Case Number: 3400435/2014
3400049/2015
3400907/2015

EMPLOYMENT TRIBUNALS

Claimant: Dr J Hubbard

Respondent: GlaxoSmithKline Services Unlimited

HEARD AT: Cambridge ET **ON**: 28th, 29th 30th November 2016
23rd December 2016
(Discussion Day)

BEFORE: **Employment Judge G P Sigsworth**

MEMBERS: **Mr D Sutton**
Mr T Chinnery

REPRESENTATION

For the Claimant: Mr A Alan (Counsel)

For the Respondents: Mr T Kibling (Counsel)

RESERVED JUDGMENT

1. Our unanimous conclusions on the remedy issues that we have been asked to determine are set out in the Reserved Reasons below.

RESERVED REASONS

1. Following our decision on liability, sent to the parties on 20 April 2016, we have now had a remedy hearing in this complex case. By reference to our liability decision, some acts of discrimination were

made out and others were not. As we concluded, essentially the Claimant's successful claims boil down to two discriminatory acts. First, problems caused by the Claimant not having a proper line manager outside PTS; and second, the unfair and discriminatory nature of her dismissal. The Tribunal heard oral evidence from the Claimant, based on her extremely lengthy witness statement, much of which was not particularly helpful to the Tribunal. The Tribunal also heard evidence on her behalf from her husband, Mr Hugh Williams. There were two live witnesses called for the Respondent. They were Ms Laura Hague, employee relations centre lead; and Ms Nicole Mulloch, director of UK benefits. The Tribunal also read and took into account as was appropriate the witness statement of Mr Steve Mac'Krell, UK pensions director. There was a voluminous bundle of documents, but the Tribunal were not referred to many documents in that bundle. There were four medical reports from joint expert witnesses, which the Tribunal has read and taken into account. The parties' representatives have provided us with a schedule of loss and a counter-schedule, and with skeleton arguments/submissions.

2. The Claimant's primary claim is for re-engagement to a scientific role within GSK. Thus, our first decision must be to decide whether such an order should be made. If we decide not to make a re-engagement order, then we must determine the appropriate compensation due to the Claimant, recognising that this is a discriminatory as well as an unfair dismissal. The Claimant is claiming a career loss - past loss of earnings, bonus and benefits (including pension, CIGNA healthcare and life insurance), and future financial loss. The question for us here is what is the base figure that we work from, whether based on full or part time working and whether the Claimant would have been promoted. The Respondent disputes that the Claimant is entitled to a career loss, saying that she would have left the organisation in any event. The Claimant also makes a claim for injury to health, based on aggravation of her pre-existing conditions by reason of the discrimination found. She also claims a *Vento* award for injury to feelings. Finally, the Claimant asks us to make recommendations for the Respondent's workforce as her claims pre-date the change of the law on this.

3. The parties ask us to make decisions in principal rather than provide detailed calculations. For example, as appropriate they will work out the pension loss after we decide (if we do not order re-engagement) the appropriate period of future loss. Further, the parties have agreed a number of matters. They are as follows:

    1) Basic award is agreed at £12,528.00.
    2) The figure for loss of statutory rights is agreed at £500.00.
    3) It is agreed that the Claimant would have received a 2% pay increase on 1st April 2015 and on 1st April each year thereafter.

4) It is agreed that, for the year to 31st March 2015 and each year thereafter, the Claimant would have received a bonus of 12% per annum if she had remained a grade 7 employee or 18% if she had been a grade 6 employee.
5) The method of calculating the value of loss of ShareReward is agreed.
6) It is agreed that the ShareValue plan and the car allowance should be part of the Claimant's financial compensation only for any period that the Tribunal determines she should be paid at grade 6.
7) It is agreed that on termination the Claimant received payments for pay in lieu of notice of £8,753.00 gross and bonus of £4,150.33 gross.
8) The net weekly pay figure is agreed.
9) The Respondent agrees that they should pay the Claimant's Tribunal fees of £1,700.00, for three issue fees and one hearing fee.

