second day. We made this a priority. Our employment judge explained we would do our best to consider what each of them had to say on every disputed issue, but that concluding the hearing was more important than considering every argument and every document that the parties might want to put forward. The parties agreed to this approach. It is to their credit that they did. We have already observed that this case was taking its toll on the parties' mental health (see LR paragraph 15). In the meantime, Ms K asserted at more than one preliminary hearing that the effect of this claim on her mental health was a reason for making an anonymity order.

17. At each stage of the hearing we agreed with the parties how much time they would have for the next stage. Our employment judge intervened frequently to ensure that each stage was completed within its allotted time.

18. The part of the hearing where the employment judge had to interrupt most often was when the respondents were asking questions of the claimant. Some of their questions appeared to be intended to elicit answers that would tend to show that the claimant had exaggerated the effect on her of PX's sexual harassment. As we had to point out more than once, this line of questioning could not help the respondents. What we were assessing was the effect of the victimisation. That was not to say that it was entirely irrelevant to consider the claimant's hurt feelings caused by the prior sexual harassment. But the relevance was not what the respondents appeared to think it was. If we accepted that the claimant was genuinely upset, or her mental health genuinely suffered, it would help the respondents for us to find that it was the sexual harassment (and not the victimisation) that had caused it.

19. Mr Hussain put to the claimant that she had left abusive voicemails on Ms K's phone. The claimant denied it.

20. After questioning the claimant for 52 minutes, the respondents agreed to spend a maximum of 20 further minutes asking her questions following the lunch break. Once those 20 minutes had elapsed, we allowed the respondents to continue asking their most important questions as an adjustment. After a further 12 minutes, we informed the respondents that we had to move on to the next stage of the hearing.

Additional findings of fact

21. We were able to base our decisions substantially on the facts we had recorded in the Liability Reasons. Some further findings were, however, necessary.

22. From February to May 2019, the claimant worked, on average, 20 hours per week. The oral evidence was not particularly reliable on this point, but we were able to calculate an average based on random samples of the hours allocated by Ms K to the claimant over WhatsApp.

23. The claimant's working hours dropped significantly in May 2019. The most likely cause of the drop-off was her A-level examinations.

24. The claimant described, truthfully in our view, how she felt at the time PX sexually harassed her:

> "The sexual assault made me feel dirty and ashamed, I'd go home and take long showers, scrubbing my skin to get his touch off me."

25. Pausing there, it goes almost without saying that where a person has been sexually harassed at work, it is the perpetrator and not the victim who ought to feel ashamed. Sadly, however, it is not uncommon for the person who has been harassed to experience feelings of undeserved shame at what has happened.

26. Ms K informed the claimant of her dismissal by telephoning the claimant's mother. She said that the claimant was "not a good worker" and was "constantly missing items out of orders". The claimant was not invited to a meeting, given any advance information about why Ms K was considering terminating her employment. She was not given any opportunity to appeal.

27. The claimant was upset and angry at being dismissed. She immediately texted her sister. Particularly hurtful was Ms K's pretending that the reason for dismissing the claimant was that she was not a good worker, when the real reason was that the claimant had informed her mother of PX's sexual harassment towards her. The claimant's angry reaction was evidenced in a heated exchange of text messages on 13 June 2019 over a hat worth £5.00.

28. We happen to know that summer A-level examinations usually take place between about 20 May and 20 June each year.

29. The claimant took three A-level subjects, one of which was psychology. The claimant sat one of her A-level exams on 13 June 2019 and found out she had been dismissed shortly after she left the examination room. By this time, the claimant only had her psychology paper left to sit.

30. Shortly after 13 June 2019 the claimant sat her psychology paper and was once again available for work.

31. Had the claimant not been dismissed, her hours would have increased back to an average of 20 hours per week.

32. In August 2019, the claimant learned that she had failed all her examinations. There was no difference in results between the papers she had sat before she was dismissed and the papers she sat afterwards.

33. Just over 9 weeks after her dismissal, the claimant found a new job. She continued in that job until March 2020.

34. When Ms K received the claimant's grievance letter in November 2019, she did not think that the claimant had a disability. She knew that the claimant had discussed her "mental state" and had put it down to problems at home. Knowing what the claimant had told her, she decided to take advantage of it in order to portray the claimant as a fantasist and a liar. She did not, however, think that the claimant's mental state was affecting the claimant's day-to-day activities.

35. As recorded in LR, Ms K replied to the claimant's grievance on 2 December 2019. It was this reply that was alleged to have been the act of unwanted conduct amounting to harassment of the claimant.

36. The claimant replied to Ms K just over two hours later. Her e-mail was combative in its tone. It began with an allegation that her mother had an audio-recording of Ms K saying that she would ensure that PX was arrested. Later in her e-mail the claimant provided accounts of other conversations tending to show that Ms K knew that PX had sexually harassed the claimant. There followed what appeared

to be a retaliatory threat to report Ms K to Social Services for neglecting her children.

