THE EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms M Lazarevic	**v**	**(1) Cloudhouse** **(2) Cloudhouse Technologies Limited** **(3) Data Accelerator Limited**

Heard at: London Central **On**: 13-14 December 2016

Before: Employment Judge Glennie

Members: Mrs J Cameron
Mr G Ellis

Representation:

Claimant: Mr N Pourghazi, Counsel
Respondent: Mr J England, Counsel

JUDGMENT ON REMEDY

The unanimous Judgment of the Tribunal is as follows:

1. **The Third Respondent shall pay to the Claimant compensation assessed at £7,000.**

2. **The Third Respondent shall pay to the Claimant interest on compensation assessed at £1,308.71.**

3. **The total payable by the Third Respondent to the Claimant is £8,308.71.**

REASONS

1. By its judgment on liability sent to the parties on 2 March 2016 the Tribunal found that the complaint of direct discrimination because of sex was well founded against the Third Respondent, Data Accelerator Limited, in respect of the Claimant's dismissal. The other complaints in issue were dismissed.

2. The Tribunal deliberated on the afternoon of the second day of the Remedies Hearing. With the parties agreement at the conclusion of the second day, the Tribunal informed the parties of its judgment and reserved the reasons to be delivered later in writing. These are the reserved reasons, in respect of which the Tribunal was unanimous.

3. The Tribunal reminded itself of its findings as set out in its reasons for the Judgment on liability. The Claimant gave further evidence on her own behalf as did Mr Corbett on behalf of the Third Respondent (which will be referred to as the Respondent in the remainder of these reasons).

4. The Claimant's evidence mainly concerned her efforts to find alternative employment since the termination of her position with the Respondent. She also relied on a report from an employment consultant. A preliminary issue that arose was the Respondent's application to rely on their own report from an employment consultant in answer to that relied on by the Claimant. This was opposed by Mr Pourghazi. The Respondent also sought to rely on an email from a Mr Carratt, reporting to set out the reasons why he had resigned from his position.

5. The Tribunal decided that it would permit the Respondent to rely on these documents for the following reasons:-

   5.1 The Respondent's report seemed on its face to add little to what was said in the Claimant's report. Therefore the Tribunal concluded that there would be no prejudice to the Claimant involved in allowing it to be read. Neither author was to be present to be cross examined and in the circumstances the Tribunal would give the reports such weight as it considered appropriate.

   5.2 A similar observation was applicable in respect of the email from Mr Carratt. It was not intended that he would be present to give evidence and, as submitted by Mr Pourghazi, his email was an after the event explanation rather than something contemporaneous. The Tribunal considered that it could take those matters into account when deciding what weight to give to that email and that, subject to that observation, the Respondent should be permitted to put it before the Tribunal as it addressed a matter raised in the claimant's witness statement.

6. The Tribunal also commented, once it had read the witness statements and documents, that paragraphs 39-54 of its reasons relating to the liability judgment made findings about what occurred in relation to the dismissal, what was decided by whom and for what reasons. The Tribunal was not going to go behind those findings and there was no need therefore for any cross examination on those matters.

7. Mr Corbett's evidence, nonetheless on occasions touched on the liability issues and where it did the Tribunal reminded itself that it had already reached decisions about those matters.

8. The issues on remedies were potentially extensive. One of these, however, was fundamental to the heads of and extent of the loss that the Claimant could recover. This was the Respondent's contention that there was a 100% chance that the Claimant would have been dismissed at the same time irrespective of any discrimination. Given its fundamental nature this is the issue that the Tribunal addressed first.

9. The Tribunal found that this question could be approached on a "date" basis or a "percentage" basis. The former approach was approved by the Court of Appeal in **O'Donoghue v Redcar and Cleveland Borough Council [2001] EWCA Civ 701** in the following terms:-

> "Where the appellant was in the estimation of the industrial Tribunal on an inevitable course towards dismissal, it was legitimate to avoid the complicated problem of some sliding scale percentage estimate of her chances of dismissal as time progressed by assessing a safe date by which the Tribunal was certain (if it felt able to be certain) that dismissal would have taken place and making an award of full compensation in respect of the period prior thereto (ignoring any question of interim percentages)."

10. An example of the latter approach is found in **Ministry of Justice v Parry [2013] ICR 311** where Langstaff P giving the judgment of the Employment Appeal Tribunal referred to reductions based on a scale that "runs across the whole spectrum from zero to 100%".

