Appeal No. UKEAT/0056/18/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 29 November 2018 &
6 December 2018

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

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(1) FIRST GREATER WESTERN LIMITED — APPELLANTS
(2) MR J LINLEY

MISS R WAIYEGO — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellants	MR TOM BROWN (of Counsel) Instructed by: Kennedys Law LLP 25 Fenchurch Avenue London EC3M 5AD
For the Respondent	MR GEORGE ELVIS YAGOMBA (Barrister (non- practising))

SUMMARY

DISABILITY DISCRIMINATION – Compensation

DISABILITY DISCRIMINATION – Loss/mitigation

DISABILITY DISCRIMINATION – Burden of proof

The **Law Reform (Contributory Negligence) Act 1945** can apply to some discrimination claims, but reduction of an award for contributory negligence would rarely, if ever, be justified because of the difficulties in applying the concept of "fault" to the victim of a discrimination claim and the fact that the discriminator may have acted without "fault" in the sense of the **1945 Act**.

The *obiter* dictum in **Way v Crouch** [2005] ICR 1362, EAT at [11] that "compensation in a sex discrimination case (and by analogy in other discrimination claims) is subject to the [**1945**] **Act**" is too broad. The essence of the right not to be discriminated against could be impaired by over-wide application of the **1945 Act**. A contributory negligence argument in a discrimination claim may be more appropriately treated as an allegation of failure to mitigate loss.

The tribunal had not erred in its assessment of the quantum of non-financial loss (psychiatric injury and injury to feelings) for disability discrimination. The awards for injury to feelings and psychiatric damage were not flawed by misdirection in relation to causation of loss; nor were they perversely high or flawed by double counting.

The tribunal had rightly rejected the Claimant's invitation to impose a financial penalty on the First Respondent under section 12A(1) of the **Employment Rights Act 1996** for deliberate and repeated breaches of employment law.

The tribunal had also rightly rejected the invitation of the Claimant to award aggravated damages. The Appeal Tribunal shared the lack of enthusiasm for such awards expressed by the Appeal Tribunal in **Commissioner of Police for the Metropolis v Shaw** [2012] ICR 464.

THE HONOURABLE MR JUSTICE KERR

1. This is an appeal by the Appellants, the Respondents below, against the decision of the Employment Tribunal (ET) sitting in Bristol following a remedies hearing. That hearing took place on 31 July 2017 and 1 August 2017. The decision is dated and was sent to the parties on 12 October 2017. The Tribunal consisted of Employment Judge Harper sitting with Mr C Harris and Ms G Mayo.

2. There is also a cross-appeal by the Respondent in the appeal, the Claimant below. Both appeal and cross-appeal are brought with leave of the sift judges who considered them on the papers. I will call the Appellants the Respondents, as they were below; and I will call the Respondent to the appeal the Claimant, as she was below.

3. Both the appeal and the cross-appeal are concerned with whether the ET erred in law in deciding the issue of financial compensation in the way it did. As you would expect, in the appeal, the Respondents say the ET awarded too much; in the cross-appeal, the Claimant says it awarded too little. The Claimant also says the ET should have exercised a rarely used jurisdiction to impose a separate financial penalty on the First Respondent, payable to the Secretary of State.

4. The background is that the Claimant commenced employment with the First Respondent on 10 March 2003. The First Respondent is a train operating company that provides passenger rail services from London Paddington to South Wales and the South West of England. The Claimant remains employed by the First Respondent although she was on sick leave for lengthy periods from August 2014 onwards.

5. When her long period of sick began, she was working for the First Respondent as a customer services information controller. She brought three claims against various Respondents, including principally the First Respondent. The first claim was presented on 24 June 2014, the second on 24 January 2015 and the third on 26 August 2015. The claims were brought against a total of 11 named Respondents.

6. In them, the Claimant variously claimed for harassment by reason of her sex, victimisation, failure to make reasonable adjustments, direct disability discrimination, unfavourable treatment arising in consequence of a disability, harassment by reason of her disability, direct race discrimination and harassment by reason of her race. The complaints covered a period going back to March 2005, and were wide ranging. She relied on about 20 separate incidents.

7. There was a 12 day hearing in February and March 2016, followed by a reserved judgment on liability produced by the same Tribunal dated 3 June 2016, and sent to the parties on 6 June 2016. In that judgment, the ET found that two acts of discrimination contrary to Part 5 of the **Equality Act 2010 (EqA 2010)** had been proved. The other parts of the claim failed.

8. The matters found proved were, first, that the First Respondent had failed to make reasonable adjustments in relation to a delay in organising funding for the Claimant to undergo cognitive behaviour therapy (CBT); and second, that both Respondents had treated the Claimant unfavourably because of something arising in consequence of her disability, by failing to consult her from April to June 2015, when she was not at work, about a reorganisation of her team.

9. The ET's findings relating to the first of the two claims that succeeded were set out in paragraphs 135-149 in the Tribunal's liability judgment. Briefly, they found that CBT had been recommended for the Claimant by Dr Harry Phoolchund on 16 April 2014 through the First Respondent's occupational health provider. Subsequently, there were various further acknowledgements that CBT would help the Claimant.

