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EMPLOYMENT TRIBUNALS

Claimant: **Miss K Munro**

Respondent: **The Cooperative Group Ltd**

Heard at: **East London Hearing Centre**

On: **23 & 24 April 2018 & (in chambers) 1 May 2018**

Before: **Employment Judge Goodrich**

Members: **Mr T Burrows**
Mrs B K Saund

Representation

Claimant: Ms A Ahmad (Counsel)

Respondent: Mr J England (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1 **The Respondent is ordered to pay the Claimant £33,377.01 (which includes interest of £3512.33) in respect of remedy, as further set out below.**

2 **The Claimant's application for costs is dismissed.**

REASONS

Background and the Issues

1 This is a hearing to decide the remedy to which the Claimant is entitled.

2 This remedy hearing follows on from a hearing on liability which took place in

May and July 2017. The Tribunal refers to this hearing as "The Liability Hearing" or "The Liability Judgment".

3 The judgment of the Tribunal at the liability hearing was:-

3.1 To the extent that the Claimant's complaints are out of time, it is just and equitable to extend time limits, as further set out below.

3.2 The Claimant's complaints of sex discrimination harassment, direct sex discrimination and sex discrimination victimisation succeed, to the extent further set out below.

4 The issues that succeeded were as follows:-

4.1 Issue 3.1 – Daniel Stokes (DS) habitually stared at C and followed her; this conduct occurred on numerous occasions from September 2014 (or some later date) to May 2016.

4.2 Issue 3.2 – On or about 8 or 9 June 2015 DS stared at C and followed her about. In response to C's objecting to being followed DS said to her: "I think you are quite pretty and I would not mind a bit" (these two allegations succeeded as sex discrimination harassment claims).

4.3 Issue 3.3 – On or about 8 or 9 June DS grabs C's bottom (succeeded as sex discrimination harassment complaint, although the date given was incorrect, as the date was in July 2015).

4.4 Issue 3.5 – In November or December 2015, DS told C that he knew every detail about her life. This succeeded as a sex discrimination harassment complaint.

4.5 Issue 3.6 – In December 2015, DS deliberately drove down the warehouse nearly hitting C twice. This succeeded as a sex discrimination harassment complaint.

4.6 Issue 5 – Through the managers identified by C, failed to deal properly, adequately, or at all, with C's complaint alleging sexual harassment by DS (such complaints having been made to R formally and/or informally) and failed to prevent the sexual harassment from continuing (if it is proven that such harassment in fact occurred).

4.7 Issue 12.1 – Through the managers identified by C, failing to deal properly, adequately, or at all, with C's complaints alleging sexual harassment from September 2014 up to and including her suspension on 31 March 2016. A number of more senior managers, namely Messrs Esak, Fry, Ziolkowski and Radley were all held to have committed acts of direct sex discrimination in their treatment of the Claimant's complaints. Other more junior managers were found to have been informed by the Claimant of allegations that she had been sexually harassed and reported these complaints to more senior managers (who failed to take

appropriate action) so were not held to have been individually at fault.

4.8 Issue 12.4 – Suspending the Claimant on 31 March 2016. This was a serious act of victimisation in which the Claimant was informed when attending a meeting to discuss a grievance she had taken out, that she was suspended and that because her allegations were serious she might be dismissed. This was an act of sex discrimination victimisation. This was an act of another manager of the Respondent, namely Ms Ward.

5 A number of the Claimant's complaints of sex discrimination were unsuccessful, namely:-

5.1 Issue 3.4 – In June 2015, DS created an incident which provoked a colleague, Jack Howe, to confront C.

5.2 Issue 3.7 – In March 2016, C's colleagues, Sam Howell and Adam Dowman, called C and her father "cunts" as she passed them in the warehouse. SH and AD positioned themselves so as to block C's path. Although the Tribunal found that these events happened and were undoubtedly poor behaviour towards the Claimant, the Tribunal held that it was not related to her sex, but because they were siding with their friend Mr Stokes (DS) and so this complaint failed.

5.3 Issue 12.3 – R deciding to change C's normal shift pattern of 2pm to 10pm to a shift pattern of 10pm to 6am in February 2016, and changing the shift pattern again in March. This complaint fail because the Tribunal was not satisfied that, in the particular circumstances, the treatment amounted to a detriment.

5.4 Issue 12.5 – Not appointing the Claimant to the role of Transport Clerk in April 2016. This complaint failed because the Tribunal found that the decision not to appoint the Claimant was in no sense whatsoever because of her being a woman.

6 The Claimant prepared a schedule of loss (subsequently updated) for the remedy hearing. This schedule of loss comprised the following elements:-

6.1 A claim for general damages (personal injury) for stress, anxiety and depression from September 2014 to date and ongoing. £15,400 was claimed.

