Appeal No. UKEAT/0276/19/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 10 March 2020
Judgment handed down on 11 June 2020

Before

MATHEW GULLICK, DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

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(1) WILSON BARCA LLP
(2) RICHARD BARCA
(3) LALITA RAJANANTH (aka LILY RAJ) APPELLANTS

MAHBOOBA SHIRIN RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MS LUCY BONE (of Counsel) Instructed by: Wilson Barca LLP 18 Carlisle Street London W1D 3BX
For the Respondent	MS LESLIE MILLIN (of Counsel) Instructed via direct access

SUMMARY

JURISDICTIONAL AND TIME POINTS; HARASSMENT

In a reserved judgment on liability, the Employment Tribunal upheld four allegations of harassment on the ground of the Claimant's age, and two allegations of harassment on the ground of her sex. Ten months later, on the first day of the remedy hearing, the Respondents contended for the first time that all six of the upheld allegations had been brought outside the statutory time limit. Although the Claimant did not respond to this point by making an application to extend time, in its reserved judgment on remedy the Employment Tribunal decided that it was just and equitable to extend time. It awarded the Claimant £20,000 for injury to her feelings under the **Vento** guidelines before making adjustments for inflation, the **Simmons v Castle** uplift and interest. It also awarded £5,000 aggravated damages in respect of the harassment on the ground of sex.

On appeal, the Employment Appeal Tribunal rejected the Respondents' challenge to the remedy judgment on the time issue, holding that this was based on the erroneous premise that the Claimant ought to have made an application to extend time once the Respondents had raised the issue at the remedy hearing. The issues determined by the liability judgment were *res judicata*; the Respondents had never attempted to overturn the liability judgment. It was not, therefore, necessary for the Claimant to make an application for an extension of time as the Respondents contended. In any event, the Employment Appeal Tribunal would have upheld the Employment Tribunal's decision to extend time in these circumstances, had it been necessary to do so.

The Employment Appeal Tribunal also rejected the Respondents' arguments that the Employment Tribunal had been wrong in principle to make awards of compensation for injury to feelings and of aggravated damages. However, it upheld the appeal against the amount of

compensation awarded. The Employment Tribunal's reasoning was either internally inconsistent or was insufficient to explain the Tribunal's reasons for the amount of the award. The assessment of compensation was remitted to the same panel of the Employment Tribunal for redetermination.

MATHEW GULLICK, DEPUTY JUDGE OF THE HIGH COURT

Introduction

1. In this Judgment, I shall refer to the parties as they appeared before the Employment Tribunal, i.e. as "the Claimant" and "the Respondents".

2. This is an Appeal by the Respondents from the Reserved Judgment as to remedy of an Employment Tribunal sitting at London Central (Employment Judge Pearl, Mrs HJ Bond and Mr J Carroll) which was sent to the parties, with Reasons, on 6th March 2019 ("the Remedy Judgment"). The Remedy Judgment followed a four-day hearing on 18th, 19th and 20th December 2018 and 5th February 2019 and a further two days of deliberation by the panel in chambers on 1st and 4th March 2019.

3. By the Remedy Judgment, the Employment Tribunal awarded the Claimant the total sum of £46,908.38 for injury to feelings in respect of unlawful discrimination by way of harassment related to her age and her sex. That sum was inclusive of £5,000 aggravated damages and was also inclusive of accrued interest.

4. At the remedy hearing, the Claimant was represented by Ms Leslie Millin of Counsel and the Respondents by Ms Lucy Bone of Counsel. Both Counsel also appeared before me at the hearing of this Appeal. I am grateful to them both for their clear and concise arguments in writing and orally.

5. The Remedy Judgment was consequent upon an earlier reserved Judgment on liability of the same panel of the Employment Tribunal ("the Liability Judgment"). The Liability Judgment and Reasons were sent to the parties on 6th February 2018, following a three-day hearing on liability and two days of deliberation by the panel, in September and October 2017.

A

6. By the Liability Judgment, the Claimant's claim of unlawful harassment on the ground of age succeeded on a limited basis against the First and Third Respondents and her claim of unlawful harassment on the ground of sex succeeded on a limited basis against the First and Second Respondents. The Claimant's other claims of harassment and of direct discrimination were dismissed.

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7. At the Liability Hearing, Ms Millin had represented the Claimant and the Respondents were represented by Ms Hodgkin of Counsel. There was no appeal against the Liability Judgment and the matter proceeded to the remedy hearing before the same panel, resulting in the Remedy Judgment.

D

8. The Respondents now appeal against the Remedy Judgment. The Respondents' Appeal was rejected at the sift stage by Soole J but was permitted to proceed by His Honour Judge Auerbach at the hearing of the Respondents' application under Rule 3(10) of the Employment Appeal Tribunal Rules.

E

9. The Claimant also sought to appeal against the Remedy Judgment, but her appeal was rejected both at the sift stage and at a Rule 3(10) hearing as not disclosing any reasonable basis for appeal.

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10. Following a hearing on 22nd July 2019, Employment Judge Pearl stayed the Remedy Judgment, pursuant to Rule 66 of the Employment Tribunal Rules of Procedure, pending the outcome of this Appeal.

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Background

11. The Claimant was called to the Bar in July 2016, shortly after her 50th birthday. She had, however, already decided to seek employment within a Solicitors' practice. She was employed by the First Respondent as a Paralegal / Office Assistant from 2nd November 2015 until her resignation, with notice, on 1st June 2016. It was agreed before the Employment Tribunal that the effective date of the termination of the Claimant's employment was 30th June 2016. The Second Respondent is a Solicitor and is the Senior Partner of the First Respondent. The Third Respondent was the Second Respondent's secretary and an employee of the First Respondent. The First Respondent is liable for the acts of unlawful harassment committed by both the Second and the Third Respondents.

12. By her ET1 claim form, received by the Employment Tribunal on 10th October 2016 (after an unsuccessful ACAS conciliation period), the Claimant alleged that she had suffered a mental breakdown as a consequence of continuous bullying and harassment by the Second and Third Respondents. She contended that such actions were discriminatory, contrary to the provisions of the Equality Act 2010, on the grounds of age, race and sex. The Claimant contended that the Second Respondent had bullied her every day during the seven months of her employment, calling her names such as "fucking stupid", "fucking stupid cunt" and "fucking stupid cow" and that the Second Respondent would shout at her if she made even a small mistake or did not do things to his satisfaction. She contended that the Third Respondent had continuously called her "stupid" and that she had said that the Claimant was "too old for the job".