37. The same e-mail engaged, in particular, with Ms K's reference to "psychological problems".

> "2) You think I have psychological problems. I wasn't aware you were medically qualified!!! And as an employer you were effing and jeffing at me at work then phoned my mum and said sorry to her than apologised to me because you said [Mr Hussain] made you angry! Psychologically unstable maybe?"

38. In her e-mail the claimant directly challenged Ms K's false account of when her employment had ended.

39. The e-mail concluded:

> "Please take legal action. It's because of people like you that people with mental illnesses suffer and because of people like you members of public suffer harassment sexual and otherwise at work".

40. From this e-mail, we find that:

40.1. The claimant was upset and angry to read Ms K's e-mail, and replied whilst her emotions were raw.

40.2. The claimant did not understand Ms K's reference to "psychological problems" to mean a direct reference to her anxiety and depression. Rather, in the claimant's mind, it was a reference to being "psychologically unstable". We deduce this from the fact that the claimant was engaging in like-for-like retaliation to the comments that she thought Ms K was making. The psychological instability of which she was accusing Ms K was swearing at her one moment and apologising the next.

40.3. The single thing about which the claimant appeared most upset was Ms K's denial that PX had sexually harassed her.

41. On 11 March 2020, the claimant spoke by telephone to Dr Kemp at her GP practice. She said that she had had a history of anxiety and panic attacks since she was 14 years old. She said that the previous week she had had a severe panic attack. A face-to-face appointment was arranged later that day.

42. The claimant then went to the surgery and spoke to Dr Rashid. She said that she had been sexually assaulted by a chef at work, and had reported it to her manager who had "fired" her. She mentioned her employment tribunal claim. She said her college attendance had dropped as a result of her low mood and anxiety. Dr Rashid suggested anti-depressants and the claimant agreed to take them.

43. Neither Mr Hussain nor Ms K were directors of SNYDL at the time the PX's sexual harassment of the claimant came to light. Nor was either respondent a director at the of the claimant's dismissal. Throughout these events, however, both Mr Hussain and Ms K had all the authority they needed to carry out investigations, hold meetings and make decisions about termination of employment. If any formal approval was required from Mr Hussain's brother to dismiss the claimant, it would have been nothing more than a rubber-stamping

exercise. These facts are relevant to whether it is just and equitable to hold the respondents personally accountable for failures of SNYDL to comply with the ACAS Code.

44. The claimant's grievance letter of 4 November 2019 began with a complaint that she had been dismissed for raising concerns about sexual harassment.

45. SNYDL presented an ET3 response to the claimant's claim. The form was completed by Mr Hussain, based on information supplied to him by Ms K and on information already known to him. In SNYDL's response, the respondents accused the claimant of making a "false allegation of sexual harassment", motivated by being caught out by PX for not paying for her food.

46. A preliminary hearing took place on 18 June 2021 before Employment Judge Slater. One of the purposes of that hearing was to determine whether or not the tribunal had jurisdiction to consider the claimant's complaint of sexual harassment by PX. That complaint had been presented after the expiry of the statutory time limit. The claimant gave oral evidence. Her evidence included answering Ms K's questions on behalf of SNYDL. She found the questions hurtful. We are not, however, aware of her being asked any questions that were inappropriate. EJ Slater decided that it was not just and equitable for the time limit to be extended. The claimant was upset by the decision.

47. In June 2021 the claimant sent messages to relatives, providing her phone and laptop details in case Ms K tried to kill her.

48. In July 2021, Dr Thompson wrote "to whom it may concern" detailing an appointment that had taken place earlier that day. According to Dr Thompson, the claimant had had low mood for "quite some time now", was struggling with her tribunal claim, and felt she would be "better off dead". She was prescribed Sertraline. Her Sertraline does was increased to 100mg in 2022.

49. Mr Hussain repeatedly asserted that the claimant had "only started to build her medical evidence following the preliminary hearing before Employment Judge Slater". That statement is not factually correct. The claimant went to her GP in March 2020 and agreed to take medication. The first preliminary hearing was before Employment Judge McDonald in September 2020. The preliminary hearing before Employment Judge Slater was not until 18 June 2021.

50. We return to the cause of the claimant's 2020-2023 mental health problems later in this judgment.

51. The claimant prepared her witness statement for the (liability) final hearing on 3 March 2022. By then, she had tried three different forms of medication for her mental health. She believed that this was "mainly due to [Ms K] and Mr Hussain gaslighting me, and making false accusations against myself and my family." At paragraph 20 of her witness statement, she stated, truthfully, "To this day I still feel ashamed and angry at myself for not doing more to stop [PX]." We also accept the following evidence in her witness statement:

> "Due to the gaslighting I have an urge to apologise all the time when I'm not in the wrong, I always feel nervous and anxious. I have a loss of confidence. I feel disconnected from myself. I always believe I'm to blame when things go wrong. I always feel like something isn't right yet I can't identify what exactly