6.2 An injury to feelings claim at the top band of the Vento guidelines, claiming £33,000.

6.3 A claim for special damages, for the Claimant's period of sickness absence from 12 September 2016 to 21 April 2017. Initially this was claimed in the Claimant's schedule of loss as being £9,457.62, representing what the Claimant's gross pay would have been for the time the Claimant's was absent from work. After discussion with the parties, the Tribunal clarified that the Claimant received statutory sick pay during

the period in question. The difference between what the Claimant would have received on full, net pay for that period; and what she did receive by way of statutory sick pay amounted to £4,458.70, the Tribunal was informed. The Tribunal understood that the sum concerned was agreed by the Respondent, although they did not agree that the Claimant was entitled to it (as set out in the list of issues at paragraphs 8.5-8.7 below.)

6.4 A claim for aggravated damages amounting to £5,000.

6.5 A claim for an ACAS uplift for failure to comply with ACAS codes of practice on disciplinary and grievance procedures, claiming an uplift of 25%.

6.6 A claim for costs.

7 The Respondent put forward a counter-schedule of loss. All the Claimant's claims were disputed, except that the Respondent accepted that there should be an injury to feelings claim. They contended that this should fall into the middle "Vento" band.

8 The Tribunal was provided with an agreed list of issues in the remedy hearing. The agreed list of issues was as follows:-

General damages

8.1 The Claimant seeks general damages for personal injury that she claims was suffered on 12 December 2016 and thereafter. Is the Claimant entitled to pursue this claim within the claims before the Tribunal? The Respondent contends that this is not a claim before the Tribunal, the Claimant contends that this is a head of damage within the existing claims.

8.2 If the Claimant is entitled to pursue this claim before the Tribunal, did any personal injury arise as a result of any relevant action of the Respondent?

8.3 If a personal injury award is appropriate, what is the appropriate quantum of such an award?

Injury to feelings

8.4 The Respondent accepts that an award for injury to feelings is appropriate. What is the appropriate quantum of such an award?

Special damages

8.5 The Claimant seeks special damages as part of her personal injury claim for the difference between her sick pay and normal pay following a period of sickness absence between 12 December 2016 and 21 April 2017. Is the Claimant entitled to pursue this claim within the claims before the

Tribunal? The Respondent claims that this is not a claim before the Tribunal, the Claimant contends that this is a head of damage within the existing claim.

8.6 If the Claimant is entitled to pursue this claim before the Tribunal did any personal injury arise as a result of any relevant action of the Respondent?

8.7 If a personal injury award is appropriate, what is the appropriate quantum of such an award?

Aggravated damages

8.8 Is an award of aggravated damages appropriate?

8.9 If so, what is the appropriate quantum of such an award?

ACAS uplift

8.10 Was there an unreasonable failure by the Respondent to follow the ACAS Code on grievances?

8.11 If so, is an ACAS uplift appropriate pursuant to section 207A TULR(C)A 1992 appropriate?

8.12 If so, what is the appropriate percentage increase?

Taxation

8.13 The Claimant contends that she is entitled to the "grossed up equivalent to reflect the benefit directly or indirectly in consequence of the termination of her employment". Is this correct?

8.14 If this is correct, what is the appropriate amount by which an award should be grossed up?

Interest

8.15 Is an award of interest appropriate on any award?

8.16 If so, in what amount?

Costs

8.17 On the basis of the Claimant's application sent by email on 20 October 2017 for costs against the Respondent, did the Respondent act unreasonably or vexatiously in the way that proceedings were conducted or did the response have no reasonable prospect of success?

8.18 If so, should the Tribunal make a costs order?

8.19 If so, in what amount?

Other matters

9 So far as the issue of costs were concerned, the Tribunal was informed that there had been some without prejudice negotiations between the parties.

10 It was agreed, therefore, with the parties' representatives that the representations on a costs order should be made in sealed envelopes so that the Tribunal would consider these only after it had reached its decisions on the above issues.

The relevant law

11 Section 124(2)(b) Equality Act 2010 (EqA) provides that a tribunal may order the respondent to pay compensation to the complainant.

12 Section 124(6) EqA provides that the amount of compensation that may be awarded under subsection (2)(b) corresponds with the amount which could be awarded by a county court under section 119.

13 The general principle in assessing compensation is that, as far as possible, complainants should be placed in the same position as they would have been but for the unlawful act.

14 An order for compensation in Employment Tribunal proceedings where discrimination claims have been successful will usually include a claim for loss of earnings and injury to feelings and there are other types of award that may be made. Aggravated damages are sometimes claimed, and a personal injury claim may be made.

15 As regards injury to feelings, guidance was given in the case of *Vento v Chief Constable of Police (no.2) (2003) IRLR 102 CA* that three broad bands of injury to feelings, as distinct from compensation for psychiatric or similar personal injury, can be indentified. The top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on grounds of sex. The middle band should be used for serious cases, which do not merit an award in the highest band. The lowest band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence.