13. In their ET3 response forms, the Respondents denied the allegations made against them. The Second Respondent denied that he had bullied the Claimant although he did accept that he

had shouted at the Claimant when she had failed to achieve the standards that he expected from her. The Employment Tribunal recorded at paragraph 10 of the Liability Judgment that:

> **"… This case revolves around the question of Mr Barca's temper. It is not only agreed, but also an essential element in the defence, that he has a very short fuse, gets angry when he considers that things have not been done correctly and he shouts and swears…"**

14. The Second Respondent accepted that he had shouted and sworn at the Claimant, although he denied the number and frequency of incidents alleged by the Claimant. He explained his behaviour, in the context of the unlawful discrimination claims advanced by the Claimant, on the basis that he shouted and swore at all his staff and also at clients. The Employment Tribunal heard evidence from the Second and Third Respondents and from several other witnesses employed by the First Respondent regarding the Second Respondent's behaviour towards others, as well as evidence from the Claimant. At paragraph 22 of the Liability Judgment, the Employment Tribunal stated:

> **"22. From the body of evidence, and leaving aside all questions related to discrimination or harassment at this point, we find that Mr Barca is unusual in the shortness of his temper. He gets angry and he loses control when he suspects that his staff have been incompetent. His loss of control can sometimes be volcanic. He erupts into a torrent of abuse, liberally spiced with very bad language, as recorded above. He accepts that he was 'flawed' in this regard. He has other sides to his personality and witnesses have said that he can be kind and generous towards others. He will praise good work. However, the violence of his outbursts has been amply demonstrated in the evidence that we have received."**

15. In the Liability Judgment, the Employment Tribunal went on to set out the specific allegations made by the Claimant, and to consider the evidence on each allegation, in some detail. At paragraphs 61-71 of the Liability Judgment, the Employment Tribunal set out its conclusions on the Claimant's harassment claims. At paragraphs 63-64 of the Liability Judgment it stated:

> **"63. There is no question that the Second Respondent's behaviour was unconscionably boorish. It is, nevertheless, a fair assessment of the evidence that he 'treats everyone rudely if they make a mistake', as Ms Hodgkin submits, using a certain degree of understatement. It is the Claimant's misfortune that she found herself in such an offensive environment, but the essential question for all the harassment claims is whether the unwanted conduct related to a relevant protected characteristic. For the most part, it did not. To give an example, calling the Claimant 'fucking stupid' does not relate to her gender and the evidence is that anyone in the office whose conduct fell short of Mr Barca's standard received the same**

abusive description. It is indefensible, grossly offensive, relevant to a claim for constructive unfair dismissal, but it is not harassment in law.

64. The consequence is that this will dispose of the harassment claims, save where there is a comment, abusive or otherwise, which amounts to 'unwanted conduct related to a relevant protected characteristic.' …"

16. At paragraphs 69-70 of the Liability Judgment, the Employment Tribunal dealt with the acts of harassment which it considered were well-founded, as follows:

"69. We accordingly consider that the age-related harassment is made out in respect of [issue] numbers 6, 8, 12 and 17 only. These comments were related to age. They had the direct effect of creating a degrading or offensive environment for the Claimant. It is reasonable for the Claimant to have formed the view that it had that effect, indeed it seems to us obvious that the effect of these comments was to demoralise her. We reject the submission that she was oversensitive to an extent that put her outside the statutory protection. In our view, Lily [Raj] was prone to make intermittent criticism related to the Claimant's age which falls within the provisions of section 26 [of the Equality Act 2010]. Where the age allegations made by the Claimant otherwise appear, we have concluded that the evidence is too imprecise or generalised for her to succeed in establishing tortious conduct.

70. Mr Barca was unrestrained in abusing employees. The instances where he engaged in unwanted conduct related to gender are two: where he called the Claimant 'a stupid cow' (24 April 2016, paragraph 51 above) and 'a stupid cunt' (January 2016, paragraph 40). There is no question that these remarks had the effect of creating a degrading and hostile environment for her and no defence can be raised on the basis of the reasonableness provision of the section."

17. There were, therefore, six allegations of harassment that were established by the Liability Judgment. In respect of harassment on the ground of age, four allegations were established against the First and Third Respondents:

a. that on 19th November 2015, the Third Respondent called the Claimant "stupid" and "slow", and said that she was too old for the job, referring to the Claimant's 21-year old predecessor as having been "very fast" (issue 6, see paragraphs 30-31 of the Liability Judgment);

b. that on 23rd November 2015, the Third Respondent called the Claimant "stupid", "slow" and "clumsy" and said that she was too old for the job, the Claimant's younger predecessor having been better (issue 8, see paragraph 33 of the Liability Judgment);

c. that in the third week of January 2016, the Third Respondent again called the Claimant derogatory names and compared her unfavourably with her younger predecessor (issue 12, see paragraph 39 of the Liability Judgment);

d. that in the first week of March 2016, the Third Respondent made another comment that the Claimant's predecessor was "young and very fast" (issue 17, see paragraphs 46-47 of the Liability Judgment).

18. In respect of harassment on the ground of sex, two allegations were established against the First and Second Respondents:

a. that in the third week of January 2016, the Second Respondent called the Claimant a "stupid cunt" during one of his customary episodes of swearing at the Claimant (issue 12, see paragraph 40 of the Liability Judgment);

b. that on 24th April 2016, the Second Respondent called the Claimant a "stupid cow" when swearing at her by way of criticism (issue 20, paragraph 51 of the Liability Judgment).