10. The ET found that contact between the Claimant and the First Respondent's employee responsible, Ms Diane Haggan, was, to put it neutrally, unsuccessful and the CBT was not provided. Some confusion ensued. The Claimant obtained a letter from her GP confirming that CBT was recommended and she hoped that this would assist. Despite this, CBT was not progressed.

11. The ET found Ms Haggan's evidence unconvincing and criticised the lack of any "active intervention by anyone on behalf of the First Respondent to arrange the funding CBT sessions, despite the Claimant's correspondence indicating that this was still outstanding…" (paragraph 183). The CBT was not provided until May 2015, just over a year later than it should have been, the ET found.

12. The ET's findings relating to the second of the two claims that succeeded - discrimination arising from disability from April to June 2015 - was the subject of findings in the liability judgment at paragraphs 158-169. Briefly, a reorganisation of the Claimant's team was being considered whilst she was off sick. Starting from about April 2015, individuals affected were able to make representations on an individual basis. Contact was not made with the Claimant to enable her to have the same opportunity.

13. Her line manager at the time, the Second Respondent, decided not to contact her because "he did not feel comfortable in contacting her directly" (paragraph 160). He approached a representative of the Claimant's trade union, Mr White of the RMT. However, the Claimant did not wish the RMT to represent her in the matter and wanted to deal with the issue herself. Mr White barely knew her and the ET found it was inappropriate to rely on his services in the circumstances.

14. In the event, the Claimant discovered the reorganisation after it had already occurred; she would have to apply for a post in the new management structure, albeit that this would be a formality and she would not have to undergo a competitive interview. The ET found that the Second Respondent "took no proper steps to ensure that Mr White had spoken with the Claimant to advise her of the reorganisation" (paragraph 166). That claim succeeded as against both Respondents remaining in this appeal.

15. When the matter came back before the ET for remedy to be determined, the ET ordered the First Respondent to pay the Claimant £22,000 in respect of psychiatric injury in relation to the first successful claim (the CBT claim). It ordered the First Respondent to pay her £19,800 plus interest for injury to feelings in relation to the CBT claim. It awarded loss of earnings of £26,766.34, an agreed net figure but subject to deduction in respect of state benefits.

16. In relation to the second successful claim (the non-consultation claim) both Respondents, jointly and severally, were ordered to pay the Claimant damages for injury to feelings of £8,800 plus interest. The ET refused to award aggravated damages and refused to order a financial penalty against the First Respondent. The ET also made a recommendation.

17. In its reasons the ET set out the issues in uncontroversial terms. It recited the course of the hearing before it and the witnesses from whom it had heard. It rehearsed in summary the submissions of the parties.

18. In the case of the Respondents, there was a document described as a "counter-schedule," which contained calculations but also written argument similar to a skeleton argument. That was penned by Mr Brown of counsel appearing then and now on appeal. On the Claimant's side, Mr Yagomba, appearing then and now in this appeal, made the submissions for the Claimant.

19. In the liability decision, the ET recorded that it had heard oral argument and referred to a small number of cases cited to it. It recorded that it found all the witnesses truthful and credible. It then proceeded to analyse the issues in the following order.

20. First, they considered whether the Claimant had sustained psychiatric injury as a result of the two acts of discrimination that succeeded. On that issue, the ET considered carefully the written evidence of a Dr Hashmi, instructed as a joint expert. Having summarised that evidence, the ET professed itself satisfied on the balance of probability that in the case of the CBT claim, psychiatric injury had been caused to the Claimant; but that in the case of the non-consultation claim, it had not been.

21. The ET went on to consider the effect of the psychiatric injury and set out its findings on that issue, concluding that "the severe impact of the condition on her day-to-day activities lasted from around the summer of 2014 until 15 March 2016." She was ready to return to work then but in fact did not return until November 2016 (see paragraph 36).

22. The ET went on to consider the then applicable Judicial College Guidelines for personal injury damages in relation to psychiatric injury generally. The ET concluded that the appropriate category was "moderately severe." After considering the range for that category, the ET concluded that the appropriate award was £20,000 uplifted by 10% by reason of the **Simmons v Castle** [2012] EWCA 1039 decision.

23. The Tribunal went on to consider loss of earnings, which does not arise as an issue in this appeal or cross-appeal. It then went on to consider injury to feelings, having directed itself in accordance with the usual case law including the **Vento** bands as uplifted. Both by reason of change in the value of money and by reason of **Simmons v Castle**, the Tribunal considered the factual position on injury to feelings at paragraphs 50-54 of its decision and concluded that it should make the awards I have already set out above.

24. Finally, the ET gave brief reasons for refusing an award of aggravated damages or a financial penalty under section 12A of the **Employment Tribunals Act 1996**, and gave its reasons for deciding to make an appropriate recommendation; a point that does not feature in this appeal or cross-appeal.

25. Such then was the remedy decision of the ET. I will deal first with the appeal and then the cross-appeal.

26. There are ten grounds of appeal; the sift judge did not limit the grounds or require them to be reorganised, though he might well have done. I need only address the first nine grounds; the tenth and last, it is accepted, does not add anything material.