The Evidence

4. Much of the Claimant's witness statement is concerned with the impact of the discrimination on her health and on her feelings. In respect of each of the nine acts of discrimination on the Scott Schedule found to have been made out, she goes into some detail as to the impact of that discrimination on her. We entirely accept that the Claimant has suffered stress and distress as a result of the discrimination made out and also an aggravation to her health conditions (see medical evidence below). We do not feel that we need to go into any detail on the evidential basis for the *Vento* award. Suffice it to say that we will conclude that this award is appropriately mid middle band. We have to bear in mind that it is very difficult for us or for anybody to disentangle the stress and distress and the injury to feelings caused to the Claimant by the acts of discrimination made out, from all the other acts alleged to be discrimination but found by the Tribunal not to be discrimination and their impact on the Claimant. Of necessity, we have to take a broad brush view of this.

5. The Claimant was employed by the Respondent for 23 years, but she was never promoted beyond grade 7 and has not been promoted since 2001. However, she was well regarded as a research scientist. From November 2010 to April 2013, the Claimant was absent from work most of the time because of ill health. When she returned to work in April 2013, she returned on a part time basis only with a new part time contract, working 22½ hours per week. It may be that she went part time at that time because of her health or because of family commitments, or for other reasons or for a combination of factors. She continued with her part time hours into her period in Global Patents and beyond. In September 2015, the Claimant applied for a Fellowship to work at the Crick Institute in London (now in St Pancras) and in

February 2016 was awarded a Fellowship. She has been working there on a part time basis from 4th April 2016, and her length of employment there will be between two and four years. The collaboration between GSK and the Institute was launched in July 2015 in order to advance basic disease biology. There are currently seven GSK employees who have joined the project team at the Institute for between 6 and 18 months at a time, although that period can be extended. There are four employees working at GSK in Stevenage. During the period of secondment, the secondees to the Institute are managed by GSK management and participate in the standard GSK performance review process. Any health or HR issues will be subject to management by the Respondent's HR function and the Respondent's occupational health as per the normal process. Once their secondment is completed, the secondees move back to their GSK home business units. The Claimant's current contract with Francis Crick expires on 3rd April 2018. She may continue with the Institute in the same or another role, or alternatively use it as a springboard to find alternative employment elsewhere, possibly at an increased salary level with the additional expertise and experience she will have gained.

6. Since the Tribunal liability hearing in November and December 2015, the Claimant has applied for a number of roles as a scientist in her specialist area with commercial organisations. In February 2016, she applied for the role of senior principal scientist in structural biology with UCB in Slough. Although she was interviewed twice, she did not get the job. In June 2016, she made an informal approach to Artex Pharmaceuticals, and had a discussion there with a contact. In July 2016 she applied for a senior scientist role in crystallography at AstraZeneka, and seemingly was not successful because she was regarded as being too senior for the role. The Claimant has applied for other roles which she believed she could be suitable for on the basis of transferable skills that she had developed at GSK. These included contracts manager at Cambridge University in February 2016, scientific research manager at Cambridge University, also in February 2016, and senior contracts manager in business development at Cambridge University on 2nd March 2016. She was rejected at the first stage of the application process for each of these roles. She therefore decided to get more experience in scientific research so that she could be eligible for other roles, as there were large numbers of people with more relevant qualifications applying for vacancies. She was using her Fellowship to make an effort to re-enter academic or industrial research. However, her specialist and particular skills in structural biology and x-ray crystallography proteins means that there is a limited job market for her in the relatively small number of pharmaceutical companies who employ people with her skills. There are possibly 20 companies in the UK but fewer than 10 around the London area, where she is able to look. It is a small community and the nature of her leaving GSK would quickly become known if she applied for another job in another company. This has happened already and she feels her

history has blocked her opportunities. She believes that she has only a remote chance of being employed at the same level of responsibility, salary and benefits she received at GSK.

7. The alternative to employment in the pharmaceutical industry is in a University or an Institute laboratory. However, such careers are built over a long term period, and the Claimant can only offer a maximum of 10 years before she retires. She is therefore unlikely, she believes, to obtain a permanent academic role in a University. She believes that being realistic about her prospects the best she can hope for after the Fellowship is complete is short term contract work paid at post-doctorate salary levels (say, £34,000 per annum full time) without the benefits that the Respondent provided, and possibly with additional travel costs etc. Again, as with Crick these jobs are often short term and although she may obtain a post for two years or so, she may have periods of time when she is not working. She also recognises that she is an expensive employee compared with recent new PhD graduates. Her husband is employed in London and she needs to be close to specialist London hospitals who can support her type 1diabetes, and that is another restriction on her job search. GSK has provided 17 pages of job postings and roles, but the Claimant believes there is no rationale for why she would be suitable for them and little understanding of her skill set. Ms Hague was able to tell us that 29 roles ultimately progressed to appointment, 5 at grade 8, 23 at grade 7, and 1 at grade 6. On average, there were 31 applicants for each role. Several of the roles sat directly within the PTS function. All roles were advertised and ultimately appointed on a full time basis. Ms Hague was not able to say whether the roles would have been a good fit for the Claimant. If the Claimant had remained at GSK, she would have benefitted from their excellent track record on retaining and re-training scientists, something the Claimant had already benefitted from in her long employment with the Respondent.

