

Neutral Citation Number: [2026] EAT 137

Case No: EA-2024-001233-DXA

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 16 September 2026

**Before :**

**HIS HONOUR JUDGE JAMES TAYLER  
(DEPUTY PRESIDENT)**

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**Between :**

**Khans Solicitors**

**Appellant**

**- and -**

**Ms F Kaiser**

**Respondent**

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**Mr A Mohammed** (instructed by Khans Solicitors) for the **Appellant**  
**Ms F Kaiser**, the **Respondent** in person

Hearing date: 2 September 2026  
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**JUDGMENT**

## **SUMMARY**

### **Disability Discrimination and Sex related Harassment**

1. The Employment Tribunal did not adequately explain why it made an award of aggravated damages. The circumstances in which aggravated damages can be awarded are considered.
2. The Employment Tribunal did not properly assess an award for the difference between statutory sick pay and full pay for part of a period of sickness absence.
3. These two minor parts of the remedy judgment are remitted to the same Employment Tribunal for redetermination.

**HIS HONOUR JUDGE JAMES TAYLER (DEPUTY PRESIDENT)**

**The issues**

1. The main issue in this appeal is whether the Employment Tribunal erred in law in awarding aggravated damages. The circumstances in which aggravated damages can be awarded are considered.
2. The second issue is whether the Employment Tribunal erred in law in awarding compensation for the difference between statutory sick pay and full pay for part of a period of sickness absence.

**The judgment appealed**

3. The appeal is against a remedy judgment of Employment Judge Jones sitting with members. The remedy hearing was held at East London on 6 June 2024 and in chambers on 8 July 2024. So far as is relevant to this appeal, the Employment Tribunal had found in favour of the claimant in complaints of unfair dismissal, disability discrimination and sex related harassment, in a liability judgment sent to the parties on 12 April 2023.

**Outline facts**

4. The respondent is a firm of solicitors. The claimant worked for the respondent from 1 April 2019 to 2 February 2021. Towards the end of her employment, the claimant had a period of sickness related absences. The Employment Tribunal held that a refusal to provide training and the dismissal of the claimant constituted discrimination because of something arising in consequence of disability. The Employment Tribunal found that the respondent had failed to make reasonable adjustments by not providing the claimant with a larger screen and/or screen protector and an ergonomic chair or a cushion. The Employment Tribunal held that the claimant had been subject to sex related harassment when she was told that if she did not wear a scarf she might find it easier to attract men. The Employment Tribunal found that the claimant had been automatically unfairly dismissed for asserting a statutory right to be paid.

## The appeal

5. The respondent was permitted to appeal against two aspects on the remedy judgment. The first is an award for aggravated damages in the sum of £5,000; the second an award of compensation for the difference between statutory sick pay and full pay for part of a period of sickness absence, in the sum of £672.56. The appeal relates to a very small part of the total sum of £109,020.64 that was awarded to the claimant.

## Aggravated damages

6. The Employment Tribunal directed itself briefly as to the circumstances in which aggravated damages can be awarded:

39. In a few of the cases referred to above, the Tribunal has awarded aggravated damages as well as a sum for injury to feelings. In respect of aggravated damages, the tribunal were aware of the case of *Armitage, Marsden and HM Prison Service v Johnson* [1997] IRLR 162. **Aggravated damages may be awarded because of the lenient or favourable way in which an employer has treated the perpetrator of discrimination**, for example promoting him before knowing the result of an inquiry into his conduct. In *HM Prison Service v Salmon* [2001] IRLR 425 **aggravated damages were awarded and the EAT held that this was appropriate in circumstances where the employer had treated a complaint about harassment in a trivial way**. It was also stated in that case that where awards are made for both PI and for ITF the tribunal should make it clear what sums are attributable to which, in order to avoid double counting. [emphasis added]