Ground 1: contributory negligence

27. The Respondents contend that the ET erred in law in failing to make any deduction to reflect the Claimant's contributory negligence in failing to give the First Respondent details of her previous cognitive behavioural therapist, Dr Derek Indoe. Mr Brown submitted that section 1(1) of the **Law Reform (Contributory Negligence) Act 1945**, applied to discrimination law, enabling the ET to make a reduction.

28. To reflect causative contributory conduct, he relied on **Way v Crouch** [2005] ICR 1362 at 1365 per HHJ Birtles at paragraph 11. He contended that the ET had failed to address the issue of contributory negligence, raised by him at the hearing when he had put questions in cross-examination to the Claimant along the lines that she, the Claimant, ought to have directed the First Respondent's attention to the availability of Dr Indoe as a provider of CBT.

29. Mr Brown told me he submitted below in closing that the Claimant's failure to do so was contributory negligence causative of some of the damage to the Claimant, making a material contribution to the harm she suffered; that a reduction ought to have been made, and that indeed the ET had not even considered that issue. Accordingly, his submission was that the matter had to be remitted for consideration.

30. Mr Yagomba, for the Claimant, described that contention as "wholly misconceived and misguided." He argued that the Respondents were attempting to challenge the findings of fact in the liability judgment "through the back door." He pointed out that the Respondents below had sought a percentage reduction in compensation on the basis of an alleged failure by the Claimant to mitigate her loss.

31. He submitted that the ET had adequately and correctly dealt with the Claimant's arguments in that regard, as shown in paragraph 13 of its decision. That paragraph does indeed record the submission of the Respondent that there should be a percentage reduction in the Claimant's loss across the board which it was suggested should be 50 per cent:

> **"13. …to reflect the probability that even if she had been provided with CBT earlier, she would have had sickness absence and/or that she would have been unable to work at full capacity and therefore would not have been in receipt of full pay. The respondents contend that the claimant failed to mitigate her loss as she did not secure CBT herself through either the NHS or privately."**

32. Later at paragraph 40 of the decision, the ET decided that it would make no reduction in the award for psychiatric injury in respect of the CBT claim. They said this:

> **"40. We find that the claimant did not fail to mitigate her loss. She attended group CBT provided through her GP. This was not helpful to her. The recommendation was for one to one CBT. The claimant did not seek to pay for CBT privately herself. However her means were not substantial. There was no failure to mitigate in this regard. We therefore make no reduction to the award for injury…"**

33. Mr Yagomba took me to various letters that were before the ET at the liability stage, demonstrating the multiple occasions on which Dr Phoolchund recommended provision of CBT from 16 April 2014 onwards. Dr Phoolchund reiterated that recommendation for the fourth time on 28 January 2015, in a letter to the First Respondent. Mr Yagomba also demonstrated from two letters, sent as far back as 10 May 2007, that Dr Indoe had been the provider of the Claimant's CBT in that year and that he had written to the First Respondent and its occupational health advisors reporting on progress. Therefore, said Mr Yagomba, the First Respondent was well aware of Dr Indoe's existence and suitability to provide CBT.

34. My points on this ground of appeal are the following. First, there is no provision in the **EqA 2010** for reducing the amount of compensation by reason of contributory fault, as there is in the unfair dismissal jurisdiction (section 122(2) of the **Employment Rights Act 1996** in the case of the basic award and section 123(6) in the case of the compensatory award).

35. Second, Mr Brown is right that the amount of compensation for discrimination under the **EqA 2010** corresponds to the amount that could be awarded by a county court, including for injury to feelings (section 119(2)(b) and 124(6) of the **EqA 2010**).

36. Third, the wording of section 1(1) of the **Law Reform (Contributory Negligence) Act 1945** on its face can apply to *some* discrimination claims under the **EqA 2010**. It is not restricted in its application and plainly applies where compensation for a tort is awarded in a county court.

37. Fourth, however, Tribunals should be very wary of accepting invitations to reduce compensation for discriminatory acts by reason of contributory negligence under the **1945 Act** and I would expect such cases rarely if ever to arise, for at least the following reasons.

38. The first reason is that the framers of the **1945 Act** had no idea it might be applied to discrimination claims; there was no statutory discrimination law until two decades later.

39. The second reason is that discrimination may not necessarily involve "the fault of any other person or persons" within the wording of the **1945 Act**, section 1(1). Discrimination can, at least arguably, be committed without fault in any ordinary sense of that word. It can be unconscious; it can be committed deliberately but misguidedly, with good intentions, and so forth.

40. I think the *obiter* statement in **Way v Crouch** [2005] ICR 1362, EAT, (cited above) at paragraph 11 that "compensation in a sex discrimination case (and by analogy in other discrimination claims) is subject to the [**1945**] **Act**" is therefore too broad.

41. Third, if a discriminator acts without "fault" within section 1(1) of the **1945 Act**, the victim is better off, not being at risk of a contributory fault reduction, than if the discriminator is at fault. That may or may not be a good thing but the proposition has an arbitrary air about it and is surely an unintended consequence of aligning the compensation jurisdiction of the ET with that of the county court.