8. We find that, had the Claimant remained with the Respondent, and with her continued health improvement and had reasonable adjustments been in place with proper line management support, there is no reason to think that she would not have had a good chance of successful reintegration and redeployment. We accept that her therapy from Dr Stubley has removed many of the previous limitations, although perhaps not all. However, outside the Respondent's workplace, she will have difficulties in getting an equivalent role, and there is a perception that she has been out of the workplace for too long and is rusty, and her age may be against her and also the reason for the termination of her employment with the Respondent, as well as the limited number of roles she could do without re-training. Although the Claimant pursues re-engagement, we note that her husband gave evidence that he personally does not think it is a good idea, although he respects and supports her wish.

9. Ms Hague told us that the transition from grade 7 to grade 6 was the biggest that existed in the organisation. In broad terms, grade 6 employees are viewed as "leaders" even if they do not have line management responsibility. The expectations of grade 6 and above reflect the additional responsibility leaders have in delivering the Respondent's strategy. Population distribution and promotion opportunities will be based on the business need for the work to be proposed at each level, as well as available budget. The head count for the PTS function in the UK is currently split between grade 7: 557 employees, grade 6: 266 employees and grade 5: 95 employees. Ms Hague was not aware of any instances where an employee has been redeployed to a new role at a higher grade than their contractual role. There have been examples where an employee has been placed into a lower graded role and the organisation has agreed to protect/ring fence salary and benefits for the primary period with a view to retaining the employment relationship. Under cross examination, Ms Hague said that a grade 7 employee has a fair chance of becoming a grade 6 employee in due course. However, she also said performance ratings do not necessarily equate to promotion – which can also depend on learning agility, leadership skills, etc.

10. Ms Mulloch gave evidence about the CIGNA health cover. This is offered to all employees at UK grades 1 to 10. Although the Respondent pays the costs of it for all employees, it is a benefit taxed at source which would have cost the Claimant £8.97 a month based on a lower rate tax. Employers can also pay for their family members to join the plan and the Claimant paid £67.25 per month to extend the cover to her husband and children. The healthcare plan is designed to give employees or a covered family member prompt access to private medical health treatment for acute conditions as required. Employees pay 15% of the cost of any treatment they or a covered family member receive up to a maximum cost to them of £500 per each plan per year. The plan will only cover the cost of pre-authorised treatment which has to be sought from the healthcare plan helpline. GSK pays the rest of the cost of any treatment they or a covered family member receives. The healthcare plan does not cover treatment to control long term or chronic illness, routine health checks such as eye tests and other matters. Ms Mulloch also told us that the Respondent has a number of corporate membership deals available to its UK employees at all grades, including a number of educational cultural venues such as the Royal Academy of Arts, the Natural History Museum and Kew Gardens. The Claimant said that she and her family would take advantage of these benefits.

Medical Evidence

11. Dr Charles Hindler, consultant psychiatrist, saw the Claimant for assessment on 14th and 28th October 2016 and his report is dated 10th November 2016. He concluded that the Claimant is suffering from

generalised anxiety disorder and that is her primary psychiatric condition. It has been of a mild to moderate nature since 2001 intermittently, but the relevant episode that we are concerned with is from October 2010 onwards. The Claimant does not meet the criteria for PTSD. She had severe GAD in the relevant period and in 2008/9. Dr Hindler concludes that the GAD was not caused by the disability discrimination but exacerbated and perpetuated by it. He found a link between the GAD and the Claimant's diabetic control due to a raised level of anxiety. It is feasible that the exacerbation of the GAD could manifest itself as an exacerbation of symptoms of fibromyalgia, and it has exacerbated the cardiac angina spasms. The Claimant is now sensitised and hyper-sensitive to similar type behaviours in the future, real or perceived. This leads to an increase in the risk of relapse of GAD. Dr Hindler's view is that it is not possible for the Claimant to be re-engaged by the Respondent, either now or in the future, because of the very high risk of a relapse of GAD due to contact with occupational health and human resources and other staff involved in her previous difficulties.