7. The Employment Tribunal made an award of injury to feelings of £25,000 for the following reasons:

107. In terms of hurt feelings, this Tribunal finds that the Claimant was known to the Respondent as she had previously worked with them as a paralegal in 2013 and 2014. Since her employment began on 1 April 2019, she trusted the Respondent and continued working there even though she was never paid her full month's wages. She was also keen to qualify as a solicitor and they had promised to help her do so by certifying to the volume, breadth and quality of the work she did for the practice. For her part, despite her disabilities and the pain and discomfort that she felt most of the time; the Claimant worked hard, did everything she was told to do, went to the office on weekends and worked late into the evenings, hoping that this would all lead to her eventually achieving her goal of becoming a solicitor.

108. Unfortunately, for their part, the Respondent treated her poorly by discriminating against her because of her disabilities. The Respondent failed to comply with the duty to make reasonable adjustments. It also harassed the Claimant, mainly through Marie's actions. The Respondent also discriminated against her because of something arising from her disability. Lastly, the Claimant's dismissal was partly due to her informing the Respondent that she had another health condition and therefore because of disability, and partly because she was consistently advocating for her statutory rights as an employee.

109. Similar to *Olayemi* above, **the Claimant in this case, inevitably suffered a sense of injury to herself and her sense of wellbeing and suffered from a deterioration in her mental health, as a result of the discrimination and the discriminatory dismissal. As a result of the treatment and her experiences at the Respondent, she has given up her dream of becoming a solicitor.**

110. In setting the level of injury to feelings we had in mind the above cases and conclusions. We considered all the cases referred to above. We note the level of injury to feelings in the case of *Base Childrenswear Ltd v Otshudi* UKEAT/0267/18 (28 February 2019, unreported), in which the claimant was awarded £16,000 for injury to feelings; £3,000 for personal injury and £4,000 as aggravated damages. This was for what could be described as a ‘one off act’ but which had a devastating effect on the claimant in that case.

111. **In this case, the Respondent’s treatment of the Claimant caused her upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness and exacerbated stress and depression.** The Respondent did so over an extended period of time.

112. **The Respondent’s treatment of the Claimant had a ‘serious and substantial effect’ on her.** In such a case, an award in the upper end of the middle Vento band is appropriate.

113. **In the circumstances, it is our judgment that an award at the top end of the middle band of Vento is appropriate** in this case. It is our judgment that the Claimant is entitled to an award of **£25,000** for injury to feelings. [emphasis added]

8. The award was at the top end of the middle **Vento** band and took account of the fact that the claimant’s treatment caused her “upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness and exacerbated stress and depression”.

9. The Employment Tribunal went on to make an award of aggravated damages in the sum of £5,000 for the following reasons:

114. The Claimant applied for aggravated damages in this case, which the Respondent defended.

115. The Tribunal considered whether this was appropriate.

116. **The most serious aggravating factor here is that the discriminator is a firm of solicitors. This is a business that represents and advises members of the public on employment law issues.**

117. The Claimant was **discriminated and harassed against by the Respondent’s practice manager/consultant and therefore a person with some influence and power within the business. The Claimant spoke to the senior partner, Mr Khan about the adjustments that she needed. She also spoke to Ms Junkerre and others, to no avail.**

118. All the Claimant’s **complaints were treated in a trivial way.** There has been **no information given to the Tribunal on what steps have been taken to address Ms Junkerre’s treatment of the Claimant** or whether there has been an investigation.

119. Lastly, **it is the senior partner in the Respondent, Mr Khan, a solicitor, who decided to terminate the Claimant's employment when she told him that she had just been diagnosed with another health condition.**

120. It is this Tribunal's judgment that it is appropriate to make an award for aggravated damages in sum of £5,000 to the Claimant. [emphasis added]

### **The relevant legal principles**

10. An award of aggravated damages can be made where a discrimination complaint is upheld. However, the circumstances in which it is appropriate to award aggravated damages are limited because it is necessary that there be an additional aggravating factor, or additional aggravating factors, that go beyond those already compensated for by an award for injury to feelings; and that the additional aggravating factor or factors have caused increased injury to that already compensated for by an award of injury to feelings. Aggravated damages are a type of award for injury to feelings and so must compensate for something in addition to that already compensated for by a conventional award for injury to feelings. I shall describe the requirements for aggravated damages as the *additional aggravating factor* and *increased injury*. The additional aggravating factor must have caused the increased injury; I shall refer to that as the *causation requirement*.