42. Fourth, the discrimination statutes do not, as already noted, include a bespoke statutory provision dealing with contributory fault and it is likely that one would have been enacted if the legislature had intended there to be a power to reduce compensation by reason of the victim's conduct.

43. Fifth, the notion of contributory negligence in the context of discrimination is perilous and difficult to apply. It presupposes that the victim has by blameworthy conduct contributed to or encouraged the unlawful act of discrimination against her. One has only to consider the example of a sexual harassment case to see how dangerous is such a notion. There is a real danger that the essence of the right not to be discriminated against could be impaired if allegations of contributory negligence are readily made and entertained.

44. I can see that contributory negligence might arise, for example, from a failure to keep an appointment for medical or other treatment such as CBT, offered by way of a reasonable adjustment which the employer has failed to provide in timely fashion. However, because of the conceptual difficulties just mentioned, I think it will normally be better to treat such cases as failure to mitigate loss rather than trying to shoehorn them into the **1945 Act**.

45. With those points in mind, I return to the facts here and the ET's decision. Paragraph 13 of the decision dealt with mitigation of loss; that is how it was put in the counter-schedule which was akin to a skeleton argument. There was no mention of contributory negligence in it. There was much emphasis placed on failure to mitigate loss.

46. I accept from Mr Brown that at the ET, though it was not mentioned in his written arguments in the counter-schedule, he orally submitted that there should be a reduction in compensation for contributory negligence comprising a failure by the Claimant to alert the First Respondent to the suitability and availability of Dr Indoe to provide CBT.

47. However, I accept Mr Yagomba's submission that it is unrealistic and fanciful to suppose that the ET would or should have upheld the contributory negligence argument. I think it unlikely that this careful Tribunal overlooked it. It is true that they did not mention the point in the decision. While a Tribunal should record the points taken by the parties, the Appeal Tribunal should not encourage "defensive drafting" by ETs.

48. The difficulties facing Mr Brown's contributory negligence argument were colossal. First, there were the findings in the liability judgment, squarely placing the blame on the First Respondent for not providing the CBT. A finding of contributory negligence would, to say the least, sit uneasily with those findings. The allegation looks very like an attempt to shift blame from Ms Haggan, where the ET at the liability hearing had found that it lay, to the Claimant.

49. Secondly, the First Respondent knew all about Dr Indoe and it had introduced him to the Claimant, as Mr Yagomba pointed out. The contributory negligence allegation amounts to the suggestion that it was somehow the Claimant's responsibility to cure the First Respondent's

A administration problems by telling the left hand what the right hand is doing and what the left hand should be doing. That seems to me unrealistic.

B 50. Third, the ET rejected any percentage reduction for failure to mitigate loss and causation arguments, factually very similar to, even though not identical to, the basis of Mr Brown's contributory negligence argument.

C 51. I do not think this careful ET overlooked the contributory negligence argument. Even if it did, that cannot possibly have affected the result. I consider for those reasons that the first ground is without substance and I dismiss it.

D **Grounds 2, 3 and 4: causation of psychiatric injury**

52. The second, third and fourth grounds of appeal can be taken together. The second is that the Tribunal treated the conclusions of Dr Hashmi as "determinative of the question of causation" E rather than weighing them with other relevant considerations.

53. The third ground is that the Claimant failed properly to address the causation of the F Claimant's psychiatric injury and consequential loss by overlooking the burden of proof, the impact of complaints pursued but dismissed and the Claimant's pre-existing vulnerability to psychiatric injury. Mr Brown, however, disavowed any intention of questioning the "eggshell G skull" principle.

54. The fourth ground of appeal is that the Claimant erred in failing to apportion the harm H suffered by the Claimant as between factors for which the Respondents were not liable and those for which it was.

55. Those grounds all concern the ET's treatment of the evidence relating to causation of psychiatric injury and in particular, the issue of divisibility of loss and its reasoning and conclusion on that issue.

56. Mr Brown submitted that the ET over-compensated the Claimant because it failed properly to address the burden of proof or the issue of causation of harm and, in particular, of divisibility of harm, most recently discussed in **BAE Systems (Operations) Ltd v M Konczak** [2018] ICR 1 CA (see the judgment of Underhill J at [70]-[72]. That decision coincided with the remedy hearing and came too late to be cited to the ET, though it was referred to **Thaine v London School of Economics** [2010] ICR 1422, which was cited with approval in **Konczak**.

57. Mr Brown reminded me that the burden lay on the Claimant - a point not mentioned in the ET's decision - to show that the wrongful conduct had made a material contribution to the Claimant's psychiatric injury; and that only where no rational basis exists for an apportionment of harm as between tortious and non-tortious causes should the Claimant be compensated for the whole of the injury suffered; that injury here being exacerbation of a pre-existing mental condition.

58. Mr Brown disavowed, as I have said, any intention to question the "eggshell skull" principle requiring the tortfeasor to take its victim as it finds her; but he contended that the ET had failed to isolate tortious from non-tortious causes of injury to the Claimant. They had uncritically adopted the findings of Dr Hashmi, who had merely described the condition of the Claimant without searching for a rational basis for an apportionment, as between tortious and non-tortious causes, of the harm the Claimant suffered.