19. The Employment Tribunal went on, having rejected the remainder of the Claimant's claims of discriminatory harassment, to address the claim for discriminatory dismissal. The Employment Tribunal considered that the Claimant had been constructively dismissed but that the dismissal was not discriminatory. Its conclusion was as follows:

> **"76. We conclude that this is a classic case in which the Omilaju principles apply. There had been a long accumulation of abuse of the Claimant, during the course of which some tortious acts can be identified in terms of harassment. However, after some gaps in the chronology the Claimant finally snapped, and her health went into decline, on or after 1 June 2016. Taken in conjunction with all the earlier acts there was a breach of the implied term of trust and confidence. This was therefore a last straw, in the sense recognised in employment law, and the Claimant was entitled to resign and claim a constructive dismissal.**
>
> **77. Where the discrimination claim fails is that it has not been established, and we are unable to conclude that the resignation was the result of the harassment or was otherwise because of the protected characteristic of gender. The catalogue of abuse and swearing directed at**

the Claimant was substantial and relatively prolonged, over a period of some months. It was this that, in our view, finally ground the Claimant down. That there were acts of tortious harassment along the way does not mean that her resignation and constructive dismissal were because of gender (or age). These incidents and the protected characteristics were incidental to the real reason for which she resigned, which was the constant barrage of abuse, principally from Mr Barca, and most of which did not infringe the Equality Act. We would, accordingly, hold that the constructive dismissal was not an act of direct discrimination. To the extent that any claim of harassment is being made, this must fail, as section 39 does not apply to harassment. In any event, on our findings there is no possibility that harassment could apply to the resignation.

78. It follows that the Claimant succeeds only in respect of the harassment related to sex and also harassment related to age, as identified above. There will be a need for a remedy hearing unless the parties can agree terms…"

20. No party raised any issue before the Employment Tribunal whether before or at the Liability Hearing or in response to the Liability Judgment regarding any of the claims having been brought outside the statutory time limit. Prior to the Remedy Hearing, no complaint was made that the Employment Tribunal had failed to address the issue of time limits in the Liability Judgment in relation to any of the allegations which it had found to be acts of unlawful discrimination, the last of which had occurred on 24th April 2016.

21. At the Remedy Hearing in December 2018, the Claimant sought as compensation in respect of the six unlawful acts that had been established what was claimed as career-long loss of earnings, in the net sum (i.e. before grossing up for tax) of £850,000. She sought £40,000 compensation for injury to feelings, as well as aggravated damages. She also claimed damages for personal injury in the sum of £88,000.

22. In the Remedy Judgment, the Employment Tribunal's reasons began as follows:

"1. This was the Remedy Hearing, the decision on liability having been promulgated on 6 February 2018. It is important to note at the outset that the Second Respondent's behaviour towards the Claimant during the course of her employment… was in many respects offensive. However, the Tribunal upheld the claims of direct discrimination only in limited respects. Although the environment was offensive, we accepted that the Second Respondent treated everyone in the office poorly, particularly if he considered that they had made a mistake: see paragraph 61 of our conclusions. We said that '… the essential question for all the harassment claims is whether the unwanted conduct related to a relevant protected characteristic. For the most part, it did not'. The example that we immediately gave there

was that calling the Claimant 'fucking stupid' did not relate to her gender and we accepted that anybody who Mr Barca thought had made some form of error would be subject to the same behaviour. As we observed, such abuse directed towards employees was 'indefensible, grossly offensive, relevant to a claim for constructive unfair dismissal, but it is not harassment in law'. (Paragraph 63). This is an important preliminary consideration and we will return to the detail of what we found to be actionable and tortious behaviour.

2. As to constructive dismissal, we had no difficulty in finding that the conduct of complained of overall amounted to repudiatory conduct. We noted the gaps in the chronology between about 18 March 2016 and 24 April and also between then and 1 June 2016. We concluded that the final incident of swearing and shouting on 1 June was the reason why the Claimant resigned. In terms of constructive dismissal, we said that this was a classic Omilaju case and that there had been a long accumulation of abuse of the Claimant. During the course of that abuse some tortious acts could be identified in terms of harassment. We concluded that there was a breach of the implied term and that what happened on 1 June was a last straw that entitled the Claimant to resign. Nevertheless, we were unable to conclude that the resignation was the result of the tortious harassment or was otherwise because of the protected characteristic of gender…"

23. The Employment Tribunal heard evidence at the Remedy Hearing from the Claimant and from expert psychiatrists instructed by both sides. The Employment Tribunal accepted the Respondents' case that the six acts of harassment that had been established did not cause the Claimant's subsequent illness, stating at paragraph 45 of the Remedy Judgment that it concluded "with a high degree of confidence that if the tortious acts had never occurred, the Claimant would have become ill at the same point in time and to the same extent". The Employment Tribunal concluded at paragraph 48 that:

"… this is a case where the psychiatric illness is properly divisible and where the cause of that illness is the overall level of abuse suffered by a vulnerable employee. The tortious acts of harassment give rise to injury to feelings, but did not cause the illness. They were incidental."

24. The Employment Tribunal rejected the Claimant's claim for future loss, concluding that even if the established acts of unlawful harassment had not occurred, the Claimant would have become ill to the same extent and would have resigned when she did. The Employment Tribunal also concluded that the Claimant had not made out her claim regarding the extent of her alleged future losses, in terms of the progress of her career beyond June 2016.

25. The Employment Tribunal dealt with the award for injury to feelings at paragraphs 50-55 of the Remedy Judgment:

> **"50. The Claimant claims £40,000 in the upper Vento band. The Respondent [sic] places compensation in the lower band. It is said by the Respondent [sic] that: (a) the non-tortious acts more greatly injured her feelings; (b) she took the acts of harassment in her stride at the time; (c) the Claimant often got on with Lily [Raj]; (d) she could stand up to Mr Barca and even demanded payment if she were to receive future abuse.**
>
> **51. We do not find these arguments convincing. Just because there was a catalogue of abusive conduct does not mean that the Claimant was either not hurt in her feelings, or not substantially hurt, by the acts of harassment. The fact that she had carried on working at the time of harassment does not dilute this. Nor does the fact that she often got on with Lily mean that the discriminatory comments did not upset her. The last point made by the Respondent [sic], concerning the Claimant's suggestion of a tariff of compensation, is especially weak, since the letter is a little bizarre and, if anything, points to the extent of her hurt feelings.**
>
> **52. The date of the ET1 is 1 [sic] October 2016 and this means that we start with the original Vento figures. As Mummery LJ said in that case [2002] EWCA Civ 1871:**
>
> > **'Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury… Striking the right balance between awarding too much and too little is obviously not easy.'**
>
> **53. As to the 3 bands, the top band should normally be reserved for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. The middle band should be used for serious cases, which do not merit an award in the highest band. Our assessment is that is where this case falls.**
>
> **54. We also note the important citation from HM Prison Service v Johnson [1997] ICR 275 as follows: '(i) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award. (ii) Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use the phrase of Sir Thomas Bingham MR, be seen as the way to "untaxed riches." (iii) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards. (iv) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings. (v) Finally, tribunals should bear in mind Sir Thomas Bingham's reference to the need for public respect for the level of awards made.'**
>
> **55. In our judgment the harassment was serious and cannot be described as 'less serious' so as to justify the lower band. We would assess the correct figure at £10,000 for each of the episodes of sex and age harassment, taking all instances under each head together. This**