16 The Employment Tribunals (Interest on award in discrimination cases) Regulations 1996 provide for interest to be awarded both on injury to feelings and loss of earnings, at a simple rate of interest. Regulation 6 provides that for injury to feelings, interest should be for the period beginning with the date of the contravention and ending on the day of calculation. The rate of interest is 8 percent. Loss of earnings, however, should be calculated at the mid point between the date of the contravention and the date of calculation.

17 As regards aggravated damages, in the case of *HM Land Registry v McGlue*

EAT/0435/11 guidance was given that aggravated damages may be given where the distress caused by an act of discrimination is made worse by being done in an exceptionally upsetting way, e.g. in a high-handed, malicious, insulting or oppressive way; or by motive, such as conduct based on prejudice, animosity, spite or vindictiveness, provided the claimant is aware of the motive; or by subsequent conduct, for example where a case is conducted at trial in an unnecessarily offensive manner, or a serious complaint is not taken seriously, or there has been a failure to apologise.

18 As regards making personal injury awards, it was held in the case of *Sheriff v Klyne Tugs Ltd (1999) IRLR 481 CA* that an Employment Tribunal has jurisdiction to award compensation by way of damages for personal injury, including both physical and psychiatric injury. In the case of *Essa v Laing Ltd (2004) IRLR 313 CA* it was held that it is not necessary to show that the particular loss was not reasonably foreseeable.

19 Causation can be an issue in personal injury cases where psychiatric damage has been claimed. In the case of *BAE Systems Ltd v Konczak (2017) IRLR 893 CA* it was held that the tribunal should try to indentify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part that is not so caused. This is an easier exercise for physical than psychiatric injury, although it may be possible to do so in either instance.

20 In the case of *Hampshire County Council v Wyatt UKEAT/0013/16/DA* guidance was given that where a respondent establishes or the evidence shows that the psychiatric injury had one or more separate material causes in addition to the respondent's unlawful act or breach of duty, then, provided the resultant harm suffered by the claimant is truly divisible, a tribunal assessing compensation will have to conduct an analysis to estimate and award compensation for that part of the harm only for which the respondent is responsible. Where notwithstanding the fact that there are competing causes for an injury the injury is indivisible, a respondent whose act was the proximate cause of the injury is required to compensate for the whole of that injury.

21 In the case of *Wyatt* the Employment Appeal Tribunal did not accept the Respondent's argument that medical evidence is an absolute requirement or that an award cannot be made in the absence of expert medical evidence in every such case bar low-value cases without an error of law.

22 As regards the amount to be awarded in personal injury cases, the Judicial College publishes from time to time guidelines for the assessment of general damages in personal injury cases; and the Claimant's representative also provided some case reports, albeit brief ones.

23 Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides for awards to be adjusted for failure to comply with a relevant code of practice. If it appears to the tribunal that the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies and the employer has unreasonably failed to comply with that Code it may, if it considers it just and equitable in all the circumstances, increase the award it makes to the employee by no more than 25%.

The evidence

24 On behalf of the Claimant the Tribunal heard evidence from:

24.1 the Claimant herself, Katie-Jo Munro;
24.2 the Claimant's mother, Michelle Munro;
24.3 the Claimant's father, Thomas Munro.

25 On behalf of the Respondent the Tribunal heard evidence from: Steven Fry, Shift Manager for the Respondent.

26 In addition the Tribunal was provided with a statement from Andy Turnau, Team Leader for the Respondent. Mr Turnau was not, however, called to the Tribunal as a witness. The Respondent's explanation for this was that Mr Tarnau was attending a funeral of his sister, an explanation which the Tribunal accepted.

27 In addition the Tribunal considered the documents to which it was referred in a bundle of documents prepared for the remedy hearing; and some documents to which it was referred at this remedy hearing from the Tribunal's bundle for the liability hearing.

Findings of fact

28 The Tribunal makes the findings of fact below which it considers relevant and necessary to determine the issues we are required to decide. We do not seek to record each detail that was provided to us. Nor do we seek to make findings on every detail on which the parties may have been in disagreement. The Tribunal has, however, considered all the evidence provided to us and we have borne it all in mind.

29 The Tribunal's judgment on remedy also needs to be taken in conjunction with the findings of fact and conclusions made at the liability hearing. We do not set out in detail all the findings of fact and other elements of the liability judgment.

30 Tribunal needs to make findings on a number of inter-related issues. These include the extent to which the Claimant suffered injury to feelings caused by the acts of unlawful discrimination towards her; whether, or to what extent, the Claimant suffered personal injury; if so, whether the harm can be apportioned by a part caused by the employer's wrong and a part not so caused; whether there are any aggravating factors to the discrimination caused by the Respondent; and whether the Respondent failed to comply with the ACAS Code.

31 The Tribunal deals separately, in its conclusions, with the preliminary point raised by the Respondent of whether the Claimant can make a personal injury claim at all.

32 Both in the Claimant's details of her claim contained in her ET1 claim form (self drafted) and in her witness statement for the liability hearing the Claimant made numerous complaints about feeling uncomfortable and unsafe because of the treatment of Mr Stokes towards her. She made numerous references to feeling upset and not taken seriously because of the manager's failures to take her complaints about

Mr Stokes seriously. These complaints were upheld.