> is wrong, I have a lingering sense of hopelessness and emotional numbness. I can't tolerate it anymore. Their denial of reality has drained my energy…"

52. On 28 November 2022, both respondents presented their individual responses to the claimant's claim. Both responses were accompanied by the same detailed Word document. In that document, the respondents stated that Ms K had recently "had two related unknown arson attacks". The document stated, "The claimant is a possible suspect and the police are investigating the matter." We are sure that the respondents wanted the tribunal to think that the claimant might have been responsible, and for this suspicion to influence the tribunal's decision-making about the claimant. The respondents' Word document was intended to be read not just by the tribunal, but also by the claimant. The respondents wanted the claimant to know what they had insinuated. They were trying to put her off.

53. We have no reason to think that the claimant had anything to do with either of these fire-setting incidents. When she learned that the respondents were insinuating that she was an arsonist, she felt anxious and hurt.

54. Tribunals often need a report from an expert psychiatrist before they can find that a contravention of EqA has caused a psychiatric injury. The absence of such a report does not necessarily prevent the tribunal from making such a finding, but the burden of proof is on the claimant, and if there is no expert opinion it can be difficult for a claimant to discharge that burden. Our employment judge pointed this out to the claimant at a preliminary hearing in August 2023. She decided not to instruct a psychiatrist to prepare a report. This was because she could not afford the cost. Her decision not to instruct a psychiatrist does not tell us anything about what the claimant believed about the strength of her case. It just means that we do not have the evidence we might otherwise have had.

55. The claimant prepared a witness statement specifically for the remedy hearing. In it, she stated:

> "Although I won the majority of the hearing, in June 2023 I self harmed because the stress and pain of what I've endured over the past 5 years was too much to handle. This includes the sexual assault by [PX], being accused of lying about it by the respondents, [Ms K]'s email 2/12/19, the 4-year duration of the ET case, the constant lies from the respondents, about myself and family, the respondents claiming they're the victims, being accused of arson, harassing, blackmailing and threatening the respondents, and having false police reports made against me."

56. Medical evidence confirms that the claimant did self-harm in June 2023. It is significant, however, that the claimant did not mention her dismissal as being one of the things that she had endured that had caused her to harm herself.

57. The claimant has now been in a stable job for about three years. She is still fearful that she is "going to get fired over something silly".

Relevant law

<u>Reconsideration of judgments</u>

58. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides the tribunal with a general power to reconsider any judgment "where it is necessary in the interests of justice to do so".

59. On reconsideration, one of the options available to the tribunal is to confirm the original judgment.

60. A tribunal should have regard to the principle of finality in litigation when deciding whether reconsideration is necessary in the interests of justice.

Harassment

61. At LR paragraphs 130 to 137, we set out the law relevant to the question of whether unwanted conduct is related to the protected characteristic of disability. We must apply those principles now.

Remedies for victimisation

62. Section 119 of EqA makes provision for the county court's powers to grant a remedy for a contravention of EqA. It provides, relevantly:

> (1)….
>
> (2)The county court has power to grant any remedy which could be granted by the High Court—
>
> (a)in proceedings in tort;
> (b)…
>
> (3)….
>
> (4)An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis
>
> (5)...(7)

63. The power of an employment tribunal to award a remedy is to be found in section 124. Relevantly, the section provides:

> (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— …(b) order the respondent to pay compensation to the complainant…
>
> …
>
> (6)The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119.

64. The following provisions can be derived from *Prison Service v. Johnson* [1997] IRLR 162:

> (1) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.
>
> (2) Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use Lord Bingham's phrase, be seen as the way to untaxed riches.
>
> (3) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award; rather to the whole range of such awards.
>
> (4) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.
>
> (5) Finally, tribunals should bear in mind Lord Bingham's reference to the need for public respect for the level of awards made.

65. In *Vento v Chief Constable of West Yorkshire Police (No. 2)* [2002] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318 the Court of Appeal identified three broad bands of compensation for injury to feelings awards, as distinct from compensation awards for psychiatric or similar personal injury. The lower band of £500 to £5,000 applied in less serious cases. The middle band of £5,000 to £15,000 applied in serious cases that did not merit an award in the upper band. The upper band of between £15,000 and £25,000 applied in the most serious cases (with the most exceptional cases capable of exceeding £25,000).

66. The *Presidential Guidance on Vento Bands – Second Addendum* reads, at paragraph 2:

> "In respect of claims presented on or after 6 April 2019, the Vento bands shall be as follows: a lower band of £900 to £8,800 (less serious cases); a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band); and an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000."

67. In *Vento,* the Court of Appeal gave examples of particular kinds of discrimination tending to fall into particular bands. A "one-off" act of discrimination was apt for the lower band. But the type of discrimination is not determinative: what matters is the effect of the discrimination on the individual: *Base Childrenswear Ltd v. Otshudi* UKEAT 0267/18 per HHJ Eady QC at paragraph 36.