59. He emphasised that the Claimant had suffered from a pre-existing mental condition for which she had required CBT, as a result of two traumatic incidents in 2005 and 2006; that she had failed in numerous cases to establish that particular conduct was discrimination, victimisation and harassment as she alleged; conduct which, no doubt, in her mind she perceived as discrimination but which was found not to be; and that Dr Hashmi had been specifically asked to differentiate between injury caused by the two acts of discrimination found to have occurred, and injury from other causes.

60. He also pointed in particular to events, among others of which the Claimant complained unsuccessfully, that had traumatised her in the period from December 2008 to August 2013, which she attributed to the conduct of her line manager at the time, Mr Field. The ET had dismissed her allegations in that regard, but the events nonetheless culminated in the Claimant going on sick leave for part of August and September 2013 and then again from October 2013.

61. That was about six months before the starting point in April 2014 of the first of the two wrongful acts of discrimination. Logically, Mr Brown argued, harm caused by events prior to April 2014 could not be causative of injury that fell to be compensated. Although Dr Hashmi was instructed as a joint expert and was therefore not cross-examined, Mr Brown criticised his two reports for failing to deal adequately with this point.

62. What Dr Hashmi had done, said Mr Brown, was to describe the Claimant's history of anxiety and depression from 2006 onwards and her condition at the time he met the Claimant in November 2016. Dr Hashmi noted that the impact of CBT undergone in 2006 to 2007 had been very positive and had enabled the Claimant to return to work (with very few days of sickness absence) until August 2013.

63. But Dr Hashmi did not, Mr Brown said, search for a rational basis for isolating in the harm caused by the two wrongful acts. In his second report of 22 July 2017, responding to questions drafted by the Respondent's then solicitor, he had not remedied the defect. Asked to "isolate the impact on [the Claimant's] health of the two acts of discrimination," he had answered that his second report:

> **"incorporated the well-established bio-psycho-social model to incorporate the impact on [the Claimant] with reference to the two acts of discrimination… It is difficult for me to isolate the impact with any more clarity. This is to note that life events tend to take a snowball effect and it is not always possible to precisely divide in separate any specific impact of an action, hence it is not possible to isolate in any other way except the way it is presented in the Report."**

64. Mr Brown did not accept that this was a rational basis for concluding that the harm was indivisible. Rationality required that the harm be treated as divisible because, at least, such harm as had predated the tortious conduct could not have been caused by it.

65. For the Claimant, Mr Yagomba stoutly defended the ET's reasoning and conclusions. He insisted that the ET was well aware of the issue of divisibility of harm; that Dr Hashmi's evidence properly addressed that issue and properly concluded that it was not possible to separate out the causes of the harm beyond the findings made in the main report; most importantly, including the point that the Claimant would have returned to work far earlier than she did if she had received CBT in 2014 when it was recommended.

66. Mr Yagomba pointed out that Dr Hashmi's evidence was thoroughly grounded in well over 700 pages of historic medical and other evidence provided to him, all of which he considered. The ET, in turn, had contemporary evidence from other medical sources, which it carefully considered, as well as Dr Hashmi's two reports, which it equally carefully considered.

67. Mr Yagomba pointed out that the ET heard from two other witnesses about the Claimant's condition during the relevant period and that the decision shows clearly that it was aware of the issue of divisibility of harm and consciously directed itself not to compensate the Claimant for the harm done by non-tortious conduct occurring before the two acts of discrimination. He submitted, therefore, that the ET's findings were rationally founded and unassailable.

68. I come to my reasoning and conclusions on these grounds. First, Dr Hashmi was the Respondent's expert as well as the Claimant's. His evidence cannot be challenged in this appeal. The Respondents were able to question him further in writing, leading to his addendum report. What he said was the expert evidence. While it is open to Mr Brown to challenge the findings of the ET based on Dr Hashmi's evidence, it is not open to him to impugn the medical opinions of Dr Hashmi, or invite the Appeal Tribunal to disagree with them.

69. Second, it does not matter that the ET did not mention the burden of proof. If ETs had to mention the burden of proof every time one arises, decisions would be burdened with endless references to it. The burden was never likely to loom large where there is known pre-existing harm and a joint expert with the job of differentiating the harm if he rationally could.

70. Third, the ET was well aware of the issue of the divisibility: see paragraphs 20, 23 and 24 of its decision. It could hardly have been unaware of that issue; the only reason CBT was needed at all was *because* of the pre-existing mental illness, which everyone agreed had not been caused by any wrong on the part of the First Respondent.

71. Fourth, the First Respondent had to take the Claimant as it found her. Undoubtedly, she had a vulnerable personality and was particularly susceptible to harm to her mental condition, as

had been demonstrated by the effect of the two incidents in 2005 and 2006; just as, on the other hand, she was a good subject for CBT which had delivered solid benefits that had enabled her to recover from that harm and maintain very good work attendance from 2006 to 2013.

72. Next, I bear in mind that the ET heard from the two lay witnesses, Ms Juma and Ms Omondi, and from the Claimant herself. The evidence is not just from Dr Hashmi. However, his evidence was very important. The question is whether it adequately grounded the findings made by the ET and whether those findings adequately reflect the approach required in the authorities, most recently reviewed in the **Konczak** case.