would make a total of £20,000. However in order to uprate this figure from 2002 levels, and in accordance with the Presidential Direction, we divide this figure by 178.5 and multiply by the appropriate figure to be found in the RPI tables compiled by the ONS for the period ending 1 October 2016, namely 264.8. This produces £29,669.47 and has to be further multiplied by 1.1 to reflect the Simmons enhancement. This produces £32,636.42."

26. The Employment Tribunal therefore awarded £10,000 for injury to feelings in respect of the acts of age harassment and £10,000 for injury to feelings in respect of the acts of sex harassment, making a total of £20,000 before uprating. The Employment Tribunal uprated this figure for inflation to £29,669.47 and by a further 10 per cent to reflect the enhancement pursuant to the Court of Appeal's decision in **Simmons v Castle** [2013] 1 WLR 1239. No issue is taken on this Appeal with the Employment Tribunal's approach to uprating or to the enhancement.

27. The Employment Tribunal dealt with the issue of aggravated damages at paragraphs 60-61 of the Remedy Judgment. The Employment Tribunal considered that the Second Respondent's two acts of unlawful harassment merited an award of £5,000 aggravated damages:

"60. We find it difficult to put Lily [Raj]'s behaviour into the category of conduct that merits aggravated damages. The comments were made at various times and were in the context of more supportive remarks, at different times, that were directed towards the Claimant. To apply the case law to Lily [Raj] so as to justify aggravated damages strikes the tribunal as unrealistic. The facts fall into none of the categories set out in HM Land Registry v McGlue, EAT, 2013. We see no proper way of equating the facts with any other case in which aggravated damages have been awarded: see also Ziawalla v Walia [2002] IRLR 693. Nor has any argument been advanced by the Claimant as to why aggravated damages should be awarded for the age harassment.

61. We take a different view of Mr Barca's two comments which were not only grossly insulting but also oppressive and we consider that the threshold has been reached for awarding an extra sum by way of aggravated damages. We estimate this at £5,000. This takes the total award for injury to feelings to £37,636.42."

28. I return to the issue of extension of time. This was addressed at paragraphs 32-33 of the Remedy Judgment, as follows:

"32. Ms Bone is correct to observe that the tribunal neglected to deal with the question of jurisdiction that is consequent on our decision that the resignation / dismissal of 10 [sic] June 2016 was not discriminatory. The last act of age harassment was on 1 March 2016 and the last act of sex harassment was on 25 April 2016. The Claimant applied for the ACAS certificate on 12 August 2016 and was already out of time (although she would not have been

aware that her dismissal claim under the Equality Act would fail.) She is between about 10 weeks (sex) and four months (age) out of time.

33. Jurisdiction is a matter for the tribunal. We are in no doubt that in these circumstances it would have been wholly inequitable to deny the Claimant any remedy or judgment on the basis that because her dismissal claims failed as matters of discrimination law, she was out of time. She had been subject to a continuing barrage of abuse and the extension of time to validate the harassment claims have [sic] caused (and could have caused) no prejudice of any sort to the Respondents, who have been able to defend the claims robustly and, in relation to dismissal, have succeeded. We have no hesitation in formally extending time, the parties having asked us to deal with this point. Our failure to do so earlier was an oversight."

29. Ms Bone confirmed to me at the hearing of this Appeal that the first time at which any issue in respect of time limits was raised by the Respondents, either with the Claimant or with the Employment Tribunal, was on the first day of the Remedy Hearing, i.e. on 18th December 2018. This was more than 10 months after the Liability Judgment was sent to the parties and well over a year after the hearing on liability. No such issue had been raised on the face of any of the Respondents' ET3 response forms or before the Employment Tribunal at the liability hearing. In Ms Bone's written submissions in reply to the Employment Tribunal, dated 28th February 2019, the following appeared under the heading "Jurisdiction":

"3. As discussed as the outset of the remedies hearing, the last act of Upheld Harassment took place on 24 April 2016. Accordingly, the Claimant's complaint is out of time, unless the Claimant applies for an extension of time. The Claimant has not made an application for an extension of time. It follows that the Tribunal does not have jurisdiction to award damages for the Upheld Harassment.

4. In the event that the Claimant does make an application as part of her Reply to the Respondents' submissions, it is submitted that that is too late as it does not permit the Respondents any opportunity to respond before the Tribunal deliberates. It is to be noted that the Claimant did not herself raise the issue of time; the Respondents raised it in all fairness to provide her with an opportunity to make the necessary application. She has not done so, despite having been advised at all material times by counsel, and that should be the end of the matter."

30. It is therefore apparent that the way in which the Respondents raised the issue of time limits was not by way of any sort of challenge to the Liability Judgment. Rather, the effect of their submissions to the Employment Tribunal at the Remedy Hearing was that the onus was entirely on the Claimant to make an application to extend time and that, in the absence of such

an application being made and succeeding, the Employment Tribunal could not award anything to the Claimant.

The Law

31. Section 26 of the Equality Act 2010 provides, so far as material:

> **"(1) A person (A) harasses another (B) if—**
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of—**
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
> **…**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect…"**

Section 26(5) provides that age and sex are two of the "relevant protected characteristics" for these purposes.