12. Dr Colin Johnston, consultant physician, with special interest in general medicine, diabetes and endocrinology, reported on 7th November 2016. He concluded that the disability discrimination did not significantly exacerbate the Claimant's diabetes. The diabetes does not significantly impact on her other medical conditions. The Claimant's life expectancy, says Dr Johnston, has been reduced by some 5 to 10 years. Diabetes alone is not a deterrent to obtaining future employment.

13. The third medical report is from Dr Benjamin Schreiber, consultant rheumatologist, dated 20th November 2016. Dr Schreiber concludes that stress has exacerbated the Claimant's lupus/fibromyalgia in its various forms from 2008 through to January 2015. Also, the driving incident where she broke her foot exacerbated her problems. The Claimant's rheumatological symptoms have not played a major part in her sickness absence or in her ability to look for alternative work. Dr Schreiber says that lupus and fibromyalgia are closely linked with stress, and the worsening of these conditions is related to the stress at work, and includes the symptoms of chest and facial pain. However, the Claimant's condition is well controlled by medication .

14. We note a fourth medical report from Mr Haydn Kelly, consultant orthopaedic surgeon, dated 24th November 2016. However, this report concerns the Claimant's broken foot and the potential costs of treating that and is not directly related to any discrimination that the Tribunal has found. It is relied upon by the Claimant in reference to her need for healthcare cover.

The Law

15. The re-engagement provisions appear in section 115 and section 116 of Employment Rights Act 1996.

16. Section 115 Order For Re-engagement

a. An order for re-engagement is an order, on such terms as the Tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment.
b. On making an order for re-engagement the Tribunal must specify the terms on which re-engagement is to take place, including –
    i. the identity of the employer,
    ii. the nature of the employment,
    iii. the remuneration for the employment,
    iv. any amount payable by the employer in respect of any benefit which the complainant might be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement,
    v. any rights and privileges (including seniority and pension rights) which must be restored to the employee, and
    vi. the date by which the order must be complied with.

Section 116 Choice of Order and Its Terms

(2) If the Tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.

c. In so doing, the Tribunal should take into account –
    i. any wish expressed by the complainant as to the nature of the order to be made,
    ii. whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and
    iii. where the complainant caused or contributed to some extent to the dismissal, whether it be just to order his re-engagement, and (if so) on what terms.

17. In *Coleman v Magnet Joinery Ltd* [1975] ICR 46, CA, it was held that the word “practicable” in section 116(3)(b) means not merely “possible” but also “capable of being carried into effect with success”.

In *Nothman v London Borough of Barnet* (Number 2) [1980] IRLR 65, CA, it was held that where the ex-employee believes him or herself to be a victim of a conspiracy by his or her employers, he or she is not

likely to be a satisfactory employee in any circumstances if re-instated or re-engaged.

In *Wood Group Heavy Industrial Turbines Ltd v Crossan* [1998] IRLR 680, EAT, it was held that where there is a breakdown of trust and confidence, the remedy of re-engagement has very limited scope and will only be practicable in the rarest of cases. Even if the way that the matter is handled results in a finding of unfair dismissal the remedy invariably will be compensation.

In *Scottish Police Services Authority v McBride* [2009] UK EATS/0020/09/BI, the claimant and the respondent parted company against a background of considerable conflict and with the claimant entertaining marked distrust of her employer. That conflict had not been resolved and there was nothing to suggest that the claimant's mistrust of her employer had lessened. Far from being practicable, the impression presented was one of the re-instatement envisaged by the Tribunal being liable to have disastrous consequences. In these circumstances, the EAT was satisfied that the high perversity test was passed in this case and the appeal was well founded. It is also noted in that case that only about 3% of successful unfair dismissal claims result in an order for re-employment or re-instatement.

18. The Claimant seeks her financial loss remedy under Equality Act 2010, rather than Employment Rights Act 1996, because of the more favourable regime in relation to discriminatory dismissal, as there is no cap on the losses that she can recover.