68. Sometimes an employee is injured by two causes, one of which is the employer's legal responsibility, and the other of which is not. In such cases, the tribunal should follow the following principles, derived from *BAE Systems (Operations) Ltd v Konczak* [2017] IRLR 893:

    a. Psychiatric harm may be divisible, even if it takes the "classic" path of stress turning into injury

    b. In all cases, the tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused.

    c. In such an exercise, focus must be on the division of the injury or harm (and not the causative potency or culpability of the tortfeasor for it

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

69. Where a claimant complains of two alleged discriminatory acts, only one of which is found to have contravened EqA, it is open to a tribunal to find that the employee's injury was caused by the lawful act, and not by the unlawful one, provided that there is a clear evidential basis: *Wisbey v. Commissioner of City of London Police* [2021] IRLR 691.

70. A tribunal may include an element of aggravated damages in the award for injury to feelings. Aggravated damages are compensatory, not punitive. They may be awarded for the additional hurt, or injury, caused by certain types of conduct.

71. Such conduct may include the employer's conduct after the original contravention, such as a failure by the employer to take the employee's original complaint seriously: *HM Land Registry v. McGlue* UKEAT 0435/11.

72. Aggravated damages are also available to compensate an employee's additional hurt caused by the employer defending the claim in an unnecessarily offensive manner (*McGlue*) or in a way that is wholly inappropriate and intimidatory (*Zaiwalla & Co v. Walia* [2002] IRLR 697). An award of aggravated damages is not supported, however, merely because an employer acts in a brusque and insensitive manner towards the employer and/or is evasive and dismissive in giving evidence (*Tameside Hospital NHS Foundation Trust v. Mylott* UKEAT 0352/09.

73. If the reason the tribunal is considering making an award for aggravated damages relates to the respondent's conduct (or the representative's conduct) at the hearing, the tribunal should (a) first consider whether to make a costs order instead, (b) only make an aggravated damages award if there was hurt caused to the claimant additional to that which would have occurred in any event by a legitimate and robust defence of the claim, and (c) only make such ana award that would compensate for the hurt caused by the conduct that went beyond that which would have been acceptable.

74. Aggravated damages are an aspect of injury to feelings. It is therefore important to have regard to the total award encompassing the injury to feelings and the aggravation of that injury, to ensure that the overall award is properly compensatory: *Commissioner of Police for the Metropolis v. Shaw* [2012] IRLR 291.

ACAS Code uplift

75. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2. One of those jurisdictions is section 120 of EqA. That section enables an employment tribunal to consider a complaint that an employer has contravened Part 5 of EqA by victimising an employee.

76. Where the claim is against an individual for a contravention of section 110, the tribunal's jurisdiction to consider that complaint also derives from section 120 of EqA. Under section 110(6) of EqA, Part 9 (enforcement) applies to a contravention of section 110 by the employer's employee or agent as if it were the employer who had contravened Part 5. Part 9 includes section 120.

77. Section 207A(2) provides:

> "(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that-
>
> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies;
>
> (b) the employer has failed to comply with that Code in relation to that matter, and
>
> (c) that failure was unreasonable,
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

78. By section 207(4), ACAS Code of Practice 1 ("the Code") is a relevant Code of Practice within the meaning of section 207A(2)(a). It was issued under Chapter III and relates primarily to procedure for the resolution of disputes.

79. Paragraph 1 of the Code provides, relevantly:

> "This Code is designed to help employers…deal with disciplinary and grievance … situations in the workplace.
>
> Disciplinary situations include… poor performance.
>
> Grievances are concerns, problems or complaints that employees raise with their employers."

80. The basic elements of fairness in disciplinary and grievance procedures are set out in paragraph 4 of the Code. These include:

- Carrying out any necessary investigations
- Informing employees of the basis of the problem and giving them an opportunity to put their case in response before any decisions are made

- Allowing employees to be accompanied at any formal disciplinary meeting
- Providing an opportunity for the employee to appeal.

81. Paragraph 32 states:

> "If it is not possible to resolve a grievance informally employees should raise the matter formally … This should be done in writing…

82. The tribunal must guard against double recovery. There is a risk of double recovery when the employer's failure to comply with the Code is based on the same action, or inaction, that may merit an award of aggravated damages for injury to feelings. In those circumstances, upward adjustment of the award under section 207A should be an alternative to an award of aggravated damages, rather than additional to it.

Section 38 award

83. Section 38 of the Employment Act 2002 applies to complaints under section 120 of EqA and provides, relevantly with our emphasis:

> "…
>
> (2) If in the case of proceedings to which this section applies-
>
> (a) the employment tribunal finds in favour of the worker but makes no award to him in respect of the claim in which the proceedings relate, and
>
> (b) [a condition is met relating to non-provision of a statutory statement of terms of employment]
>
> the tribunal must… make an award of the minimum amount to be paid **by the employer** to the worker and may …award the higher amount instead".
>
> (3) If in the case of proceedings to which this section applies-
>
> (a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and
>
> (b) [the same condition is met]
>
> the tribunal must… increase the award by the minimum amount and may…increase the award by the higher amount instead..."