73. Having carefully considered Dr Hashmi's evidence and the ET's reasoning and conclusions based on it, I agree with Mr Yagomba that the reasoning is sound and I disagree with Mr Brown's proposition that the ET wrongly compensated the Claimant for non-tortious conduct committed before April 2014 and failed to separate out that conduct when dealing with causation of psychiatric injury.

74. Dr Hashmi's key findings were as follows. He found (first report, paragraph 17.2.1) that the Claimant was fit to resume work from 16 April 2014, when she attended the appointment at which CBT was recommended. He found that it was highly unlikely she would have remained off sick if CBT had been provided immediately at that stage (paragraph 17.2.4). He found that had she returned to work with the benefit of CBT in April 2014, she would have maintained a good attendance record (paragraph 17.3.11).

75. Those findings were rationally grounded and are not open to challenge in this appeal. Dr Hashmi pointed out that the recommendation that the Claimant undergo CBT, made in April

2014, was followed by the Claimant moving on to paid leave from 3 May 2014 and attendance at work training from 16 August 2014 (paragraph 17.3.7). He properly reasoned that the CBT recommendation "installed [instilled] hope in [the Claimant's] emotional and psychological systems", enabling her to achieve these work activities.

76. In answer to the request to "explain the specific impact … of the 2 acts of discrimination," he reiterated (paragraph 18.1.3) his opinion that the first of them was the cause of the Claimant's non-return to work from April 2014. He then described her symptoms (paragraph 18.1.5), namely symptoms of anxiety, depression and post-traumatic stress disorder.

77. He noted the continuity of symptoms since mid-2013 (paragraph 18.2.1), the trauma originally suffered in the two incidents in 2005 and 2006 (paragraph 18.2.2 (b)) and commented that it is "common that during a phase of relapse of mental illness, the individual is likely to experience symptoms of the previous episodes of mental illness even when the previous episodes were treated and then recovered in full."

78. Mr Yagomba is right to say that this is a finding of vulnerability, that the tortfeasor must take the victim as it finds her and that the Claimant's non-recovery on this occasion was rationally linked to the finding that she would have returned to work had the recommended CBT been provided. Mr Brown's criticism that the findings attribute harm to non-tortious causes, overlooks the pre-existing vulnerability of the Claimant as a relevant factor when measuring the impact of the failure to provide CBT.

79. In his supplemental report, Dr Hashmi was asked to reconsider his views and to "isolate the impact" of the two acts of discrimination. He answered that, applying the established bio-

psycho-social model, it was "difficult for me to isolate the impact with any more clarity" for the reasons given in the passage I have already quoted full above. That is opinion evidence which is not open to the First Respondent challenge in this appeal.

80. In my judgement, it provided a rational basis for the ET's findings in its decision. Those findings followed a careful review of Dr Hashmi's evidence (see paragraphs 23-33). They formed a proper foundation for the ET's finding at paragraph 34, accepting the opinion of Dr Hashmi, that "on the balance of probability…. the failure to progress the CBT caused the Claimant's psychiatric injury resulting in a decline in her mental health as described by Dr Hashmi….".

81. The ET was clearly aware that the Claimant had pre-existing mental health problems; hence the reference in paragraph 34 to the First Respondent having caused a "decline" in her mental health and, by contrast, to the further finding that the second act of discrimination had not "caused or exacerbated any further injury." I see nothing in those findings of the ET to persuade me that they are out of line with the approach of the Court of Appeal in the **Konczak** contact case, or that they lack a rational foundation. I dismiss these grounds of the appeal.

Ground 5: perversely high award for psychiatric injury

82. The fifth ground of the appeal is, first, that the award of £22,000 for general damages for psychiatric injury was flawed by the errors of law already covered in the first four grounds; a proposition I find unsustainable because I have not found any such errors. Alternatively, it is said the award is so high as to be perverse independently of any other error of law.

83. The only additional point made by the Respondents to support the free standing complaint of perversity is that the ET was wrong to place the injury in the "moderately severe" band in the

Judicial College Guidelines of the time, the 13th edition. The guidelines have since been superseded from September 2017 to account for changes in the value of money, but the descriptions of the cases within the bands for psychiatric injury generally have not changed.

84. The ET rejected Dr Hashmi's characterisation of the psychiatric injury as severe and profound. The award was of £20,000, plus a 10 per cent **Simmons v Castle** uplift. The figure of £20,000 is towards the lower end of the then range for "moderately severe" psychiatric injury, which at the time of the hearing was (before applying the uplift) from £15,950 to £45,840. By the time of the Tribunal's decision, the 14th edition of been published and the range had become £16,720 to £48,080, although the ET did not refer to this change.

85. Mr Brown argued that the ET should have made an award in the "moderate" band, which is characterised by the ill effects of the injury having largely passed by the time of the award, such that "there will have been marked improvement by trial and the prognosis will be good." That was the position here, said Mr Brown. For "moderately severe", the prognosis is described as "much more optimistic than in (a) above [i.e. a "very poor" prognosis"]. The description continues "[c]ases of work-related stress resulting in a permanent or long-standing disability preventing a return to comparable employment would appear to come within this category."