Section 124 Remedies: general

a. This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1) (the jurisdiction to determine a complaint relating to a contravention of Part 5-work).
b. The Tribunal may -
    i. make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
    ii. order the respondent to pay compensation to the complainant;
    iii. make an appropriate recommendation.

(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court under section 119.

Section 119(4) provides that an award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

In *Essa v Laing Ltd* [2004] IRLR 313, CA, a claimant who is the victim of direct discrimination is entitled to be compensated for the loss which arises naturally and directly from the wrong. It is not necessary for the claimant to show that the particular type of loss was reasonably foreseeable.

In *Dickins v O2 Plc* [2009] IRLR 58, CA (citing *Sutherland v Hatton* [2002] IRLR 263, CA), it was said that the test of causation is whether the breach has made a material contribution to the Claimant's ill health.

In *Chagger v Abbey National Plc* [2010] IRLR 47, CA, it was held that in assessing compensation for discriminatory dismissal, it is necessary to ask what would have occurred had there been no unlawful discrimination. If there were a chance dismissal would have occurred in any event, even if there had been no discrimination, then in the normal way that must be factored into the calculation of loss. The gravity of the alleged discrimination is irrelevant to the question of what would have happened had there been no discrimination. It was pointed out that the task of putting the employee in the position he would have been in had there been no discrimination is not necessarily the same as asking what would have happened to the particular employment relationship had there been no discrimination. The fact that there has been a discriminatory dismissal means that the employee is on the labour market at a time and in circumstances which are not of his own choosing. It does not flow, therefore, that his prospects of obtaining a new job are the same as there would have been had he stayed. For a start, it is generally easy to obtain employment from a current job than from the status of being unemployed. The employee may have been stigmatised by taking proceedings and that may have some effect on his chances of obtaining future employment. As a result of factors such as these the discriminatory dismissal does not only shorten what would have otherwise have been a period of employment, it also alters the subsequent career path that might otherwise have been taken.

In *Wardle v Credit Agricol Corporate & Investment Bank* [2011] IRLR 694, CA, it was held that it is generally only in rare cases that it is appropriate for a court to assess an individual's loss over a career lifetime, because in most cases assessing the loss up to the point where the employee would be likely to obtain an equivalent job fairly assesses the loss. In the normal case, if a Tribunal assesses that the employee is likely to get an equivalent job by a specific date, that will encompass the possibility that they might secure the job earlier or later than predicated. A Tribunal should only assess loss on the basis that it will continue for the course of the Claimant's working life where it is entitled to take the view on the evidence before it that there is no real prospect of the employee ever obtaining an equivalent job.

19. In *Thaine v London School of Economics* [2010] EqLR 268, EAT, it was held that where a Tribunal finds a loss has been sustained by the Claimant that has more than one concurrent cause, one or more of which amounted to unlawful discrimination for which the employer is liable, and others which were not the legal responsibility of the employer, it is legally open to it to discount an award of compensation by such percentage as would reflect this potion of that responsibility.

Similarly, in *Osei-Adjei v R M Education Ltd*, unreported EAT decision of 2012, it was held that where a Claimant suffered psychological or other injuries as a result partly of a wrongful act of his employer and partly for reasons that were not the fault of the employer, the compensation stood to be assessed by reference to the relative contribution of the employer's wrongful act for the injury in question and discounting from the award the effect of other contributing causes.

In *O'Donoghue v Redcar and Cleveland Borough Council* [2001] IRLR 615, CA, it was held that where it is appropriate to assess what would or might happen in the future, the correct approach is to assess the chance of the suggested event happening. However, chances cannot always be assessed in percentage terms and whether this is appropriate will depend on circumstances. Where it can be said that, but for some procedural discrimination, there was, say, a 20% chance of an employee being dismissed in any event at the same time, the percentage approach is appropriate. On the other hand, in a case like the present case, where the question is whether there was a chance of the employee being fairly dismissed in the future, the percentage chance is likely to vary according to the time scale under consideration. Thus, there may be a 20% chance of dismissal in six months but a 30% chance in a year. In such circumstances, it may not be possible to identify an overall percentage risk. In the present case, where the Tribunal was satisfied that the applicant was 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 is certain that the dismissal would have taken place and making an award of full compensation in respect of the period prior thereto.