32. Section 40 of the Equality Act 2010, which is in Chapter 1 of Part 5 of the Act, provides:

> **"(1) An employer (A) must not, in relation to employment by A, harass a person (B)—**
>
> **(a)who is an employee of A's;**
> **(b)who has applied to A for employment."**

Section 120(1) of the Equality Act confers jurisdiction on Employment Tribunals to determine complaints made by employees of contraventions of Part 5 of the Act.

33. Section 123 of the Equality Act 2010 provides:

> **"A complaint within section 120 may not be brought after the end of –**
>
> **(a) the period of 3 months starting with the date of the act which the complaint relates, or**
> **(b) such other period as the employment tribunal thinks just and equitable."**

A The time limit of three months is extended in certain circumstances, in cases to which the mandatory early ACAS conciliation provisions apply, by section 140B of the Act. It is not necessary to set out the provisions of that section in any detail for present purposes.

B

34. Section 124(1) of the Equality Act 2010 provides, so far as material:

> **"(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).**
>
> **(2) The tribunal may—**
>
> > **(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;**
> > **(b) order the respondent to pay compensation to the complainant;**
> > **(c) make an appropriate recommendation…"**

C

D 35. An award of compensation for injury to feelings is not punitive in nature. It is designed to compensate a claimant for the degree of hurt sustained as a result of the unlawful discrimination. See, for example, **HM Prison Service v Johnson** [1997] ICR 275 at 283.

E

36. In **Vento v Chief Constable of West Yorkshire Police** [2002] EWCA Civ 1871, [2003] ICR 318, the Court of Appeal gave the following guidance:

F

> **"65. Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.**
>
> > **i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.**
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> G
>
> > **ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.**
>
> > **iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.**

H

66. There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.

67. The decision whether or not to award aggravated damages and, if so, in what amount must depend on the particular circumstances of the discrimination and on the way in which the complaint of discrimination has been handled.

68. Common sense requires that regard should also be had to the overall magnitude of the sum total of the awards of compensation for non-pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage. In particular, double recovery should be avoided by taking appropriate account of the overlap between the individual heads of damage. The extent of overlap will depend on the facts of each particular case."

The figures given by the Court of Appeal in its judgment in **Vento** fell to be updated in this case in accordance with Guidance issued by the Presidents of the Employment Tribunals. I shall set out the terms of that Guidance later in this judgment.

37. Aggravated damages may be awarded where an act of discrimination has been made worse by being done in an exceptionally upsetting way, such as in a high-handed, malicious, insulting or oppressive way; or based on the claimant's awareness of the discriminator's motive; or because of conduct subsequent to the discriminatory act (e.g. where a case is conducted at trial in an unnecessarily offensive manner). See **HM Land Registry v McGlue**, UKEAT/0435/11 at paragraph 31 and **Commissioner of Police of the Metropolis v Shaw** [2012] ICR 464 at paragraphs 22-23.

The Grounds of Appeal

38. There are seven separate Grounds of Appeal, which challenge three aspects of the Employment Tribunal's decision on Remedy:

a. It is alleged that the Tribunal erred in law in its decision to extend time;

b. It is alleged that the Tribunal erred in law in making the award for injury to feelings;

c. It is alleged that the Tribunal erred in law in awarding aggravated damages.

Issue 1: Extension of Time

39. I have already set out the way in which this point came to be raised before the Employment Tribunal. Counsel referred me to a number of authorities on the issue of extending time in discrimination claims, but none which bore any relation to the circumstances of the present case. The closest was **Rathakrishnan v Pizza Express (Restaurants) Ltd** [2016] IRLR 278, where a similar issue arose in respect of part of the claimant's claim for the first time during the course of the hearing, which was on liability and remedy. The claimant was recalled to give further evidence on the issue of extending time, and the tribunal then dealt with that issue in its reserved judgment and reasons. The circumstances of even that case are, however, far removed from those of the present Appeal.

40. In my judgment, the arguments advanced by the Respondents on this Appeal – which, it must be remembered, is against only the Remedy Judgment and is not against the Liability Judgment – must be rejected, for the following reasons.

41. The Liability Judgment has never been the subject of any challenge by the Respondents. It was not the subject of an appeal to this Tribunal when it was promulgated. It has not been and is not challenged by the present Notice of Appeal. No application was made to the Employment Tribunal by the Respondents for reconsideration of the Liability Judgment under Rule 70 of the Employment Tribunal Rules of Procedure. The Liability Judgment is, and remains, a final and conclusive judgment as between all four parties to these proceedings. It establishes that the three Respondents are liable for the acts of discriminatory harassment that were found by the Employment Tribunal to have occurred. It is, in my judgment, a fundamental problem with the

approach taken by the Respondents both at the Remedy Hearing and on this Appeal, that at no stage have they sought to overturn the Liability Judgment.

42. In my judgment, the approach taken by the Respondents at the Remedy Hearing, and subsequently, proceeds on the erroneous basis that it was for the Claimant to make an application to extend time in these circumstances. I do not accept that this was an approach open to the Respondents, in circumstances where the point only came to be raised by them after the Liability Judgement had been promulgated. In my judgment, the Respondents ought to have attempted to overturn the Liability Judgment once this issue had come to their attention. Their failure to do so is fatal to this part of their Appeal. Once the Liability Judgment had been promulgated, in my judgment the onus was at all times on the Respondents to take action to seek to overturn that Judgment on the basis that is now relied on. The Respondents' attempts both before the Employment Tribunal and on this Appeal to put the onus on the Claimant, in the circumstances, to make an application for an extension of time are, in my view, misguided. I reject Ms Bone's submission that it was open to the Respondents to raise this point in the way that they did at the hearing on remedy and that, notwithstanding the existence of the Liability Judgment, it could have been raised by them in this way at any time.

43. The difficulty with the approach taken by the Respondents was highlighted when I put to Ms Bone what the consequence of that position would be if the Appeal were to succeed on this basis. Ms Bone accepted that the outcome would be that the Liability Judgment would remain extant and undisturbed, but that the ultimate result would be a nil award of compensation for the Claimant. The Respondents therefore seek to achieve a result – the award of no compensation to the Claimant – which is not, in my judgment, compatible with the continued existence of the Liability Judgment. The result sought by the Respondents before the Employment Tribunal and on this Appeal is in direct conflict with that Judgment. In my judgment, the continuing existence

A of the Liability Judgment results in the question of whether liability has been established, as between the four parties to this Appeal, being *res judicata*.