86. Mr Yagomba submitted that the Respondents had advanced no legitimate basis to disturb the award. I agree. The Tribunal analysed (see decision paragraphs 35-39) the effects of the injury and the duration of severe impact on the Claimant's day-to-day activities and measured these against the descriptions in the Judicial College guidelines. I find no flaw in its approach to that exercise and no basis for the submission that the outcome was perverse. I reject this ground of appeal.

Grounds 6–8: challenges to the awards for injury to feelings

87. These grounds of appeal can be taken together. The sixth is that the award of £19,800 for injury to feelings in respect of the CBT complaint was so high that no reasonable tribunal could properly have awarded it. In the seventh ground the Claimant advances the same contention in relation to the £8,800 awarded for the non-consultation complaint. The eighth ground attacks the cumulative sum total of those two amounts, namely £28,600, contending that it involved "double recovery for the same injury to feelings" or alternatively that it was again "perversely high."

88. The ET directed itself in law uncontroversially, referring to guidance from case law including the **Vento** bands and the uplift to them by reason of inflation and **Simmons v Castle**. It decided that the delay in providing CBT merited an award of £19,800, at the top of the middle band, which is also the bottom of the higher band; and that the failure to consult the Claimant on the reorganisation should result in an award of £8,800, at the bottom of the middle band. Its reasons for making those awards were set out at paragraphs 50-54 of its decision.

89. Mr Brown submits that, even if the ET made no error of law thus far, in setting the awards for injury to feelings it must have taken into account subjective feelings of hurt experienced by the Claimant from acts of which she complained unsuccessfully, wrongly characterised by her as acts of discrimination, victimisation or harassment, particularly on the grounds of race or sex. For example, he submits, the Claimant regarded the non-provision of CBT in 2014 as race discrimination, believing wrongly that a white person would have been treated better.

90. Mr Brown's written submissions went over some of the facts, seeking to argue that particular factual matters ought to have pointed towards a more venial characterisation of the wrongdoing and thus a lower award for injury to feelings in respect of both complaints. He

submitted that no reasonable tribunal could have concluded that the awards for her injury to feelings, at the top of the middle band in the first case and the bottom of the middle band in the second, were objectively justified.

91. He also argued that the ET ought to have expressly considered, at some stage, the issue of "totality": whether the overall combined total awarded for injury to feelings of £28,600 was so high that the extent of the First Respondent's liability was disproportionate. He accepted the need for two separate awards, given that the Second Respondent would be jointly liable for the second but not the first.

92. Mr Yagomba defended the awards, arguing that the matter was very much one for the Tribunal; since there is no sure measure for assessing the injury to feelings, choosing the right figure within the range set by each band cannot be a nicely calibrated exercise. He submitted that the Tribunal's reasoning was sound, the high threshold of perversity was not made out and it was not for the Appeal Tribunal to interfere.

93. I have considered the ET's reasoning at paragraphs 50-54 of its decision. The ET was aware that the Claimant was seeking £30,000 for injury to feelings for each of the acts of discrimination, near the top of the range for the highest band, i.e., a total of £60,000; while the Respondent was arguing for no more than £8,000 as a combined total for both awards, representing an award for each wrong within the bottom band.

94. In my judgment, the ET's reasons are cogent and justify the level of the awards. I am not prepared to say they are perverse; though they appear quite high as a matter of impression, the extent of the Claimant's suffering, particularly from the first act of discrimination, should not be

belittled. As Dr Hashmi pointed out, her hopes were raised by the prospect of CBT and then dashed. The ET was best placed to assess the evidence and select the figure; as Mr Yagomba says, it is not a nicely calibrated exercise.

95. I am not prepared to infer that the ET overlooked non-tortious elements in the injury to her feelings which the Claimant suffered; nor that they overlooked the principle of totality. The Tribunal was not obliged expressly to mention that principle. At paragraph 20, they stated that in considering the Claimant's evidence:

> **"20. …in assessing injury to feelings we took into account that the Claimant related in her up-to-date witness statement incidents which were not related to the successful allegations… [w]e were careful to separate those matters from the successful heads of claim in assessing injury to feelings. We have focused on the impact of the successful allegations."**

96. I therefore do not find these grounds of appeal well founded and I uphold the awards for injury to feelings.

Ground 9: double counting

97. The final ground of appeal is that "awarding cumulative damages for non-financial loss (i.e. general damages for pain, suffering and loss of amenity and damages for injury to feelings) of £50,600… involved impermissible double recovery for the same damage; further or alternatively was perversely high…".

98. I do not think I can say that the combined figure of £50,600 is "perversely high", having already rejected the contention that its two component parts are perversely high. There would have to be double counting to sustain this ground of appeal, i.e. it would have to be shown that the ET awarded some element of the total of £50,600 twice over, once as part of the general damages award and again as part of the injury to feelings award.

A

99. Mr Brown's written submissions treat this as effectively an onus on the Tribunal to show that they have not double counted. He points out in his skeleton argument, correctly, that the two heads of damage are distinct in principle; but, he argues, they may be "not easily separable in practice because it is not always possible to identify whether the distress and humiliation suffered as a result of unlawful discrimination becomes a recognised psychiatric illness".