84. For the purpose of section 38, "employer" has the same meaning as in the Employment Rights Act 1996.

85. There is nothing in the Employment Act 2002 deeming an employer to include a person who has contravened section 110 of EqA in relation to the employee.

Conclusions – reconsideration

86. The decision under reconsideration is the tribunal's finding that the claimant was not disabled at the relevant time.

87. On reconsideration, we unanimously confirm that decision.

88. As already stated, the decision was made by the non-legal members, comprising the majority of the tribunal. At first sight it might seem odd that our employment judge, having previously dissented from the original decision, joined with the

majority in confirming it. The reason why the decision was unanimous is because of the principle of finality in litigation. Just because our employment judge disagreed with the decision at the time it was made does not mean that it is now necessary to vary or revoke it.

89. In coming to our collective view, we did, of course, take account of the claimant's various reconsideration grounds. Here is how we reasoned in relation to each one:

Ground 1 – college attendance

89.1. The difficulty with Ground 1 is that it relies on assertions that the claimant made in her oral evidence. We unanimously found (LR paragraph 26) that none of the parties' oral evidence was reliable enough to be taken at face value. The claimant was no exception. Our majority restated the point at LR paragraph 179.1 specifically in the context of the claimant's oral evidence about the reasons for her low attendance at college. The majority found in the original decision that the text message was a reliable indicator of the cause of absence from college not only on 14 March 2019, but also on the other occasions as well. The reason was not her mental health. It was because she preferred to go to work or go into Manchester. None of us found it necessary to disturb that conclusion.

Ground 2 – mental impairment in 2017

89.2. Ground 2 does not make it necessary to alter the majority's conclusion. The facts about the 2017 GP visit that the majority found significant are recorded at LR paragraph 40. There was no mention by the GP of any particular difficulty in carrying our normal day-to-day activities. Just because the claimant said she had been feeling low for some years does not mean that she had any particular difficulty with normal day-to-day activities for that period. There was not enough there to persuade the majority that her reported low mood for some years was the effect of a mental impairment. More significant in the majority's view was the fact that the claimant's GP visit was at a time when her parents' relationship was in difficulty. To the majority's mind, that was an adverse life event that more readily explained the claimant's perception of feeling low, and her need to visit a doctor at that time.

Ground 3 - medication

89.3. It was not entirely clear when the claimant had first been prescribed fluoxetine. The earliest reference to fluoxetine that we could find in the GP records was on 11 March 2020. In our view, it was not a reliable indicator of the existence of an impairment in December 2018 to December 2019, or what the effects of any such impairment were on the claimant's ability to attend college during that year. The claimant herself told us that her mental health deteriorated following Ms K's e-mail of 2 December 2019. Just because she needed fluoxetine in March 2020 does not mean that she needed it before 2 December 2020.

Ground 4 – Incident Book

89.4. None of us found Ground 4 convincing. We looked again at the entries in both the Incident Book and the Manager's Report Book. We could not find

any entries that demonstrated either that the two books were both genuine or both false. In our view, there was no inconsistency in our finding that only one of the books had been fabricated.

Ground 5 – training new starters

89.5. We found unanimously that Ms K had expressed concerns to the claimant about her performance. None of us thought it necessary to alter that finding on account of the claimant having been assigned to train new starters. This is for two reasons:

(a) First, the issues that were being recorded in the Incident Book were by no means incompatible with the claimant being able to show somebody else how to work behind the counter. The concerns in the Incident Book related to timekeeping, uniform and not paying for food. The fact that the claimant had been challenged for that kind of behaviour would not stop the claimant being able to show a new employee the basics of their role. She could still explain how to operate the tills and how to serve customers.

(b) Second, and in any case, the best point that the claimant can make is that no responsible employer would entrust the training of new starters to an employee who had done the sorts of things that were recorded in the Incident Book. That argument might be attractive if SNYDL was a responsible employer. But we found that SNYDL was not a responsible employer. They did not pay the National Minimum Wage or provide a written contract of employment, and they falsified key documents.

Ground 6 – missed appointments

89.6. There are two elements to Ground 6:

(a) One is the claimant's oral evidence about why she missed her Healthy Minds appointments. None of us thought that this evidence made it necessary to change the majority's conclusion. We have already made the point that the oral evidence, generally, was not reliable enough to take at face value. The claimant's particular explanation about not going to the Healthy Minds appointment was a case in point. She told us that she knew that if she went to see a counsellor, she would have to re-live her experience of being harassed by PX, which she could not face doing in July 2019. We did not accept that explanation. By July 2019, she had given a detailed account of PX's behaviour to ZA and had also spoken about it to her sister, her mother and one other person.