11. These alternative approaches mean that, if satisfied that there was a real chance that the Claimant would have been dismissed in any event in the absence of any discrimination, the Tribunal might express its findings as to that prospect either by reference to a date by which the Claimant would have been dismissed, which date would operate as a cut off point for the losses flowing from the dismissal; or by assessing the losses otherwise flowing from the dismissal and then applying a percentage reduction to reflect the possibility that there would have been a non discriminatory dismissal in any event.

12. Mr Pourghazi argued for a three stage test as follows:-

12.1 Stage one, assess the percentage chance that any decision on the Claimant's continued employment with the Respondent could ever have been taken without any taint of discrimination.

12.2 Stage two, what is the percentage chance that this non discriminatory decision would have been dismissal

12.3 Stage three, multiply the two percentage chances at stage one and stage two together.

13. Mr Pourghazi accepted that this approach was not reflected in any of the authorities and was something that he had himself developed. The Tribunal did not, in the event, consider that it was an appropriate way of assessing the percentage chance. The main difficulty about it, in the Tribunal's judgment, lay at the proposed stage one. Mr Pourghazi explained in his written submissions that this meant assessing the percentage chance that Mr Harmer would not have participated in the decision to dismiss the Claimant and that his personal and discriminatory dislike of the Claimant would not be a factor in the decision.

14. This seemed to the Tribunal to be introducing an unnecessary and complicating element into what had to be assessed. The Tribunal's decision on liability was that Mr Harmer took part in the decision to dismiss the Claimant and was in part motivated by discrimination against her. The Tribunal also found that Mr Corbett and Mr Clothier, the other participants in the decision, were not so motivated. The issue for the Tribunal therefore is what the outcome would have been if Mr Harmer's discriminatory dislike of the Claimant was removed from the picture. Asking what chance there was that it could have been removed from the picture seemed to the Tribunal to be addressing the wrong point. The correct question, in the Tribunal's judgment, was to the effect of what would have happened if Mr Harmer had not participated in the decision and/or had not held a discriminatory dislike of the Claimant. It was unnecessary and would be difficult to assess what chance there was that he might not have taken part in the decision since the fact is that he did. The same was true of assessing what chance there was that he would not have been motivated by his discriminatory dislike of the Claimant, since the fact is, as the Tribunal has found, that he was.

15. The Tribunal accepted Mr England's submission that it had to construct a hypothetical situation in which Mr Harmer's discriminatory dislike of the Claimant was excluded. The question to be answered, therefore, was what assessment the Tribunal made of the chance that the Claimant would still have been dismissed if the discriminatory element were removed from the decision.

16. The Tribunal there asked itself what the position would have been if Mr Harmer had played no part in the discussions that took place in the United States in August 2014. In this connection the Tribunal referred to its findings

in paragraph 53 of its reasons relating to liability. These findings are at the heart of the Tribunal's decision on remedy and therefore will be quoted in full.

17. In paragraph 53, the Tribunal found that the following were the components of the reason for the Claimant's dismissal:

> "53.1 *In the course of the dinner on 17 July, Mr Corbett and Mr Clothier had warned the Claimant about her approach to her work and had advised her to put the company first in her dealings with colleagues, including in particular Mr Harmer. When she and Ms Fuller were left in charge of the organisation the claimant had fallen out with Mr Kirkby and was said to be treating Mr Brown unfairly. It was reported that all the developers were unhappy when the Claimant's job was to encourage them in their work.*
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> *53.2 The respondents in the persons of Mr Corbett, Mr Clothier and Mr Harmer therefore believed that the Claimant had to be removed from her employment because she was jeopardising the company's business. Not only did they believe that she had failed to maintain the "happy ship" that Mr Corbett had requested: they believed that she had failed to maintain good working relationships with Mr Harmer, Mr Kirkby, Mr Brown and the developers.*
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> *53.3 Mr Harmer was additionally motivated by his personal dislike of the Claimant. In the course of his evidence to the Tribunal he freely admitted he disliked the Claimant and it was clear that there had been serious clashes between them.*

18. The Tribunal concluded that if Mr Corbett and Mr Clothier had been acting alone they would inevitably have reached the same decision at the same time for the reasons given predominately in paragraph 53.2 of the reasons on liability. In short, they believed that the Claimant had to be removed from her employment because she was jeopardising the company's business.