11. It is helpful to remind ourselves of the key authorities.

12. In **Alexander v Home Office** [1988] ICR 685 Lord Justice May stated:

**As with any other awards of damages, the objective of an award for unlawful racial discrimination is restitution.** Where the discrimination has caused actual pecuniary loss, such as the refusal of a job, then the damages referable to this can be readily calculated. For the injury to feelings, however, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors. Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards. Further, injury to feelings, which is likely to be of a relatively short duration, is less serious than physical injury to the body or the mind which may persist for months, in many cases for life.

Nevertheless damages for this relatively new tort of unlawful racial discrimination are at large, that is to say that they are not limited to the pecuniary loss that can be specifically proved. Further, even where exemplary or punitive damages are not sought, **nevertheless compensatory damages may and in some instances should include an element of aggravated damages where, for example, the defendant may have behaved in a highhanded, malicious, insulting or oppressive manner in committing the act of**

**discrimination:** see per Lord Devlin in *Rookes v. Barnard* [1964] A.C. 1129 , 1221; per Lord Reid in *Broome v. Cassell & Co. Ltd.* [1972] A.C. 1027 , 1085 and per Lord Diplock in *Broome's* case, at p. 1124. The material passage from Lord Diplock's speech is in these terms:

“The three heads under which damages are recoverable for those torts for which damages are ‘at large’ are classified under three heads. (1) Compensation for the harm caused to the plaintiff by the wrongful physical act of the defendant in respect of which the action is brought. In addition to any pecuniary loss specifically proved the assessment of this compensation may itself involve putting a money value upon physical hurt, as in assault, upon curtailment of liberty, as in false imprisonment or malicious prosecution, upon injury to reputation, as in defamation, false imprisonment and malicious prosecution, upon inconvenience or disturbance of the even tenor of life, as in many torts, including intimidation. (2) **Additional compensation for the injured feelings of the plaintiff where his sense of injury resulting from the wrongful physical act is justifiably heightened by the manner in which or motive for which the defendant did it. This Lord Devlin calls ‘aggravated damages.’** (3) Punishment of the defendant for his anti-social behaviour to the plaintiff. This Lord Devlin calls ‘exemplary damages.’” [emphasis added]

13. Thus, behaving in a highhanded, malicious, insulting or oppressive manner when discriminating may amount to an additional aggravating factor that can result in increased injury that can be compensated for by an award of aggravated damages. But it must be remembered that an award of aggravated damages is compensatory not punitive.

14. In **HM Prison Service v Johnson** [1997] ICR 275, Smith J stated:

We consider that, as a matter of principle, aggravated damages ought to be available to plaintiffs or applicants for the statutory torts of sex and race discrimination. Damages are at large and, at least so far as direct discrimination is concerned, **the torts may be sufficiently intentional as to enable the plaintiff to rely upon malice, or the defendant's manner of committing the tort, or other conduct, as aggravating the injury to feelings.** Although there is as yet no direct authority to support this proposition, the Court of Appeal has assumed that aggravated damages are available in discrimination cases: see *Alexander v. Home Office* [1988] I.C.R. 685 and *North West Thames Regional Health Authority v. Noone* [1988] I.C.R. 813 . Also in *Ministry of Defence v. Meredith* [1995] I.R.L.R. 539 the availability of aggravated damages was conceded by Treasury counsel before the appeal tribunal in a sex discrimination case. **We are satisfied that aggravated damages are available in discrimination cases.** [emphasis added]