(b) The other element of Ground 6 is the claimant's argument based on Mr Baynham's letter of 13 June 2019. She contends that the majority were mistaken in drawing an inference about the claimant's ability to attend college from her missed Healthy Minds appointment, because any such inference would be inconsistent with what Mr Baynham wrote. Our majority members did not find that the history given by the claimant to Mr Baynham was reliable. The

counsellor did not appear to have been particularly concerned. He recorded his assessment that the claimant was not a risk to herself at that time. There was nothing significant about fact that Mr Baynham's letter was shared with the claimant's GP. That would be good clinical practice whether the counsellor had any concerns for the claimant or not.

Ground 7 – failed exams

89.7. The claimant submitted that her disappointing examination performance was an indicator that her low attendance at college was the effect of an impairment. To our minds, that submission appears to confuse cause with effect. In all probability a major contributor to the claimant's A-level results was the fact that she had missed so much of her college course. How she fared in her examinations does not tell us why she missed college in the first place.

Ground 8 - oversleeping

89.8. Ground 8 asks us to revisit the conclusions that the majority reached about the claimant's GP visit on 19 August 2019. In our view the claimant's points about the 19 August 2019 visit do not make it necessary to disturb the majority's conclusion about it. The GP record did not state that the claimant had been tired for 12 months, or that her tiredness was the result of any particular medical condition. It was not clear from the GP record exactly what had been happening for the last 12 months. The reference to the claimant sleeping "10-11 hours during holidays" suggested that her oversleeping had begun relatively recently. The reference to "recent stress with exams" was also an indicator that the claimant was describing events in the recent past.

Conclusions - harassment

90. Despite confirming the majority decision, we must still consider whether or not Ms K's e-mail of 2 December 2019 was related to the protected characteristic of disability.

91. Ms K did not perceive that the claimant had a disability. She did not perceive facts which, if true, would have meant that the claimant would satisfy the statutory definition.

92. Unwanted conduct may, of course, be related to disability even where the person affected by it ("B" in section 26) was not disabled, and was not perceived to be disabled. There is no direct example in the Code. The analogy with homophobic insults is, in our view, instructive. It is not so long ago that many people thought it acceptable to use offensive nicknames descriptive of disabilities (such as cerebral palsy) in the workplace. A non-disabled person hearing such comments could very well find that it created an offensive environment for them. Such conduct would be related to disability by the very nature of the conduct itself.

93. We have looked at Ms K's e-mail of 2 December 2019 for something that has a comparable connection to disability. We could not find it. That is not to say that Ms K's e-mail was not hurtful. It was. But, in the context of the e-mail as a whole, the reference to "psychological problems" was not a reference to anxiety,

depression, or the effect of mental health on her day-to-day activities. It was an insinuation that the claimant had a tendency to fantasise and to lie, and that the claimant's grievance (which in fact was substantially true) was one such fantasy. As we have already recorded, the claimant did not understand "psychological problems" to be a direct reference to anxiety and depression either.

94. Ms K's unwanted conduct was not, therefore, related to the protected characteristic of disability, and did not fall within the statutory definition of harassment.

Conclusions - remedy

Remedy issue 1 – weekly hours

95. We found as a fact that, had the claimant not been dismissed, she would have worked 20 hours per week for the 9.3-week period following 13 June 2019.

Remedy issue 2 – personal injury

96. We do not make any award of damages for personal injury.

97. The claimant undoubtedly did have a mental health condition from March 2020 at the latest. But the claimant has not proved that there was a divisible psychiatric injury caused by her dismissal. Nor, if the claimant's mental health condition was an indivisible injury, has the claimant proved that her dismissal made a material contribution to it.

98. In coming to this conclusion, we did not hold it against the claimant that she had not obtained any expert psychiatric evidence.

99. Our reasons for finding that the claimant has failed to prove that her dismissal caused an injury are:

99.1. As we recorded in LR paragraph 106, the only stressor mentioned by the claimant to her GP in August 2019 was her recent round of examinations.

99.2. In her grievance letter on 4 November 2019, the claimant identified the sexual harassment by PX as the cause of the deterioration in her mental health and her relapse into self-harming (LR paragraph 112).

99.3. When giving her history to Dr Rashid in March 2020, the claimant did mention her dismissal, but also mentioned the sexual harassment.

99.4. The claimant listed the causes of her self-harm episode in June 2023. They did not include her dismissal.

Remedy issue 3 – injury to feelings

100. In our view, the hurt to the claimant's feelings is divisible. Some distinct negative feelings can be rationally attributed to the claimant's dismissal, whereas others can be attributed to other causes.

101. When assessing the hurt to the claimant's feelings that was caused by her dismissal, we have tried to distinguish between two kinds of hurt that the claimant experienced:

101.1. One is the hurt feelings that the claimant experienced more intensely because of the vulnerable state she was in before she was dismissed. The claimant was vulnerable, being a sixth-form student in her first job, stressed

about her A-level examinations, and already feeling ashamed, dirty and angry at the way PX had treated her. The fact that the claimant was vulnerable should not lessen the award of compensation: the respondents must take the claimant as they found her.