19. The Tribunal then asked itself whether it would be right to say that that decision, if made by Mr Corbett and Mr Clothier, would have been a non discriminatory decision, it being the case that the problems between the Claimant and Mr Harmer would still have been a relevant factor. There was some discussion of **CLFIS (UK) Limited v Reynolds [2015] EWCA Civ 439**, where, in relation to a complaint of discriminatory dismissal, the Court of Appeal held that the correct approach in a "tainted information" case was to treat the conduct of the person supplying the information as a separate act from that of the person who acts on it. Mr Pourghazi submitted that the decision would be tainted with discrimination if Mr Corbett and Mr Clothier were influenced by Mr Harner's dislike of the Claimant. That, however, seemed to involve avoiding the distinction drawn in **Reynolds**. The Tribunal preferred Mr England's submission that it was necessary to construct a

hypothetical situation in which the discriminatory dislike on Mr Harmer's part was excluded.

20. The Tribunal concluded that, if made by Mr Corbett and Mr Clothier for the reasons outlined above (including the fact that the Claimant and Mr Harmer did not get on), the decision would have been non discriminatory. First, there is no evidence that Mr Harmer revealed his discriminatory motivation before the decision was made. He may not have been consciously aware of it. Furthermore, the Tribunal's reasons expressed at paragraph 81 of its reasons on liability for finding that there was material on which it could properly find that Mr Harmer was influenced by the Claimant's sex were matters that arose after the Claimant's dismissal and mostly in the course of the Tribunal hearing. Although it was clear to Mr Corbett and Mr Clothier that the Claimant and Mr Harmer did not get on, there was nothing in what the evidence recorded him as saying before the dismissal that might have caused Mr Corbett and Mr Clothier to suspect an element of discrimination in his thinking. The comments that led the Tribunal to find that there was a prima facie case of discrimination all post-dated the decision to dismiss the Claimant.

21. Ultimately, the Tribunal concluded that even if Mr Harmer were removed from the picture altogether, the decision would still have been to dismiss the Claimant because of her failure to maintain a "happy ship" and her failure to maintain good working relationships with the developers, Mr Kirkby and Mr Brown. Furthermore, in the absence of any reason for Mr Corbett and Mr Clothier to have realised that Mr Harmer's dislike of the Claimant was discriminatory, their (hypothetical) decision to dismiss would have been non discriminatory even when partly based on the difficulties between the Claimant and Mr Harmer.

22. The Tribunal therefore concluded that if the element of discrimination were to be removed, it was inescapable that the Claimant would still have been dismissed on the same date and that the chance of this occurring should be assessed at 100%.

23. This finding meant that it was not necessary for the Tribunal to determine the issues about failure to mitigate since no loss of earnings would be recoverable.

24. Equally, the claim in respect of the Claimant being deprived of the use of the company computer and mobile phone would also fail. These were the respondent's property and the respondent was entitled to retain them on dismissing the claimant.

25. An award for injury to feelings was however appropriate. The Tribunal reminded itself that this award had to reflect the part of the claim that had been successful and that it should not award such compensation in respect

of the complaints that had not been made out factually or in respect of which the Tribunal had found the events to be non discriminatory.

26. The Tribunal accepted that, as stated by the Employment Appeal Tribunal in **Voith Turbo Limited v Stowe [2205] ICR 543**, a discriminatory dismissal should not be regarded as a one off event in such a way as to cause it to be placed in the lower bracket as explained in the well-known authorities of **Vento** and **D'Abell**.

27. Mr Pourghazi submitted that an appropriate award would be £10,000; Mr England suggested £5,000 but also contended that in any event an appropriate award would not exceed £8,000. The Tribunal considered that an award of £7,000, being at the lower end of the middle band, was appropriate.

28. The Tribunal did not consider that an award of aggravated damages was merited. On the findings we have made on liability, there was not high-handed or outrageous treatment of the Claimant such as to attract such an award.

29. Finally, the Tribunal considered the question of interest. Regulation 6(1)(a) of the 1996 Regulations provides for the calculation of interest on an award fro injury to feelings to be made for the period beginning on the date of the act of discrimination and ending on the day of calculation. Under regulation (3) a different period may be applied if serious injustice would be caused if interest were to be awarded in respect of the primary period. The Tribunal considered no such injustice would arise, and that interest should run at the rate of 8% from 15 August 2014, the date of the dismissal, to the calculation date, 14 December 2016, on £7,000, giving a figure of £1,308.71.

Employment Judge Glennie
2 May 2017