33 The Tribunal finds that the Claimant felt upset and was not taken seriously in all these respects.

34 The period of time for which these events occurred was considerable. The first incidents from Mr Stokes were two incidents of staring in September 2014. Thereafter no acts of discrimination, so far as the Tribunal is aware, occurred until June 2015 when the staring continued. Thereafter there were a number of other discriminatory acts, both consisting of treatment from Mr Stokes and lack of action to address the Claimant's complaints by her managers. The failure to address matters properly occurred until the outcome letter of Mr Thorne dated 31 August 2016. In this letter Mr Thorne upheld the Claimant's appeal against Mr Radley's outcome letter of the Claimant's complaints. The discrimination towards the Claimant therefore lasted between September 2014 to receipt of Mr Thorne's letter dated 31 August 2016 although, of course, there were gaps in the acts of discrimination.

35 The Claimant was also upset about various issues to do with her work that were not discrimination claims that were successful.

36 In particular the Claimant was upset about the incident in which her father hit Mr Stokes in the face and was dismissed for this. She blamed herself for her father being dismissed. The incident was in December 2015. Although the Claimant's manager's failures to address the Claimant's complaints about Mr Stokes precipitated the actions of the Claimant's father this does not of course excuse Mr Munro's violence towards Mr Stokes. Nor was the Claimant's father being dismissed one of the complaints of discrimination made by the Claimant.

37 The Claimant also felt humiliated and upset by the incident in which Mr Stokes' friends blocked her path and were abusive towards her. This took place in January 2016. Although undoubtedly poor behaviour by the individuals concerned it was not related to the Claimant's sex but towards them siding with Mr Stokes in the incident between the Claimant's father and Mr Stokes.

38 Other incidents of unsuccessful discrimination claims also to a lesser extent caused the Claimant some upset.

39 The Claimant claims special damages to cover her period of sickness absence between December 2016 and April 2017 in which she was ineligible for company sick pay and in receipt of statutory sick pay. It is necessary both to consider what her sickness absence was for; and what caused the sickness absence.

40 In dispute between the parties is whether the Claimant had ever suffered from depression prior to 2016.

41 The Claimant's GP notes show that, some years before she worked for the Respondent, she was being treated with antidepressants.

42 The Claimant's GP notes dated 27 September 2010 record that the Claimant had a stress related problem, for which she was treated with the antidepressant

escitalopram.

43 The Claimant's GP notes dated 24 May 2011 show that she had abrupt mood changes and was getting worse and had possible stress anxiety. She was again treated with escitalopram.

44 The Claimant's GP surgery notes showed that she attended surgery on 19 October 2015; and a reference was made to "bereavement".

45 On 12 January 2016 the Claimant again attended her GP practice. This referred to her being "stressed lately as she has lost many relatives".

46 On 5 May 2016, the GP practice refers to: "sexual harassment since 2014 at work, has not been dealt with, now has been moved to a different department in her company to be away from the person bullying her". Four days later the Claimant was provided with a note stating that she was not fit for work, valid from 5 May 2016 to 26 May 2016. The diagnosis was given as work related stress.

47 On 4 July 2016, was a diagnosis of "bereavement and feeling low".

48 The Claimant received a note for not being fit for work, valid from 15 July 2016 to 25 July 2016. The diagnosis given by the GP practice was "bereavement".

49 In December 2016 the Claimant had an issue with an ovarian cyst. This was the diagnosis given to her on 19 December 2016. The Claimant's GP practice notes refer on 20 December 2016 to the Claimant "crying and very stressed" stating: "doctor told her last night to get scan and x-ray at hospital straightaway as could be life threatening if it has burst". The notes refer to her needing an urgent scan.

50 The GP notes on 9 December 2016 refer to the Claimant expressing thoughts of deliberate self harm. They refer to the life events of her losing three grandparents in quick succession and her boyfriend having ended the relationship.

51 In the Claimant's witness statement for the liability hearing the Claimant referred to feeling very upset at the breakup with her relationship with her boyfriend, Mr Bernard. Mr Bernard was a work colleague of the Claimant's and they had been together for about two years. The Claimant received a text message from him whilst she was on holiday with her grandmother in the Dominican Republic.

52 The GP notes record, on 16 December 2016, that the Claimant had experienced bereavement of four very near and dear ones in the last 12 months. It was recorded that she had been left "shattered with no interest in continuing with life". She was referred to the crisis intervention team who advised her to meet the bereavement counselling team.

53 The notes of the Claimant's GP for 21 December 2016 record that the Claimant was not fit for work. The diagnosis given was "stress and bereavement". There was a reference on 20 December 2016 to the Claimant requesting referral for bereavement counselling.