In *Al Jumard v Clywd Leisure Ltd* [2008] IRLR 345, EAT, it was held that where more than one form of discrimination arises out of the same facts, it can be artificial and unreal to ask to what extent each discrete head of discrimination has contributed to the injured feelings and there will be no error of law where the Tribunal fails to do that. Where discriminatory heads overlap, it is not simply a case of treating both forms of discrimination wholly independently and then adding the sum for each. The degree of injury to feelings is not directly related to the number of grounds on which the discrimination has occurred. It may be, for example, that a Tribunal takes the view that injury to feelings in cases of race and disability discrimination is not materially different

form the injury that would have experienced had it been race alone. Similarly, there should not be some artificial attempt to assess loss by reference to each and every alleged incident of discrimination. That is wholly unreal and would be an impossible exercise. In many cases an act of discrimination, such as failing to give a proper hearing, could be divided up into various sub categories. The exercise would also give a wholly specious objectivity to what is inevitably a broad brush calculation.

20. The Claimant's case is that the proper approach to future loss is not a balance of probabilities approach but to assess the loss of a chance. We were referred to the judgment of Lord Reid in *Davies v Taylor* [1974] AC 207, HL, where he said this:

> "When a question is whether a certain thing is or is not true – whether a certain event did or did not happen – then a court must decide one way or the other. There is no question of chance or probability. Either it did or it did not happen. The standard of civil proof is a balance of probability. If the evidence shows a balance in favour of it having happened, then it is proved that in fact it did happen."

He continued:

> "You can prove that a past event happened but you cannot prove that future event will happen. I do not think the law is so foolish as to suppose that you can. All you can to do is to evaluate the chance. Sometimes it is virtually 100%: sometimes it is virtually nil. But often it is somewhere in between."

We were also referred to the judgement of Lord Diplock in *Mallett v McMonagle* [1970] AC 166, HL, where he said:

> "The role of the court in making an assessment of damages which depends on its view as to what would have been is to be contrasted with its ordinary function in civil actions which is determining what was. In determining what did happen in the past a court decides on balance of probabilities. Anything which is more probable than not it treats as certain. But in assessing damages which depend on its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages it awards."

This approach has been adopted in the context of discrimination claims in *MOD v Cannock* [1994] IRLR 509, EAT, and in *Vento v West Yorkshire Police* [2003] ICR 318, CA.

While recognising that it is sometimes possible to apply a percentage "loss of chance" analysis to the question of where the Claimant would have reached in terms of her career but for the discrimination, the Claimant contends that the general position remains that the Tribunal should continue to adopt the multiplier/multiplicand approach, with such discounting as is appropriate on the evidence.

In *Ministry of Justice v Parry*, unreported EAT decision of October 2012, the President of the Employment Appeal Tribunal stressed the importance of applying the right legal test when approaching so-called *Polkey* issues, namely a sliding scale of chance, and not the balance of probability.

21. In *HM Prison Service v Salmon* [2001] IRLR 425, EAT, it was held that, in principle, injury to feelings and psychiatric injury are distinct. In practice, however, the two types of injury are not always easily separable, giving rise to a risk of double recovery. In a given case, it may be impossible to say with any certainty or precision when the distress and humiliation that may be inflicted on the victim of discrimination becomes a recognised psychiatric illness such as depression. Injury to feelings can cover a very wide range. At the lower end are comparatively minor instances of upset or distress, typically caused by one off acts or episodes of discrimination. At the other end, the victim is likely to be suffering from serious prolonged feelings of humiliation, low self-esteem and depression; and in these cases it may be fairly arbitrary whether the symptoms are put before the Tribunal as a psychiatric illness, supported by a formal diagnosis and/or expert evidence.

The well-known *Vento* bands of compensation for injury to feelings were up-dated in *Da'bell v NSPCC* [2010] IRLR 19, EAT, and further up-dated in *Simmons v Castle* [2012] EWCA Civ 1039. The middle band is now between £6,600 and £19,800.

Conclusions

22. We accept the evidence that we have set out above, and we base our conclusions on it, applying the law as appropriate.

We have found it convenient to set out our conclusions by reference to the party's list of 26 questions that we are asked to consider. We deal first with re-engagement and questions 1, 2 and 3. We conclude that it is not practicable to order a re-engagement of the Claimant. There are two key reasons for this. First, the breakdown of the relationship between the Claimant and the Respondent. Second, the medical opinion of Dr Hindler.