B 44. For those reasons, the Appeal must fail on this Issue. But, in any event, not only is the Employment Tribunal's decision on the exercise of discretion not one with which I would have interfered had it been necessary to decide the Appeal on that basis, but I do not consider that any other result could legitimately have been arrived at by the Employment Tribunal, in the unusual C circumstances of this case, in exercising the discretion to extend time. That is so even taking into account that there is no presumption that time should be extended and that the exercise of discretion is "the exception rather than the rule", see **Robertson v Bexley Community College** D [2003] EWCA Civ 276, [2003] IRLR 434 and **Chief Constable of Lincolnshire Police v Caston** [2009] EWCA Civ 1298, [2010] IRLR 327.

E 45. The Respondents had not raised this issue at the Liability Hearing or following the promulgation of the Liability Judgment and had only raised it, without prior notice, on the first day of a Remedy Hearing which the parties had been preparing for over many months. There is no suggestion that the Respondents had been prejudiced in their approach to the Liability Hearing F or the Remedy Hearing by any delay on the part of the Claimant in issuing the proceedings based on the dates of the acts of unlawful harassment which were established. The Employment Tribunal had, by the time that the Respondents first raised the point, already heard all the evidence called by both the Claimant and the Respondents on the merits of those allegations and had made G extensive findings of fact, based on that evidence, in the Liability Judgment. No appeal was brought against the Liability Judgment and there is no suggestion that the quality of the evidence or the Tribunal's findings of fact were affected by any delay on the Claimant's part.

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46. The Claimant, as the Employment Tribunal held at paragraphs 32-33 of the Remedy Judgment, had issued proceedings within the statutory time limit in respect of her claim of discriminatory constructive dismissal. There was, the Tribunal also found, a course of conduct throughout the Claimant's employment which amounted to a fundamental breach of contract entitling her to resign and to claim that she had been constructively dismissed. The point as to time limits only arose at all because the Respondents succeeded to the extent that the Tribunal held that only six of the individual incidents during that lengthy course of conduct amounted to acts of unlawful discrimination and, as a result, rejected the Claimant's case that her constructive dismissal was discriminatory.

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47. The Respondents' submissions on this point necessarily proceed on the basis that the Employment Tribunal's unchallenged Liability Judgment correctly held those six discriminatory acts to be established on the evidence before it. The consequence of the Respondents' present argument is therefore that the Employment Tribunal should have decided to reverse the effect of that Judgment, arrived at on the merits and otherwise unimpeachable, because of a time point first raised at the Remedy Hearing, a year after the Liability Hearing and 10 months after the Liability Judgment. The prejudice to the Claimant in those circumstances would clearly have been very significant. Not only would she have been deprived of the remedy consequent upon justified findings of unlawful discrimination, but there had by the time the point was raised by the Respondents been extensive preparation for the Remedy Hearing by both sides, including the preparation of evidence and the instruction of expert psychiatrists who both attended to give oral evidence. On the other hand, no prejudice to the Respondents (beyond the bare fact of judgment having been given) arising from any delay in the presentation of the claim, either in relation to liability or remedy, was raised before the Employment Tribunal or has now been raised.

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48. In my judgment, the Respondents' position that the Employment Tribunal could legitimately have refused to extend time for the presentation of the claim in these circumstances on the basis that it was not just and equitable to do so, had the issue been properly raised, is wholly unrealistic.

49. For completeness, I should note that Ms Bone argued that the Employment Tribunal had been too hasty in proffering the analysis that it did at paragraphs 32-33 of the Remedy Judgment because there had been no application by the Claimant to extend time. The argument takes the Respondents nowhere, for the reasons given at paragraphs 40-43 above. But, in any event, Ms Bone was unable to point to any basis, save the Claimant not having positively explained any delay on her part, on which the Employment Tribunal could have refused to extend time. It is, of course, relevant to consider the reason for delay (see e.g. **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640 at paragraph 25). However, as the Employment Tribunal correctly noted, the Claimant had issued her claim within the time limit in respect of her allegedly discriminatory constructive dismissal; even if the Claimant had provided no explanation beyond that for her delay in claiming in respect of the six upheld allegations which formed part of the course of conduct which led to that dismissal (and, as the Court of Appeal noted in **Morgan**, there is no rule that time cannot be extended even in the absence of an explanation for delay), I cannot see any realistic basis upon which the Employment Tribunal could have refused to extend time in the circumstances of this case, where it had already upheld the allegations on the merits in the Liability Judgment, had it been necessary for an application to have been made to it at the Remedy Hearing. Nor is there anything in Ms Bone's point, relying on this Tribunal's decision in **Harden v Wootlif**, UKEAT/0448/14, that the Employment Tribunal failed to consider the position of each Respondent separately in its analysis; there is, in my judgment, nothing in the suggestion that there were any relevant factors peculiar to the position of any one of the Respondents in this respect.

Issue 2: The Injury to Feelings Award

50. Counsel referred me to several authorities emphasising the importance of the causal link between the discriminatory treatment and the injury to a claimant's feelings. It is unnecessary to engage in a lengthy discussion of these cases because the point was sufficiently put, for present purposes, in paragraph 49 of the judgment of this Tribunal in **The Cadogan Hotel Partners Ltd v Ozog**, UKEAT/0001/14:

> **"… The question is all about the impact on the employee; what injury they have suffered as a result of the unlawful act…"**

51. Ms Bone submits that the Employment Tribunal erred in awarding compensation for injury to feelings when it had not found that there was any impact on the Claimant's feelings as a result of the six established acts of discriminatory harassment, in particular taking into account the Tribunal's assessment of the much wider abusive (but not, on the Tribunal's findings, discriminatory) conduct of the Second Respondent towards the Claimant. I reject that submission. The Claimant's position before the Employment Tribunal was that this case was in the upper **Vento** band, and she argued for an injury to feelings award of £40,000. The Respondents' submission in their written argument to the Employment Tribunal was that "the Claimant should not recover beyond the lower band [of **Vento**]". The Respondents did not argue that the evidence was such that no injury to feelings award at all should be made. As Ms Millin correctly submitted, at paragraph 51 of the Remedy Judgment the Employment Tribunal stated, in response to Ms Bone's submission that matters other than the established acts of discriminatory harassment had "more greatly injured [the Claimant's] feelings":