54 The GP notes for 5 January 2017 referred to a diagnosis of bereavement.

55 On 20 January 2017 was a reference to the Claimant wanting to start antidepressants. The GP recorded: "has been instructed by the solicitor as it will improve outcome in her case against the company". The Claimant was diagnosed with generalised anxiety disorder, with the diagnosis being stress at work.

56 The GP surgery notes refer, on 20 January 2017, to the Claimant being treated with the antidepressant citalopram.

57 From that point onwards the diagnosis given to the Claimant was "stress at work".

58 On 20 January 2017, a diagnosis was given of symptoms of depression and the Claimant feeling low and starting on citalopram.

59 The Claimant returned to work on 24 April 2017.

60 The Claimant had a number of welfare meetings whilst she was off work sick and also return to work meetings.

61 At a welfare meeting with Mr Turnau on 15 May 2016 the Claimant referred to wanting to be able to be safe at work and that Mr Turnau was the only manager she trusted at that time.

62 The Tribunal was provided with a statutory sick pay note covering a period from 12 December 2016 in which the cause of sickness given is "stress and bereavement".

63 In a meeting with Andy Turnau on 20 February 2017, the Claimant referred to what had happened to her father and to the deaths that she had gone through. When offered office bound duties Mr Turnau's notes refer to the Claimant declining them because she was "pulled from pillar to post" and that this was one of the reasons that she was "like this".

64 There was a return to work meeting following the Claimant's return to work on 24 April 2017. The absence reason given there was: "mental illness, stress, depression including two nights at hospital".

65 There were references to the Claimant being off work sick through stress, depression and an ovarian cyst.

66 The Claimant was referred to the Respondent's occupational health physician by Mr Esak. The Tribunal was not provided with Mr Esak's letter of referral.

67 The occupational health adviser referred in his letter dated 28 March 2017 to: "As you mentioned in your referral, Miss Munro has been suffering from anxiety and depression for a number of years". He referred to this originally being triggered by workplace factors during 2014, a concern regarding harassment and to Mrs Esak referring to this in his referral. The physician then recorded that: "Miss Munro has then suffered three bereavements during 2015, over a period of nine months".

68 The physician advised: “given the duration of her symptoms and its impact on her day to day activity, I would suggest that it is likely that her case would be covered by the Equality Act 2010”. His diagnosis was that the Claimant was suffering from a “mixed anxiety/depression picture”. He advised that: “I think there is an element of work factors which have been relevant to the development of the condition.” He suggested that management discuss with the Claimant directly why it was that she did not feel safe at work and what the triggers were.

69 With regard to the Claimant’s GP notes about advice from her solicitors as to the cause of her sickness absence the Tribunal was provided with a file note of the telephone note of advice given to the Claimant. This recorded: “Advised her to go and see her GP to ensure that there is a record and for assessment of whether she needs any treatment from him/her (e.g. antidepressant)”.

70 In dispute between the parties is the extent to which the contemporaneous records of the medical practitioners and the Claimant’s managers are an accurate reflection of what she told them. The Respondent’s case is that they were; the Claimant’s evidence was that they were inaccurate on a number of occasions by over emphasising the causes of her illnesses as being related to bereavements and her relationship breakup, as opposed to the Respondent’s treatment of her.

71 The Tribunal finds the Claimant’s evidence at this remedy hearing to have been less convincing than her evidence at the liability hearing. The Claimant’s various references to her GP practitioners and her managers mis-recording what she said to them were unconvincing. We find that the Claimant was underplaying the extent to which the bereavement she experienced and her relationship breakup upset her. Whilst we accept that, from time to time, those treating the Claimant may have mis-recorded or “got the wrong end of the stick” as to what they have been told, generally the Tribunal considers that they were an accurate record of what they were told. The Claimant’s medical practitioners from her GP surgery had no vested interest to record anything other than what she told them. In the case of the occupational health advice this appears to have been referring both to Mr Esak’s letter of referral (not provided to the Tribunal) and what the Claimant told them. Also of concern to the Tribunal were steps taken to try to get notes that were recorded amended, presumably at the Claimant’s instigation.

72 The contradiction between the Claimant referring to being extremely upset about her relationship breakdown in her witness statement at the liability hearing; and her evidence when cross-examined that her breakup was one of life events that she got over quickly was also unconvincing.

73 From all the evidence provided to the Tribunal during the course of this and the liability hearing, to what extent was the Claimant psychiatric and psychological injury caused by the employer’s wrong (i.e. the complaints upheld by the Employment Tribunal); and to what extent was it not so caused?

74 Although the Tribunal has found that the Claimant has overplayed in her evidence at this remedy hearing the causative contribution to her mental ill health she has experienced, we do accept that it played a contribution. We accept the evidence

of the Claimant and her parents to that extent.