First, the history of the Claimant's redeployment from the time at Global Patents onwards led to a breakdown of the relationship between her and occupational health and human resources and also others such as Dr Baddeley. The Claimant made serious allegations against employees of the Respondent, including Dr Ryan and Dr Jiwany, Dr Baddeley and members of HR. Nothing has been done by the parties in the meantime to mend those relationships, by way of concessions about conduct, apologies and so on. We think that in the context of the case law that we have referred to, it is not practicable to order re-engagement in those circumstances. There is a second key reason as to why re-engagement would not work, and that is the opinion of Dr Hindler that there would be a very high risk of relapse of the general anxiety disorder if the Claimant came into contact with those who caused or allegedly caused her difficulties at the Respondent and who were the instruments of the discrimination found. There is, therefore, a high risk of the Respondent being in breach of its health and safety obligations to provide a safe working environment if the Claimant was allowed back. Therefore, having due regard to these two matters, we conclude that re-engagement is not practicable as it is not capable of being carried into effect with success. As the Claimant's husband recognises, although not the Claimant herself, she is doing well away from the Respondent and will make more progress once this litigation has been concluded. Closure is now required, not a continuing relationship with the Respondent.

Question 4.
If the Claimant had had the benefit of a proper line manager, and better efforts had been made to reintegrate her into the workforce, we conclude that she would have engaged with the redeployment process at the latest from December 2014. She was having treatment from her therapist, Dr Stubley, and Mr Thomas was positively involved, and even Dr Jiwany said that by February 2015 she was capable of going through the redeployment process, even though discrimination had by then occurred. We find that the Respondent is a good employer, in the sense that they strive to retrain and redeploy those employees they wish to retain. The Claimant was willing to be flexible as to the role that she might be redeployed to. If there had been no discrimination in 2014 and 2015, no grievance, and no chronic embitterment, we conclude that the Claimant would have been on the road to recovery, and the triggers for her PTSD were reducing.

Question 5.
The Respondent's case is that the Claimant's employment would not have continued beyond March 2018, at the latest. We disagree. But for the discrimination found, we conclude that the Claimant would most likely have remained in the Respondent's employment until the age of 65 or normal retirement age (in May 2024), although we apply a discount to the award to reflect a chance that she would not have done so (see below). We conclude that the multiplier/multiplicand approach,

with this appropriate discount, is the fairest way to go in the circumstances of this case. The discrimination suffered by the Claimant has had a serious impact on her career, and one that, given her age, disabilities and the circumstances of her dismissal, she will not be able to recover from. However, apart from her assertion that she wanted to continue to work to 67, we have no evidence before us that she would have done, and 65 is the age she would have received her occupational pension. Her health issues mean that, unfortunately, her life expectancy is below average, which is all the more reason that she would not wish to work longer than she had to.

Question 6.
But for the discrimination, we conclude that the Claimant would have been redeployed part time to begin with (say from February 2015), as she had been in Global Patents and as she now works at the Francis Crick Institute. However, given her improvement in health and now that her family have grown up, the likelihood is that she would have been ready for and able to do full time employment by, say, October 2016. We recognise that this is largely guess work, but it is educated.

Questions 7, 8 and 9.
We look at the history when considering the likelihood of promotion. The Claimant had not been promoted since 2001. There is little or no evidence before us to suggest that she would have been in the future, and we note that there are not many grade 6 posts in comparison with grade 7 jobs, and no doubt there is stiff competition for such posts. The Claimant's employment history with the Respondent works against her here as she had not worked for such a long period of time. We conclude that she would have remained at grade 7 until her retirement at age 65. The Claimant must give credit for notional future earnings, and we base such earnings on her part-time salary with Francis Crick. We believe this provides the best way of calculating them. The Claimant may obtain full-time work for periods of time, but is also likely to have periods of unemployment. Assuming part-time employment throughout evens this out. Thus, if her net annual earnings with the Respondent would be £45,000, and her net annual earnings at the Institute are £14,000, then her annual loss is £31,000. The parties will have the correct figures. The parties will then apply the appropriate multiplier for future loss. This will be 6.5 – 7, on the basis of the 2.5% column of table 10 of the Ogden Tables.

Questions 10 and 11.
The pension loss calculation is to age 65, when we assume the Claimant will retire. It is up to the parties to determine the method of calculation.