> **"We do not find these arguments convincing. Just because there was a catalogue of abusive conduct does not mean that the Claimant was either not hurt in her feelings, or not substantially hurt, by the acts of harassment. The fact that she had carried on working at the time of harassment does not dilute this. Nor does the fact that she often got on with [the Third Respondent] mean that the discriminatory comments did not upset her…"**

52. That, in my judgment, is a clear finding by the Employment Tribunal that the Claimant was upset and indeed was substantially hurt by the discriminatory acts that had been established. The Employment Tribunal took into account both parties' submissions and in particular took into account the Respondents' submission regarding the impact of the other abusive, but non-discriminatory, conduct on the Claimant. It concluded that the Claimant was both "upset" and "substantially hurt" by the discriminatory comments. Given the terms of those comments, set out at paragraphs 17-18 above, such a conclusion was clearly open to it. The Tribunal also made reference at the end of paragraph 51 of the Remedy Judgment to a letter, sent by the Claimant to the Second Respondent, which it considered demonstrated "the extent of her hurt feelings".

53. In my judgment, paragraph 51 of the Remedy Judgment is a sufficient explanation of the Employment Tribunal's findings regarding the gravity of the Claimant's hurt feelings. The Employment Tribunal was, in my judgment, clearly entitled to find that this was a case in which the Claimant's feelings were substantially hurt and that this was a case properly falling outside the lower band of the **Vento** guidelines. I reject Ms Bone's submission that the Tribunal's award for injury to feelings was based on its assessment of the seriousness of the Respondents' conduct rather than its assessment of the impact of that conduct on the Claimant.

54. I do, however, consider the Respondents' submissions are well-founded are in respect of the way in which the Employment Tribunal calculated the award for injury to feelings.

55. It is important when considering the calculation of the award in this case to bear in mind that it was a case to which paragraph 11 of the Guidance issued jointly by the Presidents of the Employment Tribunals for England & Wales and for Scotland applied, i.e. a case where the ET1 was presented before 11 September 2017:

> **"Subject to what is said in paragraph 12 [which relates to claims presented in Scotland], in respect of claims presented before 11 September 2017, an Employment Tribunal may uprate the bands for**

inflation by applying the formula x divided by y (178.5) multiplied by z and where x is the relevant boundary of the relevant band in the original Vento decision and z is the appropriate value from the RPI All Items Index for the month and year closest to the date of presentation of the claim (and, where the claim falls for consideration after 1 April 2013, then applying the Simmons v Castle 10% uplift).”

56. No criticism is made of the Employment Tribunal's decision to apply the Presidential Guidance or the inflation multiplier chosen by the Employment Tribunal at paragraph 55 of the Reasons. Applying it to the original **Vento** bands results in the middle band being uprated so as to have a range of £11,867.79 to £22,252.10, before the **Simmons v Castle** enhancement, and the top of the upper band to £37,086.83, again before the **Simmons v Castle** enhancement.

57. The Employment Tribunal's overall award for injury to feelings, adjusted using the same inflation multiplier and before the **Simmons v Castle** enhancement, was £29,669.47. This was, as Ms Bone submits, well inside the range for the upper band of the **Vento** guidelines. Ms Millin accepts that is correct. Counsel however differ on the correct interpretation of paragraph 53 of the Employment Tribunal’s Remedy Judgment in this regard. Ms Bone submits that it is a clear finding by the Employment Tribunal that, when viewed overall, the case fell into the middle band of the **Vento** guidelines and that the award of a total sum falling well into the upper band was contrary to the Employment Tribunal’s own earlier self-direction. Ms Millin, in contrast, submits that the reference at paragraph 53 to the case falling into the middle band of **Vento**, when read in the light of the Employment Tribunal’s subsequent decision to award separate sums in respect of each of the different types of harassment, is that each of the age and sex harassment claims, taken on their own, fell into the middle band. Ms Millin submits that a total award falling into the upper band was, in those circumstances, entirely consistent with what appears at paragraph 53 of the Reasons.

58. I have not found it necessary to resolve the conflict between the parties as to the correct interpretation of the Employment Tribunal’s reference to “this case” at paragraph 53 of the

Remedy Judgment, because I consider that on either basis the Employment Tribunal's decision on the amount of the injury to feelings award cannot stand:

a. If Ms Bone is right that the Employment Tribunal considered at paragraph 53 that the injury to feelings resulting from the six established acts of discrimination, when viewed as a whole, merited an award in the middle band of the **Vento** guidelines but not an award in the upper band, then its decision at paragraph 55 to award a total sum falling well into the upper band was not one that was reasonably open to it, given its earlier express conclusion that this was a case falling into the middle band.

b. If Ms Millin is right that the Employment Tribunal considered that the effects of the upheld age and sex harassment claims, when viewed individually, each merited awards in the middle band then the Employment Tribunal's reasoning at paragraph 55 of the Remedy Judgment is, in my judgment, not adequate to support the award that was ultimately made because it is not a sufficient account of the reasons for the level of the award (see **Meek v City of Birmingham District Council** [1987] IRLR 250). The Employment Tribunal made separate awards of the same sum for injury to feelings in respect of the age harassment and the sex harassment. That sum of £10,000 (before adjustments) is towards the mid-point of the middle **Vento** band. The Employment Tribunal did not, however, provide any reasoning to support its assessment that the effect on the Claimant's feelings was the same in each case. There were, for example, four instances of harassment related to the Claimant's age and two instances of harassment related to the Claimant's sex. It is not sufficiently clear from the Tribunal's reasoning why it considered that the impact of the two different statutory torts – committed at different times by two different individuals – should be assessed at precisely the same level in terms of the injury to the Claimant's feelings,

or why such injury fell to be compensated, separately in each case, by an award at the mid-point of the middle **Vento** band, leading to an overall award that was well into the upper band.