15. In **HM Prison Service v Salmon** [2001] IRLR 425, Mr Recorder Underhill QC, as he then was, stated:

It is convenient to start with the question of aggravated damages. It has been clear since the decision of the Court of Appeal in *Alexander v. Home Office* [1988] ICR 685 that it is open to a tribunal in a discrimination case to include in (NB) its 'compensatory' award"... an element of aggravated damages where, for example, the defendants may have behaved in a high-

handed, malicious, insulting or oppressive manner in committing the act of discrimination." see per May LJ at p.692F. **However, it is also clear that aggravated damages are awarded only on the basis, and to the extent, that the aggravating features have increased the impact of the discriminatory act or conduct on the applicant and thus the injury to his or her feelings: in other words, they form part of the compensatory award and do not constitute a separate, punitive award.** If this were not already sufficiently clear from Alexander, it was explicitly decided by the Northern Ireland Court of Appeal in *McConnell v. Police Authority for Northern Ireland* [1997] IRLR 625 (see at para 19); and *McConnell* was followed by this Tribunal in *Tchoula v. ICTS (UK) Ltd* [2000] ICR 1191 (see p.1206).

The Tribunal stated what it regarded as the aggravating features in this case at paragraph 12 of the Reasons, which we have set out above. Miss Downing submitted to us that the attempt by the senior officer at Court to blank out the offensive remarks in the dock book could not reasonably be regarded as aggravating conduct; also that Officer David's original denial could not be treated as aggravating conduct by the Prison Service, who in fact took considerable steps to identify him. We are inclined to accept both points; but it seems to us clear from the paragraph read as a whole, and in the context of the Tribunal's findings on liability (and in particular paragraphs 24-25), that these factors were not fundamental to its award of aggravated damages. **The real basis of those findings was its view that the Service perceived the entire incident as trivial and communicated that perception to Mrs Salmon by the way that it dealt with it.** The Tribunal was plainly struck in particular by the postponement of any disciplinary action against Officer David until after the conclusion of these proceedings, which it explicitly found added to the injury to Mrs Salmon's feelings. In our view there was a sufficient basis for the Tribunal to find aggravating conduct here; and the Tribunal plainly addressed the correct question, namely the extent to which that conduct aggravated the injury to Mrs Salmon's feelings. [emphasis added]

16. Thus, treating a discriminatory incident as trivial can give rise to an award of aggravated damages.

17. In **Commissioner of Police of the Metropolis v Shaw** [2012] I.C.R. 464, Underhill J (President), as he then was, questioned whether the law had taken a wrong turn when it was decided that aggravated damages are available in discrimination complaints but decided that such awards had been approved by the Court of Appeal too often to find that they were wrong in principle. The limited scope of such awards was emphasised. Underhill J summarised the key points:

16. We draw attention to three features of that summary, based as it is on Lord Devlin's analysis in *Rookes v Barnard* [1964] AC 1129.

(1) Aggravated damages are compensatory in nature and not punitive.

(2) The features that may attract an award of aggravated damages can be classified under three heads—(a) **the manner in which the defendant has committed the tort**; (b) **the motive** for it; and (c) **the defendant's conduct subsequent to the tort but in relation to it.**

(3) The **features enumerated** at (2) above **affect the award of compensation because they aggravate the distress caused by the actual wrongful act.** [emphasis added]

18. Underhill J summarised the principles:

#### Principles

19. It is important to appreciate that in the employment law field the approach to aggravated damages based on *Rookes v Barnard* and endorsed by the Law Commission has been authoritatively adopted. At the risk of repetition, we should spell out some key points and identify some problem areas relevant to the present appeal.