Question 12.
The net weekly pay figure is now agreed.

Question 13.
The JSB guidelines suggest an award for moderate psychiatric damage should be between £5,000 and £16,000. Here there are two key facts. First, the discrimination did not cause the Claimant injury to health, it merely exacerbated it temporarily, on the medical evidence. Second, it is virtually impossible for us to disentangle the discriminatory and the non-discriminatory factors that caused that exacerbation. However, we conclude that the appropriate figure should be at the lower end of the scale and we award £6,000. We are also mindful of the double recovery point with the Vento award.

Question 14.
As we have already indicated, we believe that this is a mid middle band *Vento* case and we award £13,000. Again we have a virtually impossible exercise to conduct, for reasons we have set out in the paragraph above, and again we are mindful of the double recovery point when there is also a claim for psychiatric injury. See *HMP v Salmon*.

Question 15.
We prefer the Respondent's calculation relating to the cost of private healthcare, and we think that the reference period should be over 13 years, as it is more likely to give a fairer result the longer the reference period is. With the Claimant's improving health, the healthcare cost is likely to be less than it has been in the past in any event. The BUPA quote was £4,000 per annum and that covers some chronic conditions which the CIGNA policy does not. That is the appropriate multiplicand figure, to which should be applied the appropriate multiplier.

Question 16.
We conclude that the life insurance situation is best set out in the Respondent's counter schedule. The parties should calculate the figures based on quotes obtained and apply the appropriate multiplier.

Question 17.
We do not award any of the expenses sought. The university fees were incurred by the Claimant on her own initiative without the say so of the Respondent. Other losses do not obviously flow directly and naturally from the discrimination that we found.

Question 18.
We conclude that the earlier award was not relevant as far as we know, on the basis of the Claimant's evidence and submissions.

Question 19.
We leave this to the parties, as we have decided the full-time/part-time issue.

Question 20.
We believe that we have dealt with this. Although we note that, in the last 18 months, the cost of the Claimant's healthcare has been low compared to previous years, this may not always be the case with her increasing age. However, the £4,000pa BUPA equivalent healthcare cover is appropriate. The Claimant is entitled to any medical expenses that would have been paid but for the dismissal.

Question 21.
We have dealt with this above.

Question 22.
The Respondent has not produced evidence of jobs that they say the Claimant should have applied for in the last year or so. The burden is on the Respondent to show a failure to mitigate, and they have not shown such failure on the Claimant's part. We conclude, anyway, that she has done her best to mitigate her loss.

Question 23.
The parties should calculate the figures, as they have indicated that they will do so, on the basis of our conclusions above.

Question 24.
The Claimant is not entitled to recover travel costs. Although working in London at the moment, she may not remain there. It cannot be predicted where she will work in the future, or how her future travel costs will compare with the travel costs she would have incurred if she had remained employed by the Respondent.

Question 25.
We apply the statutory rates of interest, as appropriate.

Question 26.
We make no recommendations. The Respondent already has good policies in place and it is just a question of making sure they are enforced. Generally, we are confident that they do follow them. We recognise that the Claimant's case was unusual and complex and one where the Respondent "dropped the ball". However, it was a one off situation.

23. <u>Polkey (or the appropriate discount for chance)</u>
We are mindful that we are dealing with percentage chances here. What is the chance (expressed in percentage terms) that the Claimant would have left the Respondent's employment anyway and thus would not have earned the sums that we have concluded she would have earned? We conclude that, but for the discrimination by reference to having no line manager and the difficulties that created for the Claimant, and but for the discriminatory dismissal, there is an 80% chance that the Claimant would have successfully maintained her

employment with the Respondent until retirement age in the way that we have set out. Thus, there should be a 20% reduction on all financial loss, to date and in the future, to reflect the possibility that the Claimant would not have been successfully redeployed with the Respondent.

24. The parties should come back to the Tribunal with all the figures once they have been calculated and an appropriate order will be made. We trust that we have covered the ground that the parties wished us to cover, but they are at liberty to revert to us with any legitimate queries, which we will endeavour to resolve, either on paper or (if necessary) by holding a further short hearing.

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Employment Judge G P Sigsworth, Cambridge

JUDGMENT SENT TO THE PARTIES ON

23 February 2017.....

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FOR THE SECRETARY TO THE TRIBUNALS