101.2. Another kind of hurt feelings were those separately caused by other events for which the respondents are not legally responsible. These include the oversleeping and tiredness caused by exam stress, and ongoing feelings of shame and anger at having been sexually harassed by PX in the first place. The respondents should not have to compensate the claimant for this injury.

102. The effect of the dismissal on the claimant's feelings can be summarised as follows:

102.1. She was upset and angry when she found out she had been dismissed. The hurt was not just about the loss of her job, but also the fact she had been dismissed for speaking up about sexual harassment at work.

102.2. Being dismissed was not sufficiently prominent in her mind for her to tell Dr Rashid about it on 19 August 2019 (LR paragraph 106).

102.3. She was, however, still indignant about her dismissal 5 months after being dismissed. We know this, because she made it her first complaint in her grievance letter.

102.4. Nine months after her dismissal she told Dr Rashid that she had been "fired" in a conversation about her low mood and anxiety.

102.5. By the time she made her witness statement, nearly 3 years afterwards, she felt hopeless and drained. This was largely due to the process of litigation, in which the parties were making serious allegations against each other. We will analyse this more closely under the heading of aggravated damages.

102.6. Four years after the respondents dismissed the claimant, she was still fearful of being dismissed without proper cause despite being in a stable job.

103. We now apply the *Vento* bands to those facts. Although the act of victimisation itself started and finished on one day, the effect of the victimisation lasted much longer. It was foremost in the claimant's list of grievances after 5 months, and there was residual fear of being dismissed after 4 years. It would not be quite right, in our view, to describe this as a "less serious case". We place it at the bottom of the middle band. The award should be greater than £8,800, but not significantly so. If there were no aggravated damages, our award would be £9,000.

<u>Remedy Issue 4 - Aggravated damages</u>

104. The important thing to remember here is that, although aggravated damages have a separate label, they are part of the claimant's compensation for injury to feelings.

105. We found (at paragraph 25) that Ms K's purpose in sending the e-mail was to dissuade the claimant from pursuing a claim against SNYDL. Amongst the complaints that Ms K was trying to ward off was the complaint of victimisation foreshadowed in the first paragraph of the claimant's grievance. Ms K's chosen

means of putting the claimant off was to put forward a false narrative and to insinuate that the claimant's contrary recollection was due to "psychological problems. That was an improper tactic. It was also bound to aggravate the hurt that the claimant already felt about being dismissed.

106. The claimant was very upset to read Ms K's e-mail of 2 December 2019. As we have already found (at LR paragraph 114), she reasonably interpreted Ms K to be gaslighting her. When the claimant replied some two hours later, her raw emotional state was evident in the tone of her e-mail.

107. During their defence of the claim over the next 3 years, the respondents doubled down on their untrue version of events. In particular, as we have found:

107.1. They fabricated a dismissal letter;

107.2. They fabricated a contract of employment;

107.3. They fabricated a statement in which the claimant purportedly stated that she had not been sexually harassed; and

107.4. They maintained their untrue version in their oral evidence.

108. Needless to say, such conduct was wholly inappropriate.

109. The claimant perceived this conduct to form part of the continued gaslighting. By the time she made her witness statement (some 33 months after being dismissed), this gaslighting conduct continued to eat at the claimant's self-confidence.

110. The claimant was additionally hurt by allegations made by the respondents in their individual responses, over 3 years after the claimant lost her job. They insinuated that the claimant was an arsonist. This allegation went well beyond robust defence of the claim. It was not legitimate, because it was baseless. The respondents never put forward any evidence that the claimant had been responsible for any arson attack.

111. As a result of the arson allegation, the claimant was anxious and more hurt by her dismissal than she otherwise would have been.

112. We must not overcompensate the claimant. In particular, we must take account of the substantial toll that this protracted litigation would inevitably have had on the claimant even if the respondents had behaved entirely properly. The claimant's feelings would still have been damaged by her experience at the preliminary hearing in June 2021, and by EJ Slater's conclusion that she was out of time to bring her complaint of sexual harassment. That hearing happened just before the claimant's desperate messages in June 2021, and shortly before the claimant started taking Sertraline. Likewise, the respondents cannot be expected to pay additional compensation for making the suggestion – hurtful to the claimant though it was – that the claimant did not satisfy the statutory definition of disability. That is ultimately the conclusion that the tribunal reached.

113. The claimant has not applied for a preparation time order. In any case, it would not give the claimant adequate redress. Her point is not that she has had to spend time measurable in hours to rebut the respondents' allegations, or to dismantle fabricated documents. It is that the respondents' pattern of gaslighting behaviour has damaged her self-confidence over a period of years.

114. Stepping back, and looking again at the compensation for injury to feelings, we have concluded that it should include a substantial element of aggravated damages. We assess the aggravated element at £2,250, making the total award £11,250.00.