20. *Compensatory only.* **The starting point is that the only purpose of aggravated damages is compensatory. They should not be awarded in order to punish the respondent for his conduct, however heinous: that is the province (and only in a very limited class of case) of exemplary damages, which are a wholly different creature.** This is clear from the observations of May LJ in *Alexander v Home Office* [1988] ICR 685, 692 f, where he says that “compensatory damages may and in some instances should *include* an element of aggravated damages” (our emphasis); and the point has been made repeatedly since then: see, eg, *Police Authority for Northern Ireland v McConnell* [1997] IRLR 625, 629, paras 16–18, per Sir Robert Carswell LCJ; *Tchoula v ICTS (UK) Ltd* [2000] ICR 1191, 1205, para 13(7), per Judge Peter Clark; and *Prison Service v Salmon* [2001] IRLR 425, 429, para 23, per Mr Recorder Underhill QC. **This point needs to be made because the facts in cases which attract an award of aggravated damages will be likely to be such that the tribunal is rightly indignant, if not positively outraged, at the way the employer has behaved: but (save in a case properly attracting exemplary damages) the right vehicle for such indignation is in what it chooses to say about the employer’s conduct rather than in a punitive award. ...**

21. *Aggravated damages are an aspect of injury to feelings.* It is a necessary corollary of the point made in the previous paragraph that

“aggravated damages are awarded only on the basis, and to the extent, that the aggravating features have increased the impact of the discriminatory act or conduct on the applicant and thus the injury to his or her feelings”:

see *Salmon* [2001] IRLR 425, summarising the effect of *McConnell* and *Tchoula* and also unwittingly echoing the Law Commission’s summary. Keith J recently made the same point in *Wardle v Crédit Agricole Corporate and Investment Bank* (unreported) 14 July 2010, at para 36. **Aggravated damages are thus not, conceptually, a different creature from “injury to feelings”: rather, they refer to the aggravation—etymologically, the making more serious—of the injury to feelings caused by the wrongful act as a result of some additional element.** Indeed, if this were not so, the fact that Scots law does not recognise aggravated damages as such would mean that substantially different remedies were available in identical cases north and south of the border, which is a state of affairs to be avoided if at all possible. As it is, however, as Judge Peter Clark observed in *Tchoula ICTS (UK) Ltd* [2000] ICR 1191, **whether a tribunal makes a single award for injury to feelings, reflecting**

**any aggravating features, or splits out aggravated damages as a separate head should be a matter of form rather than substance.**

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

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

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

(c) ***Subsequent conduct.*** The practice of awarding aggravated damages for conduct subsequent to the actual act complained of originated, again, in the law of defamation, to cover cases where the defendant conducted his case at trial in an unnecessarily offensive manner. Such cases can arise in the discrimination context: see *Zaiwalla & Co v Walia* [2002] IRLR 697 (though NB Maurice Kay J’s warning at para 28 of his judgment (p 702)) and *Fletcher* [2010] IRLR 25. But **there can be other kinds of aggravating subsequent conduct, such as where the employer rubs salt in the wound by plainly showing that he does not take the claimant’s complaint of discrimination seriously:** examples of this kind can be found in *Armitage*, *Salmon* and *British Telecommunications plc v Reid* [2004] IRLR 327. A failure to apologise may also come into this category; but whether it is in fact a significantly aggravating feature will depend on the circumstances of the particular case. (For another example, see the very recent decision of this tribunal (Silber J presiding) in *Bungay v Saini* (unreported) 27 September 2011 . This basis of awarding aggravated damages is rather different from the other two inasmuch as it involves reliance on conduct by the defendant other than the acts complained of themselves or the behaviour immediately

associated with them. A purist might object that subsequent acts of this kind should be treated as distinct wrongs, but the law has taken a more pragmatic approach. However, tribunals should be aware of the risks of awarding compensation in respect of conduct which has not been properly proved or examined in evidence, and of allowing the scope of the hearing to be disproportionately extended by considering distinct allegations of subsequent misconduct only on the basis that they are said to be relevant to a claim for aggravated damages.

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

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

19. So, there it is; the key question is “what additional distress was caused to this particular claimant, in the particular circumstances of this case, by the aggravating feature(s) in question?”