75 As regards the medical evidence, we recognise that the Claimant was mindful of the need to get GP backing for her claim following her advice from her solicitors to which we have referred above. Although prompted by her solicitors, the Tribunal accepts however that records from the Claimant's medical records are an accurate reflection in that a factor in the Claimant's illness was her treatment at work. We also recognise that, to a certain extent, occupational health physicians will record what the employee tells them. Nonetheless he was expressing an opinion that the Claimant had mixed anxiety and depressive picture and he did refer to the Claimant having issues at work. This appears to have been referred to both by the Claimant and Mr Esak in his referral letter although, as stated above, we were not provided with the referral letter.

76 The documentary evidence tends to suggest, however, as set out in our findings of fact here and at the liability hearing, that what the Claimant was mainly preoccupied by were a number of other issues such as the bereavements of close family members, the break up of her relationship with her boyfriend, as well as matters such as her father's dismissal from the Respondent's employment and other factors referred to earlier above. Both the unlawful discrimination and the other factors, the Tribunal finds played a part in the Claimant's harm, including her sickness absence from 12 December 2016 to 21 April 2017, with the other factors being the predominant cause.

77 The Tribunal considers that this is a case where the harm suffered can be apportioned. As referred to above, both played a part, with the part of the suffering not due to the employer's wrong being the predominant cause. We find the part of the suffering to be caused by the employer's wrong to be twenty five percent; and the part not so caused to be seventy five percent.

Closing submissions

78 Both representatives gave both typed and oral submissions.

79 Both sets of submissions addressed the issues between the parties, the agreed list of issues to which the Tribunal has referred above. Both made submissions as to the relevant law. Both made submissions as to the findings of fact the Tribunal was invited to find.

80 The Tribunal does not set out the submissions in detail, helpful although they were and we have borne them in mind.

Conclusions

Whether the Claimant is entitled to make a personal injury claim at all

81 The Respondent's case is that this was not pleaded by the Claimant and the Tribunal is unable to consider it.

82 The Tribunal does not agree with this submission including for the following reasons.

83 Employment Tribunal pleadings are usually to some extent backward looking; and to some extent forward looking.

84 A Claimant bringing an Employment Tribunal claim is expected, in box 8.2 of the claim form, to set out the details of their claim. They set out the wrong which they have experienced in the past, such as unfair dismissal, unlawful discrimination and so on.

85 The remedy being sought at the time a claim has been issued is often forward looking. It has not necessarily crystallised at the time proceedings had been issued. For example if an individual has been unfairly dismissed, or their dismissal has been an act of unlawful discrimination they may have a loss of earnings claim that continues both beyond the date of issuing of proceedings and the date of the Tribunal hearing itself. It is not uncommon for future loss of earnings to be awarded, particularly in cases where there is no twelve month limitation on loss of earnings.

86 A standard case management order, therefore, made in Employment Tribunal claims is for a schedule of loss to be provided by the Claimant before the hearing takes place, although after proceedings had been issued. Often an updated schedule of loss needs to be provided for the date of a remedy hearing.

87 Although, therefore, it is important that an employer knows the case against them, and pleadings are important, Employment Tribunal pleadings are not the same as those in the Civil Courts. There is no legal aid for bringing Employment Tribunal proceedings. The Claimant was self represented at the time she drafted her claim. The Respondent was well aware and in a position to resist the Claimant's personal injury claim, as they have. To the best of the Tribunal's recollection, for example, no Respondent has stated at a remedy hearing where a discrimination claim has been successful that no injury to feelings award should be made because the details of claim given in the ET1 claim form do not state "I claim injury to feelings".

88 It is also not uncommon, particularly in the relatively rare instances where Respondents do not have legal representation, for the Respondent to fail to plead "Polkey" or contributory fault in unfair dismissal cases. They are allowed, nonetheless to argue such points. Penalising the Claimant for a self drafted claim with the absence of a particular pleading point, where the Respondent has been well able to present their case on the claim, would show double standards and would be unwarranted and unjust.

Does the Claimant have a recognised mental illness so as to make possible a claim for special damages and a personal injury claim?

89 The Tribunal finds that, during the period between December 2016 and April 2017 she was on a spectrum of depression. Although, as found above, the Tribunal considers that she was overplaying causation, we accept that she was in a depressive state during this period of time. The Respondent has not challenged in any serious way that she made suicide attempts in November and December 2016 and the Tribunal does not doubt that she did so. This is suggestive of someone who is mentally ill – thankfully, suicide attempts are not regarded as a norm. She was treated with antidepressants, albeit she may have been the prime instigator of such treatment. She was put on to antidepressants on January 2017. She was referred to the crisis

intervention team in December 2016, with a reference to deliberate self harm. The Claimant would not have been referred to a crisis intervention team unless her mental health was considered serious enough to merit such an intervention. The Respondent's occupational health practitioner referred to the Claimant suffering from depression and anxiety and considered that it was likely that this would be covered by the Equality Act.

Extent of injury to feelings award

90 The Claimant submitted that this should be at the top point of the top band of injury to feelings; and, additionally, there should be aggravated damages and a personal injury award.

91 The Respondent submitted that the injury to feelings award should be around the mid point of the middle band; and that there should be no award either for aggravated damages or for personal injury.