Remedy Issue 5 – ACAS Code uplift

115. In our view, the tribunal has the power under section 207A of TULRCA to increase the claimant's award. The tribunal is not deprived of that power merely by the fact that the respondents were not the claimant's employer. The section applies to proceedings against an individual for a contravention of section 110 of EqA.

116. The claim did not concern a grievance to which the Code applied. It was not the claimant who reported PX's sexual harassment to a manager. The concern was raised by ZA. He did not raise it on the claimant's behalf.

117. The claimant's mother also reported PX's sexual harassment to Ms K. That concern could be said to have been raised on the claimant's behalf, but it was not in writing.

118. The claim did concern the claimant's dismissal from her employment with SNYDL. The dismissal was for the given reason of poor performance. That was a matter to which the Code applied.

119. The respondents, acting on behalf of SNYDL, decided to dismiss the claimant without taking any of the basic procedural safeguards set out in our summary of paragraph 4 of the Code.

120. That failure was unreasonable. It would have been a simple step to write to the claimant (even in a WhatsApp message) to say why Ms K thought the claimant was "not a good worker" and to ask her to discuss the future of her employment at a meeting. Failing that, she could have spoken to the claimant on the telephone. Ms K did not speak to the claimant at all. She left it to the claimant's mother to tell the claimant that she had lost her job.

121. We do not have to increase the claimant's award merely because we have the power to do so. When considering whether an increase is just and equitable (and if so in what amount), we should have regard to the fact that it is the respondents, and not SNYDL, who will end up being liable to pay the increased amount. That might lead to unfairness if, for example, the breach of the Code was the fault of others within the employer's organisation. There is no such unfairness here. For the reasons we have given, there can be no sensible distinction between a failure by SNYDL and a failure by the respondents.

122. We have taken into account other circumstances. On the one hand, SNYDL was a small employer. That is an important factor. On the other hand, SNYDL's failure to follow the Code was symptomatic of a high-handed approach to its responsibilities as an employer. For example, the claimant was not paid the National Minimum Wage. She was not given a contract of employment.

123. We have taken into account that we have already increased the injury to feelings award to include aggravated damages. The aggravated damages element reflects conduct that began nearly six months after the claimant was

dismissed in breach of the Code. There should only be a modest discount to prevent double recovery.

124. Taking all those considerations together, it is just and equitable to increase the claimant's award by 15%.

Remedy Issue 6 – section 38 increase

125. In our view Parliament did not intend for an individual discriminator to be accountable under section 38 for the employer's failure to provide a statutory statement.

126. An employment tribunal cannot make any award against a person under section 38(2) of the Employment Act 2002 unless the respondent is or was the employer of the worker who brought the claim.

127. Section 38(3), read on its own, would appear to give a tribunal power to increase an award against a person other than the employer. But in our view that subsection cannot be read on its own. The two subsections are clearly intended to be part of a single coherent scheme.

128. The only difference between section 38(2) and 38(3) is whether (apart from section 38) the tribunal makes any award in respect of the claim. For ease, we will call this a "substantive award". We cannot see why Parliament would have intended the presence (or absence) of a substantive award to be decisive of the question of who can be ordered to make the payment under section 38. Our interpretation is reinforced by the mischief at which section 38 was aimed. The purpose was to give employers a financial incentive to comply with section 1 of the Employment Rights Act 1996. Only the employer has such a duty. It makes sense that it should be the employer, and only the employer, who should have the incentive.

129. We do not therefore increase the claimant's award under section 38 of the Employment Act 2002.

Damages calculation

130. We have now resolved all the remedy issues except for interest. This enables us to calculate the claimant's damages. They are:

130.1. £11,250 damages for injury to feelings including aggravated damages

130.2. £799.80 damages for loss of earnings (9.3 weeks x 20 hours x £4.30 per hour)

130.3. £25.00 damages for expenses and the claimant's lost hat

131. Before the s207A uplift, the total is £12,074.80.

132. The amount of the 15% increase is £1,811.22. When that is added to the damages, the resulting total is £13,886.02.

Remedy Issue 7 - interest

133. Nobody put forward any positive case about what the amount of interest should be. They did not make any submissions about the relevant law. They left it to us to do the calculation.

134. In order to avoid running out of time, we took a pragmatic approach to the interest calculation. The vast majority of the damages were for injury to feelings. We made one interest calculation based on the principles for calculating interest on such damages. Strictly speaking, we should have calculated the interest on the £824 separately. The mid-point date for that sum would have been 4.7 weeks later. The overall interest figure would have been £5.95 less than it actually was.

135. As it was, we awarded interest of £4,810.12.

136. This was calculated as follows:

8% x £13,886.02 x 4.33 years = £4,810.12.

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Employment Judge Horne

11 December 2023

REASONS SENT TO THE PARTIES ON

13 December 2023

FOR THE TRIBUNAL OFFICE