20. Often, there may be much to be said for making a single award for injury to feelings, stating that account has been taken of any identified aggravating features, because this can avoid the risk of double counting.

### **Analysis**

21. The Employment Tribunal erred in its analysis of the claim for aggravated damages. It did not properly identify whether there were additional aggravating factors that caused increased injury.

22. The Employment Tribunal held that the “most serious aggravating factor here is that the discriminator is a firm of solicitors” and it was a “business that represents and advises members of the public on employment law issues”. This appears to be no more than the Employment Tribunal expressing its displeasure that a firm of solicitors should have treated an employee so badly. It sounds punitive, which is not a permissible basis to award aggravated damages. The fact that a respondent is a firm of solicitors with experience of employment law could be relevant if, as a matter of fact, it resulted in high handed highhanded, malicious, insulting or oppressive conduct because, for example, the respondent knew that it was acting unlawfully but went ahead anyway and that resulted in increased injury to the claimant. Such an award would have to be based on proper findings of fact.

23. The Employment Tribunal noted that the practice manager/consultant was a “person with some influence” but without identifying how this resulted in an additional aggravating factor or that it caused increased injury. Similarly, the Employment Tribunal did not identify how the fact that the claimant complained to Mr Khan and Ms Junkerre “to no avail” constituted an additional aggravating factor that resulted in increased injury. The Employment Tribunal did not clearly identify how the “complaints were treated in a trivial way”.

24. The Employment Tribunal stated that it was not told of any steps “taken to address Ms Junkerre’s treatment”. If this were to result in aggravated damages it would be necessary to identify that no action had been taken in respect of Ms Junkerre’s treatment of the claimant that resulted in increased injury to the claimant.

25. The Employment Tribunal stated that Mr Khan “decided to terminate the Claimant’s

employment when she told him that she had just been diagnosed with another health condition”. It did not assess how this amounted to an additional aggravating factor that had resulted in increased injury.

26. I take note of the fact that this was a modest award and constituted a very small part of the overall award. I have been careful not to be hypercritical, but while the Employment Tribunal identified conduct that could amount to additional aggravating factors, the assessment was not sufficiently based on clear findings of fact. The claimant did not ensure that these factors were additional to what had already been compensated for in the award for injury to feelings. More importantly, there was nothing in the self-direction as to the law that demonstrated an understanding that increased injury must have been caused by any additional aggravating factors. The Employment Tribunal did not refer to any increased injury or address the causation requirement.

27. The real criticism is about the reasoning of the Employment Tribunal. I have concluded that the matter should be remitted to the Employment Tribunal to redetermine whether an award for aggravated damages should be made and, if so, in what sum. I do not consider that this is case in which there is only one possible answer that would allow me to substitute a decision for that of the Employment Tribunal: **Jafri v Lincoln College** [2014] IRLR 544.

28. I consider the remission should be to the same Employment Tribunal, having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. The Employment Tribunal made numerous detailed findings that have not been successfully challenged on appeal. This Employment Tribunal will be better placed than a newly constituted Employment Tribunal to assess whether aggravated damages should be awarded and, if so, in what sum.

#### **The award for the difference between statutory sick pay and full pay**

29. The Employment Tribunal included this award in a section dealing with compensation for unfair dismissal. The Employment Tribunal held:

**76. The Claimant is also entitled to full pay for the period she was off sick. The Claimant was off sick between 11 December 2020 and 2 February 2021. It is unlikely that the Claimant would have been off sick if the Respondent had complied with**

**its duty to make reasonable adjustments.** The Claimant had been able to work with her disabilities so it is unlikely that on their own they would have caused her to be off sick. The incidents that led up to her being off sick were Marie's decision not to allow the Claimant to attend the training on the new software. The letter from Marie in November purporting to offer her a new contract for less money than had been offered to her in March 2019, which also told her that the Respondent believed that she had been self-employed to that date. It is likely that this was when she realised that she was not going to get paid.