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C

100. That point is supported by the observation to the same effect of Mr Recorder Nicholas Underhill QC, as he then was, in **HM Prison Service v Salmon** [2001] IRLR 425, EAT. But it does not follow that awards that do not expressly exclude double counting are necessarily afflicted by that vice. I repeat that we should not encourage defensive drafting by tribunals or assume they have necessarily failed in their duty if they do not include every possible point in their decisions. Tribunals should be thorough but not prolix. They should not need checklists of possible appeal issues, to be mentioned on pain of reversal.

D

E

101. This ET had particular familiarity with the detailed issues before it, having considered the history of the matter, spanning a decade or so, at length across two hearings. Both decisions are careful and well reasoned. I am not prepared to decide that there must have been double counting here, merely because the ET has not referred to the need to exclude it. I also regard the argument that there has been double counting as little different in practice from the argument that the principle of totality has been breached; an argument I have already rejected.

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102. For all those reasons, I dismiss the ninth and last ground of appeal. The appeal therefore fails and the ET's award stands, subject to the cross-appeal to which I now turn.

H

The cross appeal

103. The cross-appeal is brought on two grounds, but they are closely linked because both depend on the proposition that the ET erred in law by not considering properly whether there were aggravating features to the First Respondent's conduct, or whether the ET was bound to find that there were.

104. The first ground is that the ET should have imposed a financial penalty, payable to the Secretary of State, on the First Respondent pursuant to section 12A(1) of the **Employment Tribunals Act 1996**. It empowers a Tribunal to order payment of a financial penalty from £100 to £5,000:

> **"(1) Where an employment tribunal determining a claim involving an employer and a worker-**
>
> **(a) concludes that the employer has breached any of the worker's rights to which the claim relates, and**
>
> **b) is of the opinion that the breach has one or more aggravating features,**
>
> **…".**

105. Section 12A appears to have been a little used and, as far as I am aware, has not generated any appellate jurisprudence. It was added by section 16(1) of the **Enterprise and Regulatory Reform Act 2013**, with effect from 6 April 2013. The explanatory notes accompanying section 16 stated that its purpose is "to encourage employers to take appropriate steps to ensure that they meet their obligations in respect of their employees, and to reduce deliberate and repeated breaches of employment law".

106. Mr Yagomba complains that the ET made findings that clearly amounted to aggravating features and that accordingly it should have accepted the Claimant's invitation to exercise the power to impose a financial penalty on the First Respondent. This is to turn the power into a duty, which is not what it is. Moreover, at paragraphs 58-60 of the decision, the ET weighed the

parties' submissions and concluded that there was "no deliberate, malicious or negligent behaviour on the part of the Respondents".

107. That was a rejection of Mr Yagomba's submission below that there had been such behaviour. He had argued that there were "repeated breaches" of employment rights, but the Tribunal found only two and fairly considered that this did not amount to a case with any aggravating features. The Tribunal was undoubtedly right not to award a financial penalty.

108. For similar reasons, the other ground of the cross-appeal faces an uphill struggle. Mr Yagomba argued below for an award of aggravated damages. The Tribunal considered the criteria for such an award derived from the judgment of the EAT (Underhill P, as he then was, presiding) in **Commissioner of Police for the Metropolis v Shaw** [2012] ICR 464. The EAT in **Shaw** was unenthusiastic about such awards: see Underhill P's judgment at [25]-[28]. So am I, for the same reasons as there given.

109. Here, the Tribunal set out (at paragraphs 55 and 56) the three criteria for an award of aggravated damages: where the manner in which the wrong committed was particularly upsetting; where there was a discriminatory motive; and where subsequent conduct adds to the injury; for example, conduct in the course of conducting the Tribunal proceedings, thus rubbing salt in the wound.

110. The ET concluded that the case was not one meriting of an award of aggravated damages; the Respondents had not behaved in a high-handed, malicious, insulting or oppressive manner. The Tribunal referred back to its findings earlier in the decision (at paragraphs 50-54) dealing with injury to feelings.

111. Mr Yagomba submitted that the ET had failed to address the issue of subsequent conduct on the part of the Respondents. He pointed to a passage in the Claimant's witness statement saying that the Second Respondent's conduct since the liability hearing and judgment "has not improved." He asserted that the First Respondent had delayed the Claimant's return to work, which only took place in November 2016, about five months after the liability judgment was given. He also relied on submissions made below in closing to the effect that the First Respondent had behaved badly as an organisation.

112. I do not think there is anything in these points. The ET carefully considered the conduct of the Respondents when setting the awards for injury to feelings. It gave sound reasons for doing so. I recoil from the proposition that, having made awards for injury to feelings that are not ungenerous to the Claimant on the facts, the Tribunal was then wrong not to award her even more to compensate her further for the Respondent's conduct. Indeed, had it done so, it might have thereby lent force to Mr Brown's arguments that the awards were too high, which I have rejected.

113. I therefore decide that the cross-appeal enjoys no more success than the appeal. Both are dismissed. The ET's decision is upheld in its entirety.