92 The parties were agreed as to the relevant figures for the bands in question, taking into account inflation since the applicable Vento guidelines; and the 10% *Simmons v Castle* uplift. The bottom band was agreed as being up to £8,107. The middle band was agreed as being from £8,107 to £24,319. The top band was £24,319 to £40,534.

93 As regards aggravated damages, the Tribunal accepts that there were some aggravating features to the Respondent's treatment of the Claimant. Two stand out in particular. One was Ms Ward's actions in telling her that she was to be suspended for raising her grievance and that she might be dismissed because of the seriousness of her allegations. This was undoubtedly an aggravating feature. She was punishing the Claimant for making what transpired to be valid complaints. The other aggravating feature was the treatment of the Claimant by Mr Esak in blaming her for Mr Stokes' treatment of her.

94 The Tribunal is, however, also mindful that part of the Claimant's upset stems from complaints of sex discrimination made by her that were not upheld; and part for an incident that arose for which she did not bring a discrimination complaint (her father being dismissed for hitting Mr Stokes).

95 The Tribunal is also mindful of the need to avoid double counting because we are also making an award for a personal injury claim and we are making a substantial injury to feelings award because we consider that this is a serious injury to feelings case.

96 Having all these matters in mind the Tribunal considers that the acts of discrimination were serious and persisting over a long period of time. The first acts of discrimination were those of Mr Stokes towards the Claimant. These persisted from September 2014, when the Claimant first complained of Mr Stokes staring at her until 31 August 2017, when Mr Thorne upheld the Claimant's grievance about her manager's failures to take adequate steps to deal with her complaints. There was a gap between September 2014 and July 2015 when the Claimant and Mr Stokes were largely not coming into contact with each other and no complaints of staring by him

made. Nonetheless, there was a period of nearly two years when acts of discrimination were continuing against the Claimant and, as referred to in our findings of fact, she was upset by them.

97 Having all the evidence provided to the Tribunal in mind we consider the appropriate level of compensation to around, particularly the length of time, the number of acts of discrimination, the aggravating features of some of the behaviour and the extent of upset we place the award around the top point of the middle band/bottom point of the top band. The Tribunal awards the Claimant £25,000 injury to feelings, just inside the top band.

Interest on injury to feelings

98 The Regulations provide that this should be at the rate of 8%. This is the figure set in legislation and we abide by it. The Claimant has also had to wait for a long time to receive the sums to which she is entitled for the discrimination to which she was subjected. The basis of Mr England's opposition to this figure was that it should not be awarded if the Tribunal were to award anything like the sum claimed in the schedule of loss. In fact the Tribunal will be awarding less than half of what was claimed, so the submission made has considerably less force.

99 Regulation 6 of the Employment Tribunal Interest on Award in Discrimination Cases Regulations 1996 provides that interest on injury to feelings shall be for the period beginning with the date of the contravention or act of discrimination complained of and ending on the day of calculation.

100 The representatives differ on what that date should be for the injury to feelings award. The Claimant contended in closing submissions that it should be from July 2015. The Respondent contended that the Claimant should receive one year's interest from the date of issue of her proceedings.

101 As there are a number of acts over a period that give rise to the Claimant's injury to feelings award and there was a period of a number of months after September 2014 when the Claimant was not experiencing any discrimination the date to choose is not entirely straightforward.

102 The first of the acts of unlawful discrimination took place in September 2014 and numerous acts of discrimination occurred after that. The failure of managers to deal properly with the Claimant's complaints occurred until the Claimant received Mr Thorne's letter dated 31 August 2016.

103 We have decided to make an award slightly towards the latter part of time in which discriminatory acts took place, as to represent a short period before the incident between the Claimant's father and Mr Stokes in December 2016. This, it appeared to the Tribunal marked a turning point in the Claimant's employment. It led to the mishandling of her grievance by Mr Radley and subsequent managers, including a threat that she could be dismissed for making such a serious complaint. We award interest for injury to feelings from 1 November 2015 to 1 May 2018, being the calculation date, when the Tribunal met in chambers to discuss our judgment.

104 Interest on the Claimant's special damages covers the period from 12 December 2016 to 21 April 2017. Mr England in his closing submissions contended that interest should be calculated from the half way point in her sickness absence which would be 15 February 2017. The Tribunal accepts this submission which appears to the Tribunal to be in keeping with the Regulations on calculation of interest.

105 As regards the date for calculation of the award for general damages for personal injury, both representatives agreed that interest should be calculated from 12 December 2016, the starting point of the Claimant's sickness absence from work. We accept this agreed date.

106 As 1 May is the date that the Tribunal met to deliberate on our decisions, this is the date we treat as being the calculation date for awarding interest.

Aggravated damages

107 As referred to above the injury to feelings award includes aggravating features of the Respondent's treatment of her; and the Tribunal's injury to feelings award takes account of that.