59. The Appeal therefore succeeds on this Issue. I will return at the conclusion of this judgment to the consequences that result from that finding.

Issue 3: Aggravated Damages

60. This Issue arises in respect of the aggravated damages award, which was for the discriminatory sex harassment only. At paragraph 61 of the Remedy Judgment, the Employment Tribunal awarded £5,000 in aggravated damages for those acts of harassment. The Respondents contend that the Tribunal erred in law in making that award.

61. In **HM Land Registry v McGlue**, UKEAT/0435/11, this Tribunal stated at paragraph 35 of the judgment:

> **"A Tribunal in examining whether there is a case for aggravated damages has to look first at whether objectively viewed the conduct is capable of being aggravating, that is aggravating the sense of injustice which the individual feels and injuring their feelings still further… Aggravated damages certainly have a proper place and role to fill, but a Tribunal should also be aware and be cautious not to award under the heading "Injury to Feelings" damages for the self same conduct as it then compensates under the heading of "Aggravated Damages". It must be recognised that aggravated damages are not punitive and therefore do not depend upon any sense of outrage by a Tribunal as to the conduct which has occurred."**

62. Ms Bone submits that the Employment Tribunal erred in principle in awarding aggravated damages in this case. I reject that submission. At the time of the acts of harassment, the Second Respondent was the senior partner of the firm of Solicitors at which the Claimant was working as a paralegal. In my judgment, the Employment Tribunal was entitled to find that his actions in calling the Claimant a "stupid cow" and a "stupid cunt" were not only insulting but oppressive

and that an award of aggravated damages was, in principle, one that was open to it. At paragraphs 60-61 of Remedy Judgment, the Tribunal contrasted the appropriateness of awarding aggravated damages in respect of these acts with making such an award in respect of the acts of harassment by the Third Respondent. In my judgment, the Tribunal was entitled to reach the conclusion that aggravated damages were appropriate in principle and gave adequate reasons for reaching its conclusion. Given the respective roles of the Claimant and the Second Respondent, and the extensive history set out in both the Liability Judgment and the Remedy Judgment, the Tribunal was fully entitled to view the conduct of the Second Respondent in abusing the Claimant in these terms for her perceived poor performance as being oppressive and capable of supporting an award of aggravated damages.

63 Again, however, I consider that the Respondents submissions are well-founded in respect of the reasons given by the Employment Tribunal for the award that was made. It is incumbent upon a court or tribunal making an award of aggravated damages to explain why the amount of the basic award that it has made is insufficient to compensate the claimant and the extent to which the conduct giving rise to the award of aggravated damages has increased the impact of the discriminatory act on the claimant. As this Tribunal stated in **HM Prison Service v Salmon** [2001] IRLR 425 at paragraph 23:

> **"… However, it is also clear that aggravated damages are only awarded on the basis, and to the extent, that the aggravating features have increased the impact of the discriminatory act or conduct on the applicant and thus the injury to his or her feelings: in other words, they form part of the compensatory award and do not constitute a separate, punitive, award…"**

At paragraph 24 of its judgment in **Salmon**, this Tribunal went on to note that the "correct question" to be addressed by an Employment Tribunal in determining whether to award aggravated damages is "the extent to which that [aggravating] conduct aggravated the injury to [the claimant's] feelings."

64 The basic award of compensation made for the two incidents of harassment related to sex, which was of £10,000 before adjustments in accordance with the Presidential Guidance, was on any view a substantial award for injury to feelings which fell into the middle band of the **Vento** guidelines. In my judgment, Ms Bone is correct in her submission that the Employment Tribunal failed to explain why, having assessed the injury to feelings award for these two incidents at £10,000, a further award of £5,000 in aggravated damages was necessary to provide appropriate compensation to the Claimant, or what the additional impact was on the Claimant of the aggravating features of the Second Respondent's conduct. Ms Bone submitted, correctly, that it was the impact on the Claimant that was the "touchstone" for the award of aggravated damages. I accept that the Employment Tribunal failed to address, in its Reasons, what this Tribunal said in **HM Prison Service v Salmon** was the correct question when deciding on the amount of the award of aggravated damages.

65 The Appeal therefore succeeds on this Issue also.

Conclusion and Disposal

66 For the reasons given above in respect of the Second and Third Issues, the Appeal against the Remedy Judgment is allowed. The consequence that the Employment Tribunal's award in respect of damages for injury to feelings, aggravated damages and interest must be set aside.

67 Neither Ms Bone nor Ms Millin invited me to do anything other than remit the case to the Employment Tribunal in these circumstances. Ms Bone invited me to remit the case to a differently constituted panel; Ms Millin submitted that the hearing should be remitted to the same panel. Although the Employment Judge retired in March 2019, Counsel informed me that he was

still available to sit in the event that the case was remitted to the Employment Tribunal – and indeed his decision on the application to stay the Remedy Judgment was made after he had retired.

68 Having regard to the guidance given by this Tribunal in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, I consider that the case should be remitted to the same panel of the Employment Tribunal. The Tribunal's decision is far from being wholly flawed; the Liability Judgment has not been challenged and the Remedy Judgment has been found wanting in what is, in my judgment, a relatively limited respect. Both sets of Reasons are otherwise conspicuously clear and comprehensive and it is evident from both the Liability and Remedy Judgments that the panel has throughout the proceedings been able to approach this case in an even-handed and professional manner. I have no doubt whatsoever that it will continue to do so when the issue of the amount of the award of compensation is re-determined and that it will do so with an open mind as to what that award should be. The panel which has already dealt with this case, over 11 days of hearings and discussions in chambers, has heard all the relevant evidence and has already given two reserved decisions; the passage of time is not such as to militate against that panel dealing again with the assessment of compensation and it would be disproportionate to require the Claimant to give her evidence on remedy for a second time before a new panel who would be unfamiliar with the case.

69 I therefore remit the issues of what award of compensation should be made for injury to feelings in this case, and whether aggravated damages should be awarded in respect of the acts of discriminatory harassment on the basis of sex (and, if so, in what amount), to the same panel of the Employment Tribunal to be redetermined in the light of this judgment.