**77. The Claimant had been asking for a computer with a bigger screen to help her do her work and to ease the discomfort caused by the Glaucoma and dry eyes. This had not been forthcoming. All of those factors contributed to her going off sick,** including the anxiety and depression that she had been diagnosed with since 2018, which became worse in this period. The Claimant also contracted COVID-19 in December.

**78. It is likely that the Claimant would have been off with COVID even if the Respondent had treated her well, paid her wages in full and on time and made the necessary adjustments. The Claimant contracted COVID at the end of December 2020.**

**79. The Claimant was only paid SSP during the time that she was off sick.** She was paid £109.40 per week, which is a reduction of £168.14 from her full weekly net wage. **The Tribunal will award the Claimant the difference between SSP and her full wage for 4 weeks. £168.14 x 4 = £672.56.** [emphasis added]

### Analysis

30. There was no finding, and there appears to have been no basis for a finding, that there was a contractual right to full pay while absent from work for sickness or that there was any basis for the difference between SSP and full pay being awarded as compensation for unfair dismissal. As the respondent accepts, the reasoning of the Employment Tribunal appears to have been that the loss resulted from the discriminatory treatment of the claimant. This could form part of an award of compensation for unlawful discrimination.

31. There is no explanation of why the sum was calculated as the difference between SSP and full net pay for a period of four weeks. It may be that it was a rough estimation based on the period up to when the claimant contracted Covid and would probably have been absent from work in any event. The Employment Tribunal found that it was likely that the claimant would not have been absent from work but for the discrimination but did not assess that likelihood.

32. While it is a minor matter, I consider that this must also be remitted to the Employment Tribunal to redetermine. The Employment Tribunal should, subject to consideration of any further submission from the parties as to the correct method of assessment, assess the chance that the claimant would have been at work prior to contracting Covid, absent the respondent's discrimination, and award that percentage of the difference between her full net pay and SSP for that period; and then for the period post the claimant contracting Covid assess any chance that the claimant would have been at work having contracted Covid, absent the respondent's discrimination, and then award that percentage of the difference between her full net pay and SSP for that further period. The remission shall be to the same Employment Tribunal for the reason given in respect of the remission in respect of aggravated damages.

**Payment of the awards not the subject of this appeal**

33. At the outset of the hearing, I asked whether any payment had been made to the claimant in circumstances in which over £100,000 of the award is not subject of grounds of appeal that were permitted to proceed. I was told that no payment has been made and that the claimant has not started any formal process to enforce any part of the award. I suggested that the claimant should consider taking advice about enforcement of the award.

34. In cases such as this parties may wish to take note of Rule 64 **Employment Tribunal Rules 2024**:

Time for compliance

64. A party must comply with a judgment or order for the payment of an amount of money within 14 days of the date of the judgment or order, unless—

(a) the judgment, order, or any of these Rules specifies a different date for compliance, or

(b) the Tribunal has stayed (or in Scotland sisted) the proceedings or judgment.

35. Thus, an order requiring the payment of an amount of money must be paid within 14 days unless the Employment Tribunal fixes some other time or grants a stay in respect of some of or all of the award. Appealing to the EAT does not result in the stay of an order for the payment of a sum of

money.

36. Section 15 of the **Employment Tribunals Act 1996** provides:

15.— Enforcement.

(1) Any sum payable in pursuance of a decision of an employment tribunal in England and Wales which has been registered in accordance with Procedure Rules shall be recoverable under section 85 of the County Courts Act 1984 or otherwise as if it were payable under an order of the county court.

37. If a judgment has been appealed but the Employment Tribunal has not granted a stay, an application could potentially be made to the County Court to enforce the judgment. Where there is an appeal against the judgment of the Employment Tribunal the County Court might stay enforcement but potentially could require a payment into court or limit the stay to that part of an award that is being challenged on appeal: **Zabaxe Limited v Nicklin and Others** EAT/123/89, (1990) Times, 30 October.