Causation as to personal injury

108 As set out in the Tribunal's findings of fact above the predominant causes of the Claimant's depressive illness were factors other than the sex discrimination she experienced from the Respondent. We so find for the reasons set out in our findings of fact. The Tribunal also recognises that a part of her depressive illness can be apportioned to the Respondent's unlawful treatment of her. The two are divisible, as set out in the findings of fact above, of twenty five percent of the harm being caused by the Respondent's unlawful discrimination; and seventy five percent not so caused.

Amount of personal injury award

109 On behalf of the Claimant, Ms Ahmad contended that the injury came within the Judicial Studies Board guidelines category of moderately severe, with the figure of £15,400 being accepted as the maximum.

110 On behalf of the Respondent, Mr England contended that, if any award should be made at all (for which he gave various arguments, particularly the pleading, issues of causation and the need to avoid double counting) the broad figure of £15,400 was accepted.

111 The Tribunal would place the award as being near the top point of moderate. We accept that they affected the Claimant's ability to cope with life and work; had an adverse effect on her relationships with her family and caused her to become isolated for a period from her friends. She also made two suicide attempts. These are all factors referred to in the Judicial College guidelines. The Claimant was able to return to work at the end of a period of 19 weeks sickness absence which, the Tribunal considers keeps the award within the moderate category, although near the top of it. The brief reports given to the Tribunal of cases give a flavour as to awards made, but are of limited assistance as they do not provide an in depth description of the cases in

question.

112 We award the Claimant £15,000 under this heading, which includes the *Simmons v Castle* uplift.

113 The Tribunal, therefore, awards the Claimant 25% of £15,000.

Special damages claim

114 For the reasons set out when considering causation as to the Claimant's personal injury claim, the Tribunal awards the Claimant 25% of her loss of earnings claim.

ACAS uplift

115 It is undoubtedly the case that the Respondent dealt badly with the Claimant's complaints about her treatment from Mr Stokes; and her manager's failures to deal effectively with her complaints against Mr Stokes.

116 The statutory ACAS Code on disciplinary and grievance procedures gives relatively minimal advice on how grievances should be dealt with (although their non statutory advice is more detailed).

117 Was there an unreasonable failure by the Respondent to follow the ACAS Code on grievances?

118 The ACAS Code is concerned with procedural formalities, rather than the quality of the investigations. The Judge pressed Ms Ahmad to specify which paragraph of the Code the Respondent had not complied with. The paragraph to which she referred, paragraph 38, has no application in this case.

119 The Tribunal would accept that a complaint does not need to be made under a company's specific grievance procedures in order to be a complaint. We would accept that, although the complaint Mr Radley investigated, was not specifically stated to be a grievance, it was in fact a grievance and was provided with an outcome.

120 We do not make any uplift to an award both because the Claimant's representative has not identified which paragraph of the code was in breach; and because, until the times Mr Radley conducted an investigation, the Claimant's managers did not understand the Claimant to be making any formal form of grievance.

Costs application

121 As agreed between the parties the Tribunal opened the parties' envelope containing submissions as to costs after it had reached its decisions on remedy.

122 These issues can be dealt with reasonably quickly. The basis of the Claimant's application is that the Respondent failed to settle the Claimant's claim.

123 Neither party, however, made any great wholehearted efforts to settle the

proceedings. There were some offers and counter offers made. The last of these was on the first day of the remedy hearing when, we understand, the top line offer made by the Respondent was £15,000 and the bottom line offer by the Claimant was £65,000. The Tribunal's award fell between these two figures.

124 The Tribunal makes no award of costs.

Calculations of award

125 Pain, suffering and loss of amenity, described in the schedule of loss as "general damages", amounted to £15,000. After apportioning the award the Claimant is entitled to twenty five percent of this sum, namely £3750.

126 The Tribunal's award for injury to feelings amounted to £25,000.

127 The Tribunal's loss of earnings award, described as being "special damages" was £4458.17. Twenty five percent of this sum amounts to £1114.68.

128 Three separate calculations need to be made for interest on the awards, as the calculation dates differ for the general damages, injury to feelings and special damages awards.

129 For the general damages award, interest is to be paid from 12 December 2016 to 1 May 2018 amounts to 1.36 years which, at the rate of eight percent per annum on £3750, which the Tribunal calculates as amounting to £408.

130 For injury to feelings, interest is to be paid from 1 November 2016 to 1 May 2018, namely 1.5 years at the rate of eight percent per annum, which amounts to £3000.

131 For special damages interest is to be paid from 15 February 2017 to 1 May 2018, which at the rate of eight percent on £1114.68 for 1.17 years amounts to £104.33.

132 Added together these sums amount to £33,377.01. The Respondent is ordered to pay the Claimant this sum.

Grossing up

133 Other than being informed that the Claimant is obtained agency work since leaving the Respondent, the Tribunal is not aware of what she is earning. We ask the parties to agree the figures for any grossing up that may be required. In default of doing so an application may be made to restore the case for hearing to complete this calculation.

Employment Judge Goodrich

